

NATIONAL ATTITUDES REGARDING GENDER BIAS IN CHILD CUSTODY CASES

Douglas Dotterweich
Michael McKinney

Recent changes in family law have mandated equal treatment in child custody cases. Surveys of 4,579 attorneys and judges from four states, deemed to be nationally representative, were used to discover whether attorneys or judges perceive any favoritism toward mothers' or fathers' claims in the awarding of custody of children. Whereas attorneys, particularly males, perceive that mothers continue to be favored over fathers in custody cases, judges do not share this opinion.

Within the past 15 years, "forty-two of the fifty states . . . have established some form of task force or committee to study gender issues" (Wilker, 1989, p. 14). Many of these studies have included surveys of judges and attorneys regarding their attitudes toward the existence of gender bias in the handling of child custody cases in their court systems. "These task forces have turned out to be more than a collection of *state specific data* [italics added] on gender issues in the courts. Rather they have reinforced the idea that needed reforms will be the result of self-scrutiny from within the court system" (Wilker, 1989, p. 14). The aim of this study is to analyze the results of several of the existing state task force reports to provide a national perspective regarding attitudes toward gender bias in child custody cases. It concludes with some general policy recommendations to state court systems that might help to eliminate perceptions of gender bias that may continue to exist.

Initially, we reviewed all the publicly available state bar association studies of gender bias to determine if the same, or similar, questions and response categories were used by several states. We prepared a spreadsheet and examined the information to determine if state-specific analyses could be expanded to provide a national perspective on the issues. We did not intend to alter the content or meaning of any question or response category, we did not preselect any questions, nor did we desire to alter any state-specific analysis. Rather, our intent was to broaden the scope of each individual state's examination to draw conclusions across states. The spreadsheet identified those questions and response categories for items that were identical, or very similar, in surveys from the states of Maryland, Missouri, Texas, and Washington. These items are included in this article. The similarity in questions and

response categories between these states is supported by statements in the Missouri study that survey items were based on those of other states, including Washington, and the State Bar of Texas's contention that its questionnaires were similar to those of Maryland and Washington. Upon selection of these states, we realized that the four states vary in size, region of the country, and political orientation. Although we had originally hoped to include additional states in this study, differences in the structure of specific survey items would have made interpretation of those responses difficult. Finally, the child custody statute in each state was examined to ensure that similar primary standards were being applied. In each of these states, the welfare of the child was found to be the primary consideration in making custody decisions.

The focus of this study parallels the issues considered by the state task forces. First, do judges believe that other judges possess or exhibit any bias in favor of males or females in resolving child custody cases? Do attorneys perceive a different level of judicial bias than judges? Do male and female attorneys feel the same way about potential bias?

Due to the advent of two-income families and a more prominent role for females within the market economy, some males may be assuming a greater proportion of the family's caregiving responsibilities. In the past, custody of children under the age of 12 was usually awarded to the mother. The tender years doctrine is not a part of the family law statutes of the four states examined. However, if the trends noted above are true, and only minor differences in other factors are present, decisions that commonly award custody of small children to the mother may produce the impression that judges favor females over males.

METHOD

This article employs *z*-proportion tests as its statistical analysis technique. This approach is very appropriate with survey responses, which consist of ordinal data. The populations can be assumed to be normally distributed because all sample sizes are large (greater than 100), and the expected proportions responding in the affirmative to questions related to gender bias are not likely to be greater than 5 or more than 95%, thus satisfying the test for normality. The *z*-proportion test is a more robust procedure than alternative nonparametric tests. Therefore, the proportion of respondents answering "always or usually" will be the variable of interest.

Two primary attitudinal issues concerning child custody cases are addressed in this article. First, do some attorneys and judges continue to believe that custody decisions give greater import to the mother's position in

spite of formal changes in state laws that now require those decisions be made in the best interests of the child? Second, is it possible that current custody decisions may be overcompensating for previous actions that might have favored the female and may therefore be creating the impression that males are now favored?

