

UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

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| <p>Dan McCaleb, Executive Editor of THE<br/>CENTER SQUARE,</p> <p>Plaintiff,</p> <p>v.</p> <p>Michelle Long, in her official capacity<br/>as DIRECTOR OF TENNESSEE<br/>ADMINISTRATIVE OFFICE OF THE<br/>COURTS,</p> <p>Defendant.</p> | <p>Case No. 3:22-cv-00439</p> <p>District Judge Richardson<br/>Magistrate Judge Frensley</p> |
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PLAINTIFF'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITY

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Plaintiff Dan McCaleb, a member of the press and Executive Editor of The Center Square, respectfully submits this Second Notice of Supplemental Authority that includes three new orders issued this month by the Tennessee Supreme Court. This Second Notice of Supplemental Authority is filed in support of McCaleb's motion for preliminary injunction (ECF No. 20) and in further support of his response to Defendant's motion to dismiss for lack of subject matter jurisdiction (ECF No. 24). Briefing closed for these two pending motions on July 21, 2022, and August 4, 2022. *See* ECF No. 26 and ECF No. 28.

On November 14, 2022, after briefing for the two motions had closed, McCaleb filed a notice of supplemental authority because the Tennessee Supreme Court issued a highly relevant order in docket No. ADM2022-01198, *In Re Amendments*

*To Tenn. Rules Of Appellate Procedure & Civ. Procedure*, 2022 LEXIS 307 (Tenn. Aug. 31, 2022). See ECF No. 37 and 37-1.

Since issuing its order on November 14, 2022, the Tennessee Supreme Court issued a relevant order on December 12, 2022, and two other relevant orders on December 19, 2022, as follows: (1) *In Re: Advisory Commission On The Rules Of Practice And Procedure*, Docket No. ADM2002-00001 (Tenn. Dec. 12, 2022), a copy of the order is attached as ECF No. 38-1; (2) *In Re: Proposed Amendment To Tennessee Rules Of Civil Procedure*, Docket No. No. ADM2022-01198 (Tenn. Dec. 19, 2022), a copy of the order is attached as ECF No. 38-2; and (3) *In Re: Proposed Amendment To Tennessee Rules Of Criminal Procedure*, Docket No. ADM2022-01198 (Tenn. Dec. 19, 2022), a copy of the order is attached as ECF No. 38-3.

1. The Tennessee Administrative Office of the Courts (“TAOC”) published and disseminated a public press release on its website of the Tennessee Supreme Court’s December 12, 2022, order and further published and disseminated a copy of the order itself on its website.<sup>1</sup> McCaleb has argued that ordering TAOC Director Michelle Long to provide in-person and virtual access to future Advisory Commission meetings is appropriate under *Ex Parte Young* because Director Long has statutory authority pursuant to Tenn. Code Ann. §16-3-601(d) to approve legal, clerical, and other assistance that may be necessary for the Advisory Commission to carry out its rulemaking duties. McCaleb Memorandum, ECF No. 20-2, Page ID

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<sup>1</sup> <https://tncourts.gov/press/2022/12/12/supreme-court-appoints-sarah-keith-donald-capparella-judge-jennifer-smith-advisory>. See ECF No. 38-1.

#176; McCaleb Reply, ECF No. 26, Page ID #242; McCaleb Response, ECF No. 27, Page ID ##273-75. And that Director Long oversees the TAOC which is tasked with providing administrative support to the Advisory Commission and actively administers its meetings, including Michelle Consiglio-Young's administrative support; hosting in-person meetings at its office in Nashville; and publishing and disseminating public meeting notices on its website. McCaleb Reply, ECF No. 26, Page ID ##242-43; McCaleb Response, ECF No. 27, Page ID ##273-75.

2. In the December 12, 2022, order, the Tennessee Supreme Court reappointed some current members of the Advisory Commission to new terms beginning on January 1, 2023. And it further appointed new members to the Advisory Commission to begin their terms on January 1, 2023. ECF No. 38-1. McCaleb has argued that Tennessee's Advisory Commission is comprised of members of the bench and bar and is similar in form and substance to federal bench-bar Advisory Committees under the "experience" prong in *Richmond Newspapers*. McCaleb Memorandum, ECF No. 20-2, Page ID ##172-74; 176-80; 183; 188-90; *see also* Notice Supp. Auth., ECF No. 37, Page ID #1059, ¶1.

