

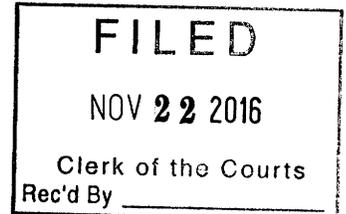
IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

IN RE PROPOSED AMENDMENTS TO RULE 10B,  
RULES OF THE TENNESSEE SUPREME COURT

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No. ADM2016-01256

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**ORDER**

On June 23, 2016, the Court filed an order soliciting written comments concerning proposed amendments to Rule 10B, Rules of the Tennessee Supreme Court, which governs the procedures for seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge, justice, or other judicial officer. The public-comment period expired on September 21, 2016.

On September 21, 2016, the “Comment of the Tennessee Bar Association” (“Comment”) was filed. (The TBA’s Comment was the only written comment received by the Court during the public-comment period.) In summary, the Comment states that the TBA supports the following proposed amendments: (1) making jurisdictional the time periods for filing the various documents specified in Rule 10B, Sections 2 and 3; (2) setting a uniform time period (twenty-one days) for filing the various documents specified in Sections 2 and 3; (3) providing that a motion for court review is to be determined by “three other judges of the intermediate court” (deleting the requirement that the reviewing judges be “in that section of the court”); and (4) making a number of non-substantive formatting changes to both the rule and the existing Explanatory Comments. The TBA, however, suggested modifications to the proposed amendments relating to motions for court review filed pursuant to Sections 3.02 and 3.03.

After due consideration of the proposed amendments set out in the public-comment order, as well as the TBA’s Comment regarding the proposed amendments, the Court has decided to adopt the amendments set out in the Appendix to this order. These amendments include modifications addressing the TBA’s comments about the appellate courts’ handling of motions for court review.

Accordingly, the Court hereby adopts the amendments set out in the Appendix to this order. The amendments shall take effect on January 1, 2017.

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

IT IS SO ORDERED.

PER CURIAM

## ***APPENDIX***

[The amendments to Tenn. Sup. Ct. R. 10B are set out below; for ease of reference, changed text is indicated by red font, with deleted text indicated by overstriking and new text indicated by underlining:]

### **Rule 10B. Disqualification or Recusal of a Judge; Filing and Disposition of Motions and Appeal**

The procedures set out in this ~~R~~rule shall be employed to determine whether a judge should preside over a case.

#### **Section 1. Motion Seeking Disqualification or Recusal of Trial Judge of Court of Record.**

**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 timely filed written motion. 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 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 ~~R~~rule.

**1.02.** While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.

**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.

**1.04.** A judge who recuses himself or herself, whether on the ~~Court's~~judge's own initiative or on motion of a party, shall not participate in selecting his or her successor, absent the agreement of all parties. With the agreement of all parties to the case, the judge may seek an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(1). Otherwise, the presiding judge of the court shall effect an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(2) or (3). If an interchange cannot be effected, or if the presiding judge is the recused judge, the presiding judge shall request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4).

#### **Section 2. Appeal From Trial Court's Denial of Disqualification or Recusal Motion.**

**2.01.** If the trial court judge enters an order denying a motion for the judge’s disqualification or recusal, or for determination of constitutional or statutory incompetence, the trial court’s ruling either can be appealed in an accelerated interlocutory appeal as of right, as provided in this ~~S~~ection 2, or the ruling can be raised as an issue in an appeal as of right, see Tenn. R. App. P. 3, following the entry of the trial court’s judgment. These two alternative methods of appeal—the accelerated interlocutory appeal or an appeal as of right following entry of the trial court’s judgment—shall be the exclusive methods for seeking appellate review of any issue concerning the trial court’s denial of a motion filed pursuant to this ~~R~~ule. In both types of appeals authorized in this section, the trial court’s ruling on the motion for disqualification or recusal shall be reviewed by the appellate court under a de novo standard of review, and any order or opinion issued by the appellate court should state with particularity the basis for its ruling on the recusal issue.

**2.02.** To effect an accelerated interlocutory appeal as of right from the denial of a motion for disqualification or recusal of the trial court judge, a petition for recusal appeal shall be filed in the appropriate appellate court within ~~fifteen~~ **twenty-one** days of the trial court’s entry of the order. In civil cases, a bond for costs as required by Tenn. R. App. P. 6 shall be filed with the petition. A copy of the petition shall be promptly served on all other parties, and a copy also shall be promptly filed with the trial court clerk. For purposes of this section, “appropriate appellate court” means the appellate court to which an appeal would lie from the trial court’s final judgment in the case.