The first two survey questions examine whether attorneys or judges perceive any favoritism toward the claims of mothers. Questions 3 and 4 assess whether recent custody decisions may provide an impression that fathers are being favored. To avoid any potential ambiguity, our method for measuring attitudinal bias for each survey question is as follows: The percentage of survey respondents answering "always or usually" will be the variable of interest. The other two response categories included in the survey are "sometimes" and "rarely/never." The specific wording of each question and the complete responses in each state survey are found in the appendix.

The first question asked was, "Are custody awards made based on the assumption that particularly young children belong with their mothers?" A high proportion of responses claiming custody awards are always or usually made on that basis indicates a perception that mothers are being favored. The second question was, "Do courts give fair consideration to fathers?" If a small proportion of judges and attorneys respond in the affirmative ("always or usually") that would also imply that mothers may be enjoying more than equal treatment.

Although two-income families are common today, it is reported that male employees tend to be paid more and have higher labor force participation rates than females (*Economic Report of the President*, 1996, Table B-29). Therefore, a high proportion of respondents answering in the affirmative to the questions "Do courts favor the parent with financial standing?" and "Is custody denied due to employment outside the home?" would create the impression that the father's position may be favored over that of the mother.

STATE SURVEY SAMPLE PROCEDURES AND RESPONSE RATES

To evaluate and determine perceptions regarding gender bias in the Maryland courts, a special committee on gender bias coordinated the distribution of surveys to judges and attorneys. Random samples of 750 male and 750 female attorneys were selected of which 210 males and 267 females were found to be out of sample (not practicing in Maryland, deceased, or retired). Usable responses were received from 295 males (54%) and 236 females (49%). Survey instruments were mailed to all 216 judges in the state of Maryland, and 175 (80%) of them responded to questions relating to child custody

issues (Special Joint Committee on Gender Bias in the Courts, 1989, pp. 175-179).

A task force in Missouri mailed questionnaires to the entire population of 13,923 attorneys and 340 judges in the state. Many of the items in the Missouri surveys were based on similar surveys done in other states, including Washington. Survey items were designed to assess the perceptions and recent experiences of the respondents regarding several gender-related issues. Surveys were returned by 2,384 attorneys (17% response rate) and 141 judges (42% response rate). Among attorneys, a greater proportion of females responded (24%) than males (17%), whereas the opposite was true for judges, with 43% males and 26% females responding. These results were comparable with similar mailed surveys conducted in other states. Nearly 1,000 of the Missouri attorneys (792 males and 207 females) and 118 judges who responded addressed gender issues relating to child custody (Missouri Task Force on Gender and Justice, 1993, pp. 7-10).

The State Bar of Texas mailed two questionnaires similar to those used in other states, including Maryland and Washington, to a sample of 4,749 Texas lawyers (3,929 males and 940 females) and 645 trial level judges (527 male and 118 female). Forty percent, or 1,894 attorneys (37% male and 41% female), responded to the survey. Among judges, 49% of the males and 50% of the females responded. Of these samples, 1,443 male attorneys, 390 female attorneys, and 321 judges responded to questions about child custody (State Bar of Texas, Department of Research and Analysis, 1994, Appendix B, p. 1).

In the state of Washington, a random sample of 1,110 male and 996 female attorneys were mailed questionnaires. Of these, 281 males (25.3%) and 212 females (21.1%) responded to issued-related to child custody (Washington State Task Force on Gender and Justice in the Courts, 1989, Appendix A, pp. 177-178). A parallel survey was distributed to Washington State judicial officers, and 458 judges (48.5%) responded. Among these, 106 addressed issues related to child custody (Washington State Task Force on Gender and Justice in the Courts, Appendix B, p. 221).

