WEAK LINK

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SPECIAL ACCESS TO JUSTICE ISSUE

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- Help for self-represented litigants
- Pro Bono Honor Roll
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Sometimes, more is better

P
cviously, the readers of this column have been made aware of the author's fondness for sports and his proclivity for relating virtually all aspects of life to metaphors associated with athletics. For example, when technological advances made it possible for radio broadcasters to provide live coverage of baseball games, one would think that the "powers that be" (i.e., owners, general managers, commissioners) would embrace the concept with open arms. In the words of former football coach and current ESPN talking head Lee Corso, "Not so fast, my friend." In fact, initially the concept of providing live, play-by-play broadcasts of major league baseball games was met with considerable reluctance by those who ran the game. Why? The thinking at that time was that if the games were available for free to those who listened to the radio broadcasts, people who otherwise would attend the games (paying for tickets, parking, concessions, souvenirs, etc.) would choose instead to listen to the radio and obtain essentially for free that which the purveyors of baseball had hoped to sell to them. In retrospect, perhaps, we now may observe that the logic in this way of thinking was flawed. At the time, however, this school of thought was considered very reasonable, even persuasive. The flaw in the logic, of course, was that the naysayers failed to take into account that when you make the game available to the masses over the radio waves for free, that mass audience gives the game an instant degree of national credibility and popularity, thereby creating an even greater demand for tickets, paraphernalia, concessions and so on.

While the analogy may not be perfect, I believe that it is similarly true that creating greater and easier access to our system of justice gives added weight and credibility to that system. When all persons, governors and the governed, captains of industry and assembly-line workers, media moguls and children with small voices and even smaller hope, have access to our system of justice as a means to solve disputes, enforce rights and resolve individual differences, the system itself benefits in so many ways. Think about the criticism that so often is leveled at our profession and the judicial process. In most instances, that criticism is rooted in the belief that the "haves" have meaningful access to that system and so on.

"Access to justice is significantly enhanced for those with wealth, power and education or any combination of those assets."

(Continued on page 5)
A lawyer should render pro bono publico legal services. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial portion of such services without fee or expectation of fee to:
   (1) persons of limited means; or
   (2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:
   (1) delivery of legal services at no fee or at a substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights, or charitable religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate;
   (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
   (3) participation in activities for improving the law, the legal system, or the legal profession.

(c) In addition to providing pro bono publico legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

The comments to Rule 6.1 can be found at http://www.tba.org/ethics/index.html.
(Continued from page 3)

justice is significantly enhanced for those with wealth, power and education or any combination of those assets.

It is the responsibility of all of us who have the honor and privilege of working within the system of justice not only to improve and enhance that system but also to make it universally available to those in need of its benefits and its protections. How may we ensure universal availability? There are many answers to that question, but one of the simplest and best is to make certain that pro bono representation is available to those persons who otherwise would be on the outside looking in. A fair and unbiased method of dispute resolution for the citizens of this nation is a most worthy goal and a goal toward which all of us within that system should strive mightily. But, a wonderful system of justice is only an illusion if it is not a system available to all in need of it. Our responsibility as lawyers is to make that illusion a realized dream. The Tennessee Supreme Court has commendably and consistently encouraged all Tennessee lawyers to fully engage in this business of making justice available to all through providing pro bono legal services. Their support extends to the adoption of Rule 6.1 of the Rules of Professional Conduct. If you have not read that rule in a while, I urge you to take time to do so right now (it starts on page 343 of the Tennessee Rules of Court and is reprinted on page 4). While preparing to write this article, I carefully read the rule and it took me less than a minute to read the whole rule. Now that you've read it, take it to heart. We can learn from the experience of those in major league baseball that greater access for all means a better system for all. Together, we must all seek to make the dream of equal justice under the law a reality. ☑

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: srrobertson@tnbar.org.
For the first time, judges in Tennessee would have mandatory guidelines to use in deciding whether certain court records may be sealed — or kept confidential — under a rule proposed in January by the Tennessee Supreme Court. The court entered an order proposing a number of amendments to the rules of procedure applying to cases in state trial and appellate courts. The rules will be submitted to the General Assembly for ratification.

“While most of these are technical changes, the adoption of new Rule 1A of the Tennessee Rules of Civil Procedure is a significant change,” Chief Justice Frank Drowota said. “Prior to the adoption of this rule, there were no written guidelines for judges to use in deciding whether or not to seal, or close, certain court records.”

The rule says it is “the public policy of this state that the public interests are best served by open courts and an independent judiciary.” Under the rule, court records are presumed to be open to the public and may be sealed only in limited circumstances, spelled out by the Supreme Court in its rule. Rule 1A generally applies to all documents filed in connection with cases before any civil court, with three narrow exceptions. It also applies to settlement agreements not filed in court but pertaining to a filed civil case, if the agreement restricts the disclosure of “information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.” The monetary amount of settlements may be kept confidential.

Procedures are set out in the rule for requesting that court records be sealed or unsealed. Non-parties also may participate in court proceedings involving the sealing or unsealing of court records, which are defined in the rule. The rule allows an immediate appeal of a judge’s decision to seal or unseal court records. Drowota said the court reviewed rules from other states and legal articles on sealing court records before referring the issue to its Advisory Commission on the Rules of Practice and Procedure for study and a recommendation. The commission drafted the text of Rule 1A and recommended its adoption. The Supreme Court published the proposal and accepted written comments from the public, lawyers and judges before adopting the rule with minor changes.

By state law, amendments to the rules of procedure, including Rule 1A, must be approved by the General Assembly. The court was to submit the amendments to the legislature in January and, if approved, they will become effective July 1. All of the rules are available at http://www.tba.org/rules/2005_scamends/.

Increase in federal court civil filing fee effective Feb. 7

On Dec. 8, 2004, President Bush signed into law the Consolidated Appropriations Act of 2005, which included a provision increasing the civil filing fee in United States District Court from $150 to $250. The civil filing fee was last increased in 1996 when it was adjusted from $120 to $150. The new filing fee is to become effective Feb. 7.

BPR complaints decreasing

The Board of Professional Responsibility reports a 5.8 percent decrease in complaint files opened for the period July 1, 2003, through June 30, 2004, in its 28th annual report. There were 926 files opened, down from 983 opened during a similar period the previous year. This is a 44 percent decrease since 1998, when 1,655 files were opened. In the past 28 years, the board has received 34,357 complaints, excluding consumer assistance concerns. The complaints have resulted in 151 disbarments, 364 suspensions, 412 public censures and 2,596 private reprimands or admonitions.
**Booker and Fanfan**

**U.S. Supreme Court makes federal sentencing guidelines ‘advisory’**

By David L. Raybin

In *United States v. Booker* and *United States v. Fanfan*, ___ S.Ct. _____, 2005 WL 50108 (Jan. 12, 2005), the court finally ruled on the constitutionality of the Federal Sentencing Guidelines (FSG). In an earlier opinion, *Blakely v. Washington*, the court found that sentencing enhancements had to be determined by a jury and not a judge. *Blakely* dealt with a state’s sentencing structure and the remaining question was how that decision would impact the FSG.

In *Booker* and *Fanfan* a highly fractured court made two findings. First, not unexpectedly, the court extended *Blakely* to the FSG. The “mandatory” provisions of the FSG conflicted with the Sixth Amendment right to a jury trial and thus the guidelines were held unconstitutional to the extent that the “mandatory” provisions had to be severed.

The initial ruling in *Booker* was not shocking. However, the great question was what remedy would be crafted given that the mandatory sentencing portions of the FSG were found to be invalid?

A separate majority of the court dealt with the remedy issue. By removing the “mandatory” provisions of the FSG the remaining statute “makes the guidelines effectively advisory, requiring a sentencing court to consider guideline ranges … but permitting [the judge] to tailor the sentence in light of other statutory concerns.” The court hinted at this earlier in the opinion: “were the guidelines merely advisory … recommending, but not requiring, the selection of particular sentences in response to a different set of facts … their use would not implicate the Sixth Amendment.”

“The great question was what remedy would be crafted given that the mandatory sentencing portions of the FSG were found to be invalid?”

While *Booker* will certainly spawn a considerable amount of litigation, it is probable that federal judges will, at least initially, sentence close to the guidelines. As time goes on it is equally probable that judges will perhaps depart from the “advisory” sentence based on the facts and circumstances of the case. This certainly is in keeping with an enlightened sentencing system. Unwarranted upward departures are certainly possible but the court retained the safeguard of appellate review. Appeals can now be based on the alleged “unreasonableness” of the particular sentence.

The remaining question is how *Booker* and *Fanfan* implicate Tennessee sentencing practices in state court. The governor’s commission is considering that very question as this article goes to press. The debate will probably center on whether we should have a bifurcated jury trial on enhancement factors or whether those factors can be “advisory” and be determined by a judge.

David L. Raybin is a partner in the Nashville law firm of Hollins, Wagster, Yarbrough, Weatherly & Raybin P.C. He received his law degree from the University of Tennessee.

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**Court interpreter rules open for comment**

Supreme Court Rules 41 and 42, which in 2002 established ethics and standards for court interpreters, has some amendments that the court would like you to comment on. The amendments would strengthen the hand of the AOC in enforcement of the rules and add criminal conduct to the grounds for revocation of credentials. Check out the changes at http://www.tba.org/rules/rules41-42.pdf and respond before the March 18 deadline.

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**LegisFlash reports what’s happening in legislature**

The Tennessee General Assembly is back in session and the TBA’s weekly legislative report is back as well. The weekly email report comes out every Thursday while the House and Senate are in session.

If you are not receiving LegisFlash, you can sign up at http://www.tba.org/tba_e-forum.mgi
Public Service Luncheon highlights weekend
Bar leaders convene for Leadership Conference

Bar leaders from across Tennessee brushed up on their skills, learned some new ideas on educational programming and were inspired by Public Service Award winners during the 2005 Mid-Year Leadership Conference in Nashville, Jan. 14-16. The meat of the programming took place Saturday, with four educational sessions at the Tennessee Bar Center, followed by the annual Public Service Luncheon at the Tennessee State Capitol.

With a crowd of about 200 in attendance, TBA President Charles Swanson and TBA Access to Justice Chair John Blankenship recognized award winners (see related story, page 18) and praised their good works.

U.S. Rep. John Tanner carried through the theme of public service in his keynote address, citing the need for an “honest broker” to keep the powerful from overrunning the less fortunate. “An independent bar and judiciary are vital to the continuation of our country as we know it,” he said. Their role “is not to protect the majority, but to protect that voice who says ‘I disagree.’ When pressure comes from the political world to dictate to the judiciary, we must stand up and say ‘no.’”

In addition, the TBA’s Board of Governors, House of Delegates and several committees and sections met during the weekend. A party celebrating the 40th birthday of the Tennessee Bar Journal wrapped up the meetings.

The TBA Leadership Conference kicked off with a series of educational programs. At left from top, Bruce Anderson and Danni Varlin (not pictured) show how different people learn in different ways. In a program on designing effective CLE programs, Harrison McIver, Cindy Wyrick, Max Williams and David Eldridge discuss new ways to do CLE. In a program on government affairs, TBA Legislative Counsel Steve Cobb (left) joined Rep. Jere Hargrove and Government Affairs Committee Chair Nathan Ridley (not pictured).

U.S. Rep. John Tanner (above) addresses a crowd of about 200 at the Public Service Luncheon in the Capitol.

Neal McBrayer (left) questions panel members, while a CLE breakout team (right) that included Linda Warren Seely and Glenn Walter brainstorms new ideas.

