

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-24103-Civ-COOKE/GOODMAN

TIKD SERVICES LLC,

Plaintiff,

vs.

THE FLORIDA BAR, et al.,

Defendants.

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**THE FLORIDA BAR'S MEMORANDUM OF LAW  
ON DISCOVERABILITY OF COMMUNICATIONS BETWEEN  
BAR STAFF ATTORNEYS AND BAR ETHICS HOTLINE CALLERS**

The Florida Bar (“TFB”), pursuant to the instructions at the August 24, 2018 hearing and related post-hearing orders (Doc. 214, 220), provides this memorandum addressing “whether communications between its staff attorneys and Florida lawyers who called the Florida Bar’s ethics hotline are confidential and cannot be produced in this lawsuit.”

**Introduction and Summary**

Plaintiff TIKD Services LLC (“TIKD”) is a non-lawyer company which alleges TFB violated antitrust laws during its investigation of TIKD for the unlicensed practice of law (“UPL”).<sup>1</sup> While the UPL investigation was ongoing, TFB’s Ethics Department responded separately to requests by attorneys for informal, non-binding ethics guidance concerning working with TIKD or a similar non-lawyer company offering a traffic ticket defense app. The Florida Supreme Court (“FSC”), which “has the inherent power and duty to prescribe

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<sup>1</sup> According to its Complaint, TIKD “offers drivers a simpler way to deal with traffic tickets” in which it “retains an independent attorney to defend a driver’s traffic ticket and caps the driver’s financial exposure for resolving that traffic ticket at the amount of TIKD’s charge.” (Doc. 80, Compl. ¶ 24.)

standards of conduct for lawyers,” requires TFB, as its arm, to give ethics advisory opinions to members of TFB pursuant to the Rules Regulating the Florida Bar (“RRTFB”) and its authorized procedures. (RRTFB 3-1.2 & 2-9.4.) In this instance, TFB provided ethics advice through a written staff opinion (Ex. A, the “Staff Opinion”) and also through oral advice on its Ethics Hotline.

TFB has provided ample discovery of how its Ethics staff viewed and addressed professional ethical issues involved with these inquiries, including through depositions of two members of the TFB Ethics Department. TFB’s written Staff Opinion itself is public record and provides a detailed summary of the ethics rules and issues involved. The ethics issues discussed in that Staff Opinion are consistent with TFB’s past guidance to attorneys concerning involvement with non-lawyer companies. In addition, in Interrogatory responses served by TIKD early in discovery, TFB identified the dates and staff counsel associated with 15 calls to its Ethics Hotline—not “dozens” as asserted by TIKD—referencing TIKD or a traffic ticket app. (Ex. B at attachment.) TFB objected, however, to producing its internal call records from those Hotline calls, which it is not permitted to disclose under the rules which govern it. (*Id.*) TIKD’s challenge to that objection is the subject of this memorandum.

TFB’s objections to producing the call records should be upheld based on Florida law regardless of any purported relevance they may have. This is particularly true because a jurisdictional question under the Eleventh Amendment remains pending, and the objection raises a core state law interest: encouraging Florida attorneys to seek ethical guidance pursuant to a procedure specifically authorized by the FSC, acting as sovereign. TFB should not be required to disclose these records, which are clearly confidential under state law, in this federal court proceeding until such time as subject matter jurisdiction is determined. To

rule otherwise would upend well-established principles of federalism.

The ethics hotline call records are also not sufficiently proportional to the needs of the case to overcome the interests of preserving confidentiality. TIKD has already obtained or had the opportunity to obtain substantial discovery on any issue allegedly necessary to proving its claims and has challenged these objections months after they were asserted.

## **I. The State Law Confidentiality Restrictions**

### **A. Factual Background and Form of the Call Records**

The call records at issue here are internal TFB documents which note the general substance of calls to the Ethics Hotline in an abbreviated form.<sup>2</sup> They are created through a computer program which assigns a sequential number each time a call is received.<sup>3</sup> TFB's Ethics Department received approximately 24,000 to 25,000 calls to its Ethics Hotline in 2017, and an Assistant Ethics Counsel might receive as many as 25 calls in a four-hour shift.<sup>4</sup>

Call records are not themselves "opinions." An "opinion" on the Ethics Hotline is oral, and is not audio-recorded by TFB.<sup>5</sup> Hotline callers sometimes submit a request for a written ethics advisory opinion after receiving oral advice, in which case a public record version of that written staff opinion (removing any identifying information) becomes public record under RRTFB 2-9.4(d).<sup>6</sup> Ethics Hotline callers can be anonymous, though TFB staff sometimes notes whether an anonymous caller is a male or female to facilitate locating the record in case the inquirer later seeks the call record.<sup>7</sup>

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<sup>2</sup> Doc. 193-8 (Quintiliani) at 173:4-174:8.

<sup>3</sup> *Id.* at 170:3-9, 173:4-174:8.

<sup>4</sup> *Id.* at 149:2-5; Doc. 193-9 (Tarbert) at 16:1-10.

<sup>5</sup> Doc. 193-8 (Quintiliani) at 172:17-21.

<sup>6</sup> *Id.* at 170:16-22.

<sup>7</sup> *Id.* at 173:15-174:3.

