FREE TO SHARE?

Grokster decision sidesteps innovation/copyright battle; puts focus on business strategies
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On the Cover
When the U.S. Supreme Court ruled in MGM Studios Inc. vs. Grokster Ltd., copyright and technology development industries saw the outcome very differently. Read about what the decision may mean for each side, beginning on page 14. Cover design by Barry Kolar.
Your passion is winning your next trial. IPSCO's passion is taking care of you.

And if you're not maintaining proper insurance protection for your law firm, we get concerned. Help us to help you by taking this quick survey—any "NO" or "NOT SURE" answers warrant a review.

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<th>Question</th>
<th>YES</th>
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<td>1. All business property properly valued?</td>
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<td>2. Practice covered when employee commits fraud?</td>
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<td>8. Does practice have adequate ERISA band coverage?</td>
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<td>11. Does business owner's policy provide for 'extra expense'?</td>
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Heartbreak followed by action

Early one warm spring morning some 24 years ago, my bride and I boarded a train in Atlanta and headed for our honeymoon. The train was called the “Southern Crescent” and it took us through the backwoods of Georgia, Alabama and Mississippi and then into the heart of the bayou. At the end of the day, we arrived at our honeymoon destination, a wonderful city called New Orleans.

We checked into the Royal Sonesta Hotel in the heart of the French Quarter and then had dinner at a fantastic restaurant called Galatoire’s. After two days of living like the king and queen of Mardi Gras, we noticed that we were quickly running out of money. So we checked out of the Royal Sonesta and into the Olivier Guest House on Tolouse.

Instead of dinner at Galatoire’s or Commander’s Palace, we had coffee and beignets at Café Du Monde and gumbo and crawfish at Tujague’s.

We took the St. Charles trolley out to the Garden District and otherwise took in all the sights and sounds of the “Big Easy.”

“Nawlins,” as the locals call it, became our favorite city.

Over the past quarter century, my bride and I have journeyed back to New Orleans on several occasions. We have not only had a second honeymoon there, but third, fourth and fifth ones as well.

We spent New Year’s Eve 1986 there and joined about 75,000 of our closest friends at the Superdome to watch our Volunteers upset Miami in the Sugar Bowl.

We followed our Vols there again in 1991 and saw them beat Virginia in the Sugar Bowl. And we have even gone to New Orleans several times over the years when there wasn’t even a football game being played.

On Sunday, Aug. 28, we heard the news that there was a major hurricane taking direct aim at Nawlins. But I didn’t worry about it. I am old enough to remember when Hurricane Betsy pounded Nawlins in 1965 and Camille struck it in 1969. The Big Easy survived both of those blows, and I was confident that Galatoire’s, Café Du Monde, the Olivier Guest House, and all my other favorite haunts in the Big Easy would be just fine, thank you.

But it wasn’t fine, of course. Hurricane Katrina struck Nawlins and the Gulf Coast with ferocity, killing hundreds and forcing thousands either to flee to safety (the lucky ones) or to pray for rescue.

I spent the next few nights watching the TV news footage of the beautiful town

(Continued on page 4)
where my bride and I spent our honey-moon. I felt heartbroken and helpless. I tried to contact my friends who live and practice law in Nawlins, Gulfport and Biloxi. Fortunately, I learned they were all safe.

Over the next several days, I received e-mails from bar leaders in Louisiana and Mississippi. I learned that in Louisiana alone, some 6,000 lawyers (one-third of the state's bar) had lost their homes, their offices, and their law practices, at least temporarily, and perhaps permanently.

Within a few days after Katrina flooded New Orleans and leveled so much of the Gulf Coast, thousands of evacuees began to arrive in Tennessee, many of those in my hometown, Memphis.

And then, in the midst of all this suffering, something extraordinary happened. All across the Volunteer State, Tennessee lawyers began to volunteer to help. A network quickly developed consisting of the Tennessee Bar Association, local bar associations, legal services offices, law schools, and private law offices from Memphis to Mountain City.

The TBA petitioned the Supreme Court to give temporary admission to displaced Louisiana, Alabama and Mississippi lawyers who sought to practice in Tennessee. Legal Service attorneys were joined by volunteer lawyers to quickly set up mobile legal clinics to counsel evacuees on available social services in the short-run and FEMA assistance in the long-run. Many lawyers even took evacuee families into their homes.

Tennessee law schools took in law students from Tulane and Loyola, and lawyers all across the state gave generously to the Red Cross and other relief funds.

In short, Tennessee lawyers opened their homes, their offices, their wallets, and their hearts. They generously gave their time, their talents, and their money.

I look forward to returning to Nawlins some day. I look forward to taking my bride back for another honey-moon. I look forward to having coffee and beignets at Café Du Monde and riding the street car out to Tulane. But above all, I look forward to having dinner with Judy and Rene Martinez and other dear friends who live and practice law in Nawlins. And when we break bread together, I will propose a toast to a great city, the triumph of the human spirit, the kindness of friends, and the kindness of strangers.

For an up-to-date look at Tennessee lawyers' efforts or see what you can do to help, go to http://www.tba.org/Katrina.
Can unfairness be cured in ex parte communications with physicians?

I am writing in response to John Day’s article, “Ex Parte Communications with Treating Physicians,” which was published in the September 2005 issue of the Tennessee Bar Journal. While I disagree with several of the assertions made by Mr. Day, I direct my letter to his conclusion that unfairness to defendants can be cured by the rule change he proposes.

Mr. Day proposes that permitting a defendant to take a discovery only deposition of a treating physician would eliminate unfairness to defendants. While that rule alleviates the risk of a defendant essentially paying the costs for a deposition a plaintiff can present as evidence at trial, the rule proposed by Mr. Day does not eliminate all unfairness. Substantial unfairness results from the fact that a plaintiff’s lawyer has unfettered, private and informal access to treating physicians. As a result, a plaintiff can meet informally with a treating physician and explore various theories and facts of the case with the treating physician without exposing adversary counsel to the weaknesses of his or her own case or educating adversary counsel. The defendant does not have that same opportunity. Because a defendant’s access to a treating physician is limited to a deposition, a defendant runs the risk of educating adversary counsel, and exposing weaknesses in his own case. Or to eliminate that risk, the defendant must simply forego discovery of certain issues.

Fairness should be achieved by creating equal access for the plaintiff and the defendant. If a defendant’s access to a treating physician is limited to a deposition,

(Continued on page 32)
Find your spot and help
Relief for Hurricane Katrina survivors swells; lawyers join together to help

A fter Hurricane Katrina did her worst and the enormity of the overwhelming disaster along the Gulf Coast came to light, Tennessee lawyers began to ask what they could do to help. In response, the Tennessee Bar Association and many other bar associations and organizations began the task of trying to direct those needing help as well as those offering help.

As its clearinghouse, the TBA launched a web page for up-to-the-minute information. From donating desks to blood, the page lists information and links to:

- ways to volunteer and where to do it, with links to bar associations’ and other organizations’ relief efforts
- how and where to make a donation
- resources of how to get help, find loved ones or see specific affected areas
- resources for legal assistance
- how to volunteer legal services or donate items to lawyers
- how to help lawyers and the judicial system rebuild
- how to avoid related scams.

“Our hearts go out to our brother and sister lawyers in Alabama, Louisiana and Mississippi, and all of the victims of this terrible disaster,” says TBA President Bill Haltom. “We will do everything we can to assist. We Tennesseans are called the Volunteers because we respond in times of need.”

Rising to the call

Lawyers across Tennessee have been stepping forward to help with disaster relief, offering legal assistance to evacuees, volunteering office space and supplies and even delivering relief supplies to the Gulf Coast.

For instance, in Nashville at press time more than 70 volunteer lawyers were working with the Legal Aid Society and Pro Bono Program to staff a free legal clinic for Katrina evacuees that will remain open at the Red Cross Service Center as long as the demand is there. Memphis and Knoxville are also seeing great volunteer contributions from lawyers. One firm in Memphis — Spicer Flynn & Rudstrom — is setting the pace, with 100 percent of the 49-member firm signing up as volunteers. Knoxville attorneys staffing a relief clinic are seeing a number of clients with issues ranging from child support to bankruptcy to social security. In Jackson, lawyers are working with agencies that have organized an umbrella group called KARE to assist victims.

