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ARTICLES

14 The new shape of LLC law: Reform act streamlines LLC process to give more flexibility
By Richard Spore

22 Anderson v. U.S.: A shift in the legal winds for public auditors?
By Bruce D. Fisher

NEWS & INFORMATION

6 TBA, TACDL say no to proposed term ‘board certified’ for lawyers
6 Supreme Court elects Barker chief justice
7 Changes would allow litigators with fewer jury trials to be certified ‘civil trial specialist’
7 Get bankruptcy certification under old rules through Dec. 1
8 Actions from the Board of Professional Responsibility
9 Displaced lawyers may practice temporarily in Tennessee
9 TBA birthplace sells at auction

DEPARTMENTS

3 President’s Perspective:
The wisdom of crowds: Why juries are smarter than judges
By Bill Haltom

5 Letters / Jest Is for All: By Arnie Glick

10 The Bulletin Board: News about TBA members & staff

26 40 Years: Court reports
By Suzanne Craig Robertson

34 Paine on Procedure: Spoliation on videotape
By Donald F. Paine

35 Classified Advertising

On the Cover
The Revised Tennessee Limited Liability Company Act, effective Jan. 1, 2006, reorganizes and simplifies Tennessee’s LLC statutes. Read the changes that make the new law more flexible, beginning on page 14. Cover design by Barry Kolar.

Read the Tennessee Bar Journal at www.tba.org
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PRESIDENT’S PERSPECTIVE

The wisdom of crowds Why juries are smarter than judges

The late great American philosopher George Burns once said, “I was married by a judge. I should have asked for a jury.” I, on the other hand, am married to a judge, and we were hitched up by a Baptist preacher. Nevertheless, I agree with George that whenever possible, one should always ask for a jury.

For the past 28 years, I have been a trial lawyer. I am not now, nor have I ever been, a litigator. (I don’t even like the word “litigator.” It sounds like the nickname of the University of Florida football team.) I can’t tell you how many cases I’ve tried. I stopped counting some time back during the Reagan administration. My best guess is that I have tried more than 100 bench trials and at least 50 jury trials. But whatever the number, I long ago decided to counsel all my clients to do what George Burns should have done on his wedding day: Ask for a jury.

Interestingly, my clients generally resist this advice, at least initially. If I left the judge-or-jury decision up to my clients, the overwhelming majority of them would ask for a bench trial or agree to waive a jury. When I ask a client why she or he doesn’t want a jury, I invariably get the same answer: Since the judge is educated in the law, she will be smarter than a jury and will therefore render a better decision.

I respond to my clients by telling them that most every judge I have ever met (beginning with my wife) is highly intelligent, well-educated, and always strives to render a fair verdict. But the truth is that in most cases, juries are smarter than even the most brilliant judge. This is true for one simple reason: Collective wisdom is better than individual wisdom.

Twelve diverse folks from the community working together are generally smarter than even the most brilliant judge who tries a case all by himself. I honestly believe that 12 high school graduates working together in the jury room are collectively smarter than Justice Scalia working in his chambers, even when he is assisted by two Harvard-educated law clerks.

My buddy and fellow Memphis lawyer Lucian Pera (who is not as smart as a judge, but is still a bright guy) recently gave me a copy of James Surowiecki’s new book, The Wisdom of Crowds: Why the Many Are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies, and Nations. It is a fascinating book that builds a compelling case that groups of people are smarter and better at coming to wise decisions than an elite individual, no matter how brill-

“I was married by a judge. I should’ve asked for a jury.”

— George Burns

(Continued on page 4)
laiant. This is not to say that groups always reach the right decision. Surowiecki contends in his book that groups that are dominated by one individual do not function well, as the very collective wisdom of the group can be destroyed by one pushy individual. Surowiecki also argues that groups work best when diverse points of view are encouraged rather than discouraged in an effort to quickly reach a consensus. In this regard, Surowiecki makes the following observation about juries:

Social scientists who study juries often differentiate between two approaches juries take. Evidence-based juries usually don’t even take a vote until after they have spent some time talking over the case, sifting through the evidence, and explicitly contemplating alternative explanations. Verdict-based juries, by contrast, see their mission as reaching a decision as quickly and decisively as possible. They take a vote before any discussion, and the debate after that tends to concentrate on getting those who don’t agree to agree.

Surowiecki argues that the collective wisdom of groups is maximized in the evidence-based jury approach to reaching a decision.

Several years ago, I had a jury deliberate for just 10 minutes before reaching a decision. They were obviously a verdict-based jury. But that group was the exception. Most juries I have encountered have taken an evidence-based approach to reaching a verdict. At the conclusion of a trial, after the verdict has been rendered and the jury has been released, I always (with the judge’s permission, of course) talk with the foreperson and any other jurors who are willing to take a few moments to speak with me. And whether I have won or lost the case, I’m almost always impressed to hear about the conscientious and diligent manner in which the jury reviewed the evidence, tried to follow the judge’s instructions, had a vigorous discussion, and strived to reach the right decision.

Don’t get me wrong. I do not always agree with juries. Perry Mason was the only trial lawyer in American legal history who always agreed with the jury. (Actually, now that I think about it, Perry never actually won a jury verdict. The judge always dismissed the charges against his client right after the real killer confessed in open court.)

But with the exception of my wife, judges also make decisions I disagree with from time to time. However, the prospects of 12 people making a bad decision are considerably less than the prospect of one person making a bad decision, even if that person is wearing black robes.

So the next time you hear somebody criticize the jury system, I suggest you respond with flattery. Tell the critic that if he or she got together with 11 other people in a jury room, you are confident they would follow the law, review the evidence, and reach a better decision than the smartest “expert” money could buy. And use the George Burns quote. At the very least, you will get a laugh.

“[G]roups of people are smarter and better at coming to wise decisions than an elite individual, no matter how brilliant.”
LETTERS

In support of Paine's Kennedy column

I suppose it is gratifying for Ted Kennedy to know he has so many defenders among the Tennessee Bar, based upon the September Letters to the Editor blasting Don Paine's July article revisiting Chappaquiddick ("Kennedy column draws readers' ire," September 2005 Letters). It is fair for Kennedy supporters to defend their man against what they perceive to be ideological attacks. It is worth noting, however, that Kennedy has launched numerous ideological attacks on prospective judicial nominees during his time in the Senate. One major effect of this has been to turn confirmation of judicial nominees into bitterly partisan affairs that amount to games of "gotcha" and do damage to the Constitution's standard of an independent judiciary. It is fair for critics of this behavior to provide context. I suspect this was Paine's point, given the first sentence of his article.

— Steve Maroney, Jackson

Disclaimer insufficient to cover Paine's opinions

I realize I am "late to the party," but want to echo the negative responses to Don Paine's article about Sen. Edward Kennedy. I am in particular agreement with Charles Ray (September 2005 Letters).

(Continued on page 21)
Proposed amendment to Rule 21
TBA, TACDL say no to proposed term ‘board certified’ for lawyers

On Oct. 6, the Tennessee Bar Association and the Tennessee Association of Criminal Defense Lawyers joined forces to urge the state Supreme Court to reject a proposed amendment to Supreme Court Rule 21 that would change the name of the Tennessee Commission on Continuing Legal Education and Specialization to the “Tennessee Board of Legal Specialization” when dealing with specialization matters.

The term “board certified,” according to the TBA and TACDL, in the context of legal specialization is misleading.

The TBA and TACDL compared the term “board certified” with its use in the medical community and found that the requirements in the medical field to use the term are much more involved and strenuous.

Using the same term for the legal certification process “is deceptive ... in connection with the court’s valuable but less rigorous certification program.”

TBA and TACDL say the balance of the proposed amendment, which would remove the requirement for an annual report statement that must be returned to the commission by each attorney, should be approved.

The proposed amendment was made by the commission on June 6. To see a copy of the comment, go to http://www.tba.org/rules/rule21_comment.html

Supreme Court elects Barker chief justice

William M. Barker of Chattanooga, center, was unanimously elected Oct. 7 by the Tennessee Supreme Court to serve as Tennessee’s new chief justice. He was sworn in the next day at the Supreme Court Building in Nashville.

The rest of the new court, standing from left, is Janice M. Holder of Memphis, E. Riley Anderson of Knoxville, Adolpho A. Birch Jr. of Nashville, and newly appointed Cornelia A. Clark of Franklin.

For more information and pictures, visit TBALink at http://www.tba.org
Send your comments

Changes would allow litigators with fewer jury trials to be certified ‘civil trial specialist’

Nashville attorney John Day is heading up a national committee charged with developing a new area of legal specialization that has never before been available to attorneys. If approved, the new program would certify lawyers who are litigators but whose careers have not included the number of days in jury trials required by the current “Civil Trial Specialist” certification.

