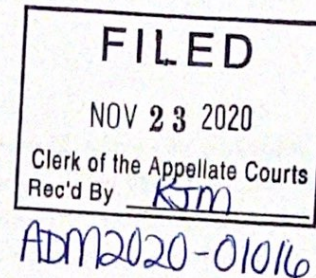
November 23, 2020



ADM2020-01016

The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 7th Avenue North
Nashville, TN 37219

IN RE: Amendments to the Tennessee Rules of Appellate and Civil Procedure
NO. ADM2020-01016

Dear Mr. Hivner:

The Tennessee Bar Association ("TBA") respectfully submits the following Comment to Supreme Court Order No. ADM2019-01016 regarding the proposed amendments to the Tennessee Rules of Appellate Procedure and Civil Procedure.

The TBA supports the proposed amendments except for the proposed amendments to the Tennessee Rule of Civil Procedure ("TRCP") 11.01 which would add email addresses to the required identification information attorneys must include on pleadings. The Executive Council of the TBA Creditors Practice Section opposes the proposed amendment, and the leadership of the TBA agrees. The TBA asks that the Court not adopt this proposed Amendment for the reasons set forth below.

While the TBA Creditors Practice Section is composed of attorneys who regularly represent creditors in debt collection litigation and, therefore, approaches the proposed change through a creditors' lens, the proposed amendment could affect almost any attorney seeking to collect personal, household, or family ("consumer") debts when such collections are not a part of his/her regular practice.

As the Court is aware, the Fair Debt Collection Practices Act ("FDCPA") strictly governs and restricts all communications between the consumer and the attorney seeking to collect the debt. It is a "strict liability" statute awarding statutory damages and attorneys' fees for violations. Among other things, the FDCPA prohibits attorneys regularly engaged in debt collection from communicating with unauthorized third parties about the debt being collected.

The TBA is greatly concerned about the unintended consequences of this amendment. Many of the defendants

in debt collection cases do not retain counsel. If attorneys are required to include email addresses on pleadings, they will be inviting unrepresented defendants to communicate with them by email. The FDCPA would apply to attorney responses to those emails. While communicating with other attorneys by email is not usually a problem because it is easy to verify that the email address being used belongs to the attorney, this is not the case for emails from otherwise unknown individuals. Consumer debt collection attorneys have strict procedures in place to verify the identity of people with whom they may be communicating by phone or letter to avoid FDCPA violations restricting communications to unauthorized third parties. However, when communicating by email, it is difficult if not almost impossible to ensure that the person we are communicating with is actually the defendant. It could be a friend or family member or some other third party (intermeddler) who may or may not be authorized to discuss the matter. If this amendment is adopted, attorneys in effect would either be forced to (a) communicate by email but not be able to verify the recipient, very likely resulting in unintended violations of the FDCPA by the attorney with significant consequences; or (b) decline to respond to the defendant's email, likely inhibiting or delaying resolution of the matter.

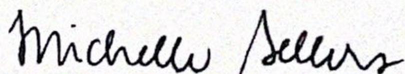
The TBA respectfully disagrees with the Advisory Commission's Comment, which says that "providing an email address...does not of itself signify consent to filing or service by email." Based on the experiences of our members with unrepresented defendants, inclusion of attorney email addresses will unquestionably often be interpreted as not only consent to communication by email, but an invitation to do so. An unrepresented consumer defendant will in all likelihood not understand the complexities of the Rules of Civil Procedure, and attorneys will be forced to deal with the repercussions.

As a practical matter, Rule 11.01 as currently written does not prohibit attorneys from including their email address on pleadings, and some do so voluntarily. At the very least, the inclusion of email addresses on pleadings should be encouraged, but voluntary on the part of the attorney. The TBA does not believe the Amendment to Rule 11.01 is necessary to accomplish the goal of facilitating communication between attorneys but will result in unintended consequences to attorneys in certain actions.

For the foregoing reasons, we ask the Court not to adopt the proposed Amendment to Rule 11.01 mandating inclusion of attorneys' email addresses in pleadings.

Thank you for your consideration. Please let us know if you have any questions.

Sincerely,



Michelle Greenway Sellers
TBA President

cc: Joycelyn A. Stevenson, TBA Executive Director
Berkley Schwarz, TBA Director of Public Policy & Government Affairs
TBA Executive Committee
Service List

FILED
OCT 27 2020
Clerk of the Appellate Courts
Rec'd By ________

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO TENNESSEE RULES OF APPELLATE PROCEDURE AND CIVIL PROCEDURE

No. ADM2020-01016 – Filed: August 28, 2020

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the proposed amendment to Rule 9 of the Tennessee Rules of Appellate Procedure, the Executive Committee of the Tennessee District Public Defenders Conference ("Conference"), expresses its tentative support for the proposed amendment. In general, the Conference agrees that the appellate courts will be better equipped to address interlocutory appeals when the trial courts and parties clarify the basis and scope of the issues they wish to have reviewed under Rule 9. In that sense, the proposed amendment reflects what the Conference believes to be the best practice. Nevertheless, the Conference is concerned that the proposed rule, if adopted without further qualification, may deprive certain litigants of interlocutory review.

