BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

2000 FIRST TENNESSEE BUILDING
165 MADISON AVENUE
MEMPHIS, TENNESSEE 38103

PHONE: 901.526.2000
FAX: 901.577.2303

www.bakerdonelson.com

THOMAS L. PARKER, SHAREHOLDER
Direct Dial: 901.577.2179
Direct Fax: 901.577.4248
E-Mail Address: tommyparker@bakerdonelson.com

November 20, 2015

The Honorable James (Jim) Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 7th Avenue North
Nashville, Tennessee 37219

Re: Comments of the Memphis Bar Association to the Proposed Amendments to the Tennessee Rules of Procedure and Evidence

Dear Jim:

Attached please find the Comments of the Memphis Bar Association with regard to the Proposed Amendments to the Tennessee Rules of Procedure.

We hope these comments will assist the court in its consideration of the proposals.

Sincerely,

Thomas L. Parker
President, Memphis Bar Association

TP:tmt

Enclosures

M TP 2703704 v1
2616900-007190 11/20/2015

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE AND EVIDENCE

No. ADM2015-01631

The Memphis Bar Association ("MBA"), by and through its Board of Directors as reflected by the signature of President, Thomas L. Parker, and the Chairman of the Professionalism Committee, David M. Cook, files the following comments regarding the proposed amendments to the Tennessee Rules of Appellate Procedure, Civil Procedure, Criminal Procedure, and Juvenile Procedure.

BACKGROUND

On August 27, 2015, this Honorable Court published the recommendations of the Advisory Commission on the Rules of Practice and Procedure with regard to proposed amendments to the Tennessee Rules of Appellate, Civil, Criminal and Juvenile Procedure.

The MBA published the proposals for comment and referred the proposed revisions to the MBA's Professionalism Committee chaired by David M. Cook. Comments were provided by the Committee as well as individual practitioners. The Memphis Bar Association's Board of Directors took up the matter at its regular monthly meetings of Thursday, October 22, 2015, and November 19, 2015 and adopted the comments that follow:

1. **TENNESSEE RULES OF APPELLATE PROCEDURE, RULE 26:**

There were no comments with regard to the proposed rule amendment allowing the Appellate Court to Dismiss an appeal on its own initiative when the transcript or statement is not timely filed.

2. **TENNESSEE RULES OF CIVIL PROCEDURE- RULES 3 AND 4:**

No objection or negative comments.

3. **RULE 4.04:**

This proposal appears problematic to the practitioners of the Memphis Bar. The proposed amendment removes the provision stating that a notation by the United States Postal Service that a properly addressed registered or certified letter is "unclaimed" (or other similar notation) would be sufficient evidence of the defendant's refusal to accept delivery. In many actions, particularly family law cases, it is not unusual for parties to attempt to avoid service of process. Now, the rule seems to allow that party to avoid service by simply not claiming the mail. The members of the family law bar believe that there will be additional costs and expenses associated with obtaining personal service in such cases which must be balanced with the need for due process of law. Additionally, a Memphis practitioner noted the following regarding Tennessee Rule of Civil Procedure 4.04(11) and 4.05(5).

> Right now in Tennessee, you can obtain service by certified mail (return receipt requested, restricted delivery) if the mailing is returned "unclaimed." The proposed rule would eliminate this designation of service of process, and states this does not demonstrate "refusal of the mail." "I have had several defendants try very, very hard to evade service, and in at least three cases, this has been the only that I could have a defendant with served with process. If this rule change is adopted, it is going to be very problematic in child support or alimony arrearage cases, as those defendants often due try to evade service. Removing this provision is going to increase litigation costs, as I cannot see any other recourse other than having my client hire a private detective or pay additional fees to a process server to track down a defendant.

Although there is a healthy dissent, the MBA Board of Directors' guarded recommendation is to favor the amendment.

4. TENNESSEE RULES OF CRIMINAL PROCEDURE:

Most of the proposed changes to the Tennessee Rules of Criminal Procedure change the reference from "preliminary examinations" to "preliminary hearings" which is a change that criminal practitioners in Memphis would recommend.

