

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

Filed: September 18, 2007

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 Rules of Evidence. In August 2007, the Advisory Commission completed its 2006-2007 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 attached Appendix A 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, November 30, 2007. Written comments should be addressed to:

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

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

PER CURIAM

APPENDIX A

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

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 6

SECURITY FOR COSTS ON APPEAL

[Insert the following new three sentences to paragraph (a) between the present fourth and fifth sentences:]

In order to ensure that a surety is sufficient, the Appellate Court Clerk may require the surety to provide proof that the surety has sufficient assets in the State of Tennessee to pay the costs of the appeal. If the Appellate Court Clerk determines that the surety is not sufficient, the Appellate Court Clerk may reject the bond for costs. The surety may appeal the decision of the Appellate Court Clerk to the Court of Appeals by filing a motion to approve the bond for costs within 10 days of the decision of the Appellate Court Clerk.

2008 Advisory Commission Comment

The 2008 amendment authorizes the Appellate Court Clerk to require a surety to provide proof that the surety has sufficient assets in the State of Tennessee to pay the costs of the appeal. The purpose of this amendment is to establish a procedure by

which the sufficiency of a surety can be reviewed in order to ensure that payment of the costs of an appeal are secured at the beginning of the appeal.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 40

COSTS

[Delete present paragraphs (d) through (g) and add the following new paragraphs (d) through (i):]

(d) Party's Statement of Recoverable Costs; Objections.-If a party has not been assessed costs on appeal under section (a) of this rule, that party may file with the appropriate appellate court a Party's Statement of Recoverable Costs in order to recover costs on appeal pursuant to section (c) of this rule. The party shall file the Party's Statement of Recoverable Costs no later than 15 days after the issuance of the mandate but may not file such a Party's Statement of Recoverable Costs before the issuance of the mandate. The party against whom costs have been assessed under section (a) shall be liable for such costs. If the court assesses costs against both appellants and appellees, each of the parties shall bear their own costs and may not recover any costs on appeal under section (c) of this rule. Any party shall have 15 days after the filing of the Party's Statement of Recoverable Costs to file any objections with the Appellate Court Clerk.

(e) Rate of Cost for Producing.-A party's costs of producing necessary copies of briefs or other appellate papers which are recoverable costs under section (c) shall be taxable at rates not higher than those generally charged for photocopying in the area where the office of the attorney seeking such costs is located.

(f) Resolution of Party's Statement of Recoverable Costs.-If objections are timely filed to the Party's Statement of Recoverable Costs, the Appellate Court Clerk shall

consider all of the documents filed relative to such Party's Statement of Recoverable Costs and issue a Clerk's Report in which the Clerk shall approve and/or disapprove such costs in whole or part as being authorized and/or not authorized by law. Any party may file an objection to the Clerk's decision with the appropriate appellate court within 10 days of the filing of the Clerk's report.

(g) Amended Mandate.-If no objection to a Party's Statement of Recoverable Costs is timely filed, the Appellate Court Clerk shall issue an amended mandate with the addition of the Party's Statement of Recoverable Costs. If no objection is timely filed by a party from the Clerk's Report, the Appellate Court Clerk shall issue an amended mandate with the addition of the Clerk's Report and accompanying Party's Statement of Recoverable Costs to the mandate. If an objection is timely filed by a party to the Clerk's Report, the Appellate Court Clerk shall issue an amended mandate by adding the order of the appropriate appellate court resolving the cost dispute.

(h) Enforcement of Amended Mandate.-A party who seeks to enforce collection of the Party's Statement of Recoverable Costs in the Amended Mandate from the liable party may do so by filing a motion in the trial court from which the appeal originated.

(i) Forfeiture of Costs of the Clerk of the Trial Court.-For failure to complete and transmit the record on appeal in the time and manner provided in these rules, the clerk of the trial court shall forfeit the clerk's entire fee set forth in Tenn. Code Ann. §8-21-401(i)(11) for preparing and transmitting the record of such portion thereof as appropriate to the appellant(s) who paid such a fee.

2008 Advisory Commission Comment

The 2008 amendment to Rule 40 amends the rule to conform to the present practice in the Appellate Court Clerk's Office in the following respects: (1) To avoid confusion with the Appellate Court Clerk's "Bill of Costs," the document submitted by attorneys has been renamed as the "Party's Statement of Recoverable Costs." (2) The 2008 amendment makes clear that the party against whom the costs, i.e., Appellate Court Clerk's costs, are assessed are also liable for a party's "Party's Statement of Recoverable Costs." Where the court divides the costs, neither party can seek these "Party's Statement of Recoverable Costs" but instead must bear their own costs of copying briefs, etc. (3) The 2008 amendment requires parties to file the "Party's Statement of Recoverable Costs" no more than 15 days after the issuance of the mandate but no sooner than the date of the issuance of the mandate. Under the prior rule, parties could file their "Verified Bill of Costs" before the mandate issued which created an unnecessary administrative burden on the Clerk's staff. (4) The 2008 amendment also sets forth a process by which these "Party's Statement of Recoverable Costs" are resolved when there is a dispute between the parties by permitting a party to object with an initial resolution by the Clerk and then by the filing of a motion and resolution of that motion by the Court. (5) Depending upon at what stage of the process the "Party's Statement of Recoverable Costs" is resolved, the 2008 amendment makes clear that the "Party's Statement of Recoverable Costs," the Clerk's Report, or the order of the Court of Appeals is to be included in an Amended Mandate to be transmitted to the trial court clerk. (6) Finally, the 2008 amendment provides that the party seeking these costs may enforce them by filing a motion in the trial court which already has the original judgment in which costs are assessed against the other party and the amended mandate in which the prevailing party's "Party's Statement of Recoverable Costs" are included.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 7A

DOMESTIC RELATIONS CASES

7A.01. In an open domestic relations case in which an order or judgment has not become final, any request for an order shall be by motion as provided in 7.02. Petitions shall not be used.

