IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE PETITION TO AMEND TENNESSEE SUPREME COURT RULE 10B

FILED
APR 14 2014
Clerk of the Courts
Rec'd By _____

No. ADM2014-00620

ORDER

Rule 10B, Rules of the Tennessee Supreme Court, sets out the procedures for seeking the disqualification or recusal of a judge. On April 1, 2014, the Tennessee Bar Association ("TBA") filed a petition to amend Rule 10B.

As the TBA explains in its Petition, the Rule currently provides two alternative methods for appealing a trial court's denial of a recusal motion: (1) the trial court's denial of the motion can be appealed via an accelerated interlocutory appeal, or (2) the recusal issue can be raised in an appeal as of right, following the entry of the trial court's judgment. The TBA's petition presents two alternative proposals for amending Rule 10B. The TBA first proposes that the Rule be amended to provide that the accelerated interlocutory appeal authorized under Rule 10B is the *exclusive* remedy for appealing a trial court's denial of a recusal motion (thereby deleting the option for challenging the recusal ruling in a later appeal as of right). In the alternative, the TBA proposes that the Court amend the Rule to provide that the de novo standard of review applies to recusal issues raised in an appeal as of right.

The Court hereby publishes the TBA's Petition, set out in the Appendix to this Order, and solicits written comments regarding the TBA's proposals from judges, lawyers, bar associations, members of the public, and any other interested parties. The deadline for submitting written comments is Monday, June 16, 2014. Written comments should be addressed to:

Mike Catalano, Clerk
Re: Petition to Amend Rule 10B
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

and should reference the docket number set out above.

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

Attached is the Tennessee Bar Association's Petition to Amend Tennessee Supreme Court Rule 10B, including Exhibit A ("TBA Recommendation for Exclusive Appellate Remedy Under Rule 10B") and Exhibit B ("TBA Recommendation If Court Chooses to Preserve Non-Exclusive Appellate Remedies").

(Exhibit C to the TBA's Petition, which lists the individuals and organizations upon which the TBA served its Petition, is omitted from this Appendix.)

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IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE: PETITION TO AMEND TENNESSEE SUPREME COURT RULE 10B	)))	No. ADM2014-00620

PETITION OF THE TENNESSEE BAR ASSOCIATION FOR THE AMENDMENT OF TENNESSEE SUPREME COURT RULE 10B CONCERNING JUDICIAL RECUSAL

The Tennessee Bar Association ("TBA") petitions the Court to amend Tennessee Supreme Court Rule 10B ("Rule 10B"), the Court's Rule governing the handling of all motions for the recusal or disqualification of judges to establish an accelerated interlocutory appeal under Rule 10B as the exclusive remedy for a party aggrieved by the denial of a recusal motion. As part of this proposed amendment, this Court would clarify, as the TBA believes is needed, that the proper standard of review for any appellate review of the denial of recusal motions is de novo, rather than abuse of discretion. The specific language proposed by the TBA is set out in Exhibit A.

In the alternative, should the Court differ with the TBA about the desirability of establishing that an accelerated interlocutory appeal under Rule 10B is the exclusive remedy for parties aggrieved by the denial of a recusal motion, and should the Court wish to retain the current ability of parties to appeal from the denial of a recusal motion after final judgment, the TBA recommends adoption of the

amendment set out in Exhibit B, which would clearly establish that the standard of review for appeals after final judgment is a de novo standard of review.

In support of the adoption of these amended rules, the TBA states as follows:

ARGUMENT

On January 4, 2012, the Court acted on a petition filed by the TBA and adopted a thorough revision of the rules governing Tennessee judicial ethics. This Order capped a lengthy process of study and deliberation – first by the TBA, and then by this Court – that led to the first substantial reform of Tennessee judicial ethics rules in more than twenty years. The most unique aspect of the 2012 amendments adopted by this Court was the adoption of Supreme Court Rule 10B, a procedural rule exclusively governing the filing and consideration of all judicial recusal motions in Tennessee courts at all levels. Rule 10B has now been in effect for more than eighteen months, and this petition seeks action by this Court to clarify and amend this Rule.

Establishing a Single Standard of Appellate Review for All Recusal Appeals

Since Rule 10B was adopted, the TBA, through its Committee on the Judiciary,[1] has followed with interest the use of Rule 10B and the decisions rendered under the Rule by the appellate courts. In the course of reviewing these decisions, the

[1] The TBA Judiciary Committee is the successor to the TBA Task Force on Judicial Conduct Rules which authored the TBA petition that led to this Court's January 4, 2012, Order, and includes lawyers and judges who served on the Task Force.

Judiciary Committee became concerned that Rule 10B might be read to allow for different standards of review to be applied to denial of recusal motions, depending on whether an aggrieved party chose to pursue an accelerated interlocutory appeal under Rule 10B or chose instead, as Rule 10B permits, to wait to seek appellate review of the denial of recusal until an appeal on the merits of the case.

