Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

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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.

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

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

1976; BPR No. 05015

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, BPR No. 05015, 1976, active

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).

Neal & Harwell, Nashville, Tennessee (1976-1979)

State of Tennessee, Department of Correction, Staff Attorney (1979-1981)

Dearborn & Ewing, Nashville, Tennessee (1981-1986)

State of Tennessee, Circuit Court Judge, Nashville, Tennessee (1986-1990)

Farris, Warfield & Kanaday, Nashville, Tennessee (1990-1994)

Tuke, Yopp & Sweeney (then Yopp & Sweeney), Nashville, Tennessee (1994-2000)

Dinsmore & Shohl, LLP (2000-2004)

Baker, Donelson, Bearman, Caldwell & Berkowitz (2004-Present)

Adjunct Instructor, Trial Practice, Vanderbilt School of Law (1994-1997)

Instructor, Civil Procedure, Nashville School of Law (2003-2009)

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.

Not Applicable

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.

Civil trial and appellate practice in state and federal courts (85-90%), mediation and arbitration (10-15%). Currently most of my litigation practice is business related, plaintiff and defendant.

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.

I am a trial and appellate lawyer, arbitrator and mediator. Initially I was trained in white collar criminal defense, but over time have handled most types of civil litigation and some criminal cases. Civil cases have included civil rights actions, family law matters, medical malpractice, contract disputes of many types, condemnation cases, personal injury cases, consumer protection cases, business disputes, non-compete agreements, landlord-tenant disputes, construction cases,

governmental claims, zoning and employee benefit matters. In recent years, cases have tended to be more complex, class action or shareholder derivative litigation, with a concentration in areas of business divorces, franchising and related antitrust, securities, fraud and fiduciary duty. Arbitrations and mediations have covered a wide variety of matters throughout the southeast, including personal injuries, divorce agreement enforcement, defamation, business disputes, contract cases, intellectual property cases, real property controversies, employment matters (age, race, sex), U.S. Olympic Qualifications and sport eligibility, and commercial property and equipment leases. See also response to question no. 9.

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

I have practiced extensively throughout the country. I have been admitted pro hac vice in 11 federal districts and states. I have taken depositions in 28 states and one foreign country. I have argued appellate cases in two states in addition to Tennessee and have argued cases before the U.S. Court of Appeals for the Sixth Circuit. I have been the mediator/arbitrator in cases in 5 states and one U.S. territory. Matters of special note include:

Brooks v. Brooks, Davidson County Circuit, 1977. Contested divorce. First trial, I believe.

United States of America v. Flynn (2 cases), United States District Court, Middle District of Tennessee, 1978. Junior co-counsel in 2 three week criminal mail fraud prosecutions based primarily on alleged breach of fiduciary duty. Multi-week jury trials. First trials in federal court.

United States of America v. Foutch, United States District Court, Middle District of Tennessee, 1981. Appointed co-counsel for defendant in criminal prosecution for conspiracy to bomb Jewish Temple. Multi-week jury trial.

Cartee v. AETNA Casualty and Surety Company, No. 81-3180, United States District Court, Middle District of Tennessee. Jury trial. Ethical issue arose in middle of trial.

Smith v. Tittle, No. 3-83-07634, United States District Court, Middle District of Tennessee, No. 3-83-07634. Civil rights action by inmate against correctional officers. Jury trial.

Centex Rogers v. Treasure Island, No. 88-1630-II, Circuit Court for Davidson County Tennessee. Complex hotel construction case with foreign deposition.

Hudgins v. Metropolitan Government, No. 91C-2408, Chancery Court for Davidson County, Tennessee. Interesting challenge to the Metropolitan Government in expanding garbage services as constituting inverse condemnation of private haulers in annexed areas.

Mike v. Po Group, No. 89-1713-II, Chancery Court for Davidson County, Tennessee. Complicated breach of fiduciary duty claim by minority shareholder against majority shareholders. Issues of first impression regarding fiduciary duties owed to minority

shareholders.

Flynn v. Shoney's, Inc., No. 89-1802-I, Chancery Court for Davidson County, Tennessee. Jury trial in age discrimination case.

Sinclair v. Rocco, No. 90C-373, Circuit Court for Davidson County, Tennessee. Aluminum poisoning medical malpractice case.

Nyquist v. Servpro Industries, Inc., No. CV-94-066-BU, United States District Court for the District of Montana, 1997. Complex franchise, tort and breach of fiduciary duty. Jury trial.

J & J Seafood v. Shoney's, Inc. No. 3:94-1116, United States District Court for the Middle District of Tennessee. Complex franchise and antitrust case.

The Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Board of Commissioners of the City of Forrest Hills, No. 95-1137-III (II), 96-868-III (II) and 96-1421-I (II), Chancery Court for Davidson County, Tennessee. Administrative appeal, certiorari and constitutional challenge to the refusal of the city to rezone property for religious use.

Ginkowski v. International Comfort Products, No. 11077, Chancery Court for Marshall County, Tennessee. Class action shareholder/breach of fiduciary duty case.

Whitaker v. Shoney's, Inc., No. 02C-549, Circuit Court for Davidson County, Tennessee. Class action shareholder/breach of fiduciary duty case.

Faust v. The Metropolitan Government, No. 96-3238-III, Chancery Court for Davidson County, Tennessee. Declaratory judgment action regarding employee benefits.

Amos v. The Metropolitan Government, No. 02-2622-I, Chancery Court for Davidson County , Tennessee and appeal including argument before the Tennessee Supreme Court, No. M2005-00932-SC-R11-CV. Declaratory judgment action regarding employee benefits.

Hicks v. Crescent Resources, Inc., No. II25632, Chancery Court for Williamson County. Jury trial on dispute by leasing agent against employer.

Bass v. Servpro Industries, Inc., No. 96-2359-CA, Circuit Court for Duval County, Florida, 2005. Complex franchise, contract and tort. Jury trial.

In re Jackie Manning for (S.D., a minor), Claim No. 415-67-3149, Office of Hearings and Appeals, Social Security Administration. Restoration of benefits case for child who was determined to have "recovered" from mental retardation. Benefits restored upon proof of brain injury.

In re Student Selection for Magnet Schools in Davidson County, Tennessee, Davidson County

Board of Education, 1995. This is not really a case or an administrative hearing as these were avoided by direct presentation to the Board of Education. It was determined that the "random" system in place in Davidson County for student selection to magnet schools was in fact not random, because it was statistically flawed. Attempts to bring the matter to the attention of the administration and of individual members of the school board failed. Through providing information to the press in conjunction with conducting a hearing before the school board demonstrating that if the same methodology was used, certain members of the Board would always be selected and others could never be selected, the Board recognized that the system was flawed. A new, truly random method of selection was then devised.

In re Direct General Corporation Securities Litigation, No. 3:05-0077, United States District Court for the Middle District of Tennessee. Securities class action.

In re Direct General, Inc. Derivative Litigation, No. 3:05-0158, United States District Court for the Middle District of Tennessee. Breach of fiduciary duty derivative action.

Randall L. Woodruff, et al. v. South Central Conference of Seventh-Day Adventists, et al., No. 3:07-0445, United States District Court for the Middle District of Tennessee (dismissed); Randall L. Woodruff, et al. v. South Central Conference of Seventh-Day Adventists, et al., No. 07C1889,Circuit Court for Davidson County, Tennessee (refiled) and then No. 08-1633-II Chancery Court for Davidson County, Tennessee (transferred). Complex piercing corporate veil and fraud case.

Christopher A. Davis v. State of Tennessee, No. 96-B-866, Criminal Court for Davidson County, Tennessee and No. M2010-01045-CCA-R3-PD, Tennessee Court of Criminal Appeals. Death penalty post-conviction action.

State of Tennessee, on the Relation of Karen Beyke, City Attorney for the City of Franklin, Tennessee v. Mary Dodson Randolph, No. 33815, Chancery Court for Williamson County, Tennessee. Action for ouster of city alderman.

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.

Following the retirement of another judge, I served the remaining four (4) years of that term as Circuit Court Judge in Davidson County. For approximately nine (9) months of that term I was assigned responsibility for the criminal docket for the Fifth Circuit Court upon the resignation of Judge Sterling Gray. Some significant cases handled include:

Green v. General Motors, No. 87-283-II, 1988 Tenn. App. LEXIS 23, January 22, 1988.

Product liability case. Mistrial caused by attorney misconduct for which sanctions were imposed.

State v. Jefferson, 769 S.W.2d 875 (Tenn. Cr. App. 1988). Post-conviction relief case. Issue of whether racial discrimination in selection of jury foreman was separate issue from discrimination in selection of other members of the grand jury which had already been resolved on appeal. Determined that discrimination in selection of foreman and jury members was a singular issue. Also noted, however, that if issues were later determined to be separate, discrimination in selection of grand jury foreman would support the grant of a new trial.

Metropolitan Government v. Sissom, 1989. Contempt sanction against landlord for codes violations.

Michitti v. Arrowsmith, No. 89-106-II, 1989 Tenn. App. LEXIS 577, August 30, 1989. Complex medical malpractice case. Jury verdict for defendant set aside in trial court due to jury's exposure to non-record evidence. Case of first impression in Tennessee.

Caldararo v. Vanderbilt University, 794 S.W.2d 738 (Tenn. 1990). Complex medical malpractice case.

Spence v. Keenan, No. 89-284 II, 1990 Tenn. App. LEXIS 130, February 28, 1990. Libel action regarding television broadcasts.

State v. Shepard, No. 01C01-9409-CC-00322 and No. 01C01-9303-CR-0080. Case and appeal addressed issue of the imposition of sentence after a plea of guilty to rape in excess of recommended sentence. Increased sentence sustained.

In private practice I have been an arbitrator in approximately 20 cases and have mediated well in excess of 225 cases. See also response to question No. 8. Several of the more significant arbitrations include a Tennessee Walking Horse National Celebration eligibility dispute and the two following AAA arbitrations regarding U.S. Olympic sport qualifications, 2004:

Andre Berto and Dr. Robert Voy, President United States Amateur Boxing, Inc., Case No. 30 190 207 04 and Juan McPherson and Dr. Robert Voy, President United States Amateur Boxing, Inc., Case No. 30 190 191 04.

Nina Cutro-Kelly and Dr. Ron Tripp and United States Judo, Inc., Case No. 30 190 00572 04.

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.

None.

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

As a Circuit Court Judge, I tried more than 150 jury trials. After serving as a Judge for two years, I received a positive response from 84% of the lawyers on the Nashville Bar Association Judicial Evaluation Poll. See **Exhibit A.** Since leaving the bench, I have served as a juror in a criminal case and was selected as a member of the Davidson County Grand Jury. Twice, I have been an expert witness on legal ethics.

During my judicial tenure I was involved in two projects that improved court administration. In one, I suggested, and the other judges agreed, that we change the way in which jury cases were assigned for trial. Under the new system, major cases would stay with the original courts for trial at the beginning of a term. All of the other cases (which had not earlier involved significant court consideration) would be set in a "bank-line" system, allowing them to be heard by the next available court. Previously each court had its own docket, resulting in under-utilization of some courts, over-taxing of others and unnecessary continuances. Under this new system, Davidson County Circuit Courts more promptly tried and disposed of a greater number of cases; in a varied form, this system is still used. The second situation involved the selection of the civil case jury venire, which responsibility rotated among the judges. When it was my turn, instead of excusing potential jurors due to scheduling conflicts, we would instead find future dates when they were available, up to a year out. The effect was to give potential jurors convenient opportunities to serve, which resulted in a deeper, more diverse jury poll.

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.

July 2003, Chancery Court, 20th Judicial District (Nashville). My name was submitted to the Governor as one of six nominees for the two open positions. I was not appointed.

July 2007, Court of Appeals, Middle Section. My name was not submitted to the Governor as one of the nominees.

October 2007, Court of Appeals, Middle Section. My name was not submitted to the Governor as one of the nominees.

January, 2008, Chancery Court, 20th Judicial District (Nashville). My name was not submitted to the Governor as one of the nominees.

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.

Seton Hall University	Vanderbilt University	National Judicial College
South Orange, New Jersey	School of Law	General Jurisdiction Program
History, Cum Laude	Nashville, Tennessee	Reno, Nevada
1969-1973	1973-1976	Summer, 1987

PERSONAL INFORMATION

15. State your age and date of birth.

61, September 4, 1951

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

40 years

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

40 years

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

Davidson 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.

Not Applicable, however, I was nominated as an alternative candidate to compete for admission to United States Air Force Academy (1969). In college I received the Northern New Jersey

Reserve Officers Award, Army ROTC, Seton Hall University (1971).

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.

No

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.

St. David's Episcopal Church, Nashville, Tennessee
Episcopal Laymen's Conference of Tennessee (Treasurer, 1995)
Room in the Inn (overnight shelter volunteer)
Meharry Medical College Circle of Friends
National Judicial College, Board of Trustees (2011-)
Nashville Conflict Resolution Center, Board of Directors (2012-)
Monroe Harding, Board of Directors (2006-2009), Board of Advisors (2009-)
Nashville Committee on Foreign Relations

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.