**2.03.** The petition for recusal appeal shall contain:

- (a) A statement of the issues presented for review;
- (b) A statement of the facts, setting forth the facts relevant to the issues presented for review;
- (c) An argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities; and
- (d) A short conclusion, stating the precise relief sought.

The petition shall be accompanied by a copy of the motion and all supporting documents filed in the trial court, a copy of the trial court’s order or opinion ruling on the motion, and a copy of any other parts of the trial court record necessary for determination of the appeal.

**2.04.** The filing of a petition for recusal appeal does not automatically stay the trial court proceeding. However, either the trial court or the appellate court may grant a stay on motion of a party or on the court’s own initiative, pending the appellate court’s determination of the appeal.

**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 the 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.

**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.

**2.07.** In an accelerated interlocutory appeal decided by either the Court of Appeals or the Court of Criminal Appeals, a party may seek the Supreme Court's review of the intermediate court's decision by filing an accelerated application for permission to appeal. The application shall be filed in the Supreme Court within ~~ten~~ twenty-one days of the filing date of the intermediate court's order or opinion. The accelerated application shall include an appendix containing: (a) copies of the petition and supporting documents filed in the intermediate appellate court; (b) copies of any answer(s) filed by order of the intermediate appellate court; and (c) a copy of the order or opinion filed by the intermediate appellate court. A copy of the accelerated application for permission to appeal shall be promptly served on all other parties. In civil cases in which the party seeking the Supreme Court's review is not the party that filed the accelerated interlocutory appeal in the intermediate court, the party filing the accelerated application shall file with the application a bond for costs as required by Tenn. R. App. P. 6.

If the Supreme Court, based upon its review of the accelerated application for permission to appeal, determines that no answer from the other parties is needed, the Court may act summarily on the accelerated application. Otherwise, the Court shall order that an answer to the application 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. The Supreme Court shall decide the appeal on an expedited basis upon a de novo standard of review and, in its discretion, may decide the appeal without oral argument.

The accelerated application for permission to appeal authorized by this section 2.07 is the exclusive method for seeking the Supreme Court's review of the intermediate court's ruling on an accelerated interlocutory appeal filed under ~~S~~section 2. The provisions of Tenn. R. App. P. 11 therefore do not apply to such appeals.

**Section 2.08. The time periods for filing a petition for recusal appeal pursuant to section 2.02 and for filing an accelerated application for permission to appeal to the Supreme Court pursuant to section 2.07 are jurisdictional and cannot be extended by the court. The computation of time for filing the foregoing matters under section 2 shall be governed by Tenn. R. App. P. 21(a).**

### **Section 3. Motion Seeking Disqualification or Recusal of Appellate Judge or Justice.**

**3.01.** Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge or justice of an appellate court shall do so by a timely filed written motion. 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 supporting disqualification of the judge or justice 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 ~~R~~rule.

**3.02. (a)** Upon the filing of a motion seeking disqualification, recusal, or determination of constitutional or statutory incompetence of an intermediate appellate judge, the judge in question 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. If the judge denies the motion, the movant, within ~~fifteen~~ twenty-one days of entry of the order, may file a motion for court review to be determined promptly by ~~the three~~ other judges ~~in that section~~ of the intermediate court upon a de novo standard of review.

(b) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of more than one judge of the intermediate appellate court (“recusal motion”), and if the recusal motion is denied by the judges in question, the movant, within twenty-one days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate appellate court who were not subjects of the recusal motion, upon a de novo standard of review. If there are not three judges of the intermediate appellate court who were not subjects of the recusal motion, then a motion for court review pursuant to this section 3.02(b) is not available; under such circumstances, the order denying the recusal motion may be appealed pursuant to section 3.02(c).

(c) If the motion for court review is denied, or if a motion for court review is not available pursuant to the second sentence of section 3.02(b), an accelerated appeal as of right lies to the Tennessee Supreme Court, which shall expeditiously decide the appeal based upon the petition and other papers filed in the intermediate appellate court. The appeal to the Supreme Court shall be titled “recusal appeal from ~~denial of court review~~ the [Court of Appeals or Court of Criminal Appeals]” and shall be filed within ~~fifteen~~ twenty-one days of the intermediate appellate court’s order denying the motion for court review or, if a motion for court review was not available pursuant to the second sentence of section 3.02(b), within twenty-one days of the order denying the motion seeking disqualification or recusal of the appellate judges in question.

**3.03. (a)** If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of a Supreme Court justice, the justice in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion. If the justice denies the motion, the movant, within ~~fifteen~~ twenty-one days of entry of the order, may file a

motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review.

(b) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of all of the justices of the Supreme Court, and if the motion is denied by the justices, no motion for court review shall be available pursuant to section 3.03(a).

