

# CHAMBLISS

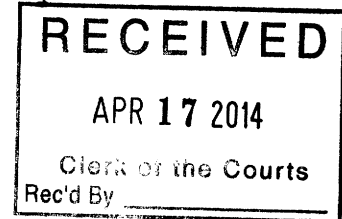
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April 16, 2014

Michael W. Catalano, Clerk  
Tennessee Appellate Court  
100 Supreme Court Bldg  
401 7th Avenue N  
Nashville, TN 37219-1407



APM 2014-620

Dear Mr. Catalano:

The TBA's petition to amend Tennessee Supreme Court Rule 10B addresses an issue which I think we, who served on the Task Force which made recommendations to the Supreme Court about the Rules of Judicial Conduct, did not, at the time, think necessary. I believe will be better for Rule 10B to be the exclusive remedy for appealing denial of a recusal motion. If the court does not agree I believe the alternative proposal to provide for a de novo standard of review will improve the recusal rules. I strongly endorse the petition of the Tennessee Bar Association.

Sincerely,

T. Maxfield Bahner

TMB/mms

FILED

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

2014 JUN 13 AM 9:05

IN RE: PETITION TO AMEND RULE 10B, RULES OF THE SUPREME COURT  
NASHVILLE

No. ADM2014-00620 – Filed: April 14, 2014

**RESPONSE TO INVITATION FOR PUBLIC COMMENT**

In response to the Court’s invitation for public comment concerning the proposed change to Supreme Court Rule 10B offered by the Tennessee Bar Association (“TBA”), the Tennessee District Public Defenders Conference (“Conference”) wishes to agree in part and disagree in part with the proposed changes to the current rule.

**I. THE *DE NOVO* REVIEW OF ALL APPEALS TO DENIED MOTIONS TO RECUSE IS PREFERRED**

The Conference wishes to express its support of the TBA’s recommendation to make all review of appeals concerning the denial of a motion to recuse a *de novo* standard of review. The Conference further agrees that the *de novo* standard of review promotes both the “transparency and accountability in decision making on recusal and encourages the development of robust decisional law”<sup>1</sup>. By creating a uniform standard of review regardless of when the appeal is taken, the Court eliminates potential confusion and uncertainty in the review of recusal motions.

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<sup>1</sup> Petition of the Tennessee Bar Association for the Amendment of Tennessee Supreme Court Rule 10B Concerning Judicial Recusal, page 4, ¶ 1.

## II. AN ACCELERATED INTERLOCUTORY APPEAL SHOULD NOT BE THE ONLY REMEDY AVAILABLE IN DENIALS OF A MOTION TO RECUSE

The Conference, however, disagrees with the proposal of the TBA to eliminate the option of appealing a motion to recuse post trial.

While the Conference agrees it is generally preferable to settle recusal questions before trial, limiting the appellate remedy to only an accelerated interlocutory appeal creates potential injustices. In certain circumstances, a party has no other option available except a post judgment appeal of a motion to recuse.

Not all trial judges who have denied a party's motion to recuse will be amicable to granting a stay based on a motion to recuse that is filed late in the proceedings. They may insist counsel immediately proceed to trial upon the denial of counsel's motion. Further, the facts behind the motion to recuse are sometimes not apparent until immediately prior to trial, or after the trial has already commenced. In these cases, the option to pursue a recusal appeal post judgment may be necessary for the parties and for the expediency of the proceeding.

One of the arguments for eliminating post judgment review is that it "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."<sup>2</sup> The language of Tennessee Supreme Court Rule 10B § 1.01 (2013) currently requires a timely filed written motion, and any motion "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." However, valid grounds may come to light at the last minute, or after the trial has begun, and a stay would likely be denied by the trial court. It could be impractical or impossible for counsel to apply for a stay from the

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<sup>2</sup> Petition of the Tennessee Bar Association for the Amendment of Tennessee Supreme Court Rule 10B Concerning Judicial Recusal, page 6, ¶ 3.

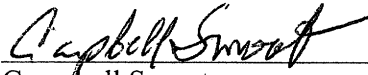
appellate court in such circumstances, and under the TBA's proposal there would then be no remedy even if it is apparent from the record that the trial court committed error. Under Tennessee Supreme Court Rule 10B § 2.04 (2013), the filing of a petition for recusal appeal does not automatically stay the trial court proceeding. A stay is discretionary on both the part of the trial court and the appellate court. *Id.* If an appeal as of right post trial is eliminated, the only way to protect the rights of litigants in these circumstances would be to codify an automatic stay in all recusal appeals. Unfortunately, this could open the door to frivolous appeals for the purpose of delay or the disruption of ongoing trials.

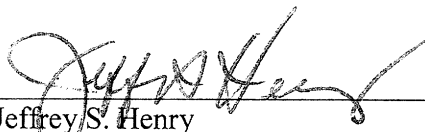
If the Court wishes to amend the rule to limit or clarify the right of post-trial recusal appeals, the Conference suggests that a workable and fair approach would be to allow the trial judge the option, upon denying a motion for recusal, of granting a stay of the proceedings pending appellate review. The amended rule could allow the interlocutory appeal as the sole remedy in cases where the trial court grants a stay, but preserve the right to a post-trial appeal where a stay is denied by the trial court. This recommendation also retains the supervisory authority of the appellate courts to grant stays and interlocutory appeals in these cases, and where the trial court has disallowed an appeal.

It is the assertion of the Conference that the TBA's proposal to limit the remedy available strictly to the accelerated interlocutory appeal would create unintended consequences to the attorneys, litigants, and the court system as a whole. A hard and fast rule such as this could eliminate appellate review of meritorious claims, and result in problems, expense, and delay to proceedings. The proposal offered herein by the Conference would address the TBA's concerns and preserve the legal issue in those circumstances where an interlocutory appeal is not available.

Respectfully submitted,

Tennessee District Public Defenders Conference

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