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**CURRENT COVERAGE**

A. Number of years of continuous coverage:  
B. Current Professional Liability/Career Program:  
C. Current Limits:  
D. Retroactive Date:

**CURRENT POLICY EXPIRATION DATE:**

E. Annual premium:  
F. Deductible:  
G. Per Claim or Annual Aggregate:  
H. Does your current policy modify or exclude coverage?

**ATTORNEYS**

Please provide information about each attorney in your firm. If you do not have a law firm attorney, please provide the names of the people who worked on your behalf. (Attach additional sheets if necessary)

<table>
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<th>Full Name</th>
<th>Date Admitted to Bar</th>
<th>State</th>
<th>Date Began Private Practice (Practice)</th>
<th>Date Admitted to Bar</th>
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**AREAS OF PRACTICE**

Please furnish the % of billable hours you spend in:

- Adversary/Alt: Defense
- Arbitration
- Bankruptcy
- Construction (Building Contracts)
- Consumer Credit (not choke action)
- Employment
- Environmental
- ERISA/Employee Benefits
- Family Law
- Divorce: marital assets < $1,000,000
- Divorce: marital assets > $1,000,000
- Elder Law
- Grandchildren, Guardianship
- Health Care: All Phases
- Health Care: ERISA
- Health Care: Health Services
- Health Care: Hospitals
- Health Care: Medical Professionals
- Health Care: Nursing Home/Assisted Living
- Health Care: Other
- Intellectual Property
- International Law
- Labor
- Employment
- Management
- Employee
- Union

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A. Have you ever had, or to your knowledge, any other insurance policies, including disability, medical, or professional liability, have been denied renewal or been canceled or any other agreement? If so, please state the nature, terms, and reasons of refusal.

B. Have you ever been involved in any dispute or claim for any income or other compensation or benefits for any employee or independent contractor?

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**YES** 

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- B. Does your firm have a risk management program, and if so, what is it? 
- C. Does your firm have a risk management program, and if so, what is it? 
- D. Does your firm have a risk management program, and if so, what is it? 
- E. Does your firm have a risk management program, and if so, what is it? 
- F. Does your firm have a risk management program, and if so, what is it? 
- G. Does your firm have a risk management program, and if so, what is it? 
- H. Does your firm have a risk management program, and if so, what is it? 

**NOTE:**

1. This form is for estimate purposes only. Completing this form does not constitute a guarantee of underwriting acceptance or premium rate. Coverage may be subject to any of the above and second to a completed new business application.

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ARTICLES

16  LAUNCH YOUR APPEAL: HOW TO GET YOUR CASE BEFORE THE STATE’S HIGHEST COURT
By Judge W. Mark Ward

25  CONSERVATION EASEMENTS AS QUALIFIED CONSERVATION CONTRIBUTIONS
By Harwell E. Coale III

NEWS & INFORMATION

6  State Supreme Court majority upholds Tennessee Criminal Sentencing Act
7  Court adds new nepotism rule, adjusts provision on moral character
7  Law schools see lots of changes in administrative positions
7  Law students raise thousands for stipends
12  Actions from the Board of Professional Responsibility

DEPARTMENTS

3  President’s Perspective: Our judicial branch under attack
   By Charles Swanson
5  Letters / Jest Is for All: By Arnie Glick
8  The Bulletin Board: News about TBA members
15  Paine on Procedure: Evidentiary nonsense
   By Donald F. Paine
23  Book Reviews: Murder in Tombstone by Steven Lubet and Perfectly Legal by Don Leatherman
32  40 Years: The write stuff:
   The Joe Henry Award for Outstanding Legal Writing
   By Suzanne Craig Robertson
38  But Seriously, Folks!: Flying the no-longer-friendly skies
   By Bill Haltom
39  Classified Advertising

On the Cover
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Fax to: 423.629.1109
Crisis in the Land of the Cherry Blossom: Do not stay on the sidelines for this one

Our judicial branch under attack

My responsibilities as TBA president recently took me to Washington, D.C., to discuss with members of Congress issues of concern to our profession. Every visit to the District of Columbia surrounds one with reminders of what a truly great and amazing country this is. Around each corner, the visitor is reminded anew of major contributions and supreme sacrifices that individuals have made over the centuries to preserve, maintain and protect this nation and the values for which it stands.

A springtime visit to Washington, D.C., is especially wonderful because spring is the time when you can appreciate not only the marble or bronze monuments to history but you can also celebrate the renewal of life poignantly symbolized by millions of beautiful cherry blossoms that explode from more than 3,700 cherry trees surrounding the Tidal Basin. If you are not awakened, inspired and renewed by a visit to Washington, D.C., in the spring, you may want to consult with your physician. You are probably dead but you just don’t know it yet!

Unfortunately, in my visit to Washington, D.C., this year, the cherry blossoms were not the only new growth to be observed. At the same time those colorful symbols of renewal adorned the fruit trees, there appeared to be a much darker, more insidious growth creeping through the hallways of our nation’s capital. This new growth is a growing mistrust, failure of confidence and lack of respect for the judicial branch of our government. The assault upon the judicial branch finds root in a fundamental misunderstanding by the general public of the appropriate role that branch plays as one of three co-equal branches of government. Although all three branches of government play critical roles, the judiciary was wisely conceived by our founders not only to conduct civil and criminal trials but also to serve as a check and balance on the natural tendency of both the executive and the legislative branches to wield power over and above that contemplated by the constitution.

The attack upon public confidence in our system of justice is nourished by over-the-top hyperbole by governmental leaders. This is not a matter of political positions. Indeed, I support the right of both sides of any politically controversial judicial decision to be critical of that decision. What I refer to, however, is the attack centered not upon the decision itself but upon the system of government that permits a decision to be made contrary to the critic’s beliefs. This type of destructive criticism ignores the fact that among the founding principles of this country is the conviction that we should be a nation that respects and protects the rights of the minority. History has shown that popular opinion can be quixotic as well as just plain wrong. Our justice system protects us all from the intemperate swings of popular opinion.

When inflammatory and destructive criticism includes direct or indirect calls for the public to revolt from or destroy the system that allows decisions (Continued on page 4)
to be made with which the critic disagrees, the rule of law is in significant danger. When the rule of law is in danger, we are all in danger. For 229 years it is adherence to the rule of law that has allowed us to maintain a civilized society where individual freedoms granted under the constitution are protected and grievances can be redressed without resort to violence or intimidation. After Brown v. Board of Education in 1954, it was our inherent respect for the rule of law that ultimately prevailed, as a result of which we are a better country and a better people. When Gore v. Bush was decided in 2000, it was adherence to the rule of law that allowed this nation to conduct a peaceful transition of government rather than the armed conflict that would have been the inescapable result in many other nations. When persons in positions of trust or power incite the public to ignore the rule of law or to personally attack those who dispense justice, it tears at the very foundations of our entire system of government. An independent judiciary is the fulcrum or pivot point upon which the system depends to properly function. Those who would deprive the judiciary of its power to protect the powerless would deprive us all of rights we have had for so long that we take them for granted. The shrill voices of indignation that now attack our legal system are more strident than at any time I can recall since the days of the “Impeach Earl Warren” billboards. The radical ideas espoused by opponents of the judicial system pose a genuine danger to our institution of government.

You may think that I am overreacting to a few intemperate statements that have received widespread publicity. I do not believe this to be the case. As an example, I will cite to you the experience of your TBA delegation when visiting the office of one of Tennessee’s members of the House of Representatives. Upon arrival for our scheduled appointment, we were advised that the representative was not available and we were to meet with her legislative assistant. As we began to discuss with him our concerns, this legislative assistant quickly let us know that, in his view, the judicial branch clearly and deservedly was the author of its own misfortune. After complaining about a lack of common sense on the part of certain judges in Georgia or Florida, he rapidly moved on to assert that if judges could not get on board pretty quickly with his view of what constitutes the will of a substantial majority, it would be the obligation of the Congress to abolish the federal court system.

“If judges could not get on board pretty quickly with his view of what constitutes the will of a substantial majority, [the legislative aide said] it would be the obligation of the Congress to abolish the federal court system.”

be the obligation of the Congress to abolish the federal court system “except for the Supreme Court” (suggesting that perhaps this legislative assistant was not totally unfamiliar with the constitution). This man was dead serious. When a person selected and authorized to represent a member of the United States Congress seriously advocates abolition of the federal court system to get judges more in line with the will of the majority, I am frightened for the direction in which we are headed. Most frightening of all to me is that this legislative representative was a law school graduate!

What can we do as members of the profession to address these attacks on our judicial system? I would suggest several things:

1. Do not yourself engage in this overheated type of rhetoric. Always feel free to disagree with a particular judicial decision and disagree vehemently if led to do so. But criticize the specific decision without ad hominem attacks on the court or the process that led to the decision.

2. Speak out when your friends and neighbors engage in vitriolic attacks on the judicial system. Help them to understand and appreciate the way the system operates. Explain the critical importance to us all of judicial independence and encourage a more reasoned approach to criticism of the offending decision.