**Section 3.04.** The time periods for filing a motion for court review pursuant to sections 3.02(a), 3.02(b), or 3.03(a) and for filing a “recusal appeal from the [Court of Appeals or Court of Criminal Appeals]” pursuant to section 3.02(c) are jurisdictional and cannot be extended by the court. The computation of time for filing the foregoing matters under section 3 shall be governed by Tenn. R. App. P. 21(a).

#### **Section 4. Motion Seeking Disqualification or Recusal of Judicial Officer Other Than Judge of Court of Record.**

**4.01.** Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judicial officer acting in a capacity other than as judge of a court of record or as an appellate judge shall do so by timely making a written or oral motion. A written motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. A motion, whether written or oral, shall state with specificity all factual and legal grounds 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 make a pro se motion under this **R**rule.

**4.02.** While the motion is pending, the judicial officer whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.

**4.03.** Upon the making of a motion pursuant to section 4.01, the judicial officer shall act promptly and, in writing, either grant or deny the motion. A written notation of the ruling on the judgment, warrant, citation, or other pleading before the judicial officer shall meet the writing requirement of the foregoing sentence; a separate written order is not required.

**4.04.** Judicial review of the denial of a motion made under section 4.01 necessarily depends on the forum in which the motion is made and is governed by the law applicable to that forum.

**Section 5. Right to File Ethical Complaint Unaffected.** The provisions of this **R**rule do not affect the right of any person to file an ethical complaint against a judge pursuant to Title 17, Chapter 5, Tennessee Code Annotated.

## **Explanatory Comments.**

This **R**ule provides a procedural framework for determining when a judge should not preside over a case. There are several bases for determining when a judge should not preside over a case, including Article VI, Section 11 (“Incompetency of judges—Special Judges”) of the Tennessee Constitution, Tenn. Code Ann. § 17-2-101 (“Grounds of incompetency”), and Tenn. S. Ct. R. 10, RJC 2.11 (“Disqualification”).

**Section 1.** Section 1 provides a procedural framework for determination of when the judge of a trial court of record should not preside over a case.

Section 1.02 provides that, while the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause. A finding by the judge that the motion is frivolous, untimely, or interposed merely for delay constitutes good cause, as anticipated by section 1.02, such that the trial judge may continue to preside over the case to the extent the judge deems appropriate.

Although the **R**ule does not state a specific period of time within which the motion must be filed, a motion under this **R**ule should be made promptly upon the moving party becoming aware of the alleged ground or grounds for such a motion. The requirement that the motion be timely filed is therefore intended to prevent a party with knowledge of facts supporting a recusal motion from delaying filing the motion to the prejudice of the other parties and the case. Depending on the circumstances, delay in bringing such a motion may constitute a waiver of the right to object to a judge presiding over a matter. Further, the delay in bringing a motion or the timing of its filing may also suggest an improper purpose for the motion.

Section 1.03 provides that, if the judge denies the motion, “the judge shall state in writing the grounds upon which he or she denies the motion.” That requirement is intended both to inform the parties of the basis for the judge’s ruling and to facilitate appellate review, should the unsuccessful movant file an appeal. By comparison, if the judge grants a disqualification motion, there is no need for the order to state the grounds of the ruling because, in granting the motion, the judge has determined that it would not be appropriate for him or her to preside over the case. And for that reason, this **R**ule does not permit an appeal from the granting of a disqualification motion.

Juvenile courts are courts of record, and the judges of those courts therefore are included within this section. Thus, a juvenile court judge who denies a disqualification motion must file a written order complying with section 1.03. Other judicial officers who serve in a juvenile court, such as a magistrate or referee, are covered by section 4 of this **R**ule.

**Section 2.** Section 2 provides for an accelerated interlocutory appeal as of right from a trial judge’s order denying a motion for disqualification. It also sets out the appellate procedure governing such appeals. The provisions of this **R**ule supercede any inconsistent provisions of the

Tennessee Rules of Appellate Procedure for purposes of the accelerated interlocutory appeal. Additionally, because Section 2.01 states the two “exclusive methods” for seeking appellate review of the trial judge’s ruling on a motion filed pursuant to this Rule, neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge’s ruling on such a motion.

Section 2.02 states that “appropriate appellate court,” as used in the section, means the court to which an appeal would lie from the trial court’s final judgment in the case. Thus, the petition for recusal appeal should be filed in the Court of Appeals in cases that would be appealed to that court following the trial court’s final judgment. Similarly, the petition should be filed in the Court of Criminal Appeals in cases that would be appealed to that court following the trial court’s final judgment. The petition should be filed in the Supreme Court in worker’s compensation cases, which are appealed directly to the Supreme Court pursuant to Tenn. Code Ann. § 50-6-225~~(e)(1)~~.

