

MEDIA GUIDE TO
Tennessee's Legal System



Sponsored by
THE TENNESSEE SUPREME COURT
and
FIRST AMENDMENT CENTER

Foreword

This handbook is prepared under the direction of the Tennessee Supreme Court and is designed to be a lasting resource for print and broadcast journalists, whether they are “veteran” legal affairs reporters or newcomers to the courthouse. It includes overviews of the state and federal judicial systems, practical tips for covering legal proceedings, information on the legal process in criminal and civil cases, state laws and court rules of interest to the media, phone numbers, addresses, website addresses and much more. Because laws and court rules are fluid, some information in the book should be cross-checked periodically with other sources, such as Tennessee Code Annotated.

This material is being provided for informational purposes and as a general guide to Tennessee law. No information contained in this handbook is intended as legal advice.

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A Message from the Tennessee Supreme Court

The Tennessee Judicial System is pleased to have partnered with the First Amendment Center to prepare this Media Guide to Tennessee's Legal System and to sponsor a Law School for Journalists. The goal of both projects is to assist print and broadcast reporters and editors as they cover courts, legal issues and legal proceedings. In turn, the public will benefit by more thorough and accurate coverage of events and issues that affect all of us.

Everyone involved hopes that the media guide will become a tool of the trade for journalists. Theirs is an important job since Tennesseans get most of their information about the legal system from the media. Covering legal issues has become increasingly difficult as the numbers and types of cases have grown at a dramatic pace. The law and the judicial system are complex, yet reporters are expected to understand and explain them with little or no legal training. And, for the most part, they do an excellent job. This guide will be a valuable supplement to the knowledge they already have as they go about the business of keeping the public informed.

The publication of this book and the Law School for Journalists could not have succeeded without the invaluable work of volunteer attorneys and members of the media who have contributed countless hours to these efforts. We also appreciate the underwriting support of the First Amendment Center, legal and media organizations. We are grateful for their contributions and advocacy for both a free press and an independent judicial system.

Covering the Courts

Overview

Your local courthouse is a treasure trove of public records and public happenings. You can walk right in and listen to virtually any proceeding and examine the documentation in most court files.

It is, with a few exceptions including some juvenile proceedings, your right to be present during court proceedings, including trials and hearings, and to take notes. In fact, many courts reserve rows close to the front for attorneys, families of litigants and media. Ask.

Right to Access

The U.S. Supreme Court has decided several cases concerning the public's right of access to judicial proceedings in criminal cases. In the 1984 case of *Press Enterprise Co. v. Superior Court*, the Supreme Court ruled that jury selection in criminal cases is presumptively open to the press and public. The court stated:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

The court announced that the First Amendment requires trial courts to consider four factors when faced with closure motions:

1. The presumption of openness can be overcome only by an overriding interest that makes closure essential to protect higher values;
2. A closure order must be narrowly tailored;
3. The trial court must consider reasonable alternatives;
4. A closure order must be supported by specific findings of fact, not mere speculation that closure is required.

Although civil proceedings have historically been open to the public, the right of access to civil proceedings is much less settled. However, some courts have concluded that the *Press Enterprise* factors apply to civil trials as well.

The leading Tennessee case concerning access to courts is *Tennessee v. Drake*, a 1985 decision of the Tennessee Supreme Court. In *Drake*, the court acknowledged that the *Press Enterprise* decision would control whether closure was proper in Tennessee criminal proceedings. Also, the Tennessee Supreme Court established a procedure that provides the media with a meaningful opportunity to be heard in opposition to closure motions. This procedure specifically recognizes the right of the media to intervene and oppose closure motions. The court stated that any closure must be in writing and must specify the basis for and extent of closure sought.

Although the court stated that closure motions should be heard as expeditiously as possible, they may not be heard until they have been filed with

the clerk's office for at least three days. Because no other notice is required it remains incumbent upon reporters to check with the clerk's office to determine whether closure motions have been filed or set for hearing. If the trial court does decide that closure is necessary, the court cannot hold the proceeding ordered closed for at least seven days. This requirement is designed to give the media an opportunity to obtain prompt appellate review.

Ten years later, the Tennessee Supreme Court ruled the four factors of *Press Enterprise* would also apply to Tennessee juvenile court proceedings.

Supreme Court Rule 30 — Media Guidelines

Supreme Court Rule 30 covers the use of television cameras, still cameras, recording and broadcasting equipment in Tennessee courtrooms. The rule follows:

A. Media Access

(1) Coverage Generally.

Media coverage of public judicial proceedings in the courts of this State shall be allowed in accordance with the provisions of this rule. The coverage shall be subject, at all times, to the authority of the presiding judge to

- i)** control the conduct of the proceedings before the court;
- ii)** maintain decorum and prevent distractions;
- iii)** guarantee the safety of any party, witness, or juror; and
- iv)** ensure the fair and impartial administration of justice in the pending cause.

(2) Requests for Media Coverage.

Requests by representatives of the media for such coverage must be made in writing to the presiding judge not less than two (2) business days before the proceeding is

scheduled to begin. The presiding judge may waive the two-day requirement at his or her discretion.

(3) **Notification of Request.**

Notification that the media has requested such coverage shall be provided by the clerk of the particular court to the attorneys of record in the case. Such notification may be waived by the judge at the clerk's request if the request is made for media coverage of all or part of a docket. If the judge waives notification, the clerk shall post a notice with the docket in a conspicuous place outside the courtroom. The notice must state that the proceedings will be covered by the media, and that any person may request a continuance when the docket is called. Such continuance shall be granted only if the person can show that he or she was prejudiced by the lack of notice, and that there is good cause to refuse, limit, terminate or temporarily suspend media coverage pursuant to section D(2).

B. Definitions

- (1) **“Coverage”** means any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment.
- (2) **“Media”** means legitimate news gathering and reporting agencies and their representatives whose function is to inform the public, or persons engaged in the preparation of educational films or recordings.
- (3) **“Proceeding”** means any trial, hearing, motion, argument on appeal, or other matter held in open court that the public is entitled to attend. For the purposes of section C of this rule, A proceeding includes any activity in the building in

which the judicial proceeding is being held or any official duty performed in any location as of the judicial proceeding.

- (4) **“Presiding Judge”** means the judge, justice, master, referee or other judicial officer who is scheduled to preside, or is presiding, over the proceeding.
- (5) **“Minor”** means any person under eighteen (18) years of age.

C. Prohibitions

- (1) **Minor Participants.** Media coverage of a witness, party, or victim who is a minor is prohibited in any judicial proceeding, except when a minor is being tried for a criminal offense as an adult.
- (2) **Jury Selection.** Media coverage of jury selection is prohibited.
- (3) **Jurors.** Media coverage of jurors during the judicial proceeding is also prohibited.
- (4) **Closed Proceedings.** Media coverage of proceedings which are otherwise closed to the public by law is prohibited.
- (5) **Juvenile Court Proceedings.** In Juvenile Court proceedings, if the court receives a request for media coverage, the court will notify the parties and their counsel of the request, and prior to the beginning of the proceedings, the court will advise the accused, the parties and the witnesses of their personal right to object, and that if consent is given, it must be in writing. Objections by a witness will suspend media coverage as to that person only during the proceeding, whereas objections by the accused in a criminal case or any party to a civil action will prohibit media coverage of the entire proceeding.

- (6) **Conferences of Counsel.** There shall be no audio pickup, recording, broadcast, or video close up of conferences, which occur in a court facility, between attorneys and their clients, between co-counsel of a client, between counsel and the presiding judge held at the bench or in chambers, or between judges in an appellate proceeding.

D. Limitations

- (1) **Discretion of Presiding Judge.** The presiding judge has the discretion to refuse, limit, terminate, or temporarily suspend, media coverage of an entire case or portions thereof, in order to
- i) control the conduct of the proceedings before the court;
 - ii) maintain decorum and prevent distractions;
 - iii) guarantee the safety of any party, witness, or juror; and
 - iv) ensure the fair administration of justice in the pending cause. Such exercise of the presiding judge's discretion shall be made following the procedures established in section D(2).
- (2) **Evidentiary Hearing.** Before denying, limiting, suspending, or terminating media coverage, the presiding judge shall hold an evidentiary hearing, if such a hearing will not delay or disrupt the judicial proceeding. In the event that an evidentiary hearing is not possible, affidavits may be used. The burden of proof shall be on the party seeking limits on media coverage. If there is no opposition to media coverage, the presiding judge may consider matters that are properly the subject of judicial notice. Media requesting coverage shall be allowed to present proof, either at the evidentiary hearing or by affidavit. Any finding that media coverage should be denied, limited, suspended or terminated must be

supported by substantial evidence that at least one of the four interests in section D(1) is involved, and that such denial, limitation, suspension, or termination is necessary to adequately reach an accommodation of such interest. The presiding judge shall enter written findings of fact detailing the substantial evidence required to support his or her order.

E. Appellate Review

Appellate review of a presiding judge's decision to terminate, suspend, limit, or exclude media coverage shall be in accordance with Rule 10 of the Tennessee Rules of Appellate Procedure.

F. Equipment and Personnel

- (1) **Limitations.** At least one, but no more than two television cameras with one operator each, two still photographers using not more than two cameras each, and one audio system for radio broadcast purposes, will be permitted in any judicial proceeding.

- (2) **Pooling Arrangements.** When more than one request for media coverage is made, the media shall select a representative to serve as a liaison and be responsible for arranging a pooling among the media that may be required by these limitations on equipment and personnel. The identity of the person selected, including name, business address, phone and fax number, shall be filed with the clerk of the court in which the proceeding is to be held. Pooling arrangements shall be reached when the court is not in session and shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. Such pooling arrangements shall include the designation of pool operators, procedures for cost

sharing, access to and dissemination of material, and selection of a pool representative if appropriate. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(3) **Personal Recorders.** Media personnel may use hand-held cassette tape recorders that are no more sensitive than the human ear without complying with section (A)(2) of this rule. Such recorders are to be used for the making of sound recordings as personal notes of the proceedings, and shall not be used for any other purpose, including broadcast. Usage shall not be obtrusive or distracting, and no change of tape shall be made during court sessions.

(4) **Print Media.** This rule does not govern the coverage of a proceeding by a news reporter or other person who is not using a camera or electronic equipment.

G. Sound and Light Criteria

(1) **Distractions.** Only television, photographic and audio equipment which does not produce distracting sound or light shall be employed to cover proceedings in a court facility. Signal lights or devices to show when equipment operating shall not be visible. Moving lights, flash attachments, or sudden light changes shall not be used.

(2) **Courtroom Light Source.** If possible, lighting for all purposes shall be accomplished from existing court facility light sources. If no technically suitable lighting exists in the court facility, modifications and additions may be made in light sources existing in the facility, provided such modifications and additions are unobtrusive, located in places designated

in advance of any proceeding by the presiding judge, and without public expense.

- (3) **Audio pickup.** Audio pickup for all purposes shall be accomplished from existing audio systems present in the court facility or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judge.
- (4) **Technical Difficulties.** Court proceedings shall not be interrupted by media personnel because of a technical or equipment problem. If any problem occurs, that piece of equipment shall be turned off while the proceeding is in session. No attempt shall be made to correct the technical or equipment problem until the proceeding is in recess or has concluded.

H. Location of Equipment and Conduct of Media Personnel

- (1) **Location of Equipment and Personnel.** The presiding judge shall designate the location in the courtroom for media equipment and operators to permit reasonable coverage without disruption of proceedings.
- (2) **Alterations.** No permanent installation shall be made nor shall any court facility be altered, unless approved in advance by the presiding judge. Expenses for alterations shall be borne by the media.
- (3) **Movement During Proceedings.** During proceedings, operating personnel shall not move about nor make any adjustment or change of any equipment which disrupts or distracts from the proceeding. Media broadcast, photographic or audio equipment

shall not be placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess in the proceeding.

- (4) **Conduct of Media Personnel.** Media personnel assigned to cover a judicial proceeding shall attire and deport themselves in such a way that will not detract from the proceeding.

I. Impermissible Use of Media Material

None of the film, videotape, still photographs, or audio recordings of proceedings under this Rule shall be admissible as evidence in the proceeding out of which it arose, any proceedings subsequent and collateral thereto, or upon any retrial or appeal of such proceeding.

J. Ceremonial Proceedings

This Rule shall not limit media coverage of investiture, ceremonial, or non-judicial proceedings conducted in court facilities under such terms and conditions as may be established by prior consent of the presiding judge.

K. Compliance

Media personnel who fail to comply with this rule shall be subject to an appropriate sanction as determined by the presiding judge.

Court Records

Every court has a clerk's office where new cases are filed, court papers are brought and court files are kept. If you're going to cover a particular court, familiarize yourself with its clerical and docketing practices. All cases are assigned numbers; keep handy the numbers of the cases you are following.

Court files that are public can be viewed at the appropriate clerk's office, depending on the type of case. If you are interested in a case, you should review the file periodically to read the new information.

Court clerks' offices routinely charge for copies of desired material. It is not always inexpensive. You can also contact a party's attorney who might provide a copy of what you need. In any event, never remove anything from a court file without specific permission.

Courts are increasingly becoming computerized, but verify all information you get from any computer search of any court. The information in the computer may be incomplete or incorrect.

Criminal Files

In criminal cases, you'll typically find a copy of the indictment which lists the formal charges, information regarding the victim and the defendant and the witnesses expected to testify. You'll also find information about the charges and the alleged facts upon which the charges are based. As the case progresses, you will find bail information, the person's date of birth and address, subpoenas for witnesses, evidentiary challenges, etc.

Civil Files

In civil cases, the key document is usually the lawsuit, called "the complaint" or "petition." In essence, the complaint lays out the heart of the plaintiff's case. But remember these are allegations, not proven facts. The complaint will include the names and addresses of the parties. Most people hire lawyers, so the lawyers' names and telephone numbers will be in there too. From the response to the complaint, hearing dates and some of the information in the file, you may be able to get a sense of the next hearing or trial issues.

Motions filed in the case normally can be found in the court file. Often, these are important but technical in nature. Be sure to see if the motion has been ruled upon. If so, a copy of the ruling, or order, should be in the file.

Exhibits

Once they are entered into evidence, exhibits normally become public. However, sensitive information may require a hearing before a trial judge before it can be copied. These may include autopsy reports, photos, tapes of wiretapped conversation and anything else a jury is allowed to review in making its decision.

Lists of the jurors selected to hear a trial also are generally public and included in the court file as part of the court proceedings, though the amount of information they contain is varied. They may include only basic information, such as the person's name, occupation, name of spouse, spouse's occupation, marital status and zip code.

Sealed Records/Files

A final word of caution: be aware of sealed records within the court file. Opening sealed envelopes without permission of the judge is forbidden.

Practical Tips for Covering the Courts

- ✓ Watch what you say around jurors and witnesses. It is natural to talk about what just went on in court but during courtroom breaks, reporters, jurors and witnesses sometimes share the same hallway, elevators, restrooms and cafeterias. If jurors or witnesses overhear your conversations, a mistrial could result.

