



InTrust

The Newsletter for Risk Management Trust Members

April 2010

RISK MANAGEMENT TRUSTEES

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TNRMT OFFERS NEW SERVICE TO MEMBERS

by John Wilburn, Trust Administrator

The Tennessee Risk Management Trust is extremely pleased to announce an exciting new service to TNRMT members and the addition of a consultant very familiar to school districts throughout the state.

Effective March 1, Stephen Smith joined TNRMT as a consultant and will be available to assist TNRMT members with questions relative to issues involving policy or potential claims within your school district/

government entity that impact or could potentially impact your school district and your insurance program. This certainly encompasses a wide area and while specific claims/coverage questions should continue to be directed to TNRMT staff, Stephen will provide consultation relative to general issues that may arise throughout the course of the days, weeks and months ahead.

Stephen's experience includes ten years with the Tennessee School Boards Association where he focused on government and labor relations activities and established himself as an expert in education legislation and policy. He recently joined the law firm of Farris Mathew Bobango in Nashville where he concentrates his practice in the areas of education law, government

relations and administrative law.

Stephen obtained his Bachelor of Science degree from the University of Tennessee, Knoxville and his Juris Doctor degree from the Nashville School of Law.

In addition to the services already mentioned, Stephen will also be assisting the Trust in its government relations activities, monitoring legislation and working with the Trust to develop legislative strategy. Stephen will also be a contributor to InTrust, TNRMT's quarterly newsletter.

Stephen can be reached by phone at

(615) 726-1200 or by email at ssmith@farrismathews.com.

We hope you will find this new service to be of benefit to you as the Trust continues to look for ways to meet its goal of providing you with coverage and services that address your needs and unique exposures in a changing world.

For more information, contact John Wilburn at (615) 532-5173, extension 325. **T**

BAIL REFORM ACT LAWSUITS

Being sued is nothing new for most counties and sheriffs. However, a new kind of lawsuit is challenging the way sheriffs, General Sessions judges, and judicial commissioners may have operated for years. The statute underlying the new lawsuits is nothing new, but counties across the State of Tennessee



Stephen Smith

are being challenged in the way they set bonds for arrestees every day.

The United States Constitution's Eighth Amendment prohibition on cruel and unusual punishment gives arrestees the right to reasonable bail. Excessive bail runs afoul of the Constitution. Tennessee Code Annotated § 40-11-102 provides that, before trial, all defendants "shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption is great." Tennessee Code Annotated § 40-11-105 provides that "[w]hen the defendant has been arrested or held to answer for any bailable offense, the defendant is entitled to be admitted to bail by the committing magistrate, by any judge of the circuit or criminal court, or by the clerk of any circuit or criminal court..." The clerk may only set the bail when the judge is not present in the court and the clerk reasonably believes that the judge will not be present within 3 hours after the defendant has been committed to the jail following arrest. However, if the circuit or criminal court clerk sets the bail, subsection (c) of § 40-11-105 limits the amounts available to the clerk to \$1,000 for a misdemeanor, \$10,000 for a felony that does not involve a crime committed against a person; \$50,000 for a felony that involves crime committed against a person, and \$100,000 for any form of homicide.

In most counties, especially small counties, the General Sessions Judge sets bail for arrestees. However, judicial commissioners may also be appointed by the county, and those individuals (who most likely are not attorneys) are also authorized to set bail. The lawsuits being filed against Tennessee counties allege that bail is being set according to a pre-set bond schedule, which is based solely on the criminal charge. However, TN Code Annotated § 40-11-118(b)

sets out the factors to be considered when setting bail, and they are:

- *the defendant's length of residence in the community*
- *the defendant's employment status and history and financial condition the defendant's family ties and relationships*
- *the defendant's reputation, character, and mental condition*
- *the defendant's prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings*
- *the nature of the offense and the apparent probability of conviction and the likely sentence*
- *the defendant's prior criminal record and the likelihood that because of that record the defendant will pose a risk of danger to the community*
- *the identity of responsible members of the community who will vouch for the defendant's reliability; and*
- *any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear*

The basis of the lawsuits being filed against Tennessee counties is an allegation that counties are instituting and approving of a system where bail is set based on something other than the statutory elements or an individualized determination of the need for bail. The lawsuits claim that, when bail is set based on a pre-set schedule based on the nature of the charges, the arrestee's Constitutional rights are being violated. The lawsuits also claim that county systems are designed to always require monetary bail, as opposed to an individualized determination that may support an arrestee being released on his/her own recognizance.

