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**PRESIDENT’S PERSPECTIVE**

**A fee dispute resolution system for the whole state**

Another step forward

It is interesting how the various experiences that occur over a career can lead to a single idea for improvement of the profession. More years ago than I care to admit I was called upon by the Knoxville Bar Association to serve as the chair of its Fee Dispute Committee. Consistent with its name, the purpose of this committee was to provide clients and lawyers with an informal, efficient method of resolving disputes over fees. By this means, utilizing procedures developed over time by the bar, clients’ disputes regarding attorneys’ fees could be addressed and resolved without the time and expense associated with litigation. During my tenure as chair of this committee, most disputes addressed were resolved successfully, more or less to the satisfaction of both client and attorney. It was my experience that both parties to this informal dispute resolution mechanism came out of the process without the bitterness or acrimony often associated with contested litigation. The hearings allowed both parties to share information, which permitted each to understand more clearly the nature of the disagreement and to consider facts on both sides of the issue that were pertinent to the fee that had been charged. A loser both sides had stated their case, I was amazed at how often the parties were able to take a step back, look at the situation a little more objectively, and reach a consensus as to how the matter should be handled.

Even when agreement could not be reached, on many occasions I observed that the party whose position was not sustained (this was the client more often than the lawyer in the cases with which I was involved) left the proceedings with a sense of satisfaction about their ability to “have had their say.”

A chair of Knoxville’s Fee Dispute Committee, I received a number of calls from folks located outside of Knoxville who had heard of our fee dispute system and who hoped to be able to participate in that system. Unfortunately, I was obligated to advise them that the services of the committee were limited to the members of the Knoxville Bar and their clients.

A little later in my career, I was appointed by the Tennessee Supreme Court to serve on the board of the Tennessee Lawyers Fund for Client Protection. You will recall that this Board administers a pool of money collected from lawyers across the state that is maintained to provide some reimbursement to those persons who have been victims of theft by their lawyers. Indeed, it is unfortunate that it is necessary to have such a fund, but, at least, I am grateful to say that our profession has not stuck its collective head in the sand on this issue but has stepped up to the plate to provide at least some level of relief for those victims. While serving on the Client Protection Fund Board, however, it was

“Dissatisfaction over fees is very often a motivating factor precipitating the filing of a disciplinary complaint against an attorney.”

Charles W. Swanson
President

(Continued on page 4)
The confluence of my experiences as chair of the KBA Fee Dispute Committee, Client Protection Fund board member and hearing panel member for the Board of Professional Responsibility led me to conclude that we should look into the need for and feasibility of implementing a statewide mechanism for resolution of disputes between lawyers and their clients over fees. At the outset of my term as TBA president, I appointed an energetic and superlative Knoxville attorney, Keith H. Burroughs, to chair a committee to explore the potential for a statewide fee dispute resolution system. Members of the committee included Waverly Crenshaw, Charlie High Jr., and David Shearon of Nashville; Melanie Murry and past-TBA-President Randy Noel of Memphis; Jonathan Steen of Jackson; James Humphreys of Kingsport; and Tasha Blakney of Knoxville. Among other things, the committee discovered that Tennessee finds itself among the minority of states not already having a statewide attorney-client fee dispute resolution system. We anticipate a hearing before the Court on that proposal within the next few months. It is my sincere hope that, within the foreseeable future, the ultimate outcome of this process will be that consumers of legal services will derive genuine benefit from this process. I also trust that the profession will be served both by the process and by diminished conflict between attorneys and their clients with the added benefit that there will be fewer opportunities for persons to denigrate the profession because of conflicts over a perceived inequity in the client’s ability to address fee disputes.

If you would like to see details of the proposed fee dispute system, please go to http://www.tba.org/committees/FeeDispute/.

I would like to take this opportunity to express sincere thanks to Keith Burroughs and the members of the Fee Dispute Committee for their time-consuming, thoughtful and diligent work on this project. We are the largest professional association in the state of Tennessee and, through Burroughs’ efforts, his committee, as well as hundreds of others of you who contribute in similar ways, we also are the best professional association in the state. Thanks to all of you who make that true. □

(Continued from page 3)

readily apparent that many of the applications were not really claims of theft but merely disputes between clients and their attorneys over the amount or the reasonableness of the fee which had been charged. Under the laws applicable to the fund, these claims were denied, but unless the case arose from one of the major metropolitan areas, there was no fee dispute process to which these claimants could be referred apart from the usual litigation process.

This year, I am completing my final term as a hearing panel member for the Board of Professional Responsibility. As a part of these duties, I have had a number of occasions to speak with Lance Bracy, Charlie High and others who serve as disciplinary counsel for the board about the types of problems which result in disciplinary complaints being lodged against lawyers. These folks repeatedly have told me that dissatisfaction over fees is very often a motivating factor precipitating the filing of a disciplinary complaint against an attorney.

The TBA has filed a petition with the Tennessee Supreme Court seeking approval of a statewide attorney-client fee dispute resolution system. We anticipate a hearing before the Court on that proposal within the next few months. It is my sincere hope that, within the foreseeable future, the ultimate outcome of this process will be that consumers of legal services will derive genuine benefit from this process. I also trust that the profession will be served both by the process and by diminished conflict between attorneys and their clients with the added benefit that there will be fewer opportunities for persons to denigrate the profession because of conflicts over a perceived inequity in the client’s ability to address fee disputes.

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Lawyers not listed on Pro Bono Honor Roll doesn’t mean they didn’t do pro bono

I just read the pro bono article (“Pro Bono Honor Roll,” TBJ Special Access to Justice Issue, February 2005), and I notice that nobody from Putnam County is listed.

I know that there are a lot of lawyers here in town who do pro bono work. Even more who do work thinking they are going to get paid and don’t. I think the programs are great because they get people involved who otherwise would not be.

My problem is that I almost refuse to do that with a program for the same reason (2005 Harris A. Gilbert Pro Bono Attorney of the Year) Vance Fry in Chattanooga refuses to do it. It is more paperwork than I care to be involved with. The majority of the time, I don’t even keep up with the time on pro bono cases.

I have felt ever since these programs started that they might be good, but they also make it something special. I understood when I was sworn in as a lawyer before the Supreme Court of Tennessee that I had an obligation to take care of people, whether or not they could afford it. I guess that is naïve, but that’s the way I am.

I don’t know what the answer to my question is; I’m not even sure what my question is; but I am reading the Tennessee Bar Journal and have come to the

(Continued on page 35)
Tennessee lawyers to help with ABA Business Law Section meeting
National meeting in Nashville will address class action, torts and corporate regs

In the wake of new federal class action legislation, increased federal regulation of securities and corporations, and a flood of recent merger and acquisition activity, the American Bar Association Section of Business Law will hold its annual spring meeting March 31 - April 3 in Nashville.

Guest speakers, panelists and attendees are scheduled to examine these and many other hot issues that are changing the face of business law. Many Tennessee lawyers will be handling duties for the ABA Business Law Section.

Barbara Mendel Mayden of Nashville is the section's chair. With more than 60,000 members, the Section of Business Law is one of the ABA's largest sections.

Many prominent business, legal and government professionals were scheduled to participate in this year's meeting, including Harvey L. Pitt, former chairman of the U.S. Securities and Exchange Commission; Alan L. Beller, the SEC's current director of Corporation Finance; and Fred Thompson, lawyer, actor and former U.S. senator from Tennessee.

Nearly 50 Tennessee business lawyers will serve as panelists at the meeting. They are:

- Brentwood: M. Kim Vance
- Chattanooga: J. Nelson Irvine and William E. Young
- Knoxville: Joan MacLeod Heminway and George W. Kuney
- Memphis: Andrew C. Branhm, Jason P. Hood, Valerie Johnson, Peter H. Kesser, George W. Loveyard II, Herman Morris and Richard R. Spore III

Other topics to be addressed at the spring meeting include new rules governing asset-backed securities, consumer debt elimination, how to avoid conflicts of interest, new challenges for corporate counsel, minority- and women-owned businesses, and trends in bankruptcy, business and corporate litigation, international corporate law and governance, patent law, federal and state tax law, commercial law and executive compensation.

For more information, visit http://www.abanet.org/buslaw/2005spring/general.shtml.

The Tennessee Board of Professional Responsibility has a new Web site where, among other helpful information, you can read the disciplinary actions of who has done what and when. The site also has other resources for attorneys and consumers. Attorneys have access to a searchable database of formal ethics opinions and informal inquiries.

Consumers can learn ethics rules, how to file complaints, how to handle fee disputes and more. To see it, go to http://www.tbpr.org.
As a lawyer you have mastered many types of writing — and it’s time you shared your work with more than just clients and the courts. Whether you have some good ideas on how you and your fellow lawyers can be more civil, you have a solution to share regarding public decision-making, or you just want to make something up and be the next lawyer to have a red-hot best-selling novel, there is an opportunity for you. (Do it for the love of the written word because most of these are not paying jobs.) Find the outlet that most interests you, sit back with your fingers on your laptop’s keyboard … and begin.

The Warren E. Burger Writing Competition

The Warren E. Burger Writing Competition deadline is June 15, so start putting those thoughts together now. You should address one or more aspects of legal excellence, civility, ethics or professionalism within the legal profession. The selected issue(s) should be of contemporary significance with clear relevance to the legal community at large. You will find out if you win the $5,000 prize Sept. 1. Download copies of the rules at http://www.innsofcourt.org.

