

THE EXECUTIVE COMMITTEE OF THE TENNESSEE TRIAL JUDGES ASSOCIATION
SUPPLEMENTAL COMMENTS AND POSITION ON PROPOSED RULE 10(C)

March 29, 2019

DOCKET NO. ADM2018-02254

FILED
MAR 29 2019
Clerk of the Appellate Courts Rec'd By <u>LM</u>

The TTJA Executive Committee provides the following supplemental comments:

Sec 17.3 of proposed Rule 10C provides Disciplinary Counsel "may petition the Court to determine whether a judge is incapacitated from continuing to perform [their] judicial duties. . ." If such a petition is filed, the Court can take such action it deems necessary, including having the judge examined "by qualified medical or mental health experts the Court shall designate", or assigning the matter to a hearing panel for a formal hearing. Assigning the case to a hearing panel for a formal hearing, however, is not a mandated action. Instead, under Sec. 17.3 the Court is allowed to conduct a hearing on the matter of incapacity and issue "an appropriate order" including an order "suspending the judge with pay . . . for an indefinite period of time and until further orders of the Court." The burden of proof needed to establish incapacity is a preponderance of the evidence. Under Sec 17.5, however, the judge must present clear and convincing evidence in order to establish the disability that caused the incapacity no longer exists and that they are fit to resume their judicial duties. In essence, the Court can serve as both the investigative and hearing panels. When the Court serves in both these roles there is no avenue to appeal a decision that one is incapacitated. When the Court assigns a case to a hearing panel for a formal hearing the avenue to appeal that panel's does exists, but that avenue of appeal runs through a body (The Court) that investigated the matter and deemed the matter worthy of a hearing. Sec. 17.3 does not provide who pays the costs associated with a medical or mental health examination ordered by the Court. Is it the judge or the Board? Also, if a judge must present clear and convincing evidence to establish that a disability no longer exists it only seems fair that the evidence needed to establish the disability should be clear and convincing. The structure that allows the Court to serve as both the investigative and hearing panel of a matter is a structure that is troubling in light of the fact that (1) there is no avenue to appeal a decision that one is incapacitated, and (2) members of the Board are prohibited by this proposed Rule from serving on the hearing panel of a matter that member has investigated.

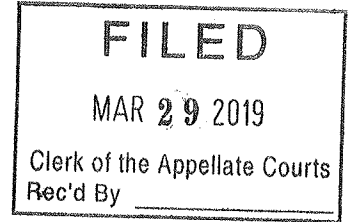
Regarding the right granted by Proposed Rule 10(c) to suspend without pay: Even a temporary involuntary suspension without pay amounts to an unconstitutional action. The established law from our state Constitution provides only the Tennessee General Assembly with the authority to remove a judge from office. The TTJA EC acknowledges that as an agreed form of discipline, judges can (and have) agreed to suspensions with and without pay. This comment only questions the action of involuntary suspension without pay.

Lastly, judges have a property interest in their jobs, particularly after election by the people. That interest may not be infringed upon without observance of procedural due process rights arising under the state and federal Constitutions. The proposed rule appears to infringe upon that interest by allowing the Tennessee Supreme Court to be the fact finder in certain instances; be involved in deciding the severity of discipline imposed by a hearing panel; but yet retain its appellate jurisdiction as the court of last resort should any aspect of the matter be appealed.

J. B. Cox, President of the TTJA
On Behalf of the Executive Committee

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: ADOPTION OF RULE 10C OF THE
RULES OF THE TENNESSEE SUPREME COURT**



No. ADM2018-02254 – Filed December 20, 2018

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Court’s invitation for public comment to the creation of Rule 10C, the Commission on Judicial Conduct (“Commission”), the Tennessee District Public Defenders Conference (“Conference”) expresses its support of the new addition to the Tennessee Supreme Court Rules. The Conference believes the Commission will serve a vital role in the promotion of transparent government and solidify the ethical standards of all attorneys and judges in Tennessee.

The Conference does not object to the creation of the Commission, but suggests that Public Defender membership should be mandatory, not permissive. Under the current proposed rule, members of the Commission shall be comprised of three attorneys, any of whom may be Public Defenders.¹ The Commission would be more effective if the rule guaranteed that at least one of the positions would necessarily be a Public Defender. Public Defenders are uniquely qualified given their unique position in the bar. They, along with District Attorneys General, have the most courtroom interaction with trial and appellate judges. Public Defenders often participate in the same courtrooms on a recurring basis, creating professional relationships which would ensure

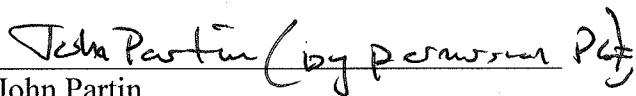
¹ (g) Six members of the public who are not salaried judges, three of whom shall be attorneys who regularly practice in the courts of this State and may be members of the district attorneys general conference or members of the district public defenders conference (hereinafter “attorney members”), and three of whom shall be members of the public who are neither judges nor attorneys (hereinafter “public members”). There shall be one attorney member from each grand division of the State and one public member from each grand division of the State.

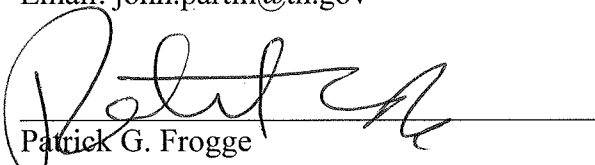
equitable participation on the Commission. Lastly, Public Defenders represent a particularly vulnerable population which may be more susceptible to judicial conduct inconsistent with ethical standards.

Therefore, the Conference urges the Court to consider editing the proposed rule to designate mandatory selection of at least one Public Defender when determining membership of the Commission.