Nashville (member, Board of Directors, 1993-1995; co-chair, Ethics and Unauthorized Practice of Law Committee, 1986 - 1988; chair, Professionalism Committee, 1990 when we drafted Ethics Handbook); Tennessee (member, Juvenile Justice Committee, 1980-1984 when we drafted Rules of Juvenile Procedure; member, Professional Standards Study Committee, 1995-1999 when we drafted the Rules of Professional Conduct; vice-chair, Committee on Ethics and Professional Responsibility, 2000-2006) and American Bar Associations; Nashville Bar Foundation (trustee, 1996-1998; Fellow, 1992-); Tennessee Bar Foundation (Fellow, 1995-); Tennessee Board of Professional Responsibility, Hearing Committee, Disciplinary District V (member, 2013-); Tennessee Judicial Council, Legislative Sub-committee for Study and Review, (chair, 1989); Federal Court Committee (member; chaired subcommittee charged with drafting updated practice and procedure manual, 2005); Merit Selection Panel for the United States District Court, Middle District of Tennessee (chair, 2007); Civil Justice Reform Act

Advisory Group, United States District Court, Middle District of Tennessee (chair, 1995-1997); Disciplinary Committee, United States District Court, Middle District of Tennessee (member, 1977-1981); Leadership Council on Legal Diversity (mentor, 2012-); Harry Phillips American Inn of Court (master, 1990-1994 and 1998-2009; emeritus member, executive committee, 2001); Tennessee Trial Lawyers Association (aka Tennessee Association for Justice) (member, 1994-2000 and 2003-2009); AAA Arbitration Panel (Commercial, Employment, Sports); AAA mediation panel; AAA judicial settlement panel; Tennessee Academy of Mediators & Arbitrators; National Academy of Distinguished Neutrals; former member, NASD Board of Arbitrators; former member CPR National Panel of Distinguished Neutrals (Franchise); approved mediator, Tennessee Commission on Alternative Dispute Resolution.

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.

Appointed Circuit Court Judge, 20th Judicial District of Tennessee, 1986 and then elected to same position, 1988. Elected Assignment Judge, Circuit Courts, 20th Judicial District 1989. Elected Presiding Judge, 20th Judicial District, 1990. Elected to the Board of Trustees, National Judicial College (2011-); Nashville Bar Association, President's Award for Contribution to the Community and Profession, 1989. Elected to the Nashville Bar Foundation, 1992 and Tennessee Bar Foundation, 1995. Elected a member of the Board of Directors of the Nashville Bar Association, 1993. Appointed by Chief Judge, as Chair, Civil Justice Reform Act Advisory Group, United States District Court, Middle District of Tennessee, 1995; argued rule issues before Tennessee Supreme Court in favor of adoption of specific rules of proposed Rules of Professional Conduct, 2002; listed in *Best Lawyers in America*®, commercial and securities litigation, bet the company litigation, franchising, administrative/regulatory law, arbitration and mediation; listed in *Chambers USA – America's Leading Business Lawyers* as a leading commercial litigation attorney in Tennessee (2005, 2006); listed in Mid-South Super Lawyers (2010-); listed in "Best of the Bar," *Nashville Business Journal* (2008); received an AV Preeminent rating from Martindale-Hubbell, which is its highest rating for both ability and ethics; after serving as a Circuit Judge for two years, received a positive response from 84% of the lawyers on the Nashville Bar Association Judicial Evaluation Poll (*see* **Exhibit A**). On those later occasions where I sought nomination from this commission, or election, to the Davidson County Trial Courts I received strong support from the bar. (*see* articles attached as **Collective Exhibit B**). Apparently no polls were conducted by the NBA for the 2007 Court of Appeals positions.

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

Young, Warden and Sweeney, "Tennessee's Sentence Reduction Laws," *The Litigator*, September, 1980; Co-Editor, *Ethics Handbook*, Nashville Bar Association, 1988; Chair, Board of Advisors, *Tennessee Ethics Handbook*, Tennessee Bar Association, 1991-present; Sweeney and Stephenson, "In the Proper Forum - Trial, Arbitration or Mediation," *Tennessee Trial Lawyer*, December, 1994; Tennessee Pattern Jury Instructions – Civil, co-author with Charles

K. Grant of practice considerations (LexisNexis, 2007); Sweeney and Collins, "Mandatory Disclosure of Information Relating to a Client Under the Tennessee Rules of Professional Conduct," Nashville Bar Journal, June 2010.

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.

Civil Procedure, Nashville School of Law (final year, 2009)

Seminar, "Truth, Lies and Permissible Puffing: The Psychology and Ethics of Negotiating deals," *Mediators role/Duty in Insuring Fairness and Integrity in Negotiations in the Mediation Process,* Nashville Bar Association, July 2010

Seminar, "Effective Communications in Mediation," Franchise Business Network, January 2011

Seminar, "Strategies, Tactics and Common Mistakes in Arbitrations," American Bar Association, May, 2012

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.

Circuit Court Judge, 20th Judicial District, Nashville, Tennessee. Appointed in 1986 and elected in 1988. Served until expiration of the term in September, 1990.

In July 2003 I submitted an application for appointment to the Chancery Court, 20th Judicial District (Nashville). My name was submitted to the Governor as one of six nominees for the two open positions.

In May 2006 I was a candidate for election to the position of Circuit Court Judge, 20th Judicial District (Nashville). Although I was fortunate to receive very strong support from the bar, I was unsuccessful in the election.

In July 2007 I submitted an application for appointment to the Court of Appeals, Middle Section. My name was not submitted to the Governor as one of the nominees.

In October 2007 I submitted an application for appointment to the Court of Appeals, Middle Section. My name was not submitted to the Governor as one of the nominees.

In January, 2008 I submitted an application for appointment to the Chancery Court, 20th Judicial District (Nashville). My name was not submitted to the Governor as one of the nominees.

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

I have been a registered lobbyist. The only time I remember was in 2000, on behalf of a public adjuster company. I have not been a lobbyist since then. Also, as staff attorney to the Tennessee Department of Correction, 1979-1981; I lobbied as part of my duties, including drafting, monitoring and working with legislators on proposed legislation.

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.

Tennessee Supreme Court Brief and an article are attached. I was the principal author of each. (See **Exhibits C and D**).

ESSAYS/PERSONAL STATEMENTS

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

I was fortunate to serve as a judge early in my career. It was challenging, rewarding. Twenty-three years ago I decided not to seek reelection, missing the fray and having other obligations to my family to fulfill, but hoped to have the opportunity to serve again in the future. Now, I have fulfilled my obligations. I have fought my fights and broadened my experience. I have further matured in the profession. I miss the scholarship, the constant learning of being a judge. I relished the challenges of judging--providing a fair and impartial forum where all parties could fully and properly present their cases, trying to reach the right decision, rather than just advocating a position. I have never been so professionally satisfied as when I was a judge. I miss that challenge and the reward, and would appreciate the opportunity to serve again.

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)***

I have actively participated in pro bono in nearly every year since my second year in law school. I have represented Pro bono clients. I have supervised representation by others. I have accepted criminal appointments in difficult and unpopular cases.

In the most significant civil case I handled I represented S.D., a disabled child. The Social Security Administration determined she was no longer disabled because she had "recovered" from mental retardation (as the term was then used), which had been diagnosed at birth. Despite the impossibility of this "recovery," the SSA cut off her benefits. We were able to prove that S.D. was disabled, but due to a brain injury at birth, which had not been properly diagnosed earlier. Benefits were restored. Since that time, we have also assisted her mom in securing educational services for her daughter. Our relationship continues.

More recently I was lead appointed counsel in a post-conviction death penalty case. Davis v. State, 96-B-866, Criminal Court, Davidson County, Tennessee and No. M2010-01045-CCA-R3-PD, Tennessee Court of Criminal Appeals. Years earlier, I had been appointed to represent an alleged Nazi in a conspiracy to blow up the Temple in Nashville. United States of America v. Foutch, United States District Court, Middle District of Tennessee, 1981.

I chaired the Nashville Pro Bono/Legal Services campaign in 1993. In 2007 and 2009 (jointly with two others that year) I received the Baker Donelson pro bono award I was recipient of the Howard Baker Award for significant contribution to the legal profession in 2012.

On a related, but separate point, I have actively promoted the hiring, development and advancement of minorities and women, and have served as a mentor. Currently, I mentor a law student through the Leadership Council on Legal Diversity.

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)***

I seek nomination to the four member Tennessee Court of Appeals, Middle Section, which hears a broad mix of civil cases including domestic, tort, contract/business, government/agency, property, parental rights and prisoner cases. In most cases, it is the court of last resort, as the Tennessee Supreme Court grants review in few cases.

I would bring to the court significant experience in many areas of law, trial experience as both a judge and as a lawyer, similar experience as an arbitrator, and the scholarly interest and disciplined approach as a legal instructor.

As a judge I was prepared for trial and argument. I listened actively and critically. I was prompt in rulings. Collegiality, including the ability to work with and consider views of others, and the ability to disagree when necessary in a positive and constructive manner, is an essential element in a cohesive multi-judge court. As a member of several arbitration panels, I have worked very well with others in similar situations.

I appreciate the difference between the role of the trial court and the Court of Appeals. Many trial court cases are resolved by jury verdicts or brief orders, which often are of significance to the parties alone. Appellate cases are different. They are usually decided by written opinions, which are important both to the parties and to public, as they can provide guidance in future disputes. The court's opinions must be written with particular care and clarity to fulfill both purposes.

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)***

Generally, I intend to have the same involvement as now, except I would not be allowed to participate in fundraising. I expect to teach, speak and write about legal issues and participate on bar and law organization committees. I will continue to be active in programs such as Room in the Inn, the Nashville Conflict Resolution Center and the National Judicial College.

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)***

I am one of seven children. My father was a first generation American; his father, an Irish immigrant, was a longshoreman on the docks of New York. My mother's father was truck driver. My parents emphasized education, discipline and hard work. Each of us attended public schools, lived at home while commuting to a local college and worked to help pay our tuition and expenses. We all graduated from college and five of us earned graduate degrees. I am the first lawyer in my family. I am grateful to my parents for the foundation they gave me. My wife and I have strived to provide similar support and guidance to our children.

I have been fortunate to have had mentors who were as quick to compliment as to criticize. They helped me learn to be a competent, loyal and ethical lawyer. I have had broad experience in many areas of trial and appellate practice, civil and criminal, and on both sides of civil cases, representing individuals and businesses. I have been in public practice and private practice and have dealt with all branches of the government. I also have taught trial practice and civil procedure. I was a respected trial judge, where I strived to be diligent, impartial, and prepared.

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)***

I will uphold the law. A judge may not disregard the law because she/he disagrees with it. Although I have never faced the exact situation this question poses, I have addressed one somewhat similar. In Michitti v. Arrowsmith, No. 89-106-II, 1989 Tenn. App. LEXIS 577, August 30, 1989, a complex medical malpractice case, plaintiff moved to set aside a defense jury verdict due to the jury's exposure to non-record evidence. Although the jury verdict for the defendant appeared to be consistent with the weight of the evidence, regardless of the outside influence, the jury misconduct could not be considered legally harmless and a new trial had to be granted, which decision was affirmed on appeal.

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. Lew Conner, partner, Waller, 2012 Richard Jones Road, Suite 340, Nashville, TN 37215, lew.conner@wallerlaw.com, 615-850-8495
B. Aubrey Harwell, Jr., partner, Neal & Harwell, 150 Fourth Ave. N, Suite 2000, Nashville, TN 37219, aharwell@nealharwell.com, 615-244-1713
C. Charles K. Grant, shareholder, Baker, Donelson, 211 Commerce St., Suite 800, Nashville, TN, cgrant@bakerdonelson.com, 615-726-5767
D. Valerie Meece, Asst. Chief, Metro Police (ret.), (Served together as panel members in a case before the Selection Appeals Panel of the Metropolitan Police Department)
E. Jackie Manning,

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 office of Judge of the Tennessee Court Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time 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: June 5, 2013.

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 and to the office of the Governor.

Matthew J. Sweeney
Type or Printed Name

Matthew Sweeney
Signature

6/5/13
Date

005015
BPR #

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

None

N MJS 964635 v1
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Metro ● State news

Bar association gives Sweeney strong support in judicial race

KIRK LOGGINS
Staff Writer

Circuit Judge Matt Sweeney, who has two opponents in the March 8 Democratic primary, received a strong vote of support in poll results released yesterday by the Nashville Bar Association.

In the only other contested judicial race on the primary ballot, General Sessions Judge Phillip Sadler was outdistanced by challenger George Linebaugh in the "candidate evaluation poll" conducted by the bar association.

Linebaugh received positive votes from 57% and negative votes from 8% of the 935 lawyers who responded to the poll.

Sadler, who served on the Metro Council for 11 years before the council chose him to fill a General Sessions Court vacancy in January 1987, got positive responses from 37% of the lawyers and negative responses from 28%.

Both Linebaugh and Sadler received "no opinion" responses from 35% of the NBA members who participated in the poll.

The bar association recommended endorsement of three unopposed incumbents, Criminal Court Judge Ann Lacy Johns, Criminal Court Judge Tom Shriver and District Attorney General Torry Johnson, in an "incumbent evaluation poll" in December.

Sweeney was recommended for endorsement by 75.4% of the 1,033 lawyers who responded to the December poll, while Sadler was recommended for endorsement by 36% of the December poll respondents.

NBA rules provide for a second poll involving all contested judicial races, and Linebaugh said yesterday he was pleased that he had been "endorsed" by the bar association.

But NBA president-elect Jonathan Harwell said yesterday the organization uses the word "recommend" rather than "endorse" in the second round of polling.

In the second poll, NBA members were not asked whether they "endorse" one candidate over another, but whether they "highly recommend," "recommend," "do not recommend" or have "no opinion" on candidates for judicial office.

The poll is aimed at assessing a candidate's "ability to be a judge," Harwell explained. "It has nothing to do with character per se."