Day and other members of the National Board of Trial Advocacy (NBTA) committee are currently writing the certification plan, which will be submitted to the NBTA Board of Directors in February 2006. Comments or suggestions can be directed to Day by e-mail at JDay@branhamday.com through January.

The NBTA certifies trial attorneys in the areas of civil and criminal trial, family law practice and, more recently, social security disability law (currently pending Supreme Court approval in Tennessee).

To achieve certification in these areas, the NBTA requires attorneys to, among other things, provide documented proof they have been lead counsel in a certain number of jury trials and that they have other specific trial and courtroom skills.

The problem is that many litigators have practices substantially oriented toward bench trials. In addition, alternatives to trial (mediation, arbitration and good-old-fashioned negotiation) resolve many disputes before going to trial.

“There are many fine litigators out there who work on huge cases all the time but are just not getting the actual number of days in a courtroom trial that we have required in the past,” says NBTA Executive Director Roberta Hugus. “They might work on a case for years and do grueling amounts of work, but they don’t get into the courtroom to try a case because it settles. I can understand how they feel. They’re thinking that ‘other trial lawyers are getting this stamp of approval and I’m doing the same amount of work. I’m just not technically getting into the courtroom,’” Hugus says.

“We began to see that in order to certify people like this we would have to not lessen the requirements, but adapt them to meet the trends. That’s what led us to move into this area of certification.”

Day, who is also a past president of the NBTA, notes that the new certification will, like other NBTA certifications, be rigorous.

“We’re not lowering the bar, we’re setting a different course,” he says.

“I believe people who do litigation work and have the experience and are competent in that area should have the opportunity to step up and be certified.”

Day says it has been a struggle to come up with a name for this area of specialization because it can cover so much ground. Lawyers who are litigators practice in many different areas of law with commercial litigation and personal injury law being just two examples.

If the NBTA Board of Directors approves the plan, Hugus says, they could conceivably begin certifying attorneys early in 2007. The Tennessee Supreme Court would have to approve any new certification before Tennessee attorneys could be certified.

“NBTA is a leader in certification of specialists and so is Tennessee,” says Dave Shearon, executive director of the Tennessee Commission on Continuing Legal Education & Specialization and a member of the ABA Standing Committee on Specialization. “Our system has been cited by the ABA as a model to other states, and our attorneys, like John Day, are providing leadership for the national certifying organizations.”

For more information on certification of specialists in Tennessee, go to http://www.cletn.com/LawCertB.aspx.

Get bankruptcy certification under old laws through Dec. 1

Bankruptcy attorneys interested in becoming certified in bankruptcy law should visit the Web site of the American Board of Certification (ABC) to read about the testing process for certification as it relates to the new “Bankruptcy Abuse Prevention and Consumer Protection Act.”

As it stands now, the ABC exam covers the current law and will not reflect the 2005 amendments until the majority of the law goes into effect. So right now you can take an exam based on current law.

Applicants may take the exam under the old law through Dec. 1. No exams will be administered Dec. 2, 2005 through Feb. 28, 2006. Following March 1, 2006, the exam will be based on the new law.

Read more about it at http://www.abcworld.org/billannouncement.html.
**Actions from the Board of Professional Responsibility**

**Reinstated**

Earl Martin Douglas of Mercer Island, Wash., has been reinstated to the practice of law after complying with Rule 21 as required by the Board of Professional Responsibility.

**Disbarred**

On Sept. 20, the Supreme Court disbarred Pennsylvania attorney Kevin L. Ritchey from the practice of law in Tennessee. The Board of Professional Responsibility had filed a petition for imposition of reciprocal discipline based on the fact that the Supreme Court of Pennsylvania had disbarred Ritchey after he pleaded guilty to indecent exposure. Disbarment prohibits him from practicing law in Tennessee; holding himself out as an attorney-at-law; performing any legal services for others; accepting any fee directly or indirectly for legal services; appearing as counsel or in any representative capacity in any proceeding in any Tennessee court or before any administrative body; or holding himself out to others or using his name, in any manner, in conjunction with the words “attorney-at-law,” “attorney,” “counselor at law” or “lawyer.” Ritchey immediately must notify each of his current clients, opposing counsel and all co-counsel in writing of the disbarment. He also must return to clients and former clients any files, papers, unearned monies or other property belonging to them. Within 10 days, he was to have filed an affidavit with the board showing compliance with the court’s order and with the rules of all state, federal and administrative jurisdictions in which he is admitted to practice. His disbarment remains in effect until further order of the Tennessee Supreme Court.

**Suspended**

The Tennessee Supreme Court temporarily suspended the law license of Knoxville lawyer Sheryl Clark Rollins on Sept. 9. The court found that Rollins failed substantially to comply with a contract entered into with the Tennessee Lawyers Assistance Program and that she posed a threat of irreparable harm to the public. The court’s order precludes Rollins from accepting any new cases and requires that she ceased representing existing clients effective Oct. 9. After that time, she also may not use any indicia of lawyer, legal assistant or law clerk nor maintain a presence where the practice of law is conducted. She must notify all clients, co-counsel and opposing counsel of the suspension, and deliver to clients any papers or property to which they are entitled. Rollins’s suspension remains in effect until dissolution or modification by the Supreme Court. She may petition the court to do so for good cause.

**Censured**

Spence R. Bruner, a Kingston attorney, was publicly censured by the Board of Professional Responsibility on Sept. 9. The board found that Bruner had failed to provide a client with timely notice of the resolution of his appeal and failed to file a timely motion to withdraw from the case. In this matter, Bruner had made a unilateral decision not to cross-examine an adverse witness. He did not consult with his client and failed to pursue appeals desired by his client. He also failed to adequately respond to requests for information; failed to take requested and necessary action on the case; and failed to appear at a hearing, instead sending his secretary to notify the court and clients that he was ill and would not be present. In several instances in the investigation of these (continued on facing page)

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**What is a public censure?**

In its continuing series, the Journal explains different types of actions from the Board of Professional Responsibility. This month we look at public censure.

Rule 9, Section 4 of the Rules of the Supreme Court of the State of Tennessee identifies the types of disciplinary action that may be imposed on lawyers licensed in the state. One of the options available to the Board of Professional Responsibility is public censure.

A censure is a public form of discipline that declares the conduct of a lawyer improper but does not limit the right to practice law. Upon the filing of a complaint, a disciplinary counsel with the Board of Professional Responsibility reviews the case. The board may approve the censure, modify it or determine that the matter be dismissed or concluded by some other form of discipline. If the board approves the censure, the target of the disciplinary action may not appeal the decision. However, the individual may demand that a formal proceeding be instituted before a hearing committee within 20 days of the board’s decision. In the event of such demand, the censure shall be withdrawn, and the matter handled in the same manner as any other formal hearing before a hearing committee.

For more information about the rules governing disciplinary actions, see Rule 9 of the Rules of the Supreme Court of Tennessee.
Supreme Court agrees with TBA
Displaced lawyers may practice temporarily in Tennessee

Lawyers displaced by Hurricane Katrina may get a 60-day temporary, emergency license to practice in Tennessee under an order issued last month by the Tennessee Supreme Court.

The action came at the request of the Tennessee Bar Association, which had asked that lawyers from Louisiana, Mississippi and Alabama be granted limited privileges to practice. The action is a way to allow the displaced lawyers to protect the interests of existing clients. However, the licenses are not limited in scope and the displaced lawyers may take new matters for which they are competent. The lawyer must be in good standing in their home jurisdiction and register with the state licensing and disciplinary authorities.

The supreme courts in several states, including Texas, Arkansas and Arizona, have already taken similar action. Read Tennessee’s order at http://www.tba.org/Katrina/courtorder_10_05_05.html.

For updates on other relief-related efforts, how to volunteer, offer office space, equipment or other resources, go to http://www.tba.org/Katrina.

TBA birthplace sells at auction
The historic property where the Tennessee Bar Association was established and where the first annual TBA convention was held on July 4, 1882, was sold at auction Sept. 10. The 131.84 acre property, listed on the National Register of Historic Places, and known as Bon Aqua Springs, flourished as a mineral springs resort for more than 100 years.

Located in Hickman County just west of Nashville, the property has been divided and sold into six tracts. Tract two, which sold for $194,000, included 38 acres, a home built in 1882, a strong perennial stream, springhouses, several fresh and sulphur springs, a cave, a 30-foot stone reservoir, a cemetery and what remains of a stone swimming pool and mineral bath structures that stood near a 110-room resort hotel. Above is a 1979 drawing by Bernard Wiley, of what the hotel must have looked like around 1910. The structure is no longer there.

The historic marker on the property says, “In 1837 William Locke Weems discovered the mineral springs around which a resort flourished for over a century. Among the historical events which occurred here was the establishment of the Bar Association of Tennessee on July 4, 1882.” The TBA was actually formed in 1881, holding its first convention in 1882.

Actions from the BPR
(continued from facing page)

Complaints, Bruner did not respond to additional requests for information from the disciplinary counsel. The board found that Bruner’s conduct violated the rules of professional conduct.