New law review at UT

The Tennessee Journal of Law and Policy, a new publication at the University of Tennessee College of Law, is accepting submissions. The first issue of this student-run, quarterly publication was published last fall and, according to its Web site promises to “analyze the latest developments in law and public decision-making.” Faculty advisors are Penny J. White and Otis H. Stephens.

To see the current issue and for more information, go to http://www.law.utk.edu/students/tjlp/tjlpcurrent.htm.

Fiction writing contest for lawyers

In theory, this is the only time you should be making up stuff as you go. Enter the National Legal Fiction Writing Competition for Lawyers, sponsored by SEA K Inc. A short story or novel excerpt in the legal fiction genre should be submitted by Sept. 5, in typed format, not exceeding 2,500 words. Submissions will be judged on originality, quality of writing and author potential. You are not charge to enter. The competition is open to any licensed attorney in the United States and its territories.

For more details on entering the contest, go to http://www.seak.com.

This very magazine

You hold in your hands the secret to your success. The Tennessee Bar Journal is always interested in reviewing submissions. Having an article published here will catapult you to the top of your practice (or possibly get you recognized in a few restaurants near the court house).

In general, stick to subjects that will affect Tennessee lawyers in some way. For writer’s guidelines, go to http://www.tba.org/Journal_Current/tbj-howtosubmit.html.

Send in your article to editor Suzanne Robertson, at srobertson@tnbar.org, and it will be reviewed by the magazine’s five-member editorial board. If it doesn’t make you rich, at least you might get famous from it.

Tennessee Bar Center now even more of a ‘hot spot’

And we don’t mean hot spot in reference to the recent three-alarm fire that nearly took out the building next door to the Tennessee Bar Center on Fourth Avenue North in Nashville. (The bar center sustained limited smoke damage and there were no injuries.)

TBA members using the Tennessee Bar Center can now access the Internet using their own laptop computers without bothering with cables. New wireless base stations have been installed on both the second and fourth floors of the bar center, so any wireless-enabled laptop will be able to connect.

Remember that several conference rooms and offices are available for members to use for free. To reserve the conference rooms, call Sarah Hendrickson at (615) 383-7421.

The member services offices, which have a telephone and a computer, need no reservations.
The Murfreesboro law office of Burger, Siskin, Scott & McFarlin announced the addition of Claire Susannah Burger to the firm. Burger recently graduated from the University of Miami School of Law. She will focus her practice on general trial and appellate litigation in both state and federal courts.

The law firm of Leitner, Williams, Dooley & Napolitan PLLC has named three new members: Craig R. Allen, Lori D. Parish and Lee H. Webb. Allen joined the firm in 2003 as of counsel. His practice emphasizes civil litigation defense with a concentration in construction, professional liability and railroad cases. He is licensed to practice in both Tennessee and Georgia and is based in the firm’s Chattanooga office. Parish joined the firm in 1997 and works in the Memphis office. Her practice emphasizes civil litigation defense with a concentration in general liability and workers’ compensation cases. Webb joined the firm in 1998 and works in the firm’s Knoxville office. Her practice focuses on civil litigation defense with a concentration in workers’ compensation cases.

Stites & Harbison PLLC has elected two of its Nashville-based attorneys to membership in the law firm. Richard Showse Myers Jr. joined the firm in 2002 as a member of the Intellectual Property and Technology Service Group. Before coming to Stites & Harbison, Myers worked as a patent examiner in the U.S. Patent and Trademark Office assessing patent applications specifically relating to pharmaceutical compounds, compositions and manufacturing processes. He received his law degree from the University of Mississippi School of Law and is admitted to the bar in Tennessee and South Carolina. Cathy Carpenter Speers has been an associate with Stites and Harbison since 2001, with a practice emphasis in domestic relations and family law. She earned her law degree from the University of Alabama School of Law and is admitted to the bar in Georgia and Tennessee.

Gregory P. Patton and Christopher J. Pittman announce the formation of the law firm of Patton & Pittman located in Clarksville. Patton is a 1991 graduate of the University of Tennessee College of Law. He is certified as a Rule 31 general civil mediator by the Tennessee Supreme Court and was the 1999 president of the Montgomery County Bar Association. His practice focuses on representation of clients in the areas of personal injury, medical malpractice, workers’ compensation and domestic relations. Nathan Hunt, a 2004 graduate of the University of Memphis School of Law, has joined the new firm as an associate.

Marty S. Turner recently became a shareholder at Colbert & Winstead PC of Nashville. Turner earned his law degree, cum laude, from the University of Kentucky College of Law in 1997. He is admitted to practice law in (continued on page 10)
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A member of the Tullahoma law firm of Henry, McCord, Bean, Miller, Gabriel & Carter PLLC after serving as an associate at the firm since 2000. LaBar focuses his practice on corporate and business transactions, taxation, estate planning and administration, intellectual property and corporate litigation. He also serves as the city attorney for the city of Morrison. He received his law degree from the University of Tennessee College of Law.

CORRECTION: The March issue of the Journal featured a new associate at the Nashville firm of Parker, Lawrence, Cantrell & Dean but misspelled his name. The correct name is Frank M. Gallina. The Journal regrets the error.

Waller Lansden Dortch & Davis PLLC has named C. Mark Pickrell as the firm’s senior counsel. Prior to joining the firm, Pickrell focused his private practice on civil appeals involving constitutional and commercial law issues and federal criminal appeals. He earned his law degree from the University of Tennessee in 1992 and currently serves as an adjunct professor of law at Vanderbilt University. The firm also named Thomas E. Bartrum as a member in the health care group. Bartrum, who is considered one of the foremost national experts on the development of diagnostic imaging centers, will focus his practice in the areas of regulatory and transactional health care law. Bartrum earned his law degree from the University of Kentucky in 1997, and his master of laws in Health Law from Loyola University in 1997.

The Chattanooga firm of Horton, Maddox & Anderson PLLC announced that Carol M. Ballard has been named a member of the firm and will concentrate on general civil litigation and appellate work. Ballard received her law degree from the University of Tennessee College of Law in 1997.

Glankler Brown PLLC recently announced that Jonathan C. Hancock and James M. Hivner have been named members of the firm. Hancock, who received his law degree in 1996 from the University of Mississippi School of Law, concentrates on commercial and civil rights litigation with a special emphasis on representation of management in employment-related disputes. Hivner concentrates his practice in the areas of probate, estate planning and administration, tax litigation and business and commercial law. He received his law degree in 1993 and his LL.M. in taxation in 1993 from the University of Alabama at Tuscaloosa.

Natasha A. Nassar, an associate with the Memphis firm of Glankler Brown has been named to the board of directors of Dress for Success — a nonprofit organization that helps low-income women make tailored transitions into the workforce.

Nathan Spencer and Drake Martin, partners in the law firm of Spencer & Martin PLC, have opened a second office in downtown Jackson. The new location will be staffed to assist clients in the areas of criminal defense, personal injury, nursing home abuse and

Knoxville attorney Frank L. Flynn Jr. died March 9. He was 66. He practiced law in Knoxville for 44 years, first practicing with his father, Frank L. Flynn, Sr. and in 1981 he joined the law firm of Pryor, Flynn, Priest and Harber. Flynn was a 1961 graduate of the University of Tennessee College of Law. He is buried at Shiloh Cemetery in Sevier County. In lieu of flowers, memorials may be made to Great Smoky Mountain Council, Boy Scouts of America, P.O. Box 51885, Knoxville, TN 37950 or Juvenile Diabetes Foundation, P.O. Box 566 Knoxville, TN 37901.
neglect, family law, civil litigation, social security disability, probate and estate work. The firm will maintain its current offices in Brownsville.

Ryan P. Durham has joined the Lawrenceburg firm of Boston, Holt & Sockwell PLLC as an associate. He will focus his practice on general civil litigation, employment, workers’ compensation and domestic relations. Prior to joining the firm Durham practiced at Bass, Berry & Sims PLC in Nashville. Durham received his law degree with honors from the University of Tennessee in 2002.

Greenebaum Doll & McDonald PLLC recently raised $20,000 for tsunami relief efforts by initiating a “Casual for Red Cross Tsunami Relief” casual dress campaign. All contributions made during the campaign were sent to the American Red Cross to aid in rescue and reconstruction efforts in Southern and Southeast Asia and East Africa.

Darlene T. Marsh, a member of Greenebaum Doll & McDonald’s Regulatory & Administrative Group, has been appointed by Gov. Phil Bredesen to the Tennessee Underground Storage Tank Board. Marsh has resigned her position as a member of the Tennessee Dry Cleaning Environmental Response Board, a position she has held since August 2003, to accept the appointment. Marsh concentrates her practice in environmental law, commercial real estate and banking, public finance and municipal law.

Nashville attorney Aubry B. Harwell Jr. was elected to the Frist Center for the Visual Arts Board of Trustees. A managing partner of Neal & Harwell, Harwell specializes in white-collar criminal defense work and commercial litigation. He is a graduate of the Vanderbilt University School of Law, where he has also taught and now serves as vice chair of the law school’s board of trustees.

The Chattanooga firm of Chambliss, Bahner & Stophel PC announced that Daryl J. Brand has joined the firm in an of counsel capacity and will focus his practice on long-term care defense and medical malpractice defense. He received his law degree from Washington and Lee University and previously served as associate solicitor general in the office of the Tennessee attorney general.

H. Chase Pittman has joined the Law and Mediation Offices of Rebecca A. delman PLC. His practice will focus on medical malpractice and long-term care defense litigation. Pittman received his law degree from the University of Memphis School of Law in 2003, where he wrote for the Tennessee Journal of Practice and Procedure. He is licensed in Tennessee and Mississippi.

