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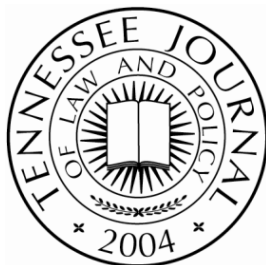
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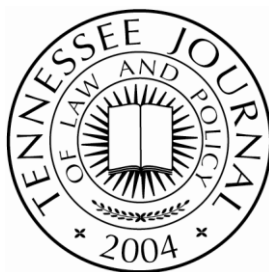
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## Welcome

MS. VAUGHT: Good morning, everyone. My name is Laura Vaught. I am a third-year law student here at UT, and I am currently serving as the *Tennessee Journal of Law and Policy*'s Symposium Editor. On behalf of the Center for Advocacy and Dispute Resolution and the Journal, I would like to welcome you to the University of Tennessee College of Law. We are really glad you are here! At this time I'm going to introduce Alex Long. Alex Long is our Associate Dean for Academic Affairs and Professor of Law. He is going to make a few remarks.

MR. LONG: Good morning, everyone. As Laura said, my name is Alex Long. I'm the Associate Dean for Academic Affairs here at the College of Law. Welcome to *A Look into the Field: Food and Agricultural Law and Policy*. Our new dean, Melanie Wilson, was scheduled to speak today here, but unfortunately she couldn't make it. The Board of Trustees is meeting today and there's a piece of law school business on the agenda, so she is attending that. I'm pinch-hitting for her.

I think one of the ways you can judge the vibrancy of an institution like this is by the number and quality of events like this that the institution holds. For example, just in the last few years, we've had multiple Supreme Court Justices come and talk to us. In the last year alone, we've had a former Solicitor General of the United States come speak, a couple of U.S. senators, numerous federal and state judges, multiple renowned scholars. We've also had multiple continuing legal education conferences and symposiums, not unlike this one. Just in the last year, for example, we have had continuing legal education programs on corporate governance, litigation under the Americans with Disabilities Act, forensic linguistics, representing

minors in immigration matters and disaster displacement and human rights, just to name a few.

Just last year, the *Tennessee Journal of Law and Policy*, which is cosponsoring today's event with the Center for Advocacy and Dispute Resolution, put on a day-long event on healthcare policy. As you can see, not only do we have a lot of events, we have got a lot of diversity within those events, all of which I think contribute to the intellectual vibrancy of this law school. Today's event on food and agricultural law and policy continues that theme, I believe.

I confess that when I first heard about this program today, my initial thought was that I probably know less about food and agricultural law than any area of the law out there, and there are lots of areas of law that I don't know anything about, so that's saying something, but when I looked at the program and I looked at the list of speakers, I realized pretty quickly that there are actually a few things I do know at least little something about. If I don't know something about them, most of the topics least appear interesting to me. I clearly see that they have some value and some use and should be interesting for anyone who is attending. For example, during the 1:00 session, I noticed we are going to have a couple speakers who are going to be discussing agricultural technology, including biotechnology, farm data and drones. I know at least a little bit about one of those things, I'm interested in another, and I can certainly see the value in the third, so I think it should be a useful event for everyone here. If you stick around long enough, stick around to the end of the day, you can also get some ethics credit from what I understand, so there should be something for everyone.

I'm especially pleased that this event grew out in

part from work being done by our students. Some students at the law school have been working on pro bono and other projects for the University of Tennessee Institute of Agriculture. Our pro bono group here, UT Pro Bono, formed a collaboration with the Institute of Agriculture last year. That work is going to make information and agricultural law issues more accessible to farmers and agribusiness through the UT Extension, and some of the material that is going to be presented at this symposium today is the result of work that is being done by UT law students, and so we are especially proud of that.

I don't want to take up too much time, but before we begin, I at least want to thank all the staff and students who have organized this event. One of the students, Laura Vaught, who you just met a minute ago, has been a driving force behind today's event and has really contributed to everything that is going to take place today. She and editors of the *Tennessee Journal of Law and Policy* have put together just an outstanding program featuring a distinguished group of speakers. We hope you enjoy your time at the law school. During the breaks feel free to look around. If you have any questions about anything, please grab someone. Someone we'll be happy to talk to you. At this time, I'm going to turn it over to Laura, and I hope you enjoy the rest of the day.



**National Agricultural Law Update**

*Cari Rincker*<sup>1</sup>

MS. VAUGHT: The *Tennessee Journal of Law and Policy* seeks to facilitate meaningful conversations about current issues in law and policy, both in our printed journals and this event every year. Today we have a unique opportunity to do just that. We have not only an outstanding range of speakers joining us, but we also have great diversity of perspectives here in our audience. Whether you are an attorney, agriculture professional, producer, educator, student or community member, we all bring a different point of view to the conversation today, and it makes sense that we are gathered here at Tennessee's land grant university to discuss how the law affects agriculture, which is our state's number one industry. There are a lot of factors impacting food and agricultural law today, and we will be discussing many of these issues. This morning we will hear about some moving trends in agriculture, including agritourism, community supported agriculture, and direct marketing to consumers. Next, we will discuss some Tennessee law and policy issues, and in the afternoon we will have a panel discussion on agricultural technology, followed by a look at professional responsibility and representing agricultural clients.

Our first presentation is going to be from Cari Rincker. She's a general practitioner in New York City with concentrations in food, agriculture and family law. She is licensed to practice in New York, New Jersey, Connecticut, Illinois, and Washington, D.C. Before starting Rincker Law, she was an associate at Budd-Falen Law Offices in Cheyenne, Wyoming, where her broad practice areas ranged from agriculture, environmental and natural

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<sup>1</sup> Cari Rincker, Attorney, Rincker Law, PLLC.

resource issues to federal lands, wind energy development, crop insurance, property law, commercial law, and probate. Cari grew up on her family's cattle farm in Shelbyville, Illinois. She received her Bachelor's of Science in Animal Science from Texas A&M and was selected to participate in the Congressional Agriculture and Natural Resource Policy Internship Program. She then attended the University of Illinois and received a Master's in Ruminant Nutrition where she focused on beef feedlot nutrition. Cari received her law degree from Pace University School of Law in White Plains, New York, where she also completed certificates in both environmental law and international law. Everyone join me in welcoming Ms. Rincker.

MS. RINCKER: Everybody has their coffee, right? I'm going to talk for the next hour on a lot of different topics, so I hope everybody is caffeinated. I have a very substantive outline. In fact, it's 42 pages long. I really hope you take this home; it will be a great resource for all of you. I will be referring to different page numbers today for those of you that brought your laptops or iPads and will be following along on the outline. As Laura said, I'm a cattle girl. I grew up in Central Illinois on a cattle farm. I grew up showing cattle through 4-H and FFA. I was a livestock judge. I still am a livestock judge. I judge county fairs in upstate New York and throughout the country. I have degrees. My undergraduate degrees are in agriculture and animal science. I have a master's degree. I wrote a thesis on ruminant nutrition. I went to law school out east, so that's what took me out there. I'm also the Chairperson of the American Bar Association, general practice, solo and small firms, Agricultural Law Committee. That is certainly a big mouthful. For those of you that are attorneys in the room that are looking to get more involved in the Agricultural Law Committee, please reach out to me; we would love to have you be a member of our group. We do have a listserv

and we offer CLEs. We just had one actually on insurance for farmers, food entrepreneurs and agribusinesses and one next month on intellectual property, so please reach out if you are at all interested in that committee.

I have offices primarily in New York City. I'm right there in midtown Manhattan and I recently got a bar license in my home state of Illinois. I do have an office there as well. I work primarily with agricultural producers, so farmers, ranchers, livestock producers, but also small to midsize agribusinesses, and increasingly, food entrepreneurs; the people making jams and jellies in their kitchen and selling them at farmers' markets. I represent those types of clients as well.

Today we are going to be talking about a whole slew of topics. We are going to start off by talking about the Veterinary Feed Directive. I actually just spoke on this topic in Missouri. The final rule just came out in June, so I think it's very timely to go ahead and begin with that topic. Then, we will be moving into the Waters of the United States. Seems to be a hot topic right now, with the Syngenta litigation. I will briefly discuss Food labeling law, because John Dillard is going to be going into more detail on that later on this afternoon. We're going to move into a couple food safety issues, specifically raw milk and the Food Safety Modernization Act. Then move into what's going on with Idaho Ag-Gag law and cannabis law. That, by the way, is the first time I have ever said that in a presentation. I am going to talk very briefly about medical marijuana, and then to close today, if we have time, with the Farm Bill.

Let's move on to the Veterinary Feed Directive, and I actually spoke on this topic, not directly with the Veterinary Feed Directive, but with the laws regulating

antibiotics, with the New York State Bar Association, Committee on Animal and the Law in June. I have a very substantive outline on my JD Supra page. If you just Google Cari Rincker and JD Supra, you will come across this outline that goes into copious detail about laws regulating antibiotics. Briefly today, I'm just going to set the groundwork for those of you that aren't familiar on just the difference between antibiotics and antimicrobials. An antibiotic is actually a type of an antimicrobial, but not all antimicrobials are antibiotics, so it's really important, as people in the agriculture legal community, not to use those words interchangeably.

Who are the players with all this? There are three government agencies that regulate antibiotics with animals. It's primarily going to be the FDA, but the USDA certainly plays a role. It regulates antibiotics in meat, poultry and eggs, and that's through three different sub-agencies, principally two of them, but the Food Safety Modernization Act, this is the big one. These are the people that have the inspectors at the plants. They are seeing if there are any violations that are taking place there with these meat animals. The Agricultural Marketing Service, which regulates the National Organic Program, which prohibits antibiotic use. APHIS, the Animal and Plant Health Inspection Service. The FDA is the biggy. All antibiotics need to be approved by FDA. It's regulating food and drugs and livestock, excluding, though, meat, poultry and eggs, which is regulated by FDA. Then we have the Center for Disease Control, and this is under the HHS umbrella, and its big role is that it has a sub-agency, which is the National Antimicrobial Resistance Monitoring Program System, and it has a few other players that sit at the table from the USDA and FDA, and it's just sort of monitoring here with the antimicrobials resistance. As I said, new animal drugs get approved by the FDA, and under the new rule that just



was published in June, that's still the same, so the FDA is the big dog with that capacity.

So prior to 1996, the FDA had two options for distributing drugs. They were either over-the-counter or prescription. That was it. Those were the two options. At the time, the Federal Food, Drug and Cosmetic Act didn't require prescriptions for medicated animal feeds. It was viewed as being impractical, because feed mills, they need to have a pharmacist basically on-site to dispense these prescription animal feeds. Then Congress in 1996 enacted the Animal Drug Availability Act. So before 1996, we had over-the-counter and prescription. Those were the only two options. This law said, okay, we are going to have a third middle ground, it's going to be called the Veterinary Feed Directive, and then the FDA a couple years later came out with the rule on the Veterinary Feed Directive. Prior to learning about all this, I thought the Veterinary Feed Directive was a new thing, but it's not. We have had it actually since 2000. So we had the first rule published in 2000 and the second rule just came out in June. So what Veterinary Feed Directive does, it requires certain medicated feeds that the veterinarian has to then issue basically a piece of paper, which is called the Veterinary Feed Directive, for that producer to have that medicated feed.

Right now there are few drugs that are out there that actually require a Veterinary Feed Directive. I was recently home in Illinois for my family's cattle sale and I was able to talk with my hometown veterinarian about this, and he was basically telling me that he's had very little experience with the Veterinary Feed Directive, because there's been so few drugs, medicated animal feeds that require it, but nonetheless, he has had some. So what is happening now with the new rule is that almost all of the medicated animal

feeds are going to require this Veterinary Feed Directive, so it's forcing the veterinarians to really get down to business there with the VFD. So with the old law, we didn't really have a whole lot, and then there was a public outcry about this, and so this is the FDA's response then to the concerns dealing with antibiotics. As I just said, the Veterinary Feed Directive is actually the written statement from the veterinarian about the medicated animal feed that authorizes the livestock producer to go ahead and use that feed and also the feed mill for issuing the medicated animal feed.

The final rule that just came out in June is actually the third of three major publications from the FDA on this topic of antibiotics. Remember, the first VFD rule came out in 2000, so then the FDA started to get concerned about it. Publication 1, which is the guidance for the industry, GFI 209. The exact publication is also listed in your outline. It talks about the judicious use of medically important antimicrobial drugs in food-producing animals. Then Publication 2 came out I think in 2012–2013 timeline that talk more about the new animal drug and new animal drug combination products. These are also available on FDA's website. They are very easy to find for those of you that want a little bit more background information. Basically the final rule that came out in June 2015 built off of these two publications.

Let's talk a little bit about what's required now under this new rule. I'm going to go through each of the stakeholders, primarily talking about veterinarians first and then moving onto livestock producers, very briefly touching on feed distributors and drug manufacturers. With veterinarians, one of the big issues now is that they must be in compliance with what's called the veterinarian-client-patient relationship. A lot of states actually have laws

requiring this already. That law must at least meet the federal standard here, which requires that the veterinarian engage with the livestock producer and assume responsibility for making medical judgments about the animal's health; two, the veterinarian have sufficient knowledge of the animal by virtue of examination and/or visit the facility where the animal is managed to initiate the preliminary diagnosis; and three, to provide for necessary follow-up evaluation or care. As I mentioned, a lot of states already have laws with this, but some states don't, and for those of you that are wondering whether or not your state has one or not, FDA is actually coming up with a list here in the next few months to help give the public and the veterinarians more information on whether or not their state complies with that. I do not know what the law is here in Tennessee on whether or not you have a veterinarian-client-patient relationship statute, but this is something to certainly think about.

Now, a couple weeks ago I was in Missouri, as I said, talking about this. I was speaking in front of the United Producers, which runs a lot of the sale barns, and there was actually a veterinarian that was there who was an extension specialist with the University of Missouri, and he was basically explaining that what this is going to require now is some face time between the veterinarian and the producers. These veterinarians are going to have to make more on-farm visits and invariably the producers are going to have to get charged for those on-farm visits, which might mean that they have less money for attorney's fees, right? So that's really what's going to be happening here, is that the veterinarian is going to have to come on-farm to see the animals themselves. Then to be clear, the veterinarian, once they are on the farm, they are going to be issuing this Veterinary Feed Directive that is in compliance with this new law.

Extra labeling use is not permitted. For those of you in the room that aren't familiar with what extra labeling use is, it is when a producer uses an antibiotic or some kind of medication contrary to what the directions say on the label. An example might be a different species. Maybe the medication is supposed to be used, under FDA approval, for cattle only and it's used for pigs or vice versa or a different dosage was used for a longer period of time. These are examples of extra labeling use, which happens, and which does happen in unique circumstances under the care and direction of the veterinarian. Under the new rule, extra labeling use is not permitted. It's going to be pretty strictly enforced. I said this comment in Missouri and that veterinarian popped up and he said extra labeling use has never been legal. I guess I just wanted to make that clear. I think it is a change, but you talk to veterinarians out there and, well, this wasn't actually prescribed before under the current law.

So let's get down to business with the Veterinary Feed Directive, what is required, what is optional, what needs to be on this fancy piece of paper. For those of you that are following along in the outline, I'm on page 34. The Veterinary Feed Directive, it makes sense, needs to have the vet and the livestock producer/client information, and it needs to have the premises at which the animals are located. A few weeks ago a livestock producer came up to me and said, well, what if it's with two different premises, do I need two different Veterinary Feed Directives? I don't know, and the regulations aren't really clear on that. I think the answer to that question will be answered here over time. My inclination is, yes, it's going to need two different Veterinary Feed Directives; one for each premises. The date of the issuance, the species, are we talking about cattle, goats, chickens? It must include the

name of the VFD drug. This makes sense. That name could be a genetic name. Is substitution allowed? This type of information needs to be included. It must also include an expiration date. Please note that the vet can write a date up to six months, so they can have this medicated animal feed for a six-month period of time, at which time there needs to be a new prescription or a refill.

A couple other requirements: The approximate number of animals to be fed, the expiration date, as I just mentioned, the drug level and the duration of use, the withdraw time of the medicated animal feed, any special instructions or cautions, the number of reorders or refills, if any, are permitted. It also must have the statement here that says the use of feed contained in this Veterinary Feed Directive drug in a manner other than as directed on the labeling is not permitted. So as I just said, extra labeling, can't do it now under the new rule. Veterinarians would say they couldn't do it before anyway. This is going to be very conspicuous on the VFD. VFD must also include an Affirmation of Intent. What the heck am I talking about? Well, if you look on page 35 of your outline, I'm offering three different choices for this Affirmation of Intent. It has to do with basically whether or not the medicated feed can be used in combination with other drugs. It also needs a veterinarian to sign it, either electronic or in written form.

As I mentioned, the VFD must include the premises ID, but it may include some additional information. And if any veterinarian comes to my office, I'm going to advise that person the more information that you can give on this I think the better. Here is some optional additional information: The location, the PIN number, you might include the specific PIN information, the description, they're Holstein, they're spotted, they're black cattle. The more description there about the cattle themselves, the

weight, the age, anything extra about the animals can go ahead and be included.

Importantly, there is no uniform form right now for this VFD. You can't go on FDA's website and the veterinarian can't print out this form that's in compliance with all these requirements. Part of the reason why I'm lecturing this here today is because I'm hopeful that maybe a veterinarian might go to one of you and say, hey, is this in compliance and you can go through the checklist to see that. Realistically they might not do that. They're probably going to work with some extension educators and kind of come up with their own form, but every veterinarian might have different forms but can still be compliant with all this. So this is something that you as practitioners could sort of help out with, with the compliance review with the veterinarians. The veterinarians then have to keep the original copy. They give one copy to the livestock producer and another copy to the feed distributor, and then with the original copy, they have to keep it for two years. If they are dealing with hard copy, they have got to keep the hard copy. If they are dealing with electronic copy, they've got to retain an electronic copy for two years, which, by the way, just that two-year retention period was, I guess, a little controversial, but I don't make the rule, I just let you guys know what it is.

Let's talk about the livestock producer requirements. Let's talk about what livestock producers need to do. They can't dispense a medicated animal feed without this VFD. They have to go to the veterinarian to go ahead and get this. They also have to maintain these records for two years. They have to keep an original, here again, hard copy, electronic copy, whatever form that it comes, for a two-year period of time, and these copies, by the way, must be available to the FDA upon the inspection.

We will talk about this in just a second. The FDA isn't going to come by to every single farm and check everybody's records. It's going to be a little bit more for-cause. So if the FDA thinks that there's a violation, they're going to come on the farm and that producer better have their records pretty well organized so they can easily show the FDA inspector that they have complied with the Veterinary Feed Directive. Livestock producers also cannot feed the VFD after the expiration date, so this is something to really stress to your clients as well, that even if they have feed left over, maybe the feed mill gave them too much or maybe, for whatever reason, the animals just didn't eat it, so they have feed that is left over after the expiration date, it cannot be fed. That's something to make sure that your client really strictly adheres to.

Let's discuss feed distributors. The feed distributors obviously cannot dispense this medicated animal feed now without this Veterinary Feed Directive, and here again, they have to maintain these records for two years in whatever form it came, electronic or hard copy, and also it must be available upon inspection of the FDA inspector. I wanted to note here with this recordkeeping requirement that if you were actually manufacturing the medicated animal feed, that you only need to keep the records for one year, so everything else is two years, but if you are manufacturing it, it's only for one year, which is a little bit of a controversy right now. Then the feed distributors also have to provide for one-time notifications to the FDA and say, hey, I'm going to be distributing these medicated animal feeds, and this notification just needs to have some basic information, and the feed distributor needs to do this within 30 days. This actually goes to Bethesda, Maryland, to the FDA, Center of Veterinary Medicine, Division of Animal Feeds. Interestingly, if one feed distributor is distributing medicated animal feeds to another feed distributor, then the

receiving feed distributor needs to send what is called an Acknowledgment. This Acknowledgment is just another requirement on feed distributors. For drug manufacturers, we have got another requirement here with language on caution. Federal law restricts medicated feed containing this Veterinary Feed Directive drug to use by and on the order of a licensed veterinarian, and for those of you that want to look at the regulation, 21 CFR 558.6(a).

As I mentioned before, with FDA enforcement, FDA can come by for a for-cause inspection here. I don't think that they are going to have really deep tentacles and hopping by from farm to farm, to feed distributor to feed distributor on a regular basis, but if they think there's a problem, the FDA is going to come by to make sure that your clients definitely have their records in order. The new rule that was just published in June is actually going to be effective next week, October 15th, and then from that point forward, different drugs are going to be rolled out, so they're going to move from OTC, over-the-counter, to being a Veterinary Feed Directive drug, and that change is going to actually take place over the next few years through January 1, 2017. Yes?

UNIDENTIFIED SPEAKER: Ms. Rincker, do the feds partner with the state agency, Tennessee Attorney General, in the compliance and enforcement?

MS. RINCKER: So right now I'm not fully aware — and that question actually came up last month in Missouri. I would say probably, it's going to probably happen, but right now it's a little unclear on whether or not the State Department of Agriculture is going to get contracted out for inspection, so probably so. Who here is a little confused about this? Anybody else? I'm actually really confused about this, and that's actually part of the



problem, that there's a lot of confusion. None of us really understand it. The courts don't understand it. Definitely people in the agriculture industry are a little confused. That's why we have the litigation that we have right now in this area.

Waters of the United States, the statute that I'm really referring here to is the Clean Water Act. So it all started with this court case with Mr. Rapanos. Mr. Rapanos in Michigan wanted to build a shopping mall by a wetland. He wanted to fill in the wetland, so he built up this shopping mall. The Michigan Department of Environmental Quality said, you can't do that, this is a federally protected land, you have got to get our permission first, and then the EPA even came in with a cease and desist and said, uh-uh, Mr. Rapanos. Mr. Rapanos didn't care, so he went forward, and this resulted in a civil suit against him by the United States. Mr. Rapanos argued that the Clean Water Act in this case gave the government jurisdiction to regulate only traditionally navigable water, while the government argued that the lands were adjacent wetlands and they were covered by the Clean Water Act.

At the district court level, the court actually sided with the government. Mr. Rapanos, you are wrong, the government is right, and then it was appealed all the way to the Supreme Court. On appeal, the Supreme Court action came down with a five-four opinion and said that the government's argument here is overly broad, that the definitional term of waters in the United States can only refer to relatively permanent standing or flowing bodies of water, not occasional, intermittent or ephemeral. With this opinion, Justice Kennedy, in his concurring opinion, started going on and on and on about how there needed to be a significant nexus to navigable waters. He suggested a more liberal, broader view, of this regulation in his concurring

opinion, which gave the EPA the great idea, let's implement this in a rule. That's essentially what happened.

This rule was actually published in June 2015. Lots was happening this summer with all this and it became effective just recently, about six weeks ago, on August 28, 2015. So what does this rule say? This is an EPA rule under the Code of Federal Regulations. It says that there are six types of waters that are categorically within the federal jurisdiction. What are those six types? They are traditional navigable waters; two, they are intrastate waters, including intrastate wetlands; three, territorial seas; four, the impoundment of jurisdictional waters; five, tributaries; and six, adjacent waters. These we know the government has jurisdiction under the Clean Water Act. Then there are two categories of water on which a case-by-case determination is made: Government/not government will make a case-by-case determination. What is it? Two different things: We have got members of very specific bodies of water. For example, on prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California or Texas coastal prairie wetlands. These case-by-case determinations are going to be made. The second one – and this is the kicker, this is the one where all the fuss is about – a water body that, due to its location within a certain distance – it doesn't say X number of miles, it says a certain distance from a high tide or a high water mark of jurisdictional water – has a significant nexus to that water.

I mentioned before with Justice Kennedy's concurring opinion on the *Rapanos* case, this is where he was gabbing, gabbing, gabbing about the significant nexus, which is where the EPA got that language. What in the world is a significant nexus? Well, we don't know, but this is what the EPA has said: having a significant nexus means that water, including wetlands, either alone or in a

combination with other similarly-situated waters in the region, significantly affects the chemical, physical or biological integrity of waters used in interstate commerce. What does that mean? Well, I don't know and nobody really knows right now, which is why North Dakota filed for a preliminary injunction basically saying we need more information, we don't understand this, and in the meantime we are going to stop what's happening here with the enforcement, and other states joined, 13 states to be exact: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico and the Dakotas and Wyoming. They claim that the new WOTUS rule is a threat to state sovereignty because it asserts federal jurisdiction over wetlands and waters that should be subject to state control. So they are arguing it's overly broad. What is the status of the litigation? Well, there's a PRO right now and that's sort of the status with WOTUS. Makes a little bit more sense? Clear as mud? Yes?

UNIDENTIFIED SPEAKER: That PRO, does that apply just to 13 states, or did they extend that to the entire United States? There has been a little bit of confusion about that.

MS. RINCKER: Right. That's a good question, and if anybody knows the answer to that, please, Mr. Dillard?

MR. DILLARD: EPA kind of made the announcement that they are going to move forward under the assumption that it applies to just 13 states. North Dakota's Attorney General went back to court to say no, this should be a national injunction, and that was denied, so, yeah, it's just the 13 states.

MS. RINCKER: So we are going forward, and really the issue with this is, we don't know what this

means. This is really vague, and then it's talking about a certain location, a certain distance, from high tide or high water, a significant nexus. What in the world does this mean? That's really the crux of a lot of the confusion here.