5. TENNESSEE RULE OF CRIMINAL PROCEDURE RULE 36.1:

The Memphis Bar finds the proposed changes to Rule 36.1 to be problematic. The proposed change to Rule 36.1 would change the time within which a person can challenge an illegal conviction from "at any time" to "before the sentence set forth in the judgment of conviction expires." The Memphis Bar submits that the existence of an illegal sentence or illegal conviction can continue to serve as impediment to an individual long after the sentence has expired. Common examples would be the detrimental impact on immigration status and also whether the sentence could possibly be expunged (which would assist the person in attempting to obtain employment). It appears to the members of the Memphis Bar Association that if a conviction is illegal, that individual could continue to suffer the effects of that illegal sentence regardless of when the time of confinement and/or probation and/or parole has long since passed. Therefore, it is our recommendation that an illegal conviction should be corrected whenever it is brought to the Court's attention. Therefore, the MBA opposes the proposed change to Rule 36.1 of the Tennessee Rules of Criminal Procedure.

6. TENNESSEE RULES OF JUVENILE PROCEDURE (TRJP):

The proposed revisions to the Tennessee Rules of Juvenile Procedures brought detailed comments from practitioners in the Juvenile Court. Rather than summarize those comments, the Memphis Bar Association would submit the attached six (6) pages of commentary submitted by

Larry Scroggs, Chief Administrative Officer and Chief Counsel for the Juvenile Court of Shelby County, Tennessee and Donna Armstard, of the Juvenile Defender Unit of the Shelby County Public Defender's Office attached as Exhibit A. The Memphis Bar Association adopts their comments and would submit them for this Honorable Court's consideration.

CONCLUSION

The Memphis Bar Association submits these comments to the Court in hopes that it will assist the Court in its analysis of the proposed amendments.

Respectfully Submitted,

By: _____

Thomas L. Parker,
President, Memphis Bar Association
BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
(901) 577-2179

By: _____

David M. Cook
Chairman, Professionalism Committee
Memphis Bar Association
THE HARDISON LAW FIRM
119 South Main Street, Suite 800
Memphis, Tennessee 38103
(901) 525-8776

Anne Fritz

From: Armstard, Donna <Donna.Armstard@shelbycountytn.gov>
Sent: Tuesday, October 13, 2015 2:53 PM
To: Anne Fritz; 'dcook@hard-law.com'
Cc: Sansbury, Laurie; Robilio, Bill
Subject: Proposed R Juv P Memo 2015-10-14 Final.docx
Attachments: Proposed R Juv P Memo 2015-10-14 Final.docx

Unfortunately I will not be able to attend the meeting tomorrow. In lieu of my attendance I am sending the attached comments in regard to the Proposed Amendments to the Rules of Juvenile Procedure. Myself, along with two other attorneys from our office, Laurie Sansbury and Bill Robilio reviewed the proposed rules. As you can see from the attached, there were some items we could appreciate, while there were others that we felt needed more clarification. I hope that the attached will provide some assistance.

Sincerely,
Donna J. Armstard

Juvenile Defender Unit
Law Office of the Shelby County Public Defender
600 Adams
Memphis, Tennseess 38103
901-222-2829
Donna.armstard@shelbycountytn.gov

Thank you for this opportunity to comment on the Proposed Comprehensive Revision of the Rules of Juvenile Procedure. We value the chance to use our voice to include the voices and concerns of the children that we represent in Juvenile Court, as well as their families and communities. We see many positive changes in the Proposed Rules, including the Advisory Commission Comments, which incorporate both the U.S. Supreme Court's evolving jurisprudence around adolescent development in Miller v. Alabama, 132 S. Ct. 2455 (2012), Graham v. Florida, 560 U.S. 48 (2010), and Roper v. Simmons, 543 U.S. 551 (2005), as well as T.C.A. § 37-1-101 regarding the core purposes of the Juvenile Code—including rehabilitation in a home environment whenever possible and an emphasis on keeping children out of secure detention. We have opted to provide comments on a few rules that we felt incorporated positive changes but also may benefit from clarification or additional changes to better protect children's fundamental rights. We appreciate the work that has gone into re-writing these rules, and we hope that you will consider our comments.