3. Assist the organized bar in providing educational opportunities so that citizens of all ages can appreciate the delicate balance of our three branches of government and the role that each branch plays in our government.

4. Solicit the support of your national, state and local leaders in refraining from vicious hyperbole calculated to destroy public confidence in the judicial system and to replace an independent judiciary with judges who seek only to divine and implement the will of the majority regardless of constitutional mandates.

I am proud to be a lawyer. I am proud and grateful to have had the opportunity to serve for a period of time as a spokesperson for a profession dedicated to maintaining and adhering to the rule of law. My time is up but our work is not finished. Constant vigilance is required to ensure that the voice of reason is not drowned out by those who would advance an agenda by destroying a system of government. Do not stay on the sidelines for this one. Your participation in the struggle to maintain an independent judiciary and a strong judicial branch of government is critical. Together, our voices can be heard. Together, we can and must support, defend and maintain a strong, effective and independent judicial branch of the government.
Race Gestae winner identifies himself

Wow! Smack in the middle of an article on young lawyers is a picture of the winners of the 1984 Race Gestae (Tenn. Bar Journal May 2005 p.22). I am one of the unidentified “fast runners” (2nd from right). I was 55 years old at the time. I had been road racing for over 10 years. For the record, I finished second behind some youngster (I think it was Haltom). He was declared the fastest plaintiff’s lawyer and I was awarded the title of fastest defendant’s lawyer. Thanks for the trip down memory lane.

— Sam Fowler, Knoxville

Large firms are asking new associates to lie

In the past three years I have interviewed several law school seniors with an eye toward taking on a young associate and planning my retirement. Few law school graduates are interested in small town rural practice and many seem to feel the need to limit their outlook for practice to rather narrow parameters. Most, if not all of them, had interviewed with one or more of the “hundred plus” lawyer firms operating in our state. Quite frankly, I was appalled at some of the requirements these large firms made a part of any job offer.

Time after time I have been told that students are told in advance that, if offered a job, they will be expected to bill clients for 70 hours each week.

I have been in practice for a long time and I doubt that any lawyer can

(Continued on page 22)
Tennessee's criminal sentencing laws do not violate the Sixth Amendment guarantee of a jury trial and were not affected by two United States Supreme Court rulings last year addressing the authority of judges to enhance sentences, the state Supreme Court said last month in a 3-2 decision.

Chief Justice Frank F. Drowota III, writing for the majority, said enhanced sentences a judge imposed on Edwin Gomez and Jonathan S. Londono were not unconstitutional. The defendants are not entitled to relief based on United States v. Booker and Blakely v. Washington, Drowota wrote. Justices William M. Barker and Janice M. Holder concurred in the decision.

“We conclude that Tennessee’s sentencing structure does not violate the Sixth Amendment,” Drowota wrote.

A Davidson County jury convicted Gomez and Londono of conspiracy to commit aggravated robbery, facilitation of felony murder, facilitation of especially aggravated robbery, and facilitation of aggravated robbery. The pair was involved in a 1999 robbery that resulted in the death of a security guard. Gomez and Londono received maximum sentences within the statutory range for each conviction. In imposing the sentences, Criminal Court Judge Cheryl Blackburn ordered they be served consecutively for an effective 49-year sentence, longer than they would have been without the enhancements determined by the judge. Gomez and Londono appealed and the Court of Criminal Appeals affirmed the judgment of the trial court.

In their Supreme Court appeal, the defendants claimed their sentences were unconstitutional because the judge, not the jury, found the enhancement factors used to impose maximum sentences. They claimed that under Blakely their sentences should have been the “presumptive minimum” defined by state law.

Noting the court’s duty “to indulge every presumption in favor of the constitutionality of statutes,” the majority rejected the defendants’ claim.

“In Booker all nine justices agreed that the Sixth Amendment is not implicated by a sentencing statute which permits judge fact-finding, but which does not mandate imposition of any increased sentence upon the judge’s finding of a fact,” Drowota wrote.

The majority explained that, unlike the statutes in Booker and Blakely, Tennessee’s sentencing statute does not mandate an increased sentence when a judge finds an enhancement factor. Even after a judge finds an enhancement factor, the judge retains discretion to select any sentence within the statutory range, including the presumptive minimum sentence. The Tennessee statute, Drowota wrote, “does not provide a system which requires or even allows judicial power to infringe upon the province of the jury.”

You can read the opinion and dissent at http://www.tsc.state.tn.us. 🌐
Court adds new nepotism rule, adjusts provision on moral character

New community resource provision in Judicial Conduct rules

The Tennessee Supreme Court has added a new provision to the Rules of Judicial Conduct that requires referrals to community resources be made "impartially and on the basis of merit."

The rule specifically prohibits nepotism and favoritism in making such referrals. Community resources include traffic schools, mental health or substance abuse programs or other such services.

The new rule may be found at http://www.tba.org/rules/amendrule10.html.

Board of Law Examiners given flexibility

The Supreme Court has also adjusted one provision of its rules on certificates of good moral character, allowing the Board of Law Examiners to waive in exceptional circumstances the requirement of a certificate of standing from the highest court of each state in which the applicant is admitted.


Law students raise thousands for stipends

The Vanderbilt Law Student Legal Aid Society raised more than $17,000 for stipends for students who take low or non-paying internships in the public interest arena through its reception, silent and live auctions held March 25.

The TBA Access to Justice Committee played a small monetary sponsorship role in the reception and auction event and contributed the labor of TBA Access to Justice Coordinator Becky Rhodes.

"It was the very hard work and detailed planning on the part of the students that made the events of Public Interest Week such a big success," Rhodes says.

To donate, contact Amanda Slager head of the student Legal Aid Society, at amanda.e.schlager@vanderbilt.edu.

University of Tennessee and Vanderbilt Law schools see lots of changes in administrative positions

Galligan, Sobieski and Blaze to return to teaching

In what seemed to be a surprise announcement last month, three of the University of Tennessee College of Law's top administrators announced their resignations from their administrative positions, saying they will return to teaching. Dean Tom Galligan, Associate Dean John Sobieski and Legal Clinic Director Douglas Blaze are each planning to leave their administrative positions at the end of the 2005-06 academic year.

In an April 20 memo Galligan wrote: "We all agreed that we love our jobs very much but that personally and professionally it was time for a change. ... We each feel strongly that the future of the UT College of Law and the University of Tennessee has never been brighter, and we look forward to continue contributing to that future by returning to the classroom to work with our students full-time."

Syverud heads to St. Louis

Vanderbilt University dean Kent Syverud will become dean of Washington University School of Law in St. Louis, starting next January. He had already announced his intentions to step down as Vanderbilt dean, saying he would return to teaching after a year's sabbatical. He came to Vanderbilt Law School in 1997.

Edward Rubin, a professor at the University of Pennsylvania, has already been chosen to succeed him at Vanderbilt.
ov. Phil Bredesen has appointed Nashville attorney Linda C. Elam of Hollins & Associates PLLC to the Tennessee Local Government Planning Advisory Committee (LGPAC). The committee is responsible for making recommendations to the commissioner of the Department of Economic and Community Development on the operations of the Local Planning Assistance Office. LGPAC has authority over the creation of and amendment to regional planning commission jurisdictions and final approval of county growth plans. Elam concentrates her legal practice in commercial real estate, commercial lending, corporate and contract law, and mergers and acquisitions and serves as mayor of Mt. Juliet. She graduated from the University of Tennessee's College of Law and College of Business Administration.

The law firm of Wiseman Biggs Bray PLLC recently announced several personnel changes and a new location. Lodie V. Biggs has been named a partner in the firm. Biggs graduated from the University of Virginia School of Law and concentrates his practice in the areas of commercial and residential real estate, economic development incentives and property tax representation. Larry R. Bray has joined the firm and will concentrate his practice in the area of estate planning, including asset protection planning, charitable planned giving, business succession planning, tax planning, business formation planning and post-death administration. Chris Patterson also has joined the firm after graduating from the University of Memphis School of Law. Patterson will work in the areas of personal injury, medical and legal malpractice, and commercial and business litigation. The firm's founding partner, Lang Wiseman, graduated with honors from Harvard Law School. He concentrates his practice in the areas of personal injury, medical and legal malpractice, commercial and business litigation, and construction and real estate disputes and litigation.

The new offices of Wiseman Biggs Bray are located at 1665 Bonnie Lane, Suite 106 in Memphis.

Jason B. Rogers, vice president and university counsel at Belmont University in Nashville, earned his doctor of education in higher education management from the University of Pennsylvania in May. He is a graduate of Vanderbilt University School of Law.

