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TENNESSEE BAR JOURNAL

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bearing witness as so many of our neighbors are without the financial means to meaningfully participate in the legal system that we all hold dear; to the fact that we are facing unprecedented attacks on our justice system and the legal profession.

I wish that I could report that with the dawning of the new year, these challenges have all resolved, but I cannot; however, as the calendar turns to 2014, I am more convinced than ever that when we combine the collective resources of our members, we can address the challenges that we face in a positive and meaningful way.

So what can we do to be the agents for change that the public and profession so desperately need us to be? It just so happens that this month’s edition of the Tennessee Bar Journal can answer some of those questions for you, especially with regard to the issue of access to justice. The cover story provides an excellent roadmap as to how you can quickly and easily become engaged in the fight for access to justice for all. In fact, you will find that you can even provide much-needed assistance to those with legal needs while sitting at your home computer in your pajamas!

Of course as we consider how we can provide meaningful access to the justice system for all, we must also consider what we can do to preserve and improve the justice system. To that end, your association has already been hard at work preparing for the 2014 session of the Tennessee General Assembly by setting our legislative agenda. As I hope you are aware, the Tennessee Bar Association employs lobbyists who spend time year ‘round working to craft and lobby for the passage of legislation of importance to the justice system, legal profession and the public at large. Likewise, they also spend time working to insure that proposed legislation that would be harmful to the justice system, legal profession or public is not enacted. While our team of lobbyists has not been able to win every battle, it is fair to say that they have played far “above their heads.”

Prior to each new session of the General Assembly, our lobbyists meet with our Governmental Affairs Committee and association leadership to consider requests made by our sections and committees for the association’s support in obtaining the passage of legislation of importance to their respective groups. Our lobbyists also work to prepare for legislation that is expected to be introduced. At the fall meetings of your Board of Governors and House of Delegates, our lobbyists presented information about these important topics in order to allow association leadership to set the legislative agenda for the year.

Both the Board of Governors and the House of Delegates agreed that the

Continued on page 4
agenda should include attempting to obtain the passage of a statute of repose for legal malpractice claims. I am personally in favor of this effort as well. Those of you who know me may be surprised by that fact, as I proudly carry the title of plaintiff's lawyer, and am generally opposed to legislation that limits the rights of the citizens of our state. In fact, one of my fellow trial lawyers for whom I have great admiration and respect, John Day, has a column in this edition of the Journal (page 33), which sets forth some reasons that he believes statutes of repose are a bad idea. So why do I believe that this is an appropriate course for our association?

Currently, given that there is no statute of repose applicable to legal malpractice claims, lawyers and their families, as well as those law firms by whom they have been employed, have virtually limitless exposure to malpractice claims. At present, a lawyer can be sued for malpractice decades after work was performed. In that instance, the lawyer may have destroyed the file, and if the case was not of significant time duration, the lawyer may not even have an independent recollection of the matter. In those situations, it is virtually impossible to mount a reasonable defense. This raises a question of fundamental fairness. There also should come some point in each lawyer's career that they should be able to retire from the practice without continuing to worry about whether they might be sued for work they performed many years before. It is important to note that a statute of repose would not apply if a lawyer intentionally covered up acts constituting malpractice, as those would be exempted from the statute of repose.

While we are focusing on legislative matters, I also want to take the opportunity to share some very exciting news with you about a campaign that is now underway which will help us achieve...
Series Focuses on Civil Right to Counsel

Legal Aid of East Tennessee and the Tennessee Bar Association conducted a multi-city panel discussion series on the issue of Civil Right to Counsel last fall. This year is the 50th anniversary of Gideon v Wainwright, which established the right to counsel in criminal cases. There has been a great deal of discussion nationally about the lack of a right to counsel in critical civil cases where the risk of harm is greater than that in many criminal cases, including domestic violence, custody and foreclosure.

Each of the sessions began with videos featuring Tennessee Supreme Court Chief Justice Gary Wade and Tennessee Bar Association President Cindy Wyrick. The events, all in November, were held at Lincoln Memorial University’s Duncan School of Law, Memorial Park Community Center in Johnson City and the University of Tennessee Chattanooga campus.

Deadline Is March 20

Comment on CLE Rule

The Tennessee Supreme Court filed an order last fall soliciting comments on amendments to Supreme Court Rule 21, which have been proposed by the Tennessee Commission on Continuing Education. Comments should be filed by March 20, 2014. The order, petition and appendix are available online.

BRIEFS

TBA Launches New Health Insurance Exchange

The Tennessee Bar Association has a new benefit to help members navigate the complicated health insurance market. Launched in early December, the TBA Health Insurance Exchange allows members to quickly and easily obtain quotes from insurance plans that are available on either public or private health insurance exchanges.

The TBA Health Insurance Exchange is operated through JLBG Health. It will help you assess your situation to find out if you are eligible for subsidies, shop for plans that are on either public or private health insurance exchanges, and apply for the health plan of your choice with or without subsidies. You will be able to shop from multiple quality carriers such as Blue Cross, Aetna, Assurant, Cigna, Humana and many others. To use the exchange, go to www.tbahealthinsuranceexchange.com/ and fill out a short form to get a quote or call (866) 907-2763. No medical questions will be asked and all pre-existing conditions are covered.

Death Tax Chart Updated for 2014

In a 2011 Tennessee Bar Journal column on estate planning, Dan Holbrook wrote about federal estate tax, with an accompanying chart on Combined Federal and Tennessee Death Tax. Holbrook has updated the chart to incorporate the 2014 indexed federal estate, gift and generation-skipping transfer (GST) tax exemptions, announced by the IRS to be continued on page 6.
Guardian Ad Litem Roles Subject of Ethics Opinion

A formal ethics opinion released Dec. 12, 2013, by the Board of Professional Responsibility addresses the question of whether it is a conflict of interest for a lawyer who was appointed guardian ad litem to subsequently represent another interest in a matter regarding the child for whom the lawyer was appointed guardian ad litem. The opinion states in part that an attorney who was appointed guardian ad litem for a child may represent another party’s interest as long as it is consistent with the interests of the child and does not violate professional conduct rules. To insure that the subsequent representation of another interest is not inconsistent with the interest of the child, it would be advisable to secure consent or permission from the judge who had appointed the lawyer as GAL to represent the other party.

Bill Young Joins AOC as Director

Former Tennessee Solicitor General Bill Young started work in December as administrative director of the Administrative Office of the Courts. Young was appointed by the Tennessee Supreme Court in September to succeed Libby Sykes, who held the position for seven years before retiring. He will direct an office of about 75 people who provide administrative support to the trial and appellate judges and courts across the state.

ABA Accepting Nominations for Appointments

The American Bar Association (ABA) is accepting applications and nominations for 2014-2015 presidential appointments to ABA standing committees, special committees, commissions and other entities and initiatives. The online application process is available until Feb. 28.

Judiciary Museum Launches New Exhibits, Website

The Tennessee Judiciary Museum launched several new exhibits and a website in December to celebrate its one-year anniversary. The exhibits detail several historic cases, divided by alcoves that show examples from all levels of Tennessee courts — trial courts, appellate courts and the Tennessee Supreme Court. The museum also launched its own website, tennesseejudiciarymuseum.org, to provide information to prospective visitors about the museum and offer lesson plans and other information for educators. The museum is open Monday through Friday from 9 a.m. to noon. Admission is free.

Survey: People Want a Lawyer Who Is Confident, Realistic

A recent survey by the attorney rating company Avvo Inc. says that consumers want a lawyer who is confident and realistic, but reality show fans want lawyers who are aggressive and attractive. The three lowest-ranking characteristics people want in their lawyers are ambitious (12 percent), friendly (15 percent) and reassuring (18 percent). The Nashville Business Journal notes that responsiveness was the top factor, cited by 92 percent of respondents, followed by track record (80 percent).

Mock Trial Case About Song-Writing Infringement

The problem and rules for the 2014 Tennessee High School Mock Trial Competition are now available. This year’s problem involves allegations that a hit song climbing the country charts violates the copyright of a song penned by struggling singer-songwriter Jessie Jameson. The infringement suit claims that the hit song is substantially similar to Jameson’s and that the author had access to the work. The defense argues that similarities between the songs are merely scenes à faire — common themes, language and expressions that appear frequently in country songs — and that the defendant did not have access to the work. Witnesses such as Dr. Doe Raymie and Jordan “Catnip” Evergreen, and two songs written and recorded just for the competition, make this year’s case entertaining as well as educational.

Updated Trust Article Online

Tennessee’s trust law underwent sweeping changes in 2013, with the goal of making Tennessee a leading contender in the national race for trust business. Tennessee practitioners learned the top 10 changes, as outlined by the lawyers of Knoxville’s Holbrook Peterson Smith PLLC, in last month’s Journal. The printed version of the article contained minor formatting issues, but the online version is correct. Read the text version at http://www.tba.org/journal/big-changes-to-tennessee-s-uniform-trust-code or download a pdf at http://www.tba.org/sites/default/files/UniformTrust-CodeArticle_Updated_0.pdf.

33 Attorneys Selected for 2014 TBA Leadership Law Class

Thirty-three lawyers from across the state were selected for the TBA’s 2014 Leadership Law program. Now in its 11th year, Leadership Law is designed to equip Tennessee lawyers with the vision, knowledge and skills necessary to serve as leaders in their profession and local communities. See the list at www.tba.org/press-release/tba-selects-attorneys-for-2014-leadership-law-class.
REINSTATED
The Tennessee Supreme Court reinstated the law license of Murfreesboro lawyer Brandon Michael Booten on Nov. 27, 2013. Booten had been suspended Nov. 1, 2013, for failing to respond to the Board of Professional Responsibility regarding a complaint of misconduct. After responding, Booten petitioned the court to remove the suspension. A hearing panel recommended that the suspension be set aside so long as Booten complies with Supreme Court Rule 9, Section 19; continues consultation with, and adheres to any recommendations from, the Tennessee Lawyers Assistance Program; and provides disciplinary counsel with a copy of any and all assessments and/or monitoring agreements.

DISABILITY INACTIVE
The Tennessee Supreme Court transferred the law license of Blount County lawyer Keith Lane Edmiston to disability inactive status on Dec. 2, 2013, pursuant to Section 21 of Tennessee Supreme Court Rule 9. Edmiston may not practice law while on inactive status. He may return to the practice of law after showing by clear and convincing evidence that the disability has been removed and he is fit to resume the practice of law.

DISCIPLINARY
Censured
Monroe County lawyer Barry Keith Maxwell was publicly censured on Nov. 14, 2013, and ordered to pay restitution to his client after the Board of Professional Responsibility found that he did not promptly refund an advance payment of fees when the work he had been retained to do was deemed unnecessary. Maxwell submitted a conditional guilty plea acknowledging a violation of Rule 1.16 of the Rules of Professional Conduct.

Montgomery County lawyer John Minor Richardson was publicly censured on Nov. 1, 2013, for failing to adequately supervise a non-lawyer employee. The Board of Professional Responsibility found that the employee did not follow internal accounting procedures, resulting in a monetary loss to a client. When Richardson discovered the problem, he terminated the employee and conducted an extensive internal audit of his accounts. He also repaid the client for the loss. He submitted a conditional guilty plea acknowledging violating Rules of Professional Conduct 1.3, 5.3 and 8.4(a).

Suspended
Knoxville lawyer M. Josiah Hoover III was suspended on Nov. 15, 2013, for one year for charging excessive fees and practicing law while his license was suspended. Hoover previously was disbarred on Nov. 15, 2012. In imposing the new discipline, the Tennessee Supreme Court mandated that the suspension run concurrently with the disbarment. Hoover’s actions were found to violate Rules of Professional Conduct 1.5(a), 5.5 and 8.4(a).

The Tennessee Supreme Court suspended Davidson County lawyer Hal Wilkes Wilkins on Dec. 2, 2013, after finding that he failed to respond to the Board of Professional Responsibility regarding a complaint of misconduct.

Disbarred
Murfreesboro lawyer Derek A. Artrip was disbarred Nov. 14, 2013, by the Tennessee Supreme Court based on two complaints that he neglected client matters and abandoned his law practice. In the first complaint, the client alleged that he failed to adequately communicate with her regarding the status of the case and the use of the retainer fee, and failed to have the matter heard by a court within 30 days as promised. In the second complaint, the client alleged that Artrip did not return the case file or provide any information about the status of the matter. In addition, the court found that Artrip did not respond to the petition for discipline and did not appear for the final hearing. His actions were determined to violate Rules of Professional Conduct 1.1, 1.3, 1.4, 1.5, 1.6(d), 3.2, 8.1(b) and 8.4(a) and (d). The disbarment comes in addition to a suspension that was imposed in 2012 and remains in place for failure to respond to complaints of misconduct.

Lance William Parr of Birmingham, Ala., was disbarred by the Tennessee Supreme Court on Nov. 18, 2013, and ordered to pay restitution to his former

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Memphis city attorney Herman Morris Jr. is the 2013 recipient of the International Municipal Lawyers Association's Joseph I. Mulligan Jr. Distinguished Public Service Award, which recognizes achievements in local government law. Morris is the first attorney from Memphis to receive this award.

Rosemary E. Phillips has been appointed Robertson County clerk and master by Chancellor Laurence M. McMillan Jr. She succeeds Kenneth Hudgens, who is retiring after 35 years. A resident of Goodlettsville, Phillips has practiced law for 31 years in the fields of family law and mediation. She earned her law degree from the University of Memphis School of Law in 1982. She will take office on Jan. 13.

John Ray Clemmons and J. Michael Clemmons have launched Clemmons & Clemmons, a civil litigation and general practice firm in downtown Nashville. The pair says the firm will focus on young professionals and small-business owners who need affordable, competent legal representation. John Ray Clemmons graduated from the University of Memphis School of Law in 2005. Michael Clemmons earned his law degree from the Nashville School of Law in 2005.

Alexander Oaks Waters has joined Long, Ragsdale & Waters as an associate attorney. He will focus on real estate transactions. Waters began clerking with the firm in December 2011. He also clerked with the Knox and Sevier counties’ district attorneys in the summer of 2011. He earned his law degree from the University of Tennessee College of Law in 2013.

