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Supreme Court deals a blow to non-competes for docs, but this fight is not over
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<td>5. Business income protected when practice can’t open?</td>
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<td>6. Practice protected when contracts are disputed?</td>
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Remember the Code of Judicial Conduct
Will we elect Judge Roy Bean?

I love Tennessee politics. All my life I have been entertained, cajoled, inspired, and yes, sometimes angered by Tennessee politicians, but never bored. Over the past 50 years, the Volunteer State has produced such colorful politicians as Estes Kefauver, Frank Clement, Howard Baker, the Al Gores (Sr. and Jr.), the Harold Fords (Sr. and Jr.), Annabelle Clement O’Brien, Cotton Ivy, Fats Everett, John J. Hooker, Lamar Alexander, “Pardon me, Ray” Blanton, Fred “Law and Order” Thompson, and John “Let us pray” Wilder. It’s been a great show.

I love old-fashioned Tennessee political oratory: Frank Clement in his keynote address to the Democratic National Convention plaintively asking, “How long, O Lord? How long?”, Al Gore Sr. in his moving 1970 concession speech promising that “the truth shall rise again!”; Bill Clinton emphatically denying, “I did not have sex with that woman, Ms. Lewinsky!” Oh, I forgot. Bill Clinton was from Arkansas, not Tennessee.

Never mind.

I will also remember the great Howard Baker asking, “What did the president know and when did the president know it?” I’ll never forget Ned Ray McWherter campaigning for governor by promising, “Gimme a cup of coffee and two Vanilla Wafers, and I’ll be ready to go to work!” And in January of 1987, Ned Ray kept his promise by gulping a cup of non-Star Bucks and two “nilla” wafers right after his inauguration and heading to the Oval Office.

(Actually the Governor of Tennessee works in the “Rectangular Office.”)

Given my love for Tennessee politics, you would think that I would be looking forward to next year’s statewide elections. But in fact, I have some real anxiety regarding the upcoming campaigns. That’s because next August, we Tennesseans will elect the men and women who will serve as our state’s judges for the next eight years, and I have some real concerns about how these campaigns might be conducted.

For many years, candidates for judicial office in Tennessee and 38 other states have followed codes of campaign conduct that restrict them from announcing their views on issues.

(Continued on page 4)
But in 2002, the United States Supreme Court issued its decision in Republican Party of Minnesota v. White, striking down a provision of Minnesota’s Code of Judicial Conduct prohibiting a candidate running for judicial office from announcing her or his views on controversial issues. The U.S. Supreme Court ruled that such a prohibition violates the First Amendment.

But how far do the First Amendment rights of a judicial candidate extend? Clearly, candidates for judicial office can discuss their experiences as lawyers and judges and their general views on the administration of justice. Moreover, they’re free to express their legal philosophies. For example, they can say, “I am a strict constructionist.” Or they can proclaim, “I am a liberal judicial activist.” (They won’t get elected if they say that, but they could say it.)

But under the codes of judicial campaign conduct, the candidates have been restrained from making a campaign promise or a commitment as to how they would rule in a particular case. This is where judicial politics gets a little fuzzy after Republican Party of Minnesota v. White. Some commentators have suggested that while candidates for judicial office have a First Amendment right to announce views on issues that may come before the court, they can’t make a commitment on how they would rule on the issue.

This has left a lot of judges and lawyers who might run for judgeships, scratching their heads, trying to figure out exactly what they can or cannot do when they are on the campaign trail. What is the substantive difference between making an “announcement” of your views on an issue that might come before you as judge and making a “commitment” on how you would rule on such an issue? And when does an announcement of a candidate’s views become a commitment or a campaign promise? Justice Potter Stewart once said, “I can’t define ‘pornography’, but I know it when I see it.” Similarly, while it is difficult to define a “commitment” (as opposed to a mere “announcement”) by a candidate for judicial office, I’ll bet the voters will know it when they see it.

The Tennessee Supreme Court has attempted to provide some guidance on this issue by adopting a new comment to the Code of Judicial Conduct. What remains to be seen is how candidates for Tennessee judicial offices will conduct their campaigns in the coming months.

All Tennessee lawyers should be concerned about this issue because it could have a dramatic impact on our judiciary. At stake is nothing less than a bedrock principle of the American legal system — a fair and impartial judiciary. Candidates for judicial office should remember that while they have First Amendment rights, they also have responsibilities to refrain from making campaign pledges or promises that would violate their oath of office in the event they are elected.

Finally, we Tennessee lawyers have an obligation to help educate the public regarding the qualities we should look for in a judge. We should remind our fellow Tennesseans that judges hold a unique position in America, and that if we start voting for them on the basis of specific campaign pledges, we’re all in a lot of trouble. The last thing we need is to elect Judge Roy Bean on his sacred campaign promise to “… give all them defendants a fair trial … and then hang ‘em!”

Editor’s note: The TBA will be holding a CLE program, Tennessee Judicial Campaign Ethics, in December. For more information about this program, go to https://www.tba.org/onsiteinfo/judicialcampaign_2005.html.
Death penalty article misses the point

I would like to comment on the article by Judge Gilbert S. Merritt (“The Death Penalty in Tennessee: Reforming a Broken System,” September 2005 TBJ). The judge concludes that in many instances, the innocent are convicted and the death penalty imposed “after trials with serious constitutional errors.” This article completely misses the point. Why are death penalty trials more likely to convict the innocent than trials that impose prison terms? For every innocent person on death row, there are 10 staring at the wall of a prison cell, mumbling, “How did this system put me in jail for x years, when I am innocent?” The death penalty trial errors are found because appeals are organized and vigorously pursued by court-appointed attorneys. The unfortunate person who does not receive the death penalty devises his own appeal, writing it out in long hand. Judge Merritt’s proposals to guarantee adequate counsel to people facing the death penalty only exacerbates the real problem by taking legal resources from those innocent people who receive prison terms. If I was on trial for murder, and I was innocent, I would rather receive the death penalty than a long prison term because continued legal representation might correct the miscarriage of justice.

— Frank R. Freemon, Nashville

WRITE TO THE JOURNAL! Letters to the editor are welcomed and considered for publication on the basis of timeliness, taste, clarity and space. They should be typed and include the author’s name, address and phone number (for verification purposes). Please send your comments to 221 Fourth Ave. N., Suite 400, Nashville, TN 37219-2198; FAX (615) 297-8058; EMAIL: srobertson@tnbar.org.
Deadline to qualify is Feb. 15, 2006
There’s a spot for you as a TBA officer, governor or delegate, but you must enter to win

During 2006, the following officers, governors and delegates of the Tennessee Bar Association (TBA) will be elected as set forth in the association’s bylaws:

TBA officers and Board of Governors officers
• A vice president (from the West Tennessee Grand Division — elected by the association’s membership-at-large). The vice president automatically assumes the office of president-elect in 2007 and president in 2008.

District governors
• District governors in the 3rd, 6th and 9th districts will be elected to three-year terms. They are elected by the members in their respective districts.
  Those who currently hold those positions are: Sam Elliott (3rd), Claudia Jack, who is ineligible for re-election because of term limits (6th) and George T. “Buck” Lewis (9th).

Grand division governors
TBA grand division governors are elected for one-year terms by the membership in each grand division.
• An East Tennessee governor from the 1st, 2nd or 3rd district.
• A Middle Tennessee governor from the 4th, 5th or 6th district.
• A West Tennessee governor from the 7th, 8th or 9th district.
  Those who currently hold those positions are: Lucian Pera (2), George T. “Buck” Lewis (4) and Paul Campbell III (5).

Qualifying, balloting & elections
The officers, governors and delegates are elected by the membership as provided by election procedures with petitions due Feb. 15, 2006. Ballots will be distributed by April 1, 2006, and ballots are due back May 1, 2006. Votes will be tallied by the accounting firm selected by the Board of Governors in accordance with Section 44 of the bylaws. If there is only one duly-qualified candidate for an office by Feb. 15, 2006, that candidate will automatically be declared elected.

TBA delegates to the ABA House of Delegates
Three members to represent the TBA in the American Bar Association (ABA) House of Delegates will be elected for two-year terms by the TBA membership in 2006. The positions are designated positions 2, 4 and 5.
  Those who currently hold those positions are: Lucian Pera (2), George T. “Buck” Lewis (4) and Paul Campbell III (5).

Questions?
This notice is in accordance with bylaws of the TBA §15 and 40 through 46.
For more information on running for any of these offices, visit the TBA’s Web site at http://www.tba.org/BOG/elexhandbook.html or call 383-7421 in Nashville or (800) 899-6993 for an election handbook.


before April 1, 2006. To be counted, all ballots must be received at the office of the TBA auditors by the close of business, May 1, 2006. Votes will be tallied by the accounting firm selected by the Board of Governors in accordance with Section 44 of the bylaws. If there is only one duly-qualified candidate for an office by Feb. 15, 2006, that candidate will automatically be declared elected.

