RUTHERFORD COUNTY AND CANNON COUNTY
CIRCUIT COURT
DIVISION III

DON R. ASH
CIRCUIT JUDGE
MERRY PEACH MARTIN
JUDICIAL ASSISTANT

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COPY

June 22, 2011

Chief Justice Cornelia A. Clark
Supreme Court Building, Suite 318
401 7th Avenue South
Nashville, Tennessee 37203

Justice William C. Koch
Supreme Court Building, Suite 321
401 7th Avenue South
Nashville, Tennessee 37203

Justice Janice M. Holder
50 Peabody Place
Suite 209
Memphis, Tennessee 38103

Justice Sharon G. Lee
Post Office Box 444
Knoxville, Tennessee 37901-0444

Justice Gary R. Wade
Post Office Box 444
Knoxville, Tennessee 37901-0444

Re: Comments on Proposed 2011 Code of Judicial Conduct

Dear Chief Justice Clark and Justices of the Tennessee Supreme Court:

My name is Don Ash and I am a Circuit Court Judge in the 16th Judicial District. For the past ten years, I have taught Judicial Ethics for the National Judicial College plus have served on the Tennessee Court of the Judiciary for over a decade. While I applaud the idea of reviewing the Code of Judicial Conduct, I have serious concerns about the proposal from the Tennessee Bar Association. I would like to describe some of the sections suggested and my issues with them.

1. Preamble (Application) I. Applicability of the Code - A judge is anyone … or an administrative judge.

- **The Court of the Judiciary, in its current form, has neither the authority nor the budget to deal with this substantial addition, namely authority over administrative judges.**

2. Canon 2- A judge shall perform … competency ..

- **This term is not defined nor am I convinced not being competent is an ethical violation, especially for elected judges.**

3. Canon 2.10(E) - This allows a judge to respond to the media.

- **This is confusing. Does (E) only apply to (D)? How are (A) and (D) not in conflict? I think this will promote judges to respond to television and newspaper inquiries about pending cases.**

4. Canon 4.2 (Comment 6A) - This says we, as judges, can endorse or oppose other candidates for public office.

- **We should not be drawn into statewide/local races and it puts us in a difficult position. Strangely, this is only in the comments and not in the Canon itself.**

5. Canon 4.4(B)(2)

- **The limit of 180 days may not be adequate time to raise campaign funds. I suggest 270 days.**

With Kindest Regards,

Don R. Ash

DRA/mpm
Cc: Mr. Michael Catalano, Clerk

State of Tennessee
Chancery Court
SIXTH JUDICIAL DISTRICT
CITY-COUNTY BUILDING
400 MAIN AVENUE, SUITE 125
KNOXVILLE, TENNESSEE 37902

DARYL R. FANSLER
CHANCELLOR

TELEPHONE: (865) 215-2560
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October 27, 2011
Via Facsimile (615)532-8757 and U. S. mail

Michael W. Catalano, Clerk
Tennessee Appellate Courts'
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE CODE OF JUDICIAL CONDUCT TOGETHER WITH CHANGES IN RULES AND STATUES, No. M2011-00420-SC-RL1-RL-Filed: March 11, 2011

Dear Mr. Catalano:

I write to comment on the proposed new rules for judicial conduct. I encourage the Court to examine the proposed rules that limit a judge's ability to participate in fund raising activities for educational, religious, charitable, fraternal or civic organizations not conducted for profit.

The proposed new rules, much like the existing rules, state that judges are encouraged to participate in the activities of such organizations. Further, it is suggested that such participation helps integrate judges into the community and furthers public understanding of, and respect for, courts and the judicial system (Rule 3.1, comments 1 and 2). However, judges are prohibited from soliciting contributions to such organizations except from family members and judges over whom the judge exercises no supervisory or appellate authority. (R.3.7(A)(2)). This rule prevents solicitation from any friends of the judge whose case he or she could not preside over because of that very relationship.

Clearly judges should not solicit from parties or counsel appearing before them or likely to. Likewise, a judge should not solicit contributions where to do so might create the impression of coercion (R. 3.1, comment 4).

However, friends are unlikely to feel coerced because of the judge's position. The judge cannot hear their case, even if they had one pending, so contributions are unlikely to be made to curry favor. The same applies to situations such as ringing the Salvation Army bell at Christmas where no contribution is solicited and where, in urban areas at least, the vast majority of contributors would not recognize the judge as such.

The judge will understand that it is unethical to ask parties or attorneys to contribute or to use the office to lend prestige to an organization's efforts to solicit contributions. However, the current restraints are not so easily understood by members of the extrajudicial organization. To the contrary, these limitations hinder our integration into the community and do nothing to further the public's understanding of the judicial system. In fact, it gives the appearance that we are elevating ourselves over those who are expected to engage in these activities in furtherance of the organization's purpose.

There are sufficient constraints on the judge's activities to allow for solicitation of contributions from friends or others not likely to appear before the Court without creating the appearance of improper behavior. I urge the court to consider expanding Rule 3.7(A) to allow for such solicitation so we may ring a bell or participate in the Optimist Club annual cheese sale or seek contributions to preserve national parks or historical museums. That allows us to pitch in just like every other member of the organization and I am confident that with the constraints set forth in the code we could do so without giving the appearance of improper behavior.

I thank you and the Court in advance for your consideration of these comments.

Sincerely,

DARYL R. FANSLER
Chancellor, 6th Judicial District

DRF/jmw

State of Tennessee
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October 26, 2011

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

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: March 11, 2011

Dear Mr. Catalano:

Enclosed herewith is the REPORT OF THE JOINT COMMITTEE OF THE TENNESSEE JUDICIAL CONFERENCE AND TENNESSEE TRIAL JUDGES ASSOCIATION ON PROPOSED NEW TENNESSEE CODE OF JUDICIAL CONDUCT. Also enclosed herewith is the Amendment of the Tennessee Trial Judges Association to the report. The report and amendment are submitted as written comments under the Tennessee Supreme Court's order filed March 11, 2011.

Thank you.

Yours very truly,

Chancellor Daryl R. Fansler
President, Tennessee
Trial Judges Association

DRF:pj

Enclosures

cc: David R. Duggan
Secretary, Tennessee Trial Judges Association

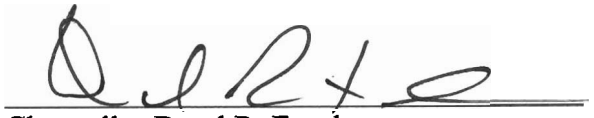
Amendment of Tennessee Trial Judges Association to the Report of the Joint Committee of the Tennessee Judicial Conference on New Proposed New Tennessee Code of Judicial Conduct Report

On October 19, 2011, the Tennessee Trial Judges Association approved the Report of the Joint Committee of the TJC and TTJA issued September 30, 2011, but adopted an amendment for Rule 3.7(A)(4). The amendment of the Tennessee Trial Judges Association would replace the Joint Committee's recommendation for Rule 3.7(A)(4). With reference to the TBA's proposed Rule 3.7(A)(4), the amendment strikes the comma following the word "entity" and strikes the language beginning with the word "but" through the word "justice." As revised, Rule 3.7(A)(4) would read as follows:

> (A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
>
> * * *
>
> (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity;
>
> * * *

The purpose of the amendment is to provide that judges may participate in activities and events of educational, religious, charitable, fraternal, or civic organizations not conducted for profit whether or not the event serves a fund raising purpose. Comment 3 to Rule 3.7 would be replaced with language in accordance with the purpose of the amendment made by the Tennessee Trial Judges Association.