Respectfully submitted,

Tennessee District Public Defenders Conference

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ADM 2018-02254

**REPORT AND RECOMMENDATION OF THE MEMPHIS BAR ASSOCIATION
JUDICIAL PRACTICES AND PROCEDURES COMMITTEE TO THE OFFICERS AND
BOARD OF DIRECTORS OF THE MEMPHIS BAR ASSOCIATION
REGARDING THE PROPOSED ADOPTION BY THE TENNESSEE SUPREME
COURT OF PROPOSED RULE 10C RELATING TO JUDICIAL DISCIPLINARY
ENFORCEMENT**

On December 20, 2018, The Supreme Court of Tennessee issued Administrative Order No. ADM2018-02254 publishing a new draft Supreme Court Rule 10C that “will result in a new and comprehensive system and set of procedures governing the discipline of Tennessee judges.” The deadline for submitting written comments to the Court on the proposed Rule is March 29, 2019.

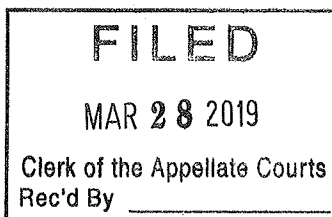
On March 1, 2019, the Judicial Practices and Procedures (“JPP”) Committee was requested by the Officers of the Memphis Bar Association to review the proposed Rule 10C and make recommendations as to the position to be taken by the Association.

The JPP Committee has met twice and has studied the proposed Rule 10C, the Position of the Executive Committee of the Tennessee Trial Judges Association, the Position of the Executive Committee of the General Sessions Judges Conference, the Recommendation of the Professional Committee of the Knoxville Bar Association, correspondence from practitioners regarding the proposed Rule, Senate Bill 722 and House Bill 782 pending in the Tennessee Legislature, and discussions with current counsel for the Tennessee Board of Judicial Conduct. Based on the foregoing, it is the Recommendation of the JPP Committee that the Memphis Bar Association oppose the adoption of the Rule as currently drafted and recommend that the Rule be subject to further study. Support should be given to the pending legislation before the General Assembly to extend the term of the Board of Judicial Conduct. Included as an attachment to this Report and Recommendation is a proposed Position of the Memphis Bar Association in Opposition to the Adoption of proposed Supreme Court Rule 10C. The JPP recommends adoption by the Board of the attachment for submission to the Court as the Position of the Memphis Bar Association.

Respectfully Submitted,

David Wade

Chair, Memphis Bar Association Judicial Practices
and Procedures Committee.



March 27, 2019

COMMENTS OF THE MEMPHIS BAR ASSOCIATION REGARDING PROPOSED RULE
10C TO THE RULES OF THE TENNESSEE SUPREME COURT

The Tennessee Supreme Court has requested “written comments from judges, lawyers, bar associations, members of the public and any other interested parties” on proposed Rule 10C to the Rules of the Court. The Memphis Bar Association, through the recommendation of its Judicial Practices and Procedures Committee (“JPP”), has adopted the following points as its written comments on the proposed Rule. As an initial point of departure, the Rule is designed to accomplish the laudable goal of creating a comprehensive structure for disciplinary action against a sitting judge or judicial candidate. However, in its attempt to bring disciplinary control of judicial conduct within the body of the Supreme Court, the Court may have created problems in the proposed Rule that further study can correct.

1. The purpose of the Rule is intended “to provide an orderly and efficient method for making inquiry into the physical, mental, and moral fitness of any Tennessee judge; the judge’s manner of performance of duty; the judge’s commission of any act that reflects unfavorably upon the judiciary of the state or brings the judiciary into disrepute or that may adversely affect the administration of justice in the state.” 10C, Sec. 1. It would establish a Commission on Judicial Conduct created by the Court. Under the Rule, the Court appoints all members of the Commission, the Chair and Vice Chair of the Commission and the Chief Disciplinary Counsel, all of whom function within the disciplinary program created by the Rule. Investigative panels and hearing panels are comprised of members of the Commission all of whom are Supreme Court appointed. It is the duty of Disciplinary Counsel to initially review complaints against judges and to make recommendations to investigative panels of the Commission. The Chair or Vice-Chair assigns investigative panels and hearing panels to determine charges against a judge. The Rule would handle charges against a Supreme Court Justice, for all practical purposes, in the same manner as would apply to all judges. In other words, the Commission, the Chair and Vice-Chair, and the Disciplinary Counsel called upon to review, investigate and hear complaints about a Justice of the Court are the same persons appointed by the Court. This procedure would not seem to comport with traditional notions of procedural due process. Some method of diversifying the appointment process should be considered.

2. A further point for consideration ties to the nature of Tennessee’s selection of trial judges through the election process. By its nature, and in contrast to the federal system, the people choose trial judges in this state. Because most judges are elected, the process of removing a judge from office should be strictly observed. Under the Constitution of the State, that process occurs in the General Assembly. Judges are subject to impeachment by the house of representatives for crimes committed in their official capacity. Tn. Cons. Art. V, Sec. 4. The

Senate conducts the trial and by a two-thirds vote the senators must concur to remove a judge from office. Alternatively, each house of the legislature by voting separately but with a concurrent two-thirds majority of both legislative branches may effect removal of a judge. Art. VI, Sec. 6. Rule 10C tacitly acknowledges these requirements by the providing that the removal of a judge must to be transmitted from the Commission to the General Assembly for final determination. 10C, Sec. 21.1. However, the Rule also permits a judge to be suspended without pay with no defined time limit for such discipline. 10C, Sec. 9.5 and 9.6. Such action could result in a *de facto* removal without observing the requirements of the Tennessee Constitution. The impact of this procedure should be reconsidered.

