IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE PROPOSED AMENDMENTS TO RULE 34, RULES OF THE TENNESSEE SUPREME COURT

No. ADM2017-00344

COMMENTS OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, Jason H. Long; Chair of the Communication Law Section, John P. Williams; Vice-Chair of the Communication Law Section Robb Harvey; General Counsel, Edward D. Lanquist; and Executive Director Emeritus, Allan F. Ramsaur, provides these comments concerning the proposed changes to Tenn. Sup. Ct. R. 34, which were issued by Order entered February 22, 2017.

Comment regarding Tenn. Sup. Ct. R. 34(1). The first two sentences of the proposed rule are incomplete statements under current law. Accordingly, we encourage the Court to state instead:

> "The public has a statutory right to inspect public records maintained by government entities including functional equivalents thereof. In addition to this statutory right, the right of the public to inspect public records maintained by the clerk of the appellate courts and clerks of the inferior courts exists under federal and state constitutional law and common law. Accordingly, the public has the right to inspect public records maintained by court clerks unless the record has been submitted under seal and the court

has accepted that submission under seal, or is the subject of a protective order."

The proposed rule fails to highlight the exacting scrutiny that is required when parties or courts attempt to seal judicial materials from public scrutiny. It also appears to imply that parties have some authority to submit materials under seal without court approval. Parties, and the courts that are assigned to their cases, should be discouraged from using protective orders to conflate the standards for production of information as confidential with the more demanding standards for sealing judicial records from public view. *See, e.g., Beauchamp v Federal Home Loan Mortgage Co.*, 628 Fed. Appx. 202, 207 (6th Cir. 2016); *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016). A proponent of sealing bears an extremely high burden.

Comment regarding Tenn. Sup. Ct. R. 34(2)(A). The statutory reference should be to Tenn. Code Ann. §10-7-503(a)(1)(A). This definition of the term "public record" was added to the Code by Chapter 1179 of the Public Acts of 2008.

Comment regarding Tenn. Sup. Ct. R. 34(2)(B)(vii). The current rule, which applies only to appellate judicial records, attempts to create its own exemption from the term "public records" as follows: "Documents protected from disclosure by order or rule of court."

Assuming that it would be lawful to do so, trial courts should not be authorized to promulgate further local exceptions to the access requirements of the Tennessee Public Records Act, or to diminish the presumptions of access that exist under constitutional law and common law. The proposed language appears to create the possibility of a patchwork of exemptions throughout the State, some of which may run afoul of existing constitutional, common law and statutory protections.

Comment regarding Tenn. Sup. Ct. R. 34(2)(B)(viii). The proposed new language in (2)(B)(vii) is vague and overly broad. We encourage the Court not to add the following draft language to (2)(B)(vii): "or potentially undermine the inherent constitutional powers granted to the court and recognized in Tenn. Code Ann. §16-3-503." This proposed language is inconsistent with the presumption of public access established by the General Assembly and endorsed by the Court in numerous decisions. The citation to Tenn. Code Ann. §16-3-503 simply refers to the law which declares that the common law at the time of the adoption of the Constitution would apply to the powers of our courts.

The language of the current rule ("the disclosure of which would frustrate or interfere with the judicial function of the courts") provides the courts sufficient discretion to decide that certain records should not be released, and even that discretion is bounded by the federal and state constitutions and existing precedent

under the common law. The Tennessee Bar Association favors, when possible, clear guidance to courts, clerks, and citizens concerning access to court records, and thus about the scope and limits of exceptions to access. While the existing language may not be a model of precision, the addition of the proposed language would make matters worse, rather than better, making the boundaries of the exception less clear.

Comment regarding Tenn. Sup Ct. R. 34(3). Subsection (3) sets forth the procedure for requesting to inspect and obtain copies of public records in the office of the Appellate Court Clerk, as well as the procedure for appealing when the requestor is "dissatisfied with the clerk's disposition of a request." However, although (1) and (2) of the revised Rule 34 make the Rule applicable to the inferior courts, there is no provision comparable to subsection (3) which would be applicable to the clerks of the inferior courts.

In addition, current Rule 34(3)(A) also contains an impermissible content-based restriction: "Requests to inspect all or any part of an appellate record in a case that has been submitted for disposition shall also contain a brief statement of the basis or reason for the request." That provision permits the Clerk, or the Court, to demand to know and then to evaluate a citizen's reason for wishing to inspect a judicial record which is public. The provision also could act as a deterrent to citizens from making a request. Moreover, this requirement is contrary to

precedent under the Public Records Act, as Tennessee law has never authorized a custodian of public records to demand to know or to evaluate a citizen's purposes in seeking access to public records.