Harwell said officials of the bar association "hope the public will make use of this information about how the lawyers feel about these candidates."

Sweeney received positive responses in the latest poll from 84% of the lawyers and negative responses from 6%. Only 10% of the poll respondents said they had no opinion of Sweeney, whom former Gov. Lamar Alexander named to a Circuit Court vacancy in September 1986.

One of Sweeney's challengers, attorney Fred E. Cowden Jr., got positive responses from 36% of the lawyers, negative responses from 21% and "no opinion" votes from 43%.

Attorney E. Lee Allen, the third candidate for the Circuit Court seat, received positive responses from only 8% of the lawyers and negative responses from 31%. More than half, or 61%, of the survey respondents said they had no opinion of Allen's qualifications to be a judge. ■

EXHIBIT A

COLLECTIVE
EXHIBIT B

Chancery, appeals court candidates named

Bredesen makes final decision

By Amanda Wardle
awardle@nashvillecitypaper.com

The 17-member state Judicial Selection Commission last weekend completed deliberations in the selection of potential appointees for available Metro and state judgeships, choosing and recommending candidates for two Metro Chancery Court judgeships and one Court of Appeals vacancy to Gov. Phil Bredesen for appointment.

Six candidates were presented Friday evening for two Chancery Court positions on the Metro bench:

- Matthew Sweeney, private attorney and former Metro Circuit Court judge.
- David Randall Kennedy, private attorney, partner Kennedy & Brown.
- Charles High Jr., disciplinary council to the state Board of Professional Responsibility.
- Richard Dinkins, private attorney and principle at Dodson, Parker, Dinkins & Behm.
- John M.L. Brown, private attorney.
- Claudia Bonnyman, Chancery Court clerk and master.

One of the available Chancery Court vacancies was made available earlier this year following approval by state legislators after they reviewed a weighted caseload study that showed judges in Davidson County to be facing extremely heavy caseloads that were showing substantial increase every year. The second vacancy was left open with the announcement that longtime Metro Chancellor Irvin Kilcrease would retire this fall.

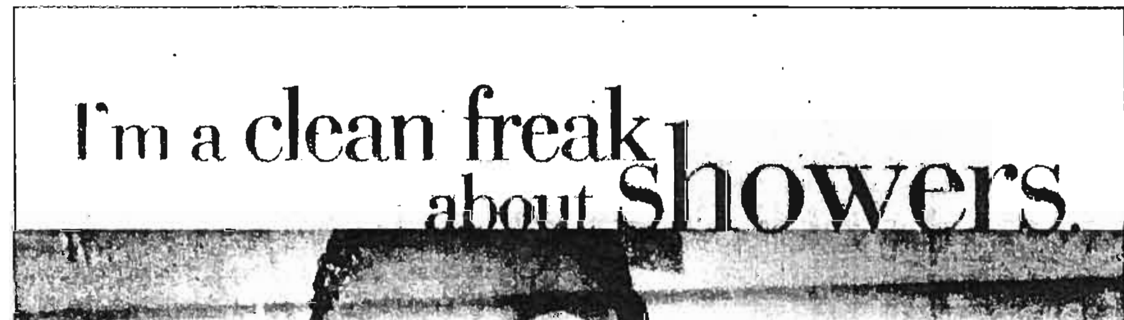
The commission also presented three candidates for one vacancy on the Tennessee Court of Appeals, an opening that was left with the announcement that Judge Ben Cantrell will retire.

- Connie Clark, Director of the Tennessee Administrative Office of the Courts.
- Donald Capparella, a private attorney specializing in appellate matters.
- Frank Clement Jr., Metro Seventh Circuit Court Judge.

Candidates for all three positions will be appointed by Bredesen, though there is no deadline for his decision, and he has offered no specific timeframe, except to say that appointments will be made "in a timely fashion." Bredesen has given no indication as to what, if anything, might influence his decision, but he said through a spokesperson last week that he looks for "strong legal abilities, a good reputation in the legal community in general and someone with the highest ethical standards."

The Nashville Bar Association last week issued a poll of its members, who were asked to provide their opinions about the applicants for available Metro and state judgeships. The following are the results of that poll for the candidates recommended last week by the state Judicial Selection Commission for available positions in Metro Chancery Court and Tennessee Court of Appeals.

Chancery Court	Highly Recommend	Recommend	Do Not Recommend	No Opinion
Claudia Bonnyman	39%	27%	8%	26%
John M.L Brown	10%	20%	19%	51%
Richard Dinkins	16%	25%	18%	40%
Charles High Jr	9%	24%	16%	51%
David Randall Kennedy	6%	14%	11%	70%
Matthew Sweeney	35%	22%	10%	33%
Court of Appeals				
Donald Capparella	12%	17%	10%	60%
Connie Clark	30%	21%	10%	39%
Frank Clement Jr.	55%	26%	6%	14%



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Sweeney rated highest for election by lawyers

78% of nearly 900 recommend him

Matt Sweeney

By SHEILA BURKE
Staff Writer

Published: Tuesday, 03/28/06

Nashville lawyer Matt Sweeney got more recommendations than any other candidate running in the upcoming judicial races in Davidson County, according to a poll released yesterday of nearly 900 lawyers in the Nashville Bar Association.

Sweeney, who is running for the Davidson County Circuit Court Division II seat, was recommended for the job by 78% of his colleagues.

"I was heartened that people still remember my performance as a judge and my performance as a lawyer and mediator and arbitrator," he said.

"I'm really looking forward for the opportunity to serve the community again."

The lawyers, however, gave Davidson County Circuit Judge Carol Soloman the most negative votes, with 35% of them voting to not recommend her. Soloman, who hears roughly half of all divorce cases in Nashville, still had more positive recommendations than her opponent, Nashville lawyer Jefre Goldtrap.

"It's been a tradition that domestic judges get low marks because a good domestic judge leaves both parties somewhat unhappy," she said.

Candidates are fighting for six judicial seats, two court clerk positions and the office of Metro Public Defender in the May Democratic primary election. Since all but one of the candidates are Democrats, every race but the one for judge in General Sessions Division III will be decided on May 2.

"The goal of doing the poll is to provide the media and the public with information," Nashville Bar Association president Sheree Wright said in a statement.

"The purpose is twofold: One, to encourage the election of qualified judges and public officials in the judicial system, and two, to have attorneys who are likely to know these candidates, both personally and professionally, provide an opinion on their qualifications." •

Published: Tuesday, 03/28/06

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Jameson, Binkley lead Nashville Bar poll for Circuit Court slot

UPDATE - Appointment could launch Metro Council race; Baker attorney heavily favored for Chancery post

Published February 29, 2008 by Ken Whitehouse

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The Nashville Bar Association has published the results of a survey of its members on who they'd like to succeed Judge Walter Kurtz on the Circuit Court bench.

Metro Councilman Mike Jameson and local attorney Joseph Binkley, Jr. lead the poll, in which almost 1,100 members of the bar participated. Also rating highly is Mary Ashley "Marsh" Nichols, special master for the Davidson County Circuit Courts. In the race for Chancery Court judge, **Matthew Sweeney of Baker Donelson** Bearman Caldwell & Berkowitz leads the pack by a mile among Bar members.

The choices both positions, however, will be up to the Tennessee Judicial Selection Commission. While the candidates await that decision, there is another group of individuals waiting to see if Jameson is selected. Should he don the robe, he would resign from the Metro Council and thus set off a special election for that seat.

NashvillePost.com has already heard of a number people that might be interested in stepping up to the plate for that job. Among them are former at-large candidate Peter Westerholm and local attorneys Jeff Ockerman and Kenny Byrd.

While those names are pure speculation from political insiders, here are the abridged results of the Nashville Bar's poll, with the candidates ranked by the percentage of respondents highly recommending them for the bench. (To download the full results, **click here**.)

Michael Jameson - 23.9%
Joseph Binkley, Jr. - 20.1%
"Marsh" Nichols - 19.1%
Russell T. Perkins - 6.8%
Amy Gowan 4.6%
Marian LeRoy Kohl - 4.4%
"Kitty" Boyte - 4.2%
Sarah Stein - 2.3%
Cynthia M. Odle - 2.2%
Jefre Scot Goldtrap - 0.5%

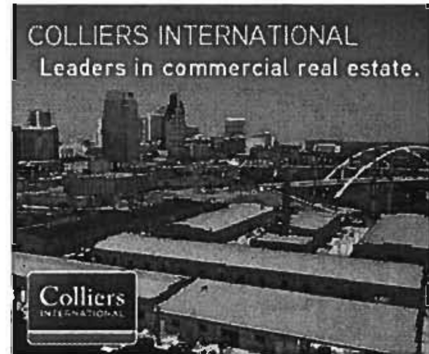
But Nichols jumps to the top when the 'highly recommend' and 'recommend' responses are combined:

"Marsh" Nichols - 42.5%
Joseph Binkley, Jr. - 41.0%
Michael Jameson - 37.7%
Russell T. Perkins - 16.0%
"Kitty" Boyte - 15.1%
Amy Gowan 12.5%
Cynthia M. Odle - 10.4%
Marian LeRoy Kohl - 10.0%
Sarah Stein - 8.7%
Jefre Scot Goldtrap - 3.7%

Politics Davidson County Circuit Court Jefferson H. Ockerman Joseph Pitts Binkley Jr. Kenneth S. 'Kenny' Byrd Mary Ashley Nichols Michael F. Jameson Peter Westerholm Walter C. Kurtz Judicial appointments/elections Politics: Metro government

POSTDATA: SEARCH

GO



POSTDATA: CHARTERS

AMSURG PORT ORANGE ANESTHESIA LLC
AMSURG CITRUS ANESTHESIA LLC
219 FRANKLIN ASSOCIATES LLC; H G HILL BRENTWOOD LLC; HILL H G BRENTWOOD LLC; TWO NINETEEN FRANKLIN ASSOCIATES LLC
RAY PROPERTY INVESTMENTS LLC
MORE >>

POSTDATA: WARRANTY DEEDS

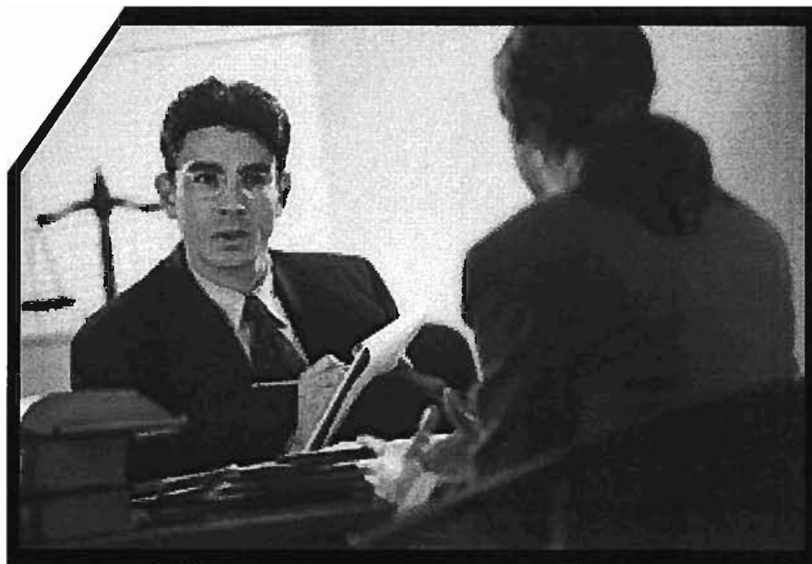
BAL, DEEPINDER S; BAL, INDUMEET B
JAIN, SHEETU; JAIN, YUGESH KUMAR
PINE OAKS PROPERTIES TWO GP; YAZDIAN, FRED
CHAPPELL, ERIC; CHAPPELL, KRISTEN
MORE >>

POSTDATA: JUDGMENTS

BISHARA, VICTOR; HAYSVILLE ESTATES LLC; THREE RIVERS OF RUTHERFORD LLC; VANDERSCHAAF, CLAIR D
CROWDER, LINDSAY; J & L ENTERPRISE; J&L ENTERPRISE; KILLOM, GERALD G; KILLOM, GEORGE; SWAYZE, LINDSAY
MORE >>

2. In the selection for the position of Chancellor for Chancery Court, Davidson County (evaluate each candidate):

	Highly Recommend	Recommend	Do Not Recommend
Katherine Dent "Kitty" Boyte	3.9% (42)	11.1% (120)	9.8% (106)
Julie M. Burnstein	25.6% (277)	15.4% (167)	6.3% (68)
Jefre S. Goldtrap	0.5% (5)	3.1% (34)	23.3% (252)
William Joseph Haynes, III	16.0% (173)	24.2% (262)	10.1% (109)
Renard A. Hirsch, Sr.	5.1% (55)	9.4% (102)	14.3% (155)
Alan D. Johnson	12.7% (137)	11.7% (127)	3.8% (41)
Irwin J. Kuhn	16.2% (175)	17.8% (193)	5.8% (63)
Russell T. Perkins	6.2% (67)	9.1% (99)	11.0% (119)
Cristi Eileen Scott	7.2% (78)	11.8% (128)	13.9% (151)
Sarah Stein	2.2% (24)	6.6% (71)	12.8% (139)
Matthew Sweeney	**47.4% (513)**	22.3% (241)	11.1% (120)



Mandatory Disclosure of Information Relating to a Client under the Tennessee Rules of Professional Conduct

by: Matt Sweeney & Caldwell G. Collins

1) *The divorce has been vicious. Neither party has been rational. Emotions run at a fevered pitch. After the judge denied holiday visitation, your client storms out of the office shouting, "This is going to end today."* What should you do?
2) *The vehicle's front seat meets all federal safety and design standards. But as an attorney in the product development division, you learn that its collapse in certain collisions poses a serious danger to any child in the rear passenger seat. Being a young parent, you are particularly concerned. The design team leader explains that all product designs pose some risk and, considering the alternatives, this is the best option, regardless of the small statistical likelihood of serious injury or death.* What can you do?
3) *Execution is scheduled for 12:01 a.m. The Supreme Court denied the final appeal. Another client in an unrelated case calls at 4:00 pm. He tells you that he, not the man to be executed, committed the murder. He is unwilling to come forward.* Can you do anything?