3. Similarly, Tn. Cons. Art. VI, Sec. 7 establishes that compensation for superior and/or inferior courts shall not be increased or diminished during their elected term. Rule 10C, as stated above, permits a judge to be suspended without pay in seeming violation of the Constitutional prohibition. The Executive Committee of the General Sessions Judges Conference has expressed concern about the effect of the Rule in this regard. The Tennessee Supreme Court in *State ex rel. Webb v. Brown*, 132 Tenn. 685 (Tenn. 1915) emphasized the constitutional mandate that judicial pay “shall not be increased or diminished during the time for which they are elected.” The word “shall” means “shall” according to the decision. The restriction preventing pay adjustments during a judge’s tenure “was to set apart the judges and to give to them independence in the discharge of their high duties.” *Id.*, at 688. The Executive Committee was careful to say that it is not seeking to preserve the salaries for unethical or misbehaving judges. But that the sanction includes a deprivation of salary is a serious matter with constitutional restrictions. The provision should be amended to comport with the Constitution.

4. Again, because judges are elected by the people, the process for judicial discipline should require a relatively high standard of proof. It is anomalous that the Rule allows discipline, including suspensions, to be imposed under a preponderance of the evidence standard, while a reinstatement petition by a judge is considered under the higher clear and convincing standard. The imposition of a discipline against a sitting judge on a preponderance of the evidence standard is contrary to requirements of Tenn. Code Ann. Sec. 17-5-308(d) which requires proof of misconduct by clear and convincing evidence. The evidentiary standard should be corrected.

5. A main purpose of the Rule is to put in place an investigative and hearing panel structure that will implement a judicial disciplinary process. It is useful to note that the Tennessee legislature has before it two identical bills, one in the House (Bill 782), and one in the Senate (Bill 722) aimed at restructuring and renaming the current Board of Judicial Conduct which ceases to exist on July 1, 2019. The proposed legislation is similar in some ways to Rule 10C and different in others. Also, the General Assembly is proposing a different bill that would extend the life of the current Board of Judicial Conduct for an additional one year, eliminating the “sunset” date of July 1, 2019 and the urgency to force through either Rule 10C or the legislative bills without additional analysis. Adoption of the extension bill would allow sufficient time for further study of the competing provisions of the judicial and the legislative initiatives. The extension bill should be supported to allow further study.

6. Rule 10C, Sec. 23.2 would require Judges subject to discipline to pay costs and fees for any proceeding in which a judge is found to be in violation of the Code of Judicial Conduct. On the other hand, if the judge is exonerated, no reimbursement for costs and fees is required by the Rule. In Mississippi, costs are reimbursed in the event of exoneration (Rules of the Mississippi Commission on Judicial Performance, Rule 8-1, based on the clear and convincing standard (that currently applies in Tennessee but would not if Rule 10C is adopted)). Other states were reviewed for consideration of handling of costs and fees. In jurisdictions where discipline was warranted, costs were stated in the rulings of each court and were under \$1,000.00. In Arkansas, Kentucky, Mississippi, North Carolina, and Florida where the court on a case by case basis can require a judge to pay fees, none were found to require payment of fees in a subsequent hearing in the event of nonconcurrence by the hearing panel in a prior hearing. Without some limitation on fees, a jurist is conceivably subject to becoming bankrupt in obtaining exoneration, especially if there should be one or more retrials of the same issues. The failure to allow the possibility of reimbursement of costs to an exonerated judge as a result of the proceedings against her or him would unfairly harm the accused. The provision should be reviewed to balance the assessment/reimbursement of costs.

7. More consideration should be given to the role of the Supreme Court in this process. The jurisdiction of the Court is appellate only. Tn. Cons. Art. VI, Sec. 2. The Rule authorizes the Supreme Court to participate in reviewing disciplinary proceedings that have not been appealed. In this regard the proposed Rule facially exceeds the constitutionally prescribed limits on the Court's jurisdiction. The role of the Court should be restructured and limited.

8. There are several areas where the Rule should be edited. Some are mentioned here:

a. Sec. 3 (2) makes the Rule applicable to “[a]ll persons ... while sitting or presiding over any judicial proceeding” However, the Rule is not clear whether it applies to court appointed officials, such as special masters or referees.

b. While the term “formal proceedings” is used throughout the Rule there is no definition for the term or a clear statement when “formal proceedings” are initiated.

c. For clarity sake all defined terms should begin with initial capitalization.

Conclusion: The Memphis Bar Association recommends that the Tennessee Supreme Court join the General Assembly to extend the current life of the Board of Judicial Conduct, in order to permit further study of Rule 10C before it is adopted for general application in the State.

FILED
MAR 28 2019
Clerk of the Appellate Courts
Rec'd By _____

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**IN RE: ADOPTION OF RULE 10C OF)
THE RULES OF THE)
TENNESSEE SUPREME COURT) No. ADM2018-02254**

**COMMENT OF THE TENNESSEE BAR ASSOCIATION
IN RESPONSE TO THE ADOPTION OF TENN. S. CT. R. 10C**

The Tennessee Bar Association (“TBA”) submits the following comment regarding the adoption of the new proposed Tenn. S. Ct. R. 10C, published by the Court for comment on December 20, 2018:

The TBA’s Committee on the Judiciary (“the Committee”) conducted an extensive review of the Court’s new proposed Rule 10C. In that process, the Committee requested additional information from the Court as referenced below. The Committee recommended that the TBA support the new proposed Rule 10C, subject to several revisions, one of which is fundamental to the TBA’s overall support as noted below. The TBA Executive Committee of the Board of Governors supports the Committee’s recommendation as outlined below.

The Committee believes that authority to supervise the judiciary is and should be vested in the Tennessee Supreme Court, rather than with the legislature as under Tenn. Code Ann. §§ 17-5-201 *et seq.* While the current statute is subject to sunset this year, we understand legislation has been introduced to extend the term of the current Board of Judicial Conduct through June 30, 2020 (SB153/HB485). A second bill also has been introduced to create a new Board of Judicial Responsibility that would be similar in part to the Commission on Judicial Conduct that would be created by proposed Rule 10C), but whose members would be appointed by the Supreme Court

but, as distinguished from the Commission, the body created by this proposed legislation would have the authority to adopt its own rules. (SB722/HB782).

