IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

No. M2011-01820-SC-RL2-RL - Filed: August 26, 2011

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 2011, the Advisory Commission completed its 2010-2011 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 Friday, October 28, 2011. 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. In addition, the order and Appendix shall be posted on the Tennessee Supreme Court's website.

PER CURIAM

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 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, an order or judgment entered pursuant to Rule 36, Tennessee Rules of Criminal Procedure, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

(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, or from an order or judgment entered pursuant to Rule 36, Tennessee Rules of Criminal Procedure.

(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.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 5

APPEAL AS OF RIGHT: SERVICE OF NOTICE OF APPEAL;
DOCKETING OF THE APPEAL

[Amend Rule 5(c) by adding the text indicated below by underlining:]

(a) Service of Notice of Appeal in Civil Actions. – Not later than 7 days after filing the notice of appeal, the appellant in a civil action shall serve a copy of the notice of appeal on counsel of record for each party or, if a party is not represented by counsel, on the party. Proof of service in the manner provided in Rule 20(e) shall be filed with the clerk of the trial court within 7 days after service. The appellant shall note on each copy served the date on which the notice of appeal was filed. Service shall be sufficient notwithstanding the death of a party or counsel. The trial court clerk shall promptly serve all filed notices of appeal on the clerk of the appellate court designated in the notice of appeal. With the notice of appeal, the trial court clerk shall also serve on the clerk of the appellate court either an appeal bond or an affidavit of indigency or a notice of the appellant's failure to file either an appeal bond or affidavit.

(b) Service of Notice of Appeal in Criminal Actions. – In criminal actions, when the defendant is the appellant and the action was prosecuted by the state, the defendant shall serve a copy of the notice of appeal on the district attorney general of the county in which the judgment was entered and on the attorney general at the Attorney General's Nashville, Tennessee office. When the defendant is the appellant and the action was prosecuted by a governmental entity other than the state for the violation of an ordinance, the copy of the notice of appeal shall be served on the chief legal officer of the entity or, if this officer's name and address does not appear of record, then on the chief

administrative officer of the entity at his or her official address. When the state or other prosecuting entity is the appellant, a copy of the notice of appeal shall be served on the defendant and the defendant's counsel. Service shall be made not later than 7 days after filing notice of appeal and proof of service shall be filed with the clerk of the trial court within 7 days after service. The appellant shall note on each copy served the date on which the notice of appeal was filed. The trial court clerk shall promptly serve all filed notices of appeal on the clerk of the appellate court designated in the notice of appeal.

(c) Docketing of the Appeal. – The clerk of the appellate court shall enter the appeal on the docket immediately upon receipt of the copy of the notice of appeal served upon the clerk of the appellate court by the trial court clerk or, in appeals other than appeals as of right pursuant to Rule 3, upon receipt of the application or petition initiating the appeal. The clerk of the appellate court shall immediately serve notice on all parties of the docketing of the appeal. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if such title does not contain the name of the appellant, the party's name, identified as appellant, shall be added to the title. With the service of the notice of docketing of the appeal, the clerk of the appellate court shall send to the appellant, and the appellant shall fully complete and return to the clerk, a docketing statement in the form prescribed by the clerk.

<u>If more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant, unless otherwise directed by the court.</u>

Advisory Commission Comment [2012]

Tenn. R. App. P. 13(a) provides that "any question of law may be brought up for review and relief by any party" and that "[c]ross-appeals, separate appeals, and separate applications for permission to appeal are not required." Tenn. R. App. P. 13(a) goes on to provide that "[d]ismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court." *See also* Tenn. R. App. P. 6(c) (providing that a party wanting to litigate appellate issues despite dismissal of the original appellant's appeal shall file a cost bond, with surety, to replace the cost bond filed by the original appellant); Tenn. R. App. P. 15(a) (providing for the voluntary dismissal of an appeal by stipulation or on motion, but also stating, "[a]ny party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss"). Thus, once one party files a notice of appeal, other parties are not required to file a separate notice of appeal in order to raise any issue(s) in the appeal. Tenn. R. App. P. 13(a), Advisory Commission Comment (stating, "[t]he result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole"). As a practical matter, however, it is not uncommon for more than one party to file a notice of appeal.

Tenn. R. App. P. 5(c) is amended to state that, in cases appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party to file a notice of appeal is considered to be the appellant. The purpose of the amendment is to clarify the application of other rules of appellate procedure, e.g., Tenn. R. App. P. 6 (governing bond for costs on appeal in civil actions), Tenn. R. App. P. 24 (governing the content and preparation of the record on appeal), and Tenn. R. App. P. 29 (governing the filing and service of briefs). A second (or later) party filing a notice of appeal may file a reply brief pursuant to Tenn. R. App. P. 27(c); that rule permits an appellee who is seeking relief from the judgment to file a brief in reply to the response of the appellant to the issues presented by appellee's request for relief.

The amendment does not apply to cases appealed to the Court of Criminal Appeals. In criminal cases involving more than one defendant, the trial court enters a separate judgment as to each defendant. For that reason, each defendant filing a notice of appeal (and also the State, when it files a notice of appeal) is considered to be an appellant. *See* Tenn. R. App. P. 3(b) and (c) (providing for appeals as of right by the defendant and/or the State in specified criminal proceedings) and Tenn. R. App. P. 5(b) (regarding service of the notice of appeal in criminal actions).

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 10

EXTRAORDINARY APPEAL BY PERMISSION ON
ORIGINAL APPLICATION TO THE APPELLATE COURT

[Add new Comment below; the text of the rule is unchanged:]

2012 Advisory Commission Comment

When the intermediate court *grants* an extraordinary appeal under Rule 10, an appeal of the final decision of the intermediate court to the Supreme Court is governed by Rule 11. Accordingly, a party has 60 days from the date of the intermediate court's judgment in the extraordinary appeal to file an application for permission to appeal under Rule 11. Note, however, that when the intermediate court *denies* an extraordinary appeal, Rule 10(b) provides that an application for extraordinary appeal must be filed in the Supreme Court within 30 days of the intermediate court's order denying the extraordinary appeal.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 11

APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT

[Amend paragraph (b) by adding the text underlined below:]

(a) Application for Permission to Appeal; Grounds. — An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

(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. Except for an application seeking to appeal the Court of Criminal Appeals' disposition of an appeal pursuant to Rule 9 or Rule 10, the time period for filing an application for permission to appeal is not jurisdictional in a case arising from the Court of Criminal Appeals and may be waived by the Supreme Court in the interest of justice. 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.