Let's talk very briefly about the Syngenta litigation, and the reason why I'm bringing this up is because I'm from Illinois, corn country, and a lot of farmers have been calling my parents' house and calling my office and what does Cari think about this, I'm getting this in the mail, should I join this lawsuit, should I not join this lawsuit? I think it's good to just be generally aware about what's happening here with this litigation. I'm not involved with this case in any capacity right now. In 2013, China refused to accept shipment of corn that contained Syngenta's MIR 162 trait. That's basically for insect resistance. For those of you that are following along in the outline, I'm on page 11. China rejected this because the GMO had not yet received a safety certification from China due to incomplete submission of materials and statistics by Syngenta. So China ended up rejecting 887,000 tonnes. That's actually spelled t-o-n-n-e-s because that's a metric ton, which I have just now learned. A metric tonne is about 2,200 pounds or 1.1 tonne.

Due to the presence of this trait, China was just rejecting everything they thought that might even have this trait, and because China was rejecting all this, this arguably caused a decrease in the market of all U.S. corn, not just the corn with MIR 162, but all U.S. corn, which is why – and I'll talk about here in a second the class action suits – many are inviting all corn producers to join hands. This allegedly has caused more than \$1 billion in losses to U.S. farmers. There have been a few lawsuits. I'm on page 12 of your outline right now. The first one was actually filed by Cargill in September 2014, and Cargill argued that

Syngenta allegedly – they broadly commercialized a new product before receiving approval from a key export line like China. Then Transcoastal, for those of you that aren't familiar with Transcoastal, they are a major exporter of livestock feed products. They sued Syngenta for \$41 million. We have these two lawsuits by companies, and then we also have lawsuits by farmers.

Essentially what has happened here, there were a few different lawsuits. They basically now have been consolidated into this case in Kansas. It survived the motion to dismiss and is currently waiting for class certification. My father even got this letter. There are many law firms that are involved in this class action lawsuit against Syngenta. With food labeling, John Dillard is going to be talking about GMO labeling here this afternoon in the Vermont litigation, so I want you to sit tight and wait for his lecture on the topic. I do have a lot of information in your outline on this, so please go ahead and refer to that, but essentially John will give the background on that. Vermont passed a law stating that starting in July 2016, so next summer, that all foods sold in Vermont must be labeled stating that it contained GMO, so sit tight for John's lecture on the topic.

We have come to origin labeling. Is anybody else a little exhausted with this topic? I feel a little exhausted, because I just feel like there's been a lot of drama over this. Canada sued, WTO, the World Trade Organization, then Mexico joined, and a whole series of different arguments. For those of you that aren't familiar with Country of Origin Labeling, it's this: Look at the label here, you see how we have the country of origin, from cattle born in Mexico, raised and slaughtered in the United States. The label actually has to say where the cattle were born, raised and harvested, and they can be different countries, like this one

here, born in Mexico, raised and harvested in the United States. We are dealing mostly with meats, also fresh and frozen fruits and vegetables, peanuts, pecans, Macadamia nuts, and Ginseng.

In October 2014, so about a year ago now, the World Trade Organization ruled in favor of Canada and Mexico in this dispute over COOL. My secretary, as she was proofreading my presentation today, I had MCOOL. For those of you that aren't familiar, that means Mandatory Country of Origin Labeling, and the reason why I make that distinction is because previous to that, it was voluntary, so it was VCOOL, and then it turned into MCOOL. It's just COOL, the WTO stated they unfairly discriminated against meat imports and gave an advantage to domestic meat products, because the consumer is only going to buy beef that has been born, raised and harvested in the United States, and I'm going to discriminate against products that were perhaps raised in Mexico or Canada, and this is under NAFTA, the North American Free Trade Agreement. That's the issue here. However, the WTO compliance panel found the labels abide with consumers with information regarding the source of meat and dismissed Canada and Mexico's claim that the labels did not serve their intended purpose.

After the October 2014 ruling, the United States appealed to the appellate body within the WTO decision, but the appellate body said forget that, you're wrong, United States, you need to go back and change your law. This just happened in May 2015. In June 2015 – we had a busy summer with food and agriculture law – in June 2015 Canada requested authorization from the WTO to suspend application of certain tariff concessions for the United States for burdening the WTO Free Trade Law under NAFTA. The United States objected to this level, which

tariff concessions would be suspended, and then the Canadian government claimed that requiring COOL on meat has cost them a combined \$900 million in losses. Where are we today in June 2015 following this WTO ruling? The U.S. House of Representatives passed the bill to repeal COOL for beef, pork and chicken in order to possibly avoid billions of dollars in tariffs that could be imposed by Canada and Mexico, and it's anticipated this is going to face opposition in the senate. Stay tuned for what's happening with COOL.

With food safety, I'm going to talk a little bit about raw milk. I get a lot of questions about this, the Peanut Corporation of America trial, and close with FSMA, Food Safety and Modernization Act. For those of you that are following in the outline, I'm on page 21, and for those of you who are not familiar with what raw milk is, it's basically milk that has not been sanitized yet, pasteurized to kill the bacteria. Proponents of raw milk, they're activists, they love it, they think that it helps with allergies and asthma.

Federal law prohibits dairies from distributing raw milk across state lines in final packaging ready for consumption, but it may be distributed across state lines if it's going to be pasteurized or used to make aged cheese. The sale of raw milk is completely prohibited in 18 states, and I highlight New Jersey because I'm bar licensed there, but it's completely prohibited in these 18 states. Raw milk in 17 states restricts the sale only on the farm where milk is produced, along with specific labeling requirements. I just wanted to also note that Tennessee is on this list of these 17 states, and from what I gather, that in Tennessee, herd leasing programs, cattle shares and goat shares are prohibited. Did you have experience with the cow shares or goat shares?

UNIDENTIFIED SPEAKER: Cow shares are legal in Tennessee.

MS. RINCKER: They are. They are not prohibited. They are allowed under cow shares, goat shares and herd leasing programs. In the 16 states they allow the sale of raw milk at retail stores separate from farms where milk was produced with appropriate labeling. Connecticut is another state that I work in; for example, it could only be sold at farmers' markets. There's been a couple court cases. I just wanted to note a few of them. I'm on page 22 of your outline for those of you that want to get the case citations that have a little bit more detail about this litigation. One is *The Organic Pastures v. FDA*. In 2012, the U.S.'s largest raw milk dairy sued the FDA for failure to respond to a petition by The Organic Pasture to have law changing banning the sale of raw milk across state lines. Then there was another lawsuit that happened more recently in April 2015. A Santa Cruz, California, resident commenced a lawsuit against a farm company after he became ill with bacteria from drinking tainted raw milk that led back to this dairy.

With food safety, I wanted to note this court case for a few reasons. First of all, I found out about this from the American Agricultural Law Association's listserv from Professor Richardson. So for those of you that want to get more involved in about what is happening in agriculture law and policy, I highly recommend getting involved with American Agricultural Law Association. It's a very helpful listserv that sends updates to various court cases on their happenings.

In way of background, in 2008 a salmonella outbreak was traced back to a peanut butter manufacturer



that ended up killing nine people and sickened 714 across 46 states. In September 2014, after a seven-week jury trial, the former CEO of this company and his brother were found guilty of 76 counts linked to intentionally shipping out salmonella-contaminated peanuts. In September 2015, they were sentenced to 28 years in prison for knowingly shipping out deadly food. He was given a 20-year sentence while Mary Wilkinson, the plant quality assurance manager, was sentenced to five years, so the CEO had to serve four times as much time as the quality assurance manager. Why do I share this information with you? Number one, I think it's always good, as agricultural lawyers and food lawyers, to have a little bit of horror stories to tell our clients to get them to straighten up and really listen to us and to really pay attention to the laws and the regulations in his this area, because this is a nightmare for company and this person.

Second, I wanted to also put in a little note that in two weeks in Charleston, South Carolina, I will be monitoring a panel on multimedia use for attorneys on how to deal with these types nightmare cases from a public relations standpoint. I was having this conversation with Laura last night, who has an ag communications background. I think as attorneys we need to be prepared on how to handle these potentially high-profiled cases, maybe a client that has a food safety issue. FSMA, Food Safety and Modernization Act, was signed in the law in January 2011, wanting to overhaul the food statutory regulations. FSMA requires facilities that produce and sell food to be registered and it provides regulations for facilities to ensure food is processed and sold safely. Analysis of hazards and risk-based preventative controls is really what FSMA is about. FSMA creates a food safety plan that food facilities — that's a key word here — food facilities must follow for identification of hazards in food and preventative controls

to ensure hazards are treated properly. I am on page 24 of your very long outline for those of you that are following along.

FSMA also provides for oversight and management of preventative controls requiring processes to kill pathogens and are monitored for appropriate temperatures as well. As I said here, the key word here is food facilities, and the reason for that is because farms are exempt, but we need to think about what the definition of a farm is here, and FSMA actually divides things out into a primary producing farm and a secondary activities farm. I'm going to go ahead and break those two down. A primary producing farm is an operation under one management in one general, but not necessarily contiguous, location. Like my family's farm is made up of a couple different farms in the same area. That would be an example there, of harvesting crops, raising of animals, et cetera. This also includes farms that compact or hold raw agricultural commodities. So what is a secondary activities farm? This is an operation that is not located on the primary farm but is devoted to harvesting, packing or holding raw agricultural commodities. These are also exempt under this requirement. It allows facilities that are not specifically on a farm to qualify under the farm label, to not be subject to preventative controls. Here's an example. An example would be where nuts are holed and dehydrated by an operation not located on the orchard before going to the processing plants. I have a client of mine who grows peppers and making sauce, but what she does is, she takes her peppers and then she goes to a commercial kitchen. She actually crosses state lines to go to the commercial kitchen. She's not considered a farm under this definition, and therefore, needs to be registered as a food facility with the FDA under FSMA. That's really, at the end of the day, what I wanted to press home, is, ask your clients a little bit

more information about the processing.

Idaho Ag-Gag. I'm on page 25 of your outline. This is a controversial and defensive topic. I actually spoke on this topic last March in front of the New York State Bar Association, Committees on Animals and the Law. I have an entire outline posted on my JD Supra page on ag-gag laws and then also hiring practices for farms, and this outline does not include that information on hiring practices, but as I was speaking with John, I actually think it's a really good use of energy while we have a lot of practitioners in the room. I think when clients come and they ask you questions about ag-gag, maybe the focus needs to really be on hiring practices to make sure that they are hiring the right people on their farms. I actually sometimes get some hate e-mail from people who read my online materials about ag law. It's just a very controversial area.

So what is ag-gag? It refers to the anti-whistleblower law that restricts employees, basically restricts undercover employees from taking unauthorized videos illustrating alleged animal cruelty on farms. Here's an example: At the presentation I gave last March, there was an attorney who went undercover for an animal activist group in New York, and he, with no experience on a farm, was able to get a job on a dairy and then take video with his phone, and then he immediately quit and then he got a job in a swine facility and then he got a job in a chicken facility. That's what we are talking about, is somebody who is undercover. The whole point of them getting the employment was for them to try to get some undercover video and they release it on YouTube in hope of having like a public outcry about what's happening.

There are these ag-gag laws now that state that this

is criminal. In New York where I'm at there is no ag-gag law. The first ag-gag law was enacted in 1990 and that was in Kansas. Actually, in your outline I have included the entire ag-gags statutes, so I have each of these state statutes right there in the outline, on pages 26 to 29. Kansas was in 1990. North Dakota and Montana was in 1991, and then we had a triplet in 2012. So it's quite a big chunk of time, over ten years, Iowa, Missouri and Utah. Then in 2013 was Arkansas. 2014 is Idaho, and that's where we are right now, and this is on pages 29 to 30.

In way of background, in 2012 an animal welfare group released a graphic video that was taken undercover of workers at this Idaho dairy. Has anybody seen the video? I haven't seen the video. In response to this video, the Idaho Dairymen's Association drafted legislation to criminalize this activity. They decided they wanted an ag-gag law. The law provides that a person commits the crime of interference with agricultural production when a person knowingly enters an agricultural facility that is not open to the public and without the facility owner's expressed consent or pursuant to judicial notice of statutory authorization makes this audio or video recording of the conduct of an agricultural production operation. The animal activist groups in Idaho were not happy and they went to go file suit saying that it was unconstitutional, that it violated free speech.

In August 2015, the U.S. District Court judge in Idaho found that this ag-gag law was unconstitutional for criminalizing certain types of speech. In his decision he actually wrote that although the state may not agree with the message certain groups seek to convey about the Idaho agricultural production facilities, such as releasing secretly recorded videos of animal abuse to the internet and calling for boycotts, it cannot deny such groups equal protection of

the laws in their exercise of their right to free speech. So as of September 2015, as of last month, the Idaho Attorney General is awaiting a formal order striking down the law before deciding whether or not they are going to appeal. We don't really know what is going to happen. For those of you that want to learn all about medical marijuana law, look at your outline. The reason why I wanted to note this was, I actually know a few cannabis attorneys in New York City who wanted to meet me as an agricultural lawyer, so I actually think that over the next decade there might be some synergies between ag cannabis lawyers and agricultural and environmental attorneys. I thank you for your time and attention, and I'll be speaking very soon on local food. Thank you.

MS. VAUGHT: Thank you, Cari. We appreciate your attendance here today and we look forward to your commentary on our next panel as well.



**Agritourism, CSAs, and Direct to Consumer Sales**

*Julie Bowling*<sup>2</sup>

*Rob Holland*<sup>3</sup>

*Cari Rincker*<sup>4</sup>

MR. WHITAKER: My name is Dan Whitaker. I'm a third-year staff editor on the *Tennessee Journal of Law and Policy*. I grew up on a farm over in Marshall County, Tennessee. That's just over in the heart of God's country. Our first panel discussion today is going to focus on some popular trends in food production and sales as well as agritourism operations. Producers who market to the public and invite them onto their farms, they face some unique legal challenges that other farmers may not, and each of our panel has had extensive experience in that area. First we have Ms. Julie Bowling. She is Assistant General Counsel and Manager of Payroll and Benefits for Farm Bureau Insurance of Tennessee. She graduated from University of Tennessee at Knoxville with a degree in agriculture, so it's good to have her back home. She received her JD with high honors from Emory University School of Law in 2006. She practiced in Atlanta, Georgia, for over three years focusing on tax controversy and litigation before moving to Columbia, Tennessee, in the spring of 2010, over near God's country.

Today, Julie enjoys working on a variety of legal issues that arise from Farm Bureau Insurance and the other Tennessee Farm Bureau Insurance Companies, including employment law, tax issues, litigation, insurance law and agricultural law. Julie has made presentations for CPE and

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<sup>3</sup> Rob Holland, Director of the Center for Profitable Agriculture.

<sup>4</sup> Attorney, Rincker Law, PLLC.

CLE credits for CPAs and attorneys on tax issues, insurance law and agricultural law. She is licensed to practice in the states of Tennessee and Georgia. Julie and her husband Matthew are activity members of Graymere Church of Christ in Columbia. In her free time she enjoys old house restoration projects, running and spending time on her family's farm in Coffee County, Tennessee.

Next, we have Mr. Rob Holland, who has been the Director for the Center for Profitable Agriculture since September 2007. Prior to his appointment as Director, Rob served as the Center's Financial Feasibility Specialist from April of 1998 to August 2010, and served as the Extension Area Specialist in Farm Management from September 1993 to March 1998, covering ten counties here in East Tennessee. Rob received a bachelor's degree in Agricultural Business from University of Tennessee at Martin in 1991 and a master's degree in Agricultural Economics from University of Tennessee at Knoxville in 1993, so welcome home as well.

In 2007 Rob graduated from the Corporate Leadership Development Program at Belmont University in Nashville. He is a 2007 graduate of Leadership Murray, serves on the Board of Directors for the Tennessee Council of Cooperatives, is a member of the Murray County Alliance and a member of First United Methodist Church in Columbia, also over near God's country. Rob is a native of Giles County, Tennessee, where he grew up on a small family farm and was a National 4-H winner. He has two children, a daughter named Regan and a son named Clark.

Finally, we have Ms. Cari Rincker joining us again. Thanks again for being up here. I won't repeat her introductions since Laura already did such a good job with that, but I will add that Cari has frequently published on the



topics we are about to discuss, including a recent book entitled *FIELD MANUAL, LEGAL GUIDE FOR NEW YORK FARMERS AND FOOD ENTREPRENEURS*. Everybody join me in welcoming our panel.

**MS. BOWLING:** Well, good morning. I hope everyone got their coffee during the break and is ready for a fun topic, and that is agritourism. I've already had people say I don't even know, what is agritourism? What is this new thing that is emerging that we are hearing about? It's a fascinating topic. It's something that is near and dear to my heart. Since I came to UT as a student, as a college student, and now working as an insurance professional, I see this growing, not just in our state, but also across the country.

To start with, let's look at some pictures. That's one of the best ways to see this. Agritourism is an emerging trend for farmers looking for ways to increase their farm income, and one way to do that, when you have a job with raising crops and selling animal products, you are looking for ways to keep a steady income, even when the weather and other factors make that problematic. Some farmers have taken to inviting people onto their farms. Pumpkin patches in the fall are one big area you see a lot of this. Farmers have learned they can grow pumpkins, people will come buy them, have pictures made with their kids, and a lot of times they'll do these things and then they expand. From an insurance perspective, looking at this, you say okay, pumpkins, COOL, no problem. Looking at that photo, see that thing that looks like a platform on there? That's the kind of thing that starts getting you worried. You think, okay, people are coming out on the farm that maybe aren't on farms all the time, may not be aware of how animals act, may not understand you shouldn't climb on everything you see, and there's some risks involved with inviting people out to your farm. Another thing you are

seeing a lot of farmers doing is “pick-your-own” operations. In our country, people are becoming more and more concerned of where their food comes from, how it’s grown, and they are actually interested in knowing who grew it and how, so they are starting to look for ways where they can get food from farmers’ markets, CSAs, which Cari is going to talk about a little bit later, and going to the farm themselves, picking the crop and taking it out. So we are seeing a lot of these berry operations in particular big in Tennessee, for you to pick your own, as well as vegetable operations.

Another thing you may see a lot of is an entertainment-type thing and education activity with corn mazes. These have taken up all over the U.S. There’s one south of Knoxville that we will talk about a little more in detail that I remember going to as a student in college. We would get a group together, go out to the corn maze at night and have a fun time going through the maze. You could buy other agricultural products while you were there. They have some educational activities where you can learn about the farm. It was a way for the farmer to tell the story of their operation, to connect with their community, and to bring people out and see what’s going on on farms in our country. So a lot of states have gone into defining agritourism for various purposes in our laws, and what I put out here is a general definition.

The definitions in Tennessee, Kansas, South Carolina, lots of places are very similar to this one, but agritourism is generally defined in state law as an activity carried out on a farm or ranch open to the members of the general public for recreational, entertainment or educational purposes, to view or enjoy rural activities including farming, ranching, historic, culture, or harvesting. Well, that’s not broad, is it? That can

encompass a lot of things, and you will see throughout this presentation and looking at the materials that it can be anything from the pictures we have seen, to petting zoos, having things where people come and ride your horses or learn about cattle, how milk is produced and go through a whole operation like that, but for our purposes as attorneys and as people advising farmers who may be interested in these activities. What matters for you is that agritourism may include farming. It may also include other commercial activities, and that makes it in some circumstances a hybrid when you are looking at regulations, when you are looking at insurance and when you are looking at liability. For all of those areas, agritourism is more of a hybrid activity.

In my job, I'm in-house counsel, so what I love is when people come to me with something before they do it. It's always better that way. It makes my life easier and I try to make their life easier when they ask in advance, but that doesn't always happen. Let's look at a hypothetical, because this could happen in real life, and we will talk about what the result could be. Farmer Bo, and I chose Bob, specifically that name. If you look in demographics today, our farm population is aging. In the United States, most farmers are age 55 or older, and that's important to all of us in my age group, because we would like to eat for the next 50 years, so do be encouraging younger people. This is an area where there is opportunity and they need to be taking on this role, because we have a lot of aging farmers and need others to be producing food for our future. Bob is a common name for many farmers.

Farmer Bob raises corn, soybeans and wheat on his farm. He has his regular insurance. He has insurance on his home. He has insurance on his cars, and he has a policy for his farming operation as well, but he hears about this agritourism and decides to branch out and he grows a

pumpkin patch one year. It gives him some diversity in his operation, and he learns that people come out. They will come see these pumpkins, they'll buy them, they will come to his farm, they will buy other products he has there. He can sell jams and jellies from some of his neighbors. He does that. He opens it to the public. More people come. Next year, he says, you know, I can make the kids have even more fun if we add a hayride, so he adds a hayride. Hitches a wagon to the tractor, puts some hay bales on it and rides the kids around. Then he says, you know, if I add another ride, the kids can ride the ferris wheel while I do the hayride, and he buys a used ferris wheel from a carnival operator, adds that. Now, we have this farm and we have the pumpkin patch and we are adding more and more to it each year.

Well, of course, what happened – and this is completely made up. I do not know that this scenario happened from anywhere. I just pulled facts that I could find from various places. Let's say someone is injured. They are on the ferris wheel, and it breaks from lack of maintenance. The parents let Farmer Bob know they want the medical bills covered, and the child has pain and suffering, what do we do? Farmer Bob calls his insurance company and says, hey, I've got a problem. What do I do? Well, the company is going to investigate. They're going to look into it, and they are going to discover that their agent didn't know Farmer Bob had a ferris wheel, was inviting people to the farm and having hayrides and doing all these things, and they may not have the right coverage for all those activities, because they didn't know; Farmer Bob didn't tell them. We are going to talk about what the company may do in that situation. Those are all things that would be considered in something like that. Now, I laugh about this hypothetical, because every injury I've heard lately on a agritourism operation, it's never the kids. It's

always an adult doing something they shouldn't be doing: going down a slide, climbing a ladder. It's always the adults, never the kids. With that in mind, that's what I'm going to talk about, is some of the liability risks that people take on in having an agritourism operation.

Looking at our hypothetical, what the insurance company is going to do, just so you know from that perspective, they are going to look at, okay, of the policies Farmer Bob which ones could apply in this situation, he have any coverage from his auto or his homeowners or his farm policy? They are going to look at all those. They are going to see if the policy has any coverage for the activity that led to the injury, and they will look at that. If they can't determine that right away, they may defend Farmer Bob, but what they will do, because your insurance policies provide two things. They provide coverage for often your property, your business, that sort of thing. They also defend you from liability. Sometimes they will pay coverage for your liability. Sometimes they may just provide the defense. It depends on what is in the policy what is covered there. What they may do is defend Farmer Bob under Reservation of Rights, which says we're going to defend you because we're not sure if there's coverage, but we're reserving our rights in case there's not coverage. We're not going to pay that if it's not covered by the policy, but we're going to pay for someone to defend you in court over this activity.

They may file an action against Farmer Bob to say, hey, court, we don't know if this policy covers this or not, so here's what we think it is, you tell us whether we owe Farmer Bob or not for coverage. It is another option the company may take on. What I want to bring out to you today is, how do we avoid this hypothetical situation where farmers who are taking on new activities on their operation

and others can be not in that situation, what do we do avoid that, and obviously the big start business planning, especially extension professionals. I know there's several of you here today and attorneys. You will meet people in your communities, in your churches, in your activities in the community; you will know people who are doing these kinds of things. Talk to them. Learn what they are doing. This is an opportunity for you to give them that advice they need on the front end. What farmers need to consider before taking on agritourism activities is, what do they want to do, what do they want their business to be, what activities are they going to engage in to make a profit, how do they need to organize and how is it organized now?

I've seen several operations that will come in and they may have their farm separate from their harvest-their-own activities. They may do their big farming, their corn, their soybeans, those activities on one tract of land, have their harvest-your-own in a different area of town, maybe in a place where there is more traffic from the public so they see it more, and they may incorporate that separately, set it up as an LLC, do something different so that's separate from their other farm activities. One, to separate out the liability and, two, to have that where it may have fewer assets involved than their main farm operation. That is something to consider. I can't give you a blueprint for that, because it is going to be case-by-case based on what the person wants for their operation, what their assets are and what their other risks are.

One of the other things to look at for people starting a new agritourism operation is, how can you mitigate some of the risks from people bringing onto the farm and into this operation? One thing we're going to talk about today are some precautionary measures that farmers can take for these type of operations to, one, limit their liability and also

to keep the members of the public safer who are coming onto their land. Another thing they can do, obviously, is to purchase insurance for the risk. If there is insurance offered and it's affordable, that is something that can be done to mitigate some of the risks. Sometimes there may be activities for which insurance is not available or it's very expensive. Zip lining, roller coasters are things that come to mind that might not have as affordable coverage out there for those types of activities, because they are riskier. If someone wants to have that on their property, they may need to consider self-insurance or go to a company that specializes in those types of activities.

What are some of the potential risks a farm could face? All businesses face a lot of these risks, in particular I see these more in agritourism operations, because in lots of state laws, and in Tennessee in particular, farms have a lot of protection and in most cases you are not having members of the public out on your farm all the time. It's not like a Walmart or a Target or a Dollar General or a restaurant where people come in all the time. When people are branching out to raise their income from these activities, their risks increase. We have potential for liability claims if someone is injured or if their property is injured while they are on your farm. There's also the potential for employment claims. Farmers may be having more employees for some of these activities, particularly your corn mazes and your others where you need people to help herd the ones coming through, show them where to go. You may have more employees than you normally had. That could put you in a different category, and I think Cari is going to talk about some of those rules later today related to that. Also, loss or damage to your property from catastrophe. We have lots of farmers who are engaging in agritourism who have built new facilities. They may add an additional building for their on-farm market, for their

farmer's market. That's another thing you need to be able to protect. If you are putting money into that operation, the farmer would then have greater costs if something is damaged from the people coming onto the farm or something else.

