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MAY 20 2022
Clerk of the Appellate Courts
Rec'd By Lmm

May 20, 2022

The Honorable James Hivner
Tennessee Supreme Court
401 7th Avenue North
Nashville, TN 37219

Dear Mr. Hivner:

The Tennessee Bar Association ("TBA") respectfully submits the following Comment on the proposed amendments to Rule 10B of the Rules of the Tennessee Supreme Court, petitioned by the Tennessee Trial Judges' Association ("TTJA"), originally filed on March 21, 2022, under TSC Case No. ADM 2022-00355.

The TBA Committee on the Judiciary ("the Committee") has considered TTJA's proposed revisions to Tenn. S. Ct. R. 10B, §§ 1 and 2 and recommends that the TBA support the proposed rule revision in part as described below. The TBA Executive Committee agrees with the Committee's recommendations.

The TTJA proposes to revise the rule by making four (4) changes, adding the bolded language below in §§ 1.01, 1.03, 2.05 and 2.06. The TBA supports the proposed changes in §§ 1.01 and 2.05 as drafted for the reasons stated in the petition. It supports the purpose of the proposed revision in § 1.03 but suggests alternative language for the reason discussed below. The TBA suggests a revision to a portion of the changes to § 2.06 requested by the TTJA also as explained below.

TTJA Proposed Amendments to Section 1:

- 1.01 Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal. The



motion shall be filed no later than ten days before trial, absent a showing of good cause which must be supported by an affidavit. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds than those stated in any previous disqualification motion supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this rule. **A subsequent motion seeking disqualification of a judge in the same case shall state, with specificity, substantially different factual and legal grounds than stated in a previous disqualification motion filed under this section and shall not be based upon the factual and legal grounds of any previous motion.**

1.02. [no changes]

1.03. Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion, **except when the motion is a subsequent motion seeking disqualification of a judge in the same case that does not state, with specificity, substantially different factual and legal grounds than stated in a previous disqualification motion filed under this section or is based upon the factual and legal grounds of any previously denied motion, in which event the judge may act summarily on the motion.**

1.04 [no changes]

TTJA Proposed Amendments to Section 2:

2.01. - 2.04. [no changes]

2.05. If the appellate court, based upon its review of the petition for recusal appeal and supporting documents, determines that no answer from the other parties is needed, the court may act summarily on the appeal. Otherwise, the appellate court shall order that an answer to be petition be filed by the other parties. The court, in its discretion, also may order further briefing by the parties within the time period set **by the court, or may remand to the trial court for the taking of proof and making further findings on matters designated by the appellate court.**

2.06. An accelerated interlocutory appeal shall be decided by the appellate court on an expedited basis. The appellate court's decision, in the court's discretion, may be

made without oral argument. Tenn. R. App. P. 39 (“Rehearing”) does not apply to the appellate court’s decision on an accelerated interlocutory appeal, and a petition for rehearing pursuant to that rule is therefore not permitted in such appeals. **In ruling upon the merits of an accelerated interlocutory appeal of an order denying a motion seeking the disqualification of a trial court judge of a court of record, the appellate court’s relief shall be limited to affirming or reversing the trial court’s order denying the motion seeking disqualification. If the trial court’s order denying the motion seeking disqualification is reversed, the appellate court shall remand the case for designation of a successor judge in accordance with section 1.04 of this rule. Nothing in this rule shall be construed as a limitation on the scope of relief the appellate court may grant in cases appealed pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure.**

2.07. - 2.08. [no changes]

TBA’s suggested revisions to TTJA proposal

In support of its suggested revision to § 1.03, TTJA notes that Rule 10B does not provide any procedure for a trial judge to act summarily upon an improper recusal motion and that the trial courts must treat repetitive Rule 10B motions – by which they mean Rule 10B motions that are based upon the same factual and legal issues addressed in previous motions – as if the matters were being raised for the first time, which they see as a waste of time.

The TBA agrees that it would be appropriate for there to be an abbreviated procedure for the disposition of repetitive, identical motions to recuse. The description of that procedure and the standards for its application, however, should be stated clearly to guide both the trial court and the appellate court as to the standard to be applied and the documentation of the trial judge’s conclusion in that regard. The use of the term “summarily” does not sufficiently serve that purpose and the TBA Committee’s discussions and inquiries indicate the term may mean very different things to individual judges. The TBA suggests that the TTJA’s proposed bolded language in §1.03 below be deleted, a period be inserted at the end of the word “motion” in the third line of the section, and that the highlighted sentence be substituted in place of the deleted language:

- 1.03. Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion, **except when the motion is a subsequent motion seeking disqualification of a judge in the same case that does not state, with specificity, substantially different factual and legal grounds than stated in a previous disqualification motion filed under this section or is based upon the factual and legal grounds**

of any previously denied motion, in which event the judge may act summarily on the motion. Notwithstanding the foregoing, where the subsequent motion is repetitive, asserting materially the same facts and legal basis alleged in the earlier motion, the judge may deny the motion in a written order so stating, without requiring a response to the motion or conducting a hearing upon it.

