

IN THE SUPREME COURT OF TENNESSEE

FILED

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IN RE:)
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PETITION FOR THE ADOPTION OF)
AMENDED TENNESSEE CODE OF)
JUDICIAL CONDUCT TOGETHER)
WITH CHANGES IN RULES AND)
STATUTES)

No. _____

APPELLATE COURT CLERK
NASHVILLE

**PETITION OF THE TENNESSEE BAR ASSOCIATION
FOR THE ADOPTION OF
AMENDED TENNESSEE CODE OF JUDICIAL CONDUCT**

SAM D. ELLIOTT
President,
Tennessee Bar Association
Gearhiser, Peters, Lockaby,
Cavett & Elliott, PLLC
320 McCallie Avenue
Chattanooga, TN 37402
Tel: 423/756-5171

T. MAXFIELD BAHNER
Chair, Tennessee Bar Association
Task Force on Rules of Judicial Conduct
Chambliss, Bahner & Stophel, P.C.
1000 Tallan Building
Two Union Square
Chattanooga, TN 37402-2500
Tel: 423/757-0202

DANIEL W. VAN HORN
President-Elect
Tennessee Bar Association
Butler, Snow, O'Mara, Stevens
& Cannada, PLLC
Crescent Center, Suite 500
6075 Poplar Avenue, P.O. Box 171443
Memphis, TN 38187-1443
Tel: 901/680-7200

SARAH Y. SHEPPEARD
Reporter, Tennessee Bar Association
Task Force on Rules of Judicial Conduct
Sheppard, Swanson & Mynatt, PLC
P.O. Box 2149
Knoxville, TN 37902
Tel: 865/546-3653

BILL HARBISON
General Counsel,
Tennessee Bar Association
Sherrard & Roe, PLC
424 Church Street
Suite 2000
Nashville, TN 37219
Tel: 615/742-4200

ALLAN F. RAMSAUR
Executive Director,
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue, N
Suite 400
Nashville, TN 37219-2198
Tel: 615/383-7421

The Tennessee Bar Association ("TBA") petitions the Court to adopt an amended Rule 10 of the Rules of the Tennessee Supreme Court, the Code of Judicial Conduct ("Amended Code"), which governs the conduct of judges of the bench in Tennessee. The proposed Rule is attached as Exhibit A. Also appended in Exhibits B and C are suggested changes in some Rules of the Court and in some Tennessee statutes which, if the draft as presented is in large part adopted, will need to be made to harmonize the provisions of those specific rules and statutes with the revisions suggested in the draft Code submitted herewith. In support of the adoption of these amended Rules, the TBA states as follows:

BACKGROUND

In September 2009, Gail Vaughn Ashworth, then President of the TBA, appointed a Task Force to thoroughly review Tennessee's current Code of Judicial Conduct. The last comprehensive review of the Tennessee Code of Judicial Conduct occurred in 1990. Although there have been some amendments to Rule 10 since then, Ms. Ashworth, after consulting with many persons from different perspectives, concluded that it was important to have a comprehensive review of the Tennessee Code of Judicial Conduct which would include a review of developments in the relevant law over the last two decades.

Ms. Ashworth appointed thirteen persons to the Task Force on Judicial Conduct Rules ("Task Force"), including a majority of whom were judges from the trial and appellate benches. She appointed T. Maxfield Bahner, Chair, and Sarah Y. Sheppard, Reporter. The other members of the Task Force are Albert C. Harvey, George T. "Buck" Lewis III, Barbara Mendel Mayden, Lucian T. Pera, Chancellor Jerri S. Bryant, Judge Angelita Blackshear Dalton, Chancellor Thomas R. "Skip" Frierson, Judge Alan E. Glenn, Judge Walter C. Kurtz, Judge Joe G. Riley, and Judge Thomas G. Stovall. Mr. Allan F. Ramsaur, Executive Director of the TBA,

although not a voting member of the Task Force, attended all meetings and conferences and was very helpful to the Task Force.