More than 100 lawyers statewide have volunteered to provide legal assistance

(continued on facing page)
Changes in the court
Clark named to Tennessee Supreme Court

Cornelia “Connie” Clark was sworn in Sept. 19 as the newest justice of the Tennessee Supreme Court. She fills a vacancy created by the retirement of Chief Justice Frank F. Drowota III.

Bredesen said that appointment of a justice to the Tennessee Supreme Court is one of the most consequential jobs of a governor. He expressed confidence in Clark’s “knowledge of the law, hard work and utmost integrity.”

Clark was appointed to the circuit bench by Gov. Ned McWherter in 1989. She was chosen by the Supreme Court as director of the Administrative Office of the Courts in 1999. She said she could only promise to do “everything possible” to earn the trust of those who supported her.

Clark, 55, holds a bachelor’s degree from Vanderbilt University and a master’s degree in teaching from Harvard University. She earned her law degree from Vanderbilt School of Law.

Anderson temporary chief justice

Before Clark was named, E. Riley Anderson of Knoxville was elected chief justice by the court, to succeed former Chief Justice Drowota. Anderson will serve until the new full court elects a new chief justice, which at press time had not occurred. The chief justice elected by the new court will serve until Aug. 31, 2006, which would have been the end of Drowota’s four-year term.

Relief for survivors

(continued from facing page)

through the TBA, which is matching volunteer attorneys with local pro bono and legal services organizations in need of assistance.

Help finding jobs

Joblink, the TBA’s new career placement service, is currently available to displaced attorneys who are seeking employment in Tennessee. Under normal conditions, this service will be open only to members. But now, attorneys from Alabama, Louisiana and Mississippi who are seeking work in Tennessee can visit http://www.tba.org/joblink/ to create an online resume and search for jobs.

For more details on how to volunteer, offer office space, office equipment or other resources, go to http://www.tba.org/Katrina.

Court raises caps

Indigent representation gets a boost

Lawyers now could be eligible to receive more compensation for their appointed work. This includes those who represent defendants charged with a felony at the trial level, juveniles in dependency and neglect cases and post dispositional reviews, as well as lawyers who represent parents in allegations against the parents that could result in the termination of parental rights. By order entered Sept. 1, and effective Oct. 1, the Supreme Court raised caps on felony cases from $1,000 to $1,500, on dependent neglect proceedings from $500 to $750, and on certain other matters and parental termination cases from $750 to $1,000.

All of these steps were made possible when the appropriations to the court for indigent representation were increased by the last session of the legislature. This is one of the measures recommended by the Tennessee Bar Association joining with the Tennessee Association of Criminal Defense Lawyers and the Public Defenders Conference as part of the rewrite of the Rule 13 on indigent representation.

The order amending Section 2(d) of Tenn. Sup. Ct. Rule 13 may be found at http://www.tsc.state.tn.us/opinions/tsc/rules/2005/Rule13ord.htm.
The Memphis office of Leitner, Williams, Dooley & Napolitan PLLC announced the addition of three new associates to its office: Jason R. Hollingsworth, who is licensed to practice in both Tennessee and Mississippi; Tracy A. Overstreet; and Aaron R. Parker. All graduated from the University of Memphis School of Law.

Howell S. Arnold has joined the Chattanooga office of Shumacker Witt Gaither & Whitaker PC as an associate. Prior to joining the firm, Arnold clerked for the Office of Mergers and Acquisitions at the Securities and Exchange Commission, and the Division of Enforcement at the New York Stock Exchange. He earned his law degree from the University of Alabama School of Law in 2003 and while there clerked in the civil division of the U.S. Attorney’s office. He also earned an LL.M. in securities and financial regulation from the Georgetown University Law Center in 2005.

Kristen Dyer has joined Neal & Harwell PLC as a staff attorney, where she will focus on civil and criminal litigation. Prior to joining the firm, she worked for 10 years as a police officer with the Metropolitan Nashville Police Department. Dyer graduated from the Nashville School of Law in May 2005.

Nashville-based Stokes Bartholomew and the New Orleans firm of Adams and Reese LLP recently announced their merger effective June 30. In Tennessee, the firm will operate as Adams and Reese/Stokes Bartholomew. The combined firms will employ nearly 300 attorneys with 36 in Nashville, and will operate in seven other markets including New Orleans, Birmingham, Houston, Jackson, Baton Rouge, Mobile and Washington, DC.

Memphis attorney Larry Rice has released the third edition of The Complete Guide to Divorce Practice, published by the American Bar Association. The book offers sample forms and model procedures for domestic law practitioners. Rice practices law as a certified family law specialist in addition to writing and lecturing.

Attorney Candice L. Reed has joined the Nashville office of Counsel On Call where she will focus on candidate screening and placement. Prior to joining the company, Reed worked in the Nashville office of Miller & Martin PLLC. She brings more than five years of commercial litigation experience to her new position. Reed earned her law degree from the University of Tennessee College of Law.

Bass, Berry & Sims PLC announced that Keli J. Stewart has joined the firm’s Nashville office. Stewart will focus on commercial litigation with an emphasis on class action product liability matters. Prior to joining the firm, she practiced at Waller Lansden Dortch & Davis PLLC and Boult, Cummings, Connors & Berry PLC. She received her law degree in 2000 from the University of Tennessee College of Law.

Larry D. Soderquist, director of the Corporate and Securities Law Institute and law professor at Vanderbilt Law School, died on Aug. 20 at Vanderbilt University Medical Center. Soderquist, 61, had been seriously injured in an automobile accident in early July. Until his death, he was counsel to Baker, Donelson, Bearman, Caldwell & Berkowitz PC. He was also the author of two mystery novels.

Marion F. McDavid, 93, of Harriman died Aug. 31. He received his law degree from George Washington University in Washington, D.C., and owned a private law practice in Harriman for more than 50 years. He served as Harriman city judge from 1951-1953. He was a member of the TBA’s Litigation Section until his death.

Compiled by Stacey Shrader and Sharon Ballinger
Mann Bracken, an Atlanta-based collections law firm, recently opened an office in Nashville to be managed by associate attorney Nicholas Adler. A 2001 graduate of the Washington and Lee School of Law, Adler worked in Atlanta and New York City before deciding to settle in middle Tennessee. Since 2003, he has worked at the Dunning Law Group handling corporate bankruptcy and restructurings. He will be Mann Bracken’s lead attorney in the state and will oversee a legal support staff of five.

The law firm of Kramer, Rayson, Leake, Rodgers & Morgan LLP has announced that immigration attorney Susan E. Schultz has joined the firm’s Knoxville office as an associate. Prior to joining the firm, Schultz served at the U.S. Citizenship and Immigration Service (formerly known as the INS). She graduated from the University of Tennessee College of Law, has served as chair of the ABA’s General Practice & Solo Division Immigration Committee and now is serving as secretary of the American Immigration Lawyers Association’s mid-south chapter.

Tennessee Lawyers Association for Women (TLAW) President Linda Warren Seely has named Tara Mooney Aaron the TLAW affiliate representative to the TBA Young Lawyers Division. Aaron works in the Nashville office of Stites & Harbison PLLC.

Thomas A. Williams, with the Chattanooga law office of Leitner, Williams, Dooley & Napolitan PLLC, has been elected vice president of the Federation of Defense and Corporate Counsel (FDCC). The counselor is comprised of experienced attorneys in private practice, general counsels and insurance claims executives. Williams also serves as southern regional director of the Defense Research Institute whose membership includes 22,000 defense civil trial attorneys.

The Nashville office of Sherrard & Roe recently announced the addition of attorneys Albert Bart and Beth Moore to its corporate and securities law group. Both previously were principals in the Nashville office of Stokes, Bartholomew, Evans & Petree. Moore concentrates her practice on corporate finance and securities regulation. She received her law degree from the University of Tennessee College of Law in 1988. Bart’s experience includes equity and debt offerings, mergers and acquisitions, and venture capital financing. He earned his law degree in 1996 from the University of Tennessee College of Law, where he was a member of the Moot Court Board and a George D. Hall Memorial Scholar.

Charles A. Trost, an attorney in Nashville, has been elected to serve as treasurer of the National Conference of Commissioners on Uniform State Laws. Trost practices at the law firm of Waller, Lansden, Dortch & Davis in the areas of state and federal tax law and litigation. He has been a member of the National Conference since 1997. The conference’s mission is to draft and promote enactment of uniform state laws designed to solve problems common to all the states.

