IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE & EVIDENCE

No. ADM2016-01777

FILED
AUG 30 2016
Clerk of the Courts
Rec'd By

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 12, 2016, the Advisory Commission completed its 2015-2016 term, and the Commission thereafter transmitted its recommendations to the Court.

The Court hereby solicits written comments from the bench, the bar, and the public concerning the Advisory Commission's recommended amendments set out in Appendix I (proposed amendments to the Rules of Evidence, the Rules of Appellate, Civil, and Criminal Procedure) and Appendix II (proposed amendments to the Rules of Juvenile Procedure) to this order. The deadline for submitting written comments is Wednesday, November 23, 2016. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to:

James Hivner, Clerk
Re: 2017 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 TENNESSEE

RULES OF EVIDENCE

RULES OF APPELLATE PROCEDURE

RULES OF CIVIL PROCEDURE

and

RULES OF CRIMINAL PROCEDURE

(new text indicated by underlining; deleted text indicated by overstriking)

TENNESSEE RULES OF EVIDENCE

RULE 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

[Add the new "Advisory Commission Comment [2017]" set out below; the text of the rule and the existing Comments are unchanged:]

* * * *

Advisory Commission Comments [2017]

Nothing in these rules prohibits the court in its inherent authority from permitting a suitable animal, toy, or support person to accompany a witness who is a minor, an alleged victim of a crime, a person with a demonstrable intellectual or emotional challenge, or a person otherwise shown to be a witness at risk for being unable to communicate effectively without the aid of such comfort. *See State v. Jose Reyes*, No. M2015-00504-CCA-R3-CD, 2016 WL 3090904 (Tenn. Crim. App. May 24, 2016).

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 3

APPEAL AS OF RIGHT: AVAILABILITY; METHOD OF INITIATION

[Amend subdivisions (e) and (f) as indicated below; the other subdivisions of the rule are unchanged:]

* * * *

(e) Initiation of Appeal as of Right. — An appeal as of right to the Supreme Court, Court of Appeals, or Court of Criminal Appeals shall be taken by timely filing a notice of appeal with the clerk of the appellate ~~trial~~ court as provided in Rule 4 and by service of the notice of appeal as provided in Rule 5. An appeal as of right may be taken without moving in arrest of judgment, praying for an appeal, entry of an order permitting an appeal or compliance with any other similar procedure. Provided, however, that in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal. ~~The trial court clerk shall send the trial judge a copy of all notices of appeal.~~

(f) Content of the Notice of Appeal. — The notice of appeal shall specify the party or parties taking the appeal by naming each one in the caption or body of the notice (but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"), shall designate the judgment from which relief is sought, and shall name the court to which the appeal is taken. The notice of appeal should include a list of the parties upon whom service of notice of docketing of the appeal is required by Rule 5 of these rules. An appeal shall not be dismissed for informality of form or title of notice of appeal.

* * * *

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, subdivision (e) of this rule is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivision (f) is also amended to be consistent with amended Form 1 ("Notice of Appeal") in the Appendix to the rules.

This paragraph of the Comment is added to cross-reference the 2017 amendment to Tenn. R. Crim. P. 36, which provides that an appeal as of right is available following the trial court's *denial* of a motion filed pursuant to Tenn. R. Crim. P. 36, in addition to cases in which the court files a corrected judgment or order. That amendment makes Tenn. R. Crim. P. 36 consistent with the text of the 2012 amendment to Tenn. R. App. P. 3(b) and (c), which authorized an appeal as of right from "an order or judgment entered pursuant to Rule 36. . ., Tennessee Rules of Criminal Procedure[.]" As a result of the 2017 amendment to Tenn. R. Crim. P. 36, the second paragraph of the 2012 Advisory Commission Comment to Tenn. R. App. P. 3(b) and (c) is superseded.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 4

APPEAL AS OF RIGHT: TIME FOR FILING NOTICE OF APPEAL

[Amend subdivision (a) as indicated below; the other subdivisions of the rule are unchanged:]

(a) Generally. — In an appeal as of right to the Supreme Court, Court of Appeals or Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the appellate ~~trial~~ court within 30 days after the date of entry of the judgment appealed from; however, in all criminal cases the "notice of appeal" document is not jurisdictional and the timely filing of such document may be waived in the interest of justice. The appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice. Any party may serve notice of entry of an appealable judgment in the manner provided in Rule 20 for the service of papers.