The 40th birthday party for the Tennessee Bar Journal — featuring games, prizes and, of course, cake — capped off the program. At left, Claudia Jack, Andree Blumstein and Gail Ashworth play to win.
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Harrwell Howard Hyne Gabbert & Manner PC recently named two new partners in its Nashville office. Greg Giffen earned his partnership after seven years with the firm. His areas of expertise include mergers and acquisitions, venture capital and other strategic business, tax and financial transactions. Giffen also has experience as a CPA. Kris Kemp joined the firm in 1997 and concentrates his practice in mergers and acquisitions, securities and general corporate matters. He also has substantial experience in international business transactions and securities offerings. He currently represents clients in the health care, life sciences, real estate, education and information technology industries.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC recently announced plans to renovate and expand its Memphis office located in the First Tennessee Building at 165 Madison Ave., where the firm has been a tenant since 1964.

The Tennessee Bar Foundation, an organization that honors attorneys who have distinguished themselves in the profession and raises funds for law-related public interest projects, inducted a new class of fellows during the TBA Leadership Conference in January. Of the 31 class members, the following fellows are TBA members: S. Lee Akers (Chattanooga), Robert R. Campbell Jr. (Nashville), Oscar C. Carr III (Memphis), Nancy Kridder Corley (Nashville), James C. Goos (Nashville), Michel G. Kaplan (Nashville), Richard E. LaRoche Sr. (Murfreesboro), William D. Leader Jr. (Nashville), Barbara Mendel Mayden (Nashville), James B. McLaren Jr. (Memphis), Nancy C. Miller-Herron (Dresden), Fred H. Moore (Chattanooga), Caren Beth Nichol (Memphis), Courtney N. Pearre (Nashville), Edward G. Phillips (Knoxville), Steven A. Riley (Nashville), Michael L. Robb (Memphis), Robert W. Sands (Columbia), Robert D. Tuke (Nashville) and Maurice Wexler (Memphis).

The Knoxville law firm of Hodges, Doughty & Carson recently announced the addition of two new associates. Michael Brezina, a graduate of the University of Tennessee College of Law, will concentrate his practice in medical malpractice defense. Matthew Birdwell, also a graduate of the University of Tennessee College of Law, will focus on commercial law and bankruptcy cases.

The law firm of North, Pursell, Ramos & Jameson PLC recently added three new members in its Nashville office. Renee Levay Stewart, who graduated from the University of Memphis School of Law in 1997, concentrates her practice in civil litigation, commercial litigation, and medical malpractice defense. Edward A. Hadley joined the firm in 2002 after completing a clerkship with the First Circuit Court in Davidson County. He graduated from the Cumberland School of Law, Samford University in 1994 and focuses his practice in the areas of medical malpractice, product liability, workers compensation, ERISA benefits and general civil litigation. J. Eric Miles has been with the firm since 2002 and is licensed to practice in all Alabama and Tennessee state courts, as well as federal courts in the Northern and Middle Districts of Alabama and the Middle District of Tennessee. Miles graduated from Tulane Law School in 1998. His areas of practice include civil litigation, commercial litigation, and medical malpractice defense.
The Tennessee Commission on Continuing Legal Education and Specialization has certified Knoxville attorney David M. Eldridge as a criminal trial specialist. Eldridge also recently was certified as a criminal trial specialist by the National Board of Trial Advocacy. Eldridge is a partner in the Knoxville firm of Eldridge & Blakney PC.

The Campbell County Bar Association recently held elections to choose its new leadership. Robert Scott was elected to serve as president; Michael Hatmaker takes over as vice president; Robert Asbury steps into the secretary’s spot; and Vic Pryor was elected treasurer.

At the Coffee County Bar Association, John LaBar was elected president, Laura Riddle was elected vice president and Craig Northcott was chosen secretary/treasurer.

Jeff T. Goodson recently joined the Law Office of John Cobb Rochford as an associate in the firm’s Nashville office. Goodson, who received his law degree from the University of Memphis, will practice in the areas of real estate, commercial litigation and intellectual property.

The University of Tennessee College of Law has announced that professor Douglas A. Blaze has assumed additional responsibilities as director of the Center for Advocacy and Dispute Resolution. Blaze currently serves as the Art Stolnitz professor of law and director of clinical programs.

The Knoxville law firm of Paine, Tarwater, Bickers, and Tillman LLP recently announced the addition of two new attorneys: Joshua R. Walker and Thomas M. Gautreaux.

Christopher R. Moore has joined the law firm of Henry, McCord, Bean, Miller, Gabriel & Carter PLLC as its newest associate. Moore, who earned his law degree from the Cumberland School of Law at Samford University, will concentrate his practice in the areas of domestic relations, personal injury, workers’ compensation, criminal defense and general civil litigation.

Pamela L. Reeves of the Knoxville firm Anderson Reeves & Cooper was recently inducted as a fellow in the American College of Civil Trial Mediators – an association of mediators and dispute resolution professionals dedicated to teaching, administering or practicing general jurisdiction civil trial mediations.

The Chattanooga firm of Grant Konvalinka & Harrison PC has announced the addition of two new associates: Richard G. Pearce and L. Katherine Higgason. Pearce, who earned his law degree from the Cumberland School of Law, will focus his practice in the areas of taxation, financial and estate planning, transactions, real estate and litigation and dispute resolution. Higgason, who clerked with Grant Konvalinka & Harrison before joining the firm, received her law degree from the University of Tennessee College of Law. She will focus her practice in the areas of litigation and dispute resolution, general business, environmental law, real estate and domestic relations.

Glandker Brown PLLC recently announced that Natasha Asly Nassar has joined the firm as an associate and will practice in the areas of taxation, estate planning, civil litigation and bankruptcy. Nassar received her law degree from Southern Methodist University in 2004.

Thomas L. Parker has joined the Memphis office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC as a shareholder and will concentrate his practice in the areas of tort litigation, government investigations and white-collar crime. Parker earned his law degree from the Vanderbilt University School of Law and later served as an assistant U.S. attorney specializing in trial and appellate work related to bank and mail fraud, narcotics and money laundering.

Charles K. Grant, a shareholder in the Nashville office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, received the Volunteer of the Year Award from the Nashville Pro Bono Program. The award is given in recognition of Grant’s commitment to providing access to justice for the poor and elderly. More specifically, he was recognized for his collaboration with the Nashville Pro Bono Program, the NAACP and the Napier Looby Bar Association in creating the Citizen Restoration Project, which provides legal representation to individuals who have served their sentence but have lost their right to vote because of a felony conviction.
BPR Actions

Reinstated

Memphis attorney Kennard Dudley Brown has been reinstated to the practice of law after complying with Rule 21 as required by the Board of Professional Responsibility.

Disbarred

Nashville attorney Carroll Thomas Strohm was disbarred by order of the Tennessee Supreme Court on Nov. 30, 2004. Strohm had been suspended from the practice of law since July 2003 pending resolution of a petition for discipline against him. Strohm consented to the disbarment on Nov. 22 when he acknowledged that he could not successfully defend himself against the disciplinary petition. Disbarred attorneys must wait at least five years before petitioning the court for reinstatement, at which time the Supreme Court must hold a formal public hearing and make a final determination.

Suspended

The Tennessee Supreme Court suspended Memphis attorney Vaughan Eugene Reid on Nov. 28, 2004 for failure to answer a complaint of misconduct. The order precludes Reid from accepting any new cases and mandates that he cease representing existing clients. After Nov. 29 he is not to 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. The suspension remains in effect until dissolution or modification by the Supreme Court.

Disability Inactive

The Tennessee Supreme Court issued an order on Nov. 7, 2004, transferring the law license of Nashville attorney Charles Ford Galbreath to disability inactive status. Galbreath filed a petition with the court requesting the transfer because of a medical condition that prohibits him from continuing the practice of law.

Suspensions for failure to pay

The following attorneys were suspended by the Board of Professional Responsibility on Sept. 20, 2004, for failure to pay annual registration fees as required by Rule 9, section 20.1 of the Tennessee Supreme Court Rules. Attorneys who paid their fees as of Jan. 14 are noted as reinstated.

TENNESSEE


OUT OF STATE

TBA Access to Justice Committee welcomes you

By John Blankenship, chair

In the post-election dialogue we have heard several references to reaching out across the aisle and crossing party lines. I suspect these comments are made because there is some amount of genuine desire to do so, but more so because it resonates with the electorate. Regardless, it has resonated with me by energizing my genuine desire to reach out across an aisle that unfortunately, but obviously, exists in our profession. On either side of this aisle are a minority and majority party. The irony is there should be only one party in this particular campaign.

Recently, I called an attorney friend of mine about helping out in a pro bono case. I wasn’t able to speak with him initially, but after informing his assistant of the reason for my call, I was told, Mr. _____ doesn’t do pro bono. Later my attorney friend confirmed this fact and the reasons why. While I have little doubt that his is an unusual position in terms of having a flat-out policy against doing pro bono, the undeniable fact is that lawyers who do provide pro bono representation in Tennessee are clearly members of a minority party. In fact, less than 40 percent of licensed attorneys in Tennessee provided pro bono representation in 2003. But I mention this number not to focus on what’s not being done, but on what can be done and what remains to be done. And following the lead of our political leaders, I hereby reach across the aisle on behalf of the Tennessee Bar Association Access to Justice Committee and the entire access to justice community, to our fellow lawyers who have heretofore, for whatever reason, declined to provide pro bono representation. We offer our encouragement, our willingness to assist, and we declare our desire to work with you in making the two parties one. If ever there was doubt that providing pro bono representation is a responsibility we all share rather than an elective activity, it has surely been removed by our Supreme Court with adoption of Rule 6.1 of the Tennessee Rules of Professional Conduct. There is certainly no longer any need for debate, if there ever was.

I am pleased and excited that this issue of the Tennessee Bar Journal is being devoted to access to justice, and I thank the TBA and the Editorial Board for doing so. And I would be remiss not to take advantage of this opportunity that the TBA has afforded us to make better known the existence and purpose of our committee. Our excellent coordinator, Becky Rhodes, has her finger on the pulse of all the pro bono and other access to justice initiatives across the state. And our wonderful attorney members in both private and public practice work hard throughout the state to expand access to justice for all Tennesseans. Give Becky a call at (615) 383-7421 and she’ll be glad to help you join the party.

TBA Access to Justice Committee’s Mission Statement

Advance the cause of equal access to justice for all Tennesseans. • Create a culture of equal access initiatives among all members of the justice community. • Coordinate and encourage cooperation among providers of legal services statewide. • Educate the bar on the need and obligation to provide pro bono publico representation. • Support the bar in fulfilling its obligations under Rule 6.1 of the Tennessee Rules of Professional Conduct. • Supply a voice for attorneys to the courts, the legislature and the public on access to justice issues.

List of Current Members of the Access to Justice Committee

Ursula Bailey, Stacy, Whitt, & Cooper
Ann Barker, Department of Children’s Services
James Barry, International Paper
Sam Blais, Solo Practitioner
John Blankenship (Chair), Blankenship & Blankenship
Doug Blaze, UT College of Law
Andrew Branham (Vice Chair), Counsel on Call
Greg Callaway, Howell & Fisher PLLC
Jim Daniel,Solo Practitioner
Jackie Dixon, Hollins, Wagster & Yarbrough
Page Garrett, Solo Practitioner
Deb House, Legal Aid of East Tennessee
Meg Jones, Community Legal Center
Alex Hurder, Vanderbilt Univ. Law School
John Lamb, Boult, Cummings, Conners & Berry PLC
Alexandra Mackay, Stites & Harbison
Susan McGannon, City of Murfreesboro Legal Department
Johanna McGlothlin, Legal Aid of East Tennessee
Eric Miller, Legal Aid of East Tennessee
Barbara Moss, Wyatt, Tarrant & Combs
Michael O’Hagan, Solo Practitioner
Harold Pinkley (Committee Chair Emeritus), Miller & Martin LLP
Allan Ramsaur, Tennessee Bar Association
Jennifer J. Rosenbaum, Southern Migrant Legal Services
Connie Ross, University of Memphis Legal Clinic
Yvette Sebelist, King & Ballow
Linda Warren Seely, Memphis Area Legal Services
Marietta Shipley, 20th Judicial Dist., Div. 2
Lucinda Smith, Nashville Pro Bono Program
Jonathan Steen, Armstrong Allen PLLC
Elizabeth A. Sykes, Administrative Office of the Courts
Terry Woods, Legal Aid of East Tennessee
Steve Xanthopoulos, West Tennessee Legal Services
Dave Yoder, Legal Aid of East Tennessee
LaFran Plunk (Paralegal Representative), West Tennessee Legal Services
Understanding the Unrepresented
The Tennessee Statewide Comprehensive
Legal Needs Survey for 2003
By Thomas C. Galligan Jr.