Loss of key employees. I talk to businesses about this a lot. If you have a dairy operation and have one foreman who knows how to do everything when you're gone, the farmer needs to plan for what do I do if that person leaves, if they get another job. We need to be planning for that as well. Business interruption and loss of income. A lot of agritourism activities work really well when the fall weather is nice and sunny and people are coming out, but on a day like today, you may take an income hit. Farmers may want to consider business interruption insurance or some other method for maintaining their income if that's a problem.

Another thing to be concerned with for agritourism operations is different regulatory regimes, and we are going to talk a little bit about that too, is, what other regulations apply, not just what you would have normally. With this type of operation, you can have zoning issues. Some agritourism activities may be considered commercial in nature; there might be some zoning issues with that that you wouldn't have with regular agricultural operations, with production farming. That is something to consider. When you are advising people, you will have to ask lots of questions about what the operation is going to be, what are you interested in doing, and where do you see this going in several years. Some of the other things to consider, potential nuisance claims. We have heard for years in the agricultural community about the concern for nuisance from your normal production activities, the smells associated with pigs and chickens and other agricultural



commodities, feedlots. Those are things we have heard about in the nuisance land. Well, agritourism can bring other types of nuisance issues, traffic, with lots of people coming out to rural areas that they may not normally have as much traffic. Noise. Trash and pollution from visitors coming and maybe not treating the land the way the rest of us would want it to be done. Those are things to consider as well.

Injuries or illnesses caused by animals. One thing I see especially at fairs throughout the state and other places, when you are bringing people in contact with animals who aren't normally around them, there is a chance of injury and illness in those areas. That's another thing to consider, and the fact that a lot of agritourism operations are seasonal operations is one thing we want to look at as well. I would encourage you, with farmers considering moving into an agritourism operation, conduct cost benefit analysis before starting the new activity. There are lots of increased costs that could come with some these increases in your activities. I know I have talked with some farmers who have moved into — especially with the on-farm market, they have had to go through zoning and building codes and all this to make sure they didn't do certain things that would cause them to go into another category and they would have — especially in some of your larger metro areas, they would be in constant contact with the codes people and the zoning board, and that is part of going through this, is looking at that, and there's a cost involved. Some of them have had to hire attorneys to do that, and they need to plan for that before moving into this type of business.

On the insurance front, I think farmers need to consider what is the cost of my insurance going to do if I take on this new agritourism activity? Is it going to

increase? Are there things I can do to make my costs less, and if I find out on the front end, I might be able to do that. Also, from your perspective as an advisor to these people who are taking on this risk, we need to make sure that they are finding things they can afford, coverage that is affordable for that type of operation. One thing I have seen that's happened several times, people don't understand insurance as well as you think, and part of that is because it's something we purchase that we hope we never have to use. You pay for it, you write a check, you have your policy and you hope you never need it, but you do it because it's a way to avoid risks and to transfer that risk onto someone else. One thing I have learned over the years, a few people have said, well, I was trying to be extra careful so I bought two commercial policies of insurance and I have one with this company and one with this company, and I said whoa, whoa, whoa, let's step back. If you buy a million in coverage from company X, a million in coverage from company Y, you may not have two million in coverage. You may have a million in coverage, half from company X and half from company Y and it costs you twice as much. I tell people beware of that, talk to an agent, get with someone, make sure they understand your operation and get what you need without that. If someone wanted two million in coverage, you get your commercial policy from your first carrier and then you purchase an excess or umbrella policy on top of that. That's how you get additional insurance coverage for that purpose. We advise people about that and make sure they understand that.

One other thing that's important on the business plan side is considering who and what entity needs to be covered by the policy. For farmers who set up their agritourism operation separately, they may want to get a policy just for that entity and the people involved in it and

not include that with their main farming operation. It might be one way to save costs to set it up properly that way. That is something to consider as well.

One of the other things to do would be to take precautionary measures. Some of our underwriters I know work with farmers and agritourism operations to tell them here are some of the things you need to consider. One example on a hayride, I know we have some farmers who have hayrides in the fall with pick your own and pumpkin patch and corn maze. There are rules about that. One, don't drive the hayride on the public roads, only on the farm, make sure there are sides on the wagon up to X height, there needs to be a chain connecting the wagon to the tractor so if the hitch came loose, it's still attached. They have all these criteria that will help them mitigate their risks and take some precautions to avoid some of the potential injuries.

The last thing, this is one that is really important to advise people about because you can do this on the front end. Lots of states have limited liability statutes for agricultural activities, for agritourism activities. Those statutes will say your liability is limited for this activity if you post this warning sign in this type this close to the activity. We need to be telling people about that and make sure they have those warning signs up and posted. That protects them a lot, and if they haven't done that, they don't have the benefit of those statutes. In Tennessee in particular there are limited liability statutes for bovine activities, activities involving cattle, equine activities, activities involving horses, and agritourism activities. Tennessee has a special law for agritourism activities that provides liability protection to agritourism professionals, if they have posted the signs and are not grossly negligent in the operation of their activity. Be aware that that is something

to make sure we advise farmers of and other people taking on these activities.

One thing I encourage people to do is to review their insurance coverage every year. Make sure they have not engaged in any new or expanded activities that aren't covered and go over that and make sure they have what they need for that operation each year. Another thing to do is to review safety and security measures each year. I do some work with one of the fares in Tennessee. I'm on the Tennessee State Fare Association Board, and one of the things this year we had a new rule about was not letting strollers go through our animal areas. People could not take a stroller through the livestock barns this year. You think, okay, what's the deal with that? Well, one of the things that has come down recently is with strollers, parents will roll them through, take the kids through, see the animals, and there's animal waste in barns, there's no way around it, it's there somewhere, take the stroller home, take the kid home, no one ever washes the wheels on the stroller, baby crawling around later, touches wheel with their hand, hand goes where? We all know. That is a potential risk of illness from being in contact with animals. There's one safety and security precautionary measure that we implemented, was no more strollers in those areas, and that is something a farmer may want to consider, if they are having people out on their farm, where would you allow strollers to be, that kind of thing.

Some other examples of precautionary measures, if you have members of the public on your operation, safety and CPR training for staff may be something to consider, depending on the time of day, having first aid stations and kits available. If there are thousands of people coming through a farm that aren't normally there, these are things they need to consider before doing that. I also recommend

having a process for handling injuries. Have someone on staff that is the go-to person if someone is injured, this is who you call. Obviously if someone is in dire need, you call 911 immediately, but you need to have a process in place for who responds, how you respond and getting everyone taken care of. If someone is injured, it's also good to have a simple witness form of what happened, what did you see and get pictures of the area before it's changed. That way you know exactly what happened, what was in place at the time. Specific measures for a particular activity, anywhere you have petting zoos, you want hand-sanitizing stations. You want hand washing so people don't get sick – the kids probably can handle it, but the adults who aren't around germs all the time will be the ones who will get sick a lot of times, so we want to be careful about that.

What happens when you do have a claim? What should farmers do to protect themselves when someone is injured at their agritourism operation? Obviously take care of them, do the best you can to handle the situation right at the time and report the claim to your insurance carrier in accordance with the policy. Most of them will require reporting very quickly. I know in the workers' comp world, a lot of times those require reporting within 24 hours. Depending on the type of claim, they need to report it in accordance with the policy, cooperate with the insurance company in the course of the investigation, and they may need to decide early on if the insurance company indicates there may not be coverage for something, they may want to hire their own counsel as well. That is something to consider.

There are other regulatory issues for agritourism operations and we are going to talk about some of these, but in particular, in Tennessee, one of the things that I think

people need to understand is, we have some exemptions in the zoning laws for agricultural activities that is particular to agriculture. Then the question comes up with agritourism, is this activity agriculture or is it something else? And I think wineries are a good example of something that – you may have a farm that was growing grapes and now they have started a winery. Where does it fit in the regime? It's kind of a hard issue to tell, and a lot of times they will go to the zoning board in their local areas and follow all those rules and then it may turn out later it wasn't what they thought it was.

We want to be very careful about that and help people on the front end and make sure they get what they need. Zoning is an area that is particularly important for agritourism. From my perspective, forgiveness is not easier than permission. Other attorneys may disagree, and I've talked with some who feel differently about that. In general I think you are better off to work it out on the front end, get in writing the information from the regulator. In local areas, a lot of these particular issues are local-based regulations, and regulators on the local level change, they change jobs, they don't get re-elected or they get elected to higher office and they move on, and it's important to make sure your person is protected, the person you are representing and advocating for, based on what they were told the first time when they started expending money to meet the regulations they were told about. Zoning, fire codes, health department rules, relating to serving food or selling food products, food labeling rules, property taxation. That's another area that could come into play with agritourism operations. If property is considered agricultural, it's taxed in a different way than commercial property. I have seen some cases where a farmer took on an agritourism operation, did everything they thought correctly, and once it was all done and the operation was going well, the local taxing authority

decided they had some commercial property now, and it's awful to expend money expanding your operation, do all this, start making money, and then have to turn it all over to your government in taxes. That's another area for business planning; look on the front end, what would this do to your property taxes and make sure you have the arguments in place to keep your tax level where you want it to be. I think one of our other speakers later today is going to talk about Greenbelt taxation and how that works in Tennessee. I'm not going to go deeply into that. I don't want to steal anyone's thunder there.

There's a recent Tennessee Supreme Court case, and a full disclosure, I was involved in this case as counsel for amicus parties. The Farm Bureau Federation, Tennessee Cattlemen's Association and several other organizations, the Tennessee Agritourism Association as well, were involved and we wanted to present our views on the laws for agritourism in Tennessee to the Supreme Court. We did that. So I want you to be aware of this case, but what it really shows what can happen when someone expands their operation and all the things that can stem from that. A lot of the cases you will see with farms and farm operations start out as disputes with neighbors, and it's a very hard thing for people to understand, but getting along with your neighbors can save you a lot of trouble in the end, but sometimes it's hard to do, because sometimes they are not reasonable either, so you've got both sides of that issue in a lot of farm cases. Sometimes they try to get along and sometimes they don't and you don't know what can happen from that.

In this particular case, what started out as a regulatory proceeding morphed into seven years of I believe still ongoing litigation related to an agritourism operation. It started out this farmer had a beef cattle

operation and I think grew corn, soybeans, some other products as well, expanded into a corn maze, also added a pumpkin patch, added a spring festival for strawberries and then started having concerts as well. There were all kinds of things going on on this farm, and what happened, a neighboring property – it was not directly adjacent, but a neighboring landowner did not enjoy the noise coming from the concerts, and that was what led to this particular lawsuit. The concerts in particular were raised, although early in the case there was a lot more. As it got to the Supreme Court, the amplified music concerts were the issue at that point.

The farmer argued that two laws protected his activity: The Tennessee Right to Farm Law and the Exemption from Zoning Rules for Agriculture. Our Supreme Court considered the case. Now, the farmer won on a motion to dismiss in the trial court, which means the farmer never presented his own evidence. He had the case dismissed at the end of the plaintiff's proof. He never presented his own evidence in the trial court, and that was the record on appeal up to the Court of Appeals and then the Tennessee Supreme Court.

The Court of Appeals affirmed the decision in favor of the farmer, dismissing the nuisance lawsuit, saying that the Right to Farm Law covered the concerts as well as the other agritourism activities and that the zoning regulations also were not covering that particular farm because it was an agricultural activity. The Tennessee Supreme Court took the case. It was the first time the Tennessee Supreme Court had considered the Right to Farm Law in Tennessee. They did uphold the Right to Farm Law and it is still in place to protect farming activities, but they determined that it did not extend nuisance protection to every activity that occurs on a farm. In particular the law did not use the word



marketing to describe the activities that it was covering, and to the extent the amplified music concerts could be considered marketing of ag products, that wasn't covered by the Right to Farm Law, so the nuisance proceeding could go forward under the Right to Farm Law, and the Right to Farm Law did not kick it out.

They also determined that amplified music concerts were entertainment, and in Tennessee, under the zoning laws, like I said, there is an exemption for agricultural. Well, that definition of agricultural in Tennessee includes your normal production of farm product on the farm, the noise, the plowing, the dust, all the things typically associated with a farm. It also included, at this time, educational and recreational activities on a farm. That was part of the definition of agriculture, but the Supreme Court said, well, educational and recreational does not equal entertainment, so they said since it did not include entertainment, that did not qualify as agriculture and the particular concerts at issue here were not exempt from zoning.

Now, that's a little preview. Theresa Denton will be talking about some changes in the law that happened after this case in a later panel, but I'm not going to tell you what they are yet, because I don't want to steal her thunder and will give her an opportunity to tell you what happened after this case. With that I'm going to let Rob get started, and we will have time for questions at the end, I think.

MR. HOLLAND: Thank you, Julie. I appreciate the opportunity to be here, and I also want to extend my appreciation to the folks who put this day together. I think it's very important. It's a very important topic for those of us that work on a daily basis with farmers, and I appreciate your interest in being here as well. I want to disclose I

guess from this point that I did hear some of the previous speakers who requested that folks go ahead and get their coffee, so I am fully caffeinated and kind of ready to roll through some of these slides. I don't recognize a lot of faces in the audience, so a lot of new folks that are new to me. I see a few faces that I do recognize. For those of you who may have heard me speak before, you knew I would be here today and you came anyway. Thank you very much. I appreciate that. We don't always have a lot of repeat consumers for some of these topics, so I appreciate the opportunity to make some comments.

I am here representing the Center for Profitable Agriculture. That was mentioned in the introduction. Our role in our center is to work primarily directly with farmers who are considering what we call value-added enterprises on the farm. If a farmer is considering processing or packaging product from their farm and marketing that direct to the public, we consider that value-added agriculture. They are adding value to the production and making that product more attractive for the consumer. We also include in value-added direct marketing and we also include agritourism. That's one of the things I think that brings me here today, is to talk to you about some of those experiences that our farmers have had as it relates to on-farm processing, packaging, direct marketing and agritourism. The Center for Profitable Agriculture is a joint venture between the Tennessee Farm Bureau and the University of Tennessee Extension, so we have got great parents, we have great partners that are involved in the work that we do. Many of the legal issues that we encounter with the farmers that we work with come about as a result of some changes, and it's probably not a surprise to you that many times business practices, in our case farm practices, may change quicker than laws do, and that's one of the things that we encounter as we work with farmers

that have become interested in processing on the farm and marketing direct to the public. So many of those practices that they implement on the farm today are changing quicker than some of the laws are. As you know and as you are no stranger to, many of the laws that we have in the state authorize departments within state government to develop and enforce rules and regulations. The laws are important, the rules and regulations are important, but both of those may be slow to change, and that sometimes causes frustration for some of the farmers that we work with.

Julie mentioned earlier that old law basically defined farming as the land, buildings and machinery used in the commercial production of farm products and nurseries. For a long time, the laws involving farming and agriculture were very specific to production. Today's agriculture involves a lot more than producing crops. Management is a big part of what goes on on the farm. There are a lot of management practices that have to be in place and are important. Production is still a key part of the agricultural environment and a key part of the farming process, but so is marketing. Some argue if you are going to produce something on the farm but you don't market it, then you are really minimizing the opportunity for profitability on the farm. To us marketing has always been a part of production, but because the law was specific to production, there were some folks who may have taken a very narrow view of that and did not include marketing as an agricultural practice, and then in recent years we have seen a great increase in the number of farms involved in adding value to crops and products from the farm, and that has created another opportunity for confusion and maybe a place where the laws have not kept up with the practices.

Let's talk just a little bit about how things have changed to make sure that we realize that some of these

new technologies and new marketing methods are actually being implemented on the farm. In Tennessee, we have seen over a 36% increase in the number of farms with direct sales to consumers. That is pretty significant. The value of those products sold to consumers has increased by 130%. Now, we are getting into the bottom line, and that's probably one reason we have seen such an increase in the number of farmers involved in adding value, is because there is a financial opportunity there for them to develop new income streams on the farm and to increase the bottom line. Almost a 21% increase in the number of farms with agritourism and recreation-related sales, 83% increase in the value of those sales, over a 30% increase in the number of farms producing and selling those value-added products, and a 6% increase in the number of farms marketing products through CSAs, and we are going to hear a little bit more about community-supported agriculture a little bit later on, but CSAs are an important marketing method for many folks. Many times this change brings confusion as we implement more and new marketing techniques direct from the farm. We have new marketing methods that brings into a lot of question whether or not those activities are actually part of and protected by the laws related to agriculture. Certainly when farmers start processing food products on the farm for sale, that really kind of removes them even further from the traditional laws of agriculture, puts them more in line with more of the commercial food processing law, but they're farmers. The activities they are now engaged in may or may not be directly included in the law, then we've heard a lot about agritourism activities as well.

I want to focus just a little bit very briefly on some of the zoning and property tax classification issues that we have encountered and some of the situations around that for farmers, and then I want to get into a little more detail about community-supported agriculture and some of the

legal or regulatory issues that come with that. First, let's just talk real briefly and real broad about some of the situations we have encountered with agritourism operations as it relates to local classifications for zoning and property tax. If you've got a very traditional farm, all they are doing is producing traditional crops that pretty easily fit into most agricultural zoning classifications. If you are not involved in agriculture in any way but you have a commercial business, that pretty well fits into commercial operations. If you are not really involved in commercial but you are in more an industrial plant or an industrial facility, that pretty well fits into the category of industrial zoning classifications. If you are developing a neighborhood, that pretty well fits into residential.

When the activities we have fit really nice and neat into these categories, there's not much question, but when, as Julie was talking earlier, you have a traditional farm who starts moving into nontraditional agricultural activity, such as agritourism, hayrides and a corn maze and now we've got concerts, that doesn't fit as neatly. The farmer argues it fits fine, it fits neatly in agriculture. The zoning folks may not feel that way. They may read the definition that says that farming and agriculture involves the production of crops, and obviously an agritourism venture, maybe a hayride does not fit production, so they look for another classification. In most every case, the classification they find is commercial, and many times they will hand the farmer the codes of commercial requirements and say here's what you have to comply with and all of a sudden you have got some mismatch in terms of things that don't seem realistic for a farmer to be implementing on their farm, but this is where a lot of our problems arise. This is where a lot of the miscommunication starts, kind of at the local level.

How do we proceed when the farm activity is not a natural, if you will, fit? Many times we will go back and look and we want to say what does the law say? If the law kind of directs for regulations to be developed and implemented at a departmental level, we want to look to see what the regulations say. That wording becomes very important. It's what the Supreme Court case did in terms of looking back to see what the language of the law was and interpret that, so we look at the law, and we look at what the regulations are. We also look to see how the regulations have been implemented in the past, because sometimes there's already been a little bit of wiggle room that's been implemented, and sometimes that's either in favor or not of the farmer, so it's important to look at and see how those regulations have been implemented in the past, and that helps us to identify what part of this does fit and what part of this does not fit, and it kind of allows us to focus on what is not fitting.

Many times these issues can be worked out at the local level. Many times what seems to be a real big miscommunication issue with the local zoning officials really just turns into maybe one part of the agritourism operation that doesn't fit, and instead of having to apply the entire book of codes for commercial zoning, maybe they only have to apply a little bit of that, and that could be a good meeting in the middle and a good way to do that. We encourage folks, before they kind of overreact, encourage folks to develop good working relationships. Communication can be key to either creating a hostile environment in that situation or not, but many times we don't find that middle ground and we have to proceed and work on actually making changes, and again, that's where good relationships come into play.

Let me transition quickly and talk a little bit about

community-supported agriculture. Some of you may not be aware of what we mean when we talk about CSAs. It's a form of marketing products from the farm. It's a really different way of doing that, some of the basic concepts of that. Community-supported agriculture ventures really kind of started and are still mostly focused on produce, farmers who have produce on their farm. What they do is, they find consumers who are interested in buying and paying in advance for a certain amount of produce that they will receive during the year, and this provides a shared investment from the consumer with the farmer, so the consumers pay up front for produce that they expect is going to be produced and will be delivered at a later date. They sign an agreement in most cases basically committing to part of the production and taking on some of the risks. If it's a bumper crop, they get a bumper delivery of produce. If it's not a bumper crop, they get less. The hope is that the farmer that is selling this CSA share will have a very diversified operation so they will have a lot of different produce coming in at different times, so when the person who purchased the CSA picks up that product or that box of goods, it will have a variety of things in it. If eggplant is the only thing they produced that year, they may box of eggplant, but that is kind the risk that they are taking on.

Now, it's working. It works for consumers. They make a connection with the farmer. The farmer gets paid in advance so they have funds to operate with. These work very well in many cases, but they don't always conform to what I refer to as some of the old laws that we deal with. For example, state law requires that produce sold in the state can only be sold in certain units. Our Tennessee Department of Agriculture follows the allowable units of sale from the National Institute of Standards and Technology, and there is this chart that exist that says tomatoes can only be sold in certain amounts. The

predominant units for produce are weighed by the head or certain dry measures. Few, if any, of those can be sold commingled with other produce by the box. The CSAs exist in terms of folks to be able to pay in advance for a delivery of products and they are not sure what the quantity is. They are good with that, but the laws don't always support that, which creates a little bit of an issue.

For those products that are required to be sold by weight, then that weight has to be determined for the benefit of the consumers on inspected scales. If you are selling by the box and you are not weighing but you have products in there that are required to be sold by weight, it creates a little bit of an issue. I mentioned that the CSAs are mostly implemented by produce farmers, but now we are having farmers who are adding more products to that mix: Meat products maybe that are derived from their farm, processed products, jams, jellies, honey, other types of products that they are including, and those products are not exempt from the other labeling and laws that are required for those products, especially those that have been part of the food processing facility. Modern marketing does not always conform to what the law says and creates some issues for us to deal with. First and foremost, developing relationships with your consumers, with your consumers is always important, having regular communication with them so they know what they are purchasing. Sales tax becomes a little bit of an issue as it relates to selling products, farm products, produce and other products as part of a CSA. Is sales tax applied, is it not, are some of the products exempt, how do you do that? There are some issues that have to be worked out.

Delivery. Many times these shares will be pre-sold and then during the season when the produce is coming in, they will be delivered for pickup. We have run into some



situations where the delivery points require a little bit of forethought, because if you are meeting your consumers on property that you don't own and somebody has an accident, whose liability coverage is going to do that? What if you are in the parking lot of a business that didn't know you were delivering products, that's turned into a little bit of an issue as well. Some of our farmers' markets don't allow for CSA deliveries on site, so some of the folks are coming to the farmers' markets and parking right outside the gate for delivery, and that turns into some issues as well. Again, we mentioned some of the standard food regulatory issues, whether you are dealing with just raw produce or processed goods or meat products, becomes important as well. Julie mentioned earlier legal business entity of your operation is important. Sometimes folks will have a sole proprietorship for the farm, they will set up an LLC for the other part of the business. That may be an excellent way to kind of protect the liability of some of the assets of the farm, but there are other issues that are involved in making that decision as well.

My point I want to make here is, all of these previous bullets I talked about can be heavily addressed with a written agreement, a strong written agreement with your consumers so that they know what they are purchasing and then all of those details about your operation can be worked into that written agreement so that you are in compliance with the law as well. Some of those key things that may be involved, certainly the terms, the price, the frequency of delivery, what will or will not be included in the product mix that they are obtaining, the details regarding delivery in terms of the times of the day and the days of the week and the times of the year. The agreement should also include how and when the payment is due for the product, if there is a refund clause or a way for them to opt out, that should be included as well. There should

always be some type of written language in the document that mentions shared risk. The consumers need to know they are paying in advance. They don't know exactly what products are going to be produced that year, but that needs to be included as well as other language that may limit the liability of the producer.

A lot of issues have come up over the years as it relates to new trends and new marketing techniques, trying to comply with some old laws, so we don't want to leave without maybe giving at least some opportunities to correct some of that. Many of the folks in the industry would like to see some type of a greater acceptance of agritourism as part of agriculture. We are going to hear a little bit about that, and some of the laws have been changed and that's been positive; however, this issue of zoning has not fully been addressed. Julie mentioned earlier maybe that these agritourism operations represent a hybrid between traditional agriculture and commercial, so many folks are pushing for some type of hybrid classification that would better meet what agritourism operations are doing.

Many of our farmers also look for greater consistency from one county to the other. They will run into some laws or issues or regulations or interpretation in one county that is different from another. They would like to see more consistency across the county lines within the state. They would like to see better permitting processes, those that are more straightforward, quicker and less expensive. They are not against complying with the law. They just want to be able to understand it. They want to be able to comply with it as quickly and painlessly and as at least expense possible. There have been pushes for fewer and more flexible laws and regulations involving more modern agriculture as it relates to direct marketing of farm products. So with that I will stop and Cari has some more

comments to make, and then we will be glad to address some questions.

MS. RINCKER: So, of course, I'm wordy and I have a big outline for this one too, which is basically a compilation of other publications that I've written in this area of law, so hopefully there will be nice research for you guys after you leave this event. I've already gabbed for an hour. You guys already know who I am, so I'm now going to give you an overview today of just a couple of miscellaneous things dealing with direct farm marketing. I'm going to be speaking primarily on statistics. I know we just talked a little bit about Tennessee statistics. I want to talk about statistics from the national perspective. Then probably skip a little bit over the CSA agreements, because it was just discussed, and then get into volunteer farm labor, which I think is an important issue to address with direct farm marketing and the local food movement.

This material on statistics today is coming from two big publications. This one here is the Direct to Intermediated Marketing of Local Foods in the United States. It's based on the 2007 Census of Agriculture. Then the second publication is newer, Trends in U.S. Local and Regional Food Systems, USDA publication based on the 2012 Food Census of Agriculture. I'm going to be referring to these two studies here today, and I think these publications were very, very well done. If you are interested in knowing some trends statistically on what's happening here with direct farm marketing, I highly suggest looking at those two documents. Something that I wanted to point out is that there's no definition of local food, but for the purpose of today's presentation, I'm going to be referring to it as it being two things. I'm not making this up. I'm using it because that's what these two studies refer to as the local food, is the direct to consumer

marketing and then a direct to an intermediate channel. That would be a farm to restaurant, farm to school, farm to grocery store, which would be the intermediate channel.