## B. Applicable Confidentiality Restrictions

The call records, which are administrative records of the judicial branch of Florida,<sup>8</sup> are confidential pursuant to state law under the RRTFB and its authorized procedures.<sup>9</sup> The RRTFB provide a series of provisions regarding the disclosure of records, including the following general restrictions:

### Access To Records

(a) Confidential Records. All records specifically designated confidential by court rules, the Florida or United States Constitution, statutes, attorney work product, and attorney-client communications shall be confidential. In the event that The Florida Bar objects to production, these records shall not be produced without order of the Supreme Court of Florida or some person designated by the supreme court to decide whether the records should be disclosed.

(b) Records Confidential under Applicable Law. All records in the possession of The Florida Bar that are confidential under applicable rule or law when made or received shall remain confidential and shall not be produced by the bar, except as authorized by rule or law or pursuant to order of the Supreme Court of Florida.

RRTFB 1-14.1. These provisions were promulgated by the FSC in 1992, which explained that, among other things, they “delineate certain records which the bar may clearly refuse to disclose, establishes confidentiality restrictions on advisory ethics opinions, and sets the procedures for maintaining and inspecting bar records.” *In re Amendments to Fla. Rules of Judicial Admin.-Pub. Access to Judicial Records*, 608 So. 2d 472, 473 (Fla. 1992).

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<sup>8</sup> “‘Judicial branch’ means the judicial branch of government, which includes the state courts system, ... *The Florida Bar*, ... and all other entities established by or operating under the authority of the supreme court or the chief justice.” Fla. R. Jud. Adm. 2.420(b)(2) (emphasis added.) “‘Records of the judicial branch’ are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of: ... (A) ‘court records’ ... and (B) ‘administrative records,’ which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.” *Id.* 2.420(b)(1).

<sup>9</sup> *See also* Fla. R. Jud. Adm. 2.420(c)(7) & (8) (providing that judicial records are exempt as public records if they are “confidential under the Florida and United States Constitutions and Florida and federal law” or “deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission”).

RRTFB 2.9-4 authorizes the procedures under which TFB provides ethics advice and the confidentiality which applies to written staff opinions.

(a) Rules of Procedure. The board of governors shall adopt rules of procedure governing the manner in which opinions on professional ethics may be solicited by members of The Florida Bar, issued by the staff of The Florida Bar or by the professional ethics committee, circulated or published by the staff of The Florida Bar or by the professional ethics committee, and appealed to the board of governors of The Florida Bar.

....

(d) Confidentiality. Each advisory opinion issued by Florida Bar ethics counsel shall be identified as a “staff opinion” and shall be available for inspection or production. The names and any identifying information of any individuals mentioned in a staff opinion shall be deleted before the staff opinion is released to anyone other than the member of The Florida Bar making the original request for the advisory opinion.

RRTFB 2.9-4. Pursuant to that authorization, Rule 1 of the Procedures for Ruling on Questions of Ethics (“Ethics Procedures”) provides that “[i]nformation concerning requests for staff opinions is confidential, except as otherwise provided in bylaw 2-9.4 and these procedures.” Ethics Procedures 1.<sup>10</sup> Ethics Procedure 3(a)(1) provides that “[a]ll information relating to the request for an oral staff opinion is confidential as provided elsewhere in these procedures.”

### C. Exceptions to Confidentiality Rules

The Court has asked whether the privilege on which the documents are being withheld is complete, limited, qualified, or absolute. To be clear, the documents are being withheld because of the confidentiality requirements under the RRTFB rather than a traditional evidentiary privilege, although a state law provision can be adopted and applied as a privilege as discussed further below. There are exceptions to the confidentiality requirements, which

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<sup>10</sup> The Ethics Procedures may be found at the following link: <https://www.floridabar.org/ethics/ethotline/ethotline001/>.

are akin to limitations of privilege. Ethics Hotline call records can be provided to the inquirer, who can waive the confidentiality. In addition, “[i]f a respondent’s defense includes reliance on the receipt of a staff opinion, ethics counsel may release to the bar counsel, grievance committee, referee, or board of governors information concerning the opinion or the opinion request that would otherwise be confidential under these rules.” Ethics Procedure 1. Also, “[i]f public statements are made by the inquirer about any advisory opinion or opinion request, confidentiality of the request and the opinion is waived and ethics counsel may disclose the opinion and information relating to the request.” *Id.* Pursuant to RRTFB 1-14, the FSC or its designee can order production of the records. Pursuant to RRTFB 2-9.4(c), “the rules of procedure adopted as required in [RRTFB 2-9.4(a)] may be temporarily waived as to any particular matter only upon unanimous vote of those present at any regular meeting of the board of governors.”

Notably, the confidentiality restrictions embodied in the RRTFB contain other exceptions,<sup>11</sup> but none of these exceptions apply to oral advisory opinions and the Ethics Hotline call records. The inclusion of specific confidentiality exceptions in parts of the RRTFB for records other than Ethics Hotline call records further supports TFB’s conclusion that it cannot provide the Ethics Hotline call records in the absence of a specific exception.<sup>12</sup>

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<sup>11</sup> See, e.g., RRTFB 3-7.1(g) & 10-8.1(f) (certain information can be disclosed about grievance proceedings and UPL proceedings in response to subpoenas by regulatory agencies); RRTFB 3-7.1(i) (certain information can be disclosed about grievance proceedings to authorities authorized to investigate alleged criminal activity); RRTFB 2-9.4(d) (a written advisory opinion is not confidential after certain identifying elements are removed, and becomes public record).

