Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

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(including county)

Scott County

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

General Session Judge for Scott County. Also: Limited private law practice

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

Licensed in 1980 BOPR #09038

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee #09038

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Director, First National Bank of Oneida (1992 - present); also, Partner in Triad Group and Beaumont Enterprises, LLC, real estate holding companies.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Continuously employed.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

As a part time General Sessions Judge, I maintain a limited and specific law practice that, in its entirety, consists of the following: (1) General Counsel for Citizens Gas Utility District of Scott and Morgan Counties (contracts, bonds and financing matters, pension issues, utility easements, pipeline expansion projects, employee law matters, etc.) and (2) transactional/title services rendered for First National Bank of Oneida and Farm Credit Services of Mid-America.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

In 1980, I opened a general law practice as a sole practitioner, often appearing in the local and state courts of the then-expanded 8th Judicial District and also the Knoxville area, occasionally taking cases in the Federal District Court. During that era, there was no public defender program in the 8th Judicial District, so I also carried an additional criminal defense caseload by appointment. I regularly appeared in the Chancery and Circuit Courts on a diverse array of legal matters involving domestic relations, land and easement litigation, accounts, receiverships and contract disputes, and occasional tort and workers compensation matters. My practice was also heavy with real estate matters (transactional and title), legal entity formation and estate planning. Retained clients were the Oneida Bank & Trust Co. and the Oneida Special School District. During this time, I accepted referrals from what was then the Rural Legal Services organization in Oak Ridge, providing pro bono divorce services to indigent women who were victims of domestic violence. For a brief time in this period, I had affiliations with other attorneys in association arrangements.

Later, I joined with attorney William S. Cooper, III to form the Law Offices of Cotton & Cooper, an association. During the tenure of that collaboration, we maintained an active practice in local and state courts, with occasional cases in Federal District Court and the State Court of Appeals. Representation included the local franchisees for Ms. Winners and McDonalds restaurants (labor/contract matters), the Town of Winfield (where we not only handled all municipal law matters, but also developed a city court system with municipal code), Scott County Government,

Lafollette Housing Authority and a group of rural medical clinics operated as Mountain Peoples Health Council, Inc.; we also actively engaged in insurance defense work, creditor bankruptcy practice and secured transactions, oil and gas matters, and transactional/title work in multiple counties for Farmers Home Administration, First National Bank, Farm Credit Association and several banks located in McCreary County, Kentucky (whose lending zone extended into Tennessee). Cotton & Cooper also provided pro bono services for Appalachia Habitat for Humanity (performing all of their document development and preparation, title work and general consultation) and Scott Appalachia Industries, a non-profit corporation providing extensive services for disabled persons. [The names of specific clients mentioned herein, are either public entities or done with their permission.]

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

None.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have served as General Sessions and Juvenile Judge for Scott County since September 1, 1990. It is a General Sessions Court with jurisdiction expanded by private legislation, which includes, in addition to the civil (up to $25,000), criminal and juvenile, jurisdiction of Domestic Relations cases (divorce, custody, adoption), Mental Health Commitments, Child Support Appeals, and exclusive Probate Court jurisdiction where I also panel juries for will contests. I also hold Truancy Court, and a Drug Court. In the calendar year of 2011, 3466 cases (of various types) passed before this court, plus numerous domestic relations matters which I regularly hear by interchange for the Chancery and Circuit Courts.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

During the first decade of my law practice (1980-1990), I served as guardian ad litem for a number of major tort cases.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

I attended the National College of Juvenile & Family Justice in Reno, Nevada, receiving certifications in family court law.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

On one prior occasion, I submitted an application to the Judicial Selection Commission for a judicial position on the Court of Appeals, which was held on April 26, 1999 in Sevierville, Tennessee. My name was not submitted to the Governor as a nominee.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Tennessee Technological University (1971-1976), BS Political Science; With Honors

University of Memphis Law School (1977-1980), JD

PERSONAL INFORMATION

15. State your age and date of birth.

Age 59 (DOB: 08/04/53)

16. How long have you lived continuously in the State of Tennessee?

All of my life.

17. How long have you lived continuously in the county where you are now living?

All of my life, except for temporary school residency in Cookeville and Memphis.

18. State the county in which you are registered to vote.

Scott County

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

None

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

In 2002, acting as Juvenile Judge for Scott County I reported to DCS authorities what I believed to be the negligence of a DCS case worker that was placing children at risk. Eventually, after an extensive investigation by DCS authorities, that case worker was terminated from employment. The DCS employee appealed the termination finding. As the terminated DCS employee continued to lose appeals, that DCS employee also filed a lawsuit in the Circuit Court for Scott County (Case No. 6193), naming as defendants the State of Tennessee Department of Children Services, and myself, individually. The terminated DCS employee finally appealed their dismissal before an Administrative Law Judge in Nashville, where the termination was upheld. Thereafter, the terminated DCS employee filed a voluntary dismissal of the Circuit Court Case against the State and myself.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

First Baptist Church of Oneida

National Eagle Scout Association

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Admitted to practice law in Tennessee (since October 1980)

Tennessee Bar Association (1980-present)

Scott County Bar Association (1980-present)

Admitted US District Court/ Eastern District (1982)

Admitted US Court of Appeals/Sixth Circuit (1987)

Admitted US Supreme Court (1986)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

From 1991-1992, President of Scott County Bar Association.

In 1998, awarded the annual 'Community Service Award" in Memphis by the Tennessee Medical Association, for the formation of the Scott County Women's Shelter and for outstanding work in the prevention of domestic violence.

In 1999, awarded the "Legal Services Award" by Rural Legal Services of Tennessee for work on behalf of families and children in eastern Tennessee.

In 2002, awarded the "Tennessee Award of Merit" by the Rural Health Association of Tennessee, for development of the STAND Program ("Schools Together Allowing No Drugs") and work in prevention of teenage substance abuse.

In 2002, selected to the "Boys & Girls Club Hall of Fame" as a leader in his field and as a role model for children in Scott County.

30. List the citations of any legal articles or books you have published.

I authored the cover article for the Tennessee Bar Journal which was titled, "The Impossible

Balance: A Tennessee Judge Makes The Case For Abolishing State's Part-Time Judgeships"; May 2001 (Vol. 37, No. 5).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I have taught various legal courses at Roane State Community College in it's Law Studies Program, where I have served on the Adjunct Faculty the last two decades.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

General Sessions Judge for Scott County (1990-present)

Candidate (unsuccessful) in the general election for Circuit Court Judge (8th Judicial District) to fill the unexpired term of Circuit Judge Conrad Troutman, Jr. (2004)

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See attachments of (1) a legal article, (2) a Chancery Court Brief, and (3) Court Opinion and Ruling. All are sole (100%) work of James L. Cotton, Jr.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

When I was in college, the administration implemented an unconventional pilot program for students facing university-related charges. In addition to the customary option of leaving one's disciplinary fate to the Dean, students were given the option of a jury trial by their "peers" (i.e., fellow students). These jury verdicts carried the same weight as administrative disciplinary actions. Somehow, I was chosen to be the student defense counsel; another student prosecuted. By the time these series of trials were over, the law bug had bitten me.

Ever since, I have always respected and enjoyed the vocation of law, and lawyers themselves. One of life's blessings is to truly enjoy your work, and I always have, both in private practice and on the bench. As a Chancellor, I would have the privilege of traveling another road in the vocation of law, hopefully, in a way that would honor the profession.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

In 1996, founded the *Scott County Women's Shelter,* and its parent non-profit organization, *The Shelter Society, Inc.* , which provides protective services and resources for the victims of domestic violence and their children.

In 2004, organized the *Scott County Drug Court*; this misdemeanor drug court was the first drug court in the 8th Judicial District.

