

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

IN RE: AMENDMENT TO RULE 27,  
RULES OF THE TENNESSEE SUPREME COURT

No.

M2010-01933-JGRLL-RL

ORDER

FILED

SEP 15 2010

Clerk of the Courts

The Court has determined that Tenn. Sup. Ct. R. 27 should be amended to dissolve the Judicial Performance Program Committee and to leave the operation of the program to evaluate appellate judges to the Judicial Performance Evaluation Commission. Accordingly, the Court proposes adopting the revised Tenn. Sup. Ct. R. 27 set out in the attached Appendix to this Order.

The Court hereby publishes the proposed revised rule for public comment. The Court solicits written comments from judges, lawyers, bar organizations, members of the public, and any other interested parties. The deadline for submitting written comments is Friday, October 15, 2010. Written comments should be addressed to:

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

with the case number above noted on the correspondence.

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

FOR THE COURT:

Cornelia A. Clark

CORNELIA A. CLARK, CHIEF JUSTICE

## *APPENDIX*

### *PROPOSED REVISION OF TENN SUP. CT. R. 27*

(additions indicated by underlining; deletions indicated by overstriking)

#### **Rule 27. Judicial Performance and Evaluation Program.**

##### **Sec. 1. Statement of Purpose.**

**1.01.** The work of Tennessee's appellate judges touches the lives of everyone who lives and works in Tennessee. The quality of justice available in Tennessee's appellate courts hinges, in large measure, on the performance of the judges who administer the system. Accordingly, the public, the bar, and the judicial system have a vital interest in a responsive and respected appellate judiciary.

**1.02.** Tennessee's appellate judiciary consists of persons who strive to administer justice to the best of their abilities and to discharge the duties of their offices impartially and efficiently. Tennessee's appellate judges also share in common a commitment to improve their own judicial skills and to improve the quality of justice administered by Tennessee's appellate courts.

**1.03.** Improving the administration of justice in Tennessee's appellate courts can best be accomplished by instituting a program of continuous self-improvement that has the broad-based support of Tennessee's appellate judges and attorneys and empowers the appellate judges, with the assistance of their peers, to enhance and to broaden their own judicial skills.

**1.04.** The Tennessee General Assembly has enacted laws that establish a merit-based process for selecting and retaining the members of Tennessee's three appellate courts. To promote informed retention decisions, Tenn. Code Ann. § 17-4-201(c) requires the Judicial Performance Evaluation Commission to publish reports concerning each appellate judge seeking election to an unexpired term or election or reelection to a full eight-year term. In addition to its primary purpose of self-improvement, the Judicial Performance Evaluation Program must provide information that will enable the Judicial Performance Evaluation Commission to perform objective evaluations and to issue fair and accurate reports concerning each appellate judge's performance.

**1.05.** In Tenn. Code Ann. § 17-4-201(a)(1), the Tennessee General Assembly has given the Tennessee Supreme Court the responsibility to promulgate a rule establishing the judicial performance evaluation program for appellate judges.

## Sec. 2. Judicial Performance Evaluation Program.

2.01. In accordance with this Court's inherent supervisory authority over the court system and the judges, and pursuant to Tenn. S. Ct. R. 11, Tenn. Code Ann. § 16-3-501 and Tenn. Code Ann. § 17-4-201(a)(1), there is hereby established a Judicial Performance Evaluation Program as part of the judicial branch of state government.

2.02. The Judicial Performance Evaluation Program shall be administered by a ~~Judicial Performance Program Committee ("Committee") whose members shall be appointed by the Supreme Court. the Judicial Performance Evaluation Commission established by Tenn. Code Ann. § 17-4-201(b). ~~The Committee's membership shall be broadly based and shall be composed of persons drawn from the bench and the bar and other persons who are familiar with the judicial system. The Supreme Court shall name the chair of the Committee and shall prescribe the terms of the members.~~~~

2.03. The ~~Committee~~ Judicial Performance Evaluation Commission shall have the responsibility for the design, the implementation, and the day-to-day operation of the Judicial Performance Evaluation Program. The ~~Committee's~~ Commission's decisions shall be consistent with this rule, and the ~~Committee~~ Commission has no power to waive or to modify any provision of this rule.

