

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

DAVID L. HUDSON,)	
)	
<i>Petitioner,</i>)	Supreme Court No.
)	M2022-01260-SC-R11-CV
v.)	Court of Appeals No.
)	M2022-01260-COA-R3-CV
MATTHEW BENDER &)	Davidson County Chancery Court
COMPANY, INC. <i>and</i>)	No. 22-1025-III
THE TENNESSEE CODE)	
COMMISSION,)	
)	
<i>Respondents.</i>)	

**PETITIONER DAVID L. HUDSON’S
VERIFIED MOTION TO RECUSE**

Pursuant to Tennessee Supreme Court Rule 10B and Tennessee Supreme Court Rule 10, Rules of Judicial Conduct (“RJC”) 2.11, Petitioner David L. Hudson moves the Honorable Holly Kirby (Chief Justice Kirby) and the Honorable Jeffrey S. Bivins (Justice Bivins) to recuse themselves from further proceedings in this matter on the grounds that their impartiality might reasonably be questioned because they are members of Respondent the Tennessee Code Commission (Commission). Petitioner asserts that this 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. Further, this Motion is supported by the declaration of Petitioner (attached as Exhibit A) in compliance with Rule 10B, § 3.01. Petitioner also relies in support of this Motion the entire record in this proceeding. Petitioner further states as follows:

FACTUAL AND PROCEDURAL HISTORY

Petitioner filed a Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access under the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503 and 10-7-505, in the Chancery Court for Davidson County, Tennessee. Petitioner sought access to and a copy of the complete and current electronic version of the Tennessee Code Annotated (TCA) and to obtain judicial review of the actions of Respondent Matthew Bender & Company, Inc., a division of LexisNexis Group (Lexis), which had denied Petitioner access to that public record. The Chancery Court denied Petitioner access to the TCA, Petitioner timely appealed to the Court of Appeals, which affirmed the Chancery Court's decision.

The TCA is produced and published by Respondent the Tennessee Code Commission (Commission), a State entity established by statute.

Tenn. Code Ann. § 1-1-101. The members of the Commission include the Chief Justice of the State of Tennessee, the Attorney General and Reporter of the State of Tennessee, the Director of Legal Services of the General Assembly of Tennessee, all serving *ex officio*, plus two members appointed by the Chief Justice. Tenn. Code Ann. § 1-1-101. Thus, the current members of the Commission include two sitting members of this Court, Chief Justice Kirby and Justice Bivins, as well as the Attorney General, whose office has represented the Commission in the courts below. *See* Tennessee Code Commission (roster of Commission published by the Court on its website [tncourts.gov](https://www.tncourts.gov)), *available at* <https://www.tncourts.gov/boards-commissions/boards-commissions/tennessee-code-commission> (last accessed Jan. 4, 2024).

The Commission intervened as a respondent in the Chancery Court and participated fully as a party in the litigation before the Chancery Court and the Court of Appeals. The Commission will be a party to the proceedings before this Court, including an appeal if Petitioner's pending application for permission to appeal under Tennessee Rule of Appellate Procedure 11 is granted.

LAW AND ANALYSIS

I. Standard of Review

It is a fundamental constitutional right that every litigant is entitled to a fair trial before an impartial tribunal. Tenn. Const. art. VI, § 11; *see also Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009).

The Preamble to the Code of Judicial Conduct reflects this foundational concept: “An independent, fair and impartial judiciary is indispensable to our system of justice. . . . The Code [] establishes the standards for the ethical conduct of judges and judicial candidates.” Tenn. R. Sup. Ct. Rule 10, Preamble. In further affirmation these precepts, Rule 2.2 of the Code of Judicial Conduct requires that a judge “shall perform all duties of judicial office fairly and impartially.” RJC 2.2.

The Rule of Judicial Conduct requiring a judge’s recusal states:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

. . .

(2) The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party . . .

RJC 2.11.

Tennessee law mandates that a judge recuse himself or herself “when a person of ordinary prudence in the judge’s position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.” *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008) (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564-65 (Tenn. 2001)); RJC 2.11(A) (“A judge shall disqualify himself [] in any proceeding in which the judge’s impartiality might be reasonably questioned[.]”). Tennessee’s standard for recusal is, therefore, objective rather than subjective. *Id.*

Once a litigant has filed a written motion establishing the basis for recusal, supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge, the “the justice in question shall act promptly by written order and either grant or deny the motion.” Rule 10B, § 3.03(a). “If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion.” *Id.*

II. There is a reasonable question as to Chief Justice Kirby and Justice Bivins’s impartiality because they are members of the Commission, a party to this proceeding.