SURVEY RESULTS

Table 1 is a compilation of the child-custody-related responses from the four states. Each of the four questions will be examined separately. First, judicial opinions concerning whether any bias may exist will be studied. These attitudes will then be compared to those for all attorneys. Finally, the

Table 1

Proportion of Respondents Answering "Always or Usually" (in percentages)

Issue	All Attorneys (<i>n</i> = 3,859)	Male Attorneys (<i>n</i> = 2,811)	Female Attorneys (<i>n</i> = 1,048)	Judges (<i>n</i> = 720)
1. Are custody awards made based on the assumption that young children belong with their mothers?	49.9	56.0	33.6	15.0
2. Do courts give fair consideration to fathers?	31.1	27.3	41.1	45.4
3. Do courts favor the parent with financial standing?	5.9	4.0	10.7	3.2
4. Is custody denied due to employment outside the home?	1.4	0.6	3.2	1.3

attorneys' responses will be analyzed by gender to see if significant differences exist.

ISSUE 1—ARE CUSTODY AWARDS MADE BASED ON THE ASSUMPTION THAT YOUNG CHILDREN BELONG WITH THEIR MOTHERS?

Just 15% of the judges surveyed believe their colleagues make custody awards based on the assumption that young children belong with their mothers. This small percentage indicates judges do not see this assumption as having a significant influence in their decision making. However, half (49.9%) of the attorneys believe custody awards continue to favor the mother. Proportion test results found this difference to be highly significant ($z = -17.302$, $p = .000$). Thus, it can be stated with nearly 100% confidence that attorneys and judges have a vastly different view concerning whether custody awards continue to favor the mother.

A majority of male attorneys (56%) hold the opinion that judges always or usually make custody awards based on this assumption, compared to one third (33.6%) of female attorneys. This difference is highly significant based on the z -proportion test results ($z = 12.378$, $p = .000$). The current study suggests that a significant proportion of attorneys believe the "tender years" doctrine continues to play an important role in custody decisions and that male attorneys are more likely to hold this opinion. Attorneys' perceptions are in sharp contrast to those of most judges, who do not believe the doctrine has any continuing place in custody decisions.

The perception held by many attorneys that the mother continues to be favored cannot be justified based on a reading of the current state statutes. Those laws are based on two primary assumptions. First, the welfare and best interests of the child are to be the primary considerations in making custody awards. Second, the law abolished any presumption that either parent has a superior right to custody of the child, all other things being equal (Smoron, 1998).

ISSUE 2—DO COURTS GIVE FAIR CONSIDERATION TO FATHERS?

Fewer than half of the judges (45.5%) feel that the courts “always or usually” give fair consideration to fathers. Thus, a majority of judges believe that there are some instances where the fathers’ claims are not being given fair consideration. Attorneys support this attitude even more strongly. Fewer than one third of all attorneys (31.1%) hold the view that fathers are always or usually given fair consideration. (The z value for the proportion test is 11.240 with a p value of .000.) Attorneys perceive that bias exists to a much greater degree than do judges, with nearly 100% confidence.

Just more than 1 in 4 (27.3%) of male attorneys have the impression that fathers are always given fair consideration. Even among female lawyers, only 4 in 10 (41.1%) feel that fair consideration is always or usually given to the father. These proportions produced a z value of 8.243, and it is statistically different at the .000 significance level. It can be stated, with nearly 100% confidence, that male attorneys are more likely than female attorneys to believe that the male in custody cases is not always given fair treatment. It is interesting to note that a majority of judges did not believe that fathers are always or usually given fair consideration. Because a majority of both male and female attorneys, as well as judges, are of the opinion that fathers are not always treated fairly, methods of overcoming this widespread perception will be addressed in the policy section of the article.

ISSUE 3—DO COURTS FAVOR THE PARENT WITH FINANCIAL STANDING?

Judges feel that a parent’s financial standing has very minimal impact on custody decisions. Only 3.2% of judges believe the courts always or usually favor the parent with financial standing. If the assumption is made that the male is generally paid more (*Economic Report of the President*, 1996), this response suggests that judges do not perceive the male to be favored in cus-

tody decisions. Attorneys tended to support this impression. Just 5.9% of attorneys claim the courts always or usually favor the parent with financial standing. Whereas the vast majority of both judges and attorneys do not perceive financial condition as playing a major role in rendering custody decisions, a comparison of the two proportions using a z-proportion test yields a z value of 2.923 with a *p* value of .01. This test result indicates that although most attorneys and judges do not feel that financial standing is a key factor in the resolution of custody cases, a greater proportion of attorneys than judges are of the opinion that financial standing sometimes influences the outcome of custody cases, with 99% confidence.