Transitional Provision. — Effective July 1, 2017, Rule 4(a) is amended to require that the notice of appeal be filed with the appellate court clerk, instead of the trial court clerk. In the event a party, on or after July 1, 2017, incorrectly attempts to file a notice of appeal with the trial court clerk, the trial court clerk shall note the date and time of receipt of the attempted filing and shall immediately notify the party attempting to file the notice of appeal that the notice must be filed with the appellate court clerk. If the attempted filing of the notice of appeal with the trial court clerk was received by the trial court clerk within 30 days after the date of entry of the judgment, the party attempting to file the notice with the trial court clerk shall have 20 additional

days, counting from the 30th day after the date of entry of the judgment, within which to file the notice of appeal with the appellate court clerk; a notice of appeal filed with the appellate court clerk during the additional period allowed by this transitional provision shall be deemed to have been timely filed. This transitional provision shall expire at 11:59 p.m., appellate court clerk's local time, on June 29, 2018, after which this transitional provision shall automatically be repealed. During the period this transitional provision is in effect, this provision shall govern all cases meeting its requirements, notwithstanding any other provision of these Rules. See Tenn. R. App. P. 2 and Tenn. R. App. P. 21(b) (stating, in summary, that the time for filing a notice of appeal cannot be suspended or extended by the appellate court).

* * * *

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, subdivision (a) of this rule is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. The word "timely" is also added to the second clause of the first sentence in subdivision (a) for the purpose of clarification. The rule is further amended to add a one year transitional rule to lessen the detrimental effect for those who mistakenly attempt to file their notice of appeal at the last minute with the trial court clerk.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 5

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

[Amend subdivisions (a), (b), and (c) as indicated below:]

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

(b) Service of Notice of Appeal in Criminal Actions. — In criminal actions, when the defendant is the appellant and the action was prosecuted by the state, the defendant shall serve a copy of the notice of appeal on the district attorney general of the county in which the judgment was entered and on the attorney general at the Attorney General's Nashville, Tennessee office. When the defendant is the appellant and the action was prosecuted by a governmental entity

other than the state for the violation of an ordinance, the copy of the notice of appeal shall be served on the chief legal officer of the entity or, if this officer's name and address does not appear of record, then on the chief administrative officer of the entity at his or her official address. When the state or other prosecuting entity is the appellant, a copy of the notice of appeal shall be served on the defendant and the defendant's counsel. Service shall be made not later than 7 days after filing notice of appeal and proof of service in the manner provided in Rule 20(e) shall be filed with the clerk of the appellate ~~trial~~ court within 7 days after service. The appellant shall note on each copy served the date on which the notice of appeal was filed. The ~~trial court~~ clerk of the appellate court shall promptly send a copy of ~~serve~~ all filed notices of appeal to ~~on~~ the trial court and the clerk of the trial ~~appellate~~ court designated in the notice of appeal.

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

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

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 4 is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivisions (a), (b) and (c) of this rule are amended to reflect this change in Rule 4. Additionally, subdivision (c) is amended to clarify the appellate court's authority to designate the title given to the appellate action.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 6

~~SECURITY FOR~~ COSTS ON APPEAL

[Amend the title of the rule as indicated above and amend subdivisions (a), (b), and (c) as indicated below:]

(a) Unless an appellant is exempted by statute or these rules or the Tennessee Rules of Civil Procedure, or has established indigency in accordance with Rule 18 and been permitted to proceed on appeal as an indigent person, the appellant shall pay to the clerk of the appellate court all applicable fees established by order or rule of the Supreme Court. Contemporaneous with the filing of appellant's notice of appeal or other initiating document, appellant shall (1) pay all applicable litigation taxes and all applicable fees required by the clerk of the appellate court, (2) establish to the satisfaction of the clerk of the appellate court the basis for an exemption, or (3) apply for, or establish proof of, indigency in accordance with Rule 18. If the appellant fails to pay the applicable litigation taxes or fees or to establish indigency or an appropriate exemption, the appellate court may issue an order requiring the appellant to show cause why the appeal should not be dismissed for failure to pay the applicable litigation taxes or fees. ~~or has filed a bond for a stay that includes security for the payment of costs on appeal, in civil actions a bond for costs on appeal shall be filed by the appellant in the trial court with the notice of appeal. The trial court shall notify the Appellate Court Clerk of a party's failure to file a bond with the notice of appeal. The appellate court may issue a show cause order as to why the appeal should not be dismissed for failure to file a bond. A bond for costs on appeal shall have sufficient surety, and it~~

~~shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed or the payment of such costs as the appellate court may direct if judgment is modified. In order to ensure that a surety is sufficient, the appellate court clerk may require the surety to provide proof that the surety has sufficient assets in the State of Tennessee to pay the costs of the appeal. If the appellate court clerk determines that the surety is not sufficient, the appellate court clerk may reject the bond for costs. The surety may appeal the decision of the appellate court clerk to the appellate court by filing a motion to approve the bond for costs within 10 days of the decision of the appellate court clerk. After a bond for costs on appeal is filed, an appellee may raise on motion for determination by the trial court objections to the form of the bond and/or the sufficiency of the surety. The provisions of Tennessee Rule of Civil Procedure 65A, regarding other forms of security and sureties, apply to a bond given under this rule.~~

(b) ~~Unless an appellant is exempted by statute or has filed an affidavit of indigency and been permitted to proceed on appeal as an indigent person, the appellant shall pay to the clerk of the appellate court all applicable litigation taxes upon receipt of the notice of docketing of the appeal pursuant to Rule 5(c). If the appellant fails to pay the litigation tax, the appellate court may issue an order requiring the appellant to show cause why the appeal should not be dismissed for failure to pay the litigation tax.~~ [Reserved.]