(c) * * * *

2012 Advisory Commission Comment

Paragraph (b) is amended to provide that the time period for filing an application for permission to appeal pursuant to Rule 11 is not jurisdictional in cases arising from the Court of Criminal Appeals (subject to two exceptions discussed below) and may be waived by the Supreme Court in the interest of justice. The amendment is based upon a similar provision governing notices of appeal in criminal cases. *See* Tenn. R. App. P. 4(a).

The discretionary waiver authority granted to the Supreme Court in the amended rule is limited to cases arising from the Court of Criminal Appeals. Thus, the amendment does not apply to cases arising from the Court of Appeals. Additionally, the amended rule provides that the waiver authority granted to the Supreme Court does not extend to cases arising from the Court of Criminal Appeals' disposition of an interlocutory appeal filed pursuant to Rule 9 or an extraordinary appeal filed pursuant to Rule 10. Consequently, in cases arising from the Court of Appeals and in cases arising from interlocutory or extraordinary appeals filed in the Court of Criminal Appeals, the applicable time periods for filing an application for permission to appeal to the Supreme Court are jurisdictional and cannot be waived.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 22

MOTIONS

[Amend paragraphs (b) and (c) by adding the new subtitles indicated below by underlining; the text of the rule is unchanged:]

(a) * * * *

(b) Motions for Procedural Orders. Notwithstanding the provisions of (a) of this Rule 22 as to motions generally, motions for procedural orders, including any motion under Rule 21(b), may be acted upon at any time, without awaiting a response. The motion shall contain a statement concerning efforts to contact adverse counsel and shall reflect whether there is opposition to the motion. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action. Pursuant to rule or order of the courts, motions for specified types of procedural orders may be disposed of by the clerk.

(c) Disposition of Motions. On request of a party or on its own motion, the appellate court may place any motion on the calendar for hearing or the court may otherwise dispose of the motion as it may determine. When a motion has been placed on the calendar for hearing, the clerk shall notify each party of the date and the time designated for the hearing. Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk.

* * * *

2012 Advisory Commission Comment

Paragraphs (b) and (c) are amended to supply a subtitle for each paragraph.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 24

CONTENT AND PREPARATION OF THE RECORD

[The text of the rule is unchanged; add the following new Advisory Commission Comment:]

Advisory Commission Comment [2012]

Tenn. R. App. P. 3(b) and (c), as well as Tenn. R. Crim. P. 36, were amended in 2012 to provide for an appeal as of right from the trial court's filing of a corrected judgment or order.

Tenn. R. App. P. 25(a) lists the items which must be included in the record on appeal. In an appeal as of right from the entry of a corrected judgment or order pursuant to Tenn. R. Crim. P. 36, the record on appeal should include the listed items (e.g., papers filed in the trial court, exhibits, transcript or statement of the evidence or proceedings, etc.) pertaining to the original judgment or order, as well as those items pertaining to the corrected judgment or order. As provided by Tenn. R. App. P. 25(a), however, the parties may designate that only certain items be included "[i]f less than the full record on appeal. . .is deemed sufficient to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal[.]"

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 30

FORM OF BRIEFS AND OTHER PAPERS

[Amend Rule 30(a) as indicated (new text underlined; deleted text stricken); the other paragraphs of the rule are unchanged:]

(a) Production Methods; Paper. – Briefs, transcripts or statements, applications, answers in opposition, petitions, motions, supporting papers, and objections should be produced on opaque, unglazed white paper by any printing, duplicating, or copying process that provides a clear black image. The use of recycled paper with the highest feasible percentage of postconsumer waste content is recommended and encouraged. Original typewritten pages may be used, but not carbon copies except on behalf of parties allowed to proceed as poor persons. All printed matters should be on paper 6⅛ by 9¼ inches in type not smaller than 11 point and type matter 4¼ by 7¼ inches. If not printed, copies should be on paper 8½ by 11 inches, double spaced, except for quoted matter, which may be single spaced, ~~with the text not smaller than standard elite typewriting and not to exceed 6½ by 9½ inches~~ with the text (1) when typewriter generated not smaller than standard elite type or (2) when computer generated not smaller than times new roman 12 point font and, in either event, not to exceed 6½ by 9½ inches on the page. Papers should be numbered on the bottom and fastened on the left.

* * * *

2012 Advisory Commission Comment

Paragraph (a) is amended to specify the minimum font size for non-printed papers generated by a computer.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 8

GENERAL RULES OF PLEADING

[Amend Rule 8.02 by deleting text stricken below:]

8.01. Claims for Relief. – * * * *

8.02. Defenses – Form of Denials. – A party shall state in short and plain terms his or her defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, he or she shall so state and this will have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. ~~Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as he or she expressly admits; but, when the pleader does so intend to controvert all its averments, he or she may do so by general denial subject to the obligations set forth in Rule 11.~~

* * * *

2012 Advisory Commission Comment

The change to Rule 8.02 eliminates the rarely used possibility of a responsive pleading that denies all averments, including denying the identities of the parties to a suit.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 12

DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED:
BY PLEADING OR MOTION: MOTION FOR JUDGMENT ON PLEADINGS

[Amend 12.06 as indicated below:]

* * * *

12.06. Motion to Strike. – Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within ~~thirty (30)~~ ninety (90) days after the service of a pleading or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

* * * *

Advisory Commission Comment [2012]

12.02. The defenses set forth in this Rule are affirmative defenses. They must be pleaded in accordance with Rule 8.03. *Allgood v. Gateway Health Sys.*, 309 S.W.3d 918, 925 (Tenn. Ct. App. 2009).

