IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

No. ADM2015-01631

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. With its meeting on August 14, 2015, the Advisory Commission completed its 2014-2015 term, and the Commission thereafter transmitted its recommendations to the Court.

The Court hereby publishes the Advisory Commission's recommended amendments set out in the two Appendices to this order. Appendix I sets out the proposed amendments to the Rules of Appellate, Civil, and Criminal Procedure. Appendix II sets out a proposed comprehensive revision of the Rules of Juvenile Procedure, which, if adopted, will replace in its entirety the current version of the Rules of Juvenile Procedure.

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 Wednesday, November 25, 2015. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to:

James Hivner, Clerk
Re: 2016 Rules Package
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 to LexisNexis and to Thomson Reuters. In addition, the order shall be posted on the Tennessee Supreme Court's website.

PER CURIAM

APPENDIX I

PROPOSED AMENDMENTS TO THE RULES OF APPELLATE, CIVIL, and CRIMINAL PROCEDURE

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 26

FILING OF THE RECORD

[Amend Rule 26(b) and the original Advisory Commission Comment to subdivision (b) as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) Filing and Notice of Filing of the Record. — Upon receipt of the record following transmittal, the clerk of the appellate court shall file the record. The clerk shall immediately serve notice on all parties of the date on which the record was filed.

(b) Dismissal for Failure of Appellant Timely to File the Transcript or Statement. — If the appellant shall fail to file the transcript or statement within the time specified in Rule 24(b) or (c), or if the appellant shall fail to follow the procedure in Rule 24(d) when no transcript or statement is to be filed, the appellate court may dismiss the appeal on its own initiative or any appellee may file a motion in the appellate court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the trial court showing the date and substance of the judgment or order from which the appeal was taken and the date on which the notice of appeal was filed. The appellant may respond within 14 days after the motion is filed. In lieu of granting the motion or at any time on its own ~~motion~~initiative, the appellate court may order the filing of the transcript or statement. Nothing in this subdivision shall be construed to authorize dismissal of an appeal due to the errors or omissions of the clerk of the trial court.

Advisory Commission Comments. *Subdivision (a).* The docketing of an appeal under these rules takes place when the clerk of the appellate court receives a copy of the notice of

appeal from the trial court clerk. Under this subdivision the clerk of the appellate court files the record immediately upon its receipt and notifies all parties of the date on which the record was filed.

Subdivision (b). The failure of a party to file the transcript or statement within the time specified in Rule 24 may result in dismissal of the appeal on the appellate court's own initiative or upon motion. The motion should be in the form set forth in Rule 22 of these rules. Nothing in this rule permits the dismissal of an appeal due to the errors or omissions of the clerk of the trial court.

Advisory Commission Comments [1997]. *Subdivision (b)*. The amendment to the first sentence fills a gap left in the original rule. If an appellant did not intend to file a transcript of evidence, but failed to follow the prescribed procedure in Rule 24(d), it was unclear where the appellee would file a motion to dismiss. The amended language makes it clear that the appellate court is the proper forum. The amendment to the third sentence keys response deadlines concerning a motion to dismiss to filing dates, not service dates.

Advisory Commission Comments [2016]. Rule 26(b) is amended to authorize the appellate court to dismiss an appeal on its own initiative if the appellant fails to file the transcript or statement of the evidence within the time specified in Rule 24(b) or (c), or if the appellant fails to follow the procedure in Rule 24(d) when no transcript or statement is to be filed. The appellate courts have case-management procedures under which the appellate court can be notified when the transcript or statement of the evidence (or a notice that neither will be filed) has not been timely filed in the trial court. For that reason, the appellate court should be authorized to dismiss an appeal in such circumstances, even if no motion to dismiss has been filed by an appellee. The Rule, however, continues to authorize any appellee to file such a motion.

Consistent with the amendment to subdivision (b) of the Rule, the original Advisory Commission Comment to subdivision (b) is amended to indicate that the appellate court can dismiss the appeal on its own initiative for failure to timely file the transcript or statement of the evidence.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 3

COMMENCEMENT OF ACTION

[Amend Rule 3 and its existing Advisory Commission Comments as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) All civil actions are commenced by filing a complaint with the clerk of the court. ~~An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.~~

(b) Subject to the provisions of Rule 4.01(3) and (4), the filing of a complaint tolls any applicable statutes of limitation and repose.

~~**Advisory Commission Comments.** Prior to the adoption of these Rules, a civil action at law could be continued and prosecuted, for purposes of applying statutes of limitation, after return of process unserved, by issuance of alias process from term to term or by recommencing suit within one year after failure to execute process. Rule 3 did not adopt the previous procedure regarding term-to-term issuance of alias process. Instead, the third sentence of Rule 3 contains a provision for obtaining issuance of new process within one year from issuance of the previous process. The Rule, of course, applies to all civil actions, whether legal or equitable in nature.~~

~~**Advisory Commission Comments [1995].** Because the former rule created confusion between the one-year recommencement period and the one-year saving statute, the recommencement provision is eliminated. The earlier six-month reissuance period is extended from six months to a full year.~~

~~**Advisory Commission Comments [1997].** Some clerks by local court rule may want to require lawyers to file a summons not to toll the running of a statute of limitations, but rather to assist the clerks' workloads. Other clerks may want to handle the chore themselves. Either position is appropriate under revised Rule 3. "Commencement" for statute of limitations purpose would occur on the day the complaint is filed, regardless of the method chosen for preparation of a summons.~~

~~Deletion of the requirement of filing a summons in addition to a complaint returns the requirement for commencement to pre-1992 status. While there appeared to be reasons making the additional summons filing mandatory, other reasons militate against it. For one thing, the recent waiver of service provisions of Rule 4.07 may lull a lawyer into believing no summons need be filed under that procedure. For another, there is a hazard that a federal diversity case in Tennessee would not be commenced by simply filing the complaint required by Federal Rule 3. *See Ragan v. Merchants Transfer & Warehouse Company*, 337 U.S. 530 (1949), reaffirmed on this ground by *Walker v. Armco Steel Corporation*, 446 U.S. 740 (1980).~~

~~Note that Rule 4.01, both then and now, requires the clerk to issue a summons "forthwith" once a complaint is filed (unless there is a waiver under Rule 4.07). Moreover, the amended rule does not prevent a lawyer from filing a summons with the clerk. In any event, good practice mandates following up to ensure that a summons is promptly issued and served.~~

~~**Advisory Commission Comments [1998].** The amendment to the third sentence removes the former eventuality of failure to return process within 30 days.~~

Advisory Commission Comments [2000]. A complaint filed by a pro se litigant incarcerated in a correctional facility is governed by the prisoner-filing provision in Rule 5.06.

~~**Advisory Commission Comments [2005].** This amendment to the final sentence mirrors an amendment to Rule 4.03 increasing time for service of a summons from 30 to 90 days.~~

Advisory Commission Comments [2013]. Rule 2 provides that "[a]ll actions in law or equity shall be known as 'civil actions.'" The initial Advisory Commission Comment to Rule 2 explains that, "[p]rior to adoption of these Rules, Tennessee practice spoke of 'civil actions at law' (Tenn. Code Ann. § 20-2010 [repealed] and of 'suits' in chancery (Tenn. Code Ann. § 21-102) [repealed]. Rule 2 simplifies the terminology of applying a single term to all civil actions." Consistent with that explanation, Rule 3 goes on to provide (in pertinent part) that "[a]ll civil actions are commenced by filing a complaint with the clerk of the court." (Emphasis added.)

Although Rules 2 and 3 simplified the terminology previously applied to "civil actions at law" and "suits" in chancery, those rules–as well as Rule 7–are silent as to their application to "petitions" authorized by statute. *See, e.g.*, Tenn. Code Ann. §§ 4-5-322 (2011) (petition for judicial review under Administrative Procedures Act); 4-21-307 (2011) (petition for judicial review of order of Human Rights Commission); 27-8-106 (2000) (petition for writ of certiorari); 29-3-103 (2000) ("bill or petition" to abate a public nuisance); 29-16-104 (2000) (petition to take land by eminent domain); 29-27-106 (2000) ("bill or petition" for partition); 30-1-117 ("verified petition" to apply for letters of administration or letters testamentary to administer the estate of a decedent); 34-3-102 (2007) (petition for appointment of a conservator); 36-3-602 (2010) (petition for order of protection); 36-5-405 (2010) (petition to set, enforce, modify or terminate support); 36-6-108 (2010) (petition to alter visitation/parental relocation); 36-6-306 (2010) (petition for grandparent visitation); and 36-6-405 (2010) (petition to modify permanent parenting plan). Depending on the nature of a statutorily authorized "petition," the petition might be considered a "complaint" for purposes of these Rules, or it might be considered a motion relating to a pending civil action. In determining whether or not a statutorily authorized petition is a "complaint" for purposes of these Rules, the court must give effect to the substance of the pleading, rather than its form. *See, e.g., Brundage v. Cumberland Cnty.*, 357 S.W.3d 361, 371 (Tenn. 2011); *Abshure v. Methodist Healthcare-Memphis Hosp.*, 325 S.W.3d 98, 104 (Tenn. 2010); *Ferguson v. Brown*, 291 S.W.3d 381, 386-87 (Tenn. Ct. App. 2008). As the Supreme Court has stated, "a trial court is not bound by the title of the pleading, but has the discretion to treat the pleading according to the relief sought." *Norton v. Everhart*, 895 S.W.2d 317, 319 (Tenn. 1995).

Advisory Commission Comments [2016]. Prior to the 2016 amendment, Rule 3 stated in its entirety:

> All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

The 2016 amendment retains in Rule 3 the first sentence set out in the foregoing quotation and designates that sentence as new subdivision (a). Because the second and third sentences of the former rule (set out above) pertained to the issuance and service of process, the Commission concludes that those matters should be addressed in Rule 4, instead of Rule 3, and

the 2016 amendment therefore deletes the second and third sentences from Rule 3. In light of that amendment to Rule 3, Rule 4.01 is simultaneously amended to address the matters previously addressed by the two sentences deleted from Rule 3. Relatedly, Rule 3 also is amended to add new subdivision (b), which states: "Subject to the provisions of Rule 4.01(3) and (4), the filing of a complaint tolls any applicable statutes of limitation and repose."

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 4

PROCESS

[Amend Rule 4 and its existing Advisory Commission Comments as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

4.01. Summons; Issuance; By Whom Served. — (1) Upon the filing of the complaint, the clerk of the court ~~wherein the complaint is filed~~ shall ~~forthwith~~ promptly issue the required summons and cause it, with necessary copies of the complaint and summons, to be delivered for service to any person authorized to serve process. This person shall serve the summons, and the return ~~indorsed~~ endorsed thereon shall be proof of the time and manner of service. A summons may be issued for service in any county against any defendant, and separate or additional summonses may be issued against any defendant upon request of plaintiff. Nothing in this rule shall affect existing laws with respect to venue.

(2) A summons and complaint may be served by any person who is not a party and is not less than 18 years of age. The process server must be identified by name and address on the return.

(3) ~~If a plaintiff or counsel for plaintiff (including third-party plaintiffs) intentionally causes delay of prompt issuance of a summons or prompt service of a summons, filing of the complaint (or third-party complaint) is ineffective.~~ If process is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to

toll any applicable statutes of limitation or repose unless the plaintiff continues the action by obtaining issuance of new process within 150 days from issuance of the previous process.

(4) If a plaintiff or counsel for a plaintiff (including a third-party plaintiff) intentionally causes delay of prompt issuance or prompt service of a summons, the filing of the complaint (or third-party complaint) will not toll any applicable statutes of limitation or repose.

4.02. Summons; Form. — The summons shall be issued in the name of the State of Tennessee, be dated and signed by the clerk, contain the name of the court and county, the title of the action, and the file number. The summons shall be directed to the defendant, shall state the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of his or her failure to do so judgment by default will be rendered against that defendant for the relief demanded in the complaint. The summons shall state the name and address of the plaintiff's attorney, if any; otherwise, it shall state the plaintiff's address.

4.03. Summons; Return. — (1) The person serving the summons shall promptly make proof of service to the court and shall identify the person served and shall describe the manner of service. If a summons is not served within 90 days after its issuance, it shall be returned stating the reasons for failure to serve. The plaintiff may obtain new summonses from time to time, as provided in Rule ~~3~~4.01~~, if any prior summons has been returned unserved or if any prior summons has not been served within 90 days of issuance~~.

(2) When process is served by mail, the original summons, endorsed as below; an affidavit of the person making service setting forth the person's compliance with the requirements of this rule; and, the return receipt shall be sent to and filed by the clerk. The person making service shall endorse over his or her signature on the original summons the date

of mailing a certified copy of the summons and a copy of the complaint to the defendant and the date of receipt of return receipt from the defendant. If the return receipt is signed by the defendant, or by person designated by Rule 4.04 or by statute, service on the defendant shall be complete. If not, service by mail may be attempted again or other methods authorized by these rules or by statute may be used.

(3) Failure to promptly file proof of service does not affect the validity of service.

4.04. Service Upon Defendants within the State. — The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows:

(1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

(2) Upon an unmarried infant or an incompetent person, by delivering a copy of the summons and complaint to the person's residence guardian or conservator if there is one known to the plaintiff; or if no guardian or conservator is known, by delivering the copies to the individual's parent having custody within this state; or if no such parent is within this state, then by delivering the copies to the person within this state having control of the individual. If none of the persons defined and enumerated above exist, the court shall appoint a practicing attorney as guardian ad litem to whom the copies shall be delivered. If any of the persons directed by this

paragraph to be served is a plaintiff, then the person who is not a plaintiff who stands next in the order named above shall be served. In addition to the service provided in this paragraph, service shall also be made on an unmarried infant who is fourteen (14) years of age or more, and who is not otherwise incompetent.

(3) Upon a partnership or unincorporated association (including a limited liability company) which is named defendant under a common name, by delivering a copy of the summons and of the complaint to a partner or managing agent of the partnership or to an officer or managing agent of the association, or to an agent authorized by appointment or by law to receive service on behalf of the partnership or association.

(4) Upon a domestic corporation, or a foreign corporation doing business in this state, by delivering a copy of the summons and of the complaint to an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the copies to any other agent authorized by appointment or by law to receive service on behalf of the corporation.

(5) Upon a nonresident individual who transacts business through an office or agency in this state, or a resident individual who transacts business through an office or agency in a county other than the county in which the resident individual resides, in any action growing out of or connected with the business of that office or agency, by delivering a copy of the summons and of the complaint to the person in charge of the office or agency.

(6) Upon the state of Tennessee or any agency thereof, by delivering a copy of the summons and of the complaint to the attorney general of the state or to any assistant attorney general.

(7) Upon a county, by delivering a copy of the summons and of the complaint to the chief executive officer of the county, or if absent from the county, to the county attorney if there is one designated; if not, by delivering the copies to the county court clerk.

(8) Upon a municipality, by delivering a copy of the summons and of the complaint to the chief executive officer thereof, or to the city attorney.

(9) Upon any other governmental or any quasi-government entity, by delivering a copy of the summons and of the complaint to any officer or managing agent thereof.

(10) Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph. The original summons shall be used for return of service of process pursuant to Rule 4.03(2). Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

(11) When service of a summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee's agent refuses to accept delivery and it is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. ~~For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery.~~

4.05. Service Upon Defendant Outside This State. — (1) Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:

(a) by any form of service authorized for service within this state pursuant to Rule 4.04;

(b) in any manner prescribed by the law of the state in which service is effected for an action in any of the courts of general jurisdiction in that state;

(c) as directed by the court.

The provisions of this Rule ~~(4.05)~~ 4.05 are inapplicable when service is effected in a place not within any judicial district of the United States.

(2) Service of process pursuant to this Rule ~~(4.05)~~ 4.05 shall include a copy of the summons and of the complaint.

(3) Service by mail upon a corporation shall be addressed to an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the

copies to any other agent authorized by appointment or by law to receive service on behalf of the corporation.

(4) Service by mail upon a partnership or unincorporated association (including a limited liability company) that is named defendant under a common name shall be addressed to a partner or managing agent of the partnership or to an officer or managing agent of the association, or to an agent authorized by appointment or by law to receive service on behalf of the partnership or association.

(5) When service of summons, process, or notice is provided for or permitted by registered or certified mail, under the laws of Tennessee, and the addressee, or the addressee's agent, refuses to accept delivery, and it is so stated in the return receipt of the United States Postal Service, the written return receipt, if returned and filed in the action, shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute. ~~For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery.~~

4.06. Reserved.

4.07. Waiver of Service; Duty to Save Costs of Service; Request to Waive. — (1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(a) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment of law to receive service of process) of a defendant subject to service;

(b) shall be dispatched through first-class mail or other reliable means;

(c) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(d) shall inform the defendant of the consequences of compliance and of a failure to comply with the request;

(e) shall set forth the date on which the request is sent;

(f) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent; and

(g) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant fails to comply with a request for waiver made by a plaintiff, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

4.08. Constructive Service. — In cases where constructive service of process is permissible under the statutes of this state, such service shall be made in the manner prescribed by those statutes, unless otherwise expressly provided in these rules.

4.09. Amendment. — At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Advisory Commission Comments. 4.01: Rule 4.01 sets out the procedure for issuance and service of the summons upon the filing of a complaint. The Rule also provides for the issuance of separate or additional summonses against any defendant upon request of the plaintiff.

The [1988] amendment allows private service of process at the plaintiff's option. Service by a sheriff or deputy remains an alternative. [1988.]

4.02: Rule 4.02 provides that the summons shall be directed to the defendant. Rule 4.02 requires that the summons notify defendant that judgment by default will be entered for failing to appear and defend within the proper time. The Rule also requires that the summons state the name and address of the plaintiff's attorney, or of the plaintiff if the plaintiff has no attorney.

4.03: (1) Rule 4.03 fixes a definite time – ~~30~~ 90 days – within which summons must be served; if not served within that period, it must be returned unserved. The Rule includes a requirement that the manner of service must be described and the person served must be identified on the return; thus any departure from the routine manner of service will instantly be apparent to the court and to defendant's counsel.

(2): Paragraph 2 explains how return of service of process by mail is accomplished. It is similar to the method used for return of service of process on nonresidents (Tenn. Code Ann. §§ 20-2-206; 20-2-211; 20-2-216). [1984.]

4.04: (1) Paragraph (1) of Rule 4.04 requires that a copy of the process, as well as of the complaint, be left with defendant. The paragraph authorizes service, in case of evasion or attempt to evade service, by leaving copies of summons and complaint at defendant's dwelling house or usual place of abode; but the Rule includes a provision, for protection of the defendant, that the copies must be left with a person of suitable age and discretion residing therein, and requires that that person's name appear on the proof of service. The Rule also includes a provision allowing service on an agent of an individual defendant when the agent is authorized to receive service on behalf of the individual served.

(2): Paragraph (2) of Rule 4.04 specifies a number of "retreating" alternative methods of service on infants and incompetents. If the first stated method of service is not possible, the second may be used; if the second is not possible, the third may be used, etc. The Rule further safeguards the interest of an otherwise competent infant by providing that, in addition to the service upon the appropriate guardian, parent, etc., personal service must be had on an unmarried infant who is age 14 or over, if otherwise competent.

(3): Paragraph (3) of Rule 4.04 allows service upon a partnership by serving a partner or managing agent of the partnership. The paragraph allows service upon an unincorporated association by serving a managing agent or officer of the unincorporated association. The Rule is not intended to affect Tenn. Code Ann. § 20-2-212, which requires that both resident and nonresident unincorporated associations and organizations, including nonresident partnerships and trusts, must, before doing business in Tennessee, appoint an agent for service of process, and failing such appointment, authorizes service upon the Secretary of State. Rule 4.04(3) provides an additional means of service where a managing agent or officer of the unincorporated association can be found in the state.

(4): Rule 4.04(4) fixes the same rules for service upon a foreign corporation doing business in the state as apply to service upon domestic corporations. The Rule allows service

upon any officer or the managing agent of the corporation, and thus relieves the process server of the necessity of seeking any particular officer first. The Rule also allows service upon the chief agent of the corporation in the county where the action is brought, and specifies that service may also be had on any other agent of the corporation authorized by appointment or law to receive service on behalf of the corporation. This clause preserves statutory provisions authorizing service upon the secretary of state or other officer where such service is authorized by statute.

(5): Paragraph (5) of Rule 4.04 governs service upon a nonresident individual who transacts business through an office or agency in the state, or upon a resident individual who transacts business in a county other than that in which he or she resides. Service may be had upon the person in charge of the office or agency in any action growing out of the business of that office or agency.

(7): In suits against a county, Rule 4.04(7) provides for service upon the chief executive officer of the county, or if that officer is absent from the county, upon the county attorney if there is one designated; if no county attorney is designated, service may be made on the county court clerk in the absence of the chief executive officer.

With the reorganization of county government structure, it is appropriate to substitute "chief executive officer of the county" for "presiding officer of the county court." In most counties the chief executive officer is the county executive. [1989.]

(8): In suits against a municipality, Rule 4.04(8) provides for service upon the chief executive officer thereof or upon the city attorney.

(9): In suits against any other governmental or quasi-governmental entity, paragraph (9) of Rule 4.04 provides for service upon any officer or managing agent thereof.

(10): Paragraph (10) of Rule 4.04 authorizes service of process by mail on residents of Tennessee. Service by mail should be inexpensive, expeditious and in most cases successful. If it is unsuccessful, traditional methods of service of process may be used. [1984.]

4.05~~8~~: Rule ~~4.05 [now~~ 4.08~~]~~ makes it clear that, in the absence of express provision in these Rules, no changes in the statutes governing constructive service are intended.

4.06~~9~~: Rule ~~4.06 [now~~ 4.09~~]~~ authorizes the court at any time to allow amendment of process or proof of service thereof, but conditions the exercise of the court's discretion upon the absence of a clear showing of material prejudice to the substantial rights of the party against whom process issued.

Advisory Commission Comments [1995]. New Rule 4.07 allows waiver of service along the lines of the current federal rule. The incentive for defendants to waive service is found

both in the expanded time for service of a motion or answer and in the sanction of shifting of costs expended in perfecting traditional service.

Advisory Commission Comments [1997]. The title of Rule 4.04 is changed from "Personal Service and Service by Mail" to "Service Upon Defendant Within This State." This change is to make clear that the emphasis of the revised Rule 4 is on the distinction between the exercise of jurisdiction by service of process within the state and all other cases.

Previously, subpart 5 of Rule 4.04 provided for service upon a foreign corporation as follows: "(5) Upon a foreign corporation which is not qualified to do business in this state, or which has no agent authorized by appointment to receive service on its behalf, by making service as provided by statute; provided, that in every such case a copy of the summons and of the complaint shall be delivered or forwarded to the person or official designated in the statute to receive the service." This subpart is deleted. A foreign corporation not qualified to do business in this state may be served as provided in Rule 4.04(4) if it is actually doing business in the state. Otherwise, service in a judicial district of the United States may be made according to Rule 4.05(3). For service outside the United States and its territories, see Rule 4A.

Former subpart 6 is renumbered to 5.

Revised Rule 4.04 also deletes former subpart 7, which provided for service upon nonresidents as follows: "(7) Upon other nonresidents, as provided by statute; provided, that in every such case, a copy of the summons and of the complaint shall be delivered or forwarded to the person or official designated in the statute to receive the service." Rule 4.05 now provides for service upon persons outside the state.

Former subparts (8), (9), (10), (11), and (12) are renumbered to (6), (7), (8), (9), and (10), respectively.

Rule 4.05, which is entitled "Service upon Defendant Outside this State," is a new subdivision. It replaces former Rule 4.05, which was captioned "constructive service." This rule is derived largely from current Tenn. Code Ann. § 20-2-215(d). Subpart (1)(a) provides for service upon non residents by any means authorized for service upon a resident in Rule 4.04. Subpart (1)(b) is derived from Federal Rule of Civil Procedure 4(e)(1), which now permits service upon a defendant in whatever manner is permitted by the law of the state in which service is effected. Subpart (1) includes the words "when reasonably calculated to give actual notice," which is a Constitutional standard prescribed in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to emphasize that any means employed must satisfy due process requirements as well those prescribed by rule or statute.

~~The last sentence in subpart (5) is an addition to bring the rule into conformity with contemporary practice of the United States Postal Service. It is designated to reinforce the power~~

~~of courts to deal with individuals who attempt to evade service of process by refusing to accept mail delivery.~~

Courts are virtually unanimous in holding that service of process is not defeated by the defendant's refusal to accept a certified or registered letter. *See, e.g. Nikwei v. Ross School of Aviation, Inc.*, 822 F.2d 939, 942 (CA10 1987) (service by mail returned marked "refused" and defendant's conclusory affidavit insufficient to invalidate service); *Merriott v. Whitsell*, 476 S.W.2d 230, 232 (Ark. 1972)(non-resident who is subject to jurisdiction of Arkansas courts cannot defeat jurisdiction by simple expedient of refusing to accept a registered letter; avoidance of service of proper process by a willful act or refusal to act on part of defendant "would create an intolerable situation and should not be permitted"); *Cortez Development Co. v. New York Capital Group, Inc.*, 401 So. 2d 1163 (Fla. App. 1981)(when address was correct according to record and information received from persons at that address, defendant had succeeded in quashing earlier service accepted by another on his behalf at that address, and post office had returned mail marked refused, substituted service of process by certified mail upon individual was effective despite defendant's sworn statement that he did not refuse mail nor instruct anyone to refuse on his behalf); *Thomas Organ Co. v. Universal Music Co.*, 261 So. 2d 323, 327 (La. App. 1972)("sending by mail a certified copy of citation and petition satisfies the requirements of 'due process'"); *McIntee v. State of Minnesota, Department of Public Safety*, 279 N.W.2d 817 (Minn. 1979)(notice sent by certified mail was sufficient when addressee disregarded postal service notice to pick up the certified mail); *Patel v. Southern Brokers, Ltd.*, 289 S.E.2d 642, 644 (S.C. 1982)("we think it can hardly be logically argued that one may avoid the process of the court by merely refusing to accept a letter known to contain a Summons and Complaint").

As one court has stated:

> A person may not deny personal service on the grounds of lack of delivery where the delivery was deliberately prevented by the action of the person to be served. * * *
>
> Where a statute provides for service by registered or certified mail, the addressee cannot assert failure of service when he willfully disregards a notice of certified mail delivered to his address under circumstances where it can be reasonably inferred that the addressee was aware of the nature of the correspondence.

Hankla v. Governing Board of Roseland Sch. Dist., 120 Cal. Rptr. 827, 834 (Cal. App. 1975). *See also European American Bank v. Abramoff*, 608 N.Y.S.2d 233 (N.Y. App. Div. 2 Dep't 1994)(service of process by mail is complete, regardless of delivery, when mailing itself is proper; bald denial of receipt of process served by mail insufficient to defeat service of process, regardless of delivery, when mailing itself is proper).

Actual notice in every case is not required. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), the United States Supreme Court noted "a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is a reasonable probability that if the statutes are complied with, the defendant will receive actual notice...." *Id*. at 24. In *Nikwei v. Ross School of Aviation, Inc.*, *supra*, the court declared it "well settled, that as to notice, due process does not require exact certainty." 822 F.2d at 944.

Former Rule 4.06 is renumbered to 4.09.

Rule 4.07, first adopted in 1995, allows waiver of service along the lines of the current federal rule. The 1995 Comment originally contained a form for waiver of service; however, two minor corrections were made to that form in 1997. To avoid any confusion, the original form has been deleted from the 1995 Comment and has been replaced with the following amended form.