In 2011, organized the *Scott County Truancy Court;* this is a specialized court that meets at 7:00 am every Monday morning (to prevent the student from missing school time). Parents and their children must attend each week, where each child comes forward and appears before the court to review weekly school attendance and academic performance. Each docket has a "life skills" session. Reports from CASA, CIT services, tutors, and other family support providers are given. Student recognition is used as incentives, and the emphasis is on sanctions that do not involve detention lock-up (such as community service work, extra classwork).

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

The judgeship I seek is Chancellor (8th Judicial District) for Union, Claiborne, Campbell, Scott, and Fentress Counties. Having one Chancellor, this court hears a broad array of cases typical for a rural-based Chancery Court. I would strive to impact the court with a judicial countenance that is grounded in "A Judge's Creed", which I authored years ago and hangs in my Chambers, and which appears as an opening page of *A Tennessee General Sessions Handbook* (Brigham and Norris), as follows:

A Judge's Creed

Never take on an imperial sense of your own self importance.

Never allow legal reasoning to supplant reason, itself.

Never allow the exceptional skill or incompetence of legal counsel to replace Justice.

Always strive to treat people who work and participate in the court system with patience and respect.

Always remember what it was like to practice law - for to "Remember". . . is to understand.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I have long been concerned about teenage substance abuse. In 2000, I founded and authored the policies for the STAND Program ("Schools Together Allowing No Drugs"). STAND is a comprehensive, drug and alcohol prevention program, administered through the public schools, that uses random drug/alcohol screens to early-identify teenage drug and alcohol use. The STAND program was one of the earliest of its kind in the country, and the first in Tennessee. I drafted due process protections in the STAND policies, and privacy protocols to protect the rights and concerns of the tested students, which remain an integral part of the program, still today. In 2008, STAND was recognized in Washington, DC for its excellence, and currently exists as an ongoing program in all of the middle and high schools of Scott County. A key component of the program is the STAND public coalition, a community organization of which I now actively participate, which provides education for parents, teachers, administrators and the general public on how to reduce teenage substance abuse in our community.

I am currently a volunteer Boy Scout leader for Troop 93 in Oneida, Tennessee.

I believe a judge can participate in community services and organizations, and still abide by ethical cannons. I intend to continue such community involvement.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

Life experiences and choices we make, of course, shape us; and in turn, shape judges who take the bench. As a teenager, the lessons I learned along the way to becoming an Eagle Scout made an indelible impression upon me; those Scouting principles still guide me, today. Growing up, our family emphasized the value of good work ethic. I believe good judges are working judges, and I have strived to apply that ethic to my present judicial duties by being accessible, keeping cases and dockets moving, and working to promptly render case decisions.

During the summers I was in college, I worked on the staff of Camp Ridgecrest for Boys in western North Carolina, where I had the opportunity to spend time on the Appalachian Trail and canoe the rivers of that region. After I graduated from college, I spent a year working as a laborer and equipment operator for Perry Coal Company to raise money for law school. During the summers that I was attending law school, rather than clerk, I chose to take the position of summer director for Camp Ridgecrest. This diversity of job experiences, and the interesting

people I met and worked with during that time, shaped and grounded me in a way that, first and foremost, influenced me to show respect to all persons regardless of background, and gave me the resolve to make difficult and sometimes unpopular decisions on the bench, when necessary.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

As Chancellor, I would uphold the law even when I disagree with it; my oath and commitment to stare decisis would allow no less. During my 22 years on the bench, I have learned to compartmentalize my personal opinions about the efficacy, fairness or practicality of laws relevant to the cases before me, and strictly adhere to the requirements of the law.

Personally, I think a Class A misdemeanor conviction is too harsh for a 19 or 20 year old who is caught with a beer ("illegal consumption"). Young adults under age 21 are defending our country in dangerous places on the other side of the world. This Conviction, which carries 11/29, is the same penalty as an assault or DUI conviction, and can seriously derail some young careers. Although good intentions are behind this law, a "B" misdemeanor, or even less might be more just, especially if the person is not intoxicated. However, I routinely apply the law in these cases, as it is codified.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Thomas W. Phillips, US District Court Judge, Eastern District, [redacted]

B. Dr. Christopher L. Whaley, President, Roane State Community College, [redacted]

C. William Paul Phillips, FMR. District Attorney General (8th Judicial District), [redacted]

D. Michael Swain, President, First National Bank of Oneida, [redacted]

E. B. Ray Thompson, Jr., Chairman, Thompson Charitable and Elgin Foundations, [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the

this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: December 19, 2012

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission.

James L. Cotton, Jr.
Type or Printed Name

Signature

December, 19, 2012
Date

09038
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Also this month: The Hazards of Taxing Contaminated Properties: Owners Beware! ■ Humor: A full-court press

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Journal

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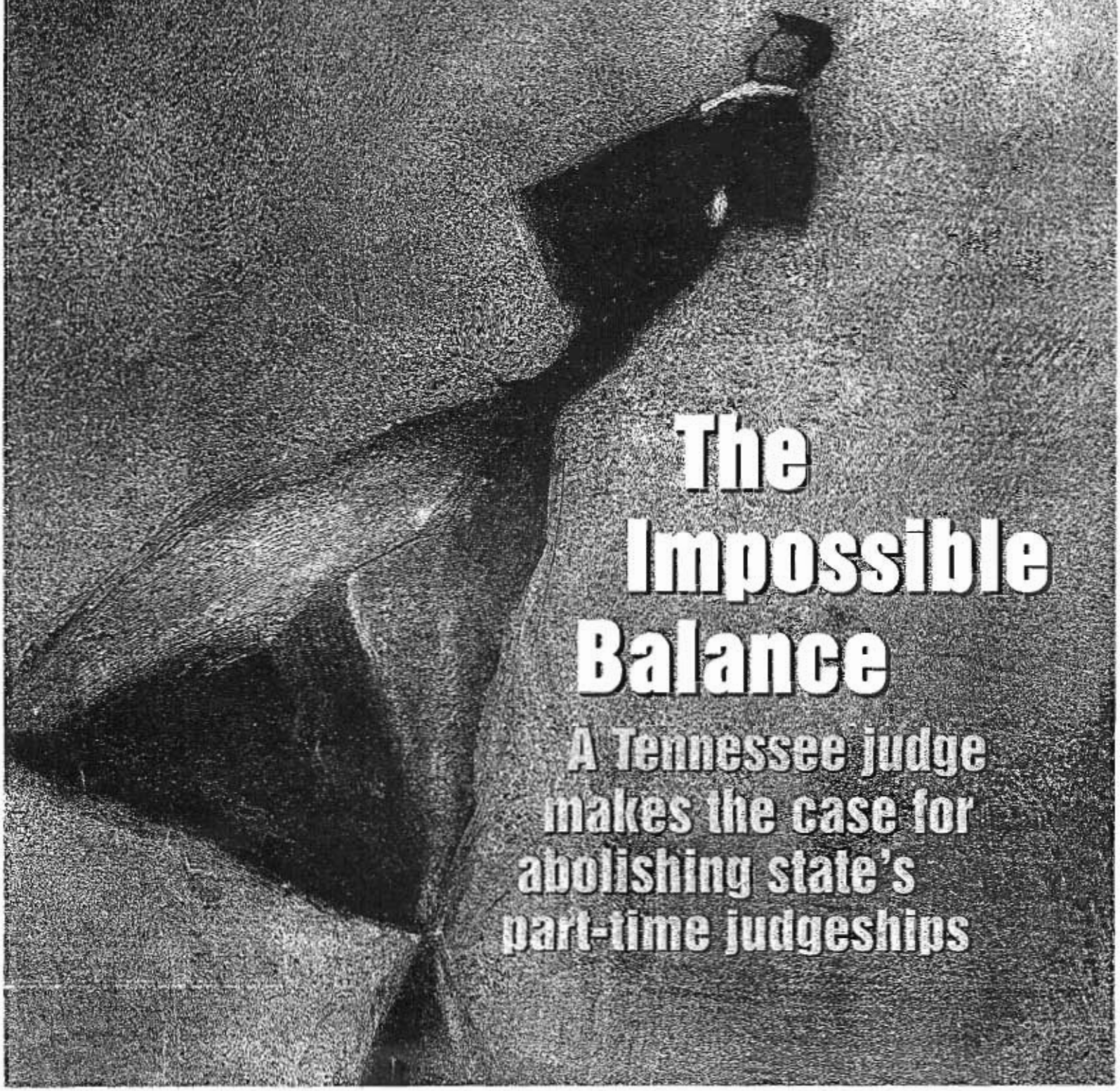

