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# Premium Estimate Request Form

**Return Completed Form for Premium Indications**

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**Please Return To:** Debbie Matthews  
**Fax No.:** 615.653.0644  
**E-mail:** debbie_matthews@ajg.com

## 1. Current Coverage

<table>
<thead>
<tr>
<th>A. Number of years of continuous coverage:</th>
<th>E. Annual premium:</th>
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<tr>
<td>B. Current Professional Liability/Certificate Program:</td>
<td>F. Deductible:</td>
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<tr>
<td>C. Excess Liability:</td>
<td>G. Per Claim or Annual Aggregate:</td>
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<tr>
<td>D. Reporting Date:</td>
<td>H. Does your current policy modify or exclude coverage?</td>
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**Current Policy Expiration Date:**

- **Quarter:**
- **Month:**
- **Year:**

## 2. Attorneys

**Provide information about each attorney in your firm. If any of your offices employ part-time attorneys, provide a number of hours worked on behalf of the firm.**

<table>
<thead>
<tr>
<th>Full Name</th>
<th>Admitted to Bar</th>
<th>State</th>
<th>Date Began Practice</th>
<th>Date Joined Firm</th>
<th>Status</th>
<th>Individual Net or Act Date</th>
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**Additional information***

## 3. Area of Practice

1. Administrative Law: Defense
2. Arbitration
3. Arbitration/Arbitration
4. Bankruptcy
5. Business Immigration
6. Consumer Credit
7. Consumer Finance
8. Criminal
9. Employment
10. Environmental Law
11. ERISA/Pension/Employee Benefits
12. Family Law: Adoption
13. Family Law: Divorce
14. Government Contracts
15. Government Contracts: Appellate
16. Government Contracts: Trial
17. Government Contracts: Other
18. Health Care: Regulatory Compliance
19. Intellectual Property
20. International Law
21. Labor and Employment: Management
22. Labor and Employment: Union
23. Litigation: Insurance Defense
24. Litigation: Trade Secret
25. Litigation: Business Arbitration
26. Litigation: Commercial
27. Litigation: General
28. Litigation: Intellectual Property
30. Litigation: Intellectual Property: Copyright
33. Litigation: Intellectual Property: Trademarks
34. Litigation: Intellectual Property: Copyright
35. Litigation: Intellectual Property: Trade Secrets
37. Litigation: Intellectual Property: Trademarks
38. Litigation: Intellectual Property: Copyright
41. Litigation: Intellectual Property: Trademarks
42. Litigation: Intellectual Property: Copyright
43. Litigation: Intellectual Property: Trade Secrets
44. Litigation: Intellectual Property: Patent
45. Litigation: Intellectual Property: Trademarks
46. Litigation: Intellectual Property: Copyright
47. Litigation: Intellectual Property: Trade Secrets
49. Litigation: Intellectual Property: Trademarks
50. Litigation: Intellectual Property: Copyright
51. Litigation: Intellectual Property: Trade Secrets
53. Litigation: Intellectual Property: Trademarks
54. Litigation: Intellectual Property: Copyright
55. Litigation: Intellectual Property: Trade Secrets
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75. Litigation: Intellectual Property: Trade Secrets
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78. Litigation: Intellectual Property: Copyright
81. Litigation: Intellectual Property: Trademarks
82. Litigation: Intellectual Property: Copyright
83. Litigation: Intellectual Property: Trade Secrets
85. Litigation: Intellectual Property: Trademarks
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94. Litigation: Intellectual Property: Copyright
95. Litigation: Intellectual Property: Trade Secrets
97. Litigation: Intellectual Property: Trademarks
98. Litigation: Intellectual Property: Copyright
100. Litigation: Intellectual Property: Patent

**Total (must equal 100%)**

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**Your Information Will Be Submitted to a Minimum of 3 Insurance Companies!**
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<th>INDIVIDUAL COVERAGE</th>
<th>COVERAGE FOR MY LAW FIRM</th>
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Name

Firm Name

Address

City/State/Zip

Phone (______) Fax (______) E-mail ________________________________

Fax to: 423.629.1109
Tennessee Bar Journal

Tell someone ‘thank you’
A golden hour

From the time you are a small child on Christmas Eve night you are acquainted with the concept that not all time is equal. The concept of time can be elastic qualitatively as well as quantitatively. You have experienced this phenomenon many times over. As a child, you know that the days before the Christmas holiday are interminable while the Christmas holiday itself seems to fly by in the twinkling of an eye. When you get a little older, that great vacation trip is over before you know it but the hours you spend awaiting the results of an important medical test grind by at an agonizingly slow pace. From a qualitative standpoint, the time you spend on a honeymoon can be considered golden, while the time you spend responding to discovery requests is copper at best, maybe even aluminum! The hour you spend with an infant sleeping on your chest is a treasure while the hour you spend changing the oil and filters on the car is the booby prize. (A few, more mechanically minded among you, may feel otherwise ... a word of advice, don’t admit it to anyone!)

You will notice that there does appear to be a consistent relationship between the quantitative and qualitative aspects of time. Those high quality, special times seem to go by much faster than the more routine, mundane hours. Conversely, those times that are characterized by pain, grief or frustration seem to stretch out much longer than, for example, hours spent in defending a deposition (unless, of course, this particular deposition causes you pain and frustration or brings grief to your client!).

The reason I point out these differences in how one may perceive the passage of time (yes, bear with me here, I actually do have a reason) is to urge you to take one of those precious hours out of your day and make it a golden hour, not only a golden hour for you but for someone else important to you as well. Do this by sitting yourself down somewhere away from the telephones, fax machines, e-mail devices and other such disrupting influences and write a letter. Do NOT type the letter, do not “word process” the letter, do not e-mail or instant-message the letter — write it out longhand. Exert some effort to make it legible but don’t worry if you make a mistake and have to scratch something out; send it just that way. Trust me, the recipient will not mind.

Who is the recipient of this letter? It is someone who has meant something to you in the practice of law. It may be an early mentor; it may be a current or former partner. It could be a former law professor. It may be a judge who taught...

(Continued on page 4)
you lessons of value. It could even be a long-valued worthy adversary whom you have come to respect and admire over the years. I don’t know who this person is … but you do. With the pressures of the profession, as well as the demands of busy personal lives, we all have those persons out there who have been important to our development and meaningful in our lives but who we have failed to adequately recognize and thank. This person is the recipient of your letter. Will this letter be worth the time you take away from other obligations to write it? I suggest that it will. Just think, when was the last time you received a handwritten letter that was more than an obligatory thank you note? If your experience is similar to mine, it probably has been a while. The mere fact that you take the time to write and send the letter will be appreciated. That it conveys information the recipient is pleased to hear will make it an object of real value to that person.

Because what it says is true and is something that you should have taken the opportunity to say earlier will make it valuable to you. Why not take time to write it right now? You have a few spare minutes or you wouldn’t be reading this column! If not now, at least get out your calendar and reserve an hour to write this letter. It does not need to be long … a page and a half of legal pad will suffice. It need not be eloquent. Sincere words of gratitude contain their own eloquence without need of further embellishment.

Within the last 18 months I have experienced the loss of my mother, my father and a very beloved 102-year-old grandmother. The loss of those family members has been painful but, in my mind, the grief associated with each of these losses has been diminished by the fact that in the years before they became ill, I took time out to send each of them a letter telling them how much they had meant to me and thanking them for giving me a platform upon which to build a life. I am comforted by knowing that each of these persons heard directly from me how much I appreciated them. I know the time I spent sending the messages to those important to me was golden. I am confident the time they spent reading those messages was golden to them as well.

Life is too short to go through it without thanking and acknowledging those who have been significant in making it better for you. Take an hour out of your busy schedule and make it a golden hour, both for yourself and for someone else who deserves to have that golden hour. It will be a marvelous gift for both of you. ☛
I’m not dead, Paty writes

In the article, “It’s not just for white men anymore,” in the April 2005 edition of the Tennessee Bar Journal, you included “Cissy” Daughtrey and Selma Cash Paty as “trailblazers.” The quotation marks are yours. I appreciate the designation and being included in that fine group of lawyers.