Let's look at some historical trends. Between 1978 to 2007, only 5.5% of farms sold food direct to consumer. This is less than one percent of total farm sales, during the peak in 1982 due to the 1976 Farmer to Consumer Direct Marketing Act. Then between 1982 and 2007 – we can see the last ten years and ten years before that, just really increasing – there was a 58% increase during that time period. We already talked about these different types of direct to farm marketing. Out of curiosity, who here has participated in a CSA? That's a good chunk of you. What was your experience like?

UNIDENTIFIED SPEAKER: Good.

MS. RINCKER: I actually participated in one in New York City. So I would go every week to this church on the upper west side and come and get my produce, and some of the CSAs actually deliver the produce as well. I haven't been able to find one in New York, but I know there are some in DC that do that and different areas you have some that deliver and some don't. Looking at the 2008 study, so that's based on the 2007 Census of Agriculture, there were a little over 71,000 farms that participated in direct to consumer outlets, but 81% of these were actually small farms. The USDA defined a small farm. It basically is a farm with gross sales of \$75,000 or less. Only 5% of large farms, \$250,000 or less, participated in direct to consumer marketing. As food and agricultural lawyers, and the statistics have changed a little bit with the 2012 Census of Agriculture, that tells us that by and large the clients that are needing legal assistance for direct to consumer are going to be the small farmer. Gross sales of

\$75,000 a year, not talking about net, but gross, that is not a big operation.

Looking at the 2012 statistics, we now have 115,000, so it increased from 71 to now 115, based on the 2012 Census of Agriculture, but again, 85% of those are still going to be small farms, so we have a whole lot more, but they're still small farms. 10% medium size farms, 5% large farms. USDA in this publication changes the definition from 250,000 to 350,000 on what it considers to be a large farm. In comparison to the 2007 data, we have got a big increase, 72% increase in the number of farms participating in direct to consumer. Thinking about the intermediate outlets, again we're talking direct to restaurant, farm to school, farm to grocery, farm to government, a little over 13,000 farms participating with 2.7 billion in sales, but wanted to compare that to the direct to consumer, which in 2007 was 877 million. The intermediate outlets are, from an economic standpoint, multiples of the total number of sales. Looking at the intermediate outlet data, 22,600 farms sold solely to intermediate channels. In comparison, there was a 68% increase from 2007 to 2012. There are farms that do both. They sell direct to consumer and they also sell maybe farm to school. In 2012, a little less than 26,000 farms sold through both methods, and that equated to about \$1.1 billion of sales.

I like charts. Let's look at this chart and see what this tells us. This is from the 2007 data. The number of farms with local sales, about 86,000; medium farms, 15,000; large farms, a little over 5,000. I wanted to know that the average dollars marketed, you can see here in this column, about 352. Compare that to the small farms here, a little less than \$10,000 of their income is coming from direct to consumer. That's not very much money; right?

But if your farmer is only grossing less than 75,000, that's an important diversification of income, but really good money here for these larger farms.

Here's a few summary points that I took home. The small farms are more likely to market direct to consumer, because it's more difficult for them to generate enough volume for distributors and institutions, farm to school. They demand higher volumes of food and more consistent time lines. Intermediate outlets require less labor. Roadside stands on farmers' markets accounted for about 80% of direct to consumer outlets. Here's an interesting statistic; farmers on average traveled about 30 miles to the farmers' market. I thought that was interesting. I wanted to also note that this is the whole idea here, is that consumers equate the public face with local food to farmers using these methods. I'm from New York City and I'll tell you that my city slicker friends, they love farmers' markets, they love the idea of farmers' markets. They might not go every week, but they want to have as many as possible, and New York City has a lot of farmers' markets, not only in Manhattan, but also in lower income neighborhoods like Brooklyn, Bronx, and Queens. Here is another table, and this is based on the 2012 data, so a couple points I wanted to note. We have had an increase in the small farms, a significant increase in the numbers there, and the large farm data also an increase. We have had a decrease, though, a slight decrease in the percentage of total local food sales from the small farm. A big increase with the large farms, though. The rest of the statistics were approximately the same, no large differences there.

Looking at the marketing channels, in 2007, with the small farms, about 34% of them – these were the farms that participated in direct to consumer marketing, so I'm not looking at all farms. I'm only looking at the ones that

are participating in direct to consumer. 34% of them participated with roadside stands, which are really popular in New York, especially if you go out to the Hamptons. You see a lot of roadside stands in the Hamptons. About 35% participated in farmers' markets. Only 1.1% participated in CSAs, which I think were surprisingly low, and 22% in intermediate channels. In contrast, let's look at the large farm data. 23% focused on roadside stands, 23% on farmers' markets, 45% on intermediate channels. That tells me that the smaller farms are more focused on the farmers' markets and the CSAs and the roadside stands and the larger operations are more focused on the farm to school, farm to institution, farm to restaurant channels. As was previously mentioned, the types of commodities that are being produced were primarily talking about vegetables, but also to a lesser extent, livestock and meat products, and I also wanted to mention that I think there's an increased trend with value-added products. I have a friend in Philadelphia who is in a CSA for pies, so every week she goes and she gets her apple pie and her cherry pie, so that's my kind of CSA.

The law is going to change from state to state on what can be sold via direct marketing, and for the sake of time, I'm going to go ahead and breeze through this a little bit since it's already been discussed. But here in New York there's a list of specific products that can be sold direct to consumer as is also in the state of Tennessee, and there's also specific products that are prescribed that are not allowed to be sold direct to consumer unless certain requirements are met. We only have five minutes left and I do want to leave time for questions. I'm going to go ahead and skip through this community-supported agriculture agreement section. I have a lot of information in your outline about that, so I encourage you to go ahead and check that out.

For those of you that had your hands raised and had participated in a CSA, out of curiosity, who had to sign an agreement? Wow, so two of you. Out of all the hands for CSA again? Keep your hands up if you had to sign an agreement. This is what is happening, right? CSAs are gaining popularity, but the frequency of actually using a written agreement is very low, which is not surprising. We are a handshake culture, we are very trusting people, the food and agriculture industry, but I think it makes sound business sense, and I think us, as a community as agriculture attorneys, we really need to collectively have this voice that it's not about not trusting the subscribers or the members of the CSA, but we just need to put all these myriad of issues down in writing that are already discussed and are also enumerated in your materials.

I'm going to go ahead and very briefly touch on volunteer farm labor and close with a few minutes of questions, but this is a real problem, I think, in the industry, because I think culturally a lot of these CSAs are using — and farms in general are using volunteer farm labor and they think if they call them an intern or if they are a community volunteer, then they're fine, but the problem is, with labor law violations is, there's no statute of limitations. A farm can wake up in 20 years from now and have a problem and all the violations; everything gets opened up for the last 20 years.

To be very brief on the topic and then we will go ahead and move on to questions, whether or not a volunteer should be considered an employee or not, here's essentially the four questions the court is going to ask: This is a volunteer for any type of organization. Is the volunteer working in expectation of compensation? That might not necessarily apply; right, especially if somebody is coming



onto a farm and just wanting to spend a Saturday afternoon picking weeds. Question two, is the volunteer displacing employees? Is that farm not hiring people because people from the community are coming and picking weeds? Probably. Question three, does the volunteer give the food business a competitive advantage? Well, if Farmer Jane has 20 volunteers to come every weekend to help her weed and Farmer Joe does not, is there a competitive advantage? Absolutely. Is the farm offering educational benefits? By and large, these farms that are having volunteers that come to them, they will typically be classified as an employee under the Fair Labor Standards Act. Now, the plot thickens. It's really not that simple, because there are various exemptions for farms, such as the 500 man-hour rule, which my outline does go into more detail. I guess my summary point is this. When a client comes to you and says I have volunteers that are on my farm, you need to stop, and that is a red flag, because there needs to be further inquiry and research in this area. It is not that straightforward, and a lot of farms I think are not in compliance with the law in this area. Without further ado, let's go ahead and move on to questions.

MR. WHITAKER: Any questions?

UNIDENTIFIED SPEAKER: Regarding compensation of volunteers, is the share of the produce considered compensation?

MS. RINCKER: It is actually. So that would be what is called in-kind compensation, and that comes into a whole other layer of compliance issues, because then the farm needs to look at the number of hours that the volunteer is working, how much is the share, is the share \$500, and look at the minimum hour requirement in that state to see if they are in compliance, but, yes, it is in-kind

compensation, and that is above the board when it comes to a volunteer.

UNIDENTIFIED SPEAKER: Community farming, like there's I know at least two or three in Knoxville, but community farming people have a plot of land or they go and just go work the farm and maybe the food goes to the school, does that fit into all this?

MS. RINCKER: Let's play out that example, because I don't think I quite understand. When you say community farming, would that be like maybe 20 people, as an association or an organization, that they own the farm?

UNIDENTIFIED SPEAKER: Well, the city gives them the land to farm in a park, in a depressed neighborhood.

MS. RINCKER: The lessee, they're leasing the land basically from the government, and then they are selling the produce?

UNIDENTIFIED SPEAKER: They may or may use it in school, they may use it for themselves.

MS. RINCKER: Okay. I'm just thinking like how I would analyze that. I would look at that very similarly that I would like a for-profit operation on the rules of selling direct to consumer or direct to institution.

MR. WHITAKER: Is that about it? I like that last slide on volunteer farmers, because it feels like my father volunteered me for farm labor, and anytime I would have a friend come over to stay the night, he would try to volunteer him the next day too. It's very near and dear to

my heart.

UNIDENTIFIED SPEAKER: I have one quick question. Rob, you mentioned like the eggs and things like that, is that statutory exemptions, or where would you find those?

MR. HOLLAND: Most of the regulations for both of those are through the Department of Agriculture.

UNIDENTIFIED SPEAKER: So it's not necessarily a statutory thing you find?

MR. HOLLAND: There is some specific language on exemptions for egg sales, and there is some specific language in the law regarding labeling for hunting. There are some things that are specific and then there are some that are broader as it relates to food products that are just under the food regulatory enforcement. It may depend on the details. There's some of both, but generally the Department of Agriculture is given the responsibility of overseeing regulations for food manufacturing, and that's pretty broad. There are some specific things, as I mentioned, the hunting marketing. We may want to visit if you've got some specific examples, but there is some of both.

UNIDENTIFIED SPEAKER: I've got one related to the eggs. I do a lot of work with a company that sells supplies to backyard poultry growers. Do we have any backyard poultry growers in this state that are actually selling eggs in their backyard poultry operation? I guess do you see any added potential liabilities for those operations, from my understanding, for the seller or the purchaser?

MR. HOLLAND: I'll take a stab at it. Yes, I think

we have a lot of egg sales from hobbyists or backyard operations. I can't quote what all the regulations are. At one time there was some basic regulations dealing with a certain quantity of egg sales. You couldn't reuse cartons. They had to be sanitary and new cartons. There are some other regulations, and those may have changed; I'm not sure what all of those are, but, yes, I think there's a lot of hobbyists, backyard flock operators that are selling eggs.

MS. BOWLING: And, yes, there could be potential liability from the sales. From an insurance perspective, a lot of policies do not cover biologic or microbial-type injuries if they are not specifically looking for that kind of coverage. That's a common exclusion on a lot of policies.

MR. WHITAKER: All right. Well, Ms. Julie, Rob, Ms. Cari, thank you so much for coming and doing this today, and we have got a little gift bag here for each of you. Thank you guys so much again.



**Issues in Tennessee Agricultural Law & Policy**

*Julie Bowling*<sup>5</sup>  
*Theresa Denton*<sup>6</sup>  
*Rhedona Rose*<sup>7</sup>

MR. WILLIAM MAZZOTA: All right. Everyone, we're going to get started again. Thank you. Welcome back. My name is Will Mazzota. I'm the Managing Editor of the *Tennessee Journal of Law & Policy*, and a third-year law student here at UT. Also, I'm very interested in agricultural issues, specifically towards the environment. This symposium is really awesome opportunity, and I thank all of our speakers for coming out today.

Our next panel discussion will focus on issues with Tennessee agriculture law and policy. Agriculture is Tennessee's number one industry. Our state boasts diverse agricultural production systems and each grand division even has its own top commodities. The work of our state legislature and state government touches many aspects of farming. The three panelists we are about to hear from, all have first-hand experience in shaping the focus of law and policy in Tennessee.

You've already been introduced to Julie Bowling, who will be joining us again. Next, I would like to introduce Ms. Theresa Denton. Theresa is general counsel at the Tennessee Department of Agriculture. She directs the department's legal works in all areas of responsibility. She

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<sup>6</sup> Theresa Denton, General Counsel at the Tennessee Department of Agriculture.

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directs with legal research and represents the department on civil and regulatory proceedings, as well as other legal matters. She served two years as deputy general counsel for the Tennessee Department of Transportation. She has also served as environmental legal counsel for the Department of Environment and Conservation, from 1994 to 2005. And as a staff attorney for the Tennessee Department of Mental Health and Mental Retardation and the Middle Tennessee Mental Health Institute. She's a 2010 graduate of the Tennessee Government Executive Institute. Theresa has a law degree from the Nashville School of Law and an M.B.A. from Vanderbilt University's Owen School of Management. She received her Bachelor's degree in history and sociology from Middle Tennessee State University.

Finally, we have Rhedona Rose. Rhedona serves as executive vice president of the Tennessee Farm Bureau Federation and previously as director of public affairs. Further, Rhedona and her colleagues in public affairs represent the interests of farmers in the Tennessee State Legislature. She also tracks legislation in congress, and federal rule making to keep farmers informed and make sure their voices are heard during those processes. She holds a Bachelor's degree in agriculture from Tennessee Tech and a Master's degree in agricultural development from Texas A&M University. She also serves the University of Tennessee as a member of the board of trustees representing the fourth district. She serves on the academic affairs and student success committee and the research outreach and economic development committee. She also has to leave a little early today, so please excuse her absence. And so, everyone, please welcome our panelists.

MS. ROSE: Thank you, Will. I appreciate being invited to be with you all today and hope that some of what

I have to share will be of interest. One thing that Will didn't share in that introduction is that I'm honored that two former interns, who have worked with me in the past, are both part of this group. One being Julie Bowling, and you all have already heard from her, but she was an intern that worked under me in the Tennessee Farm Bureau just a few years ago. And then Laura, who helped to set up much of this today, was also a former intern of ours at Farm Bureau a few years ago. We tried our best to her, just like we did Julie, but Laura wanted to go to law school. So she went to law school, and I'm glad that her love of agriculture continues in what she's doing today.

I think we decided that I will go first because I'm going to give you kind of a general overview of agriculture and how things are changing in Tennessee. A brief overview of agriculture, our changing demographics, changing population, how that's impacting the political world that we work in in Nashville, then to talk very specifically about three issues that we've been involved in with Farm Bureau that have been impacted by all of those various issues.

Agriculture is a \$46.7 billion dollar industry in this state. It generally is about 10% of our state's economy that comes from agriculture, so a very, very big and important part of agriculture. Farmers face many, many challenges. Challenges unrelated to the regulatory and legal challenges that you all are hearing here at this particular conference. They have challenges related to weather. They have challenges related to commodities. They have challenges related to diseases and insects. Then upgrading to the new technology, paying the tax bills that they have to. Paying those upgrade bills that they have to pay, in addition to trying to take care of their family and keep the farm together to pass it on to the next generation. It's been said



that in agriculture, a thousand things have to go right in order to succeed, but only one thing can go wrong and really have a very big impact on agriculture. All of those things are things that are very much involved, from our standpoint.

One of the good things about agriculture is that we know that people depend on agriculture. Whether you're involved in it or not, it's very much part of your life. Particularly, if you have an appetite for food and clothing and shelter, agriculture's important to you, so we hope that the success of the farmer is also important to you. Our appetite is growing, and perhaps you all have already heard this, but it's expected that the world's population will double in the next twenty years. We have 6.8 billion people in the world today. It's anticipated by the year 2050, we'll have 9 billion people. All of those people have to be fed and clothed. We've heard the statistic over and over again that in the next fifty years, we'll have to produce as much food as we have in the last ten thousand years combined, so we have a big challenge for us. A big part of that challenge will be allowing the farmer to adapt to technology that's becoming available in order to produce those foods.

Most of us are aware of the country of China. We know what a huge population China has. China has a growing appetite, specifically for protein and for meat products. In 1992, and I suspect there's probably many in this room that were just born around 1992, but in 1992, the Chinese population ate about half the amount of protein and meat products that we consumed here in the United States of America. By 2008, they were consuming two times the amount of protein that we're consuming. By 2013(sic), it's anticipated that the Chinese people will eat as much beef in one day as we consume in one month here in the United States of America. So all of that is certainly big

as far as the growth of this industry.

As far as Tennessee is concerned, we're seeing a reduction in the amount of land devoted to agriculture, but also to the number of people involved in agriculture. At the turn of the century, in the 1900s, we had about a quarter of a million acres, two hundred and fifty thousand acres in this state devoted to agriculture. Today we have more in line with eighty-nine thousand farms in this state. I said acres, two hundred and fifty thousand farms and now we have about eighty thousand farms in Tennessee. As far as acreage is concerned, you all probably know, we have twenty-six million acres in this state. We used to always be able to say that about thirteen million acres were devoted to agriculture, but now we're a little less than eleven million acres devoted to agriculture. We've seen a lot of that land, over the least twenty, thirty years, move out of agriculture into other uses. Quite honestly, for the agricultural community and for the Farm Bureau, that's something that's very troublesome to us because we typically see that it's some of the very best land that's devoted to other uses other than agriculture and we hate to see that happen, but we've been seeing that change pretty drastically. I looked back, just between the time frame of 2000 to 2007, we saw a drop of over four hundred thousand acres of agricultural land. And to put that in a perspective where you can understand it, that's about a hundred and fifty-six acres a day. That's about six and a half acres per hour, which means that if those statistics hold true, that just in the time of this program, you'll see about six and a half acres, that have historically been agricultural, be devoted to something else.

Now, for the next couple of slides, I wanted to show you a kind of a pictorial view of how that's taking place. This is showing the Southeast. You can see the bright red showing the area where development's taking place. I'm

going to go through a sixty-year time frame here from 1970 until the year 2030, to just show you how much population is changing in the Southeast. I'm at 1990 here, the year 2000, year 2010, year 2020, and 2030. So you can see with the population growth in the Southeast, the pressures that this is causing to our farmland. It not only puts pressure on the farmland, but I want you to think about the pressure that puts on our water needs. I want you to think about the pressures that puts on our energy needs, electricity needs, but also the impact on our timber and the other infrastructure that's very much needed in the area.

Now, this has changed things politically, as well. Because I suspect that most all of you know that our politicians are elected for a geographic area with a certain population. From basically 1901 to about 1962, we didn't go through redistricting the way we were supposed to and realigning our legislative district. So they stayed pretty much the same through that time frame. There's a famous U.S. Supreme Court decision that started out of Tennessee called *Baker v. Carr*, which kind of forced us to make the changes that we were supposed to be making. I pulled out the 1946 senatorial district. I used that one because that was one I could find in color that actually related to that time frame. You can see here in that time frame, basically all of the senate districts are about the same size, yet you know that our population was not geographically evenly disbursed during that time frame. In reality, the rural areas probably had a greater influence during that time frame than they were really supposed to. Then you look at, and I put current senate districts.

You can see that there's a significant change. What I hope you really notice here is that our big four are the areas where we have a huge population concentration, and therefore a huge concentration of our senators from those

areas as well. Our rural districts still have one senator that will represent seven, eight, in some cases as many as nine counties in their senatorial district. Yet, you can look at some of the urban areas and find that we'll have three, four, perhaps more senators from those urban areas. In fact, I counted it up. When I refer to the big four, I hope everybody knows I'm talking about Nashville, Knoxville, Memphis and Chattanooga. If you look at the senators that represent at least a portion of those big four, fourteen senators of the thirty-three that we have, fourteen represent at least a portion of those big four. It takes seventeen votes to pass a bill in our State Senate, so our big four are three votes away from having enough representation to pass a bill in our state Senate.

I just want to tell you a little bit more about the make-up because I think it's important. We've got a pretty lopsided majority right now. Most of you all are probably aware of that. The Republicans have 101 of the 132 members of our General Assembly, both House and Senate. As lopsided as that may seem, it's not the most lopsided it's ever been. In 1959, the Democrats actually had a 110 of the 132. They were a little bit worse off in 1959 than we are now. It's kind of a new General Assembly. We have 31 newcomers in that 109th, 21 in the 108th. So basically 52 of the 132 have shown up in the last two General Assemblies. The part that we pay particular attention to, though, is the fact that our rural Democratic caucus that we oftentimes depended on for agriculture issues is no longer what it used to be. There are five Democratic senators in our state Senate now, five. Three of those come from Memphis and two come from Nashville. We have no senators in the State Senate that come from rural areas that are of the Democrat Party, and that continues on into the House. In fact, we only have five House members in the House side that come from districts that are less than

100,000 in population. We've seen a definite shift there when the rural Democrats used to be very close to agriculture, and I don't mean that to come across as partisan at all, but just a change in the demographics that we're working with.

We used to have a day when most General Assembly members had some sort of agricultural background, and that's not the same today either. In fact, many of our lawmakers used to come from agricultural backgrounds, and if you look at the way they record their occupations, there are eight out of the 132 that have farming listed. Six of those eight have another occupation listed as well, such as lawyer/farmer or pharmacist/farmer. There are actually two that I would call full-time farmers out of the 132, so we've seen a drastic change of that agricultural background in folks that represent us in the General Assembly.

The last picture I'll show is a site that I hope is familiar to all of you all, your football stadium. As I talk about the declining population in agriculture and the decline in influence in the General Assembly, I want you to realize, it is still very, very important to this state. If you look at the number of folks that are involved in actual production agriculture, it would fill this stadium. If you add to that the number of folks that are in the service industry servicing those farmers, you would fill this stadium three times, plus Thompson-Boling Arena, and you would still need 5000 seats in order to make sure that we had enough seats to represent all those that are involved in the industry, so agriculture is very, very important.

One of the big things that the General Assembly deals with that affects us in agricultural, in the agriculture community, is the budget. I hope you all know that we have

a very conservative budget here in Tennessee. As a result of that, it's conservative enough that many times our Department of Agriculture, and we're going to hear from Theresa here in a little bit, they realize that they have to do it on a shoestring of money in order to do everything that they need to do. But basically, we have a \$32 billion dollar budget to represent our 6.5 million people. That's about \$5,000 per capita that we're spending in this state. We're a very tax friendly state. We have the forty-ninth lowest in the country in state and local taxes, but we have the highest sales tax in the country, which many of you all are probably aware of. As far as our business taxes, we're about middle of the state. We're one of four states that doesn't carry a transportation debt. We have the thirteenth lowest gas tax, the seventh lowest diesel tax. And so our folks, our General Assembly members, have done a pretty good job. On the downside of that is about every 10 to 15 years, we end up having to figure out where we're going to come up with more revenue in order to operate on a balanced budget as we're supposed to.

From an education standpoint, and we've seen a lot of attention to this in the last couple of years, historically, we've ranked K through 12 in the forties, as far as other states. We're now in the thirties. That's good news. Our current governor says it's his goal before he leaves office, he would like to see us in the twenties.

So, with that, I want to talk about three very specific issues that we've worked on recently that relate to agriculture, but also relate to property in some standpoints. I see Mike back here and he's going to be one of our speakers later and talk very specifically about UAVs, and I suspect about unmanned aerial vehicles, or what many of you all probably know as drones. I suspect he's going to talk a great deal about what's happening on the national

level. I do want you to be aware that we did pass a bill at our state General Assembly two years ago related to UAVs, or drones, for two distinct purposes. Number one, we wanted to make sure that as Tennesseans, that we embrace the technology. Because the technology that's out there and available through drones, we think is very, very exciting, particularly in the agriculture world. There are so many things that we can do with drones to help farmers use less chemicals, use chemicals specifically where they're needed, monitor their crops, monitor their livestock. So we wanted to embrace that technology, and it wasn't just for agriculture. In fact, eighteen very specific interests in drones wanted to make sure that they were included in that legislation to embrace that technology, and that particular public chapter is in the packet that was made available to you all. So I would encourage you to look at it. But, we also wanted to make sure that drones or UAVs could not be used to bypass our trespass laws because we have some very specific trespass laws in Tennessee. Specifically, we didn't want somebody to think "I can't walk onto your property, but I can fly ever so slightly above your property and see things that I wouldn't be able to see otherwise." So that was the real purpose of the legislation; those two purposes, to embrace the technology, but also to protect the trespass laws that we've had in place for some time.

Second, property related law that we have been very, very involved in relates to annexation. And for years in Tennessee, most annexations in this state have occurred by ordinance. And so if you were a landowner just outside of the city limits and the city decided that they wanted to annex your property, you had very little say as to whether you were going to be annexed or not. I've been with Farm Bureau for thirty years, and until two years ago, for those thirty years, that was an issue every time we met with farmers. They talked about how the annexation laws didn't

give them enough voice on when they were going to be annexed. So two years ago, out of the Chattanooga area, Representative Carter and Senator Bo Watson passed a bill that really we were kind of surprised got as much attention and as much support as it did statewide, to change our annexation laws, particularly as it related to ordinances.