Rule 206 and Rule 305: Discovery

Rules 206 and 305 both address discovery. We are appreciative of the clarification on discovery, particularly Rule 206 regarding discovery in Delinquency and Unruly matters. The new Rule clarifies that Rule 16 of the Rules of Criminal Procedure should apply in delinquency and unruly proceedings, which is an improvement over current Rule 25. However, we feel that the Advisory Commission Comment could be clearer about discovery in transfer matters. The Comment also indicates that "[i]f the parties cannot agree on discovery, then the Tennessee Rules of Criminal Procedure shall be utilized to ensure that each side has access to discovery material in each case." When read with part (b) of the rule regarding informal and formal requests for discovery, this indicates that the Rule assumes discovery in many cases will occur without formal involvement of the court. This appears to allow for informal discovery requests as well as formal motions in transfer matters, but if the parties cannot reach an agreement, it is unclear whether Rule 16 should apply.

The Comment cites State v. Willoughby, 594 S.W.2d 388 (Tenn. 1980) holding "that discovery rules do not apply to preliminary examinations and hearings." The next sentence in the comment, "Therefore, this rule would not apply to preliminary examinations and hearings..." We are not clear about the connection the comment makes between Willoughby and transfer hearings: does the Comment indicate that discovery via Rule 16 of the Rules of Criminal Procedure is or is not applicable in transfer hearings? We do appreciate the inclusion of Brady v Maryland, 373 U.S. 83 (1963) as a vehicle for discovery.

Role of Youth Services Officers and Other Similarly Situated Court personnel

We understand that the structure and mechanisms within each jurisdiction are different and will require local rules to accommodate these differences; the proposed rules emphasize throughout the development of local rules. The revised rules do not clearly resolve who is responsible for

filing petitions and the parameters of youth services and probation roles. The Comment to Rule 104, Appearance of Attorney, is identical to the comment in current Rule 19: "In no event should a youth services officer or other employee of the court appear as prosecutor in juvenile, court or fulfill in any way such role. This does not, however, prevent the youth services officer from being the petitioner or a witness in a violation of probation proceeding."

We are unclear whether this comment means that 1) the youth services officer or similar person may file a petition in any delinquency or unruly matter, and may be a witness only at violation of probation hearings; or 2) that the youth services officer may file a petition only in a violation of probation matter or serve as a witness only in a violation of probation matter. We are concerned that the decision to file a petition is unclear and that this decision can be perceived as a prosecutorial or quasi-prosecutorial role. If this decision is at the discretion of the youth services officer and not the prosecutor, the decision may exceed the parameters of the youth services officers role under the comment. Rule 201(e) states "[i]f the designated court officer determines informal adjustment to be inappropriate, then formal court proceedings shall commence with the filing of a petition or citation." The rules throughout refer to the "designated court officer"; we understand this to be a youth services or probation officer. However, if the designated court officer is a youth services officer, then in making the decision to file a petition their role may be in tension with Rule 104's prohibition on youth services officers fulfilling the role of a prosecutor.

Rule 201: Preliminary Inquiry and Informal Adjustment and Rule 202: Pretrial Diversion

We are pleased with the significant changes to these rules from the current rules, as they clarify these two dispositional options, both of which are tremendously helpful to our clients in avoiding a juvenile delinquency record. We hope that the clarification allows for an expansion of non-judicial dispositions. We also praise the Committee for removing the requirement that the child admit to the alleged offense in order to receive the benefit of these options. However, T.C.A. § 37-1-110 still requires for informal adjustment without adjudication that "the admitted facts bring the case within the jurisdiction of the court." When read with the statute, it appears that admission is still required; admission in informal adjustments is a concern because of the potential for a formal petition to be filed in the case. While the rules offer protection in stating that statements the child makes are inadmissible prior to disposition, we have concerns about the requirement of admission to receive the benefits of informal adjustment or pretrial diversion.

Rule 203: Procedures Upon Taking a Delinquent Child into Custody

This rule combines current Rules 5 and 15. We praise the Comment's emphasis on alternatives to secure detention and the recognition that detention is harmful for both the child and the family. When read in light of this revised Rule and Comment, T.C.A. § 37-1-114 offers more opportunities for magistrates to chose less restrictive alternatives that detention.