However, in your next sentence you state, “Nearly all of these women have since died.” May I assure the members of the Tennessee Bar Association that the Honorable Martha “Cissy” Daughtrey, Judge of the 6th Circuit Court of Appeals, and I are very much alive and professionally active.

I know Judge Daughtrey is living because I checked the 6th Circuit Web site to be sure she hadn’t died since my daughter and partner, Pam O’Dwyer, argued a case before a panel of which she was a member a couple of months ago.

I know I am still living because I checked the mirror this morning and still recognized my aging face. If I had died and gone to heaven, the face in the mirror would surely have more closely resembled the picture you included in the article.

— Selma Cash Paty, Chattanooga

Add one more to the roll

Brentwood lawyer P. Robert Philp Jr. wrote in to tell us his name was missing from the Pro Bono Honor Roll, which was published in the February 2005 issue. The Journal regrets the omission. If your name was omitted, let us know!
Compare Tennessee’s numbers
Survey of state lawyer disciplinary systems reported by ABA

A total of 3,725 lawyers were subject to public sanctions for professional misconduct during 2003, according to the Survey on Lawyer Discipline Systems published by the American Bar Association Standing Committee on Professional Discipline. In Tennessee, the survey reports, there were 39 public and 126 private sanctions.

The survey is the most recent annual compilation. It reports statistics on complaints filed against lawyers; dismissed complaints; cases resulting in formal charges; levels of discipline imposed in cases where charges were upheld; action on requests for reinstatement and readmission after discipline; and a range of information about caseloads, case processing and resources of lawyer disciplinary agencies.

“The average caseload per lawyer within Tennessee’s disciplinary agency was 120.”

The survey showed that 119,863 complaints were received in 2003 by disciplinary agencies, which also were addressing 32,422 complaints still pending from the previous year. In Tennessee, for the 16,488 lawyers with active licenses, there were 1,507 complaints received.

More than 62,000 complaints were summarily dismissed because they did not state facts that would constitute professional misconduct, or because the agency otherwise lacked jurisdiction. In Tennessee that number was 336.

Formal charges were warranted in response to 79,150 complaints, and actually were brought during the year against 2,912 lawyers.

In Tennessee, the total lawyer discipline system budget was $2,006,600. Assessed Supreme Court fees accounted for 95 percent of funding, with the rest coming from interest earnings and reimbursement.

The report showed 18 total paid staff, with half of them lawyers. The average caseload per lawyer within Tennessee’s disciplinary agency was 120. To compare, Oklahoma reported 17 cases per lawyer and the 3rd Judicial Department in New York said each of their lawyers handled 543 cases.

Disciplinary authorities from a total of 56 jurisdictions, including 49 states, the District of Columbia and six divisions of the New York State disciplinary system, responded to the survey.

The ABA Standing Committee on Professional Discipline is part of the ABA Center for Professional Responsibility.

The survey is posted on the ABA Web site at http://www.abanet.org/cpr/discipline/sold/sold-home.html.

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Tennessee Youth Court Program honored by national groups

The Tennessee Youth Court Program was honored during a national meeting of youth court leaders recently in Washington. The National Youth Court Center and the Office of Juvenile Justice and Delinquency Prevention recognized the Tennessee program and its coordinator, Anjanette Eash, for work in supporting and promoting youth courts in the state. When Tennessee’s program started in 2001, there were two youth courts in Tennessee. Today there are nine active and three developing programs.

Youth courts allow first-time juvenile offenders to be sentenced by a jury of their peers.
Statewide Mock Trial Competition
Hume-Fogg continues winning streak in mock trial

Nashville’s Hume-Fogg Academic High School repeated its 2004 performance as the best high school mock trial team in the state with a win over Memphis’ St. Mary’s Episcopal School in the 26th annual Tennessee State High School Mock Trial Competition. The team will represent Tennessee at the National Mock Trial Competition in Charlotte, N.C., in May.

Family Christian Academy from Chattanooga, which reigned as state and national champions in 2002 and 2003, took third place, while Bell Buckle’s Webb School took fourth place.

Special recognition is due Danielle Barnes, chair of this year’s competition; Jordan Keller, vice chair; and David Johnson, chair of the YLD’s Mock Trial Long Range Planning Committee. Scorers of the final championship round were TBA President Charles Swanson, YLD President Cindy Wyrick, YLD President-Elect Danny Van Horn, YLD East Tennessee Governor Dan Coughlin and YLD West Tennessee Governor Michelle Sellers. Many others served as judges, scorers and bailiffs, giving up their weekend to assist with the competition.

See a photo of the winning team on page 25 of this issue and a TBJ retrospective of past mock trials on page 22. More photos and full results of the mock trial can be found on TBALink at http://www.tba.org/mock-trial/2005_mocktrial_winners.html

Judicial discipline process now more transparent

Apparently following the lead of the Tennessee Supreme Court in amending lawyer discipline to allow complainant parties to disclose information about complaints filed, the Tennessee Court of the Judiciary has amended its rules of practice and procedure to provide:

“However, nothing in the Rule shall prohibit the complainant, respondent-judge, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under these Rules or from disclosing any documents or correspondence filed by, served on, or provided to that person.”

The rule amendment was effective Feb. 23.
Arlene Eskind Moses, founder of and partner in the Nashville firm of Moses & Townsend PLLC, has been elected to the American College of Family Trial Lawyers (ACFTL) – a select group of the top 100 family law trial lawyers in the United States. Moses has 24 years experience in the practice of matrimonial law and previously served as chair of the TBA’s Family Law Section. She received her law degree from the Nashville School of Law and currently serves as president of the Tennessee Board of Law Examiners.

James Tiller, a graduate of the Nashville School of Law, recently joined the Nashville law firm of Joe Dughman and Associates. Tiller practices civil law in the area of personal injury and workers’ compensation, with an emphasis on nursing home abuse and neglect. The first member of his family to attend college, Tiller came to Nashville in 1990 to pursue a career in country music. He was signed to a record label as a recording artist and songwriter. For several years he divided time between performing and counseling underprivileged children. He decided to pursue a law degree based on his experience working with at-risk youth.

The Memphis firm of Thomason, Hendrix, Harvey, Johnson & Mitchell PLLC announced that associate Craig C. Conley has been elected president of the Young Lawyers Division (YLD) of the Memphis Bar Association (MBA) and that associate attorneys Effie V. Bean and Stacie S. Winkler have been elected to the MBA YLD Board of Directors. Finally, the firm announced the addition of two new associates: Clay Culpepper and Justin Joy, and the return of associate Elizabeth S. Alrutz.

Stites & Harbison recently announced the hiring of four new attorneys in its Nashville office. Tara Mooney Aaron, a graduate of the University Tennessee College of Law, joins the firm’s intellectual property and technology service group. She previously served as law clerk in the University of Tennessee’s general counsel office and as a paralegal for the Sukin Rush Law Group in Nashville. Nicholas Barca joins the firm’s real estate and banking service group after serving as a summer associate with the firm last year. He graduated from the University of Tennessee College of Law as well with a concentration in trial advocacy. Aminah Collick, who also earned her law degree from the University of Tennessee College of Law, joins the firm’s labor and employment service group. Sam Zeigler joins the firm’s creditors rights and bankruptcy service group after serving as a summer associate with the firm last year. He is a 2004 graduate of Vanderbilt Law School.

The Memphis-based law firm of Krivcher Magids PLC recently named Geoffrey M. Hirsch as a member of the firm. Hirsch joined Krivcher Magids in 1998 as an associate and has focused on representing clients in commercial transactions. He earned his law degree from the University of Memphis School of Law in 1998.

Eric W. Reecher was recently named a shareholder and principal in the Bristol law firm of Elliott Lawson & Minor PC. Reecher began practicing with the firm in 1998. His practice includes labor and employment law, civil litigation and appeals, business consultation and transactions, corporate law, construction law and creditors’ rights law.

Compiled by Stacey Shradar and Sharon Ballinger.
Courtney L. Wilbert recently joined Colbert & Winstead PC of Nashville after receiving her law degree from the University of Tennessee. While in law school, she served as a member of the law review and speaker’s series. Wilbert will focus her practice in civil litigation and employment law.

