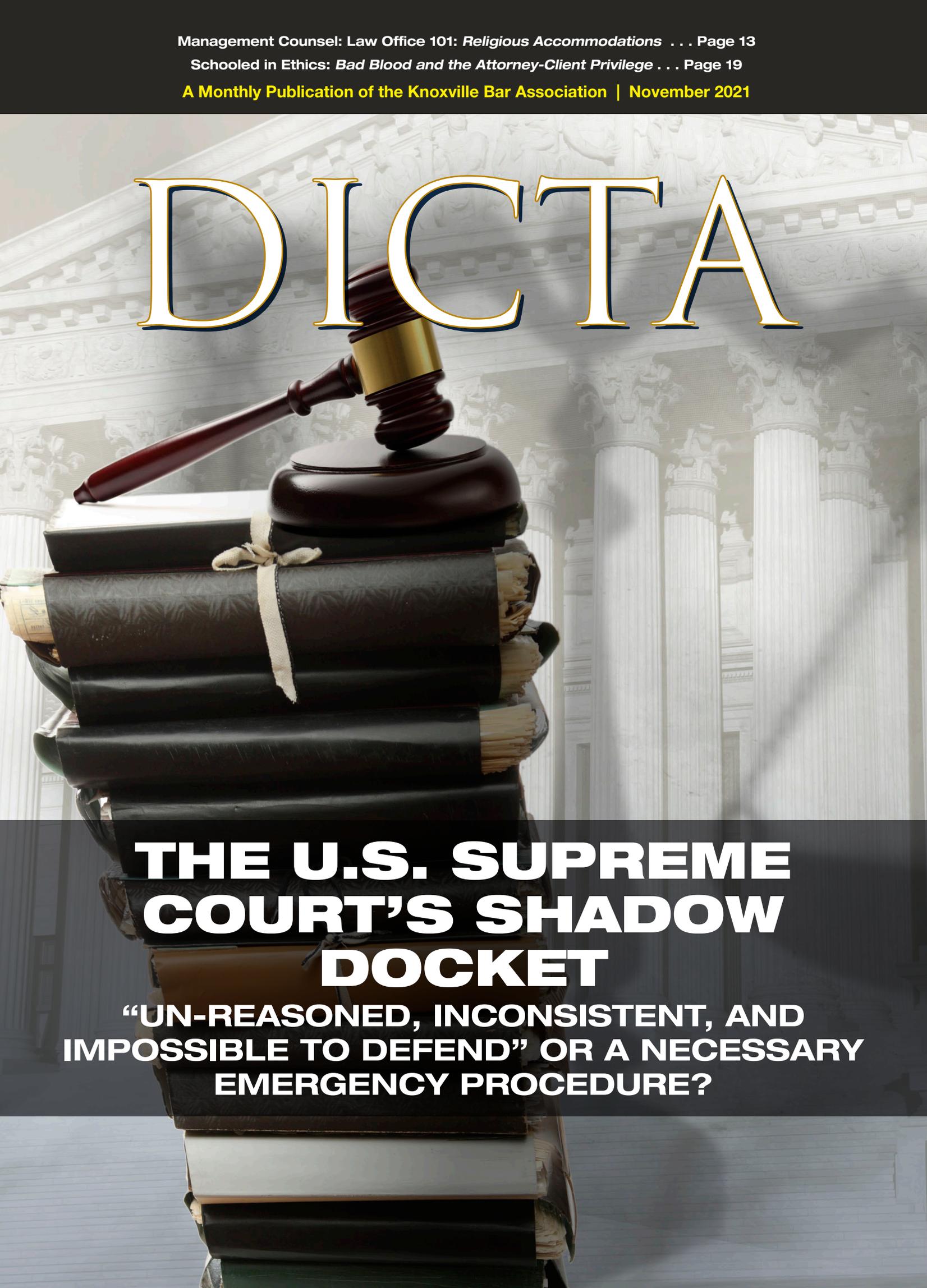


# DICTA



## **THE U.S. SUPREME COURT'S SHADOW DOCKET**

**“UN-REASONED, INCONSISTENT, AND  
IMPOSSIBLE TO DEFEND” OR A NECESSARY  
EMERGENCY PROCEDURE?**



**By: Eddy R. Smith**

*Kennerly, Montgomery & Finley, P.C.*

# LIFE (AND YOUR PRACTICE) IS FRAGILE

If the COVID-19 pandemic has taught us anything, it is that life is fragile. Most of us know of (and some knew intimately) someone who has died within the past 18 months, many of those folks under age 65. Lawyers are not immune to the fragility of life, and the tragedy of an early death creates additional problems when a lawyer dies without a sufficient succession plan.

