Chapter 1

Add to §1.1 Special Judges

The Tennessee General Assembly wholly amended Tenn. Code Ann. § 16-15-209(a) and added subsection (d) regarding Special Judges, effective April 13, 2010. This statute changes the sequence that a judge must undertake to obtain a "special judge" to preside in the sitting judge's absence. In the first three occasions, *infra*, the special judge may only sit by designation of the Chief Justice of the Tennessee Supreme Court. The sequence starts with:

(1) service by interchange pursuant to Tenn. Code Ann. §17-2-208; if not, then,
(2) former or retired judge who will agree to sit as special judge; if not, then,
(3) application to the administrative office of the courts for assistance; if not, then,
(4) after exhausting the above, a judge may appoint a lawyer from a list, on a rotating basis, of lawyers who have been previously approved by the judge or judges of the district or county who are:
    (a) constitutionally qualified,
    (b) in good standing,
    (c) possessing sufficient experience and expertise.

The amended statute[1] retains the requirements that an attorney sitting as "special judge" must announce and may only preside if the parties and counsel are notified that the attorney is sitting as "special judge." The parties must choose to proceed and not continue the case pending return of the duly elected or appointed judge. A special judge has no jurisdiction to grant attorney's fees involving an indigent defense claim or any discretionary fees.

The other provision amended in Tenn. Code Ann. § 16-15-209 was subsection (d). New subsection (d) provides that if a general sessions or juvenile judge encounters a sudden and unexpected emergency which causes the judge to be absent from court, that judge may forego the numerical sequence established and may appoint a lawyer who meets the criteria established under subsection (a).

Add as §1.2.9 Oath of a Judge

The Tennessee General Assembly, effective July 1, 2010[2], has now provided that every judge may take their oath of office in the following manner:

(1) by a supreme court justice before the governor or another supreme court justice;
(2) An inferior court judge before another such judge; and,
(3) *now* the oath may be taken in front of a *retired* judge, chancellor, or an active or *retired* judge of general sessions.

Add to §1.3 Mandatory Copies of Judgment Provided by Clerk

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[1] Tenn. Code Ann. § 16-15-209(a)(3)(A)-(D) (Michie Supp. 2010).
[2] 2010 Tenn. Public Acts 620.

Effective March 4, 2010, and codified at Tenn. Code Ann. § 18-1-111, when a judgment is entered by order of a court or by agreement of the parties *and is to be paid through the applicable clerk*, the clerk must upon the request of the debtor provide the debtor with a copy of the judgment.[3] Also mandated is that upon debtor request, the clerk must provide the debtor with a receipt for any amount paid by the debtor to the clerk in discharge of the judgment or agreement between the parties.[4]

[Comment: Often, payment arrangements other than payment through the clerk are in place. It is not uncommon to have payments made directly to the creditor or creditor's counsel. It appears that the thrust of this amendment is to have the clerk provide, without cost, a copy of the judgment or a receipt.]

[3] 2010 Tenn. Public Acts 644; Tenn. Code Ann. § 18-1-111(a) (Michie Supp. 2010).
[4] Tenn. Code Ann. § 18-1-111(b) (Michie Supp. 2010).

Chapter 2

Add to §2.4.2 Posting

Becoming effective July 1, 2010, the Tennessee General Assembly[1] amended Tenn. Code Ann.§ 29-18-115 by deleting the existing language to subsection (e) and substituting new language for service by posting by a sheriff or sheriff's deputy. Although nominal changes were made to the language of subsection (e)(1), it is the change to subsection (e)(2) that makes a substantial change. Pursuant to the amended (e)(2), there is no longer a requirement that service be attempted three (3) times within ten (10) days; only a requirement that attempted personal service be made on three (3) different dates. Then, in accordance with amended (e)(2), the sheriff or sheriff's deputy may within at least six (6) days prior to the date specified for appearance post a copy of the warrant on the door of the premises, attempt service by U.S. Postal Service and make entry of the action on the face of the warrant or summons filed in the action. The amendment added subsection (e)(3) which limits service by posting only to that to regain possession of the property and prohibits its use for any action seeking monetary damages.

Add as §2.6.6 Codification of Clean Hands Doctrine

On May 12, 2010, the Tennessee General Assembly adopted as Tenn. Code Ann.§ 16-1-201, et seq.,[2] which now codifies the "clean hands" doctrine. The doctrine of clean hands has existed as a maxim of equity in Tennessee.[3] The maxim enunciates that a plaintiff who is guilty of committing a wrong in relation to a transaction before the court may not have the aid of a court of equity or one exercising equity in enforcing any alleged rights growing out of such transaction.[4]

The common law and equitable principle has not been superseded by the statute, but is adopted to aid in the development of the law and to provide for uniform effect both at law and in equity. The statutory language expresses the intent to provide a codified definition in cases of "conflict of law" situations where being applied by courts of other States and federal courts.[5] This does not retard its application in the courts of Tennessee.

