

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

FILED

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IN RE: AMENDMENTS TO THE TENNESSEE RULES  
OF PROCEDURE & EVIDENCE

APPELLATE COURT CLERK  
NASHVILLE

No. M2009-01985-SC-RL2-RL

**ORDER**

The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal and Juvenile Procedure and the Tennessee Rules of Evidence. In August 2009, the Advisory Commission completed its 2008-2009 term and presented its recommendations to the Court. After considering the amendments recommended by the Commission, the Court hereby publishes for public comment the proposed amendments set out in the Appendix to this order.

The Court hereby solicits written comments on the proposed amendments from the bench, the bar, and the public. The deadline for submitting written comments is Monday, November 30, 2009. Written comments should be addressed to:

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

and should reference the docket number set out above.

The Clerk shall provide a copy of this order, including the Appendix, to LexisNexis and to Thomson Reuters (West). In addition, the order and Appendix shall be posted on the Tennessee Supreme Court's website.

FOR THE COURT:

  
JANICE M. HOLDER, CHIEF JUSTICE

**APPENDIX**

***PROPOSED AMENDMENTS  
PUBLISHED FOR PUBLIC COMMENT***

**FORMATTING NOTE:**

**Attached are “redlined” versions of the proposed amended rules.  
New text is indicated by underlining, and deleted text is indicated by overstriking.**

# TENNESSEE RULES OF APPELLATE PROCEDURE

## RULE 11

### APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT

[amend Rule 11(b) to read as follows:]

(b) Time; Content. — The application for permission to appeal shall be filed with the clerk of the Supreme Court within 60 days after the entry of the judgment of the Court of Appeals or Court of Criminal Appeals if no timely petition for rehearing is filed, or, if a timely petition for rehearing is filed, within 60 days after the denial of the petition or entry of the judgment on rehearing. The application shall contain a statement of: (1) the date on which the judgment was entered and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or the date of entry of the judgment on rehearing; (2) the questions presented for review and, for each question presented, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues); (3) the facts relevant to the questions presented, but facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application; and (4) the reasons, including appropriate authorities, supporting review by the Supreme Court. The brief of the appellant referred to in subdivision (f) of this rule may be served and filed with the application for permission to appeal. A copy of the opinion of the appellate court shall be appended to the application.

#### 2010 Advisory Commission Comment

Rule 11 is amended to require that the application for permission to appeal include, for each question presented, a statement of the applicable standard of review. Although Tenn. R. App. P. 11(a) lists various criteria considered by the Court in deciding whether or not to grant an application for permission to appeal, the “applicable standard of review” means the standard of review which would be applied by the Court in deciding the case on the merits, if the Court were to grant the application for permission to appeal.

## TENNESSEE RULES OF APPELLATE PROCEDURE

### RULE 24

#### CONTENT AND PREPARATION OF THE RECORD

[amend Rule 24(b) to read as follows:]

(b) Transcript of Stenographic or Other Substantially Verbatim Recording of Evidence or Proceedings. — If a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available, the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. Unless the entire transcript is to be included, the appellant shall, within 15 days after filing the notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript the appellant intends to include in the record, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 15 days after service of the description and declaration, file with the clerk of the trial court and serve on the appellant a designation of additional parts to be included. The appellant shall either have the additional parts prepared at the appellant's own expense or apply to the trial court for an order requiring the appellee to do so. The transcript, certified by the appellant, the appellant's counsel, or the reporter as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal in appeals to the Tennessee Court of Appeals or, if the appeal is direct, to the Tennessee Supreme Court and within 90 days after filing the notice of appeal in appeals to the Tennessee Court of Criminal Appeals. Upon filing the transcript, the appellant shall simultaneously serve notice of the filing on the appellee. Proof of service shall be filed with the

clerk of the trial court with the filing of the transcript. If the appellee has objections to the transcript as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of notice of the filing of the transcript. Any differences regarding the transcript shall be settled as set forth in subdivision (e) of this rule.

Within 15 days after filing the notice of appeal the appellant in a criminal action shall order from the reporter a transcript of such parts of the evidence or proceedings not already on file as the appellant deems necessary. The order shall be in writing and within the same period a copy shall be filed with the clerk of the trial court. If funding is to come from the state of Tennessee, the order shall so state.