On Sept. 26, the Board of Professional Responsibility publicly censured Maryville attorney Charles David Deas. In early March, Deas pleaded guilty in Blount County General Sessions Court to two counts of driving under the influence. He received a sentence of 11 months and 29 days, all but four days of which were suspended. He was given supervised probation with several conditions, including that he obtain drug and alcohol treatment. Deas failed to respond to requests for additional information from disciplinary counsel during investigation of these complaints. The board found that Deas’s conduct violated rules 8.1 and 8.4 of the rules of professional conduct.

Compiled by Stacey Shrader from information obtained from the Board of Professional Responsibility of the Tennessee Supreme Court.
The law firm of Leitner, Williams, Dooley & Napolitan PLLC recently welcomed Désirée I. Hill to an associate position in the firm. Hill received her law degree in 2002 from the University of Memphis.

In September, litigation attorney Lew Conner rejoined Waller Lansden Dortch & Davis PLLC, where he formerly practiced law from 1985 to 1989. Conner’s experience spans commercial, contract and tort litigation, as well as employment, domestic and government relations matters. Conner previously served as special counsel at Stokes Bartholomew Evans & Petree; as a former partner at Boult, Cummings, Connors & Berry; and as a founding partner at Dearborn & Ewing. In addition, he served on the Tennessee Court of Appeals and as special chief justice of the Tennessee Supreme Court. He earned his law degree in 1963 from the Vanderbilt University Law School.

Environmental attorney William Penny has joined Stites & Harbison PLLC as a partner in the Nashville law office where he will focus on environmental and health care law. Prior to joining Stites & Harbison, he headed the Nashville law office of Wyatt Tarrant & Combs and was chair of the firm’s environmental law practice group. He also served as general counsel for the Tennessee Department of Environment and Conservation under two governors. Penny was the founding chair of the TBA’s Environmental Law Section. He has authored *A Practical Guide to Tennessee Environmental Law* and teaches at the Nashville School of Law.

The Nashville law firm of Bone McAllester Norton PLLC announced that William T. Cheek III has joined the firm as a member. Cheek focuses his practice in business and business bankruptcy law as well as alcoholic beverage licensing and enforcement. Prior to joining Bone McAllester Norton, Cheek practiced with the Nashville firm of Dodson, Parker & Behm PC. He received his law degree from Vanderbilt University Law School in 1991 and clerked for Tennessee Supreme Court Justice Martha Craig Daughtrey in 1992.

Steve McBride has joined Southeastern Asset Management as legal counsel. McBride previously served as senior counsel with International Paper Company. He earned his law degree from Notre Dame Law School.

Glanklor Brown PLLC recently announced that Monica N. Wharton has been named an associate member of the Leo Bearman Sr. American Inn of Court. Wharton concentrates her practice in the areas of general civil litigation and employment law. Before joining the firm, she served as a law clerk for the U.S. District Court for the Western District of Virginia and practiced employment law in Raleigh, N.C. Wharton received her law degree from William and Mary Law School in 2001, where she served as a member of the National Moot Court Team, the Honors Council and the Order of Barristers.

Gary M. Brown, shareholder at Baker, Donelson, Bearman, Caldwell & Berkowitz PC, has been appointed to serve as general counsel for the Ethics Officer Association (EOA). In 2002, Brown served as special counsel to the U.S. Senate Governmental Affairs Committee in its investigation of Enron Corp. and provided advice to the committee on certain aspects of the Sarbanes-

(continued on page 12)
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SARAH HENDRICKSON,
TBA’s continuing legal education assistant, has been promoted to TBA membership director.
Hendrickson’s promotion comes on the heels of the departure of MEGAN RIZZO, who leaves the TBA to work as director of development at the Nashville Child Advocacy Center, a nonprofit organization providing services to children who are victims of abuse or witnesses to violence.
Hendrickson came to the TBA in 2003 after graduation from Emory University, where she earned her bachelor of arts in political science.

The law firm of Dunn, MacDonald, Coleman & Reynolds PC recently announced that Steve Erdely IV and Michael A. Myers were named members of the firm, and that Adam A. Edwards has joined the firm as an associate. Erdely joined the firm in 1999 and concentrates his practice in general civil litigation and insurance defense litigation. He is a 1994 graduate of Southern Illinois University School of Law and is licensed to practice law in Tennessee, Kentucky and Illinois. Myers joined the firm in 2000 and focuses his practice on civil litigation and insurance defense. He is a 1997 graduate of the University of Tennessee College of Law. Edwards will concentrate his practice in general civil litigation, construction litigation, insurance defense and products liability. He is a 2000 graduate of Washburn University and is licensed to practice law in Tennessee, Kansas, and Missouri.

Amy Holliman Brown has joined the law firm of Myers Graves & Parker PLLC in Hernando, Miss. as an associate attorney. She will practice in the areas of commercial litigation and employment law. Brown is a 2000 graduate of the University of Mississippi School of Law and she is licensed to practice law in both Mississippi and Tennessee.

Maria M. Salas and Keith D. Slocum have formed Salas Slocum Law Group PLLC, a new firm in Nashville that will focus on bankruptcy and consumer law. Salas is a certified consumer bankruptcy specialist and serves on the executive council of the Tennessee Bar Association’s Bankruptcy Section, the Nashville Bar Association’s board of directors and the MidSouth Commercial Law Institute’s board of directors. She also is a former chair of the Nashville Bar Association’s Bankruptcy Court Committee. Salas received her law degree from the Nashville School of Law in 1992. Slocum earned his law degree from the Nashville School of Law in 2003. He is a member of the Harry Phillips American Inn of Court. He also is a member of the National Association of Consumer Bankruptcy Attorneys and the National Association of Consumer Advocates.

The members and associates of Watson Roach Batson Rowell & Lauderback PLC announce the formation of their new firm. The address is 1500 Riverview Tower, 900 South Gay St., Knoxville, TN 37902; telephone (865) 637-1700; fax (865-525-2514. The mailing address is P.O. Box 131, Knoxville, TN 37901-0131.

Drescher & Sharp PC announces the addition of attorney Sean J. Martin to its practice. Martin litigates in the areas of negligence, personal injury, contract disputes, family and criminal law. He received his law degree from the University of Tennessee College of Law. Subsequently he served as clerk for the Hon. Marietta Shipley, Second Circuit Court for Davidson County. He was most recently a litigation associate with Cornelius & Collins LLP in Nashville.
Tennessee Criminal Trial Practice
By Mark Ward ■ Thomson West Publishing ■ 2005 ■ $109 ■ 867 pages

Reviewed by Donald F. Paine

Judge Mark Ward’s tome is to criminal procedure what Professor Larry Pivnick’s Tennessee Circuit Court Practice is to civil procedure: an essential book. His original 2000 edition was coauthored by public defender Paula Voss; her name continues to appear on chapters covering sentencing, appeals, and post-conviction remedies.

Chapter 4 is a treasure trove of explanations and citations concerning search and seizure, perhaps the most frequently litigated issue in criminal practice. Most prosecutions result in plea bargains, and Chapter 18 at §18.4 contains Judge Ward’s “Ten Commandments of Defense Plea Bargaining.” The Tenth Commandment is: “Be persistent, be polite, and keep coming back.” Chapters 22 and 23 contain helpful authorities on recurring evidence issues, particularly at §23.3 on impeachment of a defendant by prior convictions.

I recommend this book without reservation. Buy it, read it, and avoid malpractice.

Donald F. Paine is of counsel to Paine, Tarwater, Bickers, and Tillman in Knoxville and a regular columnist for the Tennessee Bar Journal.

The New Bankruptcy Law Dissected and Explained
2005 Bankruptcy Reform Legislation with Analysis
By William Houston Brown and Lawrence R. Ahern III ■ Thomson West Publishing ■ $50 ■ 391 pages ■ 2005

Reviewed by John A. Walker Jr.

By now every Tennessee lawyer is aware that the Bankruptcy Code has been overhauled and re-written in numerous places. The only question now is, how do we deal with this wholesale revision of the law and the repeal of much of what we have painfully learned over the years?

The cavalry has arrived to rescue us! Bankruptcy Judge Bill Brown (of Tennessee’s Western District) and bankruptcy lawyer and part-time professor Larry Ahern of Nashville (and formerly of Chattanooga) have combined efforts to produce a kind of nutshell-cum-redline appendix that explains in clear prose every change in the law and then sets out the complete text of the Bankruptcy Code showing every addition and every deletion wrought by the new law (and they do the same for the applicable portions of Titles 18 and 28 of the United States Code).

The authors spell out what the old law was and what the new law does, in detail but clearly. One of the major changes in the law is the “means test,” which determines a debtor’s right to file a Chapter 7 petition based on the relationship of his income versus the local median income. Where do you get the latter? Simple. Just turn to pages 390-391 for the tables applicable to every state.