This 26th day of October, 2011.



Chancellor Daryl R. Fansler,
President, Trial Judges Association

REPORT OF THE JOINT COMMITTEE OF THE TENNESSEE JUDICIAL CONFERENCE AND TENNESSEE TRIAL JUDGES ASSOCIATION ON PROPOSED NEW TENNESSEE CODE OF JUDICIAL CONDUCT

SEPTEMBER 30, 2011

Report to the Tennessee Judicial Conference and Tennessee Trial Judges Association on the new Tennessee Code of Judicial Conduct proposed by the TBA

In March of 2010, the Tennessee Judicial Conference and Tennessee Trial Judges Association formed a Joint Committee to study and report upon the Tennessee Bar Association's proposed new Tennessee Code of Judicial Conduct. Members of the Joint Committee are Judge Don R. Ash, Chancellor Jerri Saunders Bryant (advisory member), Judge Donald E. Parish, Judge D. Michael Swiney, and Chancellor John F. Weaver, Chair.

On October 20, 2010, the Joint Committee issued its report to the Tennessee Judicial Conference and Tennessee Trial Judges Association on the TBA Task Force's Report and Draft Code. On February 25, 2011, the TBA filed a petition with the Tennessee Supreme Court for the Court's adoption of the TBA's Proposed New Judicial Rules of Conduct. Although the TBA adopted the Joint Committee's interlocutory appeal approach for recusals, in lieu of the colleague review procedure originally proposed by the TBA Task Force, the remainder of the Joint Committee's report had minimal impact upon the TBA's pending petition.

The TBA's proposed petition does not address Tenn. Code Ann. § 17-3-106 on the "Rules of conduct for judges." The statute gives the Tennessee Judicial Conference the "full power and authority to prescribe rules of official conduct of all judges" but requires that the rules "be in compliance with the Code of Judicial Ethics as promulgated by the American Bar Association but not otherwise." However, the statutes's application to the TBA's pending petition appears to be beyond the scope of the Joint Committee's assignment.

Since mid-year of 2010, the Joint Committee has engaged in extensive study, conferences, debates and written exchanges concerning the TBA's proposed new code. From that process, the Joint Committee submits this report to the Tennessee Judicial Conference and

the Tennessee Trial Judges Association.

In making its recommendations, the Joint Committee's report follows the format of the TBA's proposed new code. Of utmost importance, the Joint Committee encourages the Tennessee Judicial Conference and the Tennessee Trial Judges Association, as well as all of the members of both organizations, to consider this report and to make their own comments to the Tennessee Supreme Court. The Court has set November 1, 2011, as the deadline for comments.

RECOMMENDATIONS OF THE JOINT COMMITTEE OF THE TJC AND TTJA ON PROPOSED NEW TENNESSEE CODE OF JUDICIAL CONDUCT, PREAMBLE–APPLICATION I.(B) and CANON 1.3 COMMENT (4)

The TBA did not adopt the Joint Committee's recommendations for the Preamble and Canon 1 of the TBA's proposed new code. The Joint Committee's recommendations concerned section I.(B) of the Application section of the Preamble and Comment 4 to Canon 1.3. The Joint Committee, however, continues to recommend the following changes from the TBA's proposals:

Preamble – Application 1.(B)

The Joint Committee proposes the following language instead of the TBA's proposed language:

> "A judge within the meaning of this Code, is anyone who is authorized to perform judicial functions, including but not limited to, an officer such as a magistrate, referee, court commissioner, judicial commissioner, special master, divorce referee or any other referee performing judicial functions."
>
> Comment – We have removed the terms "or an administrative judge or hearing officer." This removal is based on two concerns. First, the provisions of Tennessee law dealing with the Court of the Judiciary are not applicable to these individuals so there is no disciplinary authority. Next, the Court of the Judiciary does not have sufficient staff to cover this dramatic increase in the individuals they oversee.

Canon 1.3 – Comment (4)

The Joint Committee proposes the deletion of this comment.

It is believed this issue is adequately addressed in Rule 1.3.

RECOMMENDATIONS OF THE JOINT COMMITTEE ON THE TJC AND TTJA ON PROPOSED NEW TENNESSEE CODE OF JUDICIAL CONDUCT, CANON 2

The TBA adopted the Joint Committee's interlocutory appeal approach to recusals in lieu of the TBA Task Force's original colleague review approach. However, the Joint Committee continues to recommend the following revisions to the TBA's proposals, none of which were adopted by the TBA:

Canon 2

The Joint Committee proposed the deletion of the concept of "competence" as an ethical concern. The Tennessee Bar Association petition did not adopt our proposal and continues to include competence as an ethical precept. The Joint Committee strongly suggests that the use of the word "competence," which is undefined, injects a subjective performance based concept into the ethics rules. This is in conflict with Comment [3] to Rule 2.2, which admits that a judge may make good faith errors of fact or law. The Joint Committee believes that the Tennessee Bar Association proposed rule may be difficult to objectively apply.

Rule 2.1

The Joint Committee proposed that language suggesting that the duties of judicial office would take precedence over the judge's "personal" activities should be deleted. The Joint Committee suggests 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. The Tennessee Bar Association Petition did not accept our proposal.

Rule 2.5(A)

As in the language of Canon 2, the Joint Committee proposed that "competence" be deleted from the corresponding rule as an ethical consideration. The Tennessee Bar Association Petition did not adopt our proposal. Furthermore, the Joint Committee proposed that the matter of cooperation "with other judges and court officials in the administration of court business" be deleted as an ethical concern. The Tennessee Bar Association Petition did not adopt our proposal in either the substantive rule nor in the comments.

Rule 2.10(D)

The Joint Committee recommends that the proposed language be changed as follows: Notwithstanding the restrictions in paragraph (A), a judge may comment on any proceeding in which the judge is a litigant in a personal capacity.

Rule 2.10(E) and Comment [3]

Concerns judicial statements on pending or impending cases. The Joint Committee proposed the deletion of these provisions regarding the responses of a judge to "allegations" . . . "concerning the judge's conduct in a matter." The Tennessee Bar Association Petition did not adopt our proposal.

Rule 2.11(D)

Concerns the recusal or disqualification of judges. The Joint Committee suggests two changes/additions to the procedure proposed within the Tennessee Bar Association Petition. They are:

If the challenged judge grants the motion to recuse, that judge should not be required to state the reasons for the ruling including factual findings. Such a requirement is superfluous.

As a new recommendation, the Joint Committee also recommends that a comment should be added which states that if a judge acts to voluntarily recuse before a motion is filed seeking recusal, then the judge may transfer the case to another judge of the same court by written order, which need not include the reasons for the transfer, to the extent that it is necessary for the case to proceed.

