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November 29, 2011

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IN RE: PETITION FOR THE ADOPTION OF
AMENDED TENNESSEE CODE OF
JUDICIAL CONDUCT TOGETHER
WITH CHANGES IN RULES AND
STATUTES

Dear Mike:

Attached please find an original and six copies of the Supplemental Report of the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Danny Van Horn, President, Tennessee Bar Association
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FILED
NOV 29 2011
Clerk of the Courts

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

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

SUPPLEMENTAL REPORT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association Task Force on Judicial Conduct Rules (“Task Force”) met on November 19, 2011, and reviewed at length the Tennessee Supreme Court’s Order of November 8, 2011 regarding the issues for oral argument on December 2, 2011; the proposed rules of procedure as modified by the Advisory Commission to the Supreme Court on Rules of Practice and Procedure; the various public comments received regarding the proposed code and rules, and in particular the comments related to the issues identified by the Supreme Court for argument. Additionally, Judge Cheryl Blackburn met with the Task Force to discuss concerns regarding the proposed code and rules with regard to disqualification and recusal issues in criminal court.

After thorough discussion of all of the forgoing, the Task Force elected to file this supplemental report on behalf of the TBA to advise the Court and other interested parties of its current position on the issues identified for oral argument, in order to clarify its position and avoid argument on issues that are not contested. The issues listed below are numbered as in the Court's November 8 order.

ISSUE 1: Is "Application, [section] II. Senior Judge" of the TBA's proposed revision of the Code intended to apply only to senior judges/justices designated pursuant to Title 17, Chapter 2, Part 3? If so, should "pursuant to Tenn. Code Ann. 5 17-2-303" be added after "designated as a senior judge or justice"?

RESPONSE: As indicated in the comment to this section, "Application, [section] II. Senior Judge" of the TBA's proposed revision of the Code is intended to apply to senior judges/justices designated pursuant to Title 17, Chapter 2, Part 3. Therefore, the proposed addition cross-referencing the statute in the black letter rule should be added.

ISSUE 2: The Joint Committee of the Tennessee Trial Judges Association and the Tennessee Judicial Conference ("Joint Committee") recommends deleting the reference to "personal" activities in proposed Rule 2.1 on the ground 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." Report of the Joint Committee...On Proposed New Tennessee Code of Judicial Conduct ("Report of Joint Committee").

RESPONSE: It is recognized and respected that there are personal matters that may, by the application of logic and basic human compassion, take precedence over a judge's judicial duties. For example, it would be unreasonable to expect a judge to miss her father's funeral in order to hold court. Conversely, there are anecdotal examples of judges who put their personal needs over their judicial duties, to an unreasonable extent. Upon review of actions taken in other states that have adopted some version of the ABA Revised Model Code, the TBA Task Force was favorably impressed by the approach taken in Maryland and recommends the addition of the following new comment to Rule 2.1, derived in part from that state's code:

[3] With respect to time devoted to personal and extrajudicial activities, this Rule must be construed in a reasonable manner. Family obligations, illnesses, emergencies, and permissible extrajudicial activities may require a judge's immediate attention. Attending to those obligations and situations, temporary in nature, is not prohibited by this Rule.

ISSUE 3: The Joint Committee recommends several changes to proposed Rule 2.11 and to the related proposals to adopt new rules of appellate, civil and criminal procedure governing motions for recusal. The Joint Committee recommends:

(1) deleting the requirement (in Rule 2.11) for written findings when the judge grants a motion for recusal;

(2) permitting a judge who voluntarily recuses himself or herself prior to the filing of a motion for recusal to "transfer the case to another judge of the same court by written order"; and

(3) providing in the rules of procedure that "the untimely filing of a recusal motion may be considered by the judge in determining whether the motion is presented for an 'improper purpose' and ultimately in deciding the motion for recusal." Report of the Joint Committee.

Additionally, the Court received one written comment suggesting that the proposed rules of procedure include several other procedural requirements for recusal motions. The Brennan Center for Justice and Justice at Stake jointly submitted a public comment supporting the adoption of proposed Rule 2.11.

