NJDC

NATIONAL JUVENILE DEFENDER CENTER

promoting justice for all children by ensuring excellence in juvenile defense

November 25, 2015

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Clerk of the Courts
Rec'd By
ADM2015-01631

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

RE: 2016 Rules Package

Dear Honorable Chief Justice Lee and Associate Justices of the Supreme Court of Tennessee:

The National Juvenile Defender Center (NJDC) requests the Court consider small but important changes to the proposed revisions to the Tennessee Rules of Juvenile Practice and Procedure in order to clarify and safeguard youth's right to counsel in delinquency proceedings and prevent the indiscriminate shackling of youth.

NJDC is a nationwide organization with a mission of promoting justice for all children by ensuring excellence in juvenile defense. To that end, NJDC provides technical assistance, training, and support to juvenile defenders across the country. We believe that all youth have the right to zealous, well-resourced representation, and acknowledge the unique and special status of childhood and the impact that immaturity, disabilities, or trauma may have on that representation. NJDC works to improve access to and quality of counsel for all young people in delinquency court, and supports the reform of court systems that impact our nation's youth.

Constitutional Right to Counsel

While the proposed rules make great strides to guarantee appointment of counsel, a mandate that youth consult with an attorney prior to waiver of counsel would serve to ensure that children are able to make informed decisions about their legal representation and are provided with meaningful access to counsel, as guaranteed by the United States Constitution.[1] According to the United States Supreme Court, juveniles need "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [they have] a defense and to prepare and submit it."[2] As the Court also recognized eighty years ago:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[3]

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Thus, the aid of counsel is vital to an adequate defense, particularly for juveniles, but it is rendered meaningless if provided too late in the delinquency process.

The Problem of Late Appointment of Counsel and Waiver of Counsel

Tennessee can only protect the pre-trial procedural rights of young people by ensuring early appointment of counsel. The earlier counsel can meet with their clients, the more likely it is that young people will be more informed throughout the trial process. Early involvement by counsel demonstrates a commitment to the client, improves the attorney-client relationship, and ensures that the youth receives the best representation possible.[4] Indeed, according to the National Council of Juvenile and Family Court Judges, "[d]elays in the appointment of counsel create less effective juvenile delinquency court systems."[5] Uncounseled juveniles are often overeager to plea as soon as possible, to avoid the trauma of the court experience. Such early resolution gives the defender no opportunity to explore the facts of the case or obtain discovery—the later counsel is appointed, the more it is rendered meaningless in the juvenile court setting. Additionally, immediate access to counsel is necessary for youth in confinement because research establishes that even short-term incarceration is particularly harmful to adolescents.[6] In short, delays in appointing counsel deny youth the opportunity for meaningful communication with their lawyer and lead to negative outcomes.

Social science research confirms that on their own, most youth lack the capacity to understand the nature of the long and short-term consequences of juvenile court involvement and to make intelligent decisions about how to navigate the increasingly complex dimensions of the modern juvenile court.[7] Adolescent decision-makers are on average less future-oriented and less likely to properly consider the consequences of their actions.[8] As a result of immaturity, anxiety, and direct and indirect pressure from judges, prosecutors, parents, or probation officers, unrepresented youth feel compelled to resolve their cases quickly. Without being fully informed, juveniles too often capitulate to these pressures to waive counsel in order to expedite their cases, entering admissions without obtaining advice from counsel about possible defenses, mitigation, or consequences of juvenile adjudications.[9] Research shows that without appropriate guidance, juveniles are unlikely to understand rights they are asked to waive in colloquies, let alone the consequences of waiving them.[10] Even prior court experience bears no direct relationship to juveniles' ability to understand their legal rights.[11] When someone can advise and guide a juvenile through the complexities of difficult concepts, they can make more informed, knowledgeable decisions. Experts have found that youth are able to make much better decisions when informed and unhurried than when under stress and peer or authority influences—meaning juveniles are less likely to waive their rights, including their right to counsel, if they are able to consult with counsel first.[12]

Changes to the Proposed Rules Relating to Right to Counsel

As a solution to the problem of delayed appointment and wavier of counsel, the National Juvenile Defender Center suggests that the Court modify Rules 203 and 205 to the following:

> Rule 203(c)(2)(C): "The child's right to an attorney and that an attorney will be appointed to represent the child ~~at the detention hearing and subsequent hearings~~ as soon as possible prior to the detention hearing if the child's parent or custodian is financially unable or refuses to retain an attorney for the child."

Rule 203(d)(6): "The time limit for the hearing may be waived by a knowing and voluntary written waiver by the child after meaningful consultation with defense counsel…."

Rule 205(a)(2)(B): "The child subsequently knowingly and voluntarily waives the right to an attorney after the child has had an opportunity for a meaningful consultation with defense counsel concerning that right…."

Rule 205(b)(3): "The court shall not accept a waiver or deem a waiver to be knowing and voluntary unless or until the child has ~~consulted with a knowledgeable adult who has no interest adverse to the child~~ had an opportunity for a meaningful consultation with defense counsel concerning those rights."

These changes are in line with both NCJFCJ Guidelines and national standards of effective juvenile justice reform and accountability.[13] The National Council of Juvenile and Family Court Judges' (NCJFCJ) *Guidelines* instruct that in a delinquency court of excellence, counsel must be appointed prior to any initial or detention hearing and must have enough time to prepare.[14] The appointment of counsel should occur as far as possible in advance of the first court appearance in order to allow meaningful consultation between counsel, the child, and the child's family, if necessary.[15] The *National Juvenile Defense Standards* state that the juvenile defender "must consult with the client and provide representation at the earliest stage possible."[16] Finally, "timely appointment helps defenders meet their ethical obligations and secure due process for children."[17] Both NJDC and the NCJFCJ believe that juvenile judges should be extremely reluctant to allow young people to waive their right to counsel.[18] "On the rare occasion when the court accepts a waiver of the right to counsel, the court should take steps to ensure that the youth is fully informed of the consequences of the decision."[19] Namely, "[a] waiver of counsel should only be accepted after the youth has consulted with an attorney about the decision and continues to desire to waive the right."[20]

Reforms aimed at guaranteeing early appointment of counsel are often criticized as too expensive to implement. In fact, NCJFCJ reports that "juvenile delinquency courts have found that providing qualified counsel facilitates earlier resolution of summoned cases."[21] Early appointment also conserves judicial resources by preventing delays and minimizing additional hearings.[22]

Additionally, the early appointment of counsel has been shown to improve relationships across all juvenile justice system stakeholders. For example, Illinois detention center staff in one county that authorized early appointment of counsel "reported that the program has resulted in better dialogue between lawyers, children, families and detention staff, thereby leading to more consistency in recommendations for detention and release, as well as dispositional planning."[23] Thus, the early appointment of counsel is an investment in a strengthened juvenile justice system.