The Ethics of Confidentiality

A lawyer's primary duty to his client is one of loyalty. That duty entails pursuing and protecting the client's interests and preserving sensitive client information.[1] It is a fundamental principal in the lawyer-client relationship that the lawyer must maintain confidentiality to facilitate three main objectives: (1) to encourage clients to seek legal representation; (2) to fully develop facts necessary for representation; and (3) and to promote full and frank communication with lawyers.[2] However, the duty of, and justification for, confidentiality and the related, but distinct, attorney-client privilege are often misunderstood by the general public. Furthermore, a conflict sometimes arises between the duty to protect client confidences and other important values: "The broad prohibition against divulging confidential client information comes at a cost to both lawyers and society. Lawyers sometimes learn information that cannot be disclosed because of the rule of confidentiality but that would be highly useful to other persons."[3] Lawyers are criticized for protecting criminals by withholding information that the public "has the right to know," whether it concerns the location of a victim's body or the public health risk of tobacco.[4] "Nonetheless, despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it."[5] But the rule is not absolute. Professional ethical cannons, codes and rules seek to balance the competing interests between the client and the public by recognizing exceptions to confidentiality to permit, and in some circumstances require, disclosures.

EXHIBIT C

Before 2002, in scenarios 1 through 3 above, a lawyer in Tennessee was required to preserve the client's "secrets" and "confidences." Our state treated this ethical duty as near absolute absent client consent.[6] Otherwise, the lawyer was permitted to make a disclosure only where the client *expressed an intention* to commit a crime;[7] absent such expression, the lawyer was neither required nor permitted to disclose a client confidence even to prevent death or bodily injury.

In 2002, the Tennessee Supreme Court adopted the Rules of Professional Conduct (RPC).[8] The RPC reset the balance between confidentiality and public disclosure: first, it expanded the lawyer's obligation of confidentiality by protecting all "information relating to the representation of the client" rather than the narrower "secrets" and "confidences" under the previous Code of Professional Responsibility.[9] Second, it also significantly contracted the protection by requiring the disclosure of information necessary to prevent reasonably certain death or substantial bodily harm.[10] While the RPC was created in part to provide guidance to lawyers in difficult ethical situations, Rule 1.6, "Confidentiality of Information," creates a new ethical dilemma for Tennessee attorneys regarding the proper measure of disclosure of confidential information: when is disclosure necessary to prevent reasonably certain death or substantial bodily harm? Must a lawyer choose between exposing himself to liability through nondisclosure and divulging his client's information?

Tennessee Rule of Professional Conduct 1.6: Confidentiality of Information

RPC 1.6 is divided into three parts. The first recognizes the expanded general duty of attorneys to keep information relating to the client relationship confidential, providing:

> (a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

In the second part, RPC 1.6(b) provides that a lawyer *may*, under certain circumstances, disclose information as previously authorized under DR 4-101(c). The third part of the rule is entirely new, recognizing the "overriding value of life and physical integrity."[11] RPC 1.6(c) mandates that:

> (c) A lawyer *shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm; . . .[12]

This rule was adopted by the Supreme Court on its own initiative.[13]

This new rule has broad application. The threats to life and physical integrity embraced by the rule "may be the product of a client or a non-client and may be created by wrongful acts, by accident or by circumstances."[14] Rule 1.6 does not specifically address how the lawyer should determine when or whether disclosure should be made, but establishes several conditions that must be met. The lawyer must "reasonably believe" that (1) "death or substantial bodily harm" is threatened; (2) the threat is "reasonably certain"; and (3) disclosure is "necessary" to prevent the harm.[15]

Herein lies the conundrum: How is a lawyer to know when the conditions have been met? First, the Rule does not define the term "substantial bodily harm," although the comments provide examples of the harm necessary to trigger disclosure:

> Substantial bodily harm includes life threatening and debilitating illnesses and the consequences of child sexual abuse. . . . Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.[16]

The Restatement (Third) of the Law Governing Lawyers suggests that substantial bodily harm includes life-threatening injuries, the consequences of events such as imprisonment for a substantial period, and suicide.[17]

Second, when is the threat reasonably certain? Perhaps the threat is vague, your client was just blowing off steam, or the manufacturing process may be changed. How great is the risk and is it imminent? While the rule does not impose an "imminency" requirement in all circumstances (*i.e.*, the time between the conduct and the harm need not be short), there must be a clear causal link between the conduct and the apprehended harm to satisfy this condition. The Committee comment states: "Such injuries are reasonably certain to occur if they will be suffered imminently or if there is a present and substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action necessary to eliminate the threat."[18]

Continued on Page 16 ➲

Finally, is disclosure necessary to prevent the harm? Addressing a similar, although permissive, disclosure provision, one commentator has suggested the lawyer must believe disclosure will be effective in preventing the threat.[19] If the conduct posing the threat has occurred, or will occur before the lawyer effectively can prevent its occurrence, it may be improper to disclose the information.

Parsing the Language: How Strong Are Your Ethics?

While RPC 1.6 provides some guidance regarding confidentially, each attorney must determine when a threat warrants disclosure. So what is a lawyer to do? Consider the three scenarios introduced above. In the first, perhaps there is a risk of death or substantial bodily harm, but further investigation or information is needed. What did the client mean by "*This is going to end today*."? Did he mean that he is going to have a heated, blunt conversation with his wife, that he is giving up the fight, or that he is resorting to violence? Whether the threat is reasonably certain is also unclear: the husband's vague statement provides no certainty. Is disclosure necessary to prevent the harm? Perhaps the lawyer can reach her client on his cell phone and determine that he has cooled off and poses no threat. This scenario boils down to how well the lawyer knows her client and what she *reasonably* believes.

The second scenario presents a threat of death or serious bodily harm. Is it reasonably certain? The threat seems only statistical and almost unavoidable when weighed against the other options. In the same vein, disclosure does not appear necessary to prevent the harm. If the lawyer takes the matter up through the chain of command within the company, the design may be changed or the concern otherwise appropriately addressed; however, the change might expose consumers to an equally-dangerous alternative. Still, the threat is present; will the lawyer be held liable for injuries if he does not disclose the confidential information?

The third scenario is both most clear and most difficult. Death is certainly threatened: execution will be performed at 12:01. Is disclosure necessary to prevent the harm? While one's inclination is to answer "yes," the scenario is still unclear: to whom could the lawyer make the disclosure? Can a stay of execution be obtained? In addition, if the lawyer comes forward and her client is later tried, she may expose her client to a reasonably certain threat of substantial bodily harm or death.[20]

Assuming the lawyer has formed a reasonable belief that disclosure is required to prevent reasonably certain death or substantial bodily harm, what should the lawyer do? Unfortunately, the RPC leaves the lawyer pondering how and when to discharge her obligation. Contemplating disclosure without the client's consent puts the lawyer at odds with the client's self-defined interests.[21] As such, the comments to RPC 1.6 strongly indicate that disclosure is a last resort: "Where practical, the lawyer should seek to persuade the client to take suitable action."[22] Where absolutely necessary, "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose."[23] The end of the ethical road is the lawyer's best judgment under the circumstances.

Conclusion

Every Tennessee lawyer, regardless of practice area, may be faced with this issue of mandatory disclosure.[24] RPC 1.6 and its comments provide useful guidance in addressing the dilemma, but much is, poetically, left to the lawyer's own ethics.[25] So be prepared to ask yourself: *what do I stand for . . . and what should I do?* ■

***Matt Sweeney** is a former Davidson County Circuit Court Judge and currently a shareholder in the Nashville office of Baker Donelson Bearman Caldwell & Berkowitz, PC. He was a member of the TBA Committee for the Study of Standards of Professional Conduct. He can be reached at 615-726-5774 or msweeney@bakerdonelson.com.*

***Caldwell Collins** is a litigation associate in the Nashville office of Baker Donelson and can be contacted at 615-726-5762 or cacollins@bakerdonelson.com.*

(Endnotes)

1. Tenn. Rules of Prof'l Conduct R. 1.7 cmt. 1 (2008); Restatement (Third) of the Law Governing Lawyers § 16 cmt. e (2000).
2. Tenn. Rules of Prof'l Conduct R. 1.6 cmts. 2, 4; see Amanda Vance & Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 Geo. J. Legal Ethics 1003 (2004).
3. Restatement (Third) of the Law Governing Lawyers § 60 cmt. e.
4. Monroe Freedman, *Where the Bodies Are Buried: The Adversary System and the Obligation of Confidentiality*, 10 Crim. L. Bull 979 (1974); William H. Simon, *The Confidentiality Fetish: The Problem with Attorney-Client Privilege*, Colum. L. Sch. Rep., Winter 2005, *available at* http://www.law.columbia.edu/law_school/ communications/reports/ winter2005/confidental.
5. Restatement (Third) of the Law Governing Lawyers § 60 cmt. e.
6. Certain disclosures were authorized by Tenn. Code of Prof'l Responsibility DR 4-101(C) (2001).
7. "A lawyer may reveal the *intention of a client* to commit a crime and the information necessary to prevent the crime." *Id.* (emphasis added).

Continued on Page 18

Continued from page 16

[8] From 1970 until March 1, 2003, the professional conduct of Tennessee lawyers was governed by ethics rules patterned after the 1969 American Bar Association *Model Code of Professional Responsibility*. The RPC is patterned after the ABA's 1983 *Model Rules of Professional Conduct*, but includes some modifications reflecting particular Tennessee practices, statutory law, and established decisions. On August 27, 2002, the Tennessee Supreme Court approved new *Tennessee Rules of Professional Conduct*. The new rules, amended slightly by the Court on September 17, went into effect March 1, 2003. Proposed amendments are pending, but none will revise 1.6 or the analysis of that rule.

[9] "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source." Tenn. Rules of Prof'l Conduct R. 1.6 cmt. 5; Tenn. Code of Prof'l Responsibility DR 4-101(A)(defining "confidential" and "secret"); *see also* Carl A. Pierce & Lucian T. Pera, *Your Ethics Roadmap: TBA Experts Guide You Through the New Tennessee Rules of Professional Conduct*, 38 Tenn. B.J. 14 (2002), *available at* http://tba.org/Journal_TBArchives/tbjdec02.html.

[10] In the 1980 draft of the ABA Model Rules of Professional Conduct, Rule 1.7 required the disclosure of information necessary to prevent a client from committing an act that would result in death or serious bodily injury. However, in 1981, the draft was revised to make the disclosure permissive and applicable only to criminal acts likely to cause death or serious bodily injury. Doug Shafer, Compilations of Historic Lawyer "Ethics" Rules on Acting to Prevent or Rectify Client Crime or Fraud, http://evergreenethics.com/HistoricFraudRules.html (last visited April 2, 2010). The Model Rules still provide for permissive disclosure. As of November 9, 2009, all state jurisdictions either permit or require disclosure to prevent death or substantial bodily harm in at least some circumstances. ABA CPR Policy Implementation Committee, Comparison of Rule 1.6(b)(1) with Current and Proposed State Ethics Rules (2009), http://www.abanet.org/cpr/jclr/1_6b1.pdf. Forty-nine jurisdictions do not require that the injury be imminent; thirty-three do not limit disclosure to situations in which the client is the perpetrator; thirty-one do not require that the conduct be either criminal or fraudulent; and twelve jurisdictions in addition to Tennessee require disclosure. *Id.*

[11] Tenn. Rules of Prof'l Conduct R. 1.6 cmt. 16.

[12] *Id.* R. 1.6. (emphasis added).

[13] "In response to a proposal by the TBA to *permit* disclosure of client confidential information necessary to prevent reasonably certain death or substantial bodily harm, the court decided that disclosure in such circumstance should be mandatory. In this regard, Tennessee joins a growing minority of states that require disclosure when life or limb is at stake." Pierce & Pera, *supra* note 9 (emphasis added).

[14] Restatement (Third) of the Law Governing Lawyers § 66 cmts. a, b at 496.

[15] Tenn. Rules of Prof'l Conduct R. 1.6.

[16] *Id.* cmt. 16.

[17] Restatement (Third) of the Law Governing Lawyers § 66 cmt. c at 498-99.

[18] Tenn. Rules of Prof'l Conduct R. 1.6 cmt. 16. *Compare id. with* Iowa Rules of Prof'l Conduct R. 1.6 cmt. 19 (2005) (distinguishing between "imminent" and "reasonably certain").

[19] State Bar of California Ethics Hotline, *Ethics Alert: The New Limited Exception to the Professional Duty to Protect Client Secrets and Confidences*, Ethics Hotliner, May 2008, at 3, http://www.calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert_Ltd-Client-Confidence.pdf (discussing adoption of Rule of Professional Conduct 3-100 regarding permissive disclosure) (quoting New York City Bar Formal Op. 2002-01: "[A] lawyer may not ethically disclose client confidential information based upon her mere suspicion that a client intends to commit a future crime, ... but that she must have a reasonable basis for believing that the client intends to commit a crime before she is permitted to make disclosure (holding that disclosure of client's confidential information as to burial location was necessary because of lawyer's reasonable belief that children were still alive and could be rescued).").

