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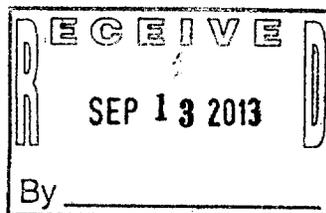
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Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Ave. North
Nashville TN 37219-1407



Re: 2014 Rules Package
No. ADM2013-02056

Dear Mr. Catalano:

I write to express my views on the proposed amendments to the Tennessee Rules of Procedure and Evidence. My comments are made below with specific reference to the particular proposed rule.

- TRAP 9 It is time for the appellate courts of this state to implement electronic filing once and for all. Paper briefs, along with the requirement for different colored covers, is archaic and severely outdated. The federal courts in this district implemented electronic filing in 2006 and serve as a resource for the implementation of electronic filing in the state courts. I remember when I first starting practicing in 1997 that many courts insisted on 14 inch paper and the gnashing of teeth when 11 inch paper finally became mandatory. Eventually, the pain of those who adhere to old ways and eschew progress subsided and the sky did not fall in. It would be the same with electronic filing. Many will cry and complain but eventually the change will be embraced. It is time to face the pain and implement electronic filing without further delay.
- TRAP 10 See above.
- TRAP 11 See above. Paper copies are bad for the environment, unnecessarily increase the cost of litigation, waste valuable resources, and increase our carbon pollution. It is time to stop this practice.
- TRAP 24 While I applaud the provision requiring an electronic copy of any transcripts, it begs the question as to why only the transcript and not the entire record. I propose that the entire record be submitted electronically in pdf format by the trial court clerk.

TRAP 25 This proposed rule needs to be proof-read as there are several typographical errors. For example, Page 14, line 263 should read “After filing *the* notice of appeal....”; Page 15, line 278, the semi-colon should be a period and the first word of the next sentence capitalized; Page 15, line 287, “contained therein” is archaic legalese and superfluous.

TRCrimP 15 This amendment is confusing. A magistrate is defined under T.C.A. 40-5-101 as any officer having power to issue a warrant for the arrest of a person charged with a public offense. Thus, this would include judicial commissioners. T.C.A. 40-5-102(3). In most counties, judicial commissioners, who are mostly non-lawyers, are the first to see the defendant upon their arrest and issue a preliminary court date based on a schedule issued by the general sessions judges of that county. Additionally, T.C.A. 40-1-106 defines the county mayor as a magistrate. The initial appearance may be anywhere from one week away to months away. So, by the actual wording of the amendment, as soon as the defendant sees a judicial commissioner or even the county mayor, the defendant may file a motion in criminal court (a court of record) to take a deposition. Yet, since the defendant has not appeared in General Sessions and has not had their case bound over to the grand jury, most criminal courts would claim to not have jurisdiction over the case until the grand jury issues an indictment. What would be the case number? Alternatively, you would have two courts with simultaneous jurisdiction - the criminal court with jurisdiction over the motion to depose a witness and the general sessions court with jurisdiction over the preliminary hearing. This is confusing and unnecessarily complicated. There is no reason given for why the motion to depose a witness cannot be filed in whichever court has the jurisdiction at the time the motion is filed.

Sincerely,

Jerry Gonzalez

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

2013 OCT 28 AM 10: 25

IN RE: TENNESSEE RULES OF APPELLATE PROCEDURE, RULE 24(c) COURT CLERK
NASHVILLE

No. ADM2013-02056

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Court's invitation for public comment concerning Tennessee Rules of Appellate Procedure 24(c), the Tennessee District Public Defenders Conference ("Conference") recommends that the rule be modified to reflect that it only applies to civil appeals.

The proposed rule change permits the trial court to determine whether the cost to obtain a stenographic transcript is beyond the financial means of an appellant, *or* whether the cost to obtain the report is more expensive than the matters at issue on appeal justify. If the trial court denies the request for a transcript, the appellant must prepare a statement from the best available means.

In *Griffin v. Illinois*, the United States Supreme Court held that destitute defendants must be afforded as adequate appellate review as defendants who have enough money to buy transcripts. 351 U.S. 12, 19; 76 S. Ct. 585, 591 (1956). Additionally, in *Draper v. Washington*, the Court held that the "state must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." 372 U.S. 487, 496; 83 S. Ct. 724, 779 (1963). These two cases acknowledge the rights of an indigent defendant in respect to obtaining a transcript of court proceedings.

The Tennessee Supreme Court has also discussed the essential need for a transcript of prior proceedings in the appeals process. In *State v. Elliott*, the Court held that an indigent defendant in a criminal prosecution must be provided with the same defense tools as a nonindigent defendant, including a transcript of prior proceedings. 524 S.W.2d 473, 475 (1975).

The proposed change to subsection (c) gives the trial judge unfettered discretion to determine whether the issues justify the cost of a stenographic report. Furthermore, should an appellant decide to raise an abuse of discretion issue, the availability of a transcript becomes essential to his appeal. The Tennessee Court of Criminal Appeals has held that without a transcript or adequate record of the trial court proceeding, the determination of the trial court is presumed to be correct. *See State v. McCoy*, 2012 Tenn. Crim. App. LEXIS 351, *citing*, *State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993). Without access to a record, the appellant would be unsuccessful in his endeavor.

As presented, the proposed change could apply to both civil and criminal cases. As a result, it may cause the unintended consequence of denying transcripts to indigent criminal

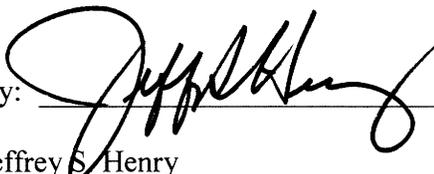
defendants. In essence, the trial court would become the “gatekeeper” regarding whether errors he or she is alleged to have made are worthy of appellate review. This would not be consistent with the rulings of both the Tennessee Supreme Court and the United States Supreme Court.

The Conference believes it is the intent of the Advisory Commission on the Rules of Practice and Procedure to apply the proposed change to subsection (c) only in civil litigation. Therefore, it is the recommendation of the Tennessee District Public Defenders Conference that the proposed change to Tennessee Rule of Appellate Procedure 24(c) clarify that it is only to apply to civil matters. This will ensure indigent criminal defendants in Tennessee are guaranteed their right to a record of the proceeding for which they are seeking an appeal.

Respectfully submitted,
Tennessee District Public Defenders Conference

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