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Judicial Perspective Panel 2015

Jeffrey S. Bivins

Supreme Court of Tennessee - Justice

Holly Kirby

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JUDICIAL PERSPECTIVES PANEL 2015

FEATURING: CHIEF JUSTICE JEFFREY S. BIVINS* AND JUSTICE
HOLLY KIRBY**

*Moderated by Professor Jeffrey Omar Usman****

February 12, 2015

Moderator: Let's start with this topic: You both have experience serving on Tennessee's intermediate appellate courts. How has that experience helped you in preparing for your role on the Tennessee Supreme Court? Justice Bivins?

Justice Bivins: Well, to begin with, you have to work with other members of the court. At the intermediate level, we're sitting in three-judge panels for every case we decide, so you already have the experience of the give and take of that process—the give and take on the opinions as well as on the overall decision. It requires you to work well with other folks. Obviously at this level there are five of us, and we have to come to a consensus if we possibly can. So I think in that way it's very helpful. The other way I think it's very helpful is it allows you to know how to work a record—know what a record's like, learn about the drafting of an opinion, what goes into that and all the processes that take place. It has proven very helpful to me, having had the intermediate appellate court experience.

Moderator: Justice Kirby?

* Chief Justice Jeffrey S. Bivins was sworn in as a member of the Tennessee Supreme Court in 2014. Prior to joining the Supreme Court, he served as a judge on the Tennessee Court of Criminal Appeals and as a Circuit Court Judge for the 21st Judicial District of Tennessee. Prior to his appointment to the trial bench, Justice Bivins practiced law with the firm of Boulton, Cummings, Connors & Berry PLC in Nashville, Tennessee. He also served as Assistant Commissioner and General Counsel for the Tennessee Department of Personnel.

** Justice Holly Kirby was sworn in as a member of the Tennessee Supreme Court in 2014. Prior to joining the Supreme Court, she was the first woman to serve as a member of the Tennessee Court of Appeals, Western Section. Before that she was a partner at the law firm of Burch, Porter and Johnson in Memphis. Kirby has served on the Tennessee Board of Judicial Conduct, the Tennessee Court of the Judiciary and the Tennessee Judicial Conference. She currently serves as the Supreme Court liaison to the Tennessee Commission on Continuing Legal Education and Specialization.

*** Professor Usman

Justice Kirby: It's been an eye-opening experience to transition to the Supreme Court, but it was an enormous help to be on the intermediate appellate court. I know how to write an opinion. I've had opinions that I've written be misconstrued by lawyers and realize that it was my fault it was misconstrued. I hadn't been clear enough, and now I know how to try to avoid that. I know the workings of the judicial system that we now help supervise. So that is an enormous help in the administrative part of the new job.

Moderator: Justice Kirby, what have you found to be the biggest differences between your service on the Tennessee Court of Appeals and your service now on the Tennessee Supreme Court?

Justice Kirby: Number one is many more events like this. [Laughter.] Also we are responsible for administering the entire judicial branch of government of the State of Tennessee. That's a huge job. Whereas before I was a working judge and most of my time was spent writing opinions and hearing lawyers argue, that is a much smaller percentage of my time now. A great deal of time is spent on administrative matters and being the public face of the judicial branch of government.

Moderator: Justice Bivins, what have you found to be the biggest differences?

Justice Bivins: I would certainly agree with Justice Kirby that that's one of the big differences. I think many of us had always heard there's a lot more administrative work to do on the Supreme Court than at the trial court level or the intermediate court level, but it's hard to understand until you get there and realize what that means. It's very true. We are serving as liaisons to different boards: the CLE commission, the Board of Professional Responsibility, all sorts of boards and commissions that we have to deal with on a daily basis. We're looking at all the different rules: the Rules of Civil Procedure, the Rules of Criminal Procedure, the Rules of Evidence, the Supreme Court Rules, all those things we have to deal with. Obviously we have the Rules Commission, and they are of great assistance, but ultimately, it's up to the five of us to decide what to do with those rules. So I would certainly agree with Justice Kirby; whereas probably 90% of my time at the intermediate court level was spent either hearing arguments or writing opinions, that's probably a little less than 50% of the time we spend now.

Moderator: When this event was announced I started hearing from a number of different attorneys who practice on the civil side and were less familiar with Justice Bivins or practice on the criminal side and were

perhaps less familiar with Justice Kirby in terms of judicial philosophies. A lot of people are very curious how you think about the law. I thought we should delve into that area so I won't get into too much trouble afterward. [Laughter.]