[20] *See 60 Minutes: Lawyers Keep 26-Year Secret* (CBS Television Broadcast May 25, 2008), http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719_page4.shtml?tag=contentMain;contentBody.

[21] Disclosure of information relating to the representation of the client under RPC 1.6(c) will not automatically make the lawyer a witness against the client because the professional duty of confidentiality is distinct from the attorney-client privilege. Comment 5, recognizing the distinction, states:

> The principle of lawyer-client confidentiality is given effect by related bodies of law, including the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or as required by the Rules of Professional Conduct or other law.

Tenn. Rules of Prof'l Conduct R. 1.6 cmt. 5; *see also*, *Purcell v. Dist. Attorney*, 676 N.E.2d 436, 437–41 (Mass. 1997)(ruling that, while lawyer under ethics rules properly revealed to law enforcement client's threats to burn down his apartment building, trial court erroneously denied lawyer's motion to quash a subpoena to testify regarding those incriminating statements in prosecution of client for attempted arson because crime-fraud exception to attorney-client privilege did not apply as the communications were not for the purpose of assisting or furthering the threatened conduct); *In re Grand Jury Investigation*, 902 N.E.2d 929 (Mass. 2009)(reaffirming *Purcell*). For fuller discussion, see Gregory Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 380-384 (2007).

[22] Tenn. Rules of Prof'l Conduct R. 1.6 cmt. 14. "The client can, of course, prevent such disclosure by refraining from the wrongful conduct. . . . Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b)." Tenn. Rules of Prof'l Conduct R. 1.6 cmt. 10. "[T]he lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure." *Id.* cmnt. 13.

[23] Tenn. Rules of Prof'l Conduct R. 1.6 cmt. 14.

[24] For another context in which the disclosure duty might arise, see Joel Cohen & Katherine A. Helm, *When a Lawyer Knows of Reasonably Certain Death*, Law.com, Feb. 1, 2010, http://www.law.com/jsp/article.jsp?id=1202439683892.

[25] *Cf.* Adam Liptak, *Lawyer Whose Disclosure of Confidence Brought Down a Judge Is Punished*, N.Y. Times, Apr. 20, 2003, *available at* http://www.nytimes.com/2003/04/20/us/lawyer-whose-disclosure-of-confidence-brought-down-a-judge-is-punished.html?pagewanted=1 (Washington Supreme Court ruled that lawyer who divulged client's confidences to bring down corrupt judge acted improperly and suspended lawyer for six months; Robert Winsor, visiting judge writing in partial dissent, questioned majority's contention that punishment was needed to maintain confidence in the judicial system; Judge Winsor wrote: "A more likely public reaction to such a harsh sanction in the post-Enron era . . . is the opposite—a perception that lawyers can be counted upon not to reveal fraud perpetrated by their clients because any whistle-blowers among them will be severely punished by the courts regardless of the public good that such whistle-blower might accomplish.").

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

WILLIS BRUCE AMOS, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
METROPOLITAN GOVERNMENT OF	)	**No. M2005-00932-SC-R11-CV**
NASHVILLE AND DAVIDSON COUNTY,	)	
TENNESSEE,	)	**Davidson County Chancery Court**
	)	**Chancellor Bonnyman**
Defendant-Appellee,	)	
	)	

BRIEF OF DEFENDANT-APPELLEE THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Metropolitan Government accepts Plaintiffs' "Statement of the Issues Presented for Review."

STANDARD OF REVIEW

The Metropolitan Government adopts Plaintiff's statement of the standard of review.

STATEMENT OF THE CASE

Retired Metropolitan Government police officers and firefighters filed this action in the Davidson County Chancery Court on September 3, 2002. (R. Vol. I, pp. 1-39). In a declaratory judgment count and in an equal protection count, Plaintiffs allege that the Metropolitan Government improperly calculated their pension benefits by excluding post-termination payments for unused vacation time from the base on which benefits are calculated. (R. Vol. I, pp. 6-8). An amended complaint was filed in May of 2003 to add another police officer to the action. (R. Vol. I, pp. 73-88).

On February 11, 2004, the parties entered a Scheduling Order. (R. Vol. I, pp. 108-09). Under this order, discovery was to be completed by July 31, 2004, and the case tried on October 25, 2004. (*Id.*). On May 14, 2004, Plaintiffs filed a second motion to amend to add fifty-one people to this lawsuit. (R. Vol. I, pp. 112-13). Plaintiffs, however, never set that motion to be heard. Then, on July 22, 2004, Plaintiffs filed a third motion to amend for the purpose of converting the case to a class action, and set it for hearing on August 13, 2004. (R. Vol. II, pp. 134-35). The Chancellor denied the motion given the impending trial date, the fact that discovery had closed, and the length of time that the suit had been pending. (R. Vol. II, pp. 134-35; R. Vol. III, pp. 293-94).

On August 24, 2004, the Metropolitan Government filed a Motion for Summary Judgment. (R. Vol. III, pp. 296-363). On September 15, 2004, Plaintiffs filed a cross-motion for summary judgment as to liability only. (R. Vol. III, p. 375 – R. Vol. IV, p. 441). The Chancellor heard both motions and issued a memorandum and order on March 11, 2005, granting the Metropolitan Government's motion and denying Plaintiffs' motion. (R. Vol. V, pp. 636-47). Plaintiffs timely filed a Notice of Appeal on April 8, 2005. (R. Vol. V, p. 648). The Court of

Appeals affirmed the grant of summary judgment to the Metropolitan Government and declined to rule on the motion to amend, as it was moot. *Amos v. The Metropolitan Government of Nashville and Davidson County, Tennessee,* 2007 Tenn. App. LEXIS 505 (Tenn. Ct. App., Aug. 2, 2007). This court granted Plaintiffs' application for permission to appeal.

STATEMENT OF THE FACTS

The Metropolitan Government disagrees with the Plaintiffs' Statement of Facts for several reasons. First, the statement is incomplete, as it does not include all of the facts that the court found to be material and undisputed. Second, it includes some "facts" that were not presented to the court in the parties' statements of undisputed facts or which no longer have any bearing, as Plaintiffs have dropped their estoppel argument. Third, it characterizes certain "facts" contrary to the record.

Defendant submits that the material undisputed facts are those stated by the court in its memorandum opinion and those admitted in the pleadings. In her memorandum opinion, the Chancellor found the following material facts to be undisputed:[1]

1. All Plaintiffs were salaried employees of Metro. (R. Vol. IV, p. 467, Plf. Resp. to Def. Stmt. Facts No. 1).

2. Metro's salaried employees are paid bimonthly, on the 22nd of each month for work performed from the 1st through the 15th of the month, and on the 7th of each month for work performed from the 16th through the last day of the month. (R. Vol. IV, pp. 467-468, Plf. Resp. to Def. Stmt. Facts No. 2).

3. All of the Plaintiffs are Metro police and fire department service pensioners who retired after September 13, 2001. (R. Vol. IV, p. 468, Plf. Resp. to Def. Stmt. Facts No. 4).

4. The Metro Benefit Board does not make decisions about when a retiring Metro employee will be paid for accumulated, unused vacation time. (R. Vol. IV, p. 468, Plf. Resp. to Def. Stmt. Facts No. 5).

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[1] The Chancellor did not cite each fact to the record. The Defendant has added these record citations. References are to Plaintiffs' Response to Defendant's Statement of Facts (*e.g.*, R. Vol. IV, p. 467, Plf. Resp. to Def. Stmt. Facts No. 1) and to Defendant's Response to Plaintiff's Statement of Facts (*e.g.*, R. Vol. IV, p. 510, Def. Resp. to Plf. Stmt. Facts No. 4).

5. In regard to accumulated, unused vacation time, retiring Metro employees have the option to be paid for this amount in a lump-sum upon their retirement, or the employee can remain on the payroll in "vacation" status until they have used all of their accumulated unused vacation time. (R. Vol. IV, pp. 468-469, Plf. Resp. to Def. Stmt. Facts No. 6).

6. In lieu of a lump-sum payment for accrued vacation days, each Plaintiff could have opted upon retirement to remain on the Metro payroll until all of his accrued vacation days were used. (R. Vol. IV, p. 469, Plf. Resp. to Def. Stmt. Facts No. 7).

7. Upon retirement, Metro paid Plaintiffs for their accumulated vacation days at the rate of pay they were receiving at the time of their retirement. (R. Vol. IV, p. 469, Plf. Resp. to Def. Stmt. Facts No. 8).

8. Metro paid all Plaintiffs for their accrued vacation pay following the termination of their employment with Metro. (R. Vol. IV, pp. 469-470, Plf. Resp. to Def. Stmt. Facts No. 9).

9. Plaintiffs could have filed a grievance under Section 6.9 of the Civil Service Rules if they were denied the ability to use the vacation days to which they were entitled under the Metro Code, but none of the Plaintiffs filed grievances. (R. Vol. IV, p. 470, Plf. Resp. to Def. Stmt. Facts No. 10).

10. On September 13, 2001, the Metro Department of Law issued an opinion that states that the lump-sum payment of unused vacation before an employee is terminated, for the purpose of increasing pension benefits, is unlawful. Soon after that, the Director of Finance and the Human Resources Director for Metro notified department heads that lump-sum payment for accruals would not be paid until an employee's final paycheck was issued. (R. Vol. IV, pp. 468 and 471, Plf. Resp. to Def. Stmt. Facts Nos. 3 and 12).

11. During the 1988-2000 tenure of the executive secretary of the Metro Employee Benefit Board, the following occurred:

    (a) The Benefit Board included in the pension calculations "anything that the employees ended up paying taxes on that we reported to the government, other than reimbursement for expenses." (R. Vol. IV, p. 510, Def. Resp. to Plf. Stmt. Facts No. 4).

(b) Cash payments included on the employee's W-2 reports were included in the pension calculations. (R. Vol. IV, pp. 511-512, Def. Resp. to Plf. Stmt. Facts No. 8).

(c) Vacation pay was reported on the W-2s and was included in the pension calculation. (R. Vol. IV, p. 512, Def. Resp. to Plf. Stmt. Facts No. 9).

(d) A formula was used to compute an employee's earnings for the purpose of determining the amount of that employee's pension: "Earnings was total cash compensation, which would include your regular rate of pay, any overtime, any shift differential you had, any type of pay." (R. Vol. IV, p. 509, Def. Resp. to Plf. Stmt. Facts No. 3).

(e) It was common for employees approaching retirement, including police officers and firemen, to have accumulated unused vacation time. (R. Vol. IV, p. 510, Def. Resp. to Plf. Stmt. Facts No. 5).

(f) Police and firemen received lump-sum payments for accrued and unused vacation time. The lump-sum payment was made before the employee's termination. (R. Vol. IV, pp. 511-512, Def. Resp. to Plf. Stmt. Facts No. 8).

(g) The Benefit Board included in the definition of earnings: "If the money was received by a member in any way that was remunerative, then the monies fell within the definition of earnings." (R. Vol. IV, p. 512, Def. Resp. to Plf. Stmt. Facts No. 10).

12. Civil Service Rule 5.13 states, "an employee, whose services are being terminated, either voluntarily or involuntarily, shall be paid for all regular earnings due and accrued vacation pay." (R. Vol. IV, p. 511, Def. Resp. to Plf. Stmt. Facts No. 7).

13. Former Police Chief Emmett Turner was first employed by Metro in 1969. He retired in 2003. During the 34 years Chief Turner was with Metro, police officers earned one day, five hours and twenty minutes of vacation each month of service with Metro for a total of twenty days per year. (R. Vol. IV, pp. 513-515, Def. Resp. to Plf. Stmt. Facts Nos. 13, 14, 17 and 18).

14. This earned vacation may not be used by the police officer until the year after it is earned and this was the policy during the 34 years Chief Turner was with Metro. (R. Vol. IV, p. 515, Def. Resp. to Plf. Stmt. Facts No. 19).

15. When Chief Turner retired, the lump-sum for his accrued but unused vacation was paid to him after his last day of work, in his final paycheck, and was not included in his pension calculation, contrary to his request. (R. Vol. IV, p. 516, Def. Resp. to Plf. Stmt. Facts No. 21).

16. In October 2000, Metro Benefit Board representative Tony Driver conducted a retirement seminar for prospective Metro retirees. At that seminar, he informed the prospective retirees that lump-sum payments for accrued vacation would be included in the calculation of their pension benefits. (R. Vol. IV, pp. 517-518, Def. Resp. to Plf. Stmt. Facts Nos. 28 and 31).

(R. Vol. V, pp. 637-638, Memorandum Opinion at 1-3).

Defendant takes particular issue with one "fact" — or at least the implications of that "fact" — stated by Plaintiffs in the body of their brief and supporting footnote:

> Police officers and firefighters, in particular, often retired with unused vacation time because of problems with scheduling time off.* (R. Vol. IV, pg. 381, 387) (Luther Dep. 7:4-18, 70:18-71:17).
>
> * In recognition of this problem, especially in the Fire Department, the Metro Civil Service Commission voted on September 14, 2004, to increase the maximum number of accumulated vacation days for firefighters from sixty (60) to seventy-five (75). (R. Vol. IV, pg. 441-42) (Hall Aff. ¶ 3). According to B. R. Hall, Sr., a Captain in the Fire Department and member of the Benefit Board, the Civil Service Commission took this action due to "problems with employees being able to utilize all of their vacation time. It has been difficult for employees to take vacation time because of scheduling issues and manpower shortages." (R. Vol. IV, pg. 442) (Hall Aff. ¶ 4).