The Chattanooga office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC announced that William Robinson has become of counsel to the firm. Robinson concentrates his practice of law in the areas of employee benefits and estate planning. He has extensive experience in pension and welfare benefits, and has represented governmental entities, multiemployer plan boards and private employers on retirement plan issues. Robinson received his law degree from the University of Tennessee College of Law.

Saul C. Belz has been named a master member of the Leo Bearman Sr. American Inn of Court. Belz concentrates his practice in the areas of business litigation, commercial disputes, complex litigation, appeals and employment law at the Nashville firm of Glankler Brown PLLC. He earned his law degree from Vanderbilt University Law School in 1967. While there, he was named Order of the Coif and served as legislation editor of the Vanderbilt Law Review. Belz currently serves as a director of the Tennessee Justice Center.

Kelvin D. Jones III has been appointed to serve on the Tennessee Supreme Court’s Task Force on Attorney/Client Fee Disputes. Jones is the executive director of the Nashville Metro Human Relations Commission and previously served as Nashville Mayor Bill Purcell’s special assistant for legal affairs. He also worked as a corporate attorney with Bass, Berry and Sims PLC and is a 2005 graduate of the TBA Leadership Law program.

The Atlanta law firm of Clark & Washington PC recently announced three new middle Tennessee offices in Nashville, Murfreesboro and Gallatin. Murfreesboro attorney John M. Green, a 1987 graduate of Vanderbilt University Law School, steps in as managing attorney for (Continued on page 10)
all three offices. Clark & Washington specializes in the representation of debtors in all aspects of Chapter 7 and 13 bankruptcy proceedings.

John Nicoll and Chasity Wilson Nicoll have opened the Law Office of Nicoll and Nicoll in Manchester. The partners plan to offer a general practice with an emphasis in real estate, business, employment and criminal law. John Nicoll graduated from the University of Tennessee College of Law and began his legal career as a JAG officer in the U.S. Army at Fort Riley, Kan. Chasity Nicoll, also a graduate of the University of Tennessee College of Law, began her career as a JAG officer at Fort Riley working primarily as a labor counselor.

Husch & Eppenberger LLC welcomed Bertis A. Echols III as an associate attorney in the firm’s Insolvency Practice Group, which represents clients dealing with commercial financial problems. Echols concentrates his practice in consumer bankruptcy matters, specializing in Chapter 7, 11 and 13 proceedings, foreclosures and evictions. Prior to joining Husch & Eppenberger, Echols worked as a law clerk in both debtor and creditor bankruptcy matters. He earned his law degree in 2004 from the University of Memphis School of Law.

The Tennessee District Public Defender’s Conference elected Jeffrey S. Henry to be executive director. Henry previously served as the organization’s director of research and training. In his new role, he will be responsible for developing policy, providing administrative services and training, managing the budgets of the state’s public defenders, and coordinating multi-district cases.

The law firm of Runyon & Runyon in Clarksville was inadvertently left off of last month’s list of leading firms that overwhelmingly support the TBA. The listing recognized firms with a minimum of three member attorneys. The Journal regrets the omission.

Forensic Services: Uncovering the Story Behind the Numbers

Crowe is one of the top 10 public accounting and consulting firms in the United States and has been serving the legal community for over 60 years. If you are looking for a firm that is credible, reliable and can help build a case that stands up in court, contact Crowe. For more information, please call, Glenn Perdue, Executive (Litigation) at 615.360.5609 or Marty Redley, Executive (Fraud) at 312.899.7005.

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NEW VIDEO PROGRAMS: BASICS AND MORE

You may not be an expert on elder law, corporate ethics or intellectual property, but sometimes you need basic information to assist a client in these or other areas. TennBarU is here to help. Now with more than 80 interactive video courses and more than 20 interactive text-based courses, TennBarU often has just the information you need to help a client. And it’s available 24/7 at a reasonable cost.

Newly added to the TennBarU video course catalog are eight one-hour classes to help you deal with issues that may be facing your elderly clients and their families. For example, TennBarU offers courses on medicaid eligibility, planning how to use retirement funds, planning for incapacity, dealing with spousal impoverishment and more.

Also new to the TennBarU video catalog are a full slate of programs on intellectual property, copyright and trademark law and courses on contract drafting, real estate closings and the use and mechanics of mediation in a business law practice.

Check out any of these programs and more at www.legalspan.com/tnbar/. Also look for new text-based online courses coming this fall on lawyer advertising, the ethics of getting paid, use of the internet, recent developments in workers’ compensation and recent case law developments in the area of search and seizure. Watch for these and more at www.tennbaru.com.

STAY COOL, THINK SNOW!

The Stonebridge Inn and Tamarack Townhouses at Snowmass Village will host the 2006 CLE SKI. Both properties are located in western Colorado and nestled in the heart of the Elk Mountain Range. Snowmass is only 20 minutes from the unique amenities and activities of the town of Aspen. Mark your calendar now for February 5-11, 2006. Information and schedules of all CLE programs will be available soon.
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:

- Tennessee: James Alvin Carraway Jr., Cordova
- Jennifer Sevier Kelly, Franklin
- Out of State: Peter Carraway Jr., Tennessee

Professional Responsibility.

- Actions from the Board of Professional Responsibility

Disbarred

Paul Allan Terry II of Livingston was disbarred from the practice of law on Aug. 11. He had been suspended temporarily in August 2004 for failing to respond to a complaint that he neglected a client’s case, which resulted in its dismissal. Because of his failure to answer the petition for discipline or appear before a hearing panel of the Board of Professional Responsibility, the panel decided that disbarment was appropriate. Terry will be eligible to apply for reinstatement to the practice of law after five years but the burden of proof is on him to demonstrate by clear and convincing evidence that he has the moral qualifications, competency and learning required for reinstatement and that the resumption of his practice would not be detrimental to the integrity and standing of the bar or administration of justice or subversion of the public interest. The court also conditioned reinstatement on making restitution to two clients; remaining current on all continuing legal education requirements; paying the costs of the disciplinary proceedings; and complying with Supreme Court rules regarding the obligations and responsibilities of a disbarred attorney. Terry must notify all clients, co-counsel and opposing counsel of his disbarment and deliver to clients any papers or property to which they are entitled. Finally, he must not use any indicia of lawyer, legal assistant, or law clerk, nor maintain a presence where the practice of law is conducted.

Censured

A public censure is a form of discipline that declares the conduct of the lawyer improper but does not limit the lawyer’s right to practice law.

On July 25, Debra Fannin Graham of Oak Ridge received a public censure from the Board of Professional Responsibility based on two complaints. Graham was given notice of the censure and did not request a hearing. The first complaint concerned Graham’s representation of a juvenile. The parents alleged that they paid Graham to represent their son in an Anderson County court case and a Knox County case. Graham failed to appear for the hearing in Anderson County but did not refund the clients’ $500 fee. In the second complaint, a client paid Graham a $1,500 non-refundable retainer to file an amended petition for custody. The client contends that Graham did nothing. Graham maintains that she was waiting for the client to provide additional information needed for the filing. The client complains that he received no communication from her regarding additional information and that his calls to her went unreturned. Graham ultimately provided the client with a $1,000 refund. The Board of Professional Responsibility found that Graham’s actions violated Rule 1.3, 1.4, 1.5, 1.16 and 8.4 of the Tennessee Rules of Professional Conduct.

On July 25, Helen L. Cornell of Nashville received a public censure from the Board of Professional Responsibility. Cornell was given notice of the censure and did not request a hearing. The board found that in representing a client, Cornell pursued an invasion of privacy claim without factual basis and/or fabricated evidence. In addition, an independent contractor employed by Cornell telephoned the opposing party during the litigation, in violation of Rule 4.2 of the Tennessee Rules of Professional Conduct.

Lee Clements was publicly censured by the Board of Professional Responsibility on July 28. Clements was given notice of the censure and did not request a hearing. Clements was retained by a client on Oct. 18, 2004 to defend her on criminal misdemeanor charges and represent her in a custody case. Beginning in November 2004, and during the course of the representation, Clements and the client became sexually involved. The board found that Clements’ conduct violated Rules 1.3, 1.16 and 8.4 of the Tennessee Rules of Professional Conduct.

Timothy J. Richter, a Springfield lawyer, was publicly censured by the Board of Professional Responsibility on Aug. 8. Richter did not request a hearing in the matter. Six complaints were filed against Richter charging that he neglected his client’s legal matters, failed to adequately communicate with his client, and overdrew his trust account by failing to accurately handle financial transactions. The board found that Richter’s conduct violated the Tennessee Rules of Professional Conduct 1.3, 1.4, 1.5 and 8.4(a)(d).