The Impossible Balance

A Tennessee judge makes the case for abolishing state's part-time judgeships

First, I want to just get it out — we ought to do away with the position of part-time general sessions judges. And yes, by the way, I'm a part-time general sessions judge. There are 40 or so of us still left in the State of Tennessee. I reached this conviction almost two years ago, about the time my wife and I shared a dinner table with Tennessee Supreme Court Chief Justice Riley Anderson and Mrs. Anderson, at a special event in Oak Ridge sponsored by Rural Legal Services. I had the opportunity for an insightful and candid discussion with the chief justice about the state of the judiciary, the practice of law and public perceptions about both.

But the truth is, I wasn't as candid with Chief Justice Anderson that evening as I really wanted to be. I held back. I wanted to crack the seal on a subject weighing heavily on me at that time, and say, "Mr. Chief Justice, let's go to work to abolish the position of part-time judges."

Why? It's about public perception of our Tennessee system of justice. It's about restoring public confidence in the independence and neutrality of judges. It's about encouraging the integrity of judges. Even more fundamentally, it's about preserving public belief in and acceptance of the rule of law.

The ethical and personal dilemmas uniquely encountered by part-time judges, who are juxtaposing a private law practice with sitting as general sessions judges, are of endless variety:

- The grandson of a valued retainer client in your private practice gets a DUI charge, and as judge, your evidentiary ruling on a closecall question of admissibility will be the controlling factor on whether or not there will be a conviction.
- One of the best clients in your private practice, who owns several apartment complexes, is feeling the frustration and expense resulting from the delays in their detainer actions, caused by your recusal from the bench and the unavoidable delays in time necessary to arrange a substitute judge.
- In private practice, you've been through a bitter and hard-fought divorce case with a local member of the bar — now that same opposing counsel is back before you on the bench. Based upon the law and facts presented, you're going to rule against her client in a very close case. Will she believe, and in turn tell her client, that their unsuccessful outcome was "payback" from the judge?
- People make appointments or show up unscheduled at your private law office, concealing their true purpose for coming, only to reveal a few minutes into your discussions with them that they "happen to have an upcoming case before you," or are "wanting help" on a case to be heard in your court.
- Your most important retainer client has been sued in a general sessions court, over in the adjoining county. Now, you uncomfortably find yourself arguing your client's case before one of your peers on the bench, with whom you haven't spoken since the last judicial conference — or was it when you were assigned as substitute judge for him?
- A person comes into your private law office, making arrangements with your secre-

(Continued on page 14)

"It's about public perception of our Tennessee system of justice. It's about restoring public confidence in the independence and neutrality of judges. It's about encouraging the integrity of judges. Even more fundamentally, it's about preserving public belief in and acceptance of the rule of law."

Cotton

Judge James L. Cotton Jr. is a graduate of the University of Memphis School of Law and has been General Sessions Judge for Scott County since 1990. He maintains a private practice in the association of Cotton & Cooper in Oneida. In 1998, Judge Cotton was awarded the Community Service Award in Memphis by the Tennessee Medical Association for organizing a women's shelter in Scott County and for his efforts in the area of domestic violence, and in 1999 was honored by Rural Legal Services for his work on behalf of Appalachian children and families.

(Continued from page 13)

tary for you to prepare a dozen routine deeds for partition of the family farm. The deeds are prepared and you are paid, completing the task but never meeting with the client. A week later and before you on the bench, while in the middle of a civil action to recover farm equipment, you embarrassingly discover from testimony in open court that these deeds were prepared by your office for one of the litigating parties, and while the case was awaiting trial before you.

These are just a handful of the infinite and unimaginable ethical problems that constantly rear up on part-time judges who practice law, threatening both their private law practice and their judicial reputation. The very fact that there are two sets of ethical rules, one for full-time judges and one specially carved out for part-time judges, although understood by the bar as technically necessary, is in reality an exercise in the parsing of ethics that is indistinguishable by the public, and assures that part-time judges are doomed to suffer public perception problems.

These are not ethical and public perception dilemmas created by the judge — they are the result of institutional flaws inherent in the part-time judge model itself.

First, part-time judges, by turning down cases in their private law practice to avoid "litigation conflict" with local attorneys who frequently appear before their bench, or to avoid the ethical snares described in the examples above, can soon find their private law practice cannibalized by the process. This can trigger unforeseen financial pressures on the judge, and be fertile ground for emotional strain or ethical compromise. Moreover, it is difficult to persuade outstanding lawyers to dismantle their private practice and serve on the part-time bench when they must take on such an array of ethical dilemmas and financial uncertainties.

Secondly, there's the serious problem of negative public perception. It is virtually impossible for a part-time judge to maintain a robust private law practice and at the same time maintain an image of independence and neutrality on the bench. It is virtually impossible to insulate a part-time judge from a barrage of ex parte case communications, when that judge cultivates the personal and business relationships necessary to build a good private law practice. Many of my outstanding peers on the part-time bench privately tell me they feel the constant stress and burden of trying to maintain ethical equilibrium between the practicing lawyer and the sitting judge.

"Public perception of the judiciary goes to the very heart of why the public is willing to obey court decisions — that is, to follow the rule of law."

In our legal system appearance and reality are inextricably intertwined. The canons of ethics tell us that even if there is no actual ethical violation, still we must avoid the "appearance of impropriety." In the final instance, the judiciary, to truly and wholly serve the ends of justice, must not only be fair and neutral — just as importantly, it must *appear* to be fair and neutral.

How the public views our judges is the gold standard by which they measure the legal system as a whole. Public perception of the judiciary goes to the very heart of why the public is willing to obey court decisions — that is, follow the rule of law.

We can never underestimate how important it is to the public, and their willingness to honor the rule of law, that they perceive their cases to be heard by an independent, fair and neutral judiciary. If the public perceives the legal process as fair and unbiased, they are willing to accept the court's decision, whether they agree with it or not. However, if the process is perceived as prejudiced, unfair or improperly influenced from the outside, they will reject the authority and decision of the court — and somehow be privately disgusted with it, even if they win. This is an immutable concept of the American system of justice and goes to the heart of why people are willing, or not willing, to follow the rule of law.

Perception of the judiciary is quite fragile. Unfortunately, cynicism prevails. I cringe when I see the ubiquitous T-shirt in shops and catalogs that reads, "A good lawyer knows the law — a great lawyer knows the judge." As it appeared Judge Ito was losing control of the courtroom in the O.J. Simpson trial, you could sense a diminished public perception of the court system, from just conversations at the coffee shop and in the break room. Likewise, when Chief Judge Robert P. Matsch appeared strong and steady in his presiding over the Oklahoma City bombing trial of Timothy McVeigh, you could feel the public's confidence in the court system surge.

Most recently, in *Bush v. Gore* we witnessed how fragile public perception can be even for the highest court in the land. The U.S. Supreme Court, which for the most part has historically remained free from criticisms of inappropriate influence or bias, suddenly found that both of its decisions — to intervene into the presidential election dispute and its final ruling — were not primarily criticized on interpretation of law, but rather by impugning the justices for their underlying political motives. You could feel public confidence in the U.S. Supreme Court slide among many citizens.

