NASHVILLE BAR ASSOCIATION

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December 30, 2019

VIA e-mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville TN 37219-1407

Re: ADM2019-01444, In re Amendments to the Tennessee Rules of Civil Procedure

Your Honors and Mr. Hivner:

The Nashville Bar Association ("NBA") respectfully submits the following Comment to Supreme Court Order No. ADM2019-01444 regarding the proposed amendments to the Tennessee Rules of Civil Procedure 26 and 37. The NBA thanks the Court for providing the NBA with additional time within which to present this Comment.

The NBA applauds the efforts of the Supreme Court and the Advisory Commission to streamline litigation through more automated discovery procedures. However, the NBA is concerned that the proposed revisions to Tennessee Rules of Civil Procedure 26 and 37 will inadvertently cause more work and debate in litigation – and thus more cost and delay.

The proposed mandatory disclosures follow the spirit of Federal Rule of Civil Procedure 26's initial disclosure requirements. Experience with the Federal Rule demonstrates no actual decrease in written discovery; litigants serve the same interrogatories and document requests regardless of the initial disclosure requirement. The initial disclosures provide only redundancy and extra work for litigants and their counsel.

The current Tennessee Rules of Civil Procedure already facilitate active, early discovery by invested litigants. Rules 33.01 and 34.02 allow plaintiffs to serve interrogatories and document requests with the original complaint and summons and allow defendants to serve the same written discovery at any time once the lawsuit is commenced. Importantly, these Rules allow litigants to tailor the scope and timing of discovery to the needs of the particular case; a largely uncontested matter need not require the same degree of document review and production as a hotly contested one.

By directing parties to provide the information and documents that are "relevant" to the

case, the proposed Rule amendments would inevitably generate more work and motion practice. Many (if not most) litigants do not have an existing file cabinet or email folder with the documents pertinent to a dispute segregated.

Instead, litigants are prompted by specific interrogatories and document requests to consider where the responsive evidence might be found somewhere in their real or digital lives. The proposed Rule 26.07 instead asks litigants to ponder what might be relevant without any guidance whatsoever. Besides the time-consuming nature of this task (especially for *pro se* litigants and novice litigators), one can expect ample motion practice over whether a litigant should have recognized and identified additional relevant materials earlier in the case.

In the end, the NBA opposes the proposed amendments to Rules 26 and 37 precisely because they have the potential to result in more litigation and more uncertainty. While disclosures are a noble idea, they must be targeted to each particular type of case to have any positive net effect. As written, proposed Rules 26 and 37 are more likely to undermine their very alms.

Thank you for your consideration.

Sincerely,

Laura Baker
NBA President
cc: Monica Mackie, NBA Executive Director
NBA Executive Committee

CBA
CHATTANOOGA BAR ASSOCIATION

November 27, 2019

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: In Re Amendments to the Tennessee Rules of Procedure & Evidence; No. ADM2019-01444

Dear Mr. Hivner:

The Chattanooga Bar Association ("CBA"), through Board of Governors, respectfully submits its comments to the proposed changes contained in ADM2019-01444. The CBA review was performed by a standing committee established to review proposed changes to the Rules of Appellate, Civil, Criminal, and Juvenile Procedure, and the Tennessee Rules of Evidence. This committee invites participation of other members of the CBA as appropriate and makes recommendations to the Board.

After discussion, the committee made its recommendation to the Board and the Board submits its comments below.

Rule 5.02: We believe that the use of "him or her" in the first line of (2) (A) is unnecessary. We also believe that to require a certificate advising of electronic transmission of the document, by mail, facsimile or hand-delivery, is unnecessary as the common practice among attorneys serving one another by email is that such certifications are almost never used. We believe the rule should allow for the parties to file a stipulation with the court announcing an agreement to service by electronic mail.

Rule 5B: With ninety-five (95) counties in Tennessee responsible for financing court operations, extreme care must be taken to ensure consistency and uniformity with electronic filing systems. The extraordinary variety of local rules of court across the thirty-one (31) judicial districts of Tennessee, with some variances within any given judicial district between circuit and chancery rules of practice, may be only the tip of the iceberg of what could happen if every county adopted an e-filing system by different vendors

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regardless of satisfying any technological standards promulgated by the Supreme Court. Frankly, this should be a single statewide system funded by the state rather than by individual counties. Some rural counties may never be able to afford an electronic filing system.

Rule 26.01 and 26.07: Our comments will be focused on proposed rule 26.07. The responses from the membership focused on two aspects of the proposed rule. First, many feel that the basic initial disclosure rule that exists in federal court is ineffective. Most share the experience that regardless of what initial disclosures are made and regardless of whether they represent a plaintiff or a defendant, they routinely receive written discovery requests that cover most of the same ground already covered by the initial disclosures. Personal injury lawyers recited countless experiences of making comparable disclosures to insurance adjusters before suit is filed, followed by request from assigned defense counsel for the same records once suit is filed. The result is a duplication of effort rather than a savings of effort.

The second response was an overwhelming objection to the creation of a requirement of an initial disclosure to include items "whether or not supportive of the disclosing party's claims or defenses." Many cannot imagine meeting with the client and telling the client something along the lines of "oh by the way, I have to tell the lawyer on the other side everything that may hurt your case such as names of witnesses and providing them copies of documents that hurt you." This seems to be contrary to the requirements of client confidentiality in the Rules of Professional Conduct. Some voice the opinion that such a rule will benefit the lazy and inefficient lawyer at the expense of the diligent and efficient lawyer. Some imagine that such disclosures may allow some lawyers to develop claims or defenses they might not otherwise have considered. None can imagine a pro se litigant having any idea of how to comply with these requirements. Almost all see this as increasing discovery disputes requiring intervention of the trial courts.

Furthermore, the timing and sequence of such initial disclosures could become a logistical nightmare. For example, consider a construction case in which a corporate owner sues the architect and general contractor of a building project. The architect and general contractor assert cross-claims against each other. The architect and general contractor also assert third-party claims against a variety of subcontractors (or identify them as potentially having comparative fault) who in turn may take similar action as to material suppliers. Each of these parties would then be required to disclose everything "whether or not supportive of the disclosing party's claims or defenses"

which may result in voluminous discovery not relevant to any claim or defense. This scenario will be common in any type of multiparty action. This will do nothing but increase the cost of litigation, discovery disputes, and the length of litigation. As the proposed rule is written, it is not hard to imagine that you could be six to nine months into a lawsuit before all the initial disclosures are completed and other discovery could begin.

Domestic law practitioners are very concerned with the revised financial forms and the difficulty that will be encountered where one party to a divorce matter is unrepresented. As noted above, the general observation is a pro se litigant will not be able to comply with these requirements. That will require intervention of the trial courts, increasing an already challenging burden in this practice area.

