

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
09/25/2017
Clerk of the
Appellate Courts

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

No. ADM2017-01892

ORDER

The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure, and the Tennessee Rules of Evidence. With its meeting on August 4, 2017, the Advisory Commission completed its 2016-2017 term, and the Commission thereafter transmitted its recommendations to the Court.

The Court hereby solicits written comments from the bench, the bar, and the public concerning the Advisory Commission's recommended amendments set out in Appendix I (proposed amendments to the Rules of Appellate Procedure, the Rules of Evidence, the Rules of Civil Procedure, and the Rules of Criminal Procedure) and Appendix II (proposed amendments to the Rules of Juvenile Procedure) to this order. The deadline for submitting written comments is Wednesday, November 22, 2017. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to:

James Hivner, Clerk
Re: 2018 Rules Package
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

and should reference the docket number set out above.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, the order shall be posted on the Tennessee Supreme Court's website.

PER CURIAM

APPENDIX I

PROPOSED AMENDMENTS TO THE TENNESSEE

RULES OF APPELLATE PROCEDURE

RULES OF EVIDENCE

RULES OF CIVIL PROCEDURE

and

RULES OF CRIMINAL PROCEDURE

(new text indicated by underlining; deleted text indicated by overstriking)

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 3

APPEAL AS OF RIGHT: AVAILABILITY; METHOD OF INITIATION.

[Modify the text of subsection (b) of the rule to include the underlined text and eliminate the strike-through text; add new subsection (i); and add new Advisory Commission Comment (2018 Amendment).]

* * * *

(b) *Availability of Appeal as of Right by Defendant in Criminal Actions.* * * * * The defendant may also appeal as of right from an order denying or revoking probation, an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure, from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding, ~~and~~ from a final order on a request for expunction, and from the denial of a motion to withdraw a guilty plea under Tennessee Rules of Criminal Procedure 32(f).

* * * *

(i) For purposes of this rule, the terms “party” and “parties” shall include any person filing a motion to intervene pursuant to Tenn. R. Civ. P. 24.

* * * *

Advisory Commission Comment [2018 Amendment]

The 2018 amendment adds to the list in subsection (b) a motion for withdrawal of a plea of guilty. *See State v. Peele*, 59 S.W.3d 701 (Tenn. 2001). The 2018 amendment also adds a new subsection (i) to clarify that the terms “party” and “parties” include persons who have filed motions to intervene and desire to take an appeal of right, as is permitted by the 2018 amendments to Rules 24 and 54, Tennessee Rules of Civil Procedure.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 4

APPEAL AS OF RIGHT: TIME FOR FILING NOTICE OF APPEAL.

[Add new subsection (f); and add new Advisory Commission Comment (2018 Amendment).]

* * * *

(f) For purposes of this rule, the terms “party” and “parties” shall include any person filing a motion to intervene pursuant to Tenn. R. Civ. P. 24.

* * * *

Advisory Commission Comment [2018 Amendment]

The 2018 amendment adds a new subsection (f) to clarify that the terms “party” and “parties” include persons who file motions to intervene and desire to take an appeal of right, as is permitted by the 2018 amendments to Rule 3, Tennessee Rules of Appellate Procedure and Rules 24 and 54, Tennessee Rules of Civil Procedure.

TENNESSEE RULES OF EVIDENCE

RULE 502

LIMITATIONS ON WAIVER OF PRIVILEGED INFORMATION OR WORK PRODUCT.

[Correct a typographical omission in the 2009-2010 amendment by adding the underlined word to the end of the introductory clause of the rule; and add new Advisory Commission Comment (2018 Amendment).]

Inadvertent disclosure of privileged information or work product does not operate as a waiver if:

* * * *

Advisory Commission Comment [2018 Amendment]

The 2018 amendment corrects a typographical error in the original text of the rule by adding the word “if” at the end of the introductory clause.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 24

INTERVENTION.

[Modify the text of the rule to include the underlined text and eliminate the strike-through text in subsection 24.01 and the first sentence of subsections 24.02 and 24.03; add new subsection 24.05; and add new Advisory Commission Comment (2018 Amendment).]