Charles M. Weirich Jr. and Daniel F. B. Peel have become of counsel in the Memphis office of Spencer, Flynn & Rudstrom PLLC. Weirich, who is a 1990 graduate of the University of Memphis School of Law, will focus his practice on business litigation, franchise law, probate law and general civil litigation. Peel graduated from Vanderbilt University School of Law in 1989 and is admitted in Tennessee and Texas. He will practice in the areas of business litigation, personal injury law, workers’ compensation and general civil litigation.

Memphis attorney and TBA Young Lawyer Division President-Elect Danny Van Horn was elected clerk of the ABA Young Lawyer Division for the upcoming bar year. His term will begin in August 2005. After serving as clerk for the 2005-06 bar year, Van Horn will become speaker of the Assembly for 2006-07. Van Horn is an attorney in the Memphis office of Armstrong Allen PLLC.

Smith & Cashion, a regional construction litigation firm based in Nashville, has added a named partner, Jefferson C. Orr. Orr, who graduated from the law school at Samford University in 1987, has significant experience in construction and development, working as an engineer on large commercial and industrial development projects. With this addition, the firm also changed its name to Smith Cashion & Orr.

In addition, the firm announced two new partners: H. Brent Patrick and Vic L. McConnell. Patrick earned his law degree from the University of Memphis in 1998 and prior to joining the firm as an associate, worked on large commercial and residential design projects. McConnell earned a degree in civil engineering from Auburn University in 1990, a master of science in civil engineering from the University of Alabama at Birmingham in 1996 and both a master of science in environmental management and law degree from Samford University in 1998.
Actions from the Board of Professional Responsibility

Disbarred

On Feb. 1 the Supreme Court of Tennessee disbarred Hardeman County lawyer John Carlin Mask Jr. from the practice of law. Mask’s license to practice law previously had been suspended temporarily based on allegations of misappropriation of client funds, posing a threat of irreparable harm to the public and for lack of continuing legal education compliance. The hearing panel of the Board of Professional Responsibility concluded that Mask had engaged in misconduct, failed to act competently, failed to represent his clients zealously, failed to represent a client within the bounds of the law, and had engaged in the unauthorized practice of law. The hearing panel further found that aggravating circumstances existed because of Mask’s long-time service as an attorney, his prior history of unethical conduct, his dishonesty and his failure to make restitution. Mask filed no answer to the petition nor did he appear at the hearing. The Supreme Court accepted the petition and disbarred Mask because of Mask’s long-time service as an attorney, his prior history of unethical conduct, his dishonesty and his failure to make restitution. The suspension will remain in effect until it is dissolved or amended by the Supreme Court.

Suspended

On Jan. 26, the Board of Professional Responsibility indefinitely suspended the law license of Knoxville attorney Gloria Jean Brown. The board found that Brown had neglected a client’s case, failed to adequately communicate with the client and failed to appear in court on two separate occasions to represent her client. Letters and phone calls both from the client and the court went unanswered by Brown. In addition, the board found Brown guilty of filing a frivolous action against the employees of the Lenoir City Domestic Violence Crisis Center, acting in a bizarre manner by cursing and screaming at opposing counsel and staff of the board, and continuing to practice law while her license was suspended for insufficient continuing legal education. Because of these factors, the board ruled that Brown’s license will not be automatically reinstated at the end of a year, but that she will have to prove by clear and convincing evidence that she is capable of returning to the practice of law and that her reinstatement would not harm the public or the administration of justice.

Rebecca C. Arnold, a Memphis attorney, was temporarily suspended from the practice of law by the Tennessee Supreme Court on Feb. 3 for failure to comply with a contract she entered into with the Tennessee Lawyers Assistance Program. Arnold may not accept new clients and continue to practice law while her license is suspended. The suspension will remain in effect until the Supreme Court finds that reinstatement would in no way be detrimental to the public interest. However, Arnold is not eligible to file a petition for reinstatement unless and until he is discharged from an order of probation entered by the Circuit Court of Williamson County.

On Feb. 3, the Supreme Court suspended the law license of Memphis attorney Douglas P. Nanney was suspended from the practice of law on Feb. 3 for a period of two years, followed by an indefinite suspension. The suspension resulted from Nanney pleading guilty to a Class E Felony charge of possessing drug paraphernalia. Nanney must comply with the rules of the court regarding notice to clients, duty to maintain records, duty to return client property, duty to return fees paid in advance that have not been expended, duty to withdraw from any court in which he has matters pending and duty to file an affidavit with the board regarding compliance. The suspension will remain in effect until the Supreme Court finds that reinstatement would in no way be detrimental to the public interest. However, Nanney is not eligible to file a petition for reinstatement unless and until he is discharged from an order of probation entered by the Circuit Court of Williamson County.

On Feb. 3, the Supreme Court suspended the law license of Hickman County attorney Steven Monroe Temple for a one-year period retroactive to Oct. 28, 2003. The court found that Temple had abandoned his law practice without notice to his clients, charged excessive fees, failed to withdraw cases when he was suspended and/or the Tennessee Fund for Client Protection.

(Continued on page 14)
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could no longer handle them, failed to communicate with clients and failed to return portions of retainer fees. Temple agreed to a conditional guilty plea including making financial restitution to four clients in exchange for the retroactive suspension. Temple also has agreed to enter into a monitoring contract with the Tennessee Lawyers Assistance Program. Temple may apply for reinstatement of his law license but must prove by clear and convincing evidence that reinstatement would not be detrimental to the integrity and standing of the bar or the administration of justice.

Susanna Laws Thomas, a Newport attorney, was suspended from the practice of law by the state Supreme Court on Feb. 4 for failure to respond to two complaints of misconduct. Thomas had been suspended previously on Sept. 7, 2004, for failure to comply with continuing legal education requirements and nonpayment of her annual fee to the Board of Professional Responsibility. Pursuant to this final suspension, she may no longer use the indicia of lawyer, legal assistant or law clerk and may not maintain a presence where the practice of law is conducted. She must notify all clients, co-counsel and opposing counsel of the suspension order and deliver to all clients the papers or property to which they are entitled. The suspension will remain in effect until it is dissolved or amended by the Supreme Court. Thomas may for good cause petition the Supreme Court for dissolution or modification of the suspension.

Disability Inactive

On Jan. 21, the Supreme Court issued an order transferring the law license of Stephen B. Catron of Bowling Green, Ky., to disability inactive status. Catron requested the voluntary transfer of his law license until such time as he can adequately practice law. He may petition the court for reinstatement upon showing that the disability no longer exists.

Compiled by Stacey Shrader from information obtained from the Board of Professional Responsibility of the Tennessee Supreme Court.

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The right to take a nonsuit ends forever once the jury retires to deliberate. Even if the verdict is set aside by grant of a new trial motion (or appellate reversal), a nonsuit depends upon the mercy of a trial judge. Such is the teaching of Lacy v. Cox, 152 S.W.3d 480 (Tenn., Drowota, Nov. 22, 2004).

Ironically, the issue should not have arisen. A chain reaction wreck occurred on Highway 66 in Sevier County. Good lawyers represented plaintiff and defendant before a good trial judge. But the jury asked during deliberations "whether it was obligated to award the plaintiff monetary damages if it concluded that the defendant was at fault." Plaintiff’s counsel moved for a nonsuit. The judge, mistakenly believing nonsuit was a matter of right even at this late stage, granted the motion.

The Supreme Court held that a nonsuit could not be taken during deliberations, even with the judge’s permission. Moreover, the court held that the illegal dismissal was with prejudice!

Much of Chief Justice Drowota’s opinion is devoted to analysis of a 1988 precedent, Panzer v. King, 743 S.W.2d 612. The significant difference is that Lacy involved a nonsuit during deliberations and Panzer involved a nonsuit after the plaintiff’s motion for new trial was granted. Some language in Panzer was overbroad and therefore rejected in Lacy. But here’s what remains:

“Nonsuits after the initial trial verdict is set aside are not a matter of right.”

We do not disturb Panzer ... insofar as it holds that a trial court has discretion to grant voluntary dismissal without prejudice subsequent to the proper granting of a new trial. The proper grant of a new trial is sufficiently analogous to the commencement of a new action to justify nonsuit under the proper circumstances and subject to such terms and conditions as the court in its sound discretion deems ‘appropriate to prevent [the] defendant from being unfairly affected.’

In summary, the timing of nonsuits can be organized into three categories.

First, a plaintiff has an absolute right to take a nonsuit from the moment of commencement until the moment the jury retires to deliberate.

Second, a nonsuit is forbidden during deliberations.

Third, after a new trial is granted by motion or appeal the plaintiff must move for permission to nonsuit; it is no longer a matter of right.

Note

1. Service and filing of a summary judgment cuts off the right to nonsuit, but the judge may permit voluntary dismissal without prejudice. Stewart v. University of Tennessee, 519 S.W.2d 591 (Tenn. 1974).
A New Road to Resolution
The Class Action Fairness Act of 2005
by Andrée Sophia Blumstein
The Class Action Fairness Act of 2005 (CAFA), \(^1\) makes two big adjustments to class action practice.

First, by elasticizing the concepts of diversity jurisdiction and removal, CAFA allows homegrown class actions based on state law — cases that until now have been solely within the bailiwick of state courts — to be outsourced to the federal court system. There, the cases will be subject to the well-developed body of federal class action law, which is generally thought to be less welcoming to multistate class actions than its state law counterparts.

Second, by tightening up some class action settlement procedures, CAFA may make the class action a less alluring litigation vehicle than it currently is.\(^2\) The new settlement rules limit the ability of class counsel to take big fees, expand the role of the courts in looking out for the class members, and give government regulators the opportunity to have a say in class settlements.