General Public Records Act Comment. Chapter 722 of the Public Acts of 2016 requires every governmental entity to designate a public records request coordinator (Tenn. Code Ann. §10-7-503(g)). The proposed Rule, as revised, does not clearly do so. It is unclear whether each inferior court clerk's office should determine the method of compliance with this requirement or whether the Court wishes to establish in Rule 34 a uniform method of compliance applicable to all clerks of inferior courts.

Respectfully Submitted,

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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.

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March 13, 2017

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Re: Tenn Sup Ct Rule 34

ADM2017-00344

Dear Mr. Hivner,

I saw that the Supreme Court of Tennessee is considering amending Tennessee Supreme Court Rule 34. I recognize that the proposed amendment to that Rule has likely already been staffed through the Tennessee Advisory Commission on the Rules of Practice and Procedure, and my suggestions for additional amendments may not be fully appropriate at this stage of the rulemaking process.

However, I would respectfully ask that the Commission and/or the Court consider a provision, or provisions, in the Rules that I believe would prohibit a practice in the appellate process that frustrates or interferes with the goal of fairness to all parties in that process. The concern I have relates primarily to access and use of verbatim transcripts and accompanying trial exhibits that are routinely filed in the trial court and then forwarded to the appellate court with the Record. I have frequently observed that one party to the litigation engages a reporter to attend the trial proceedings, and if appeal ensues, the party who engaged the reporter directs that reporter to prepare and assemble the transcript and exhibits for filing with the trial court clerk. When those items are filed in the trial court, the opposing party (who did not engage the reporter at trial and did not engage the reporter to prepare and file the transcript) is frequently permitted to obtain copies of the transcript from the trial court clerk.

It seems to me that situation is unfair to the party who has paid for the reporter's attendance at trial and for the preparation of the transcript. The other party has paid nothing toward that cost for the completion of a proper record, and yet makes use of that record throughout the course of the appeal. I wonder if the Advisory Commission or the Court would consider looking at an amendment to the Rules that would curtail this practice which seems to me to bestow on one party to an appeal more favorable economic treatment than is received by the other party. That situation seems at cross purposes with all Tennessee Court Rules which seek to administer the Rules so that a "just and inexpensive" determination of every action be had (TRCP 1).

I would be pleased to discuss my concerns further with the Advisory Commission, and am providing a copy of this correspondence to the Chair of that Commission.

Yours Very Truly,

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Cc: James M. Doran, Jr.

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March 24, 2017

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Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee (the "Committee") has carefully considered current Rule 34 and the proposed amendments thereto (the "Amendments"). At the KBA Board of Governors' (the "Board") Meeting held on March 22, 2017, the Committee presented a detailed report of its review of the Amendments. Among other things, concerns arose as to the vagueness and broadness of certain portions of the Amendments and the applicability of portions of the Amendments to inferior courts. There was also some confusion as to the goal intended to be accomplished by the Amendments.

Following the Committee's presentation and thorough discussion by the Board, the Board as a whole unanimously approved the Committee's recommendations. Those recommendations were as follows:

(a) Adopt the recommendations of the Tennessee Bar Association filed today and the concerns expressed in the correspondence dated March 6, 2017 from Knoxville attorney and KBA member Richard L. Hollow to Christy M. Gibson, JD, MPA, Sections and Committees Coordinator of the Tennessee Bar Association. Mr. Hollow shared his letter to the TBA with the KBA Professionalism Committee. A copy of such letter is attached to this letter with Mr. Hollow's permission; and,

(b) Request that the Supreme Court appoint a special committee to study and report upon the ramifications of the proposed rule changes and to study and report upon the existing law for the public's right to inspect judicial records. In addition to Supreme Court Rule 34, the existing law for the right to inspect judicial records includes the Tennessee Constitution, statutory law, and common law. The task of restating or reshaping the law for the inspection of judicial records warrants an exhaustive and thorough analysis.

With this letter, the KBA is making both of these requests.

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

Sincerely,

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March 6, 2017

Christy M. Gibson, JD, MPA
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Tennessee Bar Association
221 Fourth Avenue N, Suite 400
Nashville, TN 37219

In Re: Proposed Amendments to Tenn. Sup. Ct. R. 34

Dear Ms. Gibson:

Pursuant to the request recently conveyed to our section with regard to proposed amendments to Rule 34, I have reviewed the text of the proposed revisions and offer these observations.

The provision of "(1) Right to Inspect Public Records" purports to discuss the efficient operation of the court with regard to public records inspections pursuant to Tenn. Code Ann. § 16-3-401 which states that "the Supreme Court may make rules of practice for the better disposal of business before it".