Clarksville lawyer Roland Robert Lenard, pro bono chair of the Midsouth Chapter of the American Immigration Lawyers Association (AILA), recently authored an article on how to run an ethical pro bono immigration clinic. The piece was published in the fall issue of AILA's Pro Bono Newsletter. Last year, Lenard chaired AILA's Nashville Pro Bono Immigration Clinic, which was held in conjunction with the association's annual conference with more than 2,500 immigration lawyers attending.

Memphis lawyer Haavi Morreim has been appointed vice chair of the American Bar Association's Task Force on ADR and Conflict Resolution in Health Care, as well as vice chair of the American Health Lawyers Association's Alternative Dispute Resolution Affinity Group. Morreim is a principal in the Alternative Dispute Institute and a Rule 31-listed mediator for both civil and family matters. She teaches law and bioethics at the UT College of Medicine.

Burr & Forman recently announced that Nashville-based partner Brendi Kaplan has been selected for the 2014 class of Leadership Middle Tennessee. She will join 30 other community and business leaders in the year-long program. At Burr & Forman, Kaplan practices in the areas of health care, real estate and public finance. She graduated in 1984 from the John Marshall Law School.

Karen G. Crutchfield has joined the Knoxville office of Wimberly Lawson Wright Daves & Jones as a member. She maintains a general civil litigation practice. She earned a law degree from the University of Tennessee College of Law in 1994 and a master in social work from Washington University in St. Louis.

Memphis attorney Pamela Williams Kelly received this year’s Celebrate Pro Bono Award from the Memphis Bar Association Access to Justice Committee and the Memphis Area Legal Services Pro Bono Project for accepting the largest combined number of legal clinic and extended service cases for indigent clients. Kelly operates the Law Offices of Pamela Kelly where she handles family law, immigration, business, intellectual property and veterans’ cases.

Beau Creson has joined the Nashville law firm of Walker, Tipps & Malone, where he will focus on business and tort litigation and arbitration.Originally from Memphis, Creson attended and graduated from Vanderbilt University Law School in 2013.

Chattanooga-based Olsen Law Firm recently announced that Elizabeth “Eliza” L. Epps has joined the immigration firm as an associate. A native of Little Rock, Epps earned her law degree from William & Mary Law School. She previously clerked with the firm as well as with the Arkansas Supreme Court and Legal Aid of Arkansas.

The husband-and-wife team of Russell and Julie Cornell has opened the Cornell Law Group in Nashville’s historic Germantown neighborhood. The firm will handle estate planning, probate and tax matters, and will have a special focus on families with young children. Both earned their law degrees from Pepperdine University School of Law. Russell Cornell went on to
earned a master of law in taxation from New York University School of Law. He previously practiced with KPMG's international corporate tax group. The firm is located at 1312 5th Ave. N., Suite 102, Nashville, TN 37208. It may be reached at (615) 301-1733 or www.lawclg.com.

Nelson Mullins Riley & Scarborough recently hired Nashville real estate lawyer Tim Meyer as an attorney of counsel. Meyer will focus his practice on mergers and acquisitions, and corporate and loan transactions. He previously was lead counsel for a publicly traded real estate investment trust's business group focusing on medical facilities. Meyer earned his law degree and a master of business administration from Vanderbilt University.

Attorney Rachel C. Nelley has joined the Nashville office of Farris Bobango Branan as an associate. She will focus on administrative and health care law, including matters involving licensure and disciplinary proceedings. She also will assist clients with probate, estate and related issues. Nelley earned her law degree from the Cumberland School of Law in 1998.

Proceeds from the National Bar Association Ben F. Jones Chapter’s Barrister’s Ball helped fund scholarships for three minority students at the University of Memphis School of Law and the pro bono work of Memphis Area Legal Services. At the event, Tennessee Court of Criminal Appeals Judge Camille McMullen and Regional Medical Center lawyer Monica Wharton received the A. A. Latting Award for outstanding service to the legal profession and local community. Lawyer and Shelby County Commissioner Walter Bailey received the President’s Award from Imad Abdullah, chapter president and attorney at Baker Donelson Bearman Caldwell & Berkowitz. Also at the meeting the chapter announced its 2014 Executive Board. TBA members among the group are Vice President Amber Floyd and Corresponding Secretary Asia Diggs.

Hendersonville lawyer Timothy L. Takacs recently sponsored the 14th Annual Time Out Workshop, which drew more than 200 professionals who serve the elderly and disabled throughout Tennessee. The program featured noted experts in the long-term care field and vendor exhibits from 18 organizations. Takacs operates The Elder Law Practice of Timothy L. Takacs. He graduated in 1980 from Vanderbilt University Law School.

Two lawyers with Lewis, King, Krieg & Waldrop recently were elected to leadership positions with professional organizations. In the Nashville office, shareholder Robert Chapski was named a sustaining member of the Product Liability Advisory Council Inc. In the Knoxville office, shareholder Richard W. Krieg was one of six attorneys selected to serve on the board of directors of ALFA International, a global legal network of 145 firms.

The Nashville law firm of Cornelius & Collins has added Sepideh C. Khansari and Peter C. Robison as associates. Khansari brings more than four years of civil litigation experience to the firm, having previously worked at Butler Snow and Miller & Martin. She earned her law degree from Washington & Lee University and a master of business administration from Middle Tennessee State University. At the firm, she will work in the areas of insurance, medical malpractice and personal injury. Robison focuses his law practice on employment, insurance, general civil litigation and estate administration. Prior to joining the firm, he practiced at Drescher & Sharp and clerked for Davidson County Circuit Court Judge Thomas W. Brothers. He earned his law degree from Vanderbilt University in 2008.

Seven Tennessee lawyers recently were admitted to practice before the U.S. Supreme Court during admission ceremonies in Washington, D.C. They are Daniel Berexa with Cornelius & Collins in Nashville; Molly Glover with Burch

LICENSURE & DISCIPLINE continued from page 7

clients as a condition of reinstatement. The Board of Professional Responsibility brought charges against Parr after he was suspended from practicing law before the U.S. District Court for the Eastern District of Tennessee. The board found that he neglected cases, failed to communicate with clients and opposing counsel, failed to protect clients’ interests, demonstrated incompetence, and abandoned his practice. Parr did not respond to the petition for discipline and did not appear for the final hearing. The Supreme Court determined that his actions violated Rules of Professional Conduct 1.1, 1.3, 1.4, 1.16, 3.2, 3.4 and 8.4(a) and (d). ฏ

Compiled by Stacey Shrader Joslin from information provided by the Board of Professional Responsibility of the Tennessee Supreme Court. Licensure and disciplinary notices are included in this publication as a member service. The official record of an attorney’s status is maintained by the board. Current information about a particular attorney may be found on the board’s website at www.tbpr.org.
Porter & Johnson in Memphis; Cookeville lawyer Gregory L. Groth; former Knoxville lawyer Angela Bolton Rauber; TBA President-elect Jonathan O. Steen with Redding, Steen & Staton in Jackson; David Veile with Schell & Davies in Franklin; and 13th Judicial District Attorney General Randy York of Cookeville.

Chambliss, Bahner & Stophel has added three new associate attorneys. Martha Culp joins the firm’s business group. She graduated from the University of Alabama School of Law in 2013. Alex McVeagh joins the firm’s litigation and risk management practice group. He graduated in 2013 from Vanderbilt University Law School. Jed Roebuck joins the firm’s health care practice group. He also will handle business matters. He earned his law degree in 2011 from the University of Mississippi School of Law.

Ashley Farrell has joined the Nashville law firm of Hollins, Raybin & Weissman as an associate attorney. She will focus her practice on plaintiff’s personal injury and domestic relations. Farrell graduated from the Nashville School of Law in 2013.

Chattanooga attorney and Miller & Martin partner James Guy Beatty JR. died Nov. 12, 2013, after a long illness. He was 82. Beatty was a distinguished alumnus of the school in 1999. He was a member of the Tennessee Board of Law Examiners and chair of the board of directors for the National Conference of Bar Examiners. He also served in the ABA House of Delegates. In lieu of flowers, contributions may be made to the Church of the Good Shepherd, 211 Franklin Rd., Lookout Mountain, TN 37350; Community Foundation of Greater Chattanooga, 1270 Market St., Chattanooga 37402; or the donor’s favorite charity.

Former Jasper city attorney Paul Dewitt Kelly Jr. died Nov. 16, 2013, at 86. A graduate of Vanderbilt University and its law school, Kelly practiced law in Jasper as both a solo practitioner and a partner in Kelly and Kelly Attorneys, where he remained of counsel after his retirement. He served as a member of the Tennessee Bar Association, Tennessee Bar Foundation and Marion County Bar Association, which he also led as president. He was active in the American College of Trial Lawyers and the American Board of Trial Advocates. Memorial contributions may be made to Hospice of Chattanooga, 4411 Oakwood Dr., Chattanooga, TN 37416; Alzheimer’s Association, P.O. Box 96011, Washington, D.C., 20090; or Hosanna Community, P.O. Box 958, Hixson 37343.

Memphis lawyer Paul J. McClure JR. died Nov. 6, 2013. He was 93. A graduate of the University of Memphis Cecil C. Humphreys School of Law, he served in World War II as an ROTC professor at Rutgers University, and later practiced law with Woen & Lail in Memphis. After retirement he spent many hours every week helping low-income retirement home residents with legal documents. Memorials may be made to the Church Health Center or Colonial Park United Methodist Church. Read more about him on page 4.

Knoxville attorney Donald F. Paine died Nov. 18, 2013. He was 74. A former president of both the Knoxville and Tennessee Bar associations, Paine also was a founder of the Tennessee Law Institute and a well-known speaker and author. He was a founding member of the Tennessee Bar Journal Editorial Board and frequent contributor. He was awarded the Journal’s Justice Joe Henry Award for Outstanding Legal Writing in 1989 and 1997. A graduate of the University of Tennessee College of Law, Paine was of counsel with the firm of Paine, Tarwater, and Bickers LLP. In lieu of flowers, the family asks that donations be made to Legal Aid of East Tennessee, 502 S. Gay St., Suite 404, Knoxville 37902. Also, the Tennessee Judicial Conference Foundation is accepting donations for the Donald Franklin Paine Scholarship. Send to 1903 Division St., Nashville 37203. Read more about Mr. Paine on page 31.
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This Simple Guide Shows You the Options

You know about the need. You probably know that an estimated 1 million Tennesseans are in need of civil legal services and don’t have the resources to pay for it.¹ And you would volunteer if you could, if you had time, and if it just wasn’t so hard to plug in.

This article is going to make it easy for you to sort through the options, understand the levels of commitment and review the types of help required so you can decide, get up and go do something.

Is There Really a Need?
Tennessee attorneys dedicated more than 800,000 hours to pro bono legal service in 2011 (the most recent year for which data is available).² The nearly 10,000 attorneys who reported their volunteer time actually exceeded, on average, the state Supreme Court’s aspirational goal of 50 hours of pro bono service per year³ and many others certainly devoted time without completing the voluntary report.
Tennessee continues to lead the way in exploring and implementing innovative programs to help diminish the justice gap for those who cannot afford legal assistance, and there is no shortage of opportunity to volunteer legal expertise.

However, even with the hundreds of thousands of volunteer hours dedicated to pro bono, the gap in legal services is still immense. While 45 percent of Tennessee’s attorneys reported performing free or reduced-rate legal services, that leaves many who are not yet volunteering. One hour per month from that remaining 55 percent would add up to more than 50 full-time attorneys serving the needs of our state’s most underserved and vulnerable individuals and families.

“Pro bono work is critical to meeting the legal needs of Tennesseans,” Supreme Court Justice Janice M. Holder says, highlighting the ripple effect that volunteer legal service creates. Holder is the court’s liaison to the Access to Justice Commission. “It not only provides a much-needed service but also helps strengthen communities. When legal needs are met, our citizens can refocus on their jobs and families.”

The legal community must continue to focus on enhancing existing programs by stepping up to serve as volunteers and also by supporting new endeavors proposed by the access to justice community. Access to Justice Commission Chair and former TBA President George “Buck” Lewis notes both the progress that has been made since the Tennessee Supreme Court made access to justice its top priority, and the work that remains.

“We can all be rightfully proud of what Tennessee lawyers and the Tennessee judiciary have accomplished the last five years,” Lewis says. “The challenge in front of us now is to continue to innovate and to focus our resources on the programs, old and new, which have proven to have the most impact on the lives of our clients.”

The Tennessee legal community is fortunate to have such a variety of ways to fulfill the commitment to pro bono service: from traditional walk-in clinics or extended representation to providing online legal advice or representation for appeals, the opportunities for direct service as well as involvement with committees and outreach is vast and continues to increase. Also, the Tennessee Supreme Court has been active in implementing rules changes that encourage lawyers to do more pro bono as well as report their service.

Legal Clinics and Pro Bono Projects

There are many opportunities to provide direct legal service to clients in need. Volunteering to give advice and counsel at a free legal clinic is a great way to perform pro bono. Legal clinics are regularly hosted by legal aid programs, local bar associations and law schools. Many clinics invite clients to participate without an appointment and with any legal issue, while others may be geared to serving a particular population or issue area.

During the clinic, volunteers listen to client stories and help them identify their legal issues. In many cases, attorneys will be able to quickly answer all of the questions right then. Other clients may need additional assistance from existing legal or social service organizations, and all of the information and advice offered by legal volunteers helps move the client one step closer to resolving their legal issue. Legal clinics are also a chance for less-experienced attorneys, law students, or those seeking to increase their experience in a particular area to work with experienced lawyers while also providing much-needed support to clients.

It is precisely this exchange that engages many attorneys to devote time to service in pro bono clinics.

“The gratitude that one gets from doing pro bono work becomes addictive,” Access to Justice Commissioner and clinic innovator Tony Seaton says. “After you have spent time with a few needy people and they graciously and warmly thank you for your time and efforts, you begin to realize that the ability to practice law is a gift to you that you can either squander or share.”