While most of the new law has an effective date of Oct. 17, some of its provisions became effective immediately upon enactment on April 20. Which ones? Go to page 98; they are all set out.

In sum, this is a most readable and most useful tome. I keep mine on my desk and consult it frequently. You could do worse.

John A. Walker Jr., is a lawyer with Walker & Walker PC in Knoxville and is a fellow of the American College of Bankruptcy.
THE NEW SHAPE OF LLC LAW

Reform act streamlines LLC process to give more flexibility

By Richard Spore
When the current Tennessee Limited Liability Company Act ("Old Act") was originally adopted, the intent of the drafters was to insure that an LLC properly organized under the Old Act would be treated as a partnership for federal income tax purposes. At that time, the IRS analyzed business entities in light of the number of its "corporation-like" attributes. If an LLC possessed a certain number of corporate attributes, it would be treated as a corporation rather than as a partnership for federal income tax purposes, with potentially disastrous tax consequences. The drafters of the Old Act determined that the complexities of this tax analysis constituted a "trap for the unwary." Thus they opted for legislation with technical requirements that would force lawyers to organize LLCs that would be treated as partnerships for federal income tax purposes. This objective, while laudable, resulted in an Old Act of significant complexity and substantial length.

(Continued on page 16)
The committee met many times, formally and informally, during 2003 and 2004 and finalized its proposed draft of the Revised Act in early 2005. The Revised Act was then adopted by the General Assembly with an effective date of January 1, 2006 (the transition rules for the Revised Act are discussed in more detail below).

The Revised Act reorganizes and simplifies Tennessee’s LLC statutes. The total number of chapters in the Revised Act has been reduced to 11 from 45 in the Old Act, and the total number of provisions in the Revised Act has been reduced to 139 from 208 in the Old Act. The simpler organizational structure and language of the Revised Act will benefit business lawyers and their clients across the state. Although an exhaustive review of the Revised Act is beyond the scope of this article, Section II below will highlight certain of the key provisions of the Revised Act and significant changes from the Old Act.

Highlights of the Revised Act

Chapter 1: General Provisions. Chapter 1 includes, among other things, the defined terms that apply under the Revised Act; LLC name, registered agent and service of process requirements; and the general rules regarding personal liability and indemnification of members and others involved with LLCs. Most Chapter 1 provisions were generally carried forward from the Old Act, albeit in a simplified and more streamlined form. However, the defined terms in Chapter 1 of the Revised Act include the following noteworthy changes from the Old Act:

Distribution: This definition has been modified to exclude “amounts paid to or for the benefit of members or holders of financial rights as compensation or benefits for services rendered by them in their capacities as members, holders, officers, managers, directors or agents.” This exclusion therefore removes such compensation from the ambit of the limitations on distributions set forth in Section 306 of the Revised Act.

Family LLC: This is a new definition that includes any LLC in which two (2) or more members of the same family hold, in the aggregate, at least 50% of the financial rights in the LLC. The definition of “members of the same family” is complicated and includes entity attribution rules and up to four generations of family members.

Holder of financial rights or holder: This new definition means any non-member owner of financial rights. Under the Revised Act, a person can become a holder by virtue of an assignment of financial rights from a member (or another holder) or by original issuance of financial rights from the LLC to the holder.

LLC Documents: This new definition has been added to eliminate cumbersome references to “the articles and/or operating agreement” throughout the Revised Act. It means either or both of an LLC’s articles and (if it has one) the LLC’s operating agreement.

Chapter 2: Formation, Articles of Organization and Operating Agreement. This portion of the Revised Act includes three major simplifications to the comparable provisions of the Old Act. First, the provisions relating to the LLC’s organization and constitutional documents of LLCs have been grouped together in this one chapter for ease of reference. Second, these provisions have been streamlined and shortened considerably to make them more “user-friendly” for business lawyers and their clients. Third, the Revised Act includes in one provision — Section 205 — all “unwaivable” provisions of the Revised Act, so that lawyers do not have to hunt throughout the entire act to determine what can and cannot be waived by agreement. A major benefit of the Revised Act, apart from simplification and streamlining of the Old Act, is

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the grouping of all unwaivable provisions in one place and the clear expression of legislative intent that the members are free to organize and run their LLC as they see fit, except for these specifically enumerated unwaivable provisions.

Chapter 2 also simplifies the requirements for articles of organization in several respects. For example, it is no longer necessary for the articles to set forth the name and address of the LLC’s organizer or the number of the LLC’s members unless it has more than six members when the articles are filed.

Chapter 2’s major substantive change from the Old Act is to permit oral LLC operating agreements. Under the Old Act, member-managed LLCs are not required to have operating agreements, but board-managed LLCs are. However, under the Old Act, if an LLC — whether member-managed or board-managed — adopts an operating agreement, it must be in writing. In contrast, the Revised Act follows the Uniform Limited Liability Company Act (Uniform Act) and the Delaware Limited Liability Company Act (Delaware Act) in allowing oral operating agreements unless the articles or a written provision of the operating agreement specifically require the operating agreement to be in writing. The committee felt that there were compelling policy reasons for this change from the Old Act and that this change was also justified by Tennessee’s adoption in 2002 of the Revised Uniform Partnership Act (RUPA), which permits oral agreements for partnerships.

The Revised Act also makes clear that an operating agreement may consist of multiple documents, which, taken together, are intended to govern the LLC and the relationship of its members. In another departure from the Old Act, the Revised Act also provides that members joining the LLC after the adoption of an operating agreement are not bound by it unless the articles or operating agreement so provide.

Chapter 3: Finance. Like Chapter 2, Chapter 3 of the Revised Act gathers in one place, in a simplified and streamlined form, all the provisions relating to the initial capitalization and ongoing financial operations of the LLC. The Revised Act draws heavily on both the Uniform Act and Delaware Act in this chapter, although the basic default rules embedded in the Old Act regarding contributions, allocations and distributions are continued in the Revised Act (i.e., distributions and allocations are divided equally among the members on a per capita basis), albeit in a simplified form. Perhaps the most significant change from the Old Act in Chapter 3 is set forth in Section 309, which permits “series LLCs.” Section 309 allows an LLC to establish separate series of membership interests, financial rights, and management, each with separate rights and obligations with respect to designated LLC assets and liabilities. Most importantly, Section 309 provides that the debts and liabilities of one series are generally not enforceable against the assets of another series. This allows a single LLC to organize in a holding company-like structure, with separate series representing different business divisions that are not legally liable for each other’s debts.

Chapter 4: Management. Chapter 4 continues the themes established in Chapters 2 and 3 of the Revised Act by gathering in one place all provisions relating to LLC management and then substantially simplifying those provisions compared to the Old Act. Chapter 4 of the Revised Act is based closely on the Uniform Act. The Uniform Act, in turn, borrows a number of concepts from RUPA in the area of entity management. Since Tennessee adopted RUPA in 2002,

(Continued on page 18)
The committee felt that using simplified, RUPA-based management provisions in the Revised Act represented a sound policy decision.

Chapter 4 includes several substantive departures from the Old Act. First, the Old Act adopted LLC management models and nomenclature that ultimately proved to be somewhat idiosyncratic based on the subsequent development of LLC laws in other states and general trends in LLC practice. Therefore, the Revised Act discards certain management concepts under the Old Act — such as the “board of governors” and “chief manager” — in favor of management models and terms more widely used throughout the country.

Accordingly, the three basic LLC management models under the Revised Act are member-managed (comparable to the member-managed model under the Old Act, and similar to a general partnership governance model); manager-managed (analogous to the governornonaged model under the Old Act, and similar to a limited partnership governance model); and director-managed, which represents a departure both from the Old Act and the Uniform Act (the director-managed model in the Revised Act follows very closely the corporate governance model in the Tennessee Business Corporation Act).

Chapter 4 of the Revised Act also attempts to address questions that existed under the Old Act regarding the scope of members’ statutory and common law fiduciary duties. Under the Revised Act, the only fiduciary duties owed by a member of a member-managed LLC to the LLC and the other members are the statutory duties of loyalty and care as described in Section 403 of the Revised Act. Both duties are similar to the comparable statutory duties for partners under RUPA. The managers of a manager-managed LLC have comparable statutory fiduciary duties. The directors of a director-managed LLC owe the same standard of care applicable to corporate directors under the Tennessee Business Corporation Act.

Chapter 5: Admission of Members; Membership Interests; Transferees and Creditors of Members. Although this portion of the Revised Act draws on the Old Act (particularly §509, “Rights of Judgment Creditor”), the Uniform Act and provisions in RUPA,
it also represents significant new independent work by the committee, including two important departures from the Old Act. First, if a member withdraws from an LLC that continues in operation, the member is entitled to receive “fair value” for its membership interest from the LLC, subject to a possible offset for damages if the withdrawal is wrongful. In such circumstances, any provisions in the LLC documents relating to the determination and payment of “fair value” will control. Absent such provisions, however, Section 506 generally provides for a period of 120 days after the member’s termination for the LLC and the terminated member to agree on the amount of “fair value” and the payment terms. If the parties cannot agree on “fair value” and payment terms within that time, then either is free to pursue a judicial determination of “fair value” and the related payment terms. (Conceptually, this is similar to the procedure for buying out a dissociated partner under RUPA.)