<sup>12</sup> At least as a matter of state law, this is true regardless of whether the documents are requested in the context of a public records request or litigation discovery. Although the right to access records as a matter of public records law often is not co-extensive with the right to access documents through litigation discovery, that is in part due to the fact that one branch of government (the legislative) creates rights to public records and related exemptions, while another branch (the judicial) creates rights under discovery. This situation is different, however, in the sense that the state’s judicial branch has created both the state law discovery rules and the confidentiality rules under the RRTFB, the latter of which is more specific as to these records.

TFB is not aware of an instance in which the FSC has addressed the issue of ethics opinion confidentiality other than through its promulgation of the RRTFB and authorization of its associated procedures. The FSC has upheld confidentiality rules applicable to judicial branch records in other contexts when addressing potential discovery or other disclosure issues.<sup>13</sup> This Court has recognized TFB's purview in determining the application of its confidentiality rules. *See Watson v. Fla. Judicial Qualifications Comm'n*, No. 14-60306-CIV, 2017 WL 3218163, at \*10 (S.D. Fla. July 28, 2017) (“[I]t was within the purview of [TFB] prosecutors to determine what evidence was discoverable and subject to confidentiality and what was not.”) (Cooke, J.), *aff'd*, No. 17-13940, 2018 WL 3911775 (11th Cir. Aug. 15, 2018).

The Court has also asked TFB to address how other state supreme courts have interpreted similar privilege positions taken by other state bars. At this time, TFB has not found any applicable authority in which a state bar has asserted a privilege based on state confidentiality rules applicable to ethics advice. Similar to the FSC, other state supreme courts have applied bar confidentiality rules to prevent discovery and disclosure of documents sought in other contexts. *See, e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. McGrath*, 713 N.W.2d 682, 688 (Iowa 2006) (holding, with respect to records of attorney

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<sup>13</sup> *See, e.g., Inquiry Concerning a Judge No. 14-488 Re Shepard*, 217 So. 3d 71, 81 (Fla. 2017) (“[T]he Hearing Panel did not violate [the] right to due process by denying [the judge’s] discovery requests because the documents sought ... are confidential under the Florida Constitution and the Florida Judicial Qualification Rules.”), *cert. denied sub nom. Shepard v. Fla. Judicial Qualifications Comm'n*, 138 S. Ct. 737 (2018); *In re Inquiry Concerning a Judge, Graziano*, 696 So. 2d 744, 751-52 (Fla. 1997); *Fla. Bd. of Bar Examiners Re: Interpretation of Article I, Section 14d of Rules of Supreme Court Relating to Admissions to the Bar*, 581 So. 2d 895, 897 (Fla. 1991) (confirming its view of confidentiality of Board of Bar Examiner’s records that had been subpoenaed in federal lawsuit, and noting “[t]he Court is concerned that unless the board’s investigative files are held in confidence, many of those from whom the board seeks information concerning applicants would be unwilling to candidly respond”); *see also The Fla. Bar*, 398 So. 2d 446, 448 (Fla. 1981) (“The unauthorized practice of law investigative files of The Florida Bar, as an official arm of this Court, are subject to the control and direction of this Court and not to either of the other branches of the government,” including disclosure under Chapter 119, Florida Statutes.); *The Fla. Bar v. Committe*, 916 So. 2d 741, 745 (Fla. 2005) (rejecting challenge to confidentiality of grievance proceedings, including because “the Bar rules regarding confidentiality are protected by the constitution”).

disciplinary proceedings made confidential by Court rule, that “[i]n essence, such materials ‘are made privileged’ by the rule, ... [and] the [grievance] commission properly denied motion to compel.”); *Chronicle Pub. Co. v. Superior Court*, 354 P.2d 637, 644-51 (Cal. 1960) (holding that disciplinary complaint and records were not subject to disclosure under bar’s confidentiality rules and observing that “[i]n the interest of the public, the State Bar’s need for secrecy outweighs the litigant’s need for information”).

**D. TFB Would Not Provide Call Records under the Court’s Hypothetical**

The Court has asked TFB to address whether the confidentiality accorded to information about requests for ethics advice would still apply in a hypothetical scenario where the records contain information that could assist a homicide investigation. (Doc. 215 at 2-3.) The answer is that TFB would not produce the call records in response to the prosecutor’s request or subpoena for the same reason here: there is no rule that permits such disclosure. The prosecutor could, as with any confidential administrative record of Florida’s judicial branch, seek expedited relief from the Circuit Court of the Second Judicial Circuit pursuant to Fla. Rule of Jud. Adm. 2.420(*J*) (“Denial of Access Request for Administrative Records”).

TFB also notes that the answer would be different if the prosecutor sought confidential records of an attorney grievance proceeding. RRTFB 3-7.1(i) (“Evidence of Crime. The confidential nature of these proceedings does not preclude the giving of any information or testimony to authorities authorized to investigate alleged criminal activity.”). The ethics opinion confidentiality rules, however, do not contain a similar exception, and TFB must assess the application of the confidentiality rules on a case-by-case basis.

