News Sentinel vs. Knox Co. Commission

A study

CLAY OWEN | NEWS SENTINEL, KNOXVILLE

Sept. 19, 2007 - News Sentinel attorney Richard L. Hollow, left, confers with Editor Jack McElroy.

EDITOR'S NOTE: I could scarcely believe my eyes when I picked up the Feb. 1 edition of the News Sentinel, Knoxville, and saw the fiasco that had occurred the day before in the meeting of the Knox County Commission. How could a public body whose members were elected to represent the people be so brazen? What a contradiction: being so in-your-face about hiding what they were doing. And that was naming fellow commissioners and other office-holders by the you-scratch-my-back-and-I'll-scratch-yours-but-only-under-our-shirts method.

I doubted that the News Sentinel and other news media in Knox County would ignore it, but I wondered about the citizens. Turned out, there was broad and deep indignation about the Commission's action. The matter played itself out over the next nine months, and the newspaper and the people were vindicated.

Your managing editor has put together this special section of The Tennessee Press so that people in our state and others can see clearly what took place and perhaps be able to use it in situations in which they may find themselves some time.

You'll find articles by Jack McElroy, News Sentinel editor, and Richard L. Hollow, First Amendment attorney who represented the News Sentinel; a summary of the trial; Chancellor Daryl R. Fansler's decision; and other items.

Thanks to the News Sentinel for allowing the use of materials by various reporters and photographers, McElroy and Hollow for their contributions.

—Elenora E. Edwards

News Sentinel chose to sue

BY JACK McELROY
Editor, News Sentinel

McElroy

(Special to The Tennessee Press)

The News Sentinel had a simple choice to make after the Knox County Commission meeting of Jan. 31: sue or accept the fact that the Open Meetings Act had no real meaning in the Knoxville area.

The newspaper chose to sue.

There were signs that the commission was ignoring the Sunshine Law within days of the Jan. 12 Supreme Court ruling that term limits applied in Knox County. The decision removed from office 12 of the region's most entrenched politicians.

Scores of candidates of all political stripes declared interest in the vacated seats. The newspaper editorialized vigorously for an open process, and many community leaders called for public forums. But behind the scenes, the powers-that-be were scrambling to maintain the political structure they'd built up over decades. The commission opted against public hearings, and soon word was leaking out that one insider after another already had sewn up appointments.

The newspaper chased the reports of violations of the sunshine law, and surprisingly, several commissioners made no bones about deliberating outside of the public eye. "They can't expect any government to go into a meeting and not know what's going to go on," commented Commissioner Ivan Harmon. The morning the appointments were to be made the newspaper's lead headline read: "Politicos reveal secret talks."

The meeting itself was a textbook violation of the law. No public comment was allowed and debate among commissioners was forbidden. Nominations were simply made and voted upon. When a deadlock occurred, a recess would be called, and the commissioners would adjourn to back rooms and hallways to iron out a solution. The final stalemate was broken after one new appointee sneaked off to be sworn in early and returned to seize a seat and end the tie.

Discussions of a lawsuit began that afternoon at the newspaper, but it took until the following week to finalize the details. The case was filed Feb. 5 under the name of Editor Jack McElroy. Commissioners and other politicians decried the move, accusing the News Sentinel of acting out of self-interest. Ire mounted after fresh stories disclosed that one of the new appointees was a former drug dealer and another was responsible for a $250,000 sexual harassment judgment. As the newspaper broadened its coverage into nepotism and featherbedding in county government, one commissioner threatened to pull legal advertising from the News Sentinel. Publisher Bruce Hartmann and Editor McElroy responded with a front page letter to readers promising not to back off. Public support was overwhelming; thousands of letters, e-mails, Web postings and personal comments poured in, urging the newspaper to hold its ground.

As the legal process unfolded, the county law director, John Owings, contended that the Open Meetings Act was unconstitutionally vague and, if valid at all, required a quorum of a public body to meet in secret for a violation to occur. The newspaper's attorney, Richard Hollow, who had helped author the "sunshine law" decades ago, refuted the arguments, and Chancellor Daryl R. Fansler allowed the suit to proceed. In time, a separate lawsuit by a group of citizens led by attorney Herbert S. Moncier was joined to the News Sentinel's.

Jury selection began on Sept. 11, 2007, and the trial started the following day. Jurors heard 13 days of arguments and testimony that put dozens of public officials, candidates and journalists on the witness stand. The newspaper was accused, again, of filing the suit to sell newspapers and prop up advertising sales and of conspiring with one political faction against another. The jury apparently didn't buy it.

Under the rules of Chancery Court, jurors were charged with answering 29 interrogatories. Then, based on those findings of fact, the chancellor would make the final judgment. It took the jury just four hours to complete deliberations and answer all 29 questions in favor of the newspaper and the citizen plaintiffs.

"This is the first time in the history of Tennessee that a jury has been asked to sit in judgment of its government," said Hollow after the verdict. "It is a tremendous victory for the people of Tennessee."

Three days later, the chancellor presented his ruling. The 12 appointees were removed immediately from office, and the remaining commissioners were ordered to begin the process from scratch, this time in compliance with the Open Meetings Act.

"It is the hope of this Court," wrote the judge, "that this lengthy trial, the findings of fact by the jury and the conclusions of law by this Court will be instructive to the members of the Knox County Commission enabling them to effectively, efficiently and collegially, go about conducting the business of Knox County in public."

A few days later, a local sign maker, unsolicited, brought a banner to the News Sentinel. It read:

THANKS
The Light from the Lighthouse
has brought Justice to Knox County
-- Citizens of Knox County

It hangs now in the newsroom above the conference table where the daily news meetings are held.

Term-limits chronology

BY SCOTT BARKER
News Sentinel

1988 Knox County voters approve a charter, which allows the county more autonomy from state government.

1990 Knox County's charter goes into effect.

Nov. 8, 1994 Knox County voters by a 3 to 1 margin approve a charter amendment instituting two-consecutive-term limits for all county officials. The provision is never enforced because a state attorney general ruled it was unconstitutional. Candidates subject to term limits are never challenged in court.

February 1995 The state attorney general says term limits can't be imposed on offices set up by the state constitution, including the Knox County Commission, county executive (now mayor), sheriff, trustee, register of deeds, clerk and property assessor.

March 29, 2006 Tennessee Supreme Court upholds term limits in Shelby County, which, like Knox County, operates under a charter with a term-limits provision.

March 30, 2006 Knox County Law Director Mike Moyers tells the Knox

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CHRONOLOGY

FROM PAGE ONE

County Election Commission that a Supreme Court ruling means term limits, at least for county commissioners, are valid. Twelve incumbent Knox County commissioners would be ineligible to hold office under that interpretation.

March 31, 2006 The Knox County Election Commission declines to remove from the primary ballot the names of the 12 commissioners in danger of losing their seats because of term limits. The state election coordinator told election commissioners that they had no authority to alter the ballot less than 40 days before the election.

April 3, 2006 Lawyer Herbert S. Moncier asks the state Supreme Court to rule on whether Sheriff Tim Hutchison is subject to term limits. The high court declines to intervene, and Chancellor John Weaver sinks Moncier's attempt. In his ruling, Weaver questions the validity of the Knox County charter.

April 11, 2006 Weaver rules that the primary ballot would remain unchanged.

April 19, 2006 Five county commissioners in danger of losing their seats because of term limits, Diane Jordan, David Collins, Billy Tindell, Phil Guthe and John Griess, file a lawsuit in Weaver's court challenging the validity of the Knox County charter.

May 2, 2006 An unprecedented number of write-in candidates vie for several offices in the county primary. So many paper ballots are used that it takes more than a day to count the votes. Three commissioners at risk because of term limits lose; the nine others win their primary contests.

June 9, 2006 Weaver tosses out the charter. He rules the charter "incomplete, invalid and ineffective." He also says the term-limits provision is too broad and notes that the charter wasn't properly filed with the state.

June 12, 2006 Knox County Mayor Mike Ragsdale announces his plan to ask Weaver for additional time so the county could revise the charter to address issues raised in the ruling.

June 12, 2006 School board candidate Thomas Deakins challenges runoffs in school board elections. State Election Coordinator Brook Thompson rules that runoffs can go forward as scheduled.

June 13, 2006 Ragsdale names a 19-member Charter Review Committee to draft amendments to the charter that address Weaver's concerns.

June 14, 2006 Knoxville lawyer Gregory P. Isaacs challenges the commission's February appointment of General Sessions Court Judge Jimmy Kyle Davis. A panel of General Sessions Court judges dismisses Isaacs' motion.

June 19, 2006 County Commissioner John Schmid files a notice to appeal Weaver's decision minutes after his colleagues vote to endorse Ragsdale's approach.

June 20, 2006 Knox County law director's office formally asks Weaver for a 180-day window so the county can revise the charter.

June 21, 2006 Senior U.S. District Court Judge James H. Jarvis announces he will ask the state Supreme Court to rule on the charter's validity so he can hear a case challenging Knox County's adult business ordinance.

June 28, 2006 Weaver grants the county's request for a delay of 180 days or until appeals are exhausted. The county subsequently files an appeal and later asks the state Supreme Court to expedite the case. Meanwhile, Jarvis officially asks the state Supreme Court to determine whether the charter is valid.

Sept. 6, 2006 The state Supreme Court hears arguments for and against the charter's validity.

Nov. 7, 2006 Voters approve changes to the charter proposed by the Charter Review Committee to address Weaver's concerns.

Jan. 12, 2007 The state Supreme Court rules that the charter and its term-limits provision are valid, despite their flaws. The high court directs County Commission to replace 12 officials who must lose their posts because of term limits, appointment being the standard procedure for filling vacancies when an officeholder dies or otherwise leaves office in the middle of a term.