Some clinics are aimed at serving particular groups that may present special needs or issues: homeless, immigrants, senior citizens, domestic violence survivors, veterans, emergency first responders or other professional groups. Other clinics may focus on helping with specific legal needs such as family law, employment, health care, landlord/tenant or other housing issues.

For example, the Wills for Heroes (WFH) program has been a primary public service project of the TBA Young Lawyers Division for the past six years. WFH events are scheduled across Tennessee throughout the year. At the events, volunteer attorneys provide free wills and other basic estate planning documents to emergency first responders and their families. To date, the program has served almost 2,000 first responders in Tennessee, and more than 900 lawyers have volunteered their time to the program.

Whether volunteers are interested in participating in a regularly scheduled legal aid clinic or working with a specific issue group, many opportunities exist to get involved.

“Attorneys are always surprised at how much they are able to impact our client’s lives in just an hour or two of their time,” says Charlie McDaniel, who is Pro Bono project director at Legal Aid of East Tennessee in Chattanooga. “Sometimes all it takes is a letter or a phone call to keep a family in their home. Sometimes quickly drafting a will or power of attorney can allow someone to rest easier knowing their affairs are in order. Other cases — adoptions, conservatorships, benefits — may call upon an attorney’s particular expertise in an area of law. With their knowledge and skill set, pro bono attorneys are uniquely positioned to make huge, positive changes in people’s lives and in the community.”

If an area does not currently offer a legal clinic, there are many resources available to help develop one. Though it

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Pro Bono continued from page 13

may seem intimidating, there are organizations eager to collaborate to provide legal assistance in underserved areas. Additionally, the Tennessee Access to Justice Commission has developed a “Pro Bono Clinic in a Box,” which provides all the basic instructions, forms and other documents needed to operate a legal clinic. More information is available at http://justiceforalltn.org/i-can-help/clinic-box2.

OnlineTNJustice.org: Do It from Home

OnlineTNJustice (OTJ) is a joint project of the Tennessee Alliance for Legal Services (TALS) and the TBA. OTJ is an online opportunity based on the walk-in-clinic model where clients request brief advice and counsel about a specific civil legal issue from a volunteer lawyer. Lawyers provide basic information and advice without any expectation of long-term representation, all via a secure website. OTJ provides an option both for low-income Tennesseans in need of legal assistance and is a convenient way for attorneys to offer pro bono assistance.

OTJ works to eliminate those barriers that may keep a client or a volunteer attorney from participating in other legal clinics. Whether it is geographic location, work schedule or family obligations that keep individuals from taking part in existing legal services, OTJ offers a unique option for clients and volunteers alike. It was also developed to expand pro bono services in rural areas of the state and to provide alternatives for clients who may be eligible for legal aid services but are turned away because of the organization’s lack of resources.

Once approved, OTJ volunteer attorneys may log-in anytime and review posted user questions. Volunteer lawyers are able to read the full question before deciding whether to choose to answer it. Follow-up questions are permitted, and the volunteers may remain completely anonymous or provide whatever identifying information they want. OnlineTNJustice is an ideal option for attorneys with limited availability for in-person legal clinics or those who would prefer to be able to select only specific issues to address.

“OTJ offers a flexible, easy way to help someone in need and earn CLE credit at the same time,” TALS Executive Director Ann Pruitt explains. Volunteer attorneys receive one hour of pro bono credit for every five hours spent researching and answering civil legal questions on the site, and, she says, TALS handles filing for the CLE credit and provides malpractice coverage to the

Learn More

For more information about these and other pro bono legal opportunities in Tennessee, visit www.tba.org/resource/i-want-to-do-pro-bono

Committee Service, Leadership and Outreach Efforts

The access to justice community in Tennessee is an active and collaborative group, with many opportunities for serving, beyond direct client service. The TBAs Access to Justice Committee

and the Tennessee Supreme Courts Access to Justice Commission both have ongoing projects and give those in the legal community the chance to be part of setting the future direction of access to justice work in the state.

The Access to Justice Commission was created by the Tennessee Supreme Court in 2009 to help address the growing civil legal needs crisis in the state. The 10-person ATJ Commission operates under a strategic plan and assigns tasks to its five Advisory Committees: Education, Faith-Based Initiatives, Pro Bono, Public Awareness and Self-Represented Litigants. The committees can also propose and develop specific initiatives in response to legal needs. The commission and committees welcome input as well as volunteers to assist with project implementation. Some of the specific projects include increasing resources for pro se litigants and producing videos for the public and attorneys. The attorney education videos are designed to provide volunteers with the necessary skills to take on cases that may be outside of their day-to-day practice area.

The commission is developing its next strategic plan, which it will release early this year. The 2014 plan will include specific goals, tasks and timelines for project implementation.

Law Students: ‘We Are Being Trained to Help People’

Law schools in Tennessee provide opportunities for students to get experience by actively participating in clinics, externships and other pro bono projects. Law students play a significant role in many pro bono programs, and the experience can help them both with developing crucial skills and creating the habit of pro bono early in their careers.

Many students volunteer at legal aid clinics throughout the year, under the
supervision of experienced attorneys. T. Kyle Turner, a student at University of Memphis, Cecil C. Humphreys School of Law, has participated in the monthly Saturday Legal Clinics hosted by Memphis Area Legal Services and the Memphis Bar Association, since the beginning of his first year in law school.

“I was always aware that there was a ‘need’ for many in the community but never understood how that ‘need’ could be met. By sitting down, listening to people’s issues and providing them with advice, their trajectories could be completely changed,” Turner says. “As a law student, I am able to see the classroom learning come alive. Abstract concepts from books become real people and real issues. Seeing firsthand that what we learn every day has a practical application is inspiring. More important, however, is the idea that we are being trained to help people. Offering pro bono assistance and working with the underserved not only helps the community at large but also enhances my education in ways a classroom never can.”

That spirit of collaboration and cooperation between the students helped to generate opportunities across Tennessee for students to engage in alternative spring break projects (ASB). In these projects, students from Tennessee law schools spend their spring break working together, sometimes consecutively, to collaborate on a larger project that could not be completed by one group in only a week’s time.

In 2013, the foremost collaborative endeavor was a joint effort assisting women who have been victims of violence be able to obtain a U Visa, which allows them to temporarily remain and work in the United States. The multiweek project involved law students from Belmont College of Law, Lincoln Memorial University, University of Memphis and the University of Tennessee working together and was hosted by UT.

Rising third-year Belmont student Kristi Pickens says that assisting these women “required learning how to be a sympathetic listener and professional at the same time. The woman we helped through the U Visa process had a heart-breaking story, and at times I wanted to cry. As part of the application process, we had to know everything — the good, the bad and the ugly. It was hard for her to open up, and it was heart-wrenching to have to pry. But the more details we gathered, the stronger we could make her application. And the stronger and more professional we were, the stronger she seemed to be in telling her story.”

These and related law school projects help create a culture of pro bono with participating law students that, the hope is, will continue as they enter the practice of law.

**Tennessee Appellate Pro Bono Project**

Though many pro bono opportunities are focused on limited-scope representation, some clients are in need of representation pursuing appeals. In response

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**Supreme Court Begins Program to Honor Pro Bono Work**

A major component of the Tennessee Supreme Court’s Access to Justice initiative is promoting pro bono service among the state’s attorneys.

To encourage such efforts, the court will for the first time in 2014 recognize attorneys and law students who have demonstrated a commitment to providing legal services to those in need.

Any attorney who has performed 50 or more hours of pro bono work in 2013 will be recognized by the court as an “Attorney for Justice.” Similarly, any 2014 law school graduate who has given at least 50 hours during their law school career will be named a “Law Student for Justice.”

Recipients of the recognitions will be honored at regional events hosted by Supreme Court justices throughout the state. The court has declared that its key strategic initiative is access to justice — and pro bono work is a key component of that objective.

“Pro bono work is an important and valuable element of our service in the legal community,” Chief Justice Gary Wade said. “Ensuring accessible legal services to those who could not otherwise afford them is most deserving of this recognition.”

To be considered for the program, all service must have been provided under the provisions of Rule 6.1 of the Rules of Professional Responsibility, which includes delivery of a substantial portion of legal services without fee or expectation of fee and delivery of legal services at no fee or at a substantially reduced fee to recognized groups and individuals. The program is entirely voluntary and based on self-reporting.

Law offices located in Tennessee also may submit applications for the honor. Information on how attorneys will report pro bono service and the law office application process is available on the Administrative Office of the Courts website, www.tncourts.gov.

The program is the result of a recommendation by the Supreme Court’s Access to Justice Commission, which is tasked with making such recommendations to the Supreme Court of projects and programs necessary for enhancing access to justice.

— by Michele Wojciechowski, Administrative Office of the Courts communications director

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to this need, the TBA and TALS launched the Tennessee Appellate Pro Bono Pilot Program in 2011. This pilot initiative provides pro bono representation to litigants appearing in the Tennessee appellate courts who otherwise could not afford counsel.

The Tennessee Appellate Pro Bono Pilot Program’s primary goals are to improve access to justice for low-income litigants in Tennessee’s appellate courts by establishing a qualified panel of appellate attorneys to provide pro bono representation on appeal while also providing increased opportunities for attorneys with appellate practice expertise to use their skills to serve clients who could not otherwise afford representation. The program also provides an opportunity for young lawyers seeking appellate practice experience through pro bono representation, under the mentorship of senior appellate attorneys.

Interested volunteers, both experienced appellate litigators and those seeking to enhance their skills, are encouraged to contact the TBA to be part of this unique program.

Get Started
While a commitment to pro bono programs and service is not a substitute for adequate funding and support of existing legal aid services, it does play a crucial role in the comprehensive approach that is required to help all of those in need have meaningful access to justice in our state, regardless of their ability to pay for legal representation.

Some have noted that one of the main barriers to attorneys doing pro bono work is simply inertia or lack of time to navigate a potentially complicated process. Fortunately, there are so many opportunities available that these should never be excuses for those in the Tennessee legal community to avoid their responsibility to serving those in need.

“Don’t tell me we can’t change the world,” Buck Lewis says, “because I have seen far too many examples of the work we do meaning the world to our clients and the lawyers who serve them.”

Just choose one of these projects, then pick up the phone and begin. It’s that easy.

Tennessee Bar Association Access to Justice Coordinator LIZ TODARO and members of the TBA Access to Justice Committee contributed to this article.

Notes
3. Tennessee Rules of Professional Conduct (TRPC) 6.1: “A lawyer should aspire to render

Pro Bono Honor Roll

Look for this year’s Pro Bono Honor Roll online!

The Tennessee Bar Association is pleased to have this opportunity to join the pro bono programs in honoring those lawyers who participated in pro bono activities during the past year. More than any other profession, lawyers give of their time and talents to serve those who need their services.

We recognize that the list is not an all-inclusive list of all of the pro bono services provided in Tennessee, and we applaud all of those countless members of the bar who selflessly serve in any of the multitude of ways cataloged in the Rules. The online list is of attorneys who volunteered with the specified Tennessee pro bono programs between Nov. 1, 2012, and Oct. 31, 2013, as reported by the following programs: Chattanooga Bar Association P.A.T.H. Program, Community Legal Center, Disability Law & Advocacy Center of Tennessee, Legal Aid of East Tennessee, Legal Aid Society of Middle Tennessee & the Cumberlands, Memphis Area Legal Services, Tennessee Justice for Our Neighbors, Southeast Tennessee Legal Services, Tennessee Alliance for Legal Services/OnlineTNJustice.org, Tennessee Justice Center, Volunteer Lawyers & Professionals for the Arts, West Tennessee Legal Services and other local clinics and programs.

To read the list, go to http://www.tba.org/journal/2013_probbono

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Commitment to Public Service Honored

Each year the Tennessee Bar Association recognizes outstanding service by attorneys and law students who have dedicated their time to help others. The awards given are the **Harris Gilbert Pro Bono Volunteer of the Year**, the **Ashley T. Wiltshire Public Service Attorney of the Year** and the **Law Student Volunteer of the Year**. Read the stories of those recognized here.

**Harris Gilbert Pro Bono Volunteer of the Year**

This year’s Harris Gilbert award is presented to **CHARLES W. “BUZ” DOOLEY**. The award recognizes private attorneys who have contributed significant amounts of pro bono work and have demonstrated dedication to the development and delivery of legal services to the poor. The award is named after Gilbert, a Nashville attorney and past Tennessee Bar Association president, who exemplifies this type of commitment.

When Buz Dooley started practicing law, they didn’t even use the term pro bono. Now at 78 and three years into retirement, Dooley is downright evangelistic about the concept.

“It was just part of your duty as an attorney, to help out,” he says of his early experience providing legal services for free. “The court appoints you, and you need to take your share of the load.” The court-appointed cases he took are the only criminal cases he has handled in his long legal career doing civil defense work.

Today, of counsel and retired from Leitner, Williams, Dooley & Napolitan PLLC, Dooley still practices law. But a lot of it is pro bono, which he does as an intake and placement attorney at Legal Aid of East Tennessee.

“Buz Dooley is exponentially the most active pro bono attorney in Chattanooga, both in terms of time donated and clients served,” says Charles McDaniel, who is Southern Region pro bono project director for LAET and who nominated Dooley for the award. Dooley goes to LAET every Wednesday morning without fail, to meet with clients, offer advice and, when needed, make phone calls to line up other attorneys to take the cases. “On average, Buz meets with almost 200 clients a year, usually spending over an hour with each — an unmatched level of dedication to pro bono,” McDaniel says. “Buz is truly the best friend low-income, elderly and abused Chattanoogans have.”

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At LAET, Dooley sees all types of cases — landlord/tenant, domestic, contracts and more. “Any kind you can imagine, we deal with,” he says. In his position, he points out, he has to be vaguely familiar with all types of cases so he’ll know who to ask to take each one on.

“We try not to overload [the other volunteers],” Dooley says of how the cases are spread around. “We want to keep them happy. I try to use some of my salesmanship with that because I know when the phone rings and the caller ID says ‘legal aid’ they say oh no, more free work,” he laughs. “But they do a very good job of joining in and helping out.”