We are pleased to see that the initial probable cause determination when a child is taken into

detention pursuant to a warrantless arrest shortened to 48 hours and the Comment's explanation of this change to conform to U.S. Constitutional requirements. However, if the child is detained pursuant to an attachment or warrant, or if the initial probable cause determination is made within 48 hours, the amount of time prior to the detention hearing can be between 72 and 84 hours. Because the initial probable cause determination is based on a written affidavit and may be *ex parte*, the delay before the detention hearing may be an additional 24 or 36 hours that the child must remain in detention prior to a full detention hearing at which they are entitled to counsel. We fear this delay would allow children to languish in detention longer than necessary, a situation in tension with the Comment's emphasis on community alternatives. Ideally we hope that the child would have a full detention hearing with counsel within 48 hours of detention with or without a warrant.

At the detention hearing stage, Rule 203 requires that the child be made aware of their rights under Rule 205(b), including the "right to confront and cross-examine adverse witnesses." However, this change appears to remove By incorporating the child's rights in all hearings at the detention hearing, we presume that current Rule 15(a)(3)'s advisement of the child's right to "confront and to cross-examine the persons who prepared any police reports, probation reports or other documents submitted, as well as any witness examined by the court during the detention proceedings" is included in the right to cross-examine adverse witnesses. If the persons who prepared the report are not included under adverse witnesses, the child's defense attorney is left to dispute probable cause on the face of an affidavit of complaint or petition; this limits the ability to challenge unreliable hearsay, which is prohibited by Rule 203(d)(2).

Rule 207: Procedures Related to Child's Mental Condition

The addition to this new rule, section (c), which prohibits in adjudicatory hearings the use of statements made by the child during a competency determination, as well as prohibiting the use of testimony by an expert based on the statement or any fruits of the statement, is tremendously valuable in protecting children's right against self-incrimination. We would hope to see this critical protection expanded to cover any psychological evaluation, including sanity and commitment examinations and psychosexual evaluations. The proposed rule is broader than the protections afforded adults in Rule 12.2(c)(2) of the Rules of Criminal Procedure, which allows for the use of statements made during a competency examination to be used "for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony." The comments do not indicate that Rule 207 is intended to include these exceptions.

Rule 208: Transfer to Criminal Court

The proposed changes to current Rule 24 regarding transfer, particularly the extension of time required for notice of transfer (14 days before the hearing) and the limit on when notice of transfer may be filed (within 90 days of the child being charged), both with an exception "for good cause." However, we would note that the 14 day notice conflicts with the 3 day notice

required by T.C.A. § 37-1-134(a)(3). The other positive change in part (a) is the addition of the requirement that the state "must file written notice, in good faith and not for the purpose of delay, of the intent to seek transfer..." Together these two changes could serve to increase the opportunities for defense attorneys to prepare for a transfer hearing because they will have more time and a sense of whether the case is likely to result in a transfer hearing.

The comment "[o]nce a plea is accepted by the juvenile court, double jeopardy attaches and the matter may not be transferred to criminal court," in conjunction with the time limits described above, appear to clarify that once a matter has been adjudicated in juvenile court and the child appeals, the state is not entitled to seek transfer in the Circuit Court on appeal.

The comment's inclusion of the fundamentals principles articulated by the U.S. Supreme Court in Roper, Graham, and Miller serves as an important reminder to the court regarding a child's "lessened culpability" and greater "capacity for change", highlighting both the importance of defense counsel and the factors the court must consider.

Rule 112: Attendance of Parties

Rule 112, Attendance of Parties and Other Necessary Persons, is an important step to ensure that all necessary persons are before the court. We would hope this means that if an individual is incarcerated and can be brought to court, they would be brought. The Comment allowing participation through audio-visual transmission could be a way to allow parents or guardians in delinquency matters appear before the court if they are incarcerated or located too far away to travel for the court appearance. This can benefit juvenile clients in Delinquency matters, as well as adults in Dependent & Neglect matters. The Comment wisely indicates that audio-visual transmission should only be used in compelling circumstances and with appropriate safeguards, which we hope would provide a safeguard to prevent video hearings for children in the custody of the Department of Children's Services who can be transported to the court.

We thank you again for this opportunity to comment on the proposed rules. Our comments above are exemplary of issues we feel incorporate both positive changes and opportunities for additional positive change, but we see these positive changes and opportunities throughout the proposed rules. We hope that we will continue to see significant changes to better protect the rights of children in delinquency and unruly matters.

