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Tennessee Bar Journal
JANUARY 2005
VOL. 41, NO. 1

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Suzanne Craig Robertson

The Journal’s secret to success

Most of the things that grow and thrive in this world do so because they are given careful attention and nurturance by someone or some thing. Mothers nurture their babies. Farmers nurture their crops. Ministers nurture their flock. Scientists nurture ideas. As a consequence of this care and attention, babies become adults, crops feed nations, congregations become communities and big ideas take us to the moon and beyond. As we celebrate the 40th anniversary of the Tennessee Bar Journal, I would like for you to take a moment to recognize the person who, for the past 17 years, has nurtured and sustained this remarkable publication more than any other person: Suzanne Craig Robertson.

Obviously, Suzanne does not produce the Tennessee Bar Journal all by herself. She would be the first person to tell you that the work necessary to get a high quality professional publication out each and every month requires a significant effort by a whole team of people. If you will look immediately to the left of this column you will see a listing of those folks who comprise the Journal staff and the Editorial Board, which supervises the work of that staff. Each of those persons makes a significant and substantial contribution to the Journal. But, to paraphrase Reggie Jackson in speaking of his role as the “star of stars” on a great New York Yankee baseball team, Suzanne is the “straw that stirs the drink.”

You know what a pain it is to get a brief done for the Court of Appeals with no request for an extension of time? Consider, just for a moment, the regular responsibilities of the editor of the Tennessee Bar Journal. You just sent an edition of the Journal to press. Now, you have 30 days to do it again. You need substantive, informative articles about some area of the law. Check to make sure you have the latest information from the Board of Professional Responsibility. Go out and get advertising. Compile information about lawyers who have moved their offices, won awards or done something else that their colleagues should be aware. Respond to a complaint from a member who has no sense of humor about politics and who believes the humor columnist shouldn’t either. Prepare a layout. Encourage and cajole a president who thinks the world should adapt to his schedule to get a column submitted before the publication deadline. Design a cover. Ensure that your circulation list is up to date. Edit the articles. Do a final layout. Get it to the publisher by deadline date. Start all over.

When you really look at the burdens and responsibilities faced by the editor of the Journal, you will be forced to develop a deep and abiding respect for

(Continued on page 4)
Suzanne Robertson. I know that I have. Recently, I was talking with Gil Campbell, our former executive director, who hired Suzanne for the TBA over 17 years ago. Gil told me, “You know, we had an awful lot of really talented people who worked for the TBA, but Suzanne Robertson was one of the best hires I ever made.” Amen. When you think of the stereotypical publication editor, you think of some grouchy guy wearing a green visor, chewing on the stub of a cigar and yelling at people until they get the job done. With Suzanne, nothing could be further from the truth. I have been hanging around the TBA now for a bunch of years in varying capacities and not only have I never heard a cross word leave Suzanne’s lips, I don’t recall ever seeing those lips when they weren’t part of a generous smile and a kind word.

During her time as editor of the Journal, Suzanne has overseen the growth of this publication from a small, bimonthly professional newsletter to a slick, glitzy, award-winning monthly magazine that we all look forward to receiving. While the vision for this growth may start with the leadership of Allan Ramsaur, Howard Vogel, Pam Reeves, Don Paine, Bill Haltom, Lucian Pera and many others, there can be no doubt that its implementation has fallen squarely upon the very capable shoulders of Suzanne Robertson.

Despite her devotion to nurturing the growth and success of the Journal, Suzanne has not neglected to nurture other relationships in her life as well. Loving wife to husband, Alan, Suzanne is most proud when she is discussing the many accomplishments of her two beautiful girls, Anne Grace, age 14, and Allison, age 7. (You may have seen Allison without realizing it. She was the “cover girl” for our November issue, illustrating our cover story about legal protection for the income of minor entertainers.) Suzanne is an excellent model for balancing a busy, demanding professional life with a meaningful, rewarding personal life.

On behalf of the entire membership of the Tennessee Bar Association, I am pleased and privileged to have this opportunity to say “Happy 40th Birthday, Journal!” And thanks, Suzanne, you are the best. 

Editor’s note: It’s good when a president has such a convoluted view of things, if it’s in your favor. Charles, thank you. But I must stress how many wonderful, dedicated people work on this publication and for this association, doing it with such creativity, accuracy, professionalism and heart. I am not faster than a speeding bullet and have never once leapt a tall building in a single bound. My children don’t recognize who you describe in the part about never hearing a cross word from me. I appreciate your confidence and affirmation.— SCR
Where were you in ’65?

In this issue, you’ll read about what a lot of people were doing in 1965, some of it pertaining to the start-up of the Tennessee Bar Journal, some of it not. In every issue of 2005, there will be a look back toward how things were in the legal profession and TBA from the last 40 years.

We’d like to hear from you. What was practicing law like then? What is different now? Do you remember receiving the Journal in those early years?

If you have a law-related story from the 1960s to share, please write to us!

1964-65 Tennessee Bar Association Board of Governors

The Board of Governors voted in November 1964 to start a new magazine, the Tennessee Bar Journal. Thanks to all all of these people from the Journal staff.

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WRITE TO THE JOURNAL! Letters to the editor are welcomed and considered for publication on the basis of timeliness, taste, clarity and space. They should be typed and include the author’s name, address and phone number (for verification purposes). Please send your comments to 221 Fourth Ave. N., Suite 400, Nashville, TN 37219-2198; FAX (615) 297-8058; EMAIL: srobertson@tnbar.org.
Lawyers have an ethical obligation to report misconduct by other lawyers, if the misconduct raises a substantial question about the offending lawyer’s honesty, trustworthiness or fitness to practice law. They must report the misconduct even if it occurs totally removed from legal practice, and even if the misbehaving lawyer does not practice law. But if reporting another lawyer’s misconduct to disciplinary authorities would reveal client confidences, the lawyer considering making the report must first obtain the client’s consent.

In practical terms, clients may have a variety of reasons to refuse consent, and little incentive to grant it. These are the conclusions of Formal Opinion 04-433, issued in November by the American Bar Association Standing Committee on Ethics and Professional Responsibility. Copies of ethics opinions may be ordered from the ABA Service Center at 800/285-2221 or by e-mail to abasvcctr@staff.abanet.org.

Legal writing competition will focus on veterans

The Paralyzed Veterans of America (PVA) announces its second annual legal writing competition. Through these competitions, which are open to all law students and attorneys, PVA hopes to generate discussion on issues that affect today’s veterans. The topic of this year's competition is “Should a veteran be entitled to retain a lawyer for adjudication of claims before the Department of Veterans Affairs?”

A first prize of $1,250 and a second prize of $750 will be awarded. All submissions must be received no later than March 1. Winners will be announced during PVA Awareness Week, April 10-16. For more information on how to enter the competition and the specific rules, go to www.pva.org and click on “Legal Writing Competition.”

Civil case filings down, report says

The number of general civil suits dropped by 975, a 1.83 percent decline in fiscal year 2004, a report from the state comptroller’s office distributed today says. The report shows that 69 percent of the matters handled in the trial courts are civil; the remaining 31 percent are criminal. Probate and domestic matters make up 42 percent of all cases. The report, part of the 2004 Judicial Weighted Caseload Study Update, concludes that the state needs 3.96 new judges to handle the current caseload.
When Congress passed the Consolidated Appropriations Act of 2005, it reduced the Commerce, Justice, State, Judiciary and Related Agencies bills (H.R. 4754 and S. 2809), which provide funding for the Legal Services Corporation (LSC).

The House and Senate bills included different funding levels for LSC: the House recommended $335,282,000; the Senate recommended $335,000,000. Both amounts are significantly lower than the amounts recommended by the ABA and requested by the LSC.