7A.02. In a closed domestic relations case in which an order or judgment has become final, an action to modify said order under the court's continuing jurisdiction, such as an effort to modify custody, alimony or child support, and an action to enforce an order or judgment, such as a request for an adjudication of contempt, shall be commenced by filing a complaint under the same file number as the prior order, accompanied by a summons, as provided in Rule 4. Service shall be made on the defendant, rather than the prior attorney of record, unless said attorney affirmatively indicates that he or she is authorized to accept service. Petitions shall not be used.

2008 Advisory Commission Comment

At common law, actions to modify prior orders were frequently commenced by petitions, a type of pleading not included in these rules. Rule 7A.01 clarifies that a request for an order in a domestic relations case, prior to a judgment becoming final, shall be initiated by the filing of a motion as required in Rule 7.02. No technical form of motion is required (see Rule 8.05). The motion may be framed to state allegations, grounds, and prayers and may be verified, effectively replacing petition practice allowed prior to these rules. Local rules may provide for an extended time for response or hearing. Application for an extension of time may be granted upon request and for good cause shown by either party. In a domestic relations case, after judgment is final, the trial court by statute retains jurisdiction over various issues, including those involving children, parenting time, and child and spousal support. Rule 7A.02 clarifies

that post-judgment efforts at modification, as well as contempt actions, should be initiated by the filing of a complaint rather than a petition, and thus the remaining rules related to filing and service of complaints apply. This Rule 7A does not affect Rule 60 practice.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 8

GENERAL RULES OF PLEADING

8.01 Claims for Relief.—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks, including a specific dollar amount if damages are sought. Relief in the alternative or of several different types may be demanded.

2008 Advisory Commission Comment

The new language in Rule 8.01 is: “including a specific dollar amount if damages are sought.” The change is necessary to conform to Rule 15.02 (“amendment after verdict so as to increase the amount sued for in the action shall not be permitted”) and to Rule 54.03 (“judgment by default shall not . . . exceed in amount that prayed for in the demand for judgment”).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 59

NEW TRIALS AND ALTERATION OR
AMENDMENT OF JUDGMENTS

[Add the following at the end of the present rule:]

59.07. Motion for New Trial Grounds.-

A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted.

2008 Advisory Commission Comment

Motion for new trial grounds have been governed by case law. A helpful list can be found in Professor Larry A. Pivnick's treatise, *Tennessee Circuit Court Practice* §28:1 (Thomson West).

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5.1

PRELIMINARY EXAMINATION

[Add this language at the end of (a)(3):]

Where the recording is no longer available or is substantially inaudible, the trial court shall order a new preliminary hearing upon motion of the defendant filed not more than 60 days following arraignment. The indictment shall not be dismissed while the new preliminary hearing is pending. If the magistrate conducting the new preliminary hearing determines that probable cause does not exist, the magistrate shall certify such finding to the trial court and the trial court shall then dismiss the indictment. The discharge of the defendant by the dismissal of the indictment in such circumstances does not preclude the state from instituting a subsequent prosecution for the same offense.

[Add this language at the end of (c):]

The recording of the preliminary hearing shall be made available to the defendant in the event the defendant is subsequently prosecuted for the same offense by indictment or presentment. The remedy for the failure to preserve the recording in this circumstance shall be as set forth in subsection (a)(3).

The amendments provide remedies when the recording of a preliminary hearing is lost or damaged.

TENNESSEE RULES OF EVIDENCE

ARTICLE III. PRESUMPTIONS

[Reserved]

[Delete the second sentence of the comment.]

TENNESSEE RULES OF EVIDENCE

RULE 501

PRIVILEGES RECOGNIZED ONLY AS PROVIDED

[Amend Advisory Commission Comment by updating two Code citations to:]

Tenn. Code Ann. §24-1-211(f). DEAF PERSON-INTERPRETER PRIVILEGE

Tenn. Code Ann. §24-7-114. LEGISLATIVE COMMITTEE-WITNESS PRIVILEGE

TENNESSEE RULES OF EVIDENCE

RULE 604

INTERPRETERS

[Change the citation in the original comment to Tenn. Code Ann. §24-1-211.]

TENNESSEE RULES OF EVIDENCE

RULE 615

EXCLUSION OF WITNESSES

[Add this comment:]

2008 Advisory Commission Comment

Upon motion a court is authorized to apply Evidence Rule 615 on sequestration of witnesses to depositions pursuant to Tennessee Rule of Civil Procedure 26.03 on protective orders.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 25

DISCOVERY

[Add the following sentence to the end of the rule:]

In no event shall local rules be inconsistent with these rules.

2008 Advisory Commission Comment

The amendment nullifies local rules contrary to Juvenile Rule 25 and emphasizes the mandate of Supreme Court Rule 18, which limits local rules to those “not inconsistent with . . . the Rules of Juvenile Procedure.”