

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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APPELLATE COURT CLERK
NASHVILLE

IN RE:)
)
AMENDMENT OF RULE 30,)
RULES OF THE)
TENNESSEE SUPREME COURT)

No. ADMIN2015-00451

COMMENT OF TENNESSEE COALITION FOR OPEN GOVERNMENT

Tennessee Coalition for Open Government, Inc. (“TCOG”) submits the following comment concerning the proposed amendments to Tennessee Supreme Court Rule 30 and strongly supporting this Court’s adoption of the proposed revision of Rule 30 submitted to this Court by the Tennessee Bar Association in its recent comment to this Court:

The Tennessee Coalition for Open Government, Inc. (“TCOG”) is the only non-partisan Section 501(c)(3) organization in Tennessee whose sole mission is to protect and promote citizen access to government information and public meetings. Included within TCOG’s mission is preservation and enhancement of access to Tennessee courtrooms and judicial proceedings. TCOG operates as an alliance of citizens, media organizations, and good government groups. TCOG’s mission rests on the belief that access to government information is crucial in informed citizen participation in a democratic society. Since its inception in 2003, TCOG has conducted research into open government issues, providing information about access issues to citizens, journalists, lawmakers and government officials. TCOG participates as a member of the National Freedom of Information Coalition, an alliance of similar open government groups in all 50 states who share information and programs with the goal of improving citizen access and education at all levels. The TCOG Board of Directors consists of 22 board members including

individual citizens, members of the Tennessee Press Association, the Tennessee Association of Broadcasters, the Associated Press, Tennessee chapters of the Society of Professional Journalists, good government groups including the Tennessee chapters of the League of Women Voters and Common Cause, and attorneys and law firms emphasizing First Amendment practice. Members of the Board of TCOG serve without compensation as a public service to the citizens of Tennessee.

TCOG has extensively studied this Court's proposed amendments to Tennessee Supreme Court Rule 30, this Court's Rule governing the presence of cameras and audio recorders in the courtroom. We have corresponded and spoken with representatives of media organizations, media outlets, editor, broadcasters, and journalists of all kinds, as well as citizens who care about transparency and openness of Tennessee's judicial system. These discussions have included those interested in access to Tennessee courts from Memphis to Mountain City. Among those involved in these discussions are Tennesseans who daily observe and report on court proceedings across the State.

Two common threads have run through all these discussions. First, they reflect a deep respect and love for Tennessee's courts and their tradition of openness – a tradition longer than that in our federal courts and more fundamentally effective. Tennesseans know more about their courts and what goes on in them because of this tradition of openness. Those with whom TCOG discussed Rule 30 believe that, without a tradition of good reporting on Tennessee judicial proceedings and how Tennessee judges and court handle them, the public debate and discussion concerning judicial elections at all levels in 2014 would have been far less informed and far less productive.

Second, these discussions revealed grave concern that the adoption of the Court's

proposed revision to Rule 30, as published with the Court's March 13, 2015, Order, would be a striking backward step away from Tennessee tradition of judicial openness. Many Tennessee journalists who have studied the Court's proposed revision are convinced that, were this Court to adopt its original proposed language in the form published in the Court's March 15, 2015, Order, ordinary working journalists would no longer be able to do their job without new, wholly impractical restrictions. TCOG believes these journalists are right, and believes that these concerns must be accommodated in any revision to Rule 30.

Among TCOG's specific concern are that this Court's originally published revision would require express approval, based on a journalist's application two days in advance of any courtroom reporting, for the use of any electronic device in a courtroom, regardless of the intended purpose or actual use of the device. No reporter of any kind – not an individual blogger, or a print newspaper reporter, or a TV reporter or producer, or a radio journalist, or a journalist writing a book about a trial – could bring into a courtroom, or use in a courtroom, any smartphone, tablet computer, or laptop computer, for any purpose whatsoever, without advance approval two days in advance. Absent this two-day-in-advance approval, no reporter could use her laptop to take notes, or her iPad to write a story on the proceeding. Without advance approval, no reporter could use her iPhone to communicate with her editor during a hearing, no matter how silently she did so (such as by texting). And if reporters cannot take their phones into courtrooms, this necessarily means they will not have them in the courthouse, thereby prohibiting them from using their phones even though everyone else (such as lawyers) will have their phones in the courthouse to use during breaks.

While two-day advance approval has worked reasonably well for TV camera access to courts under present Rule 30, journalists have told TCOG that media organizations often do not

become aware of newsworthy proceedings in time to make such applications and, when they do, a rule that forces a media organization to decide who will cover a hearing two days in advance and make application for them (and their particular devices) to be approved for coverage two days in advance, is simply impractical and unreasonably burdensome, to no good end.

