

IN THE TENNESSEE COURT OF THE JUDICIARY

IN RE: THE HONORABLE JOHN A. BELL
JUDGE, GENERAL SESSIONS COURT
COCKE COUNTY, TENNESSEE

DOCKET NO. M2008-00932-CJ-CJ-CJ

COMPLAINANT: Dan A. Metcalf

File No. 06-2741

COPY

AFFIDAVIT OF LUCIAN T. PERA

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

I, Lucian T. Pera, under sworn oath, do hereby depose and state as follows:

1. I am over the age of eighteen and make this affidavit of my own personal knowledge.

I have prepared this affidavit at the request of Judge John A. Bell.

QUALIFICATIONS

2. I am an attorney licensed in the state of Tennessee and a partner with Adams and Reese LLP and a member of its Litigation Practice Group, practicing primarily in the civil trial area, including a wide variety of commercial, media, intellectual property and personal injury litigation. I also counsel and represent lawyers, law firms, and others on questions of legal and judicial ethics and the professional responsibility of lawyers and judges. My office address is Brinkley Plaza, 80 Monroe Avenue, Suite 700, Memphis, Tennessee 38103.

3. I graduated with honors from Princeton University in 1982, and obtained my law degree in 1985 from Vanderbilt University School of Law. I served as a law clerk to Judge Harry W. Wellford of the United States Court of Appeals for the Sixth Circuit. I am a member of the American Law Institute and I am listed in *The Best Lawyers in America* (Ethics and

Professional Responsibility Law; First Amendment Law) and *Chambers USA Directory* as a Leader in the Field of General Commercial Litigation.

4. For many years, I have devoted significant time and attention to the study of matters relating to legal ethics, professional responsibility, legal malpractice, loss prevention, related topics concerning the practice of law, and judicial ethics. For more than fifteen years, I have counseled lawyers practicing with my law firm about such matters and, in more recent years, I have represented and counseled lawyers, law firms, their clients, and judges about such matters as a part of my practice.

5. I also teach and write on these subjects. Most of the seminars that I have done over the last few years, as well as most of the articles that I have authored or contributed to, are listed in Exhibit A.

6. I have served on several bar association committees whose work related to these subjects. Among the bar association committees on which I have served is the Tennessee Bar Association Standing Committee on Ethics and Professional Responsibility, of which I served as Vice Chair from 1995 until 2000, and as Chair since that time. For five years, this Committee worked to develop a draft set of new lawyer ethics rules for Tennessee and, based on this work, in October 2000 the TBA filed a petition asking the Supreme Court of Tennessee to adopt these draft ethics rules. In August 2002, the Tennessee Supreme Court granted the TBA's petition and adopted these proposed ethics rules, effective March 1, 2003. The committee is presently studying the ABA's recent revisions to the ABA Model Rules of Professional Conduct for possible adoption in Tennessee.

7. From 1997 through 2002, I served on the thirteen-person American Bar Association Special Commission on the Evaluation of the Rules of Professional Conduct (also

known as the "Ethics 2000 Commission"), which was charged with reviewing the ABA Model Rules of Professional Conduct and submitting a report to the ABA House of Delegates concerning any recommended changes in them. After two sessions of debate, the ABA House of Delegates approved most of Ethics 2000's recommended changes in the ABA Model Rules of Professional Conduct at its meeting in February 2002.

8. I also served for several years as chair of the Committee on Professional Responsibility of the ABA Section of Business Law and I currently serve as chair of the Ethics Committee of the Media Law Resource Center's Defense Counsel Section. I have chaired and now serve on the editorial board of the *ABA/BNA Lawyers' Manual on Professional Responsibility*. I currently serve as Secretary of the Association of Professional Responsibility Lawyers.

9. I have been retained to serve as an expert in a number of legal malpractice, lawyer disciplinary, and other matters involving the conduct of lawyers and judges. In a number of these, I have provided testimony by affidavit and otherwise for use in a number of different state and federal courts, including Tennessee courts.