But specific to agriculture, and if you had told me ten years ago this was going to happen, I would have told you no way that it could happen, farm property that's used for agricultural purposes can no longer be annexed unless it has the written approval of the farmer that owns that property. And for us, this is huge. Because what we have seen through the years is that typically, when farm property was annexed into a city, it didn't remain farm property much longer. The pressures of being in the city, the taxation of not only paying county property taxes, but also paying city property taxes, and then just in general, the loss of infrastructure and all of the other problems that come when non-farm folks are around you it kind of was the death knell of a particular farm staying as a farm once it was annexed into the property. So the public chapter for that is in your packet as well. I will tell you this issue's a little bit ongoing in that in the law that Senator Watson and Representative Carter passed, they did make it clear that it had to be agricultural land being used for agricultural purposes. Now, they're trying to define what those agricultural purposes are. To us, we think we know it, but obviously in some areas of the state they need a clearer definition of what agricultural purposes means. You'll see that ongoing.

The third one that I want to talk about specific for property taxes, and I already kind of mentioned that I feel a little bit inadequate to talk about property taxes when we have Kelsie Jones here from the State Board of



Equalization. Any questions that come up related to property taxes, if I'm already gone, Kelsie can answer those, but as I go into that, I do want to draw your attention to a particular area of study related to property taxes that the Farm Bureau's been involved in. It's called cost of community service. The American Farmland Trust does these studies. We've had three of them done in the State of Tennessee: one in Blount County, one in Robertson County and one in Tipton County, in the three grand divisions of the state, where they go in and they look at all of the revenue at a given -- at a given set in time. They look at all of the revenue that's coming in to a particular county, and then all of the expenses that go back out. Assigned to that revenue, where's the revenue coming from and then where is it being spent?

One of the interesting things of these cost of community service studies, and like I say, the American Farmland Trust does them, they've done them all across the country, is that their results have not changed from the standpoint that typically what they show is that residential property as a whole brings in a whole lot more revenue, but it also costs a whole lot more to service. In fact, for the most part, what residential property brings in, for every dollar that they bring in, it costs from a dollar to a dollar twenty-five or thirty to service that. You can't really build yourself out of a loss of revenue issue by bringing in houses to your community. Whereas industrial park property and commercial property, they're a net contributor. For every dollar that industrial property pays in taxes, they only require back thirty, forty cents' worth of services for every dollar that they generate. Farm property is the same. I put in the particular study, the Blount County example. You can see in Blount County, for every dollar that residential collected, it was a dollar twenty-three in services; for every dollar commercial property collected,

twenty-five cents back in services; for every dollar farmland, forty-one cents back in services. And I show that to you to make the point that, yes, agricultural land may not bring in as much money as residential property or commercial property, but it also doesn't cost as much to service agricultural property. It has a lot of benefits for your community to have that open space within your community.

Which brings me to the greenbelt law. In your packet, you'll find this brochure as well. The greenbelt law was passed in 1976 to make sure that farm property is taxed on its use, best use as farm property and not on its potential development use. What we realize is that if a farmer has to pay taxes on a tract of land for its potential development use to be a Wal-Mart or a Kroger or a shopping mall of some sort, there's no way the farmer would be able to continue to use that land to farm it. And so the greenbelt law is very important to us. There's a very complicated formula, but it's been tweaked throughout the years to try to make it as fair to everybody involved to make sure that farmers can continue to farm, and yet local governments can continue to get the amount of revenue that they need to service the property. Then, the state board or the state division of property assessment prepares for every county, in the year that the county goes through its reappraisal, a schedule of what crop values are worth, commodity values, and put that formula together to come up with a fair representation of what farm property ought to be taxed, and, of course, one of the things that we're sensitive to is we don't want people to abuse the greenbelt law, so it also includes a rollback tax on it. If a developer buys a piece of farmland and cuts hay off of it or puts some cattle on it just to hold it until they get a really good development price, they're going to have to pay three years' worth of rollback taxes on that property once they take it out. So the

greenbelt law is very important to us. I would encourage you to look at that brochure. Particularly when you go into the legal profession, know that that brochure is not only available on our website within the Tennessee Farm Bureau, but I think the Division of Property Assessment links it as well where you can find out more information.

Two things I'll close with very quickly. I think by you all being here, it shows that many of you all are interested in what's going on in agriculture, but what's also going on in public policy. I would encourage you to be involved to vote, to get to know your lawmakers. Two-thirds of Americans didn't vote in the last election. And that's just very, very discouraging to me. I would encourage you to always take the opportunity to vote, get to know your lawmakers. Woody Allen said that 80% of success is showing up. You all showed up today, and I would hope that you also show up at the polls when those needs come and when that opportunity is there.

The last thing I'll share with you is we are very blessed to live in the country that we live in. Agriculture is very, very important. I want you to think around the world to those countries that have a good quality of life, and one of the common elements that you'll see in those countries is that they also have a good, strong agriculture. So, whether you make your living from farming or not, it's important to you that we have a good, strong agriculture. Quality of life and strong agriculture in our country are very, very much related. So with that, Theresa, Julie, whoever's next. Thank you all.

MS. DENTON: I want to say thank you, Rhedona. Rhedona anytime I've heard her speak, she always gives me something to think about and also to get really kind of inspired. I appreciate your words. I appreciate being asked

to be here today. I've been introduced, I'm Theresa Denton. I'm the general counsel for the Tennessee Department of Agriculture, and pleased to be here. I've seen several people I know here today, but to be in the company of people who are both interested in and knowledgeable about agricultural issues is wonderful. When I talk to my colleagues, friends, or people even individuals within the state department, they say, where do you work and what do you do? And I say, well, I'm general counsel for the Department of Agriculture, and even people within state government will look at me and like, what do you, exactly? And then before I can answer, they'll start to supply things that we must probably do. And they'll say, well, do you like sue farmers? Do you license farmers? Oh, wait a minute, you inspect farmers, that's what you do. And so there's an element of truth in all these things.

The Department of Agriculture has many, many vast programs to support agriculture, and yes, depending on, you know, what kind of farm operation you have, staff with the department may have to be licensed depending on what you're doing. If you have certain farm operations, you may actually be subject to inspection. There are, unfortunately those infrequent times where, yes, we do have to bring an administrative suit. But the department has so many programs that do support and inform and educate agriculture that it would actually take me the entire time that we have to go into every one of the programs that we have. The Department of Agriculture has broad powers within the agricultural community, but the first one that's mentioned in the statute is this one. They're empowered to encourage and promote in every practicable manner the interest of agriculture. And that is why I said that we have so many programs that fall under this very broad mandate that it would take me the entire time here to go into them, but what we are focusing on today are the food policies.

That brings us to the question, what is agriculture? What is the definition of agriculture? Until 2005, there wasn't actually a definition of agriculture in the Tennessee Code. And in 2005, a definition, an official definition, was actually included, and the definition is included in both Title 1 and Title 43. And it starts out with "the land". The first noun in this definition is "the land," and as land, buildings, machinery used in the commercial production of farm products and nursery stock. And that's not all. It goes on and it's the activity carried on in conjunction with the commercial production of farm products and nursery stock. That includes the planting, the irrigation, the harvesting, all the activities that go along with that, and that's not all. It also includes, as you've heard with Julie and Rhedona, recreation, recreational and educational activities on land used for the commercial production of farm products and nursery stock. And I want to highlight the word "commercial" because this is about commerce, so recreational and educational activities. This would concern and include things like corn mazes, field trips, farming your own produce, hayrides.

I live close to the Gentry Farm and it's not unusual to see the demonstrations and yellow school buses go by. The kids are going out, and they're going to see where pumpkins actually come from and they're going to pick one, and they're going to have a good time and play and have a field trip on this farm. That's part of recreation and education on land use for the commercial production of farm products.

In 2014, this definition, which I said was added to Tennessee Code in 2005, it was amended in 2014. It was expanded to include entertainment activities. As with recreational and educational activities, these are closely

concerned with the land. We expanded it to include entertainment activities. As you've heard Julie talk about the lawsuit that went up to the Supreme Court, *Shore v. Maple Lane Farms*, what this narrow Supreme Court decision pointed out was that the definition that we had put in the statute in 2005 did not include, according to the Supreme Court, trends in actual farm operations that were involved in by many farmers across the state, including entertainment activities. Now, the way it was amended and added, it says, entertainment activities conducted in conjunction with, but secondary to the commercial production of farm products and nursery stock. When such activities occur on land used for the commercial production of farm products and nursery stock. So there are some constraints. If you recall in the previous slide, the recreational and educational activities occurring on a farm, those were not constrained. But the entertainment activities were included and constrained because this is an activity that for it to be an agricultural use of land, needs to be connected. There needs to be a nexus with that farm operation.

You heard Rhedona talk about and show the maps showing the loss of rural land that has continued over the decade. One of the sociological and demographic results of this is when you have rural land that is lost to, very often, residential development. You have to kind of group the people and that sometimes results in a cultural clash, and you have people moving out to get the benefits of living in the country, but then all of a sudden they realize that, wait a minute, living next to a farm sometimes means that there are noises and there are smells and there are activities that maybe I don't like. So this resulted, in many cases, in nuisance activities. It involved neighbors getting in lawsuits with one another over who had the right to determine what kind of activities were going on in the other's property. So

there is a version of the Tennessee Right to Farm Act in all fifty states. All fifty states have recognized this as a public policy to protect the established farm and established farm activities.

The Tennessee Right to Farm Act establishes a rebuttable presumption that a farm operation is not a public or a private nuisance. And it also includes the activities that occur on a farm. Activities including, you've got a pretty broad definition and states list these, but it says not including and not limited to the noise, odors, dust, fumes, machinery operations, aerial seeding, spraying, fertilizer application, insecticide application and use of labor. This is all included in activities that are protected in the Tennessee Right to Farm Act.

We amended the definition of agriculture in 2014 in Public Chapter 581, the Tennessee Right to Farm Act was also amended to include marketing of farm products in conjunction with production of farm products and then any other form of agriculture, which is included in Title 43. Also, recent legislation in 2014 established a consistent definition of livestock to be used throughout the code. There was not one. So this is at TCA 43-1-114, and it is a definition of livestock applicable in the code unless there is a different and more specific definition. It says, livestock is all equine, as well as animals that are being raised primarily for use as food or fiber for human utilization or consumption including, but not limited to, cattle, sheep, swine, goats and poultry. That was placed in the law in 2014.

A real kind of different and exciting policy and law change that the Department of Agriculture is administering has to do with industrial hemp. I like this image, because it says, free the seed. And in our department in this past year,

we have been working in trying to free the seed, and we've had a few barriers along the way. But we have finally reached that goal. So this is a new policy begun in the Department of Agriculture this year, and it is for the licensing of growers of industrial hemp. Now, you might say or you might know, how does industrial hemp, being a form of cannabis, how is it different from the one that we all hear about, the hallucinogenic drug. And there's actually a definition in TCA 43-26-101 and it essentially states, and I will not read all of these scientific terms in here, that the plant or seed cannot have a THC concentration that is more than three-tenths of one percent. Now, a street drug will have a THC concentration of three to eighteen or twenty percent. We're talking about a miniscule amount. This is not medical marijuana, this is industrial hemp with three-tenths of a percent THC or less, and that's the definition.

There are over twenty-five thousand products that can be made from industrial hemp. This is a representative list. You've got hemp oil and hemp nuts. Maybe you've gone into health foods, seen some hemp cereal, ground hemp seeds maybe you can put on your cereal. Hemp clothing has been around for a long time. There are even industrial building products and paper. There are vast uses for industrial hemp, and if you will study the history of this country and other countries, and more specifically in this country, hemp was grown as an agricultural crop from the beginning of this country. It was grown in Tennessee for many decades, and there is a history in this country and in this state of growing this crop and using it for a variety of purposes.

The U.S. Farm Bill of 2013, which was signed into law in February of 2014, section 76-06 of the U.S. Farm Bill defined industrial hemp as distinct from being from the hallucinogenic drug. Further, it authorized institutions of



higher education or state departments of agriculture in states where hemp is legal to grow hemp for research or agricultural pilot programs, to grow hemp for those purposes. So, this was authorized by the U.S. Farm Bill. I will say that over thirty nations worldwide grow industrial hemp as an agricultural crop. The main growers of industrial hemp are China, Russia, and South Korea. Canada has a large program nationwide of growing industrial hemp, and actually most of their exports of industrial hemp products come to the United States and are purchased here.

The Tennessee Industrial Hemp Act was passed in 2014, Public Chapter 916. It establishes a pilot program in Tennessee to be administered by the Department of Agriculture. If you want to be an industrial hemp grower, you have to get a license from the Department of Agriculture, and the department was also required to promulgate rules and regulations implementing this plan and those have been done and were effective in 2015. Licenses have to be issued. You have to be a Tennessee resident or if you have a corporation or a business, it needs to have an office in Tennessee or a presence in Tennessee. Industrial hemp that is grown and processed under the Department of Agriculture's pilot program is not a controlled substance under state law. If you are growing industrial hemp or any related plant, and you are not growing it under the department's program, then you are in possession of a controlled substance.

Now, there were barriers to this because in federal law all forms of marijuana regardless of the THC content, even three-tenths of a percent, are a controlled substance and controlled drug. So in order to possess the hemp, regardless of your state law allowing you to have an industrial hemp pilot program, the department still had to

get permission from the U.S. Drug Enforcement Agency. The USDA approved the department's application for that permit effective April 22, 2015, so we do have permission.

Here is a map, end of 2014, hemp year-end review., and you can see, it shows the states where their state legislatures have authorized a state pilot program under the Farm Bill. And you'll see three little leaves here, Colorado and Kentucky and Vermont, where hemp has actually been growing. I hope at the end of the 2015, hemp year-end review should show one of those leaves in Tennessee because there has been hemp crops planted and grown here this year. Now concerning our 2015 hemp program, we had glitches to work out. We had barriers to overcome. There were forty-nine industrial hemp licenses issued, including one to the University of Tennessee and one to MTSU. Of those forty-six licensees, seed was planted in thirty-eight counties, and 34,440 pounds of seed were purchased. That's a picture of just one palette of some of the seeds that we received in the department. Almost eleven hundred acres of seeds were planted. Now, I will say because of the barriers and the things that we had to do to set up this program in year one, the seed arrived very late. As I told you, we didn't get our DEA approval until the end of April.

We could not distribute any seeds because couldn't import them the state until we got that DEA approval. So by the time we got the seeds and then we got them distributed, it was very late and some planting did not occur until mid June or July, and so germination rates in this first year were low because of that. I will say that while there may be established demand and supply in a very established industrial hemp program and crop in other countries, in this country since it has not been grown or developed for decades, developing a viable market for industrial hemp will take some time and it may take

significant private investment. Currently, there are no hemp seed processors in Tennessee. So, again, in any kind of business that you're looking at, you'll always have a supply and demand, and while there may be some demand, and we're working on the supply, the market, we just don't know where that is now and it will take some time.

Now, I want to point out a significant typo I have in this slide, even though it was proofread several times. If you will please take your pen and correct the typo, it says, new applications will be accepted beginning April 1st. That should read that application acceptance will be ending April 1st. So we can't accept any applications after April 1st. If any of you are or any of your acquaintances or anybody you know that wants to get in and get an application in to plant industrial hemp for this year, please get it in before April 1st. We have quite a bit of information on the department's website. We have a couple of point people in the department who are the experts on walking people through this. They are very good at this. If you or anyone you know in the agriculture community are interested in an application to grow industrial hemp, please click on that website or call me and I will direct you to the correct person to help you with that.

Another topic is the Tennessee Agriculture Enhancement Program that is administered by the Department of Agriculture. It is a cost-shared grant program that began in 2006, and it is from direct appropriations from the General Assembly. Since 2006, the department has issued grants, cost-shared grants, in excess of \$106 million dollars, funding over thirty-seven thousand projects in the agricultural community statewide. It is not only a very popular program for farmers, but very beneficial. It aids farmers embarking on and beginning projects that they might not have been able to do without a

cost-share grant. The most popular one is hay storage. Hay storage farms remain the most popular cost-share grants that we issue. Other cost-share grant include grain storage, cattle handling equipment, feeding equipment, educational programs, expanding your livestock operation and even if you're interested in beekeeping. So it is a very beneficial and very popular program that the department administers. All right. I very much appreciate the opportunity to be here with you all and share just some of the information on the topics of food and food law and policy in Tennessee. Thank you.

MS. BOWLING: Well, I'm sorry. I told Rhedona and Theresa, take as much time as they wanted, since you all had already heard from me once today and you might not be ready for another turn, but I'm back. First of all, I do want to say thank you to Laura and the University of Tennessee Law School for hosting this seminar. As a UT undergrad graduate from the School of Agriculture here, it is very good to see the law school being supportive of agriculture in our state, and of these issues and having that put out to people in our community so you can learn about it and we share some of the things we've discussed.

You've heard from Rhedona on a lot of the legislative issues coming up in our state and what's gone on through there, and you've heard from Theresa, from the executive department, about what's going on in the Department of Agriculture and with the regulatory side. What I'm going to do here is go into a little bit of a litigation report. So, what's been happening in the courts on agriculture issues in Tennessee in particular, and what rulings have come down in the last few years in that area. Most of my information is your materials. I have left you what I would call just a bibliography of cases on

agricultural issues from the last three years that talk about some of the things we've looked at here.

The first one I do want to mention, as I mentioned earlier, the *Shore v. Maple Lane Farms* case. That was the Tennessee Supreme Court's first foray into looking at the right to farm law, and what is really interesting about that case is that when you look at the changes Theresa mentioned in the laws over the last couple of years that the Department of Agriculture supported and sent to the legislature for their consideration, those changes are pretty much directly what the Supreme Court said: here is what is missing in your law for us to look at these things, and that's what the legislature passed after that case. So, you know, what we see a lot of times is the Court will give us a result, and you then have certainty, you know what's out there. And that gives the legislature a directive for how to fix or change something if they want it to mean something else. So that case has been interesting in that it went up to the Supreme Court, they ruled. And then within, I think, six months of that ruling, the legislature then took that ruling and acted on it and made some changes to the law.

The Tennessee Court of Appeals considered another case in 2014 on the Right to Farm law. Actually, the case did not really do a whole lot with the law, but it does give a really nice description of how the law was passed, where it came, and some of the legislative history of the law. That case is *Curtis v. Parchman*, which was, as you will find in a lot of these agricultural law cases, a boundary dispute. In this case, one landowner had an easement across another landowner's property to get to theirs. The aggrieved party claimed that the farmer was preventing use of their easement, and that this was a nuisance because the farming prevented the aggrieved party from crossing over their easement. The farmer, obviously, raised the Right to Farm

law and said, hey, the Right to Farm law protects me from a nuisance suit. The Court of Appeals agreed, they said that the Right to Farm law would apply in that case, but the neighboring landowner raised a different claim other than nuisance, and that was impairment of and damage to an ingress and egress easement. The Court of Appeals said, lower court, you forgot this other claim here. You need to go back and look at that. So that case gives really good information on the Right to Farm law, but it's not really applicable there as they went back and looked at a different issue and raised another claim for the lower court to consider.

One case that the Tennessee Supreme Court ruled on is actually, what I would say, is a really big deal. Had they ruled a different way, they could have caused a lot of uncertainty in our state, and that is *Roberts v. Bailey*. Yet again, this all stemmed from a boundary dispute. In that case, it started as a boundary dispute. The two parties were trying to determine where the line was between their properties. Well, one of the two parties realized in the course of researching the old deeds, that there was a problem with their ownership of their tracts of land. What they discovered was way back in 1914 to 1918, the grandparents got the property. In Tennessee in those years, they are what we call the “gap years,” and this stems back to the laws regarding ownership for women. Before 1914, women were not allowed to own property as men did. The man could pass the property on and the woman did not have any rights in it. Well, there were laws passed that gave married women rights in property just as their husbands. And in Tennessee the law was passed, I want to say in 1914, and the Supreme Court ruled in 1918 on how it affected Tennessee property rights, and there were different views of how those laws acted. Tennessee's law, the Married Women's Property Act, eliminated tenancy by the

entirety and so the married couple owned property as tenants in common, which meant that when a husband died, his half passed. The wife owned her half, and then she could pass it at her death, or however she wanted to do it. So for those years, between passage of the act and the Supreme Court ruling, there were no tenants of the entirety in Tennessee, instead there were tenants in common for married people.

Promptly after that court ruling, I mean, within no time at all, the legislature said, whoa, that's not what we want. We want tenancy by the entirety so that people have the right of survivorship like they thought they did. So the only period of time in Tennessee history where this little glitch occurs is from 1914 to 1918 for people who purchased or became owners of property during that time. What could happen is if they were married, they did not have a tenancy by the entirety, they would have tenancy in common.

Well, in *Roberts v. Bailey*, the Baileys realized that the property, the farm that they had been operating, was property that had been purchased by the grandparents during those gap years. So in the course of this boundary line dispute, they realize, uh oh, our property that we've owned and operated as our farm for at least two generations was inherited at during the "gap years," and we are not the only ones who have an interest in the property under this old gap year issue. So they joined in the other people who they thought had an interest in the property, and tried to quiet title to the property. And said, hey, you know, we are sorry, we didn't know they had an interest, but we have used it for all these years. You know, we own it by prescription or adverse possession or some other grounds that we own it. These other people should not have an

interest. Let's quiet title it, and then we can finish our boundary dispute and everyone will be happy.

Of course, it did not work that way. As you can imagine, it morphed into an even bigger issue. The trial court ruled that these other family members, who inherited down the line, actually did have an ownership interest in the property. The trial court opinion goes through and what percent each party owns. I mean, it's very complicated at that point; there's thirty-three percent in this person and eight and half percent in this person. Now, granted, these gap years aren't very many years, but there are a lot of properties in Tennessee where the ownership of that property would come into question. That ruling was very difficult to stomach. In fact, the trial judge said, that if I had my way, I would be ruling for the Baileys because the Baileys have used this property and, we want certainty, but I cannot. The way this law is, I am going to have to rule for all these other people who have an interest in the property. As you can imagine, the Tennessee Supreme Court took up that issue because it had such wide range and potential to affect so many properties in Tennessee. They came down, as you would imagine, in favor of the public policy of Tennessee, in favor of quieting title and having title be certain.

The ruling was that the Baileys did own the property by prescription; they had showed their use for twenty years. These other family members who said, well, we didn't even know we had an interest in the property, we didn't know we needed to raise our interest in the property, the Court said that was not a disability that protected their statute of limitations. They should have known. They should have looked. They were not allowed to raise it at this time. So property is now settled. The decision has been made, and the Baileys were the owners of that property.



That case was of concern to a lot of people, especially in the farm community, but we looked at it from the Farm Bureau perspective. We had some people come to us and say, should you all be interested in this? Should you participate? And we had the same concern that I am sure lots of your clients would have. The concern being that we would have farmers and members on both sides of that issue. I mean we did not know who had bought property in the gap years and who did not. So we did not participate, and I think a lot of other farm organizations felt the same way about the case. I mean, it was a big deal, but we knew that we would have members on each side of that issue because there was no way to tell unless you went and did a deed search on every piece of property around to see what the history was. So I think everyone that was involved was grateful the Supreme Court came with a ruling that added some certainty on that ownership issue and would help people with that in the future.

Looking at some of the other cases that were interesting that have come out. Let's see, there was an eminent domain case out of the State of Tennessee. This was a Tennessee Court of Appeals opinion. It was *State v. Jones*. This involved a farm in Lawrence County, a dairy farm, and one of the things we love in Tennessee is that we do have great roads. We have a great road system, but one of the problems with having a great road system is they do get built. They get built oftentimes where there is empty, open land and that can be farmland. This particular road is a wonderful highway, Highway 64 that goes on the southern part of the state. It's a nice four-lane road. A great road to drive on, but unfortunately for Mr. Jones, it bisected his farm, and for a dairy farm that was a difficult problem because it bisected part of the operations where he managed the manure that comes from the dairy operation.

To move manure and to treat it, there had to be a way to get across that highway to do that. In the eminent domain action, he had an expert witness who showed the diminution in value to his property because of that bisection of the land and how much it diminished the value of his farm operation. The State took a different view of the diminishment of value, as they do in those cases because they're trying to pay the least amount they need to to get the property for the road system.

At trial, Mr. Jones' expert testimony was accepted and considered, and the jury returned a verdict giving him, I think, about two hundred thousand dollars for the diminution in value to the farm for the amount of land that was taken in that case. The State appealed. They argued that the amount owed should be more like forty thousand dollars. So we're talking a difference of about a hundred and fifty thousand dollars between what he got from the jury and what the State believed they owed. That went up on appeal, and then there was great concern for Mr. Jones because he had actually already been paid the funds. The concern was that the State would get those funds back if he lost on appeal. They were not held in escrow. That's one thing I never could quite figure out what happened and why they were not in escrow during the time frame. On appeal, the Tennessee Court of Appeals upheld the trial court's rulings. The court held that the testimony from the expert was admissible, it was allowed to be considered, and the jury verdict was upheld, so that case was not appealed further, and he was given the funds to help with the changes in his operation he had to make due to that road coming in.

An interesting case on business organizations, it goes back to kind of what I was talking about earlier with agritourism operations. One of the most important things

on the front-end is planning how you want the business to be set up. We had an interesting case in Tennessee, and I think it was a farm community. When we saw the hands of people who actually signed an agreement with their CSA, it was low. Well, the same thing happened with farm businesses in the partnership area. You will see lots of informal partnerships in the farm community. That's an area I think we as attorneys need to be watchful for and encourage people to do more planning and look at this. Extension can help us with this as well. What happens in a lot of these situations is you have people who have an informal partnership. There's agreement as to who's putting in what, how much money is each person, which property belongs to each person, and what happens when you break up and have a dispute over who gets what in the partnership.