Section (2) refers to the definition of "public record". The citation is to Tenn. Code Ann. § 10-7-301(6). This citation is a little behind the curve. Originally, the Tennessee Public Records Act, specifically Tenn. Code Ann. § 10-7-503, did not contain a definition of a public record. Tenn. Code Ann. § 10-7-301(6) contains such a definition. In the absence of a definition in Tenn. Code Ann. § 10-7-503, our appellate courts adopted the definition contained in Tenn. Code Ann. § 10-7-301(6) and applied it to Tenn. Code Ann. § 10-7-503. When Tenn. Code Ann. § 10-7-503 was legislatively revised following the study given it in the wake of the Tennessee Waltz scandal, the definition contained in Tenn. Code Ann. § 10-7-301(6) was placed into Tenn. Code Ann. § 10-7-503 and became Tenn. Code Ann. § 10-7-503(a)(1)(A). The absence of a specific reference to the latest state of the law raises the question of whether the proposed amendments are a comprehensive review and revision of Rule 34 or whether

the changes were simply proposed in response to a specific set of circumstances or requests not reflected in the referral.

Sections 1 and 2 refer to the status of certain judicial records as being "public". However, there is nothing in the proposed rule change which deals with the process of how you go about asking for the records or what you do if the records are denied you and with whom your appeal would be lodged. Section 3, which deals with those matters, applies only to appellate courts. Therefore, as the rule is presently written, anyone seeking court records that are public, pursuant to Tenn. Code Ann. § 10-7-503, would be left on their own to determine the proper person to whom the request should be made and, if the request was denied, the individual or entity to which an appeal could be made. This means that juvenile courts, general sessions courts, domestic relations courts, circuit courts, chancery courts, criminal courts and others are completely left out of the process outlined in Section 3 as it relates to the acquisition of the records and handling of appeals. Also, the provisions of Section 3(A) regarding statements of the basis or reason for requesting the information would be omitted under the terms of the proposed revisions with respect to requests made to any court other than those of appeals or supreme court.

Section 3(A) contains the following language:

> Requests to inspect all or any part of an appellate record in a case that has been submitted for disposition *shall also* contain a brief statement of the *basis* or *reason* for the request.

It is my belief that requiring a citizen of Tennessee, who is applying for access to a presumptively open public record, to state a basis or reason for the request is a form of indirect intimidation and could function as a deterrent to the citizen in pursuing the request. People have many reasons for asking for public records. It can range from curiosity to serious research, perhaps pertaining to a point of law or a specific case or controversy. It is not always comfortable for the requestor to have to state the reason or basis for making a request. If the record is really public and if the citizen has a right to see it as a public record, then there should be no requirement for that citizen to state a basis or a reason for the request. Tenn. Code Ann. § 10-7-503 is specific in its statement that public records are open for inspection by any citizen of the State of Tennessee. Therefore, if the Courts wish to open their records and allow citizen access, it should be freely granted and not conditioned upon a statement of a basis or reason for it.

The provisions of Section 2(B)(viii) are, in my opinion, vague to the point of potential constitutional infirmity. The section provides that an exception to presumptive openness and public disclosure could occur if the disclosure would "frustrate" or "interfere" with the judicial function of the courts. The word "frustrate" is defined in the Random House Unabridged Dictionary, 2nd edition, as "to make plans worthless or of no avail or a nullity". The word "interfere" is defined in the same source

as "to come into opposition with the effect of hampering, to meddle or to obstruct". How do we define or decide when a disclosure would be worthless or of no avail or a nullity or come into opposition with or hamper or meddle or obstruct? These are highly subjective terms. I do not believe they are sufficiently definite to quatify as objective measures. This calls into question, in my opinion, whether or not they are void for vagueness. Section 2(B)(viii) further states "or potentially undermines the inherent constitutional powers granted to the court". The citation to Tenn. Code Ann. § 16-3-503 simply refers to the law which declares that the common law at the time of the adoption of the Constitution would apply to the powers of our courts. We use the word "potential" in many contexts. Yet the dictionary defines it as "possible, but not actual, or possible as opposed to actual". Again, this is a less than precise word which refers to the permanent or inseparable power of the court as described by the word "inherent".

This rather lengthy discussion of Section 2(B)(viii) is for the purpose of attempting to show that the terms incorporated are subject to a large amount of subjective interpretation and application. They lack objective clarity and certainty. They provide a basis for individual clerks or other personnel to deny a request based on subjective feelings. In other words, this appears to be an attempt, perhaps inadvertent, to create a window of opportunity for denial of any request based upon the subjective frame of mind of the custodian of the records at the point in time when the request is made. The lack of a definite, clearly articulated objective standard is disturbing.