**II. Eleventh Amendment Immunity**

TIKD presumably relies on the Federal Rules of Evidence, particularly Rule 501, to



overcome the state law prohibition on disclosure of this information. In this case, however, TFB has asserted immunity under the Eleventh Amendment, which raises a threshold question of subject matter jurisdiction.<sup>14</sup> The parties have previously briefed arguments on the Eleventh Amendment, and TFB refers to its arguments rather than repeating them here.<sup>15</sup> In this instance, presupposing the application of Rule 501 before resolving a jurisdictional challenge would negate TFB's well-settled immunity under the Eleventh Amendment,<sup>16</sup> which includes protection from the burden of litigation itself.<sup>17</sup> In addition to the grounds previously argued, the narrow exception to Eleventh Amendment immunity under *Ex parte Young* is particularly inapplicable to the discovery requests at issue, because it applies only to relief from official capacity individuals. TIKD's discovery requests, however, were directed exclusively to defendant TFB and not any individuals.

### III. Federal Rule of Evidence 501

Even if Eleventh Amendment immunity could be ignored, Rule 501 would still not provide a basis to require production of the call records. Rule 501 provides that,

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;

<sup>14</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996); *Uberoi v. Supreme Court of Fla.*, 819 F.3d 1311, 1313-14 (11th Cir. 2016).

<sup>15</sup> See Doc. 17 at 3-4; Doc. 40 at 3-4; Doc. 94 at 4-5; Doc. 114 at 4-5; Doc. 189 at 4-5; Doc. 211 at 7-8.

<sup>16</sup> See, e.g., *Kaimowitz v. Fla. Bar*, 996 F.2d 1151, 1152-53 (11th Cir. 1993) (holding TFB is immune under Eleventh Amendment); *Brown v. Fla. Bar*, 243 F. App'x 552, 553 (11th Cir. 2007) (stating that “[u]nder the prior precedent rule, *Kaimowitz* bars [Plaintiff]’s claim” against TFB); *Nichols v. Ala. State Bar*, 815 F.3d 726, 732 (11th Cir. 2016) (“[T]his Court has previously concluded that the Florida State Bar is an ‘arm of the State’ that enjoys Eleventh Amendment immunity.”); *Henry v. Fla. Bar*, No. 615-cv-1009-Orl-41TBS, 2016 WL 9632944, at \*2 (M.D. Fla. Aug. 8, 2016) (“[T]o the extent that Plaintiff argues that the Court erred by not applying the appropriate standard for determining whether the Florida Bar is an arm of the state for purposes of Eleventh Amendment immunity, that argument is without merit. . . . [and] bespeaks sanctionable conduct.” (internal citations omitted)).

<sup>17</sup> See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (“The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” (quoting *In re Ayers*, 123 U.S. 443, 505 (1887))).

- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Importantly, although this case is brought under federal question jurisdiction, it includes state law issues as well. TIKD asserts two federal antitrust counts and two state law antitrust counts against all Defendants, and an additional state law tortious interference count against The Ticket Clinic Defendants (“TTC”). TIKD’s claims against TFB include repeated allegations that TFB violated rules promulgated or authorized by the FSC. TFB has also moved for *Younger* abstention due to the issues of state law implicated.<sup>18</sup> The advisory committee notes for Rule 501 themselves acknowledge that a “problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a Federal case containing a combination of Federal and State claims and defenses.” Fed. R. Evid. 501 advisory committee’s note. That concern is well illustrated here, where TIKD invokes federal jurisdiction to override state confidentiality interests in a case contingent on numerous state law issues.

But even to the extent the federal law of privilege governs these state law questions, TFB’s objections should still be upheld because the core interests embodied in state law here should be applied as a federal evidentiary privilege. Although TFB is not aware of a decision addressing, one way or another, the application of a federal privilege to ethics confidentiality requirements under state law, the same underlying principles have resulted in such privilege in other contexts implicating the same concerns. For instance, in *Shabazz vs. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987), the court applied Rule 501 in determining that an Iowa statute

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<sup>18</sup> See Doc. 17 at 16; Doc. 20 at 5-6; Doc. 40 at 8-9; Doc. 94 at 7-8; Doc. 114 at 6-7.

requiring secrecy of matters handled by a state prison ombudsman established a limited privilege under federal law. *Id.* at 90-91.<sup>19</sup> In *Shabazz*, the court recognized that “[a]s a result of [the statute] and other confidentiality provisions, citizens have an expectation that their complaints to the office will only be disclosed to the Governor or the General Assembly, if they are disclosed at all.” *Id.* at 92. Similarly here, Ethics Hotline callers have an expectation that their calls to the Hotline will not be disclosed except as provided under the RRTFB and its authorized procedures. In *Shabazz*, “the Court was persuaded that the flow of information to the office from citizens would be threatened if it became known that the statutory assurances of general confidentiality would not be respected in federal court.” *Id.* at 92. “[A]nything which chills a citizen’s willingness to come forward limits the office’s effectiveness in the long run . . . .” *Id.*<sup>20</sup>