By order of the Tennessee Supreme Court, William A. Lockett of Chattanooga was publicly censured on Aug. 12 for two counts of misconduct. The Board of Professional...
Responding filed a petition for discipline against him on Sept. 7, 2004. On July 18, Lockett entered into a conditional guilty plea in exchange for a public censure. In one matter, Lockett misrepresented the condition of his mother’s health to adversary counsel and to the court in order to obtain a continuance for a trial. However, he immediately reported the misrepresentation and paid fees to adversary counsel as ordered by the court. In another incident, Lockett misrepresented a matter to adversary counsel in order to secure a postponement of depositions. The board found that in these matters Lockett did not pursue representation of his clients with competence and diligence.

The Board of Professional Responsibility publicly censured William Anthony Helm of Memphis on Aug. 24. He did not request a hearing on the matter. The board found that Helm seriously neglected two clients’ legal matters, that he persistently was dilatory in meeting his commitments to clients and to the board, and that he failed to promptly refund a client’s fee that he acknowledged was unearned. The board also found that for several months Helm represented these clients despite their conflicting interests in a divorce action. The board concluded that Helm knew or should have known that disagreements over the marital dissolution agreement had arisen between his clients. Finally, the board found that Helm negligently allowed his former secretary to alter the contents of pleadings that were filed with the court and bore his signature. In deciding to sanction Helm by public censure, the board found somewhat mitigating his discharge of the secretary, the parties’ entry into an amended marital dissolution agreement, and his filing of an amended divorce complaint that remedied the prior unlawful alteration.

**Disability inactive**

On Aug. 18, the Tennessee Supreme Court stayed its May 21, 2004, order of temporary suspension against Christopher P. Renard of Memphis and transferred his law license to disability inactive status. Renard agreed to the transfer. He will remain inactive until he can prove that his disability no longer exists and the Board of Professional Responsibility recommends the dissolution or modification of the temporary suspension order.

The Tennessee Supreme Court transferred the law license of Murfreesboro attorney David Lloyd Goad to disability inactive status on Aug. 19. Goad filed a petition for voluntary transfer in July because of a medical condition that incapacitates him from continuing the practice of law. While on disability inactive status Goad cannot engage in the practice of law and can only return to practicing upon showing by clear and convincing evidence that the disability has been removed and that he is fit to do so.

### What does a disability inactive status mean?

The Journal will explain different types of actions from the Board of Professional Responsibility in upcoming issues. This month we look at disability inactive status.

Attorneys in Tennessee are placed on disability inactive status by the state Supreme Court for four primary reasons:
- being declared incompetent by a court;
- being involuntarily committed on the grounds of incompetence or disability;
- being detained or placed in a mental illness treatment center after a probable cause hearing; or
- being incapacitated from continuing practicing law by reason of mental infirmity, illness or addiction to drugs or intoxicants.

In addition, any lawyer – with no disciplinary proceeding or complaint pending – may ask to be transferred to disability inactive status.

Disability inactive status takes effect immediately and remains in effect until further order of the court. However, any attorney transferred to disability inactive status is entitled to petition the court once a year (or at shorter intervals if the court allows) for reinstatement to active status. To return to active status, the attorney must show by clear and convincing evidence that the disability has been removed and that he or she is fit to resume the practice of law. In reviewing the petition for reinstatement, the court may take such action it deems necessary to determine whether the disability has been removed. This includes requiring a medical examination of the attorney and/or requiring the attorney to disclose the names of doctors who have examined or treated the individual since taking disability inactive status.

If an attorney is party to a disciplinary proceeding, and in the course of that proceeding contends that a disability makes it impossible to provide an adequate defense, the court must immediately enter an order transferring the lawyer to disability inactive status. The lawyer remains in such status until a determination can be made of his or her capacity to continue practicing law. The pending disciplinary proceeding is held in abeyance until the attorney is deemed competent to practice law or is reinstated to active status.

For each lawyer transferring to disability inactive status, the Board of Professional Responsibility publishes notice in the legal journals, newspapers and courts in counties where the attorney maintained an office. If the attorney has no partner, executor or other responsible party capable of conducting his or her affairs while on disability inactive status, the presiding judge in the judicial district in which the lawyer maintained a practice must appoint a third party to protect the interests of the disabled and his or her clients.

For more information about the rules governing disability inactive status, see Rule 9, Section 21 of the Rules of the Supreme Court of Tennessee.
On June 27, the U.S. Supreme Court issued a decision that, depending on who you ask, was either a huge victory for the copyright industries (music, movies, books, computer software, etc.) or an innovation crippling impediment to the development of new technological products. In MGM Studios Inc. v. Grokster Ltd., the Supreme Court ruled that two companies that distribute peer-to-peer (P2P) file sharing software may be held liable for contributory copyright infringement. Since the Supreme Court’s decision was limited to whether the lower courts had properly granted summary judgment, the case will go back to the district court for a trial to determine whether Grokster and StreamCast are in fact liable according to the standard specified by the Supreme Court.

The Grokster decision is the most recent battle in the music and movie industries’ war against illegal file sharing. The war began in 1999 when the Recording Industry Association of America (RIAA), a trade organization made up of record companies, sued file sharing company Napster and eventually won a preliminary injunction, which resulted in Napster’s demise. This initial victory was followed by another victory against another file sharing company, Aimster and the shutdown of several other file sharing companies that feared being the next casualties. However, as in any major war, there are inevitably losses on both sides. After the success of the music industry’s initial shock and awe litigation campaign, new file sharing companies such as Grokster and Streamcast embarked on an invigorated file sharing jihad by distributing a new generation of file sharing software which initially proved to be better able to withstand the music industry’s legal attacks.

In simple terms, P2P file sharing software allows people to trade files stored on their computers. Anyone with a computer and Internet connection can download various file sharing software for free. The software allows your computer to communicate with other computers with the same software installed in order to trade files. Although the content of files traded can include any digitized material, the vast majority of files traded are copyrighted music. Since most copyright owners have not authorized their copyrighted works to be distributed through file sharing networks, the vast majority of file sharing constitutes copyright infringement.

Although courts that have addressed the issue thus far in the United States have concluded that people who use file sharing software to trade copyrighted works without the authorization of the copyright owners are committing copyright infringement, a more difficult legal question...
is whether providers of the file sharing software can also be held liable and if so, under what circumstances. The issue in the Grokster case was whether Grokster and Streamcast could be contributorily liable for the directly infringing acts of users of their software (i.e., unauthorized downloading of copyrighted music and movies). The Supreme Court's decision indicates that the answer depends not only on how the software works, but also on the actions taken by the company distributing the software.

Early file sharing software such as that distributed by Napster operated through the use of centralized computer servers which listed files available on the computers of Napster users. Since these server computers were operated by Napster, it could exercise some degree of control over what files were traded. Unlike Napster, the file sharing software distributed by Grokster and Streamcast does not use any centralized computer servers to facilitate the sharing of files among users. Instead, copies of files are transmitted from one person's computer to another's without passing through any computer servers operated by Grokster or Streamcast.

The California district court and the 9th Circuit Court of Appeals held that individuals who used the Grokster and Morpheus software to download copyrighted works without permission committed direct infringement, but granted summary judgment to Grokster and StreamCast, finding that their distribution of the software did not constitute contributory infringement. The lower courts relied on a Supreme Court precedent established 20 years earlier in Sony Corp. of America v. Universal City Studios Inc. In Sony, the court held that the manufacturer of Betamax video recorders used by consumers to make copies of copyrighted television shows was not liable for any resulting infringements. Although the Grokster and Streamcast file sharing software is primarily used by people to trade copyrighted works, it is also capable of noninfringing use such as trading public domain material and works authorized by the copyright owners. Since the lower courts concluded that the file sharing software was capable of substantial noninfringing use, in their view Grokster and Streamcast were not contributory infringers since they were not directly involved in and had no actual knowledge of the direct infringements by users of their software because of the software's decentralized structure.

The Supreme Court's decision

The district and appeals courts' decisions in favor of Grokster and Streamcast rested on the Sony "substantial noninfringing use" precedent and many experts believed that the only way the court could reverse the 9th Circuit's decision would be to modify or at least clarify its own precedent. However, instead of deciding the case based on the Sony precedent, the court held that Grokster and Streamcast are likely guilty of contributory copyright infringement by inducing and encouraging users of their software to infringe.