Parental Rights and Right to Counsel

No longer can parents or others with potentially conflicting interests waive the fundamental due process rights of the children in their care. While youth should certainly have the option of consulting with a parent, custodian, or guardian prior to waiver, in most instances a parent, custodian, or guardian will not be an expert in the law. The changes still respect the rights and interests of parents, and do not eliminate the rights of juveniles to consult with a parent, guardian, or custodian prior to waiver. However, if a youth decides to consult with a parent, guardian, or custodian and determines to waive his right to an attorney, the changes proposed by NJDC would require that the youth must

also consult with an attorney before making a final decision. Moreover, the early appointment guarantee ensures that attorneys have as much time as possible to keep their clients' parents and guardians informed. Thus, the changes present simple modifications with lasting impact.

Simply put, Tennessee's young people need legal experts—attorneys—to assist them in making the monumental decision to waive their Constitutional right to counsel.

Indiscriminate Shackling of Juveniles

There is a growing consensus that indiscriminate shackling of youth – without an individualized judicial determination that these restraints are necessary for the safety of the youth or other people in the courtroom – is antithetical to the rehabilitative mission of the juvenile court. Mental health experts have stated that shackling children unnecessarily humiliates, stigmatizes, and traumatizes them. Additionally, restraints impede due process. They make effective communication more difficult and thereby impair youth from assisting in their own defense.

We applaud a rule change address this problem. However, in order to ensure sufficient protections for Tennessee's youth, we suggest the following changes:

> Rule 204 (a): "Children appearing in juvenile court ~~may be~~ shall not be restrained ~~if~~ unless the court determines that…"
>
> Rule 204 (b): "Any party may request to be heard as to whether or not restraints are necessary, and ~~upon request,~~ a judge shall make findings on the record…"
>
> Rule 204(c): "Restraints include, but are not limited to handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items." [proposed new subpart to Rule 204]
>
> Rule 204(d): "Factors the court may consider prior to ruling that restraints are appropriate include:
>
> 1) any past escapes or attempted escapes by the child;
> 2) evidence of a present plan of escape by the child;
> 3) any believable threats by the child to harm others during court;
> 4) any believable threats by the child to harm him or herself during court;
> 5) evidence of self-injurious behavior on the part of the child; and
> 6) a history of disruptive courtroom behavior that has placed others in potentially harmful situations." [proposed new subpart to Rule 204]

A presumption against shackling provides the court with discretion to restrain a child under limited circumstances. Additionally, in order to ensure a child's constitutional rights are met; findings should always be made on the record if there is a determination to restrain a child. Because of the immense need to limit the use of restraints on juveniles, we recommend adding an inclusive definition of "restraints" and listing, within the rule, the factors for the court to consider before deciding whether use of restraints is proper in a particular case.

National Trends

Increasingly, states are recognizing the importance of providing children with early appointment of counsel. In Montana, a 2009 law provided that youth had the right to counsel for the detention hearing.[24] That same year, the New Jersey Supreme Court held that the juvenile right to counsel attached at the time of the filing of a delinquency complaint.[25] In 2010, Louisiana passed a law to provide the appointment of counsel for all youth immediately upon arrest and detention.[26]

There are at least ten states that require juveniles to consult with counsel prior to waiver of their right to an attorney; two additional states that require not only consultation but also a full hearing; thirteen states that prohibit waiver, at least in some circumstances; and one state that provides a near-absolute ban on waiver.[27] In addition to the large number of states that already provide protections for youth prior to waiver of counsel, the national trend is heading towards increased protections, similar to those in the changes proposed by NJDC. Florida and Indiana recently enacted rules requiring consultation prior to waiver, Pennsylvania placed a near-complete prohibition on waiver for juveniles, the Court of Appeals in Kentucky interpreted their Rules to require consultation prior to waiver, and Ohio increased protections against waiver in its Rules of Juvenile Procedure.[28]

The harm of indiscriminate shackling is broadly recognized, and many states are taking steps to limit the use of restraints on juveniles. Currently, twenty-three states and the District of Columbia have limited the use of restraints on children in the courtroom, and reform efforts are active in most of the remaining states. In August 2015, the National Council of Juvenile and Family Court Judges adopted a resolution calling for the end of indiscriminate juvenile shackling. The American Bar Association took related action in February 2015. The limitations for shackling found in the NCJFCJ and ABA resolutions are similar to those in the changes indicated above, which would adopt the standards that have been successfully implemented in other states, where juvenile courts continue to function safely and efficiently.

Conclusion

The National Juvenile Defender Center appreciates the opportunity to provide comment on these critical issues affecting the youth of Tennessee. NJDC urges the Court to consider changes to the proposed Rules of Juvenile Procedure that will provide for early appointment of counsel, require juveniles to consult with an attorney prior to waiving their right to counsel, and limit the use of restraints on juveniles.

Please do not hesitate to contact us if you require further information or have questions. Thank you.

Respectfully submitted,

Kim Dvorchak
Executive Director

[1] *See In re Gault*, 387 U.S. 1 (1967).
[2] *Id.* at 36.
[3] *Powell v. Alabama*, 287 U.S. 45, 69 (1932).
[4] NAT'L JUVENILE DEFENDER CTR., NAT'L JUVENILE DEFENSE STANDARDS, § 3.1: REPRESENTATION OF THE CLIENT PRIOR TO INITIAL PROCEEDINGS (2012) [hereinafter NAT'L JUV. DEF. STDS.].
[5] THE NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 90 (2005) [hereinafter NCJFCJ GUIDELINES].
[6] BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006), http://www.justicepolicy.org/research/1978; Maia Szalavitz, *Why Juvenile Detention Makes Teens Worse*, TIME, Aug. 7, 2009, *available at* http://www.time.com/time/health/article/0,8599,1914837,00.html.
[7] *See, e.g., Graham v. Florida*, 130 S. Ct. 2026, 2032 (2010) (noting that youth's limited understanding puts them at a "significant disadvantage in criminal proceedings").
[8] Brief for the American Psychiatric Association as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636447.
[9] NAT'L JUV. DEF. STDS., § 10.4 cmt.: PREVENT INVALID WAIVER OF COUNSEL (2012).
[10] Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Court*, 54 FLA. L. REV. 577 (2002) (citing THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193-194 (1981)); *see generally* Norman Lefstein et al., *In Search of Juvenile Justice:* Gault *and Its Implementation*, 3 LAW & SOC'Y REV. 491 (1969) (discussing an empirical study demonstrating the difficulty of obtaining juvenile waivers with confidence that they are knowing and voluntary).
[11] THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193-194 (1981).
[12] Lawrence Steinberg et al., *Are Adolescents More Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583 (2009).
[13] NCJFCJ GUIDELINES 25; NAT'L JUV. DEF. STDS., § 10.4 cmt.: PREVENT INVALID WAIVER OF COUNSEL (2012).
[14] NCJFCJ GUIDELINES 77, 90.
[15] NAT'L JUV. DEF. STDS., §§ 2.5: PARENTS AND OTHER INTERESTED THIRD PARTIES, 3.1: REPRESENTATION OF THE CLIENT PRIOR TO INITIAL PROCEEDINGS (2012).
[16] NAT'L JUV. DEF. STDS., § 1.4: SCOPE OF REPRESENTATION (2012).
[17] NATIONAL JUVENILE DEFENDER CENTER, ENCOURAGING JUDGES TO SUPPORT ZEALOUS DEFENSE ADVOCACY FROM DETENTION TO POST-DISPOSITION: AN OVERVIEW OF THE JUVENILE DELINQUENCY GUIDELINES OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 4 (2006), *available at* http://njdc.info/wp-content/uploads/2013/11/Encouraging-Judges-to-Support-Zealous-Defense-Advocacy-from-Detention-to-Post-Disposition.pdf.
[18] *See* NAT'L JUV. DEF. STDS., § 10.4 cmt.: PREVENT INVALID WAIVER OF COUNSEL (2012); NCJFCJ GUIDELINES 25.
[19] NCJFCJ GUIDELINES 25.
[20] *Id.*
[21] *Id.* at 221-22.
[22] *Id.* at 78, 90-91.
[23] CHILDREN & FAMILY JUSTICE CTR., NW. UNIV. SCH. OF LAW, & NATIONAL JUVENILE DEFENDER CENTER, ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 40 (2007)
[24] MONT. CODE ANN., § 41-5-333.
[25] *In re P.M.P.*, 200 N.J. 166 (2009).
[26] LA. CH.C. ART. 809.