Jan. 22, 2007 County Commission rejects three proposals: one for a special election to fill term-limited offices, which would require action by the state Legislature; one for a nonbinding election to guide appointments; and a public forum where candidates for the four countywide offices could be interviewed.

Jan. 31, 2007 County Commission meets to replace 12 term-limited officeholders. Members of the public are not permitted to speak. When voting stalls, commissioners take breaks, then return and change votes. Chairman Scott Moore's campaign co-treasurer, Charles Bolus, is sworn in early, then breaks a deadlock by voting to appoint sheriff's employee Lee Tramel to a contested seat. Other new appointees include one outgoing commissioner's son, another's wife and the father of a sitting commissioner. The longest-serving commissioner, Billy Tindell, is named county clerk. The offices of sheriff, trustee and register of deeds are filled by deputies from within those offices. Of 19 commissioners, five now have full-time county jobs and eight others have immediate family members on the county payroll.

Feb. 1, 2007 Candidate Jonathan Wimmer says Commissioner Greg "Lumpy" Lambert privately offered to get him appointed if Wimmer would vote for Tramel. Wimmer says he refused. Lambert says he couldn't have guaranteed anything.

Feb. 2, 2007 Term-limited Trustee Mike Lowe is hired by his successor, Fred Sisk, as an $85,000-a-year deputy trustee.

Feb. 5, 2007 News Sentinel Editor Jack McElroy files a lawsuit alleging commissioners violated the state's Open Meetings Act, also known as the Sunshine Law, by holding private discussions before and during recesses from the Jan. 31 meeting. Term-limited Commissioner Mark Cawood goes to work for the Sheriff's Office as a court security officer.

Feb. 9, 2007 Gov. Phil Bredesen writes Knox County Mayor Mike Ragsdale to tell him a special election to replace the recently appointed 12 county officeholders appears out of the question because it doesn't meet constitutional muster.

Feb. 20, 2007 Commissioners vote 10-8 with one abstention against Ragsdale's effort to ask the state Legislature for help getting a special election for 12 term-limited county offices.

Feb. 28, 2007 A new state attorney general's opinion opens the door for the Legislature to allow an early election for Knox County officeholders if their appointments are invalidated. Term-limited Register of Deeds Steve Hall is hired by his successor, Sherry Witt, as a $69,000-a-year administrative assistant.

May 25, 2007 Moore says he will run for county clerk.

Aug. 1, 2007 Commissioner Sharon Cawood says she will resign her county job as a court clerk effective Aug. 17.

Aug. 3, 2007 Commissioner Tony Norman says he will retire as a Knox County schoolteacher.

Aug. 14, 2007 Chancellor Daryl R. Fansler rejects the county's request for summary judgment in the News Sentinel's lawsuit and discounts the county's argument that commissioners can deliberate privately so long as a quorum isn't present.

Aug. 27, 2007 County Commission votes 10-8 against Law Director John Owings' proposal that commissioners redo the Jan. 31 meeting and possibly head off a trial. "I don't feel like we've done anything wrong," said Commissioner Paul Pinkston, who voted no. Commissioner Lee Tramel countered that a settlement would save money. Commissioner Mark Harmon questioned the legality of bringing back term-limited commissioners to vote.

(News Sentinel, Jan. 13 and Sept. 9, 2007)

CLAY OWEN | NEWS SENTINEL, KNOXVILLE

Sept. 20, 2007 - Knoxville News Sentinel Editor Jack McElroy on the witness stand

McElroy: Here's how we'll cover the lawsuit

BY JACK McELROY
Editor, News Sentinel

We journalists are supposed to keep ourselves out of the story. We're trained to be neutral observers, reporting what we see with aloof objectivity.

But what do we do when the story is about us? How do we cover that news while maintaining credibility?

That's a dilemma the News Sentinel has faced since February when we filed suit against the Knox County Commission, accusing it of violating the Open Meetings Act.

I believed then and believe as strongly now that the lawsuit was an appropriate — indeed, necessary — extension of our watchdog role.

However, it has opened us to accusations of biased coverage. After all, we are a party to the lawsuit on which we are reporting.

That dilemma will become more problematic this week as the lawsuit goes to trial. So I thought I'd take a moment to outline our coverage plans.

Jamie Satterfield, our regular courts reporter, will be the lead writer. Readers familiar with Jamie's work know of her vigorous, no-holds-barred style. She translates legalese into common speech, which annoys some people, particularly attorneys involved in the cases she covers. But it also makes her copy highly readable.

In any event, she is an experienced and skilled journalist with a reputation for integrity.

She also has had no direct involvement in our coverage of county government, and she happens to be a resident of Sevier County, not Knox.

To provide independent scrutiny of our coverage, however, we also put out a request among local bloggers for volunteers to monitor our reports.

Three bloggers stepped forward. Happily, they span the political spectrum.

Dave Oatney, http://oatneyworld.blogspot.com/, is fairly conservative. Rich Hailey, http://shotsacrossthebow.com/weblog/, is basically libertarian. Russ McBee, http://russmcbee.com/default.aspx, is pretty liberal.

You will be able to find links to all of them — and other bloggers commenting on the trial — through our own Michael Silence's "No Silence Here" blog on knoxnews.com.

On occasion, we may also publish excerpts from these blogs in the print edition.

Here's what McBee posted in accepting the challenge to cover our coverage:

"This outreach to local bloggers seems to me to be based on two ideas: first, it appears that McElroy wants to ensure that his paper covers the trial objectively by enlisting 'civilian' outsiders as watchdogs. Second, it seems like an effort by McElroy to integrate the print edition of the paper with the local blogging community. ... I fully support both of those ideas, which is why I volunteered to participate in watching the coverage and providing feedback.

"Stay tuned. This will be interesting."

That may be the one thing all parties in this case can agree on — it will be interesting.

(Sept. 9, 2007)

Decision for plaintiffs sends signals to officials, citizens

BY RICHARD L. HOLLOW
First Amendment attorney
Knoxville


Hollow

(Special to The Tennessee Press)

This litigation was filed in February 2007 by John [Jack] McElroy II against the Knox County Commission as an entity and the individual commissioners in their official capacity. The lawsuit sought relief under the Tennessee Open Meetings Act also called the "Sunshine Law." This statute is codified in TCA §8-44-101, et seq.

The Open Meetings Act was passed in 1974. It has been subject to numerous constitutional challenges. Each of those constitutional challenges has been resolved in favor of the act. The three most prominent challenges were filed on behalf of local boards of education. These challenges were decided in 1974, the first year of the Act's existence, 1976 and 1984.

McElroy's lawsuit challenged the actions of the Knox County Commission arising out of their attempts to fill vacancies on the Commission itself and in four countywide offices existing as a result of a decision of the Tennessee Supreme Court upholding the validity of the Knox County home rule charter and the term limits provisions contained in it.

About a decade before the McElroy lawsuit was filed, the citizens of Knox County had, by referendum, amended their home rule charter to provide that no elected official could hold office for more than two terms. This was subsequently interpreted by Chancellor Daryl R. Fansler, Knox County Chancery Court, Part 2, as meaning two full terms of office. This interpretation was made in a lawsuit filed by then Knox County Law Director Richard Beeler seeking the court's approval to run for a second full term. The decision of Chancellor Fansler was never appealed, so it remains the binding law as to the interpretation of the two-term limit provision in Knox County.

Knox County government officials were never comfortable with term limits. Former Knox County Commissioner Bee DeSelm instituted litigation attempting to enforce the term limits. This litigation prompted a series of lawsuits and legal maneuvering, resulting in an opinion by Knox County Chancellor John Weaver in 2006 that the Knox County Charter was invalid. In his lengthy opinion, Chancellor Weaver ruled that the charter was invalid because of a number of errors in the processes surrounding its adoption and the completion of formal steps required by law.

Opinion said charter was valid

That opinion was appealed, and the Tennessee Supreme Court reached down, bypassing the Court of Appeals, and took the case for decision. The lawsuit, styled Jordan, et al vs. Knox County as filed by then First District Commissioner Diane Jordan, resulted in the Supreme Court's decision that the Knox County Charter was valid and that the Knox County government had been operating as a de facto body, but that there were 12 term-limited positions within the Knox County government. Eight of those term-limited positions were on County Commission, and the remaining four involved countywide officials which included the sheriff, the register of deeds, the trustee and the county clerk. The Supreme Court ordered these term-limited positions, which were, therefore, vacant, filled in accordance with the Tennessee Constitution, which required the appointment of successors by the County Commission until the next general election. This meant that the existing County Commission, including eight term-limited members, would be voting upon their successors and the successors to the term-limited countywide offices.

The entire sequence of events unfolded between Jan. 12, 2007, when the Supreme Court's decision in the Jordan case was announced, and Jan. 31, 2007, when the commissioners met to fill the term limited vacancies.

The Commission was divided regarding the procedure best used to complete the task of filling the vacancies. A segment of the Commission wanted to have an informal nonbinding vote of the people which was referred to as a plebiscite, another segment of the Commission wanted to hold a special election, and yet a third segment of the Commission, and the part backed by the dominant faction on the Commission, favored the appointment process which more closely followed the provisions of the Tennessee Constitution. A lively debate ensued in committee meetings on Jan. 16. As a result of those meetings, it became clear that the special election process, which would have required special legislation by the Tennessee legislature, was not going to work and the plebiscite was ruled out because it was too expensive and too difficult to implement. That left the commissioners with the appointment process.