A. Fundamental Concern

Section 9.7. The Committee has a fundamental concern about Section 9.7(a), which allows (but does not require) the Court to suspend a judge without pay upon conviction of, or plea of guilty or nolo contendere to, a serious crime (any felony and certain other described offenses). Neither the current statute, nor the earlier Court of the Judiciary statute, provided for suspension without pay. Additionally, Art. VI, Sec. 7, of the Tennessee Constitution prohibits a change to a judge's compensation during her/his term of office. We do not believe there is any legal authority for the Court or any other body to reduce a judge's compensation during a term of office, and we also believe it would be bad policy even if somehow constitutionally permitted in this instance. The provision has the potential for creating mischief in its discretionary application growing out of controversial rulings, unpopular judges, or otherwise; it also implies that there may be other situations where a judge's compensation can be reduced or withheld during the term of office. Even were it lawful, such a provision would be bad policy in light of Art. VI, Sec. 7, one of the basic protections of Tennessee judicial independence.

We requested additional information from the Court regarding the reasons for this provision and received the following response: "The Court does not feel that it is appropriate at this time to discuss its thought processes with regard to the ability to suspend a judge without pay as proposed in the draft rule. Of course, the Court is aware that this provision could be subject to a constitutional challenge. The Court is aware that this type of discipline was not included in the prior statutes and is keeping an open mind on the constitutionality question. The Court welcomes comments on this part of the draft rule."

B. Other Suggested Revisions

1. *Section 3(1)*. This section uses slightly different scope/application language than does the scope/application section of Supreme Court Rule 10, the Code of Judicial Conduct. To avoid any ambiguity and promote consistent application, we would suggest that the language in draft section 3(1) be deleted and replaced with the following language:

(1) All Tennessee judges, as defined in the Application section of Supreme Court Rule 10, the Tennessee Code of Judicial Conduct, other than administrative law judges and hearing officers.

2. *Section 4.5(b)*. This section refers to "formal proceedings." That term or "formal proceeding" also is used in Sections 10.7(a), (b) and (e), 13.4(c), 17.2 (cross-referencing sections 10.5 (Formal Charges), 10.9 (Evidentiary Hearing)) and 23.2(a) and (d)). The term "formal proceeding(s)" is not a defined term, and perhaps is meant to refer to a "formal investigation." We suggest this language be changed or the term be defined, particularly because early stages of the investigation of a judicial disciplinary complaint are, in fact, governed by the provisions of this Rule and, therefore, might well be considered "formal" in some sense.

In response to our questions about the use of the term, we were advised that the Court will consider including a definition of "formal proceeding."

3. *Section 8*. This section lists nine acts for which a judge can be disciplined. Rule 10C is procedural. As such, it should provide the mechanism for resolving claims of judicial misconduct. Rule 10, the Rules of Judicial Conduct, however, sets the substantive standards for a judge's conduct. This proposed Section 8 could be interpreted to create substantive standards of judicial conduct broader than or different from Rule 10 for which a judge could be disciplined. While we believe that, with two exceptions, each of the acts identified is likely included in Rule 10, the language is not identical. The two not covered are misconduct of judges regulated by Rule

8 and misconduct related to the disciplinary process itself. Following the structure of the ABA Model Rules for Judicial Disciplinary Enforcement, we would suggest that this section be rewritten to read:

The following are grounds for discipline of judges pursuant to this Rule.

(1) any conduct constituting a violation of Tenn. Sup. Ct. R. 10 or constituting a violation of so much of Tenn. Sup. Ct. R. 8 as is applicable to judges; or

(2) The willful violation of a valid order of this Court, the Commission, or an investigative or hearing panel in proceedings under this Rule; the willful failure to appear personally as directed by the Commission or an investigative or hearing panel in proceedings under this Rule; or a knowing and willful failure to respond to a lawful demand from the Commission, Disciplinary Counsel, or an investigative or hearing panel in proceedings under this Rule.

4: *Section 9.7 Temporary Suspension.* Part (a), which authorizes temporary suspension with or without pay, and part (b), which allows a judge to petition for reinstatement for "good cause," do not state an applicable burden of proof. We recommend that the burden of proof be specifically stated.

We also requested additional information from the Court regarding the burden of proof applicable in these instances. We were advised that the Court will review the burden of proof questions we raised.

C. Conclusion

In order for the TBA to fully support the new proposed Rule 10C, the TBA respectfully urges the Supreme Court to reject Section 9.7 of the proposed Rule, as it is not supported by legal authority and would be bad policy in light of Art. VI, Sec. 7, one of the basic protections of judicial independence in Tennessee. The TBA also urges the Supreme Court to revise Sections 3(1), 4.5(b), 8 and 9.7 as outlined in this Comment.

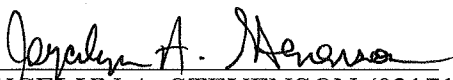
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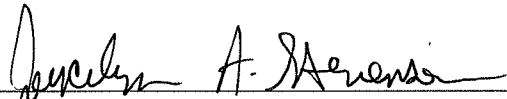
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CERTIFICATE OF SERVICE

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


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FILED
 MAR 22 2019
 Clerk of the Appellate Courts
 Rec'd By LM

ADM2018-02254

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March 19, 2019

Chief Justice Jeff Bivins
 Tennessee Supreme Court Building
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RE: Rule 10C

Dear Chief Justice Bivins:

We thank the Court for the opportunity to review and comment upon proposed Rule 10C. We share the Court's concern regarding the importance of ensuring that our state's judiciary is held to the highest ethical standards while, at the same time, providing for a thorough investigation and procedurally appropriate mechanism to address lapses in ethical behavior. The judiciary, perhaps more so than either of the two other branches of our government, depends upon the respect of the citizenry for its legitimacy. Without such respect, the rule of law is in danger of failing. The judiciary is, as Washington stated, the firmest pillar of our government.