Justice Bivins: Hopefully we won't either! [Laughter.]

Moderator: Let's start with this question: The current United States Supreme Court is engaged in a contentious and interesting debate about the role of legislative history in interpreting statutes. Justice Scalia is leaning in strongly behind the idea that legislative history is never appropriate for consideration.¹ Justice Breyer sees legislative history as often being appropriate for consideration in interpretation of statutes.² What are your respective views on the role of legislative history when you're interpreting statutes that have been passed by the Tennessee General Assembly? Is there a role for considering legislative history? Is there not? How should we look at that? Justice Bivins?

Justice Bivins: Well, I think I might differentiate between two things here. First is the statutory interpretation, which I think is your direct question, but I think there are also public policy issues that factor into that as well. So to answer your direct question about where we might fall between Justices Scalia and Breyer, I think I probably fall somewhere in the middle. As far as statutory interpretation, I agree with the fairly well-settled law that if the statute is clear on its face, then you don't need—and it's not even appropriate—to look at the legislative history behind it. But oftentimes the statute not clear, and at that point I think it's appropriate to look into the legislative history. I don't mean that legislative history dictates exactly what the result is, but I think it can be indicative of the legislature's intent, and it can be helpful in deciding that particular issue. So I definitely think there is a role for that in statutory interpretation. With regard to public policy issues, I think legislative history clearly can come into play. I think if we're looking at an issue from the Supreme Court level and we have to consider public policy, it's appropriate to delve into the legislative history of related statutes. Even though it's not technically a statutory

1. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (“Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined.”) (citing Oliver W. Holmes., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899)).

2. See, e.g., Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture on the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (“I should like to defend the classical practice and convince you that those who attack it ought to claim victory once they have made judges more sensitive to problems of the abuse of legislative history; they ought not to condemn its use altogether. They should confine their attack to the outskirts and leave the citadel at peace.”).

interpretation question, legislative history can certainly lend light upon the public policy of the state to the extent it factored into the legislature's decision.

Moderator: Justice Kirby, what's your view in terms of legislative history and its role in statutory interpretation?

Justice Kirby: I'm not comfortable with Justice Scalia's view that you never look at legislative history. We've seen many statutes that are simply inartfully drawn, and I do view our role as doing our best to implement the intent of the legislature when it enacted the statute. But the words of the statute come first and last, always. The classic approach is to look at legislative history only if the words of the statute are unclear, and I agree with that—with a proviso. I guess my view of this issue is informed a little bit by an experience that I had as an intermediate appellate judge regarding when the words of a statute are actually so clear that you would not need legislative history. One of the members of our court issued an opinion on a statute regarding a bond on appeal from general sessions to circuit court, and issued an opinion saying, "It's very clear it's this. We don't need to go into legislative history; this is what it is." Well, it turned out to be an enormously problematic opinion that resulted in a lot of appeals from general sessions to circuit courts simply being dismissed. So when the question came up again on appeal and I wrote the opinion, I basically said the statute was not as clear as we first thought and did a lot of delving into legislative history and said actually it should be that. The Supreme Court then took an appeal on that same issue. They agreed with my interpretation but said, "No. No. No. The statute is very clear. We don't need to go into legislative history." So clarity is in the eye of the beholder sometimes. I do worry about judges simply disregarding what the legislature intends and imprinting their own view on a statute under the guise of saying that it's simply clear.

Moderator: How helpful do you find it when a lawyer draws upon textual canons when pushing on statutory interpretation, trying to argue for a particular view in terms of what the statute means? Do you find those references to specific canons of textual construction helpful? Not helpful? Do they affect how you think about statutory interpretation?

Justice Kirby: I think they are helpful. But again, my experience is that each side that is arguing for a particular, differing interpretation can usually find canons of statutory construction that can support its view.

Moderator: Justice Bivins, textual canons, do you find them helpful?

Justice Bivins: I think they're helpful, yes. I would agree with Justice Kirby that oftentimes you can shape them your way—as any good lawyer would do. But I do think they're helpful. I think it brings an ability to have some predictability there and can lend some factors to give you guidance in that. So I do think they're helpful.