The U.S. Environmental Protection Agency (EPA) has appointed Justin P. Wilson, a partner in the Nashville law firm of Waller Lansden Dortch & Davis PLLC, to a two-year term as a member of the Environmental Financial Advisory Board (EFAB). At Waller Lansden, Wilson practices in the areas of environmental law and government regulation. He received his law degree from Vanderbilt University in 1970 and his master of laws in Taxation from New York University in 1974. He is a former Tennessee commissioner of environment and conservation and deputy governor for policy. In addition to serving at his firm, he currently is an adjunct professor at the Vanderbilt University Law School.

Hayden Lait has been elected president of the American College of Civil Trial Mediators — an organization dedicated to improving ethical and professional standards of mediation practice, fostering the growth of alternative dispute resolution systems throughout the country and conducting advanced ADR educational programs.

V. Michael Fox with the Nashville firm of Bruce, Weathers, Corley & Lyle PLLC has been awarded an AV rating by Martindale-Hubbell. Fox is a 1987 graduate of the Nashville School of Law and focuses his practice on the defense of alcohol-related vehicular crimes.

The law firm of Miller & Martin has announced that four of its attorneys have been given member status. Colette Koby serves in the labor & employment group in the firm’s Nashville office. She graduated with honors from Tulane Law School in 1995. The other three attorneys work out of the firm’s office in Chattanooga. Tom Hayslett concentrates his practice in both real estate development and leasing and the commercial sale of goods. He received his law degree from the University of Georgia in 1997. Travis McDonough practices in the areas of corporate officer and shareholder disputes, white-collar criminal defense, personal injury claims and securities arbitrations. He earned his law degree from Vanderbilt University in 1997. Maury Nicely concentrates his practice in the areas of labor law and employment litigation. He received his law degree from the University of Georgia in 1997.

The Knoxville law firm of Kramer, Rayson, Leake, Rodgers & Morgan LLP recently announced the addition of two new partners: Francis L. Lloyd Jr. and Amanda M. Belew.

Cynthia J. Cutler, an attorney in the Nashville office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, recently became a Tennessee Supreme Court Rule 31 Listed General Civil Mediator. Cutler is an experienced employment litigator, having represented both employers and employees in numerous matters in Tennessee and Kentucky.

The Chattanooga-based law firm of Shumacker Witt Gaither & Whitaker PC has named J. Matthew Martin and Scott Shaw as shareholders. Martin, who earned his law degree from the University of Georgia in 1998, joined the firm that same year. He is a member of the firm’s business practice group. Shaw earned his law degree from Georgia State University in 1997 and joined the firm in 1998. Prior to relocating to Chattanooga, Shaw practiced with Finn & Hurtt in Dalton, Ga. His practice focuses primarily on business-based civil litigation. He also is the newly elected president of the Chattanooga Bar Association’s Young Lawyers Division.

(Continued on page 10)
The firm also has added two new associates to its practice. **Michael D. Treacy** brings more than 20 years’ experience to the area of corporate and real estate law. He formerly served as vice president and general counsel for the New York City-based RD Management Corporation, the nation’s fifth largest private shopping center owner. **Thomas C. Greenholtz** joins the firm having previously worked for three years as a law clerk to the Hon. William M. Barker of the Tennessee Supreme Court and as an associate member of Summers & Wyatt PC. In addition to his firm duties, Greenholtz serves as adjunct professor of political science at the University of Tennessee at Chattanooga, teaching classes in constitutional law and civil liberties.

**Saul C. Belz**, an attorney with Glanekler Brown PLLC, was recently listed as a Rule 31 mediator. Belz concentrates his practice in the areas of business litigation, commercial disputes, complex litigation, appeals and employment law and has over 30 years of experience in the law. Belz received his law degree from Vanderbilt University in 1967.

The Knoxville law firm of Wimberly Lawson Seale Wright & Daves PLLC has named **Patty K. Wheeler** as a member of the firm. Wheeler received her masters and doctorate degrees from the University of Oklahoma and a law degree from the University of Southern California. She joined the firm in April 1999 and focuses her practice in employment law, alternative dispute resolution, premises liability, education law, products liability and commercial law.

**Baker, Donelson, Bearman, Caldwell & Berkowitz** is pleased to announce that U.S. Ambassador and former Senate Majority Leader **Howard H. Baker Jr.** is re-joining the firm, where he will focus his practice on public policy and international matters. Baker recently returned to the United States after serving as ambassador to Japan since June 2001.

The Nashville office of Bass, Berry & Sims recently announced that **Julie N. Jones** and **C. Dewees Berry IV**, both members of the firm, have been named Rule 31 general civil mediators by the Tennessee Alternative Dispute Resolution Commission. Jones will concentrate in general commercial law mediations. She received her law degree from the University of Tennessee, where she was editor-in-chief of the *Tennessee Law Review*. Berry will concentrate in real estate mediations while advising clients concerning zoning, planning, lease disputes, boundary, easement, restrictive covenant and land use issues. He received his J.D. from Vanderbilt University and serves as an instructor at the Nashville School of Law.

The Nashville office of Waller Lansden Dortch & Davis PLLC has named seven new members. **Jeffrey M. Clark**, who earned his law degree from the University of Memphis in 1994, practices in the area of commercial real estate and general corporate law. **Stephanie Jennings Edwards** focuses her practice in the areas of estate planning, tax law, probate litigation and business succession planning. She earned her law degree in 1992 from the University of Tennessee College of Law and a master of laws in taxation in 1998 from the University of Florida. **Karla Hyatt** practices tax law at the firm, previously serving as law clerk for Magistrate Judge William J. Haynes Jr., now U.S. District Judge for the Middle District of Tennessee. She received her law degree in 1996 from Tulane University and her master of laws in taxation in 1998 from the University of Florida. **Michael S. Mizell**, a 1997 graduate of Samford University School of Law, concentrates his practice in the areas of environmental, land use, utilities and immigration law. **Richard L. Pensinger** practices commercial real estate law. Prior to joining the firm, he was an associate with Dinsmore & Shohl LLP in Nashville. He graduated from Vanderbilt University Law School in 1997. **M. Sean Sullivan** practices in the areas of qualified retirement plans, welfare benefit plans, executive compensation and ERISA litigation. He received his law degree in 1997 from the University of Mississippi and his LL.M. in taxation from New York University in 1998. **Mark H. Wildasin**, a 1991 graduate of Vanderbilt University Law School, focuses his practice in intellectual property, financial services and antitrust litigation. Prior to joining the firm he was a judicial clerk to the Hon. Thomas A. Higgins, U.S. District judge for the Middle District of Tennessee.
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Actions from the Board of Professional Responsibility

Reinstated

The following attorneys have been reinstated to the practice of law after complying with Rule 21 as required by the Board of Professional Responsibility. All were suspended on Sept. 7, 2004.

Allis Dale Gillmor and Floyd Nolton Price, Nashville; Lisa B. Harris, Cookeville; William H. Thomas, Memphis.

Out of State: Christopher M. Caputo, Boston; Alexander M. Clem, Orlando; Ann Ingram Dennen, Huntsville; Christopher Hampton Hawks, Jackson Hole; Tonya O. Miner, Tulsa; Kerry Lee Priscock, Rockwell, Texas.

On Feb. 18, the state Supreme Court reinstated the law license of Albert F. Officer III on condition that he (1) abide by the provisions of a Tennessee Lawyers Assistance Program contract for five years, (2) comply with a Board of Professional Responsibility approved law practice monitoring/mentoring agreement for five years and (3) complete a course of study in law practice management. The order also required Officer to pay the costs of the reinstatement proceeding. Officer had been suspended on June 5, 2001, for three and one half years retroactive to April 7, 1999.

