

COURT OF APPEALS

STATE OF TENNESSEE
WESTERN SECTION

PRESIDING JUDGE
J. STEVEN STAFFORD

ASSOCIATE JUDGES
ARNOLD B. GOLDIN
BRANDON O. GIBSON
KENNY W. ARMSTRONG

NANCY ACRED
CHIEF DEPUTY CLERK
SUPREME COURT BUILDING
P.O. BOX 909
JACKSON, TENNESSEE 38302

October 30, 2014

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

Re: Rule 4(H)
Docket # ADM2014-02118

Dear Mr. Hivner:

I have reviewed the Supreme Court's proposed revision to Rule 4(H)(1) of the Rules of the Tennessee Supreme Court. I believe the proposed revision is a welcome change. However, I do want to bring a potential issue to your attention. While most attorneys have unfettered access to Lexis and/or Westlaw, many pro se litigants do not. Pro se litigants, especially those who are incarcerated, may not even have Internet access. Additionally some attorneys may have a very limited database access and may not be able to access unpublished opinions outside of Tennessee.

Therefore, I propose that the amendment include a provision that either (a) does not require unpublished opinions be provided to the Court but does require those unpublished opinions be provided to all other parties; or (b) requires the party citing the unpublished opinion to provide a copy of the opinion to a party or party's counsel within five (5) days of a request from such party or party's counsel.

Sincerely,

A handwritten signature in cursive script that reads "Brandon O. Gibson".

Brandon O. Gibson

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

IN RE: PETITION TO AMEND RULE 4(H), RULES OF THE TENNESSEE SUPREME
COURT

2014 DEC 12 AM 11:16
APPELLATE COURT CLERK
NASHVILLE

No. ADM2014-02118 – Filed: October 28, 2014

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Tennessee Supreme Court's request for comment on a the proposed change to Rule 4(H) of the Tennessee Rules of the Supreme Court, the Executive Committee of the Tennessee District Public Defenders Conference wishes to express its support to a majority of the proposed change. In addition, the Executive Committee seeks to propose amendments to the proposed rule to address additional circumstances in which the Executive Committee believes the fairness to all parties may not be met.

I. SUPPORT FOR THE AMENDMENT OF RULE 4(H) AS IT PERTAINS TO APPELLATE LEVEL CASES

The Executive Committee of the Tennessee District Public Defenders Conference wishes to express its support of the proposed amendment to Rule 4(H) of the Rules of the Tennessee Supreme Court. The Conference believes the change proposed by the Court will lessen the workload of practitioners, their staff, and the clerks in Tennessee. The current practice of attaching physical copies of unpublished opinions often turns otherwise short briefs into behemoths. The change would save time and money for the parties and the court in such proceedings. However, the Executive Committee seeks two amendments to the proposal to address potential "pitfalls" in its application.

II. RECOMMENDATION FOR PRO SE LITIGANTS

For pro se litigants, or those without access to computer research, the Executive Committee of the District Public Defenders Conference endorses part (b) of the recommendation of Judge Gibson, of the Court of Appeals, Western Section.¹ Under this proposal the party citing the unpublished opinion is to provide a copy of the opinion to all other parties, or their counsel, within five (5) days upon request. The Executive Committee finds this to be an equitable solution in these circumstances.

III. RECOMMENDATION FOR TRIAL LEVEL PROCEEDINGS

To further expand on the recommendation of Judge Gibson, the Executive Committee of the Tennessee District Public Defenders seeks to point out potential difficulties at trial or pre-trial proceedings that may arise by the proposed change of Rule 4(H).

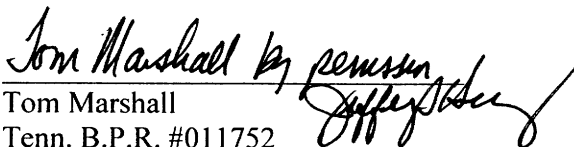
The proposed rule does not address the potential difficulties for a party when the opposing party files a brief or pleading with short notice, or the day of the court proceeding. This scenario potentially “blindsides” the opposing party, and could be addressed by a provision similar to that proposed for pro se litigants. Such a provision would require opposing parties to furnish physical copies of any unreported decisions, unless the citation to the unreported decision is filed in a pleading at least 10 days prior to any hearing.