Unfortunately, the general consensus is opposition to the adoption of proposed rule 26.07 in its entirety.

Rule 33.01: We have no criticism of the proposed change to rule 33 dealing with objections to interrogatories. We also note that these changes may require more frequent visits to trial courts on motions to compel as the habit of filing "vague, generalized or 'boilerplate' objections" is not expected to die a quick or graceful death.

Rule 37.01: The concern with this proposed amendment is wrapped up in the numerous concerns with the proposed addition of initial disclosures in rule 26.07.

As always, the CBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Steven M. Jacoway by WBC

Steven M. Jacoway
President, Chattanooga Bar Association

cc. Lynda Minks Hood, CBA Executive Director
CBA Board of Governors

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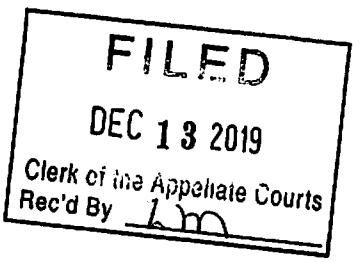
December 13, 2019



VIA EMAIL – appellatecourtclerk@tncourts.gov
AND U.S. MAIL

James M. Hivner
Appellate Court Clerk
100 Supreme Court Building
401 7th Avenue N.
Nashville, TN 37219-1407

Re: 2020 Rules Package
Docket No. ADM2019-01444

Dear Jim:

I hope you are well. Please accept this letter as the comments of this firm, Glankler Brown, PLLC, to the proposed amendments to the Rules of Civil Procedure as found in Docket No. ADM2019-01444. Our comments are directed almost exclusively to the proposed addition of Tennessee Rules of Civil Procedure, Rule 26.07 relating to "Mandatory Disclosures." Our comments would mirror and reiterate what we understand to be a number of comments and concerns as expressed by other interested parties including attorneys, law firms, and others.

First, we do not have any particular concern to putting in place requirements for mandatory disclosures. As you know, federal rules have a requirement for mandatory disclosures under F.R.C.P. Rule 26(a)(1). However, the proposed Tennessee amended rules appear to us to go significantly further than the federal rules. Initial observation and comment is that if the Tennessee courts are going to adopt mandatory disclosures, that they mirror as closely as possible the federal rules as those rules seem to work and most attorneys are familiar with those rules.

Second, the proposed Tennessee rules under 26.07(a) and (b) appear to require litigants and/or their attorneys to provide "relevant information to the claims or defenses of any party, whether or not supportive of the disclosing party's claims or defenses." As one can imagine, this is a potentially difficult, if not confusing, requirement and in our view and opinion is fraught with lots of potential issues which need not be confronted in the context of early mandatory disclosures. Our concern, as well as many other comments we have reviewed, regards placing

the burden on one party to evaluate whether documentation or information they have is or isn't supportive of the claims and defenses of any party in the lawsuit. It gets to be particularly problematic in multi-party litigation. Also, it strikes us that these requirements place on a party or its counsel something akin to a prosecutor's duty to provide all exculpatory evidence to a criminal defendant or "the other side." This seeming requirement and burden seems to go well beyond the federal rules and is fraught with potential problems in its attempts to be practically applied on a case-by-case basis. One can imagine a lot of scenarios where this could be problematic, including one side evaluating that a particular document or evidence is not "supportive" of a position or defense of the other side but the other side does and undertakes to exclude that evidence or otherwise limit its use. Overall, we viewed the scope and breadth of this requirement (particularly to the extent it differs from the federal rules) to be problematic at best and untenable at worst; placing a significant burden on the trial courts in dealing with what will no doubt be many, many arguments and controversies over this requirement. Also, as you know, the federal rule provides for an exception to documents and evidence to be used solely for impeachment. Such an exception is not found in the proposed amendments that we can see and would be appropriate.

Next, it strikes us that the timeframe of thirty days following the filing of an answer of the defendant in requiring the mandatory disclosures of both sides is potentially too short. Also, it may also be potentially unfair to the defendant in that the plaintiff will have an extended period of time to gather and collect information prior to filing suit but the defendant will only have thirty days following its answer to do so. We would suggest that the defendant be given at least sixty days to provide any required mandatory disclosures after answer and/or some other later subsequent event be identified as the trigger.

Third, it is suggested that some type of additional exemption or exception be put in place for relatively small claims such as any claim alleging damages less than some number, possibly $50,000. While General Sessions' appeals are exempted, certainly other small claims could be exempted as well. As you know, in diversity cases in federal court, jurisdiction requires $75,000 in controversy.

Finally, in regard to mandatory disclosures in divorce actions, we generally support that effort as the information required in the mandatory disclosures is the type of information that is relatively standard and present in every case (as contrasted and different from the varieties of other civil litigation one encounters).

We also appreciate both the Court's efforts to appropriately modify and update the Rules of Civil Procedure. Thank you for the opportunity to present our comments and concerns.

Very truly yours,

GLANKLER BROWN, PLLC

Wm. L. Bomar (dts)

William L. Bomar
For the Firm

WLB:dts

TENNESSEE BAR ASSOCIATION

December 9, 2019

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

IN RE: Amendments to the Tennessee Rules of Civil Procedure
NO. ADM2019-01444

Dear Mr. Hivner:

The Tennessee Bar Association ("TBA") respectfully submits the following Comment to Supreme Court Order No. ADM2019-0144 regarding the proposed amendments to the Tennessee Rules of Civil Procedure ("TRCP").

The TBA supports the proposed amendments to the TRCP except for the proposed amendments to TRCP 26 to provide for mandatory disclosures as a means of discovery, and consequently to TRCP 37. The proposed amendments place unnecessary and cumbersome discovery requirements on parties and their counsel. Many relatively simple matters will be made unnecessarily burdensome by these mandatory disclosures, which will increase litigants' respective attorney's fees, will reduce productivity, and will create new discovery delays in resolving matters.

We understand that the effort is made to mirror the standards applied by the Federal Rules of Civil Procedure. However, due to jurisdictional limits at the Federal level, the volume of filings in the State Courts of Tennessee is far greater than that of our Federal Courts. We also anticipate that the proposed mandatory disclosures will be especially arduous for litigants who do not have much money or access, such as rural clients.

Additionally, we believe that implementing the proposed mandatory disclosures will be onerous on the majority of family law litigants. Filing the proposed mandatory disclosures within thirty days of the filing of an Answer by the Defendant will be especially difficult, as many attorneys will not have adequate time with their new clients, some of whom do not have detailed record keeping systems in place, to

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discover and gather all documents relevant to claims/defenses. It is rare that a Marital Dissolution Agreement and Parenting Plan can be negotiated and signed within 30 days of filing, except for the simplest of cases. Therefore, mandatory disclosures will become the norm for most divorces, even if the majority of these will eventually settle.