Moderator: Justice Bivins, you mentioned public policy in terms of thinking about statutes. How important is it for an attorney making an argument—asking the court to interpret the statute in a particular way—to have a public policy argument as part of their briefing and presentation to the Court?

Justice Bivins: Again, I think if you're talking about a statute, public policy may or may not be important depending on the clarity of the statute. Certainly if the statute is unclear then I think we do get into public policy, much like we were talking about before with the prior question. If we're talking about an issue that involves public policy generally—a legal issue may not be necessarily a particular statutory construction issue—then I definitely think the public policy is important at our level. For the intermediate court level, I would say exactly the opposite. I really don't think I need to hear much about policy there because that's not my job at the intermediate level. I think it is our job at the Supreme Court level. We have an obligation to consider the public policy in many instances. So to the extent it's not simply a statutory interpretation issue, where there's clear resolution and no ambiguity, other than that situation, public policy can be very important to us. I would certainly encourage the arguments to focus on public policy.

Moderator: Justice Kirby?

Justice Kirby: I agree it can be important in the way that Justice Bivins mentioned. It is less helpful for lawyers to simply say what their view of what Tennessee's public policy is. It's more helpful if they can point to—typically, the court is the last resort in figuring out what Tennessee's public policy is—if they can point to a statute, for example, where the legislature has evidenced what Tennessee's public policy is or an action of the executive branch, that is more helpful than simply arguing what they believe Tennessee's public policy should be.

Moderator: If it's an issue of common law before the court, is it helpful for an attorney in presenting her case to the Court to draw upon scientific, sociological, or psychological evidence? Do you want to see information drawn from those other fields if an attorney is trying to make a public policy argument where they might be relevant? Is that something that you would find helpful in an attorney's presentation?

Justice Kirby: When we get a case, the record has already been developed at the trial court. I would be wary of somebody simply proposing that kind of evidence in the context of their appellate argument because it does not really afford the other side an appropriate opportunity to question the author of the studies, whether it's really a valid study and so on, so I would be a little bit wary of it.

Justice Bivins: I think if you're dealing with common law questions, it can possibly be relevant. I agree with Justice Kirby. I think it needs to be developed in the record if it's going to be used. And again, it's simply one factor to consider. I think we have to be careful with that though if it's a constitutional issue. I am not comfortable in looking at sociological studies and things like that in interpreting constitutional issues.

Moderator: Let's talk a little about *stare decisis*. Justice Louis Brandeis observed that "in most matters, it's more important that the appellate rule of law be settled than to be settled right."³ Justice Thomas, however, has asserted that the United States Supreme Court, at least on issues of constitutional interpretation, is giving entirely too much control to *stare decisis*.⁴ What's your view regarding what role precedent should play in the interpretation of statutes passed by the Tennessee General Assembly and also interpretation of the Tennessee Constitution? Justice Bivins?

Justice Bivins: I think *stare decisis* has to play an important role in what we do. Obviously we don't want to be changing precedent day in and day out because of the predictability factor. I would say, however, I probably come down closer to Justice Thomas's side than I do Justice Brandeis's on that issue. Because in my opinion that if there's been a fundamental misinterpretation—particularly of a constitutional provision—at some point in time we have to overturn precedent to get back to where I think the constitutional interpretation ought to be, I'm not going to be too hesitant to do overturn that precedent. At the same time, it's not something that I think we want to get into or do on a frequent basis. But I think in that situation, again, if it is a fundamental extension of a constitutional provision and I think it is fundamentally improper, I'm probably not going to hesitate to try to overturn it at that point. Precedent is not going to stop me in that situation. But again, *stare decisis* is a significant factor in what we do.

3. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–408 (1932) (Brandeis, J., dissenting)

4. See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 281-82 (2005); *McDonald v. City of Chi.*, Ill. 561 U.S. 742, 807-858 (2010) (Thomas, J., concurring).

Moderator: Justice Kirby?

Justice Kirby: I am having a little moment of déjà vu here, because I'm recalling appearing before the judicial nominating commission and your dean, Judge Gonzales, as I recall, asked me exactly that question. [Laughter.] But I'll wade into it again. I think that stare decisis is usually the wise course to follow. It does promote predictability and encourages lawyers and trial judges to feel comfortable relying on a court's decisions. However, I have seen a number of instances in which the prior decisions over time have proved unworkable or to be badly reasoned, and I think your former employer, respected jurist William Koch, said that stare decisis should not be used to perpetuate error; I do believe that.