“Given the budgetary circumstances, we are, however, very pleased to report that H.R. 4818 includes the higher House-recommended amount of $335,282,000, along with House language allowing LSC to use up to $1 million in amounts previously appropriated for a student loan repayment pilot program,” the American Bar Association released in a statement. The Senate language allocating funds to address some of the loss of funding to some states due to census-based reallocations was also included. Tennessee is one state that benefits from this provision.

See the ABA Legislative Priority Page at http://www.abanet.org/poladv/priorities/legal_services.html for complete details of the LSC appropriations process, including links to the relevant provisions of H.R. 4754 and S. 2809.

First News

The News section was first carried in the Tennessee Bar Journal in the August 1985 issue. Before that, items like this were published in the newly defunct Tennessee Lawyer newsletter. The stories carried in that first News section were:

• TBA Young Lawyers Win ABA Award
  The Young Lawyers Conference (now YLD) won for an outstanding public service project, “The Missing Children Project” at the ABA annual meeting that year in Washington, D.C. A video about runaways was made and copies were distributed to children across the state. The High School Mock Trial Competition was also honored. William H. Halton Jr. of Memphis, now a regular columnist for the Journal and TBA president-elect, was selected at the meeting as editor of the ABA-YLD’s national Barrister magazine. David J. Harris of Memphis was elected to the Young Lawyers Assembly representing Tennessee and Missouri.

• New IRS Form Required for Cash Transactions
  Details of Section 60501 of the Internal Revenue Code, which took effect earlier that year, are given.

• Photo of Chief Justice Warren Burger congratulating Judge Martha Craig Daughtrey (then a member of the Court of Criminal Appeals) and TBA President Wilson Sims, for the TBA’s role in developing a new book, Appellate Court Practice in Tennessee.

• Harbison Presented Justice Joe W. Henry Memorial Award
  William L. Harbison won the award for his article, “Exercising a Power of Appointment in Tennessee,” which was published in the May 1985 Journal. He was presented the award and $500 at the TBA’s annual meeting that year. Harbison recently served as secretary on the TBA Board of Governors. The Joe Henry Award is still given each year.

• Rule Change: In the Supreme Court of Tennessee at Nashville
  The order, filed July 1, 1985, updated Rule 20 so that out-of-state lawyers who practice in Tennessee are no longer exempt from paying the annual fee. It also adds that a lawyer residing outside the state and having no office located in the state, even if licensed in Tennessee, must associate with a Tennessee lawyer in good standing who does have a law office in the state.
Warren M. Smith and James R. Tomkins recently announced the formation of Smith & Tompkins, a partnership for the general practice of law in downtown Nashville. Smith will focus on civil litigation in the areas of insurance defense, commercial litigation, products liability defense and other tort defense. Tomkins will practice in these areas as well and also focus on business, probate and domestic litigation. Both partners earned their law degrees from the Nashville School of Law.

Husch & Eppenberger LLC recently announced that C. Ballard Scearce Jr. has been named a member of the firm. Scearce currently practices in the firm’s corporate and insolvency practice groups. He graduated from the Cumberland School of Law of Samford University in 1996.

Les Bowron is the new associate director at the Tennessee Commission on Continuing Legal Education and Specialization. He spent more than two decades in private practice in Wyoming and is now licensed in Tennessee. He had a diverse practice including personnel law, business practice, and criminal, personal injury and commercial trials. He was elected to the Wyoming legislature for four two-year terms. He received his law degree from Pepperdine University.

The Memphis and Shelby County Bar Foundation recently inducted 17 new fellows. Among those inducted were TBA members Kenny W. Armstrong, Saul C. Belz, the Hon. J. Daniel Breen, C. Thomas Cates, Thomas R. Dyer, David J. Harris, the Hon. Janice M. Holder, the Hon. Joyce Lambert Ryan, J. Brook Lathram, Harrison D. McIver and Stephen L. Shields. The Memphis and Shelby County Bar is the charitable arm of the Memphis Bar Association and supports law-related programs and projects through its grant programs. Attorneys and judges are nominated to become fellows of the foundation in recognition of their distinguished service to the legal profession and the administration of justice.

Paul W. Stewart has been named executive vice president and general counsel for NYK Logistics (Americas) Inc. Prior to joining NYK Logistics, Stewart held the position of senior vice president and general counsel to Memphis based GST Corporation and served for 12 years in private practice.

The Memphis law firm of Apperson, Crump & Maxwell PLC has hired William King Self Jr. as of counsel to the firm. Self recently was certified as an Elder Law Attorney by the National Elder Law Foundation and as an Elder Law Specialist by the Tennessee Commission on Continuing Legal Education and Specialization. Self earned his law degree from Tulane University in 1979.

Columbia attorney BILLY C. JACK died Nov. 26. He was 66. He served as Columbia city attorney for more than 20 years and as attorney for Maury Regional Hospital for 35 years. He received his law degree from Vanderbilt University, where he graduated sixth in his class in 1963.

His wife, Claudia, is a long-time member of the Tennessee Bar Association Board of Governors and is district public defender in Columbia. Memorial contributions may be made to St. John’s Episcopal Church at Ashwood, or St. Peter’s Episcopal Church, 211 W. Seventh St., Columbia, TN 38401, or to Vanderbilt Law School.

VIRGIL CARMICHAEL, a decorated World War II veteran, retired prosecutor and judge, died Nov. 13. He was 86. Carmichael graduated from the University of Tennessee and earned his law degree from Cumberland University. He was licensed to practice law in 1947. He was assistant district attorney and then Circuit Court judge for Bradley, McMinn, Polk and Monroe counties. He was a member of the Tennessee Bar Association Board of Governors and a frequent contributor to the Tennessee Bar Journal in the 1960s.
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Actions from the Board of Professional Responsibility

Censured

On Nov. 15 the Supreme Court accepted a conditional guilty plea from Nashville attorney Donald Arkovitz, in which he accepted a public censure for filing a petition that contained inaccurate statements. The Board of Professional Responsibility filed a petition for disciplinary action against Arkovitz in connection with a petition he had filed requesting the appointment of a conservator. The chancellor hearing the case discovered the inaccurate statements and reported in August 2003 that Arkovitz had failed to give proper notice and failed to include certain information required by law in the petition. Arkovitz, through counsel, filed a response to the petition but later submitted a conditional guilty plea in exchange for a censure. The board found that his actions and inactions violated DR 1-102(A)(1)(4)(5)(6), DR 6-101(A)(1)(2)(3) and DR 7-101(A)(1)(2)(3)(4) of the Code of Professional Responsibility and Rules 1.1, 1.3, 1.4 and 8.4 of the Tennessee Rules of Professional Conduct. The censure declares these actions to be improper ethical conduct but does not limit Arkovitz’s right to practice law. Meaney currently practices law in Atlanta, Ga.

Suspended

On Nov. 15 the Supreme Court suspended until further notice the law license of Mt. Juliet attorney Troy Lee Brooks. The court found that Brooks had misappropriated funds to his own use and posed a threat of irreparable harm to the public. The order precludes Brooks from accepting any new cases effective Nov. 15 and limits his representation of current clients to 30 days. After Dec. 15 Brooks may not use any indicia of lawyer, legal assistant or law clerk and may not maintain a presence where the practice of law is conducted. He also must notify all clients being represented in pending matters, all co-counsel and all opposing counsel of the suspension, and must deliver to clients any papers or property to which they are entitled.