Some called for citizen input

A number of commissioners made public statements favoring citizen input in the appointment process. They called for public hearings and nominations to be received by the citizens. In fact, no official public hearings were ever held. There were at least two informal hearings conducted by portions of the commissioners which, although well attended, fell short of being true commission-sanctioned public forums.

After the Commission committee meetings on Jan. 16, the Knox County mayor made a call for a special meeting for the purpose of conducting the appointment process. This letter was largely ignored by the Commission, whose majority at that time did not favor the county mayor or his position. Instead, a letter was drafted by a Commission employee at the request of the Commission chairman calling for a Jan. 31 meeting to conduct the appointments. No public notice was given of this action, no minutes were kept of the action taken pursuant to this called letter, and the entire matter transpired through a series of nonpublic telephone communications among Commission staff and various commissioners who, by telephone, allegedly gave their approval to the Commission staff member to place their signatures on the letter calling for the special meeting by an electronically generated process. The agenda of the meeting, contrary to the Knox County Charter, was never submitted to the agenda committee, nor was there any vote by Commission members approving the agenda.

On the Jan. 31 meeting, the rules of the Commission made it impossible for anyone, even a commissioner, to speak for or against a candidate. The rules of the Commission made it impossible for Commission members to debate a candidate's qualifications or their views with regard to support or opposition toward a candidate during the public meeting. Even though citizens could nominate persons for the vacancies, they were forbidden to speak for or against the nominations, and the nominees themselves were forbidden to make any statements in support of their own nominations. In short, the Commission rules, as adopted by the Commission and apparently promulgated by its chairman, only allowed a process of making nominations and then immediately voting during the open meeting. Any other actions taken were forbidden in the open meeting portions. Therefore, if impasses were to occur, as they did, any debate or discussion had to occur in a nonpublic, behind the scenes setting.

Many thought election prearranged

Public uproar was significant after the meeting of Jan. 31. According to public sentiment, there seemed to be a substantial number of citizens who felt that the entire process had been arranged prior to the meeting and that the meeting, except for two notable lapses in discipline among the commissioners, was nothing but an orchestrated formality. Those two lapses occurred in District Two and District Four, where somehow the agreements made by commissioners either were not followed or not properly implemented. This open controversy resulted in McElroy's decision to file his lawsuit.

The position of the Knox County Law Department, which represented the individual commissioner defendants and the Commission itself, was that there could be no violation of the Open Meetings Act unless a quorum of the Commission was present. This ignored the clear mandate of T.C.A. §8-44-102(c), which states:

No such chance meeting, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.

Since that section applied to two or more members of the Commission, it was the position of McElroy that there were numerous violations before and during the meeting of Jan. 31 where two or more commissioners either deliberated toward or made decisions in violation of the Act. In responses to written discovery made by McElroy, at least five county commissioners admitted deliberations or decisions by two or more, but less than a quorum, of the Commission. These admissions were made in writing and under oath in response to pleadings filed on behalf of McElroy.

The commissioners and the Commission, through counsel, filed a motion under Tennessee Rule of Civil Procedure 56 seeking a summary judgment dismissing the lawsuit. Among the challenges raised in that motion were the quorum argument and the theory that the Open Meetings Act was unconstitutional because of ambiguities regarding whether a quorum was required before there could be a violation.

Significantly, four decisions of the Tennessee Court of Appeals, which were handed down in the 1970s, 1980s and 1990s, interpreted the act with respect to the quorum issue, specifically finding that a quorum was not required for violation and that the "two or more" provisions of TCA §8-44-102(c) were enacted by the legislature as a "loophole closer" to avoid "crystallization of opinion in a nonpublic meeting just short of ceremonial acceptance."

Act ruled not unconstitutional

At a hearing on this motion, Chancellor Fansler ruled that the act was not unconstitutional and that a quorum was not required for violation, thereby adopting the position taken by the Tennessee Court of Appeals and rejecting the challenge of the law department. It was upon these legal theories and others that the matter proceeded to trial.

Testimony elicited during the trial of the case clearly showed that the majority or a quorum of the Commission had participated in the approval of the nonpublic meeting call letter of Jan. 19 and there were other violations of the Open Meetings Act surrounding that event. Admissions of commissioners under oath on the witness stand established that two or more commissioners had made decisions about the filling of vacancies in six of the eight commission districts prior to the meeting of Jan. 31. Admissions of witnesses and the evidence also clearly established that, during the meeting of Jan. 31, deliberations and decision making were carried out by two or more commissioners during recesses in the meeting with regard to seat vacancies in District Two and District Four where no consensus or unanimous opinion had been reached prior to the meeting. In short, there were violations of the Open Meetings Act by a quorum prior to the meeting, by two or more commissioners acting together before the meeting, and by two or more Commissioners acting together during a recess in the meeting of Jan. 31.

The jury was submitted a series of questions called jury interrogatories, which is standard Chancery Court practice. The jury, after less than four hours of deliberation and the hearing of more than three weeks of testimony, answered every question in favor of the position of the plaintiffs and against the defendants. This to me indicated that the jury agreed with the position of the plaintiffs and accepted their testimony.

This decision, which was not appealed, stands as a ratification of the Open Meetings Act and a clear demonstration to the State of Tennessee that the act can be used to redress a significant violation of the public trust by public officials. It is a historic decision because members of the public actually sat in judgment of their government in a forum provided for them by the government. This is exactly what our constitution is supposed to support.

Because the decision was so overwhelming in favor of the plaintiffs, because it will send a clear signal to public officials statewide that they need to be attentive to their responsibility to the public to make decisions in the public view, and because this position is not a popular one statewide, there will probably be attempts made legislatively to restrict the act. The plaintiffs achieved a notable success, but that success comes with the price of increased vigilance to protect the act which provided its basis.

The suing citizens

Herbert S. Moncier pointed out in the early days of the News Sentinel vs. Knox County Commission trial that it was nine citizens who first sued over allegations that commissioners broke the sunshine law in the process to replace term-limited officeholders. News Sentinel Editor Jack McElroy later filed a separate lawsuit, and Moncier's clients were allowed to intervene.

So, who are those nine citizens?

•Bee DeSelm, a long-time commissioner who stepped down from her post in 1998

•Mike Whalen, a Knoxville attorney and activist who attended the Jan. 31 meeting and publicly objected to how it was being carried out

•Gerald Bone, a retired social worker and activist

•James Gray, a leader in the Knox County Democrat party

•Alfred Ackerman, a retired physicist. His wife, Margo Ackerman, is a retired journalist and educator.

•Donna J.G. Brian, a professor at the University of Tennessee

•Robert Cunningham, also a UT professor. His wife, Mildred Cunningham, is a retired attorney.

(Sept. 24, 2007)

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IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE
JOHN McELROY, II, Plaintiff,
BEE DESELM, ET. AL.,
Intervening Plaintiffs,
ALFRED AKERMAN, ET. AL.,
Intervening Plaintiffs,
Vs. No. 168933-2
THOMAS STRICKLAND, ET. AL.,
Defendants.

MEMORANDUM OPINION AND ORDER

The jury in this case completed the jury interrogatories forms consisting of twenty-nine (29) questions designed to develop facts from which this Court could make conclusions of law. The Court approves those findings of fact and adopts them as if set forth herein. Pursuant to Tenn. Code Ann. §8-44-106, the Court makes these conclusions of law based upon those facts.

From the outset of this case, the central issue has been to what type of meeting does the Open Meetings Act apply. In support of the motion for summary judgment, defendants argued that pursuant to Tenn. Code Ann. §8-44-102(b)(2) the Act only applied when a quorum of the Commission met in a private meeting. The Court previously reviewed unpublished opinions from all three sections of the Tennessee Court of Appeals and rendered a decision from the bench regarding that issue. That opinion is adopted herein as if set forth verbatim.

Cases such as Matthews v. Shelby County Bd. Of Commissioners, 1990 W.L. 29276 (Tenn. Ct. App.) convincingly established that the Act can be violated under circumstances where a quorum is not present at the same time. The Commission continued to argue though that in order for the Open Meetings Act to be violated the number of Commissioners meeting at separate times had to be of sufficient number to constitute a quorum.

It is well accepted that the formation of public policy and decisions is public business and shall not be conducted in secret. Tenn. Code Ann. §8-44-101(a). Tennessee recognizes that the Sunshine Laws are remedial in nature and, as such, should be broadly construed to promote openness and accountability on the part of the government and to protect citizens from private deliberations at all stages in the political process. Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W. 2d 611, 616 (Tenn. App. 1992) (citations omitted); Souder v. Health Partners, Inc., 997 S.W.2d 140, 145 (Tenn. App. 1998) (citations omitted).

Simple knowledge of the final acts or vote seldom provides the public an understanding of governmental activities.

> Understanding of governmental activities requires at least knowledge of the decisions made and actions taken by public bodies. That knowledge alone is often not enough to provide meaningful insight into the operation of government. Simple knowledge of the final action or the vote is often only the unsatisfactory end of the story – the butler did it – without the deliberations and analysis leading up to the deed denouement". Ann Taylor Schwing Open Meeting Laws 2d, §6.18.

It is apparent to the Court that if the Open Meeting Act is to be broadly construed to promote openness and accountability on the part of the government that simply exposing the activities of a governing body only in those instances where a quorum, or so-called "walking quorum", is present only leaves the public with the end of the story without insight into the deliberative process that led up to the ultimate decision.

It would appear to this Court that Tenn. Code Ann. §8-44-102(c) effectively addresses the issue and reveals just how much of the deliberative process the General Assembly intended to expose to public view. "Nothing in this section shall be construed as to require a chance meeting of two (2) or more members of a public body to be considered a public meeting. No such chance meetings, informal assemblages or electronic communications shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part". Tenn. Code Ann. §8-44-102(c). This is the so-called loophole closer discussed in Matthews and Littleton v. City of Kingston Springs, 1990 W.L. 198240 (Tenn. Ct. App.).

