

Media and the Courts – Tennessee
Judicial Conference

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Panelists:
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The public's confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system.

Justice Felix Frankfurter

- Quoted in "Journalism and the Judiciary" (1997)

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Judges are the arbiters of order and common sense. They are the protectors of fairness and that elusive quality known as justice.

Without reporters, the important messages they send would be heard by no one.

Linda Deutsch, Associated Press

CORRESPONDENT, FREEDOM FORUM CALENDAR (1997)

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“Come, let us
reason together”

Isaiah 1:18

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Constitutional Provisions

- **UNITED STATES:**
 - **First Amendment:** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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Constitutional Provisions

- **UNITED STATES:**
 - **Sixth Amendment:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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Constitutional Provisions

• **TENNESSEE:**

- **Article 1, Section 17:**
"[A]ll courts shall be open"

- **Article 1, Section 19:**
"That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

Judicial Comments to Media

Tennessee Code of Judicial Conduct
Rule 2.10 Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

....

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

Judicial Comments to Media

Tennessee Code of Judicial Conduct
Rule 2.10 Judicial Statements on Pending and Impending Cases

....

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

The Tennessee Supreme Court has recognized a qualified right of the public, **founded in common law and the First Amendment to the United States Constitution, to attend judicial proceedings and to examine the documents generated in those proceedings.**

(emphasis added)

- 982 S.W.2d 359, 362 (Tenn. Crim. App. 1998)

The Knoxville News-Sentinel v. Huskey

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ACCESS TO COURTS and COURT RECORDS

- Procedural requirements articulated by the Tennessee Supreme Court in *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985) and *State v. James*, 902 S.W.2d. 911 (Tenn. 1995)(juvenile court)
- Applies to motions for closure or "other restrictive order"

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PROCEDURE – *State v. Drake*

1. Motion for closure or other restrictive measures must be in writing, stating basis for/extent of closure or other restrictions requested.
2. Expedited hearing. May not be heard until motion for closure is on file for at least three days. Public/media MAY intervene and be heard in opposition to the closure motion.
3. At a hearing, trial court must determine interveners, and then may order portion of hearing closed ONLY as necessary to avoid disclosure of prejudicial material.
4. Transcript of any closed proceeding shall be made available to public at the earliest time possible – consistent with interests compelling closure and also consistent with facilitating appeal.
5. Trial court must state specific facts why closure is essential to preserve movant's interest and make specific finding that no alternative to closure will adequately protect that interest. Decision on closure must be rendered promptly by trial court.
6. Prompt appellate review.

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PROCEDURE – *State v. Drake*

- Although not specifically stated in *Drake* – since the trial court has an obligation to consider the rights of the public and press, please consider notifying the media or asking the Clerk to do so when a motion for closure or other restriction has been made.

In re Knoxville News-Sentinel Co., 723 F.2d 470 (6th Cir. 1983)

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.

435 U.S. 589, 597 (1978)

Nixon v. Warner Communications

Tennessee Public Records Act

- Access to public records, including judicial records, is codified in the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-101, *et seq.*
- "Public records" include court records: "the pleadings, documents, and other papers filed with the Clerk[s] of . . . all courts." *In re NHC-Nashville Fire Litigation*, 293 S.W.3d 547 (Tenn. Ct. App. 2008) (citing *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996) (quoting Tenn. Code Ann. § 10-7- 403)).

Protective Orders versus Sealing Orders

- A "stark difference" exists between protective orders and orders to seal court records.
Shane Group Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016).
- The Tennessee Supreme Court has cautioned that "any restriction on public access [to judicial records] must be narrowly tailored to accommodate the competing interests without unduly impeding the free flow of information." *In re NHC-Nashville Fire Litigation*, 293 S.W.3d at 561 (quoting *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 363 (Tenn. Crim. App. 1998)).

Protective Orders

- Trial courts may enter a protective order limiting the use or disclosure of discovery materials upon a showing of "good cause" in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" (Tenn. R. Civ. P. 26.03)
- Protective orders are intended to offer parties and third parties "a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings" (*In re NHC-Nashville Fire Litigation*, 293 S.W.3d at 562)
- Standards governing a trial court's decision to issue a protective order found in *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)
- Disclosure must involve a "clearly defined injury"; broad/mere conclusory allegations "unsubstantiated by specific examples or articulated reasons" will not suffice (*Ballard*)

Protective Orders (cont.)

- "Good cause" requires a balancing of one party's need for information against the injury that would result if disclosure is compelled (*Ballard*)
- "Blanket" versus "Individualized" protective order
- One-Stage and Two-Stage PO's ("Confidential" or "Confidential – Counsel's Eyes Only" designations)

Sealing of court records—Compelling Reasons Only

- "Only the **most compelling reasons** can justify nondisclosure of judicial records." *In re Knoxville News-Sentinel, Inc.*, 723 F.2d 470, 476 (6th Cir. 1983); see also *State of Tennessee v. Christ Koulis* case (out of Williamson County)
- "[T]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Shane Grp.*, 825 F.3d at 305
- Sealing of court records may not be done unless the privacy rights of trial participants, a defendant's right to a fair trial or third parties' trade secrets or national security, override the "strong presumption in favor of openness." *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016)
- "Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Brown and Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983)

Sealing of court records (cont.)

- Sealing "**must be narrowly tailored**" to support the asserted compelling reason
- "Very different considerations apply" when litigants place material in the court's record (*Shane Grp, Inc.* (6th Cir.))
- A trial court "that chooses to seal court records must set forth specific findings and conclusions 'which justify nondisclosure to the public.'" (*Id.*)
- Even if no party objects to the motion to seal, the trial court has an obligation to explain the basis for sealing court records
- Order must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." (*Rudd*)

Sealing of court records (cont.)