#### 2010 Advisory Commission Comment

Rule 24(b) is amended to provide different time periods for filing the transcript of evidence. In civil proceedings it is 60 days after filing the notice of appeal. In criminal proceedings it is 90 days.

The 60 day period in Rule 24(c) for a statement of the evidence remains unchanged.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 27

CONTENT OF BRIEFS

[amend Rule 27(a) and (b) to read as follows:]

(a) Brief of the Appellant. — The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with references to the pages in the brief;

(2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;

(3) A jurisdictional statement in cases appealed to the Supreme Court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the Supreme Court;

(4) A statement of the issues presented for review;

(5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below;

(6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;

(7) An argument, which may be preceded by a summary of argument, setting forth:

(A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities

and appropriate references to the record (which may be quoted verbatim) relied on; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(8) A short conclusion, stating the precise relief sought.

(b) Brief of the Appellee. — The brief of appellee and all other parties shall conform to the foregoing requirements, except that items (3), (4), (5), ~~and (6)~~ and 7(B) of subdivision (a) of this rule need not be included except to the extent that the presentation by the appellant is deemed unsatisfactory. If appellee is also requesting relief from the judgment, the brief of the appellee shall contain the issues and arguments involved in his request for relief as well as the answer to the brief of appellant.

#### 2010 Advisory Commission Comment

Rule 27(a) is amended to require that the appellant's brief include, for each issue presented, a statement of the applicable standard of review. Rule 27(b) is amended to add a cross-reference to amended Rule 27(a)(7)(B).

## TENNESSEE RULES OF APPELLATE PROCEDURE

### RULE 40

#### COSTS

[amend Rule 40(a) to read as follows:]

(a) To Whom Allowed. — Except as otherwise provided by statute or these rules, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the appellate court. Costs related to the filing of motions, orders and briefs by amicus curiae shall be assessed and collected against the amicus curiae filer unless the court orders otherwise.

#### 2010 Advisory Commission Comment

This amendment provides that costs associated with the filing of an amicus brief will automatically be assessed against the amicus at the time of the filing of the amicus brief unless the court provides otherwise.



# TENNESSEE RULES OF CIVIL PROCEDURE

## RULE 3

### COMMENCEMENT OF ACTION

[amend Rule 3 by adding the new Advisory Commission Comment below:]

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

#### 2010 Advisory Commission Comment

See Rule 4.01(3), cautioning against intentional delay of service of a summons for more than 30 days. If done, filing a complaint does not commence an action and does not stop the running of a statute of limitations.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 4

PROCESS

[amend Rule 4.01 to read as follows:]

4.01. Summons; Issuance; By Whom Served; Sanction for Delay. — (1) Upon the filing of the complaint the clerk of the court wherein the complaint is filed shall forthwith issue the required summons and cause it, with necessary copies of the complaint and summons, to be delivered for service to any person authorized to serve process. This person shall serve the summons, and the return indorsed thereon shall be proof of the time and manner of service. A summons may be issued for service in any county against any defendant, and separate or additional summonses may be issued against any defendant upon request of plaintiff. Nothing in this rule shall affect existing laws with respect to venue.

(2) A summons and complaint may be served by any person who is not a party and is not less than 18 years of age. The process server must be identified by name and address on the return.

(3) If a plaintiff or counsel for plaintiff (including third-party plaintiffs) intentionally causes delay of prompt issuance of a summons or prompt service of a summons for more than 30 days after filing of the complaint, filing of the complaint (or third-party complaint) is ineffective.

2010 Advisory Commission Comment

Rule 4.01(3) is amended to allow intentionally delaying service of a summons for 30 days without running the risk of a statute of limitations bar.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 5

SERVICE AND FILING OF PLEADINGS AND  
OTHER PAPERS

[amend Rule 5.02 to read as follows:]

5.02 Service – How Made. — Whenever under these rules service is required or permitted to be made ~~upon~~ on a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service shall be made pursuant to the methods set forth in (1) or (2).

(1) Service upon the attorney or upon a party shall be made by delivering to him or her a copy of the document to be served, or by mailing it to such person's last known address, or if no address is known, by leaving the copy with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at such person's office with a clerk or other person in charge thereof; or, if there is none in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Items which may be filed by facsimile transmission pursuant to Rule 5A may be served by facsimile transmission.