In order to implement Judicial Conduct Rule 2.11(D) the Tennessee Bar Association has also proposed an amendment to the Tennessee Rules of Civil and Criminal Procedure. These two proposed changes appear as EXHIBIT B to the Petition of the Tennessee Bar Association. The proposed amendments to the procedural rules require that a movant affirmatively state that a recusal motion "...is not being presented for any improper purpose, such as to harass or to cause unnecessary delay..." The joint committee suggests that the untimely filing of a recusal motion may be considered by a judge in determining whether the motion is presented for an "improper purpose" and ultimately in deciding the motion for recusal. This may be accomplished by adding a second sentence to the proposed Rule in EXHIBIT B to the Petition of the Tennessee Bar Association as follows: A judge may consider the timeliness of the filing of a motion for recusal in deciding the motion.

The Joint Committee also recommends that the TBA's proposed rule 2.13(B) be changed to incorporate an identifiable contribution limit. The Joint Committee's report on the TBA's

proposed rule 2.13(B) is as follows:

Rule 2.13(B)

Concerns the appointment of a lawyer to a compensated position by a judge who has received campaign contributions for the lawyer, et al. The Joint Committee suggests the deletion of the Tennessee Bar Association's proposed language and the substitution of the following language:

A judge shall not appoint a lawyer to a position if the judge knows that the lawyer, the lawyer's firm, or the lawyer's spouse or domestic partner has contributed more than $1,000.00 to the judge's campaign within one year prior to such appointment unless:

(1) the position is substantially uncompensated;

(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions or given support;

(3) the judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.

RECOMMENDATIONS OF
THE JOINT COMMITTEE OF THE TJC AND TTJA ON
PROPOSED NEW TENNESSEE CODE OF JUDICIAL CONDUCT, CANON 3

The TBA did not adopt any of the Joint Committee's recommendations for Canon 3. The Joint Committee continues to make all of its prior recommendations which are as follows:

Proposed Rule 3.1(E) currently reads as follows:

> RULE 3.1 Extrajudicial Activities in General
>
> A judge may engage in personal or extrajudicial activities, except as prohibited by law or this Code. However, when engaging in such activities, a judge shall not:
>
> (E) make inappropriate use of court premises, staff, stationery, equipment, or other resources.

The Joint Committee recommends that part (E) of Proposed Rule 3.1 be revised to read as follows:

> **(E) make use of court premises, staff, stationery, equipment, or other resources in a manner prohibited by these rules.**

Proposed Rule 3.7(A)(4) currently reads as follows:

> RULE 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities
>
> (A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:
>
> (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice[;].

The Joint Committee recommends that subpart (4) of Proposed Rule 3.7(A) be revised to read

as follows:

> **(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund raising purpose, the judge shall not so participate[;].**

Proposed Rule 3.6 currently reads as follows:

Rule 3.6 Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility or an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

The Joint Committee further recommends that the TBA's proposal for Rule 3.6 be replaced by the Oklahoma version of Rule 3.6 as follows:

Rule 3.6 Affiliation with Discriminatory Organizations

RULE 3.6

Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination.

(C) A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

RECOMMENDATIONS OF
THE JOINT COMMITTEE OF THE TJC AND TTJA
ON RULES OF JUDICIAL CONDUCT, CANON 4

The TBA did not adopt any of the Joint Committee's substantive recommendations concerning Canon 4. The Joint Committee is concerned about the expansion of politics into the judiciary from the TBA's proposal for Canon 4. In particular, the Joint Committee is concerned about the TBA's deletion in its proposed Rule 4.2 of the prohibition against a judge endorsing a nonjudicial political candidate. The Joint Committee does not believe that the prestige, integrity and independence of the judiciary should be loaned to nonjudicial offices or political races. Furthermore, the Joint Committee believes that it is inconsistent to permit judges to engage in campaign activities and fund raising for themselves, and to require them to identify and disclose their contributors, but prohibit them from soliciting or accepting funds other than through a campaign committee. Accordingly, the Joint Committee continues to make the following recommendations for Canon 4:

TBA subsections 4.1(A)(4) and (5) currently read as follows:

> RULE 4.1 Political and Campaign Activities of Judges and Judicial Candidates in General
>
> (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
>
> > (4) solicit funds for or pay an assessment to a political organization or candidate for public office;
> >
> > (5) [intentionally omitted][;].

The Joint Committee recommends that subsections (4) and (5) of Proposed Rule 4.1(A) be changed to read as follows:

> **(4) pay an assessment to a political organization;**

(5) solicit funds for a political organization or another candidate for public office except that a judge or judicial candidate may make such a solicitation 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[;].

TBA Rule 4.1(A)(8) currently reads as follows:

> (A) Except as permitted by law, or by Rule 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
>
> (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4[;].

The Joint Committee recommends that subsection (8) of Proposed Rule 4.1(A) be stricken.

Canon 5A of the existing Code of Judicial Conduct provides as follows:

> A. General Requirements.
>
> (1) Except as provided by 5B(2), 5C, and 5D, a judge or a candidate for election or appointment to judicial office shall not:
>
> * * *
>
> (b) publicly endorse or publicly oppose another candidate for public office[;].
>
> * * *

TBA Rule 4.2 would delete the above prohibition as to all public offices. **The Joint Committee, while aware of the uncertainty as to nonendorsement rules and federal case law, recommends that the following be inserted as part (C) of Proposed Rule 4.2:**

> **(C) A judge or judicial candidate shall not publicly endorse or publicly oppose a candidate for a nonjudicial public office.**

Comment [5] to TBA Rule 4.2 currently reads as follows:

> [5] Judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations.

The Joint Committee recommends that Comment [5] to Proposed Rule 4.2 be revised to read as follows:

[5] Judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations. Attendance at such a dinner or event does not constitute an endorsement.

Comment [6A] to TBA Rule 4.2 currently reads as follows:

> [6A] While judges and judicial candidates are not prohibited from endorsing or opposing other candidates for public office, such activity may be imprudent, and they should be mindful that such conduct could result in disqualification of the judge in subsequent matters.

The Joint Committee recommends that Comment [6A] be changed to read as follows:

> **Attendance at an event held for a candidate for public office, whether judicial or nonjudicial, does not constitute an endorsement of the candidate irrespective of whether the event serves a fundraising purpose.**

COMMITTEE NOTES TO CANON 4

The TBA's proposed new Tennessee Code of Judicial Conduct follows the format of the ABA Model Code of Judicial Conduct. However, many of the proposed rules under Canon 4 of the proposed new Tennessee Code of Judicial Conduct contain the bracketed information, "[intentionally omitted]." These omissions may be the most notable "provisions" of the proposed new Tennessee Code of Judicial Conduct. These are provisions which the new Code would not adopt from the ABA Model Code of Judicial Conduct. The "intentionally omitted" provisions appear at Rule 4.1(A)(3), (5)–(7) and Rule 4.2(B)(2)-(6), (C). Likewise, comments [4]–[6] under Rule 4.1 are omitted. Comments [1], [2], [4], [6] and [7] are omitted under Rule 4.2. Rule 4.1(A)(4) also deletes the ABA Model Code's prohibition against making a contribution to a political organization or a candidate for public office.