H. Owen Maddux, a Chattanooga attorney, was suspended from the practice of law for 30 days and placed on probation for one year effective Nov. 19. In January 1991 Maddux joined the firm of Jahn, Jahn & Cavett as a partner. Although there was no written partnership agreement, it was understood among the partners that any fees generated were to be considered partnership income and paid into the partnership account. Beginning in December 1994 and for a three-year period thereafter, Maddux took and converted to his own use partnership fees, income and client payments made by at least 17 separate clients. These monies, totaling more than $92,000, were taken without the knowledge or consent of the other partners. In October 1996 the firm sued Maddux to recover the funds. The Chancery Court for Hamilton County found Maddux guilty of defrauding the partnership. The court imposed a 30-day suspension, a one-year probation and two additional sanctions: a requirement that Maddux perform 100 hours of community service and a requirement that he write and submit to the Hamilton County and Tennessee bar associations an article discussing partnership law and the pitfalls of dissolving a partnership. The Board of Professional Responsibility appealed the chancery court’s disciplinary action to the Tennessee Supreme Court. On Nov. 9 the Supreme Court affirmed the decision of the chancery court and pursuant to Section 18.5 of Supreme Court Rule 9, the suspension and probation became effective 10 days later.

Reinstated

Allis Dale Gillmor of Nashville, Jonathan Thomas Martin of Memphis and Guy H. Lillian III of New Orleans were reinstated to practice law in December, after being suspended for failure to comply with the terms of Rule 21. 

Compiled by Stacey Shneider from information obtained from the Board of Professional Responsibility of the Tennessee Supreme Court.
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HAPPY BIRTHDAY, TBJ!

By Suzanne Craig Robertson
A lot of information is stacked around me — on the floor, on my desk, in the window sill. There are old Tennessee Bar Journals bound in hardcover, navy blue books, black & white photos in crinkley file folders and the yellowing pages of Tennessee Lawyer, a newsletter that predated the Journal, heralding the new magazine’s coming in its January 1965 issue. Pulling out the high points of 40 years of publishing is daunting and I’m about to decide it’s not possible, glancing one more time at the calendar as the drop-dead deadline inches closer.

The fact is, I love all these Journal pages and am proud to oversee its production into its 41st year, my 18th. To relay the Journal’s first 22 years, I’ll rely on the archives. For 1987 through 2004, I can nearly do it from heart. I want you to see it all: the early Caribbean cruises offered by the TBA where men wore suits and ties on deck and their wives were only known as Mrs. Somebody Else; the Economic Survey of 1966 where it was reported that Tennessee lawyers’ median income was $16,000; my sweet Golden Retriever who posed for a cover story called “There’s no such thing as a free bite,” which generated letters in defense of a breed that of course would never bite anyone anyway; and pictures of many of you senior lawyers when you were young lawyers, right out of school.

When Wisconsin Lawyer celebrated 75 years of publication recently, freelance writer Dianne Molvig commented to editor Joyce Hastings that “it could easily turn into one of those family vacation slide shows people put on for their friends. Showing slide after slide, treasuring every moment, the folks in the audience are nodding off.” Taking that advice, you’ll be spared the minute details of the cabinetry used in the association’s former office space, but forgive me if I go on a bit about the dramatic changes in the printing industry during this time and how it has made production quicker and cheaper, and our turnaround time much shorter. (I’ll skip it this time, but believe me, the changes are huge.)

During 2005, the Journal will have a column every month highlighting different aspects of the bar world the Journal has presided over in its four decades. We’ll cover advocacy, changes in the Young Lawyers Division, convention coverage, the changing role of women and minorities, the advent of mandatory continuing legal education and more. Don’t nod off yet, there are only 187 more slides to go …

(Continued on page 15)
Advertisers jumped at the chance to advertise in the Tennessee Bar Association's new statewide magazine. Two advertisers — West Publishing Company (now ThompsonWest) and The Michie Company (now owned by Lexis-Nexis) — are still advertisers, 40 years later. In fact, West has been a continuous advertiser with the Journal since the first issue.

Advertisers in the Tennessee Bar Journal's in 1965 were:

- Bobbs-Merrill Company, Indianapolis
- Commercial Insurance Company, Newark, New Jersey
- Chattanooga Federal Savings
- Commerce Union Bank
- CT Corporation System, Atlanta and St. Louis
- Dewberry Engraving Co., Birmingham, Ala.
- First Federal Savings and Loan Association of Chattanooga
- First National Bank of Memphis
- Guaranty Title Company

It paid to advertise in the Journal, even then

West Publishing (now ThompsonWest) has been a continuous advertiser in the Tennessee Bar Journal since 1965. Thanks, West!
Modest beginnings

“As issues of the Journal follow, we hope to improve it, to give you better service and more interesting articles,” TBA President Olin White declared in his President’s Report in February 1965, the first issue of the Tennessee Bar Journal.

“The Tennessee Bar Association’s objective is not only to serve its members and the lawyers of Tennessee, but to work for the benefit of all the citizens of this state, to the end that their rights are fully protected and that there be a just and orderly determination of their claims and disputes.”

Those are pretty tall orders. Has the Journal done this?

Robert Kirk Walker of Chattanooga was TBA president-elect when the Journal was conceived.

“At the time, I knew it would be a good communicative tool and am impressed that the Tennessee Bar Journal has come into its own,” Walker says. At 79, he is of counsel at the law firm of Chambliss, Bahner and Stophel.

Being instrumental in the magazine’s beginnings makes him proud, he says, especially that it has been “embraced, refined and improved upon” by TBA staff and contributors over the years.

“We felt that the Tennessee Lawyer was an inadequate publication for us,” Walker says. “The Journal provides an opportunity for lawyers who are experts in certain fields to share their expertise with others.”

The Board of Governors had voted to start a new publication in November 1964, on recommendation of the Publications Committee, the purpose of which would be “to bring to the lawyers of Tennessee articles and studies of value in their legal practice and their improvement of the profession.” The committee’s chair that year was W. Ovid Collins Jr., of Nashville.

Collins still practices law a few days a week with Cornelius & Collins LLP in Nashville, and at 86 still reads the Journal every month.

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Collins still practices law a few days a week with Cornelius & Collins LLP in Nashville, and at 86 still reads the Journal every month.

“I’m glad we got it done,” he says of the work to start the new publication.

“It was very modest at the beginning,” (Continued from page 13)
he says. “Of course, you’ve improved it tremendously.”

The Journal was to complement the quarterly newsletter called Tennessee Lawyer, which the TBA began publishing in 1952. For 20 years the two publications dovetailed until Tennessee Lawyer ceased publication in 1985. With the January/February 1986 issue, the Journal went bi-monthly, incorporating the news and association information that had previously been in the Lawyer.

In 1999 the Journal doubled its output, going to a monthly schedule. Although some people involved in the process were afraid there would not be enough information to fill that many pages, that has proved incorrect. Turns out, there’s plenty of information lawyers need to hear and it started pouring in.

The Journal’s leap to monthly was the idea of TBA Executive Director Allan F. Ramsaur, who had been at the TBA only a few months at the time.

“The Journal is easily the most visible, tangible asset of the TBA,” Ramsaur says. “My goals in recommending that we publish monthly were to expand the services to our members, to communicate more timely and effectively, and to enhance the value of that asset. Once we convinced the leadership that the money was there, they leaped at the chance to provide the Journal every month.”

A little help from its friends

Other forms of communication have supplemented the Journal through the years, too. After Tennessee Lawyer, the TBA began another quarterly newsletter called Across the Bar, which ran in the early 1990s. In 1995, the weekly newsletter LeaderFlash began and soon adapted to technological advances by turning into an email newsletter as well. In 1995 its new best friend, TBALink, was born. TBALink is the TBA’s web site, which back when it started was the first of its kind. The Journal frequently refers to its electronic pages for more in-depth information, an option to disseminate even more information to readers. The Journal is also now available electronically. In 1998 the Journal began carrying a full continuing legal education schedule in its center.