It is clear that this section begins by telling us what is not to be considered a public meeting. That is, no chance meeting of two or more members. The second sentence in §102(c) is a limitation on the first. It states that "no such" chance meetings shall be used to decide or deliberate public business in circumvention of the spirit or requirements of the Act.

Admittedly, the second sentence beginning with "no such chance meetings" does not explicitly prohibit two or more members of a public body from deciding or deliberating public business in chance meetings, informal assemblages or by using electronic communications. It does, however, say that "no such chance meetings" shall be used for those purposes. Without reference to the first sentence, the second sentence containing the phrase no such chance meetings is meaningless. "No such meetings" alone means nothing.

In The American Heritage Dictionary, "such" is defined as "of this or that kind; being the same as that which has been last mentioned or implied; being the same". Thus, the phrase "no such meeting", given the proper definition for "such", can only mean that two or more members of a public body shall not use chance meetings, informal assemblages or electronic communications to decide or deliberate public business in circumvention of the spirit and requirements of this part. This construction of the statute is consistent with that of the Tennessee Attorney General set out at Tenn. Op. Atty. Gen. 82-48 and 88-169. Tennessee's statutory prohibition on informal gatherings used to deliberate public business subjects all gatherings of two or more members of a public body to scrutiny and effectively makes Tennessee a non-quorum state. Schwing, supra at §6.12(b).

A majority of the states expressly adopt a quorum as the test for applications of their Open Meetings Laws to gatherings of the members of public bodies. Id. at §6.10. Also, see Dewey v. Redevelopment Agency of Reno, 119 Nev.87, 64 P.3d 1070 (2003). A minority of the states expressly applies their Open Meeting Act requirements to meetings of fewer than a quorum of the particular body. Some, such as Kansas and Illinois, define a meeting as a gathering of a majority of a quorum. Connecticut, by judicial interpretation, has held that a quorum is not required. Other states, such as Colorado and Virginia, provide for application of the open meeting requirements to gatherings of fewer than a quorum in certain circumstances. Colorado applies its open meetings law to all meetings of two or more members of any state public body at which public business is discussed or at which any formal action may be taken. Schwing, supra, at §6.12(b) (citations to state cases omitted).[1] Florida courts have held that the sunshine law indicates that the decision making process of a duly appointed committee of a public body composed of more than one member of that body must be in public even though such members constitute less than a quorum of the public body. Bigelow v. Howze 291 S.2d 645 (Fla. App. 1974). In that case, the court held that "unless the decision making process of a committee composed of two or more members of a public body appointing the committee is made in public the salutary objectives of the Sunshine Law will have indeed become clouded."[2]

[1] The open meetings laws in the various states vary greatly from state to state, have been frequently amended and have been divergently construed by judicial opinion. Authority from other states is never more than persuasive authority but because of the vast differences from state to state, decisions from other states are of little value in construing Tennessee's Open Meetings Act except for statements of general purpose. Schwing, supra, §3.22,3.24.

[2] It should be noted that Florida's statute §286.011, F.S.A did not provide a "numerical trigger". There was no reference to "two or more" nor was there a reference to a quorum.

The Wisconsin Open Meetings Act contains no "numerical trigger" and the Wisconsin Supreme Court declined to adopt a "two or more" approach as a trigger to the Open Meetings Act. Instead, in considering serial meetings and walking quorums, the Wisconsin Supreme Court held that the act applied to any meetings or deliberations where enough members were present to pass a particular piece of legislation or to block it (negative quorum). State, ex rel Newspapers, Inc. v. Showers, 135 Wisc.2d 77, 398 N.W.2d 154 (1987). The Showers court noted that "they [the legislature] did not choose to trigger the statute by automatically applying the law to any deliberate meetings involving governmental business between two or more officials. This point is most critical. Were this their intention, the legislature had only to phrase this statute to read: ""Gathering of any two or more members of a governmental body ... this they did not do"."

The Wisconsin Supreme court had considered the "two or more" requirement eleven years earlier in State ex rel Lynch v. Conta, 71 Wisc.2d 662, 239 N.W.2d 313 (1976). Therein the court said:

> The sham used to conceal the existence of a privately–meeting quorum does not require that the Open Meeting requirements be applied to all private conferences involving less than a quorum. It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than a quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than a quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule. Id. at 331.

The Wisconsin Supreme Court in Conta noted the problems that arise when members of a governmental body intentionally expose themselves to the decision making process on the business of their parent body. Although the court was discussing a meeting of sufficient numbers to compose a quorum, those comments are equally applicable to any discussion wherein members of a governmental body receive evidence, advisory testimony and the views of each other. In that regard, the Conta court noted that in those circumstances

> ... an invasion of the law is evident. Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be influenced dictates that compliance with the law be met". Id. at 330, 331.

Even though the Wisconsin Supreme Court was discussing quorum meetings in the previously quoted section of the opinion, that rationale, when applied to the facts of this case, show that the same principles are just as applicable to meetings of two or more. For example, plaintiffs in this case argued that the decision by two or more Commissioners from the same district to support a candidate violated the Open Meetings Law. Some Commissioners referred to this practice of deferring to a consensus of "district mates" as "respecting" or "yielding" to the recommendations of those Commissioners. The facts of this case show that indeed, with the exceptions of Districts 2 and 4, that happened. Thus, the two Commissioners in a district exposed themselves to the decision making process on business of the parent body there was some occurrence that formed an open or silent agreement. When the whole body convened on January 31, 2007, this persuasive matter was not presented to the public. Yet, that persuasive occurrence compelled an automatic decision through the votes of the participants.

Additionally, there was extensive testimony about certain factions amongst Commission members. Apparently those factions do exist. There is a difference, however, amongst some Commissioners as to whether these should be labeled "sheriff's" factions or "mayor's" factions. Other Commissioners preferred to describe them as factions with different philosophies.

In reference to one of the factions it appears that Commissioner Moore is a most influential, if not the most influential, member of that so-called faction. Additionally, he serves as the Commission Chair. It does not take a stretch of the imagination to envision that private agreements between Commissioner Moore and another member of the faction would result in an automatic decision through the votes of the faction. If that particular faction constituted a quorum then there would be little difference between two members conferring and deciding and the entire faction conferring and deciding.

Carried further, if a faction did not have a quorum then a conference and agreement between two influential members of different factions could result in automatic decisions of the separate factions to effectuate a majority. As stated in Conta, "the possibility that a decision could be influenced dictates that compliance with the law be met".

As previously stated, the Florida court in Bigelow v. Howze took judicial notice of the fact that "committee recommendations are often accepted by public bodies at face value and with little discussion". The court stated "Therefore unless the decision making process of a committee composed of two or more members ... is made in public the salutary objectives of the Sunshine Law will have indeed become clouded".

While the Tennessee General Assembly has not been quite as direct as the Showers court might have preferred, it is inescapable, after applying statutory construction and the plain and ordinary meaning to the words contained therein, that Tenn. Code Ann. §8-44-102 (c) does contain a "two or more" trigger.

In responding to jury interrogatories I, 1 through 5, the jury found that two or more Knox County Commissioners deliberated or decided outside of a public meeting toward a decision to take

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the actions set out in the January 19, 2007, letter. That letter, of course, was the call for a special meeting on January 31, 2007, for purposes of appointing persons to fill the vacancies in the twelve offices. Applying the law to those facts, the result is that the January 19, 2007, call for a special meeting was a nullity.

Some statutes, such as Connecticut's, expressly provide that the term "meeting" does not include "communication limited to notice of meetings of any public agency or the agendas thereof". The result would normally be the same if for no other reason, as a matter of common sense. Schwing, supra, at §6.86.

Generally, inquiries by individuals to a public entity as to when the entity would meet to act upon a particular matter do not constitute a violation. Southern Valley Grain Dealers Assoc. v. Board Of County Commissioners, 257 N.W.2d 425 (N. Dak. 1977). An individual member of a public body would not violate the law by communicating items to be added to the agenda to the person in charge of assembling the agenda and sending copies to other members. Schwing, supra, §6.86.

However, when the discussion regarding the time and place of the meeting or the agenda to be established, goes beyond such purely procedural issues, then the Open Meetings Act may be violated. It is substantive issues that are covered by the Open Meetings Act. Once the discussion goes beyond the purely procedural matters of when to conduct the meeting and delves into a discussion of the merits of substantive issues then the requirements of the act are invoked.

In this case, there was substantial direct and circumstantial evidence from which it could be inferred by the jury that two or more members of the Knox County Commission did more than just discuss a time and place for the meeting. In fact, the deliberations found by the jury to have occurred resulted in a decision regarding the action to take to fill the vacancies. This decision was made while two resolutions were to be reported out to the full Commission on the next business day from the date the call was issued. The effect is that these deliberations resulted in a decision by more than a quorum of the Knox County Commission to choose one of three possible courses of action that were then being considered by the Commission. There is rarely any purpose to a nonpublic pre–meeting conference except to conduct some part of the decisional process behind closed doors. Sacramento Newspaper Guild v. Sacramento County Bd. Of Supervisors, 263 Cal. App.2d 41 (1968).

NULLIFICATION
AND ENFORCEMENT

Tenn. Code Ann. §8-44-105 provides:

Action Nullified – Exception. – Any action taken at a meeting in violation of this part shall be void and of no effect; provided, that this nullification of actions taken at such meeting shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned.

Tenn. Code Ann. §8-44-106 provides as follows:

Enforcement – Jurisdiction – (a) The circuit courts, the chancery courts, and other courts which have equity jurisdiction have jurisdiction to issue injunctions, impose penalties, and otherwise enforce the purposes of this part upon application of any citizen of this state.