In *Reed v. Thurman*, you have a father and son farm partnership. Father and son have been farming. Son has a girlfriend. And girlfriend, not a farm girl, is interested in the farm. She likes it. She starts helping out with some of the cattle operation. She and son live together, and they have a checking account together. She writes checks for some of the stuff on the account that they share, but not everything. Some of the money comes from other places. You can guess what happens when the inevitable occurs and they no longer are together, everybody wants their share of the partnership. So in that case, there was no partnership agreement. It was all informal. The Court ruled that the girlfriend was entitled to significant parts of the property from the partnership. So she got certain equipment. We're not talking copy machines; we're talking farm equipment. Some of the things that were disputed were hay rakes, manure spreaders. I mean thousands of dollars of equipment here, and she got some portion of that. She also got some portion of the checking account from

which her name was on and was an authorized signatory of. She had been writing checks for the partnership from that account so she got part of those funds.

That case is one that I would say is really important. When you're talking to people about those worst case scenarios and what can go wrong and why you need to be a little more formal with people that you trust and that you love is because of what can happen when things go wrong. It is a really good example of that. The case is *Reed v. Thurman*. The cite is 2015 WL 1119449. It is a 2015 Tennessee Court of Appeals case, so I would definitely take a look at that. If you want to wave something at somebody and say, this is why you need an agreement, that's a good one to do.

Another interesting case that I saw was on crop insurance. A lot of farmers use crop insurance not just as something to avoid risk, but it also helps them manage their income. The way the crop insurance program works in the U.S. is as a kind of hedge. You can have insurance where if prices do not get above a certain amount, you get at least a certain return on your investment, your crop. So it's a very, very good tool for farmers trying to protect their income and their crops.

In this particular case, it's *Dixon v. Producers Agricultural Insurance Company*, and it's out of the Middle District of Tennessee. In this particular case, the farmers, went to a meeting of tobacco growers, and they heard all this information about this crop insurance. And they thought, oh, well, I'm not eligible because I didn't grow tobacco for the last few years. The nice person from the insurance company said, oh, yeah, yeah, you are. If you've grown hay or any commercial product, you'll be eligible for this crop insurance. They said, oh, really, that's great, so

they bought it. They listened to it. Then their crop didn't do as well as they thought it would. They got paid from the insurance, payments to make up the loss. Then the lawsuit happened. The insurance company determined they were not entitled to coverage because they hadn't grown the crops they needed to at the time, and as you can imagine, that caused great angst and great problems for the farmers, so they sued. In that case, the insurance company was arguing that the suit was preempted by the federal law related to crop insurance. The farmers said, whoa, we've got state law claims here for misrepresentation. These people told us this policy would work; it would cover us. The Court ruled that these state law claims were not preempted by federal law and they could proceed forward with those claims. This one, I think, is an interesting case from the insurance perspective. It did give the farmers the opportunity to proceed with that case going forward.

Another case specific to Tennessee, and this is a pretty recent opinion, so I'm sure there will be appeals and further litigation on it, is relating to the *Tennessee Walking Horse Forfeiture*. What happened there, a trainer, not the owner of the horses, but a trainer was accused, and I do believe later pled guilty to some allegations of soring. The horses were seized from that operation against the trainer. This litigation involved the owners trying to get their horses back. The owners, who weren't there, they had sent their horses to the trainer's facility, they sued and moved to participate in the forfeiture proceeding to get their horses back. They said, hey, you know, we weren't the bad actor. We're not the one that committed the crime. We would like to get our animals back. They did their best to provide their proof of ownership of these particular animals. What happened in that case, the trial court granted the horse owners' motion to dismiss the forfeiture action and that would let the owners take the horses back, so that's what they did.

On appeal, the Court of Appeals went back and said, hold up, you didn't complete all the steps. They sent it back to the trial court because they said the trial court did not hold a hearing on the issue of standing. The authorities who had the horses had specifically raised standing as an issue that they wanted to be considered. They said, we don't know that these people are the owners, we don't know that they have standing to even bring this action. And so, the Court of Appeals, the case is not over, but it has been sent back for the lower court to consider the standing of these owners and make sure that these are the owners of the horses before they proceed that way. That case, a lot of people have been watching that. Because, you know, there is concern for people who have walking horses and that is a big industry in our state. When a trainer or bad actor does something, the owners don't want to lose the ownership of their animals because of that. So people have been watching that with some interest and concern, and we'll continue to follow that and see what happens in that litigation.

UNIDENTIFIED SPEAKER: What's the name of that one?

MS. BOWLING: That one is *In Re: Tennessee Walking Horse Forfeiture Litigation*. A really exciting title there. The cite in that is 2015 Westlaw, 1636704. That is from the Tennessee Court of Appeals. Another interesting boundary dispute, *The Haddad Family Partnership v. David Pouncey, et al.* In that one, it started, again, as a boundary dispute. It got even better because the two farmers started doing mean things to each other; destroying the crops that were built on the disputed property, spraying them, and cutting them down. So, you know, one would plant and the other one would do something to damage it. Then the other one would plant, and it went back and forth, so not the best situation there on that boundary dispute.

In that case, the trial court listened to all the evidence. There were expert witnesses on both sides as to where the deed said that the line was and what the difference was in the property. The trial court made a decision and also gave damages for the crops to the party who was the owner of the property. So the one who had done the damaging of the crops then did not want to pay that much, of course, on appeal. The Court of Appeals considered it and made some nice rulings on what the damage calculation amount is and how you calculate damages. So the party who was going to have to pay for these damages said, hey, wait, you know, there's some cost they didn't have to pay when they didn't have to harvest them and all this other stuff. The Court said, you didn't bring an expert. You didn't have anything else to show that, so, no, we're not doing any offset. The damages is the amount of the expected yield times the price of the commodity, minus the input cost, so that's what they determined the value of damages was, and that was upheld on appeal in Tennessee.

The last thing I want to mention, specifically in your materials, there are a couple of issues the attorney general's office has put out opinions on. And, you know, obviously, attorney general opinions are not the law, but they are an interpretation of the law by the state attorney general. They are persuasive authority and the courts do consider them when they're looking at what the law is. These particular AG opinions that are in your materials are interesting because there really aren't any court cases on those particular areas. What they concern is county zoning, what buildings qualify as incidental to an agricultural enterprise so that they're exempt from zoning. There's a rule and statute that residential buildings used by farmers and farm workers are incidental to the farm enterprise and they're exempt from the county zoning regulation, unless they fall into a narrow category of being near state federal-

aid highways, public airports and public parks. So if they're not near those things, within a certain specified distance of those things, they're exempt from zoning. That's kind of an interesting issue because with a lot of residential buildings, there may be certain fire codes and other rules that go with those. That exemption for farm residences could be helpful to farmers in those. There are two attorney general opinions on that.

Another AG opinion is on weight limits for farm trucks. One of the problems with a lot of farm operations is the roads out in those communities are often local county roads, but the crops being carried over them are heavy and may need large trucks and semis to move them. Some of the roads have weight limits, and that's a concern for farmers moving their products is, okay, can the -- the vehicle I'm using to move my product, can it qualify to drive on this road or am I going to be ticketed or in trouble for using that. That opinion in particular was looking at can a farm truck that transports poultry, does it qualify for a 10% exemption on the weight limit so that its weight limit can be plus or minus 10% from what requirement is in the law.

Now, the last one I want to point out was covered on beekeeping. I know we talked about that. The question was, does state law prohibit a homeowners association from having a restrictive covenant that eliminates beekeeping in that particular homeowners association community. The answer to that is, yes, the homeowners association can have a restrictive covenant to do that, to exclude that activity. But, obviously, they have to do that themselves, you know, that is not prohibited under state law, but there are protections in state law already for beekeeping that are there. The homeowners association may need to look at that before they enter that restrictive covenant. With that, I'm going to stop and we'll have a few



minutes for questions. And pretty much, since Rhedona's gone, all the questions I'm sure will be for her. We'll make sure to get those to her, but with that, if there are any questions, we'll be glad to answer them.

MR. WILLIAM MAZZOTA: Thank you. We have time for a few questions. So if anybody has some, kindly raise your hand.

UNIDENTIFIED SPEAKER: Question. I'm just wondering, this TAEP grant, is there anything in there available for mushroom growing? I mean, I didn't see anything. I mean, it's for the enhancement. Is there any sort of gray area?

MS. DENTON: You know, I cannot tell you from memory. They are a long list. I would invite you to go on the department's website. There's a link to TAEP and it has every application and all the guidelines. No, I've never been asked a question about mushroom growing, but there are -- it may come under just some general agricultural assistance. There are many, many categories and areas, so you may be able to fit what you're wanting into that.

UNIDENTIFIED SPEAKER: Okay. Thank you.

UNIDENTIFIED SPEAKER: This is more of a comment, but you commented on TAEP. I always like to tell that the initial funding or the initial program came from the tobacco settlement money. It was a program. That this is how Tennessee chose to spend the money to, you know, 10% or something like that, tobacco settlement money. It would go toward the transitions of farmers from growing tobacco into something else, and my compliments to the state because I've utilized the program and it does an excellent job. It's very practical. It is the most practical government program I've ever been involved in. Yes, they

do have safeguards and they do check up on you. So it's not totally a free-for-all, but they've done an excellent job and really has enhanced a number of things in the state.

MS. DENTON: Yeah, I would like to stop on that. Thank you for that. There are safeguards built into the system. They have spent a lot of time in trial and error and working on (inaudible) and verification. They want to make sure that this grant money is being used for what it is being used for, or what it was issued for.

UNIDENTIFIED SPEAKER: Oh, absolutely.

MR. KELSIE JONES: I wanted to mention one thing Rhedona alluded to about property (inaudible) tax areas where farming is concerned. And the single most sensitive area is the greenbelt program continuing eligibility where there's a transfer of the property and rollback taxes. Rollback taxes are probably the most significant property tax trap in state law because there are statutory liens, but there's nothing recorded. If you represent anyone who owns a farm or other property that's in the greenbelt law and they're trying to plan out how things play out, take that into account. Take a look at the greenbelt statutes; call the folks at the comptroller's office who are connected with property tax administration. I'm one of them.

Also, to my left is Stephanie Maxwell, who is general counsel at the division of property assessments, which tries to, you know, help assessors and taxpayers understand that law, So if you think you'll be dealing with a client to find a plan for rollback liability or make sure that it's properly addressed when there's a transaction involving farm property, please feel free to call us. As one of the earlier speakers said, it's so much better to catch that stuff upfront than to try to deal with it later, so. Thank you. Just

wanted to mention that.

MR. WILLIAM MAZZOTA: Anyone else? I don't guess. All right. Well, we can break a few minutes early for lunch. I want to remind all of you that lunch is for paid registrants only, but there are plenty other dining options available to you. We will be starting back exactly at 1:00 p.m. We don't want to get behind on our schedule. So, thank you.



**Agricultural Technology**

*Mike Buschermohle*<sup>8</sup>

*John Dillard*<sup>9</sup>

MR. SHANAHAN: Ladies and gentlemen, if I can have your attention. Please feel free to continue eating while we start our next panel. My name is Ryan Shanahan, I'm a second-year law student here and a *Tennessee Journal of Law & Policy* staff editor. Our next panel will focus on the use of technology in agricultural production and how the law shapes the way farmers can use some of these immersing technologies. We'll hear from two gentlemen who work with these issues on a daily basis.

Our first panelist, Dr. Mike Buschermohle, is Professor of Biosystems Engineering and Soil Science at the University of Tennessee Institute of Agriculture where his research and education efforts focus on precision agriculture, GPS/GIS applications in agriculture, variable rate application of production inputs, and grain drying, storage and handling. He holds a Ph.D. and Master's Degree in Agricultural Engineering from Clemson University and a Bachelor's Degree in Agricultural Engineering from the University of Kentucky. Dr. Buschermohle focuses frequently on agricultural technology to various groups across the state.

Our next panelist is John Dillard. He is an associate attorney at OFW Law in Washington, D.C. and concentrates his practice on litigation with an emphasis on agriculture, environmental and food-related matters. He has represented clients in complex matters involving Clean

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<sup>9</sup> John Dillard, Associate Attorney, OFW Law in Washington, D.C.

Water Act disputes, livestock odor nuisance tort actions, food labeling, GIPSA enforcement APHIS impoundments, biotech seed patenting, Native American agriculture, and food recalls. John also advises clients on legal issues regarding cutting-edge trends in agriculture, including "big data" and agriculture applications for Unarmed Aerial Systems, aka drones.

John, who grew up on a beef cattle farm in Amelia, Virginia, draws upon his extensive background in agriculture in serving clients. He received Bachelor of Science Degrees in Animal and Poultry Sciences and Agricultural and Applied Economics from Virginia Tech. He also earned a Master's Degree in Agricultural Economics from Purdue University. John worked as an agribusiness consultant and a USDA economist prior to attending law school at the University of Richmond. John is a prolific writer on legal issues affecting agriculture. His blog, Ag in the Courtroom, is featured on Agweb.com. He also writes a column for Farm Journal Legalese. John also speaks extensively on agriculture and policy, matters for producing groups and policy matters.

MR. BUSCHERMOHLE: Good afternoon, everyone. As Ryan said, I am a precision ag specialist with UT Extension, and I have the pleasure of working with producers and talking with them and trying to help them adopt technologies to help make their systems more profitable. And as John and I were talking about this panel session, he thought I would be the person to be able to kind of set the stage for what these technologies are, and then he would come back and talk about the legal issues.

Farming is not what it used to be. My granddaddy was born in 1912. He was the oldest of fourteen kids, they lived on a small family-owned farm outside of Bardstown,

Kentucky, and as he said, there was more limestone outcropping rock than there was poor dirt. He used mules and horses pretty much throughout his whole farming up until even in the fifties. I remember as a young boy, I was born in 1958, and he still had two draft horses on the farm. Their names were Kit and Molly, and he said that they were the best horses that he ever used, and he didn't have the heart to get rid of them after he started to switch to tractors. So they retired on the farm. I remember as a young boy, he used to put me on their back, and I was a little boy, and those horses were huge. So he farmed with two horsepower.

Today we farm with over three hundred horsepower tractors. In his day, everything was hand-harvested. If you look at corn, a good corn picker could pick two and a half acres a day. Today we have combines that can do that in a matter of minutes. And also tractors, I cut my teeth driving a John Deere B tractor, it has eighteen horsepower. Today we have the ability of tractors that can drive themselves if they're equipped with auto-guidance and use an RTK ray GPS. We can be within a centimeter of an inch anywhere in the field year after year after year. There's a lot of technologies and changes that he never got to see, but the three technologies we're going to talk about are biotechnology, big data, and unmanned aerial systems. You heard Rhedona talk a little bit about drones. I'm going to kind of give you a background of what we're using, what they are and things of that nature.

We look at biotechnology. If you look at corn years historically from 1860 up until about 2012, you can see from about 1860 up to right after the Great Depression, corn yields were pretty stable at about twenty-five bushel an acre. And then after the Great Depression, and really after World War II, all the way up into the mid-fifties, we

start to see an incline in yield. In 1983, I convinced the most sweetest, prettiest girl I have ever met in my life to marry far below herself, and her daddy was a farmer as well. He told me after he got back from World War II, he went to agriculture school. In agriculture school they taught him about fertilizer. Back then, what manure was on the farm was spread out in the fields, but it wasn't enough to meet the crop needs. He said his daddy and all the people around him made fun of him because he spent money on fertilizer, said he was going to lose his shirt. That year everybody else made twenty-five bushel an acre, he made seventy-five. And so after the Depression and up until the 1950s, management changed. UT Extension and all the agricultural extension services started helping producers become better farmers. Also, he started seeing a little bit about breeding up in those periods. But where we really see a lot of crop genetics in breeding is from the late fifties all the way up to the late nineties. We started seeing hybrids, we stopped seeing cross-figure, and you can see, the yields went up tremendously from the late fifties all the way up into the nineties.

What happened in 1996? Monsanto came out with Roundup-ready soybeans. Now we're talking GMOs. Two years later they came out with Roundup-resistant corn, and then we had Bayer Crop Signs come out with LibertyLink, we had all kind of things. If you look at the soybean crop, with Roundup-resistant and Liberty, that's a herbicide. We're spraying it across the top of the crop without killing the crop and we're able to control the weeds. Also about that time, we came out with insect resistance with BT varieties. Now, the folks that are doing that, I call them gene jockeys, but they're really geneticists. They're out there looking at how we can take and modify that crop to be able to be drought resistant. They're also looking at how we can take a soybean plant that fixes its own nitrogen



from the atmosphere and can we take that into other crops such as corn and wheat and things of that nature. What it's done, it's allowed producers to become larger. We've seen a big shift from folks that used to be great one thousand and two thousand acre farmers, and now they're up to four and five, and I even work with some folks that are thirty thousand acres. It's increased the yield because we're being able to manage the diseases, the insects, pressure of the weeds. And there's also some consumer benefits. We've got crops that we're eating that are higher in oil and protein content, and they're also using some of those for medicinal purposes. But there is a lot of controversy, as you well know, over GMOs.

The next technology we're going to talk about is big data. What is big data? If you go to any production field in the country, you'll find out that yields are not uniform across the field. There is yield variability, and there are a lot of things that cause that variability. There can be fertility, there can be soil type, topography, disease, insect, you name it, we see a lot of variability across that field. And we're now capturing data. We're talking about precision ag data. The things that really opened up precision ag and gave me an opportunity to work for UT Extension is when we started using GPS. Now we know the location of the field that we're sitting whether we're in a tractor or a combine, any type of implement as we go across the field, now we can measure the location. We have monitors in combines and systems that now measure yield. We have monitors in tractors now that measure how much seed we're putting out, where we're putting out that seed, are we using variety A or are we using variety B. All that information now with the onset of these GIS, these geographic information systems, we're able to take that information, and now I spend a lot of my career making pretty maps.

What is the thing now that everybody is talking about? I sat in the back and watched, and I did it too. I was on my phone. I see some of you on tablets. We're now more connected than we ever have been in this country. We've got cell phone technology, we've got tablets. We can be anywhere in the country, and with this big data that we'll talk about, we can monitor whatever is going on on our farming operation. So when you combine GPS and monitors and geographic information systems and the connectivity that we now have in this world, it's changed how we take it and utilize data in our farming operation.

What kind of data am I talking about? We've got yield maps. We can use imagery. There are satellites flying across taking snapshots at least once a week. We've got fertility data. We can go out now and we can do site-specific soil sampling, and we can be able to apply our nutrients and our inputs on a variable basis. We also have public data available to us. We've got soil maps coming off of NRCS, we know exactly when it's going to rain and when it's not going to rain or how much it's going to rain, and we can use that information as we do irrigation scheduling to try to reduce the amount of water that we're putting on crops.

We've also got analytics. We've got crop models, we've got big data co-ops that I'll talk about in a minute, that is data mining a tremendous amount of information that now producers are using to try to make management decisions. And if you've ever ridden in a combine or a cotton picker or a tractor with a producer, especially in the harvest season, and this is my favorite time of the year, they are always on their cell phone and they're always looking at what the current crop price is, because they're getting an idea of what their yields are and is it time to sell

now or is it time to sell later. What are we doing with all this data? We're trying to make management decisions to reduce our crop inputs or reduce the amount of money that we're putting into the crop, so therefore, we can increase our profitability. We can also reduce the environmental impacts that are being associated with agriculture. We are becoming more sustainable by using this technology and this data. We use it for variety selection, Rebel-rate seeding, irrigation decisions, where and when to apply chemicals.

What are the farmers doing with it? And there's kind of two different trains of thought. A lot of times I work individually with farmers that are trying to use their data only. They're taking their yield data, they're making yield maps, they've done site-specific soil sampling, they may have run a Veris machine and got soil electrical conductivity, but they're trying to capture data for their own farming operation, and they're trying to make management decisions based on a field by field basis. But we've also got producers out there that are sending their data into this magical cloud. And everybody is sending that to the magical cloud. These data co-ops are getting information from all over the country, whether it's different varieties, different planting rates, different insecticide, fungicide applications. And they're data mining that so when it comes time for a producer to make a decision on what variety should I plant in field A, they can say based on our information for your region, this is the variety that will give you the best yields.

We talk about being connected. My granddaddy never did go around a lot of places. When he was in his seventies, my youngest uncle took him to Disney World. Anybody ever been to Disney World? The Big Bear Jamboree, that fascinated my grandpa so much that he

talked about it until the day he died, and today he would be astounded. He could be sitting in the Big Bear Jamboree waiting area on his iPad being able to see what the crop was doing back in Kentucky, how much his yields were, and he could be on the stock market or the futures market being ready to make a decision on when to pull the trigger to sell. This thing with big data is tremendous, and it's going to get bigger. There are a lot of players in the big data realm, there's a lot of legal issues that we'll talk about, who owns the data. Can that data be transferred, what kind of contracts do you sign? Some producers are very reluctant to give their data, others are more willing, and there's a lot of legal issues.

The last technology I'm going to talk about is drones. No, we do not put missiles on drones and fly over agricultural fields and try to shoot bugs off of crops, but it's a big buzzword and it's a big growing issue right now. We start talking about unmanned aerial systems, we talk about it's a system. You've got a plane or a multi-copter, I call them flying devices. We've also got communications between the flying device. We now have the systems in the ones we own, they fly themselves much better than I can fly them. Then we have different cameras out there that we're capturing, and this all goes back to we're capturing parts of this big data. Has anybody ever flown a drone? Anybody own one? Recreational use, a lot of folks are using them. Right now we own, actually we own two multi-rotors. Multi-rotors is about like a little hop helicopter. They're really great for some of the things that we're going to do, and I'll show you with them, because they can land and lift vertically. If I'm going across the top of the crop, I can stop, I can drop down, I can hover. There's all kind of folks now looking at making devices where we can actually send a camera down under the canopy and be able to look at a leaf and take a picture of that leaf and run an algorithm

through it and determine whether we've got soybean rust or some kind of corn earworm damage.

You've also got fixed wings. Fixed wings give you a little bit more flying time. Our multi-rotor gives us the ability to fly about a fifty-acre field, and then we better find a place to land because we've got to change out batteries. With the fixed wing type systems, you're looking at probably upwards of five hundred to a thousand acres you can cover in one flight. What are we using them for? We're using them for a lot of things. We start talking about how do we communicate. And I'm going to talk about directed scouting in a minute. We're communicating two ways with these things. We're actually sitting there sending the signal to it to fly, but it's also a lot of times sending us data back. How many of you all know about a GoPro camera? A lot of folks -- we put GoPro cameras on the top of this, send it up in the air about four hundred feet, and basically what you see is a great birds eye view of the field. You can see that in the picture. So we're getting images back. We're also sending and communicating to it.

GPS is kind of interesting, but the recreational bunch, the recreational users, really revolutionized UAVs. There's a lot of free open software out there. We use it. We pre-plan a mission, we have a GPS on ours, we tell the thing where to fly, how to fly, how fast to fly and where to come back home, and then we send it up in the air. What are we capturing with this data? We're capturing a lot of pictures. GoPro video cameras are great, and you're going to see where we're doing directed scouting here in a second. Again, it's just amazing the quality of picture that we're getting back from these GoPro video, and that's going to help us in our scouting operations. But the next step is we're looking at mapping, and I'll talk about that in a minute. And we've got different camera applications that

we can put on there. You've got to realize that we see light. The light is the electromagnetic spectrum and it is made up of wave lengths, and with these different type cameras, we can capture parts of that wave length. If I want a color picture, I'm going to capture red, green and blue. Our multi-spec camera not only captures red, green and blue, it also captures things that our eyes cannot pick up. We're in the infrared range, and we're also between red where we can see in this infrared range is a red edge, and we can pick up red edge. Hyperspectral, we can pick up far more different bands than the camera that we have. All we're trying to do is be able to gather data, big data, to be able to stitch them together and make maps. And you'll see some of the maps here in a minute where we're trying to develop vegetative indices to help us make decisions. We can also put a thermal camera on there and detect heat. And now as technology is evolving, we can put cameras on there that now it's using laser technology to be able to give us the height of trees or the height of a stump or a height of anything that we want to collect.

We talk about directed scouting. We're going to end up seeing a lot of folks using multi-rotors. It gives you the ability to go up and down in a relatively easy place. Again, we can live stream the video back, so as we're flying over a field and we see something in that field that makes us say, whoa, we need to go take a further look and we can drop down and we can see whether or not we have an insect or disease problem. So when we get done with the field, we now have areas -- because these are geo-referenced as we fly through these patterns. We know where to go in the field, and we can be able to make better decisions on our scouting and probably cut our scouting time down to help the producers maximize their yield and minimize their inputs for that field. You can see the pretty pictures. We'll be looking for diseases and insects and all kinds of things,

crop progress, crop stress, weeds. Weeds are a big problem for us. We can also look at livestock. I can check fences, I can see if mama cow has had a calf. I can also use a thermal camera, because when an animal is sick, it becomes under stress, and it elevates its body temperature. So we can fly across a herd of cows and be able to pick out that Old Bessie or cow number thirty-five is sick and we need to go treat it and be able to save that cow or help its health.

If we go to mapping, we're probably going to do a lot with the fixed wings. We can cover far more area. It depends on what we really want to do with the data. But we're probably going to put some type of a multi-spec or hyper-spectral camera. We're going to capture the images, we're going to bring it back, and we're going to create some kind of vegetative indices map or some other type of map that's going to help us make decisions as far as our management goes. There are folks now that being able -- we're talking about the quality of pictures flying, you know, below four hundred feet. We're talking about centimeter resolution. So folks are out there working on how we can count soybean or corn plants in the field. You know, the last few years, we've had a tremendous amount of rain and we've had a lot of flooding and producers have got to make a decision, do I start all over or do I leave the crop, you know, if we have drowning or disease problems early in the season. So we can do drainage issues, crop insurance. Variable rate crop inputs is what everybody is looking at. Can we go in-season with cotton or corn and be able to put an in-season application of nitrogen to be able to give the crop what it needs, when it needs it to be able to maximize our profitability.