They keep you updated

In addition to the many writers who have contributed, a handful of faithful have written and written and written. Standing columns have always been a part of the Journal, beginning with “Practicing Your Profession,” by Billie Bethel (see page 20), and there has always been a column by the president. “Avoiding Legal Malpractice Claims” by Duke Nordlinger Stern ran from 1985-88. The still-popular “Paine on Procedure” by Donald F. Paine began in 1989. Well-read humor columnist Bill Haltom starting slinging funny arrows in the summer of 1993 with “But, Seriously, Folks!” and we’re laughing too hard to get him to stop. In 1992, Chancellor Robert Brandt began writing “From the Bench,” which Judge R. Vann Owens took up when he became president of the Tennessee Judicial Conference. In 1999, four columns began rotating: “Employment Law” by Tim Bland, “Day on Torts” by John Day, “Where There’s a Will” by Dan Holbrook, and “Criminal Law” by David Raybin. In 2003 we added the cartoon “Jest Is For All,” by Arnie Glick.

Our driving force

So important to the consistency of the Journal are two groups of people, the Editorial Board and the staff. The Editorial Board — chair Andrée Sophia Blumstein, Miles Mason Sr., Donald F. Paine, Nathan D. Rowell and Jonathan O. Steen — give a huge amount of time reviewing articles and having great ideas. We will feature them more fully in a subsequent issue.

Staff members whose jobs keep the Journal humming are Assistant Executive Director Barry Kolar, Production Coordinator Landry Butler and me, the editor. Stacey Shrader compiles and writes the disciplinary actions and the Bulletin Board section, with Sharon Ballinger wading through press releases checking information for Bulletin Board. A handful of other people have poured their hearts into this magazine over the years — more in recent years because almost all production is now done in-house. When the Journal began, and even up through about 1989, type-setting, photo scanning and layout were all done by outside vendors. Now, except for the printing and some proofreading, it’s all done by employees. Journal alumni include Gary Hunt, Mary Tucker, Julie Warner Swearingen, Gina Jones, David Duke and Kate Jankowski.

Award-winning? You bet

The Journal has been recognized by its peers twice with a Luminary Award from the National Association of Bar Executives for excellence in publications for mid-sized bars. Before that, it won awards from the Nashville Chapter of the International Association of Business Communicators for color photography, writing and editorials. The Tennessee Society of Association Executives awarded the Journal its Excellence Award for magazines and journals in 1994 and 2000.

Come see for yourself

The Journal has been the voice of the legal profession, a reflection of the times and circumstances surrounding the law in Tennessee, since 1965. As you can see, we are proud of the contribution and look forward to many more years of providing this legal mirror.

It’s possible this is starting to sound like that family vacation slide show, so we’ll leave it at this. But if you have a deeper interest, I invite you to come to the Tennessee Bar Center in Nashville and read through the old navy blue hard-bound treasures yourself.
Journaling legal history as it happened

The Tennessee Bar Journal has been a reflection of the legal landscape in the state for 40 years. When something major happened (and lots of not-so-major things), the Journal covered it. Here is a sampling:

1965 Amendments to Tennessee Supreme Court Rule 42 form a committee to investigate, report conclusions and recommend actions concerning lawyers' unethical practices, giving teeth to the process. Then-president-elect Robert Kirk Walker recalls this as the first big issue covered by the Journal. The Professional Ethics and Grievances Committee is the predecessor to the Board of Professional Responsibility, which was established in 1975.

n Billie Bethel, TBA executive secretary, is named editor of the new Tennessee Bar Journal. (She served in this capacity until 1982 when she was terminated. Not much was written about that in either publication, but the newsletter Tennessee Lawyer carried President John Tune's column in January 1983 saying that "the matter has been completely resolved between the Board and the former executive director ... [who has] paid to the association the sum of $20,000 which fairly represents the items the Board and a special committee believe that she purchased improperly and also represents her use of Bar personnel or assets which were not in the interest of the TBA."

1969 The journey of changing ethics rules is reported in a story by Walter P. Armstrong Jr., outlining the proposed new Code of Professional Responsibility. (In August 1974, the Journal reports that the ABA adopted amendments to the code, which were automatically effective in Tennessee. President Randy Noel reports in his February 2000 column that the TBA's Committee for the Study of Standards of Professional Conduct, after five years of work, has recommendations ready to take to the Supreme Court for action. In December 2002, the Journal runs "Your Ethics Roadmap" — by Lucian Pera, chair of the Standing Committee of Ethics and Professional Responsibility, and Carl Pierce, who was the committee's reporter — as its cover story, detailing the new rules that put Tennessee in line with nearly all other states.)


1974 No truer words are written when author T. McN Simpson III notes that "for an indefinite period of time, we must expect public discussion of the relevant issues" after the report from the Tax Modernization and Reform Commission was given to the General Assembly bringing "a measure of political respectability to the question 'should Tennessee adopt the income tax?'" (That, published in the February 1974 issue, was the first of many articles about the Tennessee Constitution and its relation to a proposed state income tax. Others following the issue are: Rodger A. Bolling and William Brent Carper, May 1984; Little H. Skennis Jr., May 1977; Robert E. Cooper Jr., January/February 1992; and in September 1999, Lewis R. Donelson and N.B. Forrest Shoaf square off in a pro/con debate.)

1977 "Legal Aid for Older Tennesseans," by William M. Stephens, points out that most counties don't have legal services programs.

n The Tennessee Consumer Protection Act of 1977 is detailed in an article by Irvin L. Tankersley. Kenneth M. Bryant wrote about it in 1999 and in 2004 Matthew Evans offered new practice tips to use with the TCPA.


1981 The Justice Joseph W. Henry Award for Outstanding Legal Writing is established to honor the writer of the best Tennessee Bar Journal article in a given year. (The award continues today, and is judged annually by the chief justice, the president of the TBA and one of the law school deans.)

1982 Gil Campbell is the new executive director and Gary Hunt is the assistant executive director, also serving as the Journal's new editor. (The February 1983 issue marks a change to an 8.5x11 magazine format, and the promise that the Journal will branch out to include feature stories, not just substantive articles.)

1985 The Journal takes over parts of Tennessee Lawyer, which prints its final issue in April. News, For-

(Continued on page 23)
Here’s a sampling of the articles in the 1965 Tennessee Bar Journals:

FEBRUARY
The President Reports by Olin White (in the 84th year of the Tennessee Bar Association, he writes about the new quarterly publication and dedicates it to the members of the profession)
“The Matter of Perspective,” by Robert Gill Gillespie (an article by a Mississippi supreme court associate justice about the changes the law has seen)
Executive director’s column by Billie Bethel: “The telephone – friend or foe?”
“Justice Chattin named to Supreme Court”

“Suggestions on selection of a trial jury,” by Virgil Carmichael, who was a regular contributor to the Journal for many years. He died just last November (see page 10).
“The case of the unpopular cause,” by Henry H. Hancock (the need for lawyers to take on unpopular defendants)
“Recent tax developments affecting the lawyer in general practice,” by John C. Stophel

MAY
The President Reports by Olin White (about the fear that our government will become a police state – it is 10 pages long)
“The Law: Ideals, Opportunities, Challenges,” by Robert Kirk Walker (a speech to law school students)
A complete schedule of the 84th Annual Convention, held at the Andrew Jackson Hotel in Nashville
“The Era of Gideon v. Wainwright,” by Hon. Frank W. Wilson (a speech)
“Bulk Sales and the Uniform Commercial Code,” by W. Harold Bigham
Executive director’s column by Billie Bethel: “Don’t let that date slip by!”
(the creation of an “Office Tickler System,” see related story, page 20)

AUGUST
The President Reports by Robert Kirk Walker (about the institution of the Professional Ethics and Grievances Committee and its 27 commissioners, Gov. Frank Clement and Tennessee Supreme Court Justice Hamilton Burnett wrote letters of congratulations to the Tennessee Bar Association upon the publication’s beginning in 1965. Their successors, Gov. Phil Bredesen and Chief Justice Frank F Drowota, have done the same.
who will investigate and report conclusions and recommendations “in matters touching unethical practices of a member of the Bar.” The TBA had filed a petition in favor of this amendment to Supreme Court Rule 42, which is printed in its entirety.

