

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
08/30/2018
Clerk of the
Appellate Courts

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

No. ADM2018-01575

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 July 20, 2018, the Advisory Commission completed its 2017-2018 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 Evidence, the Rules of Civil Procedure, and the Rules of Criminal Procedure) to this order. The deadline for submitting written comments is October 30, 2018. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to:

James Hivner, Clerk
Re: 2019 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 EVIDENCE

RULES OF CIVIL PROCEDURE

and

RULES OF CRIMINAL PROCEDURE

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

TENNESSEE RULES OF EVIDENCE

RULE 412

SEX OFFENSE CASES; RELEVANCE OF VICTIM'S SEXUAL BEHAVIOR.

[Modify the opening paragraph as follows, adding the underlined text and add the new Advisory Commission Comment (2019 Amendment) set out below:]

“Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of an offense under Tenn. Code Ann. §39-13-309 [trafficking a person for a commercial sex act], §39-13-502 [aggravated rape], §39-13-503 [rape], §39-13-504 [aggravated sexual battery], §39-13-505 [sexual battery], §39-13-506 [statutory rape], §39-13-507 [spousal sexual offenses], §39-13-509 [sexual contact by minor with an authority figure], §39-13-522 [rape of a child], §39-13-527 [sexual battery by an authority figure], Tenn. Code Ann. §39-13-528 [solicitation of minors for sexual acts], §39-13-531 [aggravated rape of a child], §35-13-532 [statutory rape by an authority figure], §35-13-533 [promoting travel for prostitution], §39-15-302 [incest], or the attempt to commit any such offense, the following rules apply:”:

* * * *

Advisory Commission Comment [2019 Amendment]

The 2019 amendment adds five offenses to which this rule applies and reorders the listing to the order of appearance in the code.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 4

PROCESS

[Amend Rule 4.04(10) and 4.05(5), and add a new 4.05(6), as indicated below:]

4.04. Service Upon Defendants Within the State. —

* * * *

(10) Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph. The original summons shall be used for return of service of process pursuant to Rule 4.03(2). Service by mail shall not be the basis for the entry of a judgment by default unless the record contains either: (a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11). If the defendant is a domestic corporation, or a foreign corporation authorized to conduct business in this state, a refusal to accept delivery shall be the basis for a default judgment only where the motion for

default is accompanied by evidence from the Tennessee Secretary of State showing that moving party made the certified mail service with the correct entity name and the correct name and address for the registered agent authorized by law to receive service of process. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

(11) * * * *

4.05. Service Upon Defendant Outside This State. —

* * * *

(5) When service of summons, process, or notice is provided for or permitted by registered or certified mail, under the laws of Tennessee, and the addressee, or the addressee's agent, refuses to accept delivery, and it is so stated in the return receipt of the United States Postal Service, the written return receipt, if returned and filed in the action, shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. ~~Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute.~~

(6) Service by mail shall not be the basis for the entry of a judgment by default unless the record contains either: (a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.05 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.05(5). If the defendant is a domestic corporation, or a foreign corporation authorized to conduct business in this state, a refusal to accept delivery shall be the basis for a default judgment only where the motion for default is accompanied by evidence from

the Tennessee Secretary of State showing that moving party made the certified mail service with the correct entity name and the correct name and address for the registered agent authorized by law to receive service of process.

Advisory Commission Comment [2019]

4.04(10) and 4.05. Rules 4.04(10) and 4.05 are amended to clarify the circumstances under which the plaintiff may obtain a default judgment when the defendant was served by mail. Under amended Rule 4.04(10) and new Rule 4.05(6), service by mail can be the basis for entry of a default judgment if the record contains either: a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04(10), Rule 4.05(5), or statute; or a return receipt stating that the addressee or the addressee’s agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11) or 4.05(5). Additionally, when the defendant against which a plaintiff seeks a default judgment after service by mail is a domestic corporation or a foreign corporation authorized to conduct business in this state, the motion for default must be accompanied by evidence from the Tennessee Secretary of State showing that the name of the corporation and the name and address of the registered agent for service of process was correct on the certified mail. Normally, the “Filing Information” record for the domestic corporation or foreign corporation authorized to conduct business in this state should be sufficient “evidence” under Tenn. R. Evid. 803(8), as that public record shows the correct entity name and the name and address of the registered agent for service of process upon the records of the Tennessee Secretary of State. When a domestic corporation or foreign corporation fails to have a registered agent for service of process or the agent cannot be found “with reasonable diligence,” then the Tennessee Secretary of State is the agent for service of process for that corporation. Tenn. Code Ann. §48-15-104(b). When a foreign corporation is