The court's unanimous opinion holds that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." It is important to note that under this inducement theory, merely supplying a technology that can be used to commit copyright infringement is not enough to be liable as a contributory infringer. Instead, the distributor must take affir-
ative action to encourage users of its technology to infringe. The court had no problem finding, based on the evidence presented, that Grokster and Streamcast encouraged users of their file sharing software to commit copyright infringement, stating that Grokster and Streamcast's unlawful intent “unmistakable.”

According to the court, inducement often occurs through advertisement or solicitation that is intended to encourage people to commit infringement. The court stressed three items of evidence supporting this intent in Grokster. First, Grokster and Streamcast were intended to take the place of Napster, which was known to be used predominantly for copyright infringement. Additionally, Grokster and Streamcast made no attempt to develop filtering tools to reduce infringing use of their software. Finally, Grokster and Streamcast’s business is based on selling advertising and the price they charge for ads is directly proportional to the number of users of their software. In essence, their business depends on infringement since it was untested that the vast majority of file sharing use is to commit copyright infringement. Although noninfringing uses exist, if Grokster or Streamcast had to rely on these uses to support their business, they would almost surely go out of business.

> Implications of the Supreme Court’s decision

Much of the media coverage of Grokster has portrayed the case as a dispute between the entertainment industry and technology. The Supreme Court apparently realized that the real dispute was between one type of business (copyright owners) and another (file sharing companies). Looking beyond the technology itself, the court’s ruling makes clear that a company’s actions in marketing a technology can be determinative as to whether it is contributorily liable for infringing uses committed by users of the technology.

After the court’s decision was announced, it was immediately criticized by technology proponents and much of the media as a severe blow to technological innovation. The Sony precedent protects technology companies from liability for the actions of the technology’s users due to the fear that without this protection, innovation will be restricted. Although the Sony rule certainly seems justified in order to encourage technological innovation, some of its strongest proponents believe it should not be subject to any limitation. Just think of the devastating effect once the record industry starts suing Apple (manufacturer of the iPod),10 computer manufacturers and any other companies that make or distribute any product that is used by people to infringe copyrights. In reality, there is an important difference. Like the Betamax video recorder in Sony, products such as the iPod and computers, although sometimes used for illegal purposes, are marketed and used largely for legal purposes.

In reality, the consequences of Grokster will likely be much less severe than the restriction on technology than predicted. The court’s decision clearly does not establish a rule that will lead to liability for any company that creates or distributes a new technology that is capable of being used for illegal purposes. Such a rule would certainly chill innovation. Instead, Grokster establishes that a company can be held liable for copyright infringements committed by users of their technology only if the company takes active steps to induce the infringement. The court specifically states that liability will not be imposed merely due to knowledge of potential or even actual infringing use. Companies will also not be liable because of their provision of product support or technical updates for technology used to commit copyright infringement or even for the failure to take affirmative action to prevent infringement.

The court’s inducement standard for contributory copyright infringement insulates companies from liability unless there is clear evidence that they took active steps to encourage infringement by users of their products or services. Although the court clearly believed that such evidence exists with respect to Grokster and Streamcast, its decision leaves room for other file sharing companies even though their products may be used for overwhelmingly infringing purposes. The outlook for Grokster and Streamcast appears very bleak since they will likely be subject to huge damage awards that are virtually certain to put them out of business. However, if a company distributes file sharing software that has noninfringing uses and does not actively market it for infringing use, it is unlikely that it would be liable for direct infringements committed by users under the Grokster standard. File sharing companies might even choose to take steps to make clear that they are not inducing infringement such as prominently providing copyright information on their web sites, encouraging noninfringing use among their consumers and using filtering software to limit infringing use to the extent it is feasible to do so.

The Grokster decision may even have some positive implications for file sharing companies as well as the music and movie industries. For example, legal file sharing services have been in the planning stages and are set to be introduced this year.11 At http://www.washingtonpost.com/wp-dyn/articles/A18568-2004Dec22.html. Reportedly all of the major record companies have agreed to make their copyrighted recordings available through such services subject to agreeable licensing terms. The Supreme Court’s decision provides a

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Looking beyond the technology itself, the court’s ruling makes clear that a company’s actions in marketing a technology can be determinative as to whether it is contributorily liable for infringements committed by users of the technology.

significant impetus for file sharing companies to enter into licensing deals with copyright owners since they now have a huge incentive to become legitimate. Even Grokster and Streamcast may attempt to do so as part of some type of settlement rather than risk a trial court decision against them on remand.

Existing legal online music services may also be helped by the Grokster decision. Many online music companies such as Apple’s iTunes, Rhapsody and the new Napster 2.0 sell song downloads, streaming music subscriptions or some combination of both. Although iTunes has received a great deal of publicity and the volume of business for these companies has increased in the past year, it is still responsible for a very small percentage of music sales, arguably at least partly due to illegal file sharing (i.e., if you can get the same thing for free, why pay 99 cents?). It is possible that more people will switch to legal online music services since the Supreme Court’s decision will make it harder for illegal file sharing services to operate.

In sum, the Supreme Court in Grokster cleverly found a way to punish the technological “evil doers” while preserving the freedom for law abiding technology companies to innovate. While the ruling will make it harder for technology companies to build their businesses based on the illegal use of their technological products, it should not be a deterrent to companies that desire to produce innovative new technologies that can be used legally as well as illegally. A technology company’s liability will depend, not on the technology itself or even how the technology is used, but on the company’s actions in marketing its technology to users. As long as companies do not take steps intended to induce infringement, they should be protected from most claims of contributory infringement regardless of how their technology is actually used.

> Notes
3. Napster was legally reincarnated as a legal online music service. See http://www.napster.com/.
4. In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003).
5. As more people have switched from phone modem Internet connections to broadband connections, movies and computer software, which are much larger files than music, have also become more commonly traded on peer-to-peer file sharing networks.
6. The Napster, Aimster and Grokster courts all agreed that individuals who use file sharing software to download copyrighted works without permission of the copyright owners are committing direct copyright infringement. Since downloading a file involves making a copy of that file on a computer hard drive (or other storage device), downloaders exercise the right of reproduction reserved to copyright owners. See 17 U.S.C. §106.
9. Interestingly, the court seemed split on how the case should have been resolved according to the Sony standard. A concurring opinion by Justice Ginsburg (joined in by Justices Rehnquist and Kennedy) indicates that Grokster and Streamcast might be liable for contributory infringement even absent inducement since they failed to present evidence that their file sharing software is capable of substantial noninfringing use. This view is contradicted by Justice Breyer’s concurring opinion (joined in by Justices Stevens and O’Connor) favoring a more lenient interpretation of substantial noninfringing use.
10. After a bill known as the Induce Act (Inducing Infringement of Copyrights Act of 2004), S.2560 was proposed in 2004, which would have essentially legislated the result reached by the Supreme court in Grokster, various copyright critics predicted that record companies would sue Apple over its iPod. See e.g., Wired News, June 24 quoting the Electronic Frontier Foundation’s Fred Von Lohmann: “If this bill were law, I could easily imagine suing Apple the very next day for inducing infringement for selling iPods.”
11. See e.g., “Mashboxx Aims to Make File Sharing Legit,” David McGuire, washingtonpost.com
Tennessee employers and employees with multi-state noncompete contracts may want to lace up their best pair of running shoes and get ready for a race. On April 1, 2005, in Palmer & Cay Inc. v. Marsh & McLennan Companies Inc., the 11th Circuit Court of Appeals revised a United States District Court, Southern District of Georgia, ruling that an employer’s noncompete agreement was unenforceable only in Georgia. The employee initiated the case in Georgia in order to use the pro-employee Georgia law regarding noncompete and non-solicitation covenants (NCAs). The 11th Circuit extended the unenforceability to any other lawsuit between the same parties, even if other lawsuits are filed outside of Georgia. Tennessee employers who have employees with connections to Georgia should be concerned because this ruling may provide an avenue of escape from an otherwise valid NCA to employees who can relocate to Georgia and are willing to preemptively bring a declaratory judgment action in Georgia. Because so many of these cases would be removable to federal court on the basis of diversity of citizenship, the Palmer & Cay decision is attracting significant attention nationwide by confirming that federal courts sitting in diversity in Georgia will issue as broad of a declaratory judgment as Georgia state courts have extended in NCA disputes. Although the defendant filed a Petition for Rehearing En Banc on April 22, the debate it is creating among commentators is likely to focus more and more attention on the importance of winning the race to the courthouse.