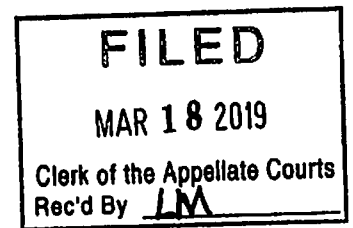
Our Council would first state that we believe the current system creating the Board of Judicial Conduct is working for the benefit of our state's judges and citizens. We can discern no shortcomings in this system and believe that it should continue. We feel that this system is in our state's judiciary's best interests.

We have been provided a copy of the responses of the Tennessee Trial Judges Conference and the Tennessee General Sessions Judges Conference to the proposed rule. We have reviewed these responses thoroughly and will state that the Tennessee Council of Juvenile and Family Court Judges concurs in their conclusions and recommendations. Accordingly, and with all due respect, our Council opposes proposed Rule 10C in its present form.

Respectfully,

Judge Vicki Snyder
 President, Tennessee Council of Juvenile and Family Court Judges

cc: Tennessee Council of Juvenile and Family Court Judges



THE EXECUTIVE COMMITTEE OF THE GENERAL SESSIONS JUDGES' CONFERENCE
RECOMMENDED COMMENTS AND POSITION ON PROPOSED RULE 10(C)
MONDAY, MARCH 18, 2019

DOCKET NO. ADM2018-02254

Tennessee General Sessions Judges share with the Court, the General Assembly, and the public at large the goal of dealing with misconduct and unethical behavior by judges, swiftly and justly, and in a manner that serves as a deterrent to future bad conduct. With regard to this shared effort and goal, the Executive Committee of the Tennessee General Sessions Judges Conference (hereinafter "TGSJC EC") has undertaken a review of the Tennessee Supreme Court's (hereinafter "Court") proposed Rule 10(C) with the aim of providing useful comments. Very respectfully, the TGSJC EC provides the following comments:

RECOMMENDED COMMENTS:

1. The TGSJC EC's initial concern is the Court's involvement in every stage of the disciplinary process. The Court appoints all members of the Commission, appoints the chair and the vice-chair, and appoints the disciplinary counsel who serves at the discretion of the Court. The Court grants itself the authority to conduct a review of all cases, whether appealed or not, and to impose any discipline it "deems appropriate." The Court also serves as the sole avenue of appellate review of the process created by this proposed rule.

The TGSJC EC is confident the Court will appoint quality, dependable people to the Commission. However, this proposed amendment provides for no independent investigation, hearing, imposition of discipline, or review separate and apart from the Court. This opens the process and the Court to obvious criticism. The Court's appointment of every member of the Commission, the Court's appointment of the chair, vice-chair and the Court's appointment of disciplinary counsel raises the foreseeable appearance of protecting the judiciary to the lay person and the legislature. Further, the total concentration of all judicial disciplinary power with the Court raises concerns that disciplinary decisions could be influenced by outside forces. If the Court has unfettered discretion to overturn every disciplinary decision of the hearing panel, whether appealed from or not, and impose the discipline it "deems appropriate", the question of the necessity of hearing panel imposing discipline must be asked. To the lay person and legislature, this total concentration of power could appear to be protection. To the members of the judiciary, it appears to be unfair. To protect the integrity of and promote confidence in the process, the Commission and its disciplinary decisions need to be separate and insulated from the Court's influence.

2. Article VI, Sec. 2 of Tennessee's Constitution, states the jurisdiction of the Supreme Court "shall be appellate only." The Court reviewing all publicly imposed discipline, whether an appeal is taken or not, and imposing any discipline it deems appropriate, places the Court outside of and in direct conflict with this specific constitutional role. This is problematic since any discipline imposed on a member of the judiciary could form the basis of either an impeachment proceeding brought pursuant to Article V or a removal proceeding brought pursuant to Article VI of Tennessee's Constitution. A member of the Court is the presiding judge of an Article V impeachment proceeding, and the Court serves its constitutional appellate role in both proceedings. The active participation, by the Court, in reviewing all discipline decisions, absent an appeal and also imposing the discipline it deems appropriate, raises serious concerns of basic fairness and partiality as the Court carries out these constitutional roles.

3. Another major concern is the sanction of suspension without pay. The concern is not with the idea of this form of discipline itself or that this form of discipline could serve to deter unethical behavior or misconduct. Instead, the concern is that a suspension of pay is diminishing compensation during an elected term and is in direct conflict with and prohibited by Article VI, Sec. 7 of the Tennessee Constitution. In light of this constitutional prohibition, the constitutionality of this form of discipline is suspect. Please note, respectfully, that the TGSJC EC is not seeking to preserve the salaries and/or benefits of unethical or misbehaving judges. Instead, the TGSJC EC seeks to preserve a provision of the Tennessee Constitution that applies in this circumstance.

4. The TGSJC EC is also concerned as to why the burden of proof needed to prove judicial misconduct is changed from the clear and convincing evidence standard, historically provided by statute, see T.C.A. §17-5-308 (d), to the preponderance of the evidence standard. This is especially perplexing since, under Sec. 17.5(b), any attempt at reinstatement is judged by a clear and convincing standard. Further, removal of most public officials is governed under the general ouster statutes, T.C.A. §8-47-101, et. seq., which requires a heightened burden of proof often referred to as a "clear case of official dereliction". See, Carney v. Crosby, 255 S.W.3d 593 (Tenn. App. 2008). Respectfully, it seems logical that a referral from the Court, to the General Assembly, to remove a judge should be based on an evidentiary standard that is higher than a preponderance of the evidence.

Also respectfully, the proposed preponderance of the evidence standard, to determine disability of a judge, is very concerning when compared to general conservatorship law which requires that disability must be by clear and convincing evidence. T.C.A §34-1-126. Since a potential ward is entitled to this heightened standard before being declared disabled, it would appear appropriate and fair that an elected or appointed judge be entitled to this same standard before being declared disabled.