New officers and board of directors of the National Bar Association's Ben F. Jones Chapter took office April 2. The officers are Mary H. Beard, president; Gina Higgins, vice president (president-elect); LaToya Williams, recording secretary; Venita Martin, corresponding secretary; Julian Bolton, treasurer; and Van Turner, parliamentarian. Members of the board of directors are Dedrick Brittenum (two-year term); Judge Bernice B. Donald (one-year term); Damon Griffin (two-year term); LaTrena Davis Ingram (three-year term); Viola Johnson (three-year term); Harrison McIver (three-year term); Precious Moore (one-year term); and Judge H. T. Lockard (honorary).

Bass, Berry & Sims PLC recently announced that Keta J. Barnes, Mary Katherine Hovious and Nancy S. Jones have joined the firm's litigation practice area. Barnes, who joined the firm's downtown Nashville office, focuses her practice on commercial litigation with an emphasis on class action products liability matters. She received her law degree from the University of Tennessee College of Law where she was student materials editor for the Tennessee Law Review.

Hovious, who joined the firm's Memphis office, concentrates her practice in commercial litigation. She earned her law degree from the Washington & Lee School of Law in 1999 and achieved the distinction of Burk's Scholar and mock trial semifinalist.

Jones has joined the firm's Nashville office as a member. She practices corpo-
rate criminal law with a focus on the health care industry, handling internal and governmental investigations, False Claims Act allegations, qui tam cases and compliance programs. She received her law degree from Syracuse University in 1978.

Nashville attorney Robert L. Trentham has become a fellow of the American College of Trial Lawyers. The college, which was founded in 1950, strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession. Fellowship in the college is by invitation only and limited to experienced trial lawyers who have mastered the art of advocacy. Trentham earned his law degree from the Vanderbilt University Law School and is a partner in the Nashville firm of Miller & Martin.

The Memphis-based Law Office of Arnold M. Weiss began operating as Weiss Spicer PLLC in January with the addition of Valerie Ann Spicer as a member. Spicer is admitted to practice in Tennessee and received both her bachelor’s and law degrees from the University of Memphis. She had served in the office as an associate prior to achieving partner status. The practice will continue to focus on the areas of foreclosure and bankruptcy law for financial institutions and the mortgage banking industry.

The law firm of Luther Anderson PLLP recently announced that Melissa A. Moreau has become a partner in the firm. Moreau, who has been with the firm for four years, concentrates her practice in the areas of insurance defense litigation and medical malpractice defense. She is a 1993 graduate of the University of Alabama School of Law and is licensed to practice law in Tennessee and Alabama.

John Rolfe has joined the Nashville office of Boult, Cummings, Conners & Berry PLC. Rolfe brings more than 10 years’ experience in the music and entertainment industry to the firm’s entertainment practice. Prior to joining Boult Cummings, Rolfe was vice president of Business and Legal Affairs at Compendia Music Group. His career in the music industry began with a business affairs position at the historic music publishing company Acuff-Rose, where he was responsible for domestic and international contract negotiations and litigation management. While at Acuff-Rose, he was involved with the signing of several prominent songwriter/artists and helped ensure copyright protection for the company’s interest in songs from legendary songwriters such as Hank Williams, The Everly Brothers, Don Gibson and Roy Acuff. Rolfe received his law degree from Vanderbilt University Law School in 1990.

The law firm of Stewart, Estes & Donnell has announced the addition of two new associates. David F. Gore graduated from the Vanderbilt University Law School and will concentrate his practice in the area of civil litigation with an emphasis on labor and employment law, class action suits and complex litigation. Allison M. LaRue received her law degree from the Nashville School of Law and will concentrate her practice in the area of general civil litigation.

The Memphis firm of Bourland, Heflin, Alvarez & Minor PLC announced that John Marshall Jones and M. Matthew Thornton were named members of the firm in January. Jones joined the firm in 2002 and concentrates his practice in the areas of civil and commercial litigation, employment law and employee benefits litigation. He received his law degree from the College of William & Mary. Thornton joined the firm in 1998 after completing a clerkship with the Tennessee Court of Appeals. He concentrates his practice in the areas of probate administration and litigation and is a graduate of the University of Tennessee College of Law.

The Nashville law firm of Mendes & Gonzales PLLC has been renamed MGLAW PLLC. The new corporate identity seeks to communicate the firm’s core practice areas of insolvency, litigation and planning.

Justin M. Sveadas and Marlene J. Bidelman-Dye have joined the Chattanooga office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC as associates. Sveadas will concentrate his practice in health law, long-term care litigation and product liability defense. He is a graduate of Emory University School of Law.

(Continued on page 10)
Bidelman-Dye represents financial institutions and borrowers regarding construction, lending and re-financing issues. She is licensed in Georgia, Massachusetts, Pennsylvania and Tennessee.

S. Russell Headrick has joined the firm’s Memphis office as a shareholder. He will concentrate his defense practice on ERISA claims; medical malpractice suits; media defamation, privacy and open record cases; and appellate work in state and federal court, including the U.S. Supreme Court. Prior to practicing law, Headrick served as law clerk to Judge Harry W. Wellford, U.S. District Court for the Western District of Tennessee.

Cathryn L. Sowers has joined the firm’s Nashville office. Sowers is co-chair of the firm’s health law litigation practice and a member of four other practice groups: health care, litigation, government relations and public policy. Prior to joining Baker Donelson, Sowers served as vice president and chief of litigation for Hospital Corporation of America (HCA).

The Hendersonville law office of Joe W. McCaleb and Associates announced the addition of Emily Yao as an associate in the office. Yao graduated from the University of Illinois College of Law in 2004 with honors in legal research and writing.

The law firm of Hunter, Smith & Davis welcomes the return of Teresa Mahan Lesnak as an associate attorney. Mahan Lesnak worked for the firm both as a summer clerk and associate prior to moving away from the area 11 years ago. Mahan Lesnak received her law degree from the University of Tennessee College of Law and practices in the area of civil litigation. She is licensed to practice in Tennessee, New Jersey, the District of Columbia and Virginia.

The Nashville School of Law will honor the achievements of alumnus Jack Norman Jr. during a ceremony on June 10. Now retired from private practice, Norman graduated from the school in 1950. His career accomplishments include service as a substitute judge and special master of the Domestic Relations Courts for Davidson County. Prior to acquiring his law degree, he was proprietor of a circus production company.

Nashville attorney Kelvin D. Jones III recently was elected to the Girl Scout Council of Cumberland Valley’s Board of Directors. Jones is the executive director of the Metro Human Relations Commission and former legal advisor to Nashville Mayor Bill Purcell. Prior to entering public service, Jones practiced corporate law at Bass, Berry & Sims PLC in Nashville. He is a graduate of Howard University and the University of Alabama School of Law.

The Mid-South Commercial Law Institute, a non-profit corporation that provides seminars on commercial law in Tennessee and surrounding states, announced its officers and board members for 2005-2006. The following Tennessee Bar Association members will be serving the organization: B. Gail Reese, a partner with Wyatt, Tarrant & Combs, takes over as president. Barbara D. Holmes of Harwell Hyne Gabbert & Manner assumes the office of vice president (president-elect). Thomas H. Forrester of Guliet, Sanford, Robinson & Martin returns for a second term as treasurer. Newly elected board members include: Sue Van Sant Palmer of Stites & Harbison; Mark S. Dessauer of Hunter, Smith & Davis; Michael K. Williamson of Batson, Nolan, Brice & Williamson; and Robert J. Gonzales of MGLAW. Returning board members include: Michael P. Coury of Farris Matthews Branan Bobango Hellen & Dunlap; Richard C. Kennedy of Kennedy, Koontz & Farinash; Edwin M. Walker of Garfinkle, McLemore & Walker; Virginia Ann Sharber of Miller & Martin; James Kelly Giffen; Henry C. Shelton of Armstrong Allen; William L. Norton III of Boul, Cummings, Conners & Berry; J. Michael Winchester of Winchester, Sellers, Foster & Steele; Robert A. Guy Jr. of Waller Lansden Dortch & Davis; David W. Houston IV of Greenbaum Doll & McDonald; Robert H. Waldschmidt of Howell & Fisher; Paul G. Jennings of Bass, Barry & Sims; E. Franklin Childress Jr. of Baker, Donelson, Bearman, Caldwell & Berkowitz; and Maria M. Salas of Rothschild & Salas.

J. Nelson Irvine, an attorney with the Chattanooga firm of Chambliss, Bahner & Stophel PC, has been elected a fellow of the American Bar Foundation. He is a 1966 graduate of the Vanderbilt University Law School.
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Actions from the Board of Professional Responsibility

Reinstated

Jane J. Buffaloe and Bruce Henderson Guthrie II, both of Chattanooga, and Steven L. Williams of Knoxville, have been reinstated to the practice of law after complying with Rule 21 as required by the Board of Professional Responsibility.

On April 12, the Tennessee Supreme Court reinstated the law license of Byron R. Simpson who had practiced law in Franklin until taking disability inactive status on Jan. 13, 2003. The court found that Simpson’s disability has been removed and that he is fit to practice law based upon the following conditions: (1) compliance with outstanding continuing legal education requirements; (2) working with a practice monitor; (3) completion of a post-trial diversionary program and dismissal of all criminal charges; (4) payment of the professional privilege tax; and (5) continued compliance with the Tennessee Lawyers Assistance Program (TLAP) for five years.