Moderator: In terms of thinking about changes not in statutory interpretation or constitutional interpretation but changes in the common law, development of the common law, Justice Oliver Wendell observed "it is revolting to have no better reason for rule of law than it was laid down in the time of Henry IV."⁵ There are legal philosophers who have argued for and have stressed the importance of consistency. If a lawyer is pushing for a change in common law—trying to get the court to adopt a new rule or change the law—what arguments do you want to see that lawyer marshal? How important are fifty-state surveys when is it time for a change in the common law?

Justice Kirby: If a lawyer is advocating change in the common law, I think that that is a potentially persuasive way to do it. I am very interested in hearing how other states handle the same kinds of issues. Common law typically develops over a long period of time and part of how it develops is the experiments in various states of tweaking the common law and seeing if it works. So if a lawyer is advocating a change in the common law, I think a comparison to other states is a potentially persuasive way to do it.

Moderator: Justice Bivins?

Justice Bivins: I'll certainly agree with that. I think that it is helpful to know what the other states are doing. I think it's oftentimes helpful to know what the federal courts are doing in those situations—and certainly while we don't consider that binding, I do think there is something to be said for consistency, whether it be from state to state or state to federal. And to the extent that there can be consistency in those interpretations of common law, I think that's helpful from the standpoint of predictability in business dealings. We have so much happening across state lines now. From an

5. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

interstate perspective, if you can have something that's generally settled, or certainly if a large number of jurisdictions are focusing on the same interpretation, I think that's helpful from a business standpoint and from a predictability standpoint for lawyers. So I would definitely say that those comparisons of other states are very helpful.

Moderator: As leaders in the legal profession in the State of Tennessee, I want to ask you a little bit about professionalism in the State of Tennessee. Justice Kirby, at the new attorney swearing-in ceremony this fall in Nashville, you spoke to the new attorneys focusing on the importance of admitting when you make a mistake, as well as the importance of trying to correct that mistake. Justice Bivins, you focused on a declining civility within our legal profession and the importance of civility within the legal profession. It struck me that with both of your comments that you were both emphasizing the importance of humility and modesty for attorneys who are practicing. TV and movie representations communicated to law students and the general public display a sense of bravado with attorneys. How important is a little bit of modesty and humility to being an effective attorney? Justice Bivins?

Justice Bivins: As you stated, I did focus on civility in my remarks and it's because it is near and dear to my heart. There is a big difference, in my opinion, in advocacy versus arrogance. And too many times we see arrogance in our courts, and not just necessarily in the courts but in depositions, in discovery, and in simple interactions between and amongst lawyers. To see that civility has been lost is very troubling to me. I do think we need to refocus on that. I generally like to use the example of former Senator Howard Baker for purposes of humility. If this man—who was Majority Leader of the U.S. Senate, former Chief of Staff to President Ronald Reagan, an ambassador, and just an incredible man—if he can be humble throughout his entire life, why can't the rest of us be?

Moderator: Justice Kirby?

Justice Kirby: I agree with that whole-heartedly. I do try to stress to law students that the most effective lawyers that I have seen project a sort of quiet confidence in themselves. They are willing to say when they don't know the answer, because they are confident that they're capable lawyers even though they don't know the answer. My perception is that the lawyers who approach the court with the most bravado and arrogance—as Justice Bivins characterized it—are usually disguising something underneath, that is a lack of confidence. Judges are pretty quick to sniff that out. I think lawyers who are willing to acknowledge the weaknesses in their cases and who are willing to acknowledge when the other side has a valid point are the most effective advocates.

Moderator: Much of the discussion that occurs with regard to lack of civility seems to focus on actions before trial courts and actions in discovery. I'm curious, either since you've been on the Tennessee Supreme Court or during your time on the Tennessee intermediate appellate courts, is there any conduct that you saw that you felt was simply unprofessional and that you don't want to see from attorneys in the future who are practicing before you now that you're on the Tennessee Supreme Court?

Justice Kirby: I've seen . . . [Laughter.] a number of instances—usually it manifests when a lawyer, in trying to argue how wrong the trial court was, or how wrong the lower court was, will end up impugning the integrity of the trial judge or impugning the integrity of opposing counsel. I don't want to hear that. And I am quick to tell a lawyer that it's an inappropriate, unprofessional argument. You can argue your case without doing either of those.