CAFA’s greatest impact will be on state law consumer class actions, state law (especially indirect purchaser) antitrust cases, and state law discrimination and wage-and-hour cases.\(^3\) Defendants sued in multiple state courts should find some reprieve from having to maintain defenses on multiple fronts, because, once in federal court, the various state law class actions will be subject to consolidation under multidistrict litigation procedures. State courts should also experience some relief in workload, but federal courts are likely to see an increase in class actions on their dockets.

State courts will, however, be in the unusual position of controlling the substantive legal doctrine to be applied by the federal courts in the cases affected by CAFA. Ancient Erie principles bind the federal courts to apply the substantive law of the state under whose law the claims arise.\(^4\)

Here is the CAFA nitty-gritty.

(Continued on page 18)
Class Action Fairness Act of 2005

I. To what cases does CAFA apply?

CAFA applies to any civil action commenced on or after Feb. 18, 2005. It does not apply to actions already pending on that date. Cases filed in state court before Feb. 18 are not subject to removal to federal court under CAFA, a boon for plaintiffs with pending state-court class actions. Cases filed in federal court before Feb. 18 are not subject to CAFA’s new settlement standards.

Even though a case is not actually brought as a class action under state or federal class action rules, it will (with some exceptions) be deemed a class action under CAFA if it is a “mass action.” Mass actions are suits proposing that the “monetary relief claims of 100 or more people ... be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.”

II. Expanded federal jurisdiction

A. “Minimal Diversity” jurisdiction

Before CAFA, the door to the federal courthouse was open only to class actions that could make it across the two thresholds of diversity jurisdiction: complete diversity of citizenship (i.e., no plaintiff and no defendant from the same state) and a claim of at least $500,000. Particularly in consumer class actions, even though total damages might be in the multi-millions, the amount-in-controversy requirement was rarely met, because rarely does an individual consumer buy anywhere near $75,000 worth of the product or service at issue. Even when the amount in controversy requirement was met, plaintiffs suing a Tennessee manufacturer, for example, could avoid federal jurisdiction by including one Tennessee citizen in the putative class, thereby destroying “complete” diversity of citizenship.

CAFA expands original federal jurisdiction over state law class actions by revamping traditional notions of statutory diversity jurisdiction. No longer is “complete diversity” of citizenship required for federal jurisdiction; barebones “minimal diversity” will suffice. All CAFA requires is that any one plaintiff and any one defendant be citizens of different states. CAFA does not raise the amount in controversy for class actions to $5 million, but allows the claims of the putative class members to be aggregated in determining whether $5 million is controversy.

Think of it as the rule of 100-1-5. CAFA amends 28 U.S.C. §1332 to give federal district courts original jurisdiction over class actions in which:

- the number of members of all proposed plaintiff classes is 100 or more;
- there is diversity of citizenship between any one member of the plaintiff class (named or unnamed) and any one defendant; and
- the amount in controversy – which may be calculated by aggregating the claims of the putative class members – exceeds $5 million.

B. Exceptions to expanded jurisdiction

There are some limits on CAFA’s expansion of original jurisdiction. By and large, the exceptions are designed to leave truly local controversies in the hands of local courts.

1. The “Home State” exception compels a district court to decline jurisdiction in some situations and permits the court to decline jurisdiction in other situations, even where the new amount-in-controversy and diversity requirements are met.

The district court must decline jurisdiction in cases of “local controversy” when all of the following elements are present:

- more than two-thirds of the proposed class members are citizens of the state in which the action was originally filed;
- at least one defendant is a citizen of the state in which the action was originally filed, (b) is a defendant from whom “significant” relief is sought, and (c) is a defendant whose alleged conduct forms a “significant” basis for claims asserted by the purported class; and
- principal injuries resulting from the alleged conduct, or any related conduct of each defendant, were incurred in the state in which the action was originally filed.

The district court may decline jurisdiction where more than one-third, but less than two-thirds, of the proposed class members and the primary defendant are citizens of the original forum state. In exercising its discretion to decline jurisdiction, the district court must consider whether

- the claims asserted involve matters of national or interstate interest;
- the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states;
- the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;
- the class action was brought in a forum with a distinct nexus to the class members, the alleged harm, or the defendants.

Blumstein

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• the number of citizens of the state in which the action was originally filed is substantially larger than the number of citizens from any other state, and whether the citizenship of the other proposed class members is dispersed among a substantial number of states; and
• during the three years preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons was filed.

2. The “State Action” exception excludes from CAFA’s new jurisdictional provisions cases in which the primary defendants are states or other governmental entities against whom a district court cannot order relief.

3. The “Covered Securities” exception excludes claims solely involving “covered securities” as defined under the Securities Act of 1933 or the Securities Act of 1934.

4. The “Small Class” exception removes from CAFA’s purview class actions in which the aggregate number of members of all proposed plaintiff classes is less than 100.

5. The “Corporate Governance” exception makes CAFA inapplicable to cases involving corporate governance issues and corporate internal affairs issues that arise under the laws of the state of incorporation.

C. Enlargement of removal power
Parallel the extended scope of original jurisdiction are new rules for removing class actions from state court to federal court. Traditionally, defendants in class actions have been thwarted in their efforts to remove cases from state court to federal court because of the narrow window of opportunity for removal. CAFA opens the window.

Before CAFA, lack of diversity jurisdiction was a major impediment to removal. After CAFA, “minimal diversity” removes that impediment.

Before CAFA, diversity cases had to be removed, if at all, within one year of filing. CAFA has eliminated the one-year rule and with it various tactics for gaming the system to avoid removal.

Before CAFA, removal was not an option if any defendant was a citizen of the forum state on the theory that no home-cooking would be served up if at least one of the defendants was local. As it turned out, the local defendant was often merely a token defendant named to prevent removal to federal court. Such token defendants were then routinely dismissed after the one-year limit on removal had safely passed, depriving the target defendant of an opportunity to remove. Now under CAFA, any defendant can remove an otherwise qualifying case even if one of the defendants is a citizen of the original forum state.

Before CAFA, a defendant seeking to remove to federal court was required to obtain the consent of the other defendants. Under CAFA, that requirement no longer exists.

Like class actions, mass actions are removable to federal court – with a few differences. Federal jurisdiction for state law mass actions lies only when the claims of the mass action plaintiffs individually meet the usual $75,000 amount-in-controversy requirement. Unlike class actions, mass actions are not subject to multidistrict litigation treatment after they have been removed to federal court. A gain, to leave truly localized actions in the hands of state courts, the following claims are excluded from the CAFA definition of “mass action”:
• claims arising from an event (a tort) in the forum state and resulting in injuries in the forum state or a contiguous state (like a train wreck or other local disaster);
• claims that were joined at the request of the defendants;
• claims asserted on behalf of the general public under a state statute specifically authorizing that practice; and
• claims consolidated or coordinated solely for pretrial proceedings.

Before CAFA, if a case was removed to federal court and then the federal court remanded the case to state court, it was virtually impossible to secure interlocutory federal appellate review of the remand. To say the least, appeal of the remand order after final judgment was not particularly availing. Putting teeth in the new removal rule, CAFA provides for expedited federal appellate review of orders either granting or denying motions to remand. After CAFA, the district court’s remand orders are immediately appealable; the appellate court has discretion to take the appeal, or not. If the appeal is accepted, the court of appeals must rule on it within 60 days. If the court of appeals does not finally adjudicate the appeal within 60 days, the appeal is deemed denied.

III. Settlements and the class member “Bill of Rights”
CAFA offers class members and persons acting on their behalf the following rights and protections:

1. Fairness hearing. Often settlements give consumers coupons for discounts on future purchases from the defendant in lieu of cash awards. If the terms of a proposed class settlement call for class members to receive all or part of their award in the form of coupons, the court must hold a hearing on the fairness of the settlement before approving it and must make written findings that the settlement (Continued on page 22)
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TENNBARU 2005

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May 19 • Tennessee Bar Center, Nashville

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2. **Coupon settlements and attorneys’ fees.** Class counsel’s fees in a coupon settlement must be based on either (a) the value of coupons actually redeemed by class members (as opposed to the number of coupons issued) or (b) the hours actually and reasonably billed in prosecuting the class action. If attorneys’ fees are based on the coupon value, the court may consider expert testimony on the actual value to the class members of coupons that are redeemed. CAFA does not, however, prevent the court from applying “lodestar” multipliers for counsel fees in cases posing increased risk or requiring particular expertise.

3. **Net loss awards and attorneys’ fees.** The court may approve a settlement under which a class member must pay attorneys’ fees that will result in a net loss to the class member — but only upon a written finding that the non-monetary benefits of settlement to the class member “substantially” outweigh the monetary loss. CAFA is silent on whether the court will have to take into account the tax consequences to the class member in making these findings.

4. **Distributions to charities and attorneys’ fees.** The court may require that the settlement provide for distribution of a portion of the value of unclaimed coupons to a charitable organization or a government entity, but distributions to charities or government entities may not be factored into the calculation of class counsel’s fee.

5. **No geographic discrimination.** The court may not approve a settlement that gives a bigger award to certain class members only because of their “closer geographic proximity to the court.” This kind of neighborhood advantage is not unknown in state court settlements.