TBA House of Delegates
Members of the TBA House of Delegates are elected in odd-numbered years, with the next election scheduled for 2007.
Benefits for law students
TBA supports law students with amendments, pizza

TBA backs student practice rule amendments
The Tennessee Bar Association is backing proposed amendments to the provisions of Tennessee Supreme Court Rule 7, which permits supervised practice by law students.

The changes would permit not only courtroom work, but also transactional work for qualified nonprofit organizations. The rewrite of the rule was initiated by the clinics at Tennessee’s four law schools and was vetted by the TBA Standing Committee on Ethics and Professional Responsibility before being approved by the Board of Governors.

Law school visits tell students about TBA
The TBA visited each of the state’s law schools this autumn in an effort to allow students to meet leaders, learn about programs and talk with lawyers from across the state.

The statewide Law School Outreach events earned 124 new student members — 58 of them from the Nashville School of Law.

The statewide sweep, which plied the students with pizza and other food, was coordinated by the Young Lawyers Division. President Bill Haltom and President-elect Larry Wilks lent their support at several of the receptions, and special thanks go to TBA staffers Becky Rhodes, Stacey Shrader and Sarah Hendrickson and former staffer Megan Rizzo.

Successful candidates of the July 2005 bar exam were admitted to the Tennessee Supreme Court in ceremonies across the state in November. Above, Legal Aid of East Tennessee attorney Deborah Yoemans, left, introduces McKenna Cox, a new staff attorney with LAET. Following the Nashville ceremony, the Tennessee Bar Association hosted an open house for new lawyers and their families at the Tennessee Bar Center. To see more pictures of the admissions ceremony and reception, go to http://www.tba.org/news/2005_falladmissions/

LSC funding reduced in committee deal
A last-minute conference committee vote in mid-November cut $14 million from the proposed budget for the Legal Services Corporation, leaving funding for next year at $330.8 million. Going into the committee, House and Senate conferees had agreed to a compromise $344 million budget, which was halfway between the House approved $330.8 million proposal and the Senate’s $358 million mark.

But a deal between Sen. Richard Shelby (R-AL) and House conferees led to the larger cut, which also eliminated $8 million for legal aid for Hurricane Katrina victims. 


PHOTOS BY BECKY RHODES
Not ‘free to share’
Grokster shuts down

The peer-to-peer (P2P) file-sharing service, Grokster, stopped doing business in early November. As detailed in the October 2005 issue of the Tennessee Bar Journal, the U.S. Supreme Court ruled this summer that using Grokster to trade copyrighted material is illegal.

Now the company has been banned from participating in the sharing of copyrighted files, ordered to stop giving away its software and pay $50 million to settle piracy complaints charged by the music and movie industries.

According to RollingStone.com, another P2P company — Mashboxx — has agreed to buy Grokster’s assets and recast it as a legal file sharing service called Grokster 3G, which will launch before the end of 2005.


More information for Tennessee lawyers representing employers
Racing to the courthouse over non-competes

On Nov. 15, the 11th Circuit Court of Appeals in Manuel v. Convergys Corp., No. 04-16032, 2005 U.S. App. LEXIS 24549 (11th Cir.), accelerated the trend of racing to the courthouse over employment-related non-competition agreements (NCAs), discussed in the October 2005 Tennessee Bar Journal (“New Race to Tennessee and Georgia Courthouses Over Non-Competition Agreements,” by Donald Benson and Stephanie Bauer Daniel).

Manuel worked in Florida for an Ohio corporation. His NCA contained both an Ohio choice of law provision and a permissive forum selection clause stating that any NCA disputes “may” be brought in the state or federal courts of Hamilton County, Ohio.

On April 5, Manuel accepted work in Georgia.

On April 8, Manuel resigned, but promised to work until the end of the month. He promised that he would not work for a competitor and that he had not yet accepted another job. On April 9, Manuel leased an apartment and obtained a driver’s license in Georgia. On April 20, Manuel brought a Georgia declaratory judgment action that the NCA was unenforceable under Georgia law.

The district court granted Manuel’s motion for summary judgment on the NCA and applied Georgia law in dismissing Convergys’s counterclaims for trade secret violations.

Where over-lapping actions are pending in two federal courts, the 11th Circuit followed the “first filed” rule. Georgia’s connections to this action were not “slight or manufactured.” The appellate court was particularly sympathetic to the Georgia forum because Georgia civil procedure allows for expedited settings of such competing litigation (citing the Georgia’ Civil Practice Act provision on the expedited setting of competing actions, O.C.G.A. § 9-2-46(a)).

Tennessee lawyers should recommend that employer clients consider their options:

1. drafting NCAs for enforcement in Georgia for those employees who can easily relocate,
2. drafting mandatory forum selection clauses to assure a favorable court and choice of law, and/or
3. preemptively racing to the courthouse.

— Donald Benson
Security tightened, new services added

Upgrades coming to TBA electronic communications

Tennessee Bar Association (TBA) members can look forward to seeing a host of improvements and new additions to the communications they regularly receive from their association.

Much of the work so far has been behind-the-scenes, but over the coming weeks and months these upgrades will become visible. Among them will be a new search engine, new daily email products and a Web interface that will let members better manage the services they receive from the TBA.

“With one of the first bar Web sites and online CLE programs, the TBA has been a leader in electronic communication,” Executive Director Allan Ramsaur says. “These steps will help keep us up-to-date in that fast-moving environment.”

Lists security improved

Some of the first changes are coming to the TBA’s electronic forums. These e-mail lists have proven so valuable over the years for lawyers exchanging information with each other that the TBA now operates more than 50 of them.

To meet that heavy demand and better protect users from spam, the TBA is moving the lists to a new server with new software that better blocks unwanted postings, provides more usable digests and manages address changes more efficiently.

New Google search engine feature

Of interest to members who turn to the TBALink database for research is a new search engine for tracking down appellate court decisions, Attorney General opinions or back articles in the Tennessee Bar Journal. This new Google search engine gives us the same power and user-friendly format that has made the company the dominant search engine in the world.

Your daily update

Also coming soon to you will be a new daily e-mail tool, TBA Today. This will bring you all of the features you like in OpinionFlash plus news from the Tennessee legal community, disciplinary actions from the Board of Professional Responsibility, updates from the Tennessee General Assembly and information on upcoming TBA programs and events. In addition, you’ll be able to customize your TBA Today to choose the type of opinions you want to receive.

Other TBALink updates

On the TBALink Web site, you’ll also be seeing changes that will let you better manage the services you receive from the TBA. This new interface will let you control your subscriptions, let you track CLE hours and more.
Actions from the Board of Professional Responsibility

Reinstated

Earl F. Johnson of Germantown was reinstated to the practice of law on Oct. 14 after complying with Rule 21 as required by the Board of Professional Responsibility. He had been suspended on Sept. 7, 2004.

On Oct. 13, the state supreme court reinstated the law license of Charles Mark Pullen of Jackson. Pullen’s license had been suspended on Dec. 16, 2002, for noncompliance with a Tennessee Lawyers Assistant Program (TLAP) monitoring agreement. At the time, the court determined that his noncompliance posed a substantial threat of harm to the public. The court reinstated Pullen’s license based on three conditions: (1) that he agree to extend his TLAP contract for five years, (2) that he agree to practice with at least one other attorney during his first year of reinstatement and (3) that he agree to have a practice monitor and trust account monitor.

The Tennessee Supreme Court reinstated the law license of Nashville lawyer Jane J. Buffaloe on Oct. 21. The court’s action was dependent on Buffaloe’s compliance with three conditions: (1) that she extend her TLAP contract for five years, (2) that she agree to have a practice monitor and trust account monitor and (3) that she attend the Tennessee Law Institute Review Program for two years. Buffaloe’s license had been suspended in 2001 for a period of three years.

Suspended

On Sept. 29, the Supreme Court of Tennessee imposed reciprocal discipline on Kansas attorney Marcus P. Potter Jr. by suspending his Tennessee law license. Potter was suspended indefinitely by the Supreme Court of Kansas in June. He did not respond to a notice to show cause why reciprocal discipline should not be imposed in Tennessee. In addition to the suspension, the court ordered that Potter pay for the costs of the proceeding.

On Sept. 29, the Supreme Court suspended Gordon M. Wasson from the practice of law for two years beginning Oct. 20, 2003, and placed him on probation for two years effective upon the date of reinstatement. The Board of Professional Responsibility requested that this discipline be imposed based on a Supreme Court of Arizona order suspending Wasson for the same period of time and placing him on similar probation. The Tennessee order subjects Wasson to the same terms and conditions imposed by the Arizona court and requires that he pay the costs of the proceeding.

Cynthia N. Asbury Podis, a Nashville lawyer, was suspended from the practice of law for six months by the Tennessee Supreme Court on Oct. 20. The suspension was the result of a conditional guilty plea submitted by Podis for failure to prepare legal matters, act with diligence and communicate with clients. The plea and the court order also mandated that Podis be monitored by a licensed attorney of the Nashville bar and meet face to face with the monitor once every two weeks. Other conditions include: (1) if she establishes a trust account, she must have a co-signer for any disbursements; (2) she is not permitted to issue checks on

What is a reprimand?