The American Bar Association ("ABA"), long interested in judicial ethics, adopted the first Canons of Judicial Ethics in 1924. These have gone through various iterations. The Model Rule adopted by the ABA in 1972, and thereafter from 1987 to 1990, underwent a comprehensive review by the ABA Standing Committee on Ethics and Professional Responsibility and a Judicial Code Subcommittee. Later a Joint Commission of the ABA was appointed to evaluate the Model Code. Its comprehensive review concluded in 2007, and the revised Model Code was adopted by the ABA House of Delegates in February, 2007. The format of the current Model Code contains four canons together with other sections entitled Preamble, Scope, Terminology and Application. Since 2008, eighteen (18) states have adopted amendments to their codes of judicial conduct based upon the 2007 ABA Model Code of Judicial Conduct.¹ Three (3) states have approved partial revisions.² Four (4) states have proposals pending.³ Seventeen (17) states have committees established to review their codes.⁴

The Task Force began its work in the autumn of 2009. It met in daylong meetings in Nashville and in telephone conference calls. Its stated goal was to comprehensively review the Tennessee Code of Judicial Conduct in Supreme Court Rule 10 in light of developments in the

¹ Hawaii effective January 1, 2009; Indiana effective January 1, 2009; Delaware effective November 1, 2009; Montana effective January 1, 2009; Ohio effective March 1, 2009; Minnesota effective July 1, 2009; Kansas effective March 1, 2009; Arkansas effective July 1, 2009; Arizona effective September 1, 2009; Wyoming effective July 1, 2009; Utah effective April 1, 2010; Nevada effective January 19, 2010; Colorado and Maryland effective July 1, 2010; Connecticut, Nebraska and Washington all effective January 1, 2011; Oklahoma which will be effective April 15, 2011.

² Massachusetts, Missouri and New York have currently approved revisions to parts of their Judicial Codes.

³ Mississippi, New Hampshire, Oklahoma and Tennessee have proposed revisions to their Judicial Codes.

⁴ Arkansas, California, District of Columbia, Illinois, Kentucky, Louisiana, Maine, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont and Wisconsin have established committees to review their code.

relevant law and the changes in the ABA Model Code of 2007, and to suggest revisions relevant to Tennessee.

The Task Force's first draft was made available for public comment in the Spring of 2010, with an original deadline for comments of July 31, 2010. That deadline was extended to October 31, 2010, so that a committee of the Tennessee Trial Judges Association and the Tennessee Judicial Conference could have more time to review the proposal and formally present it to the Tennessee Judicial Conference at its meeting in October, 2010.

In addition to the comments received from the Joint Committee of the Tennessee Judicial Conference and Tennessee Trial Judges Association, comments were received from representatives of the Knoxville Bar Association, individual judges, and a committee of juvenile and family court judges. Individual lawyers, as well as representatives of at least one section of the Tennessee Bar Association also commented.

Before the final deadline, but after many comments had been received, the Task Force began to carefully review the comments as it went back through its work product in fine detail. After receiving the comments of the Tennessee Judicial Conference and Tennessee Trial Judges Association in November, 2010, the Task Force carefully considered each of their comments and again the comments earlier received as it continued its thorough and comprehensive review of its work. All of the comments received were thoughtful and helpful. As these were considered, changes were made which are reflected in the draft submitted herewith as Exhibit A.

THE PROPOSAL OF THE TBA

The TBA proposes that the Court replace the current Tennessee Supreme Court Rule 10 with the proposed Amended Code attached to this petition as Exhibit A. This Exhibit has extensive footnotes prepared by our excellent reporter, Sarah Sheppard, comparing the draft

submitted for consideration by this Court with the current Tennessee Code and the ABA Model Code. Because of the significant renumbering, realignment and reorganization of the 2007 Model Code and the TBA recommendation that the new format be adopted, a traditional redline of the current code is not useful. The TBA recommends that, if the Court adopts the Amended Code, the comments and comparison to the current code be adopted to aid in the transition to the new code.