Apart from simple clarity about the meaning of “summarily,” one very significant concern TBA has is that, while it makes sense to allow a trial judge to quickly deny an identical, repetitive motion on these grounds, the movant still has a right to an immediate interlocutory appeal under Rule 10B (and TTJA does not propose to eliminate that right), and the appellate court needs to have a sufficient record on which to review the trial court’s denial. While our proposed language requires the trial court to provide such a record, the order itself can be very brief.

The TTJA’s proposed revision to § 2.06 adds three sentences. The TBA has no issue with the second sentence that addresses remand to a successor judge.

The first proposed added sentence concerns the relief that can be granted by the appellate court in an accelerated interlocutory appeal, providing that the relief shall be limited to affirming or reversing the trial court’s order denying the motion seeking disqualification. The TTJA suggests that the successor judge can consider motions to set aside any other order entered by the disqualified judge citing Tenn. R. Civ. P. 59 or 60. The third sentence provides that the first sentence language does not apply to a Tenn.R.App.P. Rule 3 appeal.

The TBA does not agree that § 2.06 should be amended to add the first proposed sentence; the Committee would suggest deleting that sentence as noted below for several reasons. First, it seems to change substantive law, restricting the relief the appellate court can grant if it reverses a trial judge’s denial of a recusal motion, regardless of the relationship between the grounds for disqualifying the trial judge and any other actions taken by the judge in the case. The TTJA is specifically concerned about the ability of an appellate court to grant some form of retrospective relief if a denial of recusal is reversed, including reversing orders entered by the trial court before the filing of a recusal motion. It is the sense of the TBA that Rule 10B is not the appropriate place for addressing the scope of the appellate court’s remedial authority upon ordering the disqualification of a trial court judge. It would appear better suited to development by the appellate courts on a case-by-case basis. Among the issues the appellate courts would need to address, for example, is whether the same relief is or should be available on a Rule 10B appeal as on a Rule 3 appeal.

Second, there are no criminal rules comparable to Tenn. R. Civ. P. 59 or 60¹ that would

¹ State v. Ryan, 756 S.W.2d 284, 285 (Tenn. Crim. App. 1988) (“... there is no provision in the Tennessee Rules of Criminal Procedure for a “petition to reconsider” or a “petition to rehear.” See State v. Kassie L. Kinkade, Shelby Criminal No. 93, C.C.A. at Jackson, decided May 23, 1983; State v. Mike Giardono, Sumner Criminal No. 85-114-III, C.C.A. at Nashville, opinion filed December 12, 1986 [available on WESTLAW, 1986 WL 14033].”

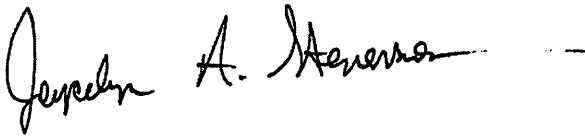
permit a successor trial judge to address other orders or actions of the disqualified judge. With the deletion of the first sentence, there is no need for the proposed third added sentence.

The TBA would support this section being amended as follows:

- 2.06. An accelerated interlocutory appeal shall be decided by the appellate court on an expedited basis. The appellate court's decision, in the court's discretion, may be made without oral argument. Tenn. R. App. P. 39 ("Rehearing") does not apply to the appellate court's decision on an accelerated interlocutory appeal, and a petition for rehearing pursuant to that rule is therefore not permitted in such appeals. (Deleting first TTJA proposed sentence). If the trial court's order denying the motion seeking disqualification is reversed, the appellate court shall remand the case for designation of a successor judge in accordance with section 1.04 of this rule. (Deleting third TTJA proposed sentence).

Thank you for your consideration. Please let us know if you have any questions.

Sincerely,

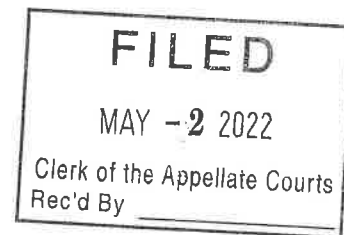


Joycelyn A. Stevenson
Executive Director

cc: TBA Executive Committee
Matt Sweeney, Chair, TBA Committee on the Judiciary
Berkley Schwarz, Director of Public Policy & Government Affairs
Service List



May 2, 2022



VIA E-Mail: appellatecourtclerk@tncourts.gov

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401 Seventh Avenue North
Nashville, TN 37219-1407

Re: No. ADM2022-00355

Dear Mr. Hivner:

I am writing to you and the Tennessee Supreme Court on behalf of the Knoxville Bar Association (KBA) Board of Governors regarding Order No. ADM2022-00355 filed by the Tennessee Trial Judges' Association to amend Tennessee Supreme Court Rule 10B.

The KBA's Professionalism Committee carefully considered the Court's Order and recommended that the KBA Board of Governors support the proposed rule change to Tennessee Supreme Court Rule 10B which provides for summary denial of improper repetitive recusal motions, gives the appellate court a means of supplementing the factual record, and codifies existing case law on the scope of expedited interlocutory appeal and the procedures to be followed on remand from orders reversing trial court orders denying recusal motions. At its meeting on April 27, 2022, the Board of Governors voted unanimously to support the proposed changes.

As always, the KBA appreciates the invitation to consider and comment on proposed rules changes.

Sincerely,

Jason H. Long, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
Executive Committee of the Knoxville Bar Association

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