

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENT OF TENNESSEE SUPREME COURT RULE 10B

No. ADM2022-00355

ORDER

On March 21, 2022, the Tennessee Trial Judges' Association ("TTJA") filed a petition asking this Court to consider adopting amendments to Rule 10B of the Rules of the Tennessee Supreme Court. If adopted, the proposed amendments will provide for summary denial of improper repetitive recusal motions, give the appellate court a means of supplementing the factual record, and codify 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.

The Court hereby publishes TTJA's petition for public comment and solicits written comments on the proposed amendments from judges, lawyers, bar associations, members of the public, and all interested parties. The deadline for submitting written comments is May 23, 2022 (60 days). Written comments should reference the docket number above and may be emailed to appellatecourtclerk@tncourts.gov or mailed to:

James Hivner, Clerk
RE: Tennessee Supreme Court Rule 10B
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

The Clerk shall provide a copy of this Order and Appendix to Lexis Nexis and to Thomson Reuters. In addition, this Order and Appendix shall be posted on the Tennessee Supreme Court's website.

It is so ORDERED.

PER CURIAM

APPENDIX

Petition of the Board of the Tennessee Trial Judges' Association to Amend Tennessee Supreme Court Rule 10B

[New text is indicated by Bold/Deleted text is indicated by ~~strikeout~~]

APPROVED DRAFT

FILED

MAR 21 2022

Clerk of the Appellate Courts

Rec'd By Lmm

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE AMENDMENT OF TENNESSEE SUPREME COURT RULE 10B

CASE NO. ADM 2022 - 00355

PETITION OF THE TENNESSEE TRIAL JUDGES' ASSOCIATION
FOR AMENDMENT TO TENNESSEE SUPREME COURT RULE 10B

INTRODUCTION

Courts must not only be fair and unbiased, they must be perceived by the general public to be fair and unbiased. Judges who are impermissibly biased must not preside in cases because they cannot fairly perform the most essential judicial functions of finding the facts and applying the facts to the law in order to reach a reasoned decision. Safeguards are provided in Tennessee Supreme Court Rule 10B ("Rule 10B"). It sets out comprehensive procedures to be employed to determine whether a judge should preside over a case. Section 1 of Rule 10B addresses the filing of motions seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a trial judge of a court of record. Section 2 of Rule 10B provides for an accelerated interlocutory appellate review of trial court orders denying disqualification or recusal motions filed pursuant to Section 1.¹

¹ Section 3 of Rule 10B addresses motions seeking disqualification of an appellate judge or justice. Section 4 applies to disqualification motions seeking removal of judicial officers other than a judge of a court of record. Section 5 affirms that Rule 10B does not affect the right of any person to file a complaint against a judge with the Board of Judicial Conduct. This petition does not seek amendment to any of these three sections.

Unlike all other pleadings, motions, or other papers filed in trial courts, motions filed pursuant to Rule 10B are not subject to the strictures of Rule 11 of the Tennessee Rules of Civil Procedure.² There are obviously valid policy reasons for not subjecting Rule 10B motions to Rule 11 sanctions.³ Nevertheless, although Section 1.01 of Rule 10B requires a movant to state affirmatively that the disqualification motion 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, Rule 10B itself does not contain any corrective mechanism analogous to Tenn. R. Civ. P. 11.03. Consequently, some litigants do indeed file Rule 10B motions for improper purposes and use Rule 10B as a tactical device for causing delay. This is most often manifested by the filing of repetitive Rule 10B motions relying on facts or circumstances addressed in previous disqualification motions denied by the trial court. The trial judge must, each time a Rule 10B motion is filed, cease taking any action in the pending case⁴ and either grant the motion or issue a written order stating in writing the grounds on which the motion is denied.⁵

Rule 10B does not provide any procedure for a trial judge to act summarily upon an improper recusal motion. Trial courts must treat repetitive Rule 10B motions that are based upon factual and legal issues addressed in previous motions as if the matters were being raised for the first time. In order to avoid needless delay and unfair prejudice to the non-moving party, Rule 10B should be amended to provide for summary denial of improper repetitive recusal motions.