“Et tu Brute?” by Billie Bethel and Robert Kirk Walker (an overview of the Economic Opportunity Act of 1964, covering the National Conference on Law and Poverty, a group convened to “discuss the problems of the extension of legal services to the poor under the program, policies and regulations of the Office of Economic Opportunity” … “the programs and policies propounded proved astonishing as well as greatly alarming to many of those present ….” It concludes that “cooperation or non-cooperation with OEO policy – either one – leads to socialism and destruction of the legal profession.”

A poem by Virgil F. Carmichael, “Condemned?”

NOVEMBER

President’s Report by Robert Kirk Walker (announcing that the board has approved a statewide economic survey for 1966)

Report of the newest member of the Tennessee Supreme Court: Larry Barkley Creson

“Defense of the Indigent and Other Unpopular Causes,” by Barnabas F. Sears (a speech given to the Tennessee Young Lawyers’ Conference, the predecessor to the Young Lawyers Division)

“A fair trial and a free press,” by Hon. Frank W. Wilson (a speech)

“Verdicts or out of court settlement of $50,000 or over in wrongful deaths in Tennessee,” compiled by J.D. Lee

Executive director’s column by Billie Bethel: “Confidentially speaking – to the legal secretary CARE” (The key to being a top legal secretary is: Conscientiousness, Appearance, Respect, Efficiency).

— Suzanne Craig Robertson
The earliest column, besides the president’s, was called “Practicing Your Profession,” written by Executive Director Billie Bethel. It offered practical advice for running a law office and no doubt was a great help to the lawyers and law office personnel of the 1960s. Some subjects covered are still true today, even with the vast changes in technology available to the law office.

Some of the advice, however, helps us recall just how much the office environment has changed. (And of course all the lawyers and clients are “he” and the support staffers are “she.”)

That timeless telephone
“The Telephone: Friend or Foe?” is the first column in the first issue. The short answer is it could be either one, depending on how you deal with your calls. It’s a “you be nice to your phone and it will be nice to you” proposition, and most of the advice given is still applicable, even though these days your phone may have 12 lines, voice mail, caller ID and valet parking. And take care in selecting your receptionist: “You should seek a girl with a clear, pleasant, well-modulated voice, good enunciation and diction and a friendly, outgoing personality.”

Some upgrades have been made
“Don’t Let That Date Slip By!” in May 1965 admonishes lawyers to establish an Office Tickler System “to serve as a reminder to you of matters which require your attention.” Here’s what you need to do: “The Tickler System file should be placed in the control of a reliable secretary, bookkeeper or file clerk. This person should have assigned two daily tasks in respect to the system. The last task of the day for the designated person should consist of picking up information cards for the tickler file from each lawyer’s desk and filing them in proper chronological sequence. The first task each morning must be the checking of the Tickler File and the distribution of the cards coming up for that day.”

It goes on to recommend 3x5 cards and index card drawers. “The file clerk should also prepare a docket sheet for the office each Friday for the following week. A sufficient number of copies should be made for each lawyer and his secretary to have one. Thusly, the entire firm has information as to the court activities of each lawyer.”

Speaking of 3x5 cards, in 1987 when I walked through the doors of the TBA for the first time, the membership records — probably about 6,000 of them — were kept in a big metal box called the Cardex and each member had a card, filed alphabetically. It was soon after that time that the TBA hooked up a computer and started using member records from an electronic database.

The Office Tickler System of 1965 sounds like the software programs like TimeSlips or OMEGA, which divides the attorney’s day into six-minute increments and integrates with accounting and case management systems. Using John Doe’s time sheet it looks like he has six and a half hours to bill that day. If he does the same thing five days a week, he’ll have 32.5 hours to bill that week. Sources tell daily reminders (printed) of upcoming deadlines. So I guess the tickler system you described is really what I use today.”

So things some places are not so different from the way they used to be.

Another lawyer told me that lawyers in his firm input the time themselves sometimes and sometimes jot it down for a secretary to enter into the system.

Time was money back then, too
The 1966 Economic Survey indicated that lawyers who kept up with their billable time “always” made an annual median income of $22,000 (East Tennessee), $18,500 (Middle) and $19,600 (West). Those who never kept time records reported a salary of $13,000, $14,200 and $15,500, respectively. So in November 1966 when Practicing Your Profession covered keeping up with billable hours, it had some legs to stand on.

“Mark Time! Forward March!!” is the November 1966 installment of the column, dealing with billing time sheets. See the figures on these pages for a suggested way to keep your time. But, the article warns, “before you select a system of time records make up your mind that you will keep COMPLETE and ACCURATE records. To keep time ‘sometimes’ is not enough!”

This sounds like the precursor to software programs like TimeSlips or OMEGA, which divides the attorney’s day into six-minute increments and integrates with accounting and case management systems. Using John Doe’s time sheet it looks like he has six and a half hours to bill that day. If he does the same thing five days a week, he’ll have 32.5 hours to bill that week. Sources tell

Some advice is timeless
(other things are funny to read 40 years later)
me that’s barely enough these days to keep you employed. It’s possible that 30-minute coffee break Mr. Doe is taking in the afternoon would need to tighten up.

In the matter of the 1966 Economic Survey, it is reported that the “survey returns have been edited and punched into IBM cards ready to be processed by the computers.” It’s also reported that the return on the survey was a whopping 56 percent. In the TBA’s 2002 survey, which surveyed members and non-members, it was conducted mostly electronically (no punch cards) and the return was 12.7 percent.

Do you C.A.R.E.?

In November 1965, the column was “Confidentially Speaking: To the Legal Secretary CARE,” which addressed the legal secretary directly, not the lawyer. “Being a Legal Secretary, in the truest sense, is not an easy task! It is not just going to the office at 9 each morning and departing promptly at 5 in the evening. It is not ‘putting up with’ your boss … It is not just collecting your pay check.

No, being a Legal Secretary is not just a job, it is a career.”

The key to being a top legal secretary is C.A.R.E.: Conscientiousness (“She is the girl who comes to the office early, who, of her own accord, stays a few minutes late because their is work which she feels should be completed …”), Appearance (A nicely typed, crisp letter, well spaced on the page, is most attractive and carries the message far more effectively than a smudged, crowded letter with strikeovers and erasures), Respect (This includes respecting the privacy of clients as well as the training and ability of the lawyer) and Efficiency (including directing skills and abilities to the most effective use, developing ways to improve her skills, to eliminate wasted operations and unnecessary tasks).

Still a good idea

In February 1973, “Use and Development of a Law Office Manual,” directs lawyers to use an office manual, how to develop one and what should go in it and even how to present it. The sample “Operations Manual for [the law firm of] Care, Considerate & Concerned Lawyers” is 16 pages long. Some particulars:

- Smoking, gum chewing and snacking in the office are not indicative of an efficient, businesslike, professional office. Such activities do not contribute to the image nor the work product of the firm. You are, therefore, respectfully requested to forego these activities during your work day.

- A refrigerator and hot plate have been provided in the coffee room … no employee shall have food at his desk during regular working hours. Eating shall be strictly confined to the coffee room area.

There are subheads about use of the telephone, document uniformity, filing systems, Tickler system, expense charges and equipment.

Although employment laws have surely changed since then – and the sample one printed in that Journal would not be much help anymore — the practice of using an office manual is, of course, still in use today.

— Suzanne Craig Robertson
A few things besides the ‘Journal’ happened in 1965
By Barry Kolar

With rioting in our cities and a rapidly escalating war in Southeast Asia, 1965 was a turbulent year for the birth of a new magazine for Tennessee lawyers. And just as the Tennessee Bar Journal has persevered through four decades, many of the issues and topics of that period remain a part of our world.