- ✓ While court is in session you must abide by the judge's rules. Some will prohibit anyone from leaving the courtroom until there is a recess. Others will allow reporters and the public in and out of the courtroom as needed. Whatever the guidelines — and this includes where reporters/artists sit — you must abide by them. Any significant problems can be directed to the judge or court officer.

- ✓ Don't let your beeper or cell phone ring in court. If you have a laptop computer, ask a deputy or the courtroom clerk if the judge will allow you to type in court. Some judges now forbid electronic equipment in the courtroom except under Supreme Court Rule 30.
- ✓ Do not conduct interviews in any part of the courtroom while court is in session. Some judges will allow interviews in the courtroom when court no longer is in session. Others will allow interviews in hallways, but please be aware that other courts may be in session and the noise can be disruptive. It is best to go outside to conduct interviews.
- ✓ If you will be following a civil or criminal case, check with the attorneys periodically on the status of any motions and on the status of the trial itself (e.g., the number of witnesses they plan to present, length of their presentations, the trial and hearing schedules.)
- ✓ There is no substitute for personal contact with the attorneys and parties prior to, during and even after the trial. Many judges are quite interested in developing a relationship with the media. But remember, often they are prohibited from commenting on particular cases due to the Code of Judicial Conduct. Canon 3(B)(9) of the Code provides as follows:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and

control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining from public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

- ✓ Dates, times and locations of proceedings sometimes change. Confirm the status of the proceeding with the attorneys, the court clerk or the judge before you head to the courthouse.
- ✓ Trying to get in touch with an attorney? Keep in mind that many attorneys are often in court. Place your call, but don't expect the lawyer to be in the office. Leave a message that says what case you're interested in and what your deadline is.
- ✓ The Annual Report of the Tennessee Judiciary is available online. Go to **www.tsc.state.tn.us**
- ✓ Need to find a particular lawyer? Try a directory in the law school or Supreme Court libraries (listed in the back) or this Internet site: **<http://www.martindale.com/xp/Martindale/home.xml>**
- ✓ Looking for a Tennessee appellate opinion, appellate court dockets, information about the death penalty or other court-related information? Check the court system website at **www.tsc.state.tn.us**
- ✓ Unsure about a legal term? Check the back of this book or try: **<http://dictionary.law.com>**

Overview of the Tennessee Judicial System

The judicial branch, one of the three basic divisions of state government, serves as a check on the powers of both the legislative and executive branches. Through the power of judicial review, the courts rule on the constitutionality of legislation passed by the General Assembly and consider the legality of administrative policies and regulations.

Tennessee's judicial system is derived from a constitutional foundation: "The judicial power of this state shall be vested in one Supreme Court and in such Circuit, Chancery, and other inferior courts as the legislature shall from time to time ordain and establish ..." (Article VI, Section 1, Constitution of the State of Tennessee).

The Supreme Court is the highest court in the state. The five justices are nominated by the Judicial Selection Commission, appointed by the governor and retained by voters on a "yes-no" ballot for 8-year terms. The majority of this court's workload consists of cases appealed from lower state courts. Appeals are granted or denied at the discretion of the Supreme Court, except in capital punishment cases where direct appeals are automatic.

The five justices also interpret the laws and Constitutions of Tennessee and the United States. The court may assume jurisdiction over undecided cases in the Court of Appeals or Court of Criminal Appeals when there is special need for a speedy decision. The court also has appellate jurisdiction in cases involving state taxes, the right to

hold public office and issues of constitutional law. The Supreme Court sits as a whole to hear oral arguments.

The intermediate appellate courts — the Court of Appeals and Court of Criminal Appeals — hear civil and criminal cases appealed from the trial courts. Each of the intermediate appellate courts has 12 members who sit in panels of three to hear cases. All three appellate courts normally sit in Knoxville, Nashville and Jackson. Members of the Court of Appeals and Court of Criminal Appeals are appointed and elected under the same system as the Tennessee Supreme Court. The method of judicial selection is detailed in Tennessee Code Annotated.

The state's trial courts include Chancery, Criminal, Circuit and Probate Courts. Judges in these courts are chosen by popular election within their judicial districts. They are elected to 8-year terms. When a mid-term vacancy occurs, the Judicial Selection Commission recommends three applicants to the governor, who makes an appointment. Under the law, the governor can reject all three recommended applicants for trial judge positions and ask the Judicial Selection Commission to begin the process again.

Courts of limited jurisdiction make up the fourth judicial level in Tennessee. These locally funded courts are General Sessions, Juvenile and Municipal Courts.

Although not a part of the court system, the offices of the attorney general, district attorneys general and district public defenders are associated with the judicial branch of state government. The attorney general, who is appointed by the Tennessee Supreme Court, represents the interests of the state in civil litigation and criminal appeals. The 31 district attorneys serve as prosecuting counsel in criminal trials. Public defenders and court-appointed private attorneys represent indigent defendants, primarily in criminal cases.

The Criminal Law Process

Beginning the Process

Criminal prosecutions may begin in a number of ways, including by arrest, citation or direct presentment to the grand jury. The most common method is arrest.

A person may be arrested by a police officer during the commission of an offense or after an arrest warrant has been sworn out by an officer or citizen. An arrest warrant is not required when an offense is committed in the presence of an officer or where there is probable cause to believe the person has committed a felony.

A felony is a crime for which the possible punishment is one year or more of confinement. Probable cause is a legal term that basically means that there is at least a 51 percent probability the person committed the crime. Probable cause is the standard of proof for issuing arrest warrants and search warrants, for preliminary hearings and for determining whether a person should be tried in criminal court.

An arrest warrant is a written document charging a person with the commission of a criminal offense. A magistrate will issue the warrant if there is sufficient probable cause to believe a crime was committed and that the individual committed it. Magistrates include judges, as well as certain mayors and city recorders.

Initial Appearance and Preliminary Hearing

An arrested person must be brought before a magistrate “without unnecessary delay”. At that point, the magistrate will determine if there is

probable cause for the arrest and advise the person of the crime for which he or she is being charged. Also, a bond will be set or, in some cases, the magistrate will indicate that the bond is “open court,” meaning that it is set later by a general sessions or criminal court judge.

The next step in the criminal process after an arrest is a preliminary hearing. It must be scheduled within 72 hours if the person is in custody. If the person is on bond, the preliminary hearing typically is not held for several weeks. At the preliminary hearing, a general sessions judge listens to evidence presented by the state to determine if probable cause exists to bind the case over to the grand jury. The defendant has the right to put on proof to counter the state's evidence, but often does not. If the case is bound over, it then goes to the grand jury for possible indictment.

If the case is a misdemeanor instead of a felony, the defendant may choose to have the case tried in general sessions court instead of having a preliminary hearing. If this happens, there is no jury and the judge decides if the defendant is guilty and what sentence should be imposed. This cannot happen in felony cases since general sessions courts may only have trials in misdemeanor cases.

The Grand Jury

The grand jury is a body of 13 citizens who meet to hear evidence of criminal activity to determine if there is probable cause to require the defendant to stand trial in criminal court. In Tennessee, the deliberations of the grand jury are secret. The only person present, in addition to the grand jurors, is the witness. Neither the district attorney, the defense attorney, nor the defendant is present when the witness gives evidence. If the grand jury finds probable cause, it returns a true bill.

Direct Presentment

When a grand jury returns a true bill after a person has been arrested and gone through general sessions for a preliminary hearing, the document returned is an indictment. But a second way of instituting the criminal process is for the district attorney to go straight to the grand jury without the person having first been arrested. This also bypasses the preliminary hearing in general sessions court. When this happens, the document returned by the grand jury is called a presentment. When a presentment is returned by the grand jury, an arrest warrant called a *capias* is issued and the defendant is then arrested.

The Next Step — Criminal Court

After the grand jury has returned an indictment or presentment, the case moves into criminal or circuit court. In some Tennessee counties, all criminal cases go to courts that handle only criminal cases; in other counties, they go to circuit court where the judge handles both civil and criminal cases.

The initial appearance in criminal or circuit court is the arraignment. Arraignments are brief and in some places are done by video transmission. At the arraignment, the judge formally advises the defendant of the charges and asks if the defendant can afford to hire an attorney. If the defendant is indigent, the judge appoints counsel. The defendant then enters a not guilty plea.

Once the defendant has been arraigned, the next step is discovery. Discovery is the term used for a process in which the prosecution provides certain information about the case to the defense and vice versa. This information includes who the state anticipates will be prosecution witnesses at trial, any statement made by the defendant to the police, an outline of any physical or scientific evidence that exists and any evidence of which the state is aware that would show the defendant may

not be guilty.

There are many types of pre-trial motions that may be filed. One of the most common is a motion to suppress evidence or suppress a confession. At these hearings, the defendant tries to convince the judge that evidence or a confession was obtained in violation of the defendant's constitutional rights so that evidence could not be used at trial. Motions to reduce bail also are common. Every defendant has a right to have bail set, except in murder cases in which the state has given notice that it will seek the death penalty. In considering the amount of bail to set, a judge will typically consider the defendant's past criminal record, ties to the community, the facts of the offense and the likelihood that a conviction will be obtained given the strength or weakness of the state's evidence.

The vast majority of cases — about 97 percent — are settled by a plea agreement without the case being set for trial. The settlement process varies substantially from county to county. Generally, the case will be docketed several times for the district attorney and the defense lawyer to discuss settlement. If an agreement is reached, a guilty plea is entered. At this time, the judge informs the defendant of the trial rights that are given up by a plea, and outlines the specific plea and sentence involved. The district attorney reads a summary of the facts establishing guilt and the defendant enters the plea. The case is then concluded and there is no appeal.

Trial

If the case cannot be settled, it will be set for trial. The time it takes from arrest to a trial date varies from county to county. It is not unusual, however, for it to take a year or more for a serious case to come to trial. A jury of 12, plus one or two alternate jurors, hears the case. During voir dire, the state and the defense ask prospective jurors questions. This process is designed to ensure that

jurors can be fair to both sides. Some prospective jurors may be excused by the judge. In addition, in a felony case, both sides get eight peremptory challenges (15 if the state is seeking the death penalty) that can be used to excuse prospective jurors that they would prefer not to have on the jury. It is very rare for a jury to be sequestered, meaning that they are not allowed to go home or have any outside contact during the trial, but this does sometimes happen, especially in death penalty cases.

After the jury is selected and sworn, the indictment listing the official charges is read to the jury, the defendant announces a plea of not guilty and both sides make an opening statement. The state puts on its proof and then the defendant may put on proof. A defendant is under no obligation to take the stand or introduce any evidence.

Frequently during the trial, the lawyers may make objections to the introduction of certain evidence or with regard to other matters. The judge will sometimes hear these arguments at a bench conference. This is done out of the hearing of the jurors so they do not hear any potentially inadmissible information. The judge will either overrule (deny) the objection and let the evidence in or sustain it and keep the offending information out of evidence.

It is sometimes important for lawyers to make objections, even if they think the trial judge will overrule them, in order to preserve the issue for possible appeal. Movies and television often distort direct and cross-examination. Television lawyers often assume facts not in evidence, use very argumentative questions and elicit bombshell responses. The real world is different. Often, mundane material must be brought out on direct. Also, direct examination generally needs to consist of non-leading questions, that is, questions that don't suggest the answer.

Cross-examination questions may be leading, but need to be focused. The type of argument-in-

a-speech question seen on television is not permitted by most judges.

After both sides have been given the opportunity to present their evidence, the state makes an initial closing argument, the defense lawyer argues, and the state makes the final closing argument. The state is permitted to argue last under the rules because it has the burden of proof.

Next, the judge reads the jury charge to the jury. It instructs them on the applicable law and can be quite lengthy. The jury then retires to begin its deliberations. To return a guilty verdict, the jury must unanimously find guilt beyond a reasonable doubt. After attempting to reach a verdict for a reasonable length of time, if all 12 jurors cannot agree as to the defendant's guilt, a hung jury or mistrial is declared. The state can choose to try the defendant again.

If a verdict is reached, the jury foreperson announces it in open court. If the verdict is guilty, the defendant will file a motion for new trial setting out what errors were allegedly made at trial. This motion is seldom granted.

An appeal can then be taken to the Court of Criminal Appeals. The appeal is often handled by the same defense attorney who tried the case, but the state is represented by the State Attorney General's Office instead of the district attorney. The Court of Criminal Appeals reviews the trial transcript, written briefs and oral arguments of the parties and determines whether the conviction should be upheld. The losing party may seek further review in the Tennessee Supreme Court.

Sentencing in Non-First Degree Murder Cases

If the defendant is convicted of a crime other than first degree murder, the judge will set the punishment at a sentencing hearing. The sentencing hearing is usually set at least a month after the verdict so that a pre-sentence report can be prepared. The pre-sentence report sets out the arrest

and social history of the defendant and often includes a statement by the victim.

The sentencing scheme in Tennessee is very complicated. It is very difficult to understand exactly how long someone will be locked up for any given crime. First, the judge is given discretion to sentence a defendant within certain statutory ranges. Each felony (except for first degree murder) is classified as an A, B, C, D or E felony, with A felonies being the most serious. Each defendant is also classified as Range I, Range II, Range III or career offender. The offender ranges are based solely on the number of prior felony convictions a defendant has. A Range I defendant has less than 2 prior felony convictions. The majority of defendants are sentenced as Range I offenders. So, for example, a Range I offender convicted of aggravated robbery, a B felony, will be sentenced by the judge to serve 8 to 12 years.

Assume that the judge decides a particular defendant should have the maximum Range I sentence of 12 years. This does not necessarily mean the defendant will be locked up for 12 years. A Range I offender will meet the parole board after serving 30 percent of the 12 year sentence, or 4 years. Range II offenders serve at least 35 percent, Range III offenders serve at least 45 percent and career offenders serve at least 60 percent.

To make things even more complicated, there are a few crimes that are called “100 percent” offenses. These include child sex offenses, aggravated rape, especially aggravated robbery and second degree murder. Sentences for these crimes are served at 80 percent before the offender is allowed to meet the parole board.

Sentencing in First Degree Murder Cases

There are three potential sentences for first degree murder: life, life without parole and the death penalty. If the state does not file a notice prior to trial indicating that it will seek either life

without parole or the death penalty, the sentence automatically will be life if a guilty verdict is returned. In Tennessee, a life sentence currently is calculated as a minimum of 51 calendar years and life without parole means that the defendant never is eligible for release.

To be eligible for either life without parole or the death penalty, the state must be able to prove that at least one of 15 aggravating circumstances set out by the legislature exists in the facts of the particular case. These include such factors as the victim was less than 12 years old, the murder involved torture or that the defendant has been convicted of prior violent crimes.

If a notice that the death penalty or life without parole is filed, the trial is bifurcated, meaning that if a verdict of guilt is returned, the same jury next hears evidence of the aggravating circumstances and any mitigating circumstances. The sentencing phase is set up much like the trial phase with opening statements, closing arguments and a jury charge on the applicable law.