² Tenn. R. Civ. P. 11.02 imposes an implied undertaking on the part of the filer that all pleadings, written motions, or other papers presented to a court are “not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Tenn. R. Civ. P. 11.03 allows for the imposition of sanctions “limited to what is sufficient to deter repetition” of conduct that violates Rule 11.02.

³ It is logically incongruent to empower a trial court judge with the authority to impose Rule 11 sanctions on motions seeking the recusal of that same judge.

⁴ Rule 10B § 1.02.

⁵ Rule 10B § 1.03.

Rule 10B creates accelerated interlocutory appeal of trial court orders denying recusal motions, and experience has shown a need for two helpful amendments to Section 2. Firstly, Section 2.05 can be improved by giving the appellate court a means of supplementing the factual record. Secondly, Section 2.06 should be amended to codify 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.

This petition seeks amendment to Rule 10B consistent with the foregoing.

DISCUSSION

The Tennessee Trial Judges' Association ("TTJA") is the professional association representing the 156 circuit judges and chancellors of courts of record in the State of Tennessee. The trial judiciary comprises the largest cohort of elected state officials in the judicial branch of government and provides judicial services to the people of Tennessee through civil and criminal courts of general jurisdiction.

On August 16, 2021, Chancellor Douglas T. Jenkins, the serving TTJA president, created a committee of selected TTJA members to consider and propose amendment to Rule 10B. The Committee's assignment was to "study and recommend to the TTJA Executive Committee whether necessity exists for requesting amendment(s) to [Rule 10B] regarding the practice/tactic of filing serial motions to recuse within the same lawsuit. ... The committee shall consider and propose language for and the procedure for any proposed amendment(s)." The committee was chaired by Chancellor Ellen Hobbs Lyle (20th Judicial District) and consisted of Circuit Judge Greg McMillan (6th Judicial District), Circuit Judge Joseph Woodruff (21st Judicial District) and Criminal Court Judge Chris Craft (30th Judicial District). On February 7, 2022, the committee's

report was delivered to the TTJA Executive Committee which in due course approved the filing of this petition.

Proposed Amendments to Section 1:

This petition seeks amendment to Section 1 as follows (the requested amending language is set out in bold):

- 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]

The proposed amendment to Section 1.01 is a codification of existing case law. See, e.g. *Adkins v. Adkins*, No. M2021-00384-COA-T10B-CV, 2021 WL 2882491 (Tenn. Ct. App. July 9, 2021); *Duke v. Duke*, 398 S.W.3d 665 (Tenn. Ct. App. 2012); *Dougherty v. Dougherty*, No. W2021-01014-COA-T10B-CV, 2021 WL 4449649 (Tenn. Ct. App. Sept. 29, 2021); *In re Adison P*, W2015-00393-COA-T10B-CV, 2015 WL 1869456 (Tenn. Ct. App. Apr. 21, 2015) (“This motion was predicated on grounds different from those that had been specifically raised in the first motion for recusal”).

Trial courts in each grand division have experienced an increase in the number of Rule 10B motions being filed in a serial fashion, asserting substantially the same factual and legal grounds as were previously asserted by the same moving party in previously denied Rule 10B motions in the same case. Occasionally, these repetitive Rule 10B motions make their way to the intermediate appellate courts on accelerated interlocutory appeal. See, e.g. *Adkins v. Adkins*, No. M2021-00384-COA-T10B-CV, 2021 WL 2882491 (Tenn. Ct. App. July 9, 2021); *Dougherty v. Dougherty*, No. W2021-01014-COA-T10B-CV, 2021 WL 4449649 (Tenn. Ct. App. Sept. 29, 2021); *In re Adison P*, W2015-00393-COA-T10B-CV, 2015 WL 1869456 (Tenn. Ct. App. Apr. 21, 2015); *Chase v. Stewart*, No. M2018-01991-COA-R3-CV, 2021 WL 402565 (Tenn. Ct. App. Feb. 4, 2021). Not every instance of filing repetitive Rule 10B motions results in an interlocutory appeal, but each one does require the trial court to suspend proceedings until such time as a detailed order denying the motion can be drafted and entered. Some parties employ this as a tactic to avoid or delay hearings, thereby unfairly prejudicing the non-moving party and witnesses.⁶ Allowing trial courts