As part of adoption, numerous definitions are set out at Tenn. Code Ann.§ 16-1-202. The statute adopts as nomenclature "claim."[6] In subsections (A) through (C) of the "claim" definition, the focus of applicability is to "commercial transactions." However, there is no adoption of the definition of a commercial transaction for purposes of this statute's application. The statute instead incorporates by definition Tennessee's Uniform Commercial Code.[7] Thus, it

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1 2010 Public Acts 827.

2 2010 Public Acts 908.

3 HENRY R. GIBSON & WILLIAM H. INMAN, GIBSON'S SUITS IN CHANCERY, §2.09 (8th Ed. 2004).

4 Id.

5 Tenn. Code Ann.§§ 16-1-201 & 16-1-202(2) (Michie Supp. 2010).

6 Tenn. Code Ann.§16-1-202(1) (Michie Supp. 2010).

7 Tenn. Code Ann.§§ 16-1-202(5) & 16-1-206 (Michie Supp. 2010); *see also*, Tenn. Code Ann.§ 47-1-101, et seq. (Michie 2001) (Uniform Commercial Code).

may be presumed that any transaction that would be governed under our Uniform Commercial Code is subject to this codified defense.

The statute provides that "unclean hands" means:

> …fraud, deceit, intentional misrepresentation or other unconscionable or inequitable scheme or conduct in connection with any commercial transaction or series or related commercial transactions pursuant to which any person has or may seek financial or other gain from another, or by recourse to such other person's property, in connection with such fraud, deceit, intentional misrepresentation or other unconscionable or inequitable scheme or conduct.[8]

Of great import, the statutory adoption[9] holds that claims brought by the plaintiff may be barred by the acts of a "predecessor-in-interest" unless that plaintiff is a "holder in due course."[10] The defenses may be asserted in accordance with the "negotiable instruments" section of our Uniform Commercial Code.[11] The courts of Tennessee are specifically empowered to enjoin, by restraining order, temporary, preliminary or permanent injunction in order to declare, uphold and enforce the provisions of this newly adopted "clean hands" statute while the matter is before the court to maintain the status quo pending adjudication or during the pendency of any appeals.[12]

Reading Tenn. Code Ann.§ 16-1-201, et. seq., in toto, this defense may be asserted at law or in equity as to any indebtedness, account, promissory note, instrument, monies, sums or damages which may be claimed or asserted as payable in connection with any commercial transaction or series of commercial transactions which would obviously encompass negotiable instruments as defined at Tenn. Code Ann.§ 47-3-104. It is a valid defense to repossession, lien encumbrance or security interest of any type or nature to enforce a claim for the payment of money or indebtedness in connection with a commercial transaction.

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[8] Tenn. Code Ann.§ 16-1-202(4) (Michie Supp. 2010).
[9] Tenn. Code Ann.§ 16-1-203 (Michie Supp. 2010).
[10] Tenn. Code Ann.§ 47-3-302 (Michie 2001) (definition of holder in due course).
[11] Tenn. Code Ann.§ 16-1-204 (Michie Supp. 2010); *see also*, Tenn. Code Ann§ 47-3-204 (Michie 2001).
[12] Tenn. Code Ann.§ 16-1-205 (Michie Supp. 2010).

Chapter 3

Add as:

§3.5.1 Scrutiny of Statutes of Limitation

As a caution to practitioners, judges in Tennessee general sessions courts are increasingly pre-screening civil cases for compliance with the applicable statute of limitations where the warrants are filed on sworn account[1] and the plaintiff is seeking a default judgment.

In courts of record, the statute of limitations is an affirmative defense that must be raised by a party in their initial pleading.[2] If that affirmative defense is not initially plead it is deemed waived.[3] The current sworn account statute[4] does not proscribe what must be included in the instrument. It only provides that whatever is included in the sworn account is "conclusive" absent a "sworn denial."[5] The Tennessee Rules of Civil Procedure are not generally applicable to proceedings in courts of general sessions in Tennessee.[6] However, by analogizing the rules of civil procedure to courts of general sessions and overlaying well established case law of Tennessee that discourages judicial activism in the "proof process," it would seem improper for the judiciary to interject themselves into fact pre-screening and thus raise a defense for the defendant and shift a burden to the plaintiff.[7] In this manner, the court would seem to show "an 'active interference' in the conduct of the cause [in which he/she is not acting as] an impartial arbiter."[8]