Part-time general sessions judges are no different in their exposure to public sensibilities, as they preside over a wide scope of cases that touch many people and many lives. The public will accept even an unfavorable ruling if it perceives the judge is acting as an independent and

neutral decision-maker. But the public will not accept, nor respect, court decisions even appearing to be financially or politically aligned with the judge's private law practice. For thousands of people in our Tennessee counties, their snapshot experience in the General Sessions Court shapes their view of the legal system as a whole.

I have found part-time judges to be some of the most conscientious and effective members of the Tennessee judiciary. But the ethical contortions and acrobatics required of a part-time judge, in juggling their private law practices with their judicial duties on the bench, compromise the credibility of even the most conscientious judges, adversely affecting public perception of the court system, and undermines the rule of law. Every case heard in every General Sessions Court of this state, whether in metropolitan or rural Tennessee, deserves the dignity of being heard by a full-time judge, unencumbered by the perceived or real compromises of private law practice.

It is high time to initiate a plan to retire the antiquated and fossilized judicial model of the part-time general sessions judge, and in turn, make every general sessions judge in Tennessee a full-time judge. Only if we begin building legislative consensus for this project now, can it hope to be implemented in 2006.

No other single, sweeping change can so dramatically improve the legal system in Tennessee, as abolishing the part-time judge. If we do, the judiciary in this state, both in public perception and in reality, will reflect a more independent, impartial and fair system of justice.

Example No. 1

IN THE CHANCERY COURT FOR SCOTT COUNTY, TENNESSEE
AT HUNTSVILLE

FIRST TRUST AND SAVINGS BANK Plaintiff vs. STEVE STANLEY AND WIFE, KATHY STANLEY, D/B/A STANLEY BUILDING AND BANK OF EAST TENNESSEE, Defendants	Civil Action No. 7966

BRIEF IN SUPPORT OF DEFENDANT STANLEY BUILDING'S MOTION FOR SUMMARY JUDGMENT

In support of its Motion For Summary Judgment filed herewith, Defendants Steve and Kathy Stanley d/b/a Stanley Building ("**Stanley**"), submits this Brief to the Court.

- CASE FACTS -

In compliance with **Rule 56** of the **Tennessee Rules of Civil Procedure** (as recently amended), and to accompany its Motion for Summary Judgment filed of even date herewith, Stanley submits a separate and concise statement of the material, undisputed facts of this case, as to which Stanley contends there is no genuine issue for trial and upon which Stanley further contends it is entitled to be dismissed from this suit as a matter of law, which are chronologically as follows:

1. On or about September 10, 1996, Stanley, a general contractor, issued a check in the amount of $24,082.50, drawn on its account at the First Trust & Savings Bank of Oneida (the "**Drawee Bank**"), said bank being the Plaintiff in the instant case. Stanley was general contractor over a post office building being built in Helenwood, Scott County, Tennessee. This check drawn by Stanley (the "**Check**"), was made payable to two separate payees, namely Tasco Electrical Contractors (an electrical subcontractor working on the post office site, hereafter called "**Tasco**") and Roden Electric (a supplier of electrical materials to the post office site, hereafter called

"Roden"). Stanley delivered the Check to Tasco, as payment to both Tasco and Roden. A copy of the Check is attached as "**Brief Exhibit One**".*

2. Tasco presented the Check to its hometown bank, then called the Bank of East Tennessee and now known as Union Planter's Bank of the Lakeway Area (the "**Depository Bank**"), which is a defendant in this case along with Stanley.*

3. When Tasco presented the Check to the Depository Bank, the Check had only the endorsement of Tasco; the endorsement of Roden was completely missing.*

4. The Depository Bank wrongfully honored and accepted the Check, despite the missing endorsement of Roden, and sent the Check through the federal check collection system, where, about a day or so later, the Check was presented to the Drawee Bank for payment.*

5. When the Check was, through the collection system, presented to the Drawee Bank, it also wrongfully honored the Check, despite the missing endorsement of Roden, and debited Stanley's account for $24,082.50, which was the face amount of the Check.*

6. A few days later, Stanley received a telephone call from Roden, asking why it had not been paid. Stanley, as drawer of the Check and knowing it had named Roden as a payee on the Check, immediately contacted the Drawee Bank to find out what happened. Stanley then learned that both the Depository Bank and Drawee bank had wrongfully honored the Check, despite the missing endorsement of Roden.*

7. Meanwhile, Tasco, after the Depository and Drawee Banks had wrongfully honored the Check, and after deposit of the Check into its "payroll account", soon wrote checks to expend the entire Check amount, and then, abandoned its work on the Helenwood post office site and left the State.*

8. This left Stanley with an unpaid supplier of materials about to file materialman's liens on a Stanley's post office project, thereby jeopardizing Stanley's post office project, credit record with Roden, and reputation in the contractor business.*

9. Stanley hired legal counsel, who, in a letter from its attorney dated October 17, 1996, made a specific settlement demand upon the Drawee Bank and Depository Bank, demanding that reimbursement be made to Stanley's account for the $24,082.50 face amount of the Check, which had been wrongfully debited from Stanley's account. In this letter, Stanley's legal counsel made reference to the bank's contractual duty to restore these Check funds to Stanley, referring to **Tennessee Code Annotated** § 47-4-401, and threatened a lawsuit if the full $24,082.50 amount of the Check was not paid to Stanley. A copy of this demand letter from Stanley's counsel is attached hereto as "**Brief Exhibit Two**".*

10. After Stanley sent out this demand letter, the Drawee Bank began to consult with its legal counsel, and continued to have access to its legal counsel, throughout the period of time pre-dating the filing of the lawsuit in this instant case.*

11. A few days after submitting the October 17, 1996 demand letter, Stanley's attorney went even further to draft a lawsuit against the Drawee Bank, which was not filed, but a copy of which was delivered to the Drawee Bank and its legal counsel, so that the Drawee Bank could evaluate the merits of Stanley's settlement demand.*

12. In November 1996, acting under pressure of potential financial losses and the inevitability of Roden filing a lien against the post office project, all deriving out of the wrongfully-honored Check, Stanley went ahead and filed a lawsuit against only the Depository Bank in Hamblin County Chancery Court, still waiting and being reluctant to sue the Drawee Bank which had been its hometown bank for many years, thereby allowing the Drawee Bank reasonable time to consider and reply to Stanley's settlement demand contained in its October 17, 1996 demand letter.*

13. On or about the first week of February 1997, the Drawee Bank decided to resolve Stanley's claim and threatened lawsuit to collect the Check funds, and did, in fact, fully reimburse Stanley the face amount of the Check, which was the sum of $24,082.50. Further evidence of the Drawee Bank's voluntary reimbursement of Stanley is contained in Paragraph No. 8 of the Drawee Bank's own verified Complaint filed in this instant case.*

14. Stanley, upon receiving full reimbursement for the Check from the Drawee Bank, then dismissed its lawsuit in Hamblin County against the Depository Bank, and considered its claim against the Drawee Bank fully and forever settled.*

15. Soon, after reimbursing Stanley, the Drawee bank then contacted the Depository Bank, asking to be fully reimbursed for the $24,082.50 it had paid to Stanley, arguing that the Depository Bank breached its check transfer warranties to the Drawee Bank, and that the Depository Bank should fully reimburse the Drawee Bank. However, the Depository Bank refused to fully reimburse the Drawee Bank, offering only to partially reimburse the Drawee Bank.*

16. When the Drawee Bank learned that the Depository Bank would not fully reimburse the Drawee Bank, the Drawee Bank then went back to Stanley, requesting that Stanley "pay back" some of the Check funds it had paid to Stanley only a few days previous thereto. Stanley refused, because Stanley believed the matter had been fully and permanently settled, when the Drawee Bank reimbursed Stanley the Check amount in reply to Stanley's October 17, 1997 demand letter.*

17. Resultingly, the Drawee Bank sued the Depository Bank and Stanley, in this instant case.*

*In compliance with recently-amended TRCP 56, all of the facts recited immediately above in Paragraph Nos. 1 through 17, inclusive, are supported by the Affidavit of Steve Stanley, said Affidavit being made and filed in the Court record of even date herewith, to which reference is hereby made by specific citation to the record in this cause.