5. Also respectfully, the proposed Section 23.2 introduces the concept of requiring a disciplined judge to pay attorney fees and costs to the Commission upon a determination that a public sanction is appropriate. However, if the judge successfully defends the charge and the charge is dismissed, the judge is not likewise allowed to recover attorney fees and costs from the Commission.

Also, if a judge prevails at the hearing panel level and the Commission appeals its own ruling, the Court can step in, sua sponte, and impose a heightened level of discipline, which would certainly increase attorney fees and costs.

Also, if the accused judge “settles” with the Commission, the Court also can, sua sponte, step in and impose a heightened level of discipline which again would certainly increase attorney fees and costs.

The TGSJC EC respectfully believes that, if this proposed amendment is adopted, it would be fair and reasonable to use a mutual “prevailing party” standard for the recovery of attorney fees and costs.

6. Also respectfully, the TGSJC EC is very concerned why the proposed Rule 10(C) provides that if a hearing panel is unable to reach a “concurrence,” the Commission is able to empanel another hearing panel to retry the case. If a majority of the hearing panel is unable to reach a concurrence, the case clearly has not been proven by a “preponderance of the evidence”. If this proposed Rule is adopted, the judge faces what amounts to “double jeopardy” in addition to having to pay for additional attorney fees and costs for two or more proceedings.

7. Also respectfully, at the conclusion of an evidentiary hearing, the proposed Rule provides that the hearing panel may dismiss the charges, or impose discipline, and either the judge or the Commission may appeal that decision to the Court.

The statutes that governed the former Court of the Judiciary and govern the current Board of Judicial Conduct grant the judge the right to appeal, see T.C.A. § 17-5-310, but for obvious reasons, they did not grant that Court or the Board the right of appeal. It is clear why a judge retains the right to appeal in the proposed Rule. However, “the decision of a hearing panel is the decision of the Commission,” (Sec. 10.9(d)), and considering the important role these hearings play in this process, it is clear why these panels are granted authority to make the Commission’s decisions on these critical issues.

In light of this broad grant of authority to speak for the Commission on these issues, the lowering of the burden of proof needed to establish misconduct, and the lack of a right to appeal being granted to the current Board of Judicial Conduct or the former Court of the Judiciary, it is less clear why this Commission is now extended the right to appeal its decisions. It is also not clear how the decision to appeal will be made and by whom it will be made since the hearing panel’s decision “is the decision of the Commission.” A hearing panel could determine that misconduct was not established by a preponderance of the evidence and

dismiss the charges only to have the Commission appeal, or the panel could find misconduct occurred and impose discipline only to have the Commission appeal that decision too.

The TGSJC EC respectfully questions the purpose, goal, or usefulness of granting the Commission the right to appeal its decisions.

8. Also respectfully, the Rules of Conduct serve as a guide to acceptable and unacceptable conduct. A rule of conduct that does not clearly do one of these two things is of no use and results in ambiguities. In both the preamble and then again in Sec 8.8, the proposed rule uses the language "any other conduct that brings the judiciary into public disrepute or that adversely affects the administration of justice." However, the rule of conduct in the current statute provides "any other conduct *calculated* to bring the judiciary into public disrepute or to adversely affect the administration of justice." T.C.A. §17-5-302(8). While the rule of conduct in T.C.A. §17-5-302(8) provides guidance on what is to be avoided and what will result in discipline, the language in the proposed rule does not provide that type of guidance at all. Instead, it leaves much to the imagination and speculation. In the view of the TGSJC EC, the removal of the words "calculated to" from this ground of misconduct opens this ground to subjective rather than objective reasoning and could allow for unintentional conduct to be swept up for disciplinary action.

9. Also respectfully, the TGSJC EC does not believe that the identity of the complainant should be confidential. If the complainant is not identified, how is the judge going to respond to said complainant? Further, the TGSJC EC is concerned that the initiating complaint does not have to be in writing nor signed by the complainant. As an example, why does the immunity for Rule 10 (C) differ from the immunity for TLAP which only allows immunity if the complainant acted in good faith without malice. (T.C.A §23-4-101)

FINAL THOUGHTS AND COMMENTS:

The TGSJC EC reaffirms its position that unethical behavior and misconduct by members of Tennessee's judiciary is not acceptable or tolerated. It also reaffirms that unethical behavior and misconduct be dealt with swiftly, justly, and in a manner that discourages such behavior and conduct.

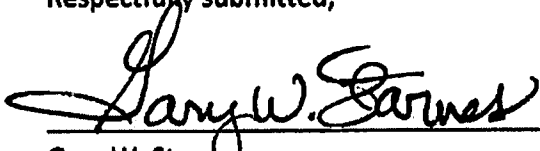
The TGSJC EC appreciates the considerable efforts made by the Court to address the issues that concern judges. We also think that many parts of the proposed Rule 10 (C) are positive and promising. **However, in light of our concerns and comments set forth above, the TGSJC EC very respectfully opposes the proposed Rule 10 (C) amendments and thus believes that said amendments should not be adopted as currently written.**

The TGSJC EC also joins in with the Tennessee Trial Judges Association (hereinafter "TTJA") and Tennessee Juvenile Court Judges Conference (hereinafter "TJCJC"). All three (3) conferences are united in opposing the proposed Rule 10 (C) amendments.

Finally, the TGSJC EC believes, as do the TTJA and TJCIC conferences, that the current system creating a Judicial Board of Conduct is working very well for the benefit of our statewide judges and citizens. We cannot discern any shortcomings or problems with the current system and believe that the current system should continue.

The TGSJC EC is thankful for the opportunity extended by the Court to comment on this proposed rule. Also, the TGSJC EC is willing to assist and work with the Court should another rule addressing this subject be considered by the Court in the future.