In the case of *Bank of America v. Vaughn*,[9] the Tennessee Court of Appeals vacated judgment granted at the general sessions and the circuit court remanding for reconsideration based upon the application of the statute of limitations. In this case, the defendant was incarcerated from 2001 and on through the time of filing of the warrant on July 28, 2008. The defendant, upon being served while incarcerated, did not file a sworn denial but did file a "motion to dismiss" predicated on lapse under the statute of limitations. Judgment for the plaintiff in the sessions court was entered on September 12, 2008 and the defendant took an appeal to the circuit court. In the circuit court, the defendant filed an "Affidavit of Facts and Argument for Appeal" again asserting that the applicable statute of limitations had run. The circuit court affirmed the judgment of the general sessions court on December 8, 2008. Without citation to authority by the Court of Appeals, the opinion appears to accord the Affidavit of Facts and Argument the same weight as a rebuttal by sworn denial and - to compound the outcome - plaintiff admitted that it bore the burden of proof showing the default occurred within the appropriate statute of limitations period. It appears very persuasive to the Court of Appeals that

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[1] See §2.5.3.1 for further clarification on sworn accounts.
[2] Tenn.R.Civ.P. 8.03 (Michie 2010).
[3] Tenn.R.Civ.P. 12.02 (Michie 2010).
[4] Tenn. Code Ann§ 24-5-107 (Michie Supp. 2010).
[5] Tenn. Code Ann.§ 24-5-107(b) (Michie Supp. 2010).
[6] Tenn.R.Civ.P. 1 (Michie 2010).
[7] *Hill v. State*, 73 Tenn. 725 (1879); COHEN, SHEPPEARD & PAINE, TENNESSEE LAW OF EVIDENCE. § 6.14 [3][c](5th Ed. 2005).
[8] Id.
[9] 2009 WL 3837073, 35 TAM 2-8, 2009 Tenn. App. LEXIS 821.

it was uncontroverted that the defendant had been incarcerated since 2001 and that reasonable minds might infer that an incarcerated defendant was not servicing his debts. The resolution of this case seems to turn far more on "the interests of justice" granting an outcome in equity rather than a direct application of Tenn. Code Ann.§ 24-5-107.

This unpublished opinion may be clearly distinguished from occasions where judges of the general sessions are denying to plaintiffs - whose claims are brought on sworn account - a default judgment due to lacking an attestation of compliance with the statute of limitations (date of last payment). In the *Vaughn* case, the defendant did in the circuit court – at minimum – file an Affidavit of Facts and Argument for Appeal thus raising the statute of limitations as a defense. In contrast, where the judge of a court of general sessions "injects himself" into a proceeding brought on sworn account denying default judgment when a defendant has not filed a sworn denial, answer or appeared, it improperly shifts a burden on the plaintiff to overcome an affirmative defense not raised by the defendant. This would appear to be an egregious form of "active interference" in the proof by a judge in the conduct of the cause.

Add as:

§3.12 Transfers

Where a civil action is brought in a general sessions court and that court finds itself *without jurisdiction*, statute mandates that the court – if in the interests of justice – transfer such action or appeal to any other court in which the action or appeal could have been brought at the time of the original filing.[10] In order to take advantage of this mandatory transfer, the court must (1) lack jurisdiction and (2) make a finding that it is in the interests of justice to transfer the case.

[Comment: The author has observed that transfers have been affected without meeting the statutory requirement that the transferring court lacks jurisdiction. These transfers may be subject to remand. However, in a practical sense, why would any advocate want to be in front of the judge whose judgment has just been reversed?]

[10] Tenn. Code Ann.§ 16-1-116 (Michie Supp. 2010).

Chapter 5

Amendment altering §5.2.2 Exemptions from Execution

On July 1, 2010, the amendment to Tenn. Code Ann.§ 26-2-103 became effective granting to a Tennessee debtor an exemption from execution, seizure, or attachment personal property to the aggregate of ten thousand dollars ($10,000.00).[1] Where the text refers to the four thousand dollar ($4,000.00) exemption, the ten thousand dollar ($10,000.00) should be substituted for matters after July 1, 2010.

Add to §5.4.1

On June 3, 2009, Tenn. Code Ann.§ 26-2-203[2] was amended to alter subsection (a) to make effective the time for which a person or garnishee must appear to start from the time of service rather than issuance. Thus, a person or garnishee may not be compelled to appear in not less than ten (10) days from service. Subsection (b) was amended to change the notice requirement nomenclature from "Notice to Judgment Debtor" to "execution form." This amendment permits the court clerks to utilize existing forms until exhausted and permits them to make necessary changes to the existing forms. The statute provides that printing of new forms shall be at the court clerk's discretion.

A recent Tennessee Attorney General's Opinion[3] has concluded that the costs of a garnishment *may* be collected when the services are requested from the clerk of the court.[4] The exception to collection at time of request is when in a chartered county[5] whose population is less than three hundred fifty thousand or more than four hundred fifty thousand under the 2000 federal census[6] - currently only Knox County, Tennessee.[7] In Knox County, the clerks may not charge costs until the service for which the charge is being made has been performed and only pursuant to Tenn. Code Ann.§ 8-21-409 rather than the general provisions of §8-21-401.