November 5, 2015

MEMO (Revised)

To: David Cook

From: Larry Scroggs

Subject: **Proposed Revisions to Tennessee Rules of Juvenile Procedure (TRJP)**

With one exception the Juvenile Court of Memphis and Shelby County is amenable to the proposed TRJP revisions. Judge Dan Michael, Tom Coupe and I have reviewed the rules revisions as has Donna Armstard, lead attorney of the Shelby County Public Defender's Special Juvenile Defender Unit.

Juvenile Court does have an issue with **Proposed Rule 208** which governs the procedure for determining whether a juvenile should be transferred to the adult system. Judge Michael strongly recommends that a juvenile court judge's discretion be preserved by (1) retaining the preamble to the current rule and (2) by substituting the word "may" for the second "shall" in the last sentence of proposed Rule 208 subsection (a).

The preamble now reads:

"When the allegations of the petition are so serious and/or the child's age or record is such that transfer of a child to the sheriff to be dealt with as an adult is **likely or probable**, the court should not hear the case on its merits, but shall proceed to conduct a probable cause hearing only, and announce that intention and purpose when the case is first presented." (Emphasis added)

The last sentence of proposed Rule 208 subsection (a) now reads:

"Once that notice is filed, the court shall not hear the case on its merits, but shall proceed to conduct a hearing only in accordance with Tenn. Code Ann. § 37-1-134."* (*The Tennessee transfer statute)

The requirements of proposed Rule 208 would impose a substantial burden on the Juvenile Court in Shelby County. The Assistant District Attorneys General assigned to juvenile court file notices of intent to transfer in many more cases than are actually set for hearing on a "transfer docket." For example, from April 15, 2015 through September 17, 2015, the ADAs filed 89 notices. As of today there have been only 39 juveniles transferred in calendar year 2015. In recent years the ADAs have filed more than 200 notices, while actual transfers have steadily declined.

Under current practice Judge Michael preliminarily reviews all petitions where the ADA has given notice of intent to seek transfer. If the judge deems it appropriate the case is set on a "transfer docket." However, if the judge concludes the allegations in the petition and the age or record of the child indicate transfer is **not likely or probable**, the request of the ADA is denied and the matter is reassigned to a delinquency docket. The ADA has the option to file a motion to reconsider. Only one such motion has been filed in two years.

Pursuant to a *Memorandum of Agreement* (the "MOA") with the U. S. Department of Justice, signed December 17, 2012, Juvenile Court has developed and implemented many policies and procedures governing the handling of juvenile delinquency cases. Transfer procedures have been a focal point from the beginning of the court's engagement with DOJ.

Additionally, Juvenile Court has worked hard to preserve "judicial discretion transfer" in Tennessee. Proposed legislation to create a system of "automatic" or "direct file" transfer regularly surfaces each session of the General Assembly. Proposed Rule 208 is a first step toward prosecutorial, rather than judicial, control of the transfer process.

COURT OF CRIMINAL APPEALS

STATE OF TENNESSEE

THOMAS T. WOODALL
PRESIDING JUDGE

103 SYLVIS STREET
DICKSON, TENNESSEE 37055
(615) 446-1661

November 18, 2015

Mr. Jim Hivner
Appellate Courts Clerk
100 Supreme Court Building
401 7th Avenue North, Room 100
Nashville, TN 37219

Re: Docket #ADM2015-01631
2016 Rules Package

Dear Mr. Hivner,

At the meeting of the Court of Criminal Appeals in October, the members of the court present unanimously instructed me, as Presiding Judge, to send this letter in response to the Supreme Court's solicitation of written comments to proposed amendments to Rule 36.1 of the Tennessee Rules of Criminal Procedure.

It is the considered opinion of the members of the Court of Criminal Appeals that Rule 36.1 should be repealed. Post-conviction relief and habeas corpus relief, when timely requested, are adequate remedies. However, in the event Rule 36.1 is not repealed, the members of the Court of Criminal Appeals believe that the Advisory Commission's proposed amendments are a step in the right direction to address various concerns of both appellate and trial judges.

Individual members of the Court of Criminal Appeals may send additional comments suggesting changes to the Advisory Commission's proposed amendments in the event Rule 36.1 is not repealed in its entirety.

Thank you for taking the time to consider the input of the members of the Court of Criminal Appeals.