LEGAL ANALYSIS AND OPINION

10. I have provided Judge Bell my full and complete legal analysis and opinion related to the Judicial Disciplinary Complaint filed against him by Dan A. Metcalf in a letter I wrote Judge Bell dated December 4, 2006. (A copy of this letter is attached as Exhibit B.) While preparing this letter, I was provided documents related to this disciplinary complaint, including the original complaint, a transcript of certain court proceedings, correspondence with disciplinary counsel, and various authorities and sources on the underlying law.

11. Based upon my review of the facts as I understand them (which are set out in my December 2006 letter) and the applicable law, it is my opinion that Judge Bell did not violate Tennessee law in warning Mr. Metcalf regarding the contemptuous nature of his conduct and speech.

12. In my opinion, Judge Bell's actions did not violate Tennessee law; rather, they followed an appropriate practice identified by other courts. Mr. Metcalf's conduct and speech in the courthouse on February 6, 2006, could be seen by a judge in Judge Bell's position, acting reasonably, to fall within the category of conduct that Tennessee contempt law aims to prohibit.

13. In my opinion, Judge Bell's response to Mr. Metcalf appears to have been, if anything, restrained and temperate. Rather than attempting to hold Mr. Metcalf in contempt, and rather than then instituting a charge of indirect criminal contempt, Judge Bell instead merely warned Mr. Metcalf, on the record, that his actions could be construed as contempt and warned Mr. Metcalf that, if he continued in his course of conduct, Judge Bell would follow the course of action laid out in Rule 42(b). As stated in my December 2006 letter, I am aware of no authority condemning the practice of issuing such a warning.

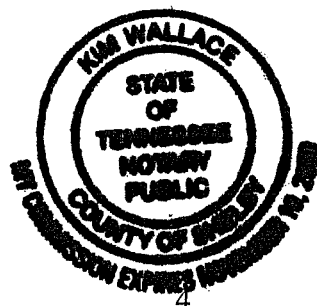

LUCIAN T. PERA

Sworn to and subscribed to before me this 1st day of July, 2008.


NOTARY PUBLIC

My Commission Expires:

Nov. 10, 2009



Lucian T. Pera
Seminars and Presentations 2005 – 2008

ADAMS AND REESE LLP


Presenter, “Accidental Clients,” 17th Annual Conference, International Association of Attorneys and Executives in Real Estate (AECRE), Napa, California, April 11 and 12, 2008.

Presenter and Facilitator, “In-House Counsel Forum on Liability Issues,” 17th Annual Conference, International Association of Attorneys and Executives in Real Estate (AECRE), Napa, California, April 11, 2008.

Presenter, “An Ethics Double Feature: “Accidental Clients” and “Conflicts Potpourri””, Bryan Cave LLP, St. Louis, Missouri, March 7, 2008.

Moderator and Presenter, "Ethics in Civil Litigation, Parts I and II," Professional Education Broadcast Network/WebCredenza, Inc., National Teleconference Seminars, February 26 and 27, 2008.

Moderator and Presenter, "Practical Lawyer Ethics: Representation, Conflicts and The Privilege," Professional Education Broadcast Network/WebCredenza, Inc., National Teleconference Seminars, January 31, 2008.

Moderator and Presenter, "Ethics for Corporate Counsel: The Evolving Liability Environment", Adams and Reese LLP and Association of Corporate Counsel, Memphis and Nashville, Tennessee, January 29-30, 2008.

Presenter, "Holiday Double-Feature: “Accidental Clients” and “Basic Digital Hygiene for Lawyers,” Memphis Bar Association, Memphis, Tennessee, December 21, 2007.

Moderator and Presenter, "Evidence in Civil Litigation: 2007 Trends and Developments," Professional Education Broadcast Network/WebCredenza, Inc., National Teleconference Seminars, December 18, 2007.

Presenter, “Accidental Clients,” Mid-South Commercial Law Institute, Nashville, Tennessee, November 30, 2007.

Presenter, “A Disqualification Motion Ripped from Case Law: *Meridian Automotive and Milbank Tweed*,” Mid-South Commercial Law Institute, Nashville, November 29, 2007.