[Comment: The language of the statute makes permissive the collection of costs of issuing garnishment for all clerks of Tennessee, except Knox County, at the time of request for service. Some clerks have read this in conjunction with Tenn. Code Ann.§ 8-22-105. This statutory provision imposes personal liability on the clerk for evasion of the letter or spirit of the fee statute. When reading the statute, it is clear that liability arises only where there is "failure to charge or collect from the one liable." The author would posit that the judgment debtor would be the one liable.]

Add as §5.4.1.1 Voidable Service on Garnishee

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1 2010 Public Acts 787.
2 2009 Public Acts 393.
3 Tenn. Atty. Gen. Op. 10-100 (Sept. 27, 2010).
4 Tenn. Code Ann.§ 8-21-401 (Michie Supp. 2010).
5 http://state.tn.us/sos/bluebook/09-10/51%20County%20&%20Municipal%20Data.pdf (Listing of Tennessee cities and statutes under which charters were issued)
6 Id. (Listing of Tennessee counties under the 2000 federal census)
7 Tenn. Code Ann.§ 8-21-409 (Michie Supp. 2010).

On July 1, 2010, an amendment to Tenn. Code Ann.§ 26-2-203[8] adding subsection (d) became effective making voidable service of process for "improper service" if service is made on an employee of the garnishee instead of the proper owner, partner or officer of the garnishee or if the employee upon whom service is made is also the judgment debtor.

[Comment: It would appear that the effect of this statute will be to incentivize counsel to emphasize to the process server serving a garnishee to make sure the named garnishee is properly served.]

[8] 2010 Public Acts No. 3103.

Chapter 6

Add as:

6.2.2.1 Preservation or Dismissal of Appeal

The case of *Crowley v. Thomas*[1] is currently pending in the Tennessee Supreme Court on the issue of whether a defendant, who appealed from an adverse judgment rendered against her in the general sessions court, may dismiss the appeal at any time in the circuit court and thereby dismiss the plaintiff's additional claims asserted in an amended complaint in the circuit court.

The case originated in the General Sessions Court for Davidson County, Tennessee, when plaintiff, James Crowley, brought an action for damages sustained in an automobile accident. Mr. Crowley prevailed and the defendant, Ms. Thomas, timely appealed to the Circuit Court for Davidson County for trial de novo. The Crowleys, as appellees, made numerous amendments to their complaint once before the circuit court. Three days prior to trial Ms Thomas, appellant - relying upon Tenn. Code Ann.§ 27-5-107 - filed a Notice of Dismissal of Appeal and Motion to Affirm the General Sessions Judgment. Upon the dismissal, the circuit court held that where the plaintiff/appellee failed to prosecute its own appeal from general sessions, the matter was dismissed and statute guided the outcome: if the appeal is dismissed for any cause, the appellee is entitled to an affirmance of the judgment below with costs.[2]

The Court of Appeals affirmed the trial court not only relying on the language of Tenn. Code Ann.§ 27-5-107, but on the – to date - undisturbed decision of the Tennessee Supreme Court in *C.B. Donaghy v. McCorkle*[3] which provides that dismissal of an appeal from a general sessions judgment results in a dismissal of the plaintiff's case even over the objection of the plaintiff-appellee.

What has been well settled law in Tennessee may soon be subject to reversal.

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[1] 2010 WL 323082, 35 TAM 11-19, 2010 Tenn. App. LEXIS 50 (Tenn.App. 2009) (Perm. to App. Granted, August 25, 2010).

[2] Tenn. Code Ann.§ 27-5-107 (Michie 2000).

[3] 98 S.W. 1050 (Tenn. 1906).

Chapter 13

Add as: §13.1.6.9 Firearms:

A recent modification to the Order of Protection statute requires the owners or possessors of firearms to "dispossess" themselves of their firearms upon the entry of an Order of Protection against them as respondents.[1] The new law requires the court to instruct the respondent, upon the issuance of a final order, that the respondent must "terminate his or her physical possession of the firearms in the respondent's possession by any lawful means" within 48 hours of the entry of the order.[2] The court must instruct the respondent to complete and return to the clerk's office an "Affidavit of Firearm Dispossession" which the court must provide to the respondent or direct the respondent to obtain from the Administrative Office of the Court's website.[3] If the respondent is a firearms dealer, certain other procedures are applicable.[4] This recent modification also provides that a respondent holding a handgun carry permit will have such permit suspended upon the entry of the Order.[5]

A respondent who knowingly fails to surrender or transfer all firearms the respondent possesses may be charged under Title 36 with a Class A misdemeanor.[6] Further, the respondent who knowingly fails to surrender or transfer the firearms may be charged with a violation of Tenn. Code Ann.§ 39-13-113 (a separate offense and a violation of an Order of Protection) (Class A misdemeanor).[7] Additionally, such respondent may be charged with the Unlawful carrying of a weapon which is a Class A misdemeanor.[8]

The new law requires the Administrative Office of the Courts to make certain changes to the forms currently in use. The author would note that new revised forms were made available on the AOC's website on July 1, 2009.