Dooley admits he can be persuasive, an attribute he says he learned as a clothing salesman in the years between earning his economics and business degree from Vanderbilt and his law degree from Cumberland School of Law at Samford. His tenure as president of the Chattanooga Bar Association in 1991-92 also helps him as he connects pro bono clients with specific needs with lawyers. “I knew an awful lot of attorneys pretty close [as president],” he says. “You get to know a lot of people that way.” So he calls them up and asks them to take a case, and usually they do it.

Dooley credits many of his prior experiences with his career successes, especially his high school years at Columbia Military Academy where he learned “the important life lesson of self-discipline.” He also served in the ROTC at Vanderbilt and in the Army at Ft. Benning. He then went to work in the clothing store his parents owned in Lawrenceburg, Tenn., where he grew up. This led him to work as a salesman for Jantzen, selling swimwear and sportswear in several Southeastern states. He loved the work. But when he married Annette, he soon realized the traveling lifestyle was not going to fit into their vision of raising a family.

He didn’t plan to be a lawyer, but several things came into play that sent Dooley to law school. One was a promise he had made to Annette, that he would not continue to travel so much once they started a family. He had told her that after five years he would either open a retail store and settle down, or go back to school for a higher degree. He was mowing his yard one day, he says, “thinking and praying about it, and it just hit me the thing for me to do was to go to law school. That’s what happens when you pray about it, I guess.”

Early on, Dooley says he and Annette developed priorities for their lives, which are religion, marriage/family and country. “I felt like I could help out people, my country and my family if I became a lawyer.”

While at Cumberland, with a wife and two children, he was very active on campus as well as holding down three jobs: working at the law library, clerking at a downtown law firm and working on weekends at a department store.

Now their two children — Doug and Ann Elizabeth — are also lawyers, having grown up around his firm. Doug, now a member at Leitner, worked in its library when he was young, his dad says, and Ann Elizabeth, who practices in Montgomery, Ala., worked sometimes as the receptionist there. “I thought surely they wouldn’t want to become lawyers after that!” he says.

Dooley has not always been a poet but when his son graduated from high school, he penned a poem for the occasion and has since written many others. More recent poems have commemorated his law firm and LAET.

“My grandfather was a real poet,” he says of the man he knew who typed poems with one arthritic finger because he couldn’t move any of the others. “I had a lot of admiration for a guy like that.”

“When I was actively practicing, we weren’t keeping up with that sort of thing,” he says of pro bono hours. “It wasn’t coming through legal aid. We were doing it because we were required to do it — because we were attorneys.”

As for new lawyers, Dooley likes that many schools are now requiring and emphasizing pro bono work.

“That’s a huge change right there,” he says. “It was hardly talked about when I was in law school, except for criminal appointments. I think it will get more people interested at an early stage.”

Like volunteer work of almost any kind, Dooley agrees that you will get more out of it than you put in.

“In what I’m doing [at LAET], I’m tickled to death when I get someone who is competent in the field on the case. That’s where I get my pleasure, from the people who I make placements to. That is the reward for me, just to see that they have some good help and not have to worry because they can’t afford an attorney.”

If you are on the fence about doing pro bono, Dooley has some advice for you: “You’ll be happy that you did it because it will make you feel good. Besides, it will make your mother proud.”

— Suzanne Craig Robertson

Pro Bono

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at least 50 hours of pro bono publico legal services per year.”

4. Supra note 2.


7. For a better understanding of the committees’ activities, go to www.tncourts.gov/programs/access-justice and read the 2012 Strategic Plan. For more information, contact Anne-Louise Wirthlin, access to justice coordinator for the commission, at (615) 741-2687 or anne-louise.wirthlin@tncourts.gov
Ashley T. Wiltshire Public Service Attorney of the Year

The Public Service Award is given to an attorney who has provided dedicated and outstanding service while employed by an organization that is primarily engaged in providing legal representation to the poor.
This year's award is given to DEBORAH YEOMANS.

Before Deborah Yeomans even entered law school, she knew exactly what she wanted to do with her life: help victims of domestic violence.

And even today — 24 years after starting work at the Legal Aid of East Tennessee — there's no doubt in her mind that she is where she should be.

“If someone came in and offered me a job in private practice paying twice the money, I’d say no,” she says without hesitation.

“I have a passion for helping victims of domestic violence, and I also have a passion for people who need help and don’t have a means to get it.”

Thousands of clients have benefited from this passion over the years, including many who are also facing bankruptcy or tax problems — two areas of the law where Yeomans has recently gained expertise. But the 51-year-old lawyer has also gone beyond just providing one-on-one assistance, sharing her knowledge and commitment across the state. Most notably, she has been involved with the Statewide Domestic Violence Coordinating Council, LAET Associate Director Debra House noted in her nomination of Yeomans for this award.

Last year the group named Yeomans its Advocate of the Year, both for her active support of the organization and her work in Tennessee’s appellate courts, where she had four cases addressing various order of protection issues, most significantly concerning the payment of court costs. She was victorious in defining the proposition that the order of protection statute really means that a victim of domestic violence cannot be charged with the costs of an Order of Protection, House wrote. “This decision has impact across our state for countless victims who seek protection through our court system. Deborah is relied upon by local judges and court clerks for her expertise in the area of domestic violence.”

Beyond her work in the area of domestic violence, Yeomans has also been a leader in helping people get what they need out of the legal system even if they cannot afford an attorney, House adds. Since the early 1990s, she has been involved with statewide pro se efforts, most recently helping develop the newly released pro se divorce forms.

“Probably the number one call we get is for help with divorces, and we just don’t have resources to do them,” Yeomans said. “There are people who have not lived together for years, but they are still married because of the cost of getting a divorce.”

Finding ways to help clients like this is what continues to drive Yeomans. While taking on these statewide responsibilities and serving as managing attorney of LAET’s Johnson City office, she still keeps more than a full load of cases. And they are where she is touched the most.

“I understand what they are going through because I witnessed what my mom went through,” Yeomans says. “All of those things that my clients tell me they’re suffering, I heard out of my dad’s mouth.”

—— Barry Kolar

Law Student Volunteer of the Year

This award recognizes a Tennessee law school student who provides outstanding volunteer services while working with an organization that provides legal representation to the indigent. This year’s winner is KATIE BLANKENSHIP, a third-year law student at Belmont University School of Law.

Like many law students, Katie Blankenship has long known that she would pursue a legal career. In fact, she has been helping out at her parents’ Murfreesboro-based law firm, Blankenship & Blankenship, since she was a teen. Now at 33 and as a third-year law student who is proud to be part of the inaugural class of Belmont University College of Law, it is her intense devotion to pro bono work that is the defining aspect of her chosen vocation.

In addition to excelling academically, Blankenship has served as a founder and leader of the Belmont Legal Aid Society and two legal clinics, as well as dedicating countless hours to other Middle Tennessee legal advocacy organizations. She has volunteered with Justice for Our Neighbors, the Tennessee Immigrant & Refugee Rights Coalition, the Hannah Project and Volunteer Lawyers for Professionals in the Arts, among others.

“It is easier to follow a well-worn path than to create a new one,” Belmont Law Professor Jeffrey Usman points out. He says when Belmont opened its doors in the fall of 2011 he was curious as to the type of students who would attend, knowing that the charter class would have a greater impact on shaping student culture than any subsequent group.

“I know now that part of the culture of Belmont law students is an understanding of the law as a profession of service to those in need and dedication to volunteering to provide such service,” he says. “The biggest single force in creating that culture is the leadership of Katie Blankenship. There have been no easy steps along the way. She has had to lead rather than be able to follow. It is not only the difficulty of the path that she has had Continued on page 20
Public Service Awards
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to travel but the remarkable distance that she has covered that sets Katie apart from other students."

Usman points to Blankenship’s roles as a founder of the Belmont Legal Aid Society, the Magdalene House Legal Clinic and the Sophia’s Heart Legal Clinic. “The first would be a tremendous success for a law school student; either of the latter two would frankly be a tremendous success for a practicing lawyer and all the more so for a student,” he says.

It is doubtful that Blankenship would ever use a word like legacy to describe her impact, but she is hopeful that her inaugural class at Belmont “is looked back upon as one that cared about the community and valued pro bono service.”

This sentiment is completely consistent with her fervent belief that lawyers have an explicit obligation to serve the community. Her conviction on this point stems from the examples of her grandfather, mother and father, all Tennessee attorneys who built legal careers “framed around service to the community. To never saying no when someone is in trouble.” Her grandfather was Nashville lawyer Paul G. Blankenship and her parents are John T. and Patricia A. Blankenship, who continue to practice in Murfreesboro.

“In her past two years of law school, Katie has devoted more time and effort than most attorneys do in an entire career,” says Belmont Law Professor Ellen Black. “Her history of service to pro bono organizations speaks for itself, and she serves as a tremendous role model to the law school community and the Nashville legal community. As a law student, she is already making a difference in the lives of those less fortunate.”

Multiple nominations for this award specifically mentioned the Magdalene House legal clinic’s work, including its help alleviating “crippling court costs,” that would have been virtually impossible to do without legal representation. Usman said he “had the great pleasure of watching the lives of several women change in a Nashville Davidson County courtroom because of the dedication and leadership of Katie Blankenship.”

Blankenship’s commitment to pro bono service extends beyond personal philosophy. She is driven to bring access to justice issues to the attention of her fellow law students and others in the legal community. “She is the kind of person that inspires people around her and is a natural leader and organizer,” says Casey Gill Summar of Volunteer Lawyers & Professionals for the Arts. “She instantly stands out as a distinct advocate for pro bono. She is unafraid to pursue a different path and lends such enthusiasm and excitement to the cause that she often brings along several other students with her, both literally and figuratively.”

In addition to direct client representation, she is involved with community education projects, serving as an active volunteer with the TBAs Public Education Committee and leading conversations about civics and the law with Nashville high school students. She also seamlessly incorporates foundations from both her undergraduate degree in cultural anthropology and her master’s degree in humanities in her approach to legal issues. She is interested in promoting holistic, community-based responses that empower individuals.

As she enters the last semester of law school, Blankenship is focused on fostering practical transitions and continuity for the organizations and programs she helped found. This includes defining a meaningful role for alumni to remain involved and supportive.

After law school, she is interested in pursuing a career in public service but she also “has a soft spot for being part of a small firm, maybe even with family.” Given that she has more than two decades of experience navigating private practice via her parents’ firm, it seems in perfect balance that this fall, she will start a clerkship with the United States District Court, serving in the chambers of the Hon. C. Clifford Shirley and the Hon. H. Bruce Guyton in Knoxville.

— Elizabeth Slagle Todaro

In her past two years of law school, Katie has devoted more time and effort than most attorneys do in an entire career.

Law Student Volunteer of the Year Katie Blankenship

— Elizabeth Slagle Todaro
Since 2003, LexisNexis™ has donated more than $220,000 to Tennessee Pro Bono Programs

The LexisNexis Cares Program offers its online service for pro bono use. And since Tennessee Justice Center (TJC) was founded in 1996, LexisNexis has worked with the Tennessee Bar Association to provide thousands of hours of free legal research time to TJC.

Hundreds of thousands of Tennesseans rely on Tennessee Justice Center each year for legal help that they couldn’t afford any place else. Thanks to the work of TJC, they are able to get the legal representation they deserve. And thanks to LexisNexis for helping provide the necessary tools.

The Tennessee Bar Association and its members all across the state say thank you to LexisNexis for its work in supporting justice for all in Tennessee.

“LexisNexis breathes life into the phrase ‘Equal Justice Under Law’ by arming us with the tools we need to represent Tennessee children and families. Because of their generosity, children receive the health care their doctors order and to which the law entitles them. Thanks LexisNexis for making the future of our community brighter!”

— Michele Johnson, executive director, Tennessee Justice Center
Effective Jan. 1, 2014, lawyers who end up having to seek to justify their conduct in the face of a disciplinary complaint (and lawyers who represent lawyers in such circumstances) will have to navigate a new, overhauled version of Tennessee Supreme Court Rule 9. The adoption of the new rule is the culmination of a year-long process initiated by the Tennessee Supreme Court when it distributed its initial proposal to revise Rule 9 on Aug. 8, 2012. The court received extensive public comment on that proposal and distributed a revised proposal for further public comment on April 18, 2013. Curiously, the Aug. 30, 2013, order adopting the new Rule 9, indicates that it will have prospective application only, so as to apply only to “matters filed with or initiated before the Board of Professional Responsibility” on or after Jan. 1, 2014. Given the sweeping nature of the revisions to Rule 9 (the prior version of the rule has been replaced entirely), it will be interesting to see how things play out with two different sets of rules and procedures in place for some period of time, particularly whether it is even feasible for the board to leave in place certain procedures acceptable in older, pending matters but not usable in new matters.

Although the court’s new Rule 9 will not satisfy all those with an interest in how the disciplinary process in Tennessee operates, everyone should be able to agree that the new Rule 9 is vastly improved in terms of organization, architecture and clarity. Among the structural improvements to Rule 9 is a new section defining terms used in the rule, including “respondent,” which will
be used throughout the rest of this article to refer to a lawyer who is the subject of a disciplinary proceeding. § 2.

In my opinion, the revisions are best explained with reference to how a lawyer is likely to encounter them — the life cycle of a disciplinary complaint. Accordingly, this article will provide a guided tour of new Rule 9 in that context, noting where appropriate both the important changes from the current process and those areas where, for better or worse, the rules remain the same.

Some of you now may be saying to yourself, “I don’t plan ever to be a respondent; is there anything about Rule 9 I still need to know?” Setting aside the fact that no one ever really plans to be a respondent, there are a few important aspects of the new Rule 9 that do not arise in the context of disciplinary proceedings, but happen to be housed in Rule 9. For those of you who are only interested in those topics, you can turn your attention immediately over to the sidebar material titled “Other Notable Aspects of New Rule 9” on page 27.