RESPONSE: This response will follow the designation of subparts of the issue above:

(1) With regard to the requirement for written findings, it is acknowledged that, if the judge recuses himself prior to the filing of a motion because a judge recognizes, *sua sponte*, that recusal is warranted, perhaps for reasons not apparent to the parties, written findings might not be required. Logic would dictate that parties should not wish to litigate before a judge who feels he or she has a conflict, and it is possible that the judge might not want to disclose the nature of the conflict. Tension is created by the fact that the party who is blindsided by this ruling might want to know why, and appellate review is stymied by the lack of written findings. On the other hand, parties have the right to an impartial judge, and if the judge has concerns that he or she cannot be impartial, the parties should respect the judge's decision.

With regard to a ruling on a motion made by one of the parties, whether contested by another party, however, a different situation exists. In the interest of transparency, as well as to create a record for potential appeal of the court's decision on the recusal motion, written findings are necessary. Because motions for recusal can be oral in some circumstances, the TBA Task Force recommends the following change to proposed Rule 2.11 (D) to strike the word "filing" and substituting the word "making":

(D) Upon the ~~filing~~-making 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.

(2) In response to the issue of whether a judge who voluntarily recuses himself or herself prior to the filing of a motion for recusal should be permitted to "transfer the case to another judge of the same court by written order", the Task Force is concerned about the issue of transparency and the potential public perception that, if a judge who feels he or she cannot hear the case is able to hand pick his or her successor, the bias of the "tainted" judge might affect the selection of the successor. This could be especially important if no written reason for the *sua sponte* voluntary recusal is given.

The TBA Task Force endorses the recommended changes to the proposed rules of Civil, Criminal and Appellate Procedure recommended by the Advisory Commission on Rules of Practice and Procedure ("Advisory Commission") at its November 18, 2011 meeting and filed with this Court. To clarify the importance of a disqualified judge not being involved in the selection of his or her successor, the Task Force recommends that the last sentence in section (4) of the Civil and Criminal Rules be made a separate section, as follows and that the previous subsection (5) be renumbered as subsection (6):

(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.

(5) A judge, upon disqualification, shall not participate in selecting his or her successor.

(6) 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

The Task Force also recommends that this sentence be included in Rule 2.11 itself, as a new subsection (E):

(E) A judge, upon disqualification, shall not participate in selecting his or her successor.

(3) The concept of timeliness of the filing of a motion for recusal is addressed in the Advisory Commission's recommended changes to the proposed procedural rules and accompanying comments. The TBA is in agreement with those proposed changes and recommends that those provisions on timeliness now be adopted.

Issue 3 also includes a reference to a written comment suggesting that the proposed rules of procedure include several other procedural requirements. The Task Force met with Judge Cheryl Blackburn to consider her recommendations filed at the deadline on November 1, 2011; is aware of the comment filed by the District Attorneys General Conference; and is aware that the Court has invited

participation by representatives of both the District Attorneys General Conference and the Public Defenders Conference. The TBA is of the view that adoption of further procedural requirements including artificial deadlines, specific sanctions and adoption of a review by an independent trial level judge are not warranted at this time. As the new procedural rules are implemented, the Advisory Commission, the TBA and other interested parties should monitor implementation and propose additional requirements as needed for the orderly administration of justice.

ISSUE 4: Are the TBA's proposed rules of procedure regarding recusal motions intended to apply to judges of the municipal and/or general sessions courts?

If so,

- (1) should a written motion for recusal be required in such courts; and
- (2) what is the appropriate procedure for appealing the ruling on such a motion?

If not, should rules be adopted to address the issue of recusal in those courts?

Relatedly, some general sessions courts -by private act- exercise jurisdiction over certain types of cases typically heard in courts of record (e.g., family law cases, juvenile proceedings, etc.); if the TBA's proposed recusal rules are not intended to apply generally to municipal and/or general sessions courts, should the

recusal rules nevertheless apply to general sessions courts exercising jurisdiction in such cases?

RESPONSE:

This response will follow the designation of subparts of the issue above:

(1) The proposed changes to the rules of civil and criminal procedure are not intended to apply in municipal and general sessions courts when acting as limited jurisdiction courts. However, the provisions of proposed amended Rule 2.11, with the change to Section (D) and the additional section (E) as suggested above, would apply to all judges. Motions could be oral, as well as written although written motions are preferable.

(2) Appeal of disqualification motions in municipal and general sessions courts could occur by writ of certiorari to the trial court.