24.01. *Intervention as of Right.* Upon timely ~~application~~ motion ~~anyone~~ any person shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the ~~applicant~~ movant claims an interest relating to the property or transaction which is the subject of the action and the ~~applicant~~ movant is so situated that the disposition of the action may as a practical matter impair or impede the ~~applicant's~~ movant's ability to protect that interest, unless the ~~applicant's~~ movant's interest is adequately represented by existing parties; or (3) by stipulation of all the parties.

24.02. *Permissive Intervention.* Upon timely ~~application~~ motion ~~anyone~~ any person may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when ~~an applicant's~~ a movant's claim or defense and the main action have a question of law or fact in common.

24.03. *Procedure.* A Any person desiring to intervene shall file and serve a motion to intervene upon the parties as provided in Rule 5.

* * * *

24.05. Finality of Judgment. Any order granting or denying a motion to intervene filed pursuant to this rule shall be a final judgment for purposes of Tenn. R. App. P. 3.

Advisory Commission Comment [2018 Amendment]

The 2018 amendment adds subsection 24.05, which, in conjunction with the changes to Rule 54, Tennessee Rules of Civil Procedure, and Rules 3 and 4, Tennessee Rules of Appellate Procedure, provides for an appeal of right from a trial court's order granting or denying a motion to intervene. The 2018 amendment also makes terminological updates, substituting the term "motion" for the prior term "application" and the term "movant" for "applicant" throughout the rule (for consistency with Tennessee Civil Procedure Rule 7 terminology).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 47

JURORS.

[Add new Advisory Commission Comment (2018 Amendment).]

Advisory Commission Comment [2018]

The 2018 amendment corrects an outdated statutory cross-reference in the 2003 Advisory Commission Comment: as a result of 2008 Tenn. Pub. Acts, ch. 1159, the statutory limit on peremptory challenges now appears at Tenn. Code Ann. §22-3-104; and so the three cross-references in the penultimate paragraph of the 2003 Advisory Commission Comment now should be to “Tenn. Code Ann. §22-3-104,” instead of to “Tenn. Code Ann. §22-3-105.”

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 54

JUDGMENTS AND COSTS.

[Add underlined text to title of Rule 54.02; renumber the current text of Rule 54.02 as subsection 54.02(1); add new subsection 54.02(2); and add new Advisory Commission Comment (2018 Amendment).]

Rule 54.02. Multiple Claims for Relief – Motion to Intervene

(1) ___ When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

(2) ___ Any order granting or denying a motion to intervene filed pursuant to Tenn. R. Civ. P. 24 shall be a final judgment for purposes of Tenn. R. App. P. 3.

Advisory Commission Comment [2018 Amendment]

The 2018 amendment renumbers the current text of Rule 54.02 as subsection 54.02(1) and adds subsection 54.02(2), which, in conjunction with changes to Rule 24, Tennessee Rules of Civil Procedure, and Rules 3 and 4, Tennessee Rules of Appellate Procedure, provides for an appeal of right from a trial court's order granting or denying a motion to intervene.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5

INITIAL APPEARANCE BEFORE MAGISTRATE.

[Modify the text of the rule to include the underlined text and eliminate the strike-through text; and add new Advisory Commission Comment (2018 Amendment).]

* * * *

(c) *Other Misdemeanors.*

* * * *

(1) *Upon Plea of Guilty.*

* * * *

(B) *Set Preliminary Hearing Unless Not Required.* The magistrate shall schedule a preliminary hearing to be held within ~~ten~~ fourteen days if the defendant remains in custody and within thirty days if released from custody, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate), unless:

- (i) the defendant expressly waives the right to a jury trial and to a prosecution based only on an indictment or presentment; or
- (ii) a preliminary hearing is not required under Rule 5(e) below.

(2) *Upon Plea of Not Guilty.*

(A) *Set Preliminary Hearing.* Unless the defendant expressly waives the right to a preliminary hearing, when the defendant pleads not guilty the magistrate shall schedule a preliminary hearing to be held within ~~ten~~ fourteen days if the defendant remains in custody and within thirty days if released, (and the fourteen

days or thirty days shall be computed from the date of the defendant's appearance before the magistrate).

* * * *

(d) *Felonies.*

* * * *

(3) *Schedule Preliminary Hearing.* When the defendant does not waive preliminary hearing and when a preliminary hearing is not rendered unnecessary under Rule 5(e), the magistrate shall schedule a preliminary hearing within ~~ten~~ fourteen days if the defendant remains in custody and within thirty days if released, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate).