Second, as noted above, the Revised Act introduces the concept of a “family LLC” owned by members of the same family. In contrast to the general rules under the Revised Act, members of a “family LLC” cannot withdraw from the LLC, which is an important nuance from an estate planning point of view.2 However, an LLC that would otherwise come within the definition of a “family LLC” may opt out of the special family LLC rules by so electing in its articles of organization. This is an important point as the broad family LLC definition may well encompass many LLCs not intended to function as estate planning vehicles where the family LLC restrictions would therefore be inappropriate.

Notwithstanding these important changes, several major default rules from the Old Act are continued in Chapter 5. These include generally free assignability of financial rights; no assignment of governance rights without unanimous consent of the members; and a member’s power to withdraw from the LLC (except in the case of family LLCs, as noted above).

Chapter 6: Dissolution and Winding Up of the LLC. These provisions closely follow the analogous provisions in the Old Act. The principal substantive changes in Chapter 6 from the Old Act are intended (i) to eliminate confusing language included in the Old Act to address now-obsolete tax concepts, and (ii) to allow single member LLCs to continue in existence following the death or disability of the single member.

Chapter 7: Merger, Conversion and Transfer of Assets. The LLC merger and conversion provisions in Chapter 7 are based on similar provisions in the Delaware Act. These provisions are intended to provide a straightforward (but nonexclusive) statutory method for

(Continued on page 20)
in structuring and running their businesses. The committee will use the remainder of 2005 to prepare a technical corrections bill for the Revised Act for submission to the legislature of 2006. Any suggested revisions may be sent to the author of this article.

Notes
1. Under §205(b), the LLC Documents may not:
   (1) Vary the requirement under §102(6) that a director be an individual.
   (2) Vary the notice requirements under §103 or under the other provisions of the Act in a manner that is manifestly unreasonable.
   (3) Vary the requirements with respect to the LLC's name under §106.
   (4) Vary the requirements under §112(c) regarding the Workers' Compensation Law.
   (5) Eliminate or vary the potential for personal liability under the last sentence of §114(a) or under §114(d).
   (6) Eliminate or vary the restrictions on indemnification in §§115(i)(1)(A), (B) or (C).
   (7) Eliminate or vary any restrictions in §§202(b)(3)(A), (B), or (C) on the elimination or limitation of the personal liability of a director in the articles under §202(b)(3).
   (8) Eliminate or vary the §205(b) “non-waivable” provisions themselves.
   (9) Eliminate or vary the restrictions on distributions in §306.
   (10) Eliminate or vary the liability for unlawful distributions in §307.
   (11) Authorize a director to appoint a proxy.
   (12) Unreasonably restrict a right to information or access to records under §308.
   (13) Eliminate the duty of loyalty under §§403(b)(1) or (2), but the LLC documents may:
      (A) Identify specific types or categories of activities that do not violate the duty of loyalty under §§403(b)(1) or (2), if not manifestly unreasonable; and
I am a fan of Senator Kennedy and was a fan of Don Paine. I do not understand how the editorial board of an organization like the Tennessee Bar Association could allow the publication of such an article. Your disclaimer is totally insufficient as far as I am concerned, because it does not explain how the article got by you in the first place.

— Walter W. Bussart, Lewisburg

**Bring back the humor column or kick out Haltom as president**

I enjoy and appreciate the *Tennessee Bar Journal* and the information provided therein. While I have to admit that I don’t read it in its entirety, I do scan it to see what might be applicable to my practice, and I always read Bill Haltom’s column, “But Seriously, Folks!” In reviewing the August copy of the *Journal* I note that that column is not included. I assume that must be due to his assumption of his new role as president of the bar association.

While I certainly appreciate Mr. Haltom and I’m proud he’s president, if him being president is going to mean that the column, “But Seriously, Folks!” will no longer be included in the *Journal*, then I move to impeach him immediately.

— Robert L. Huskey, Manchester
When the U.S. Supreme Court unanimously reversed¹ the conviction of Arthur Andersen, LLP on May 31, many in the public accounting profession breathed a collective sigh of relief. One could almost hear the champagne corks popping in the offices of many public accounting firms, even those not associated with the Enron case, but besmirched as accountants by the adverse publicity surrounding this case.² Jokes having punch lines such as “He has the integrity of an Arthur Andersen accountant” abounded on late night TV following the trial and conviction of the accountants in the Andersen case for document destruction.

Following the Supreme Court’s reversal of the Andersen conviction one might be tempted to conclude that there has been a change in the legal winds for public auditors. After all, this is a profession whose number one product is integrity and public perception of this trait. Mere indictment — formal criminal accusation — proved to be the Andersen firm’s downfall. Could a nine-to-nothing reversal mean that Andersen is not guilty of any crimes after all? After the Supreme Court’s reversal of the Andersen conviction, there was even bold talk of reversing the fortunes of many Enron defendants — banks, underwriters and others — and of suing the federal government for damages associated with ruining the careers of many Arthur Andersen employees. While approximately 100 or fewer Andersen employees were directly involved in the Enron affair, many other Andersen employees spread over dozens of offices had nothing to do with the Enron account. Could this be a time for resurrecting the once proud and highly respected Arthur Andersen firm?³

This article will first present the facts of this case. Having a timeline with a brief description of what occurred in Andersen assists in speculating about what might eventually happen to Andersen. Following an examination of the facts, a discussion examines the legal basis for the challenge to the lower court ruling. The Andersen case also raises five questions involving both legal and policy issues that this article discusses.

Facts in Andersen v. U.S.
The collapse of the Enron Corporation is well documented. Enron was at one time a natural gas pipeline company, but in the 1990s it became an energy conglomerate. During this time, the firm of public accountants, Arthur Andersen LLP (hereinafter, Andersen), was Enron’s independent public auditor. Andersen also provided Enron with internal audit and consulting services. Andersen signed off on the annual reports that Enron submitted to the SEC and shareholders during the years prior to Enron’s collapse and ultimate filing for bankruptcy.

A number of banks and underwriters have been implicated and some have entered consent decrees or civil settlements to remove their potential liabilities for their part in the Enron collapse.³ One of the casualties of Enron’s collapse was the venerable accounting firm of Arthur Andersen LLP. Prior to its collapse Andersen was highly regarded and employed more than 80,000 persons around the world in many nations. Following its indictment, Andersen’s clients deserted it, and the firm eventually filed for bankruptcy and thousands lost their jobs and pensions.

An Andersen partner named David Duncan headed the Andersen “engagement team” that handled the Enron account. Following a rather spectacular increase in Enron’s stock price in the late 1990s, it suffered financial setbacks in 2000. In 2001 financial matters turned further downward. On Aug. 14, 2001, Jeffrey Skilling, years earlier a Baker Scholar at Harvard Business School and only months earlier Enron’s newly appointed CEO, unexpectedly resigned. A few days after this, Sherron
Watkins, a senior accountant at Enron, warned Enron Chair Kenneth Lay, that Enron could “implode in a wave of accounting scandals.” Watkins also passed along the same warning to Duncan and Michael Odum, another Andersen partner who supervised Duncan.


On Oct. 10, 2001, the Andersen partner Odum held a general training meeting at the firm, which was attended by 89 Andersen employees, including 10 from the Enron engagement team. Odum told everyone to obey the firm’s document retention policy. That policy required a single central engagement file that “should contain only that information which is relevant to supporting our work.” The policy said “in cases of threatened litigation … no related information will be destroyed.” The Andersen retention policy also separately provided that if Andersen were “advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed.”

At the training meeting on Oct. 10, Odum, after urging compliance with the Andersen retention policy, added, “[I]f it’s destroyed in the course of [the] normal policy and litigation is filed the next day, that’s great … [W]e’ve followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.”

On Oct. 12, 2001, Temple entered the Enron matter into her computer, designating the “Type of Potential Claim” as Professional Practice — Government/Regulatory Investigation. Temple also e-mailed Odum suggesting that he “remind the engagement team of our documentation and retention policy.” On Oct. 16, 2001, Enron announced its 3rd quarter results that disclosed a $1.01 billion charge to earnings.

On Oct. 17, 2001, the SEC notified Enron by letter that it had opened an investigation in August and sought certain information and documents from Enron. On Oct. 19, 2001, Enron forwarded a copy of the SEC letter to Andersen. On the same day, Temple e-mailed one of Andersen’s internal team of accounting experts and attached a copy of the document policy. On Oct. 20, 2001, the Enron crisis response team held a conference call during which Temple told everyone to follow the firm’s document policy.