Capital Cases

To return a death verdict, the jury must unanimously find that at least one aggravating circumstance exists beyond a reasonable doubt and must further unanimously conclude that the aggravating factors outweigh any mitigating factors, also beyond a reasonable doubt. If a verdict of death is returned, the trial judge may set an execution date. It will routinely be stayed, however, when the defendant files an appeal. State law requires the Court of Criminal Appeals to review all death sentences. If a conviction and sentence are affirmed by the Court of Criminal Appeals, there is an automatic review by the state Supreme Court.

Within one year after the end of the state's "direct review" process, a defendant may file a petition for post-conviction relief. This is filed in the original trial court alleging violations of con-

stitutional rights. This petition generally complains that the defendant's trial attorneys were ineffective.

After a hearing on that petition, review is sought in the state appellate courts. When that appeal has been exhausted, federal review is sought by the filing of a habeas corpus petition. Once the appeals are completely exhausted, the defendant may seek clemency from the governor. If it is denied, the defendant is executed.

Contributing editor: Kathy Morante

The Civil Law Process in Courts Of Record

Chancery and Circuit Court

Civil cases can be filed in the Chancery or Circuit Court (trial courts of record in Tennessee) usually depending on the type of case and/or the amount of money at issue. Which county the case is filed in (“the venue”) depends on various things such as the type of case, where the plaintiff lives, where the defendant lives or does business, strategic concerns of the attorneys and the like. Small civil claims can be filed in the General Sessions Court, which is not a court of record in Tennessee.

The Complaint

The civil litigation process begins when the plaintiff, who is suing one or more defendants, files a “complaint” or “petition” with the clerk of the court. The complaint is an excellent starting place in which to determine the nature of the plaintiff’s claims and the amount of money or other relief sought. The complaint generally includes all theories of recovery, some of which may contradict each other and may be simply for shock value. It is worth remembering that at this point, the statements in the complaint are only allegations. The complaint also lists the names and addresses of the plaintiff and defendant and the name, address and telephone number of the plaintiff’s attorney.

The allegations, claims and type of relief sought in the complaint may change, so look in the file for an “amended complaint.” The complaint will be in the case file held by the clerk of the

court where the case was filed and is generally available for public viewing. Note the case number, which is assigned to every complaint, for ease in pulling the file in the future.

The court may issue a “scheduling order” setting the deadlines in which the case proceeds, including discovery and motions deadlines, deadlines to name expert witnesses, a date for a pre-trial settlement conference and, sometimes, a trial date. These dates can, and often do, change.

The Response

Once the complaint is filed, the court issues a summons, also referred to as “process,” and typically returns it to the plaintiff or the plaintiff’s attorney. There are time limits and specific procedures as to how the summons and complaint are to be served. In state court, the defendant usually has 30 days to file an “answer.” Defendants who do not file these documents in time risk losing the case by default.

The answer may provide only limited information to the public because it often is a fairly standard document which can, under certain circumstances, generally deny all liability, and often includes a wide range of defenses that might have little relevance to the particular case.

Discovery — Learning About the Other Side’s Case

The point of “discovery” is that in a civil trial neither side is supposed to be surprised in court by the claims, defenses or evidence put on by the other side. Therefore, parties are entitled to a broad exchange of information in which they can inquire about anything, so long as it is relevant or may lead to relevant information about some issue or defense in the case, and so long as it is not “privileged” by law, such as information concerning discussions between attorney and client.

When a plaintiff or plaintiff’s attorney serves a complaint upon a defendant, often written

requests for discovery are filed at the same time. Similarly, when the defendant answers the complaint, the response often is accompanied by written discovery requests upon the plaintiff. Written discovery primarily includes documents known as “interrogatories” and “request for production of documents.” Interrogatories are written questions directed to the other party regarding that party’s contentions and knowledge of facts relevant to the case. The answers are to be made under oath. The request for production of documents is, as its name suggests, a request that the party to which the request is directed produce documents relevant to the case such as medical records, records maintained in the course of business, insurance information, photographs and logs.

Another valuable form of written discovery is called a “request for admissions,” in which a party will ask the opposing party to admit to certain facts or legal issues in a case. The opposing party must respond within 30 days or all requests are deemed admitted.

A party not receiving responses or believing the responses received to be incomplete may file a motion to compel, seeking an order of the court to get the information. Likewise, a party seeking protection from another party’s request, such as a request for privileged information, may file a motion for a “protective order.”

Unfortunately for inquiring reporters, written discovery requests and responses are usually not filed with the clerk of the court so they may not be found in the court file. To get the information they seek, reporters may need to contact the parties or their attorneys.

Non-Written Discovery

The primary form of formal non-written discovery is the “deposition.” After the complaint is filed and answered, the scheduling of depositions can begin. This allows the attorney to question a

party, expert or other witness face-to-face in order to gather all information needed for the party to effectively present his or her case. The deposition is under oath and a court reporter is present to transcribe all testimony. It is usually conducted in a lawyer's office and is usually not public. A deposition transcript normally is not filed with the clerk, unless there is a specific reason for filing it. Only a notice to take deposition is filed with the clerk which notes the name of the person to be deposed, and the time, date and place of the deposition. Under certain circumstances, the deposition can be taken by videotape or via telephone and sometimes in response to written questions submitted in advance.

Throughout the preparation of a case, less formal modes of discovery also take place, such as talking to witnesses, photographing the scene, consulting experts on important issues in the case, researching the claim history of a particular company or individual, or conducting surveillance.

Motions

A motion is a written paper submitted by a party to the court for a ruling on a particular request. Motions can take many forms. Often, the issues are technical in nature and relate to whether the lawsuit was served in the proper court or county and properly served upon the defendant, or served upon the proper defendant.

Issues often raised by pre-trial motion include the "statue of limitations," "lack of jurisdiction over the subject matter," "failure to join a party," and "governmental immunity." One of the most valuable tools available to either party is the motion for summary judgment, which often uses the facts and materials gathered during the investigation of the case and the sworn answers taken in discovery with interrogatories or depositions. Either party can file such a motion, asking the court to rule in its favor on the case or an issue as a

matter of law; that is, that the evidence is so clear a judge or jury hearing the case could only find for the party filing the motion. While the public often expresses outrage at “frivolous” lawsuits, the motion for summary judgment is an effective tool to end such litigation.

All motions must be filed with the clerk of the court, and they are generally available for viewing in the case file in the clerk’s office. At the request of either party, a hearing may be held on the motion, including discovery motions.

Occasionally, when the motions are pending, the court file will be sent to the judge for a ruling on the motion, so the file may be temporarily removed from the clerk’s office. The decision by the judge will also be in the file, which will be in a document entitled, “order,” sometimes accompanied by a written decision or memorandum setting forth the basis of the court’s decision.

Settlement

The scheduling order will set a pre-trial conference which is held before a judge in the court in which the case is filed. The judge tries to bring the parties to a resolution of the claim. Settlement, however, need not occur at the courthouse and can occur at any time. If a case is settled, the plaintiff will usually sign a release and dismiss the claims against the defendant. Some releases contain confidentiality clauses, which vary, but often include a provision that the party is not to disclose the amount of money for which the case was settled.

Alternative Dispute Resolution

The courts have begun to follow the trend of the legal community by sometimes mandating an alternative dispute resolution (ADR) procedure. While parties can agree among themselves to ADR, such as binding arbitration, one type of ADR used in court cases is a settlement conference, which is a meeting between counsel and parties, before a judge or lawyer, to discuss the pros

and cons of one's case. In certain cases, mediation occurs before a neutral party who tries to empower the parties to reach agreement on their own.

Trial

Depending on the type of case involved, the trials in Chancery and Circuit Court cases may be with or without a jury. Judges hearing a case without a jury normally have neither the time nor interest to sit through the normal courtroom dramatics present in jury cases. Non-jury cases are also much faster to try, since there is no need for all the extra procedures such as bench conferences to avoid contamination of a jury. All cases follow the rules of evidence.

Prior to the commencement of a trial, the attorneys will meet with the judge to discuss preliminary matters, such as any outstanding "motions in limine," which are pre-trial motions to exclude evidence; to propose jury instructions; to make stipulations, and similar actions.

In a jury trial, the attorneys then begin the process of jury selection. The jury consists of twelve individuals (or fewer if the parties agree to it), often with at least one alternate juror in the event that a juror becomes unable to serve or is disqualified. In a process called "voir dire," questions are posed to the potential jurors to inquire into such matters as their knowledge of the parties and the facts of the case, and their background and additional questions directed to the particular facts of a case, but judges have discretion in what the jury can be asked and what role the attorneys play in the questioning. The attorneys are provided with a list of potential jurors, from which they may make certain strikes, called "peremptory challenges." A party may also challenge any juror "for cause." A juror could be dismissed for cause, for example, if he or she would not be able to disregard feelings about a certain issue and render a fair and impartial verdict.

After opening statements each side presents witnesses, exhibits and other evidence. At the close of the plaintiff's case, the defendant may make a "motion for directed verdict" contending that the plaintiff did not put on enough evidence to require the defendant to put on a case. If this is denied, the defendant puts on a case. After all the evidence is in, the parties give their closing arguments. Then the judge, in a jury trial, instructs the jury as to the law of the case that the jury is expected to follow when reaching its verdict. The jury then retires to the jury room to begin deliberations. The jury's verdict must be unanimous. The parties may agree however, to accept a verdict of a stated majority of the jurors. A party on the losing side may, if he or she made a motion for judgment, make a motion for "judgment notwithstanding the verdict" asking the judge to set aside the jury's verdict and find for the side making the motion. The parties may also make motions asking the court to add to or reduce the size of the award.

Any dissatisfied party may, within certain time periods, file other motions such as a motion asking the court for a new trial. The parties also have a right to appeal the court's decision, normally within 30 days of the verdict.

Burden of Proof

In the usual civil trial, the plaintiff is required to prove the defendant liable by a "preponderance of the evidence." That is, the plaintiff must prove that it is "more likely than not" the case that the defendant is liable. If the fact finder (the jury or the judge) believes the evidence is evenly balanced (50-50), then the verdict must be against the plaintiff, who did not meet his or her burden of proof. If the balance tilts even slightly, such as 51 percent in favor of liability, then the plaintiff has met his or her burden.

In some limited cases or evidentiary issues, the plaintiff must prove a case or issue by "clear and

convincing evidence.” This is a much tougher standard than a preponderance of evidence. It is not as tough a standard, however, as “beyond a reasonable doubt” which is the standard to convict a defendant on a criminal charge.

*For more information about civil procedure in a court of record, consult the **Tennessee Rules of Civil Procedure.***

A Word about Trial Objections

Objections by attorneys, and discussions about these objections, can consume a significant amount of time during trial and slow down and confuse the narrative quality of a witness’ testimony and the introduction of exhibits. Objections are critical, however, if a party is to keep out evidence, have an error immediately corrected or, if it is not corrected, to preserve the issue for appeal. Of course, sometimes attorneys may object just to look in control or to shake-up the opposition.

The Tennessee rules require that objections to evidence be made when the evidence is offered or as soon as possible afterward, or the objection is waived. Even though the grounds for the objection normally are required to be stated, reporters may find the reasons for them to be somewhat fuzzy.

Following are some of the objections commonly encountered at trial.

Objections to questions:

irrelevant; immaterial; privileged information; calls for a conclusion; hearsay; impermissibly leading; speculative; argumentative; beyond the scope of permissible questioning; calls for an impermissible opinion; compound question; calls for a conclusion.

Objections to answers (often followed by a motion to strike):

irrelevant; immaterial; privileged;
conclusion; opinion; hearsay;
unresponsive.

Objections to exhibits:

irrelevant; immaterial; no foundation or improper foundations (showing that the exhibit is what it is purported to be);
contains inadmissible material.

The judge normally rules on each objection as it comes, and will either “sustain” and uphold it, or “overrule” and reject it.

For more information see the
Tennessee Rules of Evidence.

Office of the Tennessee Attorney General

The Office of Attorney General and Reporter dates from 1831 when duties included representing the state in the Tennessee Supreme Court, providing legal advice to state officers and reporting Tennessee Supreme Court decisions. An 1853 constitutional amendment made the office an elective one, but in 1870, another constitutional change gave the Tennessee Supreme Court authority to appoint the attorney general and reporter to an eight-year term. This method of appointment remains in force and is unique among the 50 states.

As the state's chief legal officer, the attorney general represents all state executives, officials, departments, boards, agencies and commissions in matters arising from their public duties. Such representation includes participation in litigation, transactional matters, issuing formal written opinions, and giving day-to-day legal advice. The office employs 150 attorneys.

Divisions Within the Office of Attorney General

Antitrust Division. Criminal and civil enforcement practice prosecuting state and federal antitrust and related trade regulation violations as well as related white collar criminal conspiracies. Engages in civil class actions — sometimes with other states — to close businesses out of compliance with state and federal antitrust laws. Works with local district attorneys to convene grand juries and obtain indictments.

Bankruptcy and Collections Division.

Civil practice representing the state's interest in federal bankruptcy proceedings in Tennessee and other states. Defends or asserts the state's right to exercise its police and regulatory powers during such proceedings. Also handles the collection of other debts owed to the state and its agencies.

Civil Rights and Claims Division. Civil practice defending personal injury, property damage and workers' compensation claims against the state at trial and on appeal. Defends state employees sued for money damages in non-employment related civil rights suits. Represents the Department of Correction.

Civil Litigation and State Services Division. Civil defense practice primarily involving contract, employment/labor, and education law. Transactional work and litigation including acquisition, development, and disposition of real property and advising clients on contractual and procurement matters. Also defends state executives, officers, employees, and agencies in civil rights, discrimination, and education-related actions in state and federal court and the Tennessee Claims Commission at trial and on appeal.

Consumer Advocate and Protection Division. Civil practice representing the interests of Tennessee consumers in utility proceedings before judicial and quasi-judicial bodies, primarily the Tennessee Regulatory Authority. Civil enforcement practice bringing actions to enjoin unfair or deceptive acts and practices affecting Tennessee and national trade or commerce (including deceptive

advertising and telemarketing scams). Obtains restitution for victims in addition to civil penalties. Also brings proceedings to enforce the charitable solicitation statutes and the statutes prohibiting the unauthorized practice of law.

Criminal Justice Division. Criminal practice representing the state in appeals of criminal convictions. Argues before and represents the state in the Court of Criminal Appeals, Tennessee Supreme Court, the Sixth Circuit and U.S. Supreme Court. Defends the state in constitutional challenges to criminal statutes. Also handles post-conviction relief appeals and federal habeas corpus actions.

Enforcement Division. Civil enforcement practice bringing actions to stop white collar fraud and environmental violations and to recover fruits of such fraud/violation. Also brings criminal actions for securities fraud and environmental crimes in conjunction with district attorneys general. Handles civil forfeitures and provides civil rights defense and advice for the state's law enforcement agencies.

Environmental Division. Civil enforcement and defense practice representing the state environmental agency, the state environmental boards, and the state wildlife agency. Acts as litigation counsel for boards and agencies at trial and appellate levels in state and federal courts. Also provides formal and informal legal advice to agencies, and reviews all agency rules and regulations for legality.