(b) In each suit brought under this part, the court shall file written findings of fact and conclusions of law and final judgments, which shall also be recorded in the minutes of the body involved.

(c) The court shall permanently enjoin any person adjudged by it in violation of this part from further violation of this part. Each separate occurrence of such meetings not held in accordance with this part constitutes a separate violation.

(d) The final judgment or decree in each suit shall state that the court retains jurisdiction over the parties and subject matter for a period of one (1) year from the date of entry, and the court shall order the defendants to report in writing semi-annually to the court their compliance with this part.

The jury in this case found certain facts as set forth in its response to jury interrogatories from which this Court concludes that all twelve appointments made on January 31, 2007, were done in violation of Tennessee's Open Meetings Act. Accordingly, pursuant to Tenn. Code Ann. §8-44-105 those actions are hereby declared void and of no effect and pursuant to Tenn. Code Ann. §8-48-101(4) those offices are vacant, to be filled by the county legislative body in accordance with Article II, Section 2 of the Tennessee Constitution.[3]

[3] Counsel involved in this case and in particular the Law Director has urged the Court to specify the method by which the County Commission should go about filling these vacancies. The Court advised counsel from the bench on October 2, 2007, that this issue is not before the Court but the Court would respond to any appropriate motions or actions calling upon the Court to issue an opinion in that regard. Nevertheless, because of criticism of the courts for failing to specify how the original appointments should have been made and at the urging of counsel involved in this case, the Court will, by way of obiter dictum, make the following observations.

Under the Open Meetings Act, the Court is required to nullify the action taken by the County Commission on January 31, 2007. Accordingly, each and every appointment made on that date has been declared void and of no effect, thereby creating a vacancy in those offices pursuant to Tenn. Code Ann. §8-48-101.

Where the election of persons who had succeeded to occupy an elected office was adjudged void a vacancy exists and the former incumbents are not considered de jur or de facto officers and are not entitled to resume office. Tenn. Juris., Counties, §13. Shumate v. Claiborne County, 191 S.W.2d 441 (Tenn. 1946); Southall v. Billings, 375 S.W.2d 844 (Tenn. 1963). The same reasoning should apply to void appointments. Accordingly, the Knox County Commission currently consists of eleven (11) members with eight (8) vacancies.

§2.08. VACANCY., of the Knox County Charter provides that in the event of a vacancy in the office of a member of the Commission, the remaining members of the Commission shall fill said vacancy. §2.05 of the Knox County Charter defines quorum as a majority of the membership of the Commission. Membership is commonly understood to mean the total number of members in a group. At present, with eleven members, a quorum of the Knox County Commission would be six members.

This does not mean that for purposes of conducting business a quorum would be the majority of those present. When a seat is filled, the person holding the seat is a member of the body. When the seat is vacant there can be no member. It would be an absurdity to treat the vacant seats as if they were held by a phantom member for purposes of determining the majority of the membership. Additionally, defining a quorum as a majority of nineteen in these circumstances would in effect render the Knox County Commission ineffective inasmuch as it would require ten votes of the eleven remaining members to conduct business.

Nothing precludes Commission from re-appointing the same individuals appointed on January 31, 2007. However, should Commission decide to do so, that decision must be based on a new and substantial reconsideration of the issues involved in which the public is afforded ample opportunity to know the facts and to be heard pertaining to the action taken. It was not the legislative intent to allow a body to ratify a prior violative act in a subsequent meeting by a perfunctory crystallization of its earlier action. Neese v. Paris Special School District, 813 S.W.2d 432 (Tenn. Ct. App. 1990).[4]

In accordance with Tenn. Code Ann. §8-44-106(c) the Knox County Commission and its members are permanently enjoined from further violation of Tenn. Code Ann. §8-44-101, et. seq.. More precisely the Knox County Commission and its members are enjoined from engaging in any chance meetings, informal assemblages or electronic communications consisting of, or between, two or more members of the Knox County Commission for purposes of deciding or deliberating public business in circumvention of the spirit or requirements of the Open Meetings Act.

It has been said that statutes must be construed "with the saving grace of common sense". Our courts have repeatedly held that absurdity should be avoided; that the courts should not place upon a statute a construction which would work to the prejudice of the public interest and a construction which impairs, frustrates or defeats the object of a statute should be avoided. State ex rel Maner v. Leach, 588 S.W.2d 534 (Tenn. 1979).

The aforementioned comments are made without the issue currently pending before this Court. Additionally, they have been made without argument of the counsel and the opportunity to engage in discourse regarding the Court's opinion of the law. These comments are not to be construed as part of an order to the County Commission, nor is the County Law Director ordered or compelled to agree with these comments. The Law Director has asked for guidance from this Court and this Court has offered it for what the Law Director deems it may be worth. The Court stands ready to address any other issue properly brought before the Court.

[4] The term "re-do" has often been referred to as a possible remedy for an Open Meetings Act violation. Unless the Neese criteria are met, a "re-do" is insufficient and could result in an action for contempt.

Unlike the majority of states, Tennessee's Open Meetings Act provides for no penalties against those violating the act. However, a violation of this injunction which will become effective at 12.01 p.m., Friday, October 5, 2007, may result in a prosecution for criminal contempt which, if proved, could result in punishments of imprisonment for a period not to exceed ten (10) days and/or a fine of fifty dollars ($50.00) for each violation.

Additionally, the Knox County Commission pursuant to Tenn. Code Ann. §8-44-106(b) shall record this Memorandum Opinion and the Final Judgment in this case in the minutes of the Knox County Commission. Further, the Commission is ordered, pursuant to Tenn. Code Ann. §8-44-106(d) to report in writing semi-annually to this Court of its compliance with this part.

The Court will retain jurisdiction over the parties and the subject matter of this case for a period of one year from the date of entry of the final judgment.

The jury in this case found certain facts as set forth in its response to jury interrogatories from which this Court concludes that all twelve appointments made on January 31, 2007, were done in violation of Tennessee's Open Meetings Act. Accordingly, pursuant to Tenn. Code Ann. §8-44-105 those actions are hereby declared void and of no effect and pursuant to Tenn. Code Ann. §8-48-101(4) those offices are vacant, to be filled by the county legislative body in accordance with Article II, Section 2 of the Tennessee Constitution.3

CONCLUSION

During the course of this trial, members of the Commission have expressed various opinions about the obligations imposed by the public meetings act. The purpose of the act is clearly set forth at Tenn. Code Ann. §8-44-101(a):

> The General Assembly hereby declares it to be the policy of this state that formation of public policy and decisions is public business and shall not be conducted in secret.

This Court agrees with the statement in Dorrier v. Dark, that "members of public bodies will face very few situations, if any, in which they cannot be aware of … whether or not they are in the course of deliberation toward a decision on policy or administration affecting the conduct of business of the people". Dorrier at 893.

It has been said that "members of a public body may freely discuss their grandchildren, the price of a cruise, the weather, events occurring in the former Soviet Union, books and movies, their vacations and a host of other topics of interest to their personal lives or their professional lives". Schwing, supra, at §6.24. They may not discuss, however, the items set on the next agenda for the public body on which they serve, nor subjects within the jurisdiction or scope of responsibility of the public body. Items that can properly appear on an agenda of the public body and subjects on which it is empowered to act or advise are similarly forbidden for non-complying discussion by the members of the public body. When the topics for discussion and decision are such as would appropriately be addressed at a meeting of the public body, then the Open Meetings Act is applicable to the subject matter of the discussion. Id. at §6.24.

> Consent or acquiescence of, or agreement by the individual members acting separately, and not as a body, or by a number of the members less than the whole acting collectively at an unscheduled meeting without notice or opportunity of the other members to attend, is not sufficient." Webster v. Texas and Pacific Motor Transport, Co., 166 S.W.2d 75 (Tex. 1942).

The Court is not unmindful of the burdens imposed upon part time citizen legislators by the Open Meetings Act. It has been argued that the act should not apply to conversations between two district mates. The Court has pointed out that it is the Charter of Knox County that must comply with the Open Meetings Act and not the contrary. Thus, if it is difficult for the Commission to conduct its business in compliance with the Open Meetings Act with two representatives from each district then it is within the power of the Commission to remedy this issue.

In rendering this decision, the Court is uninfluenced by any motive, intent, scheme, or the lack thereof on the part of any individual Commissioner or group of Commissioners. Compliance with the Open Meetings Act is demanded regardless of one's motive or intent.

It is the hope of this Court that this lengthy trial, the findings of fact by the jury and the conclusions of law by this Court will be instructive to the members of the Knox County Commission enabling them to effectively, efficiently and collegially, go about conducting the business of Knox County in public.

Plaintiffs in this case are ordered to post an injunction bond in the amount of $500.00. Counsel for the plaintiffs are instructed to prepare a final judgment incorporating this Memorandum Opinion and Order as if set forth verbatim and taxing the costs to Knox County.

Filed and entered this fifth day of October, 2007.