If you are still with me at this point, let’s start that guided tour:

Disciplinary proceedings have always been most likely to begin because of a complaint to the Board of Professional Responsibility by a lawyer’s client, former client or some other person who feels themselves aggrieved by the lawyer’s conduct. That will continue to be true in 2014 and beyond. However, despite public comment critical of limiting the broad immunity afforded to complainants and witnesses in disciplinary proceedings, new Rule 9 now strips immunity from complainants and witnesses if they provide “false” information in communications or testimony and they have “actual knowledge of the falsity.” § 17.

In terms of how (and about what exactly) someone complains to the board about a lawyer, new Rule 9 changes the landscape somewhat. For a complaint to be sufficient to trigger disciplinary counsel’s obligation to investigate, Section 15.1 now requires not only that the complaint be in writing, but also that it identify, and be signed by, the complaining party. This should mean the end of the use of anonymous complaints to bring about an investigation by disciplinary counsel. Importantly, in the event that a complaint received by disciplinary counsel is frivolous (or complaints of conduct falling outside its jurisdiction) on its face, then disciplinary counsel can dismiss the complaint, and the rule does not require notice to the accused lawyer in such circumstances. New Rule 9 also removes one potential source of complaints against lawyers by deleting conduct in violation of the attorney’s oath of office from the section identifying conduct that is grounds for discipline. Compare § 11.1 with Section 3.2 of old Rule 9. Thus, for example, in 2014 a complaint against a lawyer that alleges only a violation of the oath of office should presumably result in an immediate dismissal and could come about without the accused lawyer even being aware of the developments.

Although the submission of a complaint remains the most likely way for disciplinary proceedings to commence against a respondent, it is still not the only way. Rule 9 still provides disciplinary counsel with some authority to initiate an investigation even in the absence of a person submitting a sufficient complaint. For example, a media report could be sufficiently serious to justify disciplinary counsel opening an investigation file under Section 4.5(a). New Rule 9 also continues to permit disciplinary counsel to seek the immediate, but temporary, suspension of a lawyer when a lawyer has (1) misappropriated funds, (2) failed to respond to a disciplinary complaint, (3) failed to comply with a certain type of TLAP monitoring agreement; or (4) otherwise poses a threat of substantial harm to the public. § 12.3(a). In the past, such a suspension triggered the obligation of disciplinary counsel to file a formal petition for discipline against the lawyer thereafter to seek a final determination regarding appropriate discipline; new Rule 9 however leaves it to the respondent to file a petition to seek to have such temporary suspension dissolved or amended. § 12.3(d).

Finally, Rule 9 also continues to require certain swift disciplinary action in the form of immediate suspension against attorneys who have been convicted of any “serious crime,” a defined term that now includes convictions in jurisdictions outside of the state of Tennessee. § 2. New Rule 9 deletes one other circumstance that resulted in immediate, temporary suspension, by dropping the convoluted proceedings required under old Rule 9 regarding a lawyer held in contempt in a case in which they are a party and, instead, simply states that anytime a lawyer is found in contempt of a court order such conduct is grounds for discipline. Compare § 11.3 with Section 3.4 of old Rule 9.

Fundamental to understanding the mechanics of what happens in the disciplinary process in Tennessee is an understanding of the structure of the board itself. New Rule 9 retains and continues the internal structure of the Board of Professional Responsibility, its district committees, and its relationship with disciplinary counsel. The board continues to be comprised of 12 members who are appointed by the court, comprised of nine attorney members and three non-attorney members. §4.1. The state of Tennessee is divided into nine disciplinary districts (§ 3), and there must be one attorney board member from each district, while the three non-attorney members include one from each of Tennessee’s three Grand Divisions. Voting, quorum and other procedural requirements (including the ability to make decisions by telephone conference or even e-mail) with which the board must comply are set out in § 4.3. And although the court’s original proposal would have made clear that the members of the board, who receive no compensation for their service (§ 4.4), must comply with the disqualification/recusal requirements imposed upon judges by Tenn. Sup. Ct. R. 10, new Rule 9 as ultimately adopted by the court makes a

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curious decision to say only that members of the board should not be involved in adjudicative functions when doing so would violate “federal or Tennessee constitutional due process requirements for administrative adjudications” and states that the procedures for motions to disqualify set out in Tenn. Sup. Ct. R. 10B do not apply. § 4.6.

District committee members — those who review certain recommendations of disciplinary counsel and who, in groups of three, serve as members of hearing panels — continue to be required to be lawyers and, for each disciplinary district the committee must have at least five members. § 6.1. District committee members are appointed by the court based upon the recommendation of the board or by the leadership of local bar associations in each district. Id. District committee members, whether acting as an individual reviewing a recommenda-

tion by disciplinary counsel or serving as a hearing panel member, must also comply with Tenn. Sup. Ct. R. 10 on disqualification/recusal as if they were a judge; however, new Rule 9 provides that the mechanics for motions to disqualify under Tenn. Sup. Ct. R. 10B do not apply. § 6.5. New Rule 9 does impose term limits upon service as a District committee member but provides that a person can be reappointed as a member, even after having served the maximum of two consecutive three-year terms, if they spend one full year off of the District committee. § 6.2.

Chief disciplinary counsel continues to be appointed to the position by the court and to serve, at the court’s pleasure, as something of a combination of an independent prosecutor and in-house lawyer for the board itself. § 7.1. Section 7.2 of new Rule 9 provides for the powers possessed by chief disciplinary counsel alone; while § 7.3 enumerates the powers equally available to chief disciplinary counsel and any full-time staff disciplinary counsel employed by chief disciplinary counsel. Among those enumerated duties are both the power to investigate possible misconduct and the duty to present disciplinary proceedings. This is consistent with the two-staged/two-tiered system contemplated by Rule 9 made up of informal but highly important (and confidential) investigative proceedings and formal, public disciplinary proceedings.

Upon the receipt of a sufficient complaint to trigger its investigative obligations, disciplinary counsel must provide a copy of the written complaint submitted against the lawyer. The lawyer shall then have an opportunity (the typical letter from disciplinary counsel offers a period of 10 days) to provide a response to the complaint. Nothing about the revisions to Rule 9 changes this process from taking place in the way that it long has with the potential for

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multiple rounds of exchanges of letters with disciplinary counsel receiving the lawyer’s response and packaging it up and sending it to the complainant for a reply and vice versa. In order to insure, however, that disciplinary counsel does provide respondent with all such submissions from the complainant, new Rule 9 explicitly requires disciplinary counsel not only to provide the original written complaint against the lawyer but also any further supplemental submissions made by the complainant.

§ 15.1(a). That same section also requires disciplinary counsel to provide a respondent with a copy of any information which results in an investigation by disciplinary counsel in the absence of a written complaint.

Though a complainant may be what gets the proceedings started, new Rule 9 continues to provide that an investigation, once commenced, does not have to stop because a complainant changes his or her mind. § 20. Likewise, disciplinary proceedings still need not automatically be put on ice because the allegations made to the board are substantially similar to allegations pending in criminal or civil litigation. § 21. Rather, any request to stay disciplinary proceedings on that basis is left to be resolved by the board at its discretion based on a “good cause” standard. Id. In most circumstances, this means that, regardless of any other issues respondent may be dealing with, disciplinary counsel’s investigation continues until s/he is in position to conclude them. When that time comes, one of several things can happen as is explained in § 15.1(b).

First, disciplinary counsel might conclude that the complaint against the lawyer should simply be dismissed. To accomplish this, the disciplinary counsel must obtain approval of the recommendation for dismissal from one member of the district committee. §§ 6.3, 15.1(c). In the event that the reviewing disciplinary committee does not agree with disciplinary counsel’s recommendation, the

member may attempt to “modify” such a recommendation but cannot seek to impose discipline greater than a private informal admonition and can only offer diversion if disciplinary counsel concurs with diversion. §§ 6.3. 15.1(c).

If approved, then the complaint is dismissed, the file is closed, and the fact of the complaint and the investigation remain confidential. The complainant is notified, however, that the complaint has been dismissed. A complainant unhappy with that outcome can appeal the dismissal, in writing, within 30 days of receiving the notice of same. § 15.4(f).

That appeal goes to the board, where the dismissal can be approved, modified, disapproved, or the board can direct disciplinary counsel to investigate further.

Second, disciplinary counsel may decide to recommend imposition of the lowest form of discipline — a private informal admonition (PIA). Section 12.6 defines a PIA as a form of discipline appropriately imposed “when there is harm or risk of harm to the client, the public, the legal system or the profession, but the misconduct appears to be an isolated incident or is minor.” Interestingly, while the review process by the district committee member is the same as with a recommended dismissal and the complainant similarly will receive notice of the outcome, when a recommended PIA is approved the complainant has no right to appeal. §15.1(g). The respondent also has no right of appeal, but can demand a formal disciplinary proceeding be initiated and have the PIA vacated.

§ 15(e). Such a course of conduct for a respondent is risky, however. Once formal proceedings are initiated, the second, formal (and public) stage of disciplinary proceedings begins, and this means that, unless exonerated by the hearing panel, a public censure is the lowest form of discipline that can be meted out to the respondent.

Third, disciplinary counsel might conclude that the alleged conduct of the lawyer in question merits discipline greater than a PIA but should not result in the imposition of formal proceedings. If so, then disciplinary counsel’s options are to recommend imposition of a private reprimand or public censure against the lawyer. Section 12.5 defines a private reprimand as the form of discipline that should be imposed either when “there are several similar acts of minor misconduct with the same time frame, but relating to different matters” or the conduct is of the same nature as what is appropriately punished through a PIA but the respondent has previously received a PIA for the same conduct and is now repeating such misconduct.

Section 12.4 explains the impact of a public censure (which as the name itself strongly hints involves being censured for your conduct in a public fashion), but does not undertake to define when it is appropriate.

Whether disciplinary counsel recommends private reprimand or public censure, the review of the recommendation is made by the board itself, and if approved, the choice for the respondent is then the same — either accept the proposed discipline or demand that a formal proceeding against her be

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commenced. § 15.1(e). The board, of course, need not approve the recommendation and could insist that a lower form of discipline (even outright dismissal) be the outcome but could also direct disciplinary counsel to proceed with formal proceedings instead of resolving through the proposed discipline. The revisions to new Rule 9 solve a problem often articulated by disciplinary counsel that public censure could not be accompanied by any further forms of requirements (i.e., public censure plus) and makes clear that as to any form of public discipline, the parties can stipulate, or be ordered to have, accompanying conditions. § 12.8.

Because imposition of private reprimand or a public censure require the approval of the full board and not just one member of the district committee, a private reprimand or public censure that is imposed by the board, and agreed to by the respondent, is not something that the complainant has any ability to appeal. As to private reprimands, this point is made clear by Section 15.1(h), which also indicates that the complainant will be notified that the matter was resolved through a private reprimand but that the proceedings are confidential. As to a public censure, this outcome is apparent only by way of implication.

Another important distinction between disciplinary counsel recommending a private reprimand or a public censure at this stage of the proceedings involves other potentially available components of a proposed resolution. While the potential for a TLAP monitoring agreement requiring reporting to the board is available either way, the possibility of diversion can only accompany private discipline while the imposition of a practice monitor can only be part of recommended public discipline.

New Rule 9 maintains diversion as a recognized concept, but it is limited only to circumstances where private, rather than public, discipline are deemed appropriate and also now provides that diversion is not something a complainant can appeal, but when a matter is handled through diversion, the complainant will receive notice that the

... lawyers will likely continue to be placed in the position of having to include such constitutional challenges in response to formal disciplinary proceedings.

complaint was resolved in a confidential manner. § 13.9. Section 13.1 also makes plain that entering into and complying with a TLAP monitoring agreement can be made a part of a diversion program. Whereas diversion is only available in connection with what would otherwise be private discipline, practice monitors — now enshrined in the rules as a defined concept in §2 and regulated thereby in § 12.9 — are only available for inclusion as a condition connected to public discipline.

Finally, disciplinary counsel could conclude at the end of the investigation that formal disciplinary proceedings should commence against the lawyer. If so, and if the disciplinary counsel’s recommendation for such a step is approved by the board, then the nature of the proceedings takes a much more public, and significantly more formal, turn. This more public, more formal turn of events can also come to pass (as set out above) because the board insists rather than approve a lesser recommendation of disciplinary counsel or because respondent so demands rather than agree to discipline as described above.

With respect to commencing formal proceedings, the new Rule 9 maintains the procedural approach in which the board files a petition, the respondent answers, and the proceedings then continue in a fashion similar to civil litigation, including the requirement of a pre-hearing conference — much akin to a Rule 16 conference in federal court — to be held by the hearing panel within 60 days of the filing of the petition or 30 days after the answer to the petition (if an extension of the time to answer was granted). § 15.2(f). Before such a conference can occur, however, there must be an assignment of the matter to a hearing panel. Despite suggestion being made that the rules should be revised to have a hearing panel assigned as soon as the board’s petition is filed (for among other reasons allowing it to be the hearing panel that rules on motions requesting additional time to respond to a petition), the court has maintained its approach that the triggering event for assignment of a hearing panel is the service of the answer to the petition by the respondent. § 15.2(d).

Another revision on the topic of assignment of hearing panels not adopted by the court was one regarding the mechanics of the board’s operations and
First, and perhaps most important of all, Section 29 of Rule 9 will now offer a comprehensive regime for appointing counsel (“receiver attorney”) to protect the interests of clients when a lawyer has died, disappeared, become disabled or incapacitated (the “affected attorney”).

- Section 29.2 establishes the ground rules for when the appointment of a receiver attorney is appropriate, how proceedings to cause the appointment can be commenced, and the standard for determining whether a receiver attorney is needed.

- Section 29.3 articulates duties owed by, and powers of, a receiver attorney including authorizing the receiver attorney to take control of and have signatory power over the affected attorney’s bank accounts.

- Section 29.4 explains that although no attorney-client relationship is created between receiver attorney and the clients of the affected attorney, the attorney-client privilege applies to their communications and the receiver attorney is still governed by Tenn. Sup. Ct. R. 8, RPC 1.6 with respect to information regarding the representation of the clients by the affected attorney.