Sincerely,

Thomas T. Woodall

Thomas T. Woodall
Presiding Judge, Court of Criminal Appeals

TTW:kkh

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE & EVIDENCE

No. ADM2015-01631 – Filed: August 27, 2015

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Tennessee Supreme Court's request for comment on the proposed changes to the Tennessee Rules of Procedure and Evidence, the Executive Committee of the Tennessee District Public Defenders Conference ("Conference") supports a majority of the Court's proposed changes, but requests clarification regarding the proposed change to Rule 26 of the Tennessee Rules of Appellate Procedure ("T.R.A.P.").

Currently, under T.R.A.P. Rule 26, if the appellant fails to timely file the transcript or statement of evidence, the appellee may file a motion with the appellate court for dismissal. The appellant in these circumstances has an opportunity to respond to the appellee's motion within 14 days.

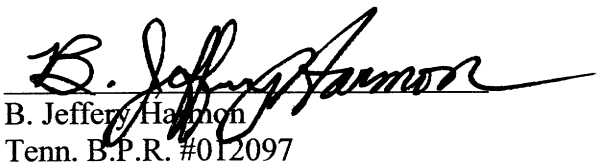
As written, the changes proposed in the Court's order allow the appellate court to dismiss an appeal on "its own initiative." The Conference has no objection to this provision but requests that a safeguard be placed in the rule for such situations, giving the Appellant time to respond to the Appellate court's preliminary order or show cause notice.

The dismissal of an appeal is an extreme remedy with far reaching consequences. Failure to timely file the record may be due to circumstances beyond the control of Appellant's attorney (e.g., a court appointed criminal case where the Court Reporter is unable to get the transcript to the attorney within the time frame set by the rules). The appellant should be offered the opportunity

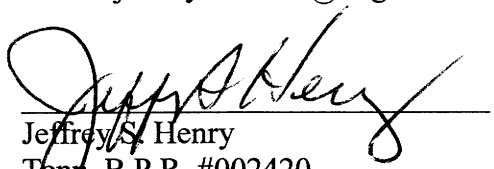
to explain the circumstances to the appellate court before the appeal is dismissed. An extension of time would be consistent with other T.R.A.P. Rules[1]. The Conference requests that the Court consider amending the proposed changes to provide a standard procedure for notice by the Appellate Court and response by the parties when the Court proposes to dismiss an appeal on its own initiative.

Respectfully submitted,

Executive Committee of the Tennessee District Public Defenders Conference

By: 

B. Jeffery Harmon
Tenn. B.P.R. #012097
President
211 Seventh Avenue North, Suite 320
Nashville, TN, 37219-1821
Phone: 615-741-5562
Fax: 615-741-5568
Email: jeffery.harmon@tn.gov

By: 

Jeffrey S. Henry
Tenn. B.P.R. #002420
Executive Director
211 Seventh Avenue North, Suite 320
Nashville, TN, 37219-1821
Phone: 615-741-5562
Fax: 615-741-5568
Email: jeffrey.henry@tn.gov

[1] *See,* Tennessee Rules of Appellate Procedure, Rule 21(b) (2015) "For good cause shown the appellate court may enlarge the time prescribed by these rules or by its order for doing any act or may permit an act to be done after the expiration of such time. . . "

From: "L. Lee Kull" <lleekull@gmail.cdom>
To: <lisa.marsh@tncourts.gov>
Date: 11/13/2015 8:08 AM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Friday, November 13, 2015 - 9:08am
Submitted by anonymous user: [207.65.94.122]
Submitted values are:

Your Name: L. Lee Kull
Your Address: 105 Gill Street, Alcoa, TN 37701
Your email address: lleekull@gmail.cdom
Your Position or Organization: L. Lee Kull, Attorney
Rule Change: Tennessee Rules of Procedure & Evidence
Docket number: ADM 2015-01631
Your public comments: Regarding TRAP 26 (b): TRAP 15 Provides a mechanism for allowing an appellee to inform the Court of the wish to present other issues for consideration and proceed as the appellant if the original appellant dismisses the appeal.The ability of the appellate court to dismiss an appeal under TRAP 26(b) for failure to file the record/transcript within the time allowed appears to allow the court to dismiss an appeal with out notice to the appellee, depriving that party the right to proceed with the appeal. See also TRAP 5 and 13.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/13497

Robert L. Holloway, Jr.
Court of Criminal Appeals
State of Tennessee
418 West 7th Street
Columbia, TN 38401
931-380-3007

October 26, 2015

James Hivner, Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: No. ADM2015-01631; Tennessee Rule of Criminal Procedure 36.1

Dear Mr. Hivner:

Recommendation: I would recommend changing the word "is" to "was" and adding "at the time the plea was entered" after the word "benefit" in the proposed Rule 36.1(c)(3)(ii).