Journalist and media organizations also have questioned the need for and purpose of such a broad reach of a revised Rule 30. Anyone who has covered or been present for a courtroom proceeding fully understands the need for decorum and order. At a most basic level, in order to a court's work to be done, any meaningful noise or distraction from members of the public and press can and should be controlled by the court. But journalists and media organizations know that the technology they use every day to do their work within courtrooms can be (and should be) used silently and without any distraction whatsoever to trial participants. Years of experience in Tennessee courtrooms, where such devices have now been successfully used, mostly without incident or disruption, confirm this.

Indeed, because this advance approval concept was written originally with TV cameras in mind, and included limitations on the number of cameras in a hearing and provisions for pooling, and because these provisions have not been tailored to cover this sweeping new scope of the definition of "electronic devices," any trial court would be left with no legal standard whatsoever to decide whether to permit a news reporter to bring her laptop into the courtroom to take notes or write her story or email her editor. What standard would a trial court use in this situation? Would it fit within *any* constitutional standard for a court to deny a reporter the ability to use a laptop (assuming its use was silent), but to permit the use of a pencil and paper, to take notes or write her story? Even if such distinctions were constitutional, on what grounds should a trial court be saddled with this responsibility? Regardless, the proposed revision gives trial judges no

help in figuring out when to permit the use of such devices. This rule-without-a-standard would be a backward step in public access to Tennessee courts.

On this basis, TCOG believes that that Rule 30 needs to be updated to reflect that the tools that media can now use to record or broadcast video or audio in a courtroom have become dramatically smaller and dramatically more numerous. But TCOG also believes that because these new devices with video and audio capability are the same devices that journalists use every day to do their work of courthouse reporting, accommodation should and must be made to allow journalists to use these tools in an appropriate way, while simultaneously prohibiting their use to record or broadcast video or audio from a courtroom without the court approval traditionally required by Rule 30.

TCOG wholeheartedly agrees with the Court's obvious concern that Rule 30 must be updated. Adopted in 1996, before most Tennesseans used the Internet and before cameras and recording devices were as compact and ubiquitous as they are today, Rule 30 has worked well in carrying forward Tennessee's tradition of open courts into an era when video and audio recording and reporting on courtroom proceedings has become more prevalent. In 2015, however, when virtually every citizen and working journalist has at least one device as capable as a 1990s video camera of recording video or audio for broadcast, media and technology have changed dramatically. This Court must update Rule 30 to keep pace with these changes in order to maintain Tennessee tradition of open courts, as well as to maintain in Tennessee courts the authority to maintain decorum, order, and fair trial rights amidst a new media and technology environment.

TCOG believes that the line the Court should draw in updating Rule 30 should not be a line based on the identity or capability of *devices* (a standard that would be held hostage to the

latest developments and changes in technology (will watches be covered by the Rule in the next year?), but should instead be a line based on the use to which any device of any kind is put. The Rule should concern itself with conduct of those present in the courtroom, not the technology they carry.

For all these reasons, TCOG endorses and supports the proposed revision of Rule 30 recently proposed by the Tennessee Bar Association in its filed comment with this Court. The TBA proposal strikes an appropriate balance between allowing journalists to use the tools they need to continue their reporting on courts, while providing Tennessee courts the tool they need to regulate fully the core concern of Rule 30 – the recording and broadcast of video and audio of Tennessee court proceedings.

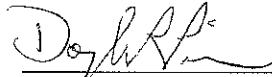
The TBA proposal recognizes that Rule 30 must be updated to recognize that a courtroom proceeding could well be recorded today for broadcast on an iPhone that a reporter carried in her purse to the courthouse. The TBA proposal also confirms that there remains a need to regulate (including requiring advance approval) of video or audio recording of courtroom proceedings. At the same time, the TBA proposal expressly removes from this requirement and regulation everyday reporting activity carried out with today’s new technology tools.

In addition to better, more focused definitions of “electronic devices” and “coverage” that help draw this line, the TBA proposal also provides a better standard for court review of media requests filed within two days of a hearing at which video or audio coverage is sought. The TBA proposal also clarifies, using the longstanding language of the Tennessee Reporter’s Shield Law, just who is a “journalist” covered by the Rule. The TBA proposal also includes an informative Preamble that states clearly the background and purpose of the Rule.

TCOG thus strongly supports the TBA proposed revision of Tennessee Supreme Court

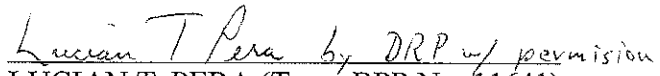
Rule 30, and urges this Court to adopt it as a means to update the Rule and preserve Tennessee's tradition of open courts.

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