With regard to cases involving a contested termination of parental rights, the requirement of mandatory disclosures by the petitioners would require the petitioner to disclose all of the factual basis for the grounds for termination and factors of best interests in support of the termination. The mandatory disclosures would alert the respondent/parent as to not only all of facts that support the Termination of Parental Rights ("TPR") filing, but it would specifically put the respondent/parent on notice that the petitioner is unaware of potential facts of misconduct by the respondent that would support the TPR, which may only be revealed in the discovery process. Practitioners in this area of law already experience serious compliance problems with respondents replying to the rule-based discovery requests and the limited options for enforcement by the courts. Thus, the result would create an obvious opportunity for the respondent to hide, delete, or otherwise alter material facts that could be discovered but now would be concealed and never discovered by the petitioner.

In these types of proceedings, practitioners are dealing with such extreme emotionally driven familial issues involving minor children, that a party may be somewhat deceptive and unwilling to provide information that is potentially damaging to their case. Therefore, mandatory disclosure in these cases would impede justice and completely undermine the discovery process rendering it pointless. The requirement of the petitioner to divulge all the information prior to engaging in the normal discovery process, would extremely prejudice the outcome of the litigation and provide the respondent with an unfair advantage in the litigation.

On another note, often clients who pursue TPR and adoption litigation are limited in financial resources and thus may choose to not even engage in the discovery process. In addition, the respondents are often pro se and file simplified responses which the court deems as an answer; however, these respondents will not likely comply in filing their mandatory disclosures. Therefore, the requirement of mandatory disclosure would only enhance and increase paperwork and litigation expenses for the parties.

For these reasons, we respectfully ask the Court to not adopt the Advisory Commission's recommended amendments to Rules 26 and Rule 37.

Thank you for your consideration. Please let us know if you have any questions.

Sincerely,

Sarah Y. Sheppeard

Sarah Y. Sheppeard
TBA President

cc: Joycelyn A. Stevenson, TBA Executive Director
Berkley Schwarz, TBA Director of Public Policy & Government Affairs
TBA Executive Committee

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December 13, 2019

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

Re: 2020 Rules Package
In re Amendments to the Tennessee Rules of Civil Procedure, No. ADM2019-01444

Your Honors and Mr. Hivner:

I write on behalf of the Tennessee Trial Lawyers Association (TTLA) to provide comments to the proposed amendments to Tennessee Rules of Civil Procedure 26 and 33. As an initial matter, we thank the Advisory Commission for its considered and thorough work. We also thank the Court for the opportunity to present our comments on these matters, which are important to our clients and to the administration of civil justice in our state courts.

For over 55 years, TTLA has worked to ensure that everyday citizens, Tennessee families, and small businesses are never deprived of their constitutional guarantee of access to justice. The mission of TTLA is protect the constitutional promise of justice for all by guaranteeing the right to trial by jury, preserving an independent judiciary, and providing access to the courts for all Tennesseans.

With respect to the proposed amendments to Rule 26 and 33, TTLA supports the underlying premise that fulsome discovery is necessary and, consistent with Rule 1, promotes the "just, speedy, and inexpensive determination of every action." The proposed mandatory disclosure provisions of Rule 26.07(1)(A)–(D) would serve these goals by encouraging parties to share key information early in the case and, through the supplementation requirements set forth in Rule 26.07(6), encourage on-going sharing as the information is developed during the litigation.

In practice, one additional key piece of information that tends to shape litigation strategies, helps parties determine the proportionality of resource warranted, and, in many

instances, moves litigation toward resolution, is the amount of liability insurance that is available to satisfy any judgment. As the Commission knows, unlike the current Tennessee Rules of Civil Procedure, the mandatory initial disclosures set forth in Federal Rule of Civil Procedure 26(a)(1)(A) includes the requirement that parties make available:

> (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Since 1970, insurance limits have been discoverable in federal courts pursuant to the Federal Rules of Civil Procedure. At the time insurance policies were explicitly included as discoverable under the Rules, the Federal Rules Advisory Committee noted that although federal and state courts were "closely divided" on whether insurance policies should be discoverable, "[r]esolution by rule amendment is indicated." The Advisory Committee observed "[t]he question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however, they have decided it, have generally treated it as procedural and governed by the rules."

The Advisory Committee concluded, "[d]isclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." The Committee Note made clear that the amendment permitting discovery of insurance coverage did not impact whether it would be admissible at trial—it generally is not; instead, admissibility remained the province of the Rules of Evidence, specifically Federal Rule of Evidence 411, analogous to Tennessee Rule of Evidence 411, which provides that evidence of liability insurance is admissible to show "agency, ownership, or control, or bias or prejudice of a witness."

Experience in the nearly fifty years since the federal rules amendment was enacted has borne out that disclosure of insurance policies has served the intended goal of allowing all parties to make "realistic appraisals" of settlement and litigation strategy "based on knowledge and not speculation." Moreover, there has been no evidence of widespread corresponding unfair prejudice to disclosing parties.

Addressing the issue of disclosure of liability insurance, in 2009, a unanimous Tennessee Supreme Court, in Thomas v. Oldfield, 279 S.W.3d 259 (Tenn. 2009), stated:

> While we are constrained by both the language and the history of current Rule 26.02 from holding that information concerning the defendants' liability insurance coverage is subject to discovery, we are convinced that the time has come to align Tennessee with the rules in forty-eight states and the federal rule in allowing discovery of this information.

Id. at 264 (emphasis supplied).

The Court noted that "Tennessee in the extreme minority of jurisdictions that have not amended or construed their rules to expressly provide for the discovery of a defendant's liability insurance coverage." Id. at 264.

The Court also concluded that discovery of insurance coverage will encourage mediation and settlement of cases by "enabl[ing] counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." Id. at 264 (citations omitted). "Allowing discovery in such circumstances apprises the parties of information necessary to produce results fair to both sides." Id. at 265 (citation omitted).

Moreover, the Court stated that allowing discovery of liability insurance limits "would be in accord with the policy of the Tennessee Rules of Civil Procedure, 'to provide for the just, speedy, and inexpensive determination of every action,' Tenn. R. Civ. P. 1 (2008), and with this Court's commitment to make the process of dispute resolution in Tennessee 'more efficient, more economical, and equally fair.'" Id. at 264-265 (citation omitted).

Accordingly, we ask that the Commission consider including among the information subject to mandatory disclosure under Rule 26.07(1): "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment."