(c) Any party wanting to litigate appellate issues despite dismissal of the original appellant's appeal shall comply with the requirements of this rule for payment of applicable fees and/or taxes as required by the clerk of the appellate court.~~file with the appellate court clerk a cost bond with sufficient surety to replace the cost bond filed by the original appellant. Filing of~~

~~the replacement cost bond shall relieve the original appellant and surety of further obligations under the original cost bond~~.

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 4 is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivisions (a) and (c) of this rule are amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (b) is deleted due to subdivision (a) being amended to address the payment of litigation taxes, which was previously addressed in subdivision (b). The amendment to Rule 6 requiring the payment of all applicable appellate fees to the clerk of the appellate court is not meant to address any additional statutory fees that might be due to the trial court clerk for preparation of the record on appeal or that are otherwise due to the trial court clerk.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 9

INTERLOCUTORY APPEAL BY PERMISSION FROM THE TRIAL COURT

[Amend subdivisions (c) and (d) as indicated below; the other subdivisions of the rule are unchanged:]

* * * *

(c) How Sought in Appellate Court; Clerk's Fees~~Cost Bond~~. — The appeal is sought by filing an application for permission to appeal with the clerk of the appellate court within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers.

Applicable fees, taxes, or documentation~~A bond for costs as~~ required by Rule 6 shall be ~~filed~~ submitted with the application. An appeal from the denial of an application for interlocutory appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in Rule 11, with the exception that the application shall be filed within 30 days of the filing date of the intermediate appellate court's order; the application shall be entitled "Application for Permission to Appeal from Denial of Rule 9 Application."

(d) Content of Application; Answer. ─ The application shall contain: (1) a statement of the questions presented for review; (2) a statement of the facts necessary to an understanding of why an appeal by permission lies, with appropriate references to the documents contained in the

appendix to the application; and (3) a statement of the reasons supporting an immediate appeal. A statement of reasons is sufficient if it simply incorporates by reference the trial court's reasons for its opinion that an appeal lies. The application shall be accompanied by an appendix containing copies of: (1) the order appealed from, (2) the trial court's statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal. Within 10 days after filing of the application, any other party may file an answer in opposition, with copies in the number required for the application, together with an appendix containing any additional parts of the record such party desires to have considered by the appellate court; any statement of facts in the answer shall contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. The answer shall be served on all other parties in the manner provided in Rule 20 for the service of papers. If available, the color of the cover of the application shall be blue, and the cover of the answer shall be red. The color of the cover of an answer filed by an amicus curiae shall be green. The application and answer shall be submitted without oral argument unless otherwise ordered.

* * * *

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (c) of this rule is amended to reflect that fees are to be submitted with the application, rather than secured under the former procedure of filing a cost bond.

Rule 9(d) is amended to require that the statement of the facts in the application contain appropriate references to the documents contained in the appendix to the application. Subdivision (d) also is amended to require that any statement of facts in an answer to the application contain appropriate references to the documents contained in the appendix to the

application or the appendix to the answer. These requirements are intended to facilitate the appellate court's efficient review of the application for an interlocutory appeal by permission from the trial court.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 10

EXTRAORDINARY APPEAL BY PERMISSION ON ORIGINAL APPLICATION IN THE APPELLATE COURT

[Amend subdivisions (b), (c), and (d) as indicated below; the other subdivisions of the rule are unchanged:]

* * * *

(b) How Sought; Clerk's Fees ~~Cost Bond~~. — An extraordinary appeal is sought by filing an application for an extraordinary appeal with the clerk of the appellate court. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. Unless necessity requires otherwise, the application shall be served on all other parties in the manner provided in Rule 20 for the service of papers. The appeal shall be docketed in accordance with Rule 5(c) upon the filing of the application with the clerk of the appellate court. An appeal from the denial of an application for extraordinary appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in this rule within 30 days of the filing date of the intermediate appellate court's order. Applicable fees, taxes, or documentation~~A bond for costs as~~ required by Rule 6 shall be ~~filed~~ submitted with the application.