* * * *

Advisory Commission Comment [2018 Amendment]

The 2018 amendment extends the time within which a preliminary hearing must occur to fourteen days from ten days when a defendant remains in custody, and confirms that the time period within which the preliminary hearing must be held shall be computed from the date of the initial appearance before the magistrate. The amendment tracks the current version of the federal analogue to this rule with respect to the in-custody time period, and, after review of other states' practices and data from Tennessee courts, the Advisory Commission determined that fourteen days represents a correct balance for the time period within which the preliminary hearing must occur after an initial appearance and when a defendant remains in custody.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 16

DISCOVERY AND INSPECTION.

[Modify the text of the rule to insert the new underlined subsection (d)(3); and, add new Advisory Commission Comment (2018 Amendment).]

* * * *

(d) *Regulating Discovery.*

* * * *

(3) Procedure in Child Pornography Cases. In any criminal proceeding relating to the sexual exploitation of minors under title 39, chapter 17, part 10 that involves documents or objects discoverable pursuant to Rule 16(a)(F), the court shall, on motion of the state:

(A) Deny any request by the defendant to copy or photograph any documents or objects depicting the sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.

(B) For the purposes of subdivision (d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant's attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial. The Court may, in its discretion, permit other individuals to have access to the documents or objects if necessary to protect the rights of the defendant.

(C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.

* * * *

Advisory Commission Comment [2018 Amendment]

Title 39, chapter 17, part 10 of the Tennessee Code Annotated prohibits conduct that involves child pornography. *See Sentencing Commission Comment* to Tenn. Code Ann. §39-17-1001. Consequently, evidence in those cases often will be material that constitutes child pornography. The amendment conforms Tennessee discovery practice to federal law concerning the reproduction of material constituting child pornography under 18 U.S.C. §3509(m). Tennessee courts face this situation on a routine basis, and the absence of a clear procedural rule can lead to delay in a defendant's defense, time-consuming proceedings, and the expenditure of judicial resources. *See, e.g., State v. Re'Licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD (Tenn. Crim. App., Feb. 12, 2009). The amendment provides the procedural means for trial courts to control the reproduction and dissemination of material constituting child pornography, while protecting a defendant's right to access the information for the purpose of a defense. A form for a protective order under section (d)(3)(C) is provided below as part of this comment.

State of Tennessee Circuit / Criminal Court <hr/> County	PROTECTIVE ORDER PURSUANT TO TENN. R. CRIM. P. 16(d)(3)	Case Number
STATE OF TENNESSEE vs. _____ <div style="text-align: right;">[Defendant's Name]</div>		

This matter is before the Court upon the motion of the State of Tennessee pursuant to Tenn. R. Crim. P. 16(d)(3) for a protective order governing the production in discovery of documents and objects relating to the sexual exploitation of minors under title 39, chapter 17, part 10. It is, therefore, ORDERED, that the following provisions of this Order shall control the disclosure, dissemination, and use of information in this action:

1. The state of Tennessee has failed to demonstrate that the documents or objects subject to discovery pursuant to Tenn. R. Crim. P. 16(a)(F) will be made reasonably available to the defendant throughout the proceeding or has failed to make the property or material reasonably available to the defendant at any time during the proceeding. Therefore, the trial court orders the state to permit the defendant to copy or photograph any documents or objects that constitute “material” (hereinafter “Prima Facie Contraband”) as defined in Tenn. Code Ann. § 39-17-1002 and prohibited by Tenn. Code Ann. §§ 39-17-1003, -1004, and -1005, subject to the following conditions.
2. Defendant and Defendant’s counsel acknowledged that the material that is subject to this order is prima facie contraband the possession of which is otherwise prohibited. Defendant and Defendant’s counsel shall be authorized to possess the Prima Facie Contraband during the pendency of this proceeding as long as Defendant and Defendant’s counsel comply with the terms of this order.
3. Defendant and Defendant’s counsel may possess and use the Prima Facie Contraband only for purposes of this litigation and not for any personal, business, commercial, scientific, competitive, or any other purpose whatsoever.
4. Except as permitted by Paragraph 5, Defendant and Defendant’s counsel shall not disclose the Prima Facie Contraband to any person. Any unauthorized disclosure shall be treated as contempt of this order and may result in criminal prosecution.