The text of Rule 4.1 of the ABA Model Code of Judicial Conduct, omitted from the TBA's proposed new Tennessee Code of Judicial Code, is as follows:

> (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial

candidate shall not:

> (3) publicly endorse or oppose a candidate for any public office;
>
> (4) . . . or make a contribution [to a political organization or a candidate for public office];
>
> (5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
>
> (6) publicly identify himself or herself as a candidate of a political organization;
>
> (7) seek, accept, or use endorsements from a political organization;

Comments to Rule 4.1 of the ABA Model Code of Judicial Conduct, omitted from the TBA's proposed new Tennessee Code of Judicial Conduct, are as follows:

> [4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These Rules do not prohibit candidates from campaigning on their own behalf, or from endorsing or opposing candidates for the same judicial office for which they are running. See Rules 4.2(B)(2) and 4.2(B)(3).
>
> [5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.
>
> [6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. For purposes of this Canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate, and is not prohibited by paragraphs (A)(2) or (A)(3).

The TBA's proposed new Tennessee Code of Judicial Conduct adds the following comment to Rule 4.1:

[3A] Rule 4.1(A)(10) prohibits a judge from using court staff in a campaign for judicial office. The rule does not preclude voluntary involvement of court staff in campaign activities during non-working hours.

The TBA's proposed new Tennessee Code of Judicial conduct intentionally omits Rule 4.2(B)(2)-(6), but retains (B)(1) and folds it into (B). The omitted provisions of Rule 4.2(B)(2)-(6) from the ABA Model Code of Judicial Conduct read as follows:

(B) A candidate for elective judicial office may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general or retention election:

(2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;

(3) publicly endorse or oppose candidates for the same judicial office for which he or she is running;

(4) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;

(5) seek, accept, or use endorsements from any person or organization other than a partisan political organization; and

(6) contribute to a political organization or candidate for public office, but not more than $[insert amount] to any one organization or candidate.

The TBA's proposed new Tennessee Code also omits Rule 4.2(C):

(C) A judicial candidate in a partisan public election may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general election:

(1) identify himself or herself as a candidate of a political organization; and

(2) seek, accept, and use endorsements of a political organization.

The following comments are intentionally omitted from Rule 4.2 of the TBA's proposed new Tennessee Code of Judicial Conduct:

COMMENT

[1] Paragraphs (B) and (C) permit judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may not engage in these activities earlier than [insert amount of time] before the first applicable electoral event, such as a caucus or a primary election.

[2] Despite paragraphs (B) and (C), judicial candidates for public election remain subject to many of the provisions of Rule 4.1. For example, a candidate continues to be prohibited from soliciting funds for a political organization, knowingly making false or misleading statements during a campaign, or making certain promises, pledges, or commitments related to future adjudicative duties. See Rule 4.1(A), paragraphs (4), (11), and (13).

[4] In nonpartisan public elections or retention elections, paragraph (B)(5) prohibits a candidate from seeking, accepting or using nominations or endorsements from a partisan political organization.

[6] For purposes of paragraph (B)(3), candidates are considered to be running for the same judicial office if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election. In endorsing or opposing another candidate for a position on the same court, a judicial candidate must abide by the same rules governing campaign conduct and speech as apply to the candidate's own campaign.

[7] Although judicial candidates in nonpartisan public elections are prohibited from running on a ticket or slate associated with a political organization, they may group themselves into slates or other alliances to conduct their campaigns more effectively. Candidates who have grouped themselves together are considered to be running for the same judicial office if they satisfy the conditions described in Comment [6].

The following comments are added to Rule 4.2 of the TBA's proposed new Tennessee Code:

[1A] It is possible for some judicial offices to be subject to a primary and general election. It is possible for some counties to have a partisan primary for a particular office whereas another county might only have a non-partisan general election for the same office. It is also conceivable that the decision as to whether or not to hold a primary might not be made until within the 180-day period before the primary. Therefore, for the sake of uniformity, the 180-day period for all judicial offices that can possibly be subject to a primary election, whether or not there actually is a primary, shall begin to run from the date the primary would be held.

[6A] While judges and judicial candidates are not prohibited from endorsing or

> opposing other candidates for public office, such activity may be imprudent, and they should be mindful that such conduct could result in disqualification of the judge in subsequent matters.
>
> [8] Compliance with all applicable election, election campaign, and election campaign fund-raising law and regulations of this jurisdiction includes, but is not limited to, the provisions of Tennessee Code Annotated §§ 2-10-101 et seq., the Campaign Financial Disclosure Act, and Tennessee Code Annotated §§ 2-10-301 et seq., the Campaign Contribution Limits Act.

The Joint Committee notes that the TBA's proposed new Tennessee Code of Judicial Conduct enables members of the judiciary to participate in more political activities than permitted under the ABA Model Code. The Joint Committee's major concern, however, is with Rule 4.2 and comment [6A]. The Joint Committee recommends that comment [6A] be revised to discourage judges from endorsing a candidate for a nonjudicial public office. Judges may have special knowledge of the fitness and qualifications of candidates for judicial offices. On the other hand, that specialized knowledge does not embrace nonjudicial candidates. As traditionally stated, the prestige of the judiciary should not be loaned to nonmembers of the judiciary. Considerations of judicial independence should make judges reluctant to become involved in nonjudicial political contests. The endorsement of nonjudicial candidates appears to be inconsistent with judicial independence and impartiality. Such endorsements may be a source of judicial disqualification and contrary to public interest and perception.

The Joint Committee proposes that Rule 4.2(C) expressly prohibit a judge's public endorsement or opposition of a candidate for a nonjudicial public office. However, in the alternative, the Joint Committee's concerns with judicial endorsements of nonjudicial candidates could be addressed in the comments rather than the rules. The trend in federal case law appears to favor the striking of state rules which give traditional notions of judicial independence priority over freedom of political activity for judges. *See, e.g., Republican Party of Minn. v. White*, 536

U.S. 765 (2002); *Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010); *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010). *But see Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010). However, the Joint Committee's aspirational goals of traditional judicial independence, integrity and impartiality may be safely lodged in the comments. The comments are aspirational in nature and do not carry the weight of disciplinary sanctions. Although recent federal case law may preclude judicial conduct rules which ban political conduct protected by the United States Constitution, there is no constitutional infringement by suggesting higher judicial aspirations in the comments. There may be permissible differences between protected conduct and desirable conduct. *See Carey*, 614 F.3d at 209 ("Through it all, no one should lose sight of the reality that a judicial candidate's right to engage in certain types of speech says nothing about the desirability of that speech.").

The Joint Committee is of the opinion that the TBA's proposed new Rule 4.1(A)(4) is overly broad and should be revised to permit a judge to solicit funds for a candidate for public office from a judge of the same level or higher level. The Joint Committee believes that the solicitation of funds from another judge of the same or higher level does not involve political influence or pressure. Moreover, the Constitutional stability of nonsolicitation rules, such as Rule 4.1(A)(4), (8), is uncertain under recent federal case law. *Compare Carey*, 614 F.3d 189, *with Siefert*, 608 F.3d 974.