Presenter, “Technology as Risk v. Technology as a Risk Management Tool,” 6th Annual Law Firm General Counsels’ Forum: Managing Risks in a New Paradigm,” The Hildebrandt Institute and Hinshaw & Culbertson LLP, New York, New York, October 30, 2007.

Moderator and Presenter, “Limiting Opinion Liability – Strategy and Ethics,” 2007 Fall Legal Opinion Seminar, ABA Working Group on Legal Opinions and ABA Section of Business Law, New York, New York, October 30, 2007.

- Moderator and Presenter, "Conflicts of Interest Panel Discussion," Aon Large Law Firm Symposium, Aon Risk Services, Chicago, Illinois, October 17, 2007.
- Moderator, "Conflicts of Interest Panel Discussion," AON Large Law Firm Symposium, Chicago, Illinois, October 16-18, 2007.
- Presenter, "Disclosure of Adverse Authority Under Rule 3.3(a)(2)," Chambliss Bahner & Stophel, P.C., Chattanooga, Tennessee (Teleconference), September 24, 2007.
- Presenter, "Document Retention in Law Firms," Association of Legal Administrators Memphis Chapter, Memphis, Tennessee, September 13, 2007.
- Co-Presenter, "Annual Review Seminar: Ethics," Tennessee Law Institute, various Tennessee locations, September 6 and 27, October 4 and 11, November 8, and December 6, 2007.
- Presenter, "Media Lawyer Ethics: What Ethics Lawyers Need to Know About the Ethics Problems of Your Media and Entertainment Lawyer Partners and Clients," 2008 Annual Meeting, Association of Professional Responsibility Lawyers, San Francisco, California, August 11, 2007.
- Presenter, "Ethics Workshop 2007: Real-World Hypotheticals for Bankruptcy Lawyers," 12th Annual Southeast Bankruptcy Workshop, American Bankruptcy Institute, Kiawah Island, South Carolina, July 25-28, 2007.
- Presenter, "Gatekeeper Ethics," 2007 Legal Education Conference, National Association of Public Pension Attorneys, Vail, Colorado, June 27, 2007.
- Presenter, "Breaking the Billable Hour Habit: Ethics & Best Practices, TransformativeLaw.com and Internet Bar Association, Podcast (recorded and posted in June 2007), available at www.freeiq.com/billablepodcast and www.transformativelaw.com.
- Presenter, "Technology & The Emergence of ODR/ADR as a Practice Area: Ethics and Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded and posted in June 2007), available at www.freeiq.com/odrpodcast and www.transformativelaw.com.
- Presenter, "How to Productize Your Practice: Ethics & Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded June 2007; podcast pending).
- Presenter, "Bus. Dev. in the Constant Comm. World: Ethics & Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded and posted in June 2007), available at www.freeiq.com/constantcommmpodcast and www.transformativelaw.com.
- Presenter, "Crisis planning Consulting for Lawyers: Ethics & Best Practices,"

TransformativeLaw.com and Internet Bar Association, Podcast (recorded and posted in June 2007), available at www.freeiq.com/crisispodcast and www.transformativelaw.com.

Presenter, "Multicasting Your Practice: Ethics & Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded June 2007; podcast pending).

Presenter, "Growing Your Practice with Podcasts: Ethics & Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded June 2007; podcast pending).

Presenter, "Growing Your Practice with Webcasts: Ethics & Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded June 2007; podcast pending).

Presenter, "Growing Your Practice with Blogs: Ethics & Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded June 2007; podcast pending).

Presenter, "Growing Your Practice with E-courses: Ethics & Best Practices," TransformativeLaw.com and Internet Bar Association, Podcast (recorded June 2007; podcast pending).

Presenter, "Ethics in Negotiating Licenses" and "Pretexting and Trademark Investigations," 5th Annual Rocky Mountain Intellectual Property & Technology Institute, Colorado Bar Association CLE, Denver, Colorado, May 24 and 25, 2007.

Presenter, "Should They Stay or Should They Go? Document Retention Issue for Clients and Lawyers in a Post-E-Discovery World," Miller & Martin Academy, Miller & Martin PLLC, Atlanta, Nashville, and Chattanooga, May 4, 2007.