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

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 lawyers licensed in the state.

Reprimand is a private form of discipline that declares the conduct of a lawyer improper but does not limit the right to practice law. Reprimands are not disclosed and remain confidential. Disciplinary cases that otherwise would be resolved by a reprimand also are eligible for diversion to practice and professionalism enhancement programs. This diversion process is used to address technical violations that caused no harm.

Upon the filing of a complaint, a disciplinary counsel with the Board of Professional Responsibility reviews the case. The board may modify the reprimand or determine that the matter be addressed by another form of discipline. If the board approves the reprimand, the chair notifies the lawyer of the decision. The board’s decision may not be appealed; however, the lawyer has 20 days to demand that a formal proceeding be instituted before a hearing committee. In the event of such demand, the reprimand is to be withdrawn and the matter handled in the same manner as any other formal hearing before a hearing committee. While individual cases are not reported publicly, the board does release the total number of reprimands. For fiscal year 2005, the board issued 23 reprimands.

For more information about the rules governing disciplinary actions, see Rule 9 of the Rules of the Supreme Court of Tennessee. ©
the trust account without
the actual co-signature of
the designee; (3) she is to
complete eight hours of
continuing legal education
on law practice manage-
ment; (4) and she is to pay
all costs associated with
the disciplinary proceeding. In
imposing this discipline, the
court noted two mitigating
factors: that she had made
restitution to three former
clients and sought medical
treatment. Podis has not
practiced law since Aug. 30,
2002 as a result of a tempo-
rary suspension. She will be
reinstated to the practice of
law automatically on April
20, 2006 if all probation
conditions are met.

Censured

Maryville attorney Charles David Deas received a public censure from the Board of Professional Responsibility on Sept. 26. In March, Deas had pleaded guilty to two counts of driving under the influence and received a sentence of 11 months and 29 days, all but four days of which were suspended. Deas was given supervised probation during the remainder of that period, with several conditions, including that he obtain drug and alcohol treatment.

The Board of Professional Responsibility censured Clarksville lawyer Rodger N. Bowman on Oct. 10 for neglecting to close an estate for approximately five years.

As a result of his neglect, his client was held in contempt for not appearing to answer motions that had been reset multiple times with the consent and knowledge of Bowman. The board censured Bowman on the condition that he enter into a monitoring agree-
ment with the Tennessee Lawyers Assistance Program, with any reported non-compliance leading to immediate suspension.

On Oct. 11, the Board of Professional Responsibility publicly censured Nashville attorney Fannie J. Harris for misrepresenting her conduct to the board. One of Harris’s clients had filed a complaint about a meeting Harris had with the district attorney. In answering the complaint, Harris stated that she had not had such a meeting and that no recording of a meeting existed. The client subsequently provided the board with a copy of a DVD reflecting a meeting between Harris, the district attorney and a county detective. The board determined that Harris’s misrepresentation violated Rule 8.4(b)(c)(d) of the Tennessee Rules of Professional Conduct.

Jacques B. Glassman of Jackson received a public censure from the Board of Professional Responsibility on Oct. 11. Glassman was retained in March 2004 to represent a client in a civil rights case. He prepared a draft complaint to file with the Tennessee Claims Commission but was instructed specifically by the client on more than one occasion to file the complaint in federal district court, not with the state agency. On July 28, 2004, Glassman filed the complaint with the Tennessee Claims Commission. On July 30, 2004, he filed the complaint with the district court, which subsequently dismissed the complaint based on the state agency filing. The board found that Glassman took action in direct violation of a client’s instructions thus violating the rules of professional conduct.

The state supreme court publicly censured Joe G. Bagwell, a Sevier County attorney, on Oct. 13. In response to a petition for discipline, Bagwell submitted a conditional guilty plea in exchange for a censure. He was found guilty of failing to adequately supervise his non-lawyer assistants and failing to keep adequate escrow records. The court also specified that Bagwell is to attend the Board of Professional Responsibility’s ethics workshop and reimburse the board for the costs of the disciplinary proceeding.

Knoxville attorney Thomas F. DiLustro. By agreement, DiLustro accepted the censure. In May 2001, a Knox county juvenile judge appointed DiLustro to represent a female client in a dependency and neglect proceeding. The client subsequently lost custody of her daughter. DiLustro was appointed a second time in August 2002 and again, the client lost custody. During the summer of 2002, DiLustro had a three-day sexual relationship with the client who soon thereafter discovered she was pregnant. The client reported that she had slept with DiLustro and thought he might be the father of the child. DiLustro did not believe the child to be his, denied the relationship and withdrew from representing the client. In chambers before the juvenile judge, DiLustro again denied the relationship. After the child was born, he filed a petition to establish paternity. He subsequently took a DNA test, which established he was not the father. The board imposed the censure for violations of the Code of Professional Responsibility, the ethics rules governing attorneys at the time the conduct occurred.

Dandridge attorney Paul Richard Talley was censured by the Board of Professional Responsibility on Nov. 4. Talley was hired by two clients to represent them in

(continued on page 12)
Actions from the Board of Professional Responsibility

(continued from page 11)

a case involving illegal alcohol sales. Talley represented both of them at a preliminary hearing on Nov. 19, 2003. The two were indicted on Feb. 9, 2004 and the matter was set for trial on March 22, 2004. After the indictment, the DA offered one client diversion and the other a misdemeanor plea. The misdemeanor offer was accepted. Tally claimed both clients accepted the offers and had the cases assigned to non-jury docket. Unbeknownst to Tally, however, the client who did accept diversion had recorded a meeting where he clearly rejected the offer. Talley was out of town on the day of the hearing and instructed his associate to go to court on his behalf. After talking to the clients, the associate learned of their true wishes and informed the judge that the parties wanted to go to trial. The court found Talley and the two clients in contempt of court for causing substantial interference with the orderly and efficient administration of justice. The client possessing the tape-recorded conversation demanded a hearing and produced the tape. The court later withdrew the contempt charge against this individual. For his role in misrepresenting a client’s position, the board imposed a censure.

Tennessee Supreme Court of Professional Responsibility of the

Disability inactive
The Supreme Court of Tennessee issued an order transferring the law license of Clark L. Shaw to disability inactive status. Shaw agreed to the transfer and will remain on disability inactive status until such time as the court determines that his disability has been removed. Compiled by Stacey Shrader from information obtained from the Board of Professional Responsibility of the Tennessee Supreme Court.

Rule 21 Suspensions

The following attorneys were suspended by the Supreme Court of Tennessee on Oct. 3 for failure to comply with Rule 21, which requires compliance with mandatory continuing legal education. Attorneys who have complied with the rule and whose reinstatement was received by the Tennessee Bar Journal by Nov. 15 are noted as reinstate.

TENNESSEE

Kingsport: Kathryn Freeman Blankenship, Gregory Wynn Francisco, Yvonne Utley Hill.
Kingston: Spence Roberts Bruner (reinstated).
Knoxville: William Gordon Ball, James Cook Humberd, Margaret Beebe Held.
Lexington: Howard Freeman Douglass (reinstate).
Maryville: Kurt Gregory Williams.
Memphis: Kay Wellman Owen, William H. Thomas Jr., Elder Leconsis Shearon III,

OUT OF STATE
Florida: Clark L. Shaw, Traci Lovell Carbonaro, Catherine Buhaly Ibold, Camille Godwin.
Maryland: Joseph Bert Conn.
Missouri: Phyllis Louise Mayes.
Mississippi: Jefferson Davis Gilder, Phillip Gregory Meek.
Ohio: Scott Edward Swartz.
Oklahoma: John Arthur Coates. Texas: John Bert Larrimer, Steven Matthew Schott.

COMMUNITY SERVICE

Memphis: J. Clark Baldwin, Jr., David C. Bruce, Edward Swartz.
Nashville: John B. Johnson, III.

Compensation

Knoxville: Yvonne Utley Hill.
Memphis: Karen Smith Moore.
Nashville: John B. Johnson, III.

Rule 6 Suspensions

The following attorneys were suspended by the Supreme Court of Tennessee on Feb. 3 for failure to pay compensations.

Knoxville: Yvonne Utley Hill.
Memphis: Karen Smith Moore.
Nashville: John B. Johnson, III.
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aydoun & Knight PLLC welcomed Wm. Lee Horn to its Nashville office in August. Horn, who was named “of counsel” to the firm, will concentrate his practice on commercial transactions, estate planning and taxation. He received his law degree from the University of Alabama School of Law.

In early September, Gov. Phil Bredesen named attorney Donald Ray Elledge to the Seventh Circuit Court in Anderson County, filling a vacancy created by the retirement of James B. Scott Jr. Elledge is co-owner and partner at the Shattuck & Elledge law firm in Clinton. His 28-year legal career has included a focus on domestic relations, criminal defense, civil litigation and estate law. Elledge earned his law degree from the YMCA Night Law School in Nashville and currently serves in the Tennessee Bar Association’s House of Delegates.