This amended form should be used to request a waiver:

Notice of Lawsuit and Request for Waiver of Service of Summons

TO: (Name of defendant or officer or agent of corporate defendant) as (title) of (name of corporate defendant)

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the (circuit or chancery) court for (county), Tennessee, and has been assigned civil action number _____.

This is not a formal summons or notification from the court, but rather a request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within _____ days after the date designated below as the date on which this Notice and Request is sent. I enclosed a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date

the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent.

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Tennessee Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this ___ day of (month) , (year) .

_____
Signature of Plaintiff's Attorney or
Unrepresented Plaintiff

This form should be used to waive service:

Waiver of Service of Summons

TO:

I acknowledge receipt of your request that I waive service of a summons in the action of _____, which is civil action number _____ in the _____ Court. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the

court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after _____ _____.

_____ _____

Date Signature

Printed/typed name:

as _____
(title)

of _____.
(name of corporate defendant)

To be printed on reverse side of the waiver form or set forth at the foot of the form:

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Tennessee Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for the failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

> A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

Rule 4.08 is the former 4.05 renumbered.

Rule 4.09 is former 4.06 renumbered.

Advisory Commission Comments [1998]. The amendment of Rule 4.03 removes the former requirement that a return must be made within the time during which the person served must respond.

Advisory Commission Comments [2004]. ~~New paragraph 4.01(3) would sanction lawyer misconduct such as that in *Stempa v. Walgreen Company*, 70 S.W.3d 39 (Tenn. Ct. App. 2001), where original counsel for plaintiffs "instructed" the clerk not to issue summonses for almost a year, despite the paragraph 4.01(1) instruction that clerks must issue a summons "forthwith."~~

Rule 4.04(10) is amended to clarify that service by certified or registered return receipt mail must be addressed to an individual specified in the applicable subparagraph of the rule. For example, service by mail upon a domestic corporation must be addressed to one of the individuals specified in Rule 4.04(4).

~~New Rule 4.04(11) conforms service on Tennessee defendants by "unclaimed" mail to Rule 4.05(5) concerning service on nonresidents.~~

Advisory Commission Comments [2005]. The amendment to Rule 4.03(1) increases time for service of a summons from 30 to 90 days.

Advisory Commission Comments [2016]. Rule 4 is revised to clarify the provisions governing the issuance and service of process.

4:01(1): Rule 4.01(1) previously required the trial court clerk, upon the filing of the complaint, to "forthwith issue the required summons and cause it, with necessary copies of the complaint and summons to be delivered for service to any person authorized to serve process." Subdivision (1) is amended by substituting the word "promptly" for the word "forthwith." This change is intended to emphasize that the clerk must issue the summons contemporaneously with, or soon after, the filing of the complaint. Because subdivision (1) requires the clerk to

"promptly" issue the summons and deliver it for service, the clerk is not permitted to delay issuing the summons (or delivering it for service) at the request of the plaintiff or plaintiff's counsel.

Some clerks by local court rule may want to require lawyers to file a summons to assist the clerks' workloads. Other clerks may want to handle the chore themselves. Either position is appropriate under Rule 4.01(1).

Note that Rule 4.01 requires the clerk to issue a summons "promptly" once a complaint is filed (unless there is a waiver under Rule 4.07). Good practice mandates following up to ensure that a summons is promptly issued and served.

4.01(3): Subdivision (3) previously provided: "If a plaintiff or counsel for plaintiff (including third-party plaintiffs) intentionally causes delay of prompt issuance of a summons or prompt service of a summons, filing of the complaint (or third-party complaint) is ineffective." In the 2016 amendment, a revised version of that provision is moved to be new subdivision (4), and the new subdivision (3) addresses the issuance of new process when the preceding process is not served within 90 days from issuance.

The third sentence of the former version of Rule 3 read: "If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint." New Rule 4.01(3) is based upon the foregoing text quoted from the former Rule 3, but the new rule contains three important changes.

First, the reference to "process remain[ing] unissued" is deleted, because that text could have been interpreted as granting the clerk the discretion to delay the issuance of process after the filing of the complaint. As noted above in the 2016 Comment to subdivision (1), the clerk is required to "promptly" issue the summons.

Second, the period for issuing new process is reduced from one year (under the former Rule 3) to 150 days, under amended subdivision (3). That change is intended, on one hand, to afford the plaintiff an adequate period within which to serve the complaint, but, on the other hand, to also promote the timely resolution of legal disputes and to avoid any prejudice to the defendant that might result from a delay in service of process.

Third, the text of former Rule 3 provided that "the plaintiff. . .[could not] rely upon the original commencement to toll the running of a *statute of limitations*" unless the plaintiff obtained issuance of new process within one year of the issuance of the previous process (or, if process was unissued, within one year of the filing of the complaint). (Emphasis added.)

Amended Rule 4.01(3) adds a reference to the tolling of statutes of repose, in addition to statutes of limitations.

4.01(4): Subdivision (4) is a revised version of the former Rule 4.01(3).

Subdivision (4) sanctions the type of conduct at issue in *Stempa v. Walgreen Company*, 70 S.W.3d 39 (Tenn. Ct. App. 2001), where the original counsel for the plaintiffs "instructed" the clerk not to issue summonses for almost a year, despite the requirement under Rule 4.01(1) that clerks issue a summons "forthwith" [now "promptly"]. The underlying rationale for subdivision (4) is that a person or entity named as a defendant in a complaint is entitled to learn without undue delay that the person or entity has been sued; although good-faith efforts to serve the defendant can necessarily take some time, subdivision (4) means that the plaintiff or plaintiff's counsel cannot intentionally delay the issuance or service of process for tactical reasons.

4.03: The last sentence of Rule 4.03(1) is amended by changing "as provided in Rule 3" to read "as provided in Rule 4.01," because the 2016 amendments move the pertinent provisions from the former Rule 3 to the new Rule 4.01(3). The last clause of Rule 4.03(1) is deleted because, in light of the 2016 amendment to Rule 4.01(3), that text is surplusage.

Rule 4.03 also is amended to add new subdivision (3), providing that the "[f]ailure to promptly file proof of service does not affect the validity of service." Subdivision (3), which is derived from Federal Rule of Civil Procedure 4(l)(3), essentially adopts in the rule the Supreme Court's analysis in *Fair v. Cochran*, 418 S.W.3d 542, 546 (Tenn. 2013) (stating that "no language in Rule 4.03(a) [sic – in context, "4.03(1)"] states or implies that the failure to return proof of service promptly renders commencement ineffective to toll the statute of limitations").

4.04(1): Rule 4.04(1) provides that a defendant who evades or attempts to evade service of the summons and complaint may be served "by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service[.]" The address shown on the individual's drivers license, handgun-carry permit, utility bill, or other similar document may be used to prove that a particular location is the "individual's dwelling house or usual place of abode[.]"

4.04(11): The former last sentence of subdivision (11) ("For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery") is deleted because the Postal Service's notation that a registered or certified letter is "unclaimed" is not sufficient, by itself, to prove that service was "refused."

4.05(5): Subdivision (5) is amended in two ways. First, the former sentence of subdivision (5) ("For purposes of this paragraph, the United States Postal Service notation that a

properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery") is deleted, for the reason stated in the preceding Comment to Rule 4.04(11). Second, the following is added as the new last sentence of subdivision (5): "Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute." That text is derived from Rule 4.04(10) – which applies to service by mail on defendants within the State – and adding it to subdivision (5) imposes the same requirement on service by mail on defendants outside this State.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 5

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

[Amend Rule 5.06 as shown below; new text is indicated by underlining:]

5.06. Filing With the Court Defined. — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event he or she shall note thereon the filing date and forthwith transmit them to the office of the clerk. The clerk shall endorse upon every pleading and other papers filed with the clerk in an action the date and hour of the filing. Recycled paper with the highest feasible percentage post-consumer waste content is recommended and encouraged for all papers filed with the court.

<u>If required to be signed in accordance with these rules or by statute, the original pleading or other paper filed with the clerk shall contain an original handwritten penned signature, except as otherwise provided in Rule 5A or Rule 5B.</u> If papers required or permitted to be filed pursuant to the rules of civil procedure are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the time fixed for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing. This provision shall also apply to service of paper by such litigants pursuant to the rules of civil procedure. "Correctional facility" shall include a prison, jail, county workhouse or similar institution in which the pro se

litigant is incarcerated. Should timeliness of filing or service become an issue, the burden is on the pro se litigant to establish compliance with this provision.

Advisory Commission Comments [2016]. Rule 5.06 is amended by adding the first sentence of the second paragraph. That sentence provides that an original pleading or other paper filed with the clerk must contain an original handwritten penned signature, except as otherwise provided in Rule 5A (governing facsimile filing of papers) or Rule 5B (governing electronic filing, signing or verification in those districts in which electronic filing is allowed by local rule).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 11

SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS;
REPRESENTATIONS TO COURT; SANCTIONS

[Amend Rule 11.01(a) as shown below; new text is indicated by underlining:]

Rule 11.01. Signature. — (a) Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, and the Tennessee Board of Professional Responsibility number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. A pleading, written motion, or other paper shall be considered signed only if it meets the signature requirement for filing purposes set forth in Rule 5.06. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Advisory Commission Comment [2016]. Subdivision (a) is amended by adding the fourth sentence, which specifies that a signature on a pleading, written motion, or other paper must meet the signature requirement for filing purposes under Rule 5.06.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 30

DEPOSITIONS UPON ORAL EXAMINATION

[Add the new Advisory Commission Comment (2016) set out below; the text of the rule and the text of the existing Advisory Commission Comments are unchanged:]

Advisory Commission Comment [2016]. Rule 30.03 provides that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the Tennessee Rules of Evidence." This language does not imply that Tenn. R. Evid. 615 is applicable to depositions. Unless otherwise ordered by the court, a lawyer may communicate with a deponent about deposition procedure or the substance of deposition testimony before, during (unless a question is pending) or after the deposition; however, such communications are subject to the Rules of Professional Conduct including, but not limited to, Tenn. Sup. Ct. R. 8, RPC 3.3 and RPC 3.4.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 69

EXECUTION ON JUDGMENTS

[Amend Rule 69.04 by replacing the current text in its entirety with the following new text:]

69.04. Extension of Time. — Within ten years from the entry of a judgment, the creditor whose judgment remains unsatisfied may file a motion to extend the judgment for another ten years. A copy of the motion shall be mailed by the judgment creditor to the last known address of the judgment debtor. If no response is filed by the judgment debtor within thirty days of the date the motion is filed with the clerk of court, the motion shall be granted without further notice or hearing, and an order extending the judgment shall be entered by the court. If a response is filed within thirty days of the filing date of the motion, the burden is on the judgment debtor to show why the judgment should not be extended for an additional ten years. The same procedure can be repeated within any additional ten-year period.

Advisory Commission Comment [2016]. Rule 69.04 has been revised to clarify that a judgment creditor must file a motion to extend a judgment, and that it is the motion which provides the judgment debtor notice and an opportunity to object. This revision eliminates the prior procedure of issuance of a show cause order by the court.

The requirement that notice is to the judgment debtor's last known address remains unchanged as the revision provides that the motion shall be mailed to the judgment debtor's last known address.

The revision replaces past practice of a show cause hearing. The revised procedure, subsequent to the filing of a motion by the judgment creditor, is the alternative of: (1) no hearing if the judgment debtor files no response to the motion in 30 days and the extension shall be

automatically granted; or (2) if the judgment debtor files a response to the motion in 30 days, the extension is not automatically granted which provides each party an opportunity to set a hearing. If a hearing is convened, it is at that point that the revision maintains prior practice of placing the burden on the judgment debtor to show why the judgment should not be extended for an additional ten years. The Commission notes that, in most judicial districts, counsel for the judgment creditor will submit a proposed order to the trial court, unless otherwise directed by the court or by local rule.

The extension procedure set out in Rule 69.04 allows the judgment creditor to avoid having the judgment become unenforceable by operation of Section 28-3-110(a)(2), Tennessee Code Annotated. That section provides that an action on a judgment "shall be commenced within ten (10) years after the cause of action accrued." The Commission notes, however, that Section 28-3-110 was amended effective July 1, 2014 to essentially exempt a narrow class of cases from the ten-year statute of limitation imposed by subsection (a)(2). *See* 2014 Tenn. Pub. Acts, ch. 596. The 2014 amendment added new subsections (b) and (c) to the statute. Subsection (b)(1) provides:

> Notwithstanding the provisions of subsection (a), there is no time within which a judgment or decree of a court of record entered on or after July 1, 2014, must be acted upon in the following circumstances:
>
> (A) The judgment is for the injury or death of a person that resulted from the judgment debtor's criminal conduct; and
>
> (B) The judgment debtor is convicted of a criminal offense for the conduct that resulted in the injury or death; or
>
> (C) The civil judgment is originally an order of restitution converted to a civil judgment pursuant to § 40-35-304.

And subsection (c) of the amended statute goes on to provide that, for any still-valid judgment awarded prior to July 1, 2014 and meeting the criteria set out in subsection (b)(1), the ten-year statute of limitation imposed by subsection (a) is tolled if the judgment creditor complies with various procedural requirements. The Commission merely points out these changes to section 28-3-110 for the benefit of any litigant or attorney involved in a case falling within subsection (b) or (c).

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 1

SCOPE AND DEFINITIONS

[Amend (b)(3) and (b)(9) and the 2006 Advisory Commission Comment as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) COURTS OF RECORD. — * * * *

(b) GENERAL SESSIONS COURT. — These rules govern the procedure in the general sessions courts in the following instances:

(1) the institution of criminal proceedings pursuant to Rules 3, 3.5, and 4;

(2) the disposition of criminal charges pursuant to Rule 5;

(3) preliminary ~~examinations~~hearings pursuant to Rule 5.1;

(4) subpoena pursuant to Rule 17;

(5) venue pursuant to Rule 18;

(6) search and seizure pursuant to Rule 41;

(7) assignment of counsel pursuant to Rule 44;

(8) the use of electronic audio-visual equipment to conduct initial appearances pursuant to Rule 43;

(9) the time computations for setting and the process for continuing preliminary ~~examinations~~hearings pursuant to Rule 45; and

(10) any other situation where the context clearly indicates applicability.

(c) JUVENILE COURTS. — * * * *

Advisory Commission Comments. * * * *

Advisory Commission Comments [2006]. In 2006, the rules were updated and reformatted to make them more easily understood. The new format was based largely on a similar undertaking to update and reformat the Federal Rules of Criminal Procedure. The advisory commission comments also were extensively revised to update citations to particular parts of these rules, to remove obsolete language, and to make the comments more comprehensible. In revising the comments, the commission consolidated the original comments with the subsequent comments added over the years, as the rules were amended. Following the 2006 revisions, new advisory commission comments will be added as individual rules are amended. Where such new comments are added, the new comments are intended to supersede the older comments only to the extent that they are in conflict. However, the presence of both comments is designed to make alterations more readily apparent.

In the event a particular case involves application of a rule as it existed prior to the reformatting and updating of the rules in 2006, please refer to a historical volume of the rules. ~~A copy of the rules and comments, as they existed just prior to the revisions in 2006, may also be found on the website of the Tennessee Supreme Court.~~

Advisory Commission Comments [2007]. * * * *

Advisory Commission Comments [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, obsolete references in Rule 1(b) to "preliminary examinations" are changed to "preliminary hearings."

Additionally, the second sentence of the 2006 Advisory Commission Comment (which sentence referred to historical information previously available on the Tennessee Supreme Court's website) is deleted because the information mentioned in that sentence is no longer available on the Court's website.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 4

PRESENCE OF THE DEFENDANT

[Amend the original Advisory Commission Comments as shown below (the text of the rule and the text of the other Advisory Commission Comments are not changed); deleted text is indicated by overstriking, and new text is indicated by underlining.]

Advisory Commission Comments. Note that the affidavit of complaint may be buttressed by additional affidavit(s) and that the magistrate or clerk may also examine under oath the complainant and any other witnesses.

A criminal summons may be issued instead of an arrest warrant; when a clerk is performing this judicial function, the district attorney general is empowered to direct the clerk whether to issue a warrant or a criminal summons upon a finding of probable cause.

Section (a)(3) requires that a docket book be kept in which every warrant and summons issued in a given county is recorded. This rule is meant to require any person issuing such a warrant or criminal summons who is not the clerk, to communicate this fact to the clerk of the court of general sessions and to see to it that the issuance is properly recorded. Rigid compliance with this rule is very important to the proper administration of criminal justice, and thus the rule is meant to be mandatory in nature.

Under section (b) probable cause for the issuance of arrest warrants and criminal summonses may be based in whole or in part upon credible hearsay. A different rule applies to the preliminary ~~examination~~hearing structured under Rule 5.1, in which the "evidence may not be inadmissible hearsay except documentary proof of ownership and written reports of expert witnesses."

The form of the arrest warrant, as set out in Rule 4(c)(1), makes no distinction between warrants issued for persons not yet arrested and those warrants issued for persons already arrested without a warrant. Such a warrant serves a dual function: first, as the authority for an arrest (where an arrest has not already been lawfully made) and, secondly, as a statement of the charge which the accused is called upon to answer. The commission did not recommend two separate warrant forms, one for use where the accused had not yet been arrested, and the second to merely state the charge against one already under arrest, because it is more utilitarian to have only the one form. The command to arrest is obviously surplusage where the warrant is directed against one already in custody; but a warrant in such cases still serves as the official charging

instrument, issued after a judicial finding of probable cause, and gives notice of the charge which must be answered.

Rule 4 was substantially derived from the corresponding federal rule and § 40-6-202 of the Law Revision Commission's proposed code.

Note that the rule provides specifically for the reissuance of unexecuted complaints and summonses.

Wherever the words "magistrate" and "clerk" appear in Rule 4, they are to be understood as being qualified by the words "who is neutral and detached and who is capable of the probable cause determination required by this rule." *See Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

See T.C.A. § 39-15-101 which sets limits on the issuance of arrest warrants for violation of support orders.

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, the fourth paragraph of the original Advisory Commission Comments to Rule 4 is amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5

INITIAL APPEARANCE BEFORE MAGISTRATE

[Amend Rule 5 and its Advisory Commission Comments as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) IN GENERAL. —

(1) APPEARANCE UPON AN ARREST. — Any person arrested–except upon a capias pursuant to an indictment or presentment–shall be taken without unnecessary delay before the nearest appropriate magistrate of:

(A) the county from which the arrest warrant issued; or

(B) the county in which the alleged offense occurred if the arrest was made without a warrant, unless a citation is issued pursuant to Rule 3.5.

(2) AFFIDAVIT OF COMPLAINT WHEN NO ARREST WARRANT. — An affidavit of complaint shall be filed promptly when a person, arrested without a warrant, is brought before a magistrate.

(3) GOVERNING RULES. — The magistrate shall proceed in accordance with this rule when an arrested person initially appears before the magistrate.

(b) SMALL OFFENSES TRIABLE BY MAGISTRATE. —

(1) ADVICE AND PLEA ENTRY FOR SMALL OFFENSE. — When the offense charged is a small offense triable by the magistrate, without regard to the plea, the magistrate shall advise the defendant of the charge, and determine defendant's plea.

(2) JUDGMENT AND SENTENCE UPON PLEA. — When the defendant pleads guilty to a small offense, the magistrate may hear relevant evidence and sentence the defendant to pay a fine.

(3) TRIAL. — When the defendant pleads not guilty to a small offense, the case shall be set for trial at some future day and the defendant's pretrial release dealt with under the provisions of applicable law, unless the defendant agrees to an immediate trial.

(4) APPEAL. — A defendant who is convicted of a small offense may appeal as a matter of right to the Circuit or Criminal Court for a trial de novo without a jury.

(c) OTHER MISDEMEANORS. —

(1) UPON PLEA OF GUILTY. — If the offense charged is a misdemeanor, but of greater magnitude than a small offense, the magistrate shall inquire how the defendant pleads to the charge. If the plea is guilty, the plea shall be reduced to writing. The following rules shall then apply:

(A) ADVICE TO DEFENDANT. — The magistrate shall advise the defendant of the right to a jury trial and to be prosecuted only on an indictment or presentment.

(B) SET PRELIMINARY ~~EXAMINATION~~HEARING UNLESS NOT REQUIRED. — The magistrate shall schedule a preliminary ~~examination~~hearing to be held within ten days if the defendant remains in custody and within thirty days if released from custody, unless:

(i) the defendant expressly waives the right to a jury trial and to a prosecution based only on an indictment or presentment; or

(ii) a preliminary ~~examination~~hearing is not required under Rule 5(e) below.

(C) WAIVER. —

(i) OF PRELIMINARY ~~EXAMINATION~~HEARING. — The magistrate may bind the defendant over to the grand jury if the defendant waives a preliminary examination on a misdemeanor.

(ii) OF PRELIMINARY ~~EXAMINATION~~HEARING AND GRAND JURY. — If the defendant offers to waive the right to a grand jury investigation and a trial by jury, the court may permit it if the district attorney general or the district attorney general's representative does not then object. In the event of such waiver, the magistrate shall hear the misdemeanor case on the guilty plea and determine the sentence. The defendant may appeal judgment on a plea of guilty to a misdemeanor after waiver of a grand jury investigation and jury trial, but only as to the sentence imposed.

(2) UPON PLEA OF NOT GUILTY. —

(A) SET PRELIMINARY ~~EXAMINATION~~HEARING. — Unless the defendant expressly waives the right to a preliminary ~~examination~~hearing, when the defendant pleads not guilty the magistrate shall schedule a preliminary ~~examination~~hearing to be held within ten days if the defendant remains in custody and within thirty days if released.

(B) WHEN PRELIMINARY ~~EXAMINATION~~HEARING WAIVED. — The magistrate may bind the case over to the grand jury if the defendant waives in writing the preliminary ~~examination~~hearing.

(C) WHEN PRELIMINARY ~~EXAMINATION~~HEARING, GRAND JURY, AND JURY TRIAL WAIVED; APPEAL. — If the defendant offers to waive in writing the right to a grand jury investigation and a trial by jury, and to submit the case to the general sessions court–and the district attorney general or the district attorney general's representative does not object–the magistrate may accept the defendant's written waiver and hear the misdemeanor case on the not guilty plea. The magistrate may enter judgment, including any fine or jail sentence prescribed by law for the misdemeanor. The state may not appeal from a judgment of acquittal. The defendant may appeal a guilty judgment or the sentence imposed, or both, to the circuit or criminal court for a trial de novo as provided by law.

(d) FELONIES. —

(1) ADVICE TO DEFENDANT. — If the offense charged is a felony, the defendant shall not be called on to plead. The magistrate shall inform the defendant of:

(A) the charge and the contents of the affidavit of complaint;

(B) the right to counsel;

(C) the right to appointed counsel if indigent;

(D) the right to remain silent and give no statement;

(E) the fact that any statement given voluntarily may be used against the defendant;

(F) the general circumstances under which the defendant may obtain pretrial release; and

(G) the right to a preliminary ~~examination~~hearing.

(2) PRELIMINARY ~~EXAMINATION~~HEARING WAIVED. — When the defendant waives preliminary ~~examination~~hearing, the magistrate shall promptly bind the defendant over to the grand jury.

(3) SCHEDULE PRELIMINARY ~~EXAMINATION~~HEARING. — When the defendant does not waive preliminary ~~examination~~hearing and when a preliminary ~~examination~~hearing is not rendered unnecessary under Rule 5(e), the magistrate shall schedule a preliminary ~~examination~~hearing within ten days if the defendant remains in custody and within thirty days if released.

(e) INDICTMENT BEFORE PRELIMINARY ~~EXAMINATION~~HEARING; EXCEPTIONS. —

(1) ENTITLEMENT TO PRELIMINARY HEARING. — Any defendant arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing. A preliminary hearing may be waived as set forth by subsection (2) or as otherwise provided in this rule.

(2) WAIVER OF PRELIMINARY HEARING BY FAILURE TO APPEAR. — A defendant waives the right to a preliminary hearing by failing to appear for a scheduled preliminary hearing, unless the defendant presents before the general sessions court, and the court finds within fourteen days after the scheduled preliminary hearing, clear and convincing evidence that the failure to appear was beyond the defendant's control. Unless the general sessions court finds by clear and

convincing evidence that the defendant's absence was beyond the defendant's control and resets the preliminary hearing, the grand jury may return an indictment or presentment on the charges.

(3) EXPEDITIOUS HEARINGS. — While a defendant should have a reasonable opportunity to assert any legal right, preliminary hearings shall be conducted as expeditiously as possible considering the inconvenience to victims and witnesses, the parties, and the court by unnecessary delays.

(4) REMEDY FOR FAILURE TO AFFORD PRELIMINARY HEARING. — If an indictment or presentment is returned against a defendant who has not waived his or her right to a preliminary hearing, the circuit or criminal court shall dismiss the indictment or presentment on motion of the defendant filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment and the case shall be remanded to the general sessions court for a preliminary hearing.

(f) DEFENDANT'S PRESENCE. — The defendant's presence at the initial appearance is governed by Rule 43.

Advisory Commission Comments. As far as the actions before a magistrate exercising the jurisdiction of a general sessions court are concerned, Rule 5 substantially embodies existing law as to jurisdiction and procedure. This rule is intended to provide comprehensive guidance for those exercising this jurisdiction. Small offenses are those which carry a maximum fine of fifty dollars and for which no imprisonment may be inflicted. T.C.A. § 40-408 [now repealed]. It should be noted in connection with subdivision (b), dealing with small offenses triable by a magistrate, that there is no appeal from the judgment in a case in which a guilty plea is entered. Where trial is held for a small offense upon a plea of not guilty and a conviction results, there is a right to a trial de novo upon appeal, but there is no right to a jury upon the new trial (there being no such right as to small offenses in the first instance). Further, where the defendant in serious misdemeanor cases waives the right to a jury trial, that waiver before the magistrate carries over into the criminal or circuit court and attaches to the trial de novo on appeal unless the defendant demands a jury as part of the appeal notice as required by § 27-5-108. *See State v.*

Jarnigan, 958 S.W.2d 135 (Tenn. 1998). The rights in all (except small) offenses to be proceeded against only by indictment or presentment and to a trial by jury are grounded upon the provisions of Art. 1, Secs. 6 and 14, Constitution of Tennessee.

The preliminary ~~examination~~hearing referred to in this rule is the proceeding formerly called a preliminary hearing. It must be scheduled within ten days if the accused is in custody, and within thirty days if the accused is on bond. See Rule 45(a), dealing with the computation of time.

It is important to note that while the Constitution and the Rules vest the right to trial by jury in the accused, this right cannot be waived under this rule in the face of an objection by the district attorney general or his or her representative. This provision acts as a safeguard against the possibility that an accused might be permitted to enter a guilty plea to a lesser included offense and effectively bar prosecution for a more serious crime. *Price v. Georgia*, 398 U.S. 323 (1970); *Waller v. Florida*, 397 U.S. 387 (1970). Hence, in effect the state now has a right to a trial by jury, if the district attorney general or his or her representative asserts the right by objecting to the waiver by the defendant. Note that the rule does not require an affirmative act on behalf of the state before an accused can effectively waive the right, but simply provides that it cannot be done in the face of an objection. This wording by the commission was deliberate, because it is recognized that many general sessions courts must sometimes operate without the presence of the district attorney general or his or her representative. Nevertheless, in order to exercise an objection and thus protect the state's position, the district attorney general personally or by representative will need to know of the proceeding and to enter an objection. The court should construe the words "or the district attorney general's representative" to include anyone connected with law enforcement who reports to the court that the district attorney general or one of his or her assistants has requested that the objection be made.