(2)(a) Service upon any attorney may also be made by sending him or her the document in Adobe PDF format to the attorney's email address, which shall be promptly furnished on request. The sender shall include language in the subject line designed to alert the recipient that a document is being served under this rule. On

the date that a document served under this rule is electronically sent to an attorney, the sender shall send by mail, facsimile or hand-delivery a certificate that advises that a document has been transmitted electronically. The certificate shall state the caption of the action; the trial court file number; the title of the transmitted document; the number of pages of the transmitted document (including all exhibits thereto); the sender's name, address, telephone number and electronic mail address; the electronic mail address of each recipient; and the date and time of the transmission. The certificate shall also include words to this effect: "If you did not receive this document, please contact the sender immediately to receive an electronic or physical copy of this document." The certificate shall be sent to all counsel of record.

(b) An attorney who sends a document to another attorney electronically and who is notified that it was not received must promptly furnish a copy of the document to the attorney who did not receive it.

(c) A document transmitted electronically shall be treated as a document that was mailed for purposes of computation of time under Rule 6.

(d) For good cause shown, an attorney may obtain a court order prohibiting service of documents on that attorney by electronic mail and requiring that all documents be served under subsection (1).

#### 2010 Advisory Commission Comment

The Commission is aware that many attorneys serve documents on one another electronically but, because the current rule does not provide electronic service is sufficient service, also send a

paper copy of the document. This rule change is designed to allow attorneys to accomplish service of pleadings and other papers electronically without the need to send a physical copy.

The requirement that the sender shall include language in the subject line designed to alert the recipient that a document is being served under this rule is intended to reduce the possibility that the recipient might overlook the service of a document. Words in the subject line to the effect of “TRCP Rule 5 Service of Document in *Smith v. Jones*” are sufficient.

Adobe PDF was chosen as the format because it is required for federal court filings and virtually all attorneys have ready access to it. Of course, the parties may stipulate to the use of a different format.

The mailing or hand delivery of a certificate was included out of concern, well-founded or not, that an email transmitting a document could be lost in cyberspace. The certificate requirement puts the receiving attorney on notice that a document has been sent and, if the document was not received, will allow that attorney to initiate a process for promptly obtaining a copy of it.

The rule provides a mechanism for a court to order, for good cause shown, that electronic service of pleadings and papers not be permitted in a particular case.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 5B

ELECTRONIC FILING, SIGNING, OR VERIFICATION

[adopt new Rule 5B:]

Any court governed by these rules may, by local rule, allow papers to be filed, signed, or verified by electronic means that comply with technological standards promulgated by the Supreme Court. Pleadings and other papers filed electronically under such local rules shall be considered the same as written papers.

2010 Advisory Commission Comment

The courts in certain counties have expressed a desire to implement an electronic filing system. This rule permits trial courts, by local rule, to adopt such systems.

Electronic filing systems have also been implemented in all of the federal district courts (with the sole exception of the United States District Court for the Northern Mariana Islands) and in a number of states. Electronic filing offers numerous advantages over traditional "paper filing," including vastly increased public access to court documents and reduction of the time and expense incurred by litigants and court personnel in filing, storing, and retrieving documents.

The Commission envisions that, in the not too distant future, all of Tennessee's courts will adopt electronic case filing systems. In order to achieve statewide uniformity, the systems utilized throughout the state must comply with technological standards promulgated by the Supreme Court. Without such uniformity, the desired ease of access to data and cost efficiencies could not be achieved.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

Rule 26.02. Discovery Scope and Limits

[amend Rule 26.02(2) to read as follows:]

\* \* \* \*

(2) ~~(Reserved.)~~ INSURANCE. A party may obtain discovery of any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

\* \* \* \*

2010 Advisory Commission Comment

New Rule 26.02(2) allows discovery of liability insurance policies.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 37

FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

[amend title of Rule 37.03 to read as follows:]

37.03 ~~Failure to Disclose or Refusal to Admit.~~ Failure to Supplement or Amend Responses or Failure to Admit. — (1) A party who without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 is not permitted, unless such failure is harmless, to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court on motion may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses (including attorney fees) caused by the failure, these sanctions may include any of the actions authorized under Rule 37.02(A), (B), and (C) and may include informing the jury of the failure to supplement or amend.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.



