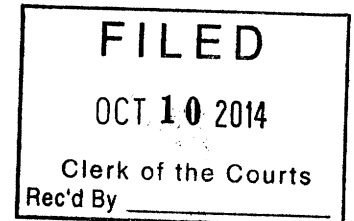


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE PETITION FOR THE ADOPTION OF AN AMENDED
COMMENT TO TENN. SUP. CT. R. 8, RPC 3.5(c)

No. ADM2014-01440



ORDER

On July 25, 2014, the Tennessee Bar Association (“TBA”) filed a “Petition . . . For the Adoption of an Amended Comment to Tenn. Sup. Ct. R. 8, RPC 3.5(c).” The TBA’s Petition asks the Court “to adopt an amended Comment to Rule 8, RPC 3.5(c). . . to make clear that the adoption of RPC 3.5(c) [effective January 1, 2011] was not intended to, and did not, overturn long-settled precedent prohibiting courts from restricting post-trial communications with discharged jurors as a matter of course or routine.”

By way of background, the TBA’s Petition states:

In 1991, this Court issued a well-reasoned opinion acknowledging the utility of post-discharge communications by lawyers with jurors, and the general right of lawyers to undertake such communications in a non-abusive manner. *State v. Thomas*, 813 S.W.2d 395 (Tenn. 1991). In *Thomas*, this Court struck down Davidson County Local Rule 5.04(e) as unenforceable. That local rule of court had provided: “Once the jurors’ service is completed all interviews of jurors by counsel, litigants, or their agents, are prohibited except with the permission of the trial court, and then only in such situations as are deemed appropriate.” *Id.* at 395. The Court explained that the flat prohibition in the local rule was contradicted by the then-existing version of Tennessee’s ethics rules, and on that basis obviated any need to address public policy or constitutional issues. *Id.* at 397.

With that background, the TBA's petition asks the Court to amend Comment [4] to RPC 3.5 "to specifically reflect that *State v. Thomas* remains good law in Tennessee." The TBA concludes its Petition by setting out its proposed revision of Comment [4].

For context, the Appendix to this order incorporates the TBA's proposed revision of Comment [4] into the complete text of RPC 3.5 and its Comments. The Court hereby solicits written comments from judges, lawyers, bar associations, members of the public, and any other interested parties concerning the TBA's proposed amendment of Comment [4]. The deadline for submitting written comments is Tuesday, December 9, 2014. Written comments should be addressed to:

James Hivner, Clerk
Re: Rule 8, RPC 3.5, Comment [4]
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

and should include the docket number set out above.

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

IT IS SO ORDERED.

PER CURIAM

APPENDIX

TBA's Proposed Amendment to Comment [4] of Tenn. Sup. Ct. R. 8, RPC 3.5

(proposed new text indicated by highlighting and underlining)

1 **Rule 3.5. Impartiality and Decorum of the Tribunal.** — A lawyer shall not:

2 (a) seek to influence a judge, juror, prospective juror, or other official by means
3 prohibited by law;

4 (b) communicate ex parte with such a person during the proceeding unless authorized
5 to do so by law or court order;

6 (c) communicate with a juror or prospective juror after discharge of the jury if:

7 (1) the communication is prohibited by law or court order;

8 (2) the juror has made known to the lawyer a desire not to
9 communicate; or

10 (3) the communication involves misrepresentation, coercion, duress, or
11 harassment;

12 (d) conduct a vexatious or harassing investigation of a juror or prospective juror; or

13 (e) engage in conduct intended to disrupt a tribunal.

14 **Comment.**

15 [1] Many forms of improper influence upon a tribunal are proscribed by criminal law.
16 Others are specified in the Tennessee Code of Judicial Conduct, with which an advocate
17 should be familiar. A lawyer is required to avoid contributing to a violation of such
18 provisions. For example, a lawyer shall not give or lend anything of value to a judge, judicial
19 officer, or employee of a tribunal, except as permitted by Canon 4(D)(5) of the Code of
20 Judicial Conduct. A lawyer, however, may make a contribution to the campaign fund of a
21 candidate for judicial office in conformity with Canon 5(B) of the Code of Judicial Conduct.

22 [2] During a proceeding a lawyer may not communicate ex parte with persons serving
23 in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized

24 to do so by law or court order. Unless such a communication is otherwise prohibited by law
25 or court order, paragraph (b) of this Rule would not prohibit a lawyer from communicating
26 with a judge on the merits of the cause in writing if the lawyer promptly delivers a copy of
27 the writing to opposing counsel and to parties who are not represented by counsel because
28 that would not be an ex parte communication.

29 [3] Paragraph (b) also does not prohibit a lawyer from communicating with a judge
30 in an ex parte hearing to establish the absence of a conflict of interest under RPC 1.7(c). In
31 such proceedings, the lawyer is of course bound by the duty of candor in RPC 3.3(a)(3).

32 [4] A lawyer may on occasion want to communicate with a juror or prospective juror
33 after the jury has been discharged. The lawyer may do so unless the communication is
34 prohibited by law, or by a court order entered in exceptional circumstances, but must respect
35 the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper
36 conduct during the communication. Although the rule references the ability of a court to
37 enter a particular order that would prohibit such communications, commonplace or routine
38 entry of such orders is not permissible under existing law. See *State v. Thomas*, 813 S.W.2d
39 395 (Tenn. 1991).

40 [4a] A communication with, or an investigation of, the spouse, child, parent, or sibling
41 of a juror or prospective juror will be deemed a communication with or an investigation of
42 the juror or prospective juror.

43 [5] The advocate's function is to present evidence and argument so that the cause may
44 be decided according to law. Refraining from abusive or obstreperous conduct is a corollary
45 of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse
46 by a judge, but should avoid reciprocation; the judge's default is no justification for similar
47 dereliction by an advocate. An advocate can present the cause, protect the record for
48 subsequent review, and preserve professional integrity by patient firmness no less effectively
49 than by belligerence or theatrics.

50 [6] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal,
51 including a deposition. See RPC 1.0(m).

52 *[end of Appendix]*