Matthew H. Wimberley, an attorney with Hunter, Smith & Davis LLP, has been named to the board of directors of the Second Harvest Food Bank of Northeast Tennessee. Wimberley serves in the firm’s corporate/business practice group. He received his law degree from the University of Tennessee College of Law in 2002. Second Harvest Food Bank of Northeast Tennessee is a non-profit organization that distributes emergency food relief to 200 charities in eight counties.

The Memphis law firm of McDonald Kuhn PLLC has announced that Stephen P. Miller has been named managing member of the firm and Henry T.V. Miller has been certified as a Rule 31 mediator offering mediation services through Resolute Systems Inc.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC recently made several personnel announcements. In the Nashville office, the firm welcomed Sarah C. McBride and Robert W. “Bo” Spessard as associates. McBride, who earned her law degree from Cumberland School of Law, previously served as an assistant attorney general for the state of Tennessee in the civil rights and claims division. Her practice at Baker Donelson will focus on products liability and transportation litigation. Spessard comes to the firm from Miller & Martin PLLC. He will concentrate his practice in corporate, business technology and intellectual property law with an emphasis on drafting and negotiating technology and telecommunications agreements. Spessard is a graduate of the Franklin Pierce Law Center in New Hampshire.

Christopher J. Coats has joined the firm’s Memphis team. Coats, who is licensed in Tennessee and Mississippi, is a 2004 cum laude graduate of the University of Mississippi School of Law. He received his master of laws in taxation from New York University School of Law in May 2005. He will focus his practice in the areas of business and estate planning.

In other news, the firm’s board of directors elected Jerry Stauffer to serve as president and chief operating officer. Stauffer formerly served as firm director, chair of the litigation department, and most recently, managing shareholder of the Memphis office. In his new role, Stauffer will develop and execute the day-to-day client development and service initiatives of the firm. In addition, Mark Glover has been named to a second term as managing shareholder in the Memphis office. Glover formerly served as chair of the litigation department and as firm director for six years. In making these announcements, the firm noted that Ben Adams would continue to

Compiled by Stacey Shrader and Sharon Ballinger

The Bulletin Board

Tennessee Bar Association members may send information about job changes, awards and work-related news. Send it to The Bulletin Board, c/o The Journal at 221 Fourth Ave. N., Suite 400, Nashville, TN 37219-2198, or e-mail to sballinger@tnbar.org. Submissions are subject to editing. Pictures are used on a space-available basis and cannot be returned. Electronic photos must be saved as a tiff or jpeg (with no compression), minimum resolution 200 dpi, and at least 1”x1.5’” or they will not be used.

PASSAGES

Criminal Court Judge Stephen (Steve) M. Bevil of Chattanooga died Nov. 16 after an extended battle with cancer. He was 60. Bevil had served Division III of the 11th Judicial District since 1990. He graduated from the University of Tennessee College of Law in 1971.
serve as board chairman and chief executive officer.

The Tennessee Commission on Continuing Legal Education & Specialization has certified Knoxville attorney E. Jerome Melson as a civil trial specialist. With this new distinction, Melson joins the Tennessee attorneys who have completed a rigorous certification process by the Tennessee Supreme Court.

The Memphis firm of Less, Getz & Lipman announced that Christopher M. Caputo has rejoined the firm as a partner and John D. Willet has become a partner. Caputo focuses his practice exclusively on construction and surety law and has extensive experience in the negotiation and drafting of construction and development contracts. Prior to joining the firm, Caputo served as legal counsel to the Massachusetts Department of Environmental Management. He earned his law degree from the University of Miami School of Law. Willet focuses his practice on construction, surety, corporate, business litigation and insurance defense. He received his law degree from the University of Memphis, where he was a member of the law review and a founding member and editor of the Tennessee Journal of Practice and Procedure.

Frost Brown Todd LLC recently announced that it named John Wingo as pro bono manager in the firm’s Nashville office. Wingo, who serves in the litigation department, focuses his practice on construction, surety, corporate, business litigation and insurance defense. He received his law degree from the University of Memphis, where he was a member of the law review and a founding member and editor of the Tennessee Journal of Practice and Procedure.

Paul Ney was recently appointed by President George Bush as principal deputy general counsel of the Department of the Navy. He took office on Nov. 1. The principal deputy is responsible for overall policy coordination within the Office of the General Counsel. Ney is a partner with the Nashville law firm of Trauger, Ney & Tuke and is former treasurer of the Tennessee Bar Association.

Michael McGovern has announced the opening of the McGovern Law Firm in Knoxville. The office is located at 3021 Tazewell Pike.

The Chattanooga office of Miller & Martin PLLC has announced that Neil A. Brunetz has joined the firm as an associate and will focus his practice on civil litigation matters such as personal injury, construction, contract, commercial disputes and malpractice actions. Brunetz earned his law degree in 2001 from the University of Tennessee College of Law where he served as managing editor of Transactions — the Tennessee journal of business law. He is licensed to practice in Tennessee and Georgia.

The Tennessee Defense Lawyers Association has named its new officers. They are: David Deming (Manier & Herod PC), president; Raymond Leathers (Ruth, Howard, Tate & Sowell), president-elect; and Robert Norred (Spears, Moore, Rebman & Williams), secretary/treasurer. James Tucker (Manier & Herod PC), Melanie Stewart (Stewart, Wilkinson & Wilson) and Stephen J. Miller (McDonald Kuhn PLLC) assumed the office of vice president. Robert Crawford and Sarah Reisner (Manier & Herod PC) were named directors and Doug Dooley (Leitner, Williams, Dooley & Napolitan PLLC) was named Tennessee state representative for the southern region of the Defense Research Institute.

Jerry O. Potter, a partner of the Hardison Law Firm PC, was inducted as a fellow of the American College of Trial Lawyers during the college’s recent annual meeting. Potter has practiced law in Memphis for 29 years and is an alumnus of the University of Memphis School of Law.

The Knoxville office of Lewis, King, Krieg & Waldrop has named John Buckingham as special counsel. He will work primarily on civil mediation, land use, eminent domain and general civil litigation cases. Prior to joining Lewis, King, Buckingham served for 10 years as an assistant U.S. attorney for the eastern district of Tennessee. He also practiced law with Kramer, Rayson, Leake, Rodgers & Morgan in Knoxville and served as Tennessee’s assistant state attorney general from 1978 to 1981. He received his law degree from the University of Tennessee in 1974.

Boult, Cummings, Conners & Berry PLC has announced that Christopher C. Puri has joined the firm’s health care practice. Puri served for seven years as legal counsel to the Tennessee Health Care Association, the state trade association representing Tennessee nursing homes. At the firm, he will focus his practice in the areas of senior housing and long-term care, as well as health care operations and compliance. Puri currently serves as chair of the American Health Lawyers Association’s Long Term Care Practice Group and as a member of the American Health Care Association’s Legal Subcommittee. Puri received his law degree from the Cumberland School of Law at Samford University in 1998.
KNOCK OUT?
Supreme Court deals a blow to non-competes for docs, but this fight is not over

By Walter E. Schuler
n a decision issued by the Tennessee Supreme Court this past summer, the court held that physician non-competition covenants are no longer valid in Tennessee, with the exception of certain physician non-competition covenants that are specifically sanctioned by statute. The issue in the case was whether a non-competition covenant between a physician and his former employer, a private medical clinic, was enforceable. The trial court had concluded that the covenant was enforceable, and entered an injunction against the physician, prohibiting him from practicing medicine within the restricted area. The Court of Appeals affirmed the trial court’s decision based on prior Tennessee case law, but remanded for consideration of the covenant’s buy-out provision. The Tennessee Supreme Court reversed the Court of Appeals, holding that all physician non-competition covenants that are not specifically authorized by statute are void as against the public policy of Tennessee.
**Non-competition covenants**

(Continued from page 17)

**Background**

Murfreesboro Medical Clinic PA (MMC), is a private group medical practice located in Murfreesboro, Tenn., and comprised of approximately 50 physicians, as well as nurse practitioners and other health care providers. In early 2000, MMC and Dr. David Udom entered into an employment agreement for Dr. Udom to practice internal medicine at MMC for an initial two-year term of employment, with an option for MMC to renew the contract for an additional period of time.

Dr. Udom’s employment agreement contained a non-competition covenant which stated: upon any termination of this Agreement …, the Employee agrees not to engage in the practice of medicine within a twenty-five (25) mile radius of the public square of Murfreesboro, Tennessee for a period of eighteen (18) months following such termination.³

The agreement also contained a “buy-out” clause, which provided that the non-competition covenant would not be enforced if Udom paid MMC an amount equal to 12 times his most recent monthly salary, and if he reimbursed MMC for any moving expenses MMC paid for him.

Upon expiration of his initial two-year employment term in August 2002, MMC advised Udom that it did not intend to extend his employment agreement. Udom subsequently notified MMC of his plans to open a medical practice approximately 15 miles from Murfreesboro in Smyrna, Tenn., and informed MMC that he did not intend to buy out clause the non-competition covenant. MMC sought an injunction in Rutherford County Chancery Court, prohibiting Udom from violating his non-competition covenant, which was granted but was stayed pending Udom’s interlocutory appeal.