Moderator: Justice Bivins?

Justice Bivins: Certainly I have seen some of that at the appellate level, though I think it is much less common at the appellate level than it is at the trial court level. I do think, as Justice Kirby said, there are instances when a lawyer comes in and makes personal attacks, distorts the record, or attempts to answer questions that he or she doesn't know the answer to, instead of admitting that. So those types of situations occur, on occasion, but it is certainly a lot less common here than it was at the trial court level.

Moderator: In a 2010 decision, quoting from legal commentator John Harris, the Tennessee Supreme Court looked at the role of litigator as follows:

In the profession of law the lawyer is not a hired mercenary; nor a hired blackguard; nor a hired vilifier of the other side; but rather is to be compared to the noble knights of the middle ages, who were professional warriors in the interest of truth and justice; who donned their armor and fought their battles, after due notice, in the open; their oath was to conquer or die on the field of honor, but they were to conquer in a fair and open fight.⁶

What's your vision of the role of a professional litigator? What should a client expect from a professional? Justice Bivins?

6. *Flowers v. Board of Professional Responsibility*, 314 S.W.3d 882 at 898 (Tenn. 2010) (citing John C. Harris, *Legal Ethics*, 69 ALB. L.J. 300, 304 (1907)).

Justice Bivins: I think it kind of goes back to my comment before on the difference between arrogance and advocacy. Certainly a good litigator is going to be a very strong advocate, is going to be very passionate, is going to be very involved in what they do, and is going to be very responsive to their clients. But they can't let their clients drive their actions. And I think that's one of the things you see, particularly with young lawyers, too much: a reluctance to address the client's behavior or to take positions that their clients want them to, when the lawyer really knows that's not appropriate to do. I am very much in favor of zealous advocacy—and very passionate advocacy—I have no problem with that. But when you venture into those areas—where you know what you're asking of the Court is something the Court can't do but you want the Court to say no so you don't have to say no; or where you know you're doing something inappropriate to the other party, or to the other side, solely because your client is asking you to do it—that's when it crosses the line.

Moderator: Justice Kirby?

Justice Kirby: I agree. One of the favored terms for a lawyer is a hired gun. I think that really trivializes what a lawyer's role is. A lawyer is a professional advocate and counselor. Think of this: You go to see a doctor, and the doctor says, "What would you like for me to do? Ok, I'll do that." The decisions on strategy and how to handle a matter are made in consultation with the client. Certainly you want to take into account what the client wants but you are the professional, and if you don't drive the consultation, or if the client wants to go a way that you think is ineffective or unethical or unprofessional, it is incumbent upon the lawyer to take control of the situation and either handle it in a professional, effective way, or ask the client to get a new lawyer.

Moderator: The event tonight has been approved for one hour of CLE by the Tennessee CLE Commission. I am sure you have the full attention of the audience that is here tonight. [Laughter.] But at many CLE events that you go to in the State of Tennessee, you'll notice people reading newspapers, people texting, or people on their cellphones. I once had someone in front of me knit a sweater. [Laughter.]

Justice Bivins: Did they give you one? [Laughter.]

Moderator: It looked like the sweater was really high quality, but it looked like their attention was elsewhere. [Laughter.] I wonder, Justice Kirby, as the liaison to the Tennessee CLE Commission from the Tennessee Supreme Court, what would you like to see CLE be in the State of Tennessee, and how do we get there?

Justice Kirby: That is a really good question that I am grappling with right now. In fact, I want to get feedback from working lawyers on exactly that question. I recall being one of those lawyers who at the end of the year needed CLE hours and sat down in an all day seminar, and I brought all my monthly bills to pay, so I was paying bills as I was sitting there getting my CLE hours. It was on a topic that really had nothing to do with my practice; I just needed the hours. Something is wrong with that system. I don't know exactly what the solution is. But CLEs should be geared toward helping lawyers get the knowledge they need and actually tailored to their practice so that it is helpful to them and they're not just getting hours at the end of the year because they have to log the hours and they have to be there in person.

Is the solution being able to go online, so that you can do all of your CLE online? To be able to cobble it together? I don't know. Around the CLE system providers have grown up and other people who now have a monetary interest in how CLE is administered and will probably have a lot to say—how much of that will be geared toward what is best for lawyer's education, as opposed to what is profitable, I don't know. Frankly, I am very new to being the liaison to the CLE Commission, but I have exactly that question in mind.