Male attorneys hold very similar views to those of judges. Just 4% of this group believe the courts always or usually favor the parent with financial standing. Female attorneys are more likely to feel that courts always or usually favor the parent with financial standing (10.7%). Once again, the difference in attitudes between male and female attorneys is significant. The z-score was 7.907, thus providing 99.9% confidence that female attorneys have the impression that financial standing is a factor in some custody decisions.

ISSUE 4—IS CUSTODY DENIED DUE TO EMPLOYMENT OUTSIDE THE HOME?

Judges and attorneys are in near perfect agreement regarding the relationship between a parent's employment outside the home and the resolution of a custody decision. Just more than 1% of both judges and attorneys believe custody is always or usually denied due to employment outside the home. Statistical testing did not reveal any significant difference between the opinions of judges and attorneys on this issue.

A significant difference was found between the perceptions of male and female attorneys concerning the importance of outside employment. Just more than 3% of female attorneys felt that custody is always or usually denied due to employment outside the home. This compares to just 0.6% of the male attorneys who felt this way. The z-score of 6.327 indicates a significant difference between the views of male and female attorneys. Whereas the proportion of female attorneys who perceive that bias may exist is quite low, it does indicate that some female attorneys believe the judicial system may sometimes deny custody due to employment outside the home. On the other hand, the overall consistency of responses from judges and attorneys, both male and female, indicates that employment outside the home is generally accepted by members of the legal system and is not a major source of perceived gender bias.

SUMMARY OF RESULTS

Table 2 is a compilation of the child-custody-related responses from the four states. These results indicate that nearly half of all members of the legal community (44.3%) feel that "custody awards are always or usually made based on the assumption that young children belong with their mothers." The implication could be that, while the tender years doctrine is no longer a part of the state custody statutes, it is perceived by a significant proportion of the legal community to continue to play an important role in the resolution of many custody cases.

A perception that gender bias exists in the courts is also indicated by the response to the second issue. When asked whether the courts always or usually give fair consideration to fathers, just one third (33.4%) of all judges and attorneys answered in the affirmative. Again, the impression exists within the legal community that the mother is being favored.

The other two issues addressed in this article sought to determine whether the courts are perceived as favoring the father's position. As stated above, males are more likely to be employed outside the home and tend to earn a higher level of income (*Economic Report of the President*, 1996). These results indicate that neither financial standing nor employment outside the home was seen as an important factor in the resolution of custody cases by the overwhelming proportion of respondents. Just 5.5% of judges and attorneys claim the courts always or usually favor the parent with financial standing. This figure dropped to 1.4% when asked whether the courts always or usually denied custody due to employment outside the home. Thus, if these two characteristics can be accurately attributed to fathers, as suggested by the data contained in the *Economic Report of the President*, state courts are not perceived to be favoring fathers over mothers.

JUDGES' ATTITUDES

Just 15% of judges perceived that custody awards are always or usually made on the assumption that young children belong with their mothers. This suggests that judges do not feel that preferential treatment toward mothers is a significant factor in making state custody awards. Fewer than half (45.4%) of the judges believe the courts always or usually give fair consideration to fathers. This finding may indicate recognition by some state family court judges that a perception of gender bias may be present in some instances.

Table 2

Proportion of Respondents Answering "Always or Usually" to a Particular Question (in percentages)

Issue	Overall
1. Are custody awards made based on the assumption that young children belong with their mothers?	44.3
2. Do courts give fair consideration to fathers?	33.4
3. Do courts favor the parent with financial standing?	5.5
4. Is custody denied due to employment outside the home?	1.4

To the extent that the assumptions regarding the latter two questions hold true, judges do not feel that any bias exists toward males over females based on the small proportion of respondents answering in the affirmative to those questions. Just 3.2% of judges have the impression that the courts always or usually favor the parent with financial standing, whereas only 1.3% believe custody is always or usually denied due to employment outside the home.