12.06. The Rule was amended to increase the amount of time to file a Rule 12.06 motion from 30 days to 90 days. The time period was extended to allow the parties additional time to explore the sufficiency of claims and defenses, including those defenses asserted under Rule 12.02, before filing a motion to strike the claim or defense for one or more of the reasons set forth in the Rule.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 45

SUBPOENA

[Amend Rule 45.01 by adding the underlined text below:]

45.01 For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at the time and place and for the party therein specified. The subpoena also must state in prominently displayed, bold-faced text: "The failure to file a motion to quash or modify within fourteen days of service of the subpoena waives all objections to the subpoena, except the right to seek the reasonable cost for producing books, papers, documents, electronically stored information, or tangible things." The clerk shall issue a subpoena or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

* * * *

Advisory Commission Comment [2012]

Rule 45.01 is amended to ensure that persons served with subpoenas receive adequate notice, simultaneously with service, that, as provided for in Rule 45.07, the failure to file a motion to quash or modify within fourteen days of service of the subpoena will result in the waiver of the right to seek relief from the subpoena (other than the right to seek the reasonable costs for producing books, papers, documents, electronically stored information, or tangible things).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 45

SUBPOENA

[Delete the original Advisory Commission Comment to 45.04, as indicated below, retain the 2009 Comment to 45.04, and add the new 2012 Comment to 45.04, as set out below; the text of the rule is unchanged:]

45.01. * * * *

45.04. Subpoena for Taking Depositions -- Place of Deposition.

(1) A subpoena for taking depositions may be issued by the clerk of the court in which the action is pending. A subpoena for taking depositions may be served at any place within the state. If the subpoena commands the person to whom it is directed to produce designated books, papers, documents, electronically stored information, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26.02, the subpoena will be subject to the provisions of Rules 30.02, 37.02 and 45.02.

(2) A resident of the state may be required to give a deposition only in the county wherein the person resides or is employed or transacts his or her business in person, or at such other convenient place as is fixed by an order of the court.

~~*Advisory Commission Comments.* 45.04: Tennessee has adopted the Uniform Foreign Deposition Act, Tenn. Code Ann. § 24-9-103 (repealed). This statute aids only the non-resident lawyer who wants to take a deposition in Tennessee for use elsewhere. Tennessee lawyers must look to the foreign state's statute for similar assistance. To determine whether a given state statute has adopted the Uniform Act, look under "Depositions" in the digest of the state's laws in the last volume of Martindale-Hubbell Law Directory.~~

Advisory Commission Comments [2009]. The amendment to Rule 45.04(1) restates settled law. A deposition subpoena, like a trial subpoena, may be served anywhere in Tennessee.

Advisory Commission Comment [2012]

45.04: Tennessee has adopted the Uniform Interstate Depositions and Discovery Act, Tenn. Code Ann. §§ 24-9-201, et seq. The Act aids only the lawyer who wants to take a deposition or obtain discovery in Tennessee for use elsewhere. Tennessee lawyers seeking to take a deposition or obtain discovery in a foreign jurisdiction must look to that jurisdiction's law for similar assistance.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 67

DEPOSIT IN COURT

[The text of the rule is unchanged; amend the 1998 Comment as indicated below:]

Advisory Commission Comments [1998]

The losing defendant cannot avoid ~~the 10% interest rate~~ post-judgment interest due under Tenn. Code Ann. § ~~47-14-222~~ 47-14-121 by depositing the verdict amount into the trial court clerk's office.

Advisory Commission Comment [2012]

The 1998 Comment is clarified, and an erroneous cross-reference to "Tenn. Code Ann. § 47-14-222" is corrected to "Tenn. Code Ann. § 47-14-121."

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 36

CLERICAL MISTAKES

[Amend Rule 36 as indicated below (new text underlined):]

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. Upon filing of the corrected judgment or order, the defendant or the state may initiate an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure.

Advisory Commission Comment [2012]

Tenn. R. Crim. P. 36 is amended to provide for an appeal as of right from the trial court's filing of a corrected judgment or order. A corresponding amendment to Tenn. R. App. P. 3 is also adopted.

Tenn. R. App. P. 25(a) lists the items which must be included in the record on appeal. In an appeal as of right from the entry of a corrected judgment or order pursuant to Tenn. R. Crim. P. 36, the record on appeal should include the listed items (e.g., papers filed in the trial court, exhibits, transcript or statement of the evidence or proceedings, etc.) pertaining to the original judgment or order, as well as those items pertaining to the corrected judgment or order. As provided by Tenn. R. App. P. 25(a), however, the parties may designate that only certain items be included "[i]f less than the full record on appeal. . .is deemed sufficient to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal[.]"

TENNESSEE RULES OF EVIDENCE

RULE 501

PRIVILEGES RECOGNIZED ONLY AS PROVIDED

[The text of the rule is unchanged. As indicated below, delete the following text from the Advisory Commission Comment [1999] and add the following Advisory Commission Comment [2012]:]

~~T.C.A. § 63-6-219(e). MEDICAL REVIEW COMMITTEE--INFORMANT PRIVILEGE~~

~~All information, interviews, incident or other reports, statements, memoranda or other data furnished to any [medical review] committee as defined in this section, and any findings, conclusions or recommendations resulting from the proceedings of such committee are declared to be privileged. All such information, in any form whatsoever, so furnished to, or generated by, a medical review committee shall be privileged communication subject to the laws pertaining to the attorney-client privilege. The records and proceedings of any such committees are confidential and shall be used by such committee, and the members thereof only in the exercise of the proper functions of the committee and shall not be public records nor be available for court subpoena or for discovery proceedings. One (1) proper function of such committees shall include advocacy for physicians before other medical peer review committees, peer review organizations, health care entities, private and governmental insurance carriers, national or local accreditation bodies, and the state board of medical examiners of this or any other state. The disclosure of confidential, privileged peer review committee information to such entities during advocacy, or as a report to the board of medical examiners under § 63-6-214(d), or to the affected physician under review, does not constitute either a waiver of confidentiality or privilege. Nothing contained herein applies to records made in the regular course of business by a hospital or other provider of health care and information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil proceedings merely because they were presented during proceedings of such committee.~~

Advisory Commission Comment [2012]

The Advisory Commission Comment [1999] was amended by deleting a reference to Tenn. Code Ann. § 63-6-219(e), which was repealed by Chapter 67, Tennessee Public Acts of 2011. In

addition to repealing Tenn. Code Ann. § 63-6-219, Chapter 67 enacted the following privilege (using identical language in two separate statutes):

> Tenn. Code Ann. §§ 63-1-150(d)(1) and 68-11-272(c)(1).
> QUALITY IMPROVEMENT COMMITTEE PRIVILEGE
>
> Records of a QIC [Quality Improvement Committee] and testimony or statements by a healthcare organization's officers or directors, trustees, healthcare providers, administrative staff, employees or other committee members or attendees relating to activities of the QIC shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena or admission into evidence in any judicial or administrative proceeding. Any person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation.
>
> *But see* Tenn. Code Ann. § 63-1-150(a) (listing statutes to which Section 63-1-150 does not apply).