We're also looking at can we make irrigation decisions. Can we take a thermal image of a crop and

determine whether or not it's under stress enough that we are affecting yield. You can see right here on one of the pretty maps that we've made. We're looking, in this particular one, at some of our nitrogen trials in cotton. You can see the difference as we create these vegetative indices and how we can use these maps to be able to say, okay, we either need to reduce the nitrogen, increase the nitrogen. Our goal, our ultimate goal is to increase the sustainability of our producers.

Forestry, I mean there's just numerous applications that we can use with UAVs. And the thing with a UAV, it gives us real time. We can capture and have been capturing the same information with airplanes and satellites for years. But if a satellite flies over and it's cloud cover, guess what, you don't get an image. If a plane flies over and the cloud ceiling is too low, you don't get an image. Producers, when do they need the image? They needed it yesterday. And so with drones and UAVs, we're going to have more real time. When I'm talking with producers, the first question I ask from them is what do they want to do with the data. That's going to determine not only what cameras or what type of system. But this data processing is a big issue. With our system, every time we snap a shutter, we take five separate images. They're geo-referenced images. A fifty acre field, we had six hundred and ninety images. We're not talking kilobytes worth of data anymore, we're not talking megabytes, we're talking about gigabytes. So now, how do we process gigabytes? There's folks that are out there looking at how we can take this information as we snap it and send it to the cloud to these big super computers. We bought the biggest, hopped up, super portable laptop that we could possibly find to be able to run some of the software. And for a fifty acre field, we turn it on when we leave work at night and we hope the next morning when we come in it's finished.



There are a lot of legal ramifications and issues with the technologies that we've talked about, and it's an exciting time to be in agriculture and it's an exciting time to be working for UT Extension and as an Extension Specialist. I think we'll probably wait until questions after we're finished, or do we have them now?

MR. SHANAHAN: Finished.

MR. BUSCHERMOHLE: Finished. Perfect.

MR. DILLARD: Thank you. As you heard in the very long introduction, I am John Dillard. I am an attorney with Olsson, Frank, Weeda. I speak on a lot of kind of these issues and have started to encounter them more in practice, but have really been brought to it by Farm Journal with a lot of these, because it is an issue where we are seeing people out there that are interested in this type of stuff. It's kind of cutting edge.

I also want to note, this is my first time in Knoxville, so I appreciate the opportunity to be here. One thing I did not get the memo on was wearing all the orange. I come prepackaged, so I'm going to follow in kind of the same order that Dr. Buschermohle did in terms of covering biotechnology, big data, then moving on to the drones. There are actually a few legal issues dealing with biotechnology. One of them is, probably the two that kind of stick out, the one that's still ongoing, I mean that is going on as we speak, is the state labeling issue, which I'll get to. Here's another fight that kind of went on and it's been kind of settled at this point, and that's on basically patenting issues with biotechnology and biotechnology crops. I've actually had a little bit of a chance to get involved in that, but it was a really to come up with these traits, it's basically

taking a trait from one species and inserting the useful trait into another species. It takes a lot of money. I think the average for the commercial crops like the soybeans or sugar beets or corn, each trait takes about a hundred and fifty million dollars to get to market. And so with that big an investment of funds in kind of research and development and paying off all the lawyers to get this done, it costs a lot of money, and so you want to protect your investment in that. So the seed companies have looked to the U.S. patent system to kind of make sure they're able to recoup their investment in that.

One of the issues that's really come about, it started in like the 1930's, we started passing some laws that protected intellectual property with seeds. At first, it was more geared towards fruit tree breeders. You had apple breeders that want to protect their varieties, you know, if somebody used a cutting or whatnot, but it didn't really apply the same to like your row crops that are more commonly used. Corn has kind of a built-in intellectual property system in that you can't replant hybrids. With some of the major crops where we have biotechnology used, soybeans and cotton are both self-pollinating crops that don't lend themselves to hybrids, and so it's actually very easy to steal this technology or to basically, steal is maybe a controversial word, but replant or brown-bag the seed from some of these crops, so the patent system has kind of had to adjust to the idea of patenting living things. It's still a controversial topic, the last case involving this was actually decided by the Supreme Court in 2013, and it actually dealt with basically a farmer that was brown-bagging soybeans, which for those not indoctrinated, brown-bagging means, basically at the end of the season, you save back some of the -- let's say you plant some soybeans. They would come with the Roundup-ready gene in them, and you basically save those over and replant them

for the next year. If you buy, say, roundup-ready crops, you sign a technology agreement where you agree, you know, you recognize, hey, Monsanto has a patent on this, I'm not going to replant these, and so it's kind of by honor code.

We had a gentleman in Indiana that fought against that. He actually called up Monsanto and told them he was doing it. He was very confrontational in this, but he called them up and said, look, here's what I'm doing. I've been doing it for eight years. I'm not going to pay you any money. What are you going to do about it? They sued him. And that went to the Supreme Court. The real issue that they were dealing with was, does a patent extend to the second generation? If you have basically technology that's capable of self-replicating, does that patent extend to the second generation? The Supreme Court held that it did in a 9-0 decision. We actually worked with the National Corn Growers Association, American Soybean Association, several soybean groups, and put together an amicus brief for that, so it's a very interesting emersion into the world of patents. I really see that as being the last kind of fight on the patent side with, unless there's some type of substantive change to the law, which there may be.

The other controversial issue with biotechnology is kind of these state labeling laws. And I'm not going to hide my bias, I'm opposed to them, but by not hiding my bias, that allows me to be frank. A lot of the money behind these kind of state labeling initiatives is coming from the organic foods industry where there's a significant kind of motivation or incentive to kind of stigmatize biotechnology. The main group behind it is Just Label It. That's primarily funded by Stonyfield Dairy and kind of headed up in that direction, and they've had some successes. I know there have been several highly publicized ballot initiatives, mostly out on the west coast, and none of

those have been successful, but they have cost both sides in the matter a substantial amount of money. And then kind of in the New England area, there has been some success going through the state legislatures in terms of getting some type of labeling measure passed. There are none that are currently in effect, but I'm going to discuss it a little bit more.

How all of these look; it starts off with model legislation that's being pushed by the organic industry, but it requires products that contain ingredients produced with genetic engineering to bare labels saying either produced with genetic engineering or partially produced with genetic engineering. That depends on kind of the makeup of the product. They also have a prohibition on any of these products that contain genetically engineered ingredients. There's a prohibition on them having anything on their labeling indicating something along the lines of like all natural or naturally grown, naturally produced. It's kind of model legislation. It has passed outright in the State of Vermont. Like Vermont has a law that if nothing else changes, July 1, 2016, retailers or manufacturers are going to be held liable for whether retailers sell products containing the labels. Connecticut and the State of Maine have both passed measures saying that we want GMO labeling, but we don't want it bad enough to litigate. They have kind of trigger clauses built in, which basically if there's a critical mass of New England states that go along with this, then that would trigger their requirements. Maine's will probably not go into effect because they built into it that there has to be a contiguous state, there has to be a contiguous state that requires GMO labeling, and New Hampshire has repeatedly voted that down, and that's the only contiguous state to Maine. Its measure actually expires in 2018 if there is nothing passed. Another state that's likely to pass it is Massachusetts. They haven't voted on it, but

three-quarters of the legislature is co-sponsoring it, so I think it might get through. With that, what we have going on, the Vermont legislation has been challenged in the Federal Court system. The plaintiffs are the Grocery Manufacturers Association, the Snack Food Manufacturers Association, International Dairy Foods Association and National Association of Manufacturers, so kind of big food is going after this in a strong way.

The real issues that they're focusing on are constitutional issues. The primary one, kind of the main thrust is the First Amendment, and then some of the compelled Commercial Speech Doctrine. They are also going after it under the Commerce Clause, which there's some valid arguments there, but it's been kind of undercut by several decisions actually involving Vermont. Then there's a push for a Federal preemption argument which has certainly some legs to it.

Under the First Amendment, I have kind of a little diagram here, but under the First Amendment, the First Amendment protects speech, and that protection of speech is not only protecting your ability to speak but also protecting your ability to not speak when you would rather not. There's not as much protection for what is called commercial speech, so advertising or labeling, as there is for, say, something like political speech, but there is still protection. There's, in this case from the GMO labeling side, this is what is kind of referred to or analyzed as a compelled disclosure. It's Vermont saying, hey, you, you're required to print this, so there's basically two routes that can be taken on compelled disclosures, and it usually leads to very different outcomes. With the compelled disclosure, if there's something that is purely factual and non-controversial, for instance, like nutrition labeling. I guess there's not a label on this bottle, but I know it's water. But if

you're dealing with like a nutrition label, that's not controversial, it's purely factual. It's measured under what's called the *Zauderer* test, which requires basically there to be some type of reasonable relationship between the compelled disclosure and the government's interest in compelling that disclosure. On the other hand, if you have something that's not purely factual, if it's controversial, if it's up in the air, you apply what's called the *Central Hudson* test which is more of an intermediate scrutiny test that's supplied there. Some courts have actually applied strict scrutiny, which is pretty hard to get past, but kind of where the Supreme Court is on anything that's not purely factual or controversial, there are the *Central Hudson* test.

To kind of discuss the different sides, so Vermont is over here on the side, this is purely factual and non-controversial. What they're requiring, a label is -- if a product is, indeed, produced with genetic engineering, that's a fact, and their belief is that that's not controversial, meaning there's no controversy over is this or is this not genetically engineered. The Grocery Manufacturers Association obviously wants the heightened standard, the *Central Hudson* test to apply. And with that, their angle is that, okay, it may be purely factual that this product is produced with genetic engineering, but the whole topic of genetic engineering is controversial, and it's basically the government injecting itself and taking a stance into this topic or this area and basically creating almost a warning label, and that's controversial. That's kind of where everybody is coming from.

If the courts do apply the *Central Hudson* test, as I said, it's kind of in this intermediate scrutiny level, the question that has to be asked is, does the government have some type of substantial interest in compelling this, and does the compulsion kind of directly advance the

government's interest, and is it more necessary than, is it more extensive than is necessary to actually serve the government's interest. I think if the courts were to apply the *Central Hudson* test, I think that you would not -- you would see the labeling measure get struck down, and part of that -- kind of in terms of demonstrating that there's a substantial interest. This is really more satisfying consumer curiosity in terms of, you know, I want to know what's in my food. It's thrown around, I have a right to know what's in my food, and there's actually a decision from 1996 where the Second Circuit held once again, from Vermont, a measure that would have required milk produced with calcium received the hormone RBST to have some type of labeling on that. And the court said, this is just consumer curiosity, there's no actual demonstration that there's any difference in the milk, so this doesn't rise to a level that we're going to really try to bend the First Amendment, so I think there's a strong argument there that this is more of a consumer curiosity deal.

There are also a substantial number of exemptions from this labeling measure, which really cuts against the government's argument that there's a need for it. So if there had been a CVS closer to like my hotel, I would have brought in, I try to bring in like samples. The exemptions include alcohol. Most beers produced with crops that are produced through genetic engineering or any of your liquors that have corn in them, that's produced with genetic engineering, that's exempt. Any product that's inspected by USDA, so any meat products, not just like steaks, but if you have chicken noodle soup that has more than a de minimis amount of chicken in it, or the Poultry Products Inspection Act, that's exempt, or that's preempted from state labeling. But then right beside it, so you can have chicken noodle soup, you're not allowed to have a label right beside it. You would have like Campbell's tomato soup probably has high

fructose corn syrup; it would have a genetically engineered label. So actually, it's estimated that only about 40% of the products in a grocery store that contain genetically engineered ingredients would actually bear a label. But there's still a substantial amount of costs kind of put on this. Another major exemption is restaurants. So I think kind of under the more intermediate scrutiny level, I think it falls down, because if your consumers really need to know this, why does their right to know really depend on where they are and what they're eating or consuming. But there are other people that disagree.

The *Zauderer* test is a much more, is a lower bar to cross. It's basically, as I said, a reasonable relationship between that. And the arguments that Vermont has put forth is, there's still questions that we have, and people use the big argument, the argument that's gaining traction is kind of the use of these roundup-ready crops. People spray more pesticides than they used to. And then there's the argument that some religions want to know, people of certain faiths, want to know what their product is. I think that might run into an establishment clause issue actually, but it hasn't come up so much during this. But I do think if it falls under this standard, it's a really low standard. I think they can come up with some type of justification. Another issue with this, and it's kind of a side issue, I mean the big fight is the genetic engineering label, but there's also a prohibition on labeling products natural. With a prohibition on speech, unlike a compelled disclosure, when the government is coming in and saying, you can't say this for commercial speech, it comes under *Central Hudson*, so that's a higher standard for them to meet. That's kind of the First Amendment issues with this.

The Dormant Commerce Clause is probably, and there's several law students in here, and I'm sure you



studied the cases or are going through cases like the, I think the one that stuck out was like New Mexico, or maybe Arizona only allowed like trains of such length, where basically if you're running trains into Arizona, you had to stop at the border and uncouple them and then re-couple them back at the California border. I mean it's kind of the idea of with the Commerce Clause, we have fifty states where you're supposed to be able to conduct business easily between them. Under our kind of a theory of the Dormant Commerce Clause, you're not allowed to discriminate against interstate commerce, and you're not allowed to unduly burden. Vermont is a very small state, it's in a cold climate, it imports about eighty-five percent of its food despite a growing, I guess, local food market there, and it creates a real issue over if you're a company that's a multi, either a regional company or a national company, you're going to have to create different types of labels for this market, for a very small market, maybe six hundred thousand people. There are real concerns actually within the industry. You know, for some, it may not be worth it to actually try to come up with separate labels for Vermont to where they may step back away from the market, but there's actually some concerns rising with the industry of kind of anti-trust in terms of just if everybody stopped selling into Vermont. So there's a lot of companies that, understand that they're going to have to lose money just to like stay within, stay out of the FTC's scrutiny. So there is a real concern about the Dormant Commerce Clause.

The courts haven't really bought into it, but so much they look at it as a relatively minor incursion on the companies, and that a lot of that comes from -- there's actually another Vermont labeling case from the early 2000s where they required the fancy -- the really efficient light bulbs had to come with a label saying that there was mercury in them and just to be aware of that. That actually

was upheld at the Second Circuit, so it's really taken, at least from the Second Circuit perspective, which is where Vermont is, it has taken that argument off the table for the most part. I mean it's still made, but it doesn't go very far.

We have had a District Court decision in the GMO challenge. The District of Vermont held that the *Zauderer* test, kind of lower bar, applied to GMO labeling. They held that it was for the most part constitutional. Vermont's law did not provide exemptions for USDA inspected products, so it was found that it was preempted for products that are inspected by USDA, so anything with meat or poultry in it. And it did hold that the prohibition on labeling products natural was unconstitutional and failed under the *Central Hudson* test. Most of the Commerce Clause arguments were dismissed. Grocery manufacturers appealed it to the Second Circuit. They actually had arguments yesterday in New York on that. I had a reporter friend that attended that and I checked in with her, and she said it's hard to tell, you know, actually watching arguments where it's going to come down, but it sounds like there was one that was pretty receptive to GMA, one pretty receptive to Vermont, and then one judge in the middle. So we'll see how that goes. We'll probably have a decision by Christmas on that.

Understanding that this is going to continue to be an issue, Congress is actually wading into the GMO labeling effort, and it has come up with a bill that at first was a long-shot, but may actually stand a chance of passing. It's pushed by a representative, Tom Payo, from Kansas, it's oftentimes known as the Tom Payo Bill. But basically it would preempt state labeling laws, and codify the approval process that is currently already in use to approve genetically engineered trades. Where it's run into controversy is they're trying to set up standards for what constitutes a non-GMO product. So it has passed the

House. It actually passed the House with a pretty broad support. It's in the Senate. They're waiting for a democrat to kind of co-sponsor it before they move forward, so we'll see how that goes.

I realize I'm going to be pushing on time, so I'm going to speed up a little bit. Dr. Buschermohle discussed big data, so this is a transition to a new topic. On the big data, there were several legal issues. I take a little bit, jokingly, a little bit of a disagreement with it. There's one legal issue with big data. So, I mean, it's a huge issue, especially for the row crops. Row croppers out there, there's pulling gigabytes and terabytes of data off of land, and there is a real question of like who owns it, but there's no -- it's not like there's a framework of laws around this. Everything comes down to the contract. Now, there are a tremendous number of issues kind of within the contract of what needs to be considered. Basically this is the issue of what can your data be used for, who owns it. That's all determined by contract. At this point, Congress and state governments haven't stepped up.

Before I get into the contract issues, try to understand some of the risks that are out there, because it's -- I mean, it's funny. I grew up on a farm and came up, I think, in the farming community. There's a real tendency to kind of -- the first reaction to anything new is paranoia, and that's certainly the case with big data. Everybody wants to know what can go wrong with this. Then they need to be kind of pulled along to explain what are the benefits of having all this data out there. There are concerns with data breaches. I mean you see it all the time with different government databases, in different companies like Target with the credit card breaches. You have data breaches, and unlike others, I mean there are risks with anything that includes financial data, but here these are data breaches that

have geospatial data attached to them. You can identify a farm with it.

There are also concerns about what happens if you're a landowner and you have data from your property or from your land, what happens to it if it's sold to a third party. You know, who is getting that, what can they do with it? I think there are going to be in terms of regulatory enforcement kind of using big data. What's to stop it if you sign up with one of the CAS programs? What's to stop the USDA from getting that data and using that to enforce Swampbuster, or the EPA from enforcing the Clean Water Act? Then there's also concern that people could use this information for market manipulation. Like I said, it's kind of like my demonstration of the farmers -- paranoia in the farming community. Does anybody in this room have any experience drafting up contracts kind of dealing with big data? You do. I'll be honest, I haven't done one for a producer, but I've kind of been in reading up on it, looking at it, there are several considerations in terms of drafting out these contracts. It kind of depends on who your client is with this.

Some of the considerations are what's the farmer's right, what's the -- the ag technology provider is kind of the term that's used for the, say, if you're using the CAS program or the Monsanto program. If you're getting data coming in from your friends or coming in from your yield monitors, you know, there's usually some type of party that provides the technological services behind that. There's real concern about what are everybody's rights under these arrangements. The ones that I take a look at kind of from the farmer's perspective, the concerns that I've noticed are will the farmer have notice or some type of prior notification before data is collected. That's something that I think I pick up more from like the cell phone world or

whatnot. I have an iPhone and I'm hooked to it, and it's killing me to be fifteen feet away from it right now. I mean you have all these apps or recording information on the background. They know how many times you open it a day, when you check it, how often you check it, how often you look at it. They're collecting a lot of information that you don't necessarily think is maybe germane to like Instagram, to know every single thing about what I do. I mean they're selling that information. I think there's also probably a market for that with some of this technology that you have on combines or planters or whatnot where it may not necessarily be something that's intuitive, but there could be some value from that in terms of like how often do you check this monitor, how often are you -- you know, things that are recording kind of in the background. I think that's a concern.

I think a lot of times producers want to know kind of what data they have of theirs that will be collected and be sent on and how will that data be used. Is there a limitation on the third parties or the types of third parties that can receive it? Is it something that could be passed on to government entities? Is it something that could be used for purposes beyond kind of agricultural production or making your farm more efficient? I will say -- like I said, I haven't contracted these, but unfortunately, it's kind of like a lot of things, there's usually not a lot of room for negotiations in terms of an individual farmer is probably presented with a form contract. It's still a consideration in terms of who owns it, what can they -- is there any way to like claw back this information once it's out there. So the contract issue, I think, is the most important. I think the one that people think is the most interesting, kind of getting back to people's paranoia, is kind of the regulatory considerations. So we have some data privacy laws out there. Probably if anybody has family or friends that work

in the health profession, you hear a lot about HIPAA. There are a lot of protections for like your medical information. It's also the Electronic Communications Privacy Act, which is more broad and general in terms of just regular electronic communications, so emails. There's nothing out there that's specific to farm data, but it would still fall under the Electronic Communications Privacy Act. Some of the groups that could use this information; the USDA, and of course, there's the Swampbuster, and the Swampbuster regulation, they also have a role in making sure that crop insurance isn't taken advantage of, so they do fraud monitoring. The EPA uses the Clean Water Act. I mean there are a lot of issues in terms of wetlands, and then kind of the same thing for state agencies.

There is, I think, an issue with the Fourth Amendment that maybe people aren't thinking of in terms of, I mean, obviously, the Fourth Amendment protects against unreasonable searches and seizures, and with this information going onto the cloud, that's really where you have Fourth Amendment issues that crop up. Because the Fourth Amendment hinges on this reasonable expectation of privacy. But even if you have what you think is an expectation of privacy in your data, or if your client thinks they have a reasonable expectation of privacy in their data, they're still sharing it with someone else, it's still going out onto the cloud.

If you have electronic communications that are held on a hard drive, that requires a warrant, which requires a higher burden to achieve. But if you have something that goes out onto a cloud or cloud data, kind of think of it in kind of this transition --I know when I was in law school, we initially started out using Outlook. I still use Outlook in the office, but actually a school switch halfway through to I partnering with Gmail. So it used to be the school sent an

email, and when Outlook would actually pull the email off of the school server, it was no longer on the school server, and so that email went into my hard drive, whereas with gmail everything stays on the server or stays in the cloud.

The Electronic Communications Privacy Act was written back when everybody had Outlook and pulled emails off the server. And so anything that's left on a server or left in the cloud for more than a hundred and eighty days is a lot easier to get at. You don't have to have a search warrant. You can get a court order, you can get a subpoena, and so this is something -- if you do have information that is out there in the cloud, that is something where it would be easier for the government to get that than if it was on a hard drive. I say all this, I don't really see it being an issue right now, but it's good red meat if you're into paranoia. I'll move to drones real quick. I do think I'm going to run out of time, which is fine.

The real issue with drones, I've been following it for about three years now. The real question has been are drones legal? My answer to it has changed a few different times, but the answer is now, yes. It hasn't always been, and I think it's like September last year I could start saying, yes. The agency has kind of struggled to keep up with the technology in terms of under what circumstances are they going to allow commercial uses of drones.

Now, the University of Tennessee and other fine research institutions have had a pass on this because there has been an exception for research in this all along. But kind of the origins of this idea of legalizing commercial drones actually started around 2007, but, in 2012, made it into statute. Congress ordered the FAA, by September 30th of this year, to integrate commercial drones into national airspace. They haven't done that, but they wouldn't be the

first government agency that's missed a deadline, but they have started a rule making process and they have also established an exemption process to allow some commercial operators to go into that.

When I say there's been a question about whether drones have been legal or not, there hasn't been a lot of data points on it. You've basically had the agency not really wanting to enforce against these small farmers, but they don't want a lot of people going out there because you're sharing the airspace with crop dusters and manned aircraft. The one data point we do have was, they went after a fellow, who was flying actually at the University of Virginia, and they've posted video of it. To be honest and frank, he was flying like a jackass, like that's how you have to fly to get the government to finally come after you. It made for a cool video, but he was flying near all these buildings super close, flying near statues, flying near people, flying in tunnels, flying over cars. I haven't actually operated one of these, but I've been at a few field days. Field day is where you have experts who are trying to show off their equipment. I've seen multiple really expensive drones just fall out of the sky and break, so it's not like it's super safe to fly these things around people.

The FAA brought a civil penalty against this guy; his name is Pirker, for reckless operation of an aircraft. Pirker and his attorneys actually challenged the case on the idea that a drone, meaning like a small remote controlled plane, or in this case rotocopter, was not actually an aircraft. The angle that they took on it was that the FAA's definition of an aircraft was too broad. They said because the definition was any contrivance invented, used or designed to navigate or fly in the air, the argument that they made was that this is too broad; this covers paper airplanes. It actually worked at the ALJ level, which I've said, you



know, this is ridiculous, this falls under more the definition of model aircraft. It was appealed to the NTSB, the National Transportation Safety Board, and they basically said, yeah, our definition is broad, and if we want to get into regulating paper aircraft -- paper planes, we will. Until then, we think your drone is an aircraft, and they did prevail. The upshot of that is the FAA does have authority over these drones, which was kind of up in the air before this case.

I think I have three minutes, so I'm going to try to pack in what I think is just more interesting to know, because they are regulating drones as aircraft. They basically have to fall under the same kind of parameters that you do for like a 747 in terms of kind of the different boxes that they have to check off even though you're flying like a remote controlled plane over farm fields, but you have to have operator qualifications. You have to have aircraft qualifications. Typically, you have to have an airworthiness certificate. I guess the one big distinction with drones is that they are exempt from having to produce that, because I think if you're manufacturing a real airplane, an air worthiness certificate takes anywhere from six to eighteen months or three years or something like that. The rapid pace of technology is just going too fast. That's the one big difference from the 747. Then you have to have operational kind of parameters in terms of what airspace you can use, what type of communications capabilities you have to have.

Real quick, the operator, the one big difference is under the proposed rules which are expected to go into effect this next spring, you're not required to have a pilot's license. You do have to take a test, but not the same type of test that you would have to take to fly an actual plane. That's different from what's being allowed now under these

conditional operating permits or exemptions. I don't know, when you all operate, do you have to have a licensed pilot?

MR. BUSCHERMOHLE: You have to have a licensed pilot and an observer that's passed a class two physical exam. We've got two operations that we can fly at now: our research station at Milan and Ames Plantation. That's the only place the University of Tennessee and my group can fly legally.