The Code of Judicial Conduct provide the rules to which justices must adhere to provide a fair and impartial justice in both practice and appearance. A justice cannot be impartial and must disqualify herself or himself if they are “an officer, director, general partner, managing member, or trustee of a party.” RJC 2.11(A)(2)(a).

Chief Justice Kirby is the Chair of the Commission, and she has appointed Justice Bivins to serve on the Commission. Thus, both Chief Justice Kirby and Justice Bivins are “officers” or “directors” of the Commission, a party to this proceeding, and their “participation in this appeal must be measured against an objective standard for recusal, which is uniquely applicable to the judicial branch.” *Hooker v. Haslam*, 393 S.W.3d 156, 169 (Tenn. 2012). Under Tennessee law regarding recusal, Chief Justice Kirby and Justice Bivins’s Commission membership raises a question as to their impartiality, requiring recusal.

CONCLUSION

Because Chief Justice Kirby and Justice Bivins’s impartiality might reasonably be in question under these circumstances, Petitioner

respectfully requests that they grant this motion and recuse themselves from this appeal, including any consideration of whether to grant Petitioner's application for permission to appeal.

Respectfully submitted,

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Counsel for Petitioner

VERIFICATION

I, David L. Hudson, pursuant to Tennessee Rule of Civil Procedure 72, declare under penalty of perjury that the facts stated above are true and correct, based on my personal knowledge, and that this motion is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost litigation.

D. L. Hudson

DAVID L. HUDSON

Date: 1/9/24

CERTIFICATE OF SERVICE

I certify that I have delivered this application by email and first-class mail to counsel for respondents at the following addresses:

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*Counsel for the Tennessee Code
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*Counsel for Matthew Bender &
Company, Inc.*

This 9th day of January, 2024.

/s/ Joshua Counts Cumby
Joshua Counts Cumby
Counsel for Petitioner

EXHIBIT A

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COMMISSION,)	
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<i>Respondents.</i>)	

**DECLARATION OF PETITIONER DAVID L. HUDSON
IN SUPPORT OF VERIFIED MOTION TO RECUSE**

STATE OF TENNESSEE

COUNTY OF DAVIDSON

I, David L. Hudson, declare under penalty of perjury that the following is true and correct:

1. I am an attorney and an Assistant Professor of Law at Belmont University College of Law where I teach Legal Information and Communication. I have also taught classes at Vanderbilt Law School and the Nashville School of Law, which awarded me its Distinguished Faculty Award in June 2018.

2. I am the author, co-author, or co-editor of more than 40 books. For much of my career I have worked on First Amendment issues, and I have served as a Justice Robert H. Jackson Legal Fellow for the Foundation for Individual Rights in Education and a First Amendment Fellow for the Freedom Forum Institute. For 17 years, I was an attorney and scholar at the First Amendment Center in Nashville, Tennessee.

3. I earned my undergraduate degree from Duke University and my law degree from Vanderbilt Law School.

4. On August 11, 2022, I filed a Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access under the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503 and 10-7-505, in the Chancery Court for Davidson County, Tennessee. I sought access to and a copy of the complete and current electronic version of the Tennessee Code Annotated (TCA) and to obtain judicial review of the actions of Respondent Matthew Bender & Company, Inc., a division of LexisNexis Group (Lexis), which had denied me access to that public record.

5. The TCA is produced and published by Respondent the Tennessee Code Commission (Commission), a State entity established by statute. Tenn. Code Ann. § 1-1-101.

6. The members of the Commission include the Chief Justice of the State of Tennessee, the Attorney General and Reporter of the State of Tennessee, the Director of Legal Services of the General Assembly of Tennessee, all serving ex officio, plus two members appointed by the Chief Justice. Tenn. Code Ann. § 1-1-101. Thus, the current members of the Commission include two sitting members of this Court, the Honorable Holly Kirby and the Honorable Jeffrey S. Bivins, as well as the Attorney General, whose office has represented the Commission in the courts below. See Tennessee Code Commission (roster of Commission published by the Court on its website [tncourts.gov](https://www.tncourts.gov)), available at <https://www.tncourts.gov/boards-commissions/boards-commissions/tennessee-code-commission> (last accessed Jan. 4, 2024).

7. The Commission intervened as a respondent in the Chancery Court, which denied me access to the TCA.

8. I timely appealed to the Court of Appeals, which affirmed the Chancery Court's decision.

9. The Commission participated in my appeal to the Court of Appeals, and it will be a party to the proceedings before this Court if my pending application for permission to appeal under Tennessee Rule of Appellate Procedure 11 is granted.

Pursuant to Tennessee Rule of Civil Procedure 72, I declare under penalty of perjury that the foregoing is true and correct.

David L. Hudson
DAVID L. HUDSON

Date: 1/9/24