(Plaintiffs' brief at 3). This statement is misleading. As the court noted, Plaintiffs conceded they were not prevented from taking vacation:

> In their memorandum of law, the Plaintiffs claim they were not allowed to take vacation that accrued because of pressing work. However, in the papers filed in support of summary judgment, the Plaintiffs concede they were not prevented from using their vacation days.[2]

(R. Vol. V, p. 638, Memorandum Opinion at 3).

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[2] The court did not cite to the authority supporting this statement, which is as follows:

> . . . (R. Vol. V, p. 564, Plaintiffs' response to Interrogatory # 4 propounded by the Metropolitan Government, which is contained in the Metropolitan Government's November 5, 2004 Notice of Filing; R. Vol. III, p. 314, Plaintiffs' response to Request for Admission # 11 propounded by the Metropolitan Government, which is attached in Collective Exhibit 2 to the Metropolitan Government's Motion for Summary Judgment; and R. Vol. III, p. 301, Plaintiffs' response to Interrogatory # 7 propounded by the Metropolitan Government, which is attached in Collective Exhibit 1 to the Metropolitan Government's Motion for Summary Judgment).

Defendant had added this citation to authority. *See* The Metropolitan Government's Reply in Support of its Motion for Summary Judgment. (R. Vol. V, p. 607, n. 8).

SUMMARY OF ARGUMENT

This case concerns the calculation of pension benefits. Plaintiffs, Metropolitan Nashville police and fire department pensioners, who retired with accrued vacation time, claim they are entitled to bigger pensions. They claim that their pension base should have included monies paid at termination for accrued vacation time. They claim they are entitled to larger pensions than similarly situated employees who had taken all of their vacation by termination. Under Plaintiff's theory, an employee who has accrued, rather than used, the maximum 60 days vacation time, would receive a larger pension — one based on 63 months' average earnings — rather than one based on a 60-month average as the pension ordinance prescribes and which the similarly situated employees would receive.

Plaintiffs were not entitled to have those payments included in their pension base for several reasons. First, the pension ordinance makes no provision for including payments for accrued vacation. The ordinance does not permit discrimination against employees who take their vacation; rather, it provides a uniform methodology for computing pensions regardless of whether vacation has accrued or been taken. Second, only payments made for personal services are included in the pension base. Employees earn vacation time for their personal services, not the lump-sum paid at termination for the accrued vacation. Third, only payments made during employment are included in the pension base. Pursuant to the Metropolitan Government's uniform policy which was established before Plaintiffs terminated, payments for accrued vacation were made after termination, not during employment.

This Court should affirm the grant of summary judgment dismissing the case.

Plaintiffs also claim that the Chancellor wrongly denied their Third Motion to Amend to convert this case into a class action. No newly discovered information was involved in this motion, and the motion was heard shortly before the parties' scheduled trial date. The action had been on file for two years and discovery had closed under the Scheduling Order. Although this issue should be pretermitted, should the Court address it, the Chancellor should be affirmed because she did not abuse her discretion.

ARGUMENT

I. THE METROPOLITAN GOVERNMENT DID NOT IMPROPERLY CALCULATE PLAINTIFFS' PENSION BENEFITS BY EXCLUDING POST-TERMINATION LUMP-SUM PAYMENTS FOR ACCRUED VACATION TIME FROM THE BASE ON WHICH PENSION BENEFITS WERE CALCULATED.

A. Introduction

Metropolitan employees are paid for five (5) work days per week, with two (2) days off without pay. (R. Vol. I, p. 5, Compl. ¶¶ 13-14; R. Vol. I, p. 52, Answ. ¶¶ 13-14). Employees also accrue 20 vacation days throughout the year at the rate of approximately 1-1/2 days per month. (*Id.*; R. Vol. IV, pp. 513-515, Def. Resp. to Plf. Stmt. Facts Nos. 13, 14, 17 and 18). An employee can accrue up to 60 vacation days. (R. Vol. IV, p. 400) (Turner Dep. 20:5-11). Prior to termination, an employee may not be paid for vacation time not taken. If an employee takes a day of vacation, he receives his normal pay for that day, just as if he had worked. In any given month, a Metro employee will be paid the same base pay whether he works five days each week or whether he takes some of those days off as vacation.

At termination an employee either may use any accrued vacation or he may be paid for that time at his current pay rate.[3] (R. Vol. IV, p. 469, Plf. Resp. to Def. Stmt. Facts No. 8). If the employee has accrued the maximum 60 vacation days and elects payment, he receives the equivalent of three (3) months additional pay. If he has used up all of his vacation time prior to termination, he gets no additional payment for vacation taken.

Prior to October 2001, the Metropolitan Government did not have a uniform government-wide policy on when payment for accrued vacation would be made to terminating employees. If

[3] Prior to 1991 or 1992, terminating employees were not paid a lump-sum for accrued vacation; rather, they were required to exhaust their accrued vacation before their service pension could begin. (R. Vol. IV, pp. 381). (Luther Dep., pp. 17:23-19:19). Sometime after 1991 or 1992, however, employees were allowed to elect whether they wanted to remain on the payroll and exhaust their accrued vacation or receive a lump-sum for their accrued vacation. (R. Vol. IV, pp. 385, 388). (Luther Dep., pp. 52:11-53:6; p. 79:8-17).

requested, some departments would authorize payment before termination. Some departments made the payment only after termination. On September 13, 2001, the Metropolitan Department of Law issued an opinion that both early payment and the consideration of that lump-sum payment in calculating the pension benefit was unauthorized and unlawful. (R. Vol. I, pp. 7, 32-33, Compl. ¶ 23, Ex. H; R. Vol. I, p. 54, Answ. ¶ 23). On October 31, 2001, the Director of Finance and the Human Resources Director sent a memorandum to all department heads announcing a new policy, consistent with the legal opinion. Payment for accrued vacation would be made in an employee's final pay check which is paid after termination. Plaintiffs, all who retired after that uniform policy was established, were paid pursuant to that policy. The monies they received for accrued vacation were not included in their pension base. Metropolitan pensions are calculated based on a terminating employee's "average earnings."[4] As "average earnings" do not include the lump-sum paid for accrued vacation, it was not included in their pension base. Plaintiffs were paid the same pension as similarly situated employees who had earned the same number of vacation days, regardless of whether vacation time had accrued or had been taken.

---

[4] (Chapter 3.37 of the Metropolitan Code, R. Vol. I, pp. 4-5 and 20, 22, Compl. ¶¶ 9-10, Exhs. B and C; R. Vol. I, p. 52, Answ. ¶ 9-10). "[E]arnings" is defined as "the total cash compensation paid...to a metropolitan employee for his personal services...." (Metropolitan Code § 3.08.010(1), R. Vol. I, pp. 4 and 13-14, Compl. ¶ 8, Exh. A; R. Vol. I, p. 52, Answ. ¶ 8). "[A]verage earnings" is defined as the "arithmetic monthly average of a metropolitan employee's earnings during the period which contains the sixty consecutive months of credited service which produces the highest average." (Metropolitan Code § 3.08.010(1), R. Vol. I, pp. 4 and 12, Compl. ¶ 6, Exh. A; R. Vol. I, p. 52, Answ. ¶ 6). Substituting the definition of "earnings" into that definition results in a definition of "average earnings" which would read:

> average earnings is the "arithmetic monthly average of [the total cash compensation paid]...to a metropolitan employee for his personal services... during the period which contains the sixty consecutive months of credited service which produces the highest average."

Thus, only cash compensation paid to the employee "for personal services" and while he is still employed (*i.e.*, during "credited service"), may be included in the employee's sixty month pension base.

B. The Post-Termination Lump-Sum Payment to Plaintiffs for Accrued Vacation Time Is Not "Earnings."

Plaintiffs argue that the lump-sum payment for accrued vacation is "earnings" which must be included in the pension base. (Plaintiffs' brief, pp. 10-16). They are mistaken. The pension ordinance does not allow the inclusion of that payment in the "average earnings" pension base. That payment is not "earnings" for two reasons. First, as the Court of Appeals found, it was not paid for personal services. Second, as the Chancellor found, it was not paid during Plaintiffs' employment.

1. The Requirement That Payment be Made During Employment.

In her opinion, the Chancellor concisely explained why police and fire department personnel sought early payment for accrued vacation time and why payment after termination is not "earnings."

> It is important to understand why, in the past, many police and fire department members requested their accrued vacation payment be made before their jobs terminated. The Plaintiffs do not challenge Metro's general plan for the payment of its employees. Metro issues paychecks twice a month on two set dates. Executive Order No. 42[5], issued in 1971, requires that salaries be paid after the pay period is completed, and not before.
>
> Since Metro paychecks are now issued following the pay period, the employees receive their final paychecks after employment has terminated. The term "average earnings" is a significant term affecting pension calculations. The Metro Code defines "earnings" as monies paid while the worker is still employed by Metro. Applying this definition, salary paid to an employee after his or her final pay

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5 The pertinent part of the Executive Order 42 states as follows:

Subject: Changing Semi-Monthly Payroll Dates so as to establish the practice of issuing paychecks following the pay period covered by such checks . . .

The practice of issuing paychecks to salaried employees semi-monthly has been long established for the Metropolitan Government and should be continued. However, the issuance of these checks on dates prior to the end of the pay period they are issued to cover is to be discontinued. Only by adjusting the date on which the payroll checks are to be issued to a time following the close of the pay period for which the checks are written can we be assured of the correctness and dependability of our payroll procedure and records. (Footnote original).

> period is completed, is not salary that may be considered "average earnings," for pension calculation purposes. . . .
>
> The Plaintiffs concede that their final paycheck is not "earnings." Rather than argue that paychecks should be issued before the pay period terminates, the Plaintiffs sought to have their accrued vacation pay included in the next to last paycheck, thus assuring their vacation pay would be included in "average earnings," those used to calculate Metro pensions. Metro refused to provide vacation pay to the Plaintiffs until the last pay period ended.
>
> . . .

(R. Vol. V, p. 639, Memorandum Opinion at 4). As the Chancellor held, "average earnings" includes only the cash compensation paid to the employee during a 60-month employment period. (*Id*). When employment terminates, the window closes. Monies paid after termination are not, and <u>never</u> have been, included in the pension base. (R. Vol. IV, p. 387). (Luther Dep. 67:7-10). In fact, as the Chancellor also noted, Plaintiffs conceded that monies paid in their final paycheck are not "earnings" for such purposes. (R. Vol. V, p. 639, Memorandum Opinion at 4).

The Chancellor closely and carefully examined the language and purpose of the pension ordinance. In constructing the ordinance, she concluded that the lump-sum payment did not constitute "earnings" for several reasons. Succinctly explaining her conclusion, she stated:

> Pensions are based on the employee's "average earnings" during his or her service. The goal is to reach the "monthly average." The formula to reach the monthly average uses the period containing the sixty consecutive months of credited service that produces the highest average. A one-time lump sum payment is outside monthly income and would, upon addition to the last month of employment, generate a month of income higher than any monthly income previously earned by the retiring employee.
>
> The Court finds it highly unlikely that the drafters intended such a formula. If the formual was to include vacation pay, it could have said so. If it had said so, it would be most consistent to allow accrued vacation pay to be added to pay after it was earned, at the rate of pay for the particular month in which it fell. Instead, vacation pay is calculated at the rate of pay for the last month of employment, often the highest month of pay during the employee's career. This

> element of pay, accrued vacation, as advocated by the Plaintiffs, does not promote actuarial soundness required for the pension benefits, because it is unpredictable.
>
> Another way of approaching the formula is to analyze how accrued vacation may be spent. Each of the Plaintiffs have accrued vacation of at least 60 days. Payment of all accrued vacation before termination adds three months of pay to the pension calculation since there are 20 workdays per month. Without deduction of three months from the total, 63 months will be averaged instead of 60. Using a 63-month period benefits Plaintiffs because it increases the average number, but the law does not authorize the formula advocated by the Plaintiffs. Including vacation pay in average earnings prevents pension calculations from fitting within the prescribed mathematical formula. It may be a good idea (there are arguments pro and con) for Metro's legislative body to encourage and reward accrual of vacation by allowing pension calculations to include vacation pay, but the ordinance definitions do not authorize inclusion.
>
> There is a more basic reason to conclude that accrued vacation must be excluded from pension calculations. A close look at the definition of "earnings" leads the Court to conclude that vacation pay was not intended to be a component of earnings. "Earnings" as defined in the Metro Code is the "total cash compensation paid by Metro to the employee for his personal services . . ." Vacation is referred to in the Metro Code as an entitlement, not earnings. It is an entitlement to enjoy a number of days *without providing personal services to Metro* but without deduction of pay. This is not to say that vacation pay does not function elsewhere as earnings. This is not to say that vacation days are not earned over time because the employee provides services to Metro. However, within the pension benefit ordinances, accrued vacation is not "earnings" and was not intended to function as earnings.

(*Id.* at 642, Memorandum Opinion at 7).

As Plaintiffs were paid for accrued vacation after termination, the payment was properly excluded from the pension base. On this basis alone, summary judgment was properly granted dismissing the Complaint.