Timing of Disclosures under Rule 26.07(2)(A)

Rule 26.07(2)(A) states that the deadline for the parties to serve their mandatory disclosures is 30 days after the sole defendant or, in multiple defendant cases, the last defendant files its answer. The effect of keying the deadline to the filing of an answer would be to potentially build in many months of delay, particularly where one or more defendant(s) either evades service of a complaint or moves to dismiss the complaint. In either case, a defendant's conduct can defeat "a major purpose" of "accelerating" the mandatory disclosure of early exchange of key information that would potentially promote efficient resolution.

Respectfully, we would suggest requiring each party's disclosures to be made 30 days after the service of the complaint on each defendant. In other words, in a multiple defendant case, after each defendant is served, the plaintiff's deadline to serve disclosures relevant to that defendant runs in 30 days. Likewise, each served defendant's deadline is also triggered by service of the complaint. This avoids the potential for unwarranted delay—which effectively amounts to an automatic stay of mandatory disclosure discovery—arising from a defendant's filing of a motion to dismiss or, in multiple defendant cases, a single defendant evading service or, for some other reason, where one defendant is not able to be served promptly.

Proposed Amendment to Rule 33.01

We support the proposed amendment to Rule 33.01 requiring an answering party to state objections "with specificity" and "clearly indicate whether responsive information is being withheld on the basis of that objection." We believe this requirement will help parties streamline discovery disputes and will enable courts more efficiently to resolve disputes that the parties are unable to resolve themselves. We also support the Advisory Commission Comment stating that "boilerplate objections are improper." We would respectfully suggest that the Commission consider including similar language in Rule 34 relating to requests for production of documents.

Again, we thank the Commission for its hard work in formulating the proposed amendments and greatly appreciate the opportunity to present our comments.

Sincerely,

Mark Chalos, TTLA Vice President-Middle

Matt Hardin, TTLA President

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December 10, 2019

James Hivner, Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: In Re Amendments to Tennessee Rules of Civil Procedure
No. ADM 2019-01444

Dear Mr. Hivner:

I am writing to express my opposition to the proposed changes to Rules 26 and 33 of the Tennessee Rules of Civil Procedure. In my opinion, these proposals appear to be a solution in search of a problem to fix.

In reviewing the proposals and the Comments section, it remains unclear to me what is actually "driving" the need for these changes when the current approach seems to work well when utilized properly by counsel and enforced by the Courts. The purported goal of exchanging information early in the process simply adds another level of work for attorneys and their clients. I strongly doubt it will eliminate similar questions or subject matter being included in Interrogatories or Request for Production of Documents which are sent in every case.

Also, as I read the proposal, if I file an Answer to the Complaint and send my discovery at that time, then the opposing party already has 30 days under the Rules to answer that discovery and provide the information which would now be required within a similar timeframe in the proposed mandatory disclosures. It seems a duplication of effort.

Further, it seems these proposals will actually lead to more contentious disagreements as attorneys argue over what information was known when, by whom, was it timely disclosed, etc. For example, poorly worded discovery requests often deserve a response that they are "vague or overly broad" because they are or the wording is unclear because the attorney asking the question is so worried that he or she will overlook an important fact. I can be guilty of that approach as well.

And, even though there is an "opt-out" provision that counsel can agree to (again another document which has to be prepared, signed and filed), I also foresee the addition of Motions being filed seeking Court approval for additional time if counsel cannot agree to an extension.

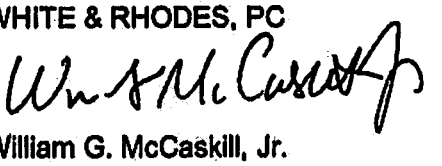
I recognize that a great deal of thought and work has gone into this process, which I certainly appreciate. However, I think we have learned (hopefully) that just because the Federal Rules are written in a certain way does not mean it would work well in our State Courts.

If there are certain practices of law which are encountering problems with the current Rules, perhaps changes to the Rules could be made to address their issues rather than a "one size fits all" approach.

I just don't really see the need for these changes.

Sincerely yours,

WHITE & RHODES, PC



William G. McCaskill, Jr.

Knoxville Bar Association

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December 4, 2019

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendments to the Tennessee Rules of Civil Procedure, Rule 5;
No. ADM2019-01444

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") has carefully considered the proposed change to Rule 5 of the Tennessee Rules of Civil Procedure related to the service and filing of pleadings and other papers. The Committee presented a report of its review of the Order at the October 16, 2019 meeting of the KBA Board of Governors (the "Board"). Following the Committee's presentation and thorough discussion by the Board, the Board voted to comment only to suggest that the service delay associated with the different filing methods be modified to be more consistent as between e-filing and facsimile filing. Specifically, there was consensus that the three-day service delay for documents filed by e-filing should also apply to documents filed by facsimile.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Wynne Caffey-Knight

Wynne Caffey-Knight, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
KBA Executive Committee (via e-mail)

KBA 2019
Knoxville Bar Association

December 4, 2019

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendments to the Tennessee Rules of Civil Procedure, Rule 26;
No. ~~ADM2018-02187~~ ADM2019-01444

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") carefully considered the proposed changes to Tennessee Rule of Civil Procedure at its September and October 2019 meetings. The proposed changes to Rule 26 would provide for mandatory disclosures similar, but not identical to, those required by the Federal Rules of Civil Procedure. The Committee presented a report of its review of the Order and proposed amendments to Rule 26 at the October 16, 2019 meeting of the KBA Board of Governors (the "Board"). Following the Committee's presentation and thorough discussion by the Board, the Board unanimously voted to adopt the Committee's recommendation to oppose the proposed amendments to Rule 26.

The Board engaged in extended discussion regarding the proposed changes and believes that the current rule appears to be adequate. The Board is certainly appreciative of the Court's desire to promote uniformity and to create efficiencies in the civil litigation realm. The Board, however, believes that such mandatory disclosures raise several concerns, including but not necessarily limited to the following:

1. The addition of mandatory disclosures further limits access to justice for litigants, both *pro se* and non-*pro se*. For example, *pro se* litigants are already financially and otherwise challenged in pursuing or defending litigation. The disclosure requirements would make their self-representation even more challenging. For clients of modest means who can pay something for representation, the disclosures will presumably require the use of their limited financial resources. Additionally, attorneys might be more reluctant to take certain cases on a contingency fee basis with the additional requirement of initial disclosures.
2. The disclosure requirements may inadvertently abrogate the attorney work product doctrine, for example by mandating the disclosure of witnesses, documents and information relevant to the claims or defenses of any party. Conceivably, this would include mandatory disclosure of adverse witnesses or evidence harmful to one's own client.
3. The disclosures also have the potential to require the disclosure of information contrary to an attorney's ethical obligations or in a manner posing an ethical conflict. For example, an attorney conceivably might have to disclose information obtained in confidence from the client.