Daryl R. Fansler, Chancellor

The trial

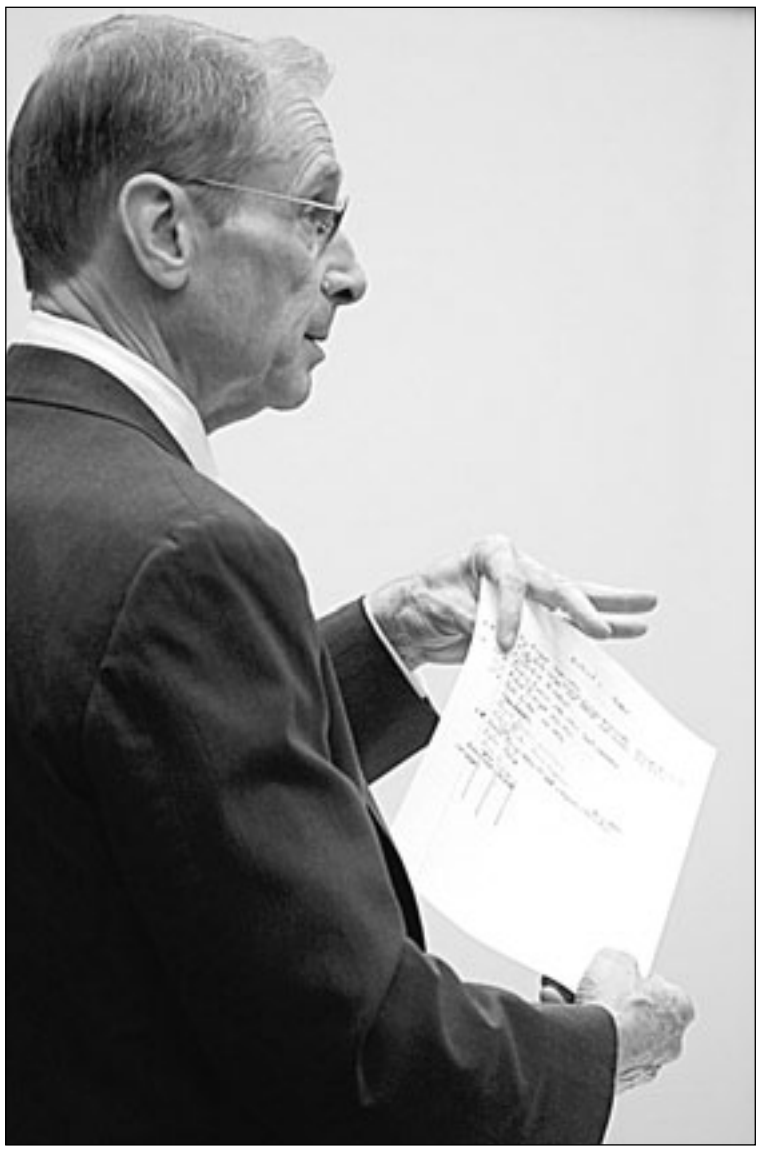
EDITOR'S NOTE: The following information was compiled from the News Sentinel, Knoxville, and www.knoxnews.com.

—Elenora E. Edwards

Sept. 10 Jurors deciding the lawsuit would be kept in the dark about certain topics, with the commissioners filing the most requests with the chancellor and attorneys Herbert S. Moncier, representing nine citizens, and Richard L. (Rick) Hollow, representing the News Sentinel, also filing requests.

Sept. 11 Knox County Law Director John Owings and Deputy Law Director Mary Ann Stackhouse complained that the pool of potential jurors was light on residents from the predominantly black 1st District. Chancellor Daryl R. Fansler nixed that argument. The law directors complained that the News Sentinel's coverage of the case was tainting the jury pool, but Fansler said, "If the newspaper was not a party to the case, we wouldn't be having this discussion. (The judge will) make sure that any juror that has been influenced does not get seated." Owings also asserted that his clients could not get a fair trial because of their being biased and that the chancellor should kick them off the panel. "In these lights, in this setting, with these (commissioners) watching, what did these people say?" Hollow asked. "(They answered) we can let everybody start even, and we can put aside any feelings and serve. They are competent jurors." Four women and eight men were picked as jurors and two people as alternates.

Sept. 12 A third alternate was picked. The jury was seated just before noon. Opening statements began. Moncier said in a beginning statement that the "sunshine law" was first violated Jan. 19 when County Commission Chairman Scott Moore told the Commission's secretary to get approval from fellow commissioners for a specially called meeting, since the public was not notified the polling was taking place. Referring to pretrial statements that brokering and lobbying took place outside public view, Hollow, representing the News Sentinel, asked, "How does that stack up with the concept of public transparency? How does that stack up with the idea that all power lies in the people?" Moncier said that a government that conceals its work no longer represents its citizens. "Secrecy and speed equal a political machine," he said. Owings said the key word might be "deliberation." He said, "There may be a lot of politics in this case. Sometimes politics are unpleasant, but this case is not about politics. At the close of this trial, you'll be asked to decide if the plaintiffs have proven by a preponderance of the evidence whether Knox County Commission deliberated—key word—in private."



SAUL YOUNG | NEWS SENTINEL, KNOXVILLE

Sept. 24 - Attorney Richard Hollow questions 7th County District Knox County Commissioner R. Larry Smith and shows copies of Smith's personal notes on County Commission candidates he interviewed prior to the Jan. 31 appointment of Knox County commissioners.

Sept. 13 The Commission's secretary confirmed that she polled 14 commissioners about whether they approved of both having a meeting and making the appointments at that meeting.

Sept. 14 Moore defended the decision to hold a special meeting to appoint 12 new commissioners. Scott Emge recounted a conversation he said he had with Commissioner Greg (Lumpy) Lambert on Jan. 12, that the appointments were already decided. Moore said he proceeded as he did because of a letter from the state Election Commission saying a special election could not be held. The News Sentinel learned that Owings had given Lambert a letter advising him to seek "private counsel." Earlier he had acknowledged lobbying fellow commissioners and striking deals with some of them for votes. Lambert was the only commissioner who had failed to turn over phone records to Hollow as part of the lawsuit.

Sept. 17 Hollow and Moncier asked the chancellor to enter a default judgment of guilt against Lambert as penalty for not turning over the phone records requested months ago. The records would have involved phone calls made in January. Stackhouse said Lambert had attempted to get the records but was told his cell phone provider maintained records for only six months. Fansler ordered Stackhouse to get a written response and file it by the next morning. As an exhibit filed by Hollow and Moncier, the jury viewed a videotape of the entire Jan. 31 meeting at which the replacement commissioners were appointed.

Sept. 18 An analysis of Moore's phone records showed Moore spent a lot of time on the phone in the days before the Jan. 31 meeting. It showed calls to Charles Bolus, Moore's campaign treasurer, Sheriff Tim Hutchison, Lee Tramel, an employee of Hutchison's, and Scott Davis, linked to Knox County Mayor Mike Ragsdale and Knox County Commission lobbyist and attorney John Valiant. Fansler said he would wait before deciding what if any sanction to impose on Lambert.

Sept. 19 Commissioner Mark Harmon testified that "a majority" of appointments to be made by the Commission were decided before the Jan. 31 meeting. He recalled a conversation with Commissioner Thomas Strickland about who might fill the term-limited seat of Strickland's 1st District colleague, Diane Jordan. He testified that there are three distinct groups among commissioners—"pro-Hutchison" being in the majority; some considered loyal to Ragsdale; and a group aligned with no one, and he included himself in this group. He said he believed the meeting "was done with speed and secrecy to make it less likely that other options would get a fair shake...." Stackhouse hinted that Harmon's testimony was sour grapes, since he lost every vote on Jan. 31.

Sept. 20 In cross-examination, Stackhouse accused McElroy of filing the lawsuit to drive up advertising rates. She also accused him of exploiting the school shooting at Columbine High School to curry favor with jurors. McElroy was managing editor of the Rocky Mountain News in Denver, Colo. at the time of the Columbine massacre. She read from a speech McElroy had given at UT. "You said, 'Journalistically it was the greatest experience I ever had,' didn't you?" Stackhouse asked. Hollow called the question a cheap shot and asked McElroy if he sought to "profit from the suffering of others." "No, sir," McElroy answered. Stackhouse then countered, "Mr. McElroy, the reason you brought up Columbine was to win favor in front of this jury, wasn't it?" Hollow stood and said, "Objection. That's absolutely reprehensible...." "I think a newspaper should step up and stand up for public access," the editor said. Testimony showed that after Moore's campaign treasurer was appointed, Moore called a recess, and Valiant escorted Bolus to be sworn in early so he could vote for another candidate Moore supported. Moore was asked what he talked with Valiant about in four phone calls during the Jan. 31 meeting. Moore said he couldn't remember, and Moncier pointed out that Valiant was in the audience at the time. Moore told jurors that Moncier had sued the county 75 times. "You wouldn't take a call from me during a meeting, would you?" Moncier asked. Moore responded, "I probably wouldn't take a call from you any time." Fansler declined to sanction Lambert concerning his failure to provide phone records and said he would instruct jurors about that and that they could infer that Lambert had something to hide.

Sept. 21 In testimony, Bolus denied there was a plan for him to be sworn in early Jan. 31 to cast a vote in a deadlocked race for another commissioner. He testified that he decided on his own to do it. He said at first he did not have the paper to be signed when he started to the first floor to take the oath, but when he went into Fansler's office to be sworn in, he did. Moncier asked, "Did it just come out of heaven? It came out of John Valiant's hand, didn't it?" Bolus said he did not remember. The chancellor shot down a bid from the Commission to have the suit tossed out. Stackhouse argued that McElroy and nine citizens had fallen short of proving their case. Her request came after lawyers for the editor and citizens had ended their case. Hollow insisted there was plenty of evidence. "Four commissioners have admitted they engaged in deliberations. The vast majority admit conduct just short of deliberations. The (open meetings) act says any conduct violating the act voids the meeting. We have direct evidence by virtue of sworn admissions they violated (the law)," Hollow said. Moncier said, "The commissioners got together on Jan. 19 in secret and deliberated to change the purpose of the meeting. They made a decision." Fansler denied the county's motion with little comment. Stackhouse began her defense by calling newly appointed Register of Deeds Sherry Witt and newly appointed Trustee Fred Sisk to the stand. Both were employed by their term-limited predecessors and both hired their ex-bosses after winning appointment. Both said they talked to commissioners individually to solicit support but were never promised appointment.