To steal a corny but very true line, a chain is no stronger than its weakest link. In a system of justice and a society that claims to be governed by the rule of law, the unrepresented person is the weakest link in the chain. The whole idea of a system of law with a commitment to equality and freedom falls apart when significant numbers of the population have no one to explain the rules to them and no one to protect their rights under those rules.

For those folks, the system presents a rule of chaos, not a rule of law. Consequently, it is imperative to provide the unrepresented with counsel and it is critical to know who is unrepresented. What, exactly, are our legal needs in this country and in the Great State of Tennessee?

To answer that question the Tennessee Alliance for Legal Services (TALS), Tennessee’s statewide planning entity for the provision of legal services to the poor, undertook a statewide legal needs analysis. TALS, the Tennessee Bar Association, and the University of Tennessee College of Law provided funding for the project, and the TALS Strategic Planning Committee took on the job.

Early on, the Strategic Planning Committee and the TALS board determined that someone with expertise would have to be involved with the design of a questionnaire and conducting the survey. The University of Tennessee College of Social Work Office of Research and Public Service (SWORPS) was the successful bidder and so SWORPS signed on. After preparation of a survey instrument, the study was underway.

SWORPS gathered information by calling 824 Tennesseans whose household incomes were below 125 percent of the federal poverty guidelines. In fact, about 18 percent of Tennessee’s total population are low income (approximately 1 million people). In order to be eligible for legal assistance under Legal Services Corporation’s guidelines, household income cannot exceed 125 percent of the U.S. Department of Health and Human Services poverty guidelines. To provide a little more background about low income people who participated in the survey is informative and enlightening. About one-third were working, either full or part-time. Eleven percent had been laid off; one in five was retired; 23 percent were dis-
abled. One in four had some college education. Fifty-five percent owned their own home.

As noted, SWORPS was calling those Tennessee households that were eligible for legal services from one of the state’s LSC funded legal services providers. Those four providers are: Legal Aid of East Tennessee, Legal Aid Society of Middle Tennessee and the Cumberlands, West Tennessee Legal Services, and Memphis Area Legal Services.3 Other legal service providers in Tennessee that do not receive funds from LSC include: Southeast Legal Services, Tennessee Justice Center, Community Legal Center in Memphis, and the Legal Clinics of the University of Memphis, University of Tennessee and Vanderbilt University.

Each phone survey took about 15 minutes and included detailed but easy to understand questions on 37 different types of legal problems. SWORPS then collected the survey results, collated them, and analyzed them for statistical significance. The findings will inform the public and decision makers. The study findings also will guide future planning for legal services.

Notably, the 824 households surveyed experienced an average of 3.3 civil legal problems in the prior year. Not every household suffered a legal problem. Of the households called, 575, or 69.8 percent, suffered some problem. And, as noted, overall, each household experienced 3.3 civil legal problems; breaking the numbers down further, on the average each person involved had 1.2 legal problems in the prior year.4 The study found a statistically significant relationship between the size of the household and the number of problems reported. Consistent with one’s intuitive judgment, as the size of the household increased, the number of reported legal problems increased. Whites were more likely not to report problems than African Americans, Hispanics and others. “Older” households, with people 60 or older (although that is sounding younger all the time), reported fewer problems than “younger” households.

Critically, those called who were working reported significantly more civil legal problems than the non-working. While the survey does not explain why the working poor have more legal problems than the non-working, this law professor guesses that working exposes a person to a whole range of legal relationships and potential problems arising out of transportation, the workplace, consumer lending, and more. Ironically then, striving to sustain or improve oneself by and through work actually exposes one to more legal problems. The law review article writer in me wonders whether this exposure could be a disincentive to work and if it is, would the meaningful provision of legal services offset or help to offset that disincentive. There are, of course, alternative explanations.5 For instance, since those surveyed had to have a land-based phone line, working people may have been over-represented in the sample and may be generally more accessible via the method of communication used. Moreover, working people may generally be better informed about and more aware of what types of problems are legal problems.

Study data on types of legal problems

The varied types of legal problems reported are too numerous to list here, but the most frequently reported problems involved: conflicts with creditors (reported by 34.6 percent of the surveyed households that experienced a legal problem in the past year); medical bills and health insurance (29.6 percent); utilities (26.2 percent); government benefits (21.8 percent); health care (15.2 percent); affording a place to live (14.3 percent); products or services (10.8 percent); and getting a loan or credit (10.8 percent). All of these categories as well as many of the other problems reported involved legal issues arising out of access to life’s necessities.6

Special attention must be paid to three categories of legal problems not listed above: immigration, domestic violence or abuse, and break-up of a relationship. It is the sense of the TALS board that immigration problems are under reported because those who face immigration issues are extremely hesitant to discuss those issues with anyone, even someone purporting to be conducting a survey about access to legal services. Similarly, it is likely that domestic violence and abuse are under reported because the person answering the phone may have been the victim of abuse and afraid to answer or may even have been an abuser. Finally, legal service attorneys across the state and nation will tell you that the unmet need in family law cases is phenomenal. Unfortunately that need may not have been accurately captured in the Tennessee survey because of the way in which the break-up of a relationship questions were asked. Consequently, it is your author’s opinion that the family law need is drastically understated. Other reasons for the under-reporting, as my friend Doug Blaze has opined, may be that persons in need have given up on those problems because there is no help. Or, it could be that other legal problems, like housing, utilities, and health care, overshadow the need for help with ending a relationship, particularly if the couple has separated.

Switching gears from the types of legal problems reported to what were the most troublesome problem categories, respondents said that their “biggest”

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Understanding the unrepresented

(Continued from page 15)

legal problems involved: housing or utilities (24.1 percent); financial and consumer (22.5 percent); health care (22.3 percent); discrimination (12.3 percent); employment (9.8 percent); family or relational (7.0 percent); community services (4.9 percent); government or veterans' benefits (4.5 percent); lawsuits or insurance (2.5 percent); juvenile (1.8 percent); and immigration (0.6 percent).

Respondents then rated the level of trouble that their biggest legal problem caused on a scale of 1 (not much trouble), 2 (some trouble) and 3 (a lot of trouble). There, the focus shifted slightly. People expressed the following levels of trouble: immigration (3), juvenile (2.6), lawsuits or insurance (2.6), employment (2.4), family and relational (2.4), discrimination (2.3), community services or the environment (2.2), financial or consumer (2.2), housing or utilities (2.2), and government or veterans' benefits (2.0).

Logically, the 511 households that had identified their biggest legal problem were asked what they did about it. There were 24.5 percent who took no actions at all because they felt it was "just the way things are" (17.6 percent). Others just "thought nothing could be done" (16.8 percent). Disturbingly for current purposes some "didn't know where to go for help" (12 percent). Others "didn't want a 'hassle'" (12 percent). But what about the 75.5 percent who tried to resolve their biggest legal problem? Some simply protested and refused to pay (30.1 percent). Others sought help from a private lawyer (24.3 percent), often at a discounted fee. Others sought help from a legal aid office or legal clinic (15.7 percent). And, others directly contacted creditors or officials on their own (13.4 percent).

Of the households surveyed who sought help from Tennessee's legal aid offices or legal clinics, about 55 percent were helped. Helped how? In 15 percent of the cases the provider worked to resolve the problem without formal action. In 15 percent of the cases, the provider gave only legal advice. In 10 percent of the cases, the provider prepared for and/or represented the client in a hearing or lawsuit. In 8.3 percent of the cases the provider provided some help with bills or rent and in 3.3 percent of the cases the legal services provider referred the client to a private attorney or service group. I was struck by how few matters got handled by actual representation at a hearing. But there seems to be no readily available data on what the optimal percentage might be.

What other facts were learned in the survey? Seventy-nine percent of the surveyed households had a car. Forty-three percent had access to the internet. While one may question the quality of the access, it would seem that both access and quality access to the internet will improve, and the internet provides some promise to both inform and assist low-income, unrepresented Tennesseans. One great resource to which people can turn is TALS web site www.TennHelp.com. The site provides easy access to organizations and agencies across the state of Tennessee that can provide help to people in need.

Critically, only 21.2 percent of the households questioned were aware of a source of free civil legal assistance for low-income households. This means only about 1 in 5 people surveyed knew of a source for free legal assistance.

So, what final highlights did SWORPS and TALS draw from the report? To reiterate, about 70 percent of the poor or near-poor households surveyed experienced a legal problem in the past year. The average number of legal problems per household was 3.3 per household or 1.2 per person. Extrapolating to the larger population in Tennessee whose incomes are at or below 125 percent of the federal poverty guidelines, 1,000,000 individuals experienced an average of 1.2 legal problems each in the prior year.

Less than 30 percent of the eligible population is aware of how or where to turn for legal assistance. Clearly, informing eligible potential clients with problems of their options is a paramount concern. But once those people are informed, who will represent them? Are there enough lawyers handling cases for those in need? No is the clear answer.

Taking the data from the needs survey and combining it with census data and statistics on closed cases by legal service providers yields an estimate of how much of the state's poor's legal needs are being met. The statistic is staggering. Only about 5 percent of the need is being met. In only 5 out of 100 cases is the need served. That means 95 percent of the poor who have legal problems are not represented.

The implications are clear. The nation faces a crisis concerning access to legal services and the legal system. The private bar, through pro bono services and other ventures, must continue to do its part and must do even more. State and national policy makers must consider creative and new ways to solve the problem such as loan forgiveness programs for law school graduates who devote at least some of their careers to legal services. The state's legal services providers also must consider new alternatives such as increased use of technology, shared resources, and creative partnerships with private law firms. Clearly within the legal services community difficult choices may have to be made between helping a large number of people with common but less complex problems or helping a smaller group of people with less common but more complex problems.

The Legal Needs Analysis shows us that the needs are great and they are unmet. Tennessee faces a crisis of unrepresented people. Why is it a crisis and why is it important to be concerned?

It is a crisis because a person with a legal problem but no real representation has no chance in a legal controversy. For them there is no rule and there is no law; there is confusion, uncertainty and oppression. For them, the American dream must sometimes seem like a one-sided nightmare.

The problem is important to me because of what I believe about social justice; it is important because of what I believe about basic fairness; it is important because the unrepresented often are members of those groups in our society who are most often under-served and most often excluded, rather than included. For all lawyers the unmet legal needs of the poor are of major concern because satisfying those needs will help to make the system
SECTION OF BUSINESS LAW

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Each year since 1992 the Tennessee Bar Association has given Access to Justice Awards in three categories. Read about this year’s winners here.

The Harris A. Gilbert Pro Bono Awards
This year’s Harris A. Gilbert Pro Bono Attorney of the Year Award is presented to two deserving attorneys, Vance H. Fry of Chattanooga and David Gall of Knoxville. The award recognizes private bar 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 TBA president, who exemplifies this type of commitment.