On Oct. 23, 2001, CEO Lay refused to answer questions during an analysts’ call due to “potential of lawsuits, as well as the SEC inquiry.” After the call, Duncan met with other Andersen partners on the Enron engagement team and told them they should be sure to comply with the document policy. Still another meeting of all team members led to another reminder of the policy and a distribution of it. Following these meetings, there was substantial destruction of paper and electronic documents.

On October 26, 2001, an Andersen senior partner circulated a New York Times article discussing the SEC’s response to the Enron situation. He noted that “the problems are just beginning and we will be in the cross-hairs. The marketplace is going to keep the pressure on this and is going to force the (Continued on page 24)
Andersen v. U.S.

(Continued from page 23)

SEC to be tough.”8 On Oct. 30, 2001, the SEC opened a formal investigation and sent Enron a letter requesting accounting documents. Document destruction continued during this period even though certain Andersen managers (including at least one partner and a forensic investigator) warned against it.

On Nov. 8, 2001, Enron announced it would comprehensively restate its assets and income. The same day, the SEC subpoenaed records from Enron and Andersen. On Nov. 9, 2001, Duncan’s secretary sent an e-mail stating: “Per Dave — No more shredding … We have been officially served for our documents.”

Enron filed for bankruptcy less than one month later. Andersen fired Duncan and later pleaded guilty to witness tampering. In March 2002, Andersen was indicted in the Southern District of Texas on one count of violating a federal obstruction of justice statute’s sections 1512(b)(2)(A) and (B). The indictment alleged that between Oct. 10 and Nov. 9, 2001, Andersen “did knowingly, intentionally and corruptly persuade … other persons, to wit: [petitioner’s] employees, with intent to cause” them to withhold documents from, and alter documents for use in, “official proceedings and investigations.” A jury trial followed and after seven days of deliberation, a deadlock resulted. The court sent the jury back for further consideration after which the jury returned with a guilty verdict. The Court of Appeals for the Fifth Circuit affirmed the conviction and Andersen filed for certiorari to the U.S. Supreme Court. The Supreme Court unanimously reversed the Fifth Circuit.

The statute under which Andersen was charged and convicted

The Andersen firm was indicted on one count in the Southern District of Texas for allegedly violating section 1512 (b)(2)(A) and (B) of the federal criminal code. This section is part of witness tampering provisions of the U.S. Criminal Code dealing with the obstruction of justice. The proviso in question provides in relevant part,

Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person … to induce any person to … withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding … shall be fined under this title or imprisoned not more than 10 years, or both.”9

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cause or induce any person to ... withhold testimony, or withhold a record, document, mutilate, or conceal an object.”

There was no question that documents in Andersen were shredded, thus satisfying the “mutilate or conceal” or actus reus part of the statute.

The principal issue in Andersen revolved around occurrence of the “intent” portion of the statute. The statute's wording as to intent required “… knowingly … or corruptly persuading” the aforementioned prohibited acts with “intent … to cause” that person to “withhold” documents from, or “alter” documents for use in an “official proceeding.” Thus the statute in question not only required “intent,” as do most crimes, but specific intent; that is, intent other than to do the act which was alleged. Stated another way, specific intent is a “subjective” element that must be inferred from other of the defendant's acts. In this case, the intent to shred the documents was obvious, but was such shredding done “with intent to knowingly … or corruptly … with intent … to cause” that person to “withhold” such documents from or “alter” documents for use in an “official proceeding?”

Proving specific intent is difficult, and the Supreme Court read that trial court's jury instruction regarding such intent as failing to convey the requisite consciousness of wrongdoing. The Supreme Court noted how little culpability the trial court required of the defendants. The jury was told: “[E]ven if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty.”

What was wrong with this instruction? The Supreme Court said it meant that innocent conduct could be covered under the statutory word “corruptly.” In effect the jury instruction was too broad, turning a specific intent crime into almost a strict liability crime where virtually no intent — just the prohibited act — is required.

The government had argued that “knowingly” in the statute was not a modifier of “corruptly” in the statute. Thus, according to the Government's theory of the case, one might “corruptly” destroy documents even if s/he did not know s/he was doing so or did so without any awareness or consciousness. If “knowingly” only applied to the words immediately following it as distinct from the entire series of acts down the statutory chain also listed in the statute, then the Government's construction of the statute was plausible. However, the Supreme Court read the word “knowingly” as applying not only to the words immediately following it, but also to the other acts in the statutory chain of acts that follow later in the section. This construction significantly increased the level of knowledge defendants had to possess to be criminally liable for document destruction under the obstruction of justice statute.

Why did the Supreme Court adopt (Continued on page 28)
We’re celebrating the Tennessee Bar Journal’s first 40 years all year! In each issue we will look at an area of life in the law to see how the TBJ covered it. This month we consider the relationship the magazine has had with the judiciary.

The judicial system is so integral to the work of lawyers — the Journal’s primary audience — that naturally over the years, judges and courts have been in the spotlight in this magazine’s pages. Many articles have been about judges: how they should be treated, paid, selected, spoken to. These pages have even revealed a serious disease called “Robitis” (reported in 1992 by R. Vann Owens, himself a chancellor in Hamilton County at the time). Owens wrote an article, “Clashes with judges can’t always be attributed to ‘Robitis,’” regarding a TBA convention program about problems between the bench and bar. “No specific cure was preferred,” he wrote, “but it was intimated that general awareness of the disease would help mitigate some of its harmful effects.”

In November 1970, TBA president Joe W. Henry, who would later serve on the Tennessee Supreme Court, wrote of the progress made when the TBA proposed to Gov. Buford Ellington “a cooperative system of judicial selection” where the Board of Governors would serve as a “Judicial Qualifications Committee to investigate and screen” candidates for judicial appointment and report back to the governor.

“This is a major milestone in the long struggle for court modernization in Tennessee,” Henry wrote. “For the first time in history, the organized Bar of this state will play a major role in judicial selection.”

Certainly 1988 was also a hot year for the topic of judicial selection as the Modified Missouri Plan, soon to be adopted as the Tennessee Plan, was discussed from different perspectives by presidents Jim Emison and Landis Turner in their president’s columns.

The cover of the May/June 1990 issue (at left) featured a story by Joe G. Riley, who was Circuit Court judge for Dyer and Lake counties. The article outlined ethical requirements for judicial candidates. “In this election year,” he wrote, “judicial hopefuls across the state should have Canon 7 of the Code of Judicial Conduct etched in their brains.”

That election year was perhaps a bit more diverse than previous judicial elections, since two years earlier the Marion Griffin Chapter of the Lawyers Association for Women had sponsored a seminar that was covered by the Journal (“Workshop teaches women how to run for judge: Gearing up for 1990,” March/April 1988, by cub reporter Suzanne Robertson). The seminar taught “the nuts and bolts of what a judicial campaign involves” and drew nearly 60 women who committed to form a statewide network. This was the beginning of the statewide Tennessee Lawyers Association for Women.

In February 1999, Lewis L. Laska and Lewis D. Howell Jr. wrote a colorful history of Tennessee judges that included such information as when a group of “Tennessee lawyers got so angry with an overbearing judge that they threatened to throw him in the river.”

More recently, the Journal has carried messages from presidents about respect for the work of judges (“Judges work hard in and out of courtroom,” by Randy Noel, May 2000, and “Judges deserve to be paid fairly,” by John Tarpley, August 2003). Katie Edge’s feature-length article, “Judicial independence/judicial accountability: A delicate balance” (May/June 1998), detailed that struggle, and outlined the work of the TBA’s then-recently new Task Force of the Tennessee Judiciary. This year, current President Bill Haltom is championing the American legal system and the protection of the rule of law (“It’s time to stand up and deliver,” July 2005, “Confidence in jury system declining,” August 2005, and “Why juries are smarter than judges,” November 2005).

Haltom and many before him remind us, through the pages of this magazine, that the goals of lawyers and judges are intertwined.

— Suzanne Craig Robertson
What’s new at TennBarU?

NEW SERIES TO ASSIST YOUNG LAWYERS

If you miss the challenges and camaraderie of law school, here is a pair of new programs for you. The TBA’s Young Lawyer Division is launching a new 4L series of courses designed for attorneys in the first year of their practice, and a Skills Enhancement Series for attorneys in the first six years of practice. The 4L Series kicks off Nov. 17 with a program focusing on practice in state court. The Skills Enhancement Series starts Dec. 7 with a program on the new Limited Liability Company Act.

If your law school experience included more than just listening to lectures, we’ve got that covered, too. Courses will be hosted at popular clubs, including B.B. King’s in Nashville, the Downtown Grille and Brewery in Knoxville, St. John’s Restaurant in Chattanooga and Swig in Memphis. All will begin at 3 p.m. and end at 5 p.m., with a happy hour to follow.