Moderator: Justice Bivins, in your role as a liaison to the Tennessee Board of Professional Responsibility, what do you see as the priorities of the Board of Professional Responsibility? Also, how should the Board of Professional Responsibility work together with Tennessee Lawyers' Assistance Program [TLAP]?

Justice Bivins: Well, I think the cooperation between those two entities is critical. I see three moving parts in this situation because I would bring in the Board of Judicial Conduct too. As far as what areas the Board needs to focus on, I certainly think impairment of a lawyer or a judge. I think we're to a point now where we also have to focus on the lack of reporting impairment.

I spoke to the Knoxville Bar Association a few months ago, and kind of addressed the situation with Judge Baumgartner that we had up there.⁷ I told them, and I'll say it again here today: We, as a profession, failed in that situation. We failed the people of the state, we failed the victims and the

7. For more on Richard Baumgartner, see Jamie Satterfield, *Court of Secrecy: How Richard Baumgartner, a drug-addicted judge, stayed on the bench despite warning*, KNOXVILLE NEWS SENTINEL (Feb. 21, 2012), <http://www.knoxnews.com/news/local/court-of-secrecy-how-richard-baumgartner-a-drug-addicted-judge-stayed-on-the-bench-despite-warnin-ep-357208631.html> [<https://perma.cc/3JTF-5DPR>].

families, and we failed Richard Baumgartner. So from that standpoint, I think it's critical that we focus on impairment and the lack of reporting. The Board also needs to focus on trusts—using funds inappropriately or things like that that are criminal actions.

As far as the interaction between those entities—I think it is absolutely critical. We are learning something from the Baumgartner situation because I do see on a frequent basis the work of TLAP overlapping with the Board and working with both boards in situations where there have literally been interventions that have stopped situations that, while they might not have been quite as bad, could have been disastrous for our profession had that intervention not happened. So I think it is absolutely critical that they work together. TLAP does an incredible job, and TLAP is able to operate with much more confidentiality than the other boards are, so I think it's critical that they be involved in the process. I think they are starting to work well together. There's a lot of coordination and communication going on constantly between those organizations. Certainly we can improve it and make it better, but I think that's one area we have to focus on because we have impaired lawyers, whether through alcoholism, or drug dependency, or dementia—that's another area where I think we're seeing some major issues arise. I think we've got to be aware of those issues, we've got to be willing to address them, and we've got to be willing to directly have interventions.

Moderator: I'd be remiss if I did not ask for a few practice pointers on behalf of the audience here tonight who are probably curious for a few pointers from justices before whom they might be appearing in the near or distant future. Let's start with getting your case before the Tennessee Supreme Court. Tennessee Rule of Appellate Procedure Rule 11 states in part:

In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.⁸

How much of a Rule 11 application should be focused on those four factors, and what makes a good Rule 11 application? Justice Kirby?

8. TENN. R. APP. P. 11.

Justice Kirby: I think the factors are very helpful. And I think it is appropriate to focus on them, with the caveat that sometimes lawyers will do it in a rather mechanical way. The overall impression that, frankly, a good application will leave with the Court is that if the Court does not take this case it will have far-reaching consequences. A lot of times lawyers will emphasize what an injustice it will be to the parties in that particular case, but at this level we are looking at whether there are consequences beyond that case for consequences in a lot of different cases. So I think the factors are helpful, but they should not be applied in a mechanical way.

Moderator: Justice Bivins?

Justice Bivins: I think the factors are very important in our determination. I certainly agree with Justice Kirby that we don't need them just recited to us. In many instances, all the factors don't apply, and I don't think you necessarily need to address them other than make a notation that these are the factors that are relevant for this particular appeal. But I think it's critically important that you show us why they are relevant.

We can't take all the cases. Our intermediate courts do a great job, but even if we think the intermediate court has erred in a particular decision we simply can't engage in error correction if it's solely going to impact that one case. I think the Court as a whole last year considered over 850 Rule 11 applications, and we took about a tenth of those. You can tell simply by the numbers what the impact has to be. So you need something to grab our attention and I think those factors certainly help us focus on the broader impact.

Moderator: Justice Bivins, I'm curious, what are some common mistakes that you see attorneys making in their briefs that are filed before the Court?