On the related issue of the applicability of the rules of civil and criminal procedure to a general sessions or other court sitting as a court of record, the civil and criminal procedure rules as recommended by the TBA and the Advisory Commission apply by their terms to a “judge acting as a court of record”.

ISSUE 5: The Court received one written comment recommending a modification of proposed Rule 3.7(A)(2) to permit a judge to solicit contributions to charitable organizations from the judge's friends, in addition to soliciting such contributions from family members and from judges over whom the judge does not exercise supervisory or appellate authority (which the rule would permit).

RESPONSE: The TBA does not feel this change should be made and will present its reasons at oral argument.

ISSUE 6: As pointed out in both the TBA's petition and in the Joint Committee's Report, proposed Rule 4.1 omits a number of provisions contained in the ABA's Model Rule 4.1. In particular, the ABA's Model Rule 4.1(A)(4) states that a judge or judicial candidate (except as permitted by law or by Rules 4.2, 4.3 and 4.4) shall not "solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office[.]" (Emphasis added.) The underscored words, however, are omitted from the TBA's proposed Rule 4.1(A)(4). In arguing this issue, the parties should address the reasons for the omission of the "contribution" text contained in the ABA Model Rule; they also should address the meaning of the word "assessment" as it relates (in the TBA's proposed rule) to "candidate[s] for public office[.]"

RESPONSE: Based on controlling precedent, the Task Force omitted provisions which would prohibit contributions to political organizations or candidates for public office because those provisions are believed to be unconstitutional.

As to the meaning of the word “assessment”, the Task Force learned about the practice by some local political organizations to require candidates who wish to run in a party primary or be designated as the party candidate to pay an assessment. The Task Force considers this element of compulsion to be different in character from the voluntary contribution which a candidate might choose to make.

ISSUE 7: Like Issue 6, Issue 7 pertains to proposed Rule 4.1(A)(4). Proposed Rule 4.1(A)(4) would state that a judge or judicial candidate shall not "solicit funds for or pay an assessment to a political organization or candidate for public office[.]" The Joint Committee recommends modifying that provision to allow a judge to solicit funds for a political organization or another candidate for public office "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[.]"

RESPONSE: The Task Force is generally in agreement with this recommended exception, and suggests the following language be substituted for Proposed Rule

4.1(A)(4):

“solicit funds for or pay an assessment to a political organization or candidate for public office except that a judge or judicial candidate may solicit funds for a political organization or candidate for public office from a member of the judge’s family or a member of the candidate’s family or from a judge or judicial candidate of the same or higher judicial level.”

The rewording encompasses defined terms in the Terminology section, which include domestic partners and others.

ISSUE 8: Proposed Rule 4.1 (A)(8) would prohibit (except as permitted by law or by Rule 4.2,4.3, and 4.4) a judge or judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee authorized by Rule 4.4[.]” The Joint Committee recommends deleting paragraph (8) from Rule 4.1(A).

RESPONSE: The TBA does not agree that judges should personally solicit campaign funds and will present its reasons at oral argument.

ISSUE 9: The Joint Committee notes that Canon 5A of the current Code of Judicial Conduct provides that a judge or candidate for judicial office shall not "publicly endorse or publicly oppose another candidate for public office" and that proposed Rules 4.1 and 4.2 would not contain a similar provision. The Joint Committee recommends adding the following new paragraph (C) to proposed Rule 4.2: "(C) A judge or judicial candidate shall not publicly endorse or publicly oppose a candidate for non-judicial public office."

RESPONSE: This was omitted based on constitutionality concerns. The TBA does recommend adoption of comment [6A] which speaks to the imprudence of such endorsements and the effect of such endorsements on issues of disqualification in subsequent matters.

CONCLUSION

The TBA wishes to express it's appreciation to the careful attention paid by the many groups and individuals who have provided comments on its proposal. The process of publication and comment has assisted in many refinements to the proposals for amendments to the Code of Judicial Conduct, procedural rules and statutes. The TBA respectfully submits that, absent unforeseen issues which might

arise from oral argument in this matter, the proposals are now ripe for final resolution by this Honorable Court.

RESPECTFULLY SUBMITTED,

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The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid on November 29, 2011

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