Suspected

Kingston attorney Charles B. Hill II was suspended from the practice of law in Tennessee for one year, effective April 1. After the Board of Professional Responsibility filed a petition for discipline against Hill, he entered a conditional guilty plea in exchange for a stated form of discipline. Hill pled guilty to allowing a statute of limitations to expire in a car accident case without filing a complaint on his clients’ behalf. Rather than admitting his irresponsibility, Hill created a fictitious judgment purporting to be an award of $2,800 in damages and gave a copy of this document to the clients. In another matter, Hill filed a voluntary dismissal of a client’s lawsuit without explaining this to the client. Finally, the board found that once disciplinary action had been initiated, Hill failed to respond in a timely manner to information requests from the disciplinary counsel. Hill may seek reinstatement to the practice of law after complying with Rule 21 as required by the Tennessee Supreme Court on March 18.

Censured

The Supreme Court of Tennessee suspended the law license of David L. Goad on March 28 after finding that Goad posed a threat of irreparable harm to the public. After 30 days he was to no longer use indicia of lawyer, legal assistant or law clerk and not 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. Goad may request dissolution or modification of the suspension for good cause.

Knoxville lawyer John Earl Rainwater was suspended from the practice of law on April 22 for failing to respond to a complaint of misconduct. After 30 days he was no longer able to use the indicia of lawyer, legal assistant or law clerk and must not 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. Rainwater may request dissolution or modification of the suspension for good cause.

Jeffrey Andrew Stinnett, a Chattanooga attorney, received a censure from the Board of Professional Responsibility on April 19. The board found that Stinnett had engaged in the practice of law during a period when his law license was administratively suspended for failing to comply with continuing legal education requirements. His representation of a client while on administrative suspension violated Rule of Professional Conduct 5.5(a). The censure declares his conduct improper but does not limit his right to practice law.

On April 13, the Board of Professional Responsibility issued a censure to Michael D. Fitzgerald of

(Continued on page 14)
“How will my judge rule on this issue?”

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Actions from the Board of Professional Responsibility

(Continued from page 12)

Memphis for failing to keep trust account records as required by Section 29 of Supreme Court Rule 9 and Rule 1.15 of the Tennessee Rules of Professional Conduct. Because of this action, the board was unable to determine if Fitzgerald was handling trust funds correctly. The board censured Fitzgerald on the condition that he comply with his monitoring agreement with the Tennessee Lawyers Assistance Program (TLAP) and that any reported incidence of non-compliance with the program would constitute grounds for immediate suspension. The censure declares his conduct improper but does not limit his right to practice law.

Arch B. Boyd III of Memphis was censured on April 14 for neglecting a legal matter, failing to adequately communicate with a client and failing to refund fees after being terminated. The Board of Professional Responsibility issued a censure on condition that Boyd submit the fee matter to the Memphis Bar Association Fee Dispute Committee to determine whether a refund is due and if so, in what amount. The censure declares his conduct improper but does not limit his right to practice law.

On April 25, the Board of Professional Responsibility issued a public censure to Earle J. Schwarz of Memphis. He did not request a hearing. A complaint was filed against him based on a declaration in a habeas corpus action that Schwarz willfully neglected his representation of his client. He neglected his client’s legal matter in a death penalty case and filed a declaration and subsequent habeas corpus proceeding setting forth that: he was admitted pro hac vice in Alabama; he represented the client from 1998-2003; he received notice in February 2003 that the Alabama Court of Criminal Appeals denied his client’s appeal; he did not notify the client of the denial of his appeal; he did not file a notice of appeal with the Alabama Supreme Court or file a notice of withdrawal. After the Alabama Court of Criminal Appeals denied his client’s appeal, Schwarz did not tell the client he was no longer representing him and he did not inform the client that he would not file a notice of appeal in the Alabama Supreme Court or pursue relief in federal court. Schwarz did not have contact with the client after the appeal was denied.

The board determined that his conduct violated Rules 1.1, 1.3, 1.16 and 8.4(a)(c)(d) of the Tennessee Rules of Professional Conduct.

On May 2, the Board of Professional Responsibility issued a public censure to Clarksville lawyer Nan Shelby Calloway. She did not request a hearing. Calloway failed to adequately communicate with her client, resulting in the client’s decision to hire another attorney to complete her legal matter. Calloway and her client could not agree on the amount of refund to be made to the client, and Calloway did not timely resolve this issue with the Nashville Bar Association Fee Dispute Committee. Calloway has repaid the client the legal fees the client paid to her for the legal work.

The board determined Calloway’s conduct violated Rules 1.1, 1.3, 1.16 and 8.4(a)(c)(d) of the Tennessee Rules of Professional Conduct.

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Rules 1.1, 1.3, 1.4, 1.5 and 8.4(a)(d) of the Tennessee Rules of Professional Conduct. A public censure is a form of discipline that declares the conduct of the lawyer improper but does not limit her right to practice law.

Contempt of court

On May 2, the Tennessee Supreme Court entered a consent order adjudging Memphis lawyer Christopher P. Renard to be in willful contempt of court and fining him $100. Renard has been continuously suspended from the practice of law since May 21, 2004, the date the court’s order of temporary suspension was entered against him for failing to respond to complaints of ethical misconduct.

The Board of Professional Responsibility filed a petition for order of contempt against him in January, alleging that after June 20, 2004, he had continued to provide legal services to a former client and had held himself out to opposing counsel and the general public as a practicing lawyer, while suspended. The board also alleged that Renard had consistently refused to properly comply with the requirements and obligations of suspended or disbarred lawyers as set forth in Supreme Court Rule 9, Section 18.

Really? So a trial judge can ignore the Supreme Court’s Rules of Evidence? Beam me up! The only authority cited is “See” State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997). But that opinion merely observes: trial courts have broad discretion in determining the admissibility of evidence.

That’s a far cry from the Stout pronouncement. Yes, a trial judge has discretion under Rule 403 balancing and under the Rule 702 gatekeeper role to bar junk science. But a judge has no more discretion than I to flout the Evidence Rules. Criminal Court Judge Dailey’s rulings at trial in Stout were upheld on appeal. He properly followed the restrictions in Rule 803(1.1) on statements of identification and Rule 803(2) on excited utterances. I doubt he believed he could ignore the plain language.

Here is the correct language that appellate opinions should contain:

“So a trial judge can ignore the Supreme Court’s Rules of Evidence? Beam me up!”

The determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is governed by Tennessee Rules of Evidence 801-804.”

Such a drug would be effective even against viral infections. If I were computer literate, I would inject a virus into all court computers. It would shut down the system every time a judge or law clerk used the nonsensical sentence in Stout.

Evidentiary nonsense

By Donald F. Paine

The Tennessee Supreme Court has injected a virus into the body of evidence. In State v. Stout, 46 S.W.3d 689, 697 (2001), the Court wrote:

The determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is left to the sound discretion of the trial court.

Donald F. Paine is a past president of the Tennessee Bar Association and is of counsel to the Knoxville firm of Paine, Tarwater, Bickers, and Tillman LLP. He lectures for the Tennessee Law Institute, BAR/BRI Bar Review, Tennessee Judicial Conference, and University of Tennessee College of Law. He is reporter to the Supreme Court Advisory Commission on Rules of Practice and Procedure.
LAUNCH YOUR APPEAL
How to get your case before the state’s highest court
By Judge W. Mark Ward
This article discusses procedure and appellate advocacy with regard to permissive appeals to the Tennessee Supreme Court. The focus will be on the legal requirements and “art” of preparing the “Application for Permission to Appeal.” It is this document that will determine whether your case is one of the many routinely denied an appeal to the state’s highest court or one of the few who make it to “the big dance.” It is hoped that practitioners will gain some further insight and enhancement of their appellate advocacy by review of this article.

An appeal from a final decision of an intermediate appellate court to the Tennessee Supreme Court is an appeal by permission that may be taken only on application and in the discretion of the Supreme Court. It may be sought by any party in a civil case and by the state or the defendant in a criminal case. Rule 11, “while neither controlling nor fully measuring the court’s discretion,” states that the following factors indicate the character of reasons that will be considered: the need to secure uniformity of decision, the need to secure settlement of important questions of law, the need to secure settlement of questions of public interest, and the need for the exercise of the Supreme Court’s supervisory authority.

The purpose of an application for permission to appeal is to demonstrate to the Supreme Court that the case is an appropriate one for the exercise of the court’s discretionary jurisdiction. “The application is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court.” The Tennessee Supreme Court is a “law development” court, not an “error-correcting” court. Hence, the focus of an applica-
Launch your appeal

(Continued from page 17)

tion for permission to appeal is to convince the justices of the Tennessee Supreme Court that they should grant the permission to appeal because of ramifications of the opinion of the intermediate appellate court that go beyond the effect of the opinion on the individual appellant. This is a daunting and difficult task. Each year, the Tennessee Supreme Court is flooded with hundreds of applications for permission to appeal and an overwhelming number of these applications are denied.