Disbarred

The Supreme Court of Tennessee disbarred Brentwood attorney Thomas L. Whiteside on March 4 for abandoning his law practice, failing to perform services, neglecting legal matters, causing serious injury to his clients and deceiving clients by taking funds under false pretenses. A petition for discipline was filed on June 28, 2004. The Board of Professional Responsibility convened a hearing on Nov. 19 and issued its judgment on Dec. 15. A disbarred attorney may not apply for reinstatement for at least five years and then must show by clear and convincing evidence that his reinstatement will not be detrimental to the integrity and standing of the bar or the administration of justice, and will not be detrimental to the public interest.

Suspended

On Feb. 23, the state Supreme Court suspended Memphis attorney Emilia Green Ballentine from the practice of law for one year effective March 6. Ballentine had been suspended previously on two separate occasions for failure to respond to a complaint of misconduct and failure to comply with continuing legal education requirements. On Nov. 3, 2003, the Board of Professional Responsibility filed a petition for discipline alleging that Ballentine continued to practice law at the Suskind Susser firm while her law license was in a continuous state of suspension. The board found that Ballentine had violated the Code of Professional Responsibility and the Tennessee Rules of Professional Conduct by engaging in the unauthorized practice of law for more than a year. The board also found that failing to update her address with the board and evading properly addressed certified mail and service of process were aggravating circumstances in the case. Any petition for reinstatement must show that the Supreme Court has dissolved the two previous suspension orders. Ballentine must also pay all costs associated with the disciplinary process.

Nashville attorney Floyd Nolton Price was indefinitely suspended from the practice of law by the Supreme Court on March 14. Price had failed to respond to three complaints of misconduct and failed to comply with a contract he had entered into with the Tennessee Lawyers Assistance Program. The order precludes Price from accepting new cases effective immediately and requires that he discontinue representing current clients within 30 days. He is to cease using any indicia of lawyer, legal assistant or law clerk and is not to maintain a presence where the practice of law is conducted. In addition, he must notify all clients, co-counsel and opposing counsel of the suspension order and return to all clients any papers or property to which they are entitled. Price may request dissolution or modification of the suspension for good cause.

Censured

On Feb. 11, the Board of Professional Responsibility censured Nashville attorney Clark L. Shaw for failing to promptly act on a client's request for a restraining order, failing to promptly correct a problem with an order that was contrary to the court's original order and failing to provide a client with a requested itemized bill for services. The board found that Shaw's neglect and failure to communicate with his client violated rules 1.3, 1.4, 1.5(a)(b) and 8.4(d) of the Tennessee Rules of Professional Conduct. The censure declares his actions improper but does not limit his right to practice law.

Christine Zellar Church, a Clarksville attorney, was publicly censured on March 7 for making unclear statements and failing to clarify facts regarding the employment history of the complainant. The BPR found that Church's actions violated rule 8.4(c) of the Tennessee Rules of Professional Conduct. Disciplinary actions are compiled by Stacy Schrader from information obtained from the Board of Professional Responsibility of the Tennessee Supreme Court.
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Running out of time?
Beware of the one-year statute of limitations for statutory penalties

By Jonathan O. Steen
Few things give lawyers more pause for concern than statutes of limitation. A potentially often overlooked statute of limitation is the one-year limitation for actions for statutory penalties, Tenn. Code Ann. §28-3-104(a)(4). This statute of limitation can be a trap for the unwary, because its application is not well defined under Tennessee law.

The Tennessee Court of Appeals has stated that an appropriate way to describe civil liability created by statute is “statutory liability.” Statutory liability can mean a number of things. A statute can establish a standard of care in a negligence action (e.g., motor vehicle statutes). A statute can identify conduct that gives rise to civil liability, and even include specific remedies for the conduct (e.g., Tennessee Consumer Protection Act of 1977). A statute can prescribe remedies for a common law right already in existence (e.g., Tenn. Code Ann. §22-4-108 – provides a remedy for retaliatory discharge due to absence from employment for jury duty). A statute can also provide for a penalty for the violation of the statute that is recoverable in a civil action (e.g., forfeiture or penalty for violation of the usury statutes). While all of these types of statutes may create a basis for a civil action, the specific nature of the civil action determines the appropriate statute of limitation to apply.

Many statutes creating a basis for a civil cause of action have their own statutes of limitation (e.g., Tennessee Products Liability Act of 1978). Many statutes that form a basis for a civil action, however, do not contain specific statutes of limitation. This creates a potential problem in cases where the civil action is one for a statutory penalty. In such cases, the one-year statute of limitation found in Tenn. Code Ann. §28-3-104(a)(4) for actions for statutory penalties applies, despite the appearance at first glance that a longer statute of limitation may apply, such as the three-year limitation for damages to personal or real property, a six-year statute of limitation for breach of contract, or even the ten-year statute of limitation for actions for which a specific statute of limitation has not been expressly provided.

**When is a suit under a particular statute an action for a statutory penalty?**

The critical inquiry in determining whether the Tenn. Code Ann. §28-3-104(a)(4) one-year limitation applies is ascertaining whether a suit under a particular statute is an action for a statutory penalty. The Tennessee Supreme Court, in Woodward v. Alston, 59 Tenn. 581 (1873), stated that a “statute penalty may be defined as a penalty fixed by statute as a punishment for the violation of some provision of law.” The Woodward court addressed the issue of whether the one-year time of limitation in Tenn. Code Ann. §28-3-104(a)(4)’s predecessor barred a statutory action to recover fees charged by court clerks for enrollments not made. The court squarely addressed the question of whether the statutory action brought under Tenn. Code 1851, sec. 3228 was a “statute penalty.” By way of example, the court referred to “the various clauses of our Code under the head of penalties,” and stated that “penalties are recovered by a proceeding in the nature of a civil action, and differ in this from criminal prosecutions.” After analyzing the language of Tenn. Code 1851, sec. 3228, the court concluded “that while the failure of the clerk to enroll the case was official delinquency, subjecting him to punishment, this proceeding is not for the purpose of punishing him, but simply to recover the money in his hands which, by his failure to perform the service, belongs not to him, but to the county trustee for public purposes, — so this proceeding is not to recover a statute penalty.”

(Continued on page 16)
Statutory penalties (Continued from page 15)

**Statutes found to be basis for statutory penalties**

To give additional context to the meaning of “action for statutory penalty,” examples of actions for statutory penalties are found in McCreary v. First Nat. Bank, 70 S.W. 821 (Tenn. 1902) and Brown v. Cumberland Tel. & Tel. Co., 181 F. 246 (C.C.W.D. Tenn. 1909). In McCreary, the plaintiff filed an action in chancery court to enforce the National Banking Act penalty for knowingly collecting usurious interest. Section 5198 of the National Banking Act provided that knowingly collecting usurious interest “will be deemed a forfeiture of the entire interest,” and allowed the person by whom the usurious interest was paid to bring a civil action to recover “twice the amount of interest.” The Tennessee Supreme Court, in acknowledging that the federal statute under which the plaintiff brought the action was a penal statute, quoted the U.S. Supreme Court for the holding that the remedy given by the statute for the usury is a penal suit. To that the court further held that the penalty where the sole question is the guilt or innocence of the accused.2

The McCreary court further held that laws prescribing penalties and forfeitures (such as the National Banking Act) are strictly construed, and, in the absence of any authority in the act for interest on the penalty, courts cannot superadd it.

In Brown, the U.S. Circuit Court for the Western District of Tennessee applied the predecessor to Tenn. Code Ann. §28-3-104(a)(4)'s one-year statute of limitation to a suit “to recover the sum of $100.00 per day as a penalty provided by the Tennessee statute for an alleged discrimination of the defendant in refusing to furnish the plaintiff a telephone.” The Brown court, finding the one year statute of limitation applicable, held that the action, which by its express terms sought to recover a penalty provided by statute, was one for statutory penalties within the definition used by the Tennessee Supreme Court in Woodward.