- STANLEY'S FIRST ARGUMENT IN SUPPORT OF SUMMARY JUDGMENT -

First Trust & Savings Bank, as Drawee Bank, is not entitled to any compensation from Stanley as sued for, because the Drawee Bank is obligated as a matter of CONTRACT to reimburse Stanley with the full face amount of the Check, because the Drawee Bank wrongfully debited the account of its own customer, Stanley, by improperly paying on a Check with a missing endorsement, whereby the Drawee Bank breached its contractual duty with Stanley to pay only

a Check that is "properly payable" under law and violated Tennessee Code Annotated § 47-4-401(a), which states as follows:

> 47-4-401. When bank may charge customer's account. - (a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank (Emphasis added).

This means that the Drawee Bank is required by statute to charge and pay a Check, only if that Check is "properly payable" against the customer's account. By clear legal implication, the Drawee Bank, by allowing payment on the Check without the required endorsement of Roden, wrongfully honored and caused payment on a Check that was not properly payable.

This case may be a case of first impression in Tennessee, since there appears to be no reported or unreported cases in Tennessee exactly analogous to the unique facts of this case. However, there is good authority in other jurisdictions, which provide legal precedent and guidance directly on point of these particular facts, legal issues and same Uniform Commercial Code provisions, which are addressed below.

The facts of this case, and the Uniform Commercial Code law which has been adopted by Tennessee and is applicable to the instant case, are virtually the same as in the case of Cincinnati Insurance Company v. First National bank of Akron, 407 N.E. 2d 519 (Ohio 1980), a complete copy of which is attached to this Memorandum as "Brief Exhibit Three". The Cincinnati Insurance case, which is still good law in Ohio and comes from a state within the Federal 6th Circuit court system as is Tennessee, is applicable both in facts and law to the instant case.

In Cincinnati Insurance, the Ohio Supreme Court stated that:

> "Relationship between bank and customer is that of debtor and creditor, based upon contractual undertaking" (Emphasis added).

The Ohio Supreme Court in Cincinnati Insurance further noted:

> "Nature of check is order by its maker to his banker or depository that face amount be paid to payees he designates, and it is notice to anyone accepting the check that signatures of all payees are required, which requirement is just as binding on drawee bank as upon anyone else."

The Court in Cincinnati Insurance, further stated as follows:

> "Where banks, if they had examined the checks to verify that each of the named payees had appropriately endorsed the checks, would have known that the checks were not "properly payable", the banks breached contract with their customer by failing in this regard" (Emphasis added).

The Ohio Supreme Court, relying on its own state-codified version of the Uniform Commercial Code which was essentially the same as our Tennessee Code Annotated § 47-4-401(a), ruled that when a bank charges an item which is not "properly payable" against its customer's account, the bank has breached its contractual duty to the customer and is therefore required to recredit the customer's account in the full, face amount of the check. See this same legal conclusion and holding of law in the case of Feldman Construction Company v. Union Bank, 104 Cal. Rptr. 912 (Cal. App. 1972), where the facts, analysis of law and ruling are consistent with Cincinnati Insurance, a complete copy of which is attached hereto as "Brief Exhibit Four".

As in the Cincinnati Insurance case, the California Court of Appeals in Feldman, under facts similar to the instant case, held that the drawee bank, after wrongfully debiting the drawer's account on a check with a missing endorsement, was liable for the full face amount of the check, ruling that:

> "Measures of damages for drawee bank's improperly paying check which bore endorsement of only one of two payees was amount by which bank improperly debited depositor's account" (Emphasis added).

As its only legal grounds in support of its lawsuit against Stanley, the Drawee Bank argues ask the Court for relief in equity, arguing that if the Drawee Bank has to pay Stanley the full amount of the Check, then Stanley will receive a financial "windfall".

The Drawee Bank's "windfall argument" would appear to be as follows: When the Drawee Bank, in response to Stanley's demand letter, reimbursed Stanley with the full $24,082.50 of the Check, Stanley's obligation to Tasco was satisfied (by Tasco's exclusive use of all Check funds), and that the $24,082.50 reimbursed to

Stanley by the Drawee Bank more than covered Stanley's remaining obligations to the omitted payee, Roden, and thus, all Check funds received by Stanley, which were over and above what Stanley owed to Roden was "windfall", and should be paid back by Stanley to the Drawee Bank.

Putting aside for a moment, what Stanley submits to be the **irrelevant argument** of the Drawee Bank as to whether or not a "windfall" actually resulted, in point of fact, the Drawee Bank's exclusive reliance on the remedy of equity, when considering the material, undisputed facts and correct application of statutory law to this case, is a misguided and inappropriate use of equity argument, and is without merit. Under the facts and law of the instant case, equity should not be used to supercede the specific remedies of statutory law, where there are Tennessee legislative enactments adopting the Uniform Commercial Code model, and those legislative enactments clearly establish a legal relationship of **contract** between the First Trust & Savings Bank, as Drawee Bank, and Stanley, as its customer and drawer of the Check. The appropriate Maxim of Equity for application to this case, which is well known, states that **"Equity Follows the Law"**, as it is stated in **Gibsons Suits In Chancery** (7th ed) § 29 (1988), as follows:

> "3. Where the legislature has passed an Act not expressly applicable to proceedings in Equity, nevertheless the Courts of Chancery will follow such statute, unless it contravenes some fundamental equitable right or some equitable remedy" (Emphasis added).

The Drawee Bank comes to the Court asking for equitable relief, not with clean hands or as an innocent party, but rather as a plaintiff whose own negligence occasioned its own losses, asking the Court to ignore the remedies of statutory law enacted to specifically address this situation.

Moreover, when the Drawee Bank argues for equitable relief based upon its "windfall" theory, it is asking the Court to disregard the contractual obligations created by statute, and in contrast to look at the "actual damages" which resulted from its wrongful handling of the Check. It is interesting to note, that in Cincinnati

Insurance, both the trial and intermediate courts refused to recredit the drawer's account for the full amount of the Checks, reasoning that the drawer failed to prove an actual loss on the Check. However, the Ohio Supreme Court rejected this analysis and application of law. The Ohio Supreme Court in Cincinnati Insurance stated that the lower courts' specific references to "ordinary care" and reliance on an interpretation of statutory law where the measure of damages is based in tort, was "misplaced", because such analysis relates only to a "negligence - type action", and does not take into consideration the contractual duties imposed on the bank by the Ohio law codified as R.C. 1304.24 (which was state-adopted **Uniform Commercial Code** law essentially identical to Tennessee Code Annotated § 47-4-401), requiring the drawee bank to only pay "properly payable" items of its customer.

The Ohio Supreme Court additionally noted in Cincinnati Insurance, which would appear to further undermine and directly speak to the Drawee Bank's erroneous reliance on the equitable argument that Stanley received a "windfall", that:

> "This result may appear harsh since the bank has the initial loss while the customer enjoys a **windfall** gain when his account is recredited. We are cognizant, however, that the Uniform Commercial Code is a sophisticated legislative enactment, which, when properly invoked, shifts the ultimate loss to the proper party or parties" (Emphasis added).