⁶ There have been instances of the filing of a repetitive Rule 10B motion on the morning of a scheduled trial or evidentiary hearing. Without needed reform, trial courts will continue to be obligated to suspend proceedings and take no further adjudicative action until they have acted upon the Rule 10B motion. If the trial court’s action is to deny the motion, the court must treat the repetitive bad-faith motion with the same detailed written justification the court employed the first time the moving party sought recusal or disqualification.

to deny such motions summarily will help to mitigate this disruptive effect and remove an incentive for abusive filing of repetitive Rule 10B motions.

Proposed amendments to Section 2:

This petition seeks amendment to Section 2 as follows (the requested amending language is set out in bold):

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]

The foregoing amendment to Section 2.05 provides a means by which the appellate court can address gaps in the factual record bearing upon the merits of an accelerated interlocutory appeal. Unlike direct appeals, which present the appellate courts with the full record developed in the trial court, interlocutory appeals are, by their very nature, taken up when the factual record is incomplete. Interlocutory appeals of orders denying Rule 10B motions do not pass through the

discretionary filter provided by Rule 9 of the Tennessee Rules of Appellate Procedure, which allows the appellate court to decline hearing interlocutory matters if the record in the court below is insufficient.

Not every accelerated interlocutory appeal of a denied Rule 10B motion will require factual supplementation, indeed such instances might be quite rare. Nevertheless, there clearly are times when additional facts are necessary for issues to be presented fairly.⁷ As the Rule is presently worded, the appellate court has no available tool with which to assemble all of the relevant contextual facts, and the non-moving party has no available procedural mechanisms to bring any factual omissions to the appellate court's attention and to obtain a remedy so that the record is accurate and complete. Expressly empowering the intermediate appellate court with the discretionary option to remand the case to the trial court for "taking proof and making further findings on matters designated by the appellate court" is consistent with the authority granted to the appellate courts by Rule 24(e) of the Tennessee Rules of Appellate Procedure to correct or modify the record in all other appeals. This recommended amendment to Section 2.05 conforms accelerated interlocutory appeals in Rule 10B cases to the procedures applicable in direct appeals and discretionary interlocutory appeals.

The proposed amendment to Section 2.06 is a codification of existing case law. *Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012) ("Pursuant to [Tennessee Supreme Court Rule 10B], we may not review the correctness or merits of the trial court's other rulings..."); *Herron v. State*, No. W2020-00776-COA-T10B-CV, 2020 WL 3481696, at *3 (Tenn. Ct. App. June 25, 2020) ("the only issue we may consider in a Tenn. Sup. Ct. R. 10B appeal is whether the [judge] should have granted the Motion to Recuse"); *Rich v. Rich*, No. M2018-00485-COA-T10B-CV,

⁷ For example, a moving party may selectively "cherry pick" statements spoken by the Judge to argue they mean one thing when, in fact, the statements meant another.

2018 WL 1989619, at * 9 (Tenn. Ct. App. Apr. 27, 2018) (“However, the only order we are able to review in a Rule 10B appeal is the trial court’s order denying the motion for recusal.”); *Gibson v. Bikas*, No. E2018-00911-COA-T10B-CV, 2018 WL 2671627, at *4 (Tenn. Ct. App. June 4, 2018) (“We do not review the merits or correctness of the trial court’s other rulings”).