[Comment: the new law is unclear concerning enforcement of the requirement of the respondent to complete the Affidavit of Firearm Dispossession. It is the author's opinion that a respondent who fails to turn in the Affidavit may be charged with contempt, but the enforcement procedures are unclear at this point. For instance, whose responsibility is it to ensure the Affidavit is returned to the clerk? Does the clerk check to make sure the respondent complies? Does the 48 hour deadline apply also to the requirement to return the Affidavit? Does anyone check the veracity of the Affidavit? Does anyone inquire of the third party transferee to ensure the weapons are secure? These and many other questions are to be answered as the courts gain experience with the new statute.]

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1 2009 Public Act 455; *see also*, Tenn. Code Ann.§§ 36-3-604, 36-3-606, 39-13-111, 39-13-113, 39-17-1307 & 36-3-615(b)(2).
2 Tenn. Code Ann.§ 36-3-625(b)(1) (Michie 2010)
3 Tenn. Code Ann.§ 36-3-615(b)(2) (Michie 2010).
4 2009 Public Act 455; *see also*, Tenn. Code Ann.§ 36-3-625 (Michie 2010).
5 Tenn. Code Ann.§ 39-17-1352(a) (Michie 2010).
6 Tenn. Code Ann.§ 36-3-625(g)(2) (Michie 2010).
7 Tenn. Code Ann.§ 39-13-113(h) (Michie 2010).
8 Tenn. Code Ann.§ 39-17-1307(e) (Michie 2010).

Add as: §13.1.9.4 Violation of Order

As discussed in §13.1.6.9, a respondent is required to transfer all of his or her firearms to a third party upon the entry of a final order.[9] A respondent who knowingly fails to surrender or transfer all firearms the respondent possesses may be charged under Title 36 with a Class A misdemeanor.[10] Further, the respondent who knowingly fails to surrender or transfer the firearms may be charged with a violation of Tenn. Code Ann.§ 39-13-113 (a separate offense and a violation of an Order of Protection) (Class A misdemeanor).[11] Finally, such respondent may be charged with a violation of Tenn. Code Ann.§ 39-17-1307 (Unlawful carrying of a weapon) (Class A misdemeanor).[12]

Add as: §13.1.9.5 Consecutive Sentencing

A recent case should be noted which has construed Tenn. Code Ann.§ 39-13-113(g), which allows for consecutive sentencing of Class A Misdemeanor violations of Orders of Protection. The court in *State v. Winfrey*[13] held that the statute authorizes sentences for violations of an order of protection to run consecutively to a conviction stemming from the same underlying facts, rather than allowing multiple convictions of violations to run consecutively to each other. In other words, a violation may run consecutively to a violation of, for instance, assault or harassment arising out of the same underlying facts, but not consecutively to an additional violation of the order.

Add to §13.1.3.2 Which Court

[Comment: it has been the author's experience that sometimes a petitioner will file in Sessions court while a divorce or custody matter is pending in Chancery Court. Although the statute clearly allows such a filing, it is the author's opinion that the better result will obtain when all issues are litigated before one judge. Therefore an informal procedure has developed in the author's jurisdiction, with the involvement of the Chancery Court judges and the Clerk and Master, that when a petitioner presents in Sessions and it is determined that an action is pending in Chancery, the petitioner is directed to file in Chancery Court. This also accomplishes the objective of judicial economy, avoiding the duplication of hearings in Sessions and Chancery.]

Add to §13.1.7 Costs

The following four new paragraphs should be inserted at the end of this section, following the Comment paragraph:

After the passage of this modification to the statute, assessment of costs against the petitioner still was problematic, even in the event of a request to dismiss the petition prior to the

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9 Tenn. Code Ann.§ 36-3-625(b) (Michie 2010).
10 Tenn. Code Ann.§ 36-3-625(g)(2) (Michie 2010).
11 Tenn. Code Ann.§ 39-13-113(h) (Michie 2010).
12 Tenn. Code Ann.§ 39-13-1307(e) (Michie 2010).
13 2009 WL 2486180, 34 TAM 41-24, 2009 Tenn.Crim.App. LEXIS 552, *10, 11.

hearing. Perhaps responding to this problem, the General Assembly in 2009 amended the statute to delete the term "petitioner" from Tenn. Code Ann.§ 36-3-617(a) and substituted the term "victim," clarifying (the author hopes) that some situations exist where it may be proper to assess costs against the petitioner. Under one interpretation, if the petitioner requests dismissal prior to the hearing, the court will not be able to determine if the petitioner is a "victim," thereby allowing the assessment of costs against the petitioner. However, under another interpretation of the statute, if the petitioner requests dismissal prior to the hearing, and because the court, without the benefit of a full hearing, would not be able to determine whether the petitioner is or is not a "victim," costs should not be assessed against the petitioner. The author would note that this change to the statute is recent and untested in the appellate courts.[14]

