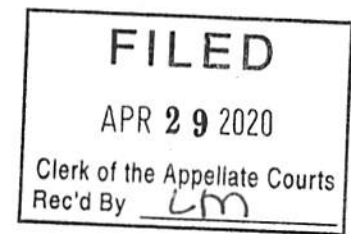




TENNESSEE BAR ASSOCIATION

April 29, 2020



The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 7th Avenue North
Nashville, TN 37219

IN RE: Tenn. Sup. Ct. R. 10B, Section 1
NO. ADM2020-00507

Dear Jim:

The Tennessee Bar Association ("TBA") respectfully submits the following Comment on the proposed amendments to Tennessee Supreme Court Rule 10B ("Rule 10B"), Section 1, filed March 30, 2020 under ADM2020-00507.

The TBA's Committee on the Judiciary considered the proposed revisions to Rule 10B, Section 1 and recommended that the TBA support the proposed rule revision in part as described and amended below. The TBA Executive Committee of the Board of Governors supports the Committee's recommendation.

The Supreme Court ("the Court") proposes to revise Rule 10B by striking certain words and adding the highlighted language below:

TENN. SUP. CT. R. 10B, SECTION 1

[New text is indicated by underlining/Deleted text is indicated by striking]

Section 1. Motion Seeking Disqualification or Recusal of Trial Judge or 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 ~~timely-filed~~ 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,

TENNESSEE BAR CENTER
221 4TH AVENUE N. SUITE 400
NASHVILLE, TN 37219

(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058

WWW.TBA.ORG



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 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.

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. Designation Procedure. A judge who recuses himself or herself, whether on the 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) and/or (3) in sequential order. If the presiding judge is the recused judge, the presiding judge shall take no action in selecting a successor. In such cases, the presiding judge pro tempore 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 by following the above procedure in sequential order, the presiding judge or the presiding judge pro tempore shall request - by using the designation request form appended to this rule - the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4). In a judicial district where the presiding judge is the only judge and he or she recuses himself or herself, the judge shall skip the sequential steps set forth in Tenn. Sup. Ct. R.11, § VII(c)(2) and (3) and instead request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R.11, § VII(c)(4), using the designation request form. Similarly, if the recusing judge is a general sessions judge or juvenile court judge, and he or she is the only general sessions or juvenile court judge in that county, the judge shall skip the sequential steps set forth in Tenn. Sup. Ct. R. 11, §VII(c)(2) and (3) and instead request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4), using the designation request form. Special permission to skip the sequential steps may be granted by the Chief Justice for good cause shown.

Page 3
April 29, 2020

The Committee supports the language added in the first new sentence as proposed by the Court expanding on what is "timely." It opposes the second added sentence as unnecessary. When Rule 10B was earlier proposed by the Court the draft included a ten-day filing provision similar to that proposed in the current draft. However, that language was not included in the rule. The committee continues to believe such a provision is unnecessary and not helpful. The committee is concerned that the proposed ten-day language may make it more difficult to address recusal issues relating to later discovered issues, such as those identified during the pretrial conference or even jury selection. Committee members suggested, for example, that it is not uncommon for the pretrial conference to be the occasion for the court to learn for the first time the identity of witnesses or experts. The committee is also concerned that the ten-day language will make it more difficult to apply the original timeliness provision because courts may tend to merely default to the application of the ten-day rule without further needed analysis.

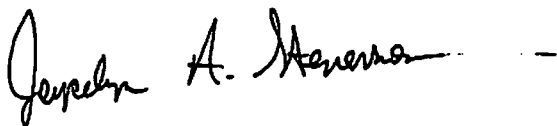
On these grounds, the committee supports the revision to section 1.01 to read as follows:

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 ~~timely filed~~ 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 supported by an affidavit...

For these reasons, we respectfully ask the Court to consider our proposed amendment to Rule 10B.

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

Sincerely,



Joycelyn A. Stevenson
Executive Director

cc: TBA Executive Committee
Berkley Schwarz, Director of Public Policy & Government Affairs
Service List



TENNESSEE BAR ASSOCIATION

April 29, 2020

The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 7th Avenue North
Nashville, TN 37219

IN RE: Tenn. Sup. Ct. R. 10B, Section 1
NO. ADM2020-00507

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The TBA's Committee on the Judiciary considered the proposed revisions to Rule 10B, Section 1 and recommended that the TBA support the proposed rule revision in part as described and amended below. The TBA Executive Committee of the Board of Governors supports the Committee's recommendation.

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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.