I. THE PROPOSED RULE PLACES THE ENTIRE REPONSIBILITY OF SPECIFYING THE ISSUE FOR REVIEW ON THE TRIAL COURT

The primary concern of the Conference is that the proposed Rule places the entire responsibility of specifying the issue or issues for review on the trial court. This has a few potential problems. First, it deprives the party seeking review of the opportunity to define the issue for itself. Under the current Rule, the party seeking review is able, via its applications in both the trial court and the appellate court, to define the precise question it would like the appellate court to consider. But under the proposed Rule, the trial court would effectively take over this

responsibility. Though many trial courts will likely handle this task appropriately, the Conference is concerned that some trial courts may, perhaps unintentionally, incorrectly identify or define the issue being certified for appellate review. And if that happens, the party seeking review may be deprived, through no fault of its own, of an otherwise appropriate interlocutory appeal.

Second, the proposed rule raises the concern that, at least in the criminal context, the appellate court will treat the requirement of issue certification much as it does certified questions under Rule 37 of the Tennessee Rule of Criminal Procedure. Under current law, appellants seeking review of a certified question as part of a guilty plea must painstakingly craft the question in a manner that satisfies the requirements set out in *State v. Preston,* 759 S.W.2d 647 (Tenn. 1988). The Court of Criminal Appeals has observed that these requirements have "become more of a trap than serving its intended purpose." *State v. Ogle,* 2001 WL 38755 (Tenn. Crim. App. Jan. 17, 2001).

The Conference is concerned that, if adopted, the new Rule may become a similar "trap." Particularly if, as discussed above, the trial court is tasked with certifying the question for interlocutory review, the Conference is concerned that otherwise meritorious appeals will be rejected because the Rule 9 Order fails to specify, or appropriately define, the question presented.

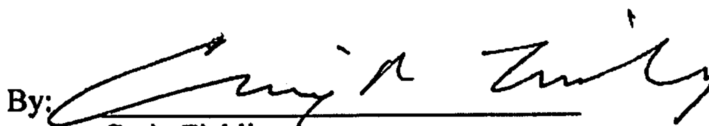
II. CONCLUSION

The Conference agrees that the interests of both the courts and the parties are best served when the issues subject to interlocutory review are made clear in the trial court before the appellate process begins. The Conference only asks that the proposed Rule be clarified to ensure that, if adopted, the new Rule does not become a "trap" that deprives its clients of appellate review. To that end, the Conference first suggests that the proposed Rule be modified to reflect that the

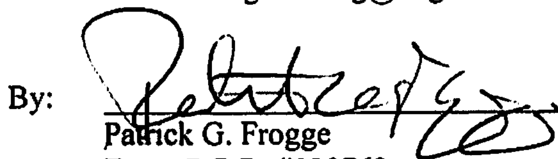
appealing party retains the ability to define the issue it wishes to have reviewed. While the trial court should certainly be permitted to express its views on the issue to be reviewed, its written order should not be treated as a limitation on the appealing party. Second, the proposed rule should be clarified to reflect that, unlike certified questions under Tenn. R. Crim. P. 37, questions certified for review under Rule 9 should be read broadly to facilitate review.

Respectfully submitted,

Tennessee District Public Defenders Conference

By: 

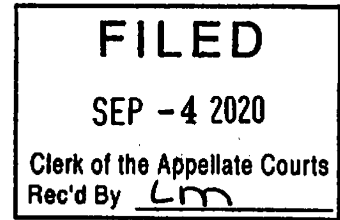
Craig Fickling
Tenn. B.P.R. #014845
President
618 Church Street, Suite 300
Nashville, TN, 37219
Phone: 615-741-5562
Fax: 615-741-5568
Email: craig.fickling@tn.gov

By: 

Patrick G. Frogge
Tenn. B.P.R. #020763
Executive Director
618 Church Street, Suite 300
Nashville, TN, 37219
Phone: 615-741-5562
Fax: 615-741-5568
Email: patrick.frogge@tn.gov

Kim Meador - Amend Rule 11.01(a) T.R.C.P.

ADM2020-01016



From: Deborah Rubenstein
To: appellatecourtclerk
Date: 9/4/2020 8:23 AM
Subject: Amend Rule 11.01(a) T.R.C.P.

A comment to the proposed amendment to T.R.C.P. 11.01(a):

The words "if any" should not be stricken. The sentence also refers to a "party," who would not have a BPR number, if *pro se*.

Thank you for your consideration.

Please Note: To ensure any correspondence with or by the Court via email is not construed as *ex parte* communication with the Court, if you are an attorney, an attorney's assistant, or any representative of an attorney involving a pending case before the Court, be sure to copy **any and all** counsel connected with the case, which is the subject of your communication with the Court, on **all email** correspondence with the Court or its Judicial Assistant. Thank you

Debbie Rubenstein, PLS/CLP
Certified Legal Professional
Judicial Assistant
Circuit Court Judge Michael W. Binkley, Division III
State of Tennessee, 21st Judicial District
135 Fourth Avenue South, Ste 286
Franklin, TN 37064
Direct: 615.599.4014
Office: 615.425.4009
Fax: 615.790.5047
NALS Editorial Board 2014-2015/2015-2016/2016-2017

LEGAL CONFIDENTIAL: The information in this email and in any attachments is information which is PRIVILEGED AND CONFIDENTIAL either legally or otherwise, and is intended only for the attention and use of the named recipient(s) and not for anyone else not named/included in this email. If you are not the intended recipient, you are not authorized to retain, disclose, copy or distribute the message and/or any of its attachments. If you received this email in error, please notify me immediately and delete this message.