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 1

TITLE OF RULES – SCOPE – PURPOSE AND CONSTRUCTION – SITUATIONS NOT COVERED BY RULES

[Amend paragraph (c) as indicated (new text underlined; deleted text stricken):]

* * * *

(c) PURPOSE AND CONSTRUCTION. These rules are designed to implement the purposes of the juvenile court law as expressed in Tenn. Code Ann. § 37-1-101 by providing speedy and inexpensive procedures for the hearing of juvenile cases that assure fairness and equity and that protect the rights and interests of all parties; by promoting uniformity in practice and procedure; and by providing guidance to judges, ~~referees~~ magistrates, attorneys, youth services and probation officers, and others participating in the juvenile court.

* * * *

Advisory Commission Comment [2012]

The 2012 amendment substitutes the term "magistrates" for the term "referees," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 2

DEFINITIONS

[Amend Rule 2 as indicated below (new text underlined; deleted text stricken):]

* * * *

(10.1) "Magistrate" means a person meeting the qualifications and serving the functions set forth in Tenn. Code Ann. § 37-1-107.

* * * *

(14) "Probation officer" means a person who performs the duties set forth in Tenn. Code Ann. § 37-1-105, particularly those of supervising and assisting children placed on probation or in the person's protective supervision or care by order of the court or other authority of law, whether such person is employed by the ~~Department of Correction~~ Department of Children's Services or so designated by the juvenile court.

* * * *

(17) ~~"Referee" means a person meeting the qualifications and serving the functions set forth in Tenn. Code Ann. § 37-1-107.~~ [Reserved.]

* * * *

Advisory Commission Comment [2012]

The 2012 amendments are housekeeping measures that substitute "Department of Children's Services" for "Department of Correction" and "magistrate" for "referee," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 4

~~REFEREES~~ MAGISTRATES

[Amend Rule 4, including the title above, as indicated (new text underlined; deleted text stricken):]

(a) HEARINGS BEFORE ~~REFEREES.~~ MAGISTRATES. The judge may direct that any case or class of cases of which the juvenile court has jurisdiction shall be heard in the first instance by the ~~referee~~ magistrate. Such cases shall be conducted in the same manner provided for the hearing of cases by the court except as otherwise specified herein. The ~~referee~~ magistrate in the conduct of the proceedings shall have the powers of a trial judge, and shall have the same authority as the judge to issue any and all process. Upon the conclusion of the hearing in each case, the ~~referee~~ magistrate shall transmit to the judge all papers relating to the case, together with the ~~referee's~~ magistrate's written findings and recommendations.

(b) REVIEW OF ~~REFEREE'S~~ MAGISTRATE'S ACTIONS. Any hearing by a ~~referee~~ magistrate on any preliminary matter shall be final and not reviewable by the judge of the juvenile court, except on the court's own motion. The setting of bond in detention hearings and any matter that is a final adjudication of a child shall not be construed to be preliminary matters under this section and are reviewable by the judge of the juvenile court upon request or upon the court's own motion, except as provided in section (c)(1) below.

(c) REQUEST FOR REHEARING BEFORE JUDGE.

(1) Any party may, within five judicial days of the transmittal to the judge of the written findings and recommendations of the ~~referee~~ magistrate, file a request with the court for a hearing by the judge of the juvenile court. The judge may, on his

or her own motion, order a rehearing of any matter heard before a ~~referee~~ magistrate, and shall allow a hearing if a request for such hearing is filed as herein prescribed. However, there shall be no rehearing in any delinquent or unruly case in which the petition is dismissed by the referee after a hearing on the merits.

(2) Each party shall be informed at the hearing before the ~~referee~~ magistrate of the right to a rehearing before the juvenile court judge, of the time limits within which a request for a rehearing must be perfected, and of the manner in which to perfect such request.

(3) Unless the judge orders otherwise, the recommendations of the ~~referee~~ magistrate shall be the decree of the court pending a rehearing.

(d) CONFIRMATION OF ~~REFEREE'S~~ MAGISTRATE'S FINDINGS AND RECOMMENDATIONS. In case no hearing before the judge is requested, or when the right to a hearing is waived, the findings and recommendations of the ~~referee~~ magistrate become the decree of the court when confirmed by an order of the judge. The final order of the court shall, in any event, be proof of such confirmation, and also of the fact that the matter was duly referred to the ~~referee~~ magistrate.

Advisory Commission Comment [2012]

The 2012 amendment substitutes the terms "magistrate" or "magistrates" for the terms "referee" or "referees," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 5

CUSTODY – WHEN CHILD MAY BE TAKEN INTO CUSTODY – PROCEDURES UPON TAKING CHILD INTO CUSTODY – RIGHTS OF CHILD

[Amend Rule 5(d)(2), (3) and (5) as indicated (new text underlined; deleted text stricken):]

* * * *

(d) PROCEDURES IN DEPENDENT AND NEGLECTED AND ABUSE CASES.

(1) * * * *

(2) GROUNDS FOR EMERGENCY REMOVAL WITHOUT COURT ORDER. Pursuant to Tenn. Code Ann. § 37-1-113, a law enforcement officer, a social worker of the ~~Department of Human Services~~ Department of Children's Services, or a duly authorized officer of the court may take a child into custody without a court order, if that person has reasonable grounds to believe that the conditions specified in Tenn. Code Ann. § 37-1-114 exist.

(3) PROCEDURES UPON TAKING CHILD INTO CUSTODY; NOTICE REQUIREMENTS. When a child is taken into custody upon an allegation that the child is dependent and neglected or abused, the person taking the child into custody shall bring the child before the court or deliver the child to a shelter care facility designated by the court or to a medical facility if the child is believed to suffer from a serious physical condition or illness which requires prompt treatment. The person shall give notice thereof, together with a reason for taking the child into custody, to the parents, guardian, or other custodian and to the court. Notice shall also immediately be given to the ~~Department of Human Services~~ Department of

Children's Services. As soon as practicable, notice shall also be given to the parents, guardian, or other custodian, and to the child if fourteen (14) years of age or older or if also alleged to be delinquent or unruly, of their right to a preliminary hearing as provided in Tenn. Code Ann. § 37-1-117 and Rule 16 of these rules; of the time, date, and place of the hearing; and of the factual circumstances necessitating the removal.