5. Defendant and Defendant's counsel may disclose the Prima Facie Contraband to the following Authorized Persons: (a) counsel of record for the parties; (b) the permanent or temporary attorneys, paralegals, clerical, and secretarial staff employed by or in practice with Defendants' counsel; (c) non-party experts or consultants (together with their associates, consultants and clerical and secretarial staff) retained to assist in the defense, settlement, or other disposition of this action; (d) court reporter(s) employed in this action; (e) court personnel; (f) a witness at any deposition or other proceeding in this action and counsel for that witness; and (g) third-party contractors engaged in one or more aspects of organizing, copying, imaging, filing, coding, converting, storing or retrieving data, documents, or other information, or designing programs for handling data connected with this litigation, including the performance of such duties in relation to a computerized litigation support system.

6. Before making any disclosure authorized by Paragraph 5, Defendant and Defendant's counsel shall deliver a copy of this Order to the Authorized Persons, shall explain its terms to the Authorized Persons, shall instruct the Authorized Persons to comply with this Order, and shall require the Authorized Persons to acknowledge receipt of a copy of this Order in writing.

7. Within 30 days of the final disposition of this action in the highest court to which an appeal is taken, or if no appeal is taken within 30 of entry of the judgment, Defendant, Defendant's counsel, and each Authorized Person shall return the Prima Facie Contraband to the state or certify under oath that the Prima Facie Contraband has been destroyed.

8. Defendant, Defendant's counsel, and each Authorized Person who receives Prima Facie Contraband shall maintain the Prima Facie Contraband in a safe and secure area consistent with the provisions of this Order to prevent unauthorized disclosure or dissemination.

9. This Order shall remain in effect after the final determination of this action, unless otherwise ordered by the Court.

10. Each person to whom any Prima Facie Contraband is disclosed agrees to be subject to the jurisdiction of this Court for the purpose of proceedings relating to compliance with or violation of this Order.

IT IS SO ORDERED.

JUDGE

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 41

SEARCH AND SEIZURE.

[Modify the text of the rule to include the underlined text and eliminate the strike-through text; add the new Advisory Commission Comment (2018 Amendment) set out below. The text of the existing Advisory Commission Comment is unchanged:]

* * * *

(g) *Motion for Return or Suppression of Property.* A person aggrieved by an unlawful or invalid search or seizure may move the court pursuant to Rule 12(b) to suppress any evidence obtained in the unlawful search or seizure. If property was unlawfully seized, the aggrieved person may move for the return of the property. ~~The motion shall be granted except as to the return of contraband if the evidence in support of the motion shows that:~~ The motion to suppress and/or the motion to return property unlawfully seized, may be granted, under applicable substantive law and except as to the return of contraband, if the evidence in support of the motion shows that:

* * * *

Advisory Commission Comment [2018 Amendment]

The 2018 amendment removes the word “shall” and inserts “may” in the section of the rule regarding the exclusion of evidence, and makes Rule 41 more consistent with recent statutory changes, *see* 2011 Tenn. Pub. Acts, ch. 252 *codified at* Tenn. Code Ann. §40-6-108, and recent case law, *see State v. Reynolds*, 504 S.W.3d 283, 313 (Tenn. 2016) (recognizing a good-faith exception to the judicially created exclusionary rule, which permits the introduction of evidence obtained “when the law enforcement officers’ action is in objectively reasonable good faith reliance *on binding appellate precedent that specifically authorizes a particular police practice*”

[italics added]); *see also State v. Tuttle*, 515 S.W.3d 282, 308 (Tenn. 2017) (negligent mistakes in wording of search warrant insufficient to invalidate search warrant). In *Reynolds*, the Tennessee Supreme Court also clarified that Rule 41, a procedural rule, does not provide greater protection than applicable substantive law on the exclusionary rule and its exceptions. The amendment makes clear that this procedural rule does not take precedence over applicable substantive law related to the exclusionary rule and its exceptions.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 49.2

ELECTRONIC FILING, SIGNING, OR VERIFICATION.