The 4L Series also includes: An Introduction to Federal Court Practice on Jan. 19; Negotiation: Arbitration vs. Mediation on March 23; Basics of Business Law on May 18; Setting up a Corporation on July 20; and Wills, Uncontested Divorce & Basic Real Estate on Sept. 21.

The Skills Enhancement Series includes: State Appellate Practice on Feb. 1; The Basics of Mergers and Acquisitions on April 5; Writing Better Briefs and Drafting Contracts on June 7; Finding and Challenging Experts on Aug. 2; and Evaluation of a Case, Reading Medical Records & Time Management on Oct. 4.

COMMON MISTAKES YOU CAN AVOID TO PREVENT LEGAL MALPRACTICE CLAIMS

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the statutory construction in which "knowingly" modified "corruptly?" The court stated that doing so made "sense both linguistically and in the statutory scheme." The Court's reasoning was that "only persons conscious of wrongdoing can be said to knowingly ... corruptly persuade."13 Said another way, the Supreme Court's construction limits criminality to those conscious of their wrongdoing, in effect increasing the mens rea requirement.

Additionally, the word "corruptly" in the obstruction statute raised other questions. Specifically, the Supreme Court found the trial court's jury instruction faulty because it imposed no "nexus" requirement between the "obstruction" (here, destruction of documents) and an "official proceeding" in which the documents might be used. Thus, according to the trial court's instruction, any destruction of documents that might "impede the government's fact finding ability" would satisfy the "corruptly" wording of the statute. This also was too broad. The Supreme Court posited several instances where a person could impede a Government investigation without violating the obstruction of justice statute. For example, the court noted that it is not necessarily corrupt for a mother to suggest to a son that he invoke his privilege against self-incrimination in a case. Further, it is not "corrupt" for an attorney to persuade a corporate client to "withhold" documents from the government that were covered by the attorney-client privilege from the IRS. Likewise it is not "corrupt" for a spouse to invoke the spousal privilege to withhold documents. Further, the court noted it is not improper for an employer to instruct its employees to comply with a valid document retention policy under ordinary circumstances.

Thus the court concluded that there are a number of legitimate instances when documents could be withheld without there being any corrupt intent. Given the Supreme Court's imposition of a linguistic "knowingly corrupt" and "nexus" requirements on the obstruction of justice statute, the likelihood diminishes for prosecutors successfully using this law.

Five questions following the Supreme Court's Andersen decision

1. Document retention

It is common knowledge that Enron is one of the animating reasons for passage of Sarbanes-Oxley. Thus it is one of the paradoxical aspects of the Andersen v. U.S. reversal that Sarbanes-Oxley clarified rules for auditor document retention and destruction that the Andersen case struggled with under the obstruction of justice statute. Of course, the Sarbanes-Oxley Act's criminal provisions, which were passed after the events in Enron, could not be applied retroactively to such acts.

Nonetheless, in the future, Sarbanes-
Oxley answers both “what” documents auditors of issuers must retain as well as “how long” such documents must be retained. In fact, the Sarbanes-Oxley Act provides two different answers to these questions. Section 802(a) requires that “any accountant who conducts an audit of an issuer of securities … shall maintain all audit or review workpapers for a period of five years from the end of the fiscal period in which the audit or review was concluded.” This adds a new section 1520 (a)(1) to Title 18 of the U.S. Code. This section by its terms covers “accountants” who “audit” “issuers.” Section 1520 (a)(1) added by Sarbanes-Oxley 802(a) expressly covers “audit or review workpapers.”

However, another section of Sarbanes-Oxley also covers auditor document retention. Section 103 of Sarbanes-Oxley requires that the PCAOB establish rules requiring that registered public accounting firms “[P]repare and maintain for a period of not less than seven years, audit work papers, and other information related to any audit report in sufficient detail to support the conclusions reached in such report.”

Thus these two sections of Sarbanes-Oxley provide different length periods for the maintenance of documents related to audits — one five years and the other seven years. Further, the types of documents required to be retained varies slightly. Section 802(a) covers “audit or review workpapers” while section 103 requires retention of “audit work papers and other information related to any audit report.” In general, given its length and complexity, Sarbanes-Oxley is well drafted. However, the SEC has tried to resolve this disparity as to what records auditors are to retain as between Sarbanes-Oxley sections and the length of time they are to retain them. It has done so in regulations promulgated on this matter.

One of the more interesting developments following enactment of this provision is the SEC’s extension by regulation of the statutory five-year period for document retention to seven years. In an effort to bring uniformity between document retention under sections 802 and 103 of the Sarbanes-Oxley Act, the SEC has adopted section 103’s seven-year period for both it and section 802, thereby creating a retention period of seven years for both sections.

The validity of this extension for the two additional years may well be legally vulnerable under the “ultra vires” doctrine. Under the ultra vires doctrine a regulator’s authority to propose and promulgate regulations is limited to the bounds of the enabling act. Thus an enabling act that permits the SEC to promulgate regulations of five years in length would seem to set the maximum limits for that section’s documents — “all audit and review workpapers.” Section 103 covers “audit work papers and other information related to any audit report in sufficient detail to support the conclusions reached in such report.”

Admittedly there is overlap between documents covered by the two sections although section 103’s “other information” language could cover more types of documents, thereby pointing to different documents covered by the two sections, also.

One could make the argument that if section 103’s documents encompass all documents in 108, it does no harm to extend 103’s added two-year coverage to 108 documents, since this appears to be correcting a drafting oversight in the statute. Whether a court will agree, is another matter.

It would seem advisable for accountants to retain all audit work papers and other documents for seven years so this ambiguity can be resolved.

2. Is it five- or seven-year document retention?
As just noted, section 802 of Sarbanes-Oxley requires that accountants retain “all audit or review workpapers for a period of five years from the end of the fiscal year in which the audit or review was concluded.”

3. Possible retrial of Andersen LLP
Following reversal of the Andersen conviction by the Supreme Court, should this be a possible retrial of Andersen LLP?
time for rejoicing in the public accounting profession? There certainly has been enough negative publicity for auditors of late to prompt them to seize upon any bit of positive news as a basis for celebration.

Andersen could be retried by the U.S. Justice Department. As of this writing, there is no word from the U.S. Justice Department as to whether this will occur. However, one wonders at the reasoning behind prosecuting a defunct firm. If the Justice Department makes a decision to retry, such retrials are not double jeopardy under the U.S. Constitution when the basis for reversal is flawed jury instructions regarding the proper legal standards to follow. As noted, the reversal was on very narrow grounds dealing with the specific intent required for corrupt intent. Also, jury instructions failed to convey the nexus between the instruction to destroy documents and the foreseeability of an official proceeding in which the documents destroyed would be used or needed. Thus, it is quite possible that a second jury trial of Andersen with jury instructions more protective of Andersen might make a second conviction more difficult.

4. Prosecutorial discretion issue
A more important public policy consideration than retrial concerns the advisability of indicting a business entity as distinct from those setting policy or taking specific criminal acts in such organizations. It is well settled that business entities may be indicted. This includes LLP’s, Andersen’s business form.

Inanimate business entities such as corporations, LLP’s and LLC’s can only act through humans. Thus corporations and the other forms do not actually do anything. They only act through their agents and servants acting within the scope of their employment. The policy question when dealing with large organizations such as Andersen, is whether prosecutors should seek indictments against such firms at all.

Prosecutors have discretion as to whom to prosecute. This discretion is limited by constitutional considerations such as the Fifth Amendment’s grand jury requirement and the equal protection clause. Otherwise, the prosecutor is virtually without legal limit as to whom she prosecutes except at the ballot box when running for office (as is often the case for state prosecutors) or is up for reappointment (in the case of federal prosecutors).

Arthur Andersen reportedly employed more than 24,000 persons in the U.S. at the time of its indictment and more than 84,000 worldwide. One guess is that fewer than 100 were complicit in the improper activities involving Enron’s auditing. Should 24,000 persons lose their jobs because 100 bad apples tainted the barrel? It would seem not. Rather, the prosecutor should seek to indict the individuals perpetrating the crimes — not the entire organization if there is no showing of
widespread firm complicity. In fact, there is evidence that others in the Andersen organization opposed some of the shredding being taken by the Houston office with respect to Enron.

It could be argued that there is a need to make an example of Andersen, given the importance of accurate financial reporting and the key role of auditors in that process. If a few "bad apples" threaten to rot the entire barrel, then prosecute the individual offenders vigorously. The wisdom of prosecuting an entire firm where a small fraction of that firm is involved in questionable conduct is open to serious question. Prosecutors can be removed from office should they prove to be overly aggressive in their prosecutorial decisions. However, as President Nixon found out when he fired Watergate Special Prosecutor Archibald Cox, it is impolitic to fire prosecutors once they have begun investigations.