VANCE H. FRY, a sole practitioner in Chattanooga, has never done anything the traditional way.

He has never practiced law the way most people do it, he hasn’t retired the way most people retire, and the pro bono work he does with Legal Aid of East Tennessee is done with his trademark “twist,” as well.

One thing you need to know about Fry, 68, is that he is a Navy man, a fact that permeates almost everything he does. He graduated from Annapolis in 1960 and had a 35-year career with the Navy, spending 25 of those years in the U.S. Naval Reserve and achieving the rank of Admiral. He retired in 1995.

Fry was 40 when he decided to go to law school, the timing of which he admits was “a little unusual.”

After law school, building a traditional practice would have been difficult for Fry because he was traveling as many as 100 days a year with the Naval Reserve. As a result, he never has practiced law full-time. From the beginning, he says, he has practiced only three days a week. His is a general practice focusing on such areas as estate planning, probate, real estate and elder law.

It was only recently, however, that Fry began doing pro bono work in earnest with Legal Aid of East Tennessee (LAET).

“About three years ago, when I turned 65, I started thinking about how I wanted to spend the next 20 years of my life. I knew I wanted a bold challenge, and then I read John Grisham’s book, The Street Lawyer, and I said, ‘That’s it,’ ” he laughs. Grisham’s book tells the story of a lawyer who eschews a partnership in a giant D.C. law firm to become an advocate for the homeless and powerless.

Fry soon discovered, however, that providing legal aid might be more fulfilling if he could tweak the system a little.

In her nomination of Fry, LAET Pro Bono Coordinator Nancy Pagano tells the story: “He soon realized that Legal Services had many regulations they had to follow, and that potential clients had to fill out and sign a lot of paperwork. Vance wanted to spend his time advising clients and providing them with legal assistance without the hassle of all the paperwork.” With officials at Legal Services, Fry developed a system that has worked well for everyone.

Fry established clinics at various Chattanooga service organizations, each of which is on the frontlines in the area’s battle against poverty. He spent most of his time, however, at The Samaritan Center, an organization that gives health and counseling services, personal items and food to people in crisis.

“My philosophy,” says Fry, “was that I wasn’t generally going to go to court with
people, because if I did that, I could probably handle only four or five cases a month. If I did other things instead, I could see quadruple the number of people. I spent my time writing letters, calling landlords, whatever the case, and then if someone had a situation that needed to go to court, I set them up with Legal Aid.

“In a year’s time, I referred about a dozen people to Legal Aid but was probably able to see and help another hundred or so. I don’t know the exact number. I haven’t stopped to count,” he says.

Pro bono work has its ups and downs but is ultimately rewarding, according to Fry.

“It can be frustrating to work in pro bono. Fifty to 60 percent of your clients are late, or they set the appointment and don’t show up. You could walk away from it and say, ‘Well, I don’t care if they don’t care,’ but then they still need the help,” he says.

“There is immense personal satisfaction in it, because I know I’m helping people who otherwise wouldn’t have access,” he says. “The way I’m doing it, I may be getting to the people who wouldn’t go down to McCallie Avenue and walk into Legal Aid.”

Fry’s efforts don’t stop at the county line. Now he is spending about half his pro bono time on overseas missions. He is conducting seminars on character and integrity for a Christian university in the Ukraine and helping missionaries in various areas of the world with the special legal concerns they often face.

What drives him to do all of this, and what are his hopes for the future of pro bono?

“I guess I’m just looking for the best way to spend my time. I didn’t want to spend it playing golf and watching TV,” he says. “I just love what I’m doing, and I think access to justice is so important. It’s a way to pay back all that’s been given to me. I feel like the Lord has provided so abundantly to me.”

You might not expect public defenders to do a lot of extra pro bono work. After all, they see their fair share of a community’s destitute population every day on the job.

One wonders, then, why David Gall, an assistant public defender for the Knox County Public Defender’s Office, spends so much time volunteering with Legal Aid.

He’s fairly practical about it. “You don’t do it to gain appreciation, you do it because it’s important that it be done,” he says. “And there’s gratification in doing a job right, even if the client doesn’t understand the benefit.

“A lot of them do understand, however, and are extremely grateful. It’s not uncommon — in fact, it is extremely common — to run into someone you’ve helped, years later, and have them recognize you. That’s when it becomes obvious that you have made an impact on that person’s life.”

He laughingly illustrates the point. “I was having some remodeling done,” he says. “I drove up to my house one day, and half the roofers stood up and shouted out at me, ‘Hey, Mr. Gall, remember me?’ People remember what you’ve done for them.”

Gall, who was one of the original attorneys on the Knox County Public Defender’s staff when it was formed in 1990, also is a member of the Knox County Foster Care Review Board and served on the board of directors of the Knoxville Legal Aid Society until it was transformed into Legal Aid of East Tennessee.

Still a member of LAET’s Pro Bono Project, Gall regularly assists with the organization’s Saturday Bar clinics.

Pro Bono Coordinator Terry Woods, who nominated Gall, writes, “David’s expertise in criminal law makes him particularly valuable to us. Many of our clients would have been denied appointments if not for the fact that we knew David would be there to address their potential criminal issues.”

Gall’s participation in pro bono does not stop with the Saturday Bar consultations. He recently has had as many as four

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open files for Pro Bono Project clients.

In those four cases, he is doing everything from helping one client regain his right to vote to recovering a driver’s license for another person to giving another client the courage to open his mail.

Woods tells how, in the previous case, a client tried to surrender himself to the Knox County Detention Center after being caught driving on a suspended license. He later received several pieces of mail from the state but would not open any of them, afraid the letters were notices to report to prison.

Woods says, “Our staff was fairly confident that the client’s concerns were not well-founded, but we asked David to talk to him. David patiently relieved the client’s fears, helped him decipher his mail and is helping him recover his driver’s license.”

Gall’s willingness to help came as a surprise for LAET, according to Woods. “David was not recruited,” she says. “He just signed up by mailing in the application on the back of a Pro Bono Project brochure. I don’t even know where he got the brochure. And I have no idea what motivated him to volunteer. That’s what is confounding. He did not join the Pro Bono Project as a result of any of the typical things we do to seduce new members.”

Woods points out that a lawyer sometimes will volunteer for pro bono work because it offers a change of pace from the typical caseload, but, she says, “David does not need Legal Aid’s help in that pursuit. He has spent the last 15 years representing poor people. Apparently, David is simply what we all strive to be: a good lawyer who takes his professional obligations seriously.”

Yet, Gall insists he hasn’t done anything earth-shattering. “I’ve helped people with small cases,” he says. “They’ve all been fairly small and pretty easy.”

To attorneys who are considering pro bono work, Gall offers this encouragement: “My experience with the bar here in Knoxville is that there will be people at your back. If you feel you’re getting in over your head, they’ll step in and

Special Recognition for Pro Bono Work

This year the TBA Access to Justice Committee and the Board of Governors voted to offer special recognition to attorneys who take on a single, complex and controversial case pro bono. The TBA awards this special recognition to DAVID SIEGEL and RICHARD GORDON, both of Memphis, for their extraordinary service in an adoption and child custody case in the Memphis area.

In that case, Chinese nationals Shaoqiang “Jack” He and his wife, Qin Luo “Casey,” gave their infant daughter to Jerry and Louise Baker. The financially distressed Hes said their arrangement was temporary, but the Bakers said they were told they could keep the girl until she was grown.

Circuit Judge Robert “Butch” Childers terminated the Hes’ parental rights after a 10-day trial last spring. The case is currently being appealed and has attracted the help of lawyers from Vanderbilt University and the University of Memphis law clinics and Chicago-based Loyola University, all of which have asked to submit briefs in the high-profile case.

Siegel’s law practice focuses on the areas of family and general law, as well as civil litigation. Gordon practices family law.

— Becky Rhodes

CASA Volunteer of the Year

REGINA SAFFEL of Jackson was awarded the CASA Volunteer of the Year Award by the TBA Young Lawyers Division. Saffel has served as a Court Appointed Special Advocate in Madison County for seven years, specializing in serving medically fragile children in the foster system. As a retired nurse, Saffel is able to use her medical experience to help judges, attorneys and family members understand complex medical issues. Her current caseload — which is indicative of her work — includes a prematurely born infant, a child with multiple chronic illnesses and a mentally challenged teenager. Her dedication to the mission of CASA and the children she is assigned has led the juvenile court judge to specifically request Saffel’s assistance on a number of cases. As one of the first volunteers sworn with the Madison County program, Saffel is an excellent resource for agency staff and often serves as a mentor to fellow volunteers. Prior to retiring, Saffel worked as a registered nurse at Union University in Jackson and served for seven years as the dean of the School of Nursing. In addition to serving as a CASA volunteer, Saffel sits on several community boards and volunteers at her church.

— Stacey Shrader

REGINA SAFFEL
help you. You shouldn’t be concerned that you are taking on more than you can handle.”

The Public Service Award

BARBARA FUTTER was awarded the Public Service Award. This 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.

Public interest law takes on a whole new meaning when you’re talking to Barbara Futter. It’s more like “personal interest” law to her.

It doesn’t take long to realize that Futter, managing attorney for the Murfreesboro office of the Legal Aid Society of Middle Tennessee and the Cumberlands (LAS), goes far beyond the call of duty by taking a personal and not just a professional interest in her clients.

In his nomination of Futter, John Blankenship of Blankenship & Blankenship in Murfreesboro, says “it wouldn’t do justice to the sort of individual and advocate she is” to merely list the types of cases she handles. He tells the story of how Futter helped a disabled couple who were being evicted from public housing because of an overcrowding problem. “Barbara donned jeans, borrowed a friend’s truck and physically moved items from the home in an attempt to prevent the eviction, because these people had nowhere else to go.”

In other situations, she has picked up groceries and other needed items for clients and visited them in the hospital. “Barbara’s concern for others can be seen beyond her clients,” he says. “It’s clear in everything she does.” Up until several months ago, she volunteered to lead a support group one night a week at the Tennessee Department of Corrections, where she served as a counselor to inmates.

Her motivation to help people in this way comes from the heart. “It’s not just working on legal matters,” she says. “It’s also caring about people and listening and helping them when you can. They don’t all have the same options I have. You know, I have friends with vehicles. I can borrow a truck, whereas maybe they can’t.”

Futter has a strong background in public interest law. While in law school, she clerked for the federal public defender in Nashville and eventually moved back to Nashville to become an attorney with the Metropolitan Davidson County Public Defender’s Office.

Later, she became executive director of Dismas House, a nonprofit organization in Nashville that works to assist inmates recently released from prison as they transition back into the community.

Now, at the Murfreesboro LAS office, she serves low-income and elderly clients in Rutherford and Cannon counties.

“One of the things I like in particular about legal aid is that every day is different. Murfreesboro is a small community and we may help one client over a period of years. You may help him with one thing and then three years later he’s back and needs your help again. I like that part — getting to know clients and assisting them,” she says. “You get involved with helping people help themselves.”

Futter says it takes a special type of person to do legal aid — “someone who is compassionate, community-minded and someone who feels very strongly that the law should be accessible to everyone.”

In the spirit of bringing that accessibility to even more people, Futter has been involved in a project suggested by Judge Don Ash to develop self-help kiosks to be located in the courthouse and other public outlets in Rutherford and Cannon counties. The touchscreen computer terminals will be physically housed in old voting booths that the county can no longer use in elections. They are designed to give people answers to their questions about the law. “They’re not meant to take the place of legal advice,” she says. “They have more of a question-and-answer format dealing with factual items that are fairly cut and dry. Where is the courtroom? What is the difference between civil and criminal law? Questions like that.”

Futter hopes to see more people enter law school with the goal of practicing public interest law. “I really hope that more people will go to law school because they believe that the law should be accessible to everyone. I hope they will go to law school to provide services, whether it be full- or part-time, for people who can’t afford it or are scared of it.