(4) * * * *

(5) ALTERNATIVES TO ORDERING EMERGENCY REMOVAL. In cases in which application is made for an order of emergency removal, the court may, as an alternative to emergency removal, authorize a representative of the ~~Department of Human Services~~ Department of Children's Services to remain in the child's home with the child until a parent, guardian, legal custodian, or adult relative of the child enters the home and expresses a willingness and apparent ability to resume permanent charge of the child, or in the case of a relative, to assume charge of the child until a parent or legal guardian enters the home and expresses such willingness and apparent ability.

Advisory Commission Comment [2012]

The 2012 amendments to paragraphs (d)(2), (3) and (5) substitute the term "Department of Children's Services" for the term "Department Human Services," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 8

INITIATION OF CASES

[Amend Rule 8(c) as indicated (new text underlined; deleted text stricken):]

* * * *

(c) PRELIMINARY INQUIRY. Upon receipt of a complaint, a designated intake court officer shall conduct a preliminary inquiry to determine whether the facts alleged establish that the matter is within the jurisdiction of the court and whether the best interests of the child or of the public require that further court action be taken. However, all complaints alleging that a child is dependent and neglected or abused shall be referred to the ~~Department of Human Services~~ Department of Children's Services.

* * * *

Advisory Commission Comment [2012]

The 2012 amendment to paragraph (c) substitutes the term "Department of Children's Services" for the term "Department of Human Services," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 11

ORDERS FOR THE ATTACHMENT OF CHILDREN

[Amend Rule 11 as indicated (new text underlined; deleted text stricken):]

(a) FAILURE TO APPEAR. When a child fails to appear at a hearing or conference to which the child has been properly summoned or personally notified to appear, the ~~referee~~ magistrate or judge may issue an order of attachment; or

(b) REQUIREMENTS FOR ISSUANCE OF ORDERS IN OTHER CASES. Where an order of attachment is sought to be issued in any other case, the following requirements must be met:

(1) The judge or ~~referee~~ magistrate must determine, from the juvenile court petition and the affidavit and/or sworn testimony presented, that there is probable cause to believe that an offense has been committed and that the child committed it or, in the case of a child alleged to be dependent and neglected, that the child is in need of the immediate protection of the court. In making this probable cause determination, the judge or ~~referee~~ magistrate shall be governed by the following:

(i) The statement of a person requesting an order of attachment must be reduced to writing and made upon oath;

(ii) The written affidavit must provide sufficient factual information to support an independent judgment that probable cause exists for the issuance of the order of attachment; and

(iii) If hearsay evidence is relied upon, the basis for the credibility of both the informant and the informant's information must

also appear in the affidavit.

(2) Pursuant to Tenn. Code Ann. § 37-1-121, the judge or ~~referee~~ magistrate must also find that:

(i) The conduct, condition or surroundings of the child are endangering the child's health or welfare or that of others; or

(ii) The child may abscond or be removed from the jurisdiction of the court; or

(iii) Service of a summons would be ineffectual or the parties are evading service.

(3) If the judge or ~~referee~~ magistrate determines that both requirements (1) and (2) above have been satisfied, then he or she may order that the child be taken into custody immediately and brought before the court in accordance with Rule 5.

Advisory Commission Comment [2012]

The 2012 amendment substitutes the term "magistrate" for the term "referee," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 13

INTAKE IN DEPENDENT AND NEGLECTED AND ABUSE CASES

[Amend Rule 13(a) and (b) and the original Advisory Commission Comment as indicated below (new text underlined; deleted text stricken):]

(a) REFERRAL TO ~~DEPARTMENT OF HUMAN SERVICES~~ DEPARTMENT OF CHILDREN'S SERVICES. When a complaint or petition is filed in the juvenile court alleging a child to be dependent and neglected and/or abused, the court shall promptly refer the case to the ~~Department of Human Services~~ Department of Children's Services to investigate the social conditions of the child and to report the findings to the court to aid the court in its disposition of the child.

(b) REFERRAL TO LICENSED CHILD-PLACING AGENCY. If the child who is the subject of the complaint or petition is in the custody of a licensed child-placing agency, or if the complaint or petition is filed by a licensed child-placing agency, the referral may be made to such agency in addition to the ~~Department of Human Services~~ Department of Children's Services.

(c) * * * *

Advisory Commission Comments

Because of the intimate involvement in, and primary responsibility for, the types of cases covered by this rule on the part of the ~~Department of Human Services~~ Department of Children's Services, the committee deemed it inappropriate to draft a more specific rule on this subject. Regarding the informal adjustment of these cases, it should be noted that no such action should be undertaken without consultation with the ~~Department of Human Services~~ Department of Children's Services. See, in this regard, subsection (a)(4) of Rule 14, which suggests that the attitude of any affected agencies be taken into account in deciding whether to informally adjust any case.

Advisory Commission Comments [2012]

The 2012 amendment substitutes the term "Department of Children's Services" for the term "Department of Human Services" in both the text of the rule and in the original Advisory Commission Comment, consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 21

PLEA OF GUILTY IN DELINQUENT AND UNRULY CASES

[Amend the original Advisory Commission Comments as indicated (new text underlined; deleted text stricken); the text of the rule is unchanged.]

Advisory Commission Comments

In subsection (b) of Rule 21, the court is required to inquire about any prior discussions the child may have had regarding potential dispositions. The court should properly make itself aware of such interactions and "bargains," and of their effect of the child's willingness to plead guilty, before it makes a decision whether to accept any such plea. The court should also ascertain, through this inquiry, with whom any such discussions took place, and whether the child's attorney was present. While it would be within the province of the District Attorney General to initiate such discussions, and possibly within that of ~~Department of Correction~~ Department of Children's Services probation officers, the committee considers that it would represent a clear conflict of interest for any court employee such as a youth services officer to conduct such discussions. See the comments to Rules 2 and 8 for further insight on this issue.

The court may at any time prior to the beginning of a dispositional hearing permit a plea of guilty to be withdrawn, and if an adjudication has been entered thereon, set aside such adjudication and allow another plea to be substituted for the plea of guilty. In the subsequent adjudicatory hearing, the court may not consider the plea which was withdrawn as an admission. Evidence of a guilty plea, later withdrawn, or of statements made in connection therewith, would not be admissible in any proceeding against the respondent.