5. Public trust in public company financial reports

Certainly one of the major fallouts from the Enron case and Andersen's involvement in it and eventual collapse has been the public perception of the accuracy and credibility that should be attached to corporate financial reports. Specifically, a recent report by the Huron Group indicates that more than half of wealthy Americans do not trust public company financial reports. Such distrust by the wealthy — and, arguably, more investment "savvy" members of society — surely does not bode well for the Bush plan to partially privatize Social Security, which necessarily means greater public investment in public companies audited by major accounting firms. If potential investors lack accurate information about public company finances, how can they expect to make rational investment decisions related to their retirement savings?

The entire matter of credibility of public audit reports of public companies goes to the professionalism of public auditors. Public auditors are supposed to adhere to recognized professional standards when they conduct an audit. Applying such standards to a specific client, they are supposed to opine on the correctness and accuracy of the client's assets, liabilities and income as presented in the client's financial statements. If those assets, liabilities and income do not accurately portray the true state of the client's affairs, the public auditor is supposed to say so by "red flagging" perceived accounting improprieties. This protects shareholders, potential shareholders, creditors, potential creditors, management, and regulators who can then take appropriate actions in light of the firm's true situation.

It is well known that even following enactment of Sarbanes-Oxley, there is a gigantic conflict of interest in the public auditing profession: the client pays the "independent" auditor. Not only that; the public auditor must rely on the client — or more specifically — the client's audit committee — for annual reappointment as auditor. Further, annual audit fees for public companies can run into the tens of millions of dollars. Thus, it would be ingenuous to say that the auditor is not "sensitive" to the audited client's wishes to see that the statement of accounts portrays a "healthy" client to Wall Street and others interested in the company. Auditor "sensitivity" to clients' wishes has led to the accounting fiascos such as Enron, WorldCom, Waste Management, Adelphia and others.

What bothers investors is the continuation of accounting problems following passage of Sarbanes-Oxley. Repeatedly Dow stocks and other "blue chip" companies continue to report accounting problems of a major sort. Perhaps some of this is good in the sense that such problems are not being covered up, but, rather, are being exposed to public scrutiny.

Nonetheless, the public is becoming increasingly skeptical about the ability of public auditing firms to be professional and "call things as they really are." The public cynically infers that how can the

(Continued on page 32)
auditor truly be professional when it is being paid by the very firm on which it is supposed to be “blowing the whistle?”

The Congress and President Bush — a Harvard Business School MBA — answered some of the concerns about public auditor professionalism when they passed the Sarbanes-Oxley Act. This act has several provisions that prod the public auditing profession to be more professional — that is, objective in applying auditing standards to clients and vocal in reacting to accounting improprieties. First was the establishment of the Public Company Accounting Oversight Board (PCAOB), a five-member board that hereafter is to set auditing standards for the conduct of public company auditors. It is notable that three of the five members of this board are NOT to be CPAs (members of the public accounting profession). In effect, by doing this, Congress said that others must “ride herd” on the public accountants when professional standards are developed for the conduct of audits of public companies — a smack in the eye of the public accounting profession if there ever was one. A second aspect of Sarbanes-Oxley designed to strengthen auditor professionalism is the requirement that public companies and issuers under the federal securities laws have audit committees responsible for hiring the “independent” public auditors. Public company audit committees must be composed of non-employee directors.

**Conclusion**

The U.S. Supreme Court’s unanimous reversal of Arthur Andersen LLP’s criminal conviction for destruction of documents and obstruction of justice, probably does not portend a significant change in the legal winds for either Andersen or for the thousands of former Andersen employees. The case itself dealt with the legality of document retention and destruction under a rather obscure obstruction of justice statute. In reversing the lower courts, the Supreme Court probably did not mean to endorse the document retention policy of Andersen. Rather, it is more likely that the Supreme Court decided that criminal prosecutions for document destruction of the type in Andersen under the federal obstruction of justice statute were too broad under traditional notions of U.S. criminal jurisprudence.

Ironically, much of the Andersen case holding has been mooted by passage of the Sarbanes-Oxley Act, at least as respects auditors of public companies. That law has specific provisions that now impose a five- or seven-year document retention period on auditors’ work papers and other documents supportive of the audit of an issuer. Thus the precedent value of Andersen with respect to document retention is limited.

The Andersen case does prompt reflection on the tremendous power held by federal prosecutors under the doctrine of prosecutorial discretion. A prosecutor has within his or her hands the ability to literally ruin a business by merely seeking and obtaining an indictment. The old joke about a prosecutor’s ability to “indict a ham sandwich” comes to mind, pointing to the relative ease skillful prosecutors can obtain indictments against virtually anyone using questionable or even contrived evidence. In the case of Andersen’s involvement with Enron, however, the facts were far from contrived. Enron is a poster child for corporate accounting abuse in its most virulent form.

However, the policy question remains: Should the prosecutor have not sought out the individuals in Andersen complicit in Enron’s financial abuses rather than trying to “bring down an entire firm” of 84,000 persons for the wrongs of at most probably 200 in that auditing firm?

Further, after Andersen fell, there were only “the Big Four.” Yet major corporate clients cry out for competent, reputable auditing services that only enormous

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— SUZANNE CRAIG ROBERTSON, Editor  
October 10, 2005
auditing firms can provide. The need for auditing firms capable of servicing major public companies has increased significantly following enactment of Sarbanes-Oxley. One of the perverse consequences of passage of Sarbanes-Oxley has been the increased need for auditing and accounting services. It would not be stretching reality to say that Sarbanes-Oxley could be termed “the public auditors’ relief act.”

Thus, while the Andersen decision is balm for the public auditing profession, it is Sarbanes-Oxley that will improve the professionalism as well as financial standing of the public accounting profession.

Notes


“The agreement came just days after Citigroup reached a $2 billion settlement. While the settlements with two of Enron’s biggest lenders closes one chapter, other banks — including Merrill Lynch and Credit Suisse First Boston — still face claims from investors.”

5. Id. at 3.
6. Id. at 4.
7. Id.
8. Id.
10. Andersen v. U.S., 544 U.S. ___, ___, ___, ___, (2005). The Supreme Court’s opinion quotes the relevant language of 18 U.S.C. §1512(b)(2)(A), (B): “Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to … cause or induce any person to … withhold testimony, or withhold a record, document, or other object, from an official proceeding … shall be fined under this title or imprisoned not more than ten years, or both.”
11. Id. at 9 (slip opinion).
12. Strict liability crimes are rare but not unknown. See Rivers and Harbors Act of 1899, 33 U.S.C. §411 (2000). “Every person that shall violate or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, 409, 414, and 415 of this title shall be guilty of a misdemeanor ….”

Note that the “knowing” requirement applies only to those who are “aiding, abetting,” but there is no such requirement for the person who is actually doing the prohibited act and thus is NOT the “aider, abettor, etc.”

13. Id.
16. Id.
17. See, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Holding invalid part of Reg. 10b-5 purporting to cover negligence, when the enabling statute section 10(b) under which regulation was promulgated only authorized regulator to regulate fraud.
18. Id.
19. Inmates of Attica Correctional Facility v. (Continued on page 36)
Spoliation on videotape

By Donald F. Paine


Dr. Alexander was fired by Jackson Radiology. He sued for wrongful termination. The defendant counterclaimed for recovery of misappropriated funds.

On the first day of his videotaped deposition he was asked to write on a sheet of paper calculation of his monthly compensation. Having viewed the tape while writing this column, I shall vouch that he was having trouble. Near the end of that day’s session he pulled the sheet off the table, unnoticed by his counsel or opposing counsel. At 5:28 p.m. for 20 seconds the necklace microphone low on his chest recorded on videotape the loud wadding of paper. And you can see his left arm moving as he puts it in his pants pocket to throw in the trash later.

The doc and his unsuspecting innocent lawyer left the room, and defense counsel looked high and low for what was to be an exhibit. Then they watched (and listened to) the videotape.

Day two opened with gradually escalating questions about what Dr. Alexander knew about the missing exhibit:

Q. Did you not take that piece of paper off the table?
A. I resent that.

Q. Well, if the videotape from yesterday reveals that you pulled that piece of paper off the table, wadded it up, and stuck it in your pocket, would that be a lie?
A. I don’t guess it would.
Q. “Don’t guess it would.”
Now, are you ready to change your testimony here about what you did with that piece of paper? Or are you just going to stand firm on this lie? What’s it gonna be, Doctor? What’s it gonna be?

One minute and 45 seconds later the perjurer answers: “I have no answer for that.” He then confessed he had destroyed the incriminating evidence.

One minute and 45 seconds later the perjurer answers: “I have no answer for that.” He then confessed he had destroyed the incriminating evidence.

What is the appropriate sanction? The Circuit Court and Court of Appeals imposed the ultimate sanction dismissing Dr. Alexander’s original claim with prejudice, leaving the counterclaim to go forward.

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(Continued on page 36)

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