Vietnam — still a contentious topic in presidential politics and the nation’s psyche — is the logical place to start. Forty years ago, the war dominated headlines as the U.S. changed its role from advisor to full combatant. Following attacks by the North Vietnamese, President Lyndon Johnson launched major air strikes through the Operation Rolling Thunder campaign, and also sent in a first wave of combat troop. The first major American ground battle of the war soon followed, when 5,500 U.S. Marines destroyed a Viet Cong stronghold on the Van Tuong peninsula. In all, troop levels increased from 23,000 at the beginning of the year to 154,000 by year-end.

As the war escalated, so did opposition back home. In October, the anti-war student-run National Coordinating Committee to End the War in Vietnam staged its first public burning of draft cards.

Also taking to the streets were protesters fighting to extend civil rights to the nation’s African-American population. Long deprived the opportunity to vote in many areas, these citizens held marches and protests across the nation, including the famous march from Selma, Ala., to the capitol in Montgomery led by Martin Luther King.

That protest was originally scheduled for March 7, but Gov. George Wallace swore to stop it, and that Sunday on the Edmund Pettus Bridge near Selma, the marchers were met by state troopers and horsemen armed with clubs and whips. The ensuing bloodshed was captured by national television crews, resulting in a public relations disaster for the governor.

In Washington, support for legislation to guarantee rights of African Americans grew, leading to August passage of the Voting Rights Act of 1965 — a measure that 

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Journaling legal history

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Journaling legal history

1986 The July/August cover story is about a new-fangled idea where interest on lawyers’ trust accounts can now go to the IOLTA program, which raises funds to support law-related public activities.

1987 Mandatory continuing legal education comes to Tennessee, requiring attorneys for the first time to log 12 hours and prove it.

1988 The TBJ Editorial Board is formed with three members: Don Paine, Bill Haltom and Mary Martin Schaffner.


1992 L. Webb Campbell covers Title 1 of the relatively new Americans with Disabilities Act in the May/June 1992 issue. Lara Womack Short points out in the September/October 1997 issue a distinction that may be drawn under the ADA between an employee’s disability and the job-related attributes of the employee’s disability. (In December 1999, authors Timothy S. Bland and Thomas J. Walsh Jr. explain recent clarifications by the U.S. Supreme Court in the Americans with Disabilities Act that resolve much confusion and conflict among lower courts, agencies and employers. William D. Evans writes in March 2003 about three ADA decisions that give courts significant guidance in resolving ADA claims.)


1994 The Tennessee Plan (formerly known as the Modified Missouri Plan) is implemented, which changes the way judges get their jobs in our state. Instead of being elected, they will be selected by the governor upon recommendation by a nominating commission. The Judicial Selection Commission and the Judicial Evaluation Commission are formed (News, May/June and July/August). The TBA voted to back the Modified Missouri Plan in 1988; TBA President Jim Emison writes in his column that he is in disagreement with the board and does not support the plan.

1998 Pamela L. Reeves becomes the first woman president of the Tennessee Bar Association. (Five years later she makes history again when husband Charles Swanson becomes TBA president, making her the only person so far to be both president and first lady of the TBA.)

1999 The Tennessee Bar Journal doubles output and goes monthly.


2002 The Givens decision touches off controversy about whether lawyers and doctors can talk ex parte. Months of rebuttal and letters to the editor spotlight this hot issue.

2004 In record time after the important Blakely v. Washington is handed down, readers of the Tennessee Bar Journal have an analysis of the impact it might have on Tennessee sentencing, authored by David Raybin. |

— Suzanne Craig Robertson
Tennessee Uniform Trust Code

New Formulation for a Trusty Tool

By Marshall H. Peterson

The TUTC ushers in a new era in trust formation, interpretation, administration and distribution, thanks to help from the Tennessee Bar Association and the Tennessee Banker’s Association.
I n medieval England, wealthy landowners wanted their lawyers to help them do at least two things: transfer real property free of the constraints of primogeniture and avoid the feudal incidents (the estate tax of its day). The solution was a method that had evolved in the equity courts from the technique for holding title to monastic lands — the use.

Despite a concerted effort by the Crown to abolish the use, its benefits were too good to constrain. Like its ancient ancestor, the erstwhile trust usually held passive assets with the rules for operation formed in the equity courts. In an agrarian society where land is the measure of wealth with families rooted in a place for their status and livelihood, this was appropriate.

The economic and social world is no longer ordered in such a way. In our Information Age economy, knowledge creates opportunity and spawns wealth. Many investment vehicles have sprung up to serve that wealth. It is also the case that Americans are mobile. Whether in search of economic opportunity, relationship considerations or adventure, it is increasingly rare that life to death and all points in between occur in the same locale.

Trusts have become, if anything, more valuable as planning tools. Not only are trusts used to manage assets for the spendthrift or incapable, but they bring advantages in a variety of circumstances widely known among planners and their clients. Whether it is to protect assets, save taxes, provide a will substitute with private disposition, or for other reasons, trusts are indispensable as modern estate planning tools.

As trusts evolve, so does the role of the trustee — the fiduciary who acts on behalf of the trust beneficiaries. Most states (formerly including Tennessee) have had a paucity of statutory law governing trust formation and administration. The common law supplies much of the law in those states. The handful of states with well-developed statutory law (such as California and New York) has often influenced the common law in all jurisdictions. In an effort to promote consistency among jurisdictions, the National Conference of Commissioners on Uniform State Law (NCCUSL) undertook a seven-year project to promulgate a Uniform Trust Code (UTC). In Tennessee a study committee representing the Tennessee Bar Association and Tennessee Banker’s Association studied the UTC, made recommendations for the Tennessee version, and submitted the proposal to the sponsors of the UTC legislation in the General Assembly. The result was the enactment of the Tennessee UTC (TUTC). In large measure the TUTC follows the UTC, but important digressions from the prototype tailor the law to Tennessee practice.

Tennessee is now in the forefront of statutory law governing trust and estate practice and trust administration. Codified as Tennessee Code Annotated §35-15-101, et. seq., the TUTC is effective July 1, 2004. Important new rights and responsibilities are now incumbent on beneficiaries and trustees. This article highlights some of the more important provisions of the new law.

Are you “qualified?”

TUTC introduces two defined terms that bring about qualitative differences in the level of reporting and approval of various administrative actions. First, a beneficiary is “a person that has either a present or future interest in a trust, vested or contingent; or in a capacity other than trustee, holds a power of appointment over trust property.” By comparison, a qualified beneficiary defines a narrower class, namely, “a beneficiary who on the date the beneficiary’s qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.”

A qualified beneficiary is accorded special status in administration of the trust. As an example, a majority of qualified beneficiaries may block the proposed transfer of the place of administration. Similarly, the trustee must keep the qualified beneficiaries “reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”

Settlement agreements

A new concept to Tennessee law that dovetails with the increasing use of alternate dispute resolution is the nonjudicial settlement agreement. If all “interested persons” agree, nonjudicial settlement agreements can be entered into that have the same effect as a judgment by a competent court. A nonexclusive list of matters that may be resolved by a nonjudicial settlement agreement includes:

(1) interpretation or construction of the terms of the trust;
(2) approval of a trustee’s reporting or accounting;
(3) direction to a trustee to refrain from a particular act or the grant of necessary or desirable powers to a trustee;
(4) resignation or appointment of a trustee and determination of a trustee’s compensation;
(5) transfer of the trust’s principal place of administration;
(6) liability of a trustee;
(7) extent or waiver of bond of a trustee;

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governing law of the trust;
(9) criteria for distribution to a beneficiary where trustee is given discretion.