- **U.S. District Court LR 5.05 and Admin. Order No. 167**
- Most PO's state: "The parties further acknowledge that this Court applies the following standard for sealing documents in the record: "[t]he proponent of sealing must provide compelling reasons to seal the documents and demonstrate that the sealing is narrowly tailored to those reasons—specifically by 'analyz[ing] in detail, document by document, the propriety of secrecy, providing reasons and legal citations.'"

Beauchamp v Federal Home Loan Mortgage Co., 658 Fed.Appx. 202, 207 (6th Cir. 2016) (quoting *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305-06 (6th Cir. 2016)).
- PO designations by litigants do not constitute "good cause"

“Blanket” sealing

- Beware litigants who request blanket sealing in the trial court
- **Might** be permitted in extremely rare circumstances (see, for example, *In re NHC-Nashville Fire Litigation*, citing *Ballard*)
- An unsealing request may be made by a party, an intervenor in the underlying litigation, or pursuant to a separate Petition under the Tennessee Public Records Act
- Requires a hearing and an “individualized review,” with the burden on the litigant seeking secrecy/court’s protection

Sealing on Appeal

- On appeal, all documents filed with the clerk are public records, and open to the public **unless** protected from disclosure by a state, rule or court order (Tenn. Sup. Ct. R. 34)
- Clerk and litigants should be aware of requirements under Tenn. Ct. App. R. 15
- Documents previously filed under seal in the trial court pursuant to a specific order of the trial court shall be filed under seal in this court subject to the same restrictions as set forth in the trial court’s order unless [the Court of Appeals] orders otherwise.” Tenn. Ct. App. R. 15(b)(i))
- “For a document to be filed under seal in the appellate court pursuant to [a trial court’s protective order], the trial court must have made an individualized determination that the particular document should be filed under seal.” (Tenn. Ct. App. R. 15(b)(ii))
- A trial court’s failure to set forth compelling reasons for nondisclosure, why the interests supporting access are not compelling, and why the seal is the least broad/restrictive possible — is grounds to vacate an order to seal (*Shane Grp., Inc.*)

Cameras in Courtrooms

- **TN SUPREME COURT RULE 30**
 - Covers camera access (not physical access)
 - Presumption in favor of cameras
- **Rule 30 Procedure:**
 - Written request two days in advance of hearing; Court may waive two-day requirement (most do)
 - Clerk posts notice on courtroom door
 - Rule allows one-two television cameras, two still photographers (two cameras each), and audio system for radio broadcast
 - Press may carry hand-held recorders
 - “Pooling” arrangement by media

Cameras in Courtrooms

• **Rule 30 Procedure:**

- **Prohibitions:**
 - Minor participants
 - Jury selection and Jurors
 - Closed proceedings
 - Juvenile court proceedings (objection by accused in criminal proceeding or by party in civil proceeding will prohibit cameras; witness may object)
 - Conferences between counsel or with Court
- Evidentiary hearing required prior to any denial, limitation or suspension of camera coverage; burden on opponent; affidavits permitted only if necessary; written findings required
- Immediate appellate review under Tenn. R. App. P. 10

State v. Pike, 978 S.W.2d 904 (Tenn. 1998)
 State v. Morrow/Meredith Broadcasting, No. 01C01-9601-CC-00022
 (Tenn. Crim. App. 4/12/96)

SHIELD LAW / Newsperson's Privilege

- Tenn. Code Ann. Section 24-1-208
 - Protects against compelled production of materials/testimony
 - Protection not limited only to confidential sources and information
 - Covers testimony as well as items such as unpublished photos, outtakes, and reporters' notes
 - Protects persons connected with or employed by news media, and those independently engaged in gathering information for publication or broadcast (bloggers)

State v. Curriden, 738 S.W.2d 192 (Tenn. 1987)
 State v. Shaffer/Kalodimos, 1990 Westlaw 3347 (Tenn. Ct. App. 1990)
 State v. Kendrick, 178 S.W.3d 734 (Tenn. Crim. App. 2005)

SHIELD LAW / Newsperson's Privilege

- Privilege may be divested only if Court, after a hearing, determines that movant 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. Movant has demonstrated that the information sought cannot reasonably be obtained by alternative means; and
 3. Movant has demonstrated a compelling and overriding public interest of the people of the State of Tennessee in the information.

Gag Orders

- Constitutional standard depends on who is restrained:
 - Trial participants: *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000).
 - Media: *State v. Montgomery*, 929 S.W.2d 409 (Tenn. Crim. App. 1996).
- Proponent of gag order must show "substantial likelihood of prejudice."
- Before entry, court must explore and reject reasonable alternative measures (e.g., change of venue, continuance, searching *voir dire*, and jury instructions)
- Any order must be narrowly tailored to avoid "substantial likelihood of prejudice."

Orders regulating Media Conduct

"Decorum" Orders

- High profile cases; generally impose time/place/manner restrictions on how media may cover hearings or trials
- *Court houses and surrounding public areas are traditionally recognized as public forums*
- Any limitations on news/expressive activities must meet strict standards
 - *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995)
- Decorum orders frequently challenged as
 - not being "content neutral"
 - not providing ample alternatives
 - not being "narrowly tailored"
 - being unconstitutionally vague

Last words

"Four things belong to a judge:

- to hear courteously,
- to answer wisely,
- to consider soberly, and
- to decide impartially."

—Socrates