Sept. 24 Commissioner R. Larry Smith testified that Moore made it clear that a plan had been hatched to get Bolus into his Commission seat to break a tie between Moore friend and former Hutchison employee and loyalist Lee Tramel and Ragsdale ally Scott Davis. Smith's testimony had tongues wagging about whether Moore and Bolus perjured themselves on the witness stand and what, if any, prosecution might result. Stackhouse was able to use Smith to show jurors an example of a commissioner who did not deliberate or strike deals. But after Smith learned from that Hollow that the commissioners never met with the potential appointees, Smith said, "That was not how it was represented to me. To me, that's not fair to the applicants. A piece of paper doesn't tell you a thing. Interviewing the candidates, seeing them face to face, that really helps you," Smith said. He said he was disappointed with other commissioners at the meeting. "It was like they were in a hurry to get out. I was like, "We need to take the time.'" He said there were five or six commissioners trying to do the right thing. Moncier asked, "Who do you think owns your seat on Commission?" "The 7th District," Smith responded.

Sept. 25 Commissioner Paul Pinkston, on the witness stand, took swipes at Ragsdale and McElroy. Dubbing the pair "M and R," Pinkston told jurors it was Ragsdale and McElroy who were after power on the Commission. But rather than there being a Hutchison faction, he said that one side is the people's side

SEE **THE TRIAL**, PAGE 7

CLAY OWEN | NEWS SENTINEL, KNOXVILLE

Sept. 12, 2007 - From left, attorney Herbert S. Moncier, Knoxville News Sentinel Editor Jack McElroy and News Sentinel attorney Rick Hollow confer during jury selection.

THE TRIAL

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and the other is M and R. He said the two had an agenda. Pinkston's wife worked for Hutchison. Pinkston defended the work of the seven-person committee that formulated a list of candidates. In a surprise move, Stackhouse sent Josh Jordan, son of Diane Jordan, to the witness stand, asked him to state his name and to confirm that he had been named to fill the term-limited seat of his mother. Then she sat down, exposing Jordan to cross-examination by Hollow and Moncier. Fansler told her she must "live with whatever comes up." Earlier she had asked that the information that he had been a drug dealer in earlier years not be revealed to the jury. However, he continued to shield Jordan.

Sept. 26 Commissioner Phil Guthe testified that he had favored a special election to fill the commission vacancies but that it became clear that not even 10 commissioners would support it. He said he then decided the Commission should put into place its longstanding "gentleman's agreement" that would allow each outgoing commissioner to decide who the appointee to replace him or her would be. He said he thought the public should not have a say in the matter. "For the public to think their voice is going to be heard in that appointment process, it wasn't going to happen. Ultimately, the decision was mine as to who I would vote for. As unsavory as that is, that's just the way it was," said Guthe. He continued that he learned that a group of commissioners was pushing Chief Deputy Lee Tramel for his seat, disregarding his choice. He said he was so angry at one point that he walked out of the building. Guthe backed Jim Smelser to take his seat in the 4th District. Commissioner Craig Leuthold's testimony indicated he did not participate in deliberating, deal-making or district-backing. Term-limited John Greiss said it was Frank Leuthold's reputation and experience that prompted him to decide to nominate him to fill his seat, the same district represented by the younger Leuthold. "I was concerned there'd be a perception of nepotism," Craig Leuthold said. But Moncier pressed him on whether his father's formidable reputation helped him win election in the first place. Craig Leuthold voted for his father at the Jan. 31 meeting. Craig Leuthold said he floated his own name as a candidate for the term-limited trustee's office but withdrew himself when he learned Fred Sisk, then deputy to Mike Lowe, wanted the post. Hollow noted that Sisk awarded Craig Leuthold a promotion and $17,000 raise soon after Sisk won appointment. Leuthold denied it was payback. Commissioner John Schmid told jurors their seats were snatched from their control in a power struggle between two commission factions. His seat went to Hutchison supporter Richard Cate. "The way I view it, (the Jan. 31 power play) exposed county government for what it was," Schmid testified. "I am ashamed to say I participated in some of it in my eight years."

Sept. 27 Commissioner Mike Hammond, a representative to the county ethics committee, denied his involvement in backing consensus candidates for term-limited offices, though he admitted he did vote for all of them. He denied supporting the gentleman's agreement. He conceded that he is considered a Ragsdale ally and confessed shame at how the meeting was carried out. "That was not our finest hour, no," he said. "Were you able to look in the mirror the next morning and say what was done was right?" Moncier asked. "No," Hammond answered.Commissioner Tony Norman said he is a reluctant member of the "dysfunctional" governmental family. He said the process on Jan. 31 had left him disillusioned. He said he was not a member of a political faction and was largely left out of the lobbying loop. He said he believed Tramel won his seat in a "rigged" process. The defense ended its case in the afternoon. A brief rebuttal by the plaintiffs' lawyers followed. Hollow and Moncier called Lambert to the witness stand. Speaking of Jan. 31, he said, "The sun was shining. There were reporters in the hallway. You couldn't swing a dead cat without hitting a reporter that day." He said there was no "back room deal-making" because there was no back room at the Commission meeting place.

Sept. 28 Fansler declined to take a decision in the case out of the hands of the jury. He turned aside a bid by the Knox County law director's office to dismiss the case and shot down requests by Hollow and Moncier to declare their clients victors. "I'm going to let all these issues go to the jury," the chancellor said. The two sides argued on the legal instructions to be given to jurors. Stackhouse asked Fansler to remove the office of sheriff, trustee, county clerk and register of deeds from the suit. Hollow argued that the law doesn't allow Fansler to pick and choose among the appointments made Jan. 31. "If the meeting itself is void, then everything done at that meeting is void," Hollow said. In asking that the chancellor declare their side the victor, Hollow said, "Every one of those seats, there had been a decision made by two or more of the governing body. It was implemented at that meeting. It was adopted. What better proof do you need?" Fansler said he would have jurors decide office by office whether the law was violated. He asked Stackhouse, "Why are we having this conversation?" She answered, "I don't know why, your honor." "Yes, you do," he countered. "We're having this conversation because somebody didn't want to answer the mayor's call (for a special meeting) and wanted to do their own. It's like—you can't fire me because I quit. Silliness is why we're having this argument, it seems to me." Later, he added, "I apologize for my lack of judicial eloquence in calling it silly, but occasionally I am completely overcome by common sense."

CLAY OWEN | NEWS SENTINEL, KNOXVILLE

Sept. 21, 2007 - Chancellor Daryl R. Fansler speaks to attorneys.

Oct. 1 In closing arguments, Hollow said his client wasn't looking for a lawsuit victory. "Are we looking for something to notch a gunbelt here?" Hollow asked. "No. What we're looking for here is a message to tell these defendants—comply with the law…only you (the jury) can do that."Moncier said the people were robbed. "It's a fix. It's a setup. It's a robbery of the offices by the sheriff's department that has maintained control of Knox County for years. They stole your government. Owings said the commissioners had done nothing wrong. "The nominations were conducted in public. The voting was conducted in public. The Knox County Commission met publicly on Jan. 31 at the City-County Building…adequate public notice printed in the Knoxville News Sentinel…politics isn't always pretty. Legally, it doesn't have to be."After closing arguments were concluded, Fansler in the afternoon instructed the jury on the law. They retired for a short time and chose to return Oct. 2.

Oct. 2 After four hours of deliberation, jurors awarded McElroy and nine

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Venable: A victory for the people

BY SAM VENABLE
Columnist, News Sentinel, Knoxville

Venable

To paraphrase Lumpy Lambert, you couldn't swing a dead cat anywhere in the courthouse Tuesday without hitting a violator of the sunshine law.

And for that, the residents of Knox County—indeed, the state of Tennessee and beyond—should be grateful.

Unless you just returned from a three-week sabbatical to Jupiter, you've surely heard the news by now: Jurors in the Tennessee Open Meetings Act lawsuit sided with News Sentinel Editor Jack McElroy and nine citizens, right straight down the line.

Their decision was clearer than branch water flowing from the highest reaches of the Great Smokies.

No ifs. No ands. No buts. No questions. Busted on all counts.)

Meaning that Knox County Commission's infamous "Black Wednesday" meeting of Jan. 31—during which 12 appointments were made to county offices—was 100 percent phony baloney. As one of my colleagues aptly (if nonathletically) happily declared, "This was a slam-dunk, grand-slam touchdown!"

With the decision, John and Jane Q. Citizen were vindicated—big time. Strike the Liberty Bell loud and long.

Sure, McElroy and the other nine took the legal steps to expose this sham for precisely what it was: a fake, a railroad job, a setup, a shell game of the highest order—or lowest, as the case may be.

But their victory is the people's victory, right out of the textbooks of American history and Civics III.

You didn't have to be a political scientist to understand just how angry Knox Countians were with the commission's trickery. The word "livid" comes quickly to mind.

Actually, there are a lot more words. And I've been saving them for this very moment.