2. The Requirement That Payment Be Made for Personal Services.

The Court of Appeals took a different path to the same place. It did not consider when the payment was made.[6] Instead, it held that as the payment for accrued vacation was not made

[6] "Furthermore, because the lump-sum payment is not includable in 'average earnings,' the timing of the lump-sum payment whether it was made prior to or after retirement, does not affect this Court's decision." *Amos v.*

for "personal services," it could not be included in the pension base. *Amos v. The Metropolitan Government of Nashville and Davidson County, Tennessee,* 2007 Tenn. App. LEXIS 505, *7-9 (Tenn. Ct. App., Aug. 2, 2007). As the Court noted, each year an employee earns vacation days off, not vacation pay in addition to their regular pay. Until an employee retires, the only thing he can do with vacation is to take time off without deduction from his regular pay. Only at termination does Civil Service Rule 5.13 provide that an employee who has not used up his vacation time may be paid for that time. In essence, the government will buy that vacation time back. As the Court of Appeals explained:

> . . . In this case, accrued vacation time is a vested right to take time off without deduction of pay that is earned by performing personal services. However, accrued vacation time is not the right to receive a lump-sum payment upon retirement. The lump-sum payment is made in lieu of the retiring employee using his/her accrued vacation time. Stated differently, the Appellants are receiving the lump-sum payment for their accrued vacation time, not for performing personal services. In essence, the Appellants are selling their accrued vacation time back to their employer instead of exercising their right to take time off without deduction of pay. Therefore, we hold that lump-sum payments for accrued vacation time are not "earnings" as defined in Metropolitan Code § 3.08.010(3) because the lump-sum payments are not for "personal services." . . .

Id. *6. The Court of Appeals is correct in its determination. The Court's analysis is similar to that made by the Michigan Court of Appeals in *Stover v. Retirement Bd. of St. Clair Shores,* 260 N.W.2d 112, 114 (Mich. App. 1977), which held that such a lump-sum payment is akin to a bonus and not includable in the pension base. *See also, Kosey v. City of Washington Police Pension Board,* 459 A.2d 432, 434-435 (Pa. Cmwlth 1983) (Lump-sum paid for accrued vacation time is merely a substitute for deferment of retirement and may not be included in pension base).

The Metropolitan Government of Nashville and Davidson County, Tennessee, 2007 Tenn. App. LEXIS 505, at *8-9.

Plaintiffs strive mightily and cite many cases in their argument that the Court of Appeals simply got it wrong, that clearly this lump-sum payment was for personal services. (Plaintiffs' brief at 10-15). They are mistaken. As an initial matter, only four cases cited by Plaintiffs concern vacation pay. *Abbott v. Kellwood Co.*, 1985 Tenn. App. LEXIS 3106 (Tenn. Ct. App., Aug. 23, 1985); *Whaler v. Melville Corporation*, 1985 Tenn. App. LEXIS 2787 (Tenn. Ct. App., Apr. 3, 1985); *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d 493 (Tenn. Ct. App. 1978); *Textile Workers Union v. Brookside Mills, Inc.*, 309 S.W.2d 371 (Tenn. 1957). None of those four cases, however, concerns pension benefits, or whether vacation time, versus a lump-sum payment for accrued vacation, is earned for "personal services."[7]

Although these four vacation cases have no direct bearing on the issues in this case, they are of at least passing interest, because they make a clear distinction between "vacation pay" and "vacation with pay." *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d at 495 ("vacation with pay" is the right to take time off; "vacation pay" is the right to be paid regardless of whether vacation is taken). That distinction further supports the Court of Appeals' determination that Metropolitan employees earn "vacation time" for their personal services and not the post-termination lump-sum payment for accrued and unused vacation, which is paid to buy out that accrued vacation time if they choose not to use it. As the Court of Appeals held:

> Vacation pay is a form of compensation for services rendered, and when the services are rendered, the right to secure the promised compensation is a vested right. *Whaler v. Melville Corp.,* No. 84-287-II, 1985 Tenn. App. LEXIS 2787 at

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7 While Plaintiffs argue they had a vested right to payment for accrued vacation because they earned it, they *were* paid for that vacation time. (R. Vol. IV, p. 469, Plf. Resp. to Def. Stmt. Facts No. 8; R. Vol. IV, pp. 469-470, Plf. Resp. to Def. Stmt. Facts No. 9). The issue in this case is not whether Plaintiffs were entitled to payment. The issue is whether they were entitled to early payment to artificially increase their pension base. These cases do not address that payment issue. Instead, they involve employees who claimed they were owed, but did not receive vacation pay. Each of these cases addresses whether, under the language of a particular contract, those plaintiffs were entitled to vacation pay. In some instances they were and in others not. These cases are inapposite to Plaintiffs' claim that the lump-sum payment for accrued vacation time was made for personal services.

> *8 (Tenn. Ct. App. April 3, 1985). In this case, accrued vacation time is a vested right to take time off without deduction of pay that is earned by performing personal services.

Amos v. The Metropolitan Government of Nashville and Davidson County, Tennessee, 2007 Tenn. App. LEXIS 505 at *7-8. What Plaintiffs earned was the right to take vacation over a period of time without deduction of pay. They did not earn the right to be paid a lump-sum for up to 3 months vacation on a single day, which then could be included in their pension base without consideration of the 3-month period over which that vacation time could be taken.

Although Plaintiffs have abandoned the estoppel argument made in the courts below, they still seem to try to use it here, clothed as rules of interpretation for ambiguous contracts. (Plaintiffs' brief, pp. 14-15). Plaintiffs argue that if any ambiguity exists on the issue of whether the payment for accrued vacation was earned for personal services, the parties' mutual understanding under the rules of "practical construction" apply. (Plaintiffs' brief at 14). They claim they are entitled to have this lump-sum payment included, because prior to September 13, 2001, the Police Department and Fire Department paid these sums to requesting employees before they terminated. A review of past practices, however, demonstrates the fallacy of that argument. Furthermore, we are not concerned here with the interpretation of an ambiguous contract. We are concerned with the application of a legislative act - the pension ordinance – which makes no provision for the inclusion of such payments, and the authority of the Director of Finance to set payment policies.

The pension ordinance itself does not govern when or whether a terminating employee should be paid for accrued vacation; that was a matter outside the Benefit Board's jurisdiction. (R. Vol. IV, p. 468, Plf. Resp. to Def. Stmt. Facts No. 5). The Director of Finance has the authority to set policy as to when employees are paid. (Civil Service Rule 5.3, R. Vol. V, pp.

553-55). From 1988 to 2000, when James Luther was Executive Secretary to the Benefit Board, the benefit board used annual W-2 income statements to compute "average earnings" and pensions.[8] (R. Vol. IV, p. 510, Def. Resp. to Plf. Stmt. Facts No. 4; R. Vol. IV, pp. 511-512, Def. Resp. to Plf. Stmt. Facts No. 8; and R. Vol. IV, p. 512, Def. Resp. to Plf. Stmt. Facts No. 9). From 1991 or 1992 to 2000, when exhaustion of vacation prior to retirement was no longer required, if a lump-sum payment for accrued vacation was included in the W-2, then it was used to compute "average earnings." If it was not included in the W-2 statement, because it was paid in a later year, then it was not included.

After the exhaustion requirement was eliminated in 1991-1992, some employees in some departments requested and received payment for accrued vacation in their next-to-last paycheck on December 22 and then took retirement on January 1 of the following year, so that the payment would be included in their pension base. The Police Department and Fire Department routinely granted such requests. (R. Vol. I, p. 83; R. Vol. IV, p. 387). Other departments addressed the payment issue in several different ways. (R. Vol. IV, p. 383). There was no consistency or uniformity throughout the Metropolitan Government. (*Id.*). As Mr. Luther testified, "some [departments] might do it one way; some another." (*Id.*).

Clearly, until October 2001, there was no uniform policy or practice regarding when such payments would be made. That new policy mandated payment after termination. Plaintiffs retired after that policy was adopted and were paid pursuant to it. Past practices of some departments in some circumstances do not provide a "practical construction" for the interpretation of benefits under the pension ordinance. Furthermore, they do not address the issue of whether the lump-sum payment constitutes "earnings" under the ordinance.

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8 "[A]verage earnings" is now calculated based on a consecutive sixty-month term that goes back from the time of termination, regardless of the time of year when the employee retires. (R. Vol. I, p. 79; R. Vol. III, pp. 296-98, 342; R. Vol. IV, p. 380; R. Vol. V, p. 641).

Plaintiffs further argue that the Court of Appeals holding rests on an artificial distinction that could have major consequences for vacation pay for all types of employment. (Plaintiffs' brief at 15).

> It essentially means that an employee's work is not consideration for a cash vacation payment.

(*Id.*). This distinction is not new to this case. In each of the vacation cases cited above, the Court of Appeals and the Supreme Court examined the contract between the parties. *Abbott v. Kellwood Co.*, 1985 Tenn. App. LEXIS 3106 at *1-2; *Whaler v. Melville Corporation*, 1985 Tenn. App. LEXIS 2787 at *5-8; *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d at 495; *Textile Workers Union v. Brookside Mills, Inc.*, 309 S.W.2d at 77-79. Where the employee is entitled to "vacation pay," he will be paid the money due at termination even if vacation time cannot be taken. Nothing in this case will change that. The only issue here is whether the lump-sum payment for accrued vacation will be included in the pension base. It cannot because the pension ordinance does not provide for its inclusion.

Consistent with the foregoing, the Chancellor and the Court of Appeals, albeit applying different rationales, agreed that terminal payment for accrued vacation is not "earnings." (R. Vol. V, p. 639). Consequently, the Chancellor and the Court of Appeals found that those payments may not be included in "average earnings" for pension calculation purposes. (*Id.*).

These holdings are consistent with all other reported decisions found. Although these courts have interpreted differently worded statutes, they uniformly reached the same conclusion: that such lump-sum payments may not be included in a pension or disability base.[9] *See, Stover v.*

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[9] One reported decision reaches a contrary conclusion. *Anderson v. Pension & Retire. Bd., City of Milford*, 355 A.2d 283 (Conn. 1974). However, the definition of what could be included in the pension base was much broader. As the court in *Santa Monica Police Officers Ass'n* said, in rejecting the import of that case:

Retirement Bd. of St. Clair Shores, 260 N.W.2d at 114 (Lump-sum payment not included in "average final compensation" for pension calculation purposes; such payments are properly viewed as a retirement bonus and not as annual compensation received during a certain number of years immediately preceding the member's retirement); *The West Virginia Consolidated Public Retirement Board v. Carter*, 633 S.E.2d 521, 528, 530 (W.Va. 2006) ("[F]inal average salary" does not permit the inclusion of payments for unused, accrued vacation in calculation of retiree benefits; the legislature did not intend to make a distinction in retirement benefits between a retiree who took a vacation and one who did not); *Craig v. City of Huntington,* 371 S.E.2d 596, 600 (W.Va. 1988) (Pension base defined as "[t]he monthly sum to be paid to each member eligible for disability... equal to sixty percent of the monthly salary or compensation being received by such member" does not include a lump-sum payment for accrued vacation and sick leave covering a number of months); *Kosey v. City of Washington Police Pension Board*, 459 A.2d at 434 (Legislature did not intend "for certain retirees to receive a large windfall simply because their [employer] chose to pay them a lump-sum for unused vacation time in lieu of requiring them to take their vacation time prior to their official retirement date."); *Combs v. Cheek*, 671 S.W.2d 177 (Ark. 1984) (For purposes of computing pension benefit, "salary" did not include payment for unused accumulated sick leave.); *Board of Trustees of the State Police Retirement Sys. v. Halsell*, 610 S.W.2d 881, 883 (Ark. 1981) (Police officer had no right to have termination payment included in his retirement pension.); *Santa Monica Police Officers Ass'n v. Board of Admin., Public Employees' Retirement Sys.*, 69 Cal. App. 3d 96, 101 (1977) (The

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That case does not help. There, the issue was the interpretation of a provision in a collective bargaining agreement. Leaving aside the difference between determining the intention of parties to a contract and that of the Legislature, even the provision involved in the Connecticut case was different. There, the pension was based on an average annual pay, "'including but not limited to base salary, holiday pay, longevity pay, overtime pay, etc., . . .'" (*Anderson v. Pension & Retire. Bd., City of Milford, supra,* 355 A.2d at p. 285).

137 Cal. App. 3d 96, 101 (1977).

legislature intended to exclude lump-sum payments for unused sick leave and vacation time from pension computations.); *Gilmore v. Burks*, 325 So.2d 455 (Fla. App. 1976) (Unused annual leave payments should not be considered compensation in computing pension benefits.). Plaintiffs have not cited any case to the contrary.

C. Plaintiffs Were Not Entitled to Be Paid for Accrued Vacation Time Before Termination.

In an attempt to avoid the exclusion of post-termination payments, Plaintiffs claim payments should have been made earlier. Under Civil Service Rule 5.13, the rule provides:

> An employee whose services are being terminated, either voluntarily or involuntarily, shall be paid for all regular earnings due and accrued and vacation pay....

(R. Vol. IV, p. 511, Def. Resp. to Plf. Stmt. Facts No. 7). Plaintiffs make a strained argument that the rule requires payment prior to termination, because the rule is written in the present tense — "being terminated" rather than "terminated." (Plaintiffs' brief, p. 5). The Chancellor rejected this argument: "This Court finds that Rule 5.13 does not explicitly address when the accrued payment must be made, but was intended to assure that payment is in fact made." (R. Vol. V, p. 640). As employees have no right to be paid for accrued vacation time before "being terminated," logically it would make no sense for them to be entitled to such payments after it becomes known that they are terminating, but before termination. In any event, as discussed above, pursuant to the uniform payment policy promulgated October 31, 2001, payment was due after termination, in the employee's last paycheck.