[Add new rule 49.2; and add new Advisory Commission Comment (2018 Amendment):]

Any court governed by these rules may, by local rule, allow papers to be filed, signed, or verified by electronic means compliant with technological standards promulgated by the Supreme Court. Pleadings and other papers filed electronically under such local rules shall be considered the same as written papers.

Advisory Commission Comment [2018 Amendment].

Courts in certain counties have expressed a desire to implement an electronic filing system. This rule permits trial courts, by local rule, to adopt such systems. This rule provides the same authority for trial courts exercising criminal jurisdiction as currently exists under Rule 5B, Tennessee Rules of Civil Procedure, and Rule 106(h), Tennessee Rules of Juvenile Procedure.

Electronic filing systems have also been implemented in all of the federal district courts (with the sole exception of the United States District Court for the Northern Mariana Islands) and in a number of states. Electronic filing offers numerous advantages over traditional “paper filing,” including vastly increased public access to court documents and reduction of the time and expense incurred by litigants and court personnel in filing, storing, and retrieving documents.

The Commission envisions that, in the not too distant future, all of Tennessee’s courts will adopt electronic case filing systems. In order to achieve statewide uniformity, the systems utilized throughout the state must comply with technological standards promulgated by the Supreme Court. Without such uniformity, the desired ease of access to data and cost efficiencies could not be achieved.

APPENDIX II

*PROPOSED AMENDMENTS TO THE TENNESSEE RULES OF JUVENILE
PROCEDURE*

(new text indicated by underlining; deleted text indicated by overstriking)

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 107

SUBPOENAS.

[Add the underlined text; and add new Advisory Commission Comment (2018 Amendment).]

* * * *

(c) *Subpoena for Production of Documents and Things*. With the exception of emergency hearings, preliminary hearings, and detention hearings, all subpoenas for the production of documents, images, records, data or like information shall be served at least 10 calendar days prior to the hearing, unless otherwise provided by law. Copies of the subpoena must be served pursuant to Rule 106 on all parties, and all material produced must be made available for inspection, copying, testing, or sampling by all parties, except as otherwise provided by law.

Advisory Commission Comment [2018]

The 2018 amendment adds a new sentence to the end of subsection (c), so that the procedure here conforms to Rule 45.02, Tennessee Rules of Civil Procedure.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 117

ENTRY OF ORDER.

[Add new Advisory Commission Comment (2018 Amendment).]

Advisory Commission Comment [2018]

Pursuant to Rule 118(c), the right to an appeal attaches upon entry of the final order.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 301

AGREED ORDERS.

[Add new Advisory Commission Comment (2018 Amendment).]

Advisory Commission Comment [2018]

The 2018 amendment modifies the Advisory Commission Comment only: the terminology and cross reference in the last sentence of the fourth paragraph of the 2016 Advisory Commission Comment is amended to correspond with statutory amendments to Tenn. Code Ann. §37-1-117 and §37-1-128, and says: “In such circumstances, a dependent and neglect petition must be filed within ~~2 judicial days~~48 hours, excluding non-judicial days, pursuant to T.C.A. ~~§37-1-128~~§37-1-117.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 309

AGREED ORDERS.

[Add new Advisory Commission Comment (2018 Amendment).]

Advisory Commission Comment [2018]

This rule does not prohibit a court from accepting stipulations entered by the parties during a pending case.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 310

MODIFICATION OF OR RELIEF FROM JUDGMENTS OR ORDERS.

[Modify the text of the rule to include the underlined text at the end of subsection (a)(1); and add new Advisory Commission Comment (2018 Amendment).]

* * * *

(a) *Modification of Orders.*

(1) Clerical Mistakes. Clerical mistakes and errors arising from oversight or omission in orders or other parts of the record may be corrected by the court at any time on its own initiative or on motion of any party. During the pendency of an appeal such mistakes may be so corrected before the record on appeal is transmitted to the appellate court and thereafter, while the appeal is pending, may be so corrected with leave of the appellate court.

* * * *

Advisory Commission Comment [2018 Amendment]

The 2018 amendment modifies subsection (a)(1) by adding the last sentence, which was inadvertently deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016. Reference should be made to Rule 24(e), Tennessee Rules of Appellate Procedure for certain procedures for correcting the record during the pendency of an appeal.