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4. The proposed changes may conflict with other statutory schemes, such as those prescribed by the Tennessee Healthcare Liability Act, those regarding domestic relations cases and those regarding incarcerated parties.
5. Experience with the federal rule counterpart has not shown to promote efficiency, reduce the need for additional discovery or advance the progression of cases.
6. The proposed rule would unnecessarily create additional burden and expense for all litigants.
7. The proposed rule mandates unrealistic time requirements.
8. The proposed rule creates an additional level of motion practice and sanctions requests.
9. The proposed rule would disadvantage attorneys and litigants who choose to diligently investigate a case, while advantaging less diligent attorneys and litigants who may rely on the disclosure of all relevant information collected by the more diligent attorney.
10. The proposed rule creates a difficult burden for mandatory supplementation.
11. The proposed rule would impose additional burdens that may be out of proportion to the magnitude of a case.
12. The proposed rule imposes on parties in domestic relations matters additional requirements over and above the other mandatory initial disclosures.
13. The proposed rule does not make concession for incarcerated parties.
14. A defendant could delay the making of mandatory disclosures simply by not timely filing an Answer or by requesting multiple extensions of time in which to file an Answer.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Wynne Caffey-Knight

Wynne Caffey-Knight, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
KBA Board of Governors (via e-mail)

Knoxville Bar Association

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December 4, 2019

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendments to the Tennessee Rules of Civil Procedure, Rule 33;
No. ADM2019-01444

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") has carefully considered the proposed changes to Rule 33 of the Tennessee Rules of Civil Procedure regarding objections to interrogatories. The Committee presented a report of its review of the Order at the October 16, 2019 meeting of the KBA Board of Governors (the "Board"). Following the Committee's presentation and thorough discussion by the Board, the Board voted unanimously to adopt the Committee's recommendation and hereby comments that it supports the proposed amendments to Rule 33.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Wynne Caffey-Knight

Wynne Caffey-Knight, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
KBA Executive Committee (via e-mail)

Knoxville Bar Association

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December 4, 2019

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendments to the Tennessee Rules of Civil Procedure, Rule 37;
No. ADM2019-01444

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") has carefully considered the proposed changes to Rule 37 of the Tennessee Rules of Civil Procedure related to potential sanctions in connection with the proposed changes to Rule 26 regarding mandatory disclosure requirements. The Committee presented a report of its review of the Order at the October 16, 2019 meeting of the KBA Board of Governors (the "Board"). Following the Committee's presentation and thorough discussion by the Board, the Board voted unanimously to adopt the Committee's recommendation and hereby comments that it opposes the proposed amendments to Rule 37. This opposition is based upon the Board's opposition to the proposed mandatory disclosure requirements under Rule 26.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Wynne Caffey-Knight

Wynne Caffey-Knight, President
Knoxville Bar Association

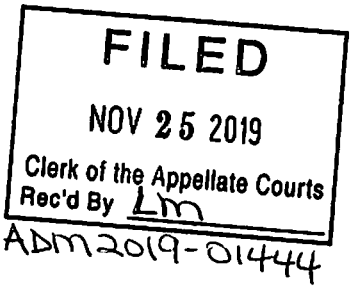
cc: Marsha Watson, KBA Executive Director (via e-mail)
KBA Executive Committee (via e-mail)

OFFICE OF
CLERK OF THE COURTS
James M. Hivner

SUPREME COURT
COURT OF APPEALS
COURT OF CRIMINAL APPEALS

STATE OF TENNESSEE

November 25, 2019



Supreme Court of Tennessee
Attn: Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: 2020 Rules Package

To the Honorable Justices of the Supreme Court of Tennessee:

The Court recently entered an Order soliciting comments to proposed amendments to the Rules of Civil Procedure. I feel compelled to comment concerning the proposed amendments to Rule 5 and Rule 5B as I believe a revision to the proposed amendments is appropriate to clarify the definition of E-Service. I want to acknowledge that I was present for the discussion of these proposed amendments before the Commission and the Commission made several changes to its proposed amendments based on my comments to that body. Unfortunately, the issues I am raising in this comment were not addressed in the full Commission meetings.

The primary purpose for amending Rules 5 and 5B were to address an oversight in the current versions of the rules with respect to electronic service through an E-Filing system. Since the adoption of Rule 5B, but prior to the recognition of this oversight, four courts (Shelby County Chancery and Circuit, Rutherford County Chancery and Davidson County Chancery) were approved for E-Filing. Two of those Courts did not allow, in their local rules, for service through their E-Filing system as it was clear that the Supreme Court had not approved this type of service in its adoption of Rule 5B. On the other hand, the other two courts adopted local rules, when implementing their E-Filing systems, that treated service through the E-Filing system as proper service under the Rules of Civil Procedure even though this type of service appears to conflict with the current Rules of Civil Procedure. Last year, upon reviewing new applications for implementation of EFiling systems, the Technology Oversight Committee (the Committee tasked with reviewing applications for implementing E-Filing in the trial courts) noticed that each new proposed E-Filing court was intending to adopt local rules that treated service through the court's E-Filing system as proper service under the Rules of Civil Procedure which, as stated previously, appears to be in conflict with the current Rules of Civil Procedure. This matter was brought to the attention of the Supreme Court and, earlier this year, in an effort to accommodate this type of service and avoid having to require the current courts permitting E-Filing to amend their local rules until a rule revision could be approved through the Rules Commission process, the Supreme Court adopted Supreme Court Rule 46A.

The Rules Commission has now proposed a revision to Rules 5 and 5B to address the purpose of Rule 46A. Having reviewed the revised proposed amendments to Rule 5 and 5B approved by the Commission, it appears to me that an additional modification is necessary to clarify what is meant by E-Service. The proposed Rule 5 makes clear that any document that is E-Filed may be E-served and that such E-service is effective service under the Rules of Civil Procedure. This is clearly the intent of the Commission and Rule 46A adopted by the Supreme Court. The definition of E-Service is included in proposed Rule 5B and states the following: "E-service" or "E-served" means the automatically generated electronic transmission, by and through an E-filing system, of a notice or document to all participants in a case who are registered users.

It is this definition that I believe needs modification. In addition to the fact that the definition does not clarify what the notice entails (i.e. notice of the filing of a document), in some instances, even meeting the definition of E-service does not comport with the expectations of service, in my opinion. The purpose of service, in my opinion, is to ensure that a document filed with the court by one party is provided to the other party(ies). Therefore, if the E-Filing system emails the document to the other party, that meets the expectation. If the E-Filing system just sends notice that a document has been filed, that does not appear to meet the expectation of service since the other party does not have access to a copy of the actual document. Current E-Filing systems, of which I am aware, are designed to do one of the following upon the e-filing of a document as follows:

(1) Send an email Notice of the filing of a document to a Registered User along with a copy of the document attached to the email;

(2) Send an email Notice of the filing of a document to a Registered User and include a hyperlink to the document in the email; or

(3) Send an email Notice of the filing of a document to a Registered User and advise the Registered User that the document may be accessed in the E-filing system.