[27] Consultation with counsel required: Alaska (if accused of felony-grade offense) (ALASKA STAT. § 47.12.090; Florida (FLA. R. JUV. P. 8.165(b)); Indiana (IND. R. CRIM. P 25); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20(b)(2)-(4); MD. R. 11-106(b)); South Carolina (in detention hearings) (S.C. CODE ANN. § 20-7-7215); Texas (TEX. FAM. CODE ANN. § 51.09); Utah (if accused of a felony) (UTAH CODE § 62A-7-201); Vermont (with consent of GAL also) (VT. R. FAM. P. 6(d)(3), (4)); Virginia (if subject to detention) (VA. CODE ANN. § 16.1-266(c)(3)); West Virginia (W. VA. CODE § 49-5-9(a)(2)). Hearing required: Kentucky (KY. REV. STAT. ANN. § 610.060(b)); New York (N.Y. FAM. CT. ACT § 249-a). Prohibition, in at least some instances: Arizona (if parents' interests are adverse or conflicting) (ARIZ. R. JUV. P. 10(D)); Arkansas (if parent has filed petition against juvenile or requested removal from home; if institutional commitment is likely; if in EJJ proceedings; if in youth services custody) (ARK. CODE ANN. § 9-27-317(d)-(g)); Illinois (if under 18 and pleading guilty, guilty but mentally ill or waiving the right to trial by jury) (725 ILL. COMP. STAT. ANN. 5/113-5); Iowa (if under 16; if 16 or older and in detention or shelter care hearing, waiver hearing, or dispositional hearing) (IOWA CODE ANN. § 232.11(2)); Kentucky (if felony-grade offense, sex offense, or if there is a possibility of detention or commitment) (KY. REV. STAT. ANN. § 610.060(2)(a)); Minnesota (if subject to competency proceedings; stand-by counsel always appointed in all detention hearings and if any out-of-home placement is proposed) (MINN. R. JUV. DEL. P. 3.02, 3.04)); Montana (if possibility of more than six months detention) (MONT. CODE ANN. § 41-5-1413); New Jersey (if incompetent) (N.J. STAT. § 2A:4A-39(b)(3)); Ohio (if possibility of transfer) (OHIO JUV. P. R. 3); Oklahoma (if petition filed pursuant to § 2-2-104) (OKLA. STAT. TIT. 10A, § 2-2-301); Texas (if in transfer hearings, adjudications, dispositions, modifications or if juvenile if mentally ill) (TEX. FAM. CODE ANN. § 51.10(b)); Vermont (if under 13) (VT. R. FAM. P. 6(d)(4)); Wisconsin (if under 15; if 15 or older and waiver is granted, court may not transfer to serious juvenile offender program or criminal court or order secure detention) (WIS. STAT. § 938.23(1m)(a)); and Pennsylvania (in almost all circumstances) (PA. R. JUV. CT. P. 152).

[28] FLA. R. JUV. P. 8.165(B); PA. R. JUV. CT. P. 152; OHIO R. JUV. P. 3; IND. R. CRIM. P. 25(C); KY. REV. STAT. ANN. § 610.060(b), as interpreted by *D.R. v. Commonwealth*, 64 S.W.3d 292, 296-97 (KY. CT. APP. 2001).

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CAMPAIGN AGAINST INDISCRIMINATE JUVENILE SHACKLING

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

Formatted: Font: (Default) Times New Roman, Highlight

Re: 2016 Rules Package

November 25, 2015

Dear Supreme Court of Tennessee:

On behalf of the organizations listed below, we write with suggested modifications of proposed Tennessee Rules of Practice and Procedure, Rule 204. Use of Restraints on Children in the Courtroom. The proposed modifications will ensure the Rule will place reasonable limitations on the use of restraints on children in juvenile delinquency court proceedings while allowing for judicial discretion in cases that may present a risk of flight or safety.

Suggested Modifications to Proposed Tennessee Rules of Practice and Procedure, Rule 204. Use of Restraints on Children in the Courtroom.

1. *Rule 204 (a) should be revised to read "Children appearing in juvenile court shall not be restrained unless the court determines that..." [A presumption against shackling provides the court with discretion to restrain a child under limited circumstances.] Restraints should be defined to include "handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items."*
2. *Rule 204 (b): Strike ~~"upon request".~~ In order to ensure a child's constitutional rights are met, findings should always be made on the record if there is a determination to restrain a child.*
3. *Advisory Commission Comments-Paragraph 2, the last sentence should be revised to state "Factors the court may consider prior to ruling restraints are appropriate include:*
4. *Advisory Commission Comments factors should be revised to read:*

    1) *any past escapes or attempted escapes by the child;*
    2) *evidence of a present plan of escape by the child;*
    3) *any believable threats by the child to harm others during court;*
    4) *any believable threats by the child to harm him or herself during court;*
    5) *evidence of self-injurious behavior on the part of the child;*
    6) *A history of disruptive courtroom behavior that has placed others in potentially harmful situations*

There is a growing consensus that indiscriminate shackling of youth -- without an individualized judicial determination that these restraints are necessary for the safety of the youth or other people in the courtroom -- is antithetical to the rehabilitative mission of the juvenile court. Mental health experts have stated that shackling children unnecessarily humiliates, stigmatizes and traumatizes them. Additionally, restraints impede due process. They make effective communication more difficult and thereby impair youth from assisting in their own defense.

Adoption of this rule would enable juvenile courts to remain true to their mission by ensuring that proceedings are free from the inherently prejudicial and damaging practice of unnecessary shackling.