**Statutes found not to be basis for statutory penalties**

Examples of actions held not to be for statutory penalties include Chattanooga Foundry & Pipe Works v. Atlanta, 27 S. Ct. 65 (1906); Doty v. Federal Land Bank, 114 S.W. 2d 953 (Tenn. 1938); and Smyrna v. Ridley, 730 S.W. 2d 318 (Tenn. 1987). In Chattanooga Foundry, the U.S. Supreme Court upheld the Sixth Circuit Court’s refusal to apply Tenn. Code Ann. §28-3-104(a)(4)'s predecessor one year statute of limitation to a civil action brought under the federal antitrust law. The U.S. Supreme Court held that the action for threefold damages, authorized by one “injured in his business or property” by the Antitrust Act of Congress, where one was led, by reason of an illegal arrangement between the members of a trust or combination formed in violation of the Antitrust Act, to pay an excessive price for iron water pipe, is not a statutory penalty and the limitation for such action is ten years under the predecessor to Tenn. Code Ann. §28-23-110.

The Tennessee Supreme Court, like the U.S. Supreme Court, adopted the reasoning of the Sixth Circuit Court of Appeals in determining whether an action was one for a penalty in Doty. Doty involved a suit under the provision of Tenn. Code Ann. §35-508 (now Tenn. Code Ann. §35-5-107) authorizing damages for failure of an officer or other person to comply with Tenn. Code Ann. §35-509 (now Tenn. Code Ann. §35-5-107) in the sale of lands at foreclosure. In holding that the action was not one to recover a statutory penalty, rather one to recover damages, the Doty court relied on the Sixth Circuit’s opinion, quoting:

In City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23, 64 L.R.A., 721, Circuit Court of Appeals for the Sixth Circuit, in an opinion by Judge Lurton, it was held that an action under section 7 of the Antitrust Law, 26 Stat., 210, 15 U.S.C.A., section 15 note, providing that “any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States . . . and shall recover three fold the damages by him sustained,” is not an action for a penalty or forfeiture, within Rev. St., section 1047, 28 U.S.C.A., section 791, prescribing a limitation of five years for a “suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States,” but one for the enforcement of a civil remedy given by statute for a private injury, compensatory in its purpose and effect; the recovery permitted in excess of actual damages being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the state (Tennessee) in which it is brought. The court held the action to be one to enforce a statutory liability, and within section 4473 of Shannon’s Code, section 8601, Code of 1932, which prescribes a limitation of ten years for certain actions, and in “all other cases

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More recently, the Tennessee Supreme Court held in Smyrna that an action to enforce the sanctions imposed by Tenn. Code Ann. § 12-4-102, is controlled by the ten-year statute of limitation in Tenn. Code Ann. §28-3-110(3), and is “not one for a statutory penalty governed by the one-year statute, Tenn. Code Ann. §28-3-104(a).” The Smyrna case highlights the difficulty interpreting whether an action brought under a statute is one for a penalty or is simply one for statutory liability. In considering the applicable statute of limitation for the action in Smyrna, the Tennessee Supreme Court noted that the Chancellor held that the six-year statute of limitation, Tenn. Code Ann. §28-3-109(3), was applicable; the majority of the Court of Appeals held that the one-year statute of limitation, Tenn. Code Ann. §28-3-104(a)(4), was the proper one; and Judge Koch was of the opinion that no statute of limitation applied.

Examples of statutes that merit inquiry

The potential problem of determining when the one-year statute of limitation for statutory penalties applies is not as uncommon as one might think. The following examples of statutes create civil liability with treble damage or penalty provisions, but do not contain or refer to any specific statutes of limitation: Tenn. Code Ann. §§ 8-50-603 (employee is entitled to treble damages and attorneys fees if employer disciplined or threatened to discipline or otherwise interfered with employee’s right to communicate with an elected official); Tenn. Code Ann. §43-28-312 (action for knowingly and intentionally cutting timber from the property of another provides for treble damages); Tenn. Code Ann. §46-2-411 (court must award treble damages when a prevailing party proves fraud relative to a sales contract for cemetery merchandise and services); Tenn. Code Ann. §47-11-107 (action for violation of the Tennessee Retail Installment Sales Act provides for liquidated damages); Tenn. Code Ann. §47-29-101(d) (court must award as damages treble the face amount of a check or draft when the person who executed and delivered the check possessed fraudulent intent in not paying the holder the full amount within 30 days); Tenn. Code Ann. §62-37-105(e) (a person who engages in the construction or home improvement business without a license may be subject to treble damages). Some of these examples have had courts address the issue of an appropriate statute of limitation, but most have not.

Ideally, the legislature, in creating civil liability by statute, should either create a specific statute of limitation within the statute or specifically refer to an existing statute of limitation applicable to the statute. Even if the legislature were to provide such guidance in future legislation, there are many statutes already in existence that create civil liability without specifying a limitation of time within which to bring the action, and do not provide clear guidance as to whether they create statutory liability or an action for a statutory penalty. In these cases, one should take care to determine that the claim is not limited to the one year statute of limitations in Tenn. Code Ann. §28-3-104(a)(4) and inadvertently let a statute of limitation pass.

Suggestions for determining whether Tenn. Code Ann. §28-3-104(a)(4) applies

There are several ways to analyze a statute creating civil liability in making the determination of whether Tenn. Code Ann. §28-3-104(a)(4) applies. First, consider how the statute is designated by its own language (e.g., as creating civil liability, or as prescribing a penalty that can be recovered in a civil action). Look not only to the caption of the statute but also to the language itself to see whether

(Continued on page 20)
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For more information about the program or to register, visit the TBA website at https://www.tba.org/onsiteinfo/solosmall_2005.html

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the term penalty, forfeiture or any similar term is found in the language of the statute. If the language is written in terms of a penalty, the more likely an action to recover the penalty would be considered an action for a statutory penalty. If language such as civil liability or terms such as damages are used, the more likely an action brought under the statute is one for statutory liability and not one for a statutory penalty. The legislative history of the statute in question may also provide guidance or at least clues as to whether statutory liability or a statutory penalty was contemplated by the legislature in creating the statute.

Second, consider whether the statute fits the definition of a statute penalty set forth by the Tennessee Supreme Court in Woodward. That is, does the statute appear to be penal in nature, “a penalty fixed by statute as a punishment,” or does it simply seem to provide a remedy of damages for a violation of a statutory or common law cause of action? Put another way, a statute penalty provides the basis for an action specifically to recover a penalty; statutory liability provides the basis for an action for a violation of the statute or other common law right.

Third, consider the damages or remedy prescribed by the statute. Is it more akin to a penalty, forfeiture or liquidated damages, or is it more similar to compensatory damages? Look to the explanation of the difference between an action for a penalty or forfeiture on one hand and one for the enforcement of a civil remedy given by statute for a private injury on the other in Chattanooga Foundry adopted by the Tennessee Supreme Court in Doty for guidance in making this determination.

Fourth, consider whether a new right and remedy are created by the statute, or whether a statutory remedy is created for an existing common law right. A statutory remedy created for an existing common law right is far less likely to be considered a statute penalty. Additionally, if the right of action existed at common law, consider whether the action is one in which pre or post judgment interest is typically allowed. Since interest cannot be given for a statute penalty without specific authorization in the statute itself, the action will likely not be one for a statute penalty if interest has been allowed under common law.

Fifth, review the cases involved in interpreting or applying the statute under consideration. Consider whether the cases construed the statute to be a penalty or have rather expressed the remedies pursuant to the statute as compensatory damages. Check to see if the statute has a counterpart in other jurisdictions, and whether courts in other jurisdictions have interpreted the statute to be a penalty or otherwise.

Finally, look at the gravamen of the action. Is the substance of the action a tort, breach of contract, or other traditional civil wrong, or is the action simply one to collect a penalty for an act or omission prohibited by the statute?

This evaluation is by no means exhaustive, but at least provides a basis for ascertaining whether Tenn. Code Ann. §28-3-104(a)(4)’s one-year statute of limitation applies to a claim based on a statute. By making oneself aware of the potential problems created by the one-year statute of limitation prescribed in Tenn. Code Ann. §28-3-104(a)(4) and taking steps at the earliest possible time to determine the applicable time limitation to a claim based on a statute, one can better avoid the pitfalls of a time-barred claim.

