

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE
CODE OF JUDICIAL CONDUCT TOGETHER WITH CHANGES IN
RULES AND STATUTES**

No. M2011-00420-SC-RL1-RL - Filed: November 8, 2011

ORDER

Rule 10, Rules of the Tennessee Supreme Court, sets out the Code of Judicial Conduct (the ethics rules applicable to Tennessee judges). On February 25, 2011, the Tennessee Bar Association (“TBA”) filed a petition asking the Court to adopt an amended Tennessee Code of Judicial Conduct. In summary, the petition asks the Court to amend Tenn. Sup. Ct. R. 10 by replacing the existing Code of Judicial Conduct with the TBA’s proposed new Code of Judicial Conduct. The TBA’s proposed revision of Tenn. Sup. Ct. R. 10 is set out in Exhibit A to the petition. In addition to proposing a revision of the Code of Judicial Conduct set out in Tenn. Sup. Ct. R. 10, the TBA’s petition also proposes specific amendments to various other court rules and statutes “to harmonize the provisions of those specific rules and statutes with the revisions suggested in the draft Code submitted herewith.”

On March 11, 2011, the Court filed an order publishing the TBA’s proposed revision of the Code of Judicial Conduct and soliciting public comments on the proposal. The comment period expired on November 1, 2011.

After having considered the petition and the written comments submitted to the Court, the Court has identified a number of issues concerning which it would be helpful to have oral arguments. The Court therefore directs the Appellate Court Clerk to schedule oral argument at 1:00 p.m. on December 2, 2011, in Nashville, and to notify all the interested parties accordingly.

The Court, at oral argument, is particularly interested in the issues listed below. Only the TBA and the organizations specified below will be permitted to present oral arguments. The length of argument as to each issue shall be in the discretion of the Chief Justice, and arguments shall proceed in the order set out below. The TBA shall argue first in support of the proposed rule at issue, and the designated party or parties shall respond with any objections, concerns or suggestions regarding the issue.

The Court requests oral arguments of the following issues, presented by the party or parties indicated below:

ISSUE 1: Is “Application, [section] II. Senior Judge” of the TBA’s proposed revision of the Code intended to apply only to senior judges/justices designated pursuant to Title 17, Chapter 2, Part 3? If so, should “pursuant to Tenn. Code Ann. § 17-2-303” be added after “designated as a senior judge or justice”?

Party requested to address this issue: The TBA.

ISSUE 2: The Joint Committee of the Tennessee Trial Judges Association and the Tennessee Judicial Conference (“Joint Committee”) recommends deleting the reference to “personal” activities in proposed Rule 2.1 on the ground that “judicial duties should not take precedence over matters of personal or family health, or over such significant events as funerals, weddings, and so forth.” *Report of the Joint Committee...On Proposed New Tennessee Code of Judicial Conduct (“Report of Joint Committee”)*.

Parties requested to address this issue: The TBA and a representative of the Joint Committee.

ISSUE 3: The Joint Committee recommends several changes to proposed Rule 2.11 and to the related proposals to adopt new rules of appellate, civil and criminal procedure governing motions for recusal. The Joint Committee recommends: (1) deleting the requirement (in Rule 2.11) for written findings when the judge grants a motion for recusal; (2) permitting a judge who voluntarily recuses himself or herself prior to the filing of a motion for recusal to “transfer the case to another judge of the same court by written order”; and (3) providing in the rules of procedure that “the untimely filing of a recusal motion may be considered by the judge in determining whether the motion is presented for an ‘improper purpose’ and ultimately in deciding the motion for recusal.” *Report of the Joint Committee*. Additionally, the Court received one written comment suggesting that the proposed rules of procedure include several other procedural requirements for recusal motions. The Brennan Center for Justice and Justice at Stake jointly submitted a public comment supporting the adoption of proposed Rule 2.11.

Parties requested to address this issue: The TBA, a representative of the Joint Committee, and, in its discretion, a representative of the Brennan Center for Justice and Justice at Stake.

ISSUE 4: Are the TBA’s proposed rules of procedure regarding recusal motions intended to apply to judges of the municipal and/or general sessions courts? If so, (1) should a written motion for recusal be required in such courts; and (2) what is the appropriate procedure for appealing the ruling on such a motion? If not, should rules be adopted to address the issue of recusal in those courts? Relatedly, some general sessions courts – by private act – exercise jurisdiction over certain types of cases typically heard in courts of record (e.g., family-law cases, juvenile proceedings, etc.); if the TBA’s proposed recusal rules are not intended to apply generally to municipal and/or general sessions courts, should the recusal rules nevertheless apply to general sessions courts exercising jurisdiction in such cases?