If no petition for rehearing is timely filed in the intermediate appellate court, the application for permission to appeal must be filed with the clerk of the Supreme Court within 60 days after entry of the judgment of the intermediate appellate court. If a timely petition for rehearing is filed, the application must be filed within 60 days after the denial of the petition to rehear or entry of the judgment on the rehearing. No extensions of time beyond the 60 days are allowed.

The application shall contain a statement of: (1) the date on which the judgment was entered and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or the date of entry of the judgment on the rehearing; (2) the questions presented for review; (3) the facts relevant to the questions presented, but facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application; and (4) the reasons, including appropriate authorities, supporting review by the Supreme Court. ... A copy of the opinion of the appellate court shall be appended to the application.

Although it is not necessary for consideration of the application for permission to appeal, the appellant may serve and file a complete brief that conforms to the requirements of T.R.A.P. 27 with the application for permission to appeal.

Since the primary purpose of an application for permission to appeal is to convince the Tennessee Supreme Court that the case is one of the few deserving discretionary review, the traditional notion has been that counsel should narrow the issues raised in the application to only those that have the greatest likelihood of success. The thought is that the Supreme Court is more likely to exercise its discretion and grant permission to appeal in a case in which there are only one or two issues that are clearly and concisely stated than it is in a case in which it is called upon to review a myriad of claims addressed in “shotgun” fashion. There is much to be said for the concept of narrowing the issues to be raised in an application for permission to appeal.

It is impossible to predict with any reasonable degree of accuracy which cases the Tennessee Supreme Court will or will not accept. However, the application is likely to be examined very closely and to stand a better chance if:

- it presents a significant legal issue of first impression
- there are conflicting decisions of the intermediate appellate court on the issue
- the intermediate appellate court reversed an action taken by a jury, or
- there is some blatant or glaring legal error of sufficient magnitude that it will have a major impact on the precedential value of the law.

The Supreme Court may also be more likely to closely examine an issue presented in an application for permission to appeal that it has not addressed in a published opinion in several years, but which now is a hotly litigated topic.

Lawyers might be well-advised in preparing their applications for permission to appeal to spend less time discussing the merits of their case and more time demonstrating why the Supreme Court should hear them. As a general principle, if the application only succeeds in establishing that the decision of the intermediate appellate court may be erroneous, it has not fulfilled its purpose. What the Tennessee Supreme Court is interested in is the actual practical effect of the disputed decision on other cases in the future and in other situations.

The original and six copies of the application must be filed, and the application must be served on all other parties. An answer in opposition may be filed within 15 days after the filing of the application for permission to appeal, setting forth the reasons why the application should not be granted and “any other matters considered necessary for the correction of the application.” The original and six copies of the answer must be filed, and it must be served on all other parties. No reply to the answer may be filed. The application will be granted if two members of the Supreme Court believe that review is appropriate.

W. Mark Ward was appointed Judge of Division IX of the Shelby County Criminal Court by the governor of Tennessee and is currently serving in that position. From 1981 to 2004 Judge Ward practiced law in Memphis as a private practitioner and as an assistant public defender. In 2000, he litigated the high profile case of Rogers v. Tennessee, which he argued before the U.S. Supreme Court. Judge Ward currently teaches as an adjunct Instructor at the School of Law at the University of Memphis and has argued 35 cases before the Tennessee Supreme Court.
permission to appeal is granted, the appellant must serve and file a brief within 30 days after the date on which permission to appeal was granted. If the appellant elected to file a brief with and at the time of filing the application for permission to appeal, he or she may also file a supplemental brief, which must be served and filed within 30 days after the date on which the permission to appeal was granted. Except by order of the Supreme Court, the argument in supplemental briefs shall not exceed 25 pages. If the appellant elects not to file a supplemental brief and to rely solely upon the brief submitted with the application for permission to appeal, the appellant must, within 30 days after the date on which the application was granted, file with the clerk of the Supreme Court and serve on the appellee notice of an election not to file a supplemental brief. The appellee must serve and file a brief within 30 days after filing of the brief or supplemental brief of the appellant or appellant’s notice of election not to file a supplemental brief. Reply briefs must be served and filed within 14 days after filing of the preceding brief. The briefs must conform with the requirements of Rule 27.

A petition to rehear may be filed with the Supreme Court following the denial of an application for permission to appeal, but the Advisory Commission Comment to T.R.A.P. 39 provides that the Supreme Court generally disfavors petitions to rehear following the denial of an application for permission to appeal. This article was written as an aid for practitioners seeking to obtain appellate relief from Tennessee’s highest court. As can be seen, getting to “the big dance” requires not only a knowledge of the technical requirements for preparing an application for permission to appeal, but an understanding of the Supreme Court’s role in the over-all appellate process and the philosophical leanings of a “law-development” court. It is hoped that this article contributes positively to the improvement of appellate advocacy in Tennessee.

Notes
1. T.R.A.P. 11(g).
4. See Fletcher v. State, 951 S.W.2d 378, 382 (Tenn. 1997) (“...obtaining permission to appeal pursuant to Rule 11 is not, by any means, automatic. Instead, this Court must be convinced that an important consideration justifies granting review.”). The fact that the opinion of the intermediate appellate court is in conflict with an opinion of the Supreme Court, with another opinion of the

“The purpose of an application for permission to appeal is to demonstrate to the Supreme Court that the case is an appropriate one for the exercise of the court’s discretionary jurisdiction. The application is not designed to [argue] the merits of the decision of the intermediate appellate court. The Tennessee Supreme Court is a ‘law development’ court, not an ‘error-correcting’ court.”

intermediate appellate courts, or some rule or statute and that the bench and bar needs guidance as to the state of the law due to the confusion would be an example of a reason for review. Likewise, the likelihood that the issue will be recurring with great regularity or will have grave impact on the administration of justice are reasons for review. There is no magic language; each case must be considered on its own terms. However, the key is to assert something beyond the mere fact that the intermediate appellate court wrongly decided the case.
8. T.R.A.P. 11(b) and 11(f). “The Supreme Court is receptive to a full brief on all issues accompanying the application for permission to appeal, but an application without brief will meet the requirements of
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truly produce 70 hours of productive work that is beneficial to clients in one week. Certainly it is impossible to achieve that goal week after week.

In a nutshell, these students are being told that the firm expects them to lie about their productivity and cheat the firm’s clients. That is one poor way to start a lawyer in practice. I have always felt that ethics is the most sacred of the legal profession’s possessions, and that dishonesty by one impugns the entire profession. It is, after all, up to us to police ourselves and protect the public from unscrupulous practitioners who have somehow avoided detection in the law school/bar exam experience.

It’s easy enough to castigate the lawyers who mishandle their trust accounts or fail to communicate with their clients, but we have a duty to insist that the mentoring time of beginning lawyers who mishandle their trust accounts or fail to communicate with their clients, but we have a duty to insist that the mentoring time of beginning practice not be tainted with the challenge of “we expect you to be dishonest.”

— Van R. Michael, Sweetwater

Joanne Scarlett while delivering mail. The Scarletts were standing in the street near their home. Mrs. Lourcey noticed that Mrs. Scarlett was nude from the waist up, and stopped her car to lend assistance. Mr. Scarlett explained that his wife was having a seizure. While Mrs. Lourcey attempted to contact the 911 operator, Mr. Scarlett produced a pistol and shot Mrs. Scarlett in the head. Mr. Scarlett then turned the gun on himself. Mr. Scarlett died at the scene. Mrs. Scarlett survived the incident. Mrs. Lourcey was later diagnosed with post traumatic stress disorder, and major depression.

The Supreme Court stated that "applying our decision in Ramsey, the Court of Appeals has correctly recognized that the element of foreseeability does not require a plaintiff to establish a relationship to the injured third party. Lourcey, at 53."

The court went on to state that: "... [W]e believe that the better-reasoned approach, which is consistent with our previous decisions in

‘Bystander’ case decided by Supreme Court

I know John Day “dreams about torts,” but he may have been asleep at the wheel on this one.

In the May edition of the Tennessee Bar Journal, John writes the article “A primer on the law of negligent infliction of emotional distress” (p. 28). In it, he talks about future claims for the court and asks the question “What if the bystander plaintiff saw a horrible incident resulting in the horrible injuries to an unknown person?” Well, the Supreme Court decided such a case.

In Lourcey, et al v. Estate of Scarlett, 146 S.W.3d 48 (Tenn. 2004), our Supreme Court held that in a “stand alone” case, a plaintiff is not required to establish a close relationship with the defendant to state a claim for negligent infliction of emotional distress. The court also affirmed a cause of action in this particular case for intentional infliction of emotional distress.

