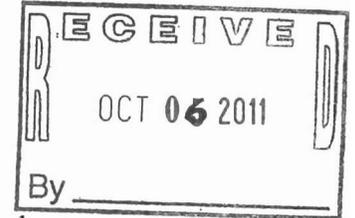




**Tennessee Farmers
Insurance Companies**
Corporate Headquarters
Post Office Box 998 • Columbia, TN 38402-0998
931.388.7872 • www.fbitn.com

October 3, 2011

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



Re: Proposed Amendment to Rule 45 Tennessee Rules of Civil Procedure
M2011-01820-SC-RL2-RL

Dear Members of the Court:

I am writing to voice my objection to the proposed change to Rule 45.01 of the Tennessee Rules of Civil Procedure that would waive almost all objections to a subpoena if not filed within 14 days of service. This time frame is arbitrarily short and unfair, especially for a person or entity that is not a party to the litigation.

Like many in the business community, my company receives hundreds of subpoenas each year, most of which involve litigation for which we are not a party. Usually these subpoenas are extremely broad, and too often late and incorrect. Further, at times service of process is at a location that is not the headquarters and it may be several days before the subpoena actually reaches the legal department.

This proposal would force our company to err on the side of filing an immediate objection to the subpoena, if only to preserve the company's rights, resulting in increased litigation in the discovery process. I believe this time restriction would work an unnecessary hardship on all Tennessee residents but especially Tennessee companies that receive hundreds of subpoenas.

If a set time frame is viewed as absolutely necessary, we propose that it be at least 30 days for parties and 60 days for nonparties after proper service. This would give a respondent adequate time to communicate with the party seeking the information and tailor the response accordingly, which is our current practice.

Thank you for your consideration.

Yours,

Ed Lancaster, General Counsel
BPR #11034

STATE OF TENNESSEE

Office of the Attorney General



LUCY HONEY HAYNES
CHIEF DEPUTY ATTORNEY GENERAL

LAWRENCE HARRINGTON
CHIEF POLICY DEPUTY

ROBERT E. COOPER, JR.
ATTORNEY GENERAL AND REPORTER
CORDELL HULL AND JOHN SEVIER STATE
OFFICE BUILDINGS

MAILING ADDRESS
P.O. BOX 20207
NASHVILLE, TN 37202

BILL YOUNG
SOLICITOR GENERAL
TELEPHONE (615) 741-3491
FACSIMILE (615) 741-2009

October 28, 2011

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

Re: Proposed Amendment to Tenn. R. App. P. 3; Supreme Court Order No.
M2011-01820-SC-RL2-RL

Dear Mr. Catalano:

I am writing in accordance with the Supreme Court's order (No. M2011-01820-SC-RL2-RL; August 26, 2011) soliciting comments regarding the proposed changes to the rules of evidence and procedure. I specifically wish to address the proposed addition to Tenn. R. App. P. 3(b). This proposal seeks to add an appeal as of right for corrected judgments entered pursuant to Tenn. R. Crim. P. 36. Based on recent clarification by the Tennessee Supreme Court of the extremely narrow scope of proper "corrected judgments" under Rule 36, there no longer remains a need to provide for appeals as of right from such judgments.

Tenn. R. Crim. P. 36 provides in its entirety as follows:

After giving any notice it considers appropriate, the court may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission.

Letter to Mike Catalano
October 28, 2011
Page 2 of 2

In the past, some trial courts have utilized this “correction” procedure to make substantive changes to criminal judgments by adding sentencing conditions that are mandated by law but were not mentioned or included during the course of sentencing proceedings. *See, e.g., State v. Harris*, No. M2008-01819-CCA-R3-CD, 2010 WL 2431981, at *2 (Tenn. Crim. App. June 11, 2010) (no app. filed) (noting that the trial court purported to but could not correct, pursuant to Tenn. R. Crim. P. 36, an illegal sentence by adding a mandatory provision that was omitted at sentencing). In essence, these courts were using Rule 36 as a vehicle for correcting illegal sentences. But in *Cantrell v. Easterling*, 346 S.W. 3d 445, 453 (Tenn. 2011), the Supreme Court explained that the only proper vehicles remaining for addressing illegal sentences are post-conviction petitions and state habeas corpus petitions. *Cantrell* also clarified that “clerical errors” subject to correction under Rule 36 are limited to scrivener errors—situations in which the judgment fails to reflect accurately the sentence actually imposed. *Id.* at 449. Given the *Cantrell* interpretation of the extremely limited scope of corrected judgments under Rule 36, providing a complete new beginning of the appellate process for correction of a typographical error or slip of the pen defeats finality of judgments and could flood the system with unnecessary appeals.

Should the Court, however, believe that some appellate remedy must be available in the event of misjudgment by a trial court of the proper use of corrected judgments under Rule 36, this amendment should clearly spell out the limited scope of such an appeal. In that event, I would propose to substitute the attached redlined proposed amendment to Rule 3 for the current proposed change.

Yours very truly,

A handwritten signature in black ink, appearing to read "RE Cooper, Jr.", with a stylized flourish at the end.

ROBERT E. COOPER, Jr.
Attorney General and Reporter

Enclosure

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 3

APPEAL AS OF RIGHT; METHOD OF INITIATION

[Amend Rule 3(b) and (c) as indicated below; paragraphs (a) and (d)-(g) are unchanged:]

(a) * * * *

(b) Availability of Appeal as of Right by Defendant in Criminal Actions. – In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) ~~or (iv)~~ (A) or (D) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding. The defendant also has an appeal as of right from the entry of an order or judgment entered pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure; such appeal shall be limited to addressing whether the lower court properly judged this to be an appropriate situation for correction of judgment and whether the correction made was proper. The entry of a properly entered corrected judgment pursuant to Rule 36 shall not provide the basis for filing a post-conviction petition attacking the corrected judgment.

(c) Availability of Appeal as of Right by the State in Criminal Actions. – In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also

appeal as of right from a final judgment in a habeas corpus, extradition, or post-conviction proceeding. The state may also appeal as of right from the entry of an order or judgment entered pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure; such appeal shall be limited to addressing whether the lower court properly judged this to be an appropriate situation for correction of judgment and whether the correction made was proper.

(d) * * * *

Advisory Commission Comment [2012]

Tenn. R. App. P. 3(b) is amended to update an obsolete cross-reference to Tenn. R. Crim. P. 37(b)(2), changing the subparagraph designations from “(i) or (iv)” to (A) or (D).”

Rule 3(b) and (c) are amended to provide for an appeal as of right from the trial court’s filing of a corrected judgment or order pursuant to Tenn. R. Crim. P. 36.