Finally, to the extent that judges are subject to election and may engage in campaign fund raising, the Joint Committee believes that it is illogical to permit judges to conduct fund raising activities but prohibit judges from personally soliciting or accepting campaign contributions other than through a campaign committee. The prohibition is inconsistent with state judges' required campaign contribution disclosures under Tenn. Code Ann. §§ 2-10-105-107 (2011).

Accordingly, the Joint Committee recommends that the TBA's proposed new Rule 4.1(A)(8) be stricken.

IN THE SUPREME COURT OF TENENSSEE
AT NASHVILLE

IN RE: RULE 13, SECTION 7
RULES OF THE TENNESSEE SUPREME COURT

No. M2011-00420-SC-RL1-RL

COMMENT OF THE
KNOXVILLE BAR ASSOCIATION

The Knoxville Bar Association (hereafter "KBA"), by and through its President, Michael J. King, its Judicial Committee, and Executive Director Marsha Wilson, files this comment regarding the Tennessee Bar Association's proposed new Code of Judicial Conduct.

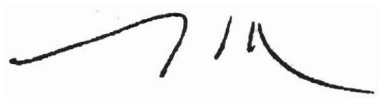
The Knoxville Bar Association wishes to express its appreciation for the work of the Tennessee Bar Association (hereafter "TBA") Taskforce in crafting the proposed new Code of Judicial Conduct. The KBA urges the Court to carefully consider the report of the Joint Committee of the Tennessee Judicial Conference and the Tennessee Trial Judges Association before adopting the proposed new Code of Judicial Conduct.

The KBA charged its Judicial Committee with the responsibility of reviewing the proposed new Code of Judicial Conduct and to report to the Board. As part of their efforts to study the proposed new Code, the KBA Judicial Committee invited Sarah Sheppeard, the Recorder of the TBA Taskforce, to make a presentation to the local judiciary on April 27, 2011. In addition, the KBA engaged in discussions with area state and appellate court judges. Based upon those discussions, the Judicial Committee determined that the majority of the judges concerns were captured in the report of the Joint Committee of the Tennessee Judicial Conference and the Tennessee Trial Judges Association.

After receiving the report of the Judicial Committee, at the regularly scheduled meeting on October 19, 2011, the KBA Board of Governors unanimously authorized providing a comment urging the Supreme Court to carefully consider the comments submitted by the Joint Committee which has studied this issue for more than a year and represents the organized bodies of state appellate and trial court judges from across Tennessee.

Respectfully submitted this 26 day of October, 2011.

KNOXVILLE BAR ASSOCIATION



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BRENNAN CENTER FOR JUSTICE

Justice at Stake campaign

October 31, 2011

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

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

Dear Mr. Catalano:

We write on behalf of the Brennan Center for Justice at N.Y.U. School of Law[1] and the Justice at Stake Campaign[2] to comment on the new Tennessee Code of Judicial Conduct and accompanying court rules proposed by the Tennessee Bar Association on February 25, 2011. We commend the Bar for its rigorous and meticulous study of the 2007 ABA Model Code

[1] The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center's Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country's constitutional democracy. Its research, public education, and advocacy in this area focuses on improving selection systems (including elections), increasing diversity on the bench, promoting measures of accountability that are appropriate for judges, and keeping courts in balance with other governmental branches.

[2] Justice at Stake is a nationwide, nonpartisan partnership of more than 50 judicial, legal, and citizen organizations. Its mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom — so judges can do their job protecting the Constitution, individual rights, and the rule of law. The arguments expressed in this letter do not necessarily represent the opinion of every Justice at Stake partner or board member.

of Judicial Conduct, and we believe the proposed new Tennessee Code of Judicial Conduct provides a strong foundation for the Tennessee Supreme Court as it considers changes to the existing Code of Judicial Conduct.

We therefore strongly urge the adoption of the proposed rules, and write to underline the importance of several elements of the proposed rules.

First, we believe proposed Rule 2.11(A)(4) provides a promising solution to the problems posed by campaign contributions and independent expenditures in judicial elections. The rising costs of judicial elections across the country have created a need for rules that clarify when recusal is appropriate based on campaign spending. In the last decade, spending on state supreme court elections more than doubled, from $83.3 million in 1990-1999 to $206.9 million in 2000-2009. Of the 22 states that hold competitive elections for judges, 20 set all-time spending records during the last decade. And in 2010, we saw this trend spill over from contested judicial elections into retention elections.

The United States Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*[3] recognized the serious threats to public perceptions of judicial impartiality that arise when judges preside over cases involving campaign supporters. There, the Court ruled that due process required a justice to recuse himself when one of the parties had spent $3 million on independent expenditures to elect that justice. That $3 million exceeded the total amount spent by all of the justice's other supporters, and by his campaign committee. The Court concluded that the spending created a "serious objective risk of actual bias."[4] With million-dollar judicial campaigns becoming the norm across the country, disqualification in cases where campaign spending raises reasonable questions about a judge's impartiality has become imperative to preserving public confidence in the courts.

We endorse the Tennessee Bar's proposed response to the problems posed by judicial campaign spending, and believe it represents a more effective approach than several existing rules.[5] In particular, we believe it represents a preferable approach to that taken in the American Bar Association's Model Code of Judicial Conduct. The Model Code contains a *per se* recusal rule, which requires disqualification when campaign contributions to a judge exceed a specified threshold amount. We believe this approach has several shortcomings not present in the rule proposed by the Tennessee Bar. First, the ABA rule fails to address the full array of campaign spending that occurs today. It applies only to contributions made directly to judicial candidates, not independent campaign expenditures, which account for a large portion of spending on judicial elections: in the most recent cycle, independent campaign spending in state high court elections—by definition uncontrolled by and

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[3] 129 S. Ct. 2252 (2009).

[4] *Id.* at 2265.

[5] *See* Adam Skaggs and Andrew Silver, Promoting Fair and Impartial Courts through Recusal Reform 13-14 (Brennan Center 2011), *available at* http://www.brennancenter.org/recusal_reform (describing Bar's proposal as "very promising" and urging "[s]tates in which judges sit for elections [to] adopt recusal rules patterned on" the Bar's proposal).

unaccountable to candidates—represented nearly one of every three dollars spent.[6] Second, pinpointing a *per se* campaign contribution limit in each state can be a daunting and insurmountable task, and any chosen number may prove to be far too high or too low. Finally, the ABA's automatic rule opens the door to gamesmanship by litigants who may attempt to engage in judge-shopping by making a disqualifying contribution to a disfavored judge.

The Tennessee Bar's Proposed Rule 2.11(A)(4) avoids these pitfalls, and provides a promising solution to concerns campaign spending may raise about the impartiality of Tennessee's courts. By including contributions and other support, the rule adequately addresses both direct contributions to a judicial candidate and independent expenditures like those that caused disqualification in *Caperton*. Additionally, by replacing a *per se* threshold with language requiring recusal where support gives rise to reasonable questions about a judge's ability to remain impartial, the rule avoids concerns of gamesmanship and judge-shopping that arise with the ABA Model Code. Finally, the comments to the proposed Rule 2.11(A)(4) guide both judges and litigants in its application, to avoid a flood of unnecessary requests and disqualifications. The factors listed in Comment 7, which mirror those the Court described in *Caperton*, provide a workable set of guidelines for judges and litigants when confronting recusal questions related to campaign contributions.