Moderator and Presenter, "2007 Ethics Update - Parts I and II," Professional Education Broadcast Network/WebCredenza, Inc., National Teleconference Seminars, May 1 and 2, 2007.

Presenter, "Ethics Opinions That Matter," Spring 2007 National Legal Malpractice Conference, ABA Standing Committee on Lawyer Professional Liability, Washington, D.C., April 26, 2007.

Presenter, "A Construction Attorney's Ethical Obligations Regarding Electronically Stored Information Under the Amendments to the Federal Rules of Civil Procedure Ethics Presentation," 2007 Annual Meeting, ABA Forum on Construction Law, San Juan, Puerto Rico, April 13, 2007.

Presenter, "E-Discovery Under the New Federal Rules: A Primer for Health Care Risk

- Managers," West Tennessee Chapter for Health Care Risk Management, Memphis, Tennessee , April 2, 2007.
- Moderator and Presenter, "Ethics in Civil Litigation 2007 - Parts I and II," Professional Education Broadcast Network, National Teleconference, March 27 and 28, 2007.
- Presenter, "Sunshine Laws: Do Politicians Prefer the Dark?", Society of Professional Journalists, Mid-South Chapter and University of Memphis Student Chapter, Memphis, Tennessee, March 27, 2007.
- Presenter, "Firm Counsel Project: Practical Resources for Firm Counsel," 1st Annual Firm Counsel Project Forum, ABA Section of Business Law Spring Meeting, Washington, D.C., March 15, 2007.
- Moderator and Presenter, "Privacy Issues and the Law," 2nd Annual Law School for Journalists, U.S. District Court for the Western District of Tennessee, University of Memphis School of Journalism, University of Memphis School of Law, and Memphis Bar Association, March 3, 2007, Memphis Tennessee.
- Presenter, "Updating the City of Memphis' Code of Ethics," Memphis City Council, Memphis, Tennessee, January 16, 2007.
- Presenter, "Accidental Clients," Memphis Bar Association Labor and Employment Law Section Annual Seminar, Memphis, Tennessee, December 1, 2006.
- Co-Presenter, "Out of Bounds," Mid-South Commercial Law Institute, Nashville, Tennessee, November 15, 2006.
- Moderator and Presenter, "The New Federal E-Discovery Rules: A Primer for Non-Litigators," Adams and Reese LLP, Firm Teleconference (Part III), All Offices, November 29 & 30, 2006.
- Moderator and Presenter, "The New Federal E-Discovery Rules: Producing and Reviewing Electronic Materials," Adams and Reese LLP, Firm Teleconference (Part II), All Offices, November 7 & 8, 2006.
- Presenter, "Accidental Clients," Tennessee Association of Construction Counsel, Nashville, Tennessee, November 3, 2006.
- Moderator and Presenter, "The New Federal E-Discovery Rules: Preparing You and Your Client for the New Meet-and-Confer," Adams and Reese LLP, Firm Teleconference (Part I), All Offices, October 24 & 25, 2006.
- Presenter, "Ethics for Public Defenders," Tennessee District Public Defenders Conference, Annual Training Seminar, Nashville, Tennessee, October 19, 2006.

Moderator and Presenter, "Malpractice Claims Against Expert Witnesses," Professional Education Broadcast Network, National Teleconference, October 18, 2006.

Presenter, "Ethics Issues in Opinion Practice," American Bar Association Section of Business Law, Legal Opinion Risk Seminar, New York, New York, October 17, 2006

Presenter, "Accidental Clients or Ten (Easy?) Pieces," Miller & Martin Academy, Miller & Martin PLLC, Nashville, Chattanooga, and Atlanta, September 15, 2006.

Co-Presenter, "Annual Review Seminar: Ethics," Tennessee Law Institute, various Tennessee locations, September 7 and 28, October 24, November 3 and 16, and December 6, 2006.

Presenter, "Working with Lawyers: Why you Should Care About Lawyer Ethics," Tennessee Association of Private Investigators, Collierville, Tennessee, August 26, 2006.