In the Court of Appeals, Udom argued...
that non-competition covenant was not enforceable because it was unreasonable, over-broad, not designed to secure a protectable interest, and was against public policy. The Court of Appeals disagreed, and held that the non-competition covenant was reasonable and enforceable, but it reversed the injunction against Udom, and remanded the case for a determination of the specific amount of the buy-out payment due to MMC. The Tennessee Supreme Court granted Udom's appeal of whether or not the non-competition covenant was enforceable.

The Supreme Court's decision

The issue of whether non-competition covenants are enforceable against physicians was one of first impression for the Tennessee Supreme Court. The court began its analysis with the well-recognized statement of the common law governing non-competition covenants generally in Tennessee — i.e., non-competition covenants are disfavored in Tennessee as a restraint of trade, and are therefore strictly construed in favor of the employee, but they are nevertheless enforceable if there is a legitimate business interest to be protected and the time and territorial limitations are reasonable.4 The court noted that under the common law analysis, factors relevant to whether a covenant is reasonable include: (1) the consideration supporting the covenant; (2) the threatened danger to the employer in the absence of the covenant; (3) the economic hardship imposed on the employee by the covenant; and (4) whether the covenant is inimical to the public interest.5

In reaching its decision, the Tennessee Supreme Court focused almost entirely on the public interest analysis, and relied heavily on the American Medical Association's (AMA) Code of Medical Ethics. Citing the AMA's Code of Medical Ethics Sections E-9.02 and E-9.06, the court stated:

Since 1980 the American Medical Association (AMA) [footnote omitted] has taken the position that physicians' non-compete agreements impact negatively on health care and are not in the public interest. [citation omitted] Although stopping short of completely prohibiting covenants not to compete, the AMA strongly discourages them. The AMA has maintained the view for the past 25 years that non-compete agreements “restrict competition, disrupt continuity of care, and potentially deprive the public of medical services.” [citation omitted] The AMA has also found that a person's right to choose a physician and free competition among physicians are “prerequisites of ethical practice.”6

The court concluded that “Having a greater number of physicians practicing in a community benefits the public by providing greater access to health care,”7 and “Increased competition for patients tends to improve quality of care and keep costs affordable.”8 The court also relied heavily on the AMA's Code of Medical Ethics as to a patient's right to choose his or her own physician:

The right of a person to choose the physician that he or she believes is best able to provide treatment is so fundamental that we can not allow it to be denied because of an employer's restrictive covenant. Were we to hold otherwise, many of Dr. Udom's patients would be denied the opportunity to choose whether or not they wanted to continue being treated by him. These patients, who have entrusted confidential information to Dr. Udom by virtue of their highly fiduciary relationship with him, should not have that relationship involuntarily terminated.9

The court cited to recently enacted statutes and judicial decisions in a minority of other jurisdictions, which have declared physician non-competition covenants unenforceable on public policy grounds.10

The court examined the Tennessee legislature's intent in enacting Tenn. Code Ann. §63-6-204 (Supp. 1998), which specifically permits certain non-competition covenants between hospitals or their affiliates and physicians, and between faculty practice plans and physicians. The court viewed the statute as being narrowly tailored, and as evidence that the legislature did not intend to allow for any other form of physician non-competition covenants, including those between a physician and his or her private medical group employer, such as the one between Udom and MMC.

Finally, the court relied on its reasoning in Spiegel v. Thomas, Mann & Smith PC,11 a 1991 decision in which the court struck down all agreements that restrict a lawyer's ability to practice law. In Udom, the court found no practical difference between the practice of law and the practice of medicine with regard to non-competition covenants:

Both professions involve a public interest generally not present in commercial contexts. Both entail a duty on the part of practitioners to make their services available to the public. Also, both are marked by a relationship between the professional and the patient or client that goes well beyond merely providing goods or services. These relationships are “consensual, highly fiduciary and peculiarly dependant on the patient's or client's trust and confidence in the physician consulted or attorney retained” [citation omitted]. In both contexts, restrictive covenants have a destructive impact on those relationships. The rules governing other businesses and trades are not relevant to either the legal or medical profession, as both often require the disclosure of private and confidential information such as, in the context of physician and patient, personal medical or family history.12

Justice Holder filed a concurring and dissenting opinion, in which she agreed that the specific non-competition covenant at issue in Udom was indeed unenforceable, but on grounds other than the majority had held. Justice Holder dissented from the majority's holding that

(Continued on page 20)
physician non-competition covenants are void unless specifically permitted by statute. According to her, the legislative history of Tenn. Code Ann. §63-6-204 indicates that the legislature “did not intend a substantive change in the law but merely a clarification of existing law.”

Rather, Justice Holder writes, “the legislature chose to regulate only some of the restrictive covenants involving physicians. Had the legislature intended to preclude all other physicians’ restrictive covenants, it could have simply precluded all restrictive covenants.”

Is the public better off after Udom?

In issuing its ruling in Udom, banning all physician non-competition covenants not specifically provided for by statute, the Tennessee Supreme Court recognized that it was placing Tennessee in the minority of jurisdictions on this issue:

Despite the AMA’s stated position that non-compete agreements among physicians are not in the public interest, we find it curious that a majority of states continue to apply a reasonableness standard in evaluating non-compete agreements between physicians, similar to the evaluation of covenants in commercial contexts.

However, the court made no mention of the Kansas Supreme Court’s decision in Idbeis v. Wichita Surgical Specialists PA, rendered some 26 days prior, in which the Kansas Supreme Court held that the AMA Code of Medical Ethics did not render physician non-competition covenants as per se against the public interest. In reviewing the AMA’s Code of Medical Ethics, the Kansas Supreme Court stated:

The AMA provisions do not state that all restrictive covenants are unethical; rather, such covenants are only unethical “if they are excessive in geographic scope and duration in the circumstances presented, or if they fail to make reasonable accommodation of patients’ choice of physician.” These requirements are really no different than the common-law requirement in Kansas that restrictive covenants be reasonable and not adverse to the public welfare.

The Tennessee Supreme Court’s curiosity as to why the majority of jurisdictions has adhered to the reasonableness standard in evaluating non-competition agreements between physicians might have been satisfied by a more in-depth analysis by the court of the impact of such agreements.

The court’s opinion in Udom contained no empirical evidence of the ill effects of physician non-competition

(Continued on page 22)

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covenants, nor any evidence of any redeeming features such agreements might have, such that the competing public and private interests at stake could be weighed more objectively. Are non-competition covenants always bad, as the court seemed to believe? Does the banning of non-competition covenants necessarily result in a greater number of physicians competing in the community? Is a greater number of physicians competing in a community always better? As a result of the Udom decision, will medical practices seek to hire more “practice extenders,” such as nurse practitioners and physician assistants, rather than to recruit new physicians into the community? Or, if medical practices do continue to recruit new physicians into their practices, will these practices invest the same amount of time, money and energy in training these physicians, and in making these new physicians productive members of the medical community? Will these medical practices encourage and foster the development of the physician-patient relationship between the practices’ patients and their employed physicians, or will these practices attempt to focus the patient’s relationship more on the medical practice as a whole?

In short, if the banning of non-competition covenants between physicians results in (1) medical practices recruiting fewer new physicians into the community; (2) less training and investment in those new physicians who are recruited, and (3) a weakening of the physician-patient relationship between a medical practice’s patients and its employed physicians, this in and of itself would be inimical to the public interest. The court’s opinion in Udom did not address these issues. Rather, the court placed much emphasis on the patient’s right to choose his or her own physician, and the right to maintain that relationship. This right is most apparent in the primary care setting, in which patients often play a major role in selecting their internist or family practitioner. However, there are many circumstances in which patients have"
little or no say as to who acts as their physician. For example, specialists and sub-specialists are most often selected by the patient’s internist or family practitioner, and not by the patient. In Tennessee, health maintenance organizations and other managed health care plans with which employers contract to provide employees’ health care benefits are major decision makers as to which primary and specialty care physicians are available to patients, and which ones are not, as these managed care entities are allowed to selectively exclude physicians from their panels.\(^{18}\)

The point here is that the individual patient’s right to choose his or her own physician is readily subordinated when other policy considerations to the contrary are understood to promote a greater public good, for example, the perceived benefits of managed care.\(^{19}\) If the Tennessee Supreme Court’s complete ban on physician non-competition covenants with private medical groups results in a reduction in new physicians being recruited into Tennessee, or results in a stifling of investment and training in such new physicians, or results in an erosion of the physician-patient relationship with regard to employed physicians, perhaps the individual patient’s right to choose his or her own physician should not be the overriding public policy concern.

**Unanswered questions**

There are a number of questions regarding the precise scope of the court’s decision in *Udom*, which the court left unanswered. First, it is not clear whether the court’s ban on physician non-competition covenants will be construed also to apply to non-solicitation clauses, which typically prohibit the physician from initiating contact with his or her former employer’s patients and employees — a form of competition.