Financial Division. Transactional and litigation practice representing the state in matters related to finance and state banking

laws, including bonds, lending agreements, audits, and solvency of insurance companies and financial institutions; approval and management of contracts related to the investment of public funds; and investment related services to the treasurer. Also represents various other agencies.

General Civil Division. Civil defense practice concerning areas of responsibility such as employment security, mental health, welfare programs, human services, child support, labor laws, and student loan collections at the trial and appellate levels in state and federal courts. Also defends the state in constitutional challenges to civil statutes.

Health Care Division. This division handles TennCare litigation and represents the Department of Health and health-related boards and commissions.

Real Property and Transportation Division. Civil litigation practice involving condemnation proceedings for state highways, parks, and other purposes, as well as other related property issues statewide, such as inverse condemnations and transportation-related litigation.

Solicitor General. This division is responsible for supervising and coordinating all appellate litigation and for review of all formal written opinions before submission to the attorney general.

Special Litigation Division. Primarily civil practice handling or assisting in especially complex litigation. Attorneys are assigned their own caseloads but also work with

attorneys in the other divisions of the office to litigate a variety of cases. Also advises other attorneys in the office on trial tactics and strategy and procedural or evidentiary matters, and defends numerous constitutional challenges to state law.

Tax Division. Civil practice handling lawsuits concerning liability for the various taxes levied by the state, and involving issues of federal and state constitutional law, as well as statutory interpretation. Represents the state Board of Equalization in the area of property taxes and the Tennessee Consolidated Retirement System on issues of membership and benefits. In addition, represents the Tennessee Regulatory Authority, the Secretary of State in corporate matters, and a large number of professional regulatory boards.

District Attorneys General Conference

The Tennessee District Attorneys General Conference was created by the General Assembly in 1961. It is comprised of the district attorneys general from the state's 31 judicial districts. The district attorneys general are elected for a term of 8 years and are responsible for the prosecution of criminal cases on behalf of the state.

The office of the executive director, created in 1972, serves as the central administrative office for the District Attorneys General Conference and is responsible for budgeting, accounting, payroll, personnel, property management and the administration of all fiscal matters.

The executive director is elected by the district attorneys general for a term of 4 years and is a member of the Tennessee Judicial Council.

Office of the United States Attorney

United States Attorneys for the Eastern, Middle and Western Districts of Tennessee serve as the federal government's lawyers in the state. U.S. Attorneys prosecute violations of the nation's criminal and civil laws, including violent crime and narcotics, bank robberies, mail and wire fraud, tax fraud, firearms violations, environmental crime and health care fraud, as well as civil and financial litigation. They also defend the federal government and its agencies in civil actions. The U.S. Attorney for each of Tennessee's three districts is appointed by the president and confirmed by the U.S. Senate.

District Public Defenders Conference

The District Public Defenders Conference is the system of elected district public defenders from each of the state's 31 judicial districts and the central administrative office of the executive director. District public defenders and their staffs are responsible for representing people accused of crimes who cannot afford private attorneys. District public defenders also have the responsibility of handling all state appeals filed by indigent people they represented in the trial courts of Tennessee. In cases of multiple defendants, or when the district public defender has a conflict of interest, a judge may appoint private attorneys to provide legal representation.

The District Public Defenders Conference was created in 1989 by the Tennessee General Assembly. With one exception, district public defenders are elected by voters in their judicial districts and serve 8-year terms. They are licensed Tennessee attorneys whose full-time work is devoted to indigent defense representation in state courts. District public defenders may represent indigent defendants in felony criminal trials, misdemeanors in General Sessions Courts, juvenile delinquency cases, appeals, post-conviction proceedings and probation/parole revocation matters. The conference employs 31 district public defenders, 129 assistant public defenders, 40 district investigators and 70 administrative personnel.

Office of Executive Director

The executive director of the conference is the

chief executive officer responsible for developing policy, providing administrative services for each office, employee training and budget review. The director monitors proposed changes in criminal statutes and testifies before the legislature regarding their impact on the criminal justice system.

Capital Division

The Capital Division of the conference assists any attorney appointed to a case in which the state is seeking the death penalty. The division confers with trial attorneys at every stage from case investigation through direct state appeal. The division provides death penalty training to criminal defense attorneys and maintains contact with capital case qualified attorneys, mitigation specialists and expert witnesses. The division also maintains a current database for expert services in capital cases. Two attorneys and a legal secretary are assigned to the Capital Division.

Office of the Federal Public Defender

The Office of the Federal Public Defender exists in each of Tennessee's three regions and is supervised by a federal public defender. The federal public defender is responsible for furnishing legal defense services to indigent persons charged with federal criminal offenses. Representation also is provided for indigent defendants charged with committing certain misdemeanors on federal facilities. A defendant's financial eligibility for representation and the appointment of counsel itself are made by the court. In addition to the attorney from the office, some indigent defendants are represented by private attorneys selected from a panel appointed by the federal court. The Federal Public Defender's offices also provide representation to defendants challenging state court convictions or sentences in habeas corpus proceedings in federal district court.

Tennessee Open Meetings Act

Overview

The state open meetings law ensures that the public's business is conducted in the sunshine, or in an open forum. The law generally prohibits governing bodies, such as school boards and city councils, from operating behind closed doors.

Statute text

8-44-102. Open meetings — “Governing body” defined — “Meeting” defined.

- (a) All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee.
- (b) (1) “Governing body” means:
 - (A) The members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration and also means a community action agency which administers community action programs under the provisions of 42 U.S.C. § 2790 [repealed]. Any governing body so defined by this section shall remain so defined, notwithstanding the fact that such governing body may have designated itself as a negotiation committee for collective bargaining purposes, and strategy sessions of a governing body under such

circumstances shall be open to the public at all times;

(B) The board of directors of any nonprofit corporation which contracts with a state agency to receive community grant funds in consideration for rendering specified services to the public; provided, that community grant funds comprise at least thirty percent (30%) of the total annual income of such corporation. Except such meetings of the board of directors of such nonprofit corporation that are called solely to discuss matters involving confidential doctor-patient relationships, personnel matters or matters required to be kept confidential by federal or state law or by federal or state regulation shall not be covered under the provisions of this chapter, and no other matter shall be discussed at such meetings;

(C) The board of directors of any not-for-profit corporation authorized by the laws of Tennessee to act for the benefit or on behalf of any one (1) or more of counties, cities, towns and local governments pursuant to the provisions of title 7, chapter 54 or 58. The provisions of this subdivision (b)(1)(C) shall not apply to any county with a metropolitan form of government and having a population of four hundred thousand (400,000) or more according to the 1980 federal census or any subsequent federal census;

(D) The board of directors of any nonprofit corporation which through contract or otherwise

provides a metropolitan form of government having a population in excess of five hundred thousand (500,000) according to the 1990 federal census or any subsequent federal census with heat, steam or incineration of refuse;

(E) (i) The board of directors of any association or nonprofit corporation authorized by the laws of Tennessee that:

(a) Was established for the benefit of local government officials or counties, cities, towns or other local governments or as a municipal bond financing pool;

(b) Receives dues, service fees or any other income from local government officials or such local governments that constitute at least thirty percent (30%) of its total annual income; and

(c) Was authorized as of January 1, 1998, under state law to obtain coverage for its employees in the Tennessee consolidated retirement system.

(ii) The provisions of this subdivision (b)(1)(E) shall not be construed to require the disclosure of a trade secret or proprietary information held or used by an association or nonprofit corporation to which this chapter applies. In the event a trade secret or proprietary information is required to be discussed in an open meeting, the association or nonprofit corporation may conduct an executive session to discuss such trade secret or proprietary information; provided, that a notice

of the executive session is included in the agenda for such meeting.

(iii) As used in this subdivision

(b)(1)(E):

(a) “Proprietary information” means rating information, plans, or proposals; actuarial information; specifications for specific services provided; and any other similar commercial or financial information used in making or deliberating toward a decision by employees, agents or the board of directors of such association or corporation; and which if known to a person or entity outside the association or corporation would give such person or entity an advantage or an opportunity to gain an advantage over the association or corporation when providing or bidding to provide the same or similar services to local governments; and

(b) “Trade secret” means the whole or any portion or phrase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and of value. The trier of fact may infer a trade secret to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes;

Meeting defined

(2) “Meeting” means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. “Meeting” does not include any on-site inspection of any project or program.

(c) Nothing in this section shall be construed as to require a chance meeting of two (2) or more members of a public body to be considered a public meeting. No such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.

Tennessee Public Records Act

Overview

The Tennessee Public Records Act is a very important tool by which journalists and the public can obtain information in government files. It was originally passed by the Tennessee General Assembly in 1957, and provides that governmental entities are to grant full access to public records to every citizen of Tennessee. The legislative policy behind the act is set forth in the enforcement provision that directs courts to construe the act broadly “so as to give the fullest possible access to public records.” § T.C.A. 10-7-505 (d).

Scope

T.C.A. § 10-7-503 (a) states that “Except as provided in section 10-7-504 (f), all state, county and municipal records. . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state Law.”

Public records defined

“Public record or records” or “State record or records” means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with a transaction of official business by any government-

tal agency. T.C.A. § 10-7-301 (6).

“Public records” within the county shall be construed to mean:

- (1) All documents, papers, records, books, and books of account in all county offices, including, but not limited to, the county clerk, the county register, the county trustee, the sheriff, the county assessor, the county executive and county commissioners, if any;
- (2) The pleadings, documents, and other papers filed with the clerks of all courts, including the courts of record, General Sessions Courts, and former courts of justices of the peace, and the minute books and other records of these courts; and
- (3) The minutes and records of the county legislative body.

In the event a Tennessee citizen’s request to review public records is denied, T.C.A. § 10-7-505 provides that a petition shall be filed in the Chancery Court for the county in which the county or municipal records sought are situated. In the case of records in the custody and control of any state department, agency or instrumentality, the petition shall be filed in the Chancery Court of Davidson County, or in the Chancery Court for the county in which the state records are situated if different from Davidson County. T.C.A. § 10-7-505 (b).

Burden of Proof Regarding Nondisclosure of Records

The burden of proof or justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those

records and the justification for the nondisclosure must be shown by a preponderance of the evidence. T.C.A. § 10-7-505 (c).

Exceptions to the Public Records Act

Compiled by Douglas R. Pierce

There are a number of exceptions to the general right of access to public records under the Tennessee Public Records Act. While many of these exceptions are set forth in T.C.A. §§ 10-7-503 and 504 of the Act, many more exist outside the Act. Moreover, these exceptions are always changing and/or evolving. The following is a list of the exceptions to the Tennessee Public Records Act:

T.C.A. 2-10-211(b) Information entered by any candidate to the Registry of Election Finance electronic filing system until the information is filed with the Registry of Election Finance.

T.C.A. 2-11-202(a)(5) Report of an election law violations investigation conducted by the Coordinator of Elections.

T.C.A. 3-2-111(b)(1) Data received by General Assembly's Fiscal Review Committee related to health benefits.

T.C.A. 3-10-108 Certain information stored or processed in legislative computer system.

T.C.A. 3-12-105 Work papers and intraoffice memoranda of Office of Legal Services for the General Assembly.

T.C.A. 3-14-109 Work papers and intraoffice memoranda of Office of Program Evaluation within General Assembly.

T.C.A. 4-3-712, -730 Proprietary information acquired by the Department of Economic and Community Development is confidential only if so designated by the Department Commissioner and the Attorney General.

T.C.A. 4-5-218 Permits state agencies to delete portions of agency documents and records,

which other provisions of law designate as confidential. Allows agency to charge fee for documents.

T.C.A. 4-6-140 Permits Commissioner of Correction to restrict access to records if access would result in jeopardy to lives of inmates and officers.

T.C.A. 4-14-308 Trade secrets or commercial or financial information regarding the operation of any business conducted by an applicant for any form of assistance from the Tennessee Technology Development Corporation.

T.C.A. 4-17-408(e) Applications (except the identity of the applicant) with supporting documents including personal financial records, trade secrets or proprietary information of applicants and all staff meetings or portions thereof for financing from the Tennessee Industrial Finance Corporation.

T.C.A. 4-21-303(d) Human Rights Commission conciliation agreements if the complainant and respondent agree and the Commission determines that disclosure is not required to further the purposes of the Human Rights Act.

T.C.A. 4-51-124(a), -205 Certain information of the Tennessee Education Lottery Corporation.

T.C.A. 4-51-126(f) Tennessee Education Lottery Corporation's procurement documents, contracts and any other documentation filed with the Lottery Procurement Panel.

T.C.A. 7-54-107 All proposals for construction operation or maintenance of an energy production facility are open for public inspection after the contract is awarded except for trade secrets and confidential information contained in the proposals and identified as such.

T.C.A. 7-86-317 A local emergency communications district board shall determine whether any proprietary information submitted to it shall remain confidential.

T.C.A. 8-3-104(10) Permits Governor to determine what records relating to the executive branch that are maintained by the Secretary of State require secrecy.

T.C.A. 8-4-116(c) State comptroller's confidential work papers.

T.C.A. 8-4-404 Information received pursuant to Comptroller's toll-free hotline for detecting improper actions by employees of community grant agencies.

T.C.A. 8-6-112 The notice to the Executive Director of the District Attorneys General Conference, the application for appointment of a District Attorney General Pro-Tem, and the proceedings on an application for criminal prosecution of a judge.

T.C.A. 8-6-407 All documents, records, or tangible objects obtained by the Attorney General pursuant to his investigative authority.

T.C.A. 8-25-109(a) All medical records submitted or compiled by any person or entity providing deferred compensation plans.

T.C.A. 8-25-307 All information contained in medical records obtained from government employees by entities with profit sharing plans.

T.C.A. 8-25-502 All medical diagnosis, treatment, or referral information contained in records obtained from employees pursuant to cafeteria benefit plans.

T.C.A. 8-30-303(d) All Department of Personnel civil service promotional and entrance tests and answers.

T.C.A. 8-36-510(a) All medical records obtained and kept pursuant to a consolidated retirement program.

T.C.A. 9-4-518 Any information contained in a report by a qualified public depository which is confidential by any law of the United States or Tennessee.

T.C.A. 9-8-307(a)(3) All records relating to the amount of funds reserved for each claim against the state prior to its final adjudication by the Claims Commission.

T.C.A. 9-19-109 Identity of owner of any public obligation.

T.C.A. 10-8-102(a) Library records showing who requested or obtained specific materials.

T.C.A. 10-7-503(b) Permits head of governmental entity to promulgate rules to maintain the confidentiality of records concerning adoption proceedings.

T.C.A. 10-7-504(a)(1) Medical records of patients in state hospitals or medical facilities or receiving medical treatment at state expense.

T.C.A. 10-7-504(a)(2) Investigative records of TBI, criminal investigative files of motor vehicle enforcement division of Department of Safety relating to stolen vehicles or parts, and all files of the driver's license issuance division of the Department of Safety relating to bogus licenses issued to undercover agents.