Plaintiffs advance the same "ambiguity" argument in support of this contention as was discussed in the previous section.[10] (Plaintiffs' brief at 19-20). However, this is not an issue of contract or ambiguity. It is an issue of the application of an ordinance which makes no provision

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[10] *See* discussion *supra* at p. 19.

for the inclusion of a payment for accrued vacation in the pension base. There was not a uniform payment practice. Payment varied among departments and in the police and fire departments was done only when requested. Furthermore, the Director of Finance had the authority to set a uniform date for all departments, all employees – which was post-termination.

All of the Plaintiffs retired after October 31, 2001, and were paid for their accrued vacation in accordance with the Finance Director's policy, a policy that the Finance Director was authorized to set. (R. Vol. IV, pp. 469-470, Plf. Resp. to Def. Stmt. Facts No. 9). The Court correctly found that Plaintiffs did not have any right to be paid for accrued vacation before termination.

D. Regardless Of When Paid, The Lump-Sum Payment For Accrued Vacation Time Cannot Be Included In The Pension Base.

Plaintiffs next contend that regardless of when paid, the lump-sum payment for accrued vacation is "earnings" because they earned vacation during the applicable 60-month period. (Plaintiffs' brief, pp. 9-11). Plaintiffs' contention is mistaken, contradicting the pension ordinance.

As the Chancellor observed, the purpose of the Metropolitan pension plan is to "replace income." (R. Vol. V, p. 641, Memorandum Opinion at 6). As discussed above, employees earn vacation time. They are not paid any monies for that time unless they take vacation or are paid for accrued vacation at termination. If an employee had accrued the maximum of 60 days vacation, it would take three months to use that time off and be paid. Had they taken the vacation, the 60-month pension base would only include earnings for 60 months of time. However, if as Plaintiffs propose, the later paid monies are included in the pension base based on when vacation was earned, then they would receive a pension based on 63 months' time even though they only worked 60 months. Employees are only entitled to a pension calculated on 60

of those 63 months. As the Chancellor found, the inclusion of payment for this unused vacation is contradictory to the purpose of the benefit system and the directive of Metropolitan Code § 3.08.010(1) that an employee's pension is to be based on a sixty-month term. *(Id.)*.

The inclusion Plaintiffs seek would undermine both the pension and the vacation systems. Excluding vacation time from the pension calculation treats all employees equally and protects and promotes both systems. Inclusion would discourage employees from taking vacations. It would penalize those employees who choose to, or who for personal or family reasons had to take vacation. Excluding such payments permits all employees to use or keep their accrued vacation as they see fit. Including the amount would undermine the uniformity of the pension system. Employees who earned the same pay and vacation would receive pensions in different amounts. It would also allow pensions based on 60 to 63-month earnings when the pension ordinance provides for a 60-month term. Excluding the payment prevents the manipulation of the pension system by artificially increasing the pension base.

Additionally, there are specific provisions in the pension ordinance that permit an employee to elect to use sick leave for pension eligibility credit or service credit; however, there are no parallel provisions that permit an employee to so use vacation leave for any pension purpose. Metropolitan Code § 3.33.050 provides as follows:

> Any member with unused sick leave time, at service retirement, shall receive one hundred percent credit, subject to an affirmative election at the time of retirement, and in accordance with the board's policies and procedures, as follows:
>
> 1. Pension eligibility credit; or
> 2. Service credit

(R. Vol. III, pp. 296-98, 351; R. Vol. V, pp. 642-43, Memorandum Opinion at 7-8). Employees are not permitted to use sick leave to increase the pension base. The ordinance does not even permit vacation time to be used for pension eligibility or service credit, never mind to increase

the pension base. As the Chancellor recognized, the explicit authorization for the use of sick leave to affect pension calculations and the absence of such authority with respect to accrued vacation further supports the conclusion that such was not intended by the Metropolitan Council. (R. Vol. V, 642-43, Memorandum Opinion at 7-8).

Metropolitan employees are only entitled to receive pensions based on cash compensation paid during a 60-month term. Accrued uncompensated vacation may not be included. Summary judgment was properly awarded and should be affirmed.

II. PLAINTIFFS' THIRD MOTION TO AMEND WAS PROPERLY DENIED.

Plaintiffs' final issue presented for review on appeal is whether the Chancellor erred in denying their Third Motion to Amend for the purpose of converting the case to a class action. Plaintiffs brought this motion before the court on August 13, 2004. (R. Vol. II, p. 134; R. Vol. III, p. 293). Trial was set for October 25, 2004, and discovery had already closed under the Scheduling Order on July 31, 2004. (R. Vol. I, p. 108; R. Vol. III, p. 293). Suit had been instigated two years earlier. (R. Vol. I, p. 1; R. Vol. II, p. 134; R. Vol. III, p. 293). Considering such, the Chancery Court determined that granting the motion would cause the trial to be unnecessarily delayed and would be contra to Rule 1 of the Tennessee Rules of Civil Procedure which requires that the Rules of Civil Procedure be construed so as to secure the just, speedy and inexpensive determination of every action. (R. Vol. III, pp. 293-94). The Chancery Court consequently denied the Plaintiffs' Third Motion to Amend. *(Id.)*.

A trial court's decision to deny a motion to amend may be reversed only when the judge has abused her or his discretion. *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979). While Rule 15.01 of the Tennessee Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires, the ability to amend one's complaint under

this rule is not without limits. When considering a motion to amend, the trial court is to consider the following: undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the amendment. *March v. Levine*, 115 S.W.3d 892, 908 (Tenn. Ct. App. 2003); *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979).[11] These are the same factors established by the United States Supreme Court when examining motions to amend under Fed. R. Civ. P. 15(a), which is identical to Tenn. R. Civ. P. 15.01. *March*, 115 S.W.3d at 908, *citing Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962).

In *March*, the court particularly examined the factor of undue delay in considering whether an amended intervening petition and cross-complaint should be allowed when it was not filed until thirty-one months after the original petition was filed and the facts underlying the amendment had been known to the movants since the beginning of the litigation. *March*, 115 S.W.3d at 908-09. While the court found that delay alone was an insufficient basis for denying leave to amend, it did find that unexplained delay coupled with other factors may constitute "undue delay" within the meaning of Rule 15 as construed in *Foman*, *Merriman* and other cases. *Id.* at 909. One such factor, the court noted, was where the party seeking to amend has known all of the facts underlying the amendment since the beginning of the litigation. *Id.* Another factor relating to undue delay, the court observed, was prejudice to the opposing party. *Id.* The court then noted that reopening of discovery alone creates significant prejudice. *Id.*, *citing, Moore v. City of Paducah*, 790 F.2d 557 (6th Cir. 1986). While this factor was discounted in this case due

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11 Plaintiffs intimate that their motion to amend is not subject to examination. On page 24 of their brief, Plaintiffs quote from *Branch v. Warren*, 527 S.W.2d 89, 91-92 (Tenn. 1975): "Rule [15] needs no construction; it means precisely what it says, that 'leave shall be freely given.'" The Middle Section of the Court of Appeals recently examined this exact statement and found that "[t]aken literally and in isolation, this general statement would destroy any discretion in the trial court about allowing or disallowing amendments under Rule 15.01." *March v. Levine*, 115 S.W.3d 892, 908 (Tenn. Ct. App. 2003). Such is not how Rule 15 is to be construed. *Id.*

to the non-movant's repeated discovery evasion, the court went on to disallow the amended petition because the movants failed to give a reason, justifiable or otherwise, as to why they failed to include the claims in their amended intervening petition and cross-complaint in their original petition. *Id.* at 909.

Plaintiffs are similar to the movants in *March.* Plaintiffs' suit had been filed for two years when they filed their Third Motion to Amend. (R. Vol. I, p. 1; R. Vol. II, p. 134). Discovery had closed under the Scheduling Order on July 31, 2004, and this case was set for trial on October 25, 2004. (R. Vol. I, p. 108). Their motion did not concern additional theories or claims that came to light during the course of the suit; it was simply a motion to try to bring in "numerous" additional retiring police officers and firefighters. (R. Vol. II, pp. 134, 260). In other words, newly discovered information was not involved. Moreover, at a minimum, Plaintiffs knew in May, 2004, that they wished to add "numerous" persons to this lawsuit, as evidenced by the second motion to amend they filed to add fifty-one people to this lawsuit. (R. Vol. I, p. 112). However, they never bothered to have their second motion to amend heard,[12] and they waited to the eleventh hour to file their Third Motion to Amend. In sum, Plaintiffs failed to give "any reason, justifiable or otherwise" why they waited so long to attempt to add other retirees. "Undue delay" was present here. *See, March*, 115 S.W.3d at 909.[13]

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12 While Plaintiffs, on page 23 of their brief, state that the trial court never ruled on their second motion to amend, it was not for the trial court to rule on it until they set it for hearing, as required by Davidson County Local Rule 26. Plaintiffs never set their second motion to amend to be heard. Consequently, the trial court never ruled on it.

13 While Plaintiffs, on page 23 of their brief, contend they were unable to agree with attorneys for the Metropolitan Government on a method to add similarly-situated persons without amending the Complaint, the Metropolitan Government certainly did not take any action to prevent Plaintiffs from filing their motions to amend. In fact, Rebecca Kaman, a Metropolitan Government attorney, informed Appellants' counsel on April 16, 2004, that they would need to file a motion to amend since the Metropolitan Government could not enter an Agreed Order allowing new plaintiffs to the case. (R. Vol. II, pp. 167-70). As demonstrated by the Metropolitan Government's response to Plaintiffs' second motion to amend, the Metropolitan Government

Furthermore, Plaintiffs' undue delay in filing their Third Motion to Amend would have resulted in prejudice to the Metropolitan Government if the motion had been granted. First, discovery was closed under the Scheduling Order. It closed July 31, 2004. As the court succinctly stated in *March*, the "[r]eopening of discovery alone creates significant prejudice." *March*, 115 S.W.3d at 908. It is hard to imagine that the addition of plaintiffs to this lawsuit would not have resulted in additional discovery. Moreover, the granting of the motion to convert this action into a class action would have easily pushed back the October 25, 2004, trial date for several months. Delay in the hearing of a pension calculation case such as the case *sub judice* is prejudicial by its very nature.

Finally, despite contentions to the contrary, Plaintiffs were attempting to add persons to this lawsuit that were not similarly situated to the original plaintiffs. Under Tenn. R. Civ. P. 23.01(2) and (3), there must be questions of law or fact common to the class and the claims or defenses of the representative parties must be typical of the claims or defenses of the class. These requirements preclude class certification if members of the class must rely on dissimilar laws and factual circumstances to present their claims. *Bohlinger v. American Credit Co.*, 594 S.W.2d 710 (Tenn. Ct. App. 1979). Similarly, the presence of claims that have fact-sensitive questions which might involve different statutes also precludes class certification. *Warren v. Scott*, 845 S.W.2d 780, 783 (Tenn. Ct. App. 1992).

As evidenced by the Metropolitan Government's response to Plaintiffs' second motion to amend, three different defenses were raised to twenty of the proposed fifty-one plaintiffs. (R. Vol. II, pp. 162-66). As fully explained in the response to that motion, some of the proposed plaintiffs are contractually barred from becoming part of this lawsuit due to releases they signed

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simply could not allow Plaintiffs to add whomever they wished, without a motion to amend, because not all of the persons that Plaintiffs wished to add were similarly-situated to Plaintiffs. (R. Vol. II, pp. 162-66).

in order to accept a retirement incentive offered by the Metropolitan Government pursuant to Ordinance No. BL2004-180. (R. Vol. II, pp. 163-164, 171-180, 183-253). The Metropolitan Government also objected to the addition of proposed plaintiffs who were disability pensioners. (R. Vol. II, pp. 164-65, 171-72, 181-85, 254-57). Disability pensioners are not similarly situated to service pensioners. Different code provisions apply to these individuals. (R. Vol. II, pp. 171-72, 181-85). Finally, the Metropolitan Government objected to a proposed plaintiff who elected to continue on regular payroll until all of his vacation days were exhausted. (R. Vol. II, pp. 165, 171-72, 258). In sum, Plaintiffs' Third Motion to Amend to convert the case to a class action was not only filed too late, but it was also not substantively appropriate due to the plaintiffs that the Plaintiffs were attempting to add.

For all of these reasons, the Chancellor did not abuse her discretion when she denied Plaintiffs' Third Motion to Amend.

CONCLUSION

Based on the authorities cited and the arguments made, the Metropolitan Government respectfully submits that this Court should affirm the decisions of the Chancellor and the Court of Appeals and dismiss this appeal in its entirety.

The trial court properly granted the Metropolitan Government's motion for summary judgment and denied the Plaintiffs' cross-motion. There is no genuine issue of material fact and the Metropolitan Government is entitled to judgment as a matter of law. The pension ordinance does not permit the inclusion of payments for accrued vacation in the pension base. If such payments were allowed, each terminating employee would be allowed to set his own pension benefit by deciding whether to take or accrue vacation. Further, such a situation would undermine uniformity of the pension system and the purpose of providing for vacation.

Additionally, it would punish those employees who chose to, or needed to, take their allotted vacation time off.

The Chancellor did not abuse her discretion in denying Plaintiffs' third motion to amend.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been sent by First Class Mail to C. Dewey Branstetter and Michael J. Wall, Branstetter, Stranch & Jennings, PLLC, 227 Second Avenue North, Nashville, Tennessee 37201, and David L. Raybin, Hollins, Wagster, Weatherly & Rabin, Sun Trust Center, 424 Church Street, 22nd Floor, Nashville, Tennessee 37219, on this the ___ day of March, 2008.

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