It is significant, in further examining the Drawee Bank's "windfall" argument, that the Court in Cincinnati Insurance emphasized that the drawee bank was not left helpless and without recourse when it paid on a check which was not "properly payable", as the Court pointed out that Ohio law, R.C. 1304.30 granted **subrogation rights** to the payor bank "... to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item". In Tennessee, just as Ohio, **the Drawee Bank is subrogated to the rights of the drawer against various third parties, when necessary to prevent unjust enrichment**, as set forth in Tennessee Code Annotated § 47-4-407(3), as follows:

> **47-4-407. Payor bank's right to subrogation on improper payment.** - If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent

> **unjust enrichment** and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, **the payor bank is subrogated to the rights:**
>
> (3) **of the drawer** or maker **against the payee or any other holder of the item** with respect to the transaction out of which the item arose. [Acts 1963, ch. 81, § 1(4-407); 1995, ch. 397, § 3.] (Emphasis added).

Clearly, under Tennessee law, the Drawee Bank, after being made to recredit the account of its customer Stanley for the full amount of the Check, is then entitled to pursue other third parties for recovery, such as the other defendant in this case, Union Planters Bank, and also the payee Tasco, which the Drawee Bank has chosen not to name as a defendant in this case. In further support and discussion of the existence of this subrogation right of the Drawee Bank, see **White & Summers, Uniform Commercial Code**, 580 § 17-6 (1972).

- CONCLUSION -

Had the Drawee Bank properly examined Stanley's Check, to verify if all payees had endorsed it, then the Drawee Bank would have known that the Check was not "properly payable" under **Tennessee Code Annotated** § 47-4-401(a). The Drawee Bank had an absolute legal duty, grounded in contract, that goes beyond the use of mere care, to make payment on the Check only in strict accordance with Stanley's "genuine order" on the Check, which required the endorsement of two payees. The Drawee bank's "windfall" argument, is not proper application of statutory law or the principles of equity. However, the Drawee Bank has subrogation rights to pursue recovery against other Check payees or holders in due course, to prevent unjust enrichment, like the other defendant in this case, Union Planters Bank, and Tasco not named in this suit. As demonstrated in the cases of **Cincinnati Insurance** and **Feldman**, the proper damages is that the full and entire face amount of the Check, which is $24,082.50, be restored to the customer's account. If the Drawee Bank had followed Stanley's genuine order on the Check, it would not have been paid without Roden's endorsement. Tennessee law, by requiring the Drawee Bank to restore the full amount of the Check funds to its customer Stanley, as a matter of contract, returns Stanley to the position it would have been, had the Drawee Bank had fully and properly performed.

- STANLEY'S SECOND ARGUMENT IN SUPPORT OF SUMMARY JUDGMENT -

The First Trust & Savings Bank, as Drawee Bank, after wrongfully debiting Stanley's account by paying on the Check with the missing endorsement, and in direct response to receiving a written demand from Stanley's attorney to restore the full, face amount of the Check to Stanley, did in fact, then pay the face amount of the Check to Stanley, and by doing so, effectively settled its dispute with Stanley, whereby the Drawee Bank is now ESTOPPED from rescinding its settlement agreement and re-claiming the Check funds from Stanley.

Settlement agreements are judicially favored under both federal and Tennessee law, and settlements of claims should be liberally construed and enforced. See In Re Astroglass Boat Co., Inc., 32 B.R. 538, 543, n. 8 (Bkrptcy M.D. Tenn. 1983); Kulka v. National Distillers Products, 483 F. 2d 619, 621 (6th Cir. 1973). Traditionally the Courts have not looked kindly upon parties' attempts to renege on settlement agreements. The well-established rule in Tennessee, regarding rescission of settlements, has been stated in Tennessee Jurisprudence, Compromise and Settlement § 8 p. 286, citing the still-prevailing ruling of McClung v. Mabry, 2 Tenn. Cas. (Shann.) 91 (1876), as follows:

> "Where the parties come fairly to an agreement or compromise as to their rights in a pending controversy, the courts will sustain the compromise; and this is so, even where the conclusion of the parties, as to their respective rights as a matter of judgment, differs from that which the court might have reached, provided there is no fraud, misrepresentation, or mistake as to matter of fact, though there be a mistake of law" (Emphasis added).

It is further set forth in this same section of Tennessee Jurisprudence, citing Byers v. Railroad, 94 Tenn. 345, 29 S.W. 128 (1895) that:

> "Compromises made in good faith of doubtful claims, by parties dealing with each other on equal terms, and with opportunities to know their rights, will be sustained by the courts."

In the instant case, the Drawee Bank is multi-million dollar banking corporation, with all of the resources that such corporations have, who continually conferred with its own legal counsel following its receipt of the October 17, 1996 demand letter from Stanley. When the Drawee Bank restored the $24,082.50 in Check funds to Stanley, with no conditions or "strings attached", responding in direct reply to the written demand of Stanley's attorney and under threat of lawsuit, it was, by clear legal implication, (1) acknowledging its legal mistake and potential exposure to liability, (2) acknowledging the legal validity of Stanley's claim, and (3) paying an agreed amount to resolve a potential lawsuit, all the time acting with full knowledge of the facts and access to legal advice. **It was, in all respects, a good faith, unconditional and irrevocable settlement of a legal controversy.**

The assumption of the Drawee Bank, whether erroneous or not, that it would be reimbursed by the Depository Bank after it paid Stanley the full amount of the Check, is based upon a mistake of law, if there is one. It is well-established in Tennessee, as cited above in McClung, that mistake of law is not grounds to rescind a settlement agreement. Obviously, in the instant case, there has been no fraud, misrepresentation or mistake of fact which would otherwise justify the Drawee Bank to escape its settlement with Stanley.

On this issue, there is also a judicial admission meritorious of the Court's consideration. That is, the fact that the Drawee Bank made a full reimbursement of the Check funds to Stanley upon the Drawee Bank's belief and assumption, mistaken or not, that the Depository Bank was liable under statutory law to reimburse the Drawee Bank for the $24,082.50 in Check funds it paid to Stanley, **is admitted by the Drawee Bank,** both expressly and impliedly, as such **judicial admission** appears in Paragraph No. 8 of the Drawee Bank's own verified Complaint, as follows:

> "8. Plaintiff avers that upon discovering the defendant-Bank's breach of warranty of transfers, then reimbursed the defendants d/b/a Stanley Building the full amount of the "Check" of $24,082.50" (Emphasis added).

It is important, again, to note that Stanley made a written demand, under threat of lawsuit, for full reimbursement of the Check funds in its October 17, 1996 demand letter, and that in direct and subsequent response thereto, was paid

$24,082.50 by the Drawee Bank. For this reason alone, and as previously addressed in this Brief and other pleadings, Stanley contends it made a full, unconditional and final settlement of its legal controversy with the Drawee Bank. However, even if the Drawee Bank argues that it did not "intend" to settle with Stanley (which would be contrary to the Drawee Bank's overt conduct in this matter and the weight of Tennessee law), then, as the Drawee Bank's only alternate position, it can only legitimately argue, under the shackles of its own judicial admission, that it reimbursed Stanley on the assumption, correct or not, that it would, in turn, be entitled to reimbursement by the Depository Bank for the Depository Bank's "breach of warranty of transfers" under Tennessee Code Annotated § 47-4-207. Even when evaluated in the most favorable light of its own pleadings, the Drawee Bank is attempting to extricate itself from a settlement agreement **based upon mistake of law - which is not grounds in Tennessee to rescind a settlement.**

Finally, it is well established under Tennessee law, that a settlement agreement may be enforced, even if it is not in writing. See again In Re Astroglass Boat Co., 32 B.R. 538, 543, n. 4 (Bkrptcy M.D. Tenn. 1983); Kulka v. National Distillers Products, 483 F. 2d 619, 621 (6th Cir. 1973).

- CONCLUSION.-

When the Drawee Bank directly responded to Stanley's demand letter, by paying to Stanley the full $24,082.50 amount of the Check, all elements of a good faith, unconditional and final settlement occurred. This is the conclusion of law highly favored in Tennessee. Even if the Drawee bank argues, contrary to its overt conduct and the weight of Tennessee law, that it did not intend to settle, by its own judicial admission, the Drawee Bank reimbursed Stanley the full amount of the Check on the assumption, erroneous or not, that it would, in turn, be reimbursed by the Depository Bank. This would be a mistake of law, which does not justify the rescission of a settlement agreement.