T.C.A. 10-7-504(a)(3) Records in possession of the Military Department involving state or national security.

T.C.A. 10-7-504(a)(4) Records of students in public educational institutions.

T.C.A. 10-7-504(a)(5) Records in possession of the office of Attorney General and Reporter relating to a pending or contemplated legal or administrative proceeding in which such office may be involved.

T.C.A. 10-7-504(a)(6) State agency records containing opinions of value of real and personal property intended to be acquired for public purposes prior to final acquisition.

T.C.A. 10-7-504(a)(7) Proposals for service contracts and sealed bids for the purchase of goods and services until the contract is fully

executed or awarded.

T.C.A. 10-7-504(a)(8) Investigative records of the internal affairs division of the department of correction or department of youth development.

T.C.A. 10-7-504(a)(9) Official health certificates obtained and maintained by the state veterinarian.

T.C.A. 10-7-504(a)(10) The capital plans, marketing and proprietary information, and trade secrets submitted to the Tennessee capital network at Middle Tennessee State University.

T.C.A. 10-7-504(a)(11) Records of historical research value given or sold to public archival institutions or libraries when the owner or donor of such records wishes to place restrictions on access to the records.

T.C.A. 10-7-504(a)(12) Personal information contained in motor vehicle records which shall be open only pursuant to Title 55 of the Tennessee Code Annotated.

T.C.A. 10-7-504(a)(13) Memoranda, work notes, case files and communications related to mental health intervention techniques conducted by mental health professionals in a group setting to provide counseling and therapy to law enforcement officers, firefighters, paramedics and other emergency medical technicians.

T.C.A. 10-7-504(a)(14) Riot, escape, and emergency transport plans of county jails and workhouses or prisons.

T.C.A. 10-7-504(a)(15) A utility department's records of address, telephone number and social security number that might be used to locate someone who has a protection order from a court to protect such person from violence.

T.C.A. 10-7-504(a)(16) A governmental entity's records of address, telephone number and social security number that might be used to locate someone who has a protection order from a court to protect such person from violence.

T.C.A. 10-7-504(a)(17) The telephone number, address and any other information which might be used to locate the whereabouts of a domestic violence shelter or rape crisis center.

T.C.A. 10-7-504(d) Records of employees' identity, treatment, or referral for treatment maintained by state or local government employee assistance program.

T.C.A. 10-7-504(e) Unpublished telephone numbers in the possession of emergency communications districts.

T.C.A. 10-7-504(f) Unpublished telephone numbers, social security numbers, and driver's license information of public employees or his immediate family member.

T.C.A. 10-7-504(g) Address and telephone number of undercover law enforcement officers and families.

T.C.A. 10-7-508 Director of records management has access to records where it is otherwise not available to the public.

T.C.A. Title 12, Chapter 3, part 2 Sealed bidding for state contracts generally.

T.C.A. 12-4-414 Payroll records submitted to the Prevailing Wage Commission of the Department of Labor pursuant to the Prevailing Wage Act.

T.C.A. 16-20-103 Memorandum, work notes or products or case files of victim/offender mediation centers.

T.C.A. 17-4-201 Information collected for evaluation of appellate judges.

T.C.A. 17-5-303(b) Complaints of judicial disability to the Court of the Judiciary.

T.C.A. 17-5-307 Affidavits of judges who voluntarily consent to state sanctions.

T.C.A. 22-2-102(a) Prevents court personnel

from divulging any secrets of the proceedings of the Jury Commissioners.

T.C.A. 22-2-302(c)(2) Jury book of Board of Jury Commissioners.

T.C.A. 23-3-105 The attorney-client privilege which presumably would restrict access to documents maintained by the government when the attorneys are government employees.

T.C.A. 23-4-105 Records, proceedings, and all communications of any lawyers' assistance program.

T.C.A. 24-1-207(b) Communications between psychiatrist and patient when disclosed in a judicial or quasi-judicial hearing.

T.C.A. 33-3-103 Applications, certificates, records, reports, legal documents received in connection with mental health services applied for. But see, **T.C.A. 33-3-105** Allows disclosure in very limited circumstances.

T.C.A. 33-3-104(10) Records identifying a present or former patient or resident treated for mental illness or mental retardation.

T.C.A. 33-3-108(b) Identity of persons who report abuse, exploitation, fraud, neglect, or mistreatment to the Department of Mental Health.

T.C.A. 36-1-102(5)(B); 36-1-111(a)(3); 36-1-116(e); 36-1-118(e)(4)(A)(ii); 36-1-125(a); 36-1-126(a)(5) Adoption records are confidential. But see **T.C.A. 36-1-127** Such records are available to those persons and family of those involved in the adoption.

T.C.A. 36-1-125, -126 Records relating to an adoption proceeding after the final order of adoption or dismissal is entered. See Op. Attorney General No. 94-15 (Feb. 4, 1994).

T.C.A. 36-3-621(e)(1) The identity of a person who reports domestic abuse, neglect or exploitation and the information so reported.

T.C.A. 36-3-623 Records of domestic violence shelters and rape crisis centers.

T.C.A. 36-3-624(e) Documents shared within or produced by a Domestic Abuse Death Review Team or a document provided by a third party to a Domestic Abuse Death Review Team

T.C.A. 36-4-130(a) Confidential communications during divorce mediation proceedings.

T.C.A. 36-6-107 The address of the child and non-perpetrating parent in a case of child abuse or child sexual abuse.

T.C.A. 37-1-131 Whether a delinquent child is on probation or in the custody of a state agency.

T.C.A. 37-1-153 Limits access to Juvenile Court files to only those persons working on the case or with the juvenile, except as to acts of delinquency which would constitute one of nine serious crimes if committed by an adult.

T.C.A. 37-1-154 Limits access to law enforcement records at the Juvenile Court to only those persons working on the case, or with the juvenile, or law enforcement officers of other jurisdictions.

T.C.A. 37-1-155 All fingerprint and photograph records of a delinquent child.

T.C.A. 37-1-409(a) Reports of harm and the identity of the reporter of child abuse.

T.C.A. 37-1-506 Information identifying delinquents received by the Council for Juvenile and Family Court Judges.

T.C.A. 37-1-612(a) Records concerning reports of child sexual abuse and all records generated as a result of such reports.

T.C.A. 37-1-705(d) Records used in or related to teen court proceedings except as necessary to permit functioning of the teen court.

T.C.A. 37-2-408(a) Records prepared in connection with the planning, placement, or care of a child in foster care.

T.C.A. 37-2-411(b) Records obtained by the Department of Human Services for preparation of the annual report on foster care.

T.C.A. 37-5-107 Application, certificates, records, reports and all legal documents, petitions, and records identifying a child or family receiving services from the Department of Children's Services.

T.C.A. 37-10-304 The record of evidence submitted to a court in connection with an application for a minor to have an abortion.

T.C.A. 38-1-304 Reports and the identity of persons filing reports concerning statutory rape and statutory rape prevention.

T.C.A. 38-6-106(c) The background investigation by a Judicial Nominating Commission delivered to the Governor.

T.C.A. 38-7-110(d) Court may order that portions of County Medical Examiner's report of autopsy may be held as confidential.

T.C.A. 39-14-144(f) Any agreement between a merchant and a person responsible for minor's theft of retail merchandise concerning the liability of such person and the payment of such damages.

T.C.A. 39-14-145(c) Written agreement entered into between a merchant and a person responsible for damages to a retail merchant for theft.

T.C.A. 39-15-202 The written consent of a pregnant woman to have an abortion.

T.C.A. 39-15-203 Abortion records and reports.

T.C.A. 40-6-304 All recordings of wire, oral, or electronic communications received through a judicially authorized wiretap.

T.C.A. 40-12-209 All written records of applications, committee actions, petitions and orders to convene an investigative grand jury.

T.C.A. 40-28-119(c) Permits parole board to promulgate rules relative to the confidentiality of records of parolees.

T.C.A. 40-28-504 Written victim impact statements.

T.C.A. 40-32-101 Expungement of records.

T.C.A. 40-38-114(b) Information received by the victim of a crime from the prosecuting attorney relating to the substance of the case.

T.C.A. 40-39-206(c) Information reported on the Tennessee Bureau of Investigation Registration Form for the sex offenders registry.

T.C.A. 41-51-102(e), -103(b) The results of a correctional facility inmate's test for infectious disease.

T.C.A. 43-35-101 Information furnished to or received by the Southern Dairy Compact Commission.

T.C.A. 45-1-126 Compliance review documents of an audit, loan review, or compliance committee appointed by the board of directors of a depository institution whose functions are to evaluate and seek to improve loan underwriting, asset quality, financial reporting, and compliance with federal or state regulatory requirements.

T.C.A. 45-2-103(a)(3)(C) Information obtained by the Commissioner of Financial Institutions when acting upon application for change of control of a bank.

T.C.A. 45-2-614 Any regulatory rating established, assigned, or accepted pursuant to agreement with a federal regulatory agent by the Tennessee Department of Banks and Financial Institutions.

T.C.A. 45-2-614(b) Regulatory rating assigned by Commissioner of Financial Institutions to any bank.

T.C.A. 45-2-1603; 45-7-216 Information obtained by bank examiner when examining the affairs of a bank.

T.C.A. 45-2-1717(c) Violations of banking laws reported by Commissioner of Department of Financial Institutions.

T.C.A. 45-3-807; 45-3-814 Allows savings and loan associations to decline to disclose their records except under certain circumstances.

T.C.A. 45-3-814 Information obtained by bank examiner when examining the affairs of a savings and loan association.

T.C.A. 45-7-216 Information contained in examinations, reports, applications, credit, investments, financial statements, and balance sheets are confidential.

T.C.A. 45-8-221 Information obtained by the banking commissioner or any financial institution's examiner for the purposes of ascertaining the true condition of the affairs of a business and industrial development corporation.

T.C.A. 45-8-221(a) Information obtained by the Commissioner of Financial Institutions or any financial institutions examiner of a business and industrial development corporation obtained for the purpose of ascertaining the true condition of the affairs of such corporation.

T.C.A. 47-18-106(g) Information received at the request of the Consumer Affairs Division pursuant to enforcement of the Tennessee Consumer Protection Act.

T.C.A. 47-23-101 Information concerning insurance required to be kept on real estate.

T.C.A. 47-25-1706 In litigation courts must preserve the secrecy of trade secrets that

otherwise would be filed or submitted to the court. Throughout the Code trade secrets are protected.

T.C.A. 48-2-118(a)(1)(A) Information obtained through private investigation by Commissioner of Commerce and Insurance to determine if a violation of the Tennessee Securities Act has occurred.

T.C.A. 49-1-302(f) Statewide tests and answers developed by the Department of Education to measure student progress.

T.C.A. 49-6-3051 Information received by a school concerning a student's adjudication for delinquency.

T.C.A. 49-6-6001(c) Department of Education student achievement tests and answers.

T.C.A. 49-7-120(b) Trade secrets, patentable information, and commercial or financial information used in research done at state colleges and universities.

T.C.A. 49-14-103 Information received by internal auditor of University of Tennessee Board of Trustees or the Board of Regents relating to illegal, improper, wasteful or fraudulent activity or any ongoing investigation thereof.

T.C.A. 49-50-1408 Reports of alleged falsification, waste, or mismanagement of public education funds, but only to the extent the person reporting requests that the person's reporting name not be revealed.

T.C.A. 50-3-302 Name, job title and other information that may be used to identify a witness interviewed during the course of an investigation of the Tennessee Department of Labor and Workforce Development.

T.C.A. 50-3-304(a)(3) Name of employee giving notice to Commissioner of Labor of possible violation of Occupational Safety and Health Act, if the employee requests.

T.C.A. 50-3-702 An employer's first report of work injury records maintained by the Division of Worker's Compensation.

T.C.A. 50-3-914 Information containing or revealing trade secrets obtained by the Commissioner of Labor while enforcing the occupational safety and health laws.

T.C.A. 50-3-2013 Information containing or revealing trade secrets obtained by the Commissioner of Labor while enforcing the Hazardous Chemical Right to Know Law.

T.C.A. 50-6-131 Medical records provided to the Division of Workers Compensation.

T.C.A. 50-6-405 Statements showing an employer's financial ability to pay workers compensation claims.

T.C.A. 50-7-701(a)(1)(B) Information obtained by the Commissioner of the Department of Employment Security while enforcing the Employment Security Law.

T.C.A. 50-9-106 Records of the observations leading to a controlled substances reasonable suspicion test.

T.C.A. 53-10-306 Information of controlled substance database of the Commissioner of Commerce and Insurance. But see, **T.C.A. 53-10-308** allowing release of such information under certain circumstances.

T.C.A. 55-10-114 Accident reports made by a person or garage to the Department of Safety. But see **T.C.A. 55-10-108** which allows such access but without liability insurance information.

T.C.A. 56-1-402(g)(8) Information relating to opinion of Commissioner of Commerce and Insurance related to insurance companies' reserve liabilities and evaluations.

T.C.A. 56-1-411 The commissioner of insurance may not disclose the contents of an examination

report, preliminary examination, or report of any insurance company, except to law enforcement officials and only if they agree to maintain the confidentiality of such reports.

T.C.A. 56-3-111 Report of insurance companies to the Board of Medical Examiners concerning medical malpractice settlements in excess of a certain amount.

T.C.A. 56-5-405 Filings relating to insurance companies' scoring models and processes.

T.C.A. 56-6-117(g) Information obtained by the Department of Commerce and Insurance as furnished by an insurer, producer, employee or agent thereof for the purposes of terminating the appointment, employment or contract or other insurance business relationship with a producer.

T.C.A. 56-9-202 Department of Commerce and Insurance files, court records and papers in proceedings and judicial reviews of insurance companies.

T.C.A. 56-9-504(a) Records, correspondence, reports, and proceedings relating to supervision of insurers in the possession of the Commissioner of Commerce & Insurance.

T.C.A. 56-10-301(d) Insurer's material transactions and reports to Commission.

T.C.A. 56-11-203(b)(2) Identity of lender where loan is consideration for merger or acquisition of control of an insurance holding company, if the lender requests.

T.C.A. 56-11-204(c) Information submitted in the pre-acquisition notification that may be filed when there is a change in control of an insurer authorized to do business in this state.

T.C.A. 56-11-208 Information obtained by the Commissioner of Commerce and Insurance pursuant to an examination of the financial condition of an insurance company.

T.C.A. 56-12-211(a)(4) Information furnished by the Department of Commerce and Insurance to National Association of Insurance Commissioners concerning regulatory information system ratios and listings of companies not included in the ratios.

T.C.A. 56-32-235 Information obtained by the Department of Commerce and Insurance concerning investigations of any health maintenance organization or person providing services under TennCare.

T.C.A. 56-44-105 Insurance reciprocity of Commissioner of Commerce and Insurance with out-of-state confidentiality requirements.

T.C.A. 56-46-109 All risk-based capital reports and risk-based capital plans with respect to any domestic insurer or foreign insurer which are filed with the commissioner of insurance.