- Sections 29.5 and 29.6 address the trial court’s ability to protect client files and records and the ability of the receiver attorney to be compensated for performance of the required duties.

- Section 29.7 provides immunity to a receiver attorney for good faith conduct in the course of official duties, and Section 29.8 makes clear that, without permission from the trial court and the informed consent of the client, the receiver attorney cannot represent a client of the affected attorney.

- Section 29.9 importantly provides recognition for attorneys to designate in advance for someone to essentially serve as a receiver attorney with all the duties and powers otherwise provided for in this rule.

- Section 29.10 establishes that an order appointing a receiver attorney under this rule serves to toll statutes of limitation and other deadlines of the clients of the affected attorney for a 60-day period.

Section 5 maintains the ability of the Board of Professional Responsibility to issue formal ethics opinions that will bind the board and bind any person who requested the opinion and also maintains the ability of disciplinary counsel to issue oral informal opinions to lawyers “when there is readily available precedent.” § 5.4.

Section 10.1 enshrines in the rules the “birth month” approach to submission of the required annual registration statement and payment of a lawyer’s $170 annual registration fee that the board implemented in the recent past.

Section 10.7 retains the perhaps-not-widely-known-of provisions in Rule 9 that require certain categories of lawyers whose licenses have been put in inactive status to still pay a registration fee to the BPR, albeit a reduced one of $85.

In 2014 and beyond, Rule 9 will contain in Section 37 a regime for bringing about the suspension of lawyers who are in default with respect to repayment of their student loans.

Rule 9 will also continue to contain provisions for the administrative suspension of lawyers who fail to pay their privilege taxes under Tennessee law (Section 26) or fail to pay their registration fee to the BPR (Section 10.6). The new Rule 9, however, more directly addresses the mechanics of how such suspensions work in terms of the reinstatement of lawyers once they comply with the obligation that triggered the suspension and now specifically address that if the lawyer does all that they can do within 30 days of their suspension — i.e. not only comply but cause a proposed Reinstatement Order to have been sent to the court — then their reinstatement is automatic even if there is some delay on the part of the court in entering any such of order of reinstatement. Lawyers who do not resolve their issues within those 30 days will have to comply with the provisions of Section 28 to provide notice to their clients, opposing counsel, etc. of the fact of their suspension.

Additionally, a few improvements to better clarify the role of the Tennessee Lawyers Assistance Program (and its autonomy from the board) and the fact that it offers a variety of types of monitoring agreements to lawyers can be found in Section 36. \(\text{\`} \)

what information is communicated by the board to potential hearing panel members prior to appointment of the hearing panel. Despite being encouraged to limit any ex parte communications to potential hearing panel members to only the information that is necessary to allow for the running of an appropriate conflicts check to determine whether recusal would be needed, the court opted simply to bless ex parte communications between the board and such potential hearing panel members generally. § 15.2(e).

New Rule 9 contains a number of other improvements directed at the formal stage of the disciplinary process. New Rule 9 continues to provide reference generally to the applicability of both the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence to...
formal disciplinary proceedings. § 34.3(a). Yet, with respect to the pursuit of discovery, disciplinary counsel has subpoena power from the beginning of the investigative process, while respondent obtains the ability to obtain issuance of subpoenas only after formal proceedings have commenced. § 19.1. The rules do provide though for the ability of a respondent to seek discovery even before formal proceedings are instituted, but only upon obtaining an order from the chair of the board. § 19.5. Section 34.3(b) expressly imposes stronger limits upon a respondent’s ability to take discovery from disciplinary counsel and from the board itself as an entity.

Other revisions that make new Rule 9 more consistent with the Tennessee Rules of Civil Procedure include changes to what must happen for a default judgment to go down against a respondent and clarifying disciplinary counsel’s ability to file an amended or supplemental petition (as well as the ability of the respondent to file an amended answer). §§ 15.2(a), (b). Similarly, consistent with Tenn. R. Civ. P. 72, new Rule 9 permits a sworn declaration to be offered whenever the rules otherwise would require an affidavit.

As was briefly mentioned above, once a formal petition for discipline has been filed, the possibility of the imposition of any private discipline is foreclosed, leaving only a range of potential outcomes (besides a hearing panel ruling in his or her favor) of public censure, suspension or disbarment as is made plain in Section 15.4(a). New Rule 9 continues to require the hearing panel to use the ABA Standards for Imposing Lawyer Sanctions as its guide in determining the appropriate type of discipline, if any. § 15.4(a). Although Rule 9 continues to afford the potential for imposition of a term of probation along with discipline in the form of a suspension, new Rule 9 makes clear that any order of suspension must require the lawyer to at least serve an active suspension of 30 days. § 12.2.

Upon conclusion of the hearing before the hearing panel, an exercise intended to work much like a bench trial in other forms of civil litigation, the panel is required not only to rule but to produce written findings and judgment. New Rule 9 extends the hearing panel’s deadline for issuing its ruling from 15 days after the hearing to 30 days. § 15.3(a). Rule 9 provides both a mechanism for the hearing panel to request more time from the chair of the board for issuing its ruling and makes clear that the hearing panel’s failure to comply with required deadlines will not provide a basis for respondent to seek to have the matter dismissed. § 15.3(a).

Despite being intended to look like a tribunal independent from the board itself, new Rule 9 fails to have the hearing panel directly transmit its ruling to the parties. Instead, a hearing panel is to provide its ruling to the executive secretary of the board and leaves it to the executive secretary to serve the ruling upon disciplinary counsel and the respondent. § 15.3(a).
Another way in which Rule 9 was quite purposely not revised by the court is worthy of mention at this point in talking about any ruling made by the hearing panel. The Tennessee Bar Association advocated in its public comment submitted to the court on Feb. 8, 2013, that Tennessee should drop the “preponderance of the evidence” standard it has employed for years in lawyer disciplinary proceedings and move to the standard used by an overwhelming majority of U.S. jurisdictions, “clear and convincing evidence.” In making that request, the TBA flagged the procedural due process concerns — implicating both Article I, § 8 of the Tennessee Constitution and the Fourteenth Amendment of the U.S. Constitution — of a system in which a lawyer's license could be revoked on the basis of the lowest form of proof known to civil law. The TBA also reminded the court that judicial disciplinary proceedings in Tennessee do require proof by the heightened “clear and convincing evidence” standard. See In re Bell, 344 S.W.3d 304, 314 (Tenn. 2011) (citing Tenn. Code Ann. § 17-5-308(d)).

Nevertheless, the court refused to change its proposed course and Section 15.2(g) of new Rule 9 still indicates that disciplinary counsel need only prove that a lawyer violated an ethical rule by a preponderance of the evidence. Likewise, and potentially serving only to continue to exacerbate the risk of constitutional challenge, the court also left in place the requirement that a lawyer seeking reinstatement has to satisfy the higher clear and convincing evidence standard. While one has to be skeptical about whether this iteration of the Tennessee Supreme Court — having passed over the opportunity to change this standard with full awareness of the constitutional dimensions — will entertain any challenge to the constitutionality of this standard of proof, lawyers will likely continue to be placed in the position of having to include such constitutional challenges in response to formal disciplinary proceedings — proceedings that the United States Supreme Court itself has described as “quasi-criminal” in nature. See In Re Ruffalo, 390 U.S. 544, modified on other grounds, 392 U.S. 919 (1968).

New Rule 9 explicitly prohibits any effort by the respondent or disciplinary counsel to seek any petition for rehearing, 15.3(b). Instead, the party not satisfied with the outcome must file any appeal within 60 days of the entry of the judgment of the hearing panel. § 33.1(a).

As has long been the case, appeals from the ruling of the hearing panel go to the Circuit or Chancery Court, and an out-of-town trial judge is to be appointed by the chief justice of the court. § 33.2. Such appeals are limited to the contents of the record created before the hearing panel and are governed by a limited review similar to many other administrative proceedings using, for example, the “substantial and material” evidence standard. § 33.1(b). Both the hearing panel and the trial court are afforded the power and discretion to stay the effect of their rulings pending appeal. § 33.3. The trial court is also given the authority to stay the ruling of the hearing panel even if the hearing panel does not. § 33.3(a). Any appeal from the ruling of the trial court is lodged with the Tennessee Supreme Court. § 33.1(d).

At any stage of the proceedings, including even as early as when disciplinary counsel is still engaged in investigating the matter and has not yet filed a formal petition for discipline, Rule 9 continues to permit the respondent lawyer to simply consent to disbarment. § 23.1. Although obviously any order of disbarment resulting therefrom is a public document, Rule 9 continues to afford confidential treatment to the affidavit or sworn declaration of the respondent lawyer. § 23.3. Section 24 also continues to encourage the concept of discipline by consent even for results involving lesser punishment than disbarment through the tender by the respondent of a conditional guilty plea but only after formal charges have been filed against the lawyer. Ultimately, any such discipline by consent is subject to approval by the Tennessee Supreme Court after review of a proposed Order of Enforcement and a Protocol Memorandum required to be submitted to the court. The Protocol Memorandum has long been something created and submitted to the court, but it is now enshrined in the rule and its contents and purpose (including specifically disclosure of what is considered by the board to be “comparative Tennessee discipline in similar cases”) defined. § 2. Unfortunately, however, the court has opted to specifically prohibit respondent from submitting any response to a Protocol Memorandum submitted by the board. § 24.1.

Reinstatement proceedings under new Rule 9 are governed as set out in Section 30 and are largely unchanged with respect to substance. The most noteworthy change is that instead of simply being able to automatically resume practice at the end of the period of suspension, a lawyer who has been suspended for less than one year cannot resume practice under new Rule 9 without first filing a petition for reinstatement and obtaining an order of reinstatement from the court. § 30.4(c). Further underlining the potential problem with the court’s refusal to adopt a clear and convincing evidence standard for the imposition of discipline, an attorney seeking reinstatement after being disbarred or receiving a disciplinary suspension must demonstrate their entitlement to reinstatement by clear and convincing evidence. § 30.4.

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Gone Missing: The Disappearance of Robert Charles Armstrong

The modern illiterati have coined the verb “to go missing.” Bob Armstrong did that back in literate days. On Monday, Aug. 19, 1974, he left his wife Wanda (Elwanda) and two daughters and two foster sons in Hendersonville to take a trip to Texas. Nothing seemed unusual at first. Armstrong, 40, sold life insurance and traveled a lot. But on this trip, unbeknownst to his wife, he was accompanied by another insurance agent. She was Wanda Green, the young mother, 21, of a young daughter, 4.

After a month of Bob’s lies about being divorced and wanting to remarry, Wanda Green and child flew to Nashville. Bob called her on the telephone. From the transcript in a later trial, we learn the conversation.

Q. What did he say to you?
A. He wanted to know if I was coming back to him. I told him no. I told him to come to Nashville and he said no. He threatened me that, if I didn’t come back to him, he would disappear from the face of the earth.

Years passed, and neither wife Wanda nor brief-mistress Wanda heard tidings from Robert Charles Armstrong. Wanda Armstrong filed suit on Aug. 11, 1980, against Pilot Life Insurance Company to collect a $30,000 policy. Trial was held in Gallatin, Sumner County, before Chancellor Edward M. Turner on Feb. 25, 1982, more than seven years after the disappearance.

I invite you to read Judge Lew Conner’s excellent opinion, Armstrong v. Pilot Life Insurance Company, 656 S.W.2d 18 (Tenn. App. 1983). But the Tenn. Code Ann. has been amended since then. So let’s examine current law on the presumption arising from absence.

Tenn. Code Ann. §§30-3-101 through 114 comprise the Uniform Absence as Evidence of Death and Absentees’ Property Law. Portions of §30-3-102 are crucial and worth quoting.

(a) A person absent from such person’s residence and unheard of for seven years or longer, whose absence is not satisfactorily explained, is presumed to be dead; provided, however, such presumption may be rebutted by proof.

(b) Exposure to specific peril shall be considered in every case. If during such absence the person has been exposed to a specific peril of death, this fact shall be considered by the court, or if there be a jury, shall be sufficient evidence for submission to the jury.

Wanda Armstrong lost her lawsuit against Pilot Life. Would she win today? I’m unsure, but the presumption of death would give her a better chance of recovering $30,000. 🍀

DONALD F. PAINE died Nov. 18, 2013. He was a past president of the Tennessee Bar Association and at the time of his death was of counsel to the Knoxville firm of Paine, Tarwater, and Bickers LLP. He was member emeritus to the Tennessee Bar Journal Editorial Board. He wrote his columns months in advance, and as a result, “Paine on Procedure” will continue through mid-2014.
He Loved the Law … and This Journal

The passing of Don Paine last November reverberated through the legal community as his colleagues, students and friends poured out their hearts about what he had done for them either directly or indirectly (read many of the tributes at www.tba.org/news/legal-community-mourns-don-paine). He changed the law and the way many practice it, through his teaching, writing and doing. This magazine you are holding (or reading online) is just one of the ways Don Paine helped improve and advance the legal conversation in Tennessee.

The Journal is what it is today, in large part, because of Don, his vision and his extreme care for what was published and how it was written.

He was a founding member — it was his idea, in fact — of the Tennessee Bar Journal Editorial Board, which was formed in 1989. It was a project Don had put in the works not long after he was president of the Tennessee Bar Association in 1986–1987. Instituting the board was a move that revolutionized this magazine, giving it a broader depth of knowledge and raising the standards for what would be published.

Earlier the same year, Don began writing his column, “Paine on Procedure.” It first ran in the January/February 1989 issue of the Journal. That column, “Nonsuits Don’t Necessarily Save You,” included a tag that said the new column would run throughout that year, which would’ve been a total of six columns. I don’t recall discussing renewal; Don just kept right on writing and readers kept eating it up, and here we are 25 Januaries later.

The first board was three members – Don, Bill Halton and Mary Martin Schaffner, who was followed by Lucian Pera. The board later grew to five and then to its current number of seven.

In the beginning, the article review system worked this way: I would mail hard copies of each submission to the board for comment. Weeks later, I’d have their responses. If there was dispute or discussion, add another several weeks. (The magazine was published six times a year then so we had a little time to play with.)

