

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
09/23/2024
Clerk of the
Appellate Courts

**IN RE: AMENDMENTS TO TENNESSEE RULES OF APPELLATE
PROCEDURE, CIVIL PROCEDURE AND CRIMINAL PROCEDURE**

No. ADM2024-01134

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 June 21, 2024, the Advisory Commission completed its 2023-2024 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, Civil Procedure, and Criminal Procedure) to this order. The deadline for submitting written comments is November 19, 2024. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to:

James Hivner, Clerk
Re: 2025 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 CIVIL PROCEDURE

and

RULES OF CRIMINAL PROCEDURE

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

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 22

MOTIONS

[Amend Rule 22 as indicated below:]

Rule 22. Motions.

(a) Content of Motion; Response. – Unless another form is elsewhere prescribed by these rules, an application for an order, unless made during a hearing, shall be made by filing a written motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a the specific provisions of these rules governing such a motion and the papers, if any, on which it is based. The motion shall state the grounds on which it is based, ~~and the order or other relief requested, and any legal argument necessary to support the motion.~~ A separate brief or memorandum of law supporting a motion need not be filed. If a motion is based on factual matters not appearing of record, the motion shall be accompanied by an affidavit, an unsworn declaration made under penalty of perjury and in the form specified in Tenn. R. Civ. P. 72, or other supporting evidence. Any affidavit or declaration must contain only factual information, not legal argument. ~~Each copy of a motion shall be accompanied by a memorandum of law and if the motion is based on matters not appearing of record, by affidavits or other evidence in support thereof.~~ Any showing in opposition to a motion, other than a procedural motion, shall be served and filed within 10 days after the motion is filed. The court may shorten or extend the time for responding to any motion.

(b) Motions for Procedural Orders. – Notwithstanding the provisions of (a) of this Rule 22 as to

motions generally, motion for procedural orders, including any motion under Rule 21(b), may be acted upon at any time, without awaiting a response. The motion shall contain a statement concerning efforts to contact adverse counsel and shall reflect whether there is opposition to the motion. Any party adversely affected by such action may by application to the court request consideration, vacation, or modification of such action. Pursuant to rule or order of the courts, motions for specified types of procedural orders may be disposed of by the clerk.

Advisory Commission Comment [2025]

Paragraph (a) was amended to make clear that a separate brief, memorandum of law, or affidavit need not be filed in every instance where relief is sought by motion. In instances where factual matters outside the record are presented for the court's consideration, the movant should file a separate affidavit, unsworn declaration made under penalty of perjury, or other supporting evidence suitable to allow the court to consider such extrajudicial facts. In such instances, the supporting materials should include only the relevant extrajudicial facts and not the legal argument of the movant or counsel.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 23

CLASS ACTIONS

[Amend Rule 23.08 as indicated below:]

23.08. Disposition of Residual Funds. Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of all approved: class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

It shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds. ~~A distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.~~ Residual funds shall be distributed to one or more entities for purposes that have a direct or indirect relationship to the objective of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class, or to the Administrative Office of the Courts to support activities and programs that promote access to the civil justice system for low income residents of Tennessee.

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court's own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement of residual funds in a manner consistent with this rule.

Advisory Commission Comment [2025]

The prior rule allowed complete discretion to use residual funds for any purpose whatsoever, with only a notation that use for indigent representation was permitted. The prevailing view among legal scholars and courts is that use of residual funds should target some combination of programs that advance the class members' interests and/or programs that advance access to justice for indigent citizens. Some jurisdictions direct that residual funds should be used exclusively for the interests of the class members and only for indigent representation purposes if advancing the class members' interests is not feasible. See generally Me. R. Civ. P. 23(f)(2). Many jurisdictions direct that a prescribed percentage of the funds should be used to provide legal help to indigent persons, with the remainder paid to organizations that reflect the class's interests. See generally S.C. R. Civ. P. 23(e)(2) (minimum 50% to access to civil justice activities or programs).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 26

GENERAL PROVISIONS REGARDING DISCOVERY

[Amend Rule 26.02 as indicated below:]

Advisory Commission Comment [2025]

Rule 26.02(4) governs discovery of facts known to and opinions held by experts and defines the specific means through which such discovery may be obtained. Tenn. R. Civ. P. 26.02(4)(A)-(B). By its terms, the Rule addresses only discovery of expert witnesses who have been specifically retained or employed to provide expert testimony, or who were consulted in anticipation of litigation or preparation for trial but are not intended to be called at trial. Witnesses who have not been specifically retained or employed by a party to provide expert testimony, but who are expected to present evidence under Tennessee Rules of Evidence 702, 703, or 705 (often referred to as “actor” or “viewer” experts) are not covered by Tenn. R. Civ. P. 26.02(4)(A)-(B). Accordingly, the identity of such witnesses, as well as any facts or opinions about which they may testify, are freely discoverable as with any ordinary witness. See *White v. Vanderbilt University, et al.*, 21 S.W.3d 215, 223-24 (Tenn. 1999).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 47

JURORS

[Amend Rule 47.02 as indicated below:]

Rule 47.02. Additional Jurors. The court may direct prior to the start of jury selection that one or more jurors in addition to the regular jury of twelve persons be called and impaneled. The additional jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. If one or more additional jurors are called, each party is entitled to one peremptory challenge for each such additional juror, up to the maximum provided by law. Such additional peremptory challenges may be used against any regular or additional juror. The trial court in its discretion may use either of the following methods to select and impanel additional jurors:

(1) During the jury selection or the trial of the case, there shall be no distinction made by the court as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. ~~A juror who is not selected to be a member of the final jury shall be discharged when that jury retires to consider its verdict.~~ If a vacancy arises after the jury retires, which the court chooses to fill, the court shall select an additional juror in the same manner.

(2) Following the selection of the jury of twelve regular jurors or such other number as the law provides, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors, in the order in which they are called, shall replace regular jurors who, ~~prior to the time the jury retires to consider its verdict,~~ become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict. ~~An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.~~

(3) Regardless of the method chosen, the court may retain additional or alternate jurors after the jury retires to deliberate. The court must ensure that a retained additional or alternate juror does not discuss the case with anyone until that additional or alternate juror replaces a juror or is discharged. Whenever any additional or alternate juror replaces a juror after deliberations have begun, the court must instruct the newly reconstituted jury panel to begin its deliberations anew.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 24

TRIAL JURORS

[Amend Rule 24(f) as indicated below:]

Rule 24: Trial Jurors

(f) ADDITIONAL JURORS. – Before jury selection begins, the court may call and impanel one or more jurors in addition to the regular jury of twelve persons. The following procedures apply:

(1) SAME AS REGULAR JURORS. – The additional jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors.

(2) METHODS OF IMPANELING ADDITIONAL JURORS. The trial court may use either of the following methods to select and impanel additional jurors:

(A) SINGLE ENTITY. – During jury selection and trial of the case, the court shall make no distinction as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. ~~A juror who is not selected to be a member of the deliberating jury shall be discharged when that jury retires to consider its verdict.~~ If a vacancy arises after the jury retires, the court shall select an

additional juror in the same manner.

(B) SEPARATE ENTITIES. – Following the selection of the jury of twelve regular jurors, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

(3) Regardless of the method chosen, the court may retain additional or alternate jurors after the jury retires to deliberate. The court must ensure that a retained additional or alternate juror does not discuss the case with anyone until that additional or alternate juror replaces a juror or is discharged. Whenever any additional or alternate juror replaces a juror after deliberations have begun, the court must instruct the newly reconstituted jury panel to begin its deliberations anew.