Three recent cases of the Tennessee Court of Appeals have shed light on the cost issue. Construing the 2008 version of the statute without the 2009 amendments, The *Pearson v. Pearson*[15] court held that the "petitioner" could never be assessed court costs based upon the plain language of the statute. This was true even though the trial court had dismissed the petition for petitioner's failure to prove the allegations by a preponderance of the evidence. It should be noted that the court was interpreting the statute prior to the 2009 change in which the word "victim" was substituted for "petitioner" in Tenn. Code Ann.§ 36-3-617(a). Similarly, the court in *Merriman v Merriman*[16] held that a petitioner could not be assessed costs where a trial court, erroneously, issued mutual orders of protection against both the petitioner and respondent. The *Merriman* court had interpreted the 2009 statute. Likewise – the court held – in even more forceful language in *Lewis v Rader*,[17] that a trial court could not assess costs against a petitioner even where the petition had been dismissed because of the petitioner's failing to appear for the hearing. The *Rader* court, construing the 2009 statute containing the term "victim," held that the change of language was "of no consequence."

The Domestic Violence State Coordinating Council, in conjunction with the Tennessee Coalition Against Domestic & Sexual Violence, has issued guidance with regard to the costs issue. In a memo dated September 1, 2009, the Council makes clear that the 2009 amendments to the statute were adopted in an effort to bring Tennessee law into compliance with applicable Federal guidelines (and not interrupt the associated flow of federal funds to Tennessee), by ensuring that "victims" are not assessed court costs. According to this memo, copies of which were sent to all Tennessee judges and clerks, a petitioner "may be charged fees and costs ONLY if a hearing is held and the evidence supports a finding that the petitioner is not a victim of domestic violence, sexual assault or stalking. The Department of Justice has also advised that if a petitioner voluntarily dismisses a petition or fails to appear in court for a hearing, no fees or costs may be imposed on the petitioner." (emphasis in original).

[Comment: For now, at least until the Tennessee Supreme Court issues guidance, the issue of whether a court may assess costs against a petitioner is "not favored." The author, in agreement with the above cited memo, would argue that if the court is able to determine that a petitioner is not a "victim," costs should be assessed against the petitioner pursuant to the court's inherent

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[14] See, 2009 Public Act 263 (Effective May 20, 2009).
[15] 2010 WL 2432053, 35 TAM 28-11, 2010 Tenn.App. LEXIS 390, *5.
[16] 2010 WL3767116, 35 TAM 42-22, 2010 Tenn. Ct. App. LEXIS 598, *6
[17] 2010 WL3853285, 35 TAM 44-18, 2010 Tenn.App. LEXIS 615, *7.

discretion as to the assessment of costs.[18] Of course, a court would be able to make this determination only after a full hearing on the merits.]

Add §13.1.6.1 – Prohibited Activities

A recent change to the statute has added the following language to item 2 of the activities which the court, in issuing either an ex parte or a full order, may prohibit: Prohibiting the respondent from "coming about the petitioner for any purpose."[19]

[18] See, e.g., *Perdue v. Green Branch Min. Co.*, 837 S.W.2d 56, 60 (Tenn. 1992).

[19] 2010 Public Act 959 (effective July 1, 2010); *see also*, Tenn. Code Ann.§ 36-3-606(a) (Michie2010).

Chapter 15

Add to: § 15.1.2.1 Pre Trial Diversion – In General/Beginning the Process:

Add the following as citation in footnote 12:

See also, *State v. Thomason*, 2009 WL 3015100, 34 TAM 47-25, 2009 Tenn. Crim. App. LEXIS 796, *7, *8, 34 TAM 47-25 (2009) (court held that DA abused his discretion in denying the defendant's request for pretrial diversion by failing to consider the defendant's amenability to correction or his propensity to re-offend and by failing to discuss the weight attributed to each of the enumerated factors; the court stated that the circumstances of the offense and the need for deterrence may justify a denial of a diversion request, but the State is required to consider all other relevant factors in making its decision.).

Chapter 16

Add as new paragraph §16.1.2 – Who is Entitled

Insert the following new paragraph as the third full paragraph on page 232 (after the paragraph ending "… a case would be entitled to a preliminary examination.]"):

[Comment: The Tennessee Supreme Court in 2010 enacted changes to Rule 5(e) which help to clarify that defendants charged pursuant to instruments other than arrest warrants are entitled to a preliminary examination. Rule 5(e)(1) was amended to read that "Any defendant arrested *or served with a criminal summons.*…" (emphasis added) See Amendments to Tennessee Rules of Criminal Procedure, adopted effective July 1, 2010.]