T.C.A. 56-50-107(b) Names and individual identification data for owners and insureds for purposes of life settlements.

T.C.A. 56-51-150 Information pertaining to the diagnosis, treatment or health of any enrollee of a prepaid limited health service organization or any state investigation of such organization by law enforcement, regulatory, licensing or other governmental agency for purposes of prosecuting or preventing insurance fraud.

T.C.A. 56-53-109(c) Information submitted to or generated by law enforcement or insurance department for the purposes of detecting or prosecuting insurance fraud.

T.C.A. 59-8-406 Information which pertained to only the analysis of the chemical and physical properties of coal seams, test borings, core samples, or soil samples.

T.C.A. 59-8-413 The identity of any person supplying information concerning a violation of any requirement of the Coal Surface Mining Act.

T.C.A. 60-1-504(b)(4) Data maintained by the State Geologist on the drilling of mineral test holes for a period of six months.

T.C.A. 60-1-505(c) All information pertaining to the application for and issuance of permits for mineral test holes maintained by the Oil and Gas Board.

T.C.A. 62-1-116 The accountant's privilege, which presumably applies to accountants employed by the government.

T.C.A. 62-1-202 Records and work papers of review committee of the Board of Accountancy.

T.C.A. 62-6-124 Financial statements submitted by contractors to the Board for Licensing Contractors.

T.C.A. 62-20-119 Financial information submitted to the Collection Service Board by a license applicant or license holder.

T.C.A. 62-27-124(c) Records obtained by law enforcement officers during official polygraph examinations.

T.C.A. 62-35-131 Any written notice notifying a registered, armed security officer/guard that he or she has been denied authorization to carry a firearm.

T.C.A. 62-43-105 Financial or client information obtained from staff leasing companies.

T.C.A. 62-43-113(b)(2)(A)(i)(g) Information furnished to the Department of Labor and Workforce Development related to staff leasing companies or groups.

T.C.A. 62-43-117 All materials compiled by the Commissioner of Commerce and Insurance in determining whether a person has violated or is in danger of violating statutes related to employee leasing.

T.C.A. 63-1-117(b)(2) Identifying information of complainant and medical records concerning

an allegation against a practitioner of the healing arts to the Division of Health Related Boards until introduced at disciplinary proceedings.

T.C.A. 63-1-136(d) Information provided to non-profit association for the purpose of assisting in the rehabilitation of impaired health care practitioners.

T.C.A. 63-2-101 A healthcare provider's patient medical records.

T.C.A. 63-5-131(d) Information furnished to and conclusions of a Dental Peer Review Committee proceeding.

T.C.A. 63-6-214 All materials, documents, and other matters relating to an investigation conducted by the Board of Medical Examiners concerning any healthcare practitioner.

T.C.A. 63-6-219(e); 71-5-158 Information furnished to and conclusions of a Medical Review Committee proceeding.

T.C.A. 63-7-125 Communications between a registered nurse and his or her client, which presumably would apply to any nurses employed by the government.

T.C.A. 63-10-405 Information furnished to Board of Pharmacy peer review committee, association board or organization board

T.C.A. 63-11-213 Communications between a licensed psychologist or psychological examiner and his or her client are privileged, which presumably would apply to any psychologist or psychological examiner employed by the government.

T.C.A. 63-11-220(d)(2) Interviews, reports, or other information furnished to psychologist peer review committees.

T.C.A. 63-12-110(d) Information received by the Board of Veterinary Medical Examiners through inspections and investigations.

T.C.A. 63-12-138 Information furnished to Board of Veterinarian Medical Examiners peer review committees.

T.C.A. 63-13-317 Information relating to the physical therapist/patient relationship, which presumably would apply to any physical therapist employed by the government.

T.C.A. 63-22-114 Marital and family therapist communications with client.

T.C.A. 63-23-107 Communications between certified social workers and clients.

T.C.A. 65-3-109 Contracts, leases, or engagements obtained by the Department of Transportation while engaged in regulations of the railways, if the interests of the company would be injured.

T.C.A. 65-4-118 The Consumer Advocate Division may enter into agreements regarding the non-disclosure of trade secrets or other confidential commercial information obtained by the division.

T.C.A. 65-15-126 Notification of shipments of highly radioactive material.

T.C.A. 66-7-107 The identity of any person who provides evidence or other information that results in an eviction or other termination of residency where the premises or the area immediately surrounding the premises are knowingly used in violation of criminal statutes prohibiting drug use and prostitution.

T.C.A. 67-1-110; T.C.A. 67-1-703; T.C.A. 67-1-1704 A taxpayer's confidential financial information.

T.C.A. 67-1-1702 Returns and tax information filed with or in the possession of the Commissioner of Revenue.

T.C.A. 67-1-1705(c) Investigative records of the special investigations unit of the Department of Revenue relating to potential criminal

prosecutions of persons for violation of the tax laws.

T.C.A. 67-4-722(c)(1) Statements, reports, or returns of taxpayers and all audits of their records and files.

T.C.A. 67-4-2808 Information obtained from the taxation of unauthorized substances, e.g. assuming a drug dealer would pay taxes on illegal gains, he should not have to worry that his reporting of income from illegal activity will result in prosecution because he reported such illegal activity for tax purposes.

T.C.A. 67-5-402 Property tax information furnished local authorities.

T.C.A. 67-8-109 Permits Commissioner of Revenue to determine what portions of his records concerning transfer taxes should remain closed.

T.C.A. 67-8-404 Permits Commissioner of Revenue by rule to determine what portion of his records concerning inheritance taxes are closed.

T.C.A. 68-1-108(a) Individual medical information contained in UB-82 claims data filed by health insurance entities with the Commissioner of Health and Environment.

T.C.A. 68-1-119(a) Information that might reveal the identities of the patient of an ambulatory surgical treatment center.

T.C.A. 68-1-1006; 68-1-1007 Data obtained from the reports required by the Tennessee Cancer Reporting System Act of 1983.

T.C.A. 68-1-1010(b) Patient specific information relating to interstate sharing of cancer reporting.

T.C.A. 68-3-205 Vital records (records of birth, death, marriage, divorce, annulment) except that the fact and date of a birth or death is not confidential. Permits Commissioner of Health

and Environment to determine by rule what portion of vital records is not confidential.

T.C.A. 68-3-313 Pre-1951 original birth certificates in adoption cases in custody of Department of Health. See Op. Attorney General No. 94-15 (Feb. 4, 1994).

T.C.A. 68-5-506(e)(1) Patient identity information collected and analyzed for the birth defects registry.

T.C.A. 68-5-703(f) Results of HIV testing of pregnant women.

T.C.A. 68-10-113 All records held by the Department of Health and Environment and local health departments concerning known or suspected cases of sexually transmitted diseases.

T.C.A. 68-10-116 The results of hepatitis B or HIV testing on any arrested person who may have exposed their blood or other bodily fluid to a law enforcement officer.

T.C.A. 68-10-117 The HIV or hepatitis B test results of any person who may have exposed an emergency worker to any potentially life threatening, airborne or bloodborne diseases. The HIV or hepatitis B virus test results of any employee of a healthcare facility who is exposed to the blood or other bodily fluid of a patient.

T.C.A. 68-11-210(a)(5)(C) Joint Commission on Accreditation of Hospital's report concerning the accreditation of a hospital or nursing home.

T.C.A. 68-11-211(d) Information obtained to assist health care providers and states to collect meaningful health care data to minimize the frequency and severity of patient abuse and to improve the delivery of health care services.

T.C.A. 68-11-222(d)(2) Results of HIV tests

T.C.A. 68-11-255(c) The identity of the parents or infant concerning the surrendering of custody of an unwanted infant.

T.C.A. 68-11-304(c) Hospital records.

T.C.A. 68-11-804; T.C.A. 68-11-901; T.C.A. 68-11-910 Patients of a nursing home have the right to keep their personal records confidential.

T.C.A. 68-11-904 The identity of the complainant and the identity of any patient or resident who is the subject of a complaint concerning any nursing home.

T.C.A. 68-11-909 Nursing home resident morbidity and mortality data gathered to aid enforcement of quality care standards for nursing homes.

T.C.A. 68-24-508 The registration and other records of alcohol abuse treatment facilities.

T.C.A. 68-29-107 Reports made by medical laboratories to the Commissioner of Health and Environment concerning infectious diseases.

T.C.A. 68-30-111 Sources of body parts for transplantation.

T.C.A. 68-55-204 Information obtained by the Commissioner of Health, Safety and Environmental Health concerning treatment of a person with traumatic brain injury.

T.C.A. 68-140-514(b)(1) Information from an investigation conducted by the Department of Health concerning the authority of any provider of any emergency medical services.

T.C.A. 68-142-108 Information required by a child fatality review team.

T.C.A. 68-202-217 Proprietary information regarding atomic energy and nuclear materials.

T.C.A. 68-212-306, 68-212-311 Annual waste reduction progress report or plan.

T.C.A. 68-212-205(d)(1)(A) On site technical assistance provided to hazardous waste generators by Commissioner of Health or the Solid Waste Disposal Control Board.

T.C.A. 69-3-113 Secret formulae or proprietary

manufacturing processes obtained by the Commissioner of Health and Environment pursuant to enforcement of the Water Quality Control Act.

T.C.A. 71-1-118 Prohibits copying of the list of public welfare recipients maintained by the Commissioner of Human Services.

T.C.A. 71-1-131 Records of the Department of Human Services concerning child or spousal support services.

T.C.A. 71-3-119 Any information derived from the Department of Human Services concerning persons applying for or receiving aid and services to needy families with children.

T.C.A. 71-5-107(f)(2)(G) Information generated by a member of TennCare Foundation in the course of the Foundation's work.

T.C.A. 71-5-142(a) Provider reimbursement information and other proprietary information for the purpose of administering the TennCare program.

T.C.A. 71-5-143(e) Information provided to or acquired by a member of the TennCare Commission staff.

T.C.A. 71-5-197(d) Information relating to pharmaceutical drugs contained in the records of the TennCare Bureau relating to pricing, trade secrets and proprietary information.

T.C.A. 71-5-304(5) Requires Department of Human Services to prevent unauthorized disclosure of information concerning food stamp recipients.

T.C.A. 71-6-118 Identity of person reporting abuse or neglect under the Adult Protection Act.

Tenn. R. Crim. P. 16(a)(2) Investigative files relevant to pending or contemplated criminal action.

T.C.A. 71-6-203(8)(B) Information submitted by child abuse services for the Department of Children Services relating solely to recipients of child abuse prevention services for the narrow purposes of tracking the effectiveness of child abuse prevention services.

Rules of the Court of the Judiciary #7 Matters that come before the Court of the Judiciary.

Rules of Juvenile Procedure #33 Predisposition reports prepared on a juvenile.

Rules of the Supreme Court #9, Sec. 25
Proceedings involving allegations of misconduct by or the disability of an attorney until a certain time.

This list was current as of February 2005. The Tennessee General Assembly, however, has averaged adding approximately eight new exceptions each year since 1988.

Wiretapping and Electronic Surveillance

Tenn. Code Ann. §§ 40-6-301 to 40-6-311 and §§ 39-13-601 to 39-13-604

Tenn. Code Ann. § 39-13-601 makes it a crime to intercept electronic communications transmitted over wire. One party may consent to interception unless the party does so to commit a tort or a crime. Tenn. Code Ann. § 39-16-604 expressly prohibits interception and/or dissemination of cell phone and/or cordless telephone radio signals without the consent of one party or a court order.

Law enforcement officials may be allowed to intercept electronic signals pursuant to the limitations set forth in the Wiretapping and Electronic Surveillance Act, Tenn. Code Ann. §§ 40-6-301 to 40-6-311 (the Act). The purpose of the Act is to uniformly protect the privacy of electronic communications and prohibit unauthorized interception. The Act seeks to strike a balance between an individual's right to privacy and society's legitimate concern in being protected from criminal activity. Before electronic signals can lawfully be intercepted by law enforcement officials, the Act requires an application in writing under oath to a court of competent jurisdiction in the district where the interception is to occur.

Libel Law Summary

This synopsis describes the fundamental elements of a lawsuit alleging slander, libel or an invasion of privacy, certain defenses to those claims, and some practical suggestions to avoid trouble altogether.

Elements of Libel and Slander

What is libel? What is slander? Is there a difference? Generally speaking, libel is based on the printed word, and slander on the spoken word. The general definition of libel is a false statement of fact about another that tends to harm his/her reputation in the eyes of the community. An inquiry into any libel lawsuit starts with the “elements,” that is, what a plaintiff must prove to a judge or jury to make out a legal claim for libel. Those elements are discussed below.

Publication. A plaintiff must show that a statement was “published” to a third person who was not covered by a privilege to receive the communication. In the media context, this usually is not in dispute, because newspaper news articles and television broadcasts receive wide circulation. But “publication” is not limited to just these forms of expression. For instance, a letter sent to a third person, a scribbled note to a news source, or even a verbal comment to a source over a telephone, can constitute “publication,” even though the statements were not disseminated to a wide audience. In addition, a person who repeats or “re-publishes” someone else’s defamatory

statement may in some cases be held liable for defamation himself.

False Statement of Fact. The readers of the publication, or listeners or viewers of a radio or TV station, must reasonably believe that the statement made by one person about another person falsely stated a fact as opposed to expressing an opinion about the second person. A more detailed explanation of the fact/opinion dichotomy is described later.

Of and Concerning Another. The statement must reasonably be read or viewed as pertaining to a specific individual or company, not an observation about an unidentifiable person or large group of individuals. In other words, to be actionable, your statement must reasonably identify another person or company, though it is not absolutely necessary that you actually identify them by name.

Defamatory Meaning. The statement must diminish an individual's or company's reputation in the community, for example, by exposing that individual or company to public scorn, ridicule, hatred or contempt. Thus, if you misstate the color of the mayor's eyes (calling them blue when they are brown) this will not support a libel claim because, even though the statement is false, it would not tend to diminish the mayor's reputation in the mind of a reasonable person. Even if you did not intend for your statement to have a negative effect, if a negative interpretation is reasonable, the statement can be actionable. However, the statement must always be considered in the context of the entire piece.

Fault. The maker of the statement (whether it is the reporter, the newspaper, the magazine,

or the radio or television station) must have been at fault in making the statement, either by being negligent or acting with constitutional “actual malice.” These standards are discussed in more detail later.

Damage. The statement must cause a provable actual injury to reputation in the form of specific monetary harm, such as lost wages. Plaintiffs often seek far more nebulous types of alleged damages, such as non-economic harm to reputation and his/her emotional well being.

Some Defenses to a Claim for Libel

So, how do you respond to a charge of libel? There are certain defenses which shield you from liability. Some of those defenses are as follows:

Substantial Truth. Libel lawsuits often begin and end with the concept of falsity. A libel plaintiff must prove that a challenged statement is false. You will be protected if the statement you published or broadcast is “substantially true;” that is, if the gist or “sting” of the statement is true, then you cannot be held liable. If the publication or broadcast would have the same effect on a reader or viewer, regardless of the error, then you cannot be held liable.