Advisory Commission Comment [2012]

The 2012 amendment modifies the original Advisory Commission Comments by substituting the term "Department of Children's Services" for the term "Department of Correction," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 23

PRETRIAL DIVERSION IN DELINQUENT AND UNRULY CASES

[Amend the Advisory Commission Comments as indicated below (new text underlined; deleted text stricken); the text of the rule is unchanged.]

Advisory Commission Comments

Pretrial diversion is intended by the committee to replace the former practice of holding cases open for further action. The procedures set forth in this rule essentially allow for a process similar to informal adjustment, with no official finding as to guilt, except that the court in the person of the judge (or ~~referee~~ magistrate) is involved in that there must be court approval of any agreement.

Courts should develop written local procedures and criteria for initiating pretrial diversion. Such criteria might include a listing of the types of cases, or charges, which might be handled by pretrial diversion. Pretrial diversion might be initiated by the parties or by the court itself, through motion or through whatever other procedure the court determines is appropriate. Local rules and procedures should also address the issue of how the district attorney general will be notified of cases in which pretrial diversion is being considered, in light of the legitimate public interest in the disposition of more serious cases.

Under this rule, if the child completes the pretrial diversion agreement, the case is dismissed. If the court, or the designated court officer, determines that the case is serious enough that such dismissal should not occur, the case should proceed to court as in any other case warranting official court action, and, if the child readily admits guilt and wishes to negotiate a settlement based upon a plea of guilty, such negotiated settlement should be handled in accordance with Rule 21.

Advisory Commission Comment [2012]

The 2012 amendment modifies the original Advisory Commission Comments by substituting the term "magistrate" for the term "referee," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 24

TRANSFER TO CRIMINAL COURT IN DELINQUENT CASES

[Amend Rule 24 and the original Advisory Commission Comment as indicated below (new text underlined; deleted text stricken):]

When the allegations of the petition are so serious and/or the child's age or record is such that transfer of a child to the sheriff to be dealt with as an adult is likely or probable, the court should not hear the case on its merits, but shall proceed to conduct a probable cause hearing only, and announce that intention and purpose when the case is first presented.

(a) TRANSFER OF JURISDICTION OF CHILD TO CRIMINAL COURT. The court after notice, hearing, and a finding that the criteria for transfer as required by Tenn. Code Ann. § 37-1-134 exist, may transfer jurisdiction over a child to adult criminal court pursuant to Tenn. Code Ann. §§ 37-1-134 and 37-1-159.

(b) TRANSFER HEARING.

(1) The judge shall conduct a transfer hearing in all cases in which transfer to criminal court is sought under Tenn. Code Ann. § 37-1-134.

(2) At the transfer hearing:

(i) A prosecutor shall represent the state;

(ii) The child shall be represented by an attorney;

(iii) The child may testify as a witness in his or her own behalf and call and examine other witnesses and produce other evidence in his or her own behalf, however no plea shall be accepted by the court; and

(iv) Each witness shall testify under oath or affirmation and be subject to cross-examination.

(3) The same rules of evidence shall apply as are applicable to a general sessions preliminary hearing.

(4) Unless the child appears in any way to be mentally ill or ~~mentally retarded~~ intellectually disabled, and unless personally or through counsel, asserts that the child is mentally ill or ~~retarded~~ intellectually disabled, it shall be presumed that the child is not committable to an institution for the mentally ill or ~~mentally retarded~~ intellectually disabled, and the court may so find. If mental illness is alleged, the court shall order psychological or psychiatric examination at any stage of the proceeding.

(5) If, after considering the evidence including the factors set forth in Tenn. Code Ann. § 37-1-134, the court determines that the criteria for transfer as set forth in Tenn. Code Ann. § 37-1-134 have been satisfied and finds that there are reasonable grounds for transfer as required by Tenn. Code Ann. § 37-1-134, the child may be transferred to criminal court for trial as in the case of adults.

(6) If reasonable grounds are not found, the judge shall deny the motion for transfer and set the petition alleging a delinquent offense for trial on its merits in juvenile court or may immediately proceed to hold the adjudicatory hearing with the consent of the respondent. However, the judge shall not at any time preside over the adjudicatory hearing of a case in which the judge has conducted a transfer hearing, if any interested party objects.

(7) Any order of transfer shall specify the grounds for transfer and set bond if the offense is bailable pursuant to state law.

(c) APPEALS. Appeals ~~from an order of transfer~~ shall be ~~by motion for an acceptance hearing~~ in accordance with Tenn. Code Ann. § 37-1-159.

Advisory Commission Comments

Under Tenn. Code Ann. § 37-1-134 the court must find reasonable grounds to believe that (i) the child committed the delinquent act as alleged, (ii) the child is not committable to an institution for the ~~mentally retarded~~ intellectually disabled or mentally ill, and (iii) the interests of the community require that the child be put under legal restraint or discipline. Regarding § 37-1-134, and subsection (b)(4) of Rule 24, it has been held by both the Tennessee Court of Appeals and Court of Criminal Appeals that, although the burden of proof is on the prosecution on such issue, there is a presumption of noncommittability similar to that relating to sanity in criminal trials. Such presumption can be rebutted by evidence introduced by the defendant, and in such event the burden would shift back to the prosecution to persuade the court the child is not committable. *See Boyd v. State*, Tenn. Crim. App. (December 30, 1979); *State v. Miller*, Tenn. App. Middle Section (June 25, 1976). The committee suggests, however, that it is good practice in any case for the court to arrange for testing and evaluation, evidence of which may be introduced by either of the parties or the court on the issue of committability.

Regarding the provision in subsection (b)(6) of the rule, prohibiting the judge who conducted a transfer hearing from presiding over the adjudicatory hearing in the same case if any interested party objects, Tenn. Code Ann. § 37-1-134 also prohibits a judge who has conducted a transfer hearing from presiding at a hearing in the same case in criminal court. Such a situation might arise if a judge were sitting specially in criminal court, or if a person who was formerly the juvenile court judge were elected to the criminal court or to any other court which might hear such a case by special arrangement.

Advisory Commission Comment [2012]

The 2012 amendment amends paragraph (c), deleting language referring to an acceptance hearing, which the statute no longer requires. Due to changes in the pertinent statutory language, the amendment also substitutes the term "intellectually disabled" for the term "mentally retarded," in both the text of the rule and in the original Advisory Commission Comments.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 29

PROCEDURE WHEN CHILD BELIEVED TO BE MENTALLY INCOMPETENT

[Amend Rule 29 as indicated (new text underlined; deleted text stricken):]

(a) AT TIME OF ADJUDICATORY HEARING.