“It’s great to be able to help someone who is so intimidated by the process that would rather give in than go to court over an issue,” she says. “It’s so rewarding when you can say to that person, ‘You’re not giving up. I’m going to be with you. I’ll ask you some questions and we’ll prepare for it. I know you can do it.’ It’s great to see them begin to believe they can get through it.”

The Law Student Volunteer Award

JOSEPH N. WILLIAMS is this year’s Law Student Volunteer Award winner. This award recognizes Tennessee law school students who have provided outstanding volunteer services while working with an organization that provides legal representation to the indigent.

R-E-S-P-E-C-T. Joe Williams found out recently what it means to the practice of law.

He says it’s the most important thing he learned while volunteering for the Legal Aid Society of Middle Tennessee and the Cumberlands (LAS) during the summer of 2004.

“The one thing I learned is it’s very important in the practice of law to treat every client with the utmost respect no matter how big or small their problem is, because it’s a pressing issue to that client,” he says.

According to Lucinda Smith, director of the Nashville Pro Bono Program,
Too many Tennesseans are being denied equal access to justice because they cannot afford to hire a lawyer to represent them in court proceedings. They include many of Tennessee's poorest citizens, only a small portion of whom can be served by the dedicated and hardworking attorneys employed by our federal, state and charitably funded legal service programs and those Tennessee attorneys who volunteer their time and talent to represent those unable to pay. It is not only Tennessee's poorest, however, who cannot afford the fees Tennessee lawyers reasonably charge for their services. Many citizens with limited means who are not eligible for representation by a legal service organization are equally unable to afford a lawyer. Yet such persons of limited means may have the same need for legal representation as their more affluent neighbors, particularly in civil matters involving their marriages, their children, their homes, their jobs, and their consumer purchases.

Faced with a legal problem and unable to pay for or otherwise secure the services of a lawyer, these Tennesseans either do nothing — effectively losing their rights under Tennessee law — or seek to represent themselves, sometimes adequately but more typically so that neither they nor the administration of justice is well-served. These self-represented litigants — the vast majority of whom represent themselves only because they cannot afford a lawyer — are flooding Tennessee's civil trial courts. This is creating serious problems for our trial judges, court clerks, the lawyers for other parties who must deal with the self-represented litigants, and for the many self-represented litigants who cannot effectively represent themselves without at least some assistance from a lawyer. In response to this problem, then, the Administrative Office of the Courts of the Tennessee Supreme Court has convened a Working Group on Self-Represented Litigants to explore various ways in which Tennessee might provide more assistance to its self-represented litigants.

The idea of a lawyer limiting the scope of a client's representation is not new. Nor is the more specific idea of a lawyer providing limited assistance to an otherwise self-represented litigant. It is, however, an idea that has not yet taken hold in Tennessee. But it may be an idea whose time has come and may even be overdue. As a starter, then, let's consider some basic questions about limited scope representation as a means for providing legal assistance to Tennessee's growing number of self-represented litigants.

**Unbundling introduced**

It is this reality that prompted the Working Group to begin exploring the idea that a less-than-full-service representation — also known as a limited scope representation, a discrete task representation, or an “unbundled” representation — by a lawyer might be better than none, would be more affordable, and perhaps would even be affordable to many of those currently unable to afford a full-service representation. Similarly, legal services attorneys might be able to serve more clients by offering limited as well as full-service representation. And maybe it would be easier to recruit lawyer volunteers to assist self-represented litigants if they knew they could limit the scope of their client's representation. Thus, the Working Group is actively considering the promotion of “lawyer-assisted self-representation” as one of several alternatives to the status quo in which the only choice for many Tennesseans is to go it alone.

The idea of a lawyer limiting the scope of a client's representation is not new. Nor is the more specific idea of a lawyer providing limited assistance to an otherwise self-represented litigant. It is, however, an idea that has not yet taken hold in Tennessee. But it may be an idea whose time has come and may even be overdue. As a starter, then, let's consider some basic questions about limited scope representation as a means for providing legal assistance to Tennessee's growing number of self-represented litigants.

**What is limited scope representation?**

First, what is limited scope representation as it relates to self-represented litigants? As defined in the very useful *Handbook on Limited Scope Legal Assistance*, published by the American Bar Association's Section of Litigation, these terms refer to situations in which a client hires an attorney to assist with specific elements of a matter such as legal advice, document preparation (or review) and/or limited appearances. The client and (Continued on page 23)
is reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.”

The idea that a representation might be limited so that the client can afford the lawyer’s assistance is suggested by the observation in Comment [7] that “agreements limiting the scope of a representation may preclude the lawyer from taking actions the client thinks are too costly.” That a lawyer might provide a limited scope representation to a self-represented litigant is suggested by Comment [8]’s observation that it would be reasonable for a lawyer and client to agree that the lawyer’s representation would be limited to a brief telephone consultation if “the client’s objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem.” All that would be necessary was that the time allotted to the consultation be sufficient to yield advice upon which the client could rely. Importantly, the Comment then adds that “[a]lthough an agreement does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

The key issue, then, is whether a limited scope representation is “reasonable under the circumstances.” Further guidance about this issue has been provided to the Community Legal Center in Memphis by the Office of Disciplinary Counsel in an Informal Advisory Opinion that is quite helpful and encouraging, although, of course, it is “not for publication” and “not binding on the Court, the Board, or the Ethics Committee” and “offers no security.”

The CLC’s request for advice related to the provision of limited legal services in domestic relations matters by two lawyers who are paid modest sums by the CLC to provide such services to persons who are representing themselves because they are unable to afford a lawyer. The lawyers are available on a part-time basis at a “pro se clinic” located in the Shelby County Courthouse. The lawyers assess the reasonableness of the limited representation, taking into account the client’s capacity to understand the procedures, the complexity of the matter(s) involved, and other factors, including that the fact that a refusal to provide a limited representation would leave the self-represented litigant who is unable to afford a lawyer without any help at all. Having determined that the limited representation would be reasonable under the circumstances, the lawyer consults with the client and obtains the client’s consent to their payment by CLC, as required by RPC 1.8(f), and to the limited nature of the representation, as required by Rule 1.2(c). Although not required by the rules, the lawyers secure their clients’ consents in writing. The consultation about the limited nature of the representation includes a warning about the risks of the client proceeding pro se, even with the lawyer’s limited advice. The services to be provided typically include advice about court requirements and assistance with the preparation of documents for filing with the court, such as a divorce complaint, summons, application for protective order, property settlement agreement or decree, and/or a parenting plan. The client is informed that the lawyers will not represent the client on a continuing basis and that the lawyer’s representation concludes when the consultation ends. Equipped with the lawyer’s limited advice and completed forms, the client then carries on pro se.

The Informal Advisory Opinion basically puts a stamp of approval on the proposed activities of the CLC pro se clinic. Although noting that whether a limited representation is reasonable under the circumstances depends on the facts, and that the issue is whether the lawyer can provide reasonably competent representation despite the limitation on the services to be provided, the opinion permits the lawyer to resolve this question by reference to whether the client (and the court) “will be in a better position with limited services than with no services.” It is hard to imagine a situation in which a person would be better off with nothing rather than something, even if the same-
Williams went beyond treating LAS clients with respect; he helped them overcome obstacles, too.

"Joe was willing to drive to all points of Davidson County to meet with disabled persons who had difficulty coming to the office — both clients and witnesses — and to take time to accompany them on errands which would have been difficult for them to accomplish on their own."

Williams, a third-year law student at Vanderbilt University, says it is important to go the extra mile for people.

"I think when you are attempting to help others with a legal problem or otherwise, it's important to empathize with them in every area of their life so that you can best understand how to help them. The legal problem they bring to you may be just the first thing on a whole laundry list of problems they are dealing with," he says.

Williams worked on a variety of cases with LAS, including social security and TennCare cases.

He first got involved with LAS on the advice of Alex Hurder, associate professor of clinical law at the Vanderbilt Legal Clinic, where Williams worked on the preparation of a brief that was argued recently by Hurder in the Sixth Circuit Court of Appeals. The case was related to the Individuals with Disabilities Education Act.

Regarding his decision to intern with LAS, he says, "As a third-year law student, school is no longer as time-consuming. I had some free time, and I thought there was no better way to spend it than to help out."

Williams particularly enjoyed working on the case of a destitute, disabled person whose social security benefits had been suspended because the Social Security Administration deemed him a "fleeing felon."

The client had a bad check in Savannah, Georgia, but had been extradited to Tennessee to face similar charges before the Georgia case could be resolved. He served a two-year prison sentence in Tennessee, but upon his release, Georgia declined to have him returned. This meant there was still an outstanding warrant for his arrest on the books in Georgia.

The Social Security Administration classifies a person as a "fleeing felon" even if they have done nothing to avoid arrest, as in the case of LAS' client.

Williams worked with LAS staff attorneys to get this individual's benefits reinstated, and is helping take the case one step further by trying to get the Social Security Administration to revise its interpretation of the statute involved. "Without Joe's assistance, this challenge likely would not be made," Smith says.

Williams has enjoyed the learning aspect of working on this particular case. "It's been a whole lot of fun, because it was pretty cutting-edge stuff we were working on."

He continued working about eight hours a week for LAS after school went back into session in the fall, because he wanted didn't want to leave the case in the middle. It's ongoing, so he still may not be here to see the end result in person. He graduates in May and will go back to his home state of Indiana to work with a five-person law firm in Logansport.

He takes with him his experience with LAS and the desire to continue doing pro bono work.

"I hope to one day be involved in public interest law again," he says.

Julie Swearingen is a freelance writer living in Springfield, Tenn. She is a former director of communications for the Tennessee Bar Association.
What's new at TennBarU?

LEARN NEW CHILD SUPPORT GUIDELINES AND EARN CLE CREDIT

The Tennessee Department of Human Services has joined with the Tennessee Bar Association to produce a new one-hour CLE program that walks you through the process of filling out an Income Shares Worksheet and provides answers to frequently answered questions. Of course that's just the latest offering from TennBarU Online. Also available are a pair of new video programs from ethics expert Lucian Pera that tackle Conflict Waivers and Engagement Letters under Tennessee’s new ethics rules; and three one-hour video programs from Nashville attorney Gary Brown that provide an update of corporate ethics issues.

CLE AT SEA

Make your reservation by April 15 for an exciting Alaskan Cruise CLE program coming this summer from TennBarU. You’ll join a group of your Tennessee legal colleagues as they sail from Seattle on July 23 to visit Ketchikan, Juneau and other Alaskan ports. This eight-day voyage isn’t just a great vacation opportunity, it will also include at least six hours of top-flight CLE programming.

BRUSH UP ON YOUR TRIAL SKILLS AT YLD SEMINAR

Now in its 19th year, the YLD’s Trial Practice seminar covers key areas in state and federal litigation. This seminar provides practical information on all aspects of jury and bench trials from voir dire to closing arguments. Learn from experienced trial practitioners from the local area as they share their insights valuable to attorneys preparing for their first or their thousandth trial.

This six-hour program is being offered all across the state, with sessions now scheduled for Memphis on March 1, Jackson on March 2, Nashville on March 3, Knoxville on March 4 and Kingsport on March 4.

CLE AT SEA

A SERVICE OF THE TENNESSEE BAR ASSOCIATION
The phrase “equal justice under law” is inscribed over the doors of courthouses throughout the country and throughout Tennessee. “Equal justice under law” means that these doors are open to all, regardless of status, and that the eyes of the law look impartially upon those who pass through them. “Equal justice under law” epitomizes the very foundation of our legal system.