We are also encouraged by Comment 5 to the proposed recusal rule, which asks judges to disclose on the record information they believe the parties might consider relevant to a possible motion for disqualification. While we prefer statutory rules requiring judges and litigants to disclose all campaign contributions and expenditures, we are nevertheless confident that judges in Tennessee will apply this directive fairly and faithfully.

Second, we strongly support proposed Rule 2.11(D) and the associated changes to the Tennessee Rules of Civil, Criminal and Appellate Procedure, which provide for written orders on recusal motions that state the reasons for the ruling, and which provide a process for litigants to obtain *de novo* review of recusal requests denied at the trial, appellate, and supreme courts.

One of the most criticized features of the recusal rules in many states is that the judge subject to a recusal motion has the unreviewable last word on whether to step aside. For many, it flies in the face of fundamental notions of disinterested, impartial decision-making to allow judges accused of bias to be the only ones who decide whether or not they are, in fact, subject to disqualification. *De novo* review of a recusal motion denied in writing promotes public confidence in the judiciary by ensuring that the final disqualification decision is made by a judge or group of judges who is impartial both in fact and in appearance.

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[6] *See* Adam Skaggs, Maria da Silva, Linda Casey and Charles Hall, *The New Politics of Judicial Elections 2009-2010* 11 (Justice at Stake 2011), *available at* http://www.newpoliticsreport.org (noting that outside groups accounted for 29.8 percent of all spending in the 2009-2010 supreme court election cycle).

* * *

By providing independent, *de novo* review of denied recusal motions, Tennessee's courts would take an important step forward in promoting public confidence in their recusal practices. And by adopting the proposed recusal rule on to campaign spending, Tennessee will take a significant step toward ensuring that the public believes decisions are reached based on the facts and the law, not on which side provided the most support to the judge's campaign. Together, these proposed rules, if adopted, will make important advancements that help ensure the perception and reality of impartial justice in the state of Tennessee.

We thank the Court for the opportunity to submit the comment, and for the reasons we have outlined, we urge the Court to adopt each of the rules addressed above.

Respectfully submitted,

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RECEIVED BY FAX
DATE: 11-1-11

State of Tennessee

TWENTIETH JUDICIAL DISTRICT

CHERYL BLACKBURN, JUDGE
CRIMINAL COURT - DIVISION III

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NASHVILLE, TENNESSEE 37201
(615) 862-5940
FAX (615) 880-2329

October 31, 2011

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue, North
Nashville, TN 37219-1407

Re: M2011-00420-SC-RL1-RL
Filed March 11, 2011

Dear Mr. Catalano:

I am writing in regard to Exhibit B to the proposed changes to the Tennessee Code of Judicial Conduct. Exhibit B contains the proposed changes to Tennessee Rules of Civil, Criminal and Appellate Procedures.

My comments are related to the failure of the proposed rules to address the problems which will be created in criminal court as a result of the Rule change. There are some additional requirements which should be included in the proposed amendments to the Rules of Criminal Procedure. Specifically, I propose the following additional requirements:

1) The motion to disqualify or recuse a judge can be filed only by the attorney representing a defendant or a defendant who has been approved by the trial court to represent him or herself.

2) The motion to disqualify or recuse must be accompanied by an affidavit stating that the grounds for the motion have been thoroughly investigated and is not being filed for improper purpose, delaying the proceedings, or not being filed because the judge has ruled upon matters which are more appropriately handled by the appellate process.

3) The motion to disqualify or recuse must be filed within thirty (30) days of arraignment. Hearings on timely filed motions will be held expeditiously; the State will be a party at the hearing, and a transcript of the proceeding will be prepared. While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no action on the case except for good cause.

4) Untimely motions and those filed within sixty (60) days of a trial date must also be accompanied by an affidavit which also includes language explaining the reason for delay and accompanied by appropriate support. Hearings on untimely motions will be held expeditiously by another judge in the judicial district; the State will be a party at the hearing; a transcript will be prepared. The original trial judge will continue to preside over all pre-trial proceedings, motions and trial unless the disqualification is granted by the judge hearing the motion. Appeal will be through normal appellate process, if the defendant is convicted at trial.

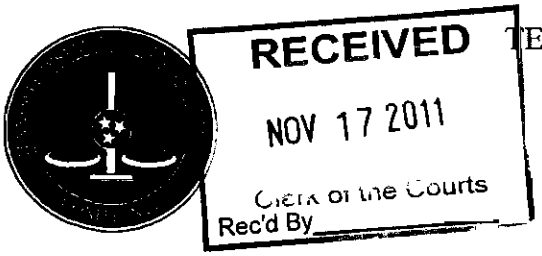
My suggestions, though rough in form, are meant to provide more precise procedures to address the abuse which might arise from the rules as written. The individuals who have been involved in developing the proposed rules probably do not appreciate the number of recusals which are filed by defendants who are represented by counsel in hopes of delaying the process or trial; for the purpose of "judge shopping"; or simply because the judge has issued an evidentiary ruling against a defendant's position.

I appreciate the opportunity to address these issues which will greatly affect the judicial efficiency in a criminal case.

Sincerely,

Cheryl Blackburn

CB/mk



TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

JAMES W. KIRBY
EXECUTIVE DIRECTOR

November 15, 2011

Chief Justice Cornelia Clark
Supreme Court Building, Suite 318
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Re: Changes to Tennessee Rules of Civil and Criminal and Appellate Procedure

Dear Justice Clark,

Please excuse the delay in responding to the proposed rule relative to when a Judge should preside over a case. The notice to comment was never received by the Tennessee District Attorneys General Conference, not the Public Defenders Conference, according to notice page.

After some discussion with various District Attorneys we can see a potential problem relative to delays in court proceedings in criminal cases if this proposed rule is extended to the criminal courts. This rule could, and quite frankly would, be used in many cases as a means of delaying the trial of the case. I can see a defense attorney filing a motion asking that the judge assigned to his case be removed for whatever reason, and there could be many alleged. The judge may have ruled adversely to the attorney in a similar type case, the judge just doesn't like the attorney, the judge is prejudiced against his client because the judge sentenced him/her before in a criminal matter. I can visualize all sorts of delays emanating from this rule. For example, the judge against whom the motion to recuse is made can take no further action or enter no orders on the case during the pendency of the motion and the ruling on the motion is appealable on an accelerated interlocutory basis. This will result in a lengthy delay even if the appeal is accelerated. There will be no way for a judge to control his/her docket in any meaningful manner.

The District Attorneys certainly agree that there are occasions wherein a judge should be removed from a particular case, but these are rare. This should not be used as a delaying tactic. In rural districts where there may be only two or three trial judges there could be a backlog that would slow the progress of criminal cases to a crawl if this rule is implemented. There are enough built-in delays already and the time from indictment to disposition is far too long as it stands now.

Unless there are some fairly strong sanctions for misuse of this rule we fear that it will be used where totally inappropriate and the result will be a huge backlog of untried criminal cases. Please consider whether or not the rule, as proposed, is appropriate for use in criminal matters.