Presenter, "Ethical Issues and Financial Data," Basics of Accounting and Finance (Summer 2006), Practising Law Institute, Chicago, Illinois, July 28, 2006.

Presenter, Presentation to Memphis City Schools Communications Department Personnel on Media Law Issues (Tennessee Public Records Act and Open Meetings Law), Memphis City Schools Teaching and Learning Academy, Memphis, Tennessee, July 20, 2006.

Presenter, "The Impact of Open Records Law on Human Resources," Tennessee Personnel Management Association, Memphis, Tennessee, July 21, 2006.

Presenter, "Ethics and Attorney-Client Privilege Issues for Municipal Attorneys," Tennessee Municipal Attorneys Association, Nashville, Tennessee, June 26, 2006.

Moderator and Presenter, "Practical Ethics for Lawyers: 2006 Update, Parts 1 and 2," Professional Education Broadcast Network/WebCredenza, Inc., National Teleconference Seminars, June 27 and 28, 2006.

Moderator and Presenter, "Problem, Role Plays, and PowerPoint: Effective Tools for Teaching Ethics," 32nd National Conference on Professional Responsibility, American Bar Association, Vancouver, British Columbia, Canada, June 2, 2006.

Moderator and Panelist, "Professional Ethics and Immigration Law," Annual Immigration Seminar, Federal Bar Association and U.S. District Court for the Western District of Tennessee, Memphis, Tennessee, May 18, 2006.

Presenter, "Ethics and the Real Estate Professional: Real-Life Hypotheticals," 2006 Annual Meeting and Convention, Tennessee Land Title Association, Memphis, Tennessee, May 4, 2006.

Presenter, "Ethics: Real-Life Hypotheticals," Lon V. Boyd Seminar, Kingsport Bar Association

and Bristol Bar Association, Asheville, North Carolina, April 23, 2006.

Panelist, "Free Speech in Judicial Elections: Where Do We Draw The Line?," Memphis Lawyers' Chapter of the Federalist Society, Memphis, Tennessee, April 27, 2006.

Moderator and Producer, "Ethical Issues Facing the Young Business Lawyer," Institute for the Young Business Lawyer, ABA Section of Business Law Spring Meeting, Tampa, Florida, April 6, 2006.

Panelist, "The Impaired Lawyer from the Law Firm's Point of View," Tennessee Lawyer Assistance Program, Nashville, Tennessee, March 31, 2006.

Moderator, "Things I Hate About You . . . : Journalists and Lawyers Square Off," Law School for Journalists, U.S. District Court for the Western District of Tennessee, Memphis Bar Association, University of Memphis Law School, and University of Memphis Journalism Department, Memphis, Tennessee, March 6, 2006.

Presenter, "Access to the Courts," Law School for Journalists, U.S. District Court for the Western District of Tennessee, Memphis Bar Association, University of Memphis Law School, and University of Memphis Journalism Department, Memphis, Tennessee, March 6, 2006.

Panelist, "Judicial Recusal and Abortion Bypass Cases," Fifth Circuit Spring Meeting and Election, American Bar Association Law Student Division, Memphis, Tennessee, February 25, 2006.



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LUCIAN T. PERA
Publications
2005-2008

Co-Author, "From Trusted Counselor to Vigilant Gatekeeper: The Evolving Liability Environment for Corporate Counsel," Association of Corporate Counsel (Sept. 2007), available at <http://www.acc.com/resource/getfile.php?id=8918> (co-authored with Brian S. Faughnan, Jeffrey E. Richardson, and Martin A. Stern).

Co-Author, "Ethics Opinions Affecting Corporate Counsel: 2006-07," *Legal Ethics for In-House Corporate Counsel*, BNA Corporate Practice Series No. 87 (2007) (co-authored with Tricia T. Olson).

Author, 1998 to present, Tennessee Survey, *MLRC 50-State Survey: Media Libel Law* (Media Law Resource Center).

Author, 1999 to present, Tennessee Survey, *MLRC 50-State Survey: Employment Libel and Privacy Law* (Media Law Resource Center).