Under Rule 5(d), covering a felony charge, it is extremely important that the magistrate inform the accused in substantial compliance with this rule.

Rule 5(e) simply carries over into the Rules the same conditional right to a preliminary hearing now embodied in T.C.A. § 40-1131 [repealed]. It was not the intention of the commission to enlarge or diminish that conditional right; therefore, the body of case law which has been developed in connection with the statute retains its precedential value. *Waugh v. State*, 564 S.W.2d 654 (Tenn. 1978).

The commission's rationale, which was presented to the Supreme Court prior to the approval of these rules, is that the court has jurisdiction to enter a judgment calling for a fine in excess of fifty dollars, where provided by law and set by a jury. If the accused waives the right to have a jury set the fine and agrees that the judge set it, this act confers upon the court jurisdiction to set such a fine. An analogous situation arises each time a defendant waives a jury and permits a trial before a judge. In either instance the judge can exercise the full jurisdiction of the court because there has been a valid waiver of the right to have jury participation. Thus, under these

rules, a judge can set a fine to the full limit of the appropriate penal statute, when a jury has been waived.

Rule 5(c)(1) and (2) conform the rule to T.C.A. § 40-4-112, which allows an appeal of the sentence even upon a plea of guilty.

This rule allows a de novo appeal "as provided by law" which contemplates a jury trial as provided by T.C.A. Section 27-3-131(a). Attorneys should be aware, however, that T.C.A. § 27-3-131(b) requires that the demand for a jury must be made at the time of filing an appeal.

These rules permit general sessions courts to use audio-visual technology to conduct initial appearances where a plea of not guilty is entered by the defendant. Nothing in paragraph (d) prohibits the prosecutor or defense counsel from being present and heard. In addition, paragraph (d) does not apply to preliminary ~~examinations~~hearings pursuant to Rule 5.1 nor misdemeanor trials. These amendments are substantially similar to Rule 5-303 of the New Mexico Rules of Criminal Procedure and Rule 10 of Hawaii Rules of Penal Procedure and reflect the growing need for the use of technology to expedite the processing of initial criminal proceedings and reduce the cost of such processing. The purposes for the Rules, which these amendments are intended to achieve, are set forth in Rule 2: "... to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Advisory Commission Comment [2007]. Tenn. Code Ann. § 40-1-109 requires a written guilty plea for misdemeanors. The amendment to subsection (c) conforms the rule to the statute.

Advisory Commission Comment [2010]. Rule 5(e) has been amended in its entirety so as to clarify when the defendant is entitled to a preliminary hearing. Rule 5(e)(1) and (4) make clear that the defendant enjoys the right to a preliminary hearing following arrest on a warrant or an appearance by a criminal summons which cannot be defeated by either an indictment or presentment. The former rule omitted the presentment, apparently by oversight, and this has been corrected. The amendment retains the former procedure of requiring a motion to dismiss if there is a premature indictment or presentment but the time for the motion is no longer measured from the "arrest," but rather from the date of the arraignment on the indictment or presentment in circuit or criminal court.

Rule 5(e)(2) provides that a defendant waives the preliminary hearing by failing to appear. There is a relief from waiver provision if the defendant promptly establishes that the defendant's absence was beyond the defendant's control. The State has the right to seek an indictment or presentment during the intervening fourteen days, which is subject to a dismissal if the defendant makes the required showing.

Rules 5(c)(1)(B) and 5(d)(3) set forth the minimum time within which preliminary hearings must be held. Rule 5(e)(3) addresses the reverse issue: the pernicious problem of

preliminary hearings being routinely continued for so long that witnesses, parties, and the Court are prejudiced. While there may be sound reasons for continuing the hearing, such as a mental examination, the hearing should not ordinarily be delayed unless it is essential for the interests of justice.

Rule 5 by its terms does not apply to an arrest upon a capias pursuant to indictment or presentment. Rule 5(a)(1). These amendments are in no way intended to change the rule that, when there is no arrest warrant or; criminal summons issued on an affidavit of complaint (where the State commences the prosecution by indictment or presentment), there is no right to a preliminary hearing. *See Moore v. State*, 578 S.W.2d 78 (Tenn. 1979).

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5.1, Tenn. R. Crim. P. 5 and its Advisory Commission Comments are amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5.1

PRELIMINARY ~~EXAMINATION~~HEARING

[Amend Rule 5.1 as shown below, and also amend the title as shown above; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) PROCEDURES. — The following rules apply to a preliminary ~~examination~~hearing:

(1) EVIDENCE. — The finding that an offense has been committed and that there is probable cause to believe that the defendant committed it shall be based on evidence which may not be inadmissible hearsay except documentary proof of ownership and written reports of expert witnesses. Rules excluding evidence acquired by unlawful means are applicable.

(2) DEFENDANT'S RIGHT TO PRESENT EVIDENCE AND CROSS-EXAMINE. — The defendant may cross-examine witnesses against him or her and may introduce evidence.

(3) CONTENT AND ACCESS TO RECORD OF PROCEEDING. — The evidence of the witnesses does not have to be reduced to writing by the magistrate, or under the magistrate's direction, and signed by the respective witnesses; but the proceedings shall be preserved by electronic recording or its equivalent. If the defendant is subsequently indicted, such recording shall be made available to the defendant or defense counsel so they may listen to the recording in order to be apprised of the evidence introduced in the preliminary ~~examination~~hearing. 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.

(b) WHEN PROBABLE CAUSE FOUND. — When the magistrate at a preliminary ~~examination~~hearing determines from the evidence that an offense has been committed and there is probable cause to believe that the defendant committed it, the magistrate shall bind the defendant over to the grand jury and either release the defendant pursuant to applicable law or commit the defendant to jail by a written order.

(c) WHEN PROBABLE CAUSE NOT FOUND. — When the magistrate determines from the evidence that there is not sufficient proof to establish that an offense has been committed or probable cause that the defendant committed it, the magistrate shall discharge the defendant. The discharge of the defendant does not preclude the state from instituting a subsequent prosecution for the same offense. 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).

(d) TRANSFER OF RECORDS. — At the conclusion of a proceeding where probable cause is found, the magistrate shall promptly transmit to the criminal court clerk all papers and records in the proceedings. When probable cause is not found, the magistrate shall return the records and papers to the general sessions court clerk.

Advisory Commission Comment. The subject of the preliminary hearing~~examination, or preliminary hearing,~~ has been the focus of a considerable amount of litigation in recent years. The purpose, scope, and quality of evidence to be admitted upon a preliminary hearing have likewise been the subjects of intense debate. Despite the language in *McKeldin v. State*, 516 S.W.2d 82 (Tenn. 1974), suggesting that this stage of the proceeding is a discovery procedure for the accused, it is the commission's position, to the contrary, that *McKeldin* does not convert the preliminary hearing into a "fishing expedition," with unlimited potential for discovery. The case holds that the preliminary hearing is a probable cause hearing, which can result in providing discovery to the defendant, an important byproduct of its probable cause function.

Discovery is specifically addressed elsewhere in these rules, and the rights of the accused and of the state clearly spelled out. As stated above, the preliminary ~~examination~~hearing is a probable cause hearing, and the scope of the proceeding is under the control of the magistrate in the exercise of a sound discretion. It is unnecessary for the magistrate to hear more of the state's proof than is necessary to establish probable cause, and the magistrate may terminate the hearing at any time that probable cause has been established and the accused has been afforded the opportunity to cross-examine the witnesses called by the state and to present defense proof reasonably tending to rebut probable cause. There is no right of the accused to call as witnesses all of the state's witnesses and question them. The magistrate may permit the accused to call witnesses summoned by the state, if in the exercise of a sound discretion the magistrate determines such testimony to be of use to the magistrate in determining probable cause, or the absence thereof. To repeat, the scope of the hearing is under the control of the magistrate, in the exercise of a sound discretion and governed by principles of fundamental fairness. The purpose of the hearing is to adjudicate the existence or absence of probable cause, and not to discover the state's case.

The quality of the evidence required is clear; it may not be inadmissible hearsay, except in those two instances deemed by the commission to be sufficient to warrant their being exceptions, i.e., documentary proof of ownership and written reports of expert witnesses.

Rule 5.1(a)(3) is drafted to make it clear that the constitutional right of the defendant to have access to a recording of the proceedings must be honored. *See Britt v. North Carolina*, 404 U.S. 226 (1971). There is no requirement that a written transcript of the proceedings be made; and certainly the requirement for an electronic recording can be waived, if knowingly and voluntarily done.

Advisory Commission Comment [2008]. The amendments provide remedies when the recording of a preliminary hearing is lost or damaged.

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5, Tenn. R. Crim. P. 5.1 is amended to substitute the term "preliminary

hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 36.1

CORRECTION OF ILLEGAL SENTENCE

[Amend Rule 36.1 as shown below; deleted text is indicated by overstriking, and new text is indicated by underlining:]

(a) ~~Either the~~ A defendant ~~or the state~~ may~~, at any time,~~ seek the correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. The motion may be filed at any time before the sentence set forth in the judgment of conviction expires. The defendant must attach to the motion a copy of each judgment order at issue. For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.

(b) Notice of any motion filed pursuant to this rule shall be promptly provided to the adverse party. If the motion states a colorable claim that the unexpired sentence is illegal, and if the defendant is indigent and is not already represented by counsel, the trial court shall appoint counsel to represent the defendant. The adverse party shall have thirty days within which to file a written response to the motion, after which the court shall promptly hold a hearing on the motion, unless all parties waive the hearing.

(c)(1) If the court determines that the sentence is not an illegal sentence, the court shall file an order denying the motion.

(2) If the court determines that the sentence is an illegal sentence, the court shall then determine whether the illegal sentence was entered pursuant to a plea agreement. If not, the court

shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(3) If the illegal sentence was entered pursuant to a plea agreement, the court shall determine whether the illegal provision of the sentence was a material component of the plea agreement.

(i) If the illegal provision was not a material component of the plea agreement, the court shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(ii) If the illegal provision was a material component of the plea agreement but the illegal provision is to the defendant's benefit, the court shall enter an order denying the motion.

(iii) If the illegal provision was a material component of the plea agreement~~. If so~~ and the illegal provision is not to the defendant's benefit, the court shall give the defendant an opportunity to withdraw his or her plea. If the defendant chooses to withdraw his or her plea, the court shall file an order stating its findings that the illegal provision was a material component of the plea agreement and is not to the defendant's benefit, stating that the defendant withdraws his or her plea, and reinstating the original charge against the defendant. If the defendant does not withdraw his or her plea, the court shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

~~(4) If the illegal sentence was entered pursuant to a plea agreement, and if the court finds that the illegal provision was not a material component of the plea agreement, then the court shall enter an amended uniform judgment document setting forth the correct sentence.~~

(d) Upon the filing of an amended uniform judgment document or order otherwise disposing of a motion filed pursuant to this rule, the defendant or the state may initiate an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure.

Advisory Commission Comments [2013]. Rule 36.1 was adopted to provide a mechanism for the defendant or the State to seek to correct an illegal sentence. With the adoption of this rule, Tenn. R. App. P. 3 also was amended to provide for an appeal as of right from the trial court's ruling on a motion filed under Rule 36.1 to correct an illegal sentence.

Advisory Commission Comment [2016]. In 1978, the Tennessee Supreme Court stated that, "[a]s a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final." *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978). Rule 36.1 was adopted in order to incorporate within the Rules of Criminal Procedure the procedure for correcting illegal sentences, including those arising from plea bargains.

As originally adopted in 2013, Rule 36.1(a) allowed either the defendant or the State to file a motion to correct an illegal sentence. Under the 2016 amendment, subdivision (a) now authorizes only the defendant to file such a motion, and the original authorization for the State to file such a motion is deleted. Subdivision (a) also is amended by adding the words "before the sentence expires" after the words "at any time." As a result of the amendment, only unexpired sentences are subject to being corrected under the rule. Additionally, subdivision (a) is amended to require the defendant-movant to include with the motion a copy of the relevant judgment order(s).

The second sentence of subdivision (b) is amended by adding the word "unexpired" before the word "sentence." Subdivision (b) also is amended to require that any necessary hearing is held "promptly."

Subdivision (c)(3) is revised to limit the circumstances under which relief may be granted under the rule where the defendant has entered into a plea bargain which contains an illegal

sentence. As amended, the rule provides that the trial court shall deny the motion if the defendant benefits from the bargained-for illegal sentence. For example, if the illegal provision was for the sentence to run concurrently with another sentence, when the law actually required a consecutive sentence, the defendant benefitted from the bargained-for illegal sentence; in such cases, relief under this rule is not available. This revision of subdivision (c)(3) essentially incorporates the limitations on habeas corpus relief available for plea-bargained illegal sentences as set forth in Tennessee Code Annotated section 29-21-101(b) (2012).

For clarity in the trial court's decision-making process, the substance of former subdivision (c)(4) is moved to the new subdivision (c)(3)(i).

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 43

PRESENCE OF THE DEFENDANT

[Amend the original Advisory Commission Comments as shown below (the text of the rule is not changed); deleted text is indicated by overstriking, and new text is indicated by underlining:]

Advisory Commission Comments. This rule is based upon but is broader than the federal rule.

Rule 43(d)(4) allows the defendant to waive his or her physical presence at the arraignment but only when the defendant's counsel of record presents the written waiver to the trial judge. If an attorney enters such an appearance, the attorney is expected to continue representation of the defendant. This rule should not be read to allow an attorney to simply make an appearance for the limited purpose of arraignment.

Rule 43(e) permits general sessions courts to use audio-visual technology to conduct initial appearances where a plea of not guilty is entered by the defendant. Nothing in paragraph (e) [formerly (d)] prohibits the prosecutor or defense counsel from being present and heard. In addition, paragraph (e) [formerly (d)] does not apply to preliminary ~~examinations~~hearings pursuant to Rule 5.1 nor misdemeanor trials. These amendments are substantially similar to Rule 5-303 of the New Mexico Rules of Criminal Procedure and Rule 10 of Hawaii Rules of Penal Procedure and reflect the growing need for the use of technology to expedite the processing of initial criminal proceedings and reduce the cost of such processing. The purposes for the Rules, which these amendments are intended to achieve, are set forth in Rule 2: "...to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

The purpose of Rule 43(f) is to extend the discretion of the court to use electronic audio-visual technology to criminal arraignments. The Rule is intended to parallel Rule 43(e) and Rule 5 of the Tennessee Rules of Criminal Procedure permitting the use of electronic audio-visual technology in initial appearances. The Rule permits the court, in its discretion, to use electronic audio-visual technology at an arraignment if the use promotes the purposes for the Tennessee Rules of Criminal Procedure, allows the judge and defendant to communicate with and view each other simultaneously, permits discussions to be heard by the public, and does not involve the defendant's entry of a guilty plea.

Advisory Commission Comment [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, the second paragraph of the original Advisory Commission Comments to Rule 43 is amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive amendments are made to the Rule.

APPENDIX II

PROPOSED COMPREHENSIVE REVISION OF THE RULES OF JUVENILE PROCEDURE

(If adopted, this revision would replace in its entirety the current version of the Rules of Juvenile Procedure)

The proposed comprehensive revision of the Tennessee Rules of Juvenile Procedure initially was drafted by a committee of the Court Improvement Program Work Group, which is a statewide multi-disciplinary group appointed by the Supreme Court to review and address issues of safety, permanency, and well-being for children and families, and to improve the judicial system as it relates to child welfare. The committee's proposed revision was approved by the Work Group and then was considered by the Advisory Commission on the Rules of Practice & Procedure. The attached proposed revision is the version adopted by the Advisory Commission.

Tennessee Rules of Juvenile Practice and Procedure

DRAFT AUGUST 2015

Tennessee Rules of Juvenile Practice and Procedure

GENERAL PROVISIONS

DELINQUENT/UNRULY PROCEEDINGS

Tennessee Rules of Juvenile Practice and Procedure

GENERAL PROVISIONS

RULE 101. TITLE OF RULES - SCOPE - PURPOSE AND CONSTRUCTION

(a) Title. These rules shall be known and cited as the Tennessee Rules of Juvenile Practice and Procedure.

(b) Scope. These rules apply to delinquent, unruly, and dependent and neglect proceedings.

(c) Exclusions.

(1) Traffic offenses are governed by T.C.A. § 37-1-146.

(2) Surrenders of parental rights are governed by T.C.A. § 36-1-111 and 112.

(3) The Tennessee Rules of Civil Procedure shall govern the following proceedings:

(A) termination of parental rights pursuant to T.C.A. § 36-1-113;

(B) parentage pursuant to T.C.A. § 36-2-301, et seq;

(C) guardianship and mental health commitment involving children;

(D) child custody proceedings under T.C.A. §§ 36-6-101, et seq., 36-6-201, et seq., and 37-1-104(a)(2) and (e);

(E) grandparent visitation proceedings pursuant to T.C.A. § 36-6-306; and

(F) civil contempt pursuant to T.C.A. §§ 29-9-104 and 105.

(4) The procedures employed in general sessions court under the Tennessee Rules of Criminal Procedure shall govern the following proceedings:

(A) child abuse prosecutions, pursuant to T.C.A. §§ 37-1-412 and 39-15-401;

(B) nonsupport of children pursuant to T.C.A. § 39-15-101, et. seq.;

(C) contributing to the delinquency or unruly behavior of a child, pursuant to T.C.A. § 37-1-156;

(D) contributing to the dependency and neglect of a child, pursuant to T.C.A. § 37-1-157;

(E) offenses involving adults arising under T.C.A. § 49-6-3001, et. seq.; and

(F) criminal contempt pursuant to T.C.A. § 29-9-102.

(5) The Rules of the Tennessee Supreme Court shall govern proceedings under T.C.A. §37-10-303 and 304.

(d) Purpose and Construction. These rules are designed to implement the purposes of the juvenile court as expressed in T.C.A. § 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, magistrates, attorneys, parties, youth services and probation officers, and others participating in the juvenile court.

Advisory Commission Comments.

These rules are promulgated pursuant to statutory authority granting rule-making power to the Supreme Court. They are intended to provide a simple and practical means of operating in juvenile court in a manner which will adequately implement the law.

These rules are not comprehensive. For example, they do not provide specific procedures for proceedings for the transfer between Tennessee and another state of children found to be delinquent, unruly, or dependent and neglected, for disposition as provided in T.C.A. §§ 37-1-141 — 37-1-144; nor do they deal with proceedings under the Interstate Juvenile Compact as found at T.C.A. §§ 37-4-101 — 37-4-106; with proceedings under the Interstate Compact on the Placement of Children as found at T.C.A. §§ 37-4-201, 37-

4-202; with proceedings in which children seek to obtain judicial consent to marriage, employment, or enlistment in the armed services; nor with special medical proceedings pursuant to T.C.A. § 33-8-301, et. seq. It is intended that these rules be applied in every instance in which they address the procedure involved. If they do not expressly or by clear implication relate to the procedure in question, then existing law is to be applied.

The Commission recommends that local juvenile courts adopt their own written rules consistent with these rules and with relevant statutory and case law, to cover particular circumstances not presently addressed by these rules. Examples of areas which might be addressed by local rules are suggested in the comments to these rules.

Rule 1.01(c) identifies the proceedings not covered by these rules and denotes the statutes or rules that are applicable to each type of proceeding.

The 2016 amendments revised and re-ordered the rules, dividing them into four sections: (1) general, (2) delinquent and unruly, (3) dependent and neglected, and (4) foster care.

RULE 102.

[Reserved]

RULE 103. SERVICE OF PROCESS AND SUMMONS

(a) General Provisions. After the petition has been filed the clerk shall schedule a time for a hearing. The clerk shall, without delay, issue the summonses to the parties, including a child alleged to be delinquent or unruly, requiring them to appear before the court to answer the allegations of the petition. The summons shall also be directed to the child alleged to be dependent and neglected and 14 or more years of age. A copy of the petition shall accompany the summons unless the summons is served by publication in which case the published summons shall indicate the general nature of the allegations and where a copy of the petition can be obtained.

(b) Order to Appear and Bring Child to Hearing. The court may endorse upon the summons an order directing the parents, guardian or other custodian of the child to appear personally at the hearing and directing the person having custody, possession or control of the child to bring the child to the hearing.

(c) Service of Summons.

(1) With the exception of an emergency hearing, preliminary hearing, or detention hearing, if a party to be served with a summons is within this state and can be found, the summons shall be served upon the party personally at least 3 days before the hearing. If the party is within this state and cannot be found, but the party's address is known or can with reasonable diligence be ascertained, the summons may be served upon the party by mailing a copy by registered or certified mail at least 5 days before the hearing. If the party is without this state but can be found or the party's address ascertained, service of the summons may be made either by delivering a copy to the party personally or by mailing a copy to the party by registered or certified mail at least 5 days before the hearing.

(2) If the child has been removed from the home, an attempt must be made to serve the summons and petition prior to an emergency hearing, preliminary hearing, or detention hearing. If service cannot be achieved prior to the hearing, the parties shall be notified as soon as possible of the date, time and place of the hearing, the child's custody status and the reasons for the child's removal.

(3) If after reasonable effort the party cannot be found and the party's mailing address cannot be ascertained, the court may order service of the summons upon the party by publication in accordance with T.C.A. §§ 21-1-203 and 204. The hearing shall not be earlier than 5 days after the date of the last publication.

(4) Service of the summons may be made by any suitable person who is not a party and is not less than 18 years of age.

(5) The court may authorize the payment of the costs of service and of necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing, as provided by law.

(6) Service of a summons upon a party in a foreign country shall be pursuant to the Tennessee Rules of Civil Procedure Rule 4A - Service Upon Defendant In a Foreign Country.

(d) Waiver of Service. A party other than a child may waive service of summons by written stipulation or voluntary appearance. A delinquent or unruly child may waive service of summons in accordance with Rule 205.

Advisory Commission Comments.

The 2016 amendment adds a distinction in subdivision (c) between the requirements for emergency, preliminary and detention hearings and the requirements for other types of hearings. There may be a circumstance where a party has been notified of the hearing but has not been served. This does not relieve the petitioner of the obligation to effect service.

The time to serve a summons is excluded from Rule 110 regarding the calculation and extension of time. See Rule 201 regarding the initiation of cases in delinquent and unruly proceedings and Rule 301 for dependent and neglect proceedings.

If a party appears voluntarily at a hearing and has not been served, the court should provide the party with a copy of the petition and memorialize the service in an order or return.

RULE 104. APPEARANCE OF ATTORNEY

(a) Entry of Appearance. An attorney who undertakes to represent a party in any juvenile court action shall immediately notify the court, unless appointed by written order of the court. An attorney must notify all parties of the entry or appointment. For the purpose of this rule, the filing of any pleading signed by an attorney constitutes an entry of appearance.

(b) Continued Representation. An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by order of the court.

(c) Prosecuting Attorney. Whenever required by statute or rule, or at his or her discretion, the district attorney general shall appear in the juvenile court and prosecute on behalf of the state.

Advisory Commission Comments.

The Commission cautions attorneys to pay special attention to subdivision (b). In the absence of a court order relieving the attorney, that attorney remains attorney of record in any case to which the attorney was appointed or entered an appearance.

In no event should a youth services officer or other employee of the court appear as prosecutor in juvenile court or fulfill in any way such role. This does not, however, prevent the youth services officer from being the petitioner or a witness in a violation of probation proceeding.

RULE 105. RESPONSIVE PLEADINGS AND MOTIONS

(a) Answer. A written answer to a petition shall not be required.

(b) Motion.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds relied upon, and shall set forth the relief or order sought.

(2) Upon the filing of the motion, the clerk shall schedule a tentative date for the motion to be heard.

(3) All motions shall include the date upon which the motion is expected to be heard and shall be served on the parties a reasonable time prior to that date.

(4) A written response to a motion shall not be required.

Advisory Commission Comments.

This rule was formerly Rule 20 of the Tennessee Rules of Juvenile Procedure.

The Commission notes that, although a written response to a pleading or motion is not required under these rules, it is not prohibited.

The Commission suggests that local rules would be an appropriate place to establish guidelines for what a "reasonable time" under this rule would be. This may differ among various localities due to the differences in dockets and available hearing dates. A best practice would be to consult with opposing counsel and any unrepresented parties in advance in order to set a date for hearing of any motion to ensure that all necessary persons are available.

Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B governing motions seeking disqualification or recusal of a judge. Section 1 of Rule 10B provides a procedural framework for determining when the judge of a court of record should not preside over the case. In summary, Section 1 provides for the filing of a motion for disqualification or recusal and also provides for the judge's prompt ruling on the motion. Section 2 of Rule 10B governs appeals from the denial of such motions, and it provides that such appeals may be affected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the exclusive methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2.

The Explanatory Comment to Tenn. Sup. Ct. R. 10B § 1 notes that juvenile courts are courts of record and that juvenile court judges therefore are included within Section 1 of this Rule. Section 4 of Tenn. Sup. Ct. R. 10B, however, governs motions for disqualification of judicial officers other than a judge of a court of record (e.g. magistrates, referees, and masters).

Attorneys or self-represented litigants should consult Tenn. Sup. Ct. R. 10B concerning the procedure for filing motions seeking the disqualification or recusal of a juvenile court judge or other judicial officer and for appealing from a denial of such a motion.

RULE 106. FILING AND SERVICE OF PLEADINGS AND OTHER PAPERS

(a) Service - When Required. Unless the Court otherwise orders, every order required by its terms to be served; every pleading subsequent to the original petition; and every written motion (other than ex parte), notice, appearance, or similar papers shall be served upon each of the parties, including the child alleged to be alleged to be delinquent or unruly. Service shall also be made on a child alleged to be dependent and neglected, if age 14 or over. If a court appointed special advocate (CASA) is appointed, the CASA volunteer shall be served in the same manner as a party.

(b) Service - How Made.

(1) Whenever service of a pleading is required or permitted to be made on a party represented by an attorney or guardian ad litem, the service shall be made upon the attorney or guardian ad litem unless service on the party is ordered by the court. Service upon the attorney, guardian ad litem or upon a party shall be made by delivering a copy of the document to be served either in person, by leaving it at the person's office, by leaving it at the person's home in a conspicuous place or with a person of suitable age and discretion residing therein, or by mailing it to such person's last known address. If no address is known, service is completed by leaving a copy with the clerk of the court. Service by mail is complete upon mailing. Items which may be filed by facsimile transmission pursuant to this rule may be served by facsimile transmission.

(2) If all parties, their attorneys or guardians ad litem agree, in writing, service of documents may be made via email in Adobe PDF format in lieu of service by mail. A signed notice of such agreement, containing the email addresses of parties and the attorneys, shall be filed with the clerk.

(c) Service – Proof of. Whenever any pleading or other paper is served, proof of the time and manner of such service shall be filed before action is taken thereon by the court or the parties. Proof may be by certificate of an attorney of record, the clerk, by affidavit of the person who served the papers, or by any other proof satisfactory to the court.

(d) Filing. All papers after the petition required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Discovery need not be filed, unless ordered by the court.

(e) Filing with the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and immediately transmit them to the office of the clerk. The clerk shall endorse upon every pleading and other papers filed with the clerk in an action the date and hour of the filing. If papers required or permitted to be filed are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the deadline for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time allowed for filing. This provision shall also apply to service of papers by such litigants. "Correctional facility" shall include a prison, jail, county workhouse or similar institution in which the pro se litigant is incarcerated. Should timeliness of filing or service become an issue, the burden is on the pro se litigant to establish compliance with this provision.