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Again please accept my apology for the delay in responding and thank you for the hard work that you do.

Sincerely,

James W. Kirby

JWK/adg

cc: Mike Catalano, Clerk TN Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DEC -1 2011

IN RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE CODE OF JUDICIAL CONDUCT TOGETHER WITH CHANGES IN RULES AND STATUTES	))))))	CASE NO: M2011-00420-FC-RL1-RL

COMMENTS OF THE TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

The Tennessee District Attorneys General Conference (TDAGC) appreciates the opportunity to be heard regarding Issue 3 of this Court's Order dated November 8, 2011. Our organization supports the Tennessee Bar Association's (TBA) proposed new Code of Judicial Conduct; however, we have serious reservations about the practical application of the draft Rule of Criminal Procedure governing the filing of motions to recuse a trial judge in a criminal case. TDAGC agrees that genuine claims for a trial judge's recusal should be made in writing; be filed without delay; be supported by an affidavit; be acted on promptly by a written order stating the reasons for the ruling; and be subject to an expedited appeal before trial. The concern of the TDAGC is not with good faith motions to recuse but rather with the possible unintended consequences where the rule can be manipulated and abused to frustrate the ends of justice.

A. ONLY THE DULY AUTHORIZED REPRESENTATIVE OF A PARTY SHOULD BE PERMITTED TO FILE A MOTION TO RECUSE

By allowing a "party" to file a motion to recuse a judge, the rule invites potential abuse from some criminal defendants. We foresee opportunities for defendants, although represented by counsel, to file their own spurious motions to recuse. A defendant, particularly one awaiting trial for serious crimes or one who habitually challenges judicial

authority, may file recusal motions designed only to delay an upcoming trial; to disrupt the orderly judicial process; or to seek a friendlier forum. These individuals are not likely to be deterred by a potential perjury charge. Their goal is to derail the proceeding by taking advantage of the proposed expedited appeal. To limit such abuse, the TDAGC recommends that the proposed rule require that motions to recuse be filed only by the attorney for the defendant, the State of Tennessee, or by a defendant who previously has been allowed by the court to represent himself or herself. Such a change would ensure that motions to recuse would be filed with some factual basis; some understanding of the applicable law; and some reasonable chance of success as opposed to being lodged as a tactical gambit.

B. MOTIONS TO RECUSE SHOULD BE FILED WITHIN A SPECIFIC TIME PERIOD

TDAGC also recommends that this Court adopt a specific time frame within which motions to recuse should be filed instead of the current language that requires only that they be "timely". In reviewing recent appellate decisions dealing with recusal motions in criminal cases, the facts at issue usually fall into one of the following categories: the trial judge was a former prosecutor; the trial judge was a former prosecutor who actually prosecuted the defendant in a prior case; the trial judge was related by blood or marriage to someone involved in the litigation; the trial judge made public statements indicating a bias against the defendant; the trial judge made pre-trial rulings adverse to the defendant's position; and the trial judge engaged in ex parte communications. Most of the aforementioned grounds would be known at the outset of the case and could be brought to the attention of the trial court within thirty (30) to forty-five (45) days of arraignment without difficulty. With that requirement, the court could make a ruling and the appellate process could take place without undue delay. Without such a provision, "timely" could mean the time most likely to provide a party with an unwarranted

advantage. Of course, the rule should provide for a failsafe mechanism for motions to be filed beyond the deadline in extraordinary circumstances but with safeguards against abuse.

C. PATENTLY FRIVOLOUS OR DILATORY MOTIONS SHOULD BE TRIAGED FROM THE SYSTEM

Finally, TDAGC urges this Court to consider other procedural steps to establish a streamlined process to dismiss untimely or frivolous motions in lieu of providing an expedited review. The TBA rule proposal recognizes that a recusal motion actually may be made for an improper purpose, "such as to harass or cause unnecessary delay or needless increase in the cost of litigation," but even in such circumstances it allows a party to pursue the expedited appeal process. Tenn.R.Crim.P., R ____ (Proposed, 2011). Given the time lines involved and the need to gather the requisite information from the trial court, "expedited" may not necessarily mean "quick" which gives rise to the concern of a trial delay for tactical reasons.

In her letter[1] to the Court dated October 31, 2011, Judge Cheryl Blackburn proposed a procedure where another judge in the district could rule on the motion promptly so as not to delay the trial and then preserve the issue for appeal after conviction if one occurs. If such method is unworkable, then perhaps a process can be developed where motions that clearly lack merit can be referred to an individual judge of the Court of Criminal Appeals. That judge could serve as a gatekeeper and an independent judicial officer to review the motion. If the judge finds it to be frivolous or improper, the trial can continue without delay, and the matter is still preserved for eventual appellate review. On the other hand, should the motion present a more meritorious claim, the reviewing judge could set the matter for the complete, expedited hearing before a full panel of the court. Under either process, even the most suspect of

[1] TDAGC shares the same concerns as Judge Blackburn and believes her suggested procedures deserve consideration.

motions would receive an independent evaluation from an unbiased judge but not be permitted to delay a trial or other proceeding.

D. CONCLUSION

In a criminal case, both the State of Tennessee and the defendant are entitled to a fair trial before an unbiased judge, and the proposed Code of Judicial Conduct establishes an excellent foundation to ensure judicial integrity and gain the confidence of the public. However, TDAGC foresees that unless the issues raised above are adequately addressed, there will be ample opportunity for mischief that will cause trials to be delayed and justice to be denied.

Respectfully submitted,

Tennessee District Attorney
Generals Conference

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been hand delivered to Allan Ramsaur, Executive Director, Tennessee Bar Association, on this the 12 day of December, 2011.

_____

MEMORANDUM

To: Mike Catalano, Appellate Court Clerk
From: Lee Ramsey, Reporter
Subject: In re Petition for Adoption of Amended Tennessee Code of Judicial Conduct, No. M2011-00420-SC-RL1-RL
Date: December 2, 2011

At its meeting on Friday, November 18, 2011, the Advisory Commission on the Rules of Practice & Procedure voted to approve revised versions of the Tennessee Bar Association's proposed rules amendments pertaining to recusal of judges. The TBA's original proposed changes to the Rules of Civil, Criminal and Appellate Procedure were set out in Exhibit B to the TBA's petition to amend the Code of Judicial Conduct.

On November 22, the Advisory Commission's revised versions of the proposed recusal rules were transmitted to the Supreme Court. At the Court's request, you emailed (on November 23) copies of the Commission's proposed rules to representatives of the organizations invited to participate in oral arguments concerning the TBA's petition to amend the Code of Judicial Conduct.

Please file the Advisory Commission's proposed recusal rules in the Clerk's file pertaining to the TBA's petition, so that they will be a part of the record of the proceeding.