Justice Bivins: With most briefs and oral arguments, one of the biggest things I see is overstatements and taking positions that simply, if you follow them to their logical conclusion, make no sense. I think, again, lawyers can get carried away with the advocacy side sometimes. We had at one point an oral argument where a lawyer advocated a rule for a particular product. So our question was then, "Well what about this product? What about this product? What about this product?" You know, it made a problem for the whole oral argument. I think the same is true in your briefs. If you're taking positions that, if you were to take a step back and realize the Court can't possibly do this, then don't do it. Recognize your weaknesses, admit them, and address them. Try to do that because that is going to be much more persuasive to us than being an advocate saying you've got the best case ever possible on every single issue.

Moderator: Justice Kirby?

Justice Kirby: I see lawyers being untruthful—spinning what is in the record, distorting what is in the record, or citing cases for propositions that the case does not stand for. If a lawyer does that, I’m going to lose respect. I wonder if sometimes they think we’re not going to look at the record or we’re not going to read the cases. So I think, perhaps in zeal, they don’t check their own reading of it, and I think lawyers must maintain a radar to know when they have moved from advocacy into being actually uncouth.

Moderator: I recently heard a fairly heated debate between two attorneys on whether you should use your full allotted time before the Tennessee Supreme Court and whether it’s just a weakness in your argument if you’re not using your full allotted time. Does it matter to you whether the attorney is using their entire time before the court?

Justice Kirby: If I could have gold stars to give for *not* using . . . [Laughter]. Honestly, again, it’s that sort of quiet confidence that every lawyer wants to be able to project to the client and to the Court—if you have selected what you think is your best and most important issue, made the best argument that you know how to, and answered the Court’s questions, then it is very effectively, frankly, to say, “That is all I need to say to you,” and sit down.

Moderator: Justice Bivins?

Justice Bivins: I think first of all you have to go back to the proposition that you want to write the best brief possible. We all have to read those briefs before we go in there and, if you’ve done an excellent job writing your brief, there is probably not a whole lot more to learn in that situation. The main thing left at that point is to answer the questions we have. To simply get up there and use up your time is counterproductive in my opinion. I think that you use what time you need to answer the questions that are there. In your brief, sometimes there may be issues that are difficult to write about and are easier to explain. I certainly understand that. It’s fine to address those issues. But there is no need to regurgitate everything that is easily covered in your written brief when you’re up there. And certainly, many, many gold stars to you if you don’t take up that whole time.

Justice Kirby: Let me follow up on what Justice Bivins said because I think that some of that flows from misapprehension of what the purpose of oral argument is. The purpose of oral argument is not for the lawyer to get up and make a speech. The lawyer’s uninterrupted time to make a presentation is in their brief. The purpose of oral argument is to have a conversation with the Court, to be available for questions, to capsulize what

your argument is in a nutshell, and to be there and be responsive to the Court's questions. So a lawyer who goes in there and crafts a 15-minute argument and is disappointed that he doesn't get to give his 15-minute speech is totally misconstruing the point of appearing before the Court for oral argument.

Justice Bivins: Let me add one more thing too there. Lawyers and others try to read too much into our questions sometimes. Remember that we may be asking a very straightforward question that we feel like we need to know the answer to, but the other aspect of questioning is that we know our other colleagues most of the time, and we know what troubles them, their predilections, and where we think they might be headed. We may think there needs to be some clarification in an area we know a colleague is likely headed, so we may ask a question that is more intended for one of our colleagues than for ourselves. So don't necessarily read into our questions that we are asking from our own particular viewpoint.

Moderator: You've focused on overstatements from lawyers in regard to the law. How much does it undermine your confidence in an attorney when they're not conversant with the record in a case that's before you? How harmful is that to their presentation?

Justice Bivins: I think it's disconcerting. I mean, obviously there are going to be times when there's a specific question asked about something in, say, a three-box record, that you're not going to know. But on the flip side of that, it's not okay to stand up and say, "Well, judge, I didn't try this case so I don't know." You have an obligation as an appellate lawyer to know that record. It ought to be a rare occurrence when you're asked a question about that record and you don't know what the answer is.

Moderator: Justice Kirby?