Chapter 17

Add as a new sentence to §17.1.2.2 Speedy Trial – Interpretation of Right: new final sentence to 17.1.2.2:

A recent Court of Appeals case makes the point that the right to speedy trial applies only in criminal proceedings and not in civil matters.[1]

Add as new paragraph to the end of § 17.1.5.3.1 – In General/Required Warnings:

A recent U.S. Supreme Court case makes the point that no specific language is necessary for the required warnings, but, rather, "the inquiry is simply whether the warnings reasonably convey to [a suspect] his rights as required by *Miranda*."[2] In the case of *Florida v. Powell*[3] the court noted that the officers informed the defendant "…that he had 'the right to talk to a lawyer before answering any of [their] questions' and 'the right to use any of [his] rights at any time," and that "in combination, the two warnings reasonably conveyed [the defendant's] right to have an attorney present, not only at the outset of interrogation, but at all times."[4]

Add as new paragraph to the §17.1.5.3.4 – Waiver of Rights:

In *Maryland v. Shatzer*[5] the United States Supreme Court analyzed whether a break in custody was sufficient to end the presumption of involuntariness of a defendant's waiver of his Miranda rights. Previously, in the seminal case of *Edwards v. Arizona*,[6] the court held that a suspect's request for counsel cannot be defeated by a subsequent waiver of such right absent a showing of additional safeguards designed to ensure that the waiver has not been obtained by coercive police tactics:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights…. [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.[7]

The court in *Shatzer* explained, "the rationale of *Edwards* is that once a suspect indicates that 'he is not capable of undergoing [custodial] questioning without advice of counsel,' 'any subsequent waiver that has come at the authorities' behest, and not at the suspect's own

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[1] See, *Byars v. Young*, 2010 WL 1998640, 35 TAM 25-12, 2010 Tenn.App. LEXIS 344, *13.
[2] *Florida v Powell*, 130 S.Ct. 1195, 1204 (2010) (citing, *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)).
[3] Id.
[4] Id. at 1204, 1205.
[5] 130 S.Ct. 1213 (2010).
[6] 451 U.S. 477, 101 S.Ct. 1880 (1981).
[7] Id. at 484, 485.

instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect."[8]

A factor the court considers when weighing whether a suspect's subsequent waiver (after first invoking his right to an attorney) is voluntary and thus valid, or whether the waiver is the product of police coercion, is length of any break in custody between the initial invocation of the right and the subsequent waiver. In *Shatzer*, the suspect had initially requested an attorney during questioning in 2003 while serving time on an unrelated conviction in a state penitentiary. Upon his request, the interview ceased and the suspect was released back into the general prison population. Approximately two and one half years later, the suspect was re-interviewed (again while an inmate at a different penal facility), executed a written waiver, and subsequently made incriminating statements. The court ruled that the break in custody and questioning was of sufficient duration to dissipate any coercive pressures present:

> When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely.[9]

The court concluded by announcing a general rule as to the length of time necessary for a break in custody to overcome any police pressure for a waiver of the right to an attorney:

> The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is re-interrogated after a break in custody that is of sufficient duration to dissipate its coercive effects…. We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption 'will not reach the correct result most of the time.'… It seems to us that period is 14 days. That provides plenty of time for the suspect to get re-acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.[10]

Add a new paragraph to the end of §17.1.5.3.7 – Request for an Attorney:

The recent United States Supreme Court case of *Berghuis v. Thompkins* confirms that a suspect's request for an attorney must be unambiguous and that simply remaining silent during questioning does not sufficiently invoke the right:

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[8] 130 S.Ct. at 1221.

[9] Id. at 1221.

[10] Id. at 1222, 1223.

> At no point in the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was '[l]argely' silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as 'yeah,' 'no,' or 'I don't know.' And on occasion he communicated by nodding his head….
>
> In the context of invoking the *Miranda* right to counsel, the Court in *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), held that a suspect must do so 'unambiguously.' If an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation, ibid., or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights….
>
> Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning. [citations omitted] Here he did neither, so he did not invoke his right to remain silent.[11]

Add § 17.1.11.4.13 Probation/Parole:

For interest to Sessions practitioners, a recent Tennessee Supreme Court case has strongly implied [by way of dicta] that certain warrantless searches of probationers may be reasonable under certain circumstances. In *State v. Turner*[12] the court, while not dealing with the status of a probationer (but containing interesting analysis concerned therewith), examined the circumstances surrounding the warrantless search of a parolee and held that the search was reasonable even though the police had no reasonable or individualized suspicion, so long as the search was conducted out of valid law enforcement concerns.[13] The court's analysis focused on the familiar "expectation of privacy" issue and progressed from the situation involving a person serving a sentence, who has a "severely curtailed" expectation of privacy (citing *State v. Dulsworth,* 781 S.W.2d 277, 284 (Tenn. Crim. App. 1989)), to parolees, who "occupy a place between incarcerated prisoners and probationers" and who may be considered to still be under the control of the penal authorities, to a person on probation, whose expectation of privacy is greater than the other two classes of defendants.[14] Although the opinion focuses mainly on the parolee's expectation of privacy ("Our resolution of the instant case also does not require us to resolve this issue as to probationers"),[15] the Sessions practitioner may gain useful insight from the court's discussion of a probationer's expectation of privacy.