These are precisely the same concerns here: Ethics Hotline callers rely on the assurances of confidentiality established in the RRTFB and its authorized procedures, and “if it became known that [those] assurances of general confidentiality would not be respected in federal court,” attorneys would be chilled from seeking such advice to help them comply with their professional responsibilities. *Id.* Indeed, encouraging attorneys’ compliance with RRTFB though TFB’s ethics advice serves not only an important *state* interest, but also an important *federal* interest *already* adopted by this Court: in its own Local Rules, this Court mandates its members to comply with the same RRTFB, which TFB’s Ethics Hotline is

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<sup>19</sup> The statute provided that “[t]he Citizens’ Aide may maintain secrecy in respect to all matters including the identities of the complainants or witnesses coming before the Citizens’ Aide, except that the General Assembly, any standing committee of the General Assembly or the Governor may require disclosure of any matter and shall have complete access to the records and files of the Citizens’ Aide. The Citizens’ Aide may conduct private hearings.” Iowa Code § 601G.8 (1985).

<sup>20</sup> Indeed, the exceptions for confidentiality are much narrower here than in *Shabazz*, presenting a much stronger basis for privilege here. *Id.* (“The basis for a privilege would be much stronger if full confidentiality were required.”).

designed to encourage.<sup>21</sup> Other cases have similarly recognized that state law should sometimes supply federal privilege by being absorbed under Rule 501.<sup>22</sup>

In addition, like the circumstances here, “the privileged nature of communications [in *Shabazz*] d[id] not prevent the plaintiffs from using other means to prove the existence of facts communicated to” the former prison ombudsman. *Id.* at 93. Nor did it preclude testimony from the former official about “rules and policies,” “daily operation[s]” or “general knowledge or expertise.” *Id.* at 91. As described below, there has been ample discovery from TFB on these issues, and ample opportunity for discovery about communications from the Ethics Hotline that did not require obtaining the call records themselves.

#### IV. Relevance and Proportionality

TFB’s objections should also be upheld because the call records are not sufficiently relevant and proportional to the needs of the case under Federal Rule of Civil Procedure 26(b).

##### A. The Ethics Hotline Calls Are Not Central to TIKD’s Claims

TIKD argues that the Ethics Hotline call records “lie[] at the very heart of TIKD’s case” (Doc. 216 at 1), but the Complaint demonstrates otherwise. The Complaint alleges TFB conspired with TTC to drive TIKD out of business through TFB’s “interminable” and “baseless” UPL investigation (Doc. 80 ¶¶ 4, 70); TFB’s unwillingness to accommodate TIKD’s demands regarding the UPL and grievance complaint processes (*id.* ¶¶ 4, 70-72, 81,

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<sup>21</sup> See S.D. Fla. Loc. R. 11.1(c) (“The standards of professional conduct of members of the Bar of this Court shall include the current Rules Regulating The Florida Bar.”); Rule 3 of the Rules Governing the Admission, Practice, Peer Review, and Discipline of Attorneys (“To remain an attorney in good standing of the bar of this Court, each member must remain an active attorney in good standing of The Florida Bar, specifically including compliance with all requirements of the Rules Regulating The Florida Bar, as promulgated by the Supreme Court of Florida.”).

<sup>22</sup> See also *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) (creating psycho-therapist patient privilege as a federal privilege, and noting that “[d]enial of the federal privilege ... would frustrate the purposes of the state legislation that was enacted to foster these confidential communications”); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (“Although we are not bound to follow the Pennsylvania law, neither should we ignore Pennsylvania’s public policy giving newspaper reporters protection from divulging their sources.”).

Ex. 3-4); statements by TFB's UPL counsel about the investigation (*id.* ¶¶ 69, 80); and TFB's providing an inquiring attorney with the non-binding, written Staff Opinion, which allegedly gave "the false impression working with TIKD would violate ethical rules" (*id.* ¶¶ 4, 58-62).

The Complaint's only reference to TFB's Ethics Hotline involves an alleged statement by a TTC attorney telling a TIKD "coverage" attorney to call the Hotline and that a different attorney had called the Hotline and stopped working with TIKD. (*Id.* ¶ 65.) The declaration which that "coverage" attorney provided to TIKD, however, does not indicate that she ever called the Ethics Hotline much less received improper advice from it. (Doc 12-4.) To the extent TIKD argues it has only recently learned of the Ethics Hotline, the evidence shows TIKD knew prior to filing this action that TFB provided advice through the Hotline concerning attorney involvement with TIKD and the specific types of issues raised in such advice.<sup>23</sup> Nonetheless, TIKD did not allege in its Complaint it was harmed by TFB providing that advice. Nor has TIKD identified any admissible testimony identified in the course of discovery and summary judgment briefing from anyone who called the Ethics Hotline, notwithstanding that these were allegedly TIKD's own coverage attorneys or prospective attorneys. Based on TIKD's own pleadings, the Ethics Hotline calls are not a core issue.