Second, does the ban apply only in the employment contract situation, or does it also apply in the shareholder or membership agreement situation, in which physician owners of private medical practices agree not to compete with one another after their separation from the practice?\(^{20}\)

Similarly, does the ban prohibit the common practice of including a non-competition covenant in a purchase and sale agreement, in which a physician agrees to sell his or her private medical practice to another physician? If so, such a ban would seemingly inhibit such agreements, or at least significantly devalue them, because any purchaser of a medical practice will demand assurances that, after completing the sale, the selling physician will not simply open a new medical practice in close proximity to the one being sold.

Third, does the ban apply to all health care providers who may be referred to as “physicians” under Tennessee law,\(^{21}\) or does it apply only to medical doctors, whose conduct is governed by the AMA Code of Medical Ethics. The term “physician” is defined in Tenn. Code Ann. §63-6-204(a)(7)(G) as a person licensed pursuant to chapter 6 or 9 of Title 63 of the Tennessee Code, which means a doctor of medicine or a doctor of osteopathy, both of whom practice medicine. If the court’s decision in *Udom* is limited only to physicians who practice medicine, how would the court view non-competition covenants that restrict competition between other health care practitioners, such as dentists, psychologists, chiropractors, physical therapists, physician assistants, nurses, nurse practitioners, podiatrists, optometrists, and the like? Don’t these practitioners have a highly confidential and close relationship with their patients, which is comparable to attorneys and physicians, which the court discussed in *Spiegel* and *Udom*, respectively?\(^{22}\)

What about certified public accountants, financial planners and investment advisors? Don’t these professionals also have a highly confidential and close relationship with their clients, with strong fiduciary obligations? How would the court distinguish the relationships that these other practitioners and professionals have with their patients and clients from those the court found so worthy of protection in *Spiegel* and *Udom*?\(^{23}\)

Finally, does the court’s holding in *Udom* preclude “compensation for competition” damages when a physician competes with his or her former medical group immediately upon termination of his or her relationship with that group? At first glance, the seemingly simple response is that the *Udom* decision would preclude any attempt by a medical group to seek such compensation, especially given that the court held in *Spiegel* that a clause in a lawyer’s agreement

(Continued on page 24)
with his former partners, requiring forfeiture of certain deferred compensation if the lawyer competed with his former law firm upon his separation from the firm, was void and unenforceable as what the plaintiff described as a "thinly-disguised non-competition agreement."24 Yet, two of the three other state statutes, which the court cited in support of its position, specifically allow for such damages to be considered in a breach of contract action against a physician who competes with his or her former medical group.25 These and other questions regarding the scope of the Udom decision will continue to create uncertainty in the health care community until further decisions are rendered by the court, or until these issues are addressed by the legislature.

**Should the legislature act?**

Surprisingly, neither the majority, nor the dissenting opinions in Udom commented on or even mentioned subsection (6) of Tenn. Code Ann. §63-6-204(f), which guarantees the enforceability of certain physician non-competition covenants with faculty practice plans:

> The requirements of this subsection (f) shall not be construed to preclude the enforceability of any restrictive covenant or prohibition exceeding the requirements or conditions of this subsection (f) that is reasonable and not inimical to the public interest under the common law principles governing restrictive covenants.26

This provision explicitly sets forth the legislature’s intent, at least with respect to physician non-competition covenants involving a faculty practice plan, which is that all non-competition covenants between a faculty practice plan and a physician must be decided by the courts on a case-by-case basis under the common law, as such law is applied to such restrictive covenants in other industries, except that any non-competition covenant between a physician and a faculty practice plan, which adheres to the scope set forth in the provisions of Tenn. Code Ann. §63-6-204(f) is deemed by the legislature to be per se enforceable, thereby taking any reasonableness analysis of the covenant out of the hands of the courts. Thus, rather than placing restrictions on the kinds of non-competition covenants physicians may have with a faculty practice plan, Tenn. Code Ann. §63-6-204(f) serves as a “safe harbor” of sorts.

The other provisions of Tenn. Code Ann. §63-6-204, which specifically deem non-competition covenants meeting certain other parameters to be per se enforceable, can be similarly construed. The court overlooked this provision of the statute, which seems to provide strong evidence that, in enacting the statute, the legislature specifically intended that other forms of reasonable physician non-competition covenants be enforceable, as determined by the courts on a case-by-case basis.27

The court did, however, recognize the Tennessee legislature’s power to undo the Tennessee Supreme Court’s ban on physician non-competition covenants in Udom by enacting legislation that specifically protects such agreements. Presumably, a simple statutory provision, which states: “Non-competition covenants between private medical practices and physicians are enforceable if they are reasonable in geographic scope and time limitations, and if they meet the other requisites of enforceability under the common law as applied to such agreements in other industries” would suffice. However, given the uncertainty regarding the precise scope of the Udom decision, and uncertainty as to the court’s position on non-competition covenants in other health care professions, any action by the legislature should address these issues as well, to determine whether a broader statutory provision would be more appropriate.

Still, the question remains as to whether the legislature should act at all. After all, it is not absolutely clear that non-competition covenants between private medical groups and physician employees have any beneficial effect on

*(Continued on page 26)*
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the public or other redeeming features. To date, the Tennessee Medical Association (TMA), which was surprised by the Udom decision, has been unable to identify a consensus among its members one way or the other on this issue. What is needed is an in-depth analysis, sanctioned by the TMA, perhaps in conjunction with the American Medical Association, other state medical associations, or professional associations, to study the positive and negative effects of a complete ban on physician non-competition covenants in the private medical group practice setting. Depending upon the outcome of such a study, the legislature can determine what, if any, action would be appropriate. In the meantime, the challenge for private medical groups and physicians seeking employment in Tennessee will be to find a way to reach a mutually acceptable contractual arrangement, which does not depend upon the enforceability of a non-competition covenant.

Conclusion

The Tennessee Supreme Court’s decision in Udom places Tennessee in the minority of jurisdictions, which ban physician non-competition covenants under the common law. More importantly, the decision creates much uncertainty in the health care community as to the precise scope of the court’s ruling. The impact of a complete ban on physician non-competition covenants in the private medical group practice setting, whether positive or negative, remains to be seen. Pending further pronouncements by the court or action by the legislature, private medical groups and physicians seeking employment in Tennessee will need to look for other ways to secure their respective interests, which may include a contractual emphasis on employees’ fiduciary duties, use or disclosure of trade secrets and confidential information, tortious interference with the contracts or business of employers, and non-solicitation of patients or employees. Creativity and compromise on both sides will be required to develop suitable contractual alternatives to non-competition covenants.

Notes

2. Udom, 166 S.W.3d 674, 684.
3. 166 S.W.3d 674 at 676.
5. Id. See also, Allright Auto Parks Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966).
6. 166 S.W.3d 674 at 679.
7. Id. at 679.
8. Id.
9. 166 S.W.3d 674 at 679 (also stating:
“Furthermore, a person has a right to choose his or her physician and to continue an ongoing professional relationship with that physician. See AMA Code of Medical Ethics E-9.06 (1977). Enforcing covenants not to compete against physicians could impair or even deny this right altogether.”

10. 166 S.W.3d 674 at 681.
12. Idom, 166 S.W.3d 674, 683.
14. 166 S.W.3d 674 at 684.
15. Id. at 680. The court also stated: “We further find it most surprising that several of the jurisdictions to have addressed this issue since 1980 have placed little emphasis on the general ethical concerns cited by the AMA in discouraging physicians’ non-compete agreements.”
17. Idbeis, 112 P.3d 81, 88.
18. A few states have enacted “any willing provider” laws, which generally require health maintenance organizations and other managed health care plans to allow any and all health care practitioners, but has enacted an AWP law covering pharmacists and pharmacies. Tenn. Code Ann. §56-7-2359.
19. See also, Tenn. Code Ann. § 63-6-204, recognizing at least two instances in which a patient’s right to choose his or her own physician is outweighed by overriding public interests promoted by allowing physician non-competition covenants with hospitals or their affiliates, and with faculty practice plans.
20. Read in the context of the issue addressed in the case, the Udorn opinion applies only to a non-competition covenant “between a physician and his former employer, a private medical clinic.” 166 S.W.3d 674 at 676. See also, 166 S.W.3d 674 at 676 (stating that “[t]he right of a person to choose the physician that he or she believes is best able to provide treatment is so fundamental that we cannot allow it to be denied because of an employer’s restrictive covenant.” (emphasis supplied). However, the court’s holding was stated much more broadly, and was not limited to only the private medical group employment context: “except for restrictions specifically provided for by statute, covenants not to compete are unenforceable against physicians.” 166 S.W.3d 674 at 684.
22. While the court implies that other health care practitioners and other professionals do not have a relationship with the public that is comparable to the relationships that lawyers and doctors have with the public (see, 166 S.W.3d 674 at 683), the question is whether or not in a given case, the court could really draw a logical distinction between such relationships. The court’s statement that “[t]he rules governing other businesses and trades are not relevant to either the legal or medical profession, as both often require the disclosure of private and confidential information such as, in the context of physician and patient, personal medical or family history” (id.) seems to beg the question as to whether or not the court would similarly protect the individual’s freedom of choice over an employer’s non-competition covenant when the relationship between the individual and such other professional involves the disclosure of private and confidential information regarding oneself or one’s family.
23. Some states have enacted legislation, banning non-competition covenants between all “professionals” and others. See, e.g., Code of Ala. §§ 8-1-1 (2005); Fla. Stat. §§ 442.33 (2005). Significantly, however, these statutes also specifically except from their ban on physician non-competition covenants, certain competitive restrictions placed on partners or shareholders upon their departure from a business or upon the dissolution of the business, and certain competitive restrictions placed on professionals who sell their businesses to another as a going concern. Id.
27. It is important to note, however, that the court’s statements as to which forms of physician non-competition covenants are and are not permissible under Tenn. Code Ann. §63-6-204 are dicta, because the statute only applies to hospitals and their affiliates, and to faculty practice plans, and these observations by the court were not necessary to resolve the issue before it. The non-competition covenant at issue before the court did not concern a hospital, an affiliate of a hospital, or a faculty practice plan, but rather, a private medical group practice.