Author, Tennessee Chapter, 2007 to present, "Reporter's Privilege Compendium," Reporters Committee for Freedom of the Press, available at <http://www.rcfp.org/privilege/index.php>.

Author, "Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct," 30 OKLA. CITY UNIV. L. REV. 637 (Fall 2005; published Jan. 2007), available at <http://www.adamsandrees.com/pdf/ABAEthics2000StateAdoptionsArticle.pdf>.

Author, "In Search of an Ethics Guide," *Business Law Today* (Nov./Dec. 2006).

Author, "The Ethics Nerd's Guide to the Media Lawyer's Ethics Library," *MediaLawLetter* (June 2006).

Co-Author, "First Amendment Earthquake: Can the Tennessee Supreme Court Retrofit Our Judicial Speech Rules?", *Tenn. Bar Journal*, June 2006 (co-authored with Brian S. Faughnan).

Co-Author, "Paradise Tarnished: Today's Sources of Liability Exposure for Corporate Counsel," Association of Corporate Counsel (co-authored with Brian S. Faughnan; 2004 and 2005), available at <http://www.acc.com/resource/v4960>.

Co-Author, "Lawyers as Whistleblowers: The Emerging Law of Retaliatory Discharge of In-House Counsel," Association of Corporate Counsel (co-authored with Brian S. Faughnan; 2004 and 2005), available to ACC members at http://www.acca.com/protected/article/governance/wrong_discharge.pdf.



December 4, 2006

Attorneys at Law

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BY EMAIL and U.S. MAIL

Hon. John A. Bell
Coke County General Sessions Court
111 Court Avenue
Newport, Tennessee 37821

Re: Legal Analysis Related to Judicial Disciplinary Complaint

Dear Judge Bell:

You have asked me to provide you with my analysis concerning the law related to a judicial disciplinary complaint filed against you by Dan A. Metcalf.

You have provided me documents related to this disciplinary complaint, including the original complaint, a transcript of certain court proceedings, correspondence with disciplinary counsel, and various authorities and sources on the underlying law.

Facts

My understanding of the facts underlying this judicial disciplinary complaint, upon which I rely and which I assume to be true for purposes of the analysis set forth in this letter, are as follows:

The incident at issue arose during the course of an election campaign for the position of Coke County General Sessions Judge, in which you were challenged in your bid for re-election by Phil Owens. Mr. Metcalf, the complainant in this matter, was involved in working with and supporting the campaign of your opponent, Phil Owens. It appears that Mr. Owens' campaign included efforts to make a campaign issue out of court practices concerning payment of court costs, restitution, and probation fees.¹

On February 6, 2006, the complainant was on the first floor of the courthouse, speaking with various people, including litigants in your court. The physical layout of the courthouse is such that Mr. Metcalf was situated where people going to and from your courtroom were required to pass by, and within earshot of, his location.

¹ Although you have expressed your opinion that the conduct of Mr. Owens' campaign was inappropriate and unethical, I have not formed an opinion on this topic.

At that time, on February 6, 2006, you were aware of several prior incidents that appeared to arise from Mr. Metcalf's activities on the first floor of the courthouse. Among these were the following:

About two weeks before, as you were leaving the courthouse, Mr. Metcalf was pointed out to you by a litigant as someone who was telling people in the courthouse that "the court [referring to your court] was just a money racket." The litigant was also confused about Mr. Metcalf's position, saying that he believed he was one of "your officers," which Mr. Metcalf was not. Mr. Metcalf's conversation with this particular litigant had made enough of an impression upon the litigant that you were obliged to engage in conversation with him to defend your actions and the court from the charges Mr. Metcalf had made.

About a week before February 6, 2006, another litigant told you that Mr. Metcalf was slandering the court in the same general location on the first floor of the courthouse, including statements that your court was "a money racket," that Cocke County General Sessions Court Probation was "a racket," that you were "crooked," and other such statements.