The harm of indiscriminate shackling is broadly recognized. In August 2015, the National Council of Juvenile and Family Court Judges adopted a resolution calling for the end of indiscriminate juvenile shackling. The American Bar Association took related action in February 2015. The limitations for shackling found in the NCJFCJ and ABA resolutions are similar to those proposed in this rule, which would adopt the standards that have been successfully implemented in other states, where juvenile courts continue to function safely and efficiently. Currently, twenty-three states and the District of Columbia have limited the use of restraints on children in the courtroom, and reform efforts are active in most of the remaining states.

We hereby request that the Supreme Court of Tennessee adopt a new rule limiting the use of restraints on children in juvenile court, with the suggested modifications. We appreciate your consideration of this important reform. Should you have any questions or desire any additional information, please do not hesitate to contact Christina Gilbert, Campaign Against Indiscriminate Juvenile Shackling (CAIJS), 202-452-0010, Ext. 103.

Sincerely,

Christina J. Gilbert, Campaign Manager
Campaign Against Indiscriminate Juvenile Shackling

Tennessee Association of Criminal Defense Lawyers

Kim Dvorchak, Executive Director
National Juvenile Defender Center

TACDL
...wherever justice demands

Tennessee Association of Criminal Defense Lawyers

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November 25, 2015

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APPELLATE COURT CLERK
NASHVILLE

Dear Supreme Court of Tennessee:

As chair of TACDL's Juvenile Justice Committee, I am writing to express my disappointment with Rule 204 of the proposed revision of the Rules of Juvenile Procedure. States and cities across the country have banned the indiscriminate shackling of children in juvenile delinquency proceedings to no ill effect—Miami has not shackled children in court since 2006, and there have been no escapes and no injuries. Here in Tennessee, Memphis and Nashville have ended shackling youth in court, also with no problems arising from the presence of unrestrained youth in court. The rule proposed fails to take into account these successes both across the country and here in Tennessee and allows courts virtually unfettered discretion in the decision to shackle youth.

Shackling unnecessarily humiliates and traumatizes children. It impedes effective communication between a child and their attorney, undermines the presumption of innocence, and is counter to the rehabilitative purpose of juvenile court. Tennessee's proposed rule amounts to a tepid suggestion that courts consider not shackling youth brought before them, and is wholly insufficient to address the problem.

The Advisory Committee Comments suggest that a Court consider 'the seriousness of the charge, the delinquency history of the child, and any past disruptive courtroom behavior by the child', all of which have minimal bearing on the immediate courtroom safety concerns that should underpin a decision to shackle a child. Shackling should address a current, founded safety concern and not be used as a punishment for prior 'disruptive' behavior or past delinquent adjudications.

While the creation of this rule certainly constitutes progress on the issue, its tepid language and lack of protection for youth is unfortunate. To adopt a strong presumption against youth shackling, I ask the committee to adopt the language proposed by the National Juvenile Defender Center's Campaign Against Indiscriminate Shackling.

Sincerely,

Diane McNamara - by permission

Diane McNamara

Suanne Bone

TACDL Juvenile Defense Committee

CAMPAIGN AGAINST INDISCRIMINATE JUVENILE SHACKLING

James Hivner, Clerk
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APPELLATE COURT CLERK
NASHVILLE

November 24, 2015

Dear Supreme Court of Tennessee:

On behalf of the organizations listed below, we write with suggested modifications of proposed Tennessee Rules of Practice and Procedure, Rule 204. Use of Restraints on Children in the Courtroom. The proposed modifications will ensure the Rule will place reasonable limitations on the use of restraints on children in juvenile delinquency court proceedings while allowing for judicial discretion in cases that may present a risk of flight or safety.

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communication more difficult and thereby impair youth from assisting in their own defense. Adoption of this rule would enable juvenile courts to remain true to their mission by ensuring that proceedings are free from the inherently prejudicial and damaging practice of unnecessary shackling.

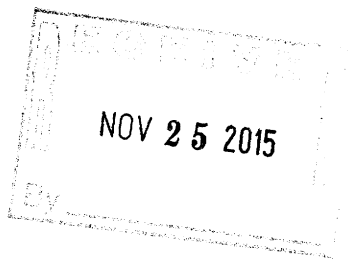
The harm of indiscriminate shackling is broadly recognized. In August 2015, the National Council of Juvenile and Family Court Judges adopted a resolution calling for the end of indiscriminate juvenile shackling. The American Bar Association took related action in February 2015. The limitations for shackling found in the NCJFCJ and ABA resolutions are similar to those proposed in this rule, which would adopt the standards that have been successfully implemented in other states, where juvenile courts continue to function safely and efficiently. Currently, twenty-three states and the District of Columbia have limited the use of restraints on children in the courtroom, and reform efforts are active in most of the remaining states.

We hereby request that the Supreme Court of Tennessee adopt a new rule limiting the use of restraints on children in juvenile court, with the suggested modifications. We appreciate your consideration of this important reform. Should you have any questions or desire any additional information, please do not hesitate to contact Christina Gilbert, Campaign Against Indiscriminate Juvenile Shackling (CAIJS), 202-452-0010, Ext. 103.

Sincerely,

Christina J. Gilbert, Campaign Manager
Campaign Against Indiscriminate Juvenile Shackling

TENNESSEE BAR
ASSOCIATION



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November 25, 2015

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Nashville, TN 37219

IN RE: AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE & EVIDENCE NO. ADM2015-01631

Dear Jim:

Attached please find an original and one copy of the Comment of the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Bill Harbison, President, Tennessee Bar Association
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APPELLATE COURT CLERK
NASHVILLE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE & EVIDENCE	)))))	**No. ADM2015-01631**

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, William L. Harbison; Chair, TBA Tort and Insurance Section, Henry D. Fincher; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, makes the following comment regarding the proposed amendments to the Rules of Procedure & Evidence filed August 27, 2015.

BACKGROUND

On August 27, 2015, this Honorable Court issued an Order soliciting comments on various amendments proposed by the Advisory Commission on Rules of Evidence and Rules of Practice and Procedure. The TBA solicited comments from all of the affected practice groups in the association. The TBA

Board reviewed those recommendations and offers the following comments and recommendations.

RECOMMENDATIONS

THE PROPOSED CHANGES TO TENN.R.CIV.P. 3, 3.01(1) AND 4.01 SHOULD NOT BE ADOPTED

The proposed amendments to the Tennessee Rules of Civil Procedure found at Rules 3 and 4 transfer the provisions with regard to time for commencement of action to Tenn.R.Civ.P. 4 and then significantly change the standards and time period for issuance of process.

No reason is offered for this drastic change to current practice. The TBA is not aware of any empirical proof or anecdotal evidence suggesting that the delayed issuance of a summons is a problem in the Tennessee judicial system.

The proposed change contains no exception regarding defendants who intentionally evade service, nor is there an exception for other situations that might justify a failure to satisfy these arbitrary deadlines. Such situations may include a lawyer's illness, miscommunication by the Clerk's office (which does not typically notify counsel when summons are returned unserved) or the parties' engaging in settlement discussions in an attempt to resolve a case without full recourse to discovery and trial.

