May 30, 2018

IN RE: PETITION TO AMEND TENNESSEE SUPREME COURT RULE 10, CANON 2, RULE OF JUDICIAL CONDUCT 2.9, COMMENT 4

No. ADM2018-00776

Dear Mr. Hivner,

This letter is to **OPPOSE** the adoption of changes to Comment 4 under the Tennessee Supreme Court Rule 10, Canon 2, Section 2.9 of the Rule of Judicial Conduct filed on April 30, 2018. The deadline for submitting written comments is May 30, 2018. There are **MULTIPLE** concerns with both the proposed changes as well as the process of proposing those changes.

1. The public is advised to return the comment by US Mail using an address line of "Re: Tenn. Sup. Ct. R. 9, section 32". The address line "Re: Tenn. Sup. Ct. R. 9, section 32" attaches to a previously posted petition filed on April 18, 2017 under No. ADM2017-00554 with a deadline for submitting written comments of Monday, June 19, 2017. Of particular concern is the potential absence of a current mail slot for the receipt of comments appropriately labeled as Tennessee Supreme Court Rule 10.

2. J.S. Daniel, Disciplinary Counsel for the Tennessee Court of the Judiciary in 2009, wrote in a prior comment to the Tennessee Supreme Court on September 21, 2009 that a "30 day comment period is far too short of a time period in light of the gravity of the proposed change." As then, the current response period is also 30 days. Wrote attorney J.S. Daniel:

> *"As an aside, I would like to point out that I only learned of this proposed amendment by a review of the AOC website. Although this proposed amendment was published September 3rd no effort was made to forward it to Disciplinary Counsel for comment. I would think that before such striking amendments to any provision of the Code of Judicial Conduct was contemplated by the Court that it would be advisable to make Disciplinary Counsel at least knowledgeable of the disputed issues so that we could properly respond."*

3. Furthermore, in 2009, attorney J.S. Daniel eloquently writes an opposition to essentially the same request advanced today by the current Tennessee Supreme Court and therefore his entire communication from September 21, 2009 is appropriate for reconsideration at this time. It is therefore included as an attachment to this letter.

4. In addition, considering the ruling from the State of Tennessee v. Christopher Minor, No. W2016-00348-SC-R11-CD, there should be much concern that this new rule would be

used to justify and / or excuse inappropriate ex parte communications which have occurred prior to the passage of such a new rule while the cases involving the inappropriate ex parte communications continue to work themselves through the trial courts and subsequent appellate process. Per the opinion of Tennessee v Minor:

> *"We conclude that a new rule applies retroactively to cases pending on direct review when the new rule is announced but does so subject to other jurisprudential concepts, such as appellate review preservation requirements and the plain error doctrine."*

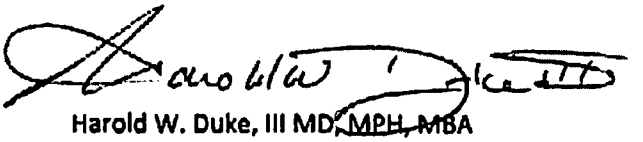
5. Also, the Veterans Treatment Courts Legislative Report Public Chapter 943, dated 2012 and prepared by the Tennessee Administrative Office of the Courts specifically challenges the use of a state-wide solution or mandate and states on page 3 under the SUMMARY OF CONCLUSIONS the following:

   > *"The most effective and cost-efficient method of assisting the largest number of men and women who have served this country is to permit each judicial district to retain the discretion to address this issue after considering the available resources and the needs of the relevant populations."*

6. The 103-page report (with Appendix) regarding the Veterans Treatment Courts also addresses concerns with specific definitions which have been re-proposed / re-cycled yet remain undefined under the currently proposed rule change.

7. In short, the proposed changes would allow any judge to communicate ex parte at any time with any one and claim an exemption under the "including but not limited" phrase while holding a "problem solving court". As alluded to in the September 21, 2009 letter by J.S. Daniel, much of the change would, ***even today***, create a cause for concern regarding the constitutionality of any such changes.

Thank you for your consideration of my comments. With warmest regards,



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September 21, 2009

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In re: Amendment to Rule 10, Canon 3 (B) (7) (e)

Dear Mike:

Please consider this letter as my opposition to the proposed amendment to the commentary of Canon 3 (B) (7) (e).

In my estimation, the whole purpose of Canon 3 (B) (7) (e) is to prohibit ex parte communications by judges who then ultimately hear disputed facts involving the parties to the action. Canon 3 (B) (7) (e) authorizes an exception to this prohibition for only a limited number of exceptional purposes. One of the primary examples is applications by indigent criminal defendants for the ordering of funds necessary to provide an adequate defense to criminal cases such as expert witnesses, investigators, etc. The type of inquiry that is made ex parte in those settings do not go to the heart of disputed matter.