Another such incident occurred before February 6, 2006, in which you overheard a litigant, in an argument with personnel in the Juvenile Court Clerk's office, asserting that the requirement of certain filing fees was "a money racket." The litigant later told you that he was just repeating something that he had heard downstairs in the courthouse, and he apologized to you for the comments.

On February 6, 2006, Scottie Ellison appeared in your court for a hearing on an alleged violation of probation related to his failure to make scheduled payments on restitution arising out of a worthless check conviction. After being granted an extension at his hearing before you, Mr. Ellison then engaged in a conversation with the court's probation officer, questioning why he had to pay probation fees and court costs, in addition to restitution. Then, Mr. Ellison related comments made to him before the hearing by Mr. Metcalf on the first floor of the courthouse. A transcript exists of this exchange between the court and Mr. Ellison, which I have reviewed.

Believing that Mr. Metcalf's actions were having an effect on, or were likely to have an effect on, proceedings before the court, you sent an officer of the court to locate Mr. Metcalf and bring him before the court. Your belief in this regard flowed from the fact that Mr. Metcalf's repeated accusations of corruption and misconduct were being consciously and directly targeted toward litigants before your court and were being made against the court in the courthouse. Once Mr. Metcalf had been brought before the court, you then, in open court and on the record, issued him a warning that a continuation of this conduct would subject him to being charged with contempt of court. A transcript exists of this exchange with Mr. Metcalf, which I have reviewed.

Analysis

Based upon my review of the facts and law applicable to the situation at hand, it is my opinion that you did not violate the law of Tennessee in warning Mr. Metcalf regarding the contemptuous nature of his conduct and speech.

Under Tennessee law, actions that constitute "abuse of, or unlawful interference with, the process or proceedings of the court" are considered to be criminal contempt. TENN. CODE ANN. § 29-9-102.² Such actions occurring outside of the presence of the court are considered to be indirect criminal contempt. *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996). Indirect criminal contempt may not be dealt with summarily; rather, the court must (1) give notice to the accused of the charges against them either orally, or on motion of the district attorney or another specially appointed attorney, and (2) hold a hearing at a later date regarding the accused's actions. TENN. R. CRIM. PROC. 42(b).

No Tennessee law of which I am aware requires that a court issue a warning to a person who may be charged with indirect criminal contempt that his conduct or speech may be considered contemptuous. Nevertheless, the decisions of numerous courts outside Tennessee have considered the use of such warnings as a constructive alternative to an actual contempt charge or a predicate helpful to prove willfulness – essentially amounting to good practice by a court in handling such conduct. *See, e.g., U.S. v. Dinitz*, 424 U.S. 600, 606 n.6 (1976) (noting a judge's failure to adequately consider alternatives, including a warning, for dealing with misconduct); *U.S. v. Schiffer*, 351 F.2d 91, 95 (6th Cir. 1965) (addressing direct contempt and noting that the court deems the practice of giving warnings "generally desirable"); *U.S. v. Powers*, 629 F.2d 619, 624-25 (9th Cir. 1980) (addressing direct contempt and noting that "[a]lthough the language of [Rule 42(a)] does not require that a warning be given, courts have recognized that a warning is favored before the power of the court is exercised" (omitting citations));³ *see also In re Hennis*, 276 N.C. 571 (1970) (reversing a finding of contempt of a courthouse picketer walking a sidewalk 61 feet outside a courtroom, where the picketer had received no warning that his conduct might interfere with an ongoing proceeding or be considered contemptuous by the court). I am aware of no authority condemning the practice of issuing such a warning. Assuming that such a warning was reasonably justified, which I believe it was based on the assumed facts stated above, I do not see any valid basis for criticism or condemnation of your decision to issue such a warning to Mr. Metcalf.

² The pertinent portions of the statute include the following:

29-9-102. Scope of power. The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

- (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice;
-
- (4) Abuse of, or unlawful interference with, the process or proceedings of the court;
-
- (6) Any other act or omission declared a contempt by law.

Tenn. Code Ann. § 29-9-102.