(f) Facsimile Filing. The juvenile court clerk shall accept papers for filing by facsimile transmission as provided in Rule 5A of the Rules of Civil Procedure.

(g) Facsimile Filing Exceptions. The following documents shall not be filed by facsimile transmission:

(1) Any pleading or similar document for which a filing fee must be paid (excluding the facsimile service charge), including, without limitation, a petition, a request for a hearing before the judge from the magistrate's order, or a notice of appeal to a trial court or appellate court; or

(2) A summons; bond; a document requiring an official seal; or a document the court has previously ordered to be filed under seal.

(h) Electronic Filing, Signing, Or Verification. Any juvenile court may, by local rule, allow papers to be filed, signed or verified by electronic means that comply with technological standards promulgated by the Supreme Court. Pleadings and other papers filed electronically under such local rules shall be considered the same as written papers.

Advisory Commission Comments.

Subdivision (b) allows for items which may be filed by facsimile to be served in the same manner. In addition, service upon a party, attorney, or guardian ad litem may be made by email upon a signed agreement of all parties, attorneys or guardians ad litem. Documents served by email are required to be attached as Adobe PDF files. Adobe PDF format was chosen because it is required for federal court filings and for service by email pursuant to Rule 5.02 of the Tennessee Rules of Civil Procedure.

Subdivision (f) requires the juvenile court clerk accept papers for filing by facsimile transmission as provided in Rule 5A of the Rules of Civil Procedure. Rule 5A.04 sets out the charge for facsimile filing, and specifies the procedure for collecting the charge when the sending party has been allowed to proceed on a paupers oath. The documents excepted from facsimile filing in subdivision (g) of this Rule are consistent with the exceptions in Rule 5A of the Rules of Civil Procedure. When filing by facsimile, the sender bears the risk of ineffective transmission and should confirm the clerk received the facsimile.

Subdivision (g) provides for the electronic filing, signing and verification of papers in juvenile court by local rule. The local rule must comply with technological standards promulgated by the Supreme Court, published at *Electronic Filing for Civil Cases, Policy & Technical Standards, Administrative Office of the Courts*, adopted September 2011, or any future standards. This amendment is modeled after Rule 5B of the Rules of Civil Procedure.

When applicable, attorneys of record and unrepresented parties are encouraged to file a notice of change of address with the court and to serve copies of the notice on all attorneys of record and unrepresented parties. Failure to do so may result in a party not receiving important documents and information.

Attorneys and unrepresented parties are responsible for inquiring whether the juvenile court has local rules that allow for facsimile or electronic filing.

RULE 107. SUBPOENAS

(a) Form — Issuance. Every subpoena shall be issued by the clerk. Each subpoena shall state the name of the court and the title of the action. Each subpoena shall command the person to attend and give testimony at a hearing and shall specify the time and place and the name of the party for whom testimony will be given. 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.

(b) Subpoena of Persons. With the exception of emergency hearings, preliminary hearings, detention hearings, or for good cause shown, all subpoenas for the attendance of witnesses shall be served at least 5 calendar days prior to the hearing.

(c) Subpoena for Production of Documents and Things. With the exception of emergency hearings, preliminary hearings, and detention hearings, all subpoenas for the production of documents, images, records, data or like information shall be served at least 10 calendar days prior to the hearing, unless otherwise provided by law.

(d) Service. A subpoena may be served by any person authorized to serve process or the witness may acknowledge service in writing on the subpoena. Service of the subpoena shall be made by delivering or offering to deliver a copy to the person to whom it is directed in accordance with this or any local rule.

Advisory Commission Comments.

The original Rules of Juvenile Procedure did not contain a rule regarding the issuance of subpoenas. The rule only applies to serving a subpoena for a court hearing. See Rule 206 regarding discovery in delinquent and unruly cases and Rule 305 in dependent and neglect cases.

This rule provides for a minimum time in which a subpoena must be served prior to a court hearing. The time limits do not apply to emergency, detention or preliminary hearings, though subpoenas should be served as far in advance of the hearing as practicable.

The time to serve a subpoena is excluded from Rule110 regarding the calculation and extension of time.

T.C.A. § 37-1-123(c) provides that a person authorized to serve process is any suitable person under the direction of the court.

Subdivision (d) allows juvenile courts to have local rules addressing acceptable methods of service of subpoenas.

This rule does not preclude the filing of a motion to quash a subpoena.

RULE 108. INJUNCTIVE RELIEF.

(a) How Obtained.

(1) A request for injunctive relief shall be in the form of a motion or a petition, or on the court's own initiative, and may be obtained by:

(A) An ex parte restraining order;

(B) An injunction issued during the pendency of a matter;

(C) An injunction issued as part of a dispositional order; or

(D) A no contact order pursuant to T.C.A. § 37-1-152.

(2) Every request for injunctive relief shall state whether a previous application for the relief has been refused by any court.

(b) In General.

(1) Every ex parte restraining order or injunction shall be specific in terms and shall describe in reasonable detail the act restrained or enjoined.

(2) Every ex parte restraining order or injunction shall be indorsed with the date and hour of issuance, shall be signed by the judge or magistrate granting it, and shall be filed in the clerk's office.

(3) Every ex parte restraining order or injunction shall be binding upon the parties to the action, their officers, agents and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the ex parte restraining order or injunction by personal service or otherwise.

(c) Ex Parte Restraining Order.

(1) An ex parte restraining order shall only restrict the doing of an act.

(2) An ex parte restraining order may be issued by the judge of the court in which the matter is pending or is to be filed, or by any magistrate serving such court.

(3) An ex parte restraining order may be issued when the court finds: (1) that a child may abscond or be removed from the court's jurisdiction; or (2) that there is a danger of immediate harm to a child such that a delay for a hearing would be likely to result in severe or irreparable harm.

(4) The standard of proof applicable in issuance of an ex parte restraining order shall be probable cause. The court may consider a motion, petition, sworn affidavit, sworn testimony or reliable hearsay.

(5) A copy of the ex parte restraining order shall be promptly served on each party by a person authorized to serve a summons. If an ex parte restraining order is issued at the commencement of an action, a copy shall be served with the summons.

(6) An ex parte restraining order becomes effective and binding on the party to be restrained at the time of service or when the party to be restrained is informed of the order, whichever is earlier.

(7) An ex parte restraining order shall expire by its terms and shall not exceed 15 days unless within such time period: (1) the court extends the order after affording the party to be restrained an opportunity to be heard, or (2) the party to be restrained consents to the extension. Any such extension of an ex parte restraining order shall be in the form of an injunction.

(d) Injunction.

(1) An injunction may restrict or mandatorily direct the doing of an act, either temporarily or permanently.

(2) Prior to the issuance of an injunction, the court shall afford the party to be enjoined notice, grounds therefore, and an opportunity to be heard.

(3) An injunction may be issued, modified or dissolved by the judge or magistrate of the court in which the matter is pending. The court shall only modify or dissolve an injunction when the court finds such to be consistent with the child's best interests.

(4) During the pendency of a matter, the court may issue an injunction when the court finds that the conduct of the person to be enjoined is or may be detrimental or harmful to the child.

(5) As part of a dispositional order, the court may issue an injunction when the court finds that the conduct of the person to be enjoined is or may be detrimental or harmful to the child and would tend to defeat the execution of a dispositional order.
(6) The standard of proof applicable in issuance of injunctive relief shall be preponderance of the evidence. Evidence shall be admitted in accordance with the Rules of Evidence. In the court's discretion, any evidence so admitted may be admissible in the underlying matter and need not be repeated if all parties participated in the hearing for injunctive relief.
(7) The court may issue an injunction upon such terms and conditions, and the injunction shall remain in force for such time, as the court determines to be consistent with the child's best interests.

(e) Injunctive Relief Against Non-Party. The court may issue an ex parte restraining order, injunction, or no contact order against a person who is not a party to the dependent and neglected, delinquent, or unruly proceeding if that person's conduct is or may be detrimental or harmful to the child. In such cases, the person to be restrained or enjoined shall be a party only to the petition or motion for injunctive relief. Neither the request for injunctive relief nor the order granting injunctive relief shall confer party status in the underlying case on the person to be enjoined.

Advisory Commission Comments.

Injunctive relief may be issued pursuant to T.C.A. § 37-1-152.

The Commission has chosen to use the term "restraining order" to refer only to an ex parte order granted by the court, while the term "injunction" applies to all orders granted after a hearing. The Commission chose the term "injunction" to clarify that the court may restrain an act or mandatorily direct the doing of an act.

A dependent and neglect matter is an inquiry as to the status of a child rather than a proceeding to determine guilt or to apportion blame or liability among various persons. As the court stated in *State Dep't of Children's Servs. v. Huffines-Dalton,* No. M2008-01267-COA-R3-JV, 2009 Tenn. App. LEXIS 364, at *18, 2009 WL 1684679 (Tenn. Ct. App. June 15, 2009):

> Under Tenn. Code Ann. § 37-1-129, the court must first hold a hearing and make findings whether a child is dependent and neglected within the meaning of the statute. 'The function of the adjudicatory hearing is to determine whether the allegations of dependency, neglect, or abuse are true.' Accordingly, the adjudication is not against either parent or the custodian but addresses the question of whether the child is dependent and neglected for any of the reasons enumerated by the statute. During this adjudicatory phase, the parties are 'entitled to the opportunity to introduce evidence and otherwise be heard in the party's own behalf and to cross examine adverse witnesses,' Tenn. Code Ann. § 37-1-127 (a), and the Rules of Evidence apply.

(Citations omitted.)

Because a dependent and neglect proceeding may involve persons other than parents or guardians, such as "caretakers" as referenced in the definition of "abuse" in T.C.A. § 37-1-102 (b)(1), or "persons with whom the child lives" under T.C.A. § 37-1-102 (b)(12)(B), the Commission intended to clarify that injunctive relief may be sought against such persons. Such persons may not enjoy a legal relationship with the child but such person's conduct may have caused or contributed to the child being found to be dependent and neglected. As the Court stated in *In re: Melanie T.,* 352 S.W.3d 687, 697 (Tenn. Ct. App. 2011):

> [I]t is clear that a biological or legal parent/child relationship is not essential to uphold a finding that a minor is "dependent and neglected." The statute expressly states that a "child" is "dependent and neglected" if that child lives with a "parent, guardian or *person*" who "*by reason of cruelty, … immorality or depravity is unfit to properly care for such child.*" By using the words "parent, guardian or person with whom the child lives," the General Assembly made it perfectly clear that a dependent and neglect claim … does not require that the "unfit" person be a biological or legal parent of the child at issue. Therefore, a person who lives with a child need not be a biological or legal parent of the child in order for a "dependent and neglected" action to be maintained against that person.

(Emphasis in original; citations omitted.)

Thus, the seeking of injunctive relief against such non-parent persons is allowed and does not, in and of itself, confer party status on such persons in the underlying dependent and neglect matter. Further, the proceeding regarding the issuance of injunctive relief may be separate from the underlying matter.

The issue of who, exactly, is a "party" to a dependent or neglect proceeding is not as straightforward as it first appears. Those with a legal relationship to the child, such as parents, are, of course, proper parties and are named respondents in such matters. The analysis grows more complex when the matter involves a step-parent or a boyfriend or girlfriend to a parent, those who have no legal interest in the child. Such persons may have caused or contributed to the child's dependent and neglect status, and whose conduct is in issue in the proceeding, but may not be appropriate persons to take steps to regain entrance to the child's life. The better practice is to view those more remote, legally, from the child as respondents in an injunction proceeding, but not as respondents in the underlying dependent and neglect matter.

The Commission notes *City of Chattanooga v. Swift,* 442 S.W.2d 257, 258 (Tenn. 1969) ("By the term 'party', in general, is meant one having a right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment") (citing *Boyles v. Smith,* 37 Tenn. 105, 107 (Tenn. 1857)).

The Commission recognizes that, pursuant to T.C.A. § 37-1-152(b), the Department of Children's Services or child protection team may apply to the court for the issuance of a no contact order with regard to suspected perpetrators of child sexual abuse. This order may require the removal from the child's home of the suspected perpetrator. The standard of proof in this proceeding is the lesser standard of probable cause while the standard of proof generally in injunctive proceedings (other than requests for an ex parte restraining order) is preponderance of the evidence.

See Rule 110 for the computation of time.

RULE 109. ORDERS FOR THE ATTACHMENT OF CHILDREN.

(a) Requirements for Issuance of Orders for Attachment. Orders for the attachment of children shall be based upon a judicial determination that there is probable cause to believe that the child is in need of the immediate protection of the court because:

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

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

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

The statement of a person requesting the order of attachment must be by affidavit or sworn testimony reduced to writing and must provide sufficient factual information to support an independent determination that probable cause exists for the issuance of the order. If hearsay evidence is relied upon, the affidavit or testimony must include the basis for the credibility of both the declarant and the declarant's statements.

(b) Failure to Appear. When a child fails to appear at a hearing or other court-scheduled proceeding to which the child has been properly served or directed by appropriate court personnel to appear, the court may, on its own initiative or on the basis of a sworn writing, issue an attachment.

(c) Terms of Order. The order for attachment shall order that the child be brought immediately before the court or that the child be taken into custody in accordance with Rule 203 or 302.

Advisory Commission Comments.

Ordinarily, proceedings in juvenile court will be initiated and conducted pursuant to the issuance of a petition and summons rather than the issuance of attachment. Attachments should be used only when necessary to further the goals and purposes of the juvenile court. The Commission notes that the offense of failure to appear is a defined offense and may provide independent grounds for the issuance of an order to take a child into custody if charged.

The issuance of an order of attachment does not determine what should occur once that child is taken into custody. There may be instances in which an order to take a child into custody is warranted but, once accomplished, that child may not meet the requirements to be held in a secure facility pending hearing. In addition, the purpose of an order to take a child into custody may vary from case to case. The order should give specific instructions as to how the attachment order should be carried out.

Subdivision (b) allows the court to issue an attachment in the event the child fails to appear at a court-scheduled hearing, meeting or conference after the child has been duly summoned to appear and fails to do so. The attachment may direct the appropriate authorities to take the child to a detention facility or to court or to another place. Prior to issuing an attachment for failure to appear, whether or not the child is charged with the delinquent act of failure to appear, the child must have received appropriate notice specifying the date, time and location of the proceeding in issue. Accordingly, the Commission encourages each court to implement notice procedures which satisfy due process and afford court participants ample notice of proceedings. For instance, a summons generally is required to initiate most court proceedings, unless the child is served with an arrest warrant or has been issued a citation, while notice of subsequent court dates may be accomplished by less formal means so long as the method chosen is effective.

This rule clarifies the evidentiary requirements for the issuance of orders for the attachment of children based on the provisions of T.C.A. §§ 37-1-113(2), 114(a)(2), 122, and 128(b)(2).

This rule will apply to the process of obtaining an "arrest order" for a child pursuant to T.C.A. §§ 37-1-113(2).

As only attachments of children are addressed in this rule, reference to T.C.A. § 37-1-122, regarding attachments of parents, guardians, and other persons having custody of children under juvenile court jurisdiction, was omitted from the rule. That code section should be consulted for guidance in regard to such action.

RULE 110. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default is not to be included. The last day of the period so computed shall be included unless:

(1) it is a Saturday, a Sunday, or a legal holiday as defined in Tenn. Code Ann. § 15-1-101, or

(2) the act to be done is the filing of a paper in court, and the last day is a day on which the office of the court clerk is closed or on which weather or other conditions have made the office of the court clerk inaccessible.

In either instance, the event period runs until the end of the next day which is not one of the aforementioned days. Absent statutory authority or a Rule of Juvenile Procedure to the contrary, when the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Extension. For cause shown, the court may extend the period of time to perform an act if the request is made prior to the expiration of the period originally prescribed. However, upon motion made after the expiration of the specified period of time to perform an act, the court may permit the act to be done where the failure to act was the result of excusable neglect. This subdivision does not apply to the time for scheduling a detention or preliminary hearing, holding hearings regarding the violation of a valid court order, filing a notice of appeal or request for hearing before the judge from the magistrate's order.

(c) Exceptions. This rule does not apply to the time provided to:

(1) serve a summons or subpoena;

(2) make a probable cause determination pursuant to Rules 203 and 302;

(3) ratify a permanency plan pursuant to T.C.A. § 37-2-403(a); or

(4) hold a permanency hearing pursuant to T.C.A. §§ 37-1-166(g)(5) and 37-2-409.

Advisory Commission Comments.

Rule 110 adopts the same formula as that provided by T.C.A. § 1-3-102, with two additions: (1) If the last day of a period falls on a Saturday, Sunday, or legal holiday, the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Thus, if the period would normally expire, for example, on November 9, but November 9 fell on a Saturday, November 10 was a Sunday, and November 11 was a legal holiday, the rule makes it clear that the period would run until the end of the day, Tuesday, November 12. When the prescribed period is less than 11 days, intermediate Saturdays, Sundays and holidays are excluded. When the time allowed is so short, the party limited by the time should not be further handicapped by losing 1 or more days because normal business operations are suspended by Saturday, Sunday, or legal holiday observances.

Subdivision (b) establishes a single standard for the courts to follow in granting enlargement of the time periods within which various acts must be done. The Rules of Civil Procedure allow for extensions to be liberally granted, but this should not be the case in juvenile court. Extension is to be allowed, even after expiration of the original period, where the failure to take timely action was due to excusable neglect. This subdivision does not apply to the time for scheduling a detention or preliminary hearing, holding hearings regarding the violation of a valid court order, filing a notice of appeal or request for hearing before the judge from the magistrate's order.

See Rule 117 regarding the entry of orders. Prior to the entry of an order, a lawyer or party may request that a copy of an order be mailed upon entry. If the clerk fails to mail a copy of the order immediately after

entry, the parties prejudiced may pursue relief through Rule 213 in delinquent or unruly cases and Rule 310 in dependent and neglect cases, rather than pursuant to this rule.

Subdivision (c) provides that the entire rule is not applicable to the time provided to serve a summons, make a probable cause determination pursuant to Rules 203 and 302, ratify a permanency plan pursuant to T.C.A. § 37-2-403(a), or hold a permanency hearing pursuant to T.C.A. §§ 37-1-166(g)(5) and 37-2-409. The time period of 48 hours for making the probable cause determination pursuant to Rules 203 and 302 is compulsory and may not be extended by the court. The timeframes for ratification of the permanency plan and holding permanency hearings are federally mandated and tied to funding requirements for children in foster care. Service of a summons or subpoena is also excepted from this rule.

Subdivision (c) also tolls the time for a child charged with a delinquent offense and found to be incompetent to stand trial. An adjudicatory hearing or hearing to transfer the child to criminal court may not be held until such time as the child is found to be competent to stand trial.

RULE 111. SCHEDULING CONFERENCES AND ORDERS

(a) Conference. In any action, the court may in its discretion, or upon motion of any party, conduct a conference with the attorneys for the parties and any unrepresented parties, in person, by telephone, or other suitable means, and thereafter enter a scheduling order that limits the time to:

(1) join other parties and to amend the pleadings;
(2) file and hear motions;
(3) complete discovery; and
(4) set the matter for adjudication.

(b) Scheduling Order. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order.

(c) Sanctions. The court may sanction a party or a party's attorney if:

(1) a party or party's attorney fails to obey a scheduling order, or
(2) no appearance is made on behalf of a party at a scheduling conference, or
(3) a party or party's attorney is substantially unprepared to participate in the conference, or
(4) a party or party's attorney fails to participate in good faith,

In lieu of or in addition to any other sanction, the court may require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Advisory Commission Comments.

The 2016 amendments added this rule for the purpose of reducing unnecessary delays. It is based on parts of Rule 16 of the Tennessee Rules of Civil Procedure. This rule does not preclude a court entering a scheduling order without holding a pretrial conference.

Judges may consider entering a scheduling order at a preliminary hearing in a dependent and neglect proceeding. The scheduling order may include, but is not limited to, the dates of the Department's child and family team meeting, ratification hearing, foster care review board, adjudication, and dispositional hearings.

See Rule 37.02 of the Tennessee Rules of Civil Procedure for guidance regarding sanctions.

RULE 112. ATTENDANCE OF PARTIES AND OTHER NECESSARY PERSONS

(a) Initial Inquiry by Court. At the beginning of each hearing, the court shall ascertain whether all necessary persons are before the court, which may include the child, parents (including alleged biological fathers), guardian or other custodian, and other parties and participants to the proceeding. If a necessary person is not present, the court shall determine whether notice of the hearing was provided to that person and whether the hearing may proceed.

(b) Responsibility of Department when Party to Proceeding. If a parent's identity or whereabouts are unknown and the Department of Children's Services is a party to the proceedings, the court shall ascertain whether the Department has made reasonable efforts to determine the identity and the whereabouts of the absent parent and include such finding in its order.

(c) Participation by Contemporaneous Means. In any proceeding, for good cause shown in compelling circumstances and with appropriate safeguards, the court may permit participation in open court by contemporaneous audio-visual transmission from a different location. However, during a delinquent or unruly adjudicatory hearing, a witness may only testify from a different location if the child has waived the right to confrontation.

Advisory Commission Comments.

The 2016 amendment is based on the requirements of the previous rule regarding permanency hearings. It is important that juvenile courts make the same inquiries at all hearings. If the court determines that an absent party did not receive adequate notice of the hearing, then the hearing should be continued.

Statutory law should be consulted in determining whether a participant is a necessary person pursuant to subdivision (a). T.C.A. § 37-1-149(b) provides for the appointment of a court appointed special advocate (CASA) to act in the best interests of the child "during and after court proceedings." T.C.A. § 37-2-416 specifies that foster parents, prospective adoptive parents, or a relative providing care for a child in state custody should be notified of any hearing or review to be held with respect to the child. The statute indicates these persons have a right to be heard at any hearing or review. However, these statutes do not confer party status to CASA volunteers, foster parents, prospective adoptive parents, or a relative providing care for a child. If these participants are to testify, they should be treated as any other witness.

When a parent, who is absent due to that parent's incarceration, expresses a desire to participate by audio-visual means, the court should request that the facility make reasonable accommodations to allow that parent's participation possible. If the facility where the parent is incarcerated is able to transport and guard the parent for the purpose of in-person participation, the court should assist with coordinating those efforts.

When the court is determining whether or not the Department of Children's Services has made reasonable efforts to ascertain the identity and whereabouts of an absent parent, the court may find it helpful to consult the Department's Administrative Policies and Procedures on conducting diligent searches.

Subdivision (c) is similar to Tenn. R. Civ. P. 43.01 and allows for participation by a party or witness by contemporaneous audio-visual transmission from a different location. This should be allowed only for good cause, in compelling circumstances, and with appropriate safeguards. Additionally, a number of statutes permit telephonic testimony in certain types of cases. *See, e.g.*, Tenn. Code Ann. § 24-7-121(d) (2000) (permitting telephonic testimony regarding payment records in child support cases); Tenn. Code Ann. § 34-8-106(b) (Supp. 2014) (permitting witnesses located in other states to testify by telephone in conservatorship or guardianship proceedings); Tenn. Code Ann. § 36-1-113(f)(3) (2014) (permitting an

incarcerated parent or guardian to participate by telephone in a hearing to terminate parental rights); Tenn. Code Ann. § 36-5-2316(f) (2014) (permitting a witness located in another state to testify by telephone in cases under the Uniform Interstate Family Support Act); Tenn. Code Ann. § 36-6-214(b) (2014) (permitting a witness located in another state to testify by telephone in cases under the Uniform Child Custody Jurisdiction and Enforcement Act). Participation by an attorney from a different location may be appropriate in preliminary or administrative matters.

RULE 113. (Reserved)

RULE 114. CONFIDENTIALITY OF PROCEEDINGS

(a) Dependent and Neglect Proceedings. Dependent and neglect cases shall not be open to the public.

(b) Delinquent and Unruly Proceedings. Delinquent and unruly cases are open to the public. However, in the discretion of the court, the general public may be excluded from any proceeding. On application of a party or on the court's own initiative, the court may determine that a proceeding, in whole or in part, should be closed except to those persons having a direct interest in the case. In determining whether to close the proceedings, and thereby balancing the interests of the parties and the public's interests in open proceedings, the court shall apply the following rules:

(1) When closure is sought by a party:

(A) The party seeking to close the hearing shall have the burden of proof;

(B) The court shall not close proceedings to any extent unless it determines that failure to do so would result in particularized prejudice to the party seeking closure that would override the public's compelling interest in open proceedings;

(C) Any order of closure must not be broader than necessary to protect the determined interests of the party seeking closure;

(2) The juvenile court must consider reasonable alternatives to closure of proceedings; and

(3) The juvenile court must make adequate written findings to support any order of closure.

Advisory Commission Comments.

This rule clarifies that dependent and neglect cases should be closed and not open to the public. This proceeding should be open to only those persons who are necessary to the particular proceeding.

State v. James, 902 S.W.2d 911 (Tenn. 1995) authorizes the closure process specified in subdivision (b) for delinquent and unruly cases. Such proceedings "may" be closed only through the process as outlined above.

RULE 115. RECORDING HEARINGS

All hearings, except ex parte hearings, shall be audio recorded by the clerk of the court and retained for a minimum of one year from the date of the final disposition of the case.

Advisory Commission Comments.

In accordance with T.C.A. §§ 37-1-124(c) and 37-1-159(a), the juvenile court is a court of record. Under this rule, all juvenile courts must create and maintain an audio recording of all hearings in juvenile court, in addition to keeping and maintaining appropriate minutes of hearings. Alternative means of recording, e.g. audio-visual equipment, are acceptable. This rule does not preclude simultaneous recording by a court reporter or other means of recording by a party.

This rule is not applicable to reviews conducted by a foster care review board.

RULE 116. STANDARD OF PROOF

In any hearing in which the standard of proof is not expressly designated by statute or rule, the standard of proof shall be preponderance of the evidence.

Advisory Commission Comments.

Most hearings in juvenile court apply an appropriate standard of proof found in statute or rule. However, the standard of proof in some hearings is not expressly stated. For example, the rule governing competency hearings does not designate a specific standard of proof. Other examples would be court approval of pretrial diversion under these rules or hearings to terminate home placement under T.C.A. § 37-1-137(e). In any such hearing, and in the absence of appellate court guidance, the appropriate standard of proof to be applied by the court would be preponderance of the evidence.

RULE 117. ENTRY OF ORDER

(a) Effective. Entry of a court order is effective when an order containing one of the following is marked on the face by the clerk as filed for entry:

(1) the signatures of the judge or magistrate and all parties or counsel, or

(2) the signatures of the judge or magistrate and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge or magistrate and a certificate of the clerk that a copy has been served on all other parties or counsel.

(b) Duties of Clerk. Following the entry of order, the clerk shall make appropriate docket notations and shall copy the order on the minutes, but failure to do so will not affect the validity of entry of the order. When requested by counsel or self-represented parties, the clerk shall without delay mail or deliver a copy of the entered order to all parties or counsel. If the clerk fails to do so, a party prejudiced by that failure may seek relief under Rule 213 in delinquent or unruly cases and Rule 310 in dependent and neglect cases.

Advisory Commission Comments.

This rule is designed to make uniform across the state the procedure for the entry of an order and to make certain the effective date of the order. Under this rule, unless otherwise ordered by the court, the effective date of the order is the date of its filing with the clerk after being signed by the judge or magistrate, even though it may not be copied or entered on the minute book until a later date.