6. **Regulatory oversight.** CAFA creates an option for state and federal officials to have input or exercise their regulatory authority with regard to the proposed settlement. Within 10 days of the filing in the district court of a proposed class settlement, each settling defendant must serve a copy of certain documents relating to the settlement upon its primary regulator in the states in which class members reside, and on the United States Attorney General, or, if the defendant is a state or federal depository institution, upon its primary state or federal regulator. No final order approving the settlement may be issued for 90 days after that notice. If the notice and waiting period provisions are not observed, any class member may elect not to be bound by the settlement.

Settlement rules unsettling? Help is on the way. After we have lived with CAFA for a year, the Judicial Conference must make recommendations on best practices that courts can use to ensure that proposed settlements are fair to class members, that class members are the primary beneficiaries of class settlements, and that the award of counsel fees appro-
appropriately reflects the extent of class counsel’s time, expense, risk and success.

IV. Some observations

Before CAFA, the “complete diversity” requirement made it virtually impossible to litigate class claims based on state law in federal courts. With CAFA’s innovative “minimal diversity” requirements, federal jurisdiction should be available in most consumer and business-conduct class actions.

In light of the enlarged federal jurisdiction, some changes in class action practice are predictable. Particularly in antitrust class actions, plaintiffs have been able to pressure foreign defendants into settlements by suing them in states like Tennessee where state law awards damages based not on the price differential, but on the entire purchase price, or where state law may appear hospitable to indirect purchaser claims, or where jury verdicts are on the rise. A foreign company confronting such pressures in class actions filed after Feb. 18, 2005, will have the option of removing the case to federal court where the more predictable class action rules and the more controlled CAFA settlement rules will apply.

Employment-related class actions brought under state laws governing wage and hour violations or discrimination may find their way into federal court, especially when the employer is neither incorporated nor headquartered in the forum state.

After CAFA, plaintiffs’ counsel will have an incentive to tailor class claims to fit the “home state” exception in order to avoid removal to federal court. A carefully pled state court case is especially likely to remain in state court when the defendants are companies with their principal places of business in the forum state.

Claims relating to “internal affairs” or “corporate governance” are exempt from CAFA. To come within this exclusion and avoid federal jurisdiction, there may be an attempt to recast traditional shareholder claims as state law corporate governance claims. As this example shows, at the very least, CAFA will spawn litigation that tests and defines its parameters.

In theory, as defense counsel begin to take advantage of CAFA’s removal provisions and settlement controls, state courts should be hearing fewer and fewer state law class actions that are nationwide or interstate in their sweep. In practice, however, case loads may not shift dramatically. It is not difficult to imagine various ways in which resourceful class counsel may manage to keep their state law class actions in state court — or use CAFA to advantage if their state law class actions are outsourced to federal court.

Notes

1. CAFA took effect on Feb. 18, 2005. SB 5; 109 P.L. 2; 119 Stat. 4. Senate Bill 5 amends Title 28 of U. S. Code, which governs the judiciary and federal procedure.

2. Securities class actions will not be significantly affected, since they are for the most part exempted from CAFA’s coverage.

3. Some federal courts required that the claim of each and every class member exceed $75,000.


5. For purposes of determining diversity jurisdiction, the citizenship of members of the proposed class is determined as of the date of filing of the complaint or amended complaint. If the case as originally pled was not subject to federal jurisdiction, citizenship is determined as of the date of service by plaintiffs of an amended pleading, motion, or “other paper” that indicates the existence of federal jurisdiction.

6. For example, the Supreme Court has just held that when a litigant’s recovery constitutes income, the litigant’s income includes the portion of the recovery paid to the attorney as a contingent fee. Commissioner v. Banks, 125 S. Ct. 826 (U.S. 2005). But see the American Jobs Creation Act of 2004, 108 P.L. 357, 118 Stat. 1418, which was signed into law on Oct. 22, 2004, and is not retroactively effective.
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Preserving Electronic Evidence

How closely should a Tennessee court follow Zubulake?

By Daniel Van Horn

At the federal-state judicial conference held last fall, federal and state judges from across Tennessee were in attendance for a presentation on electronic discovery. The presentation was very informative. Among other things, the presenters talked about: (1) the multitude of places that electronic information is stored on a computer; (2) how relatively easy it is to write over large chunks of electronic information; and (3) the high cost of conducting forensic computer searches for information. The presenters stressed the need to preserve electronic information as soon as possible to avoid the high cost of forensic searches. That presentation left many of the judges and lawyers in attendance to ask a number of questions including under what circumstances a party could be sanctioned for failure to protect and produce electronic evidence.

(Continued on page 26)
Preserving electronic evidence (Continued from page 25)

There are no directly applicable Tennessee cases. However, we do have the benefit of the Zubulake v. UBS Warburg decisions from the United States District Court for the Southern District of New York. These decisions have received an enormous amount of attention and are frequently cited by other courts, law reviews and academic journals as being authoritative on the subject of electronic discovery disputes.

There are actually six Zubulake decisions to date. Zubulake I and III dealt with the question of who should pay for the costs of electronic discovery. Those decisions held that, as in ordinary document discovery, the party producing electronic information generally bears the costs of production unless the request for production constitutes an undue burden – in which case the requesting party would bear the cost of production. That court defined an undue burden in the context of electronic discovery as any request that: (1) seeks the production of information from sources that are not readily accessible (readily accessible being defined as data in a useable format and/or reasonably indexed) and (2) fails a seven-factor test that looks at such elements as how narrowly tailored the request for production is, the need for the information, its availability from other sources, and the costs and benefits for all concerned.

Zubulake IV and V deal directly with the question of spoliation of electronic evidence and counsel’s obligation to preserve electronic evidence. In Zubulake IV, the court enunciated a test for spoliation of electronic evidence. It did so by looking at three distinct issues: (1) when the duty to preserve documents arises; (2) what types of documents must be preserved; and (3) what standard of conduct would be required to avoid sanctions. By analyzing the Zubulake court’s holding and reasoning in these areas and comparing them with relevant Tennessee case law (if any), we can get a clearer picture of just how persuasive the Zubulake opinions should be for a Tennessee court and thus how closely they should be followed.

The duty to preserve electronic documents

The Zubulake IV decision starts by recognizing that there can be no spoliation of evidence with a prior duty to preserve that evidence. The question then is when does that duty to preserve evidence arise? The Zubulake court found that a duty to preserve evidence arises when “the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” Thus, the Zubulake standard is a know or should have known type standard and could certainly apply in advance of litigation actually being filed.

In one of the very few reported Tennessee cases on spoliation of evidence, the Tennessee Court of Appeals, in Foley v. St. Thomas Hospital, was asked to rule on a spoliation of evidence claim where a body had been cremated after a pathologist had conducted an autopsy. Foley was a case of alleged medical malpractice. The plaintiff had obtained an autopsy of her husband’s body to aid in proving that his death had been the result of medical negligence. The pathologist who conducted the autopsy knew that that was the reason he was performing an autopsy. A result of the autopsy, the body or portions of it were cremated. The defendants argued that their ability to defend the case had been irreparably damaged when the body was cremated without the opportunity to conduct their own independent autopsy and examination.

The trial court agreed and granted the defendants summary judgment based on spoliation of evidence.

On appeal, the Court of Appeals reversed, holding:

The defendants would have this court impose a rule of law that in all autopsies, including those performed before any suit is filed or before there is any known reasonable basis in fact to conclude that there are grounds for suit, but where there is a “possibility” of litigation, organs should be preserved and that failure to so preserve the organs justifies exclusion of all autopsy evidence.

Thus, the Foley court was faced with the question of when the duty to preserve evidence starts and found based on the facts of that case that the duty to preserve did not attach.

Foley does not clearly set forth a standard as to when evidence must be preserved. Thus, one is left to read negative implications into the language of that case. The negative implication of the language set forth above is then that there is a reasonable basis in fact to conclude that there are grounds for suit.

The problem with reading a negative implication into the Foley language is that the facts in Foley would seem to meet that negative implication and yet the Court of Appeals still overturned the finding of spoliation. Foley was a case where the pathologist was specifically asked to determine whether the deceased husband had died of medical malpractice. Thus, prior to the autopsy there was the possibility of a lawsuit. The result of that autopsy was the clear opinion of the pathologist that the husband had died of medical malpractice. Thus, at that point, there was a reasonable basis in fact to conclude that there were grounds for suit. Accordingly, to the negative implication of Foley, the body should have been preserved. It was not, and the Court of Appeals found no issue with that failure to preserve.

The Foley court could have held that the duty to preserve attached and that the body should have been preserved but rejected spoliation on other grounds. It did not. It noted at length that it is routine practice to cremate bodies in autopsies. It expressed concern that finding spoliation in that case might result in a flood of criminal appeals because Foley’s pathologist was also the state’s chief medical examiner charged with conducting autopsies in criminal investigations. There is also the distinct possibility that Foley was a ruling appli-
The scope of the duty to preserve

After the duty to preserve evidence attaches, the next logical question is the scope of that duty. What documents or electronic information should be preserved? The Zubulake opinion answers that question by holding that a party is not obligated to preserve every shred of paper, e-mail, electronic document or back-up tape. To the contrary, a party is only obligated to preserve “unique, relevant evidence that might be useful to an adversary.” “It is under a duty to preserve what it knows or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.” In the context of electronic discovery and the facts of that case, the Zubulake court found the scope of the duty to preserve included the e-mail and electronic documents of the key players or anyone who might be listed as having discoverable knowledge as well as any back-up tapes related to those persons to the extent that back-up tapes were kept by person rather than some other storage method such as by a department or by day for the whole company. The key was to preserve all data that is readily accessible and that data that was not accessible to the extent it could be segregated and easily identified.