**B. TIKD has Already Obtained Ample Discovery Regarding TFB's Ethics Advice, and Elected Not to Pursue More**

Furthermore, TIKD has already obtained ample discovery regarding TFB's provision of ethics advice—and had ample opportunity to obtain additional discovery if needed. On April 9, 2018, TFB identified on a privilege log the 15 call records which identified any call

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<sup>23</sup> See Doc. 203-1 at 143 (Ex. 25 thereto), June 9, 2017 email from attorney to TIKD and forwarded to TIKD's CEO and Founder, stating "I discussed with a representative from the Florida Bar's Ethics Hotline my understanding of TIKD's interactions with consumers and my potential role in accepting clients/fees from TIKD. The response I received from the representative was 'I can't recommend that.' He cited rules governing the unlicensed practice of law, fee-sharing with non-lawyers, and referral services."

to TFB's Ethics Hotline for which the associated call record referenced TIKD or a traffic ticket app, as well as the date and time of the call and the name of the staff attorney in the Ethics Department who took the call. (Ex. B.)<sup>24</sup> TIKD deposed two TFB staff members, with nearly 50 collective years of experience serving in TFB's Ethics Department, who testified at length about TFB's ethics processes, the ethics advice in the Staff Opinion, and the advice TFB would have provided in response to oral inquiries generally.<sup>25</sup> These TFB staff members also responded to three of the 15 Hotline calls at issue.<sup>26</sup> One deponent wrote the Staff Opinion, and the other leads the Department.<sup>27</sup>

On its face, the Staff Opinion lays out the ethical issues raised by TFB in detail. It cites numerous prior ethics opinions and rules from the RRTFB, including rules governing attorney-client relationships (RRTFB 4-1.1, 4-1.2, and 4-1.4); fee-splitting (RRTFB 4-5.4(a)); referrals and advertising (RRTFB 4-7.18, 4-1.5); payment of fines and financial assistance to clients (RRTFB 4-1.8(e)); and violations of the ethics rules through the acts of another (RRTFB 4-8.4(a)). The Staff Opinion also states that "whether it is lawful for the company to provide the services as described is a legal question, beyond the scope of any ethics opinion," but that "[i]f the non-lawyers are engaged in [UPL], then a lawyer could not accept referrals" from them under Rule 4-5.5.<sup>28</sup> The record evidence has furthermore indicated these

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<sup>24</sup> TFB consolidated these 15 entries from the April 9, 2018 log into a supplemental privilege log dated June 25, 2018, where they became entries 109-123. That log consolidated the two separate logs from April (one attached to the Interrogatory responses regarding ethics issues, and one attached to the response to the Request for Production). Plaintiff's Notice refers to the numbering in the supplemental log, but the April 9, 2018 log attached to the Interrogatory responses may be easier to read due to font size. TFB also notes that Entry 124 on the June 25, 2018 log was produced following the consent of the caller.

<sup>25</sup> See Doc. 193-8 (Deposition of Lilijean Quintiliani) & Doc. 193-9 (Deposition of Elizabeth Tarbert).

<sup>26</sup> The Privilege Log (attached to Ex. B) identifies nine different TFB staff members who responded to calls identified on the log, including three calls by the staff counsel whom TIKD deposed.

<sup>27</sup> See Doc. 193-8 (Quintiliani) at 120:5-10; Doc. 193-9 (Tarbert) at 10:9-13.

<sup>28</sup> Cf. *Ethics Alert: Providing Legal Services to Distressed Homeowners*, updated 2013 ("Ethics Alert") (available at <https://www.floridabar.org/wp-content/uploads/2017/04/ethics-legal-service-to-homeowners.pdf>) ("This alert also does not address the issue of what conduct by nonlawyers is permissible.

are common issues to raise when an attorney asks about working with any non-lawyer company, and the author of the Staff Opinion referenced similar issues in an ethics alert posted to TFB's website during the foreclosure crisis several years ago.<sup>29</sup> An ethics counsel from the Virginia State Bar also asked TFB's Ethics Counsel in October 2017 if there had been ethics inquiries about TIKD, citing several of the same issues in his question.<sup>30</sup> TFB's Ethics counsel responded that "[t]he hotline has gotten several calls. . . . Here is what we are telling lawyers who call asking if they should be involved with TIKD," providing a list of four issues consistent with the others described above. (Ex. C.)

Furthermore, there has been substantial non-party discovery in this case, including collectively more than 20 non-party subpoenas issued by TIKD and TTC to various traffic ticket attorneys. Although TFB cannot disclose confidential records regarding requests for ethics advice, the attorneys who sought ethics advice from TFB can formally waive confidentiality or they can request from TFB such records of requests for ethics opinion or call records. Finally, the only alleged probative value of the Ethics Hotline call records is to show that TFB "discouraged" attorneys from doing business with TIKD, but TIKD already knows the names of the attorneys who were discouraged from continuing to work with TIKD. And the Ethics Hotline call records will not necessarily disclose the identities of other callers.

Accordingly, TIKD does not need additional evidence from TFB's confidential records. TIKD contends that TFB's provision of non-binding ethical advice described above

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Questions regarding whether conduct of nonlawyers constitutes the unlicensed practice of law should be directed to The Florida Bar Unlicensed Practice of Law Department at (850) 561-5840."); *see also Ethics Alert: Lawyers Should be Very Wary of Loan Modifiers*, Elizabeth Tarbert, The Florida Bar News, Vol. 36, N. 6 (Mar. 15, 2009) (same).