Numbers 1 and 2 are clearly in line with the purpose of service, in my opinion. The filed document is provided to the other parties. It's just a matter of whether they must click on the hyperlink or the attached document to view the document. Number 3 appears to be a little different as the other party is not receiving the document but is being advised of what actions can be taken to access the document. Rule 46A appears to have been drafted to accommodate that type of notice. I assume it was considered to not be overly inconvenient to have to login to the E-Filing system and see the document since that could still be done with the click of a few buttons on your computer. Access to the document was being provided. This appears to be a reasonable extension of the current service rules.

The issue arises with the fact that some E-Filing systems that are using number (3) for notification are not providing access to all documents through the E-Filing system. I do not believe this possibility was considered when drafting Rule 46A and this newly drafted amendment to Rule 5B also does not appear to consider this possibility. The definition of E-service merely requires the sending of a notice and access to the document is not required.

Therefore, in some instances, a document may be filed and, for purposes determined necessary by the clerk or court, the document will not be accessible through the E-Filing system. When the other party receives the email notification that the document has been filed, the party will not have access to the document through the E-Filing system. This could happen if for instance a document is filed that is deemed confidential and the E-Filing system security is not designed to limit access to only case participants. The E-Filing system will not allow anyone access to the document. This appears to be what is happening with some of these E-Filing systems. Under the proposed Rule 5B, the notice sent to the other parties will be deemed proper service even though the other parties will not even have access to the document without calling the clerk or the filing party to get a copy.

To address this issue, I recommend an amendment to the proposed definition of E-served or E-service as follows:

"E-service" or "E-served" means the automatically generated electronic transmission to all participants in a case who are registered users, by and through an E-filing system, of (i) a notice of the filing of a document with a copy of the document attached, (ii) a notice of the filing of a document with a hyperlink to said document or (iii) a notice of the filing of a document and the document can be accessed by the registered user in the E-Filing system.

Thank you for your consideration.

Sincerely,

James M. Hivner

ADM2019-01444

appellatecourtclerk - Comments on Proposed Amendments to the Tennessee Rules of Civil Procedure (No. ADM2019-01444)

From: Jack Burgin <jcburgin@kramer-rayson.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 10/18/2019 10:57 AM
Subject: Comments on Proposed Amendments to the Tennessee Rules of Civil Procedure (No. ADM2019-01444)

To whom it may concern, my practice is primarily in federal court and, from that perspective, I offer comments on the Proposed Amendments to the Tennessee Rules of Civil Procedure (No. ADM2019-01444)

The changes to Rule 5.02(2)(a) appear to stylistic but I will state that, in my experience, almost no attorney complies with the requirement to certify via mail, facsimile or hand-delivery that a document has been served by email. Few if any attorneys appear to me to even know of the requirement, or at least they appear to be unaware of it when I call the requirement to the attorney's attention (and say I agree to waive the certificate). Email is generally a reliable means of delivering documents (usually as reliable as mailing) so I suggest either presently or in a future advisory commission recommendation that the certification requirement be dropped or modified to permit the kind of general agreement contemplated by Federal Rule 5(b)(2)(E). Alternatively, written certification could be contingent upon events contemplated by Rule 5.02(b) or the lack of a reply email acknowledging service by email.

The amendment to Rule 5.02(c) continues to provide that the "mailbox rule" (which, as the Court explained in the decision cited below, means an three days added under Rule 6.05) applies to documents served by email. Similarly proposed Rule 5.02(3) (and proposed Rule 5B) retains the mailbox rule for E-filed documents. Absent a statutory requirement (and I know of none) the mailbox rule no longer applies in federal court when documents are sent by the court's CM/ECF filing system or sent electronically by agreement. Federal Rule 6(d). When the federal rules made this change it did not, to my recollection, trigger a revolt at the "loss" of three days to respond. There is merit in having rules such as this be uniform and I see no reason under Tennessee law to continue having a different practice in state versus federal court.

With the above exceptions and a clarification I mention next, I favor the amendments proposed in Rule 5.02(3) and Rule 5B.

Perhaps I missed it but I am unable to determine whether proposed rule 5.02(3)(c) intends to apply the mailbox rule to the transmission of court orders sent electronically. Of course, this is not a new issue. *Binkley v. Medling*, 117 S.W.3d 252, 257 (Tenn. 2003), held the mailbox rule in Rule 6.05 did not alter the time for filing a Rule 59 motion to alter or amend: "Rule 6.05 applies only when a party is required to do some act after service of a notice or other paper and does not apply when the doing of the act is triggered by some other event, like the entry of a final judgment." The Court agreed with the holding in *Begley Lumber Co., Inc. v. Trammell*, 15 S.W.3d 455, 457 (Tenn. Ct. App. 1999), that Rule 6.05 does not apply to extend by three days the time for filing a notice of appeal when a copy of the entered judgment, requested pursuant to Rule 58, is sent by mail.

Proposed rule 5.02(3)(e) could be interpreted to change the holding in *Binkley* and the decisions it cited when court orders are electronically transmitted. Presumably, *Binkley* would prohibit application of the mailbox rule to orders served by mail. At a minimum, then the proposed rule might create unintended confusion and could lead to different time limits which depend on whether the order was sent electronically or by mail. Proposed Rule 5.02(3)(e) states a "document that is E-served shall be treated as a document that was mailed for purposes of computation of time under Rule 6." This could be interpreted (or argued) to mean that orders sent electronically are "documents" within its scope. Again, maybe I missed something, but I can find no contrary provision in the proposed rule and the comments do not appear to address this issue.

For these reasons, I respectfully suggest the Advisory Commission or the Court clarify whether the mailbox rule applies when court orders are sent electronically.

I am not in favor of the changes to proposed Rule 26.07. I must acknowledge that I am not a fan of the initial disclosures requirement in federal court but recognize that they serve a purpose. I do not, therefore, opposed adopting the same concept in the Tennessee rules. My opposition is to the wording in Proposed Rules 26.07(1)(A) & (B). As written, these proposed rule require identification or production of persons or documents "relevant to the claims or defenses of any party, whether or not supportive of the disclosing party's claims or defenses." I strongly oppose the requirement to disclose information or documents that are not "supportive . . . of the disclosing party's claims or defenses."