Section 2(b)(vii) is a real sleeper. It protects documents from disclosure if they are shielded "by order or rule of court". What orders? What rule? Does this refer to the Rules of Criminal, Civil and Appellate Procedures or does it also embrace local rules of Court?

If a protective or restrictive order is entered by a court closing records to public access how long can it exist? Based upon the decision of the Western Section Court of Appeals at Jackson in Autin v. Goetz, 2017 Tenn. App. LEXIS 114, the answer may be "forever". In the Autin decision, a challenge was made to a protective order entered in a trial court closing certain records "in perpetuity". The court of appeals engaged in a lengthy discussion of protective orders and the ability of a court to retain jurisdiction over a protective order even after the underlying litigation has been dismissed or concluded. The thrust of Autin seems to be that the court retains jurisdiction over its protective order for the duration of the existence of the order notwithstanding the status of the underlying litigation. Therefore, an order entered in a court sealing records "in perpetuity" is, at least by inference, possible and permissible. That would seem to argue in favor of a more rigid examination of the proposed revisions to Rule 34.

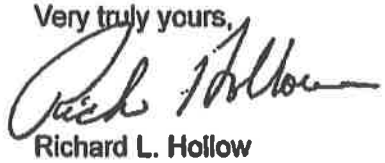
Is there an apparent contradiction in Rule 34's language? Sections 1 and 2 appear to deal with every court as previously noted. However, Section 3 appears to apply only to courts of appeals and the supreme court. Since records can be sealed in perpetuity and since Rule 34 does not contain any guidance about how and under what circumstances appeals can be taken from an order closing records or to whom that

appeal would be made in instances other than those covered in Section 3 of the Rule, we are left to assume that someone dissatisfied with a decision in a court other than the court of appeals or supreme court would have to rely on traditional methods of challenge including mandamus.

In my opinion, we should urge the court to carefully reconsider the proposed revisions to Rule 34 with an eye toward preserving to the greatest extent possible what we all consider to be the inherent right of the people under our Constitution to be able to judge the performance of those they place in positions of power and authority.

The purpose of this correspondence is not to criticize the actions of the Supreme Court in making this proposal, but simply to point out that there are potential problems for citizen access contained in the language which is currently being suggested. Respectfully, I would recommend that the comment from the Section request the Supreme Court to restudy the language with an eye toward more clarity, certainty and objectivity.

Very truly yours,



RLH:nc

Richard L. Hollow

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March 24, 2017

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Nashville, TN 37219-1407

Re: Comments of Tennessee Association of Broadcasters to Proposed Amendments to Tennessee Supreme Court Rule 34, No. ADM2017-00344

Dear Sir,

Pursuant to the Court's Order of February 22, 2017, soliciting public comments for proposed changes to Tennessee Supreme Court Rule 34, the Tennessee Association of Broadcasters ("TAB"), by and through counsel, submits the following comments:

TAB is a voluntary association of radio and television broadcast stations located in Tennessee, organized and existing as a not-for-profit Tennessee corporation. Its purpose includes promoting a high standard of public service among Tennessee broadcast stations, fostering cooperation with governmental agencies in all matters pertaining to national defense and public welfare, and encouraging customs and practices in the best interests of the broadcasting industry and the public it serves. Broadcasters, as federal licensees, are required to serve the public interest. 47 U.S.C. § 303(f); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d. 597, 599 (3rd Cir.), *cert. denied,* 327 U.S. 779 (1946) ("broadcasting station must operate in the public interest and must be deemed to be a 'trustee' for the public").

TAB appreciates the Court's recent consideration of Rule 34. We note that the Rule citation to Tennessee Code Annotated § 10-7-301(6) for a definition of "public records" should more properly be to § 10-7-502(a)(1)(A). Moreover, TAB believes this correction to citation is not merely a clerical matter, but rather indicative of the need for more significant revisions to Rule 34. The Tennessee Public Records Act, and interpretative case law, has changed significantly since Rule 34 was last revised. Accordingly, TAB urges this Court to consider a more thorough revision to Rule 34 than its recent proposal. TAB and other interested organizations and persons have participated in assisting the General Assembly in revising the Public Records Act, and we would be happy to serve in the capacity of an advisory committee for Rule 34 changes.