## 2010 Advisory Commission Comment

The title of Rule 37.03 is expanded to conform to the language in the rule.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 41

DISMISSAL OF ACTIONS

[amend Rule 41.02 to read as follows:]

41.02 Involuntary Dismissal—Effect Thereof. — (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(2) After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence, ~~in the event judgment is rendered at the close of plaintiff's evidence, the court shall make findings of fact if requested in writing within three (3) days after the announcement of the court's decision.~~ If the court grants the motion for involuntary dismissal, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

## 2010 Advisory Commission Comment

The final sentence of Rule 41.02(2) deletes the requirement of a request for written findings of fact and conclusions of law. Instead, in conformity with Rule 52.01, findings of fact and conclusions of law are required without request.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 45

SUBPOENA

[amend title of Rule 45.02 to read as follows:]

**45.02. For Production of ~~Documentary Evidence~~ Documents and Things or Inspection of Premises.** — A subpoena may command a person to produce and permit inspection, copying, testing, or sampling of designated books, papers, documents, electronically stored information, or tangible things, or inspection of premises with or without commanding the person to appear in person at the place of production or inspection. When appearance is not required, such a subpoena shall also require the person to whom it is directed to swear or affirm that the books, papers, documents, electronically stored information, or tangible things are authentic to the best of that person's knowledge, information, and belief and to state whether or not all books, papers, documents, electronically stored information, or tangible things responsive to the subpoena have been produced for copying, inspection, testing, or sampling. Copies of the subpoena must be served pursuant to Rule 5 on all parties, and all material produced must be made available for inspection, copying, testing, or sampling by all parties.

A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

An order of the court requiring compliance with a subpoena issued under this rule must provide protection to a person that is neither a party nor a party's officer from undue burden or expense resulting from compliance.

A command to permit inspection, copying, testing, or sampling may be joined with a

command to appear at trial or hearing, or at a deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

#### 2010 Advisory Commission Comment

The title of Rule 45.02 is expanded to conform to the language in the rule.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 59

NEW TRIALS AND ALTERATION OR  
AMENDMENT OF JUDGMENTS

[amend Rule 59.01 to read as follows:]

Rule 59.01. Motions Included. — Motions to which this rule is applicable are: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under ~~59.02~~ 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment. These motions are the only motions contemplated in these rules for extending the time for taking steps in the regular appellate process. Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings.

2010 Advisory Commission Comment

The amendment merely corrects an erroneous cross-reference contained in Tenn. R. Civ. P. 59.01.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5

INITIAL APPEARANCE BEFORE MAGISTRATE

[amend Rule 5(e) to read as follows:]

(e) Indictment Before Preliminary Examination; Exceptions. — ~~Any defendant arrested prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing on request, whether or not the grand jury is in session. If the defendant is indicted or charged by presentment while the preliminary hearing is being continued (whether at the defendant's or the prosecutor's request) or at any time before he or she has been afforded a preliminary hearing on a warrant, the defendant may dismiss the indictment or presentment on motion filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment.~~

(1) Entitlement to Preliminary Hearing. Any defendant arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing. A preliminary hearing may be waived as set forth by subsections (2) or as otherwise provided in this rule.

(2) Waiver of Preliminary Hearing by Failure to Appear. A defendant waives the right to a preliminary hearing by failing to appear for a scheduled preliminary hearing, unless the defendant presents before the General Sessions Court, and the court finds within fourteen days after the scheduled preliminary hearing, clear and convincing evidence that the failure to appear was beyond the defendant's control. Unless the General Sessions Court finds by clear and convincing evidence

that the defendant's absence was beyond the defendant's control and resets the preliminary hearing, the grand jury may return an indictment or presentment on the charges.

(3) Exeditious Hearings. While a defendant should have a reasonable opportunity to assert any legal right, preliminary hearings shall be conducted as expeditiously as possible considering the inconvenience to victims and witnesses, the parties, and the Court by unnecessary delays.

(4) Remedy for Failure to Afford Preliminary Hearing. If an indictment or presentment is returned against a defendant who has not waived his or her right to a preliminary hearing, the Circuit or Criminal Court shall dismiss the indictment or presentment on motion of the defendant filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment and the case shall be remanded to the General Sessions Court for a preliminary hearing.