2.04. The ~~Committee~~ the Judicial Performance Evaluation Commission shall be administratively attached to the Administrative Office of the Courts, but for all purposes other than administration, it shall be considered independent of the Administrative Office of the Courts. The Administrative Office of the Courts shall provide staff assistance to the ~~Committee~~ Commission, and the ~~Committee~~ Commission may, to the extent that funds are available, retain other experts and consultants to assist with any part of its duties.

~~2.05. The Committee shall meet at least two times per year or at the call of the chair or the request of a majority of the Committee members.~~

2.05. (a) All evaluations and final reports must be approved by the Judicial Performance Evaluation Commission, but the Commission may, in its discretion, use panels to prepare interim or preliminary reports or recommendations for consideration by the membership of the Commission.

(b) Five (5) members of the Judicial Performance Evaluation Commission shall constitute a quorum for the transaction of any business to come before the Commission except for the final decision to recommend the retention or replacement of an appellate judge. With regard to the recommendation to retain or to replace an appellate judge, the

quorum shall be seven (7) or more Commission members, and the recommendation either to retain or to replace an appellate judge shall require the assent of five (5) or more members.

(c) A Commission member who is unavoidably absent from any meeting of the Commission may participate by teleconference or by video conference if these facilities are reasonably available. Commission members participating by teleconference or video conference shall be considered present for the purpose of establishing a quorum.

~~2.06. The Committee shall administer the program for the purpose of self-improvement by appellate judges and shall provide assistance to the Judicial Performance Evaluation Commission as required by these Rules:~~

~~2.07. The Committee shall provide the Judicial Performance Evaluation Commission with the appellate judge survey results which the Commission shall use to evaluate appellate judges and to publish a final report on each appellate judge except where the appellate judge has been in office less than one year before the filing deadline of a declaration of candidacy for either an unexpired term or a full eight-year term:~~

### **Sec. 3. Evaluation Criteria.**

**3.01.** Appellate judges shall be evaluated based on the following specific criteria:

**(a) Integrity** — In addition to other appropriate performance measures, the Committee Commission shall consider:

- (1) avoidance of impropriety and appearance of impropriety;
- (2) freedom from personal bias;
- (3) ability to decide issues based on the law and the facts without regard to the identity of the parties or counsel, or the popularity of the decision and without concern for or fear of criticism;
- (4) impartiality of actions; and
- (5) compliance with the Code of Judicial Conduct contained in Tenn. S. Ct. R. 10.

**(b) Knowledge and understanding of the law** — In addition to other appropriate performance measures, the ~~committee~~ Commission shall consider:

- (1) understanding of substantive, procedural, and evidentiary law;
- (2) attentiveness to factual and legal issues before the court; and
- (3) proper application of judicial precedents and other appropriate sources of authority.

**(c) Ability to communicate** —In addition to other appropriate performance measures, the ~~committee~~ Commission shall consider:

- (1) clarity of bench rulings and other oral communications;
- (2) quality of written opinions with specific focus on clarity and logic, and the ability to explain clearly the facts of the case and the legal precedents at issue; and
- (3) sensitivity to the impact of demeanor and other nonverbal communications.

**(d) Preparation and attentiveness** —In addition to other appropriate performance measures, the ~~Committee~~ Commission shall consider:

- (1) judicial temperament, including courtesy to all parties and participants; and
- (2) willingness to permit every person legally interested in a proceeding to be heard, unless precluded by law or rules of court.

**(e) Service to the profession and the public** —In addition to other appropriate performance measure, the ~~committee~~ Commission shall consider:

- (1) efficient administration of caseload;
- (2) attendance at and participation in judicial and continuing legal education programs;
- (3) participation in organizations which are devoted to improving the administration of justice;
- (4) efforts to ensure that the court is serving the public and the justice system to the best of its ability and in such a manner as to instill confidence in the court system; and

(5) service in leadership positions and within the organizations of the judicial branch of government.