The current rule adequately provides for relief if a plaintiff abuses the modest leeway under the current rule and wrongfully delays either issuance or service of process.

In some civil situations such as partnership disputes or domestic relations cases, the issuance of service can create additional hostility between the parties. Often counsel will make the justified tactical decision to refrain from serving an opposing party. This is done to promote the agreed resolution of matters. This goal accords with Tennessee public policy and would be frustrated by these proposed changes to Rules 3 and 4.01.

In addition the Association believes that the proposed 150 day deadline to reissue an alias summons is arbitrary, unworkable, peculiar and illogical. The TBA submits that the current 12-month reissuance requirement is working fine and that there is no need to change it.

THE CHANGES TO TENN.R.CIV.P. 4.03(3), 4.04 (5), 4.04(11) AND 69 AND TENN.R.APP.P. 26 SHOULD BE ADOPTED

The TBA supports the adoption of the following proposed amendments for the following reasons.

The addition of Tenn.R.Civ. P. 4.03(3) to state that failure to file proof of service does not affect the validity of service is the only fair rule on this point and worthy of codification.

The change to Tenn.R.Civ.P. 4.04(5) specifically provides that service through certified mail is not effective unless the defendant actually signs for it. This proposed amendment together with the proposed change to Tenn.R.Civ. P. 4.04(11), more closely complies with constitutional due process requirements.

The proposed change to Tenn.R.Civ.P. 4.04(11) eliminates the use of an "unclaimed" designation as perfected service of process for service via certified mail. This change appropriately addresses due process concerns.

The proposed change to Tenn.R.Civ.P. 69 presents a streamlined procedure for the renewal of judgments before the 10-year expiration date. This change provides adequate notice and opportunity to object under those circumstances.

Finally, the proposed change to Tenn.R.App.P. 26 provides that the Court of Appeals could dismiss an appeal where neither a transcript nor a statement of evidence had been properly filed. The Court already has this authority and there is no reason it could not be codified.

TENN.R.CIV.P. 30 SHOULD BE CLARIFIED

The proposed new comment to Tenn.R.Civ.P. 30 states that Tenn.R.Evid. 615 is not applicable to depositions. The TBA understands this comment to address the contentions by some at the bar that Rule 615 prevents witnesses from consulting with their attorney during depositions. TBA wholeheartedly agrees with the Commission that consultation at breaks should not be denied. However, TBA believes that the current language proposed by the Rules Commission could be construed to eliminate the prevailing practice of excluding non-party witnesses from depositions This would be inadvisable, and the comment should clearly reflect that non-party witnesses do not have the right to attend other depositions absent consent of the parties or a court order permitting it.

THE PROPOSED CHANGES TO TENN.R.CIV.P. 5 AND 11 REGARDING SIGNATURES SHOULD NOT BE ADOPTED

The changes proposed for Tenn.R.Civ.P. 5 and 11 would require original handwritten pen signatures on all original pleadings and other papers to be filed with the clerk. In light of the proposals for permitting electronic signatures on electronically filed documents and provisions for fax filing, these changes would create a conflict with and impediment to technological trends evident in the Court and law practice and should not be adopted.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.

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November 24, 2015

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SUBJ: Comments Regarding Proposed Amendments to the Tennessee Rules of Juvenile Procedure – **Docket No. ADM 2015 - 01631**

Dear Mr. Hivner:

We write in response to the request for written comments to the proposed comprehensive amendments to the Rules of Juvenile Procedure. The primary author of these comments is Luke Wingo, a third-year law student at the University of Tennessee College of Law, who is enrolled in the College's Education Law Practicum ("the Practicum"), a clinical course that concentrates on representing unruly/status offenders (and other at-risk children and youth) as well as examining the laws governing this important, but often neglected, system in Tennessee. As a part of Mr. Wingo's work for the Practicum, he has reviewed the August 2015 Draft of the Tennessee Rules of Juvenile Practice and Procedure, with a particular eye toward those provisions related to unruly offenses.

He has prepared these comments with Dean Hill Rivkin, a professor of law at the University of Tennessee College of Law and Supervising Attorney for the Practicum, and Brenda McGee, *Pro Bono Cooperating Attorney* for the Practicum and a lawyer for children, with over thirty years of experience in the field. It is our considered opinion that the recommendations submitted here – which are focused on the impacts on unruly children and youth and are based on extensive research, analysis, and experience – will improve the system of juvenile justice in Tennessee even further for the tens of thousands of juveniles who become court-involved in the State's unruly system.

We very much appreciate the opportunity to comment on these overall salutary amendments and would be happy to provide the Court with more a detailed report, in support for our recommendations. Thank you for your consideration.

Sincerely,

FOR THE EDUCATION LAW PRACTICUM:

Dean Hill Rivkin

Dean Hill Rivkin (BPR # 004409), *Professor of Law & Practicum Supervising Attorney*
Lukeus K. Wingo, *Practicum Student Attorney*
Brenda McGee (BPR # 011296), *Pro Bono Community Cooperating Attorney*

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Comments Regarding Proposed Amendments
to the
Tennessee Rules of Juvenile Procedure
Docket No. ADM 2015 - 01631

FILED
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Valid Court Orders (VCOs)

We recommend that the Valid Court Order ("VCO") be completely eliminated from the Tennessee Rules of Juvenile Procedure. The VCO, which permits the incarceration of status offenders following the provision of full due process rights, is a historic relic that has been discredited by the National Council of Juvenile and Family Court Judges, among other prominent national organizations concerned about juvenile justice. Congress is considering abolishing the VCO in the current reauthorization of the Juvenile Justice and Delinquency Prevention Act ("JJDPA"). Studies have shown that most of the cases of children being detained under a VCO for status offenses in recent years have occurred in just a handful of states — including Tennessee where, according to AOC statistics, out of the some 20,021 status offenses reported in 2014, 721 VCOs were issued.

The States:

States and territories participating in a grant program authorized by the JJDPA, the federal law that currently allows judges to issue VCOs, report the following data on the contemporary use of the VCO.[1] Twenty-Eight (28) states and territories reported zero uses of the VCO; 11 states reported between 1-100 uses; 16 states, including Tennessee, reported over 100 uses of the VCO.[2] These numbers would support the growing national consensus that the VCO is not an effective vehicle for achieving the rehabilitative aims of the juvenile justice system. Incarcerating unruly offenders is a form of "criminalization" for non-crimes that has no evidence-based efficacy and conflicts with the prevailing view that unnecessary contact with the juvenile system can have lasting harm on children and youth.[3]

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1 Information provided by Coalition for Juvenile Justice, by way of the JDPPA from the 2013 fiscal year. Available at: http://www.bscc.ca.gov/downloads/State_VCO.pdf (*last accessed:* November 24, 2015).