In a dusty corner of my desk is a stack of e-mail printouts and phone messages I received in the wake of Black Wednesday. They're an accurate reflection of how cheated the people of this area felt when the hoodwinking occurred. A few excerpts:

•"If it weren't so infuriating it would be funny to watch."—Marilyn Read

•"Perhaps someday, with a little hope, effort and divine intervention, our community will have a legitimate and professional government."—Bill Johns

•"What a circus. What a disgrace."—Angelyn Campbell

•"This whole debacle has taught me one thing: vote, vote, vote. Rain, snow, sleet or shine. VOTE! I will make my voice heard."—Candis Hobby

•"I have lived in several major cities and have never witnessed such a spectacle of insider deals."—Dennis Garrison

•"When you turn foxes loose in the henhouse, do you really expect them to order corn bread and pinto beans?"—William Varnell

•"You don't have to go to Cuba to find a dictatorship."—Randy Webb

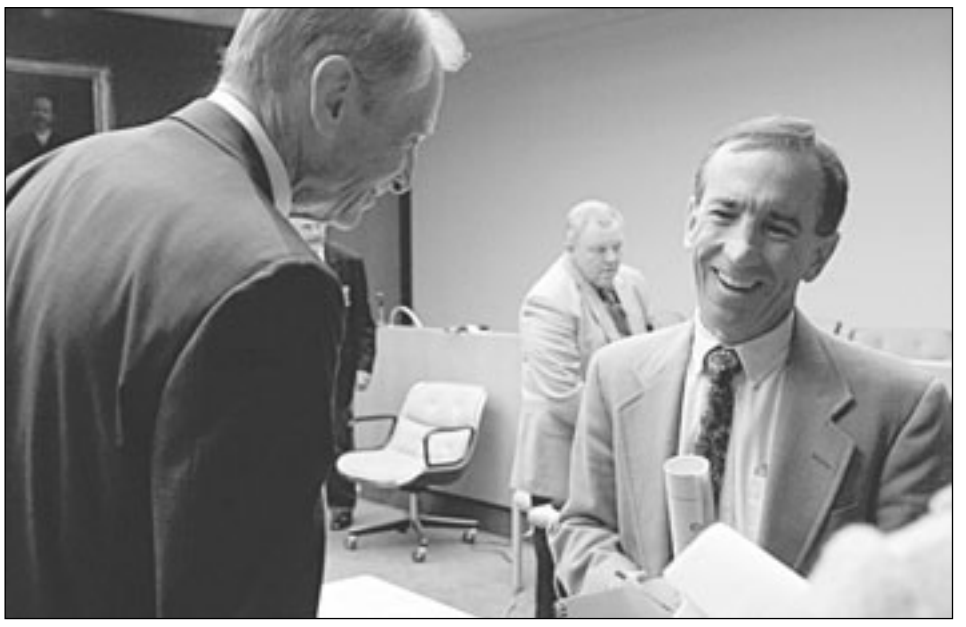
•"Do they actually think we are that stupid not to see what went on?"—Patsy Fox

Apparently they did, Patsy.

But, thankfully, the jury didn't buy it.

SAM VENABLE can be reached at (865) 342-6272 or venob@knews.com. His latest book, *Someday I May Find Honest Work: A Newspaper Humorist's Life,* is available at bookstores, the University of Tennessee Press and online from the News Sentinel.

(Oct. 3, 2007)



SAUL YOUNG | NEWS SENTINEL, KNOXVILLE

Oct. 2, 2007 - News Sentinel attorney Richard Hollow, left, speaks with News Sentinel Editor Jack McElroy after jurors awarded McElroy and nine citizens a victory against the Knox County Commission.

CLAY OWEN | NEWS SENTINEL, KNOXVILLE

Oct. 2, 2007 - Knoxville attorney Herbert S. Moncier, center, hugs citizen plaintiffs Bee DeSelm, left and Margo Akerman after jurors returned the verdict.

Statewide effect likely from verdict

BY SCOTT BARKER
News Sentinel

This week's jury verdict against the Knox County Commission over Open Meetings Act violations should have an effect statewide, Roane County Attorney Tom McFarland said Wednesday. "I think it's going to be healthy for our whole state," McFarland said.

"Accountability to the people has come to the forefront. The effect of this case will be felt from the Tri-Cities to Memphis." On Tuesday, the jury in News Sentinel Editor Jack McElroy's lawsuit found that the Commission violated the Open Meetings Act, also called the "sunshine law," by deliberating privately to fill 12 offices vacated by a state Supreme Court ruling upholding the Knox County Charter.

Knox County Chancellor Daryl R. Fansler is expected to issue a final ruling today applying the jury's determination to the "sunshine law." Several local jurisdictions train newly elected officials in state laws pertaining to public access. Charles Swanson, who represents the Knoxville City Council, said he advises council members not to discuss upcoming votes. "In my opinion," Swanson said, "they should not talk about any pending matter that could come up for a vote."

To make sure council members are up to speed on the law, Swanson trains them in the "sunshine law's" intricacies.

"We have an orientation session when City Council members are elected," Swanson said. "One of the things we do is go over the Open Meetings Act and what council members are allowed to do and what they are not allowed to do."

Other municipalities also advise newly elected officials. In Clinton, council members receive the municipal code and copies of applicable state laws, Mayor Winfred "Wimp" Shoopman said.

One exemption to the Open Meetings Act is a meeting to discuss pending lawsuits. Public panels are allowed to meet privately in "executive session" with legal counsel to make decisions about those cases. But Shoopman said he and his colleagues on the Clinton City Council don't even go into executive session. They deliberate legal decisions in regular meetings. "We actually discuss the lawsuits publicly," Shoopman said.

Shoopman said the city has made a similar effort to allow residents access to municipal records. "We revised our policies on our Open Records Law to make it easier to get those public records," Shoopman said. McFarland said Tuesday's "sunshine law" verdict, coupled with mandatory ethics policies established by county and city governments across Tennessee, should usher in a new era of openness.

Elected officials, he said, need to recognize the changed atmosphere and be careful not to break the law. "We're entering into a new age of accountability with the "sunshine law" and the new ethics policies that have gone into effect statewide," McFarland said.

(Oct. 4, 2007)

THE TRIAL

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citizens a sweeping victory by ruling that commissioners violated the Open Meetings Act in setting in secret the specially called Jan. 31 meeting. The jury also opined that the Commission did nothing to rectify the violation. The jury officially discredited testimony from Bolus that there was no plan for him to be sworn in early, which would enable him to be a tie-breaker in a hotly contested appointment. "The jury's verdict upholds the validity and importance of the 'sunshine law,' and more importantly, delivers a strong message to officeholders that the public wants its government to operate openly and with full citizen participation," McElroy said. "This is the first time in the history of Tennessee that a jury has been asked to sit in judgment of its government, Hollow said. "(The trial itself) is a tremendous victory for the people of Tennessee." Moncier said, "I'm elated for the people of Knox County. I'm thrilled the people won today every single issue." Owings commented, "This is one of the most unique situations in our history related to our county government. The people of Knox County have spoken through this jury, and we will do our best to honor the verdict." Hollow asked the chancellor to declare the Jan. 31 meeting void as required by law.

Oct. 5 Fansler nullified the appointments from the Jan. 31 meeting. His order contained a permanent injunction barring commissioners from deliberating in private. The county was given 90 days to appeal, and Owings said he would not recommend an appeal. In his ruling, Fansler warned of the need to establish a process of openness for the future. For the time being, the Commission was to operate with 11 members, and chief deputies would fill the countywide offices until their replacements are named. Fansler wrote, "It is the hope of this Court that this lengthy trial, the findings of fact by the jury and the conclusions of law by this Court will be instructive to the members of the Knox County Commission enabling them to effectively, efficiently and collegially, go about conducting the business of Knox County in public."

Open meetings help considered

BY ERIK SCHELZIG
Associated Press

Gov. Phil Bredesen said Wednesday that he hopes a newly created ombudsman position will help avoid the need for lawsuits similar to the News Sentinel's successful action against the Knox County Commission. Bredesen, a Democrat, said that while the ombudsman was originally envisioned to handle disputes about public records, he said he will consider whether those responsibilities need to be expanded. "If open meetings need to be included in some fashion in that, I'm willing to take a look at that," Bredesen said. When told of Tuesday's verdict in the Knox County case, Bredesen said he was pleased with the ruling that the commission violated the state's Open Meetings Act when members privately discussed how to fill a dozen appointments for term-limited offices before casting a public vote in January. The verdict nullifies the appointments, which included several relatives of retiring or sitting commissioners.

"I thought the newspaper should have won the lawsuit from what I knew about it," Bredesen said. "It seemed to me the actions were fairly egregious and kind of outside the road of what seemed to me to be reasonable behavior, and I'm actually glad the newspaper won." A special committee has been meeting this year to propose improvements in the state's open government laws.

(Oct. 4, 2007)

Other views of sunshine lawsuit

The following are recent editorials from Tennessee members of The Associated Press. In some cases, the editorials have been edited for length.

The (Nashville) Tennessean, Oct. 7 - Members of the Legislature looking at open government laws in Tennessee should bolster those laws, and a jury verdict in Knoxville last week is an example of why the issue is so important.

Local government representatives have tried to make the case that there should be more opportunity to have closed-door meetings, often called "executive sessions." Government decisions in private settings tend to lean on cronyism and become back room deals, when the public should hear every point made. The battle for open government should continue. Laws may be outdated, but recent events show that problems are very much alive.

The (Sevierville) Mountain Press, Oct. 5 - Sometimes people assume that the media are the only ones who care about and push for open meetings and open records. Not so. It's hard for average citizens to challenge government when government hides behind closed doors. It often takes a business with deeper pockets to fight the court battle to bring records and meetings into the sunshine.

The (Knoxville) News Sentinel spent many thousands of dollars of its company's money to battle the Knox County Commission's inept and improper handling of the appointment of new members earlier this year. This was not a win for the news media. This was a win for the people these commissioners and other elected officials represent.

Government business conducted in secret creates suspicion and resentment, besides being illegal. We don't need that and we don't deserve that. Thanks to this ruling, we will have less of it.

(News Sentinel, Oct. 14, 2007)