**Notes**

2. McCready, 70 S.W. at 823 (citations omitted).
4. 114 S.W. 2d at 954-55 (emphasis added).
5. Tenn. Code Ann. §12-4-102 is captioned “Penalty for unlawful interest” and provides:

Should any person, acting as such officer, committee member, director, or other person referred to in §12-4-101, be or become directly or unlawfully indirectly interested in any such contract, such person shall forfeit all pay and compensation therefore. Such officer shall be dismissed from such office the officer then occupies, and be ineligible for the same or a similar position for ten (10) years.
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Mock trial, public service, highlight Young Lawyers’ endeavors

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 how the Journal kept up with the Young Lawyers Division.

Students participating in the Tennessee State High School Mock Trial Competition were first pictured in the Journal in the '80s — they've now had time to finish college, law school, a clerkship or two, join a firm, make partner.

The competition began in 1978 — run by the University of Tennessee's Public Law Institute — but coverage in the Journal didn’t get serious until the competition had been taken over by the TBA Young Lawyers. In 1988, the state championships made the Journal’s cover, followed by repeat appearances in 1989, 1990 and 1993. (Was it only a coincidence that the young lawyers got its first staff member around that time, the same person who also produced the Journal?) There has been a story about the young lawyers’ flagship event every spring since then.

In 1993, the Tennessee Young Lawyers Conference (TYLC) changed its name to the current Young Lawyers Division (YLD).

Then-TYLC President Bill Haltom summed up the point of the mock trial in the May/June 1988 issue: “The mock trial teaches young people about how our system of justice works. If the students do become lawyers, they certainly would have a leg up. But any profession they go into, the mock trial experience will give them a greater respect and understanding for the law and lawyers.”

Seventeen years later, Haltom is still singing the praises of this program and others, as he prepares to take over as TBA president this June.

Haltom was correct that these students would have a leg up — just having met so many judges and seeing the process in action couldn’t hurt. In 1989, mock trial chair Mary LeMense told the students that they “would have argued this case before justices from the Tennessee Supreme Court, the Middle Section of the Court of Appeals, the Eastern Section of the Court of Appeals and the Court of Criminal Appeals. Very few attorneys have had the opportunity to argue cases in front of judges like these.”

What do we win?

Teams that win now receive a large silver bowl to keep and a traveling trophy that they retain until the next year’s competition. But back in the early days, impressive and expensive trophies were not part of the budget. In the March/April 1989 issue, mock trial chair LeMense

Supreme Court Justice William J. Harbison presides over the final round of the competition in 1991. In a 1989 TBJ he is called “a major force in getting the competition started. He said he ‘could not think of a better way for high school students to learn about the judicial system.’”

The Race Gestae, an annual 5k run and one-mile walk, is traditionally run at the TBA annual convention and sponsored by the YLD. This auspicious group of runners includes incoming TBA President Bill Haltom, at left, Chief Justice Frank Drowota, John Harber, two very fast runners with trophies who we can’t identify, and TBA Executive Director Allan Ramsaur, who was TYLC president-elect at this 1984 Race Gestae.
explained: “When we began the competition about 10 years ago, we didn’t have the money to buy a nice trophy for the winners. So Allan Ramsaur, who is in Nashville now (as executive director of the Nashville Bar Association), went up to his attic and found this trophy that he had won in some sort of forensics competition in high school or college and gave it to us to use for the mock trial. Now we call it the Rammy.”

Ramsaur, who was TYLC president in 1985-86 and is now the executive director of the Tennessee Bar Association, clarifies the trophy’s history: “I was ‘Member of the Year’ in my high school fraternity.”

The Rammy served the group well, but former YLD Director Betsy Hilt remembers that in the early ’90s “someone in the YLD had the gumption to ask Westlaw for funding to purchase a traveling trophy,” which Westlaw did.

**Fat Elvis and manslaughter**

In 1997, the National High School Mock Trial Championship was held in Nashville. By this time, the YLD had a coordinator, Betsy Hilt, who organized the national meeting along with chair Wade Cowan, Linda Willis, Reese Willis, Karyn Bryant, Jackie Dixon, Rebecca Wells-Demaree, Todd Panther and Glenn Walter. The Tennessee Young Lawyers showed the rest of the country a little bit of Southern charm by having a “Fat Elvis” entertain at a reception. This was fitting since the case that year was about the fictional murder of Elvis.

Each year, a case is developed for the local and state contests by the mock trial chair. It seems no subject has been too hot or too controversial to cover. Topics of cases have been alcohol and drug abuse, teen suicide, mental illness, the rights of AIDS victims, arson of a religious cult’s property, hazing that resulted in involuntary manslaughter, Battered Woman’s Syndrome as a defense, the beating death of a 49-year-old man, and a science project that blew up in a student’s face.

**Drug abuse, parolees and other projects**

Coverage has not all been about the mock trial, though. In 1972, Richard P. McCully outlined the new drug abuse education program, an offshoot of a program done by the Columbia Bar Association for Law Day 1971. “A team consisting of a young lawyer and a medical doctor attend a pre-arranged school assembly and discuss the legal and medical consequences of drug abuse,” he wrote. “The intent of the program is to objectively lay out all of the facts, both legal and medical, to answer questions, and to let the students make their own evaluation with respect to their feelings about drugs.”

In 1974, James N. Bryan Jr. wrote (Continued on page 24)
Young lawyers’ endeavors

(Continued from page 23)

about the need for volunteers to help with the National Volunteer Parole Aid Project, a local version of which was sponsored by the TYLC. “These volunteer projects offer every citizen the opportunity to extend the hand of friendship to an ex-offender and in so doing drastically reduce his chances of committing another offense.”

Training ground for future leaders

The YLD, recognized as the bar’s public service arm, has been involved in a lot of projects, many of which the Journal has publicized. In 1990, a feature story, “The Award-winning Tennessee Young Lawyers Conference,” by Julie R. Gamble (now TBJ contributing writer Julie Swearingen) covered all the projects that were underway that year, many of them winners of national awards. That year the TYLC

• Produced the first Tennessee Ethics Handbook, which compiled Formal Ethics Opinions, the Code of Professional Responsibility and Tennessee’s Rules of Disciplinary Enforcement, all with extensive indexes.
• Produced a Court Directory listing the Circuit, Chancery and General Sessions Court clerks and judges of every county in the state. The Journal published a shortened, pull-out reference in the July/August 1989 issue.
• Produced a Local Rules pamphlet, The Quarterly newsletter, Bridge-the-Gap seminar, and carried out projects involving hunger relief, a community handbook regarding AIDS and the law, and a seminar for attorneys and physicians.

“Being a part of the TYLC is being a part of a dynamic and vital organization committed to service to both the public and the profession,” TYLC President Randy Noel said in that article. “This is an exciting time in the TYLC’s history.”

Noel, who later served as TBA president, wasn’t the only person touting the group. Then-president Ronald Lee Gilman said, “The TYLC contributes the greatest amount of energy and effort to the bar association, especially in the area of public service, and the Young Lawyers Conference is certainly a training ground for future leaders of the Tennessee bar and the legal profession.”

That certainly was true in the case of Gilman, who was TYLC president in 1978-79. Today he is a judge on the 6th Circuit U.S. Court of Appeals.

If funding is ever an issue and if the mock trial competition is in danger of extinction, those making the money decisions need only to flip back to the March/April 1989 Journal and read student Robert Edwards’ take on the experience: “At first I thought lawyers were just out for the money, but I don’t anymore.”

It’s hard to buy that kind of PR, folks.

— Suzanne Craig Robertson

Howard Vogel waits with daughter Caroline in 1993 for the announcement of what teams will be in the final round of the state mock trial. Vogel was later a TBA president.
We take civics education seriously at the Tennessee Bar Association.

We know that a public educated in the history and workings of our legal system is vital to our country’s future — and to the future of the legal system itself. For our country to carry on the traditions that have made it great — and our legal system a model for the world — we must have a public that understands its rights and responsibilities and how they are tied to this system.

That’s why the TBA supports a strong lineup of programs across the state to teach civics in our schools and offers resources through our TnCivics web site to help everyone learn these important lessons.

One of the TBA’s biggest education efforts is the annual Tennessee State High School Mock Trial Competition. Since its founding by the Young Lawyers Division in 1980, this program has grown so that today more than 100 teams compete in district matches with the goal of qualifying for the state competition. This year’s winning team (shown above) is from Nashville’s Hume-Fogg Academic High School.