#### 2010 Advisory Commission Comment

Rule 5(e) has been amended in its entirety so as to clarify when the defendant is entitled to a preliminary hearing. Rule 5(e)(1) and (4) make clear that the defendant enjoys the right to a preliminary hearing following arrest on a warrant or an appearance by a criminal summons which cannot be defeated by either an indictment or presentment. The former rule omitted the presentment, apparently by oversight, and this has been corrected. The amendment retains the former procedure of requiring a motion to dismiss if there is a premature indictment or presentment but the time for the motion is no longer measured from the "arrest," but rather from the date of the arraignment on the indictment or presentment in circuit or criminal court.

Rule 5(e)(2) provides that a defendant waives the preliminary hearing by failing to appear. There is a relief from waiver provision if the defendant promptly establishes that the defendant's absence was beyond the defendant's control. The State has the right to seek an indictment or presentment during the intervening fourteen days, which is subject to a dismissal if the defendant makes the required showing.



Rules 5(c)(1)(B) and 5(d)(3) set forth the minimum time within which preliminary hearings must be held. Rule 5(e)(3) addresses the reverse issue: the pernicious problem of preliminary hearings being routinely continued for so long that witnesses, parties, and the Court are prejudiced. While there may be sound reasons for continuing the hearing, such as a mental examination, the hearing should not ordinarily be delayed unless it is essential for the interests of justice.

Rule 5 by its terms does not apply to an arrest upon a capias pursuant to indictment or presentment. Rule 5(a)(1). These amendments are in no way intended to change the rule that, when there is no arrest warrant or criminal summons issued on an affidavit of complaint (where the State commences the prosecution by indictment or presentment), there is no right to a preliminary hearing. See *Moore v. State*, 578 S.W.2d 78 (Tenn.1979).

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 12.2

NOTICE OF INSANITY DEFENSE OR EXPERT TESTIMONY OF  
DEFENDANT'S MENTAL CONDITION AND DISCOVERY  
AND DISCLOSURE OF EVIDENCE IN PRETRIAL COMPETENCY HEARINGS

[amend title of Rule 12.2 as indicated above and amend text of rule to read as follows:]

(a) Defense of Insanity. —

(1) Notice of Insanity Defense. — A defendant who intends to assert a defense of insanity at the time of the alleged crime shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) Timing. — Notice shall be given within the time provided for the filing of pretrial motions or at such later time as the court may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(3) Failure to File Notice. — A defendant who fails to comply with the requirements of Rule 12.2(a)(1) may not raise an insanity defense.

(b) Expert Testimony of Defendant's Mental Condition. —

(1) Notice of Expert Testimony. — A defendant who intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his or her guilt shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) Timing. — Notice described in Rule 12.2(b)(1) shall be filed within the time provided for the filing of pretrial motions or at such later time as the court may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or

make other appropriate orders.

(c) Mental Examination of Defendant. —

(1) Authority to Order Mental Examination. — On motion of the district attorney general, the court may order the defendant to submit to a mental examination by a psychiatrist or other expert designated in the court order.

(2) Inadmissibility of Statements During Examination. — No statement made by the defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony.

(d) Failure to Provide Notice of Expert Testimony or to Submit to Mental Examination. —

If a defendant fails to give notice under Rule 12.2(b) or does not submit to an examination ordered under Rule 12.2(c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition.

(e) Inadmissibility of Withdrawn Intention. — Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

(f) Reports of Competency Examinations. — Prior to any hearing on competency to stand trial, the parties shall permit the opposite party, on request, to inspect and copy or photograph any results or reports of psychiatric, psychological, or mental examinations and of scientific tests or experiments made in connection with evaluating the defendant's competency to stand trial, or copies thereof, if:

(1) the item is within the party's possession, custody, or control; and

(2) the party intends to introduce any part of the item as evidence in the party's case-in-chief at the competency hearing; or

(3) the party intends to call as a witness at the competency hearing the person who prepared the report, and the results or reports relate to the witness' testimony. This provision does not limit the State's duty to disclose such information under other appropriate rules or the duty to produce exculpatory evidence. Disclosure under this provision shall occur at least 21 days prior to a hearing on competency to stand trial unless the court finds that a shorter time is essential in the interests of justice so as not to unduly delay the trial. The court may also make such orders as are necessary to compel disclosure or make other appropriate orders.