THE PROCESS FOR DEVELOPING THIS PROPOSAL

When she appointed the Task Force, Ms. Ashworth asked it to endeavor to complete its work thoroughly, but in an abbreviated period of time. Each member of the Task Force accepted appointment with this understanding. The members spent many hours working together during in-person meetings, conference calls, email exchanges, research, drafting and repeated revisions. Some of the work was delegated to subcommittees who did extensive research and reported to the full Task Force with recommendations which were then thoroughly debated.

The Task Force has been particularly fortunate to have had Sarah Y. Sheppard as Reporter. She has herself done a great deal of work and, with exceptional scholarship and grace, has had the laboring oar in drafting and redrafting.

The Task Force was open to all suggestions it received and thoughtfully considered each.

Parts of the draft have been submitted to the staff of the ABA Center for Professional Responsibility for comment. The Task Force engaged in discussions by conference call with representatives of the ABA staff and also considered their written comments.

The Task Force also met with judges representative of drug courts to obtain their comments and learn more about the subject from their practical experience.

The Task Force carefully evaluated every comment it received, especially those received in writing.

After the Task Force completed its work, the House of Delegates of the TBA and then the TBA Board of Governors approved the final proposal appended to this Petition.

**OBSERVATIONS REGARDING THE AMENDED CODE
AND KEY SUBSTANTIVE POINTS**

1. The Preamble has been revised. The amended Preamble is limited to describing the general purpose and rationale of the Code.
2. The proposed draft includes a Scope section which is new and contains provisions from the existing Preamble to explain the structure of the Code and how the various parts of the Code are intended to operate.
3. The proposed Terminology section includes some new definitions including, for example, "aggregate," "contribution," "domestic partner" and other terms of relevance to the attached proposal.
4. The proposed Code is made up of four canons, as compared to the five canons as in the current Code. The TBA believes that realigning the format and numbering of the Code to conform to the ABA Model Code, and to provide canons, rules and comments, will be helpful now and as the law develops in Tennessee and other jurisdictions.

**SUMMARY OF MAJOR SUBSTANTIVE CHANGES
FROM THE CURRENT CODE OF JUDICIAL CONDUCT**

Following are major changes the TBA suggests to the Court:

1. Prohibit judges who participate in judicial settlement conferences from presiding over the trial or other contested issues in that matter. The recommendation is for both a

prohibition in Rule 2.6 and the Code of Judicial Conduct and an amendment Tennessee Supreme Court Rule 31, Section 20, because of the difficulties wrought by that process.

2. Adopt a limited exception to ex parte communications prohibitions for those involved in drug and mental health courts. However, disqualification may be required. See Rule 2.9, Comment [4].

3. Provide greater guidance on judicial disqualification and recusal. Included are factors such as the levels of campaign support for the judge or the judge's opponent, the timing of the support and independent expenditures. See Rule 2.11, Comment [7].

4. Require compliance with new procedures for motions to determine incompetence, disqualification and recusal.

5. Change the gift threshold for required reporting from \$150 to \$250. See Rule 3.15(2).

6. Consistent with recent constitutional decisions, significantly lessen the restrictions on campaign activities while making it clear that campaign committees and judges must fully comply with campaign finance disclosure statutes, and that such activities may lead to disqualification. See Rules 4.1, 2.11(d).

7. Include within the provisions related to judges' families a person with whom another person maintains a household and an intimate relationship other than a person to whom he or she is legally married. See Rule 2.11(d).

8. Clarify application of certain Code provisions to senior judges, part-time judges, continuing part-time judges and pro tempore judges.