ATTORNEYS' ATTITUDES

Attorneys perceive gender bias in the courtroom to a much greater extent than judges. Virtually half (49.9%) of all attorneys feel the assumption that young children belong with their mothers is always or usually made in resolving child custody cases. Male and female attorneys exhibited great disparity on this issue. Among male attorneys, 56% believe the assumption is always or usually made in the awarding of custody. This compares to a smaller but still significant proportion of female attorneys who hold that opinion (33.6%). These results indicate that a significant proportion of the legal community perceives that gender bias exists relative to this issue.

Female attorneys felt very similar to judges concerning whether fair consideration is always or usually given to fathers. Fewer than half of the female attorneys (41.1%) believe fair consideration is always given, compared to 45.4% of judges. Male attorneys perceive a greater degree of bias. Just one fourth (27.1%) of this group feel that fair consideration is always or usually given.

Attorneys generally agree with judges that gender bias toward the male is not a significant issue. The proportion of attorneys feeling that the courts always or usually favor the parent with financial standing varies from 4% for male attorneys to more than 10% for female attorneys. While most attorneys

do not perceive any gender bias in this area, a small but significant group of female attorneys do believe it may exist.

Neither male nor female attorneys feel custody is always or usually denied due to work outside of the home. The proportions are just 1.4% for all attorneys and 0.6% and 3.2% for male and female lawyers, respectively.

POLICY IMPLICATIONS

If courts seek to modify attitudes concerning the presence of gender bias in their child custody decisions, three suggestions might prove helpful. First, identification of the nature of child custody attitudes is necessary. As evidenced in this study, the perceptions of judges and attorneys on identical issues may differ markedly. Therefore, if court systems wish to change those attitudes, the perceptions of both judges and attorneys should be monitored routinely. This goal could be accomplished by periodic administration of surveys similar to those developed by the bar associations and used in this study. Such information would be instrumental in measuring the degree to which changes have occurred in attorney and judicial attitudes.

Next, from the very beginning of a child custody case, judges should make it clear that they will serve in a neutral and impartial capacity. Their sole interest should be to serve as guardian or advocate for the best interests of the child (Smoron, 1998). Such a declaration might well reduce perceptions of gender bias.

Finally, attorneys' perceptions of gender bias might be further mitigated if judges are careful to provide complete explanations for the rationale behind their decisions in custody cases. These approaches should aid in overcoming perceptions of gender bias where the law has already made such attitudes illegal on a *de facto* basis.

APPENDIX
Specific Survey Question and
Responses From State Task Force Reports

Issue 1—Are custody awards made based on the assumption that young children belong with their mothers?

A. Question in the Maryland Survey—Attorneys and Judges

“Custody awards to mothers are based on the assumption that children belong with their mothers.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	61.4	32.5	6.1	295
Female attorneys	34.7	45.6	19.7	239
Judges (all)	13.7	34.9	51.4	175

B. Question in the Missouri Survey—Attorneys and Judges

“In awarding custody, Judges indicate, by statement or action, that young children belong with their mothers.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	76.3	16.8	6.9	792
Female attorneys	58.0	30.9	11.1	207
Judges (all)	40.7	41.5	17.8	118

C. Question in the Texas Survey—Attorneys Only

“Sole managing conservatorship is based on the assumption that children belong with their mothers.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	50.0	35.0	15.0	1,443
Female attorneys	31.0	43.0	25.9	390

D. Question in the Texas Survey—Judges Only

"In general, sole managing conservatorship of children should be awarded to the mother."

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Judges (all)	10.0	36.4	53.6	321

E. Question in the Washington Survey—Attorneys Only

"Have judges indicated through action or statement that their decision to award custody to mothers was based on a belief that children belong with the mother?"

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	24.2	52.0	23.8	281
Female attorneys	13.2	54.7	32.1	212

F. Question in the Washington Survey—Judges Only

"Have you indicated through action or statement that decisions to award custody were based on a belief that children belong with their mother?"