Cindy Lourcey was a rural mail carrier in Lebanon who came upon Charles and Camper and Ramsey, is to hold that the presence or absence of a relationship between the plaintiff and an injured third party is relevant to the duty and causation elements of a negligent infliction of emotional distress claim, as well as to the question of damages, but is not dispositive of such a claim.

Lourcey, at 54.

The Supreme Court reversed the trial court’s dismissal under Rule 12.02(6) and remanded the action for further proceedings.


P.S. I remain an avid reader of the Tennessee Tort Letter.

Author’s note: David is absolutely right. I saw my error as soon as I saw the article in print but, of course, by then it was too late. I was aware of Lourcey, but remembered it as an outrageous conduct opinion, not a negligent infliction of emotional distress opinion. I apologize for the error.

— John Day

Launch your appeal

(Continued from page 17)


9. In this context, this means the greatest likelihood that the court will grant the application on the issue, not just the greatest likelihood of affecting the outcome of the case.


11. Ibid. “Perhaps less tangible in the equation is simply being fortunate enough to have the type of legal issue that at least two of the justices are interested in to begin with. It should come as no surprise that the justices, like everyone else, do not share the same enthusiasm or interest in every type of legal issue that comes up through the system.”

12. Ibid.
13. Ibid.
16. Ibid.
17. Ibid.
20. Ibid. If the appellant fails to file a notice of election not to file a supplemental brief, the appellee’s time to file a brief runs from the 30th day after permission to appeal was granted.

21. Ibid.
22. Ibid.
23. See Lease v. Tipton, 722 S.W.2d 379 (Tenn. 1986).
In Perfectly Legal, David Cay Johnston pens a captivating tale that uncovers how the rich exploit the federal income tax system. Johnston, a Pulitzer Prize winning investigative journalist for The New York Times, writes easily understood prose, and his book should be required reading for anyone interested in tax reform or curious about tax shelters.

He weaves one central theme throughout the book — America's super rich (i.e., the top 1 percent) are getting richer, at least in part because of our tax system. He marshals statistics showing that since 1970 the super rich have taken an increasingly bigger slice of the pie, with the richest of the super rich enjoying the greatest increase.

Johnston inventively calls the super rich the "political donor" class, because they make most political contributions. They also hire former government officials as lobbyists or employees. These steps afford access to Congress, and the access sometimes prompts Congress to pass favorable tax breaks.

Congress also consistently underfunds and sometimes maligns the IRS, often for easy political gain. As a direct result, the IRS audits fewer returns, respect for the tax system declines, and cheating increases, points that Johnston empha-

sizes. He also could have noted a disturbing indirect result: Congress often reacts to the cheating by making the Internal Revenue Code more complex, which in turn makes cheating and tax avoidance more likely.

Of course, tax law is inherently political, and it is prone to what Johnston calls the triumph of "marketing … over reasoned debate." One classic example he gives is the repeal of the estate tax, a tax of quite limited application. Attitudes about that tax changed dramatically when political opponents labelled it the "death" tax (a misnomer since the estate tax applies to the transfer of property on a wealthy individual's death, not to death itself). Those opponents claimed that the tax threatened the family farm, a dubious claim at best. In response, some in Congress offered legislation that would exempt estates under $10 million, thereby excluding all but a few estates from the tax and amply protecting the family farm. Opponents rejected the offer, however, pushing through legislation that ultimately will repeal the estate tax outright, including for multi-billion dollar estates.

In fact, since World War II, when the federal income tax became a tax on the masses rather than just on the wealthy, Democrats and Republicans alike have disingenuously portrayed tax breaks for the rich as breaks for the common man. As a consequence, Johnston shows, the rich pay tax at about the same rate as the middle class. However, the middle-class burden is increasing. As a disturbing example, barring a legislative change, more and more of the middle class will pay the alternative minimum tax over the next several years, effectively reversing most of their recent tax cuts.

Equally as disturbing, some rich taxpayers avoid or evade their intended share of tax by using tax shelters. In an arresting fashion, Johnston describes a number of these shelters, and his descriptions are accessible to lawyers and non-lawyers alike.

In short, in Perfectly Legal, Johnston describes a tax system near the breaking point. The book is an important resource that educates us about the system and offers needed perspective to help us fix it.

Don Leatherman is a professor at the University of Tennessee College of Law, who teaches taxation and related courses.

Murder in Tombstone
By Steven Lubet
University Press $19.80
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Professor Lubet of Northwestern has written the definitive book for lawyers about the gunfight at the O.K. Corral in Tombstone, Ariz. In Murder in Tombstone, he examines every detail of the inquest that followed. Wyatt Earp and Doc Holliday barely escaped death.

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Donald F. Paine is of counsel to the Knoxville firm of Paine, Tarwater, Bickers, and Tillman LLP, a past president of the TBA and a regular columnist for the Tennessee Bar Journal.
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Introduction

Preservation of aesthetic, environmental, historic and recreational values on private lands is difficult to accomplish. Government entities often do not have the funding to purchase and preserve these lands in an undeveloped state. Income tax incentives in return for the donation of conservation easements by private landowners provide a useful tool for accomplishing these preservation goals.

The Internal Revenue Code (hereinafter the code) allows for income tax deductions for charitable contributions under Section 170. One type of these charitable contributions is a conveyance of a partial property interest that qualifies under the code as a “conservation contribution.” The most common form of these contributions is a conservation easement, and it must meet specific requirements outlined in the

(Continued on page 26)
code and treasury regulations in order to qualify for the income tax deduction. A qualified conservation contribution is generally defined as “a contribution of a qualified real property interest, to a qualified organization, exclusively for conservation purposes.” This definition presents the following four primary elements:

1) what constitutes a qualified real property interest,
2) what is a qualified organization,
3) what constitutes exclusivity, and
4) what are conservation purposes?

Qualified real property interest

The code identifies three categories of “qualified real property interests.” These interests include: “(A) the entire interest of the donor other than a qualified mineral interest, (B) a remainder interest, [and] (C) a restriction (granted in perpetuity) on the use which may be made of the real property.” The conservation easement (i.e., restriction on use) is best suited to a landowner who wants to retain some limited use of the property while ensuring the property will not be further developed in the future.

A conservation easement is a type of negative easement which is generally unenforceable under common law due to its intangible nature. As such, many state legislatures have specifically authorized conservation easements by statute.

Qualified organization

This requirement identifies who may receive the qualified real property interest and what restrictions on alienability must be imposed on the donee. Generally, the organization must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.” Treasury regulations identify four classes of organizations that qualify under this definition:

1) a governmental unit described as a state, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made exclusively for public purposes;
2) an organization described as one which normally receives a substantial part of its support ... from a governmental unit ... or from direct or indirect contributions from the general public;
3) a charitable organization described in I.R.C. §501(c)(3) [i.e. tax-exempt] that meets the public support test of §509(a)(2);
4) a charitable organization described in I.R.C. §501(c)(3) that meets the requirements of I.R.C.
§509(a)(3) and is controlled by an organization [qualifying under one of the three foregoing categories].

In addition to the requirement that the grant must be made to a qualified organization, it must also include certain restrictions on transfer of the interest. Subsequent transfers can only be made to other qualified organizations and the original conservation purposes must be carried out by the grantee organization. However, if surrounding conditions have changed to such an extent that it is impossible to continue the original conservation purposes, the proceeds from the transfer must be used in a manner consistent with the conservation purposes.

**Exclusivity**

This requirement is an integral part of the qualified real property interest requirement, but is identified separately due to its importance. The code states that “[a] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.” The treasury regulations further interpret this statutory provision to require that a mortgagee of the conservation property must subordinate its rights to those of the qualified organization and to limit surface mining of reserved mineral interests. However, the regulations do include de minimis provisions for the exclusivity requirement regarding remote future events and minor mining impacts. The taxpayer must substantiate the condition of the property at the time of gift by providing the donee organization with appropriate baseline documentation where a retained use may potentially impact the conservation purpose.

**Conservation purpose**

While the preceding three requirements are relatively straightforward, the determination of whether a particular contribution satisfies the conservation purpose requirement can be difficult to ascertain. This is because every tract of land possesses a unique mix of conservation values. The code identifies four general classes of conservation purposes:

1) the preservation of land areas for outdoor recreation by, or the education of, the general public;

2) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

3) the preservation of open space (including farmland and forest land) where such preservation is — for the scenic enjoyment of the general public, or — pursuant to a clearly delineated Federal, State, or local government conservation policy and will yield a significant public benefit; or

4) the preservation of a historically important land area or a certified historic structure.

The review of the cases in the table clearly demonstrated that the valuation of a conservation contribution is a highly fact-based inquiry and largely dependent on expert opinion.