<sup>29</sup> See Doc. 193-8 (Quintiliani) at 166:20–167:9, 178:8-16; *see also* Ethics Alert, *supra* ("Several ethics opinions, Opinions 92-3 and 95-1 in particular, discuss similar proposals and the ethics problems that arise when lawyers enter business arrangements with nonattorneys.").

<sup>30</sup> See Doc. 193-9 (Tarbert) at 69:6–77:11, 81:12–82:3; Tarbert, Ex. 1.

constituted unlawful conduct designed to further the goals of the antitrust conspiracy. Indeed, TIKD takes the position that the Virginia Bar email proves what TFB told Hotline callers. (Doc. 216 at 2.)<sup>31</sup> But TFB does not dispute that the ethical issues outlined in the Staff Opinion and the Virginia Bar email are the issues that TFB's Ethics Counsel or Assistant Ethics Counsel would normally raise in these circumstances.<sup>32</sup> The question is not whether TFB provided such advice, but rather whether such advice constituted an antitrust violation.

TIKD has also made numerous deliberate decisions about discovery it would *not* pursue. The other staff counsel who responded to Ethics Hotline calls were all identified to TIKD on April 9, 2018, and those staff attorneys could have been deposed by TIKD. TIKD could have also deposed the individuals whom it believes contacted the Ethics Hotline and received advice.<sup>33</sup>

### C. The Discovery Sought Is Not Proportional to Needs of this Case

For all these reasons, this discovery is not proportional to the needs of the case under Rule 26(b)(1). TIKD's Complaint is not based on the specific advice from the Ethics Hotline. To the extent the Ethics Hotline advice is relevant, TIKD has obtained sufficient evidence in discovery or could have sought these records when TFB first objected in April 2018. The

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<sup>31</sup> According to TIKD, "TFB's own Ethics Counsel testified that she told her counterpart in Virginia that TFB staff were being directed to tell callers that TIKD was likely engaged in UPL and described to him the 'script' TFB was supposedly using with such callers." (Doc. 216-1.) According to the document, TFB's Ethics Counsel wrote, "Here is what we are telling lawyers who call asking if they should be involved with TIKD: 1. The Company may be engaging in UPL and if so it would unethical for the lawyer to participate under Rule 4-5.5. It is a legal question whether the company is engaged in UPL, so we can't answer that, but we do raise the issue."

<sup>32</sup> See Doc. 193-9 (Tarbert) at 69:6–10 and Ex. 1.

<sup>33</sup> Moreover, TIKD should have sought to overrule these TFB's objections earlier. The local rule provides that, "[a]ll disputes related to discovery shall be presented to the Court ... within (30) days from the: (a) original due date (or later date if extended by the Court or the parties) of the response or objection to the discovery request that is the subject of the dispute," and failure to do so "may constitute a waiver of the relief sought." S.D. Fla. Loc. R. 26(g). The parties met and conferred over the confidentiality objections to the 15 call records but certainly did not agree to extend the issue until the end of discovery. If this discovery was sufficiently important to the issues at stake, TIKD should have asked the Court to overrule TFB's objections sooner.



“amount in controversy” weighs against production because, as a state entity, there can be no damages award against TFB. “Relative access to relevant information” also weighs against production, because TIKD has asserted it already has evidence sufficient to prove its claims and because TIKD could seek these records from inquiring parties (allegedly TIKD’s coverage counsel) who can obtain them directly from TFB.

In terms of burden versus benefit, TIKD is asking to impose the burden of undermining TFB’s confidentiality rules for the small benefit of obtaining evidence it does not need. TFB’s preservation of ethics confidentiality, which is designed to encourage attorneys statewide to candidly seek ethics advice without fear that TFB will disclose the contents of their requests, must prevail over TIKD’s belated effort to obtain unnecessary discovery.<sup>34</sup>

#### IV. *FTC vs. Illinois State Bar Association* Is Inapplicable

TIKD has cited *Federal Trade Commission vs. Illinois State Bar Association*, 711 F. Supp. 445 (N.D. Ill. 1989), in which the FTC sought to enforce a subpoena related to a law enforcement investigation to obtain the names and addresses of those who sought ethics opinions provided by the Illinois State Bar Association (“ISBA”). The distinctions in that case illustrate why disclosure should not be required here. First, the defendant ISBA was (and is) a private voluntary bar association, not an official arm of the government in Illinois. *Id.* at 445. Therefore ISBA could not and did not cite an Illinois Supreme Court rule against disclosure of the records, as TFB does here. Rather than invoking any state law requirement, the ISBA relied on the attorney-client privilege. TFB does not assert attorney-client privilege over the advice it gives on the Ethics Hotline. Indeed, because TFB is a state agency acting as an arm of the judiciary that also carries out mandated functions for attorney discipline, it

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<sup>34</sup> Alternatively, the Court has discretion to deny discovery of a government’s confidential data pursuant to Federal Rule of Civil Procedure 26(c). *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985)

does not treat its ethics inquirers as “clients,” which could create conflicts of interest.<sup>35</sup>