Turnaround time was cut shorter when the TBA acquired a fax machine, although Don did not trust the new technology right away so I continued to mail his copies. You can imagine how he felt about email, but fortunately by that time he had embraced the fax machine. More recently and up until the end of last November, I walked to the fax machine only once a month, when I sent Don a proof copy of his column.

It was during this routine that I first learned of Don’s death from his long-time assistant Karen Roberts. I had not heard from Don after I faxed him the Friday before with his December column’s proof, and this was unusual. It was Don’s habit to call either me or our publications coordinator, Landry Butler, to discuss any changes shortly after he received the fax. Or we would receive a reply fax with marks all over it. I had a bad feeling that morning when there was no fax or voice mail to either of us.

Don wrote 237 columns, 31 feature articles and 30 book reviews for this magazine. In 2007 he took emeritus status on the board but never waivered in production of his writing. He had a column, feature article or book review (and sometimes two of those things) in every issue since 1989. Counting the president’s columns he wrote before that and the ones we will publish posthumously, he has been a part of 246 issues. (The Journal became monthly in 1999, and when Don learned he would need to write twice as much, he just dug in and wrote faster.) That’s more writing than any other person has done for this magazine.

He was a stickler for detail and being correct, for which I am grateful. If he found a problem, sometimes it was my error (and he extended exceptional grace to me more than once), but more often it was our difference of opinion on style. He would insist, for example, on the capitalization of certain words or the inclusion of the dreaded (in my opinion) Oxford Comma in a simple series. I have had more conversations with Don about commas than with anyone, and believe me, I have talked about commas a lot. He viewed the Associated Press Style, continued on page 32
which the *Journal* uses, with disdain. But if I could cite to a reference as to why I did something like I did, and if we were consistent, he would give in.

With his stylish exclamation points that looked like alarmed triangles, he would fax the proof back to correct my mistakes or omissions with short handwritten instructions: “Quotation marks needed!” If he had left off the quotation marks himself, he was quick to admit that.

Don had always worked ahead, having two or three columns in the can long before they were due. But when we got his submission recently for the April, May and June issues, I noticed that was farther out than he’d ever written.

A few days after he died, his reply fax for the December proof appeared in my mailbox, which he had in fact sent the afternoon before he died. Someone must have picked it up by mistake and finally put it in my mailbox. The final magazine proof had already been signed off to our printer and there could be no changes at that late date, so I picked it up gently, wondering what he had marked and would’ve been disappointed to know would not be changed.

Scrawled at an angle across the top, it was as if his dear, scratchy voice was coming through loud and clear. It said, “Looks good, Suzanne. – Don.” 📶

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Don Paine had been a columnist for the *Journal* three years already when in 1992 he was one of the recipients of the newly established Pro Bono Volunteer of the Year award, the forerunner of today’s Public Service Awards (see page 17 for this year’s winners). He was one of three honored that year, along with Memphis lawyer Brooke Lathram and the Nashville Pro Bono Program Inc.

In that story Paine speaks words that still are true more than two decades later:

### Just Do It

Donald F. Paine doesn’t remember when he started donating legal services to people who could not afford a lawyer — he just always has.

“I think I’m being honest with myself when I say that I’ve always thought you’re just supposed to do that,” he says. “I’ve just been taking [pro bono cases] all along, if someone didn’t have the money.” Also, he laughs, “I was out browbeating folks to sign up, so I sort of feel like I should keep doing it myself. Plus, they need lawyers,” Paine says of the legal service organizations in the Knoxville area. … He is a long-time consistent supporter of the Volunteer Legal Assistance Program in Knoxville, where he gets many of his pro bono referrals. He doesn’t keep track of how much time he spends on pro bono cases. “I wouldn’t even have any idea,” he says.

“A lot more pro bono work goes on than is recognized,” he says, pointing out that there are many lawyers who donate time without going through a formal referral process.

“If somebody comes through the door with a meritorious case — who can’t pay or can’t pay much — you ought to give some thought to taking the case,” he says.

“I do believe very fervently, though, that a lawyer should to able to pick and choose cases, other than criminal appointments. I’ve turned down pro bono cases just like I’ve turned down those that aren’t pro bono.”

In presenting the award, then Tennessee Supreme Court Justice Martha Craig Daughtrey said, “He has spent literally hundreds of hours working with our advisory committees on the Civil Rules, the Criminal Rules and the Tennessee Rules of Evidence. And he has donated a substantial amount of staff time to these committees. … The procedural law of Tennessee simply would not exist in its current form without Don’s pro bono efforts.”

The case that stands out the most to Paine involved trying to get custody for the mother of a girl who was deaf. His client, the girl’s mother, was also hearing-impaired. The girl had been taken away to Chicago years earlier when Paine became involved.

“I tried to handle it administratively at first,” he says. He thought it was all worked out at one point and the daughter was supposed to be on a plane from Chicago before Christmas. But then he got a telephone call he says he never will forget — everything had fallen through.

“I had to go tell [my client] right before Christmas that her daughter wasn’t coming home.”

Paine said he felt like telling the people in Chicago: “I think you picked on the wrong country boy this time,” and immediately started looking for a co-counsel who was licensed in Illinois, since Paine was not. He called a Chicago lawyer he barely knew who said he’d be glad to help, even though Paine advised him that “there’s no money in it.”

During the course of the custody battle, Paine went to court in Chicago two or three times and “had a big, knock-down, drag-out trial.” …

They won the case and the woman got her daughter back. When he went to the phone to tell his assistant Karen Roberts to tell her the outcome, he says he started crying.

“That’s the only time I ever cried [over a case]. I wanted to win so badly.” 📶

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Suzanne Craig Robertson is editor of the *Tennessee Bar Journal*. Read Mr. Paine’s obituary on page 10.

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By Suzanne Craig Robertson, excerpted from the July/August 1992 *Tennessee Bar Journal*
minds agree that there has to be some deadline for bringing legal action.

Statutes of repose are different. Statutes of repose eliminate claims, regardless of their validity, simply because a certain amount of time passed between one person’s conduct and the time a lawsuit was filed. That is, statutes of repose are triggered based on a date linked to the potential defendant’s actions rather than on the date of the injury or death. The result: persons injured or killed by another’s conduct lose their right to bring suit simply because they weren’t hurt or killed quickly enough.

Here is how a statute of repose works. Assume that a person receives a horrible injury after being ejected through the windshield in a car wreck on Sept. 21, 2013. Investigation reveals the seat belts in her car, a 2004 model, have been frequently reported as suffering from “false latching.” False latching means the seat belt latch plate looks, feels and even sounds like it is latched when inserted into the buckle but is not fully engaged. Minimal amounts of force will cause a falsely latched buckle to completely release the latch plate, meaning the occupant is essentially un-belted and unrestrained and moves as though he or she were never belted in the first place. The potential plaintiff maintains she secured the seat belt and had no reason to believe the latch was defective. She wants to bring a products liability claim against the product manufacturer.

Tennessee law requires that a products liability claim be brought within 10 years after the product is sold to the first user or consumer.1 Thus, if research reveals that the 2004 car the potential plaintiff was riding in was sold in August 2003 (right when 2004 models first went on the market) her right to bring a claim was barred before she was injured because the 10-year period expired before the accident. If the car was sold to the first user or consumer on Oct. 1, 2003, she would have only nine days to file suit or her rights would be lost forever. If the car was sold to the first user or consumer on Sept. 24, 2004, she would have the typical one year to file suit under the statute of limitations, and the statute of repose would not bar her claim.2

To be sure, we can debate whether these laws are good for society. Proponents argue that such laws grease the wheels of commerce and the fact that people are from time to time killed or injured by these greasy wheels must be ignored so that the beneficiaries of such laws can provide jobs in the favored industry. Opponents of the laws argue no industry or person should be a “get out of jail free” card and that no consumer should lose a right before they know they have one.

Those debates will continue. What we know now is this: (1) statutes of repose cut off claims regardless of their validity; (2) one defendant can ask that

**Editor’s Note:** The Journal values different points of view. The viewpoints of authors and columnists are not necessarily those of the TBJ, the Tennessee Bar Association nor its leadership. The TBA president is an official spokesperson for the TBA and the TBJ. In her column on page 3, TBA President Cindy Wyrick explains the TBA’s support for adoption of a statute of repose for lawyer professional liability claims.

Continued on page 34
fault be assigned to a non-party who cannot be sued because of the expiration of a statute of repose; and (3) fault allocated to a non-party protected by the statute of repose is ultimately borne by the plaintiff.3

The purpose of this article is to provide lawyers guidance on how to avoid the consequences of a statute of repose. Here is a checklist for lawyers faced with this issue:

1. Know which interest groups that have lobbied for and received the benefit of a statute of repose. They include health care providers, product manufacturers, the construction industry, sellers of securities, officers and directors and surveyors.4

2. Know what event triggers the running of each statute of repose and what period of time must pass before rights are lost.

3. Know the exceptions, if any, to the general rule for each statute of repose.

4. When offered representation, exercise reasonable diligence to understand whether a statute of repose is potentially applicable and, if so, whether (a) it has expired or (b) if it has not expired, when it will expire.

5. If the statute of repose has expired against the only otherwise viable defendant, decline the case.

6. If the statute of repose has expired against one of multiple defendants, determine whether the potential fault allocation against the now-immune non-party makes the case unviable against the remaining defendants. If so, decline the case. If not, advise the client of the potential impact of the statute of repose on the ultimate recovery.

7. If the statute of repose has not yet expired against a possible defendant, determine if you have enough time to investigate and evaluate the case before the statute expires. If not, decline the case.

8. If you have a valid claim against one or more defendants but are concerned that one of those defendants may attempt to assert fault against a person or entity potentially protected by a statute of repose that will vest in the future, file suit and promptly seek an order limiting the time period within which a defendant can assert fault against any non-party.5 The entry of such an order will give you the opportunity to add the non-party potentially protected by a statute of repose as a party to the case if a defendant asserts fault against the non-party, forcing the defendant who asserted fault to attempt to prove the assertion.

Finally, when you explain to your potential client why you must decline the case or, if you can accept it, why and how the statute of repose will impact the recovery, make sure that he or she understands that these laws are the product of effective lobbying of the General Assembly. The common law should not bear such a stain. 52.

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Notes


2. The three-year statute of repose in health care liability cases arises frequently in potential delayed diagnosis of cancer cases. For example, assume that a pathologist misreads a slide and thus fails to catch cancer when it is still treatable. The cancer is not discovered until three years later and there is no longer any effective treatment. Under the statute of repose, the doctor cannot be sued unless the patient can prove that the doctor was guilty of “fraudulent concealment.” The three-year statute of repose also impacts children brain-injured at birth by a medical error—they too lose their rights unless their parents bring a claim within three years.

3. Dotson v. Blake, 29 S.W.3d 26, 29 (Tenn. 2000). So, for example, if the products claim of the prospective plaintiff in the hypothetical above was barred by the statute of repose, the at-fault driver could still ask that fault be asserted against the car manufacturer. The at-fault driver would bear the burden of proof at trial on that affirmative defense. If the jury found the seat belt was defective and apportioned fault 20 percent to the at-fault driver and 80 percent to the car manufacturer, plaintiff would collect 20 percent of her damages from the at-fault driver and would bear the financial consequence of the 80-percent fault allocation to the manufacturer.

4. The construction industry (Tenn. Code Ann. § 28-3-202 (four years after substantial completion of an improvement to real property)); product manufacturers (Tenn. Code Ann. § 29-28-103(a) (10 years “from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is shorter”); exceptions are made for asbestos injuries (no time limit) (Tenn. Code Ann. § 29-28-103(b)) and silicone breast implants (25 years) (Tenn. Code Ann. § 29-28-103(c)); the medical industry (Tenn. Code Ann. § 29-26-116(a)(3) (bars medical malpractice actions brought “more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.”); corporate officers and directors (Tenn. Code Ann. § 48-18-21) (three years “after the date on which the breach or violation occurred, except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after the alleged breach or violation is, or should have been, discovered”); surveyors (Tenn. Code Ann. § 28-3-114) (four years from the date the survey is recorded on the plat); and those involved in the sale of securities (Tenn. Code Ann. § 48-2-122) (two years after the act or transaction constituting the violation). See 17 John A. Day, Donald Capparella & John Walker Wood, Tenn. Prac. Tennessee Law of Comparative Fault § 5:12 (2013 ed.).

5. This is accomplished by a request for a scheduling order under Rule 16 of the Tennessee Rules of Civil Procedure.

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our legislative advocacy goals. As you know, one of my focuses for our association this year is building relationships with our legislators, and encouraging more lawyers to seek public office on the local, state and national levels. As we can all agree, our legal system and our profession as a whole need more friends in the legislative branch of our government at all levels. While building relationships and encouraging our fellow lawyers to seek public office are both critically important steps for us to take, it is equally important that we position ourselves to financially assist those who are friends of our profession or who would be if elected to office. While many of our members have given to our association’s political action committee, LAW PAC, far more have not participated. For that reason, your TBA leadership determined that a campaign to raise money for LAW PAC was essential. In order to demonstrate just how critically important we believe this campaign to be, your association officers chose to lead the way in the campaign by each making contributions, at a level equal to or greater than what we are asking of our members. You will soon receive materials that explain in more detail the purpose of LAW PAC and the goals for the campaign. When you do, I hope that you will join us in financially supporting this very worthy cause.

As we celebrate the New Year, I hope that you share my sense of optimism about the positive change we can achieve on behalf of our justice system and those who are without the financial means to access it. Now, more than ever, “Together We Make a Difference!”

I think by now most people would agree that the legal industry is facing some changes. Some may debate the finer points of how long this change has been going on, to what depth it will change, or what has caused it … but I think at least most people would say “the times they are a changing.”

We will get our lives back next August.

I was struck with just how lucky I have been over the last few years to have had the opportunity to meet and work with so many talented people who have been willing to take the time to talk with me and help guide me in the right direction.