(c) Content of Application. — The application shall contain: (1) a statement of the questions presented for review; (2) a statement of the facts necessary to an understanding of why an extraordinary appeal lies, with appropriate references to the documents contained in the appendix to the application; (3) a statement of the reasons supporting an extraordinary appeal,

and (4) the relief sought. The application shall be accompanied by an appendix containing copies of any order or opinion relevant to the questions presented in the application ~~or~~ and any other parts of the record necessary for determination of the application. The application may also be supported by affidavits or other relevant documents, which also shall be contained in the appendix. The application to the Supreme Court shall include the application filed in the intermediate appellate court and a copy of the intermediate appellate court's order.

(d) Subsequent Procedure. ― If the appellate court is of the opinion that an extraordinary appeal should not be granted, it shall deny the application. Otherwise, the appellate court shall order that an answer to the application be filed by the other parties within the time fixed by the order. The order shall be served on all other parties and if the application has not previously been served shall have attached thereto a copy of the application. Such answers shall be accompanied by an appendix containing any additional parts of the record the answering party desires to have considered by the appellate court; any statement of facts in the answer shall contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. After the answer is filed, the appellate court shall either grant or deny the application. If the application is granted, the trial court clerk must file the record on appeal within 30 days from the date of entry of the order granting permission to appeal or within such other period as the appellate court may direct. The appellate court shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument, if oral argument is granted.

* * * *

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (b) of this rule is amended to reflect that fees are to be submitted with the application, rather than secured under the former procedure of filing a cost bond.

Rule 10(c) is amended to require that the statement of the facts in the application contain appropriate references to the documents contained in the appendix to the application. Rule 10(d) is amended to require that, in the event the appellate court orders the filing of an answer to the application, the answer be accompanied by an appendix containing any additional parts of the record the answering party desires to have considered by the appellate court; subdivision (d) also is amended to require that any statement of facts in the answer contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. These requirements are intended to facilitate the appellate court's efficient review of the application for an extraordinary appeal on original application in the appellate court.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 11

APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT

[Amend subdivisions (b), (d), and (h) as indicated below; the other subdivisions of the rule are unchanged:]

* * * *

(b) Time; Content. ― The application for permission to appeal shall be filed with the clerk of the Supreme Court within 60 days after the entry of the judgment of the Court of Appeals or Court of Criminal Appeals if no timely petition for rehearing is filed, or, if a timely petition for rehearing is filed, within 60 days after the denial of the petition or entry of the judgment on rehearing. Except for an application seeking to appeal the Court of Criminal Appeals' disposition of an appeal pursuant to Rule 9 or Rule 10, the time period for filing an application for permission to appeal is not jurisdictional in a case arising from the Court of Criminal Appeals and may be waived by the Supreme Court in the interest of justice. The application shall contain a statement of: (1) the date on which the judgment was entered and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or the date of entry of the judgment on rehearing; (2) the questions presented for review and, for each question presented, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues); (3) the facts relevant to the questions presented, with appropriate references to the record, but facts correctly stated in the opinion of the intermediate appellate court need not be

restated in the application; and (4) the reasons, including appropriate authorities, supporting review by the Supreme Court. Except by order of the Supreme Court, the argument in an application for permission to appeal shall not exceed 50 pages. The brief of the appellant referred to in subdivision (f) of this rule may be served and filed with the application for permission to appeal. A copy of the opinion of the appellate court shall be appended to the application.

(c) * * * *

(d) Answer; Reply. ─ Within 15 days after filing of the application, any other party may file an answer in opposition, with copies in the number required for the application. An answer shall set forth the reasons why the application should not be granted and any other matters considered necessary for correction of the application. Additional facts stated in the answer shall contain appropriate references to the record. Except by order of the Supreme Court, the argument in an answer in opposition shall not exceed 25 pages. The answer shall be served on all other parties in the manner provided in Rule 20 for the filing of papers. No reply to the answer shall be filed.

* * * *

(h) [Reserved.] ~~Grant of Permission; Cost Bond. In civil cases, if application for permission to appeal is made by the appellee in the Court of Appeals and there is no appeal bond for costs with sufficient surety filed by the appealing party in the Court below, the appealing party must file an appeal bond for costs with sufficient surety in the amount of $1000. If this amount is deemed insufficient to cover the costs on appeal the Court may require an additional bond in an amount the Court deems sufficient to cover the cost of appeal. If application for permission to appeal is made by the appellant in the Court of Appeals and the appeal bond is~~

~~insufficient to cover the cost of appeal, the Court may require the appealing party to file an additional bond in an amount the Court deems sufficient to cover the cost of appeal.~~

Advisory Commission Comment [2017]

Rule 11(b) and (d) are amended to require that the statement of facts in the application, and any additional facts stated in an answer to the application, contain appropriate references to the record. These requirements are intended to facilitate the appellate court's efficient review of the application for an appeal by permission from the appellate court to the Supreme Court.