As the comment notes, the Advisory Commission is aware that this goes beyond the requirements in Federal Rule 26(a) after the 2000 amendments. See comment to 2000 Amendments to Fed. R. Civ. P. 26 ("A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use."). Unfortunately, the comments do not explain why the Advisory Commission chose to be different. That lack of explanation is unfortunate, in my view. In my experience under the federal rules before the 2000 Amendments, the similar requirement proved unworkable, was often ignored, and usually led to disputes over whether a party had complied with the requirement shortly before trial. This resulted in delays and diverting attorney resources away from trial preparation.

If the proposed rule is not changed, moreover, I also oppose the requirement to provide e-mail addresses for "each person" identified in proposed rule 26.07(1)(A). A witness can always agree to communicate by email but this proposed rule effectively forces the witness to receive emails from counsel. As ubiquitous as email communications are, receiving an unsolicited or unanticipated email from an attorney (and in some cases from an attorney the witness considers to be adverse) will needlessly upset many witnesses. As defense counsel, I do not relish having to inform witnesses I may be meeting for the first time that I have to provide their email addresses (whether personal or work) to opposing counsel.

I generally favor proposed rule 26.07(1)(D). I anticipate a question arising about whether a "document" under proposed rule 26.07(1)(D) is the same as a "written instrument other than a policy of insurance" as meant in Rule 10.03. Presumably, the "document" production requirement will not require mandatory disclosure of insurance policies even when a "pleading" refers to an insurance policy. Neither the proposed rule or the comments addresses this. I also suggest that the comments to proposed rule 26.07(1)(D) clarify that it is not intended to modify or alter the

requirements in Rule 10.03 which require attaching a "written instrument" to a pleading when the claim or defense is founded on that written instrument.

I do not agree that proposed rule 26.07(1)(D) should be inapplicable to class actions, as implied by proposed rule 27.07(4)(E). Putative class action complaints are often founded on documents of some kind and I do not understand why these type of pleadings should be exempted from this aspect of the mandatory disclosure rule.

Proposed rule 27.07(4)(E) is also slightly ambiguous. "Class actions" are not class actions until the court certifies the class. Of course, that typically occurs, if at all, well after the mandatory disclosures would be due. If this exception is retained, perhaps the comments could clarify that this exception applies to complaints which include class allegations.

I thank the Court and the Advisory Commission for its work and the opportunity to comment. Should there be any questions, please let me know. These comments are my own. They are not intended to reflect the views of my clients or the other members of my law firm.

Jack Burgin
Kramer Rayson LLP
865-525-5134 (office)
865-300-7978 (mobile)

ADM2019-01444

FILED
OCT 18 2019
Clerk of the Appellate Courts
Rec'd By KM

appellatecourtclerk - ADM2019-01444

From: Mark Smith
To: appellatecourtclerk
Date: 10/18/2019 10:03 AM
Subject: ADM2019-01444

Dear Mr. Hivner, The proposed changes in the rules are very interesting and will change the ways attorneys practice, especially New Rule 26.07. As stated in the Advisory Commission Comments , "As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request , of four types of information that have been customarily secured early in litigation through formal discovery." This will benefit the litigants and should allow the case to move more quickly to mediation or settlement. The vast majority of the Bar never reads these proposed new rules. The AOC needs to advise the Bar theses rules are coming so they can make the necessary adjustments to be able to comply with these rules when adopted.

Mark T. Smith, Sumner County Clerk and Master
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appellatecourtclerk - Proposed amendment to TRCP 26

ADM2019-01444

FILED
OCT 10 2019
Clerk of the Appellate Courts
Rec'd By KM

From: "Mark R. Orr" <markrorrlaw@gmail.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 10/10/2019 4:01 PM
Subject: Proposed amendment to TRCP 26

To whom it may concern:

I am greatly troubled by the prospect of the proposed Rule 26.07, especially in the context of family law cases, which comprise the majority of my practice. Not only will it prove unreasonably burdensome on smaller law offices, but it will pretty much ensure pro se litigants are unable to navigate the waters of discovery causing additional exasperation for the clerks, judges and opposing counsel dealing with them. Additionally, and perhaps more importantly, mandatory disclosure of fact witnesses in divorce cases will almost ensure that many matters, which could have been settled by agreement, will mushroom cloud into pitched battles.

I have had repeated discussions with our colleagues, over the years, regarding the effect discovery is having on our ability to try lawsuits in a timely and cost efficient manner. I have been surprised to learn, during the course of these discussions, that no one is in favor of expanded discovery. I assumed that those at larger defense firms and those who do not seem to bat an eye at billing astronomical fees would be in favor of such changes. The bottom line is ever expanding discovery is having a chilling effect on litigation, as many clients cannot afford to see a lawsuit through to its conclusion, given the associated costs. I apologize if my input comes off as whining, but I would strongly urge some reconsideration before these proposed changes are implemented. While they may be spurred by good intentions, their effect on day to day practice and our business models may prove overwhelming to many.

Thank you for your time.

Mark

Mark R. Orr, Esq.
LAW OFFICES OF MARK R. ORR
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Please reply to the sender or contact our firm at 865.437.5301 and let us know that you have received the message in error. If received in error, please delete this message. Thank you.

INTERNAL REVENUE SERVICE REQUIRED DISCLAIMER: Pursuant to Federal Regulations (contained in Treasury Department Circular No. 230) covering practice before the Internal Revenue Service, we are required to inform you that this written communication (including attachments and enclosures), unless otherwise expressly and specifically stated, does not meet the requirements needed to avoid tax or penalties. Therefore, please note that this communication was and is not intended or written by the Law Offices of Mark R. Orr, or anyone else, to be used, and that it cannot be used by you or anyone else, for the purpose(s) of (i) avoidance or evasion of any tax or penalties, including, but not limited to, those imposed by the Internal Revenue Code, or (ii) promoting, marketing or recommending to any party any partnership or other entity, investment plan or arrangement, transaction(s), or tax related matters. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent

From: "Joe Neufeld" <jneufeld2000@aol.com>
To: <lisa.marsh@tncourts.gov>
Date: 10/11/2019 9:34 AM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Friday, October 11, 2019 - 9:34am
Submitted by anonymous user: [162.200.145.170]
Submitted values are:

Your Name: Joe Neufeld
Your Address: 166 Pryce Street, Santa Cruz, CA 95060-2872
Your email address: jneufeld2000@aol.com
Your Position or Organization: I am just a simple, unwashed member of the public
Rule Change: No comments taken at this time
Docket number: TRCP ADM2019-01444
Your public comments:
I applaud your amendments to Tennessee Rules of Civil Procedure §33.01 regarding objections made to discovery requests.

Oftentimes, response to written discovery requests contain objections, the purpose being to extend the time in which a response is due, rather than help narrow or define or shape the issue underlying the discovery request.