A nonjudicial settlement agreement may not violate a material purpose of the trust and must be with regard to matters that could properly be approved by the court.

The mod squad

We have all encountered trusts that we wish could be modified to acknowledge realities that did not exist when the trust was established. The modification, termination, combination and division of trusts is covered extensively in Tenn. Code Ann. §35-15-410 through §35-15-417.

While the settlor is living, a non-charitable irrevocable trust may be modified or terminated by the trustee upon consent of all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. The settlor must be given notice of the modification or termination at least 60 days prior to the contemplated action. Tenn. Code Ann. §35-15-411(a) spells out the required content of the notice. If the settlor does not veto the modification or termination within the 60-day period, the trustee may proceed. Concern over the Internal Revenue Service Commissioner’s position that the UTC provision that required the settlor to join in the agreement with the beneficiaries could cause estate tax inclusion, caused the TUTC drafters to give the settlor a veto power, but not to require consent.

Following the settlor’s death, a non-charitable irrevocable trust may be terminated upon consent of all beneficiaries and a determination by the court that continuance of the trust is not necessary to achieve any material purpose of the trust.

If not all beneficiaries consent (either during the settlor’s lifetime or following settlor’s death) the court may bring about the modification or termination. In that instance the court must determine (1) that modification or termination is possible under the foregoing standards and (2) that the interest of a beneficiary who does not consent will be adequately protected.

In addition, Tenn. Code Ann. §35-15-412 provides that the court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of changed circumstances, the settlor did not anticipate that the purpose of the trust could be better carried out with the change. Emphasis is placed on carrying out settlor’s probable intention. Further, a trust that has impracticable or wasteful provisions is subject to the court’s power...
to modify or terminate, as is a trust with provisions that impair its administration.

**The search for meaning**

With the greater possibility that a trust can be amended or even revoked, it is more important than ever to include clear statements of the settlor’s intent in the trust indenture. Spelling out what the settlor hopes to accomplish may be the difference in that objective being a fait accompli or subject to the whims of a fay accomplice.

Intent clauses have long been favored in drafting tax-sensitive wills and trusts (“It is settlor’s intention that this qualify for the marital deduction”) so that if a court is called on to construe the provision in question, the settlor’s intent will be known. The same advice now applies if the settlor is adamant about accomplishing a certain result.

**Virtual representation**

With the opportunities for reforming, modifying or terminating trusts, whether through the courts or via nonjudicial settlement agreements, a constraint is having all parties represented. This is especially dicey when there are potential unborn or unascertained beneficiaries whose interest must be represented.

Tenn. Code Ann. §35-15-301 through §35-15-305 provide for virtual representation — a development in our statutory law that makes the aforementioned possibilities even more doable. Representation refers to those who are authorized to receive notices on behalf of, and otherwise represent and bind persons whose interests must be represented in a particular matter. For example:

*Representation by holder of general testamentary power of appointment.* To the extent there is not a conflict of interest, the holder of a general power of appointment represents the permissible appointees, the takers in default or other persons whose interest are subject to the power.

*Representation by fiduciaries and parents.* To the extent there is not a conflict of interest:

1. a conservator may represent and bind the estate controlled by the conservator;
2. a guardian may represent and bind the ward if a conservator of the ward’s estate has not been appointed;
3. an agent having authority to act with respect to the particular question may represent and bind the principal;
4. a trustee may represent and bind the beneficiaries of the trust;
5. a personal representative of a decedent’s estate may represent and bind persons interested in the estate;
6. a parent may represent and bind the parent’s minor or unborn child if a guardian for the child has not been appointed;
7. a person designated by the settlor to represent the beneficiaries of the trust may represent and bind such beneficiaries;
8. a person designated by the beneficiaries of the trust to represent them may represent and bind such beneficiaries.

*Representation by person having substantially identical interest.* Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute.

*Appointment of representative.* If the default rules still leave an interest not adequately represented, the court can appoint a representative. Unlike the traditional guardian ad litem, the use of the term “representative” signifies that the representative may be put in place to represent the interest in not only a court proceeding but also possibly in a

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nonjudicial settlement agreement or just to receive notice.

The representative is also authorized to consider general benefit accruing to the living members of the individual's family.11

**‘Virtual R Us’**

The virtual representation provisions of the TUTC are among the most exciting, new and practical provisions enacted. Combined with the opportunity for modification and termination of trusts, with nonjudicial settlement agreements as a method for resolving trust issues as well as the traditional method of seeking the court's imprimatur or guidance for all trust issues, it appears virtual representation will be one of the most significant aspects of the TUTC.

Especially when unborn or unascertained beneficiaries are in the mix, it is difficult to achieve many trust revisions or terminations. Guardians ad litem have been understandably reluctant to approve a course of action even though the benefits to the family were clear. Now that process appears to have been made practical.

**Governing mandates**

Most of the TUTC consists of default rules. The TUTC provisions apply unless there is contrary language in the trust agreement. However, there are 12 provisions of the TUTC that cannot be overridden in drafting.

**Mandatory rules.**12 The terms of a trust prevail over any provision of this TUTC except:

1. the requirements for creating a trust;
2. the duty of a trustee to act in accordance with the purposes of the trust;
3. the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
4. the power of the court to modify or terminate a trust as provided in the TUTC;
5. the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust;
6. the power of the court to require, dispense with, or modify or terminate a bond;
7. the power of the court to adjust a trustee’s compensation from that specified in the terms of the trust;
8. the effect of an exculpatory term;
9. the rights of a person other than a trustee or beneficiary;
10. periods of limitation for commencing a judicial proceeding;
11. the power of the court to take action and exercise jurisdiction as necessary in the interest of justice;
12. subject matter jurisdiction of the court and venue for commencing a proceeding as provided in the TUTC.

This is another instance where the TUTC differs from the UTC. The latter formulation also prescribed notice to qualified beneficiaries of the existence of the trust and their right to reports. The duty to inform and report is in Tenn. Code Ann. §35-15-813, but it is a default rule to be followed unless the settlor directs otherwise in writing delivered to the trustee. The requirements for the notice are specified in Tenn. Code Ann. §35-15-813. This is another instance where the settlor needs to be informed to make a decision and may even choose to include language in the trust restricting the reports to be provided to some or all the beneficiaries.

**“Let’s choose executors and talk of wills”**13

Trusts have become increasingly popular as will substitutes. Some provisions of the TUTC reflect this trend and build in safeguards as to the integrity of the trust agreement if used in a testamentary mode. For example, Tenn. Code Ann. §35-15-601 provides...
that the capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. Tenn. Code Ann. §35-15-112 provides that the rules of construction that apply in Tennessee to the interpretation and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property. Probate (or lack thereof) of administration is also affected. Tenn. Code Ann. §35-15-505(a)(3) provides that subject to the settlor's right to direct the source from which liabilities will be paid, the property of the settlor's trust which was revocable prior to death, is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, funeral and for disposal of remains.

One of the reasons revocable trusts have become popular is increased flexibility when compared to a will. Now, Tenn. Code Ann. §35-15-602(e) provides that a settlor's powers to revoke, amend or distribute trust property may be exercised by an agent under a power of attorney only to the extent authorized by the terms of the trust or the power. This can be a useful power to take advantage of changed circumstances (for example tax law changes or personal situations), but this provision reinforces the notion that extreme care should be exercised in choosing agents for powers of attorney, and if this authority is desired, language is required in either the trust indenture or the power of attorney (and preferably both).

Under the Trustor sun

The TUTC ushers in a new era in trust formation, interpretation, administration and distribution. There are new responsibilities on fiduciaries and beneficiaries. There are new opportunities for amendment, termination and reformation. There are opportunities to accomplish many changes without the expense and formality of judicial proceedings. There is something new under the Tennessee sun. All attorneys who advise trust settlors, beneficiaries or fiduciaries must become aware of the new rules or their clients risk being burned. A better result is to bask in sunshine.