ISBA also asserted that the disclosure of the identity of attorneys who sought ethics opinions would have a chilling effect on future inquiries, which the court found speculative based on contradictory evidence collected by the FTC. *Id.* at 446. Again, however, TFB (unlike ISBA) is an arm of the state judiciary not only assigned to handle ethics inquiries about the rules of professional conduct, but also to investigate and prosecute violations of those same rules of professional conduct. Thus, there is a much greater risk that creating unwritten exceptions to the confidentiality rules upon which Ethics Hotline callers rely would chill attorneys’ willingness to (i) call TFB for ethics advice at all, and (ii) discuss openly the facts underlying their inquiries. Both of these obstacles would diminish the overall effectiveness of TFB’s advisory function as an FSC-approved mechanism to foster ethical practice under the FSC’s jurisdiction. Importantly too, no Eleventh Amendment immunity issues arose in *FTC vs. ISBA* because the defendant (ISBA) was a private entity rather than a state agency and the FTC is a federal agency. Here, in contrast, a private entity (TIKD) has sued a state agency in federal court, which violates the Eleventh Amendment.

#### V. TFB Has Not Waived Confidentiality by Asserting the Confidentiality Rules as a “Sword and Shield”

TIKD argues that TFB waived confidentiality over the Ethics Hotline records because TFB asserted in its Motion for Final Summary Judgment that

**[t]he undisputed factual record makes clear that TFB undertook an appropriate investigation of TIKD as it is required to do under RRTFB, responded to inquiries on the status of the case as required by the RRTFB, and provided advisory ethics opinions to attorneys requesting guidance as to their own contemplated conduct as TFB is required to do under the RRTFB.**

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<sup>35</sup> Moreover, *FTC vs. ISBA* addressed only production of the names and addresses of persons requesting ethics advice, unlike here where the entire call record and substance of any advice is involved.

(Doc. 216 at 2, quoting Doc. 189 (emphasis added).) The only part of that sentence involving ethics opinions is the bolded last phrase.<sup>36</sup> There is no “sword and shield” issue here.

First, TIKD cannot plausibly contend that it is being deprived of evidence needed to disprove TFB advised Ethics Hotline callers “as to their own contemplated conduct.” TIKD’s premise for why it needs the discovery is that the callers would have otherwise worked for TIKD. If the callers never contemplated working for TIKD, then TIKD could not have been allegedly harmed. Second, the quoted statement is not a waiver because the “undisputed factual record” upon which TFB relies was created through substantial discovery in which TIKD itself participated. TIKD elected to not depose other Ethics Hotline staff or depose attorneys who allegedly received “improper” advice. Nor did TIKD assert it needed this discovery to respond to TFB’s Motion for Final Summary Judgment. Any waiver must be charged to TIKD under Local Rule 26(g), and TFB asks the Court to uphold its objections on this basis alone. *Hartford Steam Boiler Inspection & Ins. Co. v. Menada, Inc.*, No. 17-CV-21465, 2018 WL 3911207, at \*1 (S.D. Fla. Jan. 16, 2018).

#### **VI. The Other Documents Identified by Plaintiff Are Not Ethics Records, but Documents Related to Attorney Disciplinary Investigations**

TIKD’s post-hearing Notice identifies 38 additional documents from TFB’s privilege log in asserting that it also seeks “scores of relevant, responsive communications (at Items 7, 12-21, 23-24, 27-45, and 50-55) between TFB and persons complaining about lawyers who worked with TIKD.” (Doc. 216 at 2-3.) First, these are not Ethics Hotline call records but records of pending attorney grievance proceedings under Chapter 3 of the RRTFB, and therefore beyond the scope of the discovery at issue here. To the extent the Court intends to

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<sup>36</sup> The first two phrases involve the UPL investigation and duties under Chapter 10 of the RRTFB.

consider ordering discovery of these additional records, TFB asks for the opportunity for additional briefing. These records of pending lawyer regulation proceedings are confidential under RRTFB 3-7.1, which provides in pertinent part that,

(a) Scope of Confidentiality. All records including files, preliminary investigation reports, interoffice memoranda, records of investigations, and the records in trials and other proceedings under these rules, except those disciplinary matters conducted in circuit courts, are property of The Florida Bar. All of those matters are confidential and will not be disclosed except as provided in these rules...

(1) Pending Investigations. Disciplinary matters pending at the initial investigatory and grievance committee levels are treated as confidential by The Florida Bar, except as provided in rules 3-7.1(e) and (k).

RRTFB 3.7-1(a); *see also The Fla. Bar v. Committe*, 916 So. 2d 741, 745 (Fla. 2005). These records have also been available in discovery from persons other than TFB, such as alleged complainants or respondents, who are not restricted by TFB's confidentiality rules. RRTFB 3-7.1(a). TIKD argues that such records must be "relevant" because TFB has included them on a privilege log, but TFB's inclusion of such documents on a privilege log in an abundance of caution is certainly no concession of relevance. TFB also notes that all of the referenced entries were included on TFB's April 9, 2018 privilege log attached to its Response to TIKD's Request for Production, and an effort to compel production of these documents could have been made earlier but was not. S.D. Fla. Loc. R. 26(g). TFB also incorporates by reference all of the other arguments asserted above.

### **Conclusion**

For all these reasons, TFB's objection to producing the Ethics Hotline call records should be sustained.

Respectfully submitted this 10th day of September, 2018.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service on September 10, 2018 to:

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