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances, rather than secured under the former procedure of filing a cost bond. Subdivision (h) of this rule, which addressed the posting of bonds under certain circumstances, is deleted as unnecessary in light of the amendment to Rule 6.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 12

DIRECT REVIEW OF ADMINISTRATIVE PROCEEDINGS
BY THE COURT OF APPEALS

[Amend the rule as indicated below; the other subdivisions of the rule are unchanged:]

I.

For those agencies which are subject to the Tennessee Uniform Administrative Procedures Act and from which appeals are taken directly to the Court of Appeals, the procedure upon review shall be as follows:

(a) Any person who is aggrieved by a final decision in a contested case may seek judicial review by filing a petition for review with the clerk of the Court of Appeals within 60 days after entry of the administrative order appealed from. The agency shall be named respondent.

(b) The petition shall specify the party seeking review, designate the order to be reviewed, and briefly describe the issues which the petitioner intends to raise. If two or more persons are entitled to petition for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition and proceed as a single petitioner.

(c) The petition shall be accompanied by any applicable fees, taxes, or documentation ~~an appropriate bond as provided in~~ required by Rule 6.

* * * *

II.

For all other agencies from which appeals are taken directly to the Court of Appeals, the procedure upon review shall be as follows:

(a) Petition for Review. — Review is instituted by filing a petition for review with the clerk of the Court of Appeals within thirty days after the date of entry of the administrative order appealed from. The petition for review shall specify the party or parties seeking review and shall designate the respondent and the order to be reviewed. The agency and all other parties of record shall be named as respondents. The petition for review filed with the clerk of the Court of Appeals shall be accompanied by petitioner's or petitioner's counsel's address, a list of the names and addresses of the parties or counsel upon whom service is required, and any applicable fees, taxes, or documentation ~~an appropriate bond as~~ required by~~in~~ Rule 6. The clerk of the Court of Appeals shall docket the proceeding and serve notice of the docketing as provided in Rule 5(c).

* * * *

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case except under limited circumstances. Subdivision (c) of section I of Rule 12 and subdivision (a) of section II of Rule 12 are amended to reflect that any applicable fees and taxes are to be submitted with the petition, rather than the former procedure of filing a cost bond.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 20A

FACSIMILE FILING OF PAPERS

[Amend subdivisions (b)(4) and (b)(6), and also the Uniform Facsimile Filing Cover Sheet, as indicated below; the other subdivisions of the rule are unchanged:]

* * * *

(b) Filing Procedures. ─

* * * *

(4) Only the following documents may be filed in an appellate court by facsimile transmission:

(*a*) ~~copy of notice of appeal served on the appellate court clerk by the trial court clerk~~ [Reserved];

* * * *

(6) No facsimile filing shall exceed ~~ten (10)~~ fifty (50) pages in length, including the cover sheet, unless authorized by the court. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation. All documents filed by facsimile transmission shall comply with all applicable rules of court, including, without limitation, rules governing the content and form of the papers, and the service of all papers.

(7) * * * *

Advisory Commission Comment [2017]

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 4 is amended

to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivision (b)(4)(a) of this rule is no longer necessary due to the amendment to Rule 4.

Rule 20A(b)(6) is amended to increase the page limit for facsimile filings from ten (10) to fifty (50).

TENNESSEE COURTS
UNIFORM FACSIMILE FILING COVER SHEET

TO (COURT CLERK): _____

WITH (COURT): _____

CLERK'S FAX NUMBER: _____

CASE NAME: _____

DOCKET NUMBER: _____

TITLE OF DOCUMENT: _____

FROM (SENDER): _____

SENDER'S ADDRESS: _____

_____

SENDER'S VOICE TELEPHONE NUMBER: _____

SENDER'S FAX TELEPHONE NUMBER: _____

DATE: _____ TOTAL PAGES, INCLUDING COVER PAGE: _____

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ~~ten (10)~~fifty (50) pages, including the cover page, shall not be filed by the clerk.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 25

COMPLETION AND TRANSMISSION OF THE RECORD

[Amend the first sentence of subdivision (a) as indicated below; the remainder of subdivision (a) and the other subdivisions of the rule are unchanged:]

(a) Time for Completion of the Record; Duty of the Parties. — The record on appeal shall be assembled, numbered and completed by the clerk of the trial court within 45 days after filing of the transcript or statement prepared in accordance with Rule 24(b) or 24(c) or, if no transcript or statement is to be filed, within 45 days after filing of appellant's notice under Rule 24(d) that no transcript or statement is to be filed, unless the time is extended by an order entered under subdivision (d) of this rule ~~or if proof of service of the notice of appeal has not been filed~~. * * * *

Advisory Commission Comment [2017]

The first sentence of subdivision (a) of this rule is amended by deleting the following obsolete text, formerly at the end of that sentence: "or if proof of service of the notice of appeal has not been filed[.]"

