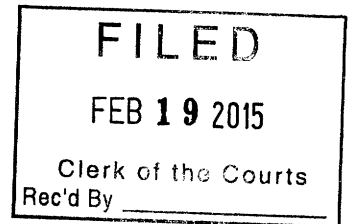


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE PETITION FOR THE ADOPTION OF AN AMENDED
COMMENT TO TENN. SUP. CT. R. 8, RPC 3.5(c)

No. ADM2014-01440

ORDER



On July 25, 2014, the Tennessee Bar Association (“TBA”) filed a “Petition. . .For the Adoption of an Amended Comment to Tenn. Sup. Ct. R. 8, RPC 3.5(c).” The TBA’s Petition asked the Court “to adopt an amended Comment to Rule 8, RPC 3.5(c). . .to make clear that the adoption of RPC 3.5(c) [effective January 1, 2011] was not intended to, and did not, overturn long-settled precedent prohibiting courts from restricting post-trial communications with discharged jurors as a matter of course or routine.”

By way of background, the TBA’s Petition stated:

In 1991, this Court issued a well-reasoned opinion acknowledging the utility of post-discharge communications by lawyers with jurors, and the general right of lawyers to undertake such communications in a non-abusive manner. *State v. Thomas*, 813 S.W.2d 395 (Tenn. 1991). In *Thomas*, this Court struck down Davidson County Local Rule 5.04(e) as unenforceable. That local rule of court had provided: “Once the jurors’ service is completed all interviews of jurors by counsel, litigants, or their agents, are prohibited except with the permission of the trial court, and then only in such situations as are deemed appropriate.” *Id.* at 395. The Court explained that the flat prohibition in the local rule was contradicted by the then-existing version of Tennessee’s ethics rules, and on that basis obviated any need to address public policy or constitutional issues. *Id.* at 397.

With that background, the TBA’s petition asked the Court to amend Comment [4] to RPC 3.5 “to specifically reflect that *State v. Thomas* remains good law in Tennessee.” The TBA concluded its Petition by setting out its proposed revision of Comment [4].

On October 10, 2014, the Court filed an order soliciting public comments from judges, lawyers, bar associations, members of the public, and any other interested parties concerning the TBA’s proposed amendment of Comment [4]. The deadline for submitting written comments was Tuesday, December 9, 2014. The Court received only one written comment during the comment period, a comment submitted by the Board of Professional Responsibility (“BPR”).

After due consideration of the TBA’s proposed amendment and the BPR’s written comment, the Court hereby adopts the amended Comment [4] set out in the appendix to this order, effective May 1, 2015.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, this order, including the appendix, shall be posted on the Tennessee Supreme Court’s website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX

Amendment to Comment [4] of Tenn. Sup. Ct. R. 8, RPC 3.5

(new text indicated by underlining)

Rule 3.5. Impartiality and Decorum of the Tribunal. — A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress, or harassment;
- (d) conduct a vexatious or harassing investigation of a juror or prospective juror; or
- (e) engage in conduct intended to disrupt a tribunal.

Comment.

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Tennessee Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. For example, a lawyer shall not give or lend anything of value to a judge, judicial officer, or employee of a tribunal, except as permitted by Canon 4(D)(5) of the Code of Judicial Conduct. A lawyer, however, may make a contribution to the campaign fund of a candidate for judicial office in conformity with Canon 5(B) of the Code of Judicial Conduct.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized

to do so by law or court order. Unless such a communication is otherwise prohibited by law or court order, paragraph (b) of this Rule would not prohibit a lawyer from communicating with a judge on the merits of the cause in writing if the lawyer promptly delivers a copy of the writing to opposing counsel and to parties who are not represented by counsel because that would not be an ex parte communication.

[3] Paragraph (b) also does not prohibit a lawyer from communicating with a judge in an ex parte hearing to establish the absence of a conflict of interest under RPC 1.7(c). In such proceedings, the lawyer is of course bound by the duty of candor in RPC 3.3(a)(3).

[4] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order entered in the case or by a federal court rule, but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication. As the Court stated in *State v. Thomas*, 813 S.W. 2d. 395 (Tenn. 1991): “After the trial, communication by a lawyer with jurors is permitted so long as he [or she] refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he [or she] could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.” *Id.* (quoting Tenn. Sup. Ct. R. 8, EC 7-29). The Court went on to state in *Thomas* that “Rule 8 therefore allows post-trial interviews by Counsel with jurors on these matters without the prior approval of the trial court.” *Id.* at 396. Although the Court’s analysis in *Thomas* was based on an earlier version of Rule 8 (i.e., the Code of Professional Responsibility), the foregoing principles quoted from *Thomas* remain valid in the context of RPC 3.5.

[4a] A communication with, or an investigation of, the spouse, child, parent, or sibling of a juror or prospective juror will be deemed a communication with or an investigation of the juror or prospective juror.

[5] The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[6] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. *See* RPC 1.0(m).

[end of Appendix]