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Judges (all)	3.8	21.7	74.5	106

Issue 2—Do courts give fair consideration to fathers?

A. Question in the Maryland Survey—Attorneys and Judges

"The courts give fair and serious consideration to fathers who actively seek custody."

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	26.8	44.4	28.8	295
Female attorneys	48.7	33.6	17.6	238
Judges (all)	80.5	13.8	5.7	174

B. Question in the Missouri Survey—Attorneys and Judges

“Judges give fair and serious consideration to fathers who seek sole managing conservatorship of their children.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	26.0	38.0	36.0	784
Female attorneys	25.2	41.9	32.9	234
Judges (all)	79.3	16.4	4.3	116

C. Question in the Texas Survey—Attorneys and Judges

“Judges give fair and serious consideration to fathers who seek sole managing conservatorship of their children.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	24.0	42.0	34.0	1443
Female attorneys	37.0	47.0	15.9	389
Judges (all)	10.0	36.4	53.6	321

D. Question in the Washington Survey—Attorneys Only

“Have judges given fair and serious consideration to fathers who actively sought custody?”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	48.9	45.7	5.4	278
Female attorneys	57.5	40.6	1.9	212

E. Question in the Washington Survey—Judges Only

“How often have you awarded custody to fathers who actively sought custody?”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Judges (all)	58.3	32.0	9.7	103

*Issue 3—Do courts favor the parent with financial standing?***A. Question in the Maryland Survey—Attorneys and Judges**

“The courts favor the parent in the stronger financial position when awarding custody.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	6.8	37.6	55.6	295
Female attorneys	16.9	44.9	38.1	236
Judges (all)	4.0	34.9	61.1	175

B. Question in the Missouri Survey—Attorneys and Judges

“In awarding custody, judges favor the parent in the stronger financial position.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	3.0	68.0	29.0	763
Female attorneys	9.0	48.0	43.0	212
Judges (all)	4.3	71.7	24.0	116

C. Question in the Texas Survey—Attorneys Only

“When the primary caretaker is in the weaker financial position, sole managing conservatorship of children is given to the parent in the stronger financial position.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	0.1	26.8	73.2	1,401
Female attorneys	4.1	36.5	59.4	394

D. Question in the Texas Survey—Judges Only

“In general, sole managing conservatorship of children should be awarded to the parent in the stronger financial position.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Judges (all)	2.5	11.3	86.2	319

E. Question in the Washington Survey—Attorneys and Judges

Not applicable.

Issue 4—Is custody denied due to employment outside the home?

A. Question in the Maryland Survey—Attorneys and Judges

“Mothers are denied custody due to employment outside the home.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	2.0	11.9	86.1	295
Female attorneys	8.1	30.9	61.0	236
Judges (all)	1.7	15.0	83.2	173

B. Question in the Missouri Survey—Attorneys and Judges

Not applicable.

C. Question in the Texas Survey—Attorneys Only

“Mothers are denied sole managing conservatorship because of their employment outside the home.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Male attorneys	0.0	5.0	95.0	1,443
Female attorneys	1.0	14.9	84.0	395

D. Question in the Texas Survey—Judges Only

“Sole managing conservatorship awards to mothers should be conditioned on limitations on their employment outside of the home.”

% Responding	Always/Usually	Sometimes	Rarely/Never	<i>n</i>
Judges (all)	1.6	5.0	99.4	318

E. Question in the Washington Survey—Attorneys Only

“Has a parent been granted custody on the condition that she or he not work outside the home?”

% Responding	Always/Usually	Sometimes	Rarely/Never	n
Male attorneys	2.3	5.7	92.0	262
Female attorneys	2.0	10.3	87.7	204
Judges (all)	0.0	0.9	99.1	106

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Douglas Dotterweich is an associate professor of economics at East Tennessee State University in Johnson City.

Michael McKinney is an attorney and assistant professor of business law at East Tennessee State University in Johnson City and an attorney with the law firm of Wyatt, Tarrant and Combs.