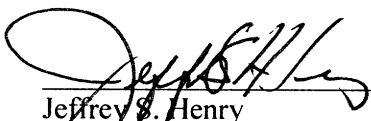
¹ See letter of Judge Gibson dated October 30, 2014 and received by the Clerk of Appellate Court on November 3, 2014.

In conclusion, the Executive Committee of the Tennessee District Public Defenders Conference reiterates its support of the change proposed by the Supreme Court of Tennessee in Order ADM2014-02118, and also requests that the Court consider the modifications suggested above.

Respectfully submitted,

Executive Committee of the Tennessee District Public
Defenders Conference

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2014 DEC 15 PM 2:58

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#ADM2014-02118

December 10, 2014

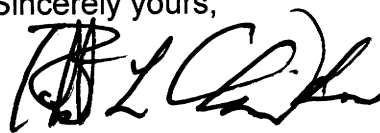
James Hivner, Clerk
Re: Rule 4(H)
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Dear Mr. Hivner:

I write to request the Tennessee Supreme Court not put forward the proposed amendments to Rule 4(H)(1) and (2). If a pleading or motion cites an unpublished opinion and the attorney has not attached a copy of the opinion, then I am required to stop reading the pleading, get on my computer, look up the case online, print a hard copy of the opinion, and then read the opinion. All of which takes additional time and slows down the decision-making process. If multiple unpublished opinions are cited, it adds to the time. Also, if I am not in my chambers, (on the bench or away from my office) I do not have access to a printer to print a hard copy of an unpublished appellate opinion. I suspect that this would also create a hardship on judges in multi-county judicial districts who do not have access to printers, when they are not in their home county.

I realize that the proposed amendment would still allow each Judicial District to require copies of unpublished opinions to be attached by local rule of court, however, my guess is that every Judicial District would adopt such a local rule for the reasons stated above. If that happens, I am not sure why there is a need at this juncture to change Rule 4(h). At some point in the future we may all become computer and internet savvy, and have the necessary hardware (printer's, etc) to be able to more readily access copies of unpublished opinions, but I do not believe we have reached that point yet. I respectfully suggest that it would be a much better use of judicial resources and time if the Rule continues to require attorneys to attach copies of unpublished opinions to their pleadings/motions. I strongly believe that changing Rule 4(H) at this point is premature and respectfully ask the Court to reconsider and not put forward the proposed amendment.

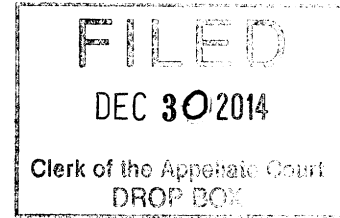
Sincerely yours,

A handwritten signature in black ink, appearing to read 'R. L. Childers', written in a cursive style.

Robert L. Childers

RLC:

cc: Circuit Court Judges, 30th Judicial District
Chancellors, 30th Judicial District



December 31, 2014

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Nashville, TN 37219

IN RE: RULE 4(H)
RULES OF THE TENNESSEE
SUPREME COURT
NO. ADM2014-02118

Dear James:

Attached please find an original and one copy of the Comment of the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

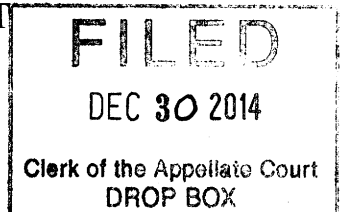
cc: Jonathan Steen, President, Tennessee Bar Association
Bob Parsley, Chair, Tennessee Bar Association Appellate
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Paul Ney, General Counsel
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(615) 383-7421 • (800) 899-6993
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**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**IN RE RULE 4(H)
RULES OF THE TENNESSEE SUPREME COURT**

No. ADM2014-02118



COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association (“TBA”), by and through its President, Jonathan O. Steen; Chair, TBA Appellate Practice Section, Robert (Bob) Parsley; General Counsel, Paul Ney; and Executive Director, Allan F. Ramsaur, files this comment in support of the proposed change with some clarification and modification of the proposed amendment to Tenn. Sup. Ct. R. 4(H).