(g) Inadmissibility of Defendant's Statements During Competency Examination. No statement made by the defendant in the course of any examination relating to his or her competency to stand trial (whether conducted with or without the defendant's consent), no testimony by any expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any competency hearing or criminal proceeding except for impeachment purposes or an issue concerning a mental condition on which the defendant has introduced evidence of incompetency or evidence requiring notice under Tenn. R. Crim. P. 12.2(b).

#### 2010 Advisory Commission Comment

New subsections (f) and (g) are taken from the temporary procedures in *State v. Harrison*, 270 S.W.3d 21 (Tenn. 2008). Competency to stand trial is an issue which should be raised at the earliest practical time. In most instances 21 days is sufficient time for expert and document disclosure, particularly where the hearing has been scheduled well in advance of trial. Occasionally a finding of competency may be subject to change such as where the defendant's mental state is fragile or the defendant's medication is altered. In such cases the court might need to revisit the

competency issue; therefore another competency hearing might need to be conducted on the morning of trial. So as not to unduly delay the trial, the court might shorten the time for disclosure or require immediate disclosure as the circumstances of the case dictate. Note that *State v. Reid*, 981 S.W.2d 166 (Tenn. 1998) may impose additional notice requirements for which advance disclosure may be required.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 15

DEPOSITIONS

[amend Rule 15(f) to read as follows:]

(f) Use as Evidence. —

(1) In General. — At the trial or in any hearing, a party may use a part or all of a deposition—otherwise admissible under the Tennessee Rules of Evidence—as substantive evidence if:

(A) the witness is unavailable as defined in Rule 15(~~i~~)(h) ; or

(B) on motion and notice, the court—in the interest of justice with due regard to the importance of presenting the testimony of witnesses orally in open court—finds such exceptional circumstances exist that make it desirable to allow the deposition to be used.

(2) Contradiction or Impeachment. Any party may use any deposition to contradict or impeach the testimony of the deponent as a witness.

(3) Completeness. If only part of a deposition is offered in evidence by a party:

(A) an adverse party may require the party to offer all of the deposition that is relevant to the part offered; and

(B) any party may offer other parts of the deposition.

2010 Advisory Commission Comment

The amendment to Rule 15(f)(1)(A) corrects a cross-reference.

TENNESSEE RULES OF EVIDENCE

RULE 501

PRIVILEGES RECOGNIZED ONLY AS PROVIDED

[amend Rule 501 by deleting from the 1999 Advisory Commission Comment the text indicated below:]

Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object

or writing.

**Advisory Commission Comments [1999].** The following statutes and rules deal with some Tennessee privileges. They are provided for the convenience of the bench and bar. The relevant statutes and rules should be consulted to ensure accuracy and completeness. Many other statutes make certain documents confidential, but the Commission did not view such confidentiality concepts as synonymous with privilege theories.

\* \* \* \*

~~T.R.Crim.P. 6(k). GRAND JURY-WITNESS PRIVILEGE~~

~~(1) Grand Jury Proceedings Secret. —Every member of the grand jury shall keep secret the proceedings of that body, and the testimony given before them except as provided in subdivision (2) below.~~

~~(2) Exception to Rule of Secrecy. —A member of the grand jury may be required by the court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any witness charged with perjury.~~

\* \* \* \*

## 2010 Advisory Commission Comment

The 2010 amendment deletes from the 1999 comment the reference to Tenn. R. Crim. P. 6(k), which is not really a privilege.



TENNESSEE RULES OF EVIDENCE

RULE 502

LIMITATIONS ON WAIVER OF PRIVILEGED  
INFORMATION OR WORK PRODUCT

[adopt new Rule 502:]

Inadvertent disclosure of privileged information or work product does not operate as a waiver if:

- (1) the disclosure is inadvertent,
- (2) the holder of the privilege or work-product protection took reasonable steps to prevent disclosure, and
- (3) the holder promptly took reasonable steps to rectify the error.

2010 Advisory Commission Comment

This language is taken from Federal Rule of Evidence 502(b). Compare Tennessee Rule of Civil Procedure 26.02(5) on discovery of electronically stored information.

TENNESSEE RULES OF EVIDENCE

RULE 903

~~SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY.~~ SUBSCRIBING WITNESSES'  
TESTIMONY

[amend title of Rule 903 as indicated above:]

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by statute.

2010 Advisory Commission Comment

The title of the rule is changed to reflect reality. A Tennessee statute does necessitate testimony of all living witnesses in a will contest “if to be found.” T.C.A. §32-4-105.