conducting business in this state without a certificate of authority, service of process is governed by statutory provisions such as Tenn. Code Ann. §§20-2-214, -215 and Tenn. Code Ann. §48-15-104. For certain regulated industries, service of process may be governed by other statutes: for example, the commissioner of the Department of Commerce and Insurance is the statutory agent for service of process for domestic and foreign insurers authorized to operate in the state of Tennessee. Tenn. Code Ann. §§ 56-2-103 and 56-2-504. Nothing in this amendment alters the validity of service upon statutory agents under existing law, but service by mail that is refused cannot be the basis for a default judgment unless the party moving for default demonstrates to the trial court that service was made using the correct entity name and a correct agent for service of process.

It should be noted that Rules 4.04(11) and 4.05(5) were amended in 2016 by deleting a former sentence in each rule which stated, in summary, that the United States Postal Service's notation on a return receipt that a properly addressed registered or certified letter was "unclaimed," or other similar notation, was sufficient evidence of the defendant's refusal to accept delivery. Thus, the Postal Service's notation that a registered or certified letter is "unclaimed" is no longer sufficient, by itself, to prove that service was "refused."

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 34

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR
INSPECTION AND OTHER PURPOSES.

[Revise the text of subsection 34.02 and add the new Advisory Commission Comment (2019 Amendment) set out below:]

34.02. *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts. The request may specify the form or forms in which the electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating with specificity the grounds and reasons for objecting to the request. If objection is made to part of an item or category, the part shall be specified. An objection must state whether any responsive materials are being withheld on the basis of that objection.

Advisory Commission Comment [2019 Amendment]

Rule 34.02 is amended to require that objections to requests for production of documents and things be stated with specificity. The amendment is intended to make clear that vague,

generalized, or “boilerplate” objections are improper. Instead, objections should be specific as to the grounds for the objection, describing the reason(s) in a manner that will reasonably inform the adverse party as to what aspect of the request the objection pertains, thereby facilitating the resolution of discovery disputes without the need for judicial intervention.

In addition, the rule is amended to require that any objection or response under Rule 34 make clear what documents and things are actually being withheld pursuant to that objection, if any. A responding party may object to part of a request, or to any item or category sought, but a party should produce those documents and things as to any part of a request for which no objection is made, making clear which parts, items, or categories are being produced. For example, a responding party may object to a Rule 34 request as overly broad on the grounds that the time period covered is too long, or that the breadth of sources from which documents are sought is unduly burdensome, providing the specific bases therefore, and further making clear whether the objection is being made in whole or in part. For any such objection or response that covers only a part of the request, it should be clear from the response that production is being limited to documents or electronically-stored information covering the specifically identified time period or sources for which the responding party has no objection.

This amendment should end the confusion that frequently arises when a producing party states several objections, but then still produces information, documents, and things, leaving the requesting party uncertain whether and to what extent relevant and responsive information has been withheld on the basis of the objection. The producing party does not need to provide a detailed description or log of all documents and things withheld, but does need to respond in a manner that will alert and inform parties what documents and things are being produced, and

what categories or types of documents and things has been withheld pursuant to objection,
thereby facilitating an informed discussion of the objection.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 43

PRESENCE OF THE DEFENDANT.

[add underlined language to Rule 43(e)(2) and delete strikethrough language, and add new Advisory Commission Comment (2019 Amendment) set out below]

(e) Initial Appearance – Audio-Visual Devices.

* * * *

(2) the judge or magistrate and the defendant are able to view and communicate with each other simultaneously and to be heard in the courtroom by members of the public or, if the judge or magistrate is not in a location accessible to the public at the time of the initial appearance, the audio-visual communication is contemporaneously accessible to the public; and,

* * * *

Advisory Commission Comment [2019]

Rule 43(e) contemplates that contemporaneous public access to initial appearances may be achieved through a monitor placed in a room open to the public, such as the lobby of a detention facility, or by other electronic means, such as live streaming accessible to public internet users.