9. Clarify when judges may provide a reference or recommendation. Permit use of official letterhead when the reference is personal or is based on personal knowledge and is

germane to the judge's professional knowledge, such as writing a letter of recommendation for a law clerk. See Rule 1.3, Comment [2].

10. Clarify a judge's responsibility to report violations of the Rules of Professional Conduct and the Code of Judicial Conduct by lawyers and judges, including reference to judicial assistance programs. See Rule 2.15.

11. Permit judges, spouses and guests to attend, free of charge, events associated with educational, civic, religious, fraternal and charitable organizations. See Rule 3.14, Comment [1].

12. Limit participation in activities of organizations which engage in political advocacy in limited subject areas or consistently for one side in lawsuits. See Rule 3.7, Comment [1].

13. Emphasize that judges must perform their duties promptly, as well as competently, diligently and cooperatively. See Rule 2.5.

IN ADDITION TO AMENDING THE CODE OF JUDICIAL CONDUCT, THE COURT SHOULD AMEND PROCEDURAL RULES, OTHER SUPREME COURT RULES AND RECOMMEND STATUTORY CHANGE TO THE GENERAL ASSEMBLY

In addition to the charge to the Task Force that it examine the Code of Judicial Conduct, the TBA asked that the Task Force place a specific emphasis on recusal and disqualification. In so doing, the Task Force also made recommendations, adopted by the TBA, that procedural rules, other Tennessee Supreme Court Rules, and statutes be amended and conformed to its recommendations on amendments to the Code of Judicial Conduct.

The first such set of recommendations involves new procedures to address determinations of incompetence, disqualification and recusal. These issues, which will be treated generally as issues of disqualification for the purposes of this discussion, have gained increased attention. In part, this attention derives from the explosion of contested, big money campaigns for judicial

office. As detailed in the attached Exhibit E, *The New Politics of Judicial Elections 2000 -2009*, attempts to influence the outcome of judicial elections and, indeed, judicial decisions through campaign contributions have grown exponentially over the last decade. This issue came to a head in the case of *Caperton v. Massey*, 129 S.Ct. 2252, 173 L.Ed.2d 1208, in which the U. S. Supreme Court held that there is a Due Process dimension to disqualification considerations when there are massive campaign contributions. The TBA recommendation is first that the Code of Judicial Conduct be amended in Rule 2.11 and related comments to explicitly address campaign contributions in the context of disqualification. However, the creation of a new substantive standard is not enough. Therefore, the TBA recommends that the Court order its Advisory Commission on Rules of Procedure and Evidence to adopt new procedures to be set forth in the Rules of Civil and Criminal Procedure and changes in the Rules of Appellate Procedure to address motions for a determination of incompetence, disqualification or recusal and to provide for an immediate interlocutory appeal as of right to the appropriate appellate court by a party aggrieved by the ruling on such a motion. The TBA earnestly believes that these procedural changes are needed to maintain the public trust and confidence in the fairness and impartiality of judicial decision making and that the procedures proposed will facilitate the public's perception of fairness without unduly burdening the justice system.

Changes are also recommended to Tennessee Supreme Court Rule 11, Article VII. The existing procedures on substitute judges can be read to require that the judge who determines himself or herself to be incompetent or disqualified or who must recuse should choose his or her successor. The TBA believes that these rules should be amended to provide that only when a judge is unavailable to hear a matter should the judge seek interchange and a substitute judge. A judge who has decided she or he has an interest in the case should not decide who will preside

over the case. The determination that a judge has an interest indeed extends to deciding who will ultimately hear the case.

The third recommendation is that the Court amend Tennessee Supreme Court Rule 31 to make explicit a prohibition that the judge who participates in a judicial settlement conference is precluded from presiding over the trial or other contested issues in the matter. This recommendation is consistent with the recommendation for changes in Amended Rule 2.6(B). That Rule and the related comments make it clear that a judge may encourage settlement, but participation in a judicial settlement conference and the information obtained in a conference make it inappropriate for that same judge to preside over contested hearings in the matter.