Reason: Most of the Rule 36.1 opinions involving an illegal concurrent sentence issued by the Court of Criminal Appeals arise from motions filed by inmates in federal or state custody for unrelated offenses. These movants seek to withdraw their plea, often decades after the entire sentence had been fully served, so that the previous convictions cannot be used to enhance a sentence on an unrelated pending or future charge. I am concerned that the use of the present tense in the phrase "the illegal provision is to the defendant's benefit" could be interpreted to mean the defendant's benefit at the time the motion was filed as opposed to when the plea was entered. After the sentence has been fully served and the concurrence has been honored, the defendant has received the benefit of the illegally short sentence and only the detriment of having the convictions on his record remain.

Although my preference would be to repeal Rule 36.1 in its entirety, if that is not possible, I recommend the change discussed above.

Sincerely,

Judge Robert L. Holloway, Jr.
Tennessee Court of Criminal Appeals

September 17, 2015

James M. Hivner, Clerk
Re: 2016 Rules Package
100 Supreme Court Building
401 7th Ave. North
Nashville, TN 37219-1407

RE Proposed changes to the Tenn. Rules of Juvenile Procedure

Dear Mr. Hivner:

This letter is in response to the August 27, 2015 solicitation for written comments to the proposed comprehensive revision of the Rules of Juvenile Procedure, which if adopted would replace in its entirety the current version of the Rules of Juvenile Procedure. I would like to begin by just saying 'Thank you' to the advisory commission which took the enormous time and energy necessary to complete this monumental task. In general, these proposed changes to the Rules of Juvenile Procedure are a welcome replacement for the current rules which have not been significantly modified in several decades. I will therefore limit my specific comments to just a few areas in the proposed rules with which I would suggest an amendment or elimination.

Proposed Rule 108: It is clear that the advisory commission wanted to limit the ability of an alleged perpetrator/nonparent to use civil proceedings as a discovery tool. More specifically, by limiting the alleged perpetrator's right of involvement as a "Party"(and I agree that "Party" must be defined within the scope of the rules), the new rules limit a perpetrator's ability to exploit further a child victim by utilizing tools to which the perpetrator would not otherwise be given access such as in a criminal proceeding.

While I agree that Proposed Rule 108 is a solid, beneficial change to the current rules, I would ask that the advisory commission consider deleting section (c)(7) which provides for automatic expiration of an Ex Parte Restraining Order unless there is consent or unless some other order is put into place within 15 days. Such a rule will be unworkable and impractical in many counties which may not set a court date within 15 days after the filing of an ex parte Restraining Order. Such a Restraining Order would not be a "removal," which would require a 72 hour preliminary hearing. Thus, the initial court date may not be set for some weeks away or not set at all. Such a rule will create confusion between Courts and Petitioners wherein Petitioners are required to go back time and again to obtain the same order. (C)(7) of this Proposed Rule is further unworkable as subsection (2) does not explain the form of consent. How will the Court know whether consent has been obtained? Under the current drafting the Petitioner could appear in court 16-60 days later and say "the Restraining Order has been extended by consent," however; the proposed rule does not have check for this.

Proposed Rule 117: The current rules of the Juvenile court do not explicitly state how an Order is entered, and the proposed rule amends to ensure that parties and courts have clarity on this critical subject. In cases involving visitation and custody it is therefore absolutely essential for all involved to understand exactly what has been agreed to and what has been ordered. The Advisory Commission Comments state that the rule is designed to make uniform across the state the procedure for the entry of the order. The proposed rule, which is similar to the Tenn. Rules of civil Procedure, R. 58 does make a strong attempt to impose that uniformity, however; it does not go far enough to ensure that parties –particularly unrepresented parties shall understand and have available to them copies of the Orders of custody and visitation.