MR. DILLARD: Yes. So, yes, that's really held back a lot of the innovation on this just because you do have kind of that restriction. That's going to go away. I mean they would still have to have some type of qualifications test, but you aren't going to have to have a pilot.

In terms of the operational requirements, I'll end on this. One of the things that's in the rule is kind of the horizontal limitations are going to be what's known as unassisted line of sight. So whoever the operator is has to at all times be capable of seeing where the aircraft is so you can't fly five miles around. It also has to be below 500 ft. ceilings. These, to like a casual observer, sound like pretty reasonable. You don't want remote controlled aircraft like this going way off past where you can see it. I represent the National Association of Wheat Growers on this matter, and you have a lot of people out in Idaho or Washington where they don't see an issue with flying one of these things ten miles away, because what are they going to hit? It's just a wheat field. So it does actually slow them down, the sight. The sight limitations and the height limitations actually make it to where they have really a lot of challenges in terms of covering a substantial amount of ground in a day. If you have a twenty thousand acre wheat operation and want to take observations of your property, it's going to

take you three or four days just because you're having to pick up and move. So that's one thing.

I'll close in terms of where the technology is heading on this. In my involvement with the Wheat Growers, you end up at these coalition meetings in D.C. Right now, you have a lot of farm groups and a lot of the like input suppliers, but you are also having Boeing and Lockheed-Martin, and these companies that traditionally are not involved in the ag space showing up. I think eventually you are going to have long-range drone flights that are used to gather a tremendous amount of information out there. It's an exciting field. Any questions?

UNIDENTIFIED SPEAKER: Just to do a little clarification, you had indicated that UT and other universities were exempt from these requirements, but I guess we don't feel very exempt because we have to get a COA to fly.

MR. DILLARD: Yes. You're not exempt from the COA requirements.

UNIDENTIFIED SPEAKER: They're pretty intrusive requirements. You have to have a pilot's license, and you have to pass physicals. It takes us how many months to get one, Dr. Buschermohle?

MR. BUSCHERMOHLE: It took us about six months to get our first one, and then the second one, it's taken much longer because the FAA finally allowed these 333 exemptions. We do have one commercial operation in Tennessee now that's pretty much able to fly pretty much all of West Tennessee. When they opened that up, it flooded them with the amount of applications, and so it slowed everything down.

UNIDENTIFIED SPEAKER: Our position is that you may not fly if you're an employee unless you have a COA.

MR. DILLARD: Yes. That's an interesting point. I should say all of this discussion has been looking at the national level, but one of the things that they're mentioning, these certificates of authorization. So one of the things that you have to have to fly is approval from your local air traffic controller, and it's known as a certificate of authorization. That's really where we're seeing a lot of kind of regional disparities.

UNIDENTIFIED SPEAKER: It's a federal requirement now you can't fly anything greater than Class E airspace.

MR. BUSCHERMOHLE: They've probably got a 333 exemption.

UNIDENTIFIED SPEAKER: But aren't they specific for aeronautical research, not agriculture research; isn't that also correct?

MR. DILLARD: You know more than I do I think.

UNIDENTIFIED SPEAKER: We've got folks chomping at the bit to go do work with drones, and we spent a long time with legal here at UT trying to be as permissive as we could, because we like to stay ahead of our farmers in this technology. At least our interpretation through legal is what we were allowed to do is that we may not fly unless we have a COA. The COA is not, I guess, as big a deal, except how many licensed pilots do you have in your organization is where you really get slowed down.

MR. DILLARD: Yes. It's certainly a situation where the government is way behind the technology, and it doesn't have to be that way. Japan, Canada, and the EU are all leaps and bounds ahead of us in terms of having regulations in place to kind of allow and promote this technology. Now, I think we're catching up very quickly, but it's still very frustrating I think to the people who are out there in the field.

MR. SHANAHAN: Thank you.



**Representing Agricultural Enterprises: Ethical  
Concerns**

*John Dillard*<sup>10</sup>

MS. VAUGHT: John Dillard is going to join us again, and he's going to give us a look at professional responsibility for lawyers who represent agricultural clients. As an attorney in Washington who represents agricultural clients himself, he has a lot of expertise in this area. So everybody welcome back John.

MR. DILLARD: Thank you. . . .

. . . .

MR. DILLARD: All right. [I] run into ethics issues from time to time, so kind of if -- how I look at it, instead of going into one particular issue, what are the kind of three things, if I was talking to someone who kind of dabbled or was thinking about getting into, like, dealing with kind of food and ag clients, what are the three things I would look for, that I would take into consideration. I think the top one, the number one thing is competence, because you are looking at kind of a specialized area of the law. I think that's important, and I think also kind of understanding a lot of times what we deal with is kind of the different rules around multi-jurisdictional practice, kind of what's allowed with that.

Then something you hope you never have to deal with, but you need to keep in mind, is kind of when to tell on your client. And that's not a good way to kind of get a lot of clients, is kind of letting them know you're available to tell on them. I try not to, I hope it's not a secret. I hope that I -- I'm not but so far into my legal practice, I'm

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<sup>10</sup> John Dillard, Associate Attorney, OFW Law in Washington, D.C.

relatively recent out of school and kind of new to the practice and still kind of in the part of my career where I'm trying to get a lot of clients and trying to bring in a lot of clients, and I get, like kind of on here, like, super excited whenever a new client comes in. There's a range of emotions, but you know, you're trying to bring in new business, and there's a real risk, though, of making sure you can actually handle what you bring in. And so it's very kind of elementary, but I think one of the most important professional rules to remember is Rule 1.1, which covers competence. You can read it, won't read it for you, but basically if you take on a case, you need to have kind of the skill and knowledge or the ability to acquire the skill and knowledge relatively easily to handle your case.

Now, how we and I use to kind of demonstrate, like, why is a challenge with practicing, like, agricultural law is kind of the breadth of what could be considered agricultural law. Now, this is actually a graphic that I came up -- I got to be an ag teacher for a day at my old high school, so I was super excited about that. I talked to them about agricultural law, and I realized I was the only one there excited about agricultural law. But I got this graphic out of it. The way kind of how I think of it is, is, you know, agricultural law, you have all these different kind of areas of the law that are very different from each other, you know, ranging from, like, very transactional stuff, like real estate or wills or contracts, you know, but then you also have criminal law and international law and food safety matters, where it kind of runs the gamut and agricultural law is just this little subset of, like, all these different little discrete areas of the law that are kind of unified in that, you know, you have clients that are in the production of food or fiber or forest products. It can be really challenging if you kind of hold yourself out as "I'm an agricultural lawyer." You know, you get hit with a lot of different -- especially if you're, like,



listed online or whatnot, you get hit with a lot of different questions, and there's no way to have kind of competence in all these kind of different fields.

An example that I think we encounter at the firm most commonly -- I have a partner that has, like, just this very specialized practice in representing, like, vendors that use the SNAP program, the EBT, for what used to be the food stamp program. We get calls from all across the country and, just, I don't know what he does. But, you know, we get these calls in from across the country, and it's usually people and they're calling us, they found him online. They call us after they've spent, you know, five grand or ten grand on their local attorney. Then you say, "Well, this is how much it'll cost to, like, solve the problem." It's, like, "Well, here's the issue: I already spent that with the guy, and most of what I got was your phone number." I mean, that's really an issue that we run into a lot, so kind of the considerations for, you know, making sure that you have the competence is kind of the legal knowledge and skill. I mean, it's not like most areas of the law are rocket science. You can bring yourself up to speed on something, but you just need to be cognizant of kind of your limitations.

I know there are a lot of egos amongst practitioners. I mean, the general answer I have to any question is, like, "Yes is the answer. Now what's the question?" It's, you know, taking a step back and kind of recognizing, you know, this is what I can handle. I think that's really -- you know, if it's a simple, like, property dispute or neighbor dispute or something, you know, it's something pretty much anybody with a bar number could handle. But it's understanding kind of when something gets to a level where maybe you need to bring in some help or bring in

some type or invest some time in kind of bringing yourself up to speed on something.

Now, why it's important, it kind of goes back to, you know, we get the calls from the people; it's, like, "Well, I already spent the five or ten grand I had lying around, on the other attorney." You have your client's livelihood at stake in many cases, and a lot of times, I mean, one of the kind of facts of life when you're in this profession, especially if you're dealing with farmers, is you don't, or you aren't dealing with -- oftentimes you aren't dealing people that have a lot of financial reserves to kind of play with. You don't have somebody that can kind of absorb a big hit all the time. So it's very important to make sure that you deliver value for the services that you provide because they have oftentimes a limited budget for purchasing legal services.

I think another thing, why it's important for agriculture, is, you know, for a, you know, a very old profession, I mean, one of the old -- you know, something that, you know, this country is built on, there's a really complex set of regulations that kind of run through the food and ag industry. You have all kinds of -- like, I challenge you to try to import 10 pounds of cheese into this country without three lawyers. I've tried; I had to get two more lawyers.

You know, there's -- just because we have a lot of these new deal programs they're still kicking around, you have different state laws that don't always, you know, make sense or whatnot. And so it is something where it's very complex. There are also consequences for the practitioner. Malpractice is a real concern, as it is in any type of area of the law. Getting any type of, you know, ineffective assistance of counsel, that has impacts on your legal

malpractice. I mean, it has impacts. You could get sued, and oftentimes if you're in-house counsel, you have fiduciary responsibilities to your clients. And so it's very important, you know, not only for the clients, but also for kind of covering yourself. It's competence, and this is intuitive, is often is more of a concern for new lawyers, especially if you're a solo practitioner, just because you're kind of getting into the field. And supervision can certainly help out. That's not to say there aren't many great solo practitioners out there that started out on their own, but it is a concern. They do have to spend or invest the time in bringing themselves up to speed.

Another consideration for many people that are, you know, above my pay grade is, you know, senior attorneys are also held responsible for the acts of their junior attorneys. You know, firms have -- I have of a case cited to here, you know, where a firm was held liable, or a supervisor was held liable, for a firm's kind of mishandling of a case, even though everything could be attributed, the actual mishandling took place, in this particular issue it was an adoption case, where the firm had, like, an outlying branch, and it was associated with the firm, but it had one attorney, and the attorney was straight out of law school. And the firm had kind of the sink-or-swim approach to their associates.

Now, I know that's a pretty common approach in the field or in private practice, but it is an issue where kind of senior attorneys can be held liable. And so kind of to watch out for that or to help out with that, the best remedy is to make sure that there's some type of supervision program in place, some type of -- it doesn't have to be super formal, but, you know, checking in, making sure that you're making yourself available for junior attorneys, kind of checking in on their projects, knowing what they're going

on. If you're a solo practitioner, seeking mentors, you know, it could be somebody that you respect or somebody that you know has experience in something, kind of running that back with them.

Another thing, another remedy to kind of make sure that you're up to speed on competence is self-education, you know, taking some time and investing in yourself. Under the bar rules in most states you're not allowed to do that on the client's dime. It's also generally bad business when they hear that you're just learning how to do something and they're paying for it, so that's kind of how you deal with that. Another kind of issue -- and this goes back to the example I gave the example of the food stamp vendors, but if you do encounter an area of the law, understanding when you're unfamiliar with it under Rule 1.1, you're required to kind of recognize when something goes beyond your level of expertise. You can't claim lack of experience in a particular area of the law as a defense to any type of allegation of incompetent representation because, basically, you can't say, "Look, this is complicated." This is a common issue, the unfamiliarity. It is a common issue, especially with general practitioners, and there's no -- you know, with medical malpractice there -- it does take into consideration kind of the size of the town or the medical market, so to speak, but there's not the same type of consideration given for attorneys in terms of if you're in a small town or if you're a general practitioner. That's something to keep in mind. It's based on what would a reasonable practitioner do.

In terms of if you are dealing with some type of area of the law that you're unfamiliar with, and we do this oftentimes, and sometimes we get brought in in terms of being a, like, food and ag niche firm. We'll oftentimes get brought in from, like, a bigger firm that maybe doesn't have

kind of specialized or, like, niche knowledge, but you can associate with an experienced co-counsel, and that can be really valuable in terms of bringing in a different perspective. Also, like the solution to lot of these things, is just kind of self-educate. You know, invest some time in learning. One issue in particular -- and you see this a lot with administrative matters as well as litigation -- is paying attention, especially if you're practicing -- like say you're admitted *pro hac vice* in a different state -- is making sure you pay attention to kind of the procedural requirements, or if, in addition to being in another state, in front of a government agency, paying attention to the procedural requirements and kind of understanding, you know, the different forms that need to be submitted, the different deadlines. That's really where you can do your client a big disservice, failing to follow that type of protocol.

The next one . . . is the multi-jurisdictional practice. And so if you pick up any type of specialty in, like, this field, like, the food and ag law, a lot of times you're going to get kind of called in to cases kind of across the country because there's only so many -- there's only so many big cases. There's only so many people that kind of invest the time to build up that type of expertise. It's kind of a fact of life that you're oftentimes going to have to cross into -- or practice in another jurisdiction outside of where you're licensed. And so one of the rules is, obviously -- and your bar is usually pretty vigilant about enforcing it, but you can't practice outside of a jurisdiction that you're licensed or assist someone else in doing so. These are kind of the considerations with dealing with multi-jurisdictional practice, the absolute most important one is to know when to seek admission *pro hac vice*, or I'm not very good with the Latin pronunciation, so however you would say that, think of that. Also abstain from -- and this one is more common sense for the most part -- but abstain from

advertising or holding yourself out as licensed to practice in a foreign jurisdiction. Then, if you do *pro hac* into a case, make sure that you associate with competent local counsel or a local co-counsel to kind of assist you with making sure you don't run afoul of any of the local procedural issues.

At the federal level, it's a little bit different, because a lot of times you'll have federal agencies that you'll practice in front of if you're dealing with ag and food law. Q lot of times there'll be FDA or USDA that you'll find yourself in front of, so it's important to know when you need to actually seek *pro hac* admission. If you're practicing in front of a federal agency, this is not required. If you have, say, a GPSA issue with, like, a livestock market or an AMS issue with some type of, like, produce-marketing something, produce-marketing issue or an FDA, like a recall issue or some type of violation, you don't need to have admission *pro hac vice* in that case because you're - - anybody with a bar license can practice in front of the federal agencies, but when you get into federal courts -- like, let's say your challenge -- let's say you don't like the results -- or FDA doesn't like the results of a particular notice of violation issue and it ends up being appealed to the federal courts. Then obviously if it's in a state outside of where you're licensed to practice, you do need to seek *pro hac* admission and find a local co-counsel.

Corporate or government practice, different states vary, but it's important here as well. It's kind of a running theme. Know when to seek *pro hac* admission. I speak of this mostly with knowledge of Virginia because that's where I'm licensed, but I know it's pretty common elsewhere. If you're, say, with a company that's located in a state that you're not licensed in, in general if you're in-house counsel you can provide legal services for your employer in the jurisdiction even if you're not barred there.

That generally doesn't extend -- or that certainly doesn't extend to well, like, you know, Joe at work, his son got a DUI, and you just want to go into court to help him out with that. If you're not licensed, that's clearly -- clearly not allowed. If you are in-house counsel and not barred in a state, many states require registration. Even if you're not a member of their bar, you do have to let them know hey, I'm working with such and such company, providing legal services in this state.

If you're -- in terms of when you -- so I've been talking about, like, when to seek admission *pro hac vice*, and so kind of finally getting around to that, you can -- you have to do it if you're representing a client before a court or a state administrative agency if it's in a matter that you're not -- in a state that you're not barred in. It generally has to be a specific matter, so in terms of, like, from a practical standpoint, when you're filling out an application to do it, you have to say, like, what's the case number. So if you're just kind of working on maybe getting a case going, it's kind of hard to -- you can't do that because you can't point to a specific matter. Kind of one of the practical -- and so kind of along those lines you're generally permitted to engage in some type of conduct in anticipation of a litigation if you -- so long as you reasonably expect to be temporarily admitted, so admitted for that case.

Like I said, if you're thinking about filing a lawsuit or if you know a lawsuit is going to be filed and you think it's reasonable that you would be temporarily admitted, you can show up in the state, you can start doing some type of work on that, and then as soon as there is an actual case number or an actual matter, an actual controversy in motion, that's when you can seek admission, *seek pro hac* admission. Oftentimes states will limit the number of *pro hac* cases that you can participate in. I know, for example, I

think Indiana, I think, caps it out at about five. That's a state we end up in a lot. Also, because we end up in Indiana a lot and have gotten -- had one attorney get bitten by this, you need to be very aware of your renewal requirements, which are usually annual. If you do not comply or -- you know, for example, in most of the states where we are, if we're doing something *pro hac*, it's usually end of the calendar year you have to reregister. If you forget to do that, that causes problems because you're then technically practicing without a license in the state.

Now, in a lot of cases, you know, you may have one attorney from a firm that's, say, you know, out there actually litigating, they are admitted *pro hoc*, but you have two or three people back at the office or out there kind of helping in the field. Subordinate attorneys are generally not required to seek *pro hac* admission so long as they have a rather limited role. If they're conducting research, meeting with clients, and interviewing witnesses, they're generally not required to have *pro hac* admission. It really just depends. Yeah, so that's kind of -- the important thing is to make sure you kind of remember it as you go through. Really, if you find yourself in this situation, really pay attention to kind of the procedural requirements, which are oftentimes applied very strictly. We are moving along quicker than I thought, so there'll be more time for hypos.

The most uncomfortable topic to kind of consider is, you know, when to tell on your clients because, I mean, the thing is, under our Constitution everybody is entitled to at least, even the biggest -- worst person in the world is entitled to, you know, one best friend or one person in their corner, and that's their attorney. And I take that role very seriously. . . . [I]t's a great responsibility, but, you know, at the same time, you know, while food and agriculture are generally positive, it seems like very benign fields --



everybody feels good about food, and everybody feels good about agriculture -- but the fact of the matter is, is you're also dealing with, you know, with clients that, if they screw something up, people can die. That's not something that you see in every field.

You know, real estate transactions might be big dollars, but usually nobody is dying. But if you screw up in food manufacturing or food processing or, you know, even something at the farm level, people can die. And so it's very important to kind of remember, even though you think of it more in the criminal context in terms of, you know, "Okay. When do I tell on my client?" like, it is important to consider also within the food and agriculture world as well. The general rule is that a lawyer may reveal -- and it's important the model rules are "may reveal," not "shall reveal" -- information related to the representation of a client to the extent that the lawyer reasonably believes it's necessary to prevent certain death or substantial bodily harm or to prevent the client from committing a crime or fraud that could result in some type of financial damage that -- that's basically the lawyer's services have been used to help to kind of perpetuate. And so the big thing is certain death, substantial injury, or "Have I been kind of used as a tool to help carry out some big fraud?"

As I discussed and actually Cari -- Cari talked on this earlier today in terms of the example of Peanut Corporation of America, but just to kind of illustrate what we're dealing with when I say that, our clients can kill people, is if we look -- and I have three examples here from relatively recent. You had a candy apple case that was this year where seven people died. Peanut Corporation of America, you had nine people die. The Jenson brothers in Colorado, I think you had 33 people die from contaminated -- I believe it was melons or cantaloupes, so in addition to

killing or making people very sick, you also have to consider --take into consideration, like, the impact that this has on the food and agriculture industry in terms of, you know, recalls or kind of loss of consumer trust can devastate certain industries. I mean, look at, you know, whenever there's a spinach recall, you know, nobody eats spinach for three months, even if, you know, most of the spinach sources wouldn't be affected. And so that's another consideration out there.

As I mentioned, kind of going back to the text, the model rules say that a lawyer may reveal information. And that's the case in Tennessee. That's the case in almost every state. I kind of have several here in the Southeast that I pulled out. One notable exception is the District of Columbia, which is where I'm co-barred. DC does require disclosure in the event that there's going to be some type of injury or death resulting from a client. One of the things to consider is in terms of if you're dealing with some type of physical harm, so either death or a substantial injury is that this is perspective only. You're trying to prevent something from happening, so only -- you can only disclose information about your client to the extent that it would prevent a future death or a future injury. Obviously, you cannot -- or it should be obvious that you can't disclose something about what they did in the past because they've told you that in confidence. You aren't going to change anything, as harsh as that may seem.

Another thing to remember here is that this provision that allows you to disclose information about your client, there's no limitation to kind of the scope of your representation. So in other words, if you're, like, doing a trust for somebody or, you know, helping them come up with, like, a farm transition program, they're kind of like, you know, "I think this would go easier if my uncle wasn't

still alive. I think I'm going to kill him." You know, you can't say, "Well, I'm just working on the trust," like, "I just want to deal with that." But, you know, that's not something -- now, under Tennessee law you would still not be required to disclose that, but nobody would come back to you later if you did disclose that and say, "Well, you're only supposed to talk about the trust, and he wasn't talking about the trust." So that's kind of on special considerations there.

The substantial financial injury matter is a little bit different. You can obviously disclose kind of prospective injuries. So if it's, like, "Look, this guy is going to rip you off or is trying to rip somebody off. I want to stop him," that's one thing. You can also disclose to mitigate or rectify past fraud. So, I mean, if it's a situation where you discover, like, "Okay. My client embezzled, like, \$3 million. He still has it, but he's getting ready to spend it," like, you know, you can step in even though the injury has already been done. Unlike, you know, somebody's substantial injury or somebody's death, you can actually rectify if money goes missing. So that's why there's a difference there, but in this case it is limited to the scope of the representation. So if you're, like, if you're, like, doing, like, somebody's DUI or something and they're, like, "Oh, yeah, by the way, I'm going to rip off, like, the crop insurance people. Like, I'm just going to, like, send them -- you know, I've kind of, like, set this up, and I'm going to rip them off and make a couple of extra -- extra couple hundred thousand dollars." That's not something you would be allowed to disclose because it's outside of the scope of your representation. It's not something that your legal services have been used in the furtherance of. And another thing is to kind of consider the disclosure is only allowed if the attorney basically would be an accessory to the crime or fraud.

As an example . . . [t]o kind of discuss, you know, the example that sticks out the most -- and unfortunately -- or fortunately for, like, the legal profession but unfortunately, like, there were no lawyers brought into this, like, you know -- and a lot of people died that didn't have to. . . . It is basically a situation where the management at this company purposely concealed, you know, these salmonella results, and they would ship -- they knew they had a salmonella problem. They started shipping product back before they got test results. They used -- they kind of fudged some test results to get things down the line. The thing is, if a lawyer had been brought into this situation, it would certainly be one of those rare occasions, very rare occasions where it would be appropriate for a practitioner to disclose his client's activities, hopefully. I mean, that's why that rule is in place, is to kind of save -- make sure that the kind of oath of confidence -- or the confidence that you have in your client doesn't override, like, the kind of policy of keeping people from being injured or being hurt.

So kind of remedies or kind of practice pointers in dealing with this, if you do have a client that is looking to do something wrong, obviously you want to discourage. Your job is to provide them legal advice, so you want to discourage your client from any type of criminal or fraudulent activities. You want to encourage your client themselves to disclose something. One remedy is if you disagree with what the client is doing or kind of the road that the client is taking, you do what's called a noisy withdrawal. That's kind of like pornography in terms of -- I don't know how you describe a noisy withdrawal, but you can -- when you see it, you see it. It's taking some type of action, like, calling attention to, like, you know, "I am leaving. I am no longer providing legal services."

In the very rare instance you did feel like you had an obligation to disclose some type of information, it's important to only divulge what is necessary to either save somebody's life or prevent somebody from being injured. If possible, make anonymous disclosures. You know, in practice how easy is that to do? I, you know, fortunately don't have a lot of experience with that. In the corporate setting it's a little bit different in terms of kind of the financial matters, under the ethical rules, and also Sarbanes-Oxley is kind of in statute. The idea is you need to promote -- or raise issues continually up the ladder to kind of satisfy your ethical obligations.

The example I have here is taking a matter to the general counsel. If the general counsel does nothing about it, take it to the CEO of the company. If the highest level of management doesn't do anything about it, under Sarbanes-Oxley you're required to take it to the board of directors, so there's that. . . .

[The remainder of the presentation consisted of audience discussion of hypothetical situations raising ethics issues and is not set out here.]

MS. VAUGHT: On behalf of the *Tennessee Journal of Law & Policy* and the Center for Advocacy and Dispute Resolution, I just want to thank you for attending today. Some of the issues that we talked about are in a constant changing period, and we saw that today. Actually, the Sixth Circuit issued a national stay on Waters of the United States rule that we talked about earlier this morning, so that's already changed. So we see a lot of these things are really popular in the law today.

The Journal was excited to host this today, and we hope you've enjoyed hearing from our panelists and

speakers. At this time I would like to thank the members of the Journal who helped: Will Mazzota, Dan Whitaker, Ryan Shanahan, Steffen, Sean, and Joseph. Additionally, we had help from the CLE coordinator for the school, Micki Fox with the *Tennessee Law Review*. The last two people I want to thank are Jenny Lackey, with the Center for Advocacy and Dispute Resolution, and our faculty adviser, Penny White. At this time I'm going to let Steffen close us out. And thanks for coming.

MS. PELLETIER: I'll keep this short. I'm Steffen Pelletier, I'm the Editor-in-Chief of the *Tennessee Journal of Law & Policy*. Before we close out today, we owe a huge thank you to Laura for putting together today's symposium. She has worked for nearly seven months towards the success of this symposium. It has certainly been about issues that she is extremely passionate about, and she pulled together a great panel of speakers. So just a little token of our appreciation, Laura, we'd like to say thank you so much for all you've done. With that, that concludes the symposium. Save travels, and thank you all for coming.