SUBMITTED this 8th day of July, 1997.

STEVE STANLEY and wife,
KATHY STANLEY, d/b/a
STANLEY BUILDING

By: _____

James L. Cotton, Jr.
COTTON & COOPER
425 N. Alberta Avenue
[Mail: P.O. Box 4250]
Oneida, Tennessee 37841
423-569-9141 (Office)
423-569-8184 (Fax)
BOPR No. 9038

CERTIFICATE OF SERVICE

The undersigned attorney, hereby certified that a true, exact and complete copy of the foregoing pleading was sent to (1) Charles B. Sexton, Esq., SEXTON, SEXTON & KAZEE, P.C., attorney for First Trust and Savings Bank, at P.O. Box 4187, Oneida, Tennessee 37841, and (2) H. Scott Reams, Esq., TAYLOR, REAMS, TILSON & HARRISON, attorney for Bank of East Tennessee (now Union Planters Bank of the Lakeway Area), at P.O. Box 1799, Morristown, Tennessee 37816-1799, by placing said copies in the U.S. Mail on July 8, 1997, with correct postage thereon.

_____

James L. Cotton, Jr., Attorney
Cotton & Cooper

Brief Exhibit One

5747

STANLEY BUILDING
ROUTE 1, BOX 158H PH. 569-8349
ONEIDA, TN 37841

DATE 9/10/96 87-715/642

PAY TO THE ORDER OF Isaacs Electrical Contractors + Roden Elec. $ 24,082 50/—

Twenty four thousand eighty two dollars 50/cts DOLLARS

FIRST TRUST & SAVINGS BANK
ONEIDA, TENNESSEE 37841

FOR HWPO #001

Kathy Stanley

⑈005747⑈ ⑆064207166⑆ ⑈0293890⑈ ⑈0002408250⑈

ENDORSE HERE

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE. RESERVED FOR FINANCIAL INSTITUTION USE.

09-11-96

★ FEDERAL RESERVE BOARD OF GOVERNORS REG CC

LAW OFFICES OF
COTTON & COOPER
AN ASSOCIATION OF ATTORNEYS
428 NORTH ALBERTA AVENUE
REPLY TO
POST OFFICE BOX 4250
ONEIDA, TENNESSEE 37841

JAMES L. COTTON, JR.
WILLIAM S. COOPER, III

TELEPHONES (423) 569-9141
(423) 569-8313
FAX (423) 569-6184

October 17, 1996

Bank of East Tennessee
Post Office Box 1217
Morristown, Tennessee 37816

First Trust & Savings Bank
Post Office Box 4909
Oneida, Tennessee 37841

RE: Stanley Building/Payment of Check
on Missing Indorsement

To the above-named banks:

This office is legal counsel for Stanley Building, of Oneida, Scott County, Tennessee.

You are hereby notified that both the Bank of East Tennessee of Morristown and the First Trust and Savings Bank of Oneida have improperly paid a check, without the sufficient and required indorsements.

More specifically, on September 10, 1996, the drawer, Stanley Building, issued a check on its Account No. 02938901 (drawn on First Trust and Savings Bank of Oneida) in the amount of $24,082.50, **made payable to two separate payees,** namely " Tasco Electrical Contractors" and (via ampersand) "Roden Elec.". A copy of this check is attached hereto.

The depository bank first taking the check for collection, being the Bank of East Tennessee, improperly allowed Tasco Electrical Contractors to directly deposit this check into Tasco's payroll account and eventually collect the funds, without the indorsement of the other payee, Roden Electric (a/k/a Roden Electrical Supply Co.). The First Trust and Savings Bank, as drawee or payor bank, also improperly paid this check out of the drawer's account, with the missing indorsement.

Stanley Building is the general contractor for the construction of a U.S. Post Office in Helenwood, Scott County, Tennessee, and named both Tasco and Roden as payees on this check, as a legal precaution and for the specific purpose of seeing that its electrical subcontractor for the post office, namely Tasco, also paid its electrical supplier for materials used at the post office, namely Roden Electric.

As a result of Bank of East Tennessee's and First Trust and Savings Bank's improper payment of this check on a missing indorsement, among other consequences, Roden Electric was not paid for its supplies sold to the post office site, materialman's liens may be filed on the post office and the construction project is being delayed, exposing Stanley Building to penalties and other actual damages each day.

The Bank of East Tennessee's and First Trust and Savings Bank's payment of this check on a missing indorsement is legally improper, because a bank, pursuant to Tennessee Code Annotated Section 47-4-401, may not charge against its customer's account any item which not "properly payable". By paying this check on less than all of the required indorsements, both banks have failed in their absolute duty to strictly follow the genuine orders of Stanley Building on its check.

Accordingly, Stanley Building demands that the $24,082.50 in funds, improperly paid by the banks on insufficient check indorsements and deposited into the Tasco payroll account, be immediately and fully restored to it in Account No. 02938901 with the First Trust and Savings Bank as the payor-drawee bank; otherwise, Stanley Building will have no alternative but to promptly file a lawsuit for recovery of its damages.

Contemporaneously with this matter, Stanley Building is also considering the immediate filing of a lawsuit in Scott County against Tasco, and all of its owners, because of its blatant deception in circumventing Roden's indorsement and its string of unnecessary delays and broken promises that have now derailed the completion schedule of the post office, and exposed Stanley Building to thousands of dollars in damages.

Stanley Building, notwithstanding the context of this demand letter, reserves recourse under all of its other rights and remedies under the Uniform Commercial Code, as adopted by Tennessee law.

We would appreciate your advising us of the authorized agent for your bank, upon which you prefer to be served process, if it becomes necessary, and certainly we will honor such request.

Respectfully,

James L. Cotton, Jr.

cc: Tasco Electrical Contractors
Roden Electric

Example No. 3

IN THE PROBATE DIVISION OF THE GENERAL SESSIONS COURT
FOR SCOTT COUNTY, TENNESSEE AT HUNTSVILLE

'98 JUN 23 PM 12 07

GRACE M. CARPENTER, Individually and as Administratrix of the Estate of **MAX CHRISTIAN CARPENTER,**	FILED JAN BURRESS, CLERK BY _____
Plaintiff,	Case No. 135-P
JACK LAXTON, as Sheriff of Scott County, and in his individual capacity, et al.	
Defendants.	
In Re: Sullivan and Lucchesi Fee Claims	

COURT OPINION AND RULING

This cause being heard for trial on the merits on June 5, 1998 before the Honorable James L. Cotton, Jr., Judge sitting at Huntsville, Tennessee by interchange substitution order of the Scott County Circuit Court, upon the pleadings filed, the testimony of the parties and their witnesses, expert testimony offered, the late-filed Irwin deposition and rebuttal testimony submitted for proof and the other evidence presented, from all of which it satisfactorily appears to the Court that this Court has jurisdiction of this proceeding and that the Estate of Max Christian Carpenter has standing and is a real party in interest in this cause, and furthermore as follows,

That this cause of action before the Court basically arises out of a dispute between Attorney David M. Sullivan ("**Sullivan**") and Attorney Ronald Lucchesi ("**Lucchesi**") over the "Memphis attorneys" 50% share of the total legal fees charged pursuant to a 40% contingency fee contract and mediated settlement of a 14 U.S.C. Section 1983 civil rights lawsuit brought by the Estate of Max Christian Carpenter, acting through its sole administratrix Grace M. Carpenter, against various individuals and law enforcement agencies (the "**Lawsuit**"),