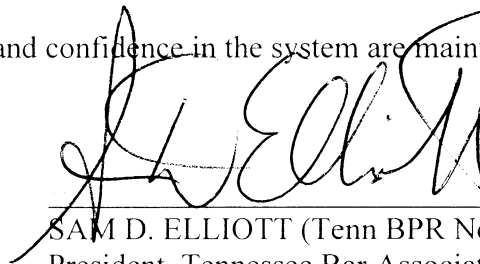
The fourth set of recommendations involves amendment to Tennessee statutes. The TBA proposes that the Court recommend a statutory change to TCA § 2-10-103(13) to require that state trial judges file their campaign disclosures with the State Registry of Election Finance rather than the individual county election commissions. This change is needed in order to assure that parties and their counsel have full, transparent access to information regarding campaign contributions. Information regarding campaign contributions is now even more relevant to determinations under Amended Rule 2.11. Under the present system, state trial judge campaign disclosures are filed in the individual county election commission offices. This means that the individuals must go to each county in the district to find the information because it is not currently available online. The Registry of Election Finance has implemented an electronic filing system that should be familiar to appellate judges because they are presently under the statewide filing system.

The other statutory change needed is to reconcile the provisions of TCA §§ 17-1-105 and 23-3-102 relative to the wind up of a law practice by a newly elected or appointed judge. The

recommendation is that a 180 day wind up period be permitted and that the provisions also be made consistent with Amended Code Rule 3.10.

CONCLUSION

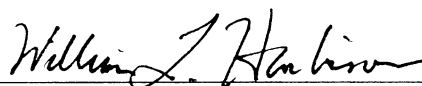
The courts of this state are held in high esteem, primarily because of the character, demeanor and integrity of the judges who hold office in Tennessee. Another reason for this high esteem is that this Court has adopted high standards through the Code of Judicial Conduct and other procedures to establish standards of conduct which are beyond reproach. The time has come for this Court to update those standards to meet changing conditions so that both the reality and the perception by the public of trust and confidence in the system are maintained.



SAM D. ELLIOTT (Tenn BPR No. 09431)
President, Tennessee Bar Association
Gearhiser, Peters, Lockaby,
Cavett & Elliott, PLLC
320 McCallie Avenue
Chattanooga, TN 37402
Tel: 423/756-5171



DANIEL W. VAN HORN (Tenn BPR No. 018940)
President-Elect, Tennessee Bar Association
Butler, Snow, O'Mara, Stevens
& Cannada, PLLC
Crescent Center, Suite 500
6075 Poplar Avenue, P.O. Box 171443
Memphis, TN 38187-1443
Tel: 901/680-7200



BILL HARBISON (Tenn BPR No. 007012)
General Counsel, Tennessee Bar Association
Sherrard & Roe, PLC
424 Church Street
Suite 2000
Nashville, TN 37219
Tel: 615/742-4200



T. MAXFIELD BAHNER (Tenn BPR No. 001150)
Chair, Tennessee Bar Association
Task Force on Rules of Judicial Conduct
Chambliss, Bahner & Stophel, P.C.
1000 Tallan Building
Two Union Square
Chattanooga, TN 37402-2500
Tel: 423/757-0202



SARAH Y. SHEPPEARD (Tenn BPR No. 007120)
Reporter, Tennessee Bar Association
Sheppard, Swanson & Mynatt, PLC
P.O. Box 2149
Knoxville, TN 37902
Tel: 865/546-3653



ALLAN F. RAMSAUR (Tenn BPR No. 5764)
Executive Director, Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue, N
Suite 400
Nashville, TN 37219-2198
Tel: 615/383-7421

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served by electronic mail notification and by mailing an electronic version of the entire proposal, within seven days of the filing of this document, upon the individuals and organizations identified in Exhibit F to the petition by regular U.S. Mail, postage paid.