I. Tennessee vs. Georgia — enforceability of non-competition and non-solicitation covenants

Enforcing an employment-related restrictive covenant is much easier under Tennessee than Georgia law. Like Georgia, Tennessee disfavors restraints on trade; however, Tennessee courts will enforce covenants not to compete where the
“restrictive contracts are reasonable as to territory and time, where a violation would result in serious damage or injury to the employer and impose no undue hardship upon the employee.”3

While Georgia’s pro-employee case law does not allow courts to “blue pencil” or reform unreasonable restrictive covenants contained in employment contracts, under most circumstances; Tennessee courts will modify noncompetition agreements where either the time or territorial limitations are found to be unreasonable.4 However, if there is evidence that an employer deliberately imposed unreasonable restrictions in a noncompetition agreement, the court will void the terms of the covenant not to compete altogether.5 Both time and territorial restrictions in covenants not to compete must be no broader than necessary to protect the interests of the employer.6

For example, where a Tennessee Court of Appeals found that a six-month restriction on competition for a nail technician was unreasonable, the time limitation was reduced to two months.7 Additionally, the Tennessee Court of Appeals modified a 20-year restriction on competition by reducing it to five years,8 whereas a Georgia court likely would have invalidated the covenants altogether. After finding that such a temporal period was unreasonable, a Georgia court would not have modified the NCA, but instead would have declared the covenant unenforceable.9 Although Tennessee courts have enforced nationwide geographic restrictions under certain circumstances,10 Georgia courts have invalidated entire NCAs based on over-broad, even less than nationwide, geographic restrictions.11 Clearly, employees seeking to get out from under restrictive NCAs are more likely to receive a favorable ruling in Georgia, while employers seeking to protect their legitimate business interests would rather litigate in Tennessee’s courts.

II. Factual background

Marsh & McLennan Companies Inc. (MMC) bought the brokerage that employed James Meathe in 1997. As part of the sale and transition, Meathe sold his shares in the acquired brokerage and accepted employment with MMC, ultimately becoming managing director and head of the Midwest Region of MMC, and according to MMC residing in Michigan and Illinois.12 Meathe executed a 1997 stock sales agreement containing NCAs and a 2002 employment-related NCA. In February 2003, Meathe left MMC, relocated to Georgia, and joined Palmer & Cay in allegedly direct competition with MMC in both Georgia and his former Midwest territory.

The 1997 stock agreement includes a provision that prevents seller for a specified time from accepting unsolicited business from any clients or prospects of the company who were solicited directly or indirectly by seller while with the company:

(b) Each Seller who is not a director of the company as of the date hereby agrees that during the Non-Solicit Period, such Seller will not (x) solicit, accept or service business that competes with businesses conducted by the Company, buyer or any of their affiliates who were solicited directly by Seller or where Seller supervised, directly or indirectly, in whole or in part, the solicitation activities related to such clients or prospects or (ii) from any former client who was such within two (2) years prior to such termination and who was solicited directly by Seller or where Seller supervised, directly or indirectly, in whole or in part, the solicitation activities related to such former client; or (y) solicit any employee of the Company or its affiliates to terminate his employment.13

The 2002 employment agreement includes a similar prohibition against accepting unsolicited business from clients of the company who were directly or indirectly solicited or serviced by employee within two years prior to the termination of employment:

(a) solicit or accept business of the type offered by the Company during my term of employment with the Company, or perform or supervise the performance of any services related to such type of business, from or for (i) clients or prospects of the Company or its affiliates who were solicited or serviced directly by me or where I supervised, directly or indirectly, in whole or in part, the solicitation or servicing activities related to such clients or prospects; or (ii) any former client of the Company or its affiliates who was such within two (2) years prior to my termination of employment and who was solicited or serviced directly by me or where I supervised, directly or indirectly, in whole or in part, the solicitation or servicing activities related to such former clients.14

To take advantage of Georgia’s anti-NCA precedent, Meathe and his new employer, Palmer & Cay, filed a declara-
“Clearly, employees seeking to get out from under restrictive NCAs are more likely to receive a favorable ruling in Georgia, while employers seeking to protect their legitimate business interests would rather litigate in Tennessee’s courts.”
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In Knoxville around 7 p.m. on the evening of June 7-8, 1994, Lisa Whedbee drove to Michael Frazier's apartment and brought him to her house. She put him in a downstairs closet armed with a butcher knife. Husband Rob Whedbee came home from playing softball after work. He ate, started messing with papers from his insurance business, but went to bed when Lisa appeared in a sexy short nightgown.

After midnight Lisa went to the closet, fetched Frazier, led him upstairs, and pointed to the marital bedroom. Frazier entered and heard Rob snoring. He looked down at Rob, decided he could not kill him, and started to leave. But he bumped the bed. Rob awoke and a struggle ensued. Lisa appeared in the bedroom holding a softball bat. Rob slammed Frazier down, grabbed the bat from Lisa, and ran out of the house to rouse a neighbor. Deputies were called. Lisa was arrested. About 6 a.m. Frazier was arrested after a long walk to his estranged wife's townhouse.

What the hell was going on?!

The answer involves religion, sex, crime and law.

These classy citizens were members of Trinity Methodist Church. Michael Frazier was choir director and organist, and Lisa Whedbee sang in the choir. Rob Whedbee attended but was less active in church affairs.

Frazier's day job was writing feature articles for the Oak Ridger newspaper. One of those was a Mother's Day 1993 story about Lisa's struggles to cope with the medical problems of daughter Brittany (age four), afflicted with Down Syndrome.

Frazier had long been attracted to Lisa. On a fateful Wednesday evening in early June, the two were the last to leave the choir loft. In the parking lot Lisa confided that for many years she had strong feelings for Frazier. Feelings escalated to holding hands and kissing, climax by sexual intercourse in late July.

The affair continued in 1994. According to proof developed in the State v. Frazier trial transcript Rob became increasingly abusive to wife Lisa. She obtained an ex parte order of protection, transformed later into an agreed order of protection with social contact. Lisa told Frazier that these legal steps served only to kindle Rob's anger and that he threatened to kill her (and her lawyer). These events culminated in the unpleasant evening we began with.

Frazier's trial for attempted first degree murder ran from Tuesday through Saturday, September 12-16, 1995, Hon. Richard Baumgartner presiding. It was the first Tennessee trial on Court TV; I have the videotapes. Prosecuting were Bill Crabtree and Jo Helm. Defending were Greg Isaacs and Ron Rayson. The latter presented in four acts the classic hillbilly defense: "The guy deserved killing."

Act I was the cross-examination of Rob Whedbee, the state's star witness:

Q. "Do you admit or deny to this jury that you forced your wife to have sex, that you raped her?"
A. "That is totally false."

Q. "Do you admit or deny that you told your wife that this divorce wasn't going to happen and that the only way she would leave your house was in a body bag?"
A. "Absolutely not. It is completely false."

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Act II was the testimony of a defense witness, a shrink named Diana McCoy. Under Evidence Rule 703 she told the jury what Frazier told her about what Lisa told him about Rob’s abuse. How can that be? Let’s inspect the rule, always a good idea:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

This is a verbose way of saying that the shrink’s opinions are the substantive evidence. But the judge may allow the jury to hear the underlying bases of the opinion in order to evaluate the accuracy of the opinion. So here the double and sometimes triple hearsay was not itself evidence, but the jury heard it for a legitimate evidentiary reason.

Act III was the testimony of two of Lisa’s girlfriends about physical injuries observed on Lisa’s body, including: “I saw bruises up her back, down the backs of her legs, and horrible black purple bruises between her legs.”

Act IV was Michael Frazier’s direct examination testimony about Lisa’s extrajudicial statements about Rob’s abuse. Why is that not excludable hearsay? Because a common category of nonhearsay encompasses statements offered to show the mental state of the hearer. Even if Lisa were a liar, her statements about Rob’s alleged abuse were admissible to prove why Frazier believed he had to protect Lisa from Rob. He was allowed to tell the jury about X-rated statements that even your perverted author is reluctant to submit for publication in the Journal.

The verdict? As to the indicted offense of attempted first degree murder, “Not guilty.” As to the lesser included offense of attempted second degree murder, “Not guilty.” As to the lesser included offense of attempted voluntary manslaughter, “Guilty.” I reckon the jurors decided, even if the victim deserved killing, they should not be on record as approving a man entering another man’s bedroom at midnight with a butcher knife.