Aパーティーの記録に、電子情報は保存されなければならない。電子情報は、検索のためのコンピューターにアクセスし、その情報が証拠となることを証明することができる。ただし、電子情報は、どのような方法で保存されるかにかかってはならない。例えば、デパートメントや日ごとに保存されるか、それ以外の方法で保存されるか、など。

The Zubulake court held that a party seeking sanctions for spoliation must establish three elements: (1) that the party having control over the evidence had an obligation to preserve it; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party’s claim or defense. Pursuant to Zubulake, a culpable state of mind for purposes of spoliation includes ordinary negligence. When evidence is destroyed in bad faith (intentionally or willfully), its relevance is presumed.

As with the question of when the duty to preserve attaches, there is no clear statement of Tennessee law on what state of mind or degree of fault is needed to impose sanctions on a party for spoliation. In fact, there appears to be a split in the language of the few cases that address spoliation. Some Tennessee cases require that the wrongdoer acted with intent to destroy or conceal the evidence. Others seem to recognize that negligence may be sufficient to establish a claim for spoliation. In fact, some cases such as Foley and Thurman-Bryant Electric Supply Company, Inc. v. Unisys Corporation, Inc. contain language that permit one to argue for either an intentional conduct standard or a negligence standard. For example, in Foley the Court of Appeals holds that there has been no evidence of intentional spoliation of the evidence (stating it in such a way that one could conclude that intentional spoliation is required). Just prior to that language, the Foley opinion states that there has

(Continued on page 29)
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Preserving electronic evidence

(Continued from page 27)

been no showing that the pathologist acted to “negligently” suppress the truth.22 Likewise, in Thurman-Bryant, the Tennessee Court of Appeals stated that it had not found any Tennessee cases on spoliation and thus cited to American Jurisprudence for the proposition that intent to destroy or conceal is required to obtain sanctions for spoliation.23 Just prior to that, the Thurman-Bryant opinion stated that:

We agree that the trial judge has discretion to impose sanctions on a party for the destruction or loss of evidence. The severity of the sanctions, however, must necessarily depend upon the circumstances of each case i.e., was the evidence lost negligently, inadvertently or intentionally. (Emphasis added.)24

Thus, Foley and Thurman-Bryant could support an argument for an intentional standard in Tennessee or a standard that would include negligence. In the criminal context, the Tennessee Supreme Court allows courts to consider spoliation that was the result of negligence.25 Likewise, the only Tennessee federal district court to address this issue in a reported decision imposed sanctions for gross negligence and fault that resulted in the spoliation of evidence.26 There is certainly support in Tennessee that could justify adoption of a spoliation standard that includes negligence. At present, it is not clear that Tennessee state courts would impose sanctions for negligent spoliation of evidence — as the Zubulake court would. Accordingly, it is not clear that Tennessee courts would or should strictly follow Zubulake as a persuasive precedent.

Counsel’s obligation to preserve evidence

 Whereas Zubulake IV set forth the test for spoliation of evidence in electronic discovery cases, Zubulake V outlined standards of conduct that counsel should follow to prevent spoliation of evidence or face sanctions for such failure. In Zubulake V, the Southern District of New York held that when the duty to preserve

attaches, counsel should work with their client to insure that a “litigation hold” is put in place.27

A litigation hold suspends a party’s routine document retention/destruction policies.28 It requires the party to communicate with all key people (those who would likely be witnesses, management and information technology personnel) that the hold is in place, to preserve any potentially relevant documents and to turn off any automatic systems that erase information. Thus, if the company has an e-mail system that catalogs e-mails for six months and then automatically deletes them, then pursuant to a litigation hold

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Preserving electronic evidence

(Continued from page 29)

that automatic delete function should be turned off and e-mails preserved for the duration of the litigation.

Pursuant to Zubulake, back-up tapes are generally not subject to a litigation hold and may continue to be recycled on a regular basis if the company has a regular policy of doing so. However, if those back-up tapes are readily accessible or are capable of being segregated by relevant personnel or department (as opposed to back-up tapes for the entire organization) then the litigation hold would require that those relevant tapes be segregated and preserved.

The Zubulake V decision went on to hold that it is not sufficient for counsel to simply communicate the litigation hold to their client and expect their client to comply with it. Rather, counsel has an obligation to take additional affirmative steps including:

1. a duty to attempt to locate all relevant documents as early as possible;
2. a duty to speak with the client's information technology personnel to learn about the client's information storage architecture, its document retention policies, and databases and to obtain a copy of any back-up tapes that should be preserved;
3. a duty to speak with all (if feasible) of the individual witnesses within the company to let them know about the litigation hold, to find out where they keep information (such as laptop computers, PDAs, home computers, etc.), and to order them to produce in electronic form a copy of all their relevant active files, e-mails and electronic information; and
4. a duty to follow up with the client, IT personnel and key people from time to time to remind them of the litigation hold, to insure that it is being complied with and to gather any documents or information that has not been previously produced.

The Zubulake court made clear that counsel will likely not locate and preserve all relevant documents in every case. That court did not intend to make counsel the absolute insurers against spoliation. It recognized that clients must bear a significant responsibility for the preservation of their own documents. Rather, the court recognized that in many cases counsel will have a better understanding of what is or is not relevant to a particular case than the clients have. Thus, counsel must take "some reasonable steps" to prevent spoliation of evidence. Simply issuing a litigation hold without getting more involved and taking proactive steps is not enough.

The steps outlined in Zubulake V are designed to prevent negligent as well as intentional spoliation of electronic evidence. Because the Tennessee standard may only sanction intentional spoliation of evidence, there is some question as to how much of the Zubulake V opinion is really applicable to Tennessee cases. Certainly the spirit of Zubulake V's requirements should carry over to Tennessee. If nothing else, Tennessee counsel may be required to take some of the Zubulake V steps to make sure that there is no intentional spoliation of evidence. If on the other hand, Tennessee currently or in the future would sanction negligent spoliation then Zubulake V's requirements would be directly applicable.

The practical impact of Zubulake

The differences (potential or real) between Tennessee spoliation case law and the Zubulake decisions are not just an academic exercise. They have very real and practical implications for Tennessee lawyers involved in discovery.

It is worth noting that the Zubulake decisions involve claims of spoliation by UBS Warburg, a major multinational firm with significant resources and a large internal IT department. Moreover, the litigation is taking place in New York – a major corporate center with significant information technology resources. Whereas, the average Tennessee case will probably not involve parties as large and sophisticated as UBS Warburg and the available IT resources although not barren are not as plentiful or cheap.

Those differences could have very practical effects on the outcome of any electronic discovery dispute by shifting the definition and meaning of undue burden. The undue burden analysis found in Zubulake I and III not only helps resolve the question of who must pay for certain kinds of electronic discovery, but it can also help define the scope of the duty to preserve documents. Presumably, if it would constitute an undue burden to order a party to pay for producing certain information then it may also follow that that party had no obligation to preserve that information. Of course, that presumes that it would be costly or difficult for the party to protect the information at issue. It is possible that preservation would not be costly but production would be. In such cases, the undue burden analysis should have no impact on the duty to preserve information.

A classic example would be the practice of having an optical scan taken of the hard drive of every computer and server where relevant information is expected to be found. At present, this is the absolute best way to insure that relevant information is not accidentally written over by programs that are active. Having an optical scan performed even preserves data that has been deleted but not yet written over. Optical scans can be fairly expensive and require that a computer or server be taken out of use for several hours at a time.

For a larger and more sophisticated client, it probably would not be an undue burden to require them to perform optical scans of a select group of computers (e.g., those of the key group of witnesses). The data stored on the hard drives but not readily accessible would probably be akin to back-up tapes that are segregated by individual. For a smaller client or an individual client, however, this cost might well be an undue burden. As such, can it be said that the litigation hold put in place in
We’re celebrating the Tennessee Bar Journal’s first 40 years all year! In each issue we will look back at an area of life in the law to see how the TBJ covered it. This month we examine coverage of women and minorities.

The Journal has come a long way, baby, since its first issue in 1965 that included photos of 42 men and not one woman. White men, of course. But don’t blame the Journal; it was a reflection of the association and legal profession at that time. Women and minorities started filtering into these pages in the following decades, first just as vacationing spouses on CLE cruises but eventually there were feature stories about their appointments to the bench and other major accomplishments.

In our most recent issue, March 2005, there were seven women and 14 men pictured (excluding ads). An ad featuring the TBA YLD’s State High School Mock Trial Competition shows five females and one male in the courtroom playing lawyers, judges and witnesses. The articles in that issue were authored by two women and two men.

Here comes the judge … ma’am

Coverage of women and minorities started heating up in 1988. In the March/April 1988 issue, the story “Workshop Teaches Women How to Run for Judge: Gearing up for 1990” was an early clue that women lawyers were not going to stay quiet much longer. The workshop drew a crowd of nearly 60 and turned out to foster the beginning of the Tennessee Lawyers’ Association for Women (TLAW).

Later that year the Journal reported on the organizational meeting of TLAW, which was held during the Tennessee Bar Association’s convention in Memphis. The speaker was Barbara Mendel Mayden of the ABA Commission on Women in the Profession, who told the startling findings of the commission.

“Our first surprise,” Mayden said, “was to find out that although, clearly, women have made great strides, the barriers that still exist aren’t only subtle ones, but the types of overt problems that most of us thought were history.”

A iso in 1988, the Journal reported that, according to an ABA Journal survey, “female lawyers had a median personal income of $40,190, while male lawyers had a median income of $71,710.”