**(f) Effectiveness in working with other judges and court personnel**—In addition to other appropriate performance measures, the ~~committee~~ Commission shall consider:

(1) exchanging ideas and opinions with other judges during the decision-making process;

(2) commenting on the work of colleagues;

(3) facilitating the performance of the administrative responsibilities of other judges; and

(4) working effectively with court staff.

#### **Sec. 4. Evaluation Procedure for Appellate Judges.**

**4.01.** The Judicial Performance and Evaluation Program shall include the regular evaluation of the performance of appellate judges. The evaluations shall be carried out using professionally accepted methods to provide objective and reliable evaluations and to reduce the risk of unfair ratings and statistical comparisons. Evaluations shall be based on sufficient data to ensure the statistical reliability of the evaluation information.

**4.02.** The Judicial Performance Evaluation Program for appellate judges, in addition to being used for self-improvement purposes, shall also be used for the evaluation required of appellate judges seeking election to an unexpired term or election or re-election to a full eight-year term under Tenn. Code Ann § 17-4-201(b).

#### **Sec. 5. Evaluation Procedure for Appellate Judges for Retention Recommendations.**

**5.01.** The Judicial Performance Evaluation Commission created by Tenn. Code Ann. § 17-4-201(b) shall perform evaluations of all appellate judges seeking election to an unexpired term or election or reelection to a full eight (8) year term for the purpose of aiding the public in evaluating the performance of the appellate judges in accordance with the provisions of this rule. ~~The Judicial Evaluation Commission has no power to waive or modify any provision of this Rule.~~

~~5.02.~~ The Judicial Performance Evaluation Commission shall be administratively attached to the Administrative Office of the Courts but, for all purposes other than administration, shall be considered independent of the Administrative Office of the Courts.

~~5.03.~~ The Administrative Office of the Courts shall provide staff assistance to the Judicial Performance Evaluation Commission, and the Commission may also request assistance from the Judicial Performance Program Committee. The assistance provided to the Judicial Performance Evaluation Commission shall be consistent with the funds available for the operation of the program.

~~5.04:~~ **5.02.** (a) The Judicial Performance Evaluation Commission's evaluation shall be consistent with the criteria in Section 3.01 and shall be based on the results of the evaluation surveys ~~conducted by the Judicial Performance Program Committee~~, on the personal information contained in an approved self-reporting form, and on such other comments and information as the Commission shall receive from any source.

(b) If, because of gubernatorial appointment, an appellate judge holds office less than one year before the filing deadline of a declaration of candidacy for either an unexpired term or a full eight-year term, and evaluation surveys are not available ~~from the Judicial Performance Program Committee~~, the Judicial Performance Evaluation Commission shall conduct an evaluation and make a retention recommendation using an approved self-reporting form, the judge's application, and other reliable information.

~~5.05.~~ (a) All evaluations and final reports must be approved by the Judicial Performance Evaluation Commission, but the Judicial Performance Evaluation Commission may, in its discretion, use panels to prepare interim or preliminary reports or recommendations for consideration by the membership of the Judicial Performance Evaluation Commission.

(b) ~~Five (5) members of the Judicial Performance Evaluation Commission shall constitute a quorum for the transaction of any business to come before the Commission except for the final decision to recommend the retention or replacement of an appellate judge. With regard to the recommendation to retain or to replace an appellate judge, the quorum shall be seven (7) or more Commission members, and the recommendation either to retain or to replace an appellate judge shall require the assent of five (5) or more members.~~

(c) ~~A Commission member who is unavoidably absent from any meeting of the Commission may participate by teleconference or by video conference if these facilities are reasonably available. Commission members participating by teleconference or video conference shall be considered present for the purpose of establishing a quorum.~~

~~5.06:~~ 5.03. The Judicial Performance Evaluation Commission, or a panel thereof, shall conduct a public interview with each appellate judge seeking election to an unexpired term or re-election to a full eight-year term. The ~~Judicial Performance Evaluation~~ Commission's meetings and deliberations shall be public.