The proposed commentary would authorize local courts to create their own rules and authorize ex parte communications by judges serving on therapeutic or problem solving courts. These judges then after having authorized for themselves ex parte communications would use information obtained in this fashion to make decisions on disputed issues. This is an antithesis to a neural and detached magistrate hearing disputed issues. In these therapeutic settings judges who are involved in accepting ex parte communications from other treatment providers, probation officers and social workers should not be involved in the future court decision making for the individuals who are undergoing this treatment program. These undertakings are social work activities by the judges who participate. In a recent case that I was involved, the judge in addition to participating in ex parte communications with other treatment provides, engaged in his own individual investigations by going with others on home inspections of probationers in a drug court. This type of activity causes these judges to lose their capacity to be neural and detached in deciding issues that come back to court for resolution. This type of conduct by the judges who are so involved diminishes the perception of the public that

their actions are fair, unbiased and appropriate. It is impossible for me to see judges act as therapists and interveners one day and arbiters of disputed facts on another. In my opinion, if a judge is participating in drug court and is actively involved in case management he or she is ineligible to act as a decision maker in probation revocations or other cases which involve disputed issues. Judges who act in this manner appear to violate basic due process of law. Judge Tipton held correctly this way in his opinion in the case of State v. Hopson 2008 WL 446717 (Tenn. Crim. App.) dealing with a drug court action of revocation. In the Hopson opinion Judge Tipton relies on Gagnon v. Scarpelli, 411 U.S. 778, 93 S.CT. 1761 (1973) in which the Supreme Court of the United States held that due process mandates a neutral and detached hearing body. This would apply to any adjudicatory action and would disqualify those who possessed ex parte information.

It would be my opinion that the commentary should be strengthened to reflect that if a judge participates in the active supervision of probationers and receives ex parte communications either through their own investigation, through social workers, probations officers, treatment providers or others who work with the judge in this role, those judges should be ineligible and prohibited from deciding contested issues of fact involving those in which treatment was provided to during the program.

The drug court scenario is beset with potential for Judicial Code violations. In addition to this Canon provision, judges who are participating in these types of activities are obviously making an independent investigation of facts in the case and this is prohibited by the same commentary which is being proposed to be amended and is prohibited by the Canon in question. The proposed commentary amendment offers an opportunity to much mischievous activity on the part of judges who ultimately decide these issues and I think it would be best for the Court to decline this proposed commentary amendment.

As an aside, I would like to point out that I only learned of this proposed amendment by a review of the AOC website. Although this proposed amendment was published September 3rd no effort was made to forward it to Disciplinary Counsel for comment. I would think that before such striking amendments to any provision of the Code of Judicial Conduct was contemplated by the Court that it would be advisable to make Disciplinary Counsel at least knowledgeable of the disputed issues so that we could properly respond.

If I can assist in any way in the future please feel free to call upon me.

Sincerely yours,

J. S. Daniel
Disciplinary Counsel

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO TENNESSEE SUPREME COURT RULE 10, CANON 2, RULE OF JUDICIAL CONDUCT 2.9, COMMENT 4	)	**No. ADM2018-00776**

COMMENT OF THE TENNESSEE BAR ASSOCIATION IN RESPONSE TO THE PETITION FOR AMENDMENT OF TENN. S. CT. R. 10, CANON 2, RULE OF JUDICIAL CONDUCT 2.9, COMMENT 4

The Tennessee Bar Association ("TBA"), submits the following comment regarding the proposed amendments to Tenn. S. Ct. R. 10, Canon 2, Rule of Judicial Conduct 2.9, Comment 4, filed April 30, 2018.

The Supreme Court's Order was carefully reviewed by the TBA Committee on the Judiciary, and after much consideration and discussion, the TBA supports the Petition for Amendment of Tenn. S. Ct. R. 10 in its entirety.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

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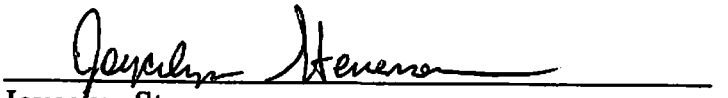
CERTIFICATE OF SERVICE

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.


Joycelyn Stevenson

"Exhibit A"

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May 24, 2018

VIA E-Mail: appellatecourtclerk@tncourts.gov

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Re: Petition to Amend Tennessee Supreme Court Rule 10, Canon 2, Rule of Judicial Conduct 2.9, Comment 4; No. ADM2018-00776

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") has carefully considered the proposed change to Tennessee Supreme Court Rule 10, Canon 2, Rule of Judicial Conduct 2.9, Comment 4, to support the assistance provided to individuals through therapeutic and problem-solving courts. At the KBA Board of Governors' (the "Board") meeting held on May 16, 2018, the Committee presented a report of its review of the Petition. Following the Committee's presentation and thorough discussion by the Board, the Board as a whole unanimously adopted the Committee's recommendation to file this comment in support of the Petition.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Keith H. Burroughs, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
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