In July 2001, the Journal helped celebrate “50 Years of Pioneers,” with the Marion Griffin Chapter of the Lawyers’ Association for Women to honor the first women admitted to practice in Tennessee. (Read details about them at http://www.tba.org/pioneers.html.) From left, mothers and daughters Claudia Swafford Haltom, Cissy Daughtrey, Carran Daughtrey and Claude Gableback Swafford.

Memphis attorney Herman Morris was featured in 1992 for a Journal dedicated to parental leave policies. He said one of the reasons he left private practice was “so he could spend more time with his children.”
reported that in a nationwide survey, the percentage of law school enrollment for women and minorities had increased. "Women now represent 42 percent of all law students," it said. First-year minority enrollment increased a whopping 9 percent that year, bringing their numbers to 11.6 percent of all students in J.D. programs.

Quality of life issues emerge

By early 1990, the Journal cited a National Law Journal/West Publishing survey that said "60 percent of the respondents said they had experienced unwanted sexual attention, but rarely reported it." It also reported that 42 percent of women said they delayed having children to pursue their careers, and 24 percent said they opted for slower career advancement to have time for their personal lives. It was 1992 before the Journal published a special issue about parental leave policies — acknowledging that lawyers might have lives outside of the race for the billable hour. Barbara Moss outlined what a firm would need to include in its policy, plus assured readers that "if you think having children and taking parental leave is professional suicide, think again." She cautioned that the firm’s attitude is key. "It’s important for managing partners to tell parents [women and men] that the firm expects them to take time off."

Trailblazers get ink

In 1990 the Journal featured a tribute to women "trailblazers," with personal interviews with Erma G. Greenwood, Selma Cash Paty, Anne H. Schneider, Rebecca Thomas, Osta Underwood and Cissy Daughtrey.

Nearly all of these women have since died, but the Journal captured priceless experiences of the first women who practiced law in Tennessee.

When Osta Underwood was licensed in 1936 and began practicing law in Nashville she recalled that "when the women lawyers wanted to meet we reserved a table for six at the Old Chamber of Commerce dining room on Union Street."

"No woman in her right mind would want to be a lawyer in 1947," Paty said in that interview. "It wasn’t a profession that a woman would consider."

The cover story for September/October 1995 was "The Final Battle: Tennessee’s Vote for Women Decided the Nation" about the 75th anniversary of the passage of the 19th Amendment. The article features pictures of women picketing the White House in 1917, as well as these words:

'Women have suffered an agony of soul that you can never comprehend that you and your daughters might inherit political freedom,’ said Carrie Chapman Catt, who followed Susan B. Anthony as head of the National American Woman Suffrage Association. 'That vote has been costly. Prize it!'

For the state’s 200th birthday in

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that case would require such an optical scan be performed — probably not. The real problem is that counsel and parties will not know for certain what their preservation obligations are until clearer case law is announced or a claim for spoliation is made and ruled upon by the court. At that point, it may be too late.

The better approach in Tennessee, at least until additional case law guidance is developed, is to approach your adversary and attempt to negotiate on the front end of a case the contours of an agreement as to all parties’ duty to preserve documents and which party will pay for what kinds of discovery. If your opponent will not agree to a negotiated resolution, then at a minimum counsel should document the discussions and the offer. That documentation may be useful later in any case.

Counsel may even want to move the court for an order of preservation that details each party’s obligations to preserve evidence. If too many courts will probably not be receptive to entry of these types of orders. Courts may see such a move as just another discovery dispute in which courts are loath to get involved. However, if enough of these spoliation disputes make their way to court and/or counsel is careful to position a motion for discovery as just another discovery dispute in which courts are loath to get involved. However, if enough of these spoliation disputes make their way to court and/or counsel is careful to position a motion for a preservation order as an attempt to avoid discovery disputes, then courts may be willing to enter such an order.

Finally, until Tennessee establishes clearer precedent, it may be wise for litigants to follow Zubulake even if its requirements are seemingly more stringent than Tennessee law. For example, litigants may want to issue a litigation hold when it becomes evident that information may be relevant to a later filed suit and not wait until it is clear that reasonable grounds exist to file suit. Moreover, Tennessee litigants may want to guard against negligent spoliation of evidence even if Tennessee might only sanction intentional spoliation. Because Zubulake is more stringent in its requirements, litigants certainly will not run afoul of Tennessee law if they so do. Following existing Tennessee precedent may be sufficient, but given its conflicting pronouncements, doing so might result in that one case that goes up on appeal and establishes new precedent.

Given Zubulake’s wide spread acceptance and national acclaim, it will likely help shape the law concerning electronic discovery in Tennessee. However, any litigant or court relying upon it as persuasive precedent should be cognizant of the significant difference between Zubulake and current Tennessee law on spoliation of evidence.

Notes
8. Zubulake I modified an earlier eight-factor test announced in Rowe Entertainment Inc. v. The William Morris Agency Inc., 205 F.R.D. 421, 428, 429 (S.D.N.Y. 2002). Zubulake I was announced on May 13, 2003. That same day, the Western District of Tennessee rendered an opinion concerning an electronic discovery dispute in which it followed the eight factor Rowe test. See Medronic Sofamor Danek Inc. v. Michelson, 2003 U.S. Dist. LEXIS 14447, *8-9 (W.D. Tenn. May 13, 2003). There has been no reported Tennessee decision since May 13, 2003, to address whether Tennessee courts would follow the earlier eight-factor Rowe test or the seven-factor Zubulake test. Based on the Medronic case, it seems clear that Tennessee courts would follow the same general approach outlined in Rowe and Zubulake. It is just not clear that Zubulake would be strictly followed.
10. “Document” in the context of electronic discovery does not simply mean a hard copy of the information. Rather, it includes the metadata and other information included in the organization's original electronic format. Zubulake, 220 F.R.D. at 218.
13. Foley, 906 S.W.2d at 453.
19. See Ferguson, 2 S.W.3d at 917 (Tennessee Supreme Court permitting spoliation in the criminal context to be shown through negligent destruction of evidence); Foley, 906 S.W.2d at 454 (holding that the record is devoid of any facts to show that the pathologist acted negligently to suppress the truth); Turman-Bryant Electric Supply Company Inc. v. Unisys Corporation Inc., 1991 Tenn. A pp. LEXIS 870, *14-15 (Tenn. Ct. A pp., W.S., Nov. 4, 1991)(holding that the severity of the sanctions must depend on the circumstances of each case, i.e., was the evidence lost negligently, inadvertently, intentionally, etc.); Jackson v. N issan Motor Corporation, 121 F.R.D. 311, 318 - 321 (M.D. Tenn. 1988)(holding that intent is relevant in considering what sanction if any should be imposed, and holding that gross negligence, fault, bad faith or willfulness may be sufficient to establish spoliation).
(Continued from page 3)

1994, the Journal chronicled landmarks of Tennessee law in an article by Nashville lawyer Lewis L. Laska. Among many entries it tells of

- Ida B. Wells, a black woman who in 1884 challenged “Jim Crow” railroad seating;
- Marion S. Griffin, the first woman allowed to take the written bar exam in Tennessee, in 1907. (In 1982, a chapter of the Lawyers’ Association for Women was formed in Nashville and named for her.)
- Nashville lawyer Z. A. Alexander Looby, who along with Thurgood Marshall, gained acquittal of most blacks accused of rioting in Columbia. “The famous ‘Mink Slide’ riot had drawn national attention,” Laska wrote, “and the verdict was widely seen as a triumph of law and capable lawyers over southern lawlessness.”
- Roy B. J. Campbell Jr., the first African-American to graduate from the University of Tennessee law school, in 1955; in 1987, a black woman, Marilyn Yarborough, becomes its dean.
- Black civil rights attorney Avon N. Williams, who achieved victory when the mostly white University of Tennessee at Nashville was ordered in federal court to merge into the mostly black Tennessee State University. “This is the first time any court has ordered a white-into-black merger in higher education,” Laska wrote.
- George H. Brown Jr., who in 1980 was the first African-American man on the Tennessee Supreme Court, followed by A. A. Birch in 1993.
- Julia Smith Gibbons, who was the first female federal district court judge in Memphis at the time of her appointment in 1993.
- Black civil rights attorney Avon N. Williams, who achieved victory when the mostly white University of Tennessee at Nashville was ordered in federal court to merge into the mostly black Tennessee State University. “This is the first time any court has ordered a white-into-black merger in higher education,” Laska wrote.
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- Julia Smith Gibbons, who was the first female federal district court judge in Memphis at the time of her appointment in 1993.

In 1996 Monica Allie was the first — and so far only — woman to receive the Joe Henry Award for Outstanding Legal Writing, an annual award given by the Journal since 1985.

Martha Craig “Cissy” Daughtrey, the First Lady of Firsts, was featured on the August 2003 cover — among many other firsts, she was the first woman on the Tennessee Supreme Court (1990) and the Sixth Circuit Court of Appeals (1993).

In 1994, Memphis lawyer Prince Chambliss became the first African-American officer of the TBA when he was appointed secretary. That same year, Frederick H. L. McCullum, an African-American lawyer from Chattanooga, was president-elect of the Young Lawyers Division, which holds a seat on the TBA board. UT law professor Dwight A Arons wrote a feature for the Journal in 1999 about many early African-American and women lawyers in Tennessee — the same year the TBA was lead by its first woman president, Pamela L. Reeves. She was followed by Katie Edge two years later. In 2004, Memphis lawyer Cecilia Barnes was appointed secretary of the TBA, the first African-American woman to fill an officer’s position in the association. In 2005, Marcia Eason was elected vice president and will become the TBA’s third woman president, in 2007.