Prior to entry of a written order, parties are usually bound by the terms of the court's oral command, assuming the command is specific and unambiguous. *Blackburn v. Blackburn*, 270 S.W.3d 42 (Tenn. 2008). *See also Ross v. Ross*, No. M2008-00594-COA-R3-CV, 2008 Tenn. App. LEXIS 729, 2008 WL 5191329 (Tenn. Ct. App. Dec. 10, 2008) (holding that violating the court's oral command may constitute contempt if the command is specific and unambiguous in all respects).

Subdivision (a) specifies that an order of the court cannot be filed until it bears not only signature of the judge or magistrate, but also (1) the signatures of all parties or their counsel or (2) a certificate of counsel or the clerk that copies of the order have been served on all parties or counsel of record. The purpose is to provide notice to all parties or their counsel before the order becomes final to allow any party to file a timely appeal.

Occasionally, it is foreseeable that an order will not be entered promptly upon submission to the judge or magistrate although a party contemplates filing an appeal or post-trial motion. When a party anticipates such an order will not be promptly entered, the party may be assured of notice of entry by employing this rule. A lawyer or party who requests a copy of the order stamped with the entry date should not be prejudiced by a clerk's failure to comply with the request. Upon request, the clerk is to immediately mail a copy of the order to all concerned. The request and mailing, or failure to mail, do not affect the time for filing a post-trial motion or a notice of appeal. Parties prejudiced by clerical negligence may pursue relief pursuant to Rule 213 in delinquent or unruly cases and Rule 310 in dependent and neglect cases.

Rule 106 requires service on counsel when a party is represented.

RULE 118. APPEALS

(a) General. Appeals shall be taken pursuant to T.C.A. § 37-1-159.

(b) Right to an Attorney. The right to an attorney at all stages of the proceedings shall include the right to an attorney in an appeal.

(c) When Right Attaches. The right to an appeal attaches upon entry of the final order.

(d) Notification. At any hearing which will result in a final order, the judge shall notify all parties of their right to appeal and the time limits for and manner in which the right to appeal can be perfected, and the right to an attorney on appeal.

(e) Filing. An appeal may be filed with the clerk of the juvenile court within 10 days of the entry of the final order. A prematurely filed notice of appeal shall be treated as filed on the day of entry of the order from which the appeal is taken.

(f) Perfection. An appeal is perfected when a notice of appeal is filed and:
(1) a filing fee is paid, or bond in lieu of the filing fee is posted;
(2) an affidavit of indigency is filed within the applicable time period and an order allowing filing on a pauper's oath is subsequently entered; or
(3) the court has previously determined the appellant to be indigent.

(g) Indigent Status. If leave to proceed as an indigent person is denied, the clerk of the juvenile court shall serve notice of the denial to the parties.

(h) Record on Appeal. When an appeal has been perfected, the clerk shall cause the entire record in the case, including the juvenile court's findings and written reports from probation officers, court employees or professional consultants, to be taken to the circuit court, where the case shall be set for a *de novo* hearing.

(i) Parties to the Appeal. All parties to the juvenile court proceeding shall be parties to the *de novo* hearing.

Advisory Commission Comments.

Appeals under this rule do not include the request for a hearing before the juvenile court judge after entry of a magistrate's order. Such requests are controlled by T.C.A. § 37-1-107 governing magistrates.

The right to appeal accrues upon entry of a final order. Prior to the 2016 amendment, the previous language read "upon entry of the order of final disposition." The Commission modified the language to make clear that orders other than an order entered following a dispositional hearing may be considered "final orders." Black's Law Dictionary defines final order as "an order that is dispositive of the entire case." *Black's Law Dictionary* 1206 (9th ed. 2009). Tennessee case law holds that a judgment is final "when it decides and disposes of the whole merits of the case leaving nothing for the further judgment of the court." *Richardson v. Board of Dentistry*, 913 S.W.2d 446, 460 (Tenn. 1995) (citing *Saunders v. Metropolitan Gov't of Nashville & Davidson County*, 383 S.W.2d 28, 31 (Tenn. 1964)). Examples of final orders in juvenile court include, but are not limited to, orders revoking probation or terminating home placement, an order finding a child violated a valid court order pursuant to § 31.303(f)(2) & (3) of Title 28 of the Code of Federal Regulations, dispositional orders, and the same orders issued by a magistrate that have not been appealed to the judge. This list is not exclusive, and other orders may be considered final orders. The Commission

also notes the case of *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002), in which the court held that ratification of a permanency plan is not a final order.

This rule clarifies that a notice of an appeal, pursuant to T.C.A. § 37-1-159, must be filed with the clerk of the juvenile court and not with the youth services officer or any other office.

Pursuant to subdivision (i) and T.C.A. § 37-1-159, all parties subject to the final order are parties to the appeal.

This rule clarifies that an appeal is perfected when the notice of appeal is filed and the required filing fee is paid or otherwise satisfied. Such satisfaction includes payment of the fee or by proceeding *in forma pauperis*. See T.C.A. § 20-12-127.

See Rule 110 for the computation of time.

T.C.A. § 37-1-103, regarding the juvenile court's exclusive jurisdiction, has been amended to make clear that the juvenile court retains jurisdiction to the extent needed to complete any reviews or permanency hearings for children in foster care during the pendency of the appeal to administer the case until the appeal has been decided or further orders entered by the circuit court.

The constitutional prohibition against being placed twice in jeopardy for the same offense applies to juvenile court proceedings as well as adult proceedings. *Breed v. Jones*, 421 U.S. 519 (1975); *State v. Jackson*, 503 S.W. 2d 185 (Tenn. 1973). Normally, jeopardy attaches in a non-jury proceeding when a witness is sworn to testify. *State v. Pennington*, 952 S.W.2d 420, 422 (Tenn. 1997). *See also, State v. Bryan*, W1999–00620–CCA–R3–CD, 2000 WL 33288749, 2000 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. June 27, 2000). 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. *State v. Jackson*, supra.

DELINQUENT/UNRULY PROCEEDINGS

RULE 201. PRELIMINARY INQUIRY AND INFORMAL ADJUSTMENT

(a) Purposes. The juvenile court preliminary inquiry is intended to:

(1) Provide for resolution of complaints by excluding from the juvenile court at its inception:

(A) Those matters over which the juvenile court has no jurisdiction;

(B) Those matters in which there appears to be insufficient evidence to support a petition; or

(C) Those matters in which sufficient evidence may exist to bring a child within the jurisdiction of the juvenile court but which are not serious enough to require official action under the juvenile court law or which may be suitably referred to a non-judicial agency available in the community;

(2) Provide for the commencement of proceedings in the juvenile court by the filing of a petition only when necessary for the welfare of the child or the safety and protection of the public.

(b) Receipt of Complaint. Any person or agency having knowledge of the facts may file a complaint with the juvenile court or an officer designated by the court alleging facts to indicate a child is delinquent or unruly. The court representative accepting the complaint shall note thereon the date and time of receipt of the complaint.

(c) Duties of Designated Court Officer. Upon receipt of the complaint, the designated court officer shall:

(1) Interview or otherwise seek information from the complainant, victim and any witness to the alleged offense.

(2) Conduct an interview with the child who is the subject of the complaint and the child's parents, guardian or legal custodian. At the beginning of the interview, the officer shall explain the nature of the complaint and inform the child of the right to counsel, where applicable, that if the child cannot afford an attorney one will be appointed if applicable, and that the child has a right to remain silent and any statements made by the child will not be admissible in any proceeding prior to the dispositional hearing.

(A) If the child invokes the right to an attorney, the designated court officer shall immediately suspend the interview, allow for the appointment or retention of counsel, and reschedule the matter.

(B) If the child chooses to proceed with the interview without counsel, the designated court officer shall obtain a written waiver from the child and proceed with the interview.

(3) If the designated court officer determines that the juvenile court does not have jurisdiction over the matter or there appears to be insufficient evidence to support the complaint, then the complaint shall be closed and no further action taken by the court.

(d) Informal Adjustment. (1) If the designated court officer determines that the matter is not serious enough to require official action before the juvenile court judge, then the designated court officer may remedy the situation by giving counsel and advice to the parties through an informal adjustment. In determining whether informal adjustment should be undertaken, the designated court officer may consider:

(A) Whether the child has had a problem in the home, school or community which indicates that counsel and advice would be desirable;

(B) Whether the child and the parents, guardian or legal custodian seem able to resolve the matter with the assistance of the designated court officer or other court staff, and without formal juvenile court action;

(C) Whether further observation or evaluation by the designated court officer is needed before a decision can be reached;

(D) The attitude of the child, parents, guardian, or legal custodian;

(E) The concerns of the victim, child, the parents, guardian, or legal custodian, and/or any other affected persons or agencies;

(F) The age, maturity and mental condition of the child;

(G) The prior history or record, if any, of the child;

(H) The recommendation, if any, of the referring party or agency;

(I) The results of any mental health, drug and alcohol or other assessments or screenings of the child; and

(J) Any other circumstances which indicate that informal adjustment would be consistent with the best interest of the child and the public.

(2) The informal adjustment shall not occur without the consent of the child and the child's parents, guardian or other legal custodian. Prior to giving consent, the child must be notified that participation is optional and may be terminated by the child at any time.

(3) The informal adjustment process shall not continue beyond a period of 3 months from its commencement unless such extension is approved by the court for an additional period not to exceed a total of 6 months. The process shall only include counsel and advice, or referral to an agency available in the community for successful completion of a suitable treatment program, class or some form of alternative dispute resolution.

(4) Upon successful completion of a period of informal adjustment, the complaint shall be closed and no further action taken by the court. If a petition has been filed, then the petition shall be dismissed with prejudice.

(5) The designated court officer may terminate the informal adjustment and proceed with formal court action if at any time the child or the child's parents, guardian or legal custodian:

(A) Declines to participate further in the informal adjustment process;

(B) Denies the jurisdiction of the juvenile court over the instant matter;

(C) Expresses a desire that the facts be determined by the court;

(D) Fails to comply with the terms of the informal adjustment program.

(6) Upon termination of the informal adjustment process, the designated court officer shall notify the child and the child's parent, guardian or legal custodian thereof, and the victim. The termination shall be reported to the court. Such notification shall include the basis for the termination.

(e) Informal Adjustment Determined Inappropriate. If the designated court officer determines informal adjustment to be inappropriate, then formal court proceedings shall commence with the filing of a petition or citation.

(f) Statements of Child. Any statements made by the child during the preliminary inquiry or informal adjustment are not admissible in any proceeding prior to the dispositional hearing.

Advisory Commission Comments.

The 2016 amendment combines two previous rules regarding intake in and informal adjustment in delinquent and unruly cases. The intent of this rule is to allow local courts flexibility in how they handle informal adjustment, but also to spell out those basic procedures which must take place in every case in which informal adjustment is undertaken to ensure that informal adjustment is voluntary, as required in T.C.A § 37-1-110.

The requirement in subdivision (b) that the court representative accepting a complaint shall note thereon the date and time of receipt of the complaint has been added to ensure that complaints are reduced to writing and documentation exists as to when the complaint was received. The term "complaint" includes, but is not limited to, a petition or citation. The complaint may be filed with the clerk of the court or another person designated by the court. The term "complaint" as used in these rules is not equivalent to a complaint referenced in the Rules of Civil Procedure.

As part of the preliminary inquiry, subdivision (c) requires the designated court officer to notify the child of the child's right to an attorney at the beginning of the interview with the child. T.C.A. § 37-1-126 provides that a child is entitled to be represented by an attorney in any delinquent proceeding. A child is entitled to an attorney when charged with an unruly offense when the child is in jeopardy of being removed from the home pursuant to T.C.A. § 37-1-132(b). Not all children charged with an unruly offense are entitled to an attorney. The right attaches when the child is in jeopardy of being placed outside the child's home with a person, agency or facility. Prior to placing custody of an unruly child with the Department of Children's Services, the court is obligated to refer the child to the Department's juvenile-family crisis intervention program pursuant to T.C.A. § 37-168. A child's assertion of the right to counsel should not preclude an informal adjustment when appropriate.

It should be noted that, although attitude may be a factor under subdivision (d)(1)(iv) to consider in determining whether to undertake informal adjustment, it should not be the sole basis for denying informal adjustment. Each locality is encouraged to adopt and implement standardized risk and needs assessment tools in order to assist in this process.

Because informal adjustment allows only for counseling and advice, subdivision (d)(3) does not allow for sanctions such as restitution. However, in many instances, the child or the child's family may desire to pay the alleged victim for any harm done. If the child and the victim agree to restitution, this can be done independently of the informal adjustment and not as a prerequisite or condition of the informal adjustment. If the intent is to make restitution a condition, the appropriate resolution is pretrial diversion and not informal adjustment.

Subdivision (e) provides that when an informal adjustment is determined to be inappropriate then formal court proceedings shall commence with the filing of a petition or citation. If a petition has not been filed at this point in time, then such petition should be filed with the clerk of the court. If a citation has been filed that meets the requirements of T.C.A. § 40-7-118, then a petition need not be filed in order to commence formal proceedings. If an informal adjustment is determined to be inappropriate, the designated court officer should assess whether a pretrial diversion is appropriate.

Courts should develop written local procedures and criteria for initiating informal adjustments. Such criteria might include a listing of the types of cases, or charges, which might be handled by informal adjustment. Local rules should include a process by which the district attorney general, petitioner, or victim of the offense may object to an informal adjustment.

RULE 202. PRETRIAL DIVERSION

(a) Pretrial Diversion Agreement. If the designated court officer determines that the matter is appropriate for pretrial diversion, the pretrial diversion agreement shall be in writing and signed by the child, the child's parent, guardian or other legal custodian and the designated court office. The agreement must be approved by the court before it is of any force and effect.

(b) Consent. The pretrial diversion shall not occur without consent of the child and the child's parent, guardian or other legal custodian.

(c) Time Limits. The pretrial diversion process may continue for a period up to 6 months, unless the child is discharged sooner by the court. Upon application of any party made prior to the expiration of the initial time period, and after notice and a hearing, the diversion may be extended for a period not to exceed an additional 6 months.

(d) Requirements. In addition to any counsel and advice authorized for an informal adjustment, sanctions, including, but not limited to community service work and monetary restitution may be made a part of the agreement. The parties, by mutual consent and with court approval, may modify the requirements of the agreement at any time before its termination.

(e) Violation of Pretrial Diversion. If failure to comply with the agreement is alleged, the child shall be given written notice of the alleged violation and an opportunity to be heard on that issue prior to the reinstatement of proceedings pursuant to the original charge. Notice of the failure to comply must be filed prior to the expiration of the pretrial diversion. The filing of the notice extends the period of pretrial diversion pending a prompt hearing on the merits of the alleged violation.

(f) Statements of Child. Any statements made by the child during the preliminary inquiry or pretrial diversion are not admissible in any proceeding prior to the dispositional hearing.

Advisory Commission Comments.

The procedures set forth in this rule essentially allow for a process similar to informal adjustment, with no official finding as to guilt; however, because conditions of a pretrial diversion may be more demanding than those allowed in an informal adjustment there must be court approval of any agreement. Prior to determining whether a case is appropriate for pretrial diversion, the designated court officer should follow the procedures in Rule 201(a)–(c), regarding the preliminary inquiry. Though sanctions, such as community service work or monetary restitution, are not allowed to be imposed on an informal adjustment, these sanctions are appropriate requirements for a pretrial diversion.

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 ensure the district attorney general is notified of cases in which pretrial diversion is being considered, in light of the legitimate public interest in the disposition of more serious cases.

Pursuant to T.C.A. § 37-1-110, 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 209.

RULE 203. PROCEDURES UPON TAKING A DELINQUENT CHILD INTO CUSTODY

(a) Delinquent child taken into custody and released. When a child is taken into custody and is not detainable, the child shall be released to the child's parent, guardian or other custodian within a reasonable time. The child and the person to whom a child is released shall be served a summons requiring the child's return to court at such time and place as the court directs.

(b) Delinquent child taken into custody and not released.

(1) If a child is taken into custody without an order and:

(A) The child is alleged to be delinquent and held in secure detention, a probable cause determination that an offense has been committed by the child shall be made by a magistrate within 48 hours of the child being taken into custody; or

(B) The child is alleged to be delinquent and detained under the special circumstances exception pursuant to T.C.A. § 37-1-114(c)(3), a probable cause determination that an offense has been committed by the child and a finding of special circumstances shall be made by a magistrate within 24 hours, excluding nonjudicial days, but no later than 48 hours of the child being taken into custody.

In either case, if the magistrate does not make the required findings, the child shall be immediately released to the child's parent, guardian or other custodian. "Magistrate" means a person designated as such pursuant to the provisions of T.C.A §§ 37-1-107 or 40-1-106. Probable cause determinations shall be based on a written affidavit, which may be sworn to in person or by audio-visual electronic means.

(2) If a child alleged to be delinquent is taken into custody pursuant to an order of attachment or if a probable cause determination is made pursuant to paragraph (b), the child shall not remain in detention longer than 72 hours, excluding nonjudicial days, but in no event more than 84 hours, unless a detention hearing is held. For a child so detained, a petition setting forth the allegations against the child and the basis for asserting the court's jurisdiction shall be filed prior to the child's detention hearing.

(c) Secure detention of delinquent child.

(1) A child alleged to be delinquent and not released shall be placed in a juvenile detention facility. The court and the child's parent, guardian or other custodian shall immediately be notified of the child's location and of the reason for the child's detention.

(2) A child not released shall be informed upon being placed in the detention facility, both verbally and in writing, by a person designated by the court of:

(A) The reason for being detained, including the nature of the alleged offense;

(B) The child's right to a detention hearing and an explanation of the purpose of a detention hearing;

(C) The child's right to an attorney and that an attorney will be appointed to represent the child at the detention hearing and subsequent hearings if the child's parent or custodian is financially unable or refuses to retain an attorney for the child;

(D) The right not to say anything about the charges being placed against the child and that anything the child says may be used against the child in court;

(E) The right to communicate with the child's attorney and parent, guardian or other custodian, and that provision will be made by the detention facility to allow for such private communication.

(d) Detention Hearing.

(1) Advisement of Rights. At the beginning of the detention hearing, the court shall inform the parties of the purpose of the hearing and the possible consequences of the detention hearing, and shall inform the child of the child's rights pursuant to Rule 205.

(2) Evidence. Any finding that there is probable cause to believe that an offense has been committed, and that the child committed it, shall be based on evidence admitted pursuant to the Rules of Evidence, except that such evidence may include reliable hearsay.

(3) Required Determinations. The court, in making the decision on whether to detain the child, shall:

(A) Determine whether probable cause exists as to whether the charged offense or a lesser included offense has been committed and whether the child committed it; and

(B) If probable cause has been determined, whether the offense is one which qualifies for continued detention under T.C.A. § 37-1-114; and

(C) If probable cause has been determined and the offense qualifies for continued detention, determine whether it is in the best interest of the child and the community that the child remain in detention pending further hearings. In making this best interest determination, the court should consider the likelihood that the child would abscond or be removed from the jurisdiction of the court; and

(D) Determine whether any less restrictive alternatives to detention are available which would satisfy the court's best interest determination above. The court may impose conditions on release such as the setting of bail, restrictions on the child's movements and activities, requirements of the child's parent, guardian, or custodian, or other community-based alternatives as an alternative to continued detention.

(4) Release of Child. If the court does not find the child is detainable as above, the child shall be released to an appropriate parent, guardian or responsible adult. The court may impose conditions on release as above, and a hearing shall be scheduled.

(5) Continued Detention of Child. If the court orders the child to be detained, or if the child waives a the detention hearing, the court shall ensure that the child's case will be scheduled so as to limit the time the child spends in secure detention.

(6) Waiver of Time Limit for Detention Hearing. The time limit for the hearing may be waived by a knowing and voluntary written waiver by the child. Any such waiver may be revoked at any time, at which time a detention hearing shall be held within the time frame outlined in T.C.A. § 37-1-117.

Advisory Commission Comments.

This rule applies only to children alleged to be delinquent. A child alleged to be unruly and taken into custody may not be held in a secure facility for a period longer than allowed in T.C.A. § 37-1-114.

Subdivision (b) clarifies that upon a warrantless arrest of a child alleged to be delinquent, a neutral and detached magistrate must make a probable cause determination that the child has committed the delinquent offense within 48 hours of the arrest. This determination may be made *ex parte*. Under the Fourth Amendment, in order for a state to detain a person arrested without a warrant, a judicial officer must determine that probable cause exists to believe the person has committed a crime. *Gerstein v. Pugh, 420 U.S. 103 (1974)*. The judicial officer must make this determination "either before or promptly after arrest." *Id.* at 124. Seventeen years later, the Court further refined its *Gerstein* decision, holding that probable cause determinations must be made within 48 hours of a warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) ("A jurisdiction that chooses to offer combined [probable cause and arraignment] proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest"). Although the Supreme Court has not addressed whether *Gerstein* hearings are required for juveniles, the Sixth Circuit has answered this question affirmatively. *Cox v. Turley*, 506 F.2d 1347, 1353 (6th Cir. 1974) ("Both the Fourth Amendment and the Fifth Amendment were violated because there was no prompt determination of probable cause – a constitutional mandate that protects juveniles as well as adults"). *See also State v. Bishop*, No. W2010-01207-SC-R11-CD, 2014 Tenn. LEXIS 189, 2008 WL 888198 (Tenn. 2013), and *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996).

The probable cause determination in subdivision (b)(1) must be based on a written affidavit reciting the facts, which may be sworn to in person or by audio-visual electronic means. Black's Law Dictionary defines affidavit as "(a) voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Black's Law Dictionary* 66 (9th ed. 2009).

Subdivision (b)(2) refers to an "order of attachment." The Commission uses the phrase "order of attachment" to refer to any court order commanding that the child be taken into custody. Some jurisdictions may refer to these orders as orders of arrest or arrest warrants. Such orders of attachment may direct the appropriate authorities to take the child to a detention facility, to the police station, to court, or to another place.

Wherever possible, community-based alternatives to secure detention facilities should be used. This preference is in keeping with the prohibition in T.C.A. § 37-1-114 against any detention or shelter care of children unless "there is no less drastic alternative to removal of the child from the custody of his parent, guardian or legal custodian available which would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing."

The Commission recognizes that detention is a severe curtailment of the child's liberty and affects not only the child, but the child's parent, guardian or custodian. A child in detention is presumed to be innocent and retains all rights guaranteed to children facing charges but who are not detained. Accordingly, detention should be as brief as possible and should be used only when absolutely necessary to accomplish the objectives of the statute. The court should determine, on an individual basis, whether the child's continued detention is warranted under T.C.A. § 37-1-114 and that there are no less drastic alternatives available. The court should make specific findings of fact justifying continued detention.

A child alleged to be delinquent has the right to an attorney at the detention hearing, as well as all other stages of a delinquency proceeding. The court must inform the child of the right to an attorney at the beginning of the hearing, pursuant to the procedures in Rule 205. Also, in order for a child to effectively waive the right to an attorney, the court must comply with the process to obtain a knowing and voluntary waiver in that rule.

Courts should have an established practice in place for the appointment of attorneys as soon as possible prior to detention hearings. If at all practicable, detention hearings should not be continued for the sole reason of locating and appointing attorneys. The Commission recognizes that time constraints may interfere with this objective, but would stress that continued deprivation of liberty is a significant event in the life of a child.

RULE 204. USE OF RESTRAINTS ON CHILDREN IN THE COURTROOM

(a) Children appearing in juvenile court may be restrained if the court determines that:
  (1) The behavior of the child represents a threat to his or her safety or the safety of other people in the courtroom; or
  (2) The behavior of the child presents a substantial risk of flight from the courtroom; and
  (3) There are no less restrictive alternatives to restraints that will prevent flight or risk of harm to the child or another person in the courtroom.

(b) Any party may request to be heard as to whether or not restraints are necessary, and upon request, a judge shall make findings on the record regarding the decision to restrain the child.

Advisory Commission Comments.

The general statutory requirement is to "remove the taint of criminality" from children appearing in our juvenile courts.

It is not anticipated by this Commission that juvenile courts will be required to engage in an extensive fact-finding hearing prior to ruling that restraints on a particular child are appropriate. It is further understood that Tennessee juvenile courtrooms vary greatly in structure, availability of security personnel and their ability to handle security concerns. A few of the factors the court may wish to consider prior to ruling restraints are appropriate are:

1) The seriousness of the charges;
2) The delinquency history of the child;
3) Any past disruptive courtroom behavior by the child;
4) Any past escape attempts by the child;
5) Any security risks at a particular time in a courtroom due to structure and/or low staffing levels of security personnel.

The Commission is seeking to promote an individual determination by the court as to whether a child should be restrained in the courtroom. The focus of this rule should be balancing between the child's best interest and the safety of the courtroom. This rule only addresses children within the courtroom. It does not address transportation to and from the courthouse and to and from the courtroom.

A large number of children in delinquency proceedings have suffered neglect or abuse, and/or have physical or mental disabilities. Restraints on these children are particularly inappropriate in most circumstances.

Communication between a child and an adult attorney is often difficult, and restraints compound that problem. Children disengage from communication with their attorneys even more than adult defendants because "juveniles have limited understanding of the criminal justice system and the roles of the institutional actors within it." *Graham v. Florida*, 560 U.S. 48, 51 (2010).

RULE 205. NOTIFICATION AND WAIVER OF RIGHTS OF CHILDREN

(a) Right To Attorney.

(1) Notification of Right to Attorney. In all proceedings in which a child is by law entitled to representation by an attorney, the court shall expressly inform the child of the right to an attorney. If a child waives the right to an attorney, the court shall inform the child of the continuing right to an attorney at all stages of the proceedings.

(2) Waiver of Right to an Attorney. No child shall be deemed to have waived the assistance of an attorney until and unless:

(A) The child has been fully informed of the right to an attorney;

(B) The child subsequently knowingly and voluntarily waives the right to an attorney; and

(C) The waiver is confirmed in writing by the child.

(3) Appointment of Attorney. When a child who is entitled to a court-appointed attorney does not knowingly and voluntarily waive the right to an attorney and cannot afford an attorney, or when the child's parents or other persons legally obligated to care for and support the child are able to afford an attorney but refuse to hire one, the court shall appoint an attorney and assess attorney's fees pursuant to T.C.A. § 37-1-150.

(b) Notification And Waiver of Additional Rights at a Hearing.

(1) Notification of Rights to a Child Who has Waived the Right to an Attorney. At the outset of any juvenile court hearing, the court shall advise any child who has waived the right to an attorney of:

(A) The right to remain silent;

(B) The right to plead not guilty;

(C) The right to a trial;

(D) The right to confront and cross-examine adverse witnesses;

(E) The right to present testimony on the child's behalf;

(F) The right to subpoena evidence on the child's own behalf;

(G) The right to appeal any final order, the time limits for and manner in which the right to appeal can be perfected, and the right to an attorney on appeal.

(2) Notification and Waiver Where Child Represented by An Attorney. When the child is represented by an attorney, the attorney shall fully advise the child of the child's rights under the Constitution of the United States, the Constitution of Tennessee, any other law, and any rule of court. The child shall make the decision whether or not to waive those rights, after full consultation with the child's attorney. The obligation of the attorney to advise the child of the child's rights in no way diminishes the Court's obligations both to advise the child of the child's rights and to ascertain whether waivers of those rights are made knowingly and voluntarily.

(3) Waiver of Rights Where Child Not Represented by An Attorney. When the child is not represented by an attorney, the child may not waive any rights guaranteed to the child under the Constitution of the United States, the Constitution of Tennessee, any other law, or any rule of court unless the Court has fully advised the child of the child's rights and has determined that the child knowingly and voluntarily waives those rights. The court shall not accept a waiver or deem a waiver to be knowing and voluntary unless or until the child has consulted with a knowledgeable adult who has no interest adverse to the child.