The court hinted that warrantless searches of probationers may be reasonable, under the 4th Amendment of the United States Constitution and the Tennessee Constitution, if certain

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[11] Id. at 2256, 2257, 2259 & 2260.
[12] 297 S.W.3d 155 (Tenn. 2009).
[13] Id. at 167.
[14] Id. at 161.
[15] Id. at 162, fn. 4.

conditions are present. First, the probation documents must state that the probationer has consented, as a condition of probation, to a warrantless search.[16] Next (again, drawing from the court's discussion involving parolees), the officer conducting the search must be aware that the defendant is on probation and is subject to a warrantless search.[17] Finally, and perhaps most importantly, the search must not be arbitrary but must be based on a reasonable suspicion ("… the balance of these considerations requires *no more than* reasonable suspicion….") (citing *United States v. Knights*, 534 U.S. 112 (2001)) (emphasis in original).[18]

[16] Id. at 161.
[17] Id. at 166, fn. 10.
[18] Id. at 162.

Chapter 20

Add as § 20.1.3 Judicial Subpoena:

A procedure exists regarding the issuance of a special type of subpoena which should be noted by the Sessions practitioner. Although sparingly used in the author's experience, this subpoena is an effective tool for law enforcement and may be used as an investigatory device in certain cases in which a search warrant may not be advisable. The statute, Tenn. Code Ann§ 40-17-123, is comprehensive and in-depth study is recommended for those Sessions practitioners who may be confronted with its use.

Generally, a law enforcement officer (as defined in Tenn. Code Ann.§ 39-11-106 may seek a subpoena for the "production of books, papers, records, documents, tangible things, or information and data electronically stored for the purpose of establishing, investigating or gathering evidence for the prosecution of a criminal offense."[1] Similar to a search warrant, the officer is to prepare an affidavit which must state "with particularity" certain items listed in the statute, such as "articulable reasons" why the officer is seeking the subpoena, the specific documents or things requested, and a statement describing the nexus between the items sought and the crime being investigated.[2] The request may be made of a Sessions judge or a judge of a court of record, and the judge is required to make certain findings prior to the subpoena's issuance.[3] If a subpoena is issued, the affidavit must be kept by the court under seal.[4]

[1] Tenn. Code Ann.§ 40-17-123(a) (Michie Supp. 2010).
[2] Tenn. Code Ann.§ 40-17-123(c) (Michie Supp. 2010).
[3] Tenn. Code Ann.§ 40-17-123(d)(1) (Michie Supp. 2010).
[4] Tenn. Code Ann.§ 40-17-123(e) (Michie Supp. 2010).

Chapter 21

Add new paragraph to §21.1.1.1 – Overview of the Trial Date:

Add the following as a new 4th full paragraph on page 375 (in the discussion of bench trials) (after the paragraph which ends with "… waivers of grand jury and jury trial must be obtained."):

The court in *State v. Salyer*[1] held that the General Sessions court committed error when it conducted a bench trial on a traffic citation without obtaining the defendant's written waiver of his right to grand jury presentation, his right to a jury trial, and his right to counsel. The defendant's conviction was vacated.

Add to Footnote 160 in Section 21.1.3.8.5 – Revocation of Probation:

See also, *State v. Walker*, 307 S.W.3d 260, 265, 34 TAM 41-29 (Tenn. Crim. App. 2009) (court held that lab report may be admitted against probationer, provided such report is accompanied by an affidavit which contains certain information required by the statute; the court specifically held that the admission of the report and affidavit without testimony from the lab technician is not a violation of the defendant's right of confrontation or of *Crawford v. Washington*, 541 U.S. 36 (2004)).

Add new paragraph at the end of Section 21.1.3.8.4 – Modification of Probation:

[Comment: It is the author's opinion that an extension of probation, which happens frequently in the author's court, may be granted only in the context of a probation revocation proceeding. However, the author further believes that this right may be waived by the probationer, thus saving the probationer from being arrested on the violation warrant and posting an additional bond. Such a waiver must, of course, be knowing and voluntary, and must occur prior to the end of the probation period.]

Add the following cite to footnote 163, Section 21.1.3.8.5 – Revocation of Probation:

See also, *State v. Cox*, 2010 WL 98885, 35 TAM 11-32, 2010 Tenn. Crim. App. LEXIS 27.

[1] 2009 WL 1798381, 34 TAM 32-21, 2009 Tenn. Crim. App. LEXIS 486, *7, *8.