Respectfully submitted,



Gary W. Starnes
President of the TGSJC

3/18/19

Date Signed

**appellatecourtclerk - RESPONSE OF TGSJC TO PROPOSED RULE 10 (C)
AMENDMENTS- DOCKET NO. ADM2018-02254**

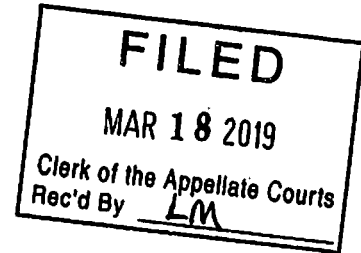
From: "Starnes, Gary W" <GStarnes@HamiltonTN.gov>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/18/2019 4:17 PM
Subject: RESPONSE OF TGSJC TO PROPOSED RULE 10 (C) AMENDMENTS-
DOCKET NO. ADM2018-02254
Attachments: General Sessions Court.Final Version of TGSJC Response to Rule 10C (PDF)
dated 3-18-19.pdf

Dear Mr. Hivner:

Pursuant to the Order of the Tennessee Supreme Court on 12/20/18, attached are the "comments" and "responses" of the Tennessee General Sessions Judges Conference (hereinafter "TGSJC") to the proposed Rule 10 (C) amendments. Please accept this email and attachment on behalf of the TGSJC. I will mail a letter and hard copy via U.S. Mail. If you need additional information, please let me know. Thank you.

3/18/19

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Date: 3/18/2019 11:17 AM
Subject: Docket No. ADM2018-02254Comments on Proposed Supreme Court Rule 10(C)
Attachments: TTJAEXECUTIVECOMMITTEECOMMENTRULE10C.docx

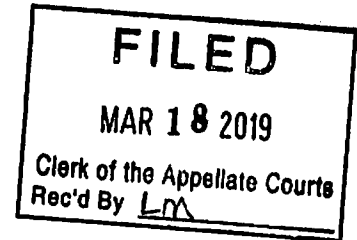
Dear Mr. Hivner:

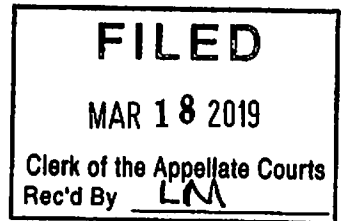
Enclosed herewith is a copy of "The Tennessee Trial Judges Association's Executive Committee's Comments And Position On Proposed Rule 10C" which was adopted unanimously on March 12, 2018, in Gatlinburg, Tennessee as the Tennessee Trial Judges Association's comments and position on proposed Rule 10(C). We request that you post these comments

Thank you.

Sincerely,

J. B. Cox, Chancellor
President, Tennessee Trial Judges Association





ADM2018-02254

THE TENNESSEE TRIAL JUDGES ASSOCIATION'S EXECUTIVE COMMITTEE'S COMMENTS AND POSITION ON PROPOSED RULE 10C

ADOPTED UNANIMOUSLY ON MARCH 12, 2019 IN GATLINBURG TENNESSEE AS THE TTJA'S COMMENTS AND POSTION ON PROPOSED RULE 10C

Tennessee trial judges share with the Court, the General Assembly and the public at large the goal of dealing with misconduct and unethical behavior swiftly and justly and in a manner that serves as a deterrent to future bad conduct. With this shared goal in mind the Executive Committee of the Tennessee Trial Judges Association ("EC") has undertaken a review of the Supreme Court's ("Court") proposed Rule 10C with the aim of providing useful comments. The EC's comments are set out below.

COMMENTS:

1 The EC's initial concern is the Court's involvement in every stage of the disciplinary process. The Court appoints all members of the Commission, appoints the chair and the vice-chair and appoints the disciplinary counsel who serves at the discretion of the Court. The Court grants itself the authority to conduct a review of all cases, whether appealed or not, and to impose any discipline it "deems appropriate." The Court also serves as the sole avenue of appellate review of the process created by this proposed rule.

The EC is confident the Court will appoint quality, dependable people to the commission. However, this construct provides for no independent investigation, hearing, imposition of discipline or review separate from the Court. This opens the process and the Court to obvious criticism. The Court's appointment of every member of the Commission, the Court's appointment of the chair, vice-chair and the Court's appointment of disciplinary counsel raises the foreseeable appearance of protecting the judiciary to the lay person. Further, the concentration of all public disciplinary power in the bosom of the Court raises concerns that disciplinary decisions could be influenced by outside forces. If the Court has unfettered discretion to overturn every disciplinary decision of the hearing panel whether appealed from or not and impose the discipline it "deems appropriate", the question of the necessity of hearing panel imposing discipline must be asked. To the lay person this concentration of power could appear to be protection; to the members of the judiciary it appears to be unfair. To protect the integrity of and promote confidence in the process, the Commission and its disciplinary decisions need to be insulated from the Court's influence.

2. Article VI, Sec. 2 of Tennessee's Constitution states the jurisdiction of the Supreme Court "shall be appellate only." The Court reviewing all publicly imposed discipline whether an appeal is taken or not and imposing any discipline it deems appropriate places the Court outside this specific constitutional role. This is problematic since any discipline imposed on a member of the judiciary could form the basis of either an impeachment proceeding brought pursuant to Article V or a removal proceeding brought pursuant to Article VI of Tennessee's Constitution. A member of the Court is the presiding judge of an Article V impeachment proceeding, and the Court serves its constitutional appellate role in both proceedings. Active participation by the Court in reviewing all discipline decisions absent an appeal and also imposing the discipline it deems appropriate raises concerns of basic fairness and partiality as the Court carries out these constitutional roles.