As attorneys, we serve as officers and gatekeepers at the doors of the courts. That is to say, our knowledgeable and skillful representation of clients is essential to the proper functioning of our legal system. Those persons who lack the benefit of legal counsel are typically at a disadvantage to those who enjoy this benefit. And as we all know, the benefit of counsel comes at a price. Ours is a paying profession by which attorneys strive — just like their clients — to make a living. We also know that many, many persons are unable to afford legal services.

As a result, attorneys shoulder a special responsibility. It is our responsibility to keep the doors to the courthouse open even to those who cannot afford to pay for counsel. For the phrase “equal justice under law” to be fully meaningful, it must comprise those persons who lack the financial resources to afford counsel. Otherwise “equal justice under law” will mean in effect “equal justice under law for those with incomes over the poverty level.” What a poor definition of justice! The very meaning of justice, then, depends in part upon our willingness — upon your willingness — to donate some of your time and expertise to those who could not otherwise afford it.

Participation in pro bono by Tennessee attorneys could be stronger. According to Becky Rhodes, access to justice coordinator of the Tennessee Bar Association, statewide participation of Tennessee attorneys in pro bono activities ranges from approximately 5 to 10 percent in some areas of the state to 25 to 30 percent in other areas. Contrast these participation rates with those of Maryland, one of only three states that require all attorneys to report their level of pro bono activity. The other states with mandatory reporting are Florida and Nevada.

(To be clear, Maryland makes the reporting of pro bono activity mandatory, but does not make participation itself mandatory.) In 2002, 48 percent of Maryland’s approximately 30,000 attorneys reported some level of pro bono activity. It is estimated that in 2002 Maryland attorneys donated over $150 million worth of legal services to persons of limited financial means.

Compared to many states — Tennessee included — 48 percent is a high level of participation. For Tennessee attorneys, a participation rate of one in 10 or even three in 10 is too low. We can do more, we should do more. After all, Tennessee is the Volunteer State.

The Maryland statistics are also instructive concerning the imbalance of participation. In 2002, Maryland’s 30,000 attorneys spent on average 33 hours per attorney in pro bono activity. However, given that more than half of Maryland’s attorneys did nothing, in reality the 48 percent who participated averaged much more than 33 hours of service. This disparity highlights the common fact that, when it comes to pro bono, a small number of attorneys are doing most of the service. For example, partners in larger firms often consider pro bono to be something to delegate to the associates. This should not be the case. The better way is active participation by all. Tennessee Rules of Professional Conduct Rule 6.1 states that a “lawyer should render pro bono publico legal services.”

I encourage each attorney in Tennessee to make the Tennessee Bar Association’s Access to Justice Honor Roll by serving at the very least one pro bono client each year.

Of course, particularly for small firms and sole practitioners, making a place in the schedule for pro bono clients can be especially problematic. Donating money to legal aid societies is another way that attorneys can help. In this regard, larger law firms may consider funding a part-time or full-time pro bono coordinator for the firm who not only could represent low-income clients, but also could manage the pro bono activities of other attorneys in the firm.

Funding for legal aid remains a challenge. In the civil arena, according to the Tennessee Bar Association Access to Justice Committee, there is only one legal
aid attorney for every 10,000 low-income Tennesseans. By comparison, there is one private attorney for every 500 citizens in the state. Studies show that approximately one-half of all low-income persons will require aid in some civil legal matter each year.

Nevertheless, in addition to contributing funds to legal aid, the best way remains active involvement in pro bono by all attorneys, whether sole practitioners or partners in large firms. On behalf of the Tennessee Supreme Court, I challenge you to find a way to participate. By way of realizing greater participation, I recommend that every law firm in Tennessee adopt a formal, written pro bono policy. As a helpful starting point, the Tennessee Bar Association Access to Justice Committee has developed a model pro bono policy statement.

There are many ways to contribute to access to justice in addition to representing clients in court. Programs range from Volunteer Income Tax Assistance, wherein attorneys assist low-income taxpayers in filling out their federal income tax forms, to helping to educate low-income persons about their legal rights in a variety of areas. Providing legal services at a reduced or pro-rated fee is another important way that attorneys can increase access to justice by persons of limited means. The Tennessee Bar Association Access to Justice Committee and local legal aid societies can assist you in finding ways to participate. I encourage you to gain insight by talking with members of these organizations. Our means of participating in pro bono service are limited only by our imagination.

The phrase “equal justice under law” is inscribed over the doors of courthouses throughout the country and throughout Tennessee. But as we have discussed, for “equal justice under law” to be truly and fully “equal,” legal counsel must be made available to those who could not otherwise afford it. The meaning of “equal justice under law” is thus necessarily complemented by another phrase, “pro bono publico,” which means “for the public good.”

The phrase “pro bono publico” may not be inscribed over the courthouse doors; “pro bono” is not written in marble or in stone. Rather, the phrase “pro bono” is displayed in our service on behalf of those who cannot otherwise afford legal counsel. When you walk through the courthouse doors with a pro bono client, the words “pro bono” are spelled out for all to see. Only then do the chiseled words “equal justice under law” mean everything they can and should mean.

Notes
3. The model policy is available at www.tba.org/committees/AccessJus/probono.html.

This article is adapted from a speech delivered on Nov. 4, 2004, at a luncheon sponsored by the Legal Aid Society of Middle Tennessee and the Cumberlands and the Tennessee Bar Association Access to Justice Committee.

Chief Justice Frank F. Drowota III was elected to the Tennessee Supreme Court in 1980. He served as chief justice from January 1989 to September 1990, and was re-elected chief justice in 2001. He served as a Chancery Court trial judge 1970 through 1974; was on the Court of Appeals 1974 through 1980, and was president of the Tennessee Judicial Conference 1979-80. He earned his bachelor’s (1960) and law degrees from Vanderbilt University (1965).
thing was less than everything. Turning to the required assessment of the client’s capacity to comprehend the matter — e.g., the elements of a parenting plan form — and the complexity of the matter — e.g., a “routine” as opposed to peculiar or more complicated parenting plan — the opinion blesses limited legal assistance with respect to the preparation of a routine parenting plan. In such circumstances the limited assistance is regarded not only as reasonable, but also as beneficial to both the self-represented litigant and the court. Finally, although unwilling to establish a presumption that the provision of limited scope representation in programs like the pro se clinic sponsored by CLC is reasonable, the opinion notes that all lawyers are presumed to act reasonably in the conduct of their business, and, more particularly, that “given that these services are rendered pro bono it is unlikely that an arguable case of reasonableness would be questioned or sanctioned.”

The opinion helpfully addressed two other issues. First, it held that on the facts presented the two lawyers who staffed the pro se clinic were not associated with each other in a law firm for purposes of the imputation of conflicts of interest between them and also that they were not associated with the CLC so that conflicts of CLC attorneys would be imputed to them and vice versa. This is consistent with the ABA’s new Model Rule 6.5 that relaxes the conflict of interest rules as applied to a lawyer, like those who staffed the CLC pro se clinic, who provides short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court and without expectation by either the lawyer or client that the lawyer will provide continuing representation in the matter. The Working Group expects to consult with the TBA Standing Committee on Ethics and Professional Responsibility as to whether a rule like ABA Model Rule 6.5 should be added to the Tennessee Rules.

The opinion also clarifies that in order to avoid misleading the court, it is sufficient if a document prepared by the lawyer for a self-representing person states that the document was prepared with the attorney’s assistance without an intention to become counsel of record in the matter. This is consistent with decisions in other jurisdictions and makes good sense.

This opinion marks a propitious first step in Tennessee toward the acceptance of limited scope representation as one of the tools lawyers can use to expand access to justice for persons of limited means who cannot afford full-service representation but who can better seek justice on their own with some limited assistance provided by a lawyer either on a pro bono basis or for a reduced fee that the client is able to afford.

The Advisory Ethics opinion is con-
work. It will help people meaningfully participate in the system, rather than be victimized by it. It will foster and instill heightened faith, trust, and commitment to our justice system and nation.

Notes

1. Critically, in order to be called a person had to have a land-lined phone. Consequently, the homeless and people with only cell phones were not called. One might conclude that in order to have a land-lined phone a person had to have a home or apartment. Consequently, one might intuitively conclude that those called were not as poor as others who could not be called at all.

2. For purposes of the survey SWORPS distinguished the Extremely Low-Income Household (at or below 62.5 percent of the poverty guidelines) from the Low Income Household (income above 62.5 percent of the poverty guidelines but below 125 percent).

3. Each of the providers who receive LSC funding also retained SWORPS to do regional studies, the results of which will be studied and shared by the providers.

4. There was no statistical relationship found between the number of legal problems reported by Extremely Low-Income Households as opposed to Low Income Households.

5. I thank my friend Doug Blaze for his insights regarding this and other matters.

6. The other categories are reported at pages 3 and 4 of the Executive Summary.

Thomas C. Galligan Jr. is dean and Elvin E. Overton Professor of Law, University of Tennessee College of Law and chair of the TALS Strategic Planning Committee. Many thanks to Doug Blaze, Jim Deming and Jackie Dixon for reviewing a draft of this article and making it better than it otherwise would have been. The data included in this article comes from the Statewide Comprehensive Legal Needs Survey for 2003. The author has not included pointed citations to the survey or to the Executive Summary: Highlighted Findings from the Statewide Comprehensive Legal Needs Survey for 2003 but heavily relied on both. Copies of both are available on the TALS web site at www.tals.org.
In his acceptance speech upon being awarded the Robert F. Kennedy human rights award for his work fighting human rights violations at great personal risk, former farmworker Lucas Benitez explained working conditions for those harvesting: “The right to a just wage, the right to work free of forced labor, the right to organize ... are routinely violated when it comes to farmworkers in the United States.”

Southern Migrant Legal Services (SMLS), a Project of Texas RioGrande Legal Aid, is now in its fourth year of representing farmworkers across the Southeast in litigation to vindicate the rights described by Benitez. SMLS opened in Nashville in 2001 to expand access to legal services to migrant farmworkers, a group often isolated geographically, linguistically, and culturally from the private bar and other legal services programs. SMLS’s bilingual staff provides free employment-related legal services to indigent migrant farmworkers in six southern states: Alabama, Arkansas, Kentucky, Louisiana, Mississippi and Tennessee. Funding is provided through the Legal Services Corporation, a private, non-profit corporation established by Congress to ensure that the poor have equal access to justice.

Farmworkers represent a sizable population of low-wage workers in the Southeast. In Tennessee, for example, 44 percent of the state’s land is farmed, and agricultural production — including poultry processing, nursery and floriculture products, soybeans, cotton, tobacco, fruits, and vegetables — generates around $2 billion annually in farm cash receipts. Farmworkers, who are predominantly Hispanic, include local residents, U.S. workers who migrate from Texas and Florida during harvest season, and foreign nationals employed using various federal guestworker programs.

A recent survey of farmworkers conducted by the U.S. Department of Labor paints the following portrait of a farmworker. He is 29 years old, married, and has a sixth-grade education. His primary language is Spanish. In the past decade, the median income of an individual farmworker has remained less than $7,500 per year and $10,500 per year for his family. At the same time that his relative poverty has increased, his use of social services has declined. Although his work as a farmworker is by nature contingent, only 20 percent of farmworkers receive unemployment benefits, only 10 percent receive benefits under Medicaid, and only 13 percent receive food stamps. Just 5 percent of farmworkers received employer-provided health insurance. Less than half owned a vehicle, which means that farmworkers depend on employers, contractors and co-workers for transportation to work. Only 14 percent own a home in the United States. Both of these percentages are lower than in 1994-1995, a sign not only that many farmworkers live in poverty, but also that the real value of their wages is declining. For example, the price of tomatoes shows how the value of farmworker wages has declined over the last 20 years. Although the price of tomatoes to the consumer has increased with inflation, the average piece rate for red tomato pickers is still 72 cents per 5/8 bushel basket, a wage that has barely risen for 20 years. This means that a farmworker has to pick over 40 bushels a day to make minimum wage. Because of inflation, the fact that the piece rate has remained the same for 20 years means that farmworkers and their families can buy 30 percent less with the same wages.