Before the adoption of Rule 10B, a party whose motion to recuse a judge had been denied had limited options for appellate review. That party could, of course, simply seek appellate review of denial of a recusal motion in the ordinary course of an appeal after a final judgment on the merits of a case. Alternatively, the aggrieved party could seek an interlocutory appeal by permission under either of Tennessee Rules of Appellate Procedure 9 or 10; however, any such interlocutory appeals were only granted in the discretion of the appellate court. Regardless of the manner of appellate review, the standard of appellate review was clear: abuse of discretion. *See, e.g.*, *State v. Odom*, 336 S.W.3d 541, 576 (Tenn. 2011) (abuse of discretion standard in direct appeal after judgment); *Bean v. Bailey*, 280 S.W.3d 798, 805 (Tenn. 2009) (abuse of discretion standard on interlocutory appeal).

The adoption of Rule 10B, then introduced two fundamental changes: the availability of a right to an accelerated interlocutory appeal of an order denying recusal[2] and the replacement of the abuse-of-discretion appellate standard of review

[2] Tenn. S. Ct. R. 10B, § 2.01.

with a *de novo* standard of review.[3] Crucially, the TBA proposed, and this Court approved, a provision in Rule 10B that now makes the appellate remedy of accelerated appeal *non-exclusive* – in other words, a party aggrieved by the denial of a recusal motion may, if the party chooses, *not* take an accelerated appeal under Rule 10B and only seek appellate review of the denial of recusal after a final judgment.[4] What is completely clear is that any accelerated interlocutory appeal under Rule 10B is subject to a *de novo* standard of review. What is not clear is what standard of review governs appellate review of the denial of recusal after a final judgment.

On the one hand, one could read the intent of the Court in adopting Rule 10B to mean that *all* appellate review of denials of recusal motions, no matter how an appeal is pursued, should be subject to a *de novo* standard of review. That would be consistent, at least, with the intent of the TBA in proposing this new standard, as a *de novo* standard of review encourages transparency and accountability in decision-making on recusal and encourages the development of robust decisional law.

On the other hand, the actual language of Rule 10B concerning the standard of review is found in Section 2.06: "The appeal shall be decided by the appellate court on an expedited basis upon a de novo standard of review." Section 3.02 and 3.03 include similar language to address the review of a recusal denial by an individual appellate judge. There is simply nothing in the language of these sections, however,

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[3] *Id.* § 2.06.

[4] *Id.* § 2.01.

to clearly indicate that the intent of Rule 10B is to change the appellate standard of review when it occurs after a final judgment. After all, any such review would not be under Rule 10B; thus, the argument would go, there is no indication that Section 2.06 of Rule 10B was intended to have such sweeping effect outside the four corners of the Rule.

The TBA recommends that, to address this ambiguity, the Court should amend Rule 10B to clearly and expressly provide that only one standard of review now governs appellate review of recusal denials, no matter whether taken by accelerated interlocutory appeal or by appellate review after a final judgment.

Establishing an Accelerated Interlocutory Appeal Under Rule 10B as the Exclusive Appellate Remedy For All Denials of Recusal

Having considered the question of the appropriate standard of review in these two situations, the TBA then paused and reconsidered whether its original recommendation to allow two non-exclusive appellate remedies – a recommendation approved by this Court and enacted in Rule 10B – was wise.

When the TBA proposed retention of the traditional after-judgment appellate remedy alongside the new accelerated interlocutory appeal under Rule 10B, one of the reasons it did so was concern by members of the TBA's Task Force about the significance of the change involved in making an accelerated appeal the *exclusive* appellate remedy. This change would, of course, deny parties any chance to raise recusal denials in a subsequent merits appeal. Now, on further reflection, and having

studied the first wave of appellate decisions under Rule 10B, the TBA Judiciary Committee has recommended, and the TBA proposes in this Petition, that an accelerated interlocutory appeal under Rule 10B should be *the exclusive remedy* for an aggrieved party to challenge the denial of a motion to recuse. In other words, the TBA proposes that this Court eliminate the right of an aggrieved party to seek appellate review after a final judgment.

Over the last two years, with knowledge of the orderly and efficient way in which Rule 10B appeals have been handled by the courts, especially the appellate courts, the TBA has come to believe that the interests of the judicial system in the promptest, most transparent, and most accountable method of resolving recusal questions argues strongly in favor of requiring litigants aggrieved by the denial of a recusal motion to seek an appeal immediately. The TBA sees no meaningful purpose to be served by delaying the correction or affirmance of recusal rulings.

Requiring litigants to appeal denials of recusal motions contemporaneously is preferable for at least two reasons. First, if the denial is erroneous, correcting the error early, especially before trial, saves judicial resources, attorney fees, and costs. If the denial is affirmed, the parties and the trial court have the benefit of the appellate court's opinion. Second, requiring parties to decide whether to appeal earlier removes the opportunity for the parties to sit back and judge the outcome of dispositive motions or trial before deciding whether to appeal the recusal order. The TBA sees no legitimate purpose to be served by delaying the correction of any errors in recusal

orders. Indeed, forcing such decisions to an earlier point in litigation surely tends to avoid waste of party and judicial resources if the trial court has erred.