³ A number of the cases addressing the use of warnings, including the three cited here, involve *direct* contempt, arising from conduct in the presence of the court. If issuing a warning is seen as a good practice in this context, designed to forestall further misconduct, as well as to promote fairness to the person thought to be engaging in misconduct, the use of warning seems all the more designed to further these goals where the misconduct might amount to *indirect* contempt, where the consequences for such conduct may be less apparent.

In my opinion, your actions did not violate Tennessee law; rather, they followed an appropriate practice identified by other courts. Mr. Metcalf's conduct and speech in the courthouse on February 6, 2006, could be seen by a judge in your position, acting reasonably, to fall within the category of conduct that Tennessee contempt law aims to prohibit.

In *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996), an attorney confronted a jury and his attorney-opponent after receiving an unfavorable judgment, asking the jury how they could live with themselves after returning their verdict and calling his attorney opponent the most unethical attorney he knew. *Id.* at 396-97. Based on Mr. Ellison's statement and other facts known to you from then-recent events, it would have appeared to a reasonable judge in your position that Mr. Metcalf had gone further than the attorney charged with contempt in *Black*; attacking the integrity of the court itself in handling matters such as Mr. Ellison, and had made these allegations directly and purposefully to a litigant who was shortly to appear before the court.

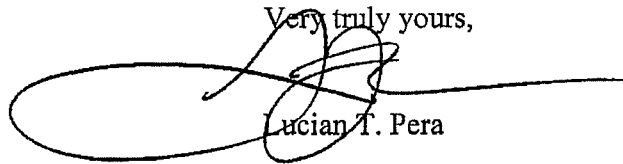
It is, of course, conceivable that a court reviewing a finding of indirect contempt against Mr. Metcalf for his conduct regarding Mr. Ellison might conclude that his actions and speech were, in fact, protected by the First Amendment, and thus reverse such a contempt finding. It is well-settled, however, that First Amendment rights are subject to greater regulation when those rights are exercised in connection with court proceedings, whether by participants in court proceedings or by those whose conduct or speech otherwise has a substantial likelihood of materially prejudicing an adjudicative proceeding. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Thus, while the fact that Mr. Metcalf was part of an electoral campaign for your opponent might be seen by some as meaning that the First Amendment would absolutely protect his conduct and speech, it seems likely to me that, even if such conduct and speech were protected by the First Amendment when undertaken at some location distant from the court and its proceedings, a very different First Amendment analysis would likely apply to identical conduct and speech undertaken in or near the court, especially where the conduct or speech interfered with, or was likely to interfere with, proceedings before the court. It appears to me that, in issuing the warning that you did to Mr. Metcalf, you had apparently concluded that his continuing conduct and speech posed a substantial likelihood of materially prejudicing proceedings before your court, and it appears to me that such a conclusion was reasonable. If another judge, brought in later to try a contempt charge on these facts, were to find that, based on whatever factual record emerged, Mr. Metcalf's conduct *did not* pose a substantial likelihood of materially prejudicing proceedings before your court, in my opinion, that would in no way diminish the reasonableness of your action in issuing the warning.

Put another way, I have not been provided with, nor have I found in my research, any Tennessee case law that would make it clear that Mr. Metcalf's conduct was immune from contempt based on the First Amendment. Absent such case law, a judge in your position would seem to me wholly justified in taking merely the first step in a possible indirect contempt proceeding – *i.e.*, issuing Mr. Metcalf an appropriate warning that his conduct risked such a charge. It appears to me that the only potential impropriety of which you might be accused is using the court's power and authority to chill the First Amendment rights of Mr. Metcalf. Given the state of the law, any such accusation would appear to me to be groundless.

In my opinion, your response to Mr. Metcalf appears to have been, if anything, restrained and temperate. Rather than attempting to hold Mr. Metcalf in contempt, and rather than then instituting a charge of indirect criminal contempt, you instead merely warned Mr. Metcalf, on the record, that his actions could be construed as contempt and that, if he continued in his course of conduct, you would follow the course of action laid out in Rule 42(b).

If I can be of further service in this matter, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lucian T. Pera', is written over the typed name. The signature is highly stylized with loops and a long horizontal stroke extending to the right.

Lucian T. Pera

LTP/kw

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