<table>
<thead>
<tr>
<th>Case</th>
<th>Taxpayer</th>
<th>IRS</th>
<th>Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Browning v. CIR(1997)</td>
<td>$254,000</td>
<td>$0</td>
<td>$209,000</td>
</tr>
<tr>
<td>Schwab v. CIR(1994)</td>
<td>$900,000</td>
<td>$0</td>
<td>$544,000</td>
</tr>
<tr>
<td>Clemens v. CIR(1992)</td>
<td>$910,000</td>
<td>$110,000</td>
<td>$703,000</td>
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<tr>
<td>Schapiro v. CIR(1991)</td>
<td>$595,031</td>
<td>$388,000</td>
<td>$595,031</td>
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<tr>
<td>Dorsey v. CIR(1990)</td>
<td>$245,000</td>
<td>$46,000</td>
<td>$153,422</td>
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<tr>
<td>Higgins v. CIR(1990)</td>
<td>$110,000</td>
<td>$50,150</td>
<td>$103,000</td>
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<tr>
<td>Griffin v. CIR(1989)</td>
<td>$195,000</td>
<td>$35,000</td>
<td>$70,000</td>
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<tr>
<td>Richmond v. U.S.(1988)</td>
<td>$150,000</td>
<td>$59,000</td>
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<tr>
<td>Losch v. CIR(1988)</td>
<td>$235,000</td>
<td>$70,000</td>
<td>$130,000</td>
</tr>
<tr>
<td>Fannon v. CIR(1986)</td>
<td>$236,752</td>
<td>$0</td>
<td>$90,956</td>
</tr>
<tr>
<td>Symington v. CIR(1986)</td>
<td>$150,000</td>
<td>$0</td>
<td>$92,370</td>
</tr>
<tr>
<td>Todd v. CIR(1985)</td>
<td>$353,000</td>
<td>$31,000</td>
<td>$31,000</td>
</tr>
</tbody>
</table>

The Treasury Regulations attempt to further define these broad categories and provide some specific examples; however, it is impossible to identify the infinite different circumstances that qualify as conservation purposes. The regulations do identify that public access is required where the conservation

---

Trey Coale is an associate with the Mobile, Ala., law firm of Coale, Dukes, Kirkpatrick & Crowley, PC. He received his undergraduate degree from the University of the South and his law degree from the University of Alabama School of Law. He also holds masters’ degrees in forest resources from the University of Georgia and environmental law from Vermont Law School and is scheduled to complete his LL.M. in taxation from the University of Alabama this August.
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Conservation easements

(Continued from page 27)

purpose is for the preservation of land areas for outdoor recreation by, or the education of, the general public. Public access is not required to accomplish the other general categories of conservation purposes except where the lack of public access would frustrate the proposed conservation purpose.19

Given the wide variety of individual circumstances that would qualify as conservation purposes, the determination is inherently a case-by-case analysis. Such uncertainty could seemingly cause taxpayers to shy away from making conservation contributions for the fear they would invite an I.R.S. audit. The only certain way to determine whether a particular taxpayer's contribution will qualify for a conservation deduction is to request a private letter ruling from the I.R.S. A request in writing must be submitted that outlines the facts of the particular conservation contribution, the controlling law (e.g., “under” 170(h) of the I.R.C. a deduction is allowed for ...), and ask the I.R.S. to rule whether the contribution qualifies. The problem with requesting private letter rulings is that they are quite expensive (present application fee is $6,000)20 and time consuming (possibly taking over a year). Additionally, the I.R.S. will not rule on whether the valuation of the deduction (discussed below) is correct.21

While requesting a private letter ruling often is not an appropriate course of action for determining how to create a conservation contribution that will qualify for an income tax deduction, analysis of past private letter rulings provides useful insight into how to structure the transaction. It should be noted that a private letter ruling applies solely to the taxpayer who requested it, and it cannot be used or cited as precedent.22

Forty-five private letter rulings issued during the time period of 1982 to 2004 were found that directly addressed the issue of whether a particular contribution constituted a qualified conservation contribution and was thus available for an income tax deduction. The rulings involved a wide variety of conservation purposes, and were all determined to be valid conservation contributions pursuant to I.R.C. §170(h). This high approval rate could be attributable to the fact that a taxpayer would not undertake the effort and expense to obtain a private letter ruling without presenting a strong case. Further, it may reflect that the qualified organization receiving the easement helps ensure the significance of the donation. On the other hand, it may simply indicate a somewhat tolerant approach by the I.R.S. in the interpretation of conservation purposes under I.R.C. §170(h)(4) given the volume of litigation in regards to valuation discussed in the next section.23

Often the conservation easements involved contributions that asserted they fulfilled several of the broad categories of conservation purposes identified in the code. Many of the easements involved agricultural/livestock farms or ranches. In general, these taxpayers proposed to restrict the land from commercial and residential development while continuing farming/ranching activities. Easements preserving structures or areas with historic significance was another common purpose. Other easements involved retained uses such as forest management and harvesting, mineral rights, outdoor recreation, water use, limited residential development, commercial campgrounds, summer camps, and guest ranches. Most of the rulings involve some combination of the above listed uses. Often the subject property is located in close proximity to a public recreation area and/or ecologically

Update from the author

This year there are increased enforcement activities against abusive practices involving conservation easement donations. The IRS is targeting abusive practices with conservation easement donations, such as over-valuation of the contributions and failures of the charities to enforce easement restrictions. The IRS is modifying its tax forms filed by both the donor taxpayer and the receiving charity to assist with identifying abuses. Approximately 400 open space easements and 700 facade easements have been targeted for audit.

For more, see Written Statement of Mark W. Everson, Commissioner of Internal Revenue, Before the Committee on Finance, United States Hearing on Exempt Organizations: Enforcement Problems, Accomplishments and Future Direction, April 5, 2005, pages 9–10.
Conservation easements

(Continued from page 29)

sensitive area such as a park, national forest, wildlife refuge or public waterbody. Other properties are located in areas that are experiencing rapid growth and development where there are express governmental policies and goals for preserving and maintaining undeveloped lands.24

Conservation contribution deduction valuation

The value of the conservation contribution is the fair market value of the restriction at the time of the contribution.25 Such fair market value can be determined through a comparable sales appraisal approach using sales of similar easements in the area, however such information is often limited. Therefore, the fair market value of the contribution will often be determined as the fair market value of the property prior to donation of the easement (its highest and best use) less the fair market value of the property after donation of the easement.26 Such before and after valuation must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property’s potential highest and best use.27

A deduction in excess of five thousand dollars for a donation of a conservation easement must be substantiated by the submission of a qualified appraisal by a qualified appraiser.28 The intangible nature of conservation easements can lead to widely varying opinions as to value of the easement by equally qualified appraisers. The Congressional Joint Committee on Taxation recently referred to such valuation difficulties in justifying its recommendations for significant new limits on the allowable charitable deductions for donations of qualified conservation contributions.29

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Thus, large deductions for conservation contributions seem to provide potential fertile ground for IRS audit.

Indeed, as mentioned above, much of the litigation in this area has been regarding the valuation of the donation. In some cases the I.R.S. has taken the position that the easement donation was worth nothing, arguing that there has been no change in highest and best use of the property. For example Schwab v. C.I.R. involved the preservation of a waterfowl preserve on a 1,500-acre farm where Taxpayer claimed $900,000 value for the easement and the I.R.S. asserted $0 value for the easement on basis of no change of highest and best use. The Tax Court ruled the easement value to be $544,000.30 Fannon v. C.I.R. involved a donation of a scenic easement over a farm through restricting development where Taxpayer claimed $236,752 value for the easement and the I.R.S. asserted a $0 value for the easement on basis of no change in highest and best use. The Tax Court ruled the easement value to be $90,956 and on further appeal the Fourth Circuit increased the easement value to $121,781.31

Overall review of several cases regarding valuation indicates a general trend of both the U.S. Tax Court and U.S. District Courts to recognize at least some value for the conservation contribution, usually (but not always) somewhere between the extremes of valuations presented by the Taxpayer and I.R.S. experts and more recently leaning towards the Taxpayer's valuation (see table, page 27).32

The review of the listed cases in the table clearly demonstrated that the valuation of a conservation contribution is a highly fact-based inquiry and largely dependent on expert opinion.33

Conclusion

Conservation easements are useful tools for preserving aesthetic, environmental, and historic values on privately owned lands. Furthermore, they can provide significant income tax deductions for the donor landowner. Ambiguities in the Code and Treasury (Continued on page 36)
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 the Journal’s writing competition, the Justice Joe W. Henry Memorial Award for Outstanding Legal Writing.

Twenty-four years ago — after 16 years of Tennessee Bar Journals — writers who were filling up its pages were given another incentive to write besides the fame and fortune that usually follows publication in the Journal.

An award was established to honor the “lawyer who writes the most outstanding article that is published in the Tennessee Bar Journal,” wrote Ronald Lee Gilman in announcing the award in 1982. “The purpose of the award is to encourage practicing Tennessee lawyers to write scholarly yet practical articles for the Journal that will be of maximum benefit to the members of our bar.”

To be eligible for the award the writer had to be a TBA member “primarily engaged in active legal practice.” Full-time judges and faculty were not in the running.

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WHAT?? Only one woman has won the Joe Henry Award so far. Monica Allie receives the plaque from President Dan Breen in 1997 for her article “The New Adoption Law in Tennessee: A Controversial, Sweeping Reform.” Pam Reeves, who was to become the TBA’s first woman president, looks on.