The TBA's Specific Proposal

On this basis, the TBA recommends and petitions the Court to amend Rule 10B to make an accelerated interlocutory appeal under Rule 10B the exclusive remedy for a party aggrieved by the denial of a recusal motion. Adopting this approach would remove the need to address the question of the proper appellate standard of review for review occurring after final judgment. To accomplish this result, the TBA recommends adoption of the amendment set out in Exhibit A.

In the alternative, should the Court differ with the TBA about the desirability of a Rule 10B accelerated interlocutory appeal as an exclusive remedy and wish to retain the current ability of parties to appeal from the denial of a recusal motion after final judgment, the TBA recommends adoption of the amendment set out in Exhibit B. This draft language clearly establishes that the standard of review for appeals after final judgment is a *de novo* standard of review.

CONCLUSION

For these reasons, the TBA petitions this Court to adopt the rule amendments set out above.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

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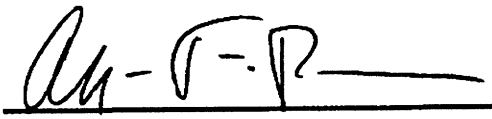
By: 

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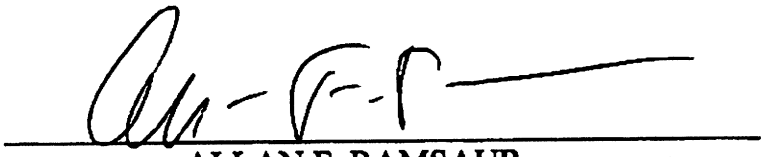
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served, within seven days of the filing of this document, upon the individuals and organizations identified in Exhibit C to the petition, by regular U.S. Mail, postage prepaid.



ALLAN F. RAMSAUR

EXHIBIT A

TBA RECOMMENDATION FOR EXCLUSIVE APPELLATE REMEDY UNDER RULE 10B

Tennessee Supreme Court Rule 10B
(Showing only affected sections; additions shown *underlined and italicized*; deletions shown as ~~struck though~~)

The TBA proposes that the Court amend Rule 10B as follows:

. . . .

Section 2. Availability of Interlocutory Appeal as of Right *as Exclusive Remedy* Following 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, an accelerated interlocutory appeal as of right lies from the order. *The accelerated interlocutory appeal as of right provided by this Section constitutes the exclusive remedy for any party following an order on a motion under this Rule.* The failure to pursue an accelerated interlocutory appeal~~, however, does not constitute a waiver~~ *constitutes a full and final waiver* of the right to raise any issue concerning the trial court's ruling on the motion in an appeal as of right at the conclusion of the case. ~~The accelerated interlocutory appeal or an appeal as of right at the conclusion of the case 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 Rule.~~

. . . .

EXPLANATORY COMMENTS

. . . .

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 Rule supersede any inconsistent provisions of the Tennessee Rules of Appellate Procedure for purposes of the accelerated interlocutory appeal. Additionally, because Section 2.01 states that 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. Additionally, *a party aggrieved by a denial of a motion to recuse may not seek review of that decision after a final judgment has been entered in the case.*

. . . .

EXHIBIT B
TBA RECOMMENDATION IF COURT CHOOSES TO PRESERVE NON-EXCLUSIVE APPELLATE REMEDIES

Tennessee Supreme Court Rule 10B
(Showing only affected sections; additions shown *underlined and italicized*; deletions shown as ~~struck though~~)

In the event that the Court differs with the TBA's proposal that an accelerated interlocutory appeal under Rule 10B be an aggrieved party's exclusive appellate remedy, the TBA proposes that a new Section 3 be adopted, in the following form, with existing Sections 3 through 5 to be renumbered to follow new Section 3:

Section 3. Appellate Review other than Interlocutory Appeal Under this Rule Preserved; Applicable Standard of Review.

3.01. As provided in Section 2.01 of this Rule, the failure to pursue an accelerated interlocutory appeal from an order of the trial court judge denying a motion for the judge's disqualification or recusal, or for determination of constitutional or statutory incompetence under this Rule does not constitute a waiver of the right to raise any issue concerning the trial court's order in an appeal as of right at the conclusion of the case. The accelerated interlocutory appeal or an appeal as of right at the conclusion of the case 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 Rule.

3.02. Any such appeal as of right of an issue concerning the trial court's denial of a motion filed pursuant to this Rule at the conclusion of the case shall be decided by the appellate court upon a de novo standard of review. Any order or opinion issued by the appellate court should state with particularity the basis for its ruling.

The TBA further proposes that the Explanatory Comments to Rule 10B be amended to add the following new paragraph concerning new Section 3, and that references to existing Sections 3 through 5 be amended accordingly:

Section 3. Section 3 confirms that Rule 10B provides only one of two non-exclusive appellate remedies for a party aggrieved by the denial of a recusal motion. Section 3.02 confirms that, when a party chooses to seek appellate review after final judgment, the standard of review is de novo, just as for an accelerated interlocutory appeal under Rule 10B.