**NLRB Doesn’t Apply**

Despite the fact that farm work is often dangerous and under-compensated, many types of farmworkers are exempt from state and federal worker protection laws including the National Labor Relations Act and state workers’ compensation statutes. Farmworkers’ legal claims typically arise under the Fair Labor Standards Act (FLSA), 29 U.S.C §§ 201 et seq., the federal minimum wage and overtime law, and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801 et seq. Generally, the FLSA requires that workers be paid the federal minimum wage of $5.15 per hour, even if they work on a piece rate. While field workers are exempt from overtime, some farmworkers employed in packing sheds and processing plants do qualify for overtime. The AWPA governs relationships among agricultural employers, and labor recruiters, and farmworkers, including recruitment, payment of wages, housing, and transportation. For instance, in order to deter labor recruiters from taking
advantage of vulnerable employees by means of providing misleading information at recruitment, the AWPA requires that farm labor contractors be registered with the U.S. Department of Labor and that agricultural employers who use such contractors check to ensure that such contractors are properly licensed. The AWPA also requires that an agricultural employer who provides housing to his workers must have that housing inspected by the government before it is occupied by employees, to ensure that it meets state and federal health and safety standards. And because unsafe vehicles have all too often endangered the lives and health of farmworkers, the AWPA requires that agricultural employers and contractors who transport farmworkers ensure the vehicles meet federal safety standards and that the vehicles are appropriately insured.

SMLS also represents U.S. and foreign workers who seek employment for jobs filled through the H-2A temporary agricultural guestworker program. If an employer so applies, and the U.S. Department of Labor certifies that there are no U.S. workers available for his temporary positions, he may bring foreign guestworkers pursuant to a specific contract of employment. These temporary guestworkers are allowed into the United States on a temporary work visa to work only for the agricultural employer who imports them, and they must return to their home country when their term of employment ends or is terminated. Meanwhile, an employer is required to accept U.S. workers who apply for these positions until the halfway point of the contract. To protect the rights of American workers, SMLS has represented U.S. workers who allege that employers denied them these jobs because the employers unlawfully preferred a foreign workforce. To protect against mistreatment of the H-2A workers, SMLS has also represented guestworkers who did not receive the benefits of the contract as promised.

SMLS has also litigated cases involving human trafficking, pesticide exposure, migrant housing, labor relations, unemployment insurance and employment discrimination.

“As lawyers, we feel honored to be able to represent workers who face extraordinary obstacles in accessing the American justice system,” says Douglas L. Stevick, managing attorney of SMLS, “consistent with our mandate from the Legal Services Corporation to work to ensure that linguistic, cultural, and geographic barriers do not deter the poor from standing up for their rights.”

Notes

Jennifer J. Rosenbaum, an attorney with Southern Migrant Legal Services, a Project of Texas RioGrande Legal Aid, has received a Skadden Fellowship to represent indigent migrant farmworkers across Tennessee in their labor and employment disputes. She is 2002 graduate of Harvard Law School.
Help May Be on the Way for Self-Represented Litigants

By Elizabeth A. Sykes and Sue Allison

Self-represented litigants — many with limited resources — who turn to the Internet to purchase do-it-yourself legal forms often learn when they arrive at the courthouse that they were duped or misled. What they may discover is that the forms they bought are absolutely useless in Tennessee courts, said Connie Clark, administrative director for the Administrative Office of the Courts.

"Judges, court clerks and lawyers across the state are having to break the news to increasing numbers of litigants that the forms, sometimes costing hundreds of dollars, will not accomplish what they were promised or led to believe," she said. "That growing problem was part of the impetus for a pro se summit hosted by the AOC and our subsequent efforts to reasonably assist self-represented court users."

Following the 2003 summit, attended by judges, court clerks, lawyers and others interested in the legal system and those who use it without benefit of legal counsel, a Work Group on Self-Represented Litigants was created. (See related story, page 22.) Co-chaired by Circuit Court Judge Jacqueline Schulten of the 11th Judicial District and Professor Carl Pierce of the University of Tennessee College of Law, the group is focusing on family law issues. Four sub-groups were formed to work on the development of uniform family law forms; pilot projects; education concerning the need for pro se assistance; and pro se-related ethical issues for judges, lawyers and clerks.

Members of the bar are an integral part of the work group, Clark said, and also are involved in providing pro se assistance through programs across the state. In 2003 and 2004, the AOC, using grant funds, awarded a total of $615,000 to Tennessee organizations, agencies and services based on their written proposals. The money is earmarked to help Tennesseans with family law legal issues, but without resources to hire private legal counsel.

The 2003 grantees were Community Legal Center in Memphis; Community Mediation Services in Anderson County; Legal Aid of East Tennessee; the Memphis Bar Association; Southeast Legal Services in Hamilton County; Sumner County Juvenile Court; Legal Aid Society of Middle Tennessee and the Cumberlands; Mediation Services of Putnam County; and Weakley County Juvenile Court.

In 2004, funds for services to self-represented parents with access and visitation issues were awarded to Community Legal Center in Memphis; Anderson County Juvenile Court Community Mediation Services; Legal Aid of East Tennessee; Legal Aid Society of Middle Tennessee; Mediation Services of Putnam County; the; Weakley County Juvenile Court; Oasis Center of Davidson County; Decatur County Juvenile Court; and Mediation Center in Maury County, serving Maury County Juvenile Court.

"All of the grantees are assisting people who cannot afford to hire an attorney and who need help with family law issues," Clark said. "In awarding the grants, we have tried to do a variety of things because we want to see what works."

At a recent judicial conference, a pro se panel discussion was convened that included Linda Warren Seely with West Tennessee Legal Services, Chancellor Richard Ladd of the 2nd Judicial District; and Circuit Court Judge Neil Thomas of the 11th Judicial District and the AOC's Elizabeth A. Sykes. Judges from across Tennessee attended the session for an update on pro se initiatives and programs.

Ladd said he has been impressed with the services being provided to pro se litigants by Legal Aid of Upper East Tennessee in the region where he holds court.

"People who qualify and cannot afford a lawyer can come in and have a session and get the family law forms they need," he said. "They are doing an excellent job. When people come into court, they are prepared. It's just a very excellent program."

Services being provided across the state also include family law self help centers; pro se clinics, free explanatory materials, mediation in custody and visitation cases; filing assistance; and free attorney consultations. The help is offered by bar groups, legal aid organizations and others committed to opening the courthouse doors to all Tennesseans.

"The AOC grantees are using their funds to make the court system accessible..."
to those who may have felt locked out because they have limited resources,” Clark said. “We are off to a good start, but will continue to look at programs in other states and other options for providing the help they need.”

Seely, a member of the AOC Work Group on Self-Represented Litigants, told judges at the Judicial Conference that a survey of court clerks was one of the steps taken to determine how additional assistance might be provided. Clerks who responded said the biggest need is court-approved uniform forms. They also recommended easily understandable instructions and brochures for pro se litigants; additional resources such as a toll-free telephone number; information and forms on a web site; and a requirement that attorneys provide assistance with pro se cases.

Thomas cited a first-hand example of the need, a Hancock County pro se litigant who appeared before him with useless forms he had purchased.

“We don’t have the time to deal with unapproved forms,” he said. “If it does not result in a valid divorce and there’s a remarriage, then, on top of everything else, you’ve got bigamy.”

He said judges, attorneys and clerks should ask litigants where they got invalid forms and report the sellers to the Office of the Attorney General. The problem of invalid forms is a growing one, the panel said. For example, doing a search for “legal forms” on the Google search engine produces 1,260,000 results.

“What we need to do is come up with a mechanism where we don’t wind up with a disaster,” Thomas said.

In addition to the organizations statewide involved in helping self-represented litigants, courts also are reaching out to help. In the 18th Judicial District — Sumner County — some forms have been simplified and made available upon request.

“Recently there has been an increase in pro se litigants filing for absolute divorce,” Chancellor Tom Gray said.

“Forms obtained from the Internet or some other source almost always fail to meet legal requirements, so the court prepared a one-page form which is given to pro se litigants filing for absolute divorce.”

The court system also has resources for self-represented litigants on its web site at www.tsc.state.tn.us. A “Self Help” section includes links to agencies; legal forms; multi-lingual videos on basic rights, the rights of parents in abuse and neglect cases and how to obtain orders of protection; and informational publications. The court system web site is updated on a regular basis with new material helpful to pro se litigants and others.

Elizabeth A. Sykes is the deputy director of the Administrative Office of the Courts. She is a graduate of Austin Peay State University and the University of Memphis School of Law.

Sue Allison is the public information officer for the Tennessee Judicial System.
he 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 following list is not an all-inclusive list of all of the pro bono service 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. We would like to know and let your colleagues know about those contributions. The following is a list of attorneys who volunteered with the specified Tennessee pro bono programs between Nov. 20, 2003 and Nov. 1, 2004, as reported by the following programs: Nashville Bar Association /Legal Aid Society of Middle Tennessee and the Cumberlands, Legal Aid of East Tennessee, Memphis Area Legal Services, West Tennessee Legal Services, and Community Legal Center.

If you or someone you know participated in pro bono through another effort (and therefore are not on this list), please let the TBA know. Every effort has been made to ensure the accuracy of this list. If you are aware of a mistake or omission, please email probono@tnbar.org.
(Continued from page 37)

Roger Stanfield
Sheila Stevenson
Jonathan Steen
Michael Tabor
Chris Taylor
Daniel Taylor
Linda Sessions Taylor
Shannon Toone

William Killian
Charles Ables
Shannon Toone
Linda Sessions Taylor
Daniel Taylor
Chris Taylor
Michael Tabor
Jonathan Steen
Shelia Stevenson
Roger Stanfield
Mechelle Story
Rebecca Hicks
Darren Gibson

in those courts.

County attorneys have
routinely handled cases
in those courts.

Kim Nelson

ROBERTSON
Lisa S. Richter
Collier W. Goodlett
James M. Balthrop

RUTHERFORD
John Baker
Gary Beaasley
Diana Benson
John Blankenship
Donald Bulloch
Kent Coleman
Jim Duncan
Terry Fann
Brad Hornsby
Chris Kelly
Rick Mansfield
Ewing Sellers
Mitchell Shannon
Keith Siskin
Sandra Trail
Bonita Tucker

MCNARY
Anita Beth Adams

MEGS
Britt McKenzie

MONROE
Peter Allman
John Carson
Lewis Kinnard
Doris Matthews

MONTGOMERY
Jeff Grimes
Timothy Barnes
Jay Runyon
Bob Lenard

MOORE
Coffee and Lincoln
County attorneys have
routinely handled cases
in those courts.

OBON
Roger Fisher

RHEA
Gary Fritts
Darren Gibson
Rebecca Hicks
Michelle Story

ROANE
Andrew Bernstein
David A. Billions
Sam Blais
Darrell D. Blanton
David Blalock
Richard Booth
Marcus Bozeman
Stuart Brookman
Beth Brooks
Aubrey L. Brown Jr.
Kaye G. Burson
Lara Butler
John Cannon
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(Continued on page 44)
Although not decided by the Court of Appeals for our region of the country, in an important case the 10th U.S. Circuit Court of Appeals recently held that a Department of Labor (DOL) regulation interpreting the Family and Medical Leave Act (FMLA) is invalid because it contravenes the FMLA’s legislative purpose. The FMLA defines the worksite of a jointly employed employee as the primary employer’s offices from which the employee is assigned or reports. Harbert v. Healthcare Services Group Inc. 391 F.3d 1140 (10th Cir., 2004).