Opinion. Recall that a plaintiff must prove that the defendant published or broadcast a statement of fact about him/her. A common response to an allegation of libel is “but that was just my opinion!” But, it’s not that easy. It is true that pure statements of opinion cannot form the basis for libel liability. So, for instance, a statement that “the City of Nashville has confusing street signs” is too nebulous to subject the speaker of the statement to liability. Statements that amount

to rhetorical hyperbole (such as “Candidate Jane Doe is full of malarkey,” or “the architect of City Art Museum must have blinders on”) likewise do not reasonably assert an objectively verifiable statement of fact. Instead, they amount to subjective evaluations and, thus, are not actionable.

But, many statements fall into a gray zone. In considering whether a statement is fact or opinion, a court will consider whether the challenged statement can reasonably be verified as being true or false, and whether the context in which the statement is published suggests that it is a subjective evaluation.

Thus, saying in a sports column that Cal Ripken is a “sloppy” fielder at third base is the writer’s subjective assessment and would not be actionable. Such a statement is not put through an objective verification, and the context in which it is published — a sports column — alerts the reader to expect the writer’s opinion. But, saying in a news article that a businessman is a “criminal” who has “has illegally failed to report millions of dollars in assets to avoid tax liability” may be capable of being proven true or false and could create a risk of a claim against the maker of the statement.

Anytime you choose to express an opinion, it is wise to state the facts upon which you base that opinion. And, you should keep in mind that the context in which a statement is published or broadcast does not necessarily insulate you from liability. Sometimes, even in areas where a reader or viewer is expecting a speaker’s opinion —such as in an editorial, op-ed piece, book review or even a sports column — a false statement of fact may create the risk of a claim.

Fair Report Privilege. A “privileged” communication is one that possibly could be considered libelous under certain circumstances, but the occasion on which it is made allows the statement to be made without liability.

The privilege to report about government activities may be the strongest defense to any libel action, because it can shield you from liability even if a statement is false and even if the false statement injured someone’s reputation. This privilege, commonly known as the “fair report privilege,” provides that a newspaper or radio/TV station (or a private person, for that matter) cannot be held liable for the publication of defamatory statements if the published statements are a fair and accurate account of what occurred during an official proceeding or were made in an official report. The privilege applies to reports about judicial, legislative and other official government proceedings. The privilege applies even if the underlying statements being reported upon are not true.

With that the case, you may report the content of police logs and city council minutes without fear of liability, provided that your account is fair and accurate. This same principle applies to reports about judicial proceedings and meetings of various legislative and other governmental bodies. Accounts of such reports and proceedings do not need to be verbatim accounts, but should represent the views expressed. For instance, if a council proceeding includes accusations of embezzlement against the mayor, but the mayor in that meeting directly refutes the charges, a “fair and accurate” account of that meeting would reflect both sides.

However, you should be aware that under current Tennessee law, the fair report

privilege also can be lost by a print reporter or broadcaster who (1) knows that the statement made in a government report or proceeding is false or (2) entertains serious doubts as to its truth. This is an extremely high standard, but the privilege is capable of being divested.

Standards of Fault: Negligence Versus Actual Malice

There are three categories of plaintiffs in a libel lawsuit: public officials, public figures and private figures. Both public officials and public figures must prove that a media defendant published a false statement of fact with constitutional “actual malice,” that is, with knowledge that a statement was false or with reckless disregard as to the statement’s truth or falsity. This can be a difficult standard for a plaintiff to meet. Unfortunately, the term “actual malice” is confusing and often misunderstood. The term does not mean that a reporter acted against a news subject with spite or ill will. Rather, the term “actual malice” means that a publisher or broadcaster entertained serious doubts as to a statement’s truth or falsity, or ignored a reliable source’s statement that what was about to be published was false.

Private individuals, on the other hand, merely have to prove “negligence,” that is, proving that the print or broadcast media failed to exercise ordinary care prior to publishing or broadcasting a false and defamatory statement about the individual. This is a lower, and therefore easier, standard for a plaintiff to meet than the “actual malice” standard. Just what constitutes “negligence” typically will be decided on a case-by-case basis by the jury.

So, who then is “public” and who is “private”?

Public officials include all of your elected officials, from the governor to the county mayor. The term also includes other government officials and

employees — city managers, school superintendents, mid-level bureaucrats, public school teachers, and police officers. All may be treated as public officials if the stories relate in some way to their official capacities — including their fitness for public office. Former government officials may fall in this category as well.

Public figures — as opposed to public officials — are a separate category that is further divided into two areas. First are “general purpose” public figures: people who are prominent or well-known. This category includes those who are famous and constantly in the public eye and some who may not be considered famous. In Tennessee, general purpose public figures might include some members of professional sports teams, officers of political parties and many entertainers.

The more common public figure in libel cases is the “limited purpose” public figure, an individual who otherwise may be fairly private — or relatively unknown to the community at large — except for the limited purpose of getting deeply involved in some type of community controversy that becomes worthy of media attention. For example, a person leading opposition to approval by the city council to re-zone land for a large retailer likely would be considered a limited purpose public figure regarding statements made about these public activities.

Invasion of Privacy

Generally speaking, the phrase “invasion of privacy” has been defined as the “right to be left alone.” Legally speaking, courts have broken up this tort into four separate and distinct claims, although not all have been recognized in Tennessee by the Supreme Court as a viable cause of action.

Publicity placing a person in a “false light.” In order to establish a “false light” claim, an individual (not a corporation) must prove that the news broadcast or article publicized false or misleading

information about him/her, or an aspect of that person's life, in a "false light" which was highly offensive to a reasonable person and that the entity or person that publicized it knew the matters were false or acted in a reckless manner with regard to the falsity when it was publicized. This cause of action requires "public disclosure" of the false information, which entails a larger audience than a single person. For example, where a private investigator disclosed information about an employee only to the employer, the "public" disclosure requirement may not have been met. An additional requirement is that the information must be "highly offensive" to a "reasonable" person. For example, if a news story states, incorrectly, that a person was involved in union activity, that disclosure should not be found to be highly offensive to a reasonable person.

While the literal truth of the published facts is not an absolute defense to a "false light" claim, in cases where the publication involves a public figure or public official, or which involve a matter of public interest, the plaintiff must meet the constitutional "actual malice" test. In addition, where a plaintiff is alleging both libel and "false light," he/she should be required to prove damages attributable to each claim.

Intrusion. This type of invasion of privacy is related to trespass. It may occur when a person intrudes, physically or otherwise, upon the "solitude or seclusion" of another, such as by illegally entering private property or illegally tape recording or eavesdropping in order to record a person's private activities or conversations. Claims are sometimes made by persons who claim that a reporter should not have been allowed to accompany law enforcement personnel or view a crime scene. Sometimes, a claim will be made that a reporter failed to disclose or misrepresented

his/her identity in order to gain access to a place where a member of the general public typically is not invited to go. Journalists should be aware of this claim, since the law is not well settled.

Publication of embarrassing private facts. The Tennessee Supreme Court has not recognized this sub-set of “invasion of privacy” as a viable cause of action, but you nevertheless should be aware of it. What may constitute a publication of private facts is often difficult to prove. It would require publicizing private facts about an individual that would offend an ordinary reader, viewer or listener’s sensibilities. A press report or photograph about an event that occurs in public almost never can form the basis of a successful tort claim, yet lawsuits are sometimes filed over public events. The press should not be held liable, for instance, for publishing a photograph of two people kissing at a public event. On the other hand, people may in some instances have a right not to be photographed (without consent) in other situations, such as in a private hospital room or restroom. Publication of intimate details about a person’s private life, such as health, family or financial problems, creates a risk of a claim. However, in some cases there is a reasonable basis to disclose private information, such as facts about political candidates.

Misappropriation. The Tennessee Supreme Court also has not recognized this sub-set of “invasion of privacy” as a viable cause of action against the news media. A claim for “misappropriation” is less likely to be made against the media, because of constitutional protections for newsgathering and publication. Generally, one may not use the name or

picture of a person without his or her consent for advertising or trade purposes.

For instance, a company cannot sell a new pair of athletic shoes by showing a picture of a celebrity endorsing such shoes unless that celebrity has given you permission. In the news context, pictures of athletes, the Mayor, the Governor and the like are not published or broadcast for “advertising” or “trade” purposes, and thus the media rarely faces such a claim.

Some Defenses to Invasion of Privacy

Consent. When planning to publish or broadcast private facts about a private individual, such as an individual’s contraction of a hideous disease or details of an individual’s personal financial troubles, you will be free from liability if that person consents to the publication of your story. However, keep in mind that in some limited circumstances such consent can be withdrawn, revoked or made subject to certain conditions, such as that person not be photographed or mentioned by name. In most circumstances, however, explicit consent from a news subject is not feasible, and thus not legally required. It would be difficult and highly impractical, for instance, to obtain consent from news subjects who are involved in accidents and other public events. In these circumstances, consent should be implied by virtue of the event taking place.

Newsworthiness. The names, faces and activities of public officials and public figures almost always will be newsworthy, and thus a publisher or broadcaster cannot be held liable for sharing these images and activities with the general public. Where private individuals are involved, the law of privacy recognizes a defense whenever a publication concerns a

matter of “public interest.” Thus, even an unwilling participant in a newsworthy event—such as a surviving victim of a plane crash—cannot hold you liable for publishing his or her image or story about the harrowing ordeal. Even family members grieving in public generally cannot successfully maintain an invasion of privacy lawsuit. As previously discussed, if private information was gathered from a public record, then no liability can follow.

Some Practical Tips

Public records. The reliance you place on information from public records and public meetings is often the most defensible information. It may be corroborated, and establishes certain legal privileges.

Promises of confidentiality. Reporters, editors and producers must be careful what they promise sources. If a reporter agrees that a source’s statements are off the record, or that he/she will get to review the quotes prior to publication, failure to comply with the agreement may lead a disgruntled source to sue. You should discuss with your management what their expectations are with regard to discussions regarding confidentiality. Make sure that you and the source have the same understanding about the meaning of phrases such as “not for attribution” and “off the record.”

If a source does insist on conditions before granting an interview, be clear on what those conditions are. Get them in writing, if possible, or record his/her consent to be interviewed or any other conditions on tape. At the very least, such precautions can help avoid the inevitable dispute between the reporter and the source. In addition, you

should be aware of who is granting consent. For example, a nurse or doctor may not have authority to permit you to take pictures of their patients. And a child may not have the authority to let you into his home to photograph his parents' illegal activities.

Pre-publication review. No one can make a story bullet-proof and immune from a claim. It does help to have your editor/producer review your stories, and in some instances your management may decide to involve a lawyer in the pre-publication/pre-broadcast process. Good lawyers with First Amendment experience can help spot issues and refine language in a story. However, most lawsuits alleging libel and invasion of privacy do not arise from lengthy investigative pieces — the types of stories that are most often shared with lawyers prior to publication. Rather, they stem from general assignment stories, such as those about crime, children, or professionals (i.e., teachers, doctors and lawyers who trade on their reputation). And they can arise from a lack of attention to detail, such as when a headline or cutline does not match a story, or when rewrites or summaries are prepared by those who are not involved in the fact-gathering process and do not know the material as well as the reporters and photojournalists who prepared the story. The best prepublication review comes from the reporter first (check your facts) and the editor second. Accuracy and responsibility will always help journalists stay clear of the libel and privacy morass.

Handling retractions. Most media outlets have a straightforward rule: if you publish or broadcast an error and subsequently learn of your mistake, you correct it. This is a sound journalistic policy,

though it is not a complete defense to a libel claim. If you called someone a thief yesterday, apologizing today may not undo the harm that person believes has been caused to his/her reputation.

Tennessee has a statute (Tenn. Code Annotated Section 29-24-103), which primarily limits the amount of damages for libel as long as certain conditions are met. Thus, a retraction can be considered in determining the damages that a plaintiff has suffered. The retraction statute applies to newspapers and periodicals, but it may also apply to other media outlets.

Retractions, amplifications or corrections should be drafted carefully and be limited to setting the record straight. It is advisable to consult with an attorney when preparing such corrections.

Records retention. You should consult with your management about what the publication's policies are regarding retention of notes and other documents about stories. If a lawsuit is filed over a news story, those records may have to be turned over to the plaintiff and his lawyers. (The most common exception is where a confidential source would be revealed.) A policy on record retention is best left to each individual publisher or broadcaster. But, whatever your policy (keep all notes, throw them all away or keep them under certain circumstances), it is best to adhere to that policy.

Tennessee's Newspersons' Privilege (i.e., the "Shield Law")

The Tennessee Newspersons' Privilege (sometimes called the "Shield Law") (Tenn. Code Annotated Section 24-1-208), provides that persons employed by the news media in any news gathering or disseminating capacity cannot be forced to disclose the source of news or information "procured for publication." This privilege may be asserted whether or not the source has been promised confidentiality.

The law's reach is broad, covering those employed by newspapers, magazines, journals, press associations, news agencies, wire services, radio and television and any other printed, photographic, mechanical, or electronic means of reporting news. This law also applies to persons who are independently engaged in gathering information for publication or broadcast.

The Shield Law provides that it does not apply to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of the information. For example, if a reporter is sued about a story on a person's illegal drug activity, and the reporter asserts that the statement is true based on information from a particular unnamed source, the reporter may not be able to maintain the confidentiality of that source by citing the Shield Law. There may be other constitutional protections for that information, but the law in this area is in a state of flux.

The Tennessee Shield Law may be "divested" by court order only if the court, after a hearing,

determines that the person seeking the information has shown by clear and convincing evidence that:

- 1) There is probable cause to believe that the person from whom the information is sought has information that is clearly relevant to a specific probable violation of law;
- 2) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and
- 3) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

The privilege applies in any state or local judicial, legislative, or administrative forum in Tennessee. It may also be applicable to proceedings in federal court.

*Contributing editors: Robb Harvey and
Eileen Burkhalter Smith.*

Copyright Law

The federal copyright law, found in Title 17 of the U.S. Code, provides protection for “original works of authorship,” including literary and photographic works, music, drama, audio recordings and even architectural works. Tangible forms of protected works can include such things as film and even computer disks. Copyright protection generally does not extend to an idea, fact, procedure, process, method, system, discovery, name or title, but protects expressions of information, meaning some element of original composition is required.

The copyright law gives the author or creator exclusive rights to reproduce and distribute copies of the original work; prepare spin-offs; perform or display the work; prevent modifications harmful to the creator’s reputation; and stop the destruction of protected work.

Examples of violations would be one television station using excerpts from a competitor’s coverage of a news event without permission or altering another station’s tape of the event and airing it.

Since 1989, the protection has been extended to works with or without the copyright symbol (©) and to those not formally registered with the U.S. Copyright Office. But, copyright is easier to prove if notice is given and the work is registered. Also, copyright registration is required prior to filing an infringement action.

While the creator generally owns the copyright, there is an exception for “works for hire” when the creator’s employer owns the copyright. A

number of factors can be used to determine a “work for hire,” such as control over the project, how the hired party is compensated and how the work is created.