(1) * * * *

(2) During the pendency of any such proceeding in which a child is believed to be suffering from mental illness or ~~mental retardation~~ intellectual disability the court may order the child to be evaluated as provided in Tenn. Code Ann., Title 37.

(3) * * * *

(b) AT TIME OF THE OFFENSE. * * * *

(c) APPOINTMENT OF EXPERT WITNESSES; DETENTION OF CHILD FOR EXAMINATION.

(1) Where the child's sanity or competency is at issue and the court has set the matter for an adjudicatory hearing or a hearing to determine the mental condition of the child, the court may appoint as many as three (3) disinterested qualified experts to examine the child and testify at the hearing. If not performed by private practitioners, such examinations shall be performed at facilities designated by the Commissioner of Mental Health ~~and Mental Retardation~~ or Commissioner of Intellectual and Developmental Disabilities. Other competent evidence may be introduced at the hearing. The appointment of experts by the court shall not preclude the state or the child from calling other expert witnesses to testify at the adjudicatory hearing or at the hearing to determine the mental condition of the child.

(2) * * * *

Advisory Commission Comment [2012]

The 2012 amendments substitute the term "intellectual disability" for the term "mental retardation" and also substitute "Commissioner of Mental Health or Commissioner of Intellectual and Developmental Disabilities" for "Commissioner of Mental Health and Mental Retardation," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 32

DISPOSITIONAL HEARINGS; ORDERS

[Amend the original Advisory Commission Comments as indicated (new text underlined; deleted text stricken); the text of the rule is unchanged:]

Advisory Commission Comments

In choosing among statutorily permissible dispositions in delinquent and unruly cases, the judge should select the least restrictive disposition both in terms of kind and duration that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case, and the age and prior record of the child. A child should not be committed to any institution if, consistent with the public safety, the child can be treated and rehabilitated through community-level resources.

The committee intends that dispositional hearings and dispositional orders in unruly cases be in accordance with the federal "valid court order" regulations, found in the appendix to these rules. The committee further encourages the making of written findings of fact and reasons for ordering particular dispositions within the law.

At both the adjudicatory hearing and the dispositional hearing, it is appropriate that youth services and probation officers be witnesses regarding admissible evidence of which they have knowledge. However, neither youth services officers nor probation officers should present cases or otherwise act as prosecution for the state in any juvenile court hearing, except as provided in Tenn. Code Ann. § 37-1-128, regarding revocation of probation proceedings.

Local rules should provide procedures for the obtaining of the psychiatric and psychological evaluations discussed in subsection (f), including provisions for such evaluations in cases in which a person or child at issue is indigent, and including provisions for the subpoenaing of persons who may have prepared any such evaluations.

Regarding review of dispositional orders, all orders which place a child under court-directed supervision pursuant to Tenn. Code Ann. § 37-1-131 (delinquent child), § 37-1-132 (unruly child), or § 37-1-130 (dependent and neglected child), may be reviewed by the court in accordance with the provisions of Rules 34 and 35. The committee encourages courts to keep track of all such cases either informally, or formally as provided in Rule 34. In cases involving commitment of a child to the ~~Department of Correction~~ Department of Children's Services, review is governed by Tenn. Code Ann. § 37-1-137. See also Rule 36 and Tenn. Code Ann. §§ 37-1-107, 37-1-138, 37-1-159, on the review of juvenile court cases.

Advisory Commission Comment [2012]

The 2012 amendment changes the last paragraph of the original Advisory Commission Comments by substituting the term "Department of Children's Services" for the term "Department of Correction," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 32A

PERMANENCY PLANNING

[Amend Rule 32A as indicated (new text underlined; deleted text stricken):]

* * * *

(e) CONTINUANCES. A case may be continued to a date certain only upon good cause shown.

~~(e)~~(f) ORDER. At the conclusion of each ratification hearing, judicial review, and permanency hearing the court shall enter an order in writing and signed by the judge. The order shall include the name of the persons attending the hearing and their relationship to the child; if a parent is not represented by counsel, that the parent has waived his or her right pursuant to Rule 30; and, if a necessary person is not present, whether notice of the hearing was provided. If a parent's identity or whereabouts are unknown, the order shall include findings of the reasonable efforts made by the agency to identify the parent or to ascertain the whereabouts of the absent parent. The order shall include findings of fact that the permanency plan is in the best interest of the child and that the agency has or has not exercised reasonable efforts pursuant to T.C.A. § 37-1-166. In addition, the order shall include all other findings required by federal and state law.

~~(f)~~(g) RATIFICATION HEARING.

(1) The court shall review the permanency plan for each child in foster care pursuant to T.C.A. § 37-2-403. The court shall take such action as may be necessary to ensure the plan is in the child's best interest. The initial permanency plan must be ratified within sixty (60) days of a child's foster care placement. Permanency plans are subject to modification and shall be reevaluated and updated at least annually.

(2) The court shall explain on the record that the purpose of the ratification hearing is to review and approve the permanency plan. The court shall advise the parties that the consequences of failure to comply with the plan, visit or support the child will be termination of the parents' or guardians' parental rights, and that the parents or guardians may be represented by an attorney in any termination proceeding.

(3) If the permanency plan has been agreed upon by the parties, the court shall review and only ratify the plan if the court finds it to be in the best interest of the child. If the court finds the plan is not in the best interest of the child, the court shall hold an evidentiary hearing to develop and ratify a plan that is in the best interest of the child.

(4) If the parties are unable to agree on the permanency plan, the court shall hold an evidentiary hearing to develop and ratify a plan that is in the best interest of the child.

(5) In cases where the court ratifies the plan without modifications and the parent or guardian is not present at the ratification hearing and did not participate in the development of the permanency plan, the court shall determine the efforts made by the agency to notify the parent or guardian of the requirements of the plan. The court shall include findings of these efforts in the order. In cases where the parent or guardian is not present for the hearing and the court modifies any provisions of the plan, the judge shall instruct the agency in the order to timely notify the parent or guardian of the plan's provisions.

~~(g)~~(h) JUDICIAL REVIEW; FOSTER CARE REVIEW BOARD HEARINGS.