~~5.07:~~ 5.04. The Judicial Performance Evaluation Commission may accept, and in its discretion, may solicit public comments concerning the performance of the appellate judges seeking election to an expired term or election or re-election to a full eight-year term. The ~~Judicial Performance Evaluation Commission~~ shall provide each appellate judge with a reasonable opportunity to respond to any information or comment received by the Commission regarding that judge prior to the preparation of the Commission's evaluation of that judge.

~~5.08:~~ 5.05. The Judicial Performance Evaluation Commission shall provide each appellate judge seeking election to an unexpired term or election or re-election to a full eight-year term with a draft of its evaluation and shall provide the appellate judge with a reasonable opportunity to comment or respond either personally or in writing before the publication of the final report or supplemental report required by Tenn. Code Ann. § 17-4-201(c).

~~5.09:~~ 5.06. The final public report or supplemental report required by Tenn. Code Ann. § 17-4-201(c) shall, at the appellate judge's request, include the judge's response to the Judicial Performance Evaluation Commission's evaluation. The judge's response, which shall be in addition to the Commission's report or supplemental report, shall not exceed 600 words.

## **Sec. 6. Confidentiality.**

**6.01.** Evaluations conducted as part of the Judicial Performance Evaluation Program must be conducted candidly and in strict confidence so that they may be based on reliable information and so that the areas for improvement may be determined fairly. The disclosure of evaluation information other than in the manner permitted by this rule or by Tenn. Code Ann. § 17-4-201(c) would be counterproductive to the goals of the performance program and would reduce the free flow of information and responses.

**6.02.** All records and information obtained and maintained by ~~the Judicial Performance Program Committee and~~ the Judicial Performance Evaluation Commission concerning the performance of individual judges shall be strictly confidential and shall not be disclosed except as provided by statute or this rule. The ~~Judicial Performance Program Committee and the Judicial Performance Evaluation~~ Commission shall ensure the



confidentiality of information regarding the performance of all judges and shall preserve the anonymity of all persons who may be requested to furnish evaluation information.

**6.03.** Records and information pertaining to the performance and evaluation of judges shall not be disclosed except as follows:

(a) ~~Except as provided by Section 6.03(4),~~ Only the individual judge being evaluated and the person or persons selected to present the data to the judge shall be permitted to know to which judge particular information applies.

(b) The ~~committee~~ Commission may provide aggregate statistical information that does not identify specific judges to the Administrative Office of the Courts and the Tennessee Judicial Conference for use in the development of judicial education programs.

~~(c) The Judicial Performance Program Committee shall provide an annual public report to the Supreme Court concerning the operation of the program. The report may contain aggregate statistical information that does not identify individual judges and may also contain recommendations for improvements in the program.~~

~~(d) The Judicial Performance Program Committee shall provide the Judicial Performance Evaluation Commission with a tabulation of all survey responses with regard to all appellate judges, except appellate judges in office less than one year. The Judicial Performance Evaluation Commission shall treat the tabulations of the survey responses used in preparing its evaluation, final report, and supplemental report, if any, pursuant to Tenn. Code Ann. § 17-4-201 as confidential.~~

**6.04.** Except when publicly disclosed in accordance with Section 6.03, all information, questionnaires, notes, memoranda, or other data declared confidential by this rule shall not be admissible as evidence, nor discoverable in any action of any kind in any court or before any tribunal, board, agency, or persons.

**6.05.** All records pertaining to a particular judge maintained by the ~~Judicial Performance Program Committee or the~~ Judicial Performance Evaluation Commission shall be destroyed six months after the judge's death or retirement. The records shall not be destroyed if the judge applies for or is certified as a senior judge in accordance with Tenn. Code Ann. § 17-2-302.

*(end of Appendix)*