BACKGROUND

On October 28, 2014, this court issued an order publishing for comment proposed amendments to Tenn. Sup. Ct. R. 4(H)(1) and (2). As is generally its practice, the TBA published the Rule for comment noting the TBA would solicit recommendations for comments and circulated the proposal to various affected sections including the TBA Appellate Practice Section. The Appellate Practice Section recommended support for the rule with some clarification and modification. The TBA Executive Committee adopted that recommendation and amplified some of the thoughts for clarification and modification.

THE TENN. SUP. CT. R. 4(H) SHOULD PERMIT THE CITATION OF UNPUBLISHED DECISIONS WITHOUT FILING A COPY OF THE DECISION WITH A COURT IF THE DECISION IS AVAILABLE FROM ELECTRONIC DATABASES INCLUDING WEST LAW, LEXIS, FASTCASE, CASE MAKER, TENNESSEE SUPREME COURT ADMINISTRATIVE OFFICES OF THE COURT WEBSITE, TENNESSEE BAR ASSOCIATION WEBSITE OR OTHER PUBLICLY AVAILABLE WEBSITES

The present rule requires a copy of the unpublished decisions be furnished to the court and all other parties. While Tennessee Appellate Courts may have access to both Westlaw and Lexis, at present not all members of the bar subscribe to both services because it is viewed as an unnecessary duplication of expense. Most Tennessee lawyers have long viewed as unnecessary the requirement to file copies of unpublished opinions. The TBA generally supports the proposed amendment.

The advent of electronic publishing of decisions has meant that there's a proliferation of sources including Tennessee-specific sources like the Tennessee Supreme Court (tsc.state.tn.us) site administered by the Administrative Offices of the Court and the Tennessee Bar Association (tba.org) site administered by the TBA which make available opinions before they are published with national services. In addition, various services have different timelines for making available decisions as they come out.

Because of the expense, there are many law firms who now subscribe to only one of the two major national databases. TBA members have access to the Fastcase national database. Other groups within the bar have access to other

national, regional, and other databases. All of these services are legitimate and should be listed in the rule as examples.

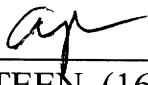
TENN. SUP. CT. R. 4(H) SHOULD PERMIT A PARTY WHICH DOES NOT HAVE ACCESS TO A SPECIFIC VERSION OF A CASE TO REQUEST A COPY

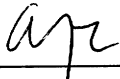
Recognizing in most situations counsel will have access to one of the electronic versions of unpublished opinions but also recognizing in *pro se* situations and some other circumstances that decisions might not be available from a specific database, the TBA recommends that the rule permit a party to request that a party citing an unpublished decision provide a copy but the copies not be required in every instance.

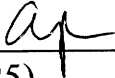
CONCLUSION


In order to facilitate the court's consideration of the TBA recommendations, the TBA presents, as an appendix, a redline version of the rule which would accomplish the clarification and modification called for by the TBA in this comment.

Respectfully Submitted,

By: /s/ by permission 
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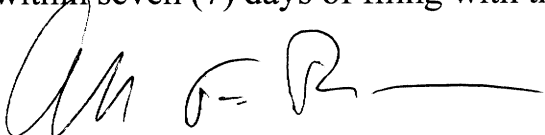
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.


Allan F. Ramsaur

APPENDIX

RULE 4: PUBLICATION OF OPINIONS — NOT FOR CITATION DESIGNATION — PRECEDENTIAL VALUE AND CITATION OF UNPUBLISHED OPINIONS.