The mediated settlement amount of the lawsuit and the attorneys fees which are the subject of this proceeding are under seal of confidentiality and located in escrow under previous orders of this Court, whereby this Court's rulings and dispositions of the attorneys fees in controversy, as hereinafter awarded to the attorney litigants, will be identified by percentage and not by amount,

In the instant case, the controversy between the attorney litigants is that Lucchesi claims there was an oral agreement between himself and Sullivan to equally divide their share of the Memphis attorneys legal fees (again, the Sullivan-Lucchesi or "Memphis attorneys" share of fees being 50% of the total legal fees arising out of the 40% contingency contract) without regard to the actual amount of time and services provided by each attorney to the Lawsuit, and in contraposition thereto, Sullivan advocates that no such oral agreement existed and that it was intended and understood between he and Lucchesi that they would be paid only for the actual work they individually rendered to the Lawsuit,

Although Sullivan and Lucchesi were friends, worked out of the same law building in Memphis with internal offices in close proximity of each other, shared a receptionist and "associated" together by representing their client in the Lawsuit, in what Lucchesi characterized in his testimony as a "joint venture", even more importantly and controlling, Sullivan and Lucchesi were sole practitioners of law, operating out of segregated and exclusive offices, and having separate and distinct letterhead containing only their individual names, wherefrom the Court finds that Sullivan and Lucchesi were not an **association of attorneys or partners in a law firm** as defined under the rules of professional ethics governing the practice of law in this state,

That even if there was a clearly understood, good faith and mutually-acknowledged agreement between Sullivan and Lucchesi to equally split the "Memphis attorneys" share of the legal fees, under the facts and evidence presented in this case, Lucchesi's argument claiming one-half of the

"Memphis attorneys" fees is legally untenable, because such an agreement would violate the Code of Professional Responsibility promulgated by the Tennessee Supreme Court and be unenforceable as a matter of law, because Sullivan and Lucchesi were not an "association of attorneys" or "partners in a law office or law firm" and Disciplinary Rule 2-107 unequivocally prohibits the division of a legal fee for legal services between lawyers who are not in an association or partners in a law firm unless ". . . the division is made in proportion to the services performed and responsibility assumed by each" (underlined emphasis added; see Sup. Ct. Rules, Rule 8, Code of Prof. Resp., DR 2-107),

Thus, to determine the proportion of services performed and responsibilities assumed between Sullivan and Lucchesi in the Lawsuit, the Court, after hearing the proof in this case, looked to and applied the criteria set forth in Disciplinary Rule 2-106 (See Sup. Ct. Rules, Rule 8, Code of Prof. Resp., DR 2-106),

In evaluating the actual services performed and responsibility assumed in the Lawsuit by Sullivan and Lucchesi on an individual basis, the Court finds that Sullivan was de facto, the lead attorney, because Sullivan was, from the inception of the Lawsuit, the attorney in charge of most aspects of the case, being responsible for most communications with the client and her family, interviewing witnesses, arranging for support trial counsel to be brought into the Lawsuit, managing the burdensome logistical demands of the case, organizing discovery, actively participating in 27 depositions and attending more, researching, preparing and himself typing most of the responsive pleadings in reply to the voluminous number of motions and other filings submitted by the many defendant-parties, with Sullivan often working under the pressure of severe time constraints and limited lawyer manpower, and including Sullivan's successful defense of their client's case at a critical juncture in the Lawsuit against a battery of the defendants' summary judgment motions and an interlocutory appeal brought before the United States Sixth Circuit Court of

Appeals in Cincinnati, it appearing to the Court that Sullivan was, in reality, the linchpin that held this difficult and complex Lawsuit together for their client from its filing to mediation, and thereafter to wrap up lingering legal problems, all of this culminating in Sullivan logging, by contemporaneous entries, more than 1031 hours of billable time on the Lawsuit,

Further, in evaluating the actual services performed and responsibility assumed in the Lawsuit by Lucchesi on an individual basis, the Court finds, comparatively, that Lucchesi performed substantially less work on the Lawsuit than Sullivan but that Lucchesi did provide valuable services and assume certain responsibilities worthy of fee compensation in the Lawsuit; for example, Lucchesi signed the original Lawsuit complaint and thus carried the ultimate responsibilities that naturally follow, brought unspecialized but significant trial experience to the Lawsuit in its early stages when such experience was needed for Sullivan and Lucchesi to confidently accept the demands of the Lawsuit and at a time when neither Sullivan nor Lucchesi, acting alone, could have tackled the Lawsuit, made numerous trips from Memphis spending more than 50 days in Knoxville where Lucchesi undoubtedly mixed that time with the business of the Lawsuit and personal matters, took two depositions and attended several others, summarized 14 depositions (although Sullivan pointed out some material deficiencies in these summaries bringing their usefulness into question), brought needed financial resources to the case by carrying the load of a significant amount of Lawsuit expenses, was the first contract and key connection for the Lawsuit coming to Memphis and into the legal hands of the parties, conducted (mostly on an informal and undocumented basis) numerous discussions of analysis and strategy about the Lawsuit during travel trips and during office discussions over a period of three-plus years, all of this culminating in Lucchesi logging by recollected reconstruction and not contemporaneous entries, a total of 269.50 hours of billable time, with Lucchesi being eventually dismissed as counsel by his client but at a time after mediation was successfully completed and the Lawsuit was essentially concluded,

Finally, it being the finding of the Court, in evaluating the proportion of professional services personally rendered by Sullivan and Lucchesi regarding their individual earned right to the legal fees escrowed by this Court and in compliance with Disciplinary Rules 2-107 and 2-106, that Sullivan performed 80% of the services performed and responsibility assumed in the Lawsuit, and further, that Lucchesi performed 20% of the services performed and responsibility assumed in the Lawsuit, moreover, that the 40% contingency contract fee was reasonable and appropriate, and that the "Memphis attorneys" share of legal fees now in court-ordered escrow and herein awarded to Sullivan and Lucchesi in this order do not constitute excessive or improper legal fees in any respect,

The Court is aware that its decision in this case will, in all likelihood, be unsatisfactory to both parties, the Court seeing the parties become inextricably entrenched in the righteousness of their legal positions and seeing the acrimony that has developed between them as stakeholders in the outcome of this case; however, the Court reminding the attorney-litigants, that any dissatisfaction they feel should be tempered by the fact that this instant cause of action is the direct and proximate result of their own shortcomings in the handling of the fee issues, whereby, if the parties had, early in the Lawsuit, exercised a reasonable and professional degree of foresight and thought in discussing fee arrangements under the prevailing guidance of the canons of professional responsibility, then this unfortunate circumstance leading to this case would not have occurred,.

Accordingly, good cause appearing and by a preponderance of the evidence presented, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

1. That Sullivan is awarded 80% of the legal fees in court-ordered escrow, and Lucchesi is awarded 20% of the legal fees in court-ordered escrow; all references to these escrowed legal fees shall mean and include accrued interest.

2. The Court, after deliberation on the issue, shall not entertain motions to pay the legal fees of the Carpenter estate which are connected with this case, out of the escrowed funds, it being the opinion of the Court in this regard, that the Carpenter estate would have been entitled to a portion of the escrow funds only if a equivalent portion of the legal fees of the attorney-litigants were found to be "excessive" by the Court.

3. That because of the valuable and timely services provided to the parties and the Court by the court reporter firm, all under demanding time constraints, that all the parties' court reporter fees shall be paid on their own before release of escrow to the attorney-litigants, or alternatively, each attorney's share of court reporter fees shall be withheld and paid by the Clerk out of their respective share of legal fees in escrow.

4. That the parties shall have through the date of July 23, 1998 at 4:30 p.m. (Huntsville, Tennessee time), to appeal this ruling.

5. That the costs of this cause, which are $250.00, shall be taxed equally to the parties, to be withheld by the Clerk out of the court-ordered escrow.

James L. Cotton, Jr.
Judge