(c) Knowing and Voluntary Waivers.

(1) Criteria for Knowing and Voluntary Waivers. The court shall only accept a waiver if the child is able to make an intelligent and understanding decision based on the child's mental condition, age, education, experience, the nature or complexity of the case, or any other relevant factor.

(2) Procedure for Making and Confirming Waivers. Any and all waivers of rights at a hearing shall be made orally and in open court, and shall be confirmed in writing by the child and the judge. When the child is not represented by an attorney, the court shall advise the child in open court of the right to an appointed attorney. The court shall not proceed with the hearing unless the child has waived the right to an attorney in accordance with the provisions of this rule.

Advisory Commission Comments.

Children alleged to be delinquent and children alleged to be unruly and in jeopardy of being removed from the home have the right to an attorney pursuant to T.C.A. § 37-1-126. In addition, this statute also mandates appointment of an attorney for a child who is "not represented by the child's parent, guardian, guardian ad litem, or custodian" and who is alleged to be delinquent, or unruly and in jeopardy of being removed from the home. The statute contemplates that a child will not appear in court without adult guidance and representation. Parents are not automatically disqualified from fulfilling this function. However, as the Supreme Court has observed in a different context, "As a general rule, counsel should be provided, and … any doubt should be resolved in favor of appointment of counsel." *State ex rel. Gillard v. Cook*, 528 S.W.2d 545, 548 (Tenn. 1975).

A "knowledgeable adult who has no interest adverse to the child," referenced in subdivision (b)(3), is a person who can provide advice to the child and who will have no interests that interfere with providing dispassionate and mature advice to the child. This person should have no interests that prevent the person from keeping the child's best interests and the child's desires in the forefront. A person who now or in the past brought charges against the child generally does not qualify. Where possible, this person should have a pre-existing relationship with the child. While parents generally satisfy this requirement, the court should determine the level of trust between the child and the child's parents before allowing the parent to satisfy this requirement. When a child is in the custody of the Department, its employees do not satisfy the requirement of this rule. Depending on the circumstances, a foster parent may qualify.

It is the responsibility of the attorney representing the child charged with a delinquent or unruly offense to fully advise the child of his or her rights. If a child chooses to waive his or her rights, the child can only do so once the court has determined that the child has been advised of each and every right and knowingly and voluntarily is waiving each of the rights.

All waivers of rights shall be made orally and in open court and confirmed in a writing signed by both the judge and the child waiving the rights. The confirming document can be a preprinted form, but must specify the rights that are being waived and must acknowledge that the individual is choosing to waive those rights.

Subdivision (c) provides that the court shall only accept a waiver by a child of his or her rights only if the child is able to make an intelligent and understanding decision based on certain factors. The Tennessee Supreme Court has applied the totality-of-the-circumstances test in analyzing juvenile waivers. *See State v. Callahan*, 979 S.W.2d 577 (Tenn. 1998).

The court should address the child, not the parents or other adults who are present in the courtroom, and should always take into account the child's age, mental condition, education, experience and the nature and complexity of the case when deciding how to question the child about the child's understanding of the rights and whether the child waives those rights. The court must address the child in language appropriate to that particular child.

RULE 206. DISCOVERY

(a) Each juvenile court shall ensure that the parties in delinquent and unruly proceedings have access to any discovery materials consistent with Rule 16 of the Rules of Criminal Procedure.

(b) An informal request for discovery is encouraged, but if the parties cannot agree as to discovery, then a formal discovery request shall be made.

Advisory Commission Comments.

In drafting this rule, the Commission was concerned with potential burdens and delays that might be caused if existing criminal discovery methods were applied without modification to juvenile court proceedings. This does not preclude adoption by each court of local rules of procedure to implement the discovery mechanisms found in the Tennessee Rules of Criminal Procedure. The Commission emphasizes the mandate of Supreme Court Rule 18, which limits local rules to those "not inconsistent with . . . the Rules of Juvenile Procedure[.]"

State v. Willoughby, 594 S. W.2d 388 (Tenn. 1980) holds that discovery rules do not apply to preliminary examinations and hearings. Therefore, this rule would not apply to any probable cause hearing in juvenile court with the caveat that this rule is not the exclusive procedure for obtaining discovery. The state must disclose any exculpatory evidence to the child's attorney per *Brady v. Maryland*, 373 U.S. 83 (1963).

If the parties cannot agree on discovery, then the Tennessee Rules of Criminal Procedure shall be utilized to ensure that each side has access to discovery materials in each case. If a request for discovery is made on behalf of the child and the district attorney is not prosecuting the case, the person prosecuting the case must comply with Rule 16 of the Rules of Criminal Procedure.

Juvenile court practitioners are advised to fully acquaint themselves with Rule 16 of the Rules of Criminal Procedure.

RULE 207. PROCEDURES RELATED TO CHILD'S MENTAL CONDITION

(a) At Time of Adjudicatory Hearing.

(1) If at any time prior to or during the adjudicatory hearing in a delinquent or unruly case, the court has reasonable grounds to believe the child named in the petition may be incompetent to proceed with an adjudicatory hearing, the court shall stay the proceedings pending a determination of the child's competency to stand trial. Reasonable grounds to believe that the child is incompetent to proceed may be based upon an oral or written motion by any party or upon the court's own initiative.

(2) The court shall order one or more evaluations of a child to assist in determining whether the child is mentally competent to stand trial. The evaluations are to be performed by a licensed psychologist or psychiatrist who has expertise in child development and has received training in forensic evaluation procedures through formal instruction, professional supervision, or both.

(3) If the issue of a child's competency to stand trial arises prior to the child having either a retained or appointed attorney, no further action will occur until an attorney is in place to represent the child.

(4) In any case in which such an evaluation is ordered, the court shall schedule a hearing in order to determine competency.

(5) If the child is found to be incompetent to proceed with the adjudicatory hearing, the adjudication shall be stayed pending further proceedings and time limits shall be tolled. If the court finds that the provision of services or treatment to the child may result in the child achieving competence, then the court may order such treatment or services. In addition, the court may inform the parties as to procedures for voluntary admission to public and private mental health facilities in lieu of judicial commitment. If the child does not meet the standards for involuntary hospitalization, but remains incompetent to stand trial, the child shall be released to the appropriate guardian or custodian pending further hearings in juvenile court.

(6) If the child is found to be competent the court shall proceed with an adjudicatory hearing.

(7) The child's mental competence to stand trial may be raised at any stage of the proceeding by motion**,** and the court has a continuing obligation to consider the issue when raised.

(b) At Time of the Offense; Affirmative Defense.

(1) If the child named in the petition intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the child had the mental state required for the offense charged, the child shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the court in writing of such intention and file a copy of such notice with the clerk. Upon filing of the notice, upon motion of the state, or on its own initiative, the court may cause the child to be examined in accordance with the procedures set forth in this rule and consistent with the procedures outlined in Rule 12.2 of the Rules of Criminal Procedure.

(2) The court, upon good cause shown and in its discretion, may waive the requirements in subdivision (b)(1) and permit the introduction of such defense, or may continue the hearing for the purpose of an examination in accordance with the procedures set forth in this rule. A continuance granted for this purpose tolls the time limits for adjudicatory hearings.

(c) Inadmissibility of Child's Statements During Competency Examination. No statement made by the child in the course of any examination relating to his or her competency to stand trial (whether conducted with or without the child's consent), no testimony by any expert based on such statement, and no other fruits of the statement are admissible in evidence against the child in a delinquent or unruly adjudicatory hearing.

Advisory Commission Comments.

There are no reported cases in Tennessee addressing the question of whether or under what circumstances an insanity defense is available in juvenile court proceedings. Application of this defense in juvenile proceedings has been recognized in various jurisdictions. *See, e.g. In re Two Minor Children*, 592 P.2d 166 (Nev. 1979); *State ex rel. Causey*, 363 So. 2d 472 (La. 1978); *Winburn v. State*, 145 N.W.2d 178 (Wis. 1966); *see also In* re *Ramon M.*, 584 P.2d 524 (Cal. 1978); and *State v. Ferrell*, 209 S.W.2d 642 (Tex. Civ. App. 1948). The leading case holding the insanity defense inapplicable to delinquency proceedings, *In re H.C.,* 256 A.2d 322 (N.J. 1969), was subsequently held to be overridden by modifications of the New Jersey Juvenile Court Act. *In re R.G.W*., 342 A.2d 869 (N.J. 1975), *aff 'd*, 358 A.2d 473 (N.J. 1976). However, at least one jurisdiction continues to preclude the insanity defense from being asserted at the adjudicatory hearing (although recognizing the claim of incompetence to stand trial). *See In re C.W.M.*, 407 A.2d 617 (D.C. 1979); s*ee also Golden v. State*, 21 S.W.3d 801 (Ark. 2000).

This rule is not intended to alter the substantive law respecting the applicability of the insanity defense to juvenile court proceedings in Tennessee or to delineate those circumstances under which such a defense may be available. Rather, it provides procedures for those cases in which "the child intends to introduce expert testimony relating to mental disease, defect or other condition bearing upon the issue of whether the child had the mental state required for the offense charged."

The 2016 amendment was drafted to articulate a clear difference between a finding of incompetency by the court and an affirmative defense of diminished capacity. In addition, the rule clarifies that a child's statements made during an evaluation of their competency shall not be used against them in court as an admission of guilt.

Rule 110 provides that in a delinquency proceeding the computation of time shall toll during the period in which the child is found to be incompetent to stand trial.

RULE 208. TRANSFER TO CRIMINAL COURT

(a) Notice of Intent to Seek Transfer of Jurisdiction of Child to Criminal Court. The state must file written notice, in good faith and not for the purpose of delay, of the intent to seek transfer in accordance with Tenn. Code Ann. § 37-1-134. The decision on whether or not the state will seek transfer must be made within 90 days of the child being charged with an offense and no less than 14 days prior to the transfer hearing or the adjudicatory hearing, whichever occurs first. This time period may be extended by the court for good cause. The written notice of intent to seek transfer must be filed at least 14 days prior to the transfer hearing. Once that notice is filed, the court shall not hear the case on its merits, but shall proceed to conduct a hearing only in accordance with Tenn. Code Ann. § 37-1-134.

(b) Transfer Hearing.

(1) At the transfer hearing:

(A) A prosecutor shall represent the state;

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

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

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

(2) The same rules of evidence shall apply as are applicable to a preliminary examination, pursuant to the Tennessee Rules of Criminal Procedure.

(3) Unless the child appears in any way to be mentally ill or intellectually disabled, and unless personally or through counsel asserts that the child is mentally ill or intellectually disabled, it shall be presumed that the child is not committable to an institution for the mentally ill or 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.

(4) If the court determines that the criteria for transfer have been satisfied and finds that there are reasonable grounds for transfer, the child may be transferred to criminal court.

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

Advisory Commission Comments.

When considering whether "reasonable grounds" is equivalent to "probable cause," the courts in Tennessee have opined: "While no definition of 'reasonable grounds' is provided in the statute, the term has been used interchangeably with 'probable cause' by the courts of this state." *State v. Bowery*, 189 S.W.3d 240, 248 (Tenn. Crim. App. 2004); *State v. Melson*, 638 S.W.2d 342, 350 (Tenn. 1982); *State v. Humphreys,* 70 S.W.3d 752, 761 (Tenn. Crim. App. 2001).

Regarding the provision in subdivision (b)(1) that the child shall be represented by an attorney, the child must have the benefit of an attorney at the transfer hearing due to the significant ramifications if the child's case is transferred to adult court.

The U. S. Supreme Court's rulings in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005) recognized that courts must consider a juvenile's "lessened culpability" and greater "capacity for change". In accordance with these cases, the child must be represented by counsel in order to ensure consideration by the courts of all issues involving a minor defendant in a delinquency action, especially the unique nature of the juvenile offender.

Under T.C.A. § 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 intellectually disabled or

mentally ill, and (iii) the interests of the community require that the child be put under legal restraint or discipline. Regarding subdivision (b)(3) and § 37-1-134, 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 Howell v. Hodge,* 710 F.3d 381, 386 (6th Cir. 2013). The Commission 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.

Subdivision (b)(1)(C) provides that no plea shall be accepted by the court during the transfer hearing. This does not preclude the parties from agreeing to terminate the transfer hearing prior to its completion and holding an adjudicatory hearing. Once a plea is accepted by the juvenile court, double jeopardy attaches and the matter may not be transferred to criminal court. *See Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779 (1975) and *State v. Jackson*, 503 S.W.2d 185 (Tenn. 1973).

If the case is not transferred to criminal court, T.C.A. § 37-1-134 prohibits the judge who conducted the transfer hearing from presiding over the adjudicatory hearing on the petition if a party objects. Also, T.C.A. § 37-1-134 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.

RULE 209. PLEA OF GUILTY OR NO CONTEST – JUDICIAL DIVERSION

(a) Court's Inquiry of Child. Before accepting a plea of guilty or no contest, and in addition to the requirements set out in Rule 205, the court must address the child personally in open court and inform the child of, and determine that the child understands, the following:

(1) The nature of the charge to which the plea is offered and the possible dispositional consequences of the plea; if a specific disposition is the basis of the plea, the child should be informed specifically of the nature of that disposition;

(2) That if the child is not represented by an attorney, the child has a right to be represented by an attorney at every stage of the proceedings including the guilty plea, and that, if necessary, one will be appointed;

(3) That the child has the right to plead not guilty or to persist in that plea if it has already been made;

(4) That if the child has been charged with a delinquent offense, the child has a right to a trial to determine whether the child is guilty of the charged offense; and that, at that trial, the judge may only find the child guilty if the judge finds that the state has proven the child's guilt of the offense or a lesser included offense beyond a reasonable doubt;

(5) That if the child has been charged with being unruly, the child has a right to a trial to determine whether the child is unruly; and that, at that trial, the judge may only find the child unruly if the judge finds that the charge has been proven by clear and convincing evidence;

(6) At the trial, the child has the right to call witnesses and present evidence, including the right to subpoena witnesses and documents to the proceeding and the right to confront and cross-examine adverse witnesses, and the right to testify;

(7) That the child has the right against self incrimination, including the right not to testify at the trial;

(8) That if the child pleads guilty or no contest, there will not be a trial (except as to the disposition in cases in which disposition is not part of the plea agreement), and that by pleading guilty, the child waives the right to a trial on the merits;

(9) That if the child pleads guilty or no contest, the child admits there is a need of treatment and rehabilitation;

(10) That if the child pleads guilty or no contest, the child waives the right to appeal the adjudication to the circuit court or to have a hearing before the judge on the issue of adjudication if the matter is being heard by a magistrate;

(11) That if the plea includes an agreement as to disposition, the child also waives the right to appeal the disposition to the circuit court or to have a hearing before the judge on the issue of disposition if the matter is being heard by a magistrate;

(12) That if the child pleads guilty or no contest, the court may ask the child questions about the offense to which the plea was made; if the child answers these questions falsely under oath, the child's answers may later be used against the child in a prosecution for perjury or false statement, unless the plea is a best interest guilty plea; and

(13) That if the child pleads guilty or no contest, the plea may have an effect upon the child's immigration or naturalization status, and, if the child is represented by counsel, the court shall determine that the child has been advised by counsel of the immigration consequences of a plea.

(b) Determination of Voluntariness of Plea. The court shall not accept a guilty or no contest plea without first, by addressing the child personally in open court, determining that the plea is voluntary and not the result of force or threats or promises apart from a plea bargain agreement. If a child stands mute or pleads evasively, a plea of not guilty shall be entered by the court.

(c) Factual Basis for Guilty Plea. The court shall neither enter a judgment upon a guilty plea nor approve an agreed disposition without satisfying itself that there is a factual basis for the guilty plea.

(d) No Contest. A child may plead no contest only with the consent of the court. Before accepting a plea of no contest, the court shall consider the views of the parties and the interest of the public in the effective administration of justice.

(e) Agreement on Disposition. If the court accepts a guilty or no contest plea pursuant to an agreement on disposition, the court shall approve the agreed disposition. If the court rejects a guilty or no contest plea, the dispositional agreement shall be null and void.

(f) Judicial Diversion. If the court accepts a guilty or no contest plea pursuant to a judicial diversion and approves the conditions of probation, the plea shall not be entered as a judgment of guilty and the child shall not be found delinquent. If the child violates the terms of the diversion and the court so finds, then the plea may be entered as a judgment of guilty, and the child shall be found delinquent.

Advisory Commission Comments.

Pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and with the consent of the court, a child may enter a "best interests" guilty plea. This is not a no contest plea. When the child enters an *Alford* plea, he or she is pleading guilty because it is in his or her best interests, but he or she does not necessarily agree to the factual basis of the plea as set out by the state's attorney. A guilty plea entered pursuant to *Alford* has all the legal effects of a guilty plea, except that the child cannot be charged with perjury or false statement if he or she later disputes the facts that serve as a basis for the guilty plea or denies his or her guilt of the offense.

The 2016 amendment to this rule adds a provision to allow the child to enter a no contest (nolo contendere) plea. Latin for "I do not wish to contend," Black's Law Dictionary defines a nolo contendere plea as follows: "A plea by which the defendant does not contest or admit guilt." *Black's Law Dictionary* 1269 (9th ed. 2009). *See also* Tenn. R. Crim. Proc. 11(a)(1) and (2). The no contest plea requires the court's approval and is similar in legal effect to an *Alford* plea.

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 on the child's willingness to plead guilty or no contest, 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 or parent, guardian or custodian was present.

The 2016 amendment adds the provision that if the child pleads guilty or no contest, the child waives the right to appeal the adjudication to the circuit court, or to have a hearing before the judge on the issue of adjudication if the matter is being heard by a magistrate.

The court may at any time prior to the beginning of a dispositional hearing permit a plea of guilty or no contest 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 or nolo contendere. In the subsequent adjudicatory hearing, the court may not consider the plea which was withdrawn as an admission. Evidence of a guilty or no contest plea, later withdrawn, or of statements made in connection therewith, would not be admissible in any proceeding against the child.

The 2016 amendment adds that if the plea includes an agreement as to disposition, the child waives the right to appeal the disposition to the circuit court or to have a hearing before the judge on the issue of disposition, if the matter is being heard by a magistrate.

Finally, the 2016 amendment allows the court to accept a plea of guilty or no contest on a judicial diversion, pursuant to T.C.A. § 37-1-129(a), and defer further proceedings while placing a child on probation. In doing so, the plea shall not be entered as a judgment, and the child shall not found delinquent.

RULE 210. ADJUDICATORY HEARINGS

(a) Scope of Hearing. The adjudicatory hearing is the proceeding at which the court determines whether the evidence supports a finding that a child is delinquent or unruly, and whether the child is in need of treatment and rehabilitation. The adjudicatory hearing shall be held in accordance with T.C.A. § 37-1-129.

(b) Time Limits on Scheduling Adjudicatory Hearings. In all cases, except violations of valid court orders, in which a child is in detention or otherwise has been placed out of the home by court order shall be heard within 30 days of the date the child was placed outside of the home. For good cause shown, the adjudicatory hearing may be continued beyond the 30 day time limit to a date certain as the court may direct. All other cases shall be heard within 30 days of the date of the filing of the petition if such scheduling appears to the court to be reasonable and possible considering the circumstances of the case, including without limitation, whether service on all parties has been achieved. Every case shall be heard within 90 days of the date of the filing of the petition. For good cause shown, the adjudicatory hearing may be continued beyond the 90 day time limit to a date certain as the court may direct.

(c) Beginning Adjudicatory Hearing. At the beginning of each hearing, the court shall:

(1) Ascertain whether the parties before the court are represented by attorneys;

(2) Verify the name, age and residence of the child who is the subject of the case, and ascertain the relationship of the parties, each to the other;

(3) Ascertain whether all necessary parties are present;

(4) Ascertain whether notice requirements have been complied with, and if not, whether the affected parties knowingly and voluntarily waive compliance;

(5) Explain to the parties the purpose of the hearing and the possible consequences thereof; and

(6) Explain to the parties their rights as set forth in Rule 205.

(d) Evidence Admissible. The court shall consider only evidence which has been formally admitted at the adjudicatory hearing. All testimony shall be under oath and may be in narrative form. Evidence shall be admitted as provided by the Tennessee Rules of Evidence. Evidence illegally seized or obtained shall not be received over objection to establish the allegations in the petition. In addition, no statement made by a child to the youth services officer or designated intake officer shall be admissible against the child prior to the dispositional hearing.

(e) Adjudication; Standard of Proof; and Findings in Delinquent Cases. At the conclusion of the adjudicatory hearing, the court shall enter an order in accordance with the following provisions:

(1) If the court finds that the delinquent offense has not been proved beyond a reasonable doubt, it shall dismiss the petition.

(2) If the court finds that the delinquent offense has been proved beyond a reasonable doubt, it shall enter an order finding the child guilty and shall immediately proceed to a hearing to determine whether the child is in need of treatment or rehabilitation, or shall schedule it for a later date. At that hearing:

(A) If the court does not find that the child is in need of treatment or rehabilitation, no further proceedings shall be held and the court shall discharge the child from any detention or other restriction previously ordered. In such event, the court shall enter an order finding that the child is not in need of treatment or rehabilitation. The child shall not be adjudicated delinquent.

(B) If the court finds the child is in need of treatment and rehabilitation, it shall enter an order finding that the child is in need of treatment or rehabilitation and that the child is adjudicated delinquent. The court shall immediately proceed to a dispositional hearing or schedule it to be heard on a later date.

(f) Adjudication; Standard of Proof; and Findings in Unruly Cases. At the conclusion of the adjudicatory hearing, the court shall enter an order in accordance with the following provisions:

(1) If the court finds that the unruly offense has not been proved by clear and convincing evidence, it shall dismiss the petition.

(2) If the court finds that the unruly offense has been proved by clear and convincing evidence, it shall enter an order finding the child guilty and shall immediately proceed to a hearing to determine whether the child is in need of treatment or rehabilitation, or shall schedule it for a later date. At that hearing:

(A) If the court does not find that the child is in need of treatment or rehabilitation, no further proceedings shall be held and the court shall discharge the child from any detention or other restriction previously ordered. In such event, the court shall enter an order finding that the child is not in need of treatment or rehabilitation. The child shall not be adjudicated unruly.

(B) If the court finds the child is in need of treatment and rehabilitation, it shall enter an order finding that the child is in need of treatment or rehabilitation and that the child is adjudicated unruly. The court shall immediately proceed to a dispositional hearing or schedule it to be heard on a later date.

(g) Transfer to Home County. The case of an out-of-county resident may be transferred to the child's county of residence for disposition.

Advisory Commission Comments.

It is the Commission's intent that the court consider only evidence which has been properly admitted during the adjudicatory hearing. The Commission recognizes that the court may have held one or more hearings prior to the adjudicatory hearing which may have resulted in the admission of evidence. Furthermore, the Commission recognizes that the court's file may contain reports and other items submitted by the Department, CASA, law enforcement, or service providers. Such reports and items may not be considered by the court unless properly admitted during the adjudicatory hearing.

This rule combines previous Rule 17 regarding Time Limits on Scheduling Adjudicatory Hearings and Rule 28 Adjudicatory Hearings. The Commission felt this to be logically consistent and would aid practitioners' use of the rule. This rule highlights the statutory framework of a delinquent or unruly case with regard to the adjudicatory hearing.

This rule does not apply to a violation of a Valid Court Order. See the Appendix to these rules regarding Valid Court Orders.

During the adjudicatory hearing and prior to disposition, the court makes two distinct findings with regard to each child charged as a delinquent or unruly child: whether the evidence is sufficient to sustain the allegations in the petition, and, if so, whether the child is in need of treatment or rehabilitation. Upon making these findings, the court then proceeds to the dispositional hearing. T.C.A. § 37-1-129(b) states that upon a finding of guilt the court must "proceed immediately or at a postponed hearing" to determine whether the child is "in need of treatment or rehabilitation." This is consistent with the definition of "delinquent child" under T.C.A. § 37-1-102(b) ("delinquent child means a child who has committed a delinquent act and is in need of treatment and rehabilitation"), and T.C.A. § 37-1-129(f), which allows the court to continue the adjudicatory hearing to receive evidence bearing upon the issue of treatment and rehabilitation. Similarly, the definition of "unruly child" under T.C.A. § 37-1-102(b) also requires a finding of "in need of treatment and rehabilitation" in order to adjudicate the child to be an unruly child.

The Commission understands that many courts may, in an effort to achieve judicial economy, and absent contrary circumstances, elect to conduct both the "treatment and rehabilitation" phase of the adjudicatory hearing and the dispositional hearing immediately after the guilt phase of the adjudicatory hearing. In the event the court continues the adjudicatory hearing to receive evidence bearing upon the issue of treatment and rehabilitation, the court has the authority pursuant to T.C.A. § 37-1-129(f) to issue orders regarding the child pending the resumption of the hearing.

The Commission notes that T.C.A. § 37-1-129(b) states that the commission of acts which constitute a felony or that reflect recidivistic delinquency is sufficient to sustain a finding that the child is in need of treatment or rehabilitation.

The Commission notes that the Juvenile Offender Act, T.C.A. § 55-10-701 et. seq., also known as the Drug Free Youth Act, requires the adjudicatory court to send to the Department of Safety an order of denial of driving privileges when the child is "convicted of the offense." As explained above, a conviction does not necessarily lead to an adjudication of delinquency due to the added requirement that the court find that the child is in need of treatment and rehabilitation. All parties must be aware of the court's duty under the Act.

The new rule changes the requirement that the adjudicatory hearing be "scheduled for adjudication" within either 30 or 90 days to a requirement that the adjudicatory hearing be "heard."

The varying time limits in these rules for children in custody or detention and children not in custody indicate the Commission's strong intent that cases involving children in custody, and especially in secure detention, be given priority on the docket. Of course, all hearings should be scheduled and held as speedily as possible in the interest of providing timely treatment for children. The Commission recognizes the fact that a child's perception of time is quite different from that of an adult, with shorter periods of time being felt as being much extended, so that it is important that whatever action is taken be taken expeditiously, within the limits of practicability.

There are instances, however, where it will be quite appropriate to allow for a relatively longer period of time prior to disposition, in particular, for the child to prove to the court that a less restrictive disposition may be desirable in the case, for example. This is the purpose of the longer 90-day limit in cases in which children are not being held in custody, and of the provisions allowing for extensions of the time limits. Another valid reason for extensions of the limits would be to obtain psychological evaluations and testing which could not be obtained within the specified time limits.

In any case in which the time limits prescribed are not complied with, or in which the provisions for continuances are not complied with, the court may dismiss the charges with prejudice where it determines that failure to comply with the time limits constitutes a violation of the child's right to a speedy trial. In any case in which the time limits prescribed are not complied with, or in which the provisions for extensions are not complied with, the court may discharge the child from the jurisdiction of the juvenile court if the court determines that the interests of justice so require.

These rules do not require a pretrial conference; however, the Commission encourages courts to schedule a pretrial conference or settlement date during which negotiations may occur with the parties and counsel, law enforcement, victims, and the district attorney.

RULE 211. DISPOSITIONAL HEARINGS

(a) Time Limits on Scheduling Dispositional Hearings. Dispositional hearings shall be held within 15 days of the adjudicatory hearing if the child is in detention or otherwise has been placed out of the home by court order, and within 90 days of the adjudicatory hearing in all other cases. Upon good cause shown, the dispositional hearing may be continued to a date certain.