Denying probation, Judge Baumbgartner sentenced Frazier to the maximum of four years, but at 30 percent he would have served around 15 months in the penitentiary.

And what about Lisa Whedbee, indicted for solicitation of first degree murder? Current Knoxville Bar Prexy and Lisa’s defense lawyer, David Eldridge, obtained a plea bargain that netted her just under a year at the Knox County Penal Farm.

Query: As a result of reading this article, how many of you folks are going to start checking out the closets before retiring at night?
Non-competition agreements

(Continued from page 20)

Supreme Court regarding such choice of law provisions, and confirmed its final judgment to the Georgia Supreme Court’s ruling that Georgia would consider such a choice of law provision by first examining whether the NCA violated Georgia’s public policy regarding NCAs. In applying this choice of law analysis to the 1997 and 2002 agreements executed by Meathe, the District Court found the NCAs in the 1997 and 2002 agreements violated Georgia’s policy regarding NCAs by preventing acceptance of unsolicited business.

Tennessee’s “reasonableness” approach versus Georgia’s “all or nothing” approach, makes it much more probable that a Tennessee court would enforce a choice of law provision contained in a NCA. In Tennessee, in the absence of a choice of law provision, the rule of lex loci contractus applies, meaning that the contract will be governed by the law of the place where the contract is made. However, it is well settled in Tennessee that the parties may mutually agree that the law of some place other than the place of making the contract will govern. In order for a choice of law provision to govern (unless it is the choice of the place of making the contract), the parties must enter into the choice of law provision in good faith and the other state must have “some material connection with the transaction.” On the other hand, Georgia courts are likely to apply their own law where the law of the selected forum may conflict with the public policy of Georgia. Therefore, because of Tennessee’s approach to NCAs in employment contracts, it also seems more likely that the parties’ choice of law provision would be honored in Tennessee than in Georgia.

IV. Scope of declaratory judgment

As a result of applying Georgia’s choice of law principles, the District Court granted a declaratory judgment to Plaintiffs Meathe and Palmer & Cay, finding the NCAs to be unenforceable in Georgia and enjoined MMC from enforcing them against Meathe in Georgia. Thus, the territorial scope of the declaratory judgment from the District Court was limited in the same way as the scope of its injunctive award. This appeared to leave open the possibility that, if MMC could obtain jurisdiction over Meathe in some other jurisdiction, that it could sue him for competitive activities outside of Georgia and obtain a ruling using the parties’ agreed upon choice of law provisions in the 1997 and 2002 agreements. The District Court, perhaps mindful of having been reversed in an earlier case for granting nationwide injunctive relief against enforcement of an invalid NCA under similar circumstances, restricted its ruling to a judgment that the NCA was declared unenforceable.

The Palmer & Cay decision reverses the District Court’s territorial limitation of its declaratory judgment as to the 2002 agreement, but remands for further findings as to whether the 1997 NCA was ancillary to employment or to the sale of a business. A federal court sitting in diversity in a state declaratory judgment action would apply that state’s interpretation of its declaratory judgment statute’s affect on claim and issue preclusion, unless that state’s law conflicts with federal interests. The 11th Circuit cited a Georgia case, Hostetler v. Answerthink, involving a race to state courts in Georgia and Florida, where the Georgia court was the first to issue a final declaratory judgment, fully resolving all issues and claims that the parties actually or could have brought based on the events before the court. Because Georgia does not limit its declaratory judgments in employment-related NCA cases, the federal court sitting in diversity would give equally broad territorial, issue and claim preclusion affect to its ruling.

In essence, the 11th Circuit clarified that the declaratory judgment issued as to the 2002 NCA fully resolved the dispute between the parties based on the agreements and the facts alleged in the lawsuit. Although injunctive relief would not be issued on a nationwide basis because of...
limits in the federal statutory basis of injunctive authority, as confirmed in the earlier Keener case, the declaratory judgment fully resolved the dispute whenever the parties may be, not just as to claims and issues presented in a Georgia state or federal court.

V. Growth industry in forum shopping

Before Palmer & Cay, it was clear that if an employer had a valid NCA in, for example, Tennessee, and if it could obtain jurisdiction in Tennessee over its former employee who now lived in Georgia, then the NCA would likely be enforced under Tennessee law, particularly if the agreement includes a Tennessee choice of law clause.

It was also clear that if the employee located in Georgia was sued in Georgia, a court applying Georgia law would not enforce the agreement, even if the NCA stated that Tennessee law was to apply. Georgia’s choice of law principles require its courts to bypass initially such choice of law provisions and first determine whether the NCA is enforceable under Georgia law. The strong Georgia public policy against NCAs would not allow a Georgia court to enforce an NCA contrary to that policy, despite a choice of law provision in the NCA. A federal court in Georgia hearing a case based on diversity jurisdiction would also apply Georgia law to such a contract dispute.

It was not yet clear what the employee could gain by preemptively rushing to court in Georgia for a judgment declaring the NCA unenforceable under Georgia law. Would that protect him only from suit in Georgia? Could he still be sued elsewhere for his prior competition outside of Georgia? Palmer & Cay now indicates that in the 11th Circuit the employee obtaining such a final declaratory judgment would be protected if he were simultaneously or later sued outside of Georgia, whether or not his competitive activities were restricted to Georgia.

Rushing to court in Georgia assures that Georgia’s substantive restrictions against NCAs will many times find an NCA unenforceable, even if the state where it was originally signed and drafted would reach a different conclusion.

VI. Responding within, and outside, of Georgia

Employees can more easily relocate if their former territories include states like Georgia, or if their jobs could be performed primarily by telephone or internet from any state. Tennessee employers with operations in or near Georgia should consider the likelihood of such relocations and draft its NCA provisions with an eye toward enforceability in Georgia, not just the current location of its employee.

“Tennessee’s ‘reasonableness’ approach versus Georgia’s ‘all or nothing’ approach, makes it much more probable that a Tennessee court would enforce a choice of law provision contained in a NCA.”

Companies often send “cease and desist” letters prior to an enforcement action. Now, prolonged letter writing may no longer be a useful tactic against a former employee willing to rush to the courthouse to obtain a declaratory judgment in a favorable jurisdiction.

Waiving venue and forum selection clauses may decide a case’s outcome. Litigants must balance the merits of a forum where jurisdiction is easily obtained and where docket pressures allow for a quick hearing on a temporary restraining order (TRO) to be set against the importance of a forum applying favorable law. Employers may face multiple lawsuits, progressing in different forums. Litigation strategy must recognize that it is not the first court that enters a TRO or preliminary injunction, but the first to enter a final judgment that will have its judgment followed in other jurisdictions. Consequently, employers may be forced to aggressively fight any Georgia litigation until a final judgment can be obtained outside Georgia in a forum willing to apply the NCA’s choice of law provisions.

Companies seeking to help a new employee avoid the enforcement of an NCA might pursue a declaratory judgment that it is unenforceable by rushing to a state or federal court applying favorable anti-NCA case law.

In response to this development, an ounce of prevention may be worth a pound of cure, even for employers in jurisdictions that have not faced the issue yet. Employers should carefully examine their contracts to make sure that they include useful forum selection, consent to jurisdiction, and choice of law provisions. Even if choice of law provisions will not be enforced in declaratory judgment actions brought in Georgia, could the employer prevent a declaratory judgment preemptive strike by providing in a forum selection clause that all disputes must be brought in a specific forum, with parallel consents to jurisdiction and service?

VII. Forum selection clauses

A race to the courthouse may be the only reliable protection for Tennessee

(Continued on page 26)
employers because including a forum selection clause choosing a Tennessee court may not be enough to keep decisions regarding the enforceability of NCAs inside Tennessee. Although forum selection clauses are generally enforceable in Tennessee, the dicta of two Georgia cases may indicate a willingness to refuse enforcement of forum selection clauses where enforcement would result in application of a choice of law provision contrary to the public policy of Georgia disfavoring restraints on trade. This is important to Tennessee employers because Tennessee courts may enforce or “blue pencil” an NCA that Georgia courts would find completely unenforceable.

In Iero v. Mohawk Finishing Products Inc., a forum selection clause in an non-competition covenant was enforced by the Georgia Court of Appeals because Iero did not show that the clause was “unreasonable under the circumstances.” Unfortunately, Georgia courts have shed little light on what constitutes “unreasonable under the circumstances.” Georgia courts consider more than whether the chosen forum would be merely inconvenient for one of the litigants, but also whether there is evidence of “fraud, undue influence or overweening bargaining power.”