So, what is a county to do? First, it seems that a county needs to ensure that arrestees are having a bond set within a reasonable time after arrest. Unfortunately, no state statute dictates when bail must be set, but certain cases suggest that bail must be set within 48 hours of arrest. Nonetheless, the statute does require an individual evaluation of the arrestee's particular situation, and General Sessions judges, judicial commissioners, and clerks setting bail should make a determination of bail amount based on an individualized questioning of the arrestee. The nature of the charge is but one factor to consider. Of course, this individualized determination becomes a little more complicated when the arrestee is charged with domestic violence, but counties would be wise to train judges or judicial commissioners to keep a written record of the individualized assessment made of each arrestee admitted to bail. Judges and judicial commissioners must also be trained to consider the factors listed above, as well as those listed in Tennessee Code Annotated § 40-11-150 for domestic violence charges, which include whether the defendant is a threat to the alleged victim or a threat to public safety.

While General Sessions judges and judicial commissioners enjoy judicial immunity, counties do not, and General Sessions judges, any appointed judicial commissioners, and the clerks are employees of the county. Therefore, a county should limit its liability by providing training to judicial commissioners and judges on the statutory factors to consider. Counties should also consider the record-keeping that is required of judges and judicial commissioners in order to prove that an individualized determination was actually made on each bail setting.

Appropriate policies and training are usually a county's best defense, along with appropriate record keeping.

Brandon O. Gibson is a partner in Pentecost & Glenn, PLLC in Jackson, TN. Gibson and her firm represent counties, county officials, and county employees in all areas of governmental tort and civil rights claims. She can be reached at bjgibson@pgandr.com.

HOW MANY ATTORNEYS DO WE REALLY NEED?

by John Evans, Next Generation Underwriters

Elsewhere in this newsletter, you have noticed that TNRMT has decided to retain an attorney to assist members with legal questions and issues. You may wonder how many attorneys are really necessary to resolve an issue or, better yet, how many are necessary to avoid getting in to problems when good advice may keep you out of trouble.

This question is a good one and has no right or wrong answer from our perspective. The answer lies not in how many tools you possess but how you use them. Having a county or school attorney on retainer and having access to the TNRMT attorney could give rise to the question of conflicting opinions, but again, it is not about the resources, but how you choose to use them that matters.

An important point to keep in mind as you may ponder how and when to call on your local or retained attorney (or both) is to consider the issue at hand. Each of you has been in a position to wonder what would happen if you choose to take a certain course of action. The important point here is that you still have a choice and may be able to avoid legal trouble by asking for good advice and several opinions before trouble presents itself.

If you have been involved in governmental administration for even a short period of time, you have been the recipient of the dreaded lawsuit. When this inevitable situation arises, you have no choice but to follow your local government's policies and call the attorney of choice. This attorney has been chosen by your local government to handle such situations.

We know our members use their best judgment in using their resources wisely. However, it is inevitable that an attorney will be needed at some time in your career in spite of careful planning and proper execution of your local government's objectives. Your policies, procedures and execution of these will be challenged. As members, you will call on TNRMT to defend your interpretation and use of your policies and procedures when legal issues arise. There is a time when attorney advice should be given with consideration of your TNRMT program which is on the hook to pay any resulting costs or judgment amounts.

There are certainly times when calling the TNRMT attorney makes sense.

Many other scenarios will come to mind as you consider this information. Each one is different and requires a different course of action. Whether to call one, two or more attorneys is a matter of need and personal judgment that should be considered with tempered thought after a determination of what you really need to accomplish. TNRMT is pleased to be able to offer an additional option should you decide advice of an attorney is warranted. **T**

TNRMT DOES MORE THAN HANDLE CLAIMS

by John Wilburn, Trust Administrator

On January 28, 2010, TOSS and its Platinum Sponsors, The Tennessee Risk Management Trust and Next Generation Underwriters sponsored a very informative presentation at the Nashville Marriott to a group of more than thirty Directors and staff members concerning sexual harassment within the school as well as religious issues including the establishment and exercise clauses in the school setting. Dr. Keith Brewer indicated that comments received from attendees indicated this was one of the more informative sessions of the 2009- 2010 school year.

Presenters for the CEO event included long term attorneys for the Trust, Charles Purcell of Waldrop and Hall of Jackson, TN and John Schwalb of Williams and Schwalb of Franklin, TN.

TOSS and its Platinum Sponsors, TNRMT and NGU, hope to present more educational opportunities for TOSS members through various regional meetings. Watch for additional information from TOSS or its sponsors. **T**



Charles Purcell



Dr. Donald Hopper and John Schwalb