It’s crunch time. You hope that all of the hard work, the long hours, the sacrifices you and your loved ones have made have prepared you for that final time at the plate, that last swing of the bat.

I believe things are going in the right direction. … The market looks promising. The goal is to build self-confidence and trust in others. The rest is to pass the BAR.

It can be difficult in the early months and years of law school to know how to allocate limited time and attention. Some things deserve a little. Some deserve none. Others deserve as much as they can get — often more than a busy schedule will allow.

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The Art of Having Three Biological Parents

The issues surrounding same-sex marriage, surrogacy, second-parent adoptions, parental rights stemming from in vitro-fertilization and other forms of assisted reproductive technology (ART) and how these issues translate from state to state within the U.S. are hot-button ones in the field of Family Law. The science that facilitates some of these possibilities is advancing daily, and the capability to provide the chance for children to couples, both to same-sex and heterosexual partners, that never existed before is taking the area of Family Law into truly uncharted waters. Another issue, the subject of this article, that will further muddy those waters, is the possibility of a child having three parents based on DNA contributions from at least three distinct people to form the embryo. In order to understand the state of the law in Tennessee and elsewhere, as well as the science, in layman’s terms, that makes this actually possible, a short overview of both is required.

The scientific arenas of genetic testing as well as insemination and fertilization have been growing for years at an accelerated speed. It is now possible to tell, from the potential parents of a child, a great deal of information about the child to be. One item that can be determined is a child’s proclivity to develop mitochondrial disease. The mitochondria are sub-parts of human cells that process glucose into energy. In simple terms, the mitochondria are the battery packs of the cell. Mitochondrial disease occurs in approximately 1 in 4,000 births in the United States and prevents the mitochondria from properly functioning. This disease usually disrupts organs in the body that are major users of energy, like the heart, the brain, the kidneys and the liver. If a person has mitochondrial disease, it may cause damage to any of these organs or others and lead to a plethora of health problems throughout that person’s lifetime.

Scientists have hypothesized and conducted experiments to prove that the mitochondrial DNA1 that each person possesses, if determined to be deficient through screening, can be substituted with that of another, healthy mtDNA donor. The current technology has been tested with monkeys successfully and allows for the replacement of the deficient mtDNA with healthy mtDNA. This technology has been replicated with human eggs to create embryos free of mitochondrial disease in the child, with at least one living as long as eight days in a laboratory. The complicated process actually involves implanting mtDNA from a healthy egg into the core of another egg where the deficient mtDNA has been removed. Consequently, from a potential legal perspective, the future child could have mitochondria from one person as well as DNA components from a man and a woman all in its makeup.

Where then does this leave the legal debate and how does this narrow issue fit into the larger debate about donors, surrogacy, intended parents and the rights as well as obligations of parents? As most people are aware, the landscape of the American family has changed drastically in recent years. The advent of effective assisted reproductive technology has opened the possibilities for families...
of every configuration, including those that would have been previously unable, in the biological sense, to create their own children. The legal community has grappled over the course of the past 20 years with an effective way to keep pace with the scientific possibilities that necessarily create the practical realities of non-traditional families. The possibility of a couple, either same-sex or heterosexual, to use a surrogate in order to create children from their own DNA has raised serious questions about the law’s traditional assumptions regarding who is a legal parent.

A brief set of definitions commonly used in surrogacy discussions is useful here. *Intended parents* is the term used to define the couple that is the intended destination, legally and practically, of the child. Also, there are two common types of surrogacy: *traditional* surrogacy wherein the woman carrying the child is impregnated with the sperm of the father, but the intended mother has no biological contribution and gestational surrogacy where both of the intended parents’ DNA is contributed by use of an inseminated egg that is then implanted in the surrogate. On occasion, there are also *gametes donors*, generally someone who contributes sperm anonymously and that DNA is later used for insemination with or without a surrogate for the intended parents. Gametes donors generally do not become involved in the lives of the children that their DNA is used to produce, but there has been debate surrounding the subsequent right of a child to later find the gametes donor.

Different jurisdictions had these issues surrounding surrogacy in a number of ways and employ different methods of insuring that the rights of all of these parties are observed. Some jurisdictions have taken the approach that the intended parents should hold all parental rights regardless of the biological connection or lack thereof, to the child created. Recently, this logic has been extended to same-sex couples in those same jurisdictions. Other jurisdictions have maintained a more traditional approach that the genetic parents of a child will also be the legal parents regardless of the wishes of the intended parents absent some sort of waiver of the rights.

Tennessee in particular has adopted a middle-ground approach that not only considers the procreative intent of the parties, but also factors in who the birth parent was and whether there are any other parties who have claims to parenthood of any kind. Since there are clearly still disputes between the jurisdictions and simply being the intended parents is not necessarily a guarantee of being the legal parent of a child, the implication that the rights of biological contributors of DNA are viable regardless of pre-conception and pre-birth intent raises more questions regarding the donation of mtDNA.

The discussion of surrogacy above is only an analogy to the discussion of mtDNA. When a surrogate is used with same-sex couples, and in some instances with heterosexual couples, there will be at least one parent who does not contribute to the child’s DNA or to its gestation. However, the use of an mtDNA donor would not prohibit the use of DNA from both a potential mother and father and, typically, a child would be carried by the mother contributing her DNA, not a surrogate. The use of substitute mtDNA is only for a portion of the cell, not a replacement for the entire sperm or egg. Therefore, the legal arguments alter yet again. What rights, if any, does a person donating only a portion of the DNA that composes a child have? Will this issue be handled on a jurisdiction-by-jurisdiction basis as the issue of surrogacy has been, or will the contribution of mtDNA be considered a lesser contribution than that of using the womb for gestation or actual egg or sperm donation has been?

The United Kingdom has attempted to address the issues surrounding the use of mtDNA donors and what parental rights, if any, those persons might possess. In the European legal community, standards have been adopted regarding the legal implications of tissue and cell donation. These standards suggest that, in most instances, the donor would be anonymous and the recipient of the tissue or cells would have few, if any rights to knowledge of the identity of the donor, or anything about the person. The corollary being, of course, that by donating tissue or cells, Continued on page 38
Family Law continued from page 37

this does not create a right for the donor to have information about the recipient or control over anything regarding their donation. In 2012 in the United Kingdom, based on a lengthy debate about the status of potential mtDNA donors, the conclusion was reached that mtDNA donors should be considered akin to tissue donors and not that of gametes donors, giving them no significant rights as parents to the unborn child despite the potential of being the “third” parent in the creation of the child.

Which direction will the United States go if and when mitochondrial DNA donation becomes a reality? Obviously, this debate, and its place in the larger area of assisted reproduction, creates more questions than it immediately answers. The work of lawyers and courts in the past 20 years has laid the groundwork for achieving workable and fair solutions to the most personal of legal issues such as, who is the legal parent of a child. 

MARLENE ESKIND MOSES is the principal and manager of MTR Family Law PLLC, a family and divorce law firm in Nashville. She is a past president of the American Academy of Matrimonial Lawyers. She has held prior presidencies with the Tennessee Board of Law Examiners, the Lawyers’ Association for Women and the Tennessee Supreme Court Historical Society. She is currently serving as a vice president of the International Academy of Matrimonial Lawyers. The Tennessee Commission on Continuing Legal & Specialization has designated Moses as a Family Law Specialist; she is board certified as a Family Law Trial Specialist.

MANUEL BENJAMIN RUSS earned a bachelor of arts from Johns Hopkins University, a master of arts from University College London, and a law degree from the Emory University School of Law. He is in private practice in Nashville focusing primarily on criminal defense.

Notes
1. This is often noted in the literature with the acronym mtDNA.

Ask the TBA Membership Maven

Dear Membership Maven,
Happy New Year to you! For years I’ve been using a mish-mash of billing, calendar and management tools for my practice, and things have been going well enough. But this year I resolve to be a better me, Super Me, a more organized, stop-looking-for-my-keys kind of me! What tools do you have to inspire me?

Signed,
Organize Me!

Dear OM,
I completely understand how being better organized can give you peace of mind and center your efforts! Why, just recently I traded in my Rolodex® for a fancy electronic contact list, and while I miss the scribbles and scent of my decades-old index cards, I am more productive now than ever before!

OM, the TBA has recently partnered with Clio, the leading practice management, time & billing and client collaboration platform. As a TBA member you receive a discount and a free 30-day trial period! Check it out at www.goclio.com to see if Clio can help you get on the track to optimum productivity!

RESOLUTION SOLUTION from The Maven
Let me guess … one of your 2014 resolutions is to volunteer, to help people, to be a do-gooder! Well, I have the solution for you! Pro Bono work is a cinch to plug into, takes very little time and can have a tremendous impact on people’s lives. So just do it! Find out how, beginning on page 12, and at www.tba.org/resource/i-want-to-do-pro-bono

To ask the TBA Membership Maven a question please email maven@tnbar.org or her alter-ego, Kelly Stosik, the Tennessee Bar Association’s membership director.
There Ought to Be a Law

THIS YEAR’S CONTEST THEME

How often have you said or heard it said, “There ought to be a law …”? If you could put a law into place or take an existing law off the books, what would it be? Don’t just complain about the state of things; learn about the process of implementing a law and propose a change.

Middle and high school students are invited to participate in the Tennessee Bar Association’s 4th Annual YouTube Video Contest and create a 3-minute video that explores this issue. Some key questions to consider include the following:

• What is the problem that needs a legislative solution?
• What is your solution? Be as detailed as possible.
• Background information: the rationale, research, personal experience and evidence relating to your proposal.
• Are you aware of similar legislation previously introduced in Tennessee or in other states? If so, you may want to mention it and include outcome of the legislation.
• Please describe any costs or benefits that may be associated with your proposal. (Consider financial expenses, savings or revenue, health, social, environmental or other impacts.)
• Who do you think would support the bill? Who do you think would oppose the bill? (Consider legislators, the governor and his administration, state and local government agencies and interest groups.)

For contest rules and entry form visit http://www.tba.org/programs/the-tba-youtube-video-contest
Remembering Two Great Teachers

One taught us law. The other taught us grace. And those of us blessed to practice law need to learn as much as we can about both topics.

The law professor was Don Paine. His gracious and grace-filled colleague was John Smartt. They were proud, first generation lawyers, colleagues and close friends. And they died within just a few days of each other last November.

I first met Don Paine 35 years ago when I took the Crossley Bar Review Course. I took the course to help me pass the Bar Exam, and it worked.

But I got a lot more out of the Crossley Bar Review Course than my law license. For the first time, I began to actually learn the law.

Don taught me more law in three weeks in the Bar Review Course than I had learned in three years of law school.

I had somehow managed to obtain a law degree without also obtaining a practical working knowledge of the law. I’ll be the first to admit that this was more of an indictment of me than it was of my law professors. As a first generation law student, torts, civil procedure, Constitutional law and evidence were all foreign subjects to me.

But in Professor Paine’s bar review class, the law suddenly began to make sense to me.

Don’s approach to the law wasn’t esoteric, philosophical or abstract. It was practical. Imminently practical.

And not only was it practical, it was fun. Like all great trial lawyers, Don was a great storyteller, and he illustrated the rules of law with great stories about how they were applied (or not applied!) in Tennessee courtrooms.

My legal education from Don didn’t end with the bar review course. After the course was over and I passed the Bar and hung out my shingle, I kept going back to Don’s classroom.

Don’s classrooms were found all over the state in CLE programs, including the marvelous Tennessee Law Institute. And perhaps his best “classroom” was found each month on a page or two in the Tennessee Bar Journal in his “Paine on Procedure” column.

But great teachers do not confine their teaching to the classroom. They teach in their friendships with students. Over the years, I was blessed to develop a friendship with Don and have him teach me law not only in lectures or columns, but over many nice beers from local breweries. Don was not only Tennessee’s leading authority on the law of evidence. He was the Volunteer State’s top expert on beer.

And like all good professors, Don was available for student conferences. Like so many Tennessee lawyers, when I had a question of law that needed to be addressed, I would just call Don at his office. He never failed to take my call. Not once. And I never met a Tennessee lawyer who had an unanswered call to Don Paine.

I met John Smartt in 1981, when I attended my very first Tennessee Bar Convention. John was serving as “emcee” of the UT Law School Alumni Breakfast, just as he did each year.

John was the perfect host for the event because he was a proud graduate of the University of Tennessee College of Law and a proud lawyer.
A member of the greatest generation, John was one of the many veterans who came to “The Hill” in the late 1940s to attend law school on the GI Bill.

After receiving his law degree in 1948, John was UT Director of Alumni Affairs from 1948 to 1969. And in 1972, John teamed up with his friend Don to create the Tennessee Law Institute, serving as its coordinator and “chief marketer” from 1972 to 1988.

I have met few people who enjoyed life as much as John Smartt did. He was a runner, a swimmer and a biker long before folks ever heard of triathlons.

For more than 30 years, he competed in the Senior Olympics at the district, state and national levels. And he didn’t just compete; he won. In 1995, at the youthful age of 76, he took fifth place in his age group at the Senior Olympic Games in San Antonio. A year later, he was chosen to carry the Olympic torch through the streets of Knoxville as it passed en route to Atlanta for the Summer Games.

And John didn’t just run and swim. He also took the time to walk, leading wildflower hikes in the Great Smoky Mountains.

John loved to sing. In his 90s, he formed a barber shop quartet that performed a capella concerts at senior citizens homes across East Tennessee.

We UT grads like to talk about “the spirit of The Hill.” John Smartt personified that spirit more than any man I ever met. John was a powerful person not because he sought power, but because he transferred power to others.

He was a kind, selfless person, who bragged about you and everyone but himself, and in the process, he made us all feel special.

Don and John were quite a team in the Tennessee Law Institute and in their support and friendship for Tennessee lawyers.

From Don, we learned all about Tennessee law. And from John, we learned to love and cherish life in general, and a life in the law in particular.

We were all so blessed to share their lives of law and grace. 💫

BILL HALTOM is a partner with the Memphis firm of Thomason, Hendrix, Harvey, Johnson & Mitchell. He is past president of the Tennessee Bar Association and is a past president of the Memphis Bar Association.

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