In one of her monthly president’s columns in 2000, Reeves wrote

It is very easy for those of us who have been able to follow the footsteps of these trailblazers to forget that times have not always been good for women in our profession. I will use my experience to try to help young lawyers appreciate the leadership and examples of the women who led the way.

A long way, baby? You be the judge. — Suzanne Craig Robertson
Got Microsoft? Trustees should expect a fight

By Dan W. Holbrook

Income or principal? Trustees must characterize every receipt as one or the other, or some combination. Beneficiaries may worry that their financial well-being could be drastically affected if a trustee failed to characterize trust receipts accurately. Trustees may worry that they are at risk as well if beneficiaries’ differing interests make them question the trustees’ judgment.

The general rules for allocating between income and principal, contained in Tennessee’s Uniform Principal and Income Act (UPAIA), Tenn. Code Ann. §35-6-101 et seq., enacted in 2000, can sometimes surprise, however. For example, an IRA paid to a trust upon the account owner’s death may be entirely taxable income for tax purposes but characterized entirely as principal for trust accounting purposes.

Many trustees were recently confronted with a major UPAIA event, whether they were aware of it or not. On Dec. 2, 2004, Microsoft paid a special dividend of $3 per share. Since the company had over 10 billion shares outstanding, the dividend amounted to about $32 billion, the largest single amount of capital ever paid out to investors anywhere any time. $3 per share represents about 11 percent of the $27 stock price on the payment date and about 35 percent of the roughly $92 billion of gross assets of the corporation.

Trustees and their income beneficiaries probably delighted in the extra cash flow, easily assuming that the net effect was a conversion of principal to income. But was it? There are competing authorities.

Argument for principal. Tenn. Code Ann. §35-6-401 contains rules for characterizing trust receipts from entities (corporation, partnership, etc.) as either income or principal, assuming the trust instrument doesn’t specify (few do). Under paragraph (b), the general rule is that money received from an entity should be allocated to income. Under paragraph (c), there are exceptions that require allocation to principal instead, including money received in a total or partial liquidation of the entity. A partial liquidation occurs, says paragraph (d)(2), when “the total amount of money and property received in a distribution … is greater than 20 percent of the entity’s gross assets.”

Whoops. The Microsoft special dividend was about 35% of the entity’s gross assets. The logical interpretation of the statute would be that all of that dividend should be treated as a partial liquidation and allocated to principal.

Argument for income. On the same day as the Microsoft dividend, Dec. 2, 2004, a three-judge California Court of Appeals unanimously held in a virtually identical fact situation, based on the identical California UPAIA, that the word “received” in the statute requires looking at the amount received by that one single trust receiving the dividend, not the entire amount being distributed by the entity. In other words, there is no “partial liquidation” under the UPAIA unless one trust alone receives more than 20 percent of the entity’s gross assets. Estate of Thomas, 124 Cal.App.4th 711, 21 Cal.Rptr.3rd 741 (2004). This case requires that the Microsoft dividend be treated as income.

Although this result seems patently absurd, the court went to considerable lengths to justify its conclusion. I understand a petition to the California Supreme Court has been filed, but statistically there is only a relatively small chance of both certiorari and reversal.

Like all uniform laws, UPAIA directs that it should be construed to be

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as consistent as possible with other states adopting it. Accordingly, the Thomas case from California may carry significant precedential weight in Tennessee. There appear to be no other cases construing the statute.

It may be significant that the legislature of the state of Washington, home of Microsoft and of many of its biggest shareholders, modified the UPAIA by deleting the word “received” in paragraph (d)(2) and substituting the word “distributed,” thus making the Thomas decision clearly inapplicable in that state alone.

**Tennessee Law.** This leaves Tennessee trustees with a dilemma. What to do?

Trustees who have already paid out the dividend as income can point to the Thomas case if questioned by unhappy remainder beneficiaries. Of course, lack of contemporaneous records of the trustees’ deliberations as to how to characterize the receipt may still leave Trustees feeling exposed.

Trustees who retained the Microsoft dividend as principal, or who are still deciding how to treat it, have five choices:

1. Rely on the plain language of the Tennessee statute, including its Official Comments. Add the dividend to principal. Consider explaining the dilemma to the income beneficiaries and seeking a release.

2. Rely on Thomas as the sole precedent, assuming that Tennessee and all other states with the same version of the UPAIA would be likely to concur. Pay it out as income. Consider explaining the dilemma to the remainder beneficiaries and seeking a release.

3. Hold the amount in suspense, until there is reasonable certainty in Tennessee. Such certainty might arise from a definitive opinion from the California Supreme Court; or better yet from a case or Attorney General Opinion in Tennessee; or best of all from the Tennessee legislature’s retroactive adoption of Washington state’s amendment to the uniform act. Of course, reasonable certainty may never arrive. Consider lobbying your state legislator in any event so that similar situations will not be a future problem.

4. With an “income-only” trust, exercise the Trustee’s power to adjust under Tenn. Code Ann. §35-6-104, to recharacterize all or any portion of income as principal, or vice versa, to strike the optimum balance among all of the beneficiaries of the trust.1 That is, use the flexibility within UPAIA itself to resolve any uncertainties UPAIA is causing.

5. Make your trust the test case and seek a ruling in Tennessee. Or become the defendant when one of the trust beneficiaries sues. Be sure you let the rest of us know the outcome. 

**Note**

1. See the author’s column on the trustee’s power to adjust under the UPAIA in Holbrook, “Total Return Trusts Come to Tennessee,” 37 Tenn. Bar J. 33, December 2001.
I'm not a divorce lawyer, and I don't play one on TV. I used to do divorce work, but I had to quit because I became so angry at one of my clients that I considered moving into criminal law. Not as a lawyer, but as a defendant in a murder trial.

But I practice law with a number of smart lawyers who do domestic work, and I sleep with a judge who hears domestic cases. (By the way, for the record, the judge I'm sleeping with is my wife. As the late great legal philosopher Henny Youngman might have put it, that's no lady judge, that's my wife!)

I also hang around a lot of divorce lawyers. I'm sort of a divorce lawyer groupie. I have found that divorce lawyers like to drink, tell great stories, and generally pick up the bar tab. They are my kind of lawyers.

Accordingly, even though I haven't practiced divorce law in years, and I am, at best, a recovering divorce lawyer, I have heard a lot about the new child support guidelines. And believe me, if I ever think about returning to the domestic law field, I'll just take a look at these child support guidelines and head right back to the safety and security of medical malpractice litigation, where the only thing I have to fear is President Bush and the Republican Congress.

One of the reasons I went to law school is, in the words of Chevy Chase, I was told there would be no math. I have been math-challenged all my life. The biggest challenge I've ever faced in life was Algebra II in the 11th grade. The United States Supreme Court banned prayer in the classroom some 40 years ago. But

"I have it on good authority that calculating child support under the new guidelines is about as simple as assembling toys at 2 a.m. on Christmas morning."

when I was taking Algebra II in Mrs. Van Vlack’s class at Frayser High School in 1969, I defied the U.S. Supreme Court every day. Whenever I took an Algebra II exam, I prayed like a regular Billy Graham. I would take one look at the exam, bow my head, and say, “Lord, if you’ll just miraculously give me the answers to this test, I’ll become a missionary, so long as you don’t have to take a math course in order to become a missionary.”

Thanks to the Good Lord above and many after-school sessions with Mrs. Van Vlack below, I somehow survived Algebra II. When I went to the University of Tennessee to pursue my bachelor of conservative arts degree, I took Football Math. That wasn’t the official title of the course, but that’s what everybody called it. It was a college math course offered to football players and to non-jocks like me who could not do any Jethro Beaudine ciphering that involved more than taking off your socks and shoes.

I haven’t had a math course since I passed Football Math in 1971. And during my three years at the Big Orange College of Law, I was not required to take Law Mathematics or, heaven forbid, Law Algebra II.

I’ve now practiced law for 26 years, and the only time I’ve ever had to use math has been in calculating a contingency fee. And even then, I’ve always used a calculator unless the case was so small that I could actually figure out the fee simply by taking off my shoes and socks.

But based on what my friends in the domestic bar have told me (generally over a few drinks at a domestic bar), the new child support guidelines require more than the math skills of Jethro Beaudine. They require the skills of Miss Jane Hathaway.

Although I don’t know this for a fact, I have been told that to calculate child support under the new guidelines...
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BUT SERIOUSLY, FOLKS!

I have it on good authority that calculating child support under the new guidelines is about as simple as assembling toys at 2 a.m. on Christmas morning. As the father of three children, I have never had to worry about calculating child support payments, but I have learned on many a Christmas morning that the three most terrifying words in the English language are "some assembly required."

I don't know who came up with the new child support guidelines. I suspect it was some deadbeat dad who has a degree from the Massachusetts Institute of Technology. All I know is that I was in Court the other day waiting to start a trial in a good old non-math tort case when I briefly observed a judge and several domestic lawyers trying to calculate child support payments. The judge kept mumbling, "naught, naught ... carry the naught." And the defense lawyer was speaking algebra. She sounded just like my old teacher, Mrs. Van Vlack. I suddenly developed a case of post-traumatic A lgebra stress disorder.

I didn't see a spreadsheet. The judge probably had it up under the bench keeping her feet warm.

The whole experience reminded me of the story about the dad who worked hard to send his boy to the University of Tennesse. When his son came home from Knoxville after his first semester, the dad said, "Son, tell me something they've learned you up at UT." The son thought for a moment and then said, "$\pi r^2.""

"Pie are square?" exclaimed the dad. "I can't believe I wasted all that tuition money! Pie aren't square, son! Cornbread are square! Pie are round!"
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