2 *Id.*

3 As recently stated by Barack Obama, in the context of his *Presidential Proclamation in recognition of National Youth Justice Awareness Month* (2015):

> All our Nation's children deserve the chance to fulfill their greatest potential, and nothing should limit the scope of their futures. But all too often, our juvenile and criminal justice systems weigh our young people down so heavily that they cannot reach their piece of the American dream. When that happens, America is deprived of immeasurable possibility. This month,

Based on 2014 statistics, in Tennessee 78 percent of all status offense referrals were made by schools and law enforcement (48% schools, 30% law enforcement); 44 percent of petitions referred were for truancy, where the majority of VCOs are issued.[4]

By the simple act of eliminating the Appendix to the Rules, the Court will remove this stigmatizing instrument from Tennessee law. It is important to note that the Appendix simply recites verbatim the VCO regulation promulgated by the Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), an arm of the U.S. Department of Justice. The VCO is not mandated by the Tennessee General Assembly, is not a part of Tennessee law except as an Appendix to the Juvenile Rules, and is not mandated by OJJDP for the State to receive federal juvenile justice funding.

The Judges:

The National Council of Juvenile and Family Court Judges ("NCJFCJ") was the entity in the late 1970s that advocated for Congress to enact the VCO exception in the JJDPA, which contains a core mandate that status offenders not be incarcerated in secure juvenile detention facilities (jails) when they are adjudicated guilty in a status offense case. Today, this same national organization of juvenile judges is repudiating the need for the VCO. The overwhelming consensus is that better alternatives exist, in lieu of jailing status offenders, for serving the needs of juveniles for treatment, rehabilitation, and education. Indeed, the VCO conflicts with a chief goal of the Tennessee juvenile justice system, namely to "remove the taint of criminality and the consequences of criminal behavior and substitute therefor a program of treatment, training and rehabilitation."[5]

In 2010, the Board of Trustees of the NCJFCJ voted to support the phase out of the VCO exception as proposed in Senate legislation reauthorizing the JJDPA. Since its incorporation into the JJDPA in 1980, the exception has provided the only mechanism whereby status offenders found to have violated conditions of a VCO may be securely detained in a juvenile detention or correctional facility.[6]

NCJFCJ President Douglas Johnson commented:

> we rededicate ourselves to preventing youth from entering the juvenile and criminal justice systems and recommit to building a country where all our daughters and sons can grow, flourish, and take our Nation to new and greater heights.

4 Tennessee Administrative Office of the Courts, Juvenile and Family Courts, Statistics (2014).

5 TENN. CODE ANN. § 37-1-101(a) (2).

6 http://www.ojjdp.gov/enews/10juvjust/100317.html (*last accessed:* November 24, 2015).

> The Board's decision to support the elimination of the Valid Court Order exception came after careful consideration, debate, and reflection. NCJFCJ continues our commitment to improve the lives of children and parents in our juvenile and family courts.[7]

This organizational position in favor of eliminating the VCO recognizes that confinement of status offenders is an ineffective response to meeting the needs of these at-risk children. The Court should do the same for these children in Tennessee.

The NCJFCJ is hopeful that the reauthorization of the JJDPA will provide structure and new funding streams for juvenile justice systems that will begin to alleviate the overuse of secured detention for status offenders. Many organizations and funding agencies are dedicated to developing resources and tools to promote promising practices; to create partnerships with allied professionals and groups; and to advocate for the most effective responses for status offenders.

Removing the VCO will allow Tennessee courts to find more effective ways to respond to status offenses and will hold more accountable the entities in the community with better resources and expertise to respond to the issues presented by status offenses.

The Juvenile Advocacy Groups

Across the nation, several juvenile advocacy groups, such as the Coalition for Juvenile Justice, join in the consensus that the VCO should be eliminated from the JJDPA. These organizations, as advocates for children, voice additional concerns about the VCO, namely that when status offenders are introduced to the juvenile criminal justice system they are more likely to become another statistic of the system. They also cite the expert opinion on the mental, emotional, and sometimes physical distress that status offenders experience through incarceration.

This research has shown the damaging effects secure confinement can have on children, whether as a detention method before a court appearance or as a form of punishment after adjudication.[8] Children who are securely detained are more likely to become more deeply involved in the juvenile or criminal justice system and are more likely to re-enter the criminal justice system than children who participate in community-based programs.

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[7] *Id.*

[8] Holman, B., et al., (2007) THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES. The Justice Policy Institute, Annie E. Casey Foundation.

Detention also has a negative and significant impact on many facets of the child's life. A child who has been securely detained has a higher likelihood of suffering from physical or mental health problems, struggling in or not completing school, and having difficulty in the labor market later in life.

A more deep-seated issue raised about the VCO is whether it actually serves a legitimate juvenile justice purpose. If deployed as an instrument of deterrence in a truancy case, where the majority of VCOs occur, it stretches reason and good sense to conclude that detaining youth for missing school, and forcing them to miss more school, would actually deter young persons from skipping class. If the purpose of the VCO is to rehabilitate the youth, it also beggars belief that this blunt instrument, which causes mental and physical distress, is a proper avenue to rehabilitate. At bottom, the only realistic justification for the VCO is one of punishing children and youth, a response that has no moral or legal justification in a system designed to treat and rehabilitate.

Constitutional Arguments

Another salient reason for eliminating the VCO relates to its dubious constitutionality. In *Doe v. Norris,* 751 S.W.2d 834 (Tenn. 1988), this Court held that secure detention for an unruly child is unconstitutional under the Tennessee Constitution.[9] This decision was premised primarily on the comingling of delinquent and status offenders. Status offenders who are confined in secure juvenile jails are comingled with delinquent offenders, and treated like delinquents. No matter how short the duration of their incarceration, they are shackled, placed in orange jumpsuits, drug-tested, and subject to the strict regimen of the jail. In this manner, the VCO conflicts with the central reasoning of *Doe v. Norris* and should be eliminated on this basis alone.

We have witnessed first-hand the failure to appoint counsel *prior* to the issuance of a VCO and, in selected cases, *prior* to the violation hearing. The failure to appoint counsel to status offenders throughout the VCO process offends basic concepts of fairness and due process. At a time when these at-risk youth are most vulnerable, they do not have the guiding hand of counsel to assist them. Consequently, they are deprived of the ability to argue that the VCO should not be entered and that its conditions are unfair or inappropriate to their circumstances.

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[9] *Doe v. Norris* also casts doubt on the constitutionality of TENN. CODE ANN. §37-1-114 (b), which permits the pre-adjudication secure detention of unruly offenders for 24 hours or longer.

A larger concern is the practice of allowing these at-risk youth to waive their right to counsel in the VCO process. The reality is that the vast majority of these young people cannot knowingly and intelligibly waive this fundamental right. They often do not comprehend the process or the terms of VCOs and, most importantly, the consequences.

Locking up status offenders through VCOs has no legitimate purpose. It allows non-criminal acts to validate incarcerating a juvenile. In 2015, it is difficult to justify the understanding that incarcerating a youth in a detention center serves society better off than attempting to provide robust educational, health, and social services. For all of these reasons, we urge the Court to remove the existing Appendix to the Rules and eliminate the VCO in Tennessee.