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1.04. Designation Procedure. A judge who recuses himself or herself, whether on the 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) and/or (3) in sequential order. If the presiding judge is the recused judge, the presiding judge shall take no action in selecting a successor. In such cases, the presiding judge pro tempore 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 by following the above procedure in sequential order, the presiding judge or the presiding judge pro tempore shall request - by using the designation request form appended to this rule - the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4). In a judicial district where the presiding judge is the only judge and he or she recuses himself or herself, the judge shall skip the sequential steps set forth in Tenn. Sup. Ct. R.11, § VII(c)(2) and (3) and instead request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R.11, § VII(c)(4), using the designation request form. Similarly, if the recusing judge is a general sessions judge or juvenile court judge, and he or she is the only general sessions or juvenile court judge in that county, the judge shall skip the sequential steps set forth in Tenn. Sup. Ct. R. 11, §VII(c)(2) and (3) and instead request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4), using the designation request form. Special permission to skip the sequential steps may be granted by the Chief Justice for good cause shown.

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April 29, 2020

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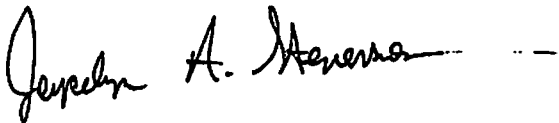
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1.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by ~~timely filed~~ written motion filed promptly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

For these reasons, we respectfully ask the Court to consider our proposed amendment to Rule 10B.

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

Sincerely,



Joycelyn A. Stevenson
Executive Director

cc: TBA Executive Committee
Berkley Schwarz, Director of Public Policy & Government Affairs
Service List

SCHUCHARDT LAW FIRM

ATTORNEYS AT LAW

6223 Highland Place Way, Suite 201
Knoxville, TN 37919
Phone: (865) 304-4374
Fax: (703) 232-1044

Elliott J. Schuchardt, Esq.
Attorney at Law

www.schuchardtlaw.com
e-mail: elliott016@gmail.com



ADM2020-00507

Admitted in
Tennessee
Pennsylvania

April 17, 2020

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 10B, Section 1
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comments on Proposed Amendment to Rule 10B, Section 1

Dear Mr. Hivner:

I appreciate this opportunity to comment on the Court's proposed amendment to Supreme Court Rule 10B, Section 1.

The Court is proposing a *fairly significant change* to the rule.

The current version of the rule requires a party to file a recusal motion in a "timely" manner. "Timely" is not defined, but is generally interpreted to mean a certain number of days prior to trial.

The new language would require parties to file recusal motions "promptly" after learning of information that could warrant recusal. This means that recusal motions would need to be filed *much earlier* in a case.

I would not recommend the new language, because it could encourage unnecessary litigation. Often, a litigant may suspect that a judge's independence is compromised, and that the judge should recuse. However, that is not always the case. In the vast majority of cases, the judge does *not* allow his or her potential bias to be a problem. It therefore makes sense for the litigant to wait and see if there is, or will be a problem. When there is no problem, no motion is required.

The proposed amendment to the rule would require parties to file potentially-unnecessary motions to recuse. This would be a waste of the court's time, and could engender unnecessary ill-will between court and counsel on future cases.

I would therefore, respectfully, not recommend the proposed language.

James M. Hivner, Clerk
April 17, 2020

Finally, I did a quick search of other jurisdictions. Other jurisdictions seem to be using the "timely" language, which is current Tennessee law.

I appreciate the opportunity to submit these comments to the Court.

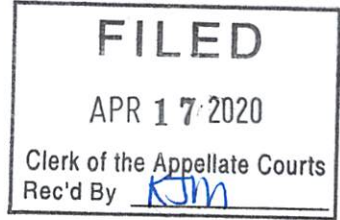
Very truly yours,

/s/ Elliott Schuchardt

Elliott J. Schuchardt



April 17, 2020



VIA E-Mail: appellatecourtclerk@tncourts.gov

Knoxville Bar Association
505 Main Street, Suite 50
P.O. Box 2027
Knoxville, TN 37901-2027
PH: (865) 522-6522
FAX: (865) 523-5662

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendments to Tennessee Supreme Court Rule 10B, Section 1; No. ADM2020-00507

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order referenced above, the Knoxville Bar Association ("KBA") Professionalism Committee ("Committee") has carefully considered the proposed change to Tennessee Supreme Court Rule 10B, Section 1, pertaining to the timeliness of a filed motion for recusal or disqualification. At the KBA Board of Governors' (the "Board") meeting held on April 15, 2020, the Committee presented a report of its review of the Board. Following the Committee's presentation and thorough discussion by the Board, the Board as a whole unanimously adopted the Committee's recommendation to file this comment in support of the proposed changes to Rule 10B, Section 1.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Hanson Tipton, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)
KBA Executive Committee (via e-mail)

Hanson R. Tipton
President

Cheryl G. Rice
President-Elect

Jason H. Long
Treasurer

Loretta G. Cravers
Secretary

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Michael J. Stanuszek
Amanda Tonkin
Elizabeth Towe
Mikel A. Towe

Executive Director
Marsha S. Watson
mwatson@knoxbar.org