APPENDIX A: FORMS

Form 1

[Amend footnote 1 as indicated below:]

NOTICE OF APPEAL[1]

In the _____ Court for _____ County, Tennessee

No. _____

A. B., Plaintiff	)	
	)	
v.	)	Notice of Appeal
	)	
C. D., Defendant	)	

Notice is hereby given that C. D., defendant above named, hereby appeals to the (Supreme Court of Tennessee or Court of Appeals or Court of Criminal Appeals) from the final judgment entered in this action on the _____ day of _____, 20___.

/s/_____

_____
(Address)

Counsel for C. D.

[1] The ~~copy of the~~ notice of appeal filed with the clerk of the appellate court should include a list of the parties upon whom service of notice of docketing of the appeal is required by Rule 5 of these rules.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 4

PROCESS

[Amend subdivisions 4.04(10) and 4.05(5), and add a new 4.05(6), as indicated below; the other subdivisions of the rule are unchanged:]

4.04. Service Upon Defendants Within The State. —

* * * *

(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 either: (a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11). 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) * * * *

4.05. Service Upon Defendant Outside This State. —

* * * *

(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.~~

(6) Service by mail shall not be the basis for the entry of a judgment by default unless the record contains either: (a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.05 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.05(5).

* * * *

Advisory Commission Comment [2017]

4.04(10) and 4.05. Rules 4.04(10) and 4.05 are amended to clarify the circumstances under which the plaintiff may obtain a default judgment when the defendant was served by mail.

Under amended Rule 4.04(10) and new Rule 4.05(6), service by mail can be the basis for entry of a default judgment if the record contains either: a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04(10), Rule 4.05(5), or statute; or a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11) or 4.05(5).

It should be noted that Rules 4.04(11) and 4.05(5) were amended in 2016 by deleting a former sentence in each rule which stated, in summary, that the United States Postal Service's notation on a return receipt that a properly addressed registered or certified letter was "unclaimed," or other similar notation, was sufficient evidence of the defendant's refusal to accept delivery. Thus, the Postal Service's notation that a registered or certified letter is "unclaimed" is no longer sufficient, by itself, to prove that service was "refused."

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 5A

FACSIMILE FILING OF PAPERS

[Amend subdivision 5A.02(5) and the Uniform Facsimile Filing Cover Sheet as indicated below; the other subdivisions of the rule are unchanged:]

* * * *

5A.02. Filing Procedures. — (1) * * * *

(5) No facsimile filing shall exceed ~~ten (10)~~ fifty (50) pages in length, including the cover sheet, unless authorized by the court; absent such authorization, a facsimile transmission exceeding ~~ten (10)~~ fifty (50) pages, including the cover sheet, shall not be filed by the clerk. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation. All documents filed by facsimile transmission shall comply with all applicable rules of court, including, without limitation, rules governing the content and form of pleadings and other papers; the signing of pleadings, motions and other papers; and the service of all papers.

(6) * * * *

Advisory Commission Comment [2017]

Rule 5A.02(5) is amended to increase the page limit for facsimile filings from ten (10) to fifty (50).

TENNESSEE COURTS
UNIFORM FACSIMILE FILING COVER SHEET

TO (COURT CLERK): _____

WITH (COURT): _____

CLERK'S FAX NUMBER: _____

CASE NAME: _____

DOCKET NUMBER: _____

TITLE OF DOCUMENT: _____

FROM (SENDER): _____

SENDER'S ADDRESS: _____

_____

SENDER'S VOICE TELEPHONE NUMBER: _____

SENDER'S FAX TELEPHONE NUMBER: _____

DATE: _____ TOTAL PAGES, INCLUDING COVER PAGE: _____

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ~~ten (10)~~fifty (50) pages, including the cover page, shall not be filed by the clerk.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 60

RELIEF FROM JUDGMENTS OR ORDERS

[Add the new Advisory Commission Comment for Rule 60.02, as set out below; the text of the rule is unchanged:]

* * * *

Advisory Commission Comment [2017]

60.02. Rule 60.02 provides that a motion filed pursuant to the Rule "shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken." The Supreme Court, however, has held that "the reasonable time filing requirement of Rule 60.02 does not apply to petitions seeking relief from void judgments under Rule 60.02(3)." *Turner v. Turner*, 473 S.W.3d 257, 260 (Tenn. 2015). But the Court went on to also hold in *Turner* that relief from a void judgment should nevertheless be denied "if the following exceptional circumstances exist: '(1) [t]he party seeking relief, after having had actual notice of the judgment, manifested an intention to treat the judgment as valid; and (2) [g]ranting the relief would impair another person's substantial interest of reliance on the judgment.' Restatement (Second) of Judgments § 66 (1982)." *Id.*

