

The Tennessee Department of Human Services has developed and is implementing a computer system to assist in the enforcement of child support payments. The computer system, referred to as T.C.S.E.S. (Tennessee Child Support Enforcement System), contains confidential information regarding both the custodial and non-custodial parents, including but not limited to addresses, employment status and history, income, expenses, property, assets and A.F.D.C. benefits information. Currently, a proposal exists which would provide certain courtrooms with computer linkage so that referees and judges could personally access T.C.S.E.S. Inquiry has been submitted to this committee for an opinion regarding whether judicial access to such information would constitute an unethical and impermissible ex parte or other communication.

Supreme Court Rule 10, Canon 3(A)(4) provides in pertinent part as follows:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

The attendant drafter's Commentary provides as follows:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers and other persons who are not participants in the proceeding, except to the limited extent permitted. ...

The confidential information regarding custodial and non-custodial parents contained within T.C.S.E.S. represents data supplied by several sources. Clerks of Court are required to execute a computer access security agreement containing in part the following language:

1. I shall maintain confidential all computer information and resources to which I have access and control.
2. I shall take appropriate measures to safeguard and protect the information and computer resources of the State that are made available to me.
3. I shall use the information and computer resources only for authorized State business and not disclose any information or documentation obtained from, or pertaining to, the State's computer system to any third-party, except in the routine, lawful conduct of the State's business.

A judge is not permitted to make a private inquiry off the record and act upon the information so obtained, State v. Suttles, 767 S.W.2d 403 (1989). Likewise, a judge may not legally act upon private knowledge obtained through private investigation, Caldwell v. State, 48 S.W.2d 1087 (1932). Judicial knowledge upon which a decision may be based is not the personal knowledge of the judge, but the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which he plays a neutral role, Vaughn v. Shelby Williams of Tennessee, Inc., 813 S.W.2d 132 (1991). As the Supreme Court in Vaughn noted:

It seems appropriate that when the trial judge becomes a source of information and when a decision is ultimately influenced with that information, the parties should have the opportunity to cross-examine in order to impeach the source of the evidence or otherwise persuade an impartial trier of fact that the court's observations are, for whatever reason, inaccurate, just as they would any other witness.

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A valuable discussion regarding ex parte communications is found at *Judicial Conducts and Ethics*, 2d Ed., page 149, § 5.01, providing in relevant portion as follows:

Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte communications or correspondence can be misleading; the information given to the judge "may be incomplete or inaccurate, the problem can be incorrectly stated". At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or the facts. ...

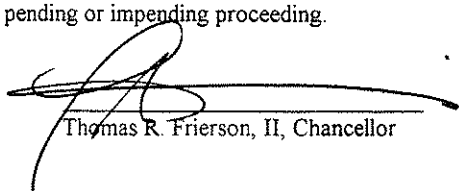
The term "communication" is not defined by Rule 10 of the Tennessee Supreme Court. *Black's Law Dictionary* provides the following definitions:

Communicate: To bestow, convey, make known, recount, impart; to give by way of information. (Citations omitted.)

Communication: Information given, the sharing of knowledge by one with another; conference; consultation or bargaining preparatory to making a contract. Intercourse; connection. (Citations omitted.)

Unquestionably, the supply of information available from T.C.S.E.S. to a judicial officer would constitute a communication which might ultimately influence the officer in a decision rendered. Inherent problems affecting the validity and admissibility of such information include confidentiality, inaccuracy or other system error. The terms of the computer access security agreement evince that system data constitutes State information and resources for authorized State business. As indicated earlier, much of the information supplied for T.C.S.E.S. records constitutes work product of persons who are not participants in the proceeding, clearly hearsay. A party's full right to be heard according to law would include the right to cross-examine the providers of information held by T.C.S.E.S., as well as the opportunity to challenge any claimed inaccuracies and/or deficiencies in the system itself.

The Committee is of the opinion that judicial consideration of information available through T.C.S.E.S. without all parties present and given the full right to be heard would constitute an impermissible communication concerning a pending or impending proceeding.


Thomas R. Frierson, II, Chancellor

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CONCUR:
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