For lawyers with colleagues who can absorb clients and existing work, the worst outcome for those colleagues might be a several-month, unanticipated, significant increase in workload (think canceled vacation plans and missed kids' activities). For solo and small firm attorneys, an unexpected death or disability can create a catastrophe for clients, the local bar, and the lawyer's family.

The stakes are high. What happens to clients and their critical legal matters? How will your practice continue, at least long enough to handle the transition? How is staff comforted, assisted and retained when a key lawyer/employer is suddenly out of the picture? How do you protect and provide for your family?

Several KBA members have been called upon to close a law practice upon the death of a solo or small firm practitioner. Fiona Hill and Tom Ramsey closed the practice of colleague Jack Piper, who died suddenly in the office.

Scott Hurley (with another attorney) was appointed by Judge Harold Wimberly to wind up a deceased attorney's practice. All three were quite generous with their time to talk about their experiences, providing several principles and lessons for those in law practice.

There is an "unbelievable" amount of work to close another attorney's practice (for which serving attorneys likely will be paid nothing or significantly less than their hourly rates). The task is significantly harder when no other attorneys know the clients or the projects; the attorney does not keep detailed notes regarding the status of legal work; billing is allowed to fall behind, sometimes with significant amounts in the client trust account without sufficient explanation of the client's and firm's shares; and there are no staff members who know what the attorney knew. In short, the attorney kept too much in his head without written documentation and knowledge by key personnel.

Scott was so impressed by the difficulties of his situation that he resolved to plan better for his practice. He created a law firm contingency plan, communicated the plan to staff and family, and *rehearsed* the plan with them. Such a plan should address notifying clients, courts, opposing counsel and co-counsel, the Board of Professional Responsibility, experts, vendors, insurance carriers (life, health, professional liability), and financial institutions; handling client files (transfers within the firm, if possible, and referrals to other counsel where necessary);

addressing pending deadlines (motions for stays, extensions of time and continuance); attending to law firm financial matters (billing statements to clients and prompt action on receivables and payables); and paying and retaining staff.

As stated in prior articles and CLE programs, there are quality resources at your disposal. The KBA and ABA have significant online resources.<sup>1</sup> The KBA's "Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death" provides detailed step-by-step instructions addressing appointing another attorney as receiver to take control of your practice, naming an authorized signer to take control of your client trust account (an urgent matter to clients awaiting recoveries in the law firm's possession), special considerations in

the death of a solo practitioner, and answers to frequently asked questions regarding sensitive matters those closing your practice might encounter. The Guide provides checklists for your own succession planning, closing another attorney's practice, closing your own office, and closing your trust accounts.

The Guide also includes many sample agreements and document language, such as long-form and short-form agreements with another attorney to close your practice, advance consent to close your practice, a limited power of attorney to handle firm bank accounts and

safe deposit boxes, a letter of understanding regarding a trusted person to keep the power of attorney until needed, notices to the Tennessee BPR of designated receiver/assisting attorney and authorized account signer, provisions for your will regarding closing your practice, letters to clients advising that you are unable to continue in practice or are closing your practice, a letter from your firm offering to continue representation, and forms regarding transfer of files.

Leaving no stone unturned, the Guide provides a file tracking chart, a law office list of contacts and contracts, and primary and secondary sources regarding applicable ethics rules and best practices.

You really have no excuse for failing to plan. Yes, it will take significant time. Of course, it will be unpleasant to think about. It might even lead to some difficult conversations and realizations. None of that changes the fact that it is necessary.

Good lawyering often involves anticipating what could go wrong and planning to prevent or ameliorate bad outcomes. Let's be good lawyers by planning for the closing of our practices to protect our clients, staff, colleagues and families.

*Good lawyering often involves anticipating what could go wrong and planning to prevent or ameliorate bad outcomes.*

<sup>1</sup> <https://www.knoxbar.org/?pg=SuccessionPlanning>; [https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyersintransition/successionplanning/](https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/).