Knoxville Bar Association

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VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building, 401 Seventh Avenue North
Nashville, TN 37219-1407

Re: **No. ADM2021-00969**

Dear Mr. Hivner:

I am writing to you and the Tennessee Supreme Court on behalf of the Knoxville Bar Association (KBA) Board of Governors regarding Order No. ADM2021-00969. The KBA Board of Governors respectfully submits this comment for the Court's consideration regarding the proposed amendment to Tennessee Rule of Civil Procedure 45.09. The Advisory Commission is recommending adding a new section to this Rule that appears to empower trial court clerks to issue any Rule 45 subpoena as a paper document or by electronic means. The KBA's Professionalism Committee has raised the following questions or concerns about the proposed amendment.

First, explicitly authorizing electronic issuance of subpoenas may invite abuses of electronic systems by parties requesting numerous electronic subpoenas in bad faith. The language in the proposed amendment does not appear to be limited to clerk's offices in jurisdictions with electronic filing systems. Although Rule 45.07 prohibits imposing undue burden or expense on an individual non-party witness, it does not clearly address abuses arising not from the requests in a particular subpoena but from the number of subpoenas issued. And Rule 45.07 may not be much of a deterrent to pro se litigants, especially since they are not subject to the Rules of Professional Conduct.

Second, it may not be clear from the current language of the proposed amendment whether court clerks are intended to have the discretion to determine the appropriate method for issuing a requested subpoena in any particular case. To the extent the proposed amendment does grant trial court clerks discretion to issue subpoenas electronically, that could open the clerks to complaints from litigants about how the discretion was exercised.

Third, if they have not weighed in already, it could be beneficial to request a comment from the Tennessee Court Clerks' Conference.

As always, the KBA appreciates the invitation to consider and comment on proposed rules changes.

Sincerely,

Cheryl G. Rice
President

Lisa Marsh - In re Amendments to Tennessee Rules of Appellate Procedure and Civil Procedure, No. ADM2021-00969

From: "Paul J. Krog" <pkrog@bulso.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 11/23/2021 6:50 PM
Subject: In re Amendments to Tennessee Rules of Appellate Procedure and Civil Procedure, No. ADM2021-00969

Dear Mr. Hivner,

Please permit me to make the following comments of (with one exception) a technical nature concerning the above-referenced proposed amendments. Please also forgive the informality of doing so via email.

TRAP 11: The proposed amendment to Rule 11(f) deletes the page limitation, but unlike the proposed amendments to (b) and (d), does not insert a cross-reference to Rule 30(e); the advisory commission's comment says that (f) has been amended to refer to 30(e), so this appears to be an oversight and should be corrected.

TRAP 27(i): Leaving this vestigial version of Rule 27(i) is inelegant. The better practice would be to replace 27(i), including its heading, with the material being added as TRAP 30(e) (and to change the cross-references accordingly).

TRAP 30(e): In addition to the portions listed in the second paragraph of the proposed insertion, any compendium of materials appended to a brief pursuant to Rule 27(e) should be excluded from the word count as well. These compendia are not substantive portions of the brief and can run to thousands of words in complex statutory cases. There is also the question of tabular appendices, which were somewhat ambiguous under the old Rule and remain unaddressed in the current proposal. By way of example, both parties attached substantial material of this kind in the *Milan Supply Chain Solutions* case. If the Court finds it helpful, such appendices should be explicitly excluded from the word count as well.

In addition, the proposed rule gives the respondent to a Rule 11 application only 5,000 words, compared to an applicant's 15,000. This is a proportional reduction in the respondent's space over the current divide of 50 and 25 pages, respectively. The respondent will invariably need to restate facts and either restate issues or set out new issues. (As one presenter noted at a recent appellate-writing seminar I attended, "If you represent the appellee and are satisfied with the appellant's statement of the issues, one party needs a new attorney.") The Court should maintain the existing proportional divide between the applicant and the respondent and afford the latter 7,500 words under the revised Rule 30(e).

Finally, as typed in the appendix to Court's order, the second paragraph of TRAP 30(e) contains a typo: "Table of Contends" should be "Table of Contents."

TRAP 30(a): There is no proposal to amend Rule 30(a) to incorporate the formatting specifications currently contained in Supreme Court Rule 46 § 3.02(a). This is unfortunate, as having those formatting standards segregated in the Supreme Court Rules leads to confusion and likely reduces compliance. The Court should, in conjunction with adopting the word limitations from Supreme Court Rule 46 into the Rules of Appellate Procedure, do the same with the document-formatting rules. Incorporating only one set of these provisions into the Rules of Appellate Procedure creates unnecessary conflict between the two.

TRCP 5B(2): The proposed rule as written is ambiguous. Does the penultimate sentence mean that these documents can be electronically signed when being electronically filed or served, or when the local court allows efiling, or even when being served and filed by conventional, physical means? If the Court intends to make an electronic signature a substitute for a physical signature in all contexts, it should make that change by amending Rule 11.01(a), not by adding this subsection to Rule 5B.

TRCP 58: This is my non-technical comment. The proposed amendment is unwise, unnecessary, and a trap for the unwary. As a practical matter, orders prepared by the court rarely comply, at least in an unambiguous fashion, with Rule 58(3). And in this fashion the proposed rule creates conflict with Rule 65: restraining orders become effective on notice per Rule 65.03(5), regardless of whether they contain the signatures and certificates described in Rule 58. Respectfully, the requirements in Rule 58, particularly with respect to orders prepared by the court, are inefficient, and a rule more analogous to Federal Rule of Civil Procedure 58(c) would be preferable as yielding greater certainty, clarity, and finality. (The requirement in the Tennessee rule that counsel serve, and certify service, of counsel-prepared orders is salutary, and I do not intend to suggest otherwise.) I recently concluded a case in which the judge signed a putatively final order that failed to comply with Rule 58: much delay was caused by the need to obtain a replacement order with the appropriate certificate of service. The Court should not expand this no-finality trap farther than it already extends.

Respectfully submitted,

Paul Krog
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