The recommended amendment to Section 2.06 clarifies the scope of available relief by expressly limiting an appellate decision to the merits of the order denying the Rule 10B motion. An appellate ruling exceeding these parameters can result in unrequested retrospective relief vacating several years’ worth of interlocutory orders entered by the trial court, with the added effect of setting aside decisions made by the trial court on prior Rule 10B motions and previously affirmed by the appellate court.⁸ The proposed amendment to Section 2.06 reinforces the proper function of interlocutory review of trial court orders denying Rule 10B motions.

Moreover, the proposed amendment does not unfairly prejudice the party obtaining interlocutory reversal of an order denying Rule 10B relief; indeed, the proposed amendment places the question of whether further relief should be granted for earlier interlocutory decisions by the disqualified judge in the hands of the judge to whom the case is reassigned. This is where such questions ought to be answered. The successor trial court judge has the ability to hold hearings, take proof, and make findings of fact.

If the Rule 10B motion is granted by the trial court, there is no appeal. A successful Rule 10B moving party who is able to demonstrate that a prior interlocutory order was the product of impermissible bias, an abuse of discretion or was otherwise unjust, can bring that issue to the

⁸ One example is *Chase v. Stewart*, No. M2018-01991-COA-R3-CV, 2021 WL 402565 (Tenn.Ct.App. Feb. 4, 2021). The Tennessee Supreme Court denied the non-moving party’s Tenn. R. App. P. 11 application for further appellate review with a “Not for Citation” designation pursuant to Tennessee Supreme Court Rule 4(E), thereby declaring the opinion of the Court of Appeals has no precedential value and implying disquiet on the part of the Supreme Court with the granting of retrospective relief in an accelerated interlocutory appeal.

successor trial court judge by way of Tenn. R. Civ. P. Rule 59. Whether the successor trial judge correctly or incorrectly decides the Rule 59 motion is a matter that can be addressed on a direct appeal if need be. The proposed amendment to Section 2.06 will provide the same remedial procedure to successful Rule 10B movants irrespective of where in the process the motion was granted; in the trial court or on accelerated interlocutory appeal.

CONCLUSION

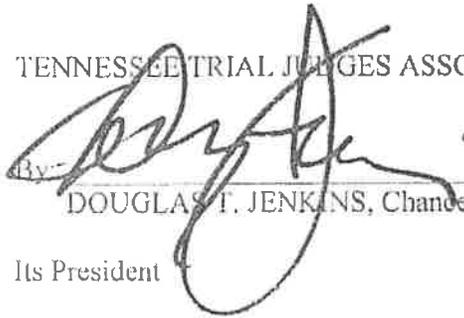
Rule 10B serves a vital purpose by providing a procedural framework within which a litigant's valid objection to the qualifications of a judge can be adjudicated. This purpose is undercut by the abuse of Rule 10B by litigants bringing motions in bad faith. This harms the non-moving party and damages the general perceptions of the judiciary and the justice system.

The amendments proposed in this petition represent modest additions to the existing language of Rule 10B in order to codify some of the principles established in case law, to remove an incentive for bad-faith tactics, and clarify the scope of interlocutory appellate review. The Tennessee Trial Judges Association believes these proposed amendments are helpful, necessary, and consistent with the imperative of protecting a fair process of civil and criminal justice in Tennessee.

WHEREFORE: The Tennessee Trial Judges Association respectfully urges the adoption of these proposed amendments by the Tennessee Supreme Court.

Respectfully submitted:

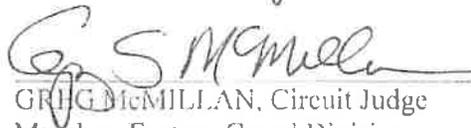
TENNESSEE TRIAL JUDGES ASSOCIATION

By: 
DOUGLAS T. JENKINS, Chancellor

Its President

Committee To Consider And Propose Amendments
To Supreme Court Rule 10B


ELLEN HOBBS LYLE, Chancellor, Chair


GREG McMILLAN, Circuit Judge
Member, Eastern Grand Division


JOSEPH A. WOODRUFF, Circuit Judge
Member, Middle Grand Division


CHRIS CRAFT, Criminal Court Judge
Member, Western Grand Division