“The decision creates much uncertainty in the health care community as to the precise scope of the court’s ruling.”
Let’s stop living in the past
Moving on …

We’re celebrating the Tennessee Bar Journal’s first 40 years all year! In each issue we have looked at areas of life in the law to see how the TBJ covered them. This month we wrap it up.

In the January 2005 Tennessee Bar Journal I wrote about the 40 years’ worth of magazines stacked around me, as we began the year-long commemoration of this publication’s four decades. Since then we’ve spent 12 months chronicling how the profession has changed (and not changed) from the magazine’s yellowed pages. It’s been fun, but frankly, I’m ready to stop living in the past and get on with my life.

We’ve looked at legislation, women in the law, the Young Lawyers Division, Joe Henry Award winners, conventions, editorial board, continuing legal education, sections and committees, and the judiciary. It’s a good history, full of rich drama, and I welcome you to come browse the pages anytime.

Before I shut these navy blue hardback volumes, though, I wanted to show you a couple more things. These are some high points of the Journal’s first 40 (the lowpoints you either already remember too well on your own … or you don’t need to know about them).

Now let’s concentrate on Vol. 42 — and the years that follow. Happy 40th, TBJ! May there be many more.

— Suzanne Craig Robertson

A Change of Venue
Tennessee Bar Association prepares to move downtown, expand services

By Suzanne Craig Robertson

The Tennessee Bar Association will be moving to downtown Nashville by mid-2007. The move is part of a master plan to relocate the entire office of the TBA’s 12 staff members, as well as the entire board of directors, to 10,000 square feet in a historic office building on Andrew Johnson Avenue.

When the TBA was formed in 1884, it was headquartered in the Tennessee Journal Building on Second Avenue. The current building on 101 Church Street serves as the headquarters for the TBA’s 170 member staff. Following the move, the TBA’s activities will be consolidated in a single location.

The building at 111 Public Square, 14th floor, house of the state and local bar association, judicial and judicial sections and committees, and the judiciary. It's a good history, full of rich drama, and I welcome you to come browse the pages anytime.

Before I shut these navy blue hardback volumes, though, I wanted to show you a couple more things. These are some high points of the Journal’s first 40 (the lowpoints you either already remember too well on your own … or you don’t need to know about them).

Now let’s concentrate on Vol. 42 — and the years that follow. Happy 40th, TBJ! May there be many more.

— Suzanne Craig Robertson

TENNESSEE BAR JOURNAL, DECEMBER 2005
LEFT: Nothing too impressive about this cover, which was fine for me. It’s the sample edition I was given when I interviewed for the TBA director of communications job in 1987. I thought “Hey, there’s no where to go but ‘up’ with this publication.”

ABOVE LEFT: Most authors just use a picture of themselves, but in 1988 when Memphis lawyer Irma Merrill authored the Journal’s only dog law article (a record that still stands), naturally her Rottweiler Prudence needed to be included. ABOVE RIGHT: This is the only black and white cover the Journal has had, but the emotion of Sarah Sheppeard and her daughter, Jennifer Alford, after Alford’s team won the 1993 mock trial was too much to pass up.

ABOVE LEFT: Ellen Hobbs Lyle was on the TBJ editorial board at the time of this 1988 cover and we needed a model who would work for free. I think this is probably what gave her the idea to run for chancellor. ABOVE RIGHT: We set up and shoot many of our covers, including this very economical one from 1991 that featured an Earth pillow toy, leftover copy paper and a scrap of black velvet.

ABOVE: Since 2000, Perry Craft has written, with co-authors Paku Khan, Nicole Davis Bass and Michael Shepard, an annual update on actions from the U.S. Supreme Court. RIGHT: We only celebrated one month for our 30th. Look for our 50th in 2015.
As ‘Luck’ would have it
Evolving law on creditors’
claims in an estate

By Dan W. Holbrook

Much of law involves resolving competing interests, and legislators and judges are routinely asked to recognize but balance such interests. In estate administration, there is such a conflict regarding creditors’ claims. Two recent decisions, Luck1 and Burke2, bring clarity to a previously confusing situation.

On the one hand, the law must recognize the rights of creditors to establish and prove claims against an estate. On the other hand, there is an ancient doctrine of repose that insists on estates being administered diligently. “Limitation statutes are found upon considerations of public policy, which is strongly sustained in its discouragement of litigation under circumstances which, in many cases, preclude the attainment of truth and justice; in its suppression of frauds and perjuries in attempts to set up demands against the estates of deceased persons, when the means to exposing their falsity have perished; in the necessity that those who succeed to the rights and property of such deceased persons should be quieted in the enjoyment of their rights, and for other reasons.”3
In Tenn. Code Ann. §§ 30-2-306, 307 and 310, our state legislature established a procedure for creditors to file and prove claims, but created two separate time limits, commonly known as “nonclaim statutes,” either of which can permanently bar a claim. First, the “inside limit” provides that, once an estate is opened, the court has a duty to publish notice to creditors, and the personal representative (PR) has a duty to notify all known or reasonably ascertainable creditors. Any claim not filed within four months from the date of first publication is forever barred. Second, the “outside limit” provides that, whether or not an estate is ever opened, “the ‘outside’ limit of 12 months from date of death did not bar the claim, based on the fear that “[R]elatives of a decedent could avoid payment to a decedent’s creditors by not seeking probate until a year had elapsed. We do not believe this is what our legislature intended.” In other words, the Court of Appeals reversed itself in Luck, declaring that the statute says what it means, and means what it says, i.e., file within 12 months, or you’re out of luck: [O]ur decision in Estate of Divinny and its progeny have misconstrued the statute of limitations applicable to a creditor’s claim against an estate. ... We are ... mindful of the public policy concern raised in Divinny ... However, this court’s concern in Divinny is not well founded.”

A creditor is not without remedy, says the court, citing Tenn. Code Ann. § 30-1-301, which permits a probate court to appoint a PR upon the petition by any creditor (or any next of kin) after six months have elapsed from date of death.

Also in 2005, the Court of Appeals addressed the duty of providing notice. In Burke, the estate was opened within 12 months after death; the PR was the decedent’s ex-wife; the creditor was the ex-wife’s divorce lawyer (the ex-wife’s debt having been assumed by the decedent under the divorce decree); and the PR did not notify the creditor of the decedent’s death. The 12-month outside limit clearly barred any claim against the estate. However, the Court of Appeals permitted a claim by the creditor against the PR personally, for breach of fiduciary duty. Not only does this make sense as a matter of fiduciary law and statutory interpretation, it is no doubt required as a matter of constitutional due process under Pope.

How to advise your clients

If you represent a creditor, be afraid, be very afraid. The law essentially assumes that a creditor will learn of a debtor’s death within 12 months. There is no exception (except for taxes or the state, including TennCare, or possibly on account of actual fraud). Therefore, diligence is required on creditors’ parts to pay attention to death notices. If no estate has been opened and the 12-month deadline is approaching, any creditor (or any next of kin) can petition the probate court to appoint a PR. Tenn. Code Ann. § 30-1-301. If neither the spouse nor any next of kin want to be PR, a creditor is eligible to serve, and may receive compensation for serving just as any PR can. Tenn. Code Ann. § 30-1-106.

If you represent a beneficiary of the estate, your advice may reasonably be to suggest that the PR delay getting appointed until after 12 months from date of death, in hopes of reaping a windfall from an inattentive creditor whose claim becomes barred. On the other hand, delay may preclude access to the estate assets or cost the estate in other ways, so some balancing of interests may be necessary. Further, if a cred-

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Recent Tennessee Developments in Legal Malpractice
(and other items of potential interest to Tennessee lawyers)

By William S. Walton

The recent collapse of American National Lawyers Insurance Reciprocal, a major underwriter of legal malpractice insurance for Tennessee practitioners,¹ has led many Tennessee lawyers to be increasingly cautious concerning potential claims for legal malpractice. Such caution is well advised. Claims for legal malpractice claims are increasingly more common, and, as virtually all practitioners can attest, reasonable insurance coverage has become more expensive and difficult to obtain.