In Harbert, the plaintiff was employed by Healthcare Services in Brush, Colorado. The plaintiff performed her duties at the facility in Brush and reported to a district manager, whose office was located in Golden, Colorado. The plaintiff was injured and requested FMLA leave. Although Healthcare Services granted her two periods of leave, it denied her request for FMLA leave because she was not employed at a worksite with 50 or more employees within a 75 mile radius and thus, was not eligible for FMLA leave. This conclusion was based on the premise that the plaintiff’s worksite was the facility in Brush, not the defendant’s regional office in Golden.

The plaintiff sued Healthcare Services, claiming it violated the FMLA by denying her leave. The trial court granted judgment in favor of the plaintiff. Healthcare Services appealed, arguing that the regulation that defines the plaintiff’s worksite as

“Worksite usually means the place an employee works, but the DOL defines it as the place from which the employee is assigned or reports.”

Golden, Colorado is invalid.

The 10th Circuit reversed, and held that 29 C.F.R. 825.111(a)(3), which provides that the “worksite” of an employee who is jointly employed by two or more employers is “the primary employer’s office from which the employee is assigned or reports,” is invalid as applied in the situation of an employee with a fixed place of work because it is contrary to the FMLA.

The court held that the DOL’s definition of the term “worksite” is contrary to the common meaning of that term. Worksite usually means the place an employee works, but the DOL defines it as the place from which the employee is assigned or reports. In Harbert, this meant the plaintiff’s worksite was Healthcare Services’ regional office, where the plaintiff went only for occasional meetings.

The court further held that the regulation does not effect the Congressional purpose underlying the 50/75 provision (employees are excluded from FMLA coverage if their employer does not employ 50 employees within a 75 mile radius of the employee’s worksite). The court held that Congress included this provision because it recognized that employers with more than 50 employees may have difficulty finding replacements for employees who work at geographically scattered locations. An employer’s ability to replace a particular employee during his or her period of leave will depend on where that employee must perform his or her work. The court noted that, generally, the Congressional purpose underlying the 50/75 provision is not effected if the “worksite” of an employee who has a regular place of work is defined as any site other than that place. Thus, the court found the DOL’s regulation to be invalid.

Timothy S. Bland is a partner in the Memphis office of Ford & Harrison LLP, a national law firm exclusively representing management in labor and employment matters. His column runs quarterly in the Tennessee Bar Journal.
A stute student Matt Ledwith asked a question in my Evidence class that got me to pondering. Does the federal ancient documents hearsay exception admit statements of multiple declarants?

Federal Rule 803(16) allows evidence of “statements in a document in existence 20 years or more, the authenticity of which is established.”

Let’s analyze an example I used in class. Fast-forward 20 years to 2025 and assume an offer in a federal trial of the Sept. 16, 2002, edition of The Knoxville News Sentinel. A huge headline screamed that “toxic fumes force thousands to flee.” Stories written by seven hearsay declarants (reporters) told of a train derailment near rich folks’ neighborhoods that ruptured a tanker car filled with 10,600 gallons of sulfuric acid. Many other declarants had a say-so in the stories, including emergency officials and fleeing residents.

Are all hearsay statements by these many declarants admissible through the federal ancient documents exception? Reluctantly, I’ve concluded that the answer to Matt’s question is “yes.”

My reluctance is grounded in doubts about the trustworthiness of such statements. Normally we don’t make an exception to the hearsay exclusionary rule unless there is a guarantee of trustworthiness. For example, the multiple declarants who typically make a business record are under a business duty to report or record truthful. But I find nothing that would make a 2002 statement trustworthy in 2025 just because more than 20 years had elapsed.

The Tennessee version of Rule 803(16) is limited to documents 30 years old that affect an interest in property. Usually there is only one declarant, for example the grantor in a warranty deed. So the problem discussed usually wouldn’t arise in a state trial.

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 Tilman 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.
sistent with ethics opinions issued in other states.6

**What’s happening?**

The AOC Working Group on Self-Represented Litigants is currently focusing its attention on self-representation in domestic relations matters and will soon be circulating for comment a proposed set of simplified domestic relations forms and explanatory brochures to be used by self-represented litigants or by volunteer lawyers who would assist them with the completion of the forms. Once finalized after input from the domestic relations bar and the judiciary, the Working Group hopes that the Supreme Court will adopt the forms for use on a statewide basis and approve the explanatory brochures. These materials will serve as the centerpiece for the Working Group’s further exploration of how to involve more lawyers in the limited scope representation of self-represented litigants who cannot currently afford a full-service representation. The goal is to use these form and brochures, together with other resource materials about limited scope representation in domestic relations matters that the Working Group hopes to develop in collaboration with domestic relations practitioners, to make it easier for more lawyers to offer pro bono limited scope representation in domestic relations matters, perhaps as a volunteer in a pro se clinic similar to the program sponsored by the CLC in Memphis.

It is important to emphasize, however, that the Working Group is equally interested in promoting for-profit initiatives by private domestic relations practitioners who would offer limited scope representation for a reduced fee. The experience in other states suggests that very few persons able to pay for a full-service representation would opt for a lawyer-assisted self-representation to save on legal fees. On the other hand, there are likely to be a significant number of persons who cannot afford a full-service representation, but who would be able and willing to pay a reduced fee for some limited advice and drafting assistance that would enhance their capacity to represent themselves without undue risk to their own interests and the efficient administration of justice. Experience in other states indicates that the provision of limited scope representation in domestic relations matters can be profitable while also enabling persons of limited means to have a more equal chance for their day in court than would be the case if required to represent themselves without any assistance.

The Working Group is fully aware that neither pro bono nor for-profit limited scope representation will be a panacea for all that ails access to justice in Tennessee. But, it can be part of the solution. As Professor Blaze said when commenting on the crisis in legal aid in Tennessee, “Working together, we just might make a difference” — in this case by adding the provision of limited scope representation for self-represented litigants to our repertoire of ways to provide equal access to justice for all Tennesseans.

Tennessee lawyers interested in limited scope representation as a means for attracting new clients or as a vehicle through which they will provide pro bono legal services to persons of limited means can consult the following very useful resource materials:

- ABA Section of Litigation, Modest Means Task Force, Handbook on Limited Scope Legal Assistance, at http://www.abanet.org/litigation/taskforces/modest/home.html. In addition to the report, there is an extensive appendix including numerous practice tools.

**Notes**

3. Id., Appendix 3 (Description of Unbundling for Clients and Potential Clients).
4. Id., Appendices 9-16.
6. For summaries of and links to ethics opinions provided by the ABA’s ProSe/Unbundling Resource Center, go to http://www.abanet.org/legalservices/delivery/delunbundethics.
7. Douglas A. Blaze, “The Crisis in Legal Aid: Working Together, We Just Might Make a

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Carl A. Pierce is professor of law at the University of Tennessee College of Law. He currently serves as co-chair (with Circuit Judge Jackie Schulten from Chattanooga) of the Administrative Office of the Court’s Working Group on Self-Represented Litigants.
Daddies are getting a bad rap on TV
From ‘Make Room for Daddy’ to ‘Who’s Your Daddy?’

By Bill Haltom

Fifty years ago when I was growing up during in the Eisenhower administration, daddies were revered figures in America. My dad had his own special chair in the living room right in front of our Zenith black-and-white TV set. And when Daddy sat on his throne and watched TV, what did he see? He saw heroic daddies, that’s what! The 1950s and '60s was a golden era not only for my dad, but also for TV daddies. All the heroes on TV in the 1950s and '60s were either daddies or cowboys.

In those days, the titles of the shows said it all – “Father Knows Best,” “Make Room for Daddy,” “My Mother the Car” … (well okay, two out of three ain’t bad).

To really appreciate how significant TV dads were in the 1950s and '60s, just ask yourself this question: What did Beaver Cleaver, Ricky Nelson, Pebbles Flintstone, Bam Bam Rubble, Opie, Little Ricky, Hoss, Adam, Little Joe, all three sons, and the entire Brady Bunch have in common? They all had outstanding daddies.

The TV daddies of the '50s and '60s were hard-working men who personified the work ethic. Ward Cleaver, Fred Flintstone, Rob Petrie, and Robert Young (who later went to medical school and changed his name to Dr. Marcus Welby) all went to the office every day and worked hard to bring home the bacon for June, Wilma, Laura, and the kids.

The TV daddies in the '50s and '60s were wise men who were respected by their children. They were also devoted family men. Ward Cleaver never went through a mid-life crisis and decided to trade in June for a trophy wife. Ricky Ricardo never ran off with Ethel Mertz.

Twelve years ago, then-Vice President Danny Quayle set off a national debate when he criticized the popular television program “Murphy Brown” after an episode in which Murphy had a baby without having a husband to help take care of the baby on future episodes.

“[Her real daddy is] the guy who has cared for her, nurtured her, paid for her education and given her straight teeth.”

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Twelve years ago, then-Vice President Danny Quayle set off a national debate when he criticized the popular television program “Murphy Brown” after an episode in which Murphy had a baby without having a husband to help take care of the baby on future episodes.

Vice President Quayle’s comments about Murphy Brown were ridiculed by newspaper columnists, politicians, and late-night talk-show hosts. The vice president was generally dismissed as a light-weight buffoon who, after all, couldn’t spell “potato.”

Since that time, the downward spiral of TV daddies has continued unchecked as the TV culture replaced Robert Young and Ward Cleaver with Homer Simpson and Al Bundy.

But now, in the early years of the 21st century, TV dad has hit rock bottom.

On January 3, the Fox Network aired “Who’s Your Daddy?” a 90-minute special in which a woman given up for adoption as an infant attempted to guess the identity of her birth father for a $100,000 prize. That’s right, my fellow Americans. We’ve gone from “Make Room for Daddy” to “Who’s Your Daddy?”

I did not see the show. It was on opposite the Sugar Bowl, which for a southern football fan like me is a religious event. I’ve been told that while I was watching the Sugar Bowl, the young woman who was the “star” of “Who’s Your Daddy?” was introduced to eight men, all claiming to be her father. The woman interviewed the men, dismissed ones she felt were imposters, and eventually picked the guy she thought was her daddy. The show was apparently a cross between “Survivor” and “To Tell the Truth.”

At the end of the show, if the

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woman correctly guessed which man was her father, she could win $100,000. If she guessed incorrectly, the imposter she chose would win the money. In any event, the Fox Network insisted there would be a “happy ending” since the woman would be reunited with her “real daddy.” Nevertheless, I can’t help but think that the princess and her “daddy” would have a lot happier reunion if the princess won $100,000.

Well, I didn’t miss “Who’s Your Daddy?” I didn’t watch it, and I didn’t miss it. As far as I’m concerned, the show was an insult to me and every other man in America who answers to the once-revered title “Daddy.” For the woman who starred on the show, there is a real short answer to the question, “Who’s your daddy?” The answer is that wonderful man who adopted her when she was a baby. He’s the guy who has cared for her, nurtured her, paid for her education and given her straight teeth.

He’s the guy who probably gave her a car for her 16th birthday and then nervously paced in his den at midnight waiting to hear the sound of the car coming back into his driveway. He’s the man who danced with her at the father-daughter dance. He’s the man who paid for her college education. He’s the man who is ready to walk her down the aisle and give her away at her wedding and then pay for the whole show.

Frankly I think they should have called the show “Who is the Sperm Contributor?” I’m sorry, but I do not believe the birth father deserves the title “Daddy.” His sole contribution to this young woman’s life was made at conception. He forfeited the title “Daddy” long ago to a real man who wasn’t even on the TV show and was ineligible to win the $100,000.

Where’s Danny Quayle now that we really need him? ☹

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