Your support of the Tennessee Bar Association makes all of this possible.

Visit the Tennessee Bar Association’s TnCivics web site at www.tba.org/tncivics
Learn more about the Mock Trial competition at www.tba.org/mocktrial
The ‘Brides in the Bath’ case
The other crimes of George Joseph Smith

By Donald F. Paine

While Brits were dying on Flanders fields, George Joseph Smith was on trial for his life at the Old Bailey from June 22 through July 1, 1915.

George and I share a common bond in our respective chequered criminal careers: we served time in reform school. He was released in 1888, I in 1957.

Following reformation he adopted a more unusual lifestyle than even I. He was married eight times without divorce. But three of his “wives” died during honeymoons by drowning in bathtubs:

- June 13, 1912, Bessie Mundy at Herne Bay (east of London on the Thames Estuary),
- Dec. 12, 1913, Alice Burnham at Blackpool (north of Liverpool on the Irish Sea), and
- Dec. 18, 1914, Margaret Lofty at Highgate (in London).

It is little wonder that this trial has been dubbed the “Brides in the Bath” case.

Facts common to each death included these:

1. Smith knew brides briefly.
2. He arranged by wills or insurance policies to benefit from bridal death.
3. He took brides to doctors and described mysterious symptoms.
4. He brought groceries to the honeymoon hotels and
5. He rented bathtubs if the hotel was without.

Smith was put to trial for murdering Bessie Mundy. He did not lack for able counsel. Marshall Hall was the Bob Ritchie amongst barristers, the sort of lawyer you covet if you’re guilty as sin.

The crucial evidence issue at trial was whether the jury
should hear about the suspicious Burnham and Lofty drownings. The judge ruled those admissible to prove two noncharacter issues: absence of mistake and common scheme or plan. These avenues for admissibility are available today under Tennessee and Federal Rules 404(b).

How did he do it? Probably by walking into the bathroom while his trusting bride was bathing, grabbing her by the ankles, and lifting her until her submerged head could no longer draw breath. Do not try this at home! The jurors in the Smith trial tried it with a policewoman in swimsuit during deliberations (under what procedure is a mystery to me), and the officer almost drowned.

After 22 minutes the jury convicted. The appeal was orally argued and decided on July 29. George Joseph Smith was strung up at 8 a.m. on Friday, Aug. 13, 1915. This is a sterling example of swift British justice.

“Do not try this at home!”

Donald F. Paine is of counsel to the Knoxville firm of Paine, Tarwater, Bickers, and Tillman LLP and a frequent contributor to the Tennessee Bar Journal.
The tort of negligent infliction of emotional distress suffers from immaturity and split personality disorder. It suffers from immaturity because it is relatively new to Tennessee jurisprudence. It suffers from split personality disorder because it is really three different torts rolled into one. Let’s try to solve these problems through linguistic therapy.

Historically a person who suffered a purely emotional injury as a result of the negligence of another was denied a recovery. The law did not want to permit recovery for “temporary” harms and there was a concern that the injuries could be faked. There was also concern that there would be a flood of litigation if recovery for purely emotional injuries was permitted. The injustice of this position resulted in exceptions to the general rule. For example, a person could recover for emotional injuries if the injury arose when the person was “in the zone of danger” of physical harm or if there was a “physical manifestation” of the emotional injury.

In recent years, however, the Tennessee Supreme Court has recognized that emotional injuries can be real and, if produced by someone else’s negligence, compensable. The first case to squarely address the issue was Camper v. Minor, a lawsuit brought by a man who was involved in a wreck where a teenager was killed. Mr. Camper had no real physical injuries, but alleged that the incident caused post traumatic stress disorder.

The Supreme Court advanced the law and recognized his right to seek damages. It held that Camper needed to prove not only negligence but also that his injuries were “serious” or “severe.”

“In recent years, the Supreme Court has recognized that emotional injuries can be real and, if produced by someone else’s negligence, compensable.”

The court defined those terms as meaning an emotional injury such that “a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” The court required that the claim be supported by expert medical or scientific proof.

Thus, the first type of case under the “negligent infliction of emotional distress” umbrella arises when the person brings only a claim for emotional injuries. This is what the court came to call a “stand alone” case.

The reason we needed a “stand alone” label was because of the claim brought by Ron Amos. Amos proved that Vanderbilt University failed to warn his wife Julie of her potential exposure to HIV so that she might take appropriate measures to protect third parties. Julie had gotten a blood transfusion and, unknown to her, contracted HIV. The illness came to light only after the Amos’s daughter died of an AIDS-related virus secondary to HIV contracted in utero. Julie later died of AIDS. Ron was exposed to but never contracted HIV.

Ron sued for the death of his wife, wrongful birth, and his emotional distress. The Court ruled that Ron did not have to support his emotional distress claim with expert medical or scientific proof because his emotional injuries were “parasitic,” i.e. they arose as a “consequence of negligent conduct.
that result[ed] in multiple types of damages. A verdict in Ron’s favor was affirmed.

There is one other type of “negligent infliction of emotional distress” claim: “bystander” recovery. This cause of action, created in the case of Ramsey v. Beavers, which arose when the plaintiff saw his mother get hit by a car. To win this type case the plaintiff must not only prove that the defendant’s negligence caused the death or injury to third person but also that the emotional injury was foreseeable given consideration of at least these three factors: (1) sufficient proximity between the plaintiff and the injury producing-event to allow for sensory observation by the plaintiff; (2) the degree of injury to the third person, i.e., the injury must be, or be reasonably perceived to be, serious or fatal; and (3) the “closeness” in the relationship between the plaintiff and the third person. Finally, the injury to the plaintiff must be “serious” or “severe” as those terms were defined in Camper.

Therefore, we have three types of negligent infliction of emotional distress case. First, we have “stand alone” cases, which must be supported by expert medical or scientific proof. Second, we have “parasitic” cases, in which serious or severe emotional injury is required but expert medical or scientific proof is not. Third, we have “bystander” cases, in which the plaintiff is not involved in the incident but who can prove that emotional harm is foreseeable, usually by proof of some combination of sensory observation of serious harm to a third person with whom the plaintiff has a relationship.

Correctly classifying these cases solves the problem of split personality disorder. The problem of immaturity in this area of the law (and in life) can be solved, if at all, only with time and experience. Will the court allow a bystander claim when the plaintiff did not see but did hear the incident? What if the bystander plaintiff saw a horrible incident resulting in horrible injuries to an unknown person? Is the question of foreseeability in bystander cases for the Court or the jury? Does testimony of a social worker, standing alone, meet the threshold of “scientific proof?” The answers to these questions await appropriate cases.

Notes
3. 915 S.W.2d 437 (Tenn. 1996).
4. Id. at 446.
5. Id. (citations omitted). This is an unfortunate definition. Over the long run, most people can “cope” with almost anything. They may need therapy, they may need medication, they may need both, but they can “cope.” Certainly the Court meant to permit recovery in cases where a person sought counseling or received medication, particularly if the counseling or medication was received over an extended period. This definition will be further refined.
6. Id. This proof is not required in cases alleging intentional infliction of emotional distress unless the plaintiff intends to prove that the injury is permanent. Miller v. Willbanks, 8 S.W.3d 607 (Tenn. 1999). One court has held that the use of a neuropsychologist (without supporting testimony of a medical doctor) meets the standard. Shaffer v. Shelby County, 2002 WL 54389 (Tenn. App. 2002).
7. 62 S.W.3d 133 (Tenn. 2001).
8. Id. at 137.
9. 931 S.W.2d 527 (Tenn. 1996).
10. Id. at 531.
11. Id.
12. Id. In Thurman v. Sellers, 62 S.W.3d 145, 162-64 (Tenn. App. 2001) the Court of Appeals held that the relationship between the plaintiff and the third person need not be “close.” However, the Thurman court was analyzing the case as a “bystander” case when it appears to the author that it was a classic “stand alone” case. In the stand alone case the “closeness” between the third person and the plaintiff may be relevant on the issue of damages but is not relevant to make a prima facie case. For another case that demonstrates the risk of confusion between “stand alone” and “bystander” cases read McCracken v. City of Millington, 1999 WL 142391 (Tenn. App. 1999).
The TBA Family Law Section is proud to announce the availability of the 3rd Edition Alimony Bench Book, a Tennessee Bar Association publication brought to you by the Alimony Committee of the TBA Family Law Section.