As stated above, juvenile courts are courts of record. The accelerated interlocutory appeal procedure set out in section 2 therefore applies to a juvenile court judge’s denial of a disqualification motion. As a result, an interlocutory appeal as of right lies to either the Court of Appeals or the Court of Criminal Appeals (see the definition of “appropriate appellate court” in section 2.02) from the juvenile court judge’s denial of a disqualification motion, even in those juvenile proceedings in which a de novo appeal to criminal or circuit court is ordinarily available. *See* Tenn. Code Ann. § 37-1-159(a) (providing for a de novo appeal to criminal court in a delinquency proceeding and for a de novo appeal to circuit court in an unruly child proceeding or a dependent and neglect proceeding).

**Section 3.** Section 3 provides a procedural framework for determination of when an appellate judge or justice should not preside over a case. It also provides for review of the judge’s or justice’s decision if he or she denies the motion. See the Comment to Section 1 for a discussion of the timeliness of motions filed pursuant to this Rule. Also, see the Comment to Section 1.03 for a discussion of the requirement that, if the judge or justice denies the motion, “the judge [or justice] shall state in writing the grounds upon which he or she denies the motion.”

**Section 4.** Section 4 provides a procedural framework for determination of when a judicial officer other than a judge of a trial court of record or an appellate judge should not preside over a case. Note, however, that Section 1 of this Rule applies to a “judge acting as a court of record.” Consequently, Section 1 applies to a general sessions judge who, by private act, exercises jurisdiction over certain types of cases typically heard in courts of record (e.g., family-law cases, juvenile proceedings, etc.). See the Comment to Section 1 for a discussion of the timeliness of motions made pursuant to this Rule.

Given the informality of proceedings before judges of the general sessions and municipal courts, as well proceedings before other types of judicial officers, and because of the varying statutes, ordinances, and rules and regulations applicable to the many different types of proceedings before such officers, it is not possible to address in this Rule the method for seeking

judicial review of the denial of a motion for disqualification in every type proceeding covered by this section. Section 4 therefore does not establish specific appeal procedures governing recusal motions made in such proceedings. Thus, the general law applicable to each proceeding will govern. For example, a general sessions court's judgment in a civil case can be appealed to circuit court for a de novo proceeding; with a de novo review of the general sessions court's judgment readily available, there is no need for a separate appeal mechanism for reviewing a general sessions judge's denial of a motion for disqualification. Similarly, rulings of some judicial officers (e.g., a magistrate, referee or master) can be subject to the approval or review of a judge of a court of record. These examples are provided to illustrate that, in the various proceedings covered by this section, review of a judge's or other judicial officer's denial of a motion for disqualification should be sought in accordance with the appeal procedure generally available for review of the judge's or judicial officer's other rulings.

2016 Amendments. Effective January 1, 2017, Rule 10B is amended in the following respects.

Sections 2.08 and 3.04 are added to the rule. Those new provisions provide that the time periods for filing the various documents specified in sections 2 and 3 are jurisdictional and cannot be extended by the court. The new sections 2.08 and 3.04 also provide that the computation of time for filing those various documents is governed by Tenn. R. App. P. 21(a).

Section 3.02 also is amended by adding a new subdivision (b) to address the situation in which a motion alleges grounds for the disqualification or recusal of more than one judge of an intermediate appellate court. If the motion is denied, and if there are three judges of the intermediate appellate court who were not subjects of the motion, subdivision (b) provides that the movant may file a motion for court review in the intermediate appellate court, which motion shall be promptly ruled upon by three unaffected judges. If, however, there are not three judges of that court who were not subjects of the motion, subdivision (b) provides that a motion for court review is not available in the intermediate appellate court. In such cases, the amended rule permits an appeal to the Supreme Court without a motion for court review having been filed in the intermediate appellate court. Similarly, section 3.03 is amended by adding new subdivision (b) which states that a motion for court review is not available in cases in which a motion for disqualification or recusal alleges grounds pertaining to all of the justices of the Supreme Court.

Sections 2 and 3 also are amended to increase the time limits for filing the various documents specified in those two sections of the rule. The former time limits for filing such documents were either ten days or fifteen days, depending on the particular document. Because sections 2 and 3 are simultaneously amended to make the time limitations jurisdictional, the time limits are increased to twenty-one days to ensure that litigants have sufficient time to meet those deadlines.

Lastly, a number of "housekeeping" amendments are made to Rule 10B and its Explanatory Comments, i.e., non-substantive changes relating to formatting, etc.

*[end of Appendix]*