3. Another concern is the sanction of suspension without pay. The concern is not with the idea of this form of discipline itself or that this form of discipline could serve to deter unethical behavior or misconduct. Instead, the concern is that a suspension of pay is diminishing compensation during an elected term, and diminishing judicial compensation during an elected term is prohibited by Art. VI, Sec. 7 of the Tennessee Constitution. In light of this constitutional prohibition, the constitutionality of this form of discipline is suspect. In making this comment the EC is not seeking to preserve the salaries of unethical or misbehaving judges. Instead, the EC seeks to preserve a provision of the Constitution its members swore to protect when they took their oath of office.

4. The EC is perplexed why the burden of proof needed to prove misconduct is changed from the clear and convincing evidence standard historically provided by statute, see T.C.A. §17-5-308(d), to the preponderance of the evidence standard. This is especially perplexing since under sec. 17.5(b) any attempt at reinstatement is judged by a clear and convincing standard. Further, removal of most public officials is governed under the general ouster statutes, T.C.A. 8-47-101, et. seq., which requires a heightened burden of proof often referred to as a "clear case of official dereliction". See, *Carney v. Crosby*, 255 S.W.3d 593 (Tenn. App. 2008). It seems logical that a referral from the Court to the General Assembly to remove a judge be based on an evidentiary standard that is higher than a preponderance of the evidence.

Also, the preponderance of the evidence standard to determine disability is troubling in light of conservatorship requirements that proof of disability must be by clear and convincing evidence. T.C.A §34-1-126. Since a ward is entitled to this heightened standard before being declared disabled, should not an elected judge be entitled to this same standard before being declared disabled to perform the duties of the office they were elected to perform?

5. Section 23.2 introduces the concept of requiring a disciplined judge pay attorney fees and costs to the commission upon a determination a public sanction is appropriate. However, if the judge successfully defends the charge and the charge is dismissed he/she is not likewise allowed to recover attorney fees or costs from the commission. The EC is of the opinion that basic concepts of fairness dictate if the commission is entitled to recover costs and attorney

fees if it's the prevailing party then the accused judge should be allowed to recover their fees and costs if they are the prevailing party. This is especially the case considering the accused judge who prevails at the hearing panel level could be saddled with additional costs if the Commission appeals its own ruling, or the additional costs associated when the accused settles with the Commission only to have the Court, sua sponte, step in and impose a heightened level of discipline thereby increasing fees and costs.

6. The EC questions why the proposed Rule provides that if a hearing panel is unable to reach a "concurrence" the Commission is able to empanel another hearing panel to retry the case. Obviously, if a majority of the hearing panel is unable to reach a concurrence the case has not been proven by a "preponderance of the evidence". The judge faces what amounts to double jeopardy and also faces the prospect of having to pay attorney fees and costs for two proceedings.

7. At the conclusion of an evidentiary hearing the Rule provides that the hearing panel may dismiss the charges or impose discipline and either the judge or the Commission may appeal that decision to the Court. The statutes that governed the former Court of the Judiciary and govern the current Board of Judicial Conduct grant the judge the right to appeal, see Tenn. Code Ann. § 17-5-310, but for obvious reasons they did not grant that Court or Board the right of appeal. It is clear why a judge retains the right to appeal in the proposed Rule. However, "the decision of a hearing panel is the decision of the Commission," (Sec. 10.9(d)), and considering the important role these hearings play in this process it is clear why these panels are granted authority to make the commission's decisions on these critical issues. In light of this broad grant of authority to speak for the commission on these issues, the lowering of the burden of proof needed to establish misconduct, and the lack of a right to appeal being granted to the current Board of Judicial Conduct or the former Court of the Judiciary, it is less clear why this commission is now extended the right to appeal its decisions. It is also not clear how the decision to appeal will be made and by whom it will be made since the hearing panel's decision "is the decision of the Commission." A hearing panel could determine misconduct was not established by a preponderance of the evidence and dismiss the charges only to have the Commission appeal, or the panel could find misconduct occurred and impose discipline only to have the Commission appeal that decision too. The EC questions the purpose, goal or usefulness of granting the Commission the right to appeal its decisions.

8. Rules of conduct serve as a guide to acceptable and unacceptable conduct. A rule of conduct that does not clearly do one of these two things is often of no use. In both the preamble and then again in sec 8.8 the proposed rule uses the language "Any other conduct that brings the judiciary into public disrepute or that adversely affects the administration of justice". However, the rule of conduct in the current statute provides "any other conduct *calculated* to bring the judiciary into public disrepute or to adversely affect the administration of justice." T.C.A.17-5-302(8). While the rule of conduct in T.C.A. 17-5-302(8) provides guidance on what is to be avoided and what will result in discipline, the language in the proposed rule

does not provide that type of guidance at all. Instead, it leaves much to the imagination, and in the EC's view the removal of the words "calculated to" from this ground of misconduct opens this ground to subjective rather than objective reasoning and could allow for unintentional conduct to be swept up for disciplinary action.

9. While the EC understands that the identity of the complainant can be confidential, the EC is concerned that the initiating complaint does not have to be in writing nor signed by the complainant. The EC is also concerned as to why the immunity for Rule 10C differs from the immunity for TLAP which only allows immunity if the complainant acted in good faith without malice. (TCA 23-4-101)

POSITION:

The EC once again expresses its position that unethical behavior and misconduct by members of Tennessee's judiciary is not acceptable or tolerated. It also expresses again the concern shared by all that unethical behavior and misconduct be dealt with swiftly, justly and in a manner that discourages such behavior and conduct. The considerable efforts made by the Court to address the issues that concern us all did not go unnoticed or unappreciated as the EC reviewed the proposed rule and carefully considered the above comments. There are many parts of this proposed rule that are positive and promising, but in light of the concerns expressed above the EC of the TTJA takes the position proposed Rule 10C should not be adopted. The EC is thankful for the opportunity extended by the Court to comment on this proposed rule, and as a significant part of Tennessee's judiciary, the TTJA is always willing to assist in any way, if needed, should another rule addressing this subject be considered by the Court in the future. Should such a rule be proposed we would again welcome the opportunity to review the rule and submit comments.