Parties requested to address this issue: The TBA and a representative of the Joint Committee.

ISSUE 5: The Court received one written comment recommending a modification of proposed Rule 3.7(A)(2) to permit a judge to solicit contributions to charitable organizations from the judge’s friends, in addition to soliciting such contributions from family members and from judges over whom the judge does not exercise supervisory or appellate authority (which the rule would permit).

Parties requested to address this issue: The TBA and, in its discretion, a representative of the Joint Committee.

ISSUE 6: As pointed out in both the TBA’s petition and in the Joint Committee’s Report, proposed Rule 4.1 omits a number of provisions contained in the ABA’s Model Rule 4.1. In particular, the ABA’s Model Rule 4.1(A)(4) states that a judge or judicial candidate (except as permitted by law or by Rules 4.2, 4.3 and 4.4) shall not “solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office[.]” (Emphasis added.) The underscored words, however, are omitted from the TBA’s proposed Rule 4.1(A)(4). In arguing this issue, the parties should address the reasons for the omission of the “contribution” text contained in the ABA Model Rule; they also should address the meaning of

the word “assessment” as it relates (in the TBA’s proposed rule) to “candidate[s] for public office[.]”

Parties requested to address this issue: The TBA and a representative of the Joint Committee.

ISSUE 7: Like Issue 5, Issue 6 pertains to proposed Rule 4.1(A)(4). Proposed Rule 4.1(A)(4) would state that a judge or judicial candidate shall not “solicit funds for or pay an assessment to a political organization or candidate for public office[.]” The Joint Committee recommends modifying that provision to allow a judge to solicit funds for a political organization or another candidate for public office “from a family member or domestic partner of the judge or judicial candidate and from a judge or judicial candidate of the same or higher judicial level[.]”

Parties requested to address this issue: The TBA and a representative of the Joint Committee.

ISSUE 8: Proposed Rule 4.1(A)(8) would prohibit (except as permitted by law or by Rule 4.2, 4.3, and 4.4) a judge or judicial candidate from “personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee authorized by Rule 4.4[.]” The Joint Committee recommends deleting paragraph (8) from Rule 4.1(A).

Parties requested to address this issue: The TBA and a representative of the Joint Committee.

ISSUE 9: The Joint Committee notes that Canon 5A of the current Code of Judicial Conduct provides that a judge or candidate for judicial office shall not “publicly endorse or publicly oppose another candidate for public office” and that proposed Rules 4.1 and 4.2 would not contain a similar provision. The Joint Committee recommends adding the following new paragraph (C) to proposed Rule 4.2: “(C) A judge or judicial candidate shall not publicly endorse or publicly oppose a candidate for nonjudicial public office.”

Parties requested to address this issue: The TBA and a representative of the Joint Committee.

In addition to the organizations listed above as parties requested to participate in the oral arguments, the Court invites representatives of the Tennessee Council of Juvenile and

Family Court Judges, the Tennessee General Sessions Judges Conference, and the Tennessee Municipal Judges Conference to attend the oral arguments. Should any of those organizations wish to address one or more of the issues listed above at oral argument, the organization shall notify the Appellate Court Clerk in writing by Wednesday, November 23, 2011, and shall designate a representative to appear on the organization's behalf.

A number of issues were raised in the various public comments submitted to the Court. The omission of any of those issues from the list of issues to be argued orally before the Court does not signify that the Court has already decided to adopt or reject any of the suggested changes to the proposed rules. If the TBA and/or any of the individuals or organizations that previously submitted written comments wishes to submit further written argument as to any issue(s) omitted from the above list, those written arguments shall be filed with the Court and received by the Appellate Court Clerk, in Nashville, on or before November 29, 2011.

In closing, the Court thanks the TBA for its conscientious and thorough work in developing and presenting to the Court the proposed amendments to the Code of Judicial Conduct. The Court also thanks the organizations and individuals who submitted written comments concerning the proposed amendments; the comments submitted to the Court are very helpful in our consideration of the proposed amendments. The Court expresses its sincere gratitude to all the participants in this important rulemaking process.

The Clerk shall send a copy of this order to each of the organizations listed above as participating in oral arguments, as well as to each individual and organization that filed a written comment during the public-comment period.

IT IS SO ORDERED.

PER CURIAM