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 36

CLERICAL MISTAKES

[Amend the rule as indicated below:]

After giving any notice it considers appropriate, the court may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission. Upon filing of the corrected judgment or order, or upon the court's denial 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 Comment [2017]

The rule is amended to provide that an appeal as of right is available following the trial court's *denial* of a motion filed pursuant to Tenn. R. Crim. P. 36, in addition to cases in which the trial court files a corrected judgment or order. Although Tenn. R. App. P. 3 was amended in 2012 to accomplish this result, the text of Tenn. R. Crim. P. 36 was not changed at that time; additionally, the 2012 Advisory Commission Comment to Tenn. R. App. P. 3(b) and (c) failed to convey the intent behind the 2012 amendment to Tenn. R. App. P. 3. As a result, amended Tenn. R. App. P. 3(b) and (c) were not consistent with the text of Tenn. R. Crim. P. 36. Construing the text of both rules, the Court of Criminal Appeals held that an appeal as of right still was not available in cases in which the trial court denied a Tenn. R. Crim. P. 36 motion, notwithstanding the 2012 amendment to Tenn. R. App. P. 3(b) and (c). *See, e.g.*, *State v. Ross*, No. E2014-02563-CCA-R3-CD, 2015 WL 7567285, at *6 (Tenn. Crim. App. Nov. 24, 2015), *appeal denied, not for citation* (Tenn. Apr. 6, 2016) (stating that "[t]his court has repeatedly held that Tennessee Rule of Appellate Procedure 3(b) provides no appeal as of right from the *denial* of a Rule 36 motion, and this court lacks jurisdiction to entertain such an appeal" and that "[t]his outcome is not changed by any of the recent amendments to Rules 36 and 3(b)") (emphasis in original). This 2017 amendment resolves the inconsistency between the two rules and makes it clear that an appeal as of right is available regardless of whether the trial court grants or denies a Tenn. R. Crim. P. 36 motion.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 49.1

FACSIMILE FILING OF PAPERS

[Amend subdivision (c)(3) and the Uniform Facsimile Filing Cover Sheet as indicated below; the other subdivisions of the rule are unchanged:]

* * * *

(c) REQUIREMENTS FOR FACSIMILE FILED DOCUMENTS. —

(1) * * * *

(3) LENGTH. — No facsimile filing shall exceed ~~ten (10)~~ fifty (50) pages in length, including the cover sheet, unless authorized by the court; absent such authorization, a facsimile transmission exceeding ~~ten (10)~~ fifty (50) pages, including the cover sheet, shall not be filed by the clerk. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation.

(4) * * * *

Advisory Commission Comment [2017]

Rule 49.1(c)(3) is amended to increase the page limit for facsimile filings from ten (10) to fifty (50).

TENNESSEE COURTS
UNIFORM FACSIMILE FILING COVER SHEET

TO (COURT CLERK): _____

WITH (COURT): _____

CLERK'S FAX NUMBER: _____

CASE NAME: _____

DOCKET NUMBER: _____

TITLE OF DOCUMENT: _____

FROM (SENDER): _____

SENDER'S ADDRESS: _____

_____

SENDER'S VOICE TELEPHONE NUMBER: _____

SENDER'S FAX TELEPHONE NUMBER: _____

DATE: _____ TOTAL PAGES, INCLUDING COVER PAGE: _____

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ~~ten (10)~~fifty (50) pages, including the cover page, shall not be filed by the clerk.

APPENDIX II

PROPOSED AMENDMENTS TO THE TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 108. INJUNCTIVE RELIEF.

[Amend Rule 108 and the original Advisory Commission Comment to read as follows (new text underlined; deleted text stricken):]

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

(8) If the request for an ex parte restraining order is brought against a parent of a child and the relief requested would interfere with the parent's constitutional right to have care and control of the child, the court shall proceed with a preliminary hearing within 72 hours of entry of the ex parte order, pursuant to Rule 302, rather than the 15 day timeframe prescribed above.

(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)).

~~If the request for an ex parte restraining order is brought against a parent of a child and the relief requested would interfere with the parent's constitutional right to have care and control of the child, the court should proceed with a preliminary hearing within 72 hours, pursuant to Rule 302, rather than the 15 day timeframe prescribed in subdivision (c)(7) above.~~

~~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.

Advisory Commission Comments [2017].

The rule is amended by deleting subdivision 108(a)(1)(D), which referred to no contact orders pursuant to T.C.A. § 37-1-152. Also, the last paragraph of the original Advisory Commission comment is deleted. These changes were necessary due to an amendment to T.C.A. § 37-1-152.

The rule is also amended by deleting a paragraph in the original Advisory Commission Comments and adding the substance of that paragraph as the new subdivision (c)(8) of the rule.

RULE 109. ORDERS FOR THE ATTACHMENT OF CHILDREN.