(1) The court shall review the permanency plan, or delegate the review to the foster care review board, within ninety (90) days of the child's date of foster care and no less often than every six (6) months thereafter until such time as the child is no longer in foster care. Reviews may be scheduled as often as determined necessary. The agency shall submit a report on the progress of the permanency plan to the court or foster care review board. In addition, the progress report shall be provided to the parents whose rights have not been terminated or surrendered, the parent's attorney, guardian ad litem and/or attorney for the child and the child who is a party to the proceeding. The hearings shall be held in accordance with T.C.A. §§ 37-2-404 and 406.

(2) When the review of the permanency plan is conducted by the foster care review board, the board shall prepare and submit an advisory report of its findings and recommendations in accordance with T.C.A. § 37-2-406(c)(1)(A). The court shall establish a procedure to receive the report from the foster care review board. The advisory report shall be filed with the clerk of the court who shall record the date and hour of the filing. The clerk of the court shall also mail a copy of the report to all parties and their attorneys of record. At the next hearing by the court, the court shall review the board's advisory report. The court shall determine whether the recommendations are in the best interest of the child and, if in the child's best interest, incorporate the recommendations into the child's permanency plan.

(3) The court shall also establish a procedure to receive, docket and conduct a hearing on a direct referral of the foster care review board within the time limits

provided by T.C.A. § 37-2-406(c)(1)(B). The court shall ensure that the board is provided a copy of the order.

~~(h)~~(i) PERMANENCY PLANNING.

(1) The court shall conduct a permanency hearing within twelve (12) months of the child's date of foster care placement; or within thirty (30) days of a determination that reasonable efforts to reunify the family are not required pursuant to T.C.A. § 37-1-166(g)(4). The hearing shall be conducted pursuant to T.C.A. § 37-2-409.

(2) At this hearing the court shall make findings of fact whether reasonable efforts have been made to reunify the family or to finalize another permanent goal. These findings shall be included in the order.

(3) The court must determine the appropriate goal for the child to achieve permanency. Continuation of the goal of reunification should be allowed only in circumstances where the parent or guardian has substantially complied with the permanency plan. However, in determining whether the parent or guardian is in substantial compliance, the court must determine that the agency has provided reasonable efforts for the parent or guardian to comply with the responsibilities on the permanency plan. Additionally, the court shall determine whether the services for the child provided for in the plan are in the best interest of the child and if other services are required.

Advisory Commission Comment [2012]

The 2012 amendment adds new paragraph (e) regarding continuances (and re-letters the subsequent existing paragraphs). Continuances of foster care review board hearings shall only occur when absolutely necessary so as to not unduly delay permanency for youth in custody.

Paragraph (h)(2) is also amended to provide for the filing of the advisory report. As a result of the amendment, the advisory report shall be treated like any other court document. Therefore it must be file-stamped and placed in the judicial file. Further, the clerk of the court shall mail a copy of the report to all parties to the case and their attorney of record.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 34

RELIEF FROM JUDGMENTS OR ORDERS –
MODIFICATION AND VACATION OF ORDERS

[Amend Rule 34(c) as indicated (new text underlined; deleted text stricken):]

* * * *

(c) MODIFICATION FOR BEST INTEREST OF CHILD. An order of the court may also be modified or vacated on the ground that changed circumstances so require in the best interest of the child, except an order committing a delinquent child to the ~~Department of Correction~~ Department of Children's Services or an institution for delinquent children, an order terminating parental rights or an order of dismissal. An order granting probation to a child found to be delinquent or unruly may be revoked, according to the provisions of Rule 35, on the ground that the conditions of probation have not been observed. Placements after a child has been committed to the ~~Department of Correction~~ Department of Children's Services shall be reviewed as provided in Tenn. Code Ann. § 37-1-137, and, in the case of termination of home placement, Rule 35.

* * * *

Advisory Commission Comment [2012]

The 2012 amendment substitutes the term "Department of Children's Services" for the term "Department of Corrections," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 36

APPEALS

[Amend Rule 36(c) and the original Advisory Commission Comment as indicated (new text underlined; deleted text stricken):]

* * * *

(c) NOTIFICATION OF RIGHT TO APPEAL IN DELINQUENT AND UNRULY CASES. At the dispositional hearing on a petition alleging delinquent or unruly conduct, whether before the ~~referee~~ magistrate or judge and whether on a plea of guilty or not guilty, if the respondent is found guilty, he or she shall be informed of the right to appeal, the time limit for appeal, the manner in which to perfect an appeal, and the right to an appointed attorney on appeal if indigent.

* * * *

Advisory Commission Comments

Appeals which may be taken under Tenn. Code Ann. § 37-1-159 include appeals of orders revoking probation or terminating home placement, both of which may be considered "final dispositions" of children, as that section requires.

This rule requires that the juvenile court judge or ~~referee~~ magistrate inform any child found guilty of a delinquent or unruly offense of the right to appeal, etc., in subsection (c). Failure to so inform such a child may entitle the child to file a delayed appeal under the Juvenile Post Commitment Procedures Act, at Tenn. Code Ann. § 37-1-319. Subsection (d), while not mandatory, indicates the committee's strong intent that such notifications take place in all cases, both in the interest of informing parties of their rights, and in the interest of preserving the finality of judgments by avoiding any occasion for a writ of certiorari on the basis that a party was not so informed at the hearing or was without fault in being unaware of the right to appeal.

The constitutional prohibition against being placed twice in jeopardy for the same offense precludes the state from seeking de novo appeal in a delinquent or unruly case which has been dismissed following a hearing on the merits. For further discussion of this issue see the comment to Rule 4.

Advisory Commission Comments [2012]

The 2012 amendment substitutes, in paragraph (c) of the rule and in the original Advisory Commission Comments, the term "magistrate" for the term "referee," consistent with statutory changes enacted by the General Assembly.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 38

PROTECTIVE ORDERS-- JUDICIAL CONSENT FOR TREATMENT

[Amend Rule 38(b) as indicated (new text underlined; deleted text stricken):]

(a) * * * *

(b) ORAL AND TELEPHONE AUTHORIZATIONS. Where the need for an emergency order under section (a) of this rule arises and the court is not in regular session, the judge or ~~referee~~ magistrate may give oral or telephone authorization to place a child in protective custody or to detain a child in a physical health care service, which authorization shall have the same force and effect as if written and which shall be followed by a written order on the first regular day of court thereafter.

(c) * * * *

(d) * * * *

Advisory Commission Comment [2012]

The 2012 amendment substitutes in paragraph (b) the term "magistrate" for the term "referee," consistent with statutory changes enacted by the General Assembly.