(b) Separate from Adjudicatory Hearing. A dispositional hearing shall be separate and distinct from the adjudicatory hearing to which it relates. However, it may be held immediately following the adjudicatory hearing or at a later date.

(c) Notice of Right to Appeal. At the conclusion of the dispositional hearing, the court shall advise the child of the right to appeal the dispositional order.

(d) Temporary Order. Where a continuance of the dispositional hearing is ordered, the court may enter such temporary order that is in the best interest of the child. Detention may ordered, but only where such detention appears to be necessary for the protection of the child or others, or where necessary to assure the child's appearance at the subsequent dispositional hearing.

(e) Evidence Admissible; Standard of Proof. In arriving at its dispositional decision, the court shall consider only evidence which has been formally admitted and the juvenile court record of the child. All testimony shall be under oath and may be in narrative form. The rules of evidence shall apply except that reliable hearsay, including, but not limited to, documents such as psychiatric or psychological screenings or evaluations of the child or the child's parents or custodian or reports or assessments prepared by a probation officer, youth services officer or the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. However, this subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the Tennessee Constitution. The parties shall have the right to examine any person who has prepared any report admitted into evidence. The standard of proof at the dispositional hearing is preponderance of the evidence.

Advisory Commission Comments.

The purpose of a dispositional hearing is to design an appropriate plan to meet the needs of the child and to achieve the objectives of the state in exercising jurisdiction. When possible, the initial approach should involve working with the child and the family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the child.

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. The preference is for the child to be treated and rehabilitated through community-level resources when appropriate and available. The Commission encourages the making of written findings of fact and reasons for ordering particular dispositions within the law.

If a child alleged to be unruly is placed under a "valid court order" pursuant to § 31.303(f)(3) of Title 28 of the Code of Federal Regulations, the dispositional hearing and order shall be in accordance with the federal regulations, found in the Appendix to these rules.

At the dispositional hearing, it is appropriate that youth services and probation officers be witnesses regarding admissible evidence of which they have knowledge. Youth services officers or probation officers may act as a fact witness.

Although a report may be admissible as reliable hearsay, all the contents of the report may not be reliable hearsay. This is especially important when the source gives an opinion that the person is not qualified to give.

RULE 212. PROBATION OR HOME PLACEMENT SUPERVISION VIOLATION

(a) Procedure. Proceedings to establish a violation of the conditions of probation or home placement supervision shall be conducted in the same manner as proceedings on petitions alleging delinquent conduct. The child whose probation or home placement supervision is sought to be modified or revoked shall be entitled to all rights that a child alleged to be delinquent is entitled to under law and these rules. A petition is required for a violation of probation. A petition is also required for a violation of home placement supervision when the child has been released from the custody of the Department of Children's Services. The petition shall identify the remedy being sought and the factual basis for the action.

(b) Burden of proof. The burden of proof shall be a preponderance of the evidence.

(c) Disposition. If the child violates the conditions of probation or home placement supervision, the court may make any other disposition which would have been permissible in the original proceeding, subject to T.C.A. § 37-1-137.

Advisory Commission Comments.

The term "probation" refers to a child on either state or county probation, and a petition is required to initiate a proceeding to violate.

The term "home placement supervision" refers to a child who has been in state custody and is now placed at home for a trial period. A child on home placement supervision remains in state custody until discharged by operation of law at the expiration of 30 days. During that 30 day period the Department of Children's Services is authorized to remove the child from the home at its discretion. A petition is not required to remove the child, but notice must be filed with the court. A review hearing must be scheduled within 30 days of the child's removal, pursuant to T.C.A. § 37-1-137(d)(2) or within 7 days if the child is placed in detention, pursuant to T.C.A. § 37-1-137(e).

Upon discharge from custody, the child may continue on home placement supervision, a program that the Department refers to as "aftercare." When a child who is not in the legal custody of the Department violates home placement supervision (aftercare), a violation petition is required. A hearing is required and must occur within 7 days if the child is placed in detention. *See* T.C.A. § 37-1-137(e).

RULE 213. MODIFICATION OF OR RELIEF FROM JUDGMENTS OR ORDERS

(a) Except in cases where the petition has been heard upon the merits and dismissed, the procedures herein shall be followed to obtain appropriate relief under this rule.

(b) Modification of Orders.

(1) Clerical Mistakes. Clerical mistakes and errors arising from oversight or omission in orders or other parts of the record may be corrected by the court at any time on its own initiative or on motion of any party.

(2) Modification for Changed Circumstances. An order of the court may be modified on the ground that, since the entry of the order, changed circumstances and the best interests of the child require it; however, an order committing a delinquent or unruly child to the Department of Children's Services or an order of dismissal may not be modified on these grounds.

(3) Modification for Newly Discovered Evidence. A dispositional order may be modified on the ground that newly discovered evidence so requires. The court, in making this determination, shall make any modification consistent with the best interests of the child.

(c) Relief from Judgments or Orders.

An order of the court shall be set aside if it is determined that:

(1) It was obtained by fraud or mistake sufficient to satisfy the legal requirements for relief in any other civil action;

(2) The court lacked jurisdiction over a necessary party or of the subject matter; or

(3) Newly discovered evidence so requires. The court must determine that, with regard to such newly discovered evidence, the movant was without fault in failing to present such evidence at the original proceeding, and that such evidence may have resulted in a different judgment at the original proceeding.

(d) Procedure. Any party to a proceeding, a probation officer, or other person having supervision or legal custody of or an interest in a child may seek the relief provided in this rule. A motion shall set forth in concise language the grounds upon which the relief is requested. Notice of the date and time for a hearing on the motion shall be given to the parties to the proceeding and to those affected by the relief sought.

(e) Disposition. After the hearing, the court shall deny or grant relief as the evidence warrants. Where a modification of an order is granted, the court may order any disposition which would be permissible at the original dispositional hearing, or the court may schedule a dispositional hearing in accordance with these rules.

Advisory Commission Comments.

T.C.A. § 37-1-139 authorizes the modification of and relief from orders under certain circumstances. Note that a motion, and not a petition, is to be filed when seeking relief pursuant to this rule.

The procedures in this rule regarding setting aside of orders draws from the concepts contained in T.C.A. § 40-26-105, writ of error coram nobis in criminal matters. Relief pursuant to this statute is limited to "subsequently or newly discovered evidence" and requires the court to find that the defendant was without fault in failing to present such evidence at the original proceeding and that such evidence "may have resulted in a different judgment" had it been presented at the original proceeding.

In the event an order is set aside, the District Attorney General will, of course, decide if a delinquency matter should be retried. The petitioner in an unruly matter will likewise make such a decision. The court, however, is to reschedule the hearing and proceed as it did with the original proceeding.

Placements after a child has been committed to the Department of Children's Services shall be reviewed as provided in T.C.A. § 37-1-137 and these rules.

DEPENDENT AND NEGLECT PROCEEDINGS

RULE 301. INITIATION OF CASES

A dependent and neglect case is commenced by the filing of a petition. When the petitioner is not the Department of Children's Services, the court shall promptly refer the case to the Department for investigation.

Advisory Commission Comments.

This rule is intended to define the commencement of a dependent and neglect case in juvenile court. The former practice of informally adjusting dependent and neglect cases has been eliminated.

A dependent and neglect case may be initiated by the Department of Children's Services, a private party, or the court. The clerk shall not prevent any person from filing a petition in accordance with the law.

When an intake court officer receives information alleging facts that, if true, indicate that a child is dependent and neglected and is subject to the jurisdiction of that court, the officer shall assist in the filing of a petition and refer the allegations for investigation by the Department of Children's Services. A private party shall be permitted to file a petition with the court clerk regardless of whether the officer assisted with the preparation of the petition. If a private party chooses not to file a petition, the officer may still make a referral to the Department.

There are situations in which a court must exercise its authority on an emergency basis to protect a child already under the jurisdiction of the court on a previously filed petition other than a dependent and neglect petition. The exercise of that authority is typically done in a bench order. In such circumstances, a dependent and neglect petition must be filed within 2 judicial days, pursuant to T.C.A. § 37-1-128.

Unless there are new dependent and neglect allegations, any subsequent petition alleging material change of circumstances, filed after the disposition of the original case, shall be considered a continuation of that original case.

RULE 302. PROCEDURES UPON TAKING CHILD INTO CUSTODY

(a) Child Taken Into Custody Without Court Order. When a child is taken into custody without a court order pursuant to T.C.A. § 37-1-113(a)(3), a written protective custody order for the removal of legal custody, containing the probable cause determination required by T.C.A. § 37-1-114(a)(2), shall issue from a magistrate, as defined by T.C.A. §§ 37-1-107 or 40-1-106, within 48 hours of the taking of physical custody. The probable cause determination shall be based on a written affidavit, which may be sworn to in person or by audio-visual electronic means. If the court denies the protective custody order, the child shall be returned to the parent, guardian, or legal custodian. If the protective custody order is issued, a preliminary hearing shall be held within 72 hours, excluding non-judicial days, of the child being taken into custody.

(b) Child Taken Into Custody Pursuant to Court Order. If a child is removed from the home of a parent, guardian or legal custodian pursuant to a protective custody order, the child shall not remain in protective custody longer than 72 hours, excluding non-judicial days, unless a preliminary hearing is held.

(c) Findings of Protective Custody Order. A protective custody order issued pursuant to subdivision (a) or (b) shall include findings of fact supporting the probable cause determination required by T.C.A. § 37-1-114(a)(2). In addition, if the protective custody order places the child in the custody of the Department of Children's Services, the order shall include facts supporting a finding that it is contrary to the welfare of the child to remain in the home.

(d) Preliminary Hearing.

(1) Appointment of Guardian ad Litem. The court shall make every effort to appoint a guardian ad litem for the child prior to the preliminary hearing.

(2) Notification of Rights. At the beginning of the preliminary hearing, the court shall inform the parties of the purpose of the hearing and the possible consequences of the preliminary hearing, and shall inform the parties of their rights pursuant to Rule 303.

(3) Evidence. Reliable hearsay may be considered at the preliminary hearing.

(4) Required Determinations. The court, in making a decision on whether the child's continued removal from the home is warranted, shall:

(A) Determine whether probable cause exists that the child is a dependent and neglected child; and

(B) If probable cause is found, determine whether the child is subject to an immediate threat to the child's health or safety, or whether the child may be removed from the jurisdiction of the court; and

(C) Determine whether any less drastic alternative is available to the removal of the child from the custody of the parent, guardian or legal custodian.

(5) Determination at Preliminary Hearing. If the court finds that the child's continued removal from the home is not warranted, the court shall return the child to the person from whom custody was removed. If the court determines at the hearing that the child's removal is required, the court may order that the child be placed in the custody of a suitable person, persons, or agency. If the court returns the child to the person from whom custody was removed, the court may enter a temporary order setting forth conditions of the return designed to protect the rights and interests of the child and the parties pending further hearing.

(6) Waiver of Time Limit for Preliminary Hearing. The time limit for the hearing may be waived by a knowing and voluntary written waiver by the respondent. Any such waiver may be revoked at any time, at which time a preliminary hearing shall be held within the time frame outlined in T.C.A. § 37-1-117.

Advisory Commission Comments.

Subdivision (a) establishes the procedure for obtaining a probable cause determination when the child has been removed from the home due to the existence of exigent circumstances and without a court order. T.C.A. § 37-1-128(b)(2) currently requires both the probable cause determination defined in T.C.A. § 37-1-114(a)(2) and a court order for removal of a child from the child's parent, guardian, legal custodian or the person who physically possesses or controls the child. T.C.A. § 37-1-113(a)(3) also references the probable cause determination contained in T.C.A. § 37-1-114(a)(2). Reading these three statutes in conjunction, T.C.A. § 37-1-113(a)(3) must be interpreted to allow the taking of physical possession of the child only, prior to the judicial probable cause determination and order. Subdivision (a) provides a time limit for the judicial probable cause determination and issuance of the statutorily-required order prior to the preliminary hearing. The judge or magistrate should be contacted after removal to make the probable cause determination and to issue a written order within the 48 hour limit. These requests and determinations are made *ex parte* as to the parent, guardian, or legal custodian. Non-judicial days are included in the time computation and shall not extend the 48 hour limit. As these requests address the immediate protection of the child, as referenced by T.C.A. § 37-1-128(b)(2), the time limit requires that judges and magistrates be available at inconvenient hours to make probable cause determinations.

The probable cause determination in subdivision (a) must be based on a written affidavit reciting the facts, which may be sworn to in person or by electronic means. Black's Law Dictionary defines affidavit as "(a) voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Black's Law Dictionary* 66 (9th ed. 2009).

The time limit of 48 hours tracks the time period in Rule 203 regarding the probable cause determination required after a warrantless arrest of a child alleged to be delinquent. That time limit is based on *Gerstein v. Pugh,* 420 U.S. 103 (1974), *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991), *Cox v. Turley*, 506 F.2d 1347, 1353 (6th Cir. 1974), *State v. Bishop*, No. W2010-01207-SC-R11-CD, 2014 Tenn. LEXIS 189, 2008 WL 888198 (Tenn. 2013), and *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996). It is reasonable to apply the same time limits for a probable cause determination by an independent magistrate to (1) a delinquent child arrested without a warrant, and (2) a parent whose child is removed without a prior court order, as well as the child who is removed in a dependent and neglect case.

If a child is taken into custody pursuant to either subdivisions (a) or (b) (which is applicable to the situation where the court issues a protective custody order prior to the child being removed from the home), a preliminary hearing must be held within 72 hours, excluding non-judicial days, of when the child was taken into custody, pursuant to T.C.A. § 37-1-117. Pursuant to Rule 111, judges may consider entering a scheduling order at a preliminary hearing, especially when the child is in the custody of the Department of Children's Services. The scheduling order may include, but is not limited to, the dates of the Department's child and family team meeting, ratification hearing, foster care review board, adjudication, and dispositional hearings.

The second sentence of subdivision (c) is applicable to a child who is placed in custody of the Department of Children's Services. Federal law requires a "contrary to the welfare" finding in the first order that removes the child from the home in order for the child to be eligible for Title IV-E funding. 45 C.F.R. § 1356.21(E).

RULE 303. NOTIFICATION AND WAIVER OF RIGHTS

(a) Right to Attorney.

(1) Notification of Right to an Attorney. In all proceedings in which a party is by law entitled to representation by an attorney, the court shall expressly inform the party of the right to an attorney. If a party waives the right to an attorney, the court shall inform the party of the continuing right to an attorney at all stages of the proceedings.

(2) Waiver of Right to an Attorney. No party shall be deemed to have waived the assistance of an attorney until and unless:

(A) The party has been fully informed of the right to an attorney;

(B) The party subsequently knowingly and voluntarily waives the right to an attorney; and

(C) The waiver is confirmed in writing by the party.

(3) Appointment of Attorney. When an indigent party who is entitled to an attorney does not knowingly and voluntarily waive the right to an attorney, the court shall appoint an attorney to represent that party.

(b) Notification and Waiver of Additional Rights.

(1) Notification and Waiver Where Party Represented by an Attorney. When the party is represented by an attorney, the attorney shall fully advise that party of the party's rights under the Constitution of the United States, the Constitution of Tennessee, any other law, and any rule of court. The party shall make the decision whether or not to waive those rights, after full consultation with the party's attorney. The obligation of the attorney to advise the party of the party's rights in no way diminishes the court's obligations both to advise the party of the party's rights and to ascertain whether waivers of those rights are made knowingly and voluntarily.

(2) Waiver of Rights Where Party Not Represented by an Attorney. When the party is not represented by an attorney, that party may not waive any rights guaranteed to the party under the Constitution of the United States, the Constitution of Tennessee, any other law, or any rule of court unless the Court has fully advised the party of the party's rights and has determined that he or she knowingly and voluntarily waives those rights.

(3) Notification of Rights to a Party Who has Waived the Right to an Attorney. At the outset of any juvenile court hearing, the court shall advise any party who has waived the right to an attorney or who does not have an attorney of:

(A) The privilege against self-incrimination;

(B) The right cross-examine adverse witnesses;

(C) The right to present testimony on the party's behalf;

(D) The right to subpoena evidence on the party's behalf;

(E) The right to appeal any final order, the time limits for and manner in which the right to appeal can be perfected, and the right to an attorney on appeal.

(c) Knowing and Voluntary Waiver.

(1) Criteria for Knowing and Voluntary Waivers. A court shall not accept a waiver or deem a waiver to have been made voluntarily and knowingly if the party is or was unable to make an intelligent and understanding decision because of the party's mental condition, education, experience, the nature or complexity of the case, or any other relevant factor.

(2) Procedure for Making and Confirming Waivers. Any and all waivers of rights shall be made orally and in open court, and shall be confirmed in writing by the party and the judge. When the party is not represented by an attorney, the court shall advise that party in open court of the right to an attorney. The court shall not proceed with the hearing unless that party has waived the right to an attorney in accordance with the provisions of this rule.

Advisory Commission Comments.

In a proceeding in which a party is entitled to counsel and in which the court has determined the individual is not indigent, the court should allow the party a reasonable time to retain counsel. However, if a party engages in a "cat and mouse" game with the court in order to impede the judicial process, then the court may make a determination that the party has effectively waived the right to counsel. *State v. Houston*, 2013 Tenn. Crim. App. LEXIS 112, 2013 WL 500231 (Tenn. Crim. App., Feb. 11, 2013).

A waiver of any right shall be made orally and in open court and confirmed in a writing signed by both the judge and the party waiving the rights. The confirming document may be a preprinted form, but it must specify the rights that are being waived and must acknowledge that the individual is choosing to waive those rights.

RULE 304. INTERVENTION

(a) Intervention as of Right. Upon timely application, anyone shall be permitted to intervene in an action: (1)when a provision of the Tennessee Constitution, the United States Constitution, or a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the subject matter of the action and the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by an existing party; or (3) by written stipulation of all of the parties.

(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. Except for interventions for the purpose of modification of an order pursuant to Rule 310, anyone desiring to intervene shall serve a written motion to intervene upon the parties as provided in Rule 103. The motion shall state the grounds for the requested intervention and shall further state the claim or defense for which intervention is sought. For a person seeking to intervene as a matter of right, the motion shall state the statute or constitutional provision which gives the person the right to intervene. The court shall conduct a hearing on the motion to intervene as soon as practicable after filing of the motion.

Advisory Commission Comments.

The original Rules of Juvenile Procedure did not contain a process for seeking intervention. The Tennessee Supreme Court concluded that intervention in juvenile court should be analyzed under the provisions of Rule 24 of the Tennessee Rules of Civil Procedure, specifically finding that application of the rule "would not compromise the efficacy of juvenile proceedings." *Gonzalez v. Tennessee Department of Children's Services*, 136 S.W. 3d 613, 617 (Tenn. 2004). Other jurisdictions have concluded that the state's rules of civil procedure should govern intervention in juvenile court. *See In re T.H.*, 753 S.E. 2d 207, 211 (N.C. App. 2014). Consequently, the language of this Rule is taken nearly verbatim from Rule 24 of the Tennessee Rules of Civil Procedure.

Subdivision (a) preserves any statutory right to intervene in a specific action and allows interventions by right when an applicant can show that the disposition of the action will, as a practical matter, impair that person's ability to protect the asserted interest. Permissive intervention, which is directed to the discretion of the juvenile court, is allowed when the person seeking intervention can show a claim or defense which is in common with or has questions of fact or law common to the claims and defenses of an original party. Allowing intervention is designed to prevent multiple litigation without unduly delaying the proceeding in the juvenile court. The court's discretion to permit intervention under subdivision (b) should be exercised in the context of the purposes of the Juvenile Court Act — particularly the provision of a "simple judicial procedure...in which the parties are ensured a fair hearing[.]" T.C.A. § 37-1-101.

For the purposes of intervention, the term "person" includes any public or private agency – in particular, the Department of Children's Services when the Department is not the original petitioner. A person's application to intervene must be "timely"; that concept again is to be considered within the purposes of the Juvenile Court Act. The procedure established in subdivision (c) presumes that the court will address the issue of intervention as soon as practicable without delaying the resolution of the action in question and without compromising the best interest of the child involved.

The rule does not attempt to define which persons can automatically intervene and which are to be automatically excluded from intervention. That determination will be made on an individual basis depending upon the particular facts of the case and the stage of the proceeding in which intervention is sought. A court also has the authority to allow intervention on a limited basis. *See In re Marquise T.G.,* No. M2011-00809-COA-R3-JV, 2012 Tenn. Ct. App. LEXIS 324, 2012 WL 1825766 (Tenn. Ct. App, 2012)(grandmother allowed to intervene for the purpose of seeking visitation, but not allowed to intervene to seek custody).

When a person seeks to intervene for the purpose of modification of an order, the person should refer to Rule 310.

RULE 305. DISCOVERY

(a) Each court shall ensure that the parties in dependent and neglect proceedings have access to information which would be available in circuit court.

(b) Parties shall attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of cases. Only when such attempts have failed, discovery may be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure without a court order.

(c) Leave to obtain discovery pursuant to the Tennessee Rules of Civil Procedure for reasons other than a failed attempt at informal discovery shall be freely given by the court when justice so requires.

(d) Upon motion of a party or upon the court's own initiative, the court may order that the discovery be completed by a certain date.

(e) Any motion to compel discovery, motion to quash, motion for protective order, or other discovery related motion shall:

(1) quote verbatim the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena, or excerpt of a deposition which shows the question and objection or response, if applicable;

(2) state the reason or reasons supporting the motion; and

(3) be accompanied by a statement certifying that the moving party or counsel has made a good faith effort to resolve by agreement the issues raised and that agreement has not been achieved. Such effort shall be set forth with particularity in the statement.

(f) The court shall decide any motion relating to discovery in accordance with the Tennessee Rules of Civil Procedure.

(g) A child shall be required to respond to discovery requests only if the child is the petitioner or a respondent to the action.

(h) A guardian ad litem shall not testify at a deposition.

(i) Except as provided in subdivision (e) above, discovery materials shall not be filed with the court.

Advisory Commission Comments.

This rule permits parties to utilize the discovery rules found in the Tennessee Rules of Civil Procedure if: (1) an attempt to conduct informal discovery fails; or (2) if the party has obtained permission in a court order. A party may utilize subdivision (c) of this rule only when informal discovery is not possible or practical, e.g., the party may need to depose a non-party witness prior to trial. When attempts at informal discovery fail or are at an impasse, the parties should then presume that they are participating in formal discovery.

In order to reduce the cost of depositions, attorneys and parties should note that Rule 30.02 of the Tennessee Rules of Civil Procedure allows for non-stenographic recording and for telephone depositions. Likewise, Rule 26.03 of the Tennessee Rules of Civil Procedure permits the court to issue a protective order when a party seeks to limit discovery in order to avoid undue burden or expense, as well as for other reasons.

The Commission recognizes that formal discovery could potentially lengthen the time it takes to set and conclude dependent and neglect proceedings. Courts, attorneys, and parties should note that subdivision (d) permits a court ordered deadline for the completion of discovery. The Tennessee Rules of Civil Procedure allow the court to shorten deadlines for responding to discovery requests. Courts are encouraged to conduct scheduling conferences and issue scheduling orders as permitted under Rule 111.

RULE 306. TAKING CHILDREN'S TESTIMONY

(a) Any examination of a child witness shall be conducted in a manner that takes into account the child's age and developmental level. Such testimony shall be recorded.

(b) When a child testifies, the examination shall be conducted either in chambers or in a courtroom which has been cleared of observers and non-party witnesses.

(c) Upon motion of any party or upon its own initiative and upon good cause shown based upon the best interest of the child, the court may order one or more of the following accommodations:

(1) Arrangement of the courtroom or chambers so that certain individuals are not within the child's line of vision;

(2) Exclusion of the parties from chambers or the courtroom while the child is testifying; any motion for exclusion of the parties shall be made prior to trial, except in extraordinary circumstances;

(3) Examination of the child through written questions and written answers;

(4) Observation by the parties of the child's testimony by closed circuit television or other contemporaneous audio-visual transmission;

(5) Examination of the child by the court rather than directly by the parties or attorneys;

(6) Allowing the presence of a properly trained comfort animal;

(7) Permitting the child to have a stuffed animal or similar comfort toy while the child is testifying; or

(8) Permitting the child to be accompanied by a support person who is not a party or a witness.

(d) If the court excludes the parties from chambers or the courtroom while the child is testifying, the court shall ensure the following procedures are followed:

(1) Counsel for the parties and child(ren), including the guardian(s) ad litem, shall be permitted to be present during the child's testimony.

(2) The court shall inform any party who is not represented by counsel of the right to be represented by counsel and shall appoint counsel if requested by an indigent party who is entitled to an attorney.

(e) If the court examines the child rather than permitting the parties or attorney to directly examine the child, the court shall ensure the following procedures are followed:

(1) The parties or their counsel if represented, the guardian(s) ad litem, and attorney(s) ad litem shall submit written questions to the court prior to the child's testimony. The court shall ask the questions as written.

(2) If a party or attorney has an objection to a question, he or she may make the objection by raising his or her hand and then submitting the objection in writing. The written objection shall be provided to the party or attorney who wrote the question, and he or she shall be provided an opportunity to respond to the objection, before the court may sustain the objection.

(3) After all of the submitted questions have been asked by the court, the court shall take a recess. During the recess, the attorneys shall have an opportunity to consult with their clients. If a party or attorney wishes to ask additional questions, he or she shall submit the questions in writing prior to the end of the recess.

(4) The court shall continue the above process until there are no further questions for the child from any party or attorney.

Advisory Commission Comments.

The Commission drafted this rule in order to provide guidelines to courts and attorneys as they seek to balance the due process rights of the respondents with the need to protect child witnesses from unnecessary trauma.

Subdivision (b) requires that when a child testifies the examination must be conducted either in chambers or in a courtroom which has been cleared of observers and non-party witnesses. Court appointed special advocates (CASAs) appointed pursuant to T.C.A. § 37-1-149, as well as foster parents, prospective adoptive parents, and relatives providing care for a child in state custody are not parties to the dependent and neglected action and should be excluded from the courtroom while the child is testifying.

When an unrepresented party requests appointment of an attorney or time to retain an attorney due to the court's decision to allow a child's testimony to be taken pursuant to subdivision (d), the hearing will likely need to be continued. In addition to the time it takes to appoint or retain the attorney, the attorney will need reasonable time to prepare.

Courts and attorneys should note that it is neither necessary nor desirable for the alleged perpetrator to be made a party to the dependent and neglect proceeding unless that person is the child's parent or legal guardian. In cases where the alleged perpetrator is not the parent or legal guardian, and where a court order limiting the alleged perpetrator's access to the child is appropriate, a related petition for a restraining order pursuant to T.C.A. § 37-1-152 and Rule 108 could accomplish the goal of protecting the child without granting the alleged perpetrator party status in the underlying action. In addition to other benefits, this strategy could limit or eliminate the alleged perpetrator's participation in the dependent and neglect case hearings and increase the child's comfort level.

Courts and attorneys may find it helpful to refer to Rule 112 concerning when testimony may be taken by audio-visual means.

RULE 307. ADJUDICATORY HEARINGS

(a) Scope of Hearing. The adjudicatory hearing is the proceeding at which the court determines whether the evidence supports a finding that a child is dependent and neglected. The adjudicatory hearing shall be held in accordance with T.C.A. § 37-1-129.

(b) Time Limits on Scheduling Adjudicatory Hearings.