Justice Kirby: I think we fairly regularly will see lawyers argue a case that they did not try. It is a daunting task to take a big record and prepare for oral argument and be ready to answer any potential questions the judges might come up with about where this is in the record or where that is. But I think we as judges can tell the difference between a lawyer who has really put effort into learning the record and simply in the pressure of the moment standing before the Court can't bring it to mind and the lawyer who didn't know it to begin with. Part of the confidence that a lawyer needs to project comes from being very prepared. And if you are very prepared, then you can honestly say to the Court, "I remember it's in the record but I can't remember exactly where it is and what exactly it says," as opposed to, "Uh . . ." and a deer in the headlights look. I think that's the difference that Justice Bivins was getting at.

Justice Bivins: I think that's right. I can certainly understand if you can't tell me it's on page 754 of the transcript or something—I'm not expecting that. But I do, in most instances, expect you to know whether it is in the record or not and hopefully generally where we might find it—whose testimony it is or what type of exhibit to look for. Narrow it down and let us know whether it's in the record or not. Remember, most of the time in those instances we have not seen the record itself when we're at oral argument.

Moderator: In 2010 the Conference of Chief Justices from state supreme courts issued a resolution expressing some concern about the state of knowledge regarding state constitutional law, not just among members of the general the public but also within the legal profession.⁹ We've seen concerns voiced in a number of states about the quality of argument that arises when people are making a case under a state constitutional provision. When a lawyer is trying to argue based upon something violating or not violating the Tennessee Constitution, what kind of arguments do you want to see a lawyer marshal in that case? Justice Kirby?

Justice Kirby: I would like to see the lawyer first focus on the language in our Constitution—the particular provision and any other language within the Tennessee Constitution that would bear on it. Perhaps the same phrase is used a number of times or there is some context within the actual words and the document. If there is a corollary to that provision in the Federal Constitution, then it is helpful to do some comparison, but often there is not. State constitutions are fundamentally different. If the language used in the Constitution is not clear, as we have discussed, it is helpful to me to see some context. It's harder to get a history of how a particular provision came to be in a state constitution than how a provision came to be in our Federal Constitution, but it is helpful to me to have the context and the history behind it if it's available.

Moderator: Justice Bivins?

Justice Bivins: Well, I think perhaps part of what the chief justices were getting at is the whole notion of a lack of civics education in this country. But I do think a state constitution is obviously a very important document. State constitutions raise very important issues. Certainly for my interpretation, if there is a corollary provision of the Federal Constitution, I want to know what the interpretation of that provision has been. Although obviously we have the authority to interpret the rights involved in our Constitution more broadly than the rights in the Federal Constitution, I am

9. Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 82 & nn. 149-50 (2013).

going to be reluctant to do that unless you can give me a really strong reason, because of, again, predictability and consistency. I think to the extent that we can have consistent interpretations between our Federal Constitution and our state Constitution, as well as amongst the various states, that that helps with predictability and helps lawyers be able to provide advice all across the country.

Moderator: In our audience tonight we have experienced members of the Bar, brand new members of the Bar, and current law students. I was wondering if you would be willing to share any sort of thoughts or advice for our audience tonight. Justice Bivins?

Justice Bivins: I think we've touched on a lot of what I would try to say, reaching across a broad spectrum tonight. I would probably bring it back to the professionalism issue that we talked about earlier. Your reputation is everything in this profession. Your reputation is everything in front of our Court or any other court, as is your reputation amongst other lawyers. If you think that other lawyers and judges don't know your reputation, you're sadly mistaken. Those lawyers that stretch the truth, that act inappropriately toward other lawyers, or that cross the line in their advocacy, we're going to know about that. I think it is incredibly important to think about your reputation and your integrity every day in every action you take. I think that goes from law students all the way up to professors and justices. It's no different from one to the other.

Moderator: Justice Kirby?

Justice Kirby: I would agree, and I would stress to the law students that even though they are not practicing law now, they are probably sitting next to somebody that they will be practicing law with, or practicing law for. Even amongst their fellow law students—the reputation they carve out in law school follows them. So to the extent that you treat fellow students with respect and with a professional, friendly demeanor, then that will carry you a long way as you are practicing law out in the real world.

Moderator: The quality of justice in any state depends greatly on the intelligence, the character, the judgment of the men and women who serve on the state judiciary. The people of Tennessee are very fortunate to have Justice Bivins and Justice Kirby serving on the Tennessee Supreme Court. They've been extraordinarily generous with us tonight in sharing their time. Please join me in thanking them, not just for their time tonight, but also for their dedicated service on behalf of the people of the State of Tennessee.