For works not for hire with copyright protection secured in 1978 or later, the protection lasts for the life of the creator plus 70 years. For works for hire, protection lasts 95 years from first publication or 120 years from time of creation, whichever expires first. Different durations apply to works copyrighted prior to 1978.

Copyrighted materials can be used with the clear consent of the copyright holder. Merely giving credit to the copyright holder does not constitute consent. And, the “fair use” doctrine also allows the use of copyright material in certain circumstances. Four questions help determine “fair use,” which does not require consent.

1. What is the purpose and character of the use? Pure political commentary is more likely to contain “fair use” than commercial expression.
2. What is the nature of the copyrighted work? The copyright of highly factual material, such as a phone book, is less easily infringed on than more creative work.
3. How much of the copyrighted work is used? No more of the original may be used than is reasonably necessary.
4. What is the potential effect upon the value of the original?

Internet Resources

Tennessee Code: The Code contains the statutes of Tennessee as passed by the General Assembly. An unannotated version of the Tennessee Code can be found on the Internet at: www.tsc.state.tn.us

Public Acts: Legislation passed by the General Assembly, but not yet codified in Tennessee Code Annotated, may be obtained from the publications division of the Tennessee Secretary of State's office. These public acts, as well as private acts, are on the web at: www.state.tn.us/sos/acts/acts.htm

Rules of Court: This resource is of particular importance in determining criminal and civil legal processes. The rules are published by both Michie/Lexis Publishing and Thomson West Publishing. Rules of Civil Procedure, Rules of Criminal Procedure or Rules of Juvenile Procedure should be consulted depending on the type of case. Rules of Evidence apply to both civil and criminal matters. The Rules of Appellate Procedure govern the process for cases on appeal. Individual appellate courts have their own procedural rules as well. The Tennessee Supreme Court rules include the Code of Judicial Conduct for judges and the Code of Professional Responsibility for lawyers. Local courts may have their own rules, which can be obtained from the clerk of the court. Procedural rules, appellate court rules and

some local rules are on the Internet at:

www.tsc.state.tn.us.

State Appellate Court Opinions: The appellate court clerk has offices in Jackson, Nashville and Knoxville. When requesting information about a case or copies of an opinion, it is necessary to contact the office in the grand division from which the case originated.

Appellate court opinions released since 1995 are available on the Internet at:

www.tsc.state.tn.us. Opinions designated for publication are compiled in *West's Tennessee Decisions*, reported in the *Southwestern Reporter*. These opinions are arranged chronologically, and it is difficult to find one unless you know the case name, volume and page number. For example, *Doe v. Sundquist*, an adoption records case, has an official citation of 2 S.W.3d 919 (Tenn. 1999). This means you can find the opinion in Volume 2 of the third edition of the *Southwestern Reporter* beginning on page 919. The information in the parentheses shows the case was decided by the Tennessee Supreme Court in 1999.

State Government Regulations: An important source of Tennessee regulatory law are the rules and regulations promulgated by state agencies with rule-making authority. These rules are compiled in *Rules and Regulations of the State of Tennessee*, published by the Secretary of State. Emergency and public necessity rules, as well as proposed rules, are published in the *Tennessee Administrative Register (T.A.R.)*. Both publications are found in most law libraries, and are also posted on the web at:

<http://tennessee.gov/sos/pub/index.htm>

Attorney General Opinions: The Office of the Attorney General and Reporter issues advisory legal opinions at the request of state officials. These opinions provide useful guidance on many legal issues. Opinions can be found in most law libraries. Recent opinions may be found on the Internet at:
www.attorneygeneral.state.tn.us/opyear.html

Reporters Committee for Freedom of the Press:
www.rcfp.org

Tennessee Coalition for Open Government:
<http://www.tcog.info>

First Amendment Center:
<http://www.firstamendmentcenter.org>

Directory of Legal Resources

Tennessee State Courts & Related Agencies

Appellate Court Clerk's Offices

Jackson(731) 423-5840

Nashville(615) 741-2681

Knoxville(865) 594-6700

On the web:www.tsc.state.tn.us

Supreme Court Law Libraries

Jackson(731) 423-5849

Nashville(615) 741-2016

Knoxville(865) 594-6128

On the web: www.tsc.state.tn.us

Administrative Office of the Courts ..(615) 741-2687

Public Information Office(615) 532-6047

On the web: www.tsc.state.tn.us

Council of Juvenile & Family Court Judges

.....(615) 741-3980

Attorney General and Reporter

.....(615) 741-6474

Public Information Office(615) 741-5860

On the web: www.attorneygeneral.state.tn.us

District Attorneys General Conference

.....(615) 741-1696

On the web: www.tndagc.com

District Public Defenders Conference

.....(615) 741-5562

Post Conviction Defender's Office . . .(615) 741-9385

Board of Professional Responsibility

.....(615) 361-7500

Secretary of State - Publications Division

.....(615) 741-2650

On the web: www.state.tn.us/sos/pub/pub.htm

Federal Courts

United States Supreme Court

Clerk of Court(202) 479-3011

Public Information Office(202) 479-3211

On the web: www.supremecourtus.gov

Sixth Circuit Court of Appeals Court

Clerk(513) 564-7000

On the web:

<http://pacer.ca6.uscourts.gov/index.php>

United States District Courts in Tennessee

Clerk - Western District(901) 495-1200

On the web: www.tnwd.uscourts.gov

Clerk - Middle District(615) 736-2364

On the web: www.tnmd.uscourts.gov

Clerk - Eastern District(865) 545-4428

On the web: www.tned.uscourts.gov

Administrative Office of the United States Courts

Office of Public Affairs(202) 502-2600

On the web: www.uscourts.gov

Law Schools in Tennessee

University of Tennessee College of Law

.....(865) 974-2521

Law Library(865) 974-7419

On the web: www.law.utk.edu

Cecil C. Humphreys School of Law ..(901) 678-2421
Law Library(901) 678-2426
On the web: www.law.memphis.edu

Nashville School of Law(615) 256-3684
On the web: www.nashvilleschooloflaw.net

Vanderbilt University Law School ... (615) 322-2615
Law Library(615) 322-2568
On the web: www.law.vanderbilt.edu

Bar Associations

American Bar Association(312) 988-5522
Division for Media Relations ... (312) 988-6132
On the web: www.abanet.org

Tennessee Bar Association(615) 383-7421
On the web: www.tba.org

Tennessee Lawyers Association for Women
.....(615) 646-2954

Tennessee Association of Criminal Defense Lawyers
.....(615) 726-1225
On the web: www.tacd.com

Tennessee Trial Lawyers Association
.....(615) 329-3000
On the web: www.ttla.org

Tennessee Defense Lawyers Association
.....(901) 527-4679

Other useful web sites

The Tennessee Court System website

(www.tsc.state.tn.us) includes links to legal and government-related websites

<http://www.tsc.state.tn.us/geninfo/clinks1.htm>

The Freedom Forum

(First Amendment & Media Issues)

www.freedomforum.org

Open Records/Open Meetings Statutes in All States

<http://web.missouri.edu/~foiwww/citelist.html>

U.S. Supreme Court Opinions

<http://www.supremecourtus.gov>

U.S. Court of Appeals for the Sixth Circuit

<http://pacer.ca6.uscourts.gov/index.php>

United States Code (federal statutes)

<http://uscode.house.gov/search/criteria.php>

National Center for State Courts

(links to state, federal and international court sites)

<http://www.ncsconline.org/>

American Law Sources Online

<http://www.lawsource.com/also/>

Tennessee General Assembly

<http://www.legislature.state.tn.us>

Glossary of Legal Terms

A

acquit - To find a defendant not guilty in a criminal trial.

adjudication - A judgment or decree.

affidavit - A written or printed declaration or statement under oath.

affirm - The ruling of an appellate court that the judgment of a lower court is correct and should stand.

appeal - Review of a case by a higher court.

appellant - Party appealing a decision or judgment to a higher court.

appellee - The party against whom an appeal is filed.

arbitration - The hearing and settlement of a dispute between opposing parties by a third party whose decision the parties have agreed to accept.

arraignment - A court hearing in a criminal case where a defendant is advised of the charges and asked to plead guilty or not guilty. Most arraignments in Tennessee are held in General Sessions Court.

B

bail bond - An agreement by a third party to pay a certain sum of money if the defendant fails to appear in court.

bench trial - Trial held before judge sitting without a jury; jury waived trial.

bench warrant - Process issued by the court or “from the bench” for the attachment or arrest of a person.

binding over - The act by which a court or magistrate requires a person to enter into a recognizance or furnish bail to appear for trial, to keep the peace, to attend as a witness, etc. Also describes act of lower court in transferring case to higher court or to grand jury after a finding of probable cause to believe that defendant committed crime.

brief - A legal document, prepared by an attorney, which presents the law and facts supporting his or her client.

C

caseload - The number of cases a judge handles.

cause of action - A legal claim.

certiorari - A procedure for removing a case from a lower court to a higher court for review.

change of venue - Moving a case from one court, or location, to another.

civil law - All law that is not criminal law.

class - There are five classifications of felonies and three classifications of misdemeanors. With the exception of murder in the first degree, all

felonies in the Revised Criminal Code, in the old Title 39 and in titles other than Title 39 are classified. Each felony has an A, B, C, D, or E classification. “A” is the most serious and “E” is the least serious. Each misdemeanor has either an A, B, or C classification with “A” being most serious and “C” being least serious. Murder in the first degree carries three possible penalties: life (with the possibility of parole), life without parole, and death.

code - A collection of laws promulgated by legislative authority.

common law - A system of jurisprudence based on precedent rather than statutory laws.

commutation - Change of punishment from a greater to a lesser degree or ending a sentence that has been partially served.

corpus delicti - The body or material substance upon which crime has been committed; e.g., the corpse of a murdered person or the charred remains of a burned house.

D

de novo - “Anew.” A trial de novo is a completely new trial.

declaratory judgment - A judgment declaring the rights of the parties on a question of law.

decree - Decision or order of the court. A final decree completes the suit; an interlocutory decree is provisional or preliminary.

default judgment - Under Rules of Civil Procedure, when a party against whom a judgment for affirmative relief is sought has failed to plead (i.e.,

answer) or otherwise defend, he is in default and a judgment by default may be entered either by the clerk or the court.

defendant - A person charged with a crime or a person against whom a civil action is brought.

deposition - Sworn testimony taken outside the courtroom according to the rules of the court.

discovery - A pretrial proceeding where a party to an action may be informed of the facts known by other parties or witnesses.

docket - Book containing entries of all proceedings in a court.

double jeopardy - Prohibition against more than one prosecution for the same crime.

due process - Constitutional guarantee that an accused person receives a fair and impartial trial.

E

en banc - "On the bench." All judges of a court sitting together to hear a case.

et al. - "and others."

exculpatory evidence - Evidence indicating that a defendant did not commit the crime.

ex parte - A proceeding brought for the benefit of one party only without notice to or challenge by an adverse party.

F

felony - A serious criminal offense for which the minimum sentence is one year.

G

grand jury - A panel of citizens sworn to inquire into crime and if appropriate bring accusations, or indictments, against the suspects.

guardian ad litem - A person appointed by a court to manage the interests of a minor or incompetent person whose property is involved in litigation.

H

habeas corpus - “You have the body.” A writ of habeas corpus requires that a person be brought before a judge. It is usually used to direct an official to produce a prisoner so the court may determine if liberty has been denied without due process.

I

in camera - in chambers; in private.

indictment - Written accusation of a grand jury charging a crime.

injunction - Court orders prohibiting specific actions from being carried out.

interrogatories - Written questions which must be answered under oath.

J

judgment - Final determination by a court.

judgment document - Document that explains the sentence an offender receives from a trial court.

jurisprudence - The science of law.

L

lesser included offense - a crime composed of some, but not all, of the elements of a greater crime; commission of the greater crime automatically includes commission of the lesser included offense.

limited jurisdiction - Courts limited in the types of criminal and civil cases they may hear.

litigant - Person or group engaged in a lawsuit.

M

misdemeanor - Criminal offense that is less than a felony and punishable by less than a year in jail.

mitigating circumstances - Do not justify or excuse an offense, but may be considered as reasons for reducing the degree of blame.

motion - Oral or written request before, during or after a trial on which a court issues a ruling or order.

moot - Unsettled or undecided.

N

negligence - The absence of ordinary care.

nolo contendere - Latin phrase meaning “I will not contest it”; a plea in a criminal case which has a similar legal effect as pleading guilty. A defendant may plead nolo contendere only with the consent of the court.

O

opinion, per curiam - Phrase used to distinguish an opinion of the whole court from an opinion written by only one judge.

P

parole - The conditional and revocable release of an inmate by the Board of Paroles to parole supervision.

peremptory challenge - Procedure for rejecting prospective jurors without a reason. Each side is permitted a limited number of peremptory challenges.

power of attorney - Document authorizing another to act as one's agent or attorney in fact (not an attorney at law).

probable cause - Reasonable belief that a crime has been committed; the basis for all lawful searches.

probate - The legal process of establishing the validity of a will and settling an estate.

probation - A sentence of confinement which is suspended upon a term of probation supervision. It may include community service or restitution or both. Probation must automatically be considered if the defendant is eligible.

pro bono - Legal services provided without attorney fees.

pro se - Legal representation of oneself

pro tem - "Temporary."

R

remand - To send back.

S

sentence, concurrent - Two or more sentences which run at the same time.

sentence, consecutive - Two or more sentences which run one after another.

sentence, determinate - A sentence that states exactly the time to be served or money to be paid.

sequester a jury - To place members of a jury into 24 hour a day seclusion until a verdict is reached.

settlement conference - A meeting between parties of a lawsuit, their attorneys and a judge to attempt a resolution of the dispute without a trial.

statute - A law created by the Legislature.

stay - Halting a judicial proceeding by order of the court.

subpoena - A written legal notice requiring a person to appear in court and give testimony or produce documentary evidence.

subpoena duces tecum - “Under penalty you shall take it with you.” A process by which the court commands a witness to produce specific documents or records in a trial.

T

tort - An injury or wrong committed with or without force to the person or property of another giving rise to a claim for damages.

V

venue - The specific county, city or geographical area in which a court has jurisdiction.

voir dire - (pronounced “vwar-deer”) - “To speak the truth.” The process of preliminary examination of prospective jurors regarding their qualifications.

W

writ - A written court order directing a person to perform or refrain from performing a specific act.

writ of mandamus - An order issued by a court of superior jurisdiction commanding performance of a particular act by an inferior court or public official.

THE FIRST AMENDMENT CENTER

The First Amendment Center works to preserve and protect First Amendment freedoms through information and education. The center serves as a forum for the study and exploration of free-expression issues, including the freedoms of speech, press and religion and the rights to assemble and to petition the government.

The center is housed in the John Seigenthaler Center at Vanderbilt University in Nashville, Tenn. It also has offices in Arlington, Va. It is an operating program of the Freedom Forum, a nonpartisan foundation dedicated to free press, free speech and free spirit for all people.

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