Notes
11. (Tenn. Code Ann. §35-15-305(c)).
12. (Tenn. Code Ann. §35-15-105(b)).
13. Shakespeare, Richard II.

Omission

Last month’s article, “Promissory Estoppel: The enforcement of gratuitous promises to prevent injustice” by Steven Feldman, should have also carried the following information: “Adapted from Chapter 5, Consideration, of the forthcoming book, Tennessee Contract Law and Practice, with the permission of the publisher and copyright owner, West, a Thomson business.”

The Journal regrets the omission.
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Excited utterance: Brad Cunningham’s comeuppance

By Donald F. Paine

Some of you will recall my January/February 1997 column about this “pluperfect jerk.” The Oregon Supreme Court recently held admissible crucial evidence offered at his trial for murdering estranged wife Cheryl, a lawyer.

My earlier column dealt with the state of mind hearsay exception. The recent opinion considered the excited utterance exception. Common law and current rules require that three foundation facts be established to the trial judge’s satisfaction:

1. a startling event,
2. a statement made while declarant was under stress of excitement caused by the event, and
3. a relationship between the statement and the event.

See Tennessee Rule of Evidence 803(2), identical to the Oregon and federal language.

In Portland on Sunday, Sept. 21, 1986, Brad Cunningham was supposed to return the couple’s three sons to Cheryl by 7 p.m. He telephoned at 7:10 claiming “gas problems” with his car and refusing to say where the boys were. At 7:59 Cheryl called her mother to report:

“I’m going down to the Mobil station by the IGA store … to meet Brad and pick up the children.”

Around 8:30 Cheryl was found beaten to death on the Sunset Highway a short distance from the Mobil station. Is her hearsay statement admissible to prove that she met Brad? Yes, because it was an excited utterance.

First, the phone call from Brad startled Cheryl, a parent concerned about her children. Second, she was under stress of excitement caused by that call when she phoned her mother. Third, the subject matter of her statement related to the startling event.

Every now and then justice prevails over evil. It did in this case. ✡

“Current rules require that three foundation facts be established.”

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Donald F. Paine is a past president of the Tennessee Bar Association and is of counsel to the Knoxville firm of Paine, Tarwater, Bickers, and Tillman LLP. He lectures for the Tennessee Law Institute, BAR/BRI Bar Review, Tennessee Judicial Conference, and University of Tennessee College of Law. He is reporter to the Supreme Court Advisory Commission on Rules of Practice and Procedure.
I’m a P.K. (preacher’s kid). When I was growing up, everybody in the church my father pastored hoped that I would someday be a minister. People were always coming up to me and saying, “Billy, when you grow up, do you think the Lord will call you to be a preacher like your daddy?”

And I would always respond, “No, I think the devil is going to call me to be a lawyer like my uncle.”

My dad did not think this was funny. To the eternal disappointment of all my father’s parishioners, I never became a preacher. I didn’t even apply to seminary, although I think I could have been admitted under an affirmative action program for sinners.

But brothers and sisters, it’s never too late to get the call! I could still become a preacher. Believe it or not, I could still become ordained in the next 24 hours. Why, by tomorrow night I could be preaching sermons, performing baptisms, officiating weddings, spinning offering plates, and appearing on the PTL Club.

All I have to do is sign up with one of a number of virtual churches now recruiting me via e-mails.

Every morning when I get to my non-ecclesiastical office, I turn on my computer and read the numerous e-mails that have been sent to me overnight by concerned people throughout the world. Most of the people that send me e-mails in the middle of the night are concerned about my love life. They offer me all sorts of products designed to make a part of my anatomy grow through a miraculous medical process called “natural male enhancement.” So help me, I get about 50 e-mails a night on this topic. I don’t know why I’m being singled out, but I have to tell you, it does make me feel pretty insecure.

Strangely enough, I also get at least one or two e-mails a night offering to set me up on a blind date. Apparently the folks that send me these e-mails are not aware of the fact that (1) I have been happily married for 23 years, and (2) I am in desperate need of natural male enhancement.

I delete all these e-mails pertaining to my love life (or lack thereof) as quickly as possible. But recently I have begun receiving several e-mails that I find very intriguing. These e-mails offer me the opportunity of an eternal lifetime, specifically, the chance, at long last, to be an ordained minister.

And here’s the really great part. I don’t even have to go to seminary. I just have to sign up! Call it natural theological enhancement.

All I have to do is respond to the e-call, charge my instant theology degree to my credit card, and within 24 hours, I will have my preacher’s license, seminary degree, and ordination papers (batteries and Bible not included).

I am absolutely thrilled to finally be entering the ministry. For most of my life, I, like Jonah, have ignored God’s call to head to Nineveh, or in my case, seminary. I didn’t want to spend several years studying Greek and Hebrew while listening to pointy-headed liberal theology professors express their doubts about the virgin birth. Fortunately, I have not yet been swallowed by a fish.

But now, I don’t have to worry about that. I’m ready for the promised land of ministry, and I don’t even have to wander through the wilderness to get there.

(Continued on page 36)
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A few things besides the ‘Journal’ happened in 1965

(Continued from page 22)

suspended literacy tests and provided for the appointment of federal examiners who could register qualified citizens to vote.

Violence also erupted that year in New York, where Malcolm X was assassinated by Black Muslims, and in Los Angeles, where a routine traffic stop sparked rioters, who took over the streets in the Watts neighborhood for six days, leaving 34 deaths, more than 1,000 people injured and more than $40 million in damages.

Amidst all of this upheaval, there was also triumph, perhaps most notably in space, where several milestones were passed. Soviet cosmonauts were the first to walk in space in March, and days later NASA launched Gemini 3, the nation’s first two-person space flight. In June, Edward White took the first steps in space by a U.S. astronaut.

Unmanned space crafts also explored new regions, with the U.S.’s Mariner 4 flying past Mars in July and the Soviet’s Venus 3 taking flight toward Venus in November (it landed on March 1, 1966).

The birth of Rudolph and raindrops on roses

Other creations from 1965 remain with us today. “The Sound of Music” opened to crowds that even surpassed “Gone with the Wind,” the Gateway Arch began welcoming travelers to St. Louis, and the animated Christmas favorite “Rudolph the Red-Nosed Reindeer” made its debut. One 1965 invention that didn’t have such a long run — the Sony Betamax video format.

Barry Kolar is assistant executive director of the Tennessee Bar Association. He is, of course, not old enough to remember any of these events personally.

BUT SERIOUSLY, FOLKS!

(Continued from page 34)

I just have to reach out and touch my computer, hit “reply,” walk down the virtual aisle, and accept the call, just as I am.

And so, brothers and sisters, I’m pleased to announce that this Sunday I will be taking the e-pulpit of my new church, The First Church of Spam. I’ll be preaching on the timely topic “How I Gave Up My Law Career and Became a Preacher in Just 24 Hours, and How You Can Too for a Very Small Fee.”

Next week, my new wife (Tammy Faye) and I will be appearing on the PTL Club along with Jimmy Swaggert, and we will soon be opening our new faith-based amusement park, Six E-Mails Under Heaven.

Finally, I am also pleased to announce that I will be joining Oral Roberts and Benny Hinn at an upcoming healing crusade. Frankly, Oral and Benny could use my help in ministering to the sick. You see, brothers and sisters, I recently bought an e-mail doctor’s license.
Throw out that topic anywhere in Tennessee and you’ll get an ear full of answers. In Nashville, there’s the famous Tootsie’s Orchid Lounge. In Memphis, fans of Sleep Out Louie’s will make their case. Knoxville — don’t forget the O.C.I. And Chattanooga, well everyone knows that’s where Big River Brewing got its start.

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