Unlike the Civil Circuit court, the common litigant in Juvenile Court is often unsophisticated and unrepresented. I propose the following modification to Proposed Rule 117: In subsection (b), delete the phrase "when requested by counsel or unrepresented parties." Proposed Rule 117 does not require the clerk of the court to mail copies of the Orders to parties or unrepresented parties *unless they request.* My suggested modification would require the clerk to mail out the orders even without being asked. In this way, for example, an unrepresented grandmother who has been given custody of her grandchildren would automatically receive a copy of the court order. She and the parents (also probably unrepresented) will have full notice of the order governing visitation.

The Proposed Rule 117 as currently put forth provides for entry of an order, yes, but it does not explain how parties will actually receive the order. The current practice in Juvenile Courts throughout the State of Tennessee is as follows: DCS attorney prepares the order and provides a copy to the other parties. Even if Proposed Rule 117 is implemented as law, the current practice would likely not change. If the current practice does not change, Proposed Rule 117 would be undermined altogether. What is needed, is a complete shift in the burden regarding who must mail/provide the Orders and how that is done (not who will prepare them, but who will provide a copy of the entered order).

In Sevier County Juvenile Court one attorney is charged with preparing the Order at the end of each hearing. That attorney does prepare a certificate of service but below the signature line is written "deputy clerk, Sevier County Juvenile Court." Usually all attorneys have signed that order. There is no question that this is a final order and no question that all counsel and unrepresented parties will receive a copy of that order. My suggested modification to Proposed Rule 117 places the burden for mailing Orders on the Juvenile Court Clerk; it ensures that Orders are entered and effective. The process is seamless in Sevier County and could be implemented statewide to the benefit of children and parents.

Proposed Rule 118: In the Rule regarding Appeals, there is no mechanism for an appeal from a Magistrate to the Juvenile Judge. The Advisory comments state that it is not but

that it is covered by T.C.A. 37-1-107 in the law governing Magistrates. Shouldn't the Rules of Juvenile Procedure necessarily have such a rule to implement T.C.A. 37-1-107?

Proposed Rule 306: I am certain that many attorneys, judges, and child welfare advocates will appreciate this proposed rule which in the words of the Advisory Commission seeks to "balance the due process rights of the respondents with the need to protect child witnesses from unnecessary trauma." If you do nothing else, please implement this rule as written because the current Rules of Juvenile Procedure are virtually silent on this subject of children as witnesses. Current practices in Tenn. Juvenile courts vary widely.

Proposed Rule 401: It is clear that the advisory commission wanted to eliminate much of the ambiguity between a "Permanency Plan Ratification Hearing" as required by T.C.A. 37-2-403 and a "Permanency Hearing" as required by T.C.A. 37-2-409. I agree that such a distinction in the rules is necessary and promotes the statutory scheme far better than the current Rules of Juvenile Procedure which blend the two types of hearing into a single rule, causing a great deal of confusion among courts and practitioners (See Rule 32A of the current Rules). The proposed rule(s) largely mirror the statute and come as a welcome addition. I wish to address one concern though and a possible solution. T.C.A. 37-2-403 does not require children to be present at the initial permanency plan ratification hearing. Because of the ambiguity and the confusion about the difference between these types of hearings, many judges and practitioners believe that the children must be present at the initial ratification. The proposed rule, as written, does not eliminate that confusion. The purpose of the initial ratification hearing, however, is to review the permanency plan, its goals, and requirements, not to see the children. I would propose the following addition to clear up the ambiguity:

"(J) A child adjudicated to be delinquent or unruly shall be present at the permanency plan ratification hearing. If a child is fourteen (14) years of age or more at the time of the permanency plan ratification hearing and that child is adjudicated dependent and neglect or alleged to be dependent and neglected, that child shall be present for the hearing."

My proposed addition is consistent with the advisory comments to the proposed rule and with T.C.A. 37-1-121 which requires that a summons be directed to a child in a dependency and neglect proceeding if the child is fourteen (14) years of age or more. Children who are 14 years of age apparently have some greater right to notice and participation according to the state legislature.

Thank you in advance for your consideration of my comments.

Respectfully,

Daniel Smithwick

Daniel K. Smithwick, BPR #023900
327 Logan Street
Seymour, TN 37865, (865) 337-3368