When a dispute over a discovery issues surfaces, the parties are required to meet and confer, prior to any court involvement. A party may interpose a meritless objection in order to invoke this "meet and confer" prerequisite in order to buy more time to respond. These proposed amendments will help curb such abuse.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/26646

WILLIAM D. VINES, III *†
JAMES C. WRIGHT
G. KEVIN HARDIN
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Firm Medical Consultant
FRED GRELLO, MD

September 24, 2019

Sender:
James C. Wright
Partner
Direct Dial: (865) 244-3920
E-mail: jwright@bvblaw.com

James Hivner, Clerk
Re: 2020 Rules Package
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: T.R.C.P. - ADM 2019-01444

Dear Mr. Hivner:

I am submitting the following comments as it would relate to the advisory commission's recommendations to the Court, said comments being submitted within the December 13, 2019 deadline.

Proposed Change to Rule 26.07 – Mandatory Disclosures

I have not seen a statement of the reason or need for the recommendation in regard to this drastic and significant change to the TRCP. The existing rules provide adequate and sufficient means to obtain discovery as parties may need, while at the same time protecting doctrines such as work product, attorney-client privilege, matters and information obtained "in anticipation of litigation." This rule appears to attempt to abrogate or certainly an argument would be made that said rule would abrogate same. For instance, either a plaintiff attorney or a defendant attorney may spend significant time and money investigating a matter and may learn both positive and negative matters during their investigation. In a significant construction products liability or medical malpractice matter, this could be in the tens of thousands, if not more. Rule 26.07 would appear to require and impose a continuing duty to disclose such information and impose a duty upon the attorney signing by way of verification subjecting to sanctions.

Further, one of the reasons that many parties (and attorneys) seek to avoid Federal Court are the additional costs to the clients in relationship to compliance with rules, including the Federal rule on disclosure. This rule alone in Federal Court generates significant time (and

thereby costs to the client for compiling and creating the information necessary for this disclosure). Parties also still get interrogatory sets that they also have to comply with as well. Therefore, practicing in Federal Court is significantly more costly to parties than it is in State Court.

Beyond this, the rule will create its own "cottage industry" of practice relating to motions to declare disclosures inadequate, incomplete or simply not filed timely. For a *pro se* litigant, this rule would likely make access to courts impossible. In fact, this rule change contemplates the creation of an enforcement practice relating to the disclosures in the verification process, as well as a change to Rule 37 to provide for a sanctions mechanism. In essence, we are simply creating another whole realm of unnecessary pleadings, when the very matters sought can be obtained through ordinary discovery. This rule disadvantages parties that have significant monies to obtain information through their counsel by requiring them to divulge this information to parties who have not prepared or done their homework, while at the same time also disadvantages clients who are not wealthy enough to go through the efforts to comply with an additional layer of discovery process, as well as motions that will be generated that their disclosures were inadequate and untimely.

In short, I do not see a modified federal disclosure system as being an improvement over the present Tennessee system, when as an attorney I can obtain the same information through discovery without the unnecessary costs that the federal courts burden a party with to comply with this rule. There simply appears to be no true compelling reason to create an entire new set of motion practices relating to disclosures.

At present, when I meet with a client I will go through with them generally the costs of different matters and steps in litigation. The disclosure requirements by their very nature add an additional cost factor to the client. Even in a relatively straightforward and small case, the requirement to investigate and put together disclosures, supplement the disclosures and deal with motion practices relating to it will add thousands of dollars to the litigation costs. In a large case involving a products matter, construction issue or a medical malpractice, the costs could be in the tens of thousands of dollars. While this proposed rule change is well meant, it simply creates a cost factor for clients that is unnecessary in light of the current rules that provide the basis to obtain adequate discovery and creates a whole new realm of motion practices that would unnecessarily burden litigants, lawyers and the courts.

The Tennessee Rules of Civil Procedure in regard to discovery are not broken. They work adequately. This extra burden does not enable a party to gain any particular additional evidence that could not be obtained through ordinary discovery. At the same time, however, it creates the potential for an argument that long-standing principles relating to work product and matters prepared in anticipation of litigation may be abrogated by this rule and creates a mine field for compliance.

BUTLER & VINES BABB
Attorneys at Law

I would request that Rule 26.07 be left as is, as well as Rule 37. This is not meant as any negative to the Committee and is hopefully not taken as such.

Very truly yours,

James C. Wright

JCW/pad

appellatecourtclerk - Tennessee Supreme Court Proposes Mandatory Pretrial Discovery Disclosures in Divorce Litigation

---

From: Zale Dowlen <zale.dowlen@outlook.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 8/21/2019 10:05 AM
Subject: Tennessee Supreme Court Proposes Mandatory Pretrial Discovery Disclosures in Divorce Litigation
Cc: Kimi deMent <Kimi.deMent@tncourts.gov>

Dear Court:

Thank you for the comment period on this issue. As an attorney who assists low income individuals and who handles a few divorces, this proposal seems to create an even greater chasm between the low income individuals, who want and/or need a divorce, and the ability to get one. Essentially, this proposal only assists the trial attorneys who need an excuse for unnecessary discovery.

This seems to run contrary to the "Access to Justice" mindset that the court has been striving to achieve. I hope this helps.

ADM2019-01444

FILED
AUG 21 2019
Clerk of the Appellate Courts
Rec'd By LM

Rule 26

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"Your plans will fall apart right in front of you, if you fail to get good advice.
But if you first seek out multiple counselors, you'll watch your plans succeed."
Proverbs 15:22 TPT

appellatecourtclerk - Rukle 26 Mandatory Disclosures

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TENNESSEE RULES OF CIVIL PROCD.

As you solicited comments about mandatory disclosure in civil actions, I write to endorse the idea.

Especially in personal injury cases, disclosure of information, such as data and information required maintained by federal and/or state law ought to be disclosed without a request.

In truck crash litigation, for example, the truck company should mandatorily tender to the plaintiff all documents and things required maintained by the Federal Motor Carrier Safety Regulations, including the driver's personnel file, logs for three months before the crash, trip records for the last three months before the crash including bills of lading, contracts incident to the load(s) carried at the time of a crash and lease agreements for the tractor, trailer, and any leased equipment involved in the crash, radio frequency device information, geolocation data for the last three months before the crash, and history of driving infractions of the truck driver. Drug tests of the truck driver also ought to be subject to mandatory disclosure if performed after a crash. This will expedite discovery, faciliatate settlement, and relieve judges of discovery disputes.

In divorce cases, local rules of some counties require tendering finanaical affidavits of income and expenses, and certain documents and things pertaining to electronically stored information. Each party to a divorce ought to be required to share any investment documents and pension documents involving marital property. Each ought to provide the other a list of insurance products, including sums paid into any insurance products, without a request for same.

Bill Cremins