Disclaimer about likenesses
The photos you see here are, for the most part, the ones that were current at the time the writer won the award (and were published then in the Journal), so yes, there may have been some, uh, changes in the interim. It does seem that some of them were in high school at the time. We are aware that these are not recent photos.

So please do not comment to award winners when you see them if you believe there has been any change in their appearance over the years, and do not write a letter to the editor about it.
although their submissions “will continue to be encouraged.”

The award was established by the TBA Board of Governors, on the recommendation of the Publications Committee. Gilman was its chair that year, 1982. The first award was given in 1982, but encompassed articles from fiscal 1981-82. In 1987, the competition was judged using articles based on a calendar year.

This award is unusual in that the winner receives $500 with the plaque, the only TBA award to do so.

The judging

Three people always judge the Joe Henry Award, as set up by the board in 1982: the president of the TBA; the chief justice of the Tennessee Supreme Court, or an appellate judge designated by the chief justice; and the dean of Memphis State University of Tennessee or Vanderbilt law schools (on a rotating basis), or a faculty member designated by the dean.

This year’s competition was judged by TBA President Charles Swanson, Chief Justice Frank F. Drowota and Dean Tom Galligan of UT.

Its namesake

The award was named for the late chief justice of the Tennessee Supreme Court, Joe W. Henry, “a practicing lawyer, a scholar, and a writer with a rare talent for clear, forceful and often dramatic wording,” the announcement says. Henry was elected to the court in 1974 and died June 9, 1980.

Guidelines

To be considered, articles (in addi-

(Continued on page 35)
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Joe W. Henry Award

(Continued from page 33)

Joe W. Henry Award

(Continued from page 33)

TENNESSEE BAR JOURNAL, JUNE 2005
Conservation easements

(Continued from page 31)

Regulations as to what constitutes a qualified conservation contribution may tend to cause taxpayers to shy away from donating conservation easements and claiming an income tax deduction. Application for private letter rulings on the validity of a given contribution can be obtained, but are expensive and time consuming. However, analysis of past private letter rulings, while not available as precedent for future determinations, provide valuable insight into how to structure a valid conservation easement. Furthermore, past rulings indicate that the I.R.S. typically approves proposed conservation easements as qualified conservation contributions under I.R.C. §170(h) saving its argument as to the easement value. The intangible nature of conservation easements can lead to dispute with the I.R.S. over the value of the deduction; however, the courts have recognized the value of such deductions over I.R.S. objection. Proof of the change, because of the easement, in the highest and best potential use of the property has been shown to be instrumental in supporting valuations of the easement and thus the deduction taken by the taxpayer.

Notes
6. 26 C.F.R. §1.170A-14(c)(1).
7. 26 C.F.R. §1.170A-14(c)(1)(i); I.R.C. §170(c)(1).
11. 26 C.F.R. §1.170A-14(c)(2).
12. Id.
15. Id.
18. 26 C.F.R. §1.170A-14(d)-(f)
20. Rev. Proc. 2004-1 Appendix A(3)(c)
[fee reduction to $500 is available for letter rulings where gross income is less than $250,000].
26. Id., Schapiro v. C.I.R., T.C. Memo. 1991-128 [Tax Court ruling that before value is highest and best potential use accepting as such the approach in the Taxpayer's appraisal that gave the before value of multiple lots in subdivided condition and rejecting approach in IRS appraisal that before value was single residence on vacant acreage].
29. Options to Improve Tax Compliance and Reform Tax Expenditures, January 27, 2005, Congressional Joint Committee on Taxation.
33. Id.
I’m so old I actually remember when flying on a commercial airliner was a very enjoyable experience. I took my first flight in 1956, when I was only four years old. My mother and I flew a Southern Airways DC-3 from Memphis to Atlanta. Nearly a half century later, I still vividly recall every moment of the flight.

Mom and I boarded the DC-3 by climbing up a small step ladder through a door at the end of the plane, right by the tail section. Once inside the plane, we were greeted by a very happy, smiling stewardess (they weren’t called flight attendants in those days) who treated us as if we were royalty. She escorted us uphill to our seats, given the fact that even when a DC-3 is on the ground, it juts up at 45° angle. (Think of the plane Humphrey Bogart put Ingrid Bergman on at the end of Casablanca. That was a DC-3. Fly it again, Sam!) Our seats were first class, but that’s not because we were rich. (Remember, folks, my daddy was a Baptist preacher.) All seats on a DC-3 — all 20 of them — were first class.

Before we took off, the stewardess handed me a package of Chiclets. She told me to chew them during the flight so that my ears wouldn’t pop. Also, before the flight, Mom and I were personally greeted by both the captain and the co-pilot, who told us that the weather was nice and they were certainly happy that we were flying with them to Atlanta, thank you. The captain even presented me with my very own set of pilot’s wings that he pinned to the lapel of my suit jacket. (Mom had dressed me up in my Sunday School clothes for the flight.)

After pinning the wings on me, the captain pronounced that I was “an official Southern Airways junior pilot!” Mom took a picture of me shaking hands with the captain. (Just a couple of us flyboys ready to take off!)

After we were airborne and reached cruising altitude, the stewardess hooked trays to our seats. In those days, the trays did not flip out of the seat in front of you. The stewardess then brought us a wonderful hot lunch served on real china on real linen with real silverware. Mom and I dined as if we were Queen Elizabeth and Prince Charles.

After lunch, the stewardess escorted me to the cockpit so that I could enjoy a brief visit with the captain and co-pilot. Even though I was an official Southern Airways junior pilot (Captain Billy!), I was not allowed to fly the plane.

When we landed in Atlanta, the captain, the co-pilot, and the stewardess walked Mom and me downhill to the back of the plane and helped us out the door and down the step ladder. The entire crew then reiterated how much they appreciated that we had flown with them. Mom and I thanked them profusely for getting us safely to Atlanta so that I could visit with my grandmother. Then, Grandmother herself made a dramatic appearance, racing from the Atlanta airport gate to the side of the plane where she hugged Mom and me, and then took a picture of Mom, the stewardess, the captain, the co-pilot and her grandson, Captain Billy.

Fifty years later, I am now a frequent flyer. Several times a month, I fasten my seatbelt, make sure my seatback and tray table are in their full, locked and upright position, and soar off into the once-friendly skies. More often than not, I am still flying from Memphis to Atlanta since there are a lot of mean doctors in Atlanta who like to testify against the nice innocent doctors I represent in Tennessee.

Besides, as the old joke goes, whether you’re going to heaven or hell, you’re probably going to have to change planes in Atlanta. But take it from me, flying from Memphis to Atlanta is not...
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(Continued on page 40)
what it used to be. These days commercial air travel is about as exciting and romantic as a cattle call.

First, when you get on airliner these days, you are not greeted by a happy, smiling stewardess. Instead, you encounter a grumpy flight attendant who has all the charm of a Marine drill instructor. If you ask her any questions, she's most likely going to tell you to sit down and shut up.

Second, unless you are prepared to take out a second mortgage on your home, you will not be flying first class. You will be flying “coach,” which should not be mistaken for second class or even third class. In coach you will be surrounded by people who are approximately the same size as Japanese Sumo wrestlers. And once you reach cruising altitude and the “fasten seatbelt” sign goes off, these wrestlers will spend the rest of the flight climbing over you during their repeated trips to the bathroom.

Third, you will no longer be served a hot meal on real china with real linen and real silverware. If you’re lucky, you will receive a package of peanuts and a bottle of warm tap water.

And believe it or not, it’s getting worse. Recently, the annual Airline Quality Rating Study was released, containing the shocking finding that the “overall quality of air travel is deteriorating” these days. Fewer flights are on time, complaints about air service are up 27 percent, and airlines are laying off employees and cutting back on services. The good news is that there’s not much more cutting back that the airlines can do. There are no more hot meals or junior pilot wings. American Airlines recently got rid of blankets and pillows on flights. The airline claimed that it was a cost-reducing measure to save $300,000 a year. I think American Airlines was just trying to avoid an inevitable pillow fight between disgruntled customers and grumpy flight attendants.

I sure wish Southern Airways was still around and offering DC-3 service from Memphis to Atlanta. I’ve been told that a modern jetliner flies at twice the speed of a DC-3, but I don’t believe it. When Mom and I flew from Memphis to Atlanta 50 years ago, the wonderful flight took off on schedule, arrived on time, and seemed to last just a few joyous minutes. But these days when I am crammed between two Japanese Sumo wrestlers inside a modern Delta jetliner at the Memphis airport, the plane proceeds to taxi halfway to Atlanta where it sits on the tarmac for an hour before finally taking off on a bumpy, miserable flight that seems to last forever.

Maybe rather than just complaining, I ought to do something about this. After all, I am still an official Southern Airways junior pilot. ☹

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**CLASSIFIEDS**

(Continued from page 39)

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