One particular aspect of the proposed changes that is especially troubling in the new Section (2)(B)(vii) (the "Proposed Section"). The Proposed Section would exempt the following from public access under the Tennessee Public Records Act, "Any other written or electronic record the disclosure of which would frustrate or interfere with the judicial function of the courts or potentially undermine the inherent constitutional power granted to the court and recognized in Tenn. Code Ann. § 16-3-503." The current version of this Section Rule 34 (2)(B)(vii) is broad, but the Proposed Section would broaden the scope of this exemption even further by adding the phrase "or potentially undermine the inherent constitutional powers granted to the court."

TAB opposes the addition to this phrase because it would be inconsistent with the Supreme Court's recognition of how the Tennessee Public Records Act is patterned, as noted in *Schneider v. City of Jackson*, 226 S.W.3d 332 (2007) . In addition to making the section too broad, the proposed addition makes the section too vague to inform anyone as to what is or is not exempt.

In the realm of state open records laws, and even the federal Freedom of Information Act, there are two basic patterns. The governmental entity can either have a few broadly worded exemptions that will require substantial court interpretation, or the governmental entity can have many narrow specific exemptions. The Supreme Court recognized these two distinct patterns when it reversed the Tennessee Court of Appeals recognition of a "law enforcement privilege" that had not been adopted by the General Assembly. *Schneider* 226 S.W.3d 332. Specifically the court stated:

> In adopting the law enforcement privilege, the Court of Appeals relied exclusively upon federal court decisions and decisions of other state courts. However, the Court of Appeals failed to account for the distinctions between the Public Records Act and the open records laws of these other jurisdictions. For example, the federal government's open records law, the Freedom of Information Act ("FOIA"), has nine broad and general exceptions to disclosure that necessarily require substantial judicial interpretation. See 5 U.S.C.A. § 552(b) (West 2007). The Illinois and Massachusetts courts decisions upon which the Court of Appeals relied were interpreting state statutes patterned upon FOIA. *See Roulette v. Dep't. of Cent. Mgmt. Servs.*, 141 Ill. App. 3d 394, 95 Ill. Dec. 587, 490 N.E.2d 60, 64 (1986); *Globe Newspaper Co. v. Boston Ret. Board*, 388 Mass. 427, 446 N.E.2d 1051, 1055 n. 11 (1983). One of the primary federal cases upon which the Court of Appeals relied observed that the law enforcement privilege is "largely incorporated" into FOIA. *United States v. Myerson*, 856 F. 2d 481, 483-84 (2d Cir. 1988).
>
> In contrast, the Public Records Act is not patterned upon FOIA. It provides specific statutory exceptions to disclosure, with more than a dozen such exceptions for the records of law enforcement agencies. Significantly, none of these express exceptions incorporate the law enforcement privilege or otherwise bar disclosure of the field interview cards at issue in this appeal.

Id. at 342-43 (footnotes omitted).

In *Schneider*, the Court specifically noted that the Tennessee "Public Records Act [is] distinct from FOIA and the open records laws of other states." *Id.* at 343. Tennessee clearly follows the pattern of requiring specific, not broad, exemptions. In *Schneider*, the Court noted, "A comparison of open records and open meetings laws may be found at the Reporters Committee for Freedom of the Press, *Open Government Guide*, http://www.rcfp.org/ogg/index.php." Id. at 342, n. 13. This comparison of the various states open records laws includes an appendix for Tennessee, noting that Tennessee has well over 350 exemptions to the Public Records Act. Since the date of that Open Government Guide to which the Supreme Court referred, the Tennessee General Assembly has continued to enact several specific exemptions each year.

If the Court were to adopt the Proposed Section this would take the Public Records Act from a pattern that has many specific exemptions to one that has many specific exemptions plus this now, broad exemption. In so doing, Rule 34 would alter the general pattern of the Public Records Act and essentially give Tennessee citizens the "worst of both worlds," i.e., a plethora of specific exemptions to review, plus a broad exemption subject to uncertain future interpretations.

TAB is not aware of any event that has prompted this need for the Proposed Section. If there has been such an event that has led the Court to believe a rule change is needed, TAB urges the Court to adopt a narrowly tailored revision, and not such a broadly worded revision. If there has been no such event, then there would seem to be no need to expand Rule 34 to make it more broad and more vague.

TAB is concerned that the Proposed Section does not serve the public interest, which is paramount in the Public Records Act. The benefit of having specific exemptions is so that the average citizen will know what he or she may access under the Public Records Act. The broader an exemption is, the less notice provided to the public to inform them what may or may not be exempt. In the context of open courts the U.S. Supreme Court has observed, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980). Likewise, having specific, not so broad and vague exemptions, furthers public trust in government in general, and in our courts in particular.

Therefore, TAB respectfully urges the Court not to adopt the Proposed Section.

Sincerely,

Douglas R. Pierce