Lee W. Ramsey
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TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 3

APPEAL AS OF RIGHT: AVAILABILITY; METHOD OF INITIATION

[Amend Rule 3 by adding new paragraph (__):]

(__) **Availability of Interlocutory Appeal as of Right in Disqualification, Recusal and Incompetence Motions.** After a trial court judge enters an order on a motion for the judge's recusal or disqualification, or determination of constitutional or statutory incompetence, an accelerated interlocutory appeal as of right by the aggrieved party lies from the order. A notice of appeal shall be filed within ten days of entry of the order. In civil cases, a bond for costs as required by Rule 6 shall be filed with the notice of appeal. The notice of appeal shall be accompanied by (1) a statement of the issues presented for review; (2) a statement of the facts necessary to an understanding of why the appeal lies; (3) a statement of the reasons supporting the appeal, and (4) the relief sought. The application shall be accompanied by copies of any order or opinion or parts of the record necessary for determination of the appeal. The appeal shall be decided expeditiously on an accelerated basis by a panel of the court upon a de novo standard of review. The appellate court's determination may be made without oral argument and shall be based upon the record as it existed at the time the judge acted on the motion. The court may in its discretion order further briefing by the parties within the time period set by the court. Any order or opinion issued by the appellate court should state with particularity the basis for its ruling.

Advisory Commission Comment [201_]

The _[year]_ amendment added paragraph (__), authorizing an accelerated interlocutory appeal as of right from the trial court's ruling on a motion for the judge's recusal or disqualification, or for a determination of constitutional or statutory incompetence.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 22

MOTIONS

[Amend Rule 22 by adding new paragraph (__):]

(__) Motions Seeking Disqualification of an Appellate Judge. An appellate judge whose disqualification, recusal, or determination of constitutional or statutory incompetence is sought by a timely filed written motion may disqualify himself or herself by order stating the basis for disqualification and without the necessity of further action of the other members of that court. The motion shall be supported by affidavit on personal knowledge or a declaration under penalty of perjury and other appropriate materials and shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The judge in question shall act promptly by written order and either grant or deny the motion, stating the reasons for the ruling, including factual findings directly addressing the grounds upon which the motion was made. After an intermediate appellate judge acts on such a motion, an aggrieved party may file a motion for reconsideration to be determined promptly by the other judges of that court in that section upon a de novo standard of review. An accelerated appeal as of right lies to the Tennessee Supreme Court.

If a motion is filed seeking the recusal or disqualification, or determination of constitutional or statutory incompetence, of a Supreme Court justice, that justice shall act promptly by written order and either grant or deny the motion, stating the reasons for the ruling, including factual findings

directly addressing the grounds upon which the motion was made. An aggrieved party may file a motion for reconsideration, which shall be determined promptly by the remaining justices of that court upon a de novo standard of review.

Advisory Commission Comment [201_]

This Rule provides a procedural framework for determination of when an appellate judge should not preside over a case. There are several bases for determining when a judge should not sit including Tennessee Constitution Article VI, Section 11 (incompetence), Title 17, Chapter 2 (incompetence, and interchange) and Tenn. Sup. Ct. R. 10, Code of Judicial Conduct Rule 2.11. For appellate procedure regarding immediate interlocutory appeal of motions denied, see Tenn. R. App. P. 3 and Tenn. R. App. P. 22. The court may grant a stay of the appeal under Tenn. R. App. P. 9 or 10.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE __

[TITLE?]

[Adopt new Rule __:]

Rule ___. The following procedure shall be employed to determine whether a judge should preside over a case:

(1) Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or judge acting as a court of record shall do so by a timely filed written motion meeting the requirements of Tenn. R. Civ. P. 11. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and other appropriate materials and shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) Upon the filing of a motion seeking disqualification, recusal, or a determination of constitutional or statutory incompetence, a judge shall act promptly by written order and either grant or deny the motion, stating the reasons for the ruling, including factual findings directly addressing the grounds upon which the motion was made.

(3) The order reflecting the court's ruling on the motion is appealable as of right on an

accelerated interlocutory basis to the appropriate intermediate appellate court.

(4) While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken. A judge, upon disqualification, shall not participate in selecting his or her successor.

(5) The failure to pursue an accelerated interlocutory appeal does not constitute a waiver of the right to raise any issue concerning the trial court's ruling on the motion in an appeal as of right at the conclusion of the case.

Advisory Commission Comment [201_]

This Rule provides a procedural framework for determination of when a judge should not preside over a case. There are several bases for determining when a judge should not preside over a case, including Tennessee Constitution Article VI, Section 11 (incompetence), T.C.A. Title 17, Chapter 2 (incompetence, and interchange) and Tenn. S. Ct. R. 10, Code of Judicial Conduct Rule 2.11. For appellate procedure and regarding an accelerated interlocutory appeal of an order regarding a motion for disqualification, See Tenn. R. App. P. 3(__). A finding by a trial judge that the motion is frivolous, untimely, or interposed merely for delay constitutes good cause, as anticipated by (4) above, such that the trial judge may continue to preside over the case to the extent the judge deems appropriate. The requirement that the motion is timely filed is intended to prevent a party with knowledge of facts supporting a recusal motion from delaying filing the motion to the prejudice of the others and the case. Depending on the circumstances, delay in bringing such a motion may constitute a waiver of the right to object to a judge presiding over a matter. Further, the delay in bringing a motion or the timing of its filing may also suggest an improper purpose for the motion. The Court, in its sound discretion, may grant a stay of the action under Tenn. R. Civ. P. 62.03.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE __

[TITLE?]

[Adopt new Rule __:]

Rule __. The following procedure shall be employed to determine whether a judge should preside over a case:

(1) Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or judge acting as a court of record shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and other appropriate materials and shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) Upon the filing of a motion seeking disqualification, recusal, or a determination of constitutional or statutory incompetence, a judge shall act promptly by written order and either grant or deny the motion, stating the reasons for the ruling, including factual findings directly addressing the grounds upon which the motion was made.

(3) The order reflecting the court's ruling on the motion is appealable as of right on an accelerated interlocutory basis to the appropriate intermediate appellate court.

(4) While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken. A judge, upon disqualification, shall not participate in selecting his or her successor.

(5) The failure to pursue an accelerated interlocutory appeal does not constitute a waiver of the right to raise any issue concerning the trial court's ruling on the motion in an appeal as of right at the conclusion of the case.

Advisory Commission Comment [201_]

This Rule provides a procedural framework for determination of when a judge should not preside over a case. There are several bases for determining when a judge should not preside over a case, including Tennessee Constitution Article VI, Section 11 (incompetence), T.C.A. Title 17, Chapter 2 (incompetence, and interchange) and Tenn. S. Ct. R. 10, Code of Judicial Conduct Rule 2.11. For appellate procedure and regarding an accelerated interlocutory appeal of an order regarding a motion for disqualification, See Tenn. R. App. P. 3(__). A finding by a trial judge that the motion is frivolous, untimely, or interposed merely for delay constitutes good cause, as anticipated by (4) above, such that the trial judge may continue to preside over the case to the extent the judge deems appropriate. The requirement that the motion is timely filed is intended to prevent a party with knowledge of facts supporting a recusal motion from delaying filing the motion to the prejudice of the others and the case. Depending on the circumstances, delay in bringing such a motion may constitute a waiver of the right to object to a judge presiding over a matter. Further, the delay in bringing a motion or the timing of its filing may also suggest an improper purpose for the motion. The Court, in its sound discretion, may grant a stay of the action.