Please note that, in addition to the above stated, we also here submit brief comments on two other proposed amendments to the Tennessee Rules of Juvenile Procedure. They appear separately, on the following page.

Rule 201: **Preliminary Inquiry and Informal Adjustment / Rule 205. Notification and Waiver of Rights of Children**

Addressing: **201(c) (2) (B) and 205(a) (2), 205(b) (3) (Waiving Right to an Attorney)**

Comment: Allowing a minor to waive the right to an attorney in any juvenile proceeding is very unsettling, even with the safeguards addressed in the Advisory Commission Comments. In most cases a child can never "knowingly" waive his constitutional rights to an attorney. It takes a certain level of sophistication even to understand the right to an attorney. This is a salient concern in cases that deal with juvenile defendants with special education needs. As studies have shown, a majority of children and youth in the juvenile justice system have either been identified with educational disabilities or have disabilities or impairments that go untreated or undetected. Even when implementing the safeguard of having a '"knowledgeable adult who has no interest adverse to the child" still brings up concerns because most parents of juvenile defendants are not adequately knowledgeable and lack the sophistication to understand the protected right to an attorney. We propose that the right to waive be removed or implemented in a way that requires an attorney to be on standby to advise the juvenile prior to the waiver.

Rule 204: **Use of Restraints on Children in the Courtroom**

Comment: We applaud this amendment. It is a step in the right direction and comports with the national trend to end indiscriminate shackling of juveniles, especially those who are court-involved for status offenses. In our view, status offenders should never be shackled indiscriminately in detention facilities or in court except for extraordinary, documented misconduct. Our concern is that this revision is not robust enough and still allows for too much discretion in how the rule will be applied. We also question whether the courts and the individuals responsible for the transportation and detention of the juveniles will take the necessary steps in addressing each individual child when deciding on the use of restraints. Only with rigorous documentation of the justification for restraints will a record be made to review this practice and its continued need.

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Clerk of the Courts
Rec'd By

Knoxville Bar Association

November 24, 2015

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James Hivner, Clerk
100 Supreme Court Building
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Nashville, TN 37219-1407

Re: Proposed Amendments to the Tennessee Rules of Procedure and Evidence; No. ADM2015-01631

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's order of August 27, 2015, the Knoxville Bar Association respectfully submits the following comments regarding the amendments proposed by the Advisory Commission on the Rules of Practice and Procedure. The Knoxville Bar Association has a longstanding practice of carefully reviewing all proposed rules and amendments. In this case, the Professionalism Committee of the Knoxville Bar Association carefully reviewed each of the proposed amendments and prepared a report and analysis to the Board of Governors. At its meeting on October 21, 2015, the Board of Governors of the Knoxville Bar Association approved the following comments. As always, the KBA appreciates the work of the Commission and particularly appreciates being allowed to assist the Court with review and commentary on the proposed amendments.

With regard to the proposed Tennessee Rules of **Juvenile Practice and Procedure**, after extensive study, the KBA does not write to express either support for or opposition to the proposed amendments; however, the KBA believes that the detailed analysis undertaken by KBA member Julia Spannaus could assist the Court, and therefore provides that memorandum along with its comments.

TRCP Rule 3 regarding the commencement of an action. The Professionalism Committee noted that the rule does not contemplate actions that are brought by a Petition rather than a Complaint. The KBA supports the proposed amendment with the addition of the words "or petition" after the word "complaint" in the proposed revisions.

TRCP Rule 4.01(3). The proposed change substantially shortens the time for reissuance of an alias summons from one year after the filing of a complaint and issuance of a summons to only sixty days after the initial ninety days of filing or the action is extinguished. Based upon the experience and analysis of the Professionalism Committee, the KBA opposes the proposed change to the existing rule as being unduly burdensome and unnecessary.

TRCP 4.01(11). The proposed revision omits language that allows an "unclaimed" certified letter, with return receipt requested, to be used as equivalent to refusing to accept process. Effectively, this revision eliminates the argument that constructive service of process has been had through Defendant's passive failure to pick up a certified letter, as opposed to refusing acceptance from a postal carrier. The proposed revision changes existing case law, which provides that "actual notice in every case is not required" and, it is "well settled, that as to notice, due process does not require exact certainty." *McIntee v. State of Minn. Dept. of Safety*, 279 N.W.2d 817 (Minn. 1979). The KBA opposes the amendment as unnecessary.

TRCP 5.06. The KBA supports the amendment concerning the requirement that an original penned signature be included on filed Pleadings.

TRCP 30 and 30.03. The revision to Rule 30 merely adds an advisory comment to the Rule which the KBA supports. However, the revision to Rule 30.03 comments regarding an attorney's communication with a deponent about deposition procedure or the substance of a deposition testimony appears to conflict with an existing Advisory Commission comment.

TRCP 69.04. The KBA supports the proposed change regarding the procedure for maintaining the 10 years statute of limitations from extinguishing a judgment without the necessity of a show cause hearing order.

TRAP 26(b), The KBA supports the proposed change concerning consequences when an appellant fails to timely file the transcript of statement as required by Rule 24.

TRCrimP 36.1. The proposed change concerns the elimination of the state's ability to seek correction of an illegal sentence, which can currently be sought by either the state or the defendant. At the recommendation of the Professionalism Committee, the KBA opposes this amendment on the grounds that there are occasions on which a prosecutor might be ethically required to advocate for the correction of an illegal sentence.

Thank you for the opportunity to serve the Court.

Respectfully submitted,

Tasha Blakney
President

TENNESSEE RULES OF JUVENILE PRACTICE AND PROCEDURE

Provided by: Julia Spannaus on behalf of the Juvenile Court & Child Justice Section of the Knoxville Bar Association

Summary of Proposed Changes

The proposed rule changes for the Juvenile Rules replace the old rules entirely. The proposed changes are clear and will resolve problems with non-conformity of practice across courts as to how Juvenile cases will be handled.

If adopted in their entirety, unchanged, they will greatly benefit Juvenile practice across the state. Below are minor changes or areas that could still benefit from clarification. These suggestions are based on the variations in practice observed across Juvenile Courts in nine East Tennessee counties, including Knox County. This summary of recommendations has been prepared by Julia Spannaus for the Juvenile Court and Child Justice Section of the Knoxville Bar Association, and contains the input and modifications suggested by that Section.