3. All three December orders (ECF No. 38-1, 38-2, and 38-3) being filed as supplemental authority are silent as to a precise date in December when the Advisory Commission either previously met or will meet. *Cf. In Re Amendments To Tenn. Rules Of Appellate Procedure & Civ. Procedure*, 2022 LEXIS 307, \*1 (Tenn. Aug. 31, 2022) (speaking through its order and declaring the Advisory Commission met "on June 10, 2022"). McCaleb has argued the TAOC does not make the precise

meeting dates public. McCaleb Memorandum, ECF No. 20-2, Page ID #184.

McCaleb has further argued the Advisory Commission would convene meetings in the remaining six months of the 2022 calendar year. McCaleb Memorandum, ECF No. 20-2, Page ID #184. On behalf of Director Long, TAOC Deputy Director Rachel Harmon — a licensed Tennessee attorney and officer of the Court — testified under penalty of perjury that the “Advisory Commission typically meets quarterly.”

Harmon Supp. Decl., ECF No. 23-1, Page ID #220, ¶10. Deputy Director Harmon further testified on July 12, 2022, that the next quarterly Advisory Commission meeting was “tentatively scheduled for September 9, 2022.” Harmon Supp. Decl., ECF No. 23-1, Page ID #220, ¶10. Thus, based on the Tennessee Supreme Court’s order declaring the Advisory Commission met on June 10, 2022, and Deputy Director Harmon’s declaration testimony that the Advisory Commission was tentatively scheduled to meet on September 9, 2022 — three months after it met in June — the Advisory Commission’s next quarterly meeting will be three months from September on a day this month in December 2022.<sup>2</sup>

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<sup>2</sup> The plain meaning of the word “quarterly” is generally defined as something that is “repeated four times a year. It is done every three months.” *Quarterly*, THE LAW DICTIONARY, <https://thelawdictionary.org/quarterly/> (last visited Dec. 20, 2022).

December 20, 2022

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474

James McQuaid, Admitted *pro hac vice*

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Attorneys for Plaintiff, Dan McCaleb,  
Executive Editor of The Center Square

## CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2022, a copy of the foregoing Plaintiff's Second Notice of Supplemental Authority was filed electronically via the Court's CM/ECF filing system. Notice of this filing will be sent by operation of the Court to all parties indicated on the electronic filing receipt, including a copy to the Office of Tennessee Attorney General and Reporter, counsel for Defendant Administrative Director Michelle Long, as follows:

JONATHAN SKRMETTI  
Office of the Attorney General & Reporter  
Janet M. Kleinfelter, *Deputy Attorney General*  
Public Interest Division  
Steven A. Hart, *Special Counsel*  
P.O. Box 20207  
Nashville, Tennessee 37202-0207  
janet.kleinfelter@ag.tn.gov  
steve.hart@ag.tn.gov

/s/ M. E. Buck Dougherty III  
M. E. Buck Dougherty III, TN BPR #022474

# Exhibit

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## IN THE SUPREME COURT OF TENNESSEE

**IN RE: ADVISORY COMMISSION ON THE RULES OF PRACTICE AND  
PROCEDURE**

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**No. ADM2022-00001**

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**ORDER**

It appears to the Court that the terms of Commission members Kathryn Barnett, James Bowman, Doug Halijan, F. Dulin Kelly, and Allan Wade expire December 31, 2022. Because of their outstanding contributions to the Commission, and based upon their eligibility and willingness to accept new appointments, this Court is pleased to reappoint these members to another term, beginning January 1, 2023, and ending June 30, 2026.

It also appears that the terms of Steven Strain and F. Braxton Terry expire December 31, 2022. This Court gratefully acknowledges the valuable service Mr. Strain and Mr. Terry have demonstrated during their term and the significant contributions they have made.

To replace Mr. Strain beginning January 1, 2023, and ending June 30, 2026, the Court is pleased to appoint:

Sarah Keith  
Assistant District Attorney General  
Anderson County District Attorney General's Office  
101 South Main Street, #300  
Clinton, TN 37716  
Phone: 865-457-5640  
Email: swkeith@tndagc.org

To replace Mr. Terry beginning January 1, 2023, and ending June 30, 2026, the Court is pleased to appoint:

Donald Capparella  
Dodson Parker Behm and Capparella PC  
1310 Sixth Avenue North  
Nashville, TN 37208  
Phone: 615-254-2291  
Email: capparella@dodsonparker.com



The Court appreciates the service of Judge Mark Ward as the Trial Court Liaison for the Advisory Commission on the Rules of Practice and Procedure. As the new Trial Court Liaison, the Court is pleased to appoint:

Judge Jennifer L. Smith  
20th Judicial District Criminal Court  
Division IV  
408 - 2nd Avenue North  
Suite 6100  
Nashville, TN 37201  
Phone: 615-862-5945

IT IS SO ORDERED.