[Amend Rule 109 and the original Advisory Commission Comment to read as follows (new text underlined; deleted text stricken)]:

(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), 117(b), and 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.

Advisory Commission Comments [2017].

The rule is amended by adding this 2017 Advisory Commission Comments as further explanation. Additionally, the fourth paragraph of the original Advisory Commission Comment is amended by changing two references to T.C.A. § 37-1-128(b) to T.C.A. § 37-1-117(b), in light of the amendments to the statutes.

An attachment is distinguished from an order for the removal of custody or order of detention, in that it addresses only the physical taking of the person of the child, under terms specified by the court, for the purposes specified in this rule. An attachment may accompany an order of removal

of custody, order of detention, or other order, if necessary to accomplish the taking of child's person, but will not be necessitated in every case, as where the child is already in the physical custody of the intended entity.

If the probable cause determination in subdivision (a) is based on a written affidavit reciting the facts, it may be sworn to in person or by audio-visual 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).

RULE 201. PRELIMINARY INQUIRY AND INFORMAL ADJUSTMENT.

[Amend Rule 201 and the original Advisory Commission Comment to read as follows (new text underlined; deleted text stricken):]

(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~~ 37-1-168. 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)(l)(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, i~~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.

Advisory Commission Comments [2017].

The rule is amended by deleting the last sentence of subdivision 201(d)(3). That sentence (which provided, "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") was intended to have been deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016, but was inadvertently included in the revision.

Additionally, the fifth paragraph of the original Advisory Commission Comment is amended by deleting references to subdivision 201(d)(3), which also should have been removed in the comprehensive revision of the Rules of Juvenile Procedure

RULE 202. PRETRIAL DIVERSION.

[Amend Rule 202 and the original Advisory Commission Comment to read as follows (new text underlined; deleted text stricken):]

(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~~ Modification. ~~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.

Advisory Commission Comments [2017].

The rule is amended by deleting the first sentence of subdivision 202(d) and changing the title to "Modification." That sentence (which provided, "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") was intended to have been deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016, but was inadvertently included in the revision.

Additionally, the last sentence of the first paragraph of the original Advisory Commission Comment is deleted, because it also should have been removed in the comprehensive revision of the Rules of Juvenile Procedure.

RULE 203. PROCEDURES UPON TAKING A DELINQUENT CHILD INTO CUSTODY.

[Amend Rule 203 to read as follows (new text underlined; deleted text stricken):]

(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. If the required findings are made and the child remains in secure detention, a detention hearing must be held within the timeframes outlined in subdivision (b)(2). "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 as soon as possible prior to the detention hearing 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 remains 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 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)(l) 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.

Advisory Commission Comments [2017].

A new sentence (which reads, "If the required findings are made and the child remains in secure detention, a detention hearing must be held within the timeframes outlined in subdivision

(b)(2)") is added to subdivision (b)(1) to provide further clarification that a detention hearing must be held even though the required 48-hour probable cause findings are made.

RULE 208. TRANSFER TO CRIMINAL COURT.

[Amend Rule 208 and the original Advisory Commission Comment to read as follows (new text underlined; deleted text stricken):]

(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~~is probable cause 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)(l) 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.

Advisory Commission Comments [2017].

Subdivision (b)(4) is amended to substitute the term "probable cause" for the term "reasonable grounds" because T.C.A. § 37-1-134 was amended to use the term "probable cause."

RULE 210. ADJUDICATORY HEARINGS.

[Amend the original Advisory Commission Comment of Rule 210 to read as follows (new text underlined; deleted text stricken):]

Advisory Commission Comments.

It is the Commission's intent that the court considers 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.

Advisory Commission Comments [2017].

The last sentence of the third paragraph of the Advisory Commission Comments rule is deleted. That sentence (which provided "See the Appendix to these rules regarding Valid Court Orders") should have been deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016, because the appendix to which it referred was deleted at that time.

RULE 211. DISPOSITIONAL HEARINGS.

[Amend the original Advisory Commission Comment of Rule 211 to read as follows (new text underlined; deleted text stricken):]

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.

Advisory Commission Comments [2017].

The third paragraph of the Advisory Commission Comments is amended by deleting a reference to the appendix that was deleted in the comprehensive revision of the Rules of Juvenile Procedure, effective July 1, 2016.

RULE 302. PROCEDURES UPON TAKING CHILD INTO CUSTODY.

[Amend the original Advisory Commission Comment to Rule 302 to read as follows (new text underlined; deleted text stricken):]

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)~~117(b) 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)~~117(b), 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 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).

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. M 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).

Advisory Commission Comments]2017].

The first paragraph of the original Advisory Commission Comment is amended by changing two references to T.C.A. § 37-1-128(b) to T.C.A. § 37-1-117(b), in light of the amendments to the statutes.