The 3rd Edition Alimony Bench Book includes cases that are current through December 31, 2004, and is available free in downloadable format on TBA's website at www.tba.org. A hard copy version of this publication may be purchased for $30 per book by contacting the Tennessee Bar Association at 1-800-899-6993, or in Nashville at 615-383-7421, or online at TBA's online bookstore at www.tba.org.

The TBA would like to thank Alimony Committee Chair Amy Amundsen and the members of the Committee for their hard work and commitment to this publication. The Committee's hope is that this book will assist judges in their attempts to award consistent alimony in cases across Tennessee.

Tennessee Bar Association
Sanctions for failure to supplement discovery responses

By Donald F. Paine

Our duty to supplement responses to discovery requests is set out in Tennessee Rule of Civil Procedure 26.05 and Federal Rule 26(e). The only significant difference between the two versions appears to involve depositions. In Tennessee, as the 2001 comment emphasizes, deposition answers of all witnesses must be supplemented. The federal language encompasses only depositions of experts. In either court interrogatories or production of documents requests are covered.

What does supplementation entail? With respect to identity of witnesses, the names of new ones found or hired must be furnished to adverse counsel. For responses such as interrogatory answers, a lawyer who discovers after the client’s response that the answer is incorrect must say so. The same duty applies where the answer was incomplete in retrospect.

How far in advance of trial must supplementation occur? The rules don’t give us a number of days. We are required to “seasonably” amend. That word is of precious little help, as it means in legal contexts “timely.”

What sanctions can be visited on our clients if we mess up? Federal Rule 37(c)(1) states that a party is not permitted to use at trial information not disclosed. Tennessee has no rule on sanctions for nondisclosure. But we do have two important appellate opinions.

The Supreme Court in Lyle v. Exxon, 746 S.W.2d 694 (1988), reviewed a workers’ compensation award. Plaintiff’s vocational expert was not named in the original answer to an interrogatory asking for names of testifying experts. Not until four days before trial did plaintiff’s counsel deliver an unsworn supplemental response naming this expert as a witness. Defense counsel immediately filed a motion in limine to exclude the testimony. On trial day the chancellor offered a continuance, which the defendant declined, apparently opting to interview the expert during the lunch break. The Court ruled that trial judges have the inherent power to sanction discovery abuse.

Elaborating on this power, Justice Fones wrote:

Excluding the testimony of an expert witness may be an appropriate sanction for failure to name the witness. However, other sanctions may be appropriate where the failure to name an expert witness is not knowing and deliberate. In determining the appropriate sanction the trial judge should consider:

1. The explanation given for the failure to name the witness,
2. The importance of the testimony of the witness,
3. The need for time to prepare to meet the testimony, and
4. The possibility of a continuance.

The court affirmed the chancellor’s discretion to offer a continuance rather than to exclude the vocational expert’s testimony.

Ammons v. Bonilla, 886 S.W.2d 239 (Tenn. Ct. App. 1994), is a scarier precedent. A motorcycle rider was injured when a car turned left as the motorcycle attempted to pass it. Charges flew about which driver violated rules of the road, which driver was drunk, and the like. The jury faced with this swearing match needed some.

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No patent for PBJ!

By Bill Haltom

I’m not an intellectual property lawyer, and I don’t play one on the Internet. However, I am something of an expert in the field of peanut butter and jelly sandwiches. I have been eating them for more than 50 years and have been making them for nearly that long, which makes me an expert in the field of PBJ engineering. “PBJ” is the term we sandwich experts use for peanut butter and jelly sandwiches.

I can’t remember the first time I ate a PBJ. It was some time back in the 1950s, and it was a case of love at first bite. PBJ was a staple in my mom’s kitchen during the Eisenhower administration.

I also can’t remember the first time I actually made a PBJ. However, I am confident that it was the first dish I ever put together. It was the entrée in a three-course dinner along with a glass of Bosco (the appetizer) and an Oreo cookie (dessert).

In recent years, I have continued my part-time career as a PBJ chef by making thousands of PBJs for my three children. During my 50 years of PBJ construction and consumption, it has never occurred to me that I could get a patent for Haltom PBJs. But the idea of a PBJ patent did occur to the smart bidnessmen and bidnesswomen at Smuckers, one of America’s largest manufacturers of jellies.

The Smuckers Company invests a lot of time and money in PBJ research and development, or as we say in the business, PBJ R&D. Recently those crackerjack PBJ scientists at Smuckers came up with a new invention, the “Uncrustable!” Quick! Lock up the secret recipe for the Uncrustable in the Smuckers’ vault, the same place where we keep the secret recipe for boysenberry jam!”

Shortly thereafter, the Smuckers’ big wigs summoned their lawyers to get a patent on the Uncrustable. This sent shockwaves throughout my kitchen and the entire PBJ industry. It presented a sticky legal issue: Could Smuckers get a patent on the PBJ? If so, could Smuckers’ lawyers then secure court orders stopping you, me, our children and millions of other chefs from making PBJs?

Smuckers’ lawyers claimed that the Uncrustable is a one-of-a-kind product, like Coca Cola Classic or Kentucky Fried Chicken that features the late Colonel Sanders’ secret blend of herbs and spices. “Nonsense!” replied the U.S. Patent and Trademark Office, contending that the recipe for the Uncrustable is no secret. Everyone who’s ever made a PBJ knows the formula: peanut butter, jelly and bread. And if you want it without the crust, you just trim the sides!

“Uncrustable,” a pocket-sized PBJ that has no crust. One can just imagine that exciting moment in the Smuckers’ lab when their top inventor screamed, “Eureka! We’ve done it! The no-crust PBJ! We’ll call it the

“Nonsense!” replied the U.S. Patent and Trademark Office, contending that the recipe for the Uncrustable is no secret. Everyone who’s ever made a PBJ knows the formula: peanut butter, jelly and bread. And if you want it without the crust, you just trim the sides!

Well, there’s no reason for a peanut butter panic. Behold, fellow PBJ

Bill Haltom, sandwich connoisseur, is a partner with the Memphis firm of Thomason, Hendrix, Harvey, Johnson & Mitchell. He is president-elect of the Tennessee Bar Association and is a past president of the Memphis Bar Association.

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lovers, I bring you good tidings of great joy! On April 8, the federal appeals court ruled that Smuckers has no legal right to a patent for a PBJ, even one without a crust. Unless Tom DeLay impeaches the judges for reaching the wrong result, you and I are now safe to go back in the kitchen and whip up a PBJ with or without the crust. And we will not be violating any federal patent law when we do it!

Smuckers’ lawyers will probably seek an appeal to the United States Supreme Court. However, I have it on good authority that Justice Scalia eats PBJs every day for lunch. His clerks make them for him and deliver them right into his chambers. Consequently, Smuckers will be about as welcome in the United States Supreme Court as Al Gore, who, by the way, never got a patent on the Internet.

So bon appetit, my fellow hungry PBJ-munching Americans! Now if you will excuse me, I’m going to return to my kitchen laboratory where I am hard at work on my latest invention. I’m going to call it … the Bologna Sandwich.

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Look for Bill Haltom’s new book, No Controlling Legal Authority, out this summer from TBA Press!

TBA members can enjoy Bill Haltom’s weekly online columns at http://www.tba.org/TBA_BH/

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experts to sort things out. The plaintiff offered three, on accident reconstruction plus alcohol consumption plus mechanics. But there was a problem. Around a month after commencement of the action, defense counsel had served this interrogatory: “Identify each person that you expect to call as an expert witness at trial.” Plaintiff’s counsel had responded: “None at this time.” There was no supplementation. The circuit judge barred the experts from testifying, and the jury returned a defense verdict.

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