PER CURIAM

# Exhibit

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IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

FILED

12/19/2022

Clerk of the  
Appellate Courts

IN RE: PROPOSED AMENDMENT TO TENNESSEE RULES OF CIVIL  
PROCEDURE

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No. ADM2022-01198

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**ORDER**

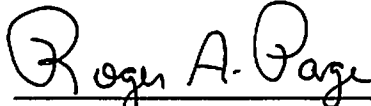
The Court adopts the attached amendment effective July 1, 2023, subject to approval by resolution of the General Assembly. The rule amended is as follows:

**RULE 5.02 SERVICE AND FILING OF PLEADINGS  
AND OTHER PAPERS**

The text of the amendment is set out in the attached Appendix.

IT IS SO ORDERED.

FOR THE COURT:



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ROGER A. PAGE  
CHIEF JUSTICE

**APPENDIX**

***AMENDMENT TO THE  
RULES OF CIVIL PROCEDURE***

**[Deleted text is indicated by overstriking,  
and new text is indicated by underlining.]**

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 5.02

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

[Amend Rule 5.02 as indicated below:]

**5.02. Service – How Made.**

. . .

(2)(a) Service on any attorney or on a party may also be made by emailing the attorney person the document in Adobe PDF to the attorney's recipient's email address, which shall be promptly furnished on request. The sender shall include language in the subject line designed to alert the recipient that a document is being served under this rule. ~~On the date that a document served under this rule is electronically sent to an attorney, the sender shall send by mail, facsimile or hand delivery a certificate that advises that a document has been transmitted electronically. The certificate shall state the caption of the action; the trial court file number; the title of the transmitted document; the number of pages of the transmitted document (including all exhibits thereto); the sender's name, address, telephone number and electronic mail address; the electronic mail address of each recipient; and the date and~~

~~time of the transmission. The certificate shall also include words to this effect: "If you did not receive this document, please contact the sender immediately to receive an electronic or physical copy of this document." The certificate shall be sent to all counsel of record.~~

(b) A sender who emails a document and is notified that it was not received must promptly furnish a copy of the document to the attorney person who did not receive it.

(c) A document transmitted by email shall be treated as a document that was mailed for purposes of computation of time under Rule 6.

(d) For good cause shown, an attorney or self-represented party may obtain a court order prohibiting service of documents on that attorney person by electronic mail and requiring that all documents be served under subsection (1) or (3).

*Advisory Commission Comment [2023]*

Rule 5.02(2) is amended to provide self-represented parties the same convenience in sending and receiving documents by email that is afforded to attorneys. Section 5.02(2)(d) provides that a trial court may excuse a party from receiving service by email “for good cause shown [...] .” The rule is not intended to require pro se litigants who lack regular and reliable email access to find a means to acquire it. When email service is feasible, however, courts should “not excuse the pro se litigant from complying with the same substantive and procedural rules that represented parties are expected to observe.” State v. Sprunger, 458 S.W.3d 482, 491 (Tenn. 2015) (Citations omitted). Rule 5.02(2) is further amended to eliminate the requirement of a mailed, faxed, or hand-delivered certificate advising that a document has been transmitted electronically.

# Exhibit

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IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

FILED

12/19/2022

Clerk of the  
Appellate Courts

IN RE: PROPOSED AMENDMENT TO TENNESSEE RULES OF  
CRIMINAL PROCEDURE

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No. ADM2022-01198

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**ORDER**

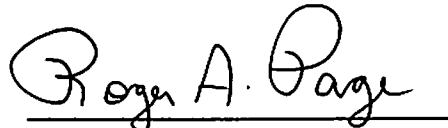
The Court adopts the attached amendments effective July 1, 2023, subject to approval by resolution of the General Assembly. The rule amended is as follows:

**RULE 49 SERVING AND FILING PAPERS**

The text of the amendment is set out in the attached Appendix.

IT IS SO ORDERED.

FOR THE COURT:



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ROGER A. PAGE  
CHIEF JUSTICE

**APPENDIX**

***AMENDMENT TO THE  
RULES OF CRIMINAL PROCEDURE***

**[Deleted text is indicated by overstriking,  
and new text is indicated by underlining.]**

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 49

SERVING AND FILING PAPERS

[Amend Rule 49(b)(2) as indicated below:]

. . .

**(b)(2) Service; How Made.**

. . .

(D) Electronic Service. Service on any attorney may also be made by emailing the attorney the document in Adobe PDF to the attorney's email address, which shall be promptly furnished on request. The sender shall include language in the subject line designed to alert the recipient that a document is being served under this rule. A sender who emails a document and is notified that it was not received must promptly furnish a copy of the document to the attorney who did not receive it.