Part I General Provisions

Rule 103(c)(1) – Serving the summons is permitted in this proposed rule by registered mail (not with a signature upon receipt) to the party's address if "known or can with reasonable diligence be ascertained".
Comment – Information provided by parties is often inaccurate or outdated, especially with regard to putative/alleged biological fathers or absent parents. Biological fathers may be unaware they have a child at all and will not be on notice that the child is in a non-parent or the state's custody. The proposed rule appears to permit service (and therefore the default) of a party without the additional protection of a signature upon receipt of service by mail, as would be required under the Civil Rules of Procedure.
Suggestion-Either exclude the possibility of defaulting against the party if registered mail without signature is the method of service used (more similar to the Civil Rules), or to require an Affidavit be submitted if default is sought based upon service by mail without signature. An Affidavit should detail the information or search methods used to identify this address for the Party. Some method should permit relief from default by the aggrieved Party if this information in the Affidavit was inaccurate and had no possibility of accomplishing actual notice.

Rule 106(a) – has a typo. "alleged to be" is repeated at the end of the first sentence.

Rule 106(a) Service – When Required
Comment – Courts and DCS county offices have widely varying practices as to whether proposed foster care permanency plans are served on parties prior to hearings.

Suggestion – To require service of the proposed Permanency Plan being presented to the Court for ratification prior to the ratification or permanency hearing. This could be accomplished by adding the words "...or similar papers *including proposed foster care Permanency Plans*..." to Rule 106(a) Service – When Required.

Rule 107(c) – subpoenas for production "...shall be served at least 10 calendar days prior..."
Comment – It is unclear as written whether this timeline is to serve the subpoena on the person required to produce the evidence or to serve a copy on parties so they are on notice of documentary evidence to be produced at trial. It is also unclear how this impacts required notices to the subject of the records if HIPPA applies or if they are banking records.
Suggestion – to clarify or specifically endorse a procedure that accounts for HIPPA or banking records notice requirements. Medical and drug treatment records are frequently needed for these proceedings, and practice varies significantly on the notice provided to the subjects.

Rule 108(c)(7) – *Ex parte* restraining order is in place for 15 days, pending hearing
Comment – This is unclear if the person being restrained is a custodial parent. Juvenile courts differ in how long they provide for a parent to receive a hearing when one custodial parent is restrained from exercising custody in favor of the other custodial parent. From the Respondent parent's perspective a "removal" of custody has occurred, but for the Petitioning parent it is more favorably viewed as a Restraining order. When scheduling the preliminary hearing, some courts use the 72-hour hearing timeline as in proposed Rule 302(b) and some courts apply the longer time period for a restraining order, as described in this rule.
Suggestion– to modify either Rule 108(c)(7) or Rule 302(b) to clarify which timeline should be used in this circumstance, in order to unify practice across courts.

Part II – Delinquent/Unruly Proceedings

Rule 205 – Right to counsel for child
Comment – The comments section for this Rule references TCA 37-1-126 (in turn referencing 37-1-132), which requires appointed counsel for children alleged to be Unruly only if they are in jeopardy of being removed from their home. In practice, the facts concerning the jeopardy of removal are often revealed during the course of one or multiple proceedings prior to the right to counsel attaching. Further, the child may remain in DCS custody following disposition without counsel or without a Guardian *ad Litem* if they were placed through an "Unruly" status, rather than as a "Neglected" child. Lack of a Guardian *ad Litem* or counsel for a child whose parents have opposed the child in the Unruly legal proceeding may deprive the child of a voice during his or her foster care stay. There is wide variance between counties as to how Unruly representation is handled.
Suggestion – this issue should be reviewed at greater length with a variety of voices heard from the various institutional perspectives that are impacted (eg, Juvenile

Courts, AOC funding, GALs, Public Defenders and DCS). It would be premature to offer a Rule change, but it is a significant issue for a small number of children.

Part III – Dependent and Neglect Proceedings

Rule 302(b) – *see suggestion on Rule 108(c)(7), above.*

Rule 306 (d)(2) – testimony of child outside the presence of the parties
Comment – If a non-parent/offender is a party (i.e. abuse allegation in which stepfather is restrained or excluded from the home) and the non-parent/offender is indigent but otherwise not entitled to counsel, does this rule anticipate they would be required to hire counsel in order to observe the child's testimony or have questions posed on his behalf, or would this rule not apply if the non-parent/offender is unrepresented?
Suggestion – To address this in the Comments for this Rule so that it is clear what the intent is.

Rule 308 (e) – Evidence Admissible at Dispositional Hearing
Suggestion – to add to the reliable hearsay list: "documents such as... results of urine or hair follicle drug screenings, the results and recommendations from an alcohol and drug assessment and discharge summaries from drug treatment facilities of the child, the child's parents or custodian"

Post-Dispositional phase, generally
Comment – Many Juvenile Courts, especially on non-DCS neglect cases, will hold "Review" hearings following the initial disposition. These Review hearings function to review progress the parent has made toward rehabilitating themselves with an eye toward restoring custody to the parent, much like in a foster care case. The temporary custodians, often proceeding *pro se*, may not be in favor of this continued review. Juvenile Courts apply the loss of "superior parental rights" at different points in the case, some at the Dispositional hearing and some not until the case is closed following multiple "Review" hearings.
Suggestion - Addressing the existence of such "Review" hearings in a rule, or addressing the point at which the superior parental right/preference is lost to a non-parent custodial party would assist in unifying practice among courts in the post-dispositional phase.

Rule 310 – Modification of or Relief from Judgments or Orders
(a) Modification of Orders (3) for Changed Circumstances –
Comment - this Rule uses the language "changed circumstances" rather than "material change in circumstances".
Suggestion – If this rule is intended to set out the procedure for modifying custody following the loss of superior parental preference to a non-parent, the language used should be "material change in circumstances". Otherwise, some language in

the comments would be helpful to clarify the use of the term "changed circumstances".

Part IV – Foster Care Proceedings
No suggested changes

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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

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Clerk of the Courts
Rec'd By

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: _____

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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
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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.

FILED
NOV 19 2015
Clerk of the Courts
Rec'd By _____

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

FILED
2015 NOV 16 PM 12:22
APPELLATE COURT CLERK
NASHVILLE

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.

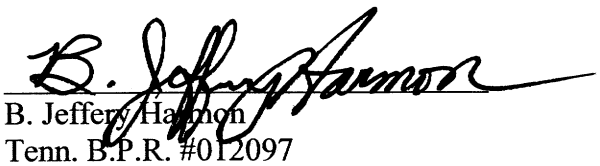
As written, the changes proposed in the Court's order allow the appellate court to dismiss an appeal on "its own initiative." The Conference has no objection to this provision but requests that a safeguard be placed in the rule for such situations, giving the Appellant time to respond to the Appellate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

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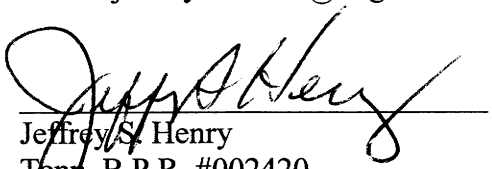
By: 

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[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

FILED
NOV 13 2015
Clerk of the Courts
Rec'd By _____

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

FILED
OCT 28 2015
Clerk of the Courts
Rec'd By

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

FILED
2015 SEP 21 PM 1:36
APPELLATE COURT CLERK
NASHVILLE
ADM2015-01631

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