(1) All cases in which a child has been placed out of the home by court order shall be heard within 30 days of the date the child was placed outside of the home. All other cases shall be heard within 30 days of the date of filing of the petition if such early scheduling appears to the court to be reasonable and possible considering the circumstances of the case, including but not limited to, whether service on all parties has been achieved. In any event, every case shall be heard for adjudication within 90 days of either the date the child was placed outside the home or date of filing of the petition, as applicable**.**

(2) Upon good cause shown, the adjudicatory hearing may be continued to a date certain.

(c) Beginning Adjudicatory Hearing.

(1) At the beginning of each hearing, the court shall:

(A) Ascertain whether the parties before the court are represented by attorneys;

(B) Verify the name, age and residence of the child who is the subject of the case, and ascertain the relationship of the parties, each to the other;

(C) Ascertain whether all necessary parties are present;

(D) Ascertain whether notice requirements have been complied with, and if not, whether the affected parties knowingly and voluntarily waive compliance;

(E) Explain to the parties the purpose of the hearing and the possible consequences thereof; and

(F) Explain to the parties their rights as set forth in Rule 303.

(d) Evidence Admissible. The court shall consider only evidence which has been formally admitted at the adjudicatory hearing. All testimony shall be under oath and may be in narrative form. Evidence shall be admitted as provided by the Tennessee Rules of Evidence.

(e) Adjudication of Status, Standard of Proof, and Findings.

(1) At the conclusion of the adjudicatory hearing, the court shall enter an order in accordance with the following provisions:

(A) If the court finds that the allegations have not been proved by clear and convincing evidence, it shall dismiss the petition.

(B) If the court finds that the allegations have been proved by clear and convincing evidence, it shall adjudicate the child dependent and neglected. The court shall immediately proceed to a dispositional hearing or schedule it to be heard on a later date.

(C) If the court finds that the child is dependent and neglected, the court shall additionally make a finding whether the parents or either of them or another person who had custody of the child committed severe child abuse.

(2) The court shall include findings of fact in its adjudicatory order. The adjudicatory order shall be filed within 30 days of the close of the hearing or, if a petition for certiorari is filed, within 5 days thereafter.

(f) Transfer to Home County for Disposition. The case of an out-of-county resident may be transferred to the child's county of residence for disposition.

Advisory Commission Comments.

The varying time limits in these rules for children placed out of the home by court order versus those who remain in the home indicate that cases involving children placed out of the home be given priority on the docket. All hearings should be scheduled and held as speedily as possible in the interest of providing timely resolution for children and families. It is important that whatever action is taken be completed expeditiously, within the limits of practicability, given the fact that a child's perception of time is quite different from that of an adult, with shorter periods of time perceived as being much extended.

Some proceedings may be so complex that the court and parties may benefit from a pretrial conference to narrow or limit issues, decide evidentiary issues, and address other pretrial matters so as to achieve judicial economy.

This rule clarifies that the court must file its written adjudicatory hearing order within 30 days from the closing of the hearing, or, if a petition for certiorari is filed, within 5 days thereafter, pursuant to T.C.A. § 37-1-129(a). See Rule 110 for the computation of time.

RULE 308. DISPOSITIONAL HEARINGS

(a) Time Limits on Scheduling Dispositional Hearings. Dispositional hearings shall be held within 15 days of the adjudicatory hearing if the child is placed out of the home by court order, and within 90 days of the adjudicatory hearing in all other cases. Upon good cause shown, the dispositional hearing may be continued to a date certain.

(b) Separate from Adjudicatory Hearing. A dispositional hearing shall be separate and distinct from the adjudicatory hearing to which it relates. However, it may be held immediately following the adjudicatory hearing or at a later date.

(c) Notice of Right to Appeal. At the conclusion of the dispositional hearing, the court shall advise the parties of the right to appeal the dispositional order.

(d) Temporary Order. Where a continuance of the dispositional hearing is ordered, the court may enter a temporary order that is in the best interest of the child.

(e) Evidence Admissible; Standard of Proof. In arriving at its dispositional decision, the court shall consider only evidence which has been formally admitted, and the juvenile court record of the child. All testimony shall be under oath and may be in narrative form. The Rules of Evidence shall apply except that reliable hearsay including, but not limited to, documents such as psychiatric or psychological screenings or evaluations of the child or the child's parents or custodian or reports or assessments prepared by a probation officer, youth services officer or the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. However, this subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Tennessee Constitution. The parties shall have the right to examine any person who has prepared any report admitted into evidence. The standard of proof at the dispositional hearing is preponderance of the evidence.

Advisory Commission Comments.

The purpose of dispositions in juvenile court actions is to design an appropriate order to meet the needs of the child and to achieve the objectives of the state in exercising jurisdiction. When possible, the initial approach should involve working with the child and the family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the child and family.

At the dispositional hearing, it is appropriate that youth services and probation officers be witnesses regarding admissible evidence of which they have knowledge. Youth services officers or probation officers may be a fact witness but shall not engage in the unauthorized practice of law.

Although a report may be admissible as reliable hearsay, all the contents of the report may not be reliable hearsay. This is especially important when the source gives an opinion that the person is not qualified to give.

Though this rule allows for the dispositional hearing to be held within 15 days of the adjudicatory hearing when the child is placed out of the home by court order or 90 days in all other cases, it should be noted that under these rules the dispositional hearing may be held immediately following the adjudicatory hearing if the court determines that delay for preparation by the parties is not necessary.

RULE 309. AGREED ORDERS

(a) General Provisions. Any or all issues within a case may be resolved by a written agreement between all parties, submitted to the court in the form of an agreed order. An agreed order, signed by all parties or counsel, upon being approved by the court and entered in its minutes, becomes the order of the court. An agreed order should recite that the parties are aware that the agreement is the order of the court and that failure to comply with the order may constitute contempt of court.

(b) Modification. An agreed order may be modified in accordance with Rule 310.

Advisory Commission Comments.

This rule clarifies that unless previously dismissed from the proceeding all parties to the original proceedings, including the Department of Children's Services and any interveners, are required to agree to an order for it to constitute an agreed order. Any party not wishing to participate in further proceedings may seek approval from the court to be dismissed as a party.

RULE 310. MODIFICATION OF OR RELIEF FROM JUDGMENTS OR ORDERS

(a) Modification of Orders.

(1) Clerical Mistakes. Clerical mistakes and errors arising from oversight or omission in orders or other parts of the record may be corrected by the court at any time on its own initiative or on motion of any party.

(2) Modification for Newly Discovered Evidence. A dispositional order may be modified on the ground that newly discovered evidence so requires. The court, in making this determination, shall make any modification consistent with the best interests of the child.

(3) Modification for Changed Circumstances. An order of the court may be modified on the ground that, since the entry of the order, changed circumstances and the best interests of the child require it.

(b) Relief from Judgments or Orders.

An order of the court shall be set aside if it is determined that:

(1) It was obtained by fraud or mistake sufficient to satisfy the legal requirements for relief in any other civil action;

(2) The court lacked jurisdiction over a necessary party or of the subject matter; or

(3) Newly discovered evidence so requires. The court must determine that, with regard to such newly discovered evidence, the movant was without fault in failing to present such evidence at the original proceeding, and that such evidence may have resulted in a different judgment at the original proceeding.

(c) Procedure. Any party to a proceeding, the guardian ad litem, or other person having legal custody of or an interest in a child may seek the relief provided in this rule. A request for relief under this rule shall set forth in concise language the grounds upon which the relief is requested. If relief is sought under subdivisions (a)(1) and (2) or (b), a motion shall be filed and notice shall be given pursuant to Rule106. If relief is sought under subdivision (a)(3), a petition shall be filed and served pursuant to Rule 103.

(d) Disposition. After the hearing, the court shall deny or grant relief as the evidence warrants. Where a modification of an order is granted, the court may order any disposition which would be permissible at the original dispositional hearing, or the court may schedule a dispositional hearing in accordance with these rules.

Advisory Commission Comments.

T.C.A. § 37-1-139 authorizes the modification of and relief from orders under certain circumstances. A motion is filed if relief is sought under subdivisions (a)(1) and (2) or (b). However, a petition is required if relief is sought because of changed circumstances under subdivision (a)(3).

The Commission anticipates that persons not a party to the original proceeding will request relief under this rule. In such cases, the motion should include a request to intervene as a party. In the event that the person is making new allegations that the child is dependent and neglected, the person should file a dependent and neglect petition under T.C.A. §§ 37-1-119 and 120, rather than a petition to modify.

FOSTER CARE PROCEEDINGS

RULE 401. RATIFICATION HEARINGS

(a) Purpose of Ratification Hearing. The court shall explain on the record the purpose of the hearing.

(b) Notification of Parties. The court shall verify all parties have been properly served. In the event a party's whereabouts are unknown and the party could not be notified of the ratification hearing, the court shall determine the Department of Children's Services' reasonable efforts to notify the party of the contents of the permanency plan. If the court finds the Department has made reasonable efforts to notify the party of the contents of the plan, then the court shall proceed with the ratification of the plan.

(c) Review of Permanency Plan. The court shall review the permanency plan for each child in foster care. In reviewing the permanency plan, the court shall address the following:

(1) Whether the parties participated in the development of the plan and are in agreement with the provisions of the plan;
(2) Whether the permanency goals are appropriate, and if a concurrent goal is needed;
(3) Whether the plan includes outcomes and corresponding action steps for each permanency goal;
(4) Whether the child's placement is safe and appropriate;
(5) Whether the child's well-being is appropriately addressed through health, education and independent living skills if applicable;
(6) Whether the visitation schedule is sufficient to maintain the bond between the child and parent, and the child and siblings, who are not residing in the same placement; and
(7) Whether the statement of responsibilities for each party are reasonably related to remedying the conditions that necessitate foster care or prevent the child from safely returning home.

(d) Inclusion of Recommendations of Foster Care Review Board. If a foster care review board hearing has occurred prior to the ratification hearing, the court shall review the recommendations of the board. If the board's recommendations are in the best interest of the child, the court shall incorporate the recommendations into the plan.

(e) Evidentiary Hearing. An evidentiary hearing shall be required to ratify the plan if the following occur:

(1) The parties do not agree on the provisions of the plan;
(2) The guardian ad litem objects to the provisions of the plan; or
(3) The court determines the Department has not prioritized the outcomes and corresponding action steps for each party in the statement of responsibilities.

(f) Agreement – Modification. If the parties are in agreement to the provisions of the plan and the plan is found to be in the best interest of the child, or at the conclusion of the hearing, the court shall ratify the plan upon making fact-specific findings pursuant to T.C.A. § 37-2-403. If the court modifies the plan, and a party is not present at the hearing, the court shall direct the Department to make reasonable efforts to notify the party of the modified provisions of the plan.

(g) Abandonment Criteria. The court shall explain on the record the law relating to abandonment and the possible consequences of termination of parental rights.

(h) Rights of Party Not Served. The court may issue a temporary order ratifying the plan. Such order shall be without prejudice to the rights of any party who has not been served with the original petition. If a party was not served, the court shall set a hearing within 60 days to determine whether the Department has conducted a diligent search.

(i) Findings – Order. The court shall make fact-specific findings pursuant to T.C.A. § 37-2-403 and shall enter an order within 30 days of the hearing.

Advisory Commission Comments.

Permanency planning is the process of carrying out within a time-limited period a set of goal directed activities designed to help the foster child live with a permanent family. The permanency planning process requires the juvenile court to identify a permanency goal and oversee the implementation and modification of the permanency plan for each child in foster care. The permanency planning process includes, but is not limited to, the ratification hearing, periodic progress review hearing, foster care review board hearing and permanency hearing.

The purpose of the ratification hearing is for the court to review the permanency plan for the child prepared by the Department and approve the plan if it is in the best interest of the child. The permanency plan becomes an order of the court once ratified and should outline the responsibilities of each party to achieve one or more specific goals for the child. If court determines the permanency plan is not in the best interest of the child, the court should order that the plan be modified accordingly. In determining whether the permanency plan is in the child's best interest, the plan is to be reviewed by the court as described in subdivision (c) and T.C.A. § 37-2-403.

A ratification hearing is held to approve the initial permanency plan and all subsequent permanency plans. The initial permanency plan must be ratified within 60 days of the date the child is placed in foster care, except as provided in T.C.A. § 37-1-166. A subsequent plan must be ratified within 12 months of the original plan if the child remains in foster care. T.C.A. § 37-2-403.

The ratification hearing is separate and distinct from a periodic progress review (previously termed judicial review) or a permanency hearing. At the ratification hearing the court is not determining the compliance of the parties to the plan; it is reviewing the plan being presented for ratification and determining if the plan is in the best interest of the child.

T.C.A. § 37-2-403 provides that the permanency plan should be reevaluated and updated annually. However, new plans should be submitted to the court for ratification more frequently when the priority of responsibilities change, new facts are discovered which prevent the child from safely returning home, or there is a change in the goal on the plan. After the initial permanency plan is ratified, a subsequent permanency plan presented to the court for ratification should not be a duplicate of the initial plan. The subsequent plan should reflect the changes that have occurred in the child's case since the ratification of the prior plan.

A child adjudicated to be delinquent or unruly is a party to the proceeding and should attend the ratification hearing, as well as all hearings associated with permanency planning.

Subdivision (d) provides that the court include in the permanency plan the recommendations of the foster care review board if the court finds the recommendations to be in the best interest of the child.

Subdivision (e) requires that an evidentiary hearing be held if the parties do not agree or if the guardian ad litem objects to the permanency plan. In addition, if the Department has not prioritized the outcomes and corresponding action steps for each party in the statement of responsibilities, an evidentiary hearing must be held and testimony presented regarding the priority of responsibilities. The reason for this requirement is that when the court does review compliance of the parties at the periodic progress review or permanency hearing, the court is required to determine the weight assigned to each action step in order to

determine whether the Department has made reasonable efforts and whether the parent is in substantial compliance.

If the parties are in agreement to the permanency plan, the court must also find that the plan is in the best interest of the child. This may be done without an evidentiary hearing.

Subdivision (g) requires the court to explain on the record the law relating to abandonment, pursuant to T.C.A. § 37-2-403(a)(2)(B).

Subdivision (h) provides that, if a party has not been served with the original petition, the court may enter a temporary order ratifying the permanency plan without prejudice to that person's rights. The court must schedule a hearing to determine whether the Department has conducted a diligent search. Absent parties, especially parents, should be included as soon as possible in the child's case in order to prevent a delay in permanency for the child.

RULE 402. PERIODIC PROGRESS REVIEWS

(a) A periodic progress review hearing shall occur when the court has not established a foster care review board or has elected to review certain cases instead of assigning the cases to the board.

(b) The court shall explain on the record the purpose of the hearing and review the following:

(1) The continued appropriateness of the permanency goals , and if a concurrent goal is needed;

(2) Whether the child's placement is safe and appropriate;

(3) Whether the child's well-being is being appropriately addressed through health, education, and independent living skills if applicable;

(4) Whether the visitation schedule continues to be sufficient to maintain the bond between the child and parent, and the child and siblings, who are not residing in the same placement;

(5) The reasonableness of the Department of Children's Services' efforts to identify or locate the parent or child whose identity or whereabouts are unknown;

(6) The reasonableness of the Department's efforts based on the prioritization of the outcomes and corresponding action steps in the statement of responsibilities; and

(7) The compliance of the parents or child with the statement of responsibilities in the plan.

(c) If a foster care review board hearing has occurred prior to the periodic progress review, the court shall review the recommendations of the board. If the court finds the board's recommendations are in the best interest of the child, the court shall incorporate the recommendations into the plan.

(d) If in addition to the periodic progress review the Department requests the court also ratify a new permanency plan, the periodic progress review and ratification hearing on the new plan shall be bifurcated.

(e) At the conclusion of the hearing, the court shall make fact-specific findings including a timeline for goal completion and shall enter an order within 30 days of the hearing. If the court finds additional services are necessary to mitigate the causes necessitating foster care, the court shall order the Department to incorporate the services into the permanency plan.

Advisory Commission Comments.

The periodic progress review (formerly known as judicial review) of the permanency plan is held pursuant to T.C.A. § 37-2-404. Either a foster care review board or periodic progress review must be held within 90 days of the date of custody and no less often than every 6 months thereafter.

The purpose of this hearing is to ensure that the child is safe, that provisions are being made for the child's well-being, and that the permanency plan and goals remain in the best interest of the child. The court has a duty to monitor and determine compliance with the terms of the permanency plan by the parties, and issue such orders as may be appropriate to enforce compliance by reviewing those matters outlined in subdivision (b). The periodic progress review is an opportunity for the court to correct potential delays or barriers to permanency for the child prior to the permanency hearing.

A child adjudicated to be delinquent or unruly is a party to the proceeding and should attend the periodic progress review. The Commission notes that there is a distinction between visitation and home passes when reviewing a child adjudicated delinquent or unruly and placed in a residential facility. The child may not be eligible for home passes, but this should not deter visitation between the parent or prior legal guardian and child at the facility.

If the Department is seeking ratification of a new permanency plan at this hearing, the hearings are to be bifurcated as the purpose of the hearings is different. *See* Rule 401.

RULE 403. FOSTER CARE REVIEW BOARD

(a) Scheduling and Notice. The court shall determine the date, time and location of each foster care review board and shall notify the Department of Children's Services and the board members no later than 14 calendar days prior to the scheduled review. Each case shall be set at a specific time that allows for a comprehensive review. All parties, their attorneys, guardians ad litem, and foster parents shall be notified in writing of the review not less than 10 calendar days prior to the scheduled review.

(b) Documentation. The Department shall provide supporting documentation in regard to the child's safety, well-being, and permanency as determined by local rule. Documentation should be provided to the court facilitator no less than 7 calendar days prior to review for distribution to the board members.

(c) Quorum and Attendance. Prior to the beginning of each review, the court facilitator shall verify that a quorum of members exists. In verifying the quorum, the court facilitator shall inquire as to any conflicts of interest of the board members requiring recusal. The review shall proceed only if it is determined that all necessary persons who are not present were properly notified. If timely notification was not provided, the court facilitator will reschedule the matter as soon as possible.

(d) Conduct of the Review.

(1) The board shall use a summary form to gather information.

(2) Information provided to the board shall only come from persons before the board during the review or from documentation provided by the parties.

(3) Only the parties, their attorneys, the child, and the guardian ad litem or attorney for the child have the right to be present during the entire review. Necessary persons may be present during the entire review if agreed to by all the parties. Necessary persons are to present information to the board in the presence of the parties.

(4) The board may hear from the child outside the presence of the parties.

(e) Recommendations. The board shall make written recommendations that address the child's safety, well-being, and permanency. The board shall deliberate to develop recommendations. All deliberation shall occur outside the presence of the parties, their attorneys, and other persons present for the review. Recommendations shall be made addressing the needs pursuant to Rule 402(b) of these rules. All recommendations should be agreed upon by a majority of board. If there is no majority agreement for each recommendation, the court facilitator shall:

(1) Identify the conflict;

(2) Instruct the board to review all relevant documentation and testimony;

(3) Instruct the board to ensure that the recommendations provide for the safety, well-being, permanency of the child, and are in the child's best interest; and

(4) In the event no consensus can be reached, make a direct referral to the court.

(f) Announcement of Recommendations - Scheduling Next Review. After deliberation, the board will announce its recommendations to the parties and set a date for the next review. No additional information may be presented during the announcement of the recommendations. The court facilitator shall ensure the signatures of all parties present at the review are obtained on the summary form, noting those persons were present for the review. The court facilitator shall also note anyone else who was present for the review.

(g) Summary Form Filed with Clerk. The court facilitator shall file the summary form with the clerk of the court, who shall record the date and time of the filing. The clerk of the court shall send a copy of the summary form to all parties and their attorneys of record or guardians ad litem.

(h) Review by Judge or Magistrate. The court shall establish a procedure to provide the recommendations to the judge or magistrate within 10 judicial days of the review for the court to review the recommendations, determine if they are in the best interest of the of the child, and confirm as an order of the court at the next ratification hearing, periodic progress review, or permanency hearing.

(i) Direct Referral. When the board makes the determination that a direct referral shall be made by the court, the court facilitator will determine the type of direct referral as provided by T.C.A. § 37-2-406(c)(1)(B). The court facilitator will file the direct referral with the clerk of the court. The court facilitator shall inform the review board of the outcome of the direct referral at the next review of the child's case before the foster care review board.

(j) Statements of Child. Any statements made by a child at the review are not admissible in a delinquent or unruly proceeding prior to a dispositional hearing.

RULE 404. PERMANENCY HEARINGS

(a) Review of Previous Orders/Recommendations by Court. Prior to the beginning of a permanency hearing, the court shall review previous ratification orders, periodic progress review orders, and foster care review board recommendations.

(b) Purpose of Hearing. The court shall explain on the record the purpose of the hearing.

(c) Testimony. The court shall receive testimony from the parties related to the following:

(1) Whether the Department's efforts to assist the parent or child in complying with the statement of responsibilities are reasonable based on the Department's prioritization of the outcomes and corresponding action steps in the statement of responsibilities in the permanency plan;

(2) Whether the parent or child is in substantial compliance with the statement of responsibilities in the plan;

(3) If the child is able to communicate, the child's views on the provisions in the plan;

(4) Whether the independent living plan or transitional living plan is designed to assist and prepare foster youth in making the transition from foster care to adulthood by providing opportunities to obtain life skills for self-sufficiency, independence, and permanency;

(5) If the youth is seventeen years old, testimony from the Department regarding extension of foster care services available to the youth at the age of eighteen and testimony from the youth as to whether the youth understands the available services;

(6) Whether the proposed permanency goals and timelines for achieving the goals are in the best interest of the child; and

(7) Whether barriers exist to successfully achieving the proposed permanency goals, and if services are needed to eliminate the barriers.

(d) Reasonable Efforts Finding as to Goal. At the conclusion of the hearing, if the goal on the existing permanency plan is to return home, the court shall make fact-specific findings as to whether the Department has provided reasonable efforts for the child to return home safely. If the plan contains a goal other than return home, the court shall make fact-specific findings as to whether the Department has provided reasonable efforts to place the child consistent with the specific goal. If the permanency plan contains concurrent goals, the court shall make reasonable-efforts findings as to both goals.

(e) Hearing for Youth Seventeen Years or Older Prior to Release from Department. A permanency hearing shall be held 3 months prior to the release from foster care of a youth who is 17 years or older. The court shall hold an evidentiary hearing on the transition living plan and review the plan to ensure the plan sufficiently addresses the following, if applicable: support person or system, education, employment, health needs, information on available benefits through other agencies, available transportation, youth has received all essential documentation including government issued identification, and any special factors.

(f) Youth Planning to Accept Extension of Foster Care. At the permanency hearing to approve the transition plan for a youth who plans to accept extension of foster care, the court shall set a hearing date within 60 days of the youth's eligibility for extension of foster care for the purpose of confirming the voluntary placement agreement and ratification of the transition plan.

(g) Bifurcated Permanency Hearing and Ratification Hearing. If, in addition to the permanency hearing, the Department requests the court also ratify a new permanency plan, the permanency hearing and ratification hearing on the new plan shall be bifurcated with the permanency hearing occurring first.

Advisory Commission Comments.

A permanency hearing is a separate and distinct hearing from the ratification and periodic progress review hearings. The purpose of the permanency hearing is to decide upon the final permanency outcome for the child. In determining the final permanency outcome, the court is to review the compliance of all parties and decide on a final permanency outcome for the child that is in the child's best interest. The court must outline a specific timetable and plan for the child to return home or to achieve another permanency goal, if returning home is not in the child's best interest.

In order to make a decision regarding the final permanency outcome of the case, the permanency hearing must be bifurcated from any ratification hearing on a new permanency plan. The decisions made during the permanency hearing dictate the contents of a new permanency plan. The permanency plan that is ratified after a permanency hearing should not be a revision of a previous plan. Rather, it should be a detailed and comprehensive schedule that charts the child's final path to permanency subsequent to the permanency hearing.

At the beginning of the hearing, the court must determine if all necessary persons are present pursuant to Rule 112. All children are required to attend the permanency hearing pursuant to T.C.A. § 37-2-409, except any child under a doctor's care who is prevented by the doctor from attending, a child placed outside the state, or a child on runaway status. The court should consider allowing a child who cannot attend because of the first two exceptions to participate by another means as prescribed in Rule 112. The court must hear directly from the child on the child's views on the provisions in the plan. When receiving testimony from the child, the court shall comply with the provisions of Rule 306.

APPENDIX – VALID COURT ORDER REGULATIONS

[The current version of 28 C.F.R. § 31.303(f)(3) ("Valid Court Order") shall be published (and updated as necessary) in this Appendix for the convenience of the litigants and lawyers appearing in juvenile court, and for the convenience of the juvenile court judges, magistrates, and other juvenile-court officials:]

28 C.F.R. § 31.303. Substantive Requirements.

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(f) * * *

(3) Valid court order. For the purpose of determining whether a valid court order exists and a juvenile has been found to be in violation of that valid order all of the following conditions must be present prior to secure incarceration:

(i) The juvenile must have been brought into a court of competent jurisdiction and made subject to an order issued pursuant to proper authority. The order must be one which regulates future conduct of the juvenile. Prior to issuance of the order, the juvenile must have received the full due process rights guaranteed by the Constitution of the United States.

(ii) The court must have entered a judgment and/or remedy in accord with established legal principles based on the facts after a hearing which observes proper procedures.

(iii) The juvenile in question must have received adequate and fair warning of the consequences of violation of the order at the time it was issued and such warning must be provided to the juvenile and to the juvenile's attorney and/or legal guardian in writing and be reflected In the court record and proceedings.

(iv) All judicial proceedings related to an alleged violation of a valid court order must be held before a court of competent jurisdiction. A juvenile accused of violating a valid court order may be held in secure detention beyond the 24–hour grace period permitted for a noncriminal juvenile offender under OJJDP monitoring policy, for protective purposes as prescribed by State law, or to assure the juvenile's appearance at the violation hearing, as provided by State law, if there has been a judicial determination based on a hearing during the 24–hour grace period that there is probable cause to believe the juvenile violated the court order. In such case the juveniles may be held pending a violation hearing for such period of time as is provided by State law, but in no event should detention prior to a violation hearing exceed 72 hours exclusive of nonjudicial days. A juvenile alleged or found in a violation hearing to have violated a Valid Court Order may be held only in a secure juvenile detention or correctional facility, and not in an adult jail or lockup.

(v) Prior to and during the violation hearing the following full due process rights must be provided:

(A) The right to have the charges against the juvenile in writing served upon him a reasonable time before the hearing;

(B) The right to a hearing before a court;

(C) The right to an explanation of the nature and consequences of the proceeding;

(D) The right to legal counsel, and the right to have such counsel appointed by the court if indigent;

(E) The right to confront witnesses;

(F) The right to present witnesses;

(G) The right to have a transcript or record of the proceedings; and

(H) The right of appeal to an appropriate court.

(vi) In entering any order that directs or authorizes the placement of a status offender in a secure facility, the judge presiding over an initial probable cause hearing or violation hearing must determine that all the elements of a valid court order (paragraphs (f)(3)(i), (ii) and (iii) of this section) and the applicable due process rights (paragraph (f)(3)(v) of this section) were afforded the juvenile and, in the case of a violation hearing, the judge must obtain and review a written report that: reviews the behavior of the juvenile and the circumstances under which the juvenile was brought before the court and made subject to such order; determines the reasons for the juvenile's behavior; and determines whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate. This report must be prepared and submitted by an appropriate public agency (other than a court or law enforcement agency).

(vii) A non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order.