- (A)(1) As used in this Rule, “publication” means publication in the official reporter (Southwestern Reporter 3d).
- (2) Unless explicitly designated “Not For Publication,” all opinions of the Tennessee Supreme Court shall be published in the official reporter. Concurring and dissenting opinions shall be published along with the majority opinion.
- (3) Opinions of the Special Workers' Compensation Appeals Panels shall not be published unless publication is ordered by a majority of the Supreme Court.
- (4) The Clerk of this Court will promptly file opinions of this Court. A copy of the opinions shall be provided to the Attorney General and Reporter upon filing.
- (B) No opinion of the Court of Appeals or Court of Criminal Appeals shall be published in the official reporter until after the time for filing an application for permission to appeal has expired.
- (C) If an application for permission to appeal is filed and granted, the opinion of the intermediate appellate court shall not be published in the official reporter, unless otherwise directed by the Tennessee Supreme Court.
- (D) If an application for permission to appeal is filed and denied, the opinion of the intermediate appellate court may be published in the official reporter in accordance with the rules of the intermediate appellate court if the opinion meets one or more of the following standards of publication:
- (i) the opinion establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a set of facts significantly different from those stated in other published opinions;
 - (ii) the opinion involves a legal issue of continuing public interest;
 - (iii) the opinion criticizes, with reasons given, an existing rule of law;
 - (iv) the opinion resolves an apparent conflict of authority, whether or not the earlier opinion or opinions are reported;
 - (v) the opinion updates, clarifies or distinguishes a principle of law; or
 - (vi) the opinion makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law. See Court of Appeals Rule 11(b) and Court of Criminal Appeals Rule 19.1(a).
- (E)(1) If an application for permission to appeal is hereafter denied by this Court with a “Not for Citation” designation, the opinion of the intermediate appellate court has no precedential value.
- (2) An opinion so designated shall not be published in any official reporter nor cited by any judge in any trial or appellate court decision, or by any litigant in any brief, or other material presented to any court, except when the opinion is the basis for a claim of res judicata, collateral estoppel, law of the case, or to establish a split of authority, or when the opinion is relevant to a criminal, post-conviction or habeas corpus action involving the same defendant.
- (3) From and after the effective date of this Rule, the precedential and citation value applicable to intermediate appellate court decisions designated “Not for Citation,” shall also apply to intermediate appellate court decisions which have previously been designated, “Denied, Concurring in Results Only” (DCRO), or “Denied, Not for Publication,” (DNP).
- (F) If no application for permission to appeal is filed, or if an application is filed but dismissed as untimely, publication of the intermediate appellate court opinion shall proceed in accordance with either Court of Appeals Rule 11 or Court of Criminal Appeals Rule 19.
- (G)(1) An unpublished opinion shall be considered controlling authority between the parties to the case when relevant under the doctrines of the law of the case, res judicata, collateral estoppel, or in a criminal, post-conviction, or habeas corpus action involving the same defendant. Unless designated “Not For Citation,” “DCRO” or “DNP” pursuant to subsection (F) of this Rule, unpublished opinions for all other purposes shall be considered persuasive authority. Unpublished opinions of the Special Workers' Compensation Appeals Panel shall likewise be considered persuasive authority.
- (2) Opinions reported in the official reporter, however, shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction.

(H)(1) If an unpublished opinion cited by a party is available from an internet-based electronic database, including for example, Westlaw, Lexis, Fastcase, Casemaker, tsc.state.tn.us, tba.org, the party is not required to furnish the court with a copy of the unpublished opinion. A court or party without access to the specific internet-based electronic database from which the unpublished opinion was derived may request, and the party citing shall provide, a copy of any unpublished opinion in a compatible format. A district may adopt a local rule requiring a party to furnish the court and other parties with a copy of unpublished opinions.

A copy of any unpublished opinion cited shall be furnished to the court and all parties by attaching it to the document in which it is cited.

(2) The citation of any unpublished decision relied upon by a party, as well as the title page of the copies and any citation to the of an unpublished decision shall contain a notation indicating whether or not an application for permission to appeal has been filed and, if filed, the date and disposition of the application. Where appropriate, the notation shall indicate that an application has been filed and is currently pending.

[As amended by order filed and effective November 1 and November 10, 1999. Amended by order filed December 13, 2006.]

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