Although Iero enforced a forum selection clause, the court noted that it was leaving open the issue of whether a forum selection clause would be unenforceable in Georgia as against public policy on a different factual record. The Georgia Court of Appeals pointed out that the U.S. Supreme Court has noted that “certain contractual forum selection clauses may be held unenforceable if such clause contravenes ‘a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.’” Perhaps this indicates that the Georgia courts will someday consider whether a forum selection clause may fail if it dictates an objectionable choice of law. The repeated efforts by both opinions to phrase the standard in terms of public policy and to note arguments not raised by those appellants, may indicate that the enforceability of such forum selection

I would appreciate hearing from any attorneys having had dealings with Johnny Dunaway in the Chancery Court in Campbell County.

You may contact me by telephone, e-mail or postal mail as you wish.
I may be reached at the following:
865-539-1067 (office)
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As parties continue to assess the usefulness of the Palmer & Cay decision in avoiding NCAs, one message is clear: pro-active, aggressive litigation strategies have grown even more important for employers.

Notes
2. Id. (petition for rehearing en banc filed April 22, 2005). On Sept. 6, defendant filed its notice of filing in the 11th Circuit of petition for writ of certiorari to the U.S. Supreme Court.
5. Id.
9. See, e.g., Riddle v. Geo-Hydro Eng’rs Inc., 561 S.E.2d 456, 458 (Ga. Ct. App. 2002) (restrictive covenant containing nonsolicitation clause was unenforceable because it did not limit the purpose for which the ex-employee could not solicit clients of his former employer and therefore was unreasonable).
10. Id.
11. See, e.g., Hulcher Servs. Inc. v. R.J. Corman Co., LLC, 543 S.E.2d 461, 466 (Ga. Ct. App. 2000) (Court of Appeals upheld trial court ruling the covenant not to compete was unreasonable and therefore unenforceable where five state restriction was broader than the area where the employee worked).
14. Id. at *6-7.
16. Id.
18. See, e.g., Paul Robinson Inc. v. Haege, 218 Ga. App. 578, 462 S.E.2d 396 (1995). The situation regarding potential customers is not quite so clear where the prior contact was little more than an unsuccessful “cold call.” Id.
21. Id.
24. Id. at *15.
25. Id. at *12-13 (citing White v. Fletcher/Mayo/Assocs. Inc. 303 S.E.2d 746, 749 (Ga. 1983)).
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Non-competition agreements

(Continued from page 27)


32. Id.


35. Id. See also Deaton v. Wise, 210 S.W.2d 665, 669 (Tenn. 1948); Stevenson v. Lima Locomotive Works Inc., 172 S.W.2d 812, 814-15 (Tenn. 1943) (“Where the parties agree to performance of the contract in a foreign state, the contract itself must be referable to that state, that is, its performance in the particular state is in some way either beneficial or desirable.”).


37. Keener, 342 F.3d at 1266.


41. In Palmer & Cay, the District Court erred in ruling that on the pleadings, there was no set of facts on which MMC could show that the 1997 Agreement was ancillary to the sale of a business. The 11th Circuit remanded for further proceedings regarding the 1997 Agreement. Palmer & Cay Inc., 2005 U.S. App. LEXIS 5243 at *____.

42. Enron Capital & Trade Resources Corp. v. Polsky, 227 Ga. App. 727, 490 S.E.2d 136, 138 (Ga. App. Ct. 1997) (declaratory judgment is available where a legal judgment is sought that would control or direct future action like ongoing competition and employment).


46. Id. at 138-39.

47. Id. (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).

48. Id. at 138 (“Under these circumstances, Iero fails to show that the mere enforcement of a freely negotiated forum selection clause violates Georgia public policy. Indeed he does not even address whether the New York court would apply New York law. Accordingly, our inquiry is limited to whether enforcement of the forum selection clause is inconvenient or would deprive Iero of his day in court.”).

49. Id. (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).
TBA sections cover special areas of the law

People who know what you are talking about

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 consider sections, the subgroups of the TBA devoted to particular subject areas.

The Tennessee Bar Association has steadily increased the number of its sections over the years — now there are 25 of these specialized groups that focus on various areas of the law.

At the 1965 convention, eight sections met: Real Property, Probate & Trust, Plaintiff's Attorneys, Insurance, Labor Law, Military Law, Municipal Law & County Attorneys and Young Lawyers. Reports of these meetings were the first coverage the Tennessee Bar Journal gave to TBA sections. Some of those sections are still active and some have faded away.


In his September/October 1989 President's Perspective, Jack Wheeler explained what goes on “behind the scenes of a section and some of the things your section chair must deal with.” Chairs are responsible for setting the budget, working with an editor for a newsletter, and collecting section members’ views in drafting proposed legislation, among other duties.

Wheeler wrote: “The people who are elected to these [section chair] positions take on a lot for a year and we appreciate this volunteer work very much. It’s important to us because it involves you.”

The function of a section, according to TBA bylaws, is “to investigate, discuss and evaluate trends and activities in its specialized areas and make appropriate recommendations to the Board of Governors regarding legislation, continuing legal education or other needed action in regard to the specialized areas of the law.”

One of the areas sections have excelled at is in providing suggestions and support for CLE seminars. For instance, the Health Law Section is in its 17th year of offering the Health Law Forum, a highly successfully program with section members as the driving force.

As the number of sections and their scope of influence has increased, so has TBA staff time devoted to them. In 1987, when the first director of communications was hired, section chairs got their first official liaison. That duty was passed along, coupled with other duties at different times. Today, Lynn Pointer is the sections and committees coordinator as part of her job as programs administrator. She spends about 75 percent of her time on sections.

“The value in joining a section is much greater than it was years ago,” Pointer says, “simply because we can now send members instant information — changes in the law, court opinions, and other news from the legal community. Technology has changed everyone’s expectations. People expect us to deliver news and information quickly and I believe TBA does just that.”

— Suzanne Craig Robertson
A law review article got me to thinking. Why do courts in some counties apply this crassly unconstitutional statute on a daily basis? Pull from the shelf Volume 11A of the Code and turn to T.C.A. §§66-28-101–521; locate §102 on “Application.” Also grab Volume 13, containing county populations as of the 2000 census in the supplement. And while you’re at it consult Volume 1, where you will find the Class Legislation Clause of our Tennessee Constitution, Article XI, Section 8:

The legislature shall have no power … to pass any law granting to any … individuals rights … other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law.

When enacted in 1975 the statutory scheme applied only in the four largest counties: Shelby, Davidson, Knox and Hamilton. Because these had substantially greater populations than the remaining 91 counties, a rational basis existed for discrimination. Large urban areas arguably have unique residential landlord and tenant issues.

In 1992 the General Assembly extended application to counties of 68,000 population according to the 1990 or any subsequent census. But four counties were removed from coverage by population bracketing: Rutherford, Sullivan, Washington and Williamson. That left only six medium size counties covered: Anderson, Blount, Bradley, Madison, Montgomery and Sumner.

Let’s see. Rutherford and Williamson, not covered, lie just south of Nashville (Davidson County); Montgomery and Sumner, covered, lie north of the Music City. Am I to believe that residential rental problems differ in these two directions? Get outta here.

To make sure the four exempt counties remained so despite the 2000 census, in 2001 T.C.A. §66-28-102(d) was added to exclude them in perpetuity. That exacerbated the unconstitutionality, if such a thing is possible. Three more counties did become covered as a result of the most recent census: Maury, Sevier and Wilson.

The Supreme Court was able to avoid deciding the constitutional question raised in Crawford v. Buckner, 839 S.W.2d 754 (Tenn. 1992). There an injured apartment tenant was trying to prevail despite an exculpatory clause in her lease. At the time of injury the county (Bradley) was not covered by the URL&TA, which prohibits such clauses at T.C.A. §66-28-203. The court held exculpatory clauses in residential leases void statewide as violating public policy.

I hope the justices will grant permission to appeal in an appropriate case and resolve the constitutional question once and for all. Meanwhile lawyers whose clients are prejudiced by this patchquilt map should challenge constitutionality at every level: General Sessions and Circuit and the Court of Appeals. Ashby Scott’s article cited in the endnote gives you all the ammunition you need.¹

**Note**

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