Tennessee’s Court of Appeals has addressed a variety of issues during 2005 involving legal malpractice, which Tennessee lawyers may find of interest. For example, the Eastern Section of the Tennessee Court of Appeals recently released its opinion in Chapman v. Bearfield.² Chapman discusses the requirements for expert affidavits in a legal malpractice case in Tennessee. It is well settled that expert testimony is required to support a claim for legal malpractice unless the alleged malpractice is within the common knowledge of layman.³ Moreover, it is equally well established that whether a lawyer’s conduct meets the applicable professional standard of care is generally considered to be beyond the knowledge of layman. Cleckner v. Dale.⁴

Should a lawyer from Mountain City be able to serve as an expert in a legal malpractice case against a lawyer in Memphis (or vice versa)? While several courts have debated whether the legal expert had to be familiar with the specific local custom and practice where the defendant lawyer practiced law in order to qualify as an expert,⁵ Chapman clarifies this debate. The Chapman court determined that an opposing expert’s affidavit in a legal malpractice case does not necessarily have to demonstrate that the opposing expert is

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Malpractice developments

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familiar with the specific locality where the defendant lawyer practices law. Rather, the “locality” for the purposes of legal malpractice in Tennessee is defined by the borders of this state.

Chapman involved a legal malpractice claim by the plaintiffs against their former lawyer. The former lawyer (now defendant) was retained to represent the plaintiffs in a medical malpractice action. During the course of the original representation, the lawyer filed an amended complaint that repudiated the plaintiffs originally pled theory of recovery. The plaintiffs grew dissatisfied with their former counsel and subsequently hired a new lawyer. The plaintiffs then sued their former lawyer for legal malpractice.

As expected, the defendant lawyer filed a motion for summary judgment supported by his own expert witness affidavit opining that he was familiar with the “standard of care required of attorneys located in the upper East Tennessee area.” The plaintiffs filed an opposing affidavit from another attorney. The opposing expert stated that he was familiar with the standard of care for lawyers practicing in Tennessee and opined that the defendant lawyer had breached the standard of care. However, the trial court later entered summary judgment for the lawyer defendant. The trial court disallowed the expert affidavit filed in opposition to the motion for summary judgment, finding that the expert’s affidavit did not satisfy the so-called “locality rule.” Without an expert affidavit to oppose the motion for summary judgment, the underlying legal malpractice claim was dismissed.

Observing that Tennessee law governing legal malpractice actions does not create such a fine distinction, the Chapman court vacated the judgment entered by the trial court. Writing for a unanimous court, Judge Swiney observed, “We hold there is no locality rule for an expert witness in a legal malpractice action, other than the expert witness must be familiar with the standard of care ‘which is commonly possessed and exercised by attorneys in practice in the jurisdiction,’ here, Tennessee. If Spalding created a ‘locality rule’ for legal malpractice actions, the ‘locality’ is the state of Tennessee."

While Chapman appears to broaden the ability of a plaintiff to secure expert testimony in a legal malpractice case, the appellate courts have also re-emphasized in two recent decisions that plaintiffs must act promptly when they know or reasonably should know facts suggesting that they have been harmed or damaged by their lawyer’s conduct or omission. This rule may still apply even though the lawyer continues to represent the client in the underlying legal action.

A cause of action for legal malpractice accrues in Tennessee when 1) the defendant’s negligence causes the plaintiff to suffer a legally cognizable or actual injury; and 2) the plaintiff knows “or in the exercise of reasonable diligence should have known this injury was caused by defendant’s negligence.” Careful practitioners are reminded that a potential legal malpractice plaintiff may not sleep on their right to pursue a cause of action for legal malpractice by waiting to determine how his or her underlying case will ultimately be resolved.

The Tennessee Court of Appeals in Chrisman v. Baker cautioned practitioners again that a plaintiff must be vigilant in pursuing a legal malpractice claim or face dismissal of their claim on statute of limitations grounds. In Chrisman, the defendant lawyer represented the plaintiff in her representative capacity as conservator and subsequently as administrator of an estate. In the underlying estate action, the probate judge had advised plaintiff in open court during 1997 that the procedures she followed to compensate herself were not legally proper and the judge intended to remove the plaintiff as conservator as soon as a new administrator was qualified.

Following this 1997 hearing, the defendant lawyer apparently acknowledged to plaintiff that he had provided advice on the wrong procedure. Nonetheless, he provided assurance to the plaintiff that her claim for services would be honored as soon as the probate

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Walton
court considered proof of her claim. Counsel apparently was wrong again.

On March 18, 2002, the probate judge denied the plaintiff’s petition for caretaker services. One year later, March 17, 2003, plaintiff sued her former lawyer alleging that the lawyer was guilty of legal malpractice and she contended that the denial of her claim in 2002 was her first indication that she might have a claim against her former attorney because of her lawyer’s erroneous advice. The lawyer moved to dismiss based upon the statute of limitations.

The trial court agreed that the claim was time barred and dismissed the claim. Upholding the lawyer’s defense based upon the statute of limitations, the Tennessee Court of Appeals for the Eastern District of Tennessee stated, “We do not believe that reliance upon erroneous legal advice can operate to toll the statute of limitations inasmuch as the discovery rule relating to injury only applies to matters of fact unknown to a prospective plaintiff, not matters of law” (citing Cherry v. Williams).9

The Tennessee Court of Appeals for the Middle District of Tennessee in Sommer v. Womick10 reached the same result as Chrisman on strikingly similar facts. In Sommer, the plaintiffs originally sued a physician for alleged medical malpractice. The federal district court dismissed the medical malpractice lawsuit on May 21, 2001, a day before the scheduled trial. During a pre-trial hearing, the federal district court excluded the plaintiff’s medical expert. Without expert testimony, the underlying medical malpractice claims were dismissed. The plaintiffs in Sommer, like the plaintiff in Chrisman, were in court when the judge announced his adverse ruling.

The plaintiffs in Sommer appealed to the Sixth Circuit Court of Appeals. The appeal was handled by the original lawyer. The Sixth Circuit Court of Appeals affirmed the dismissal on Jan. 30, 2003. The plaintiffs subsequently sued their original lawyer for legal malpractice on April 25, 2003. The lawyer defendant defended based upon the statute of limitations. The lawyer argued that the plaintiffs were aware of an actionable wrong when the original lawsuit was dismissed in open court.

The trial court agreed that the plaintiffs had filed their legal malpractice claim beyond the statute of limitations and dismissed the claim against the lawyer. Although noting that the facts in Sommer led to a harsh result, the Tennessee Court of Appeals affirmed the dismissal of the legal malpractice claim and stated,

In this case, the United States District judge stated, in the presence of the Sommers, that the law was sufficiently clear to provide adequate guidance to plaintiffs and their counsel on what the requirements for admissibility of expert opinion testimony was in a medical malpractice action. The judge then said that the Sommers’ counsel had not presented expert testimony that met those requirements, and, moreover, had not done sufficient work to meet the requirements of Rule 26 (a) (2). The fact that the Sommers did not understand the judge’s comments to be critical of their attorney but thought the judge was upset with [the physician expert] does not necessarily create a genuine issue of material fact that would defeat a motion for summary judgment.

Ironically, the lawyers in Chrisman and Sommer were both saved from a legal malpractice claim by the statute of limitations because they had brought their clients to court, and the clients were present when the court rendered adverse rulings (even though the clients maintained that they did not appreciate the significance of the rulings).

Additional guidance has also been provided to Tennessee lawyers in several other areas that may impact legal

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malpractice claims. Specifically, for lawyers battling the determined pro se litigant, Tennessee appellate courts have emphasized that the lawyer should insure that the trial court addresses all of the pro se party's outstanding motions before the case is sent to the appellate courts.

Lawyers litigating legal malpractice actions with pro se parties, and particularly those lawyers battling self represented parties who are in jail, appreciate the enormous expense and time often required to defeat such litigation. Tennessee's appellate courts recognize that litigation involving self-represented parties is difficult and challenging.11

The Tennessee Supreme Court in 2000 addressed such problems in the context of legal malpractice claim in the case of Logan v. Winstead.12 Logan involved an inmate who sued his former criminal defense lawyer for legal malpractice. The lawyer filed a motion for summary judgment supported by his own expert affidavit attesting to the lawyer's compliance with the applicable standard of care. The trial court dismissed the action. The Tennessee Court of Appeals affirmed. However, the Tennessee Supreme Court found that the trial court addressed the outstanding motions by the pro se party before the case is dismissed (and ultimately appealed).

Bell involved an appeal from a wrongful death suit filed by a murder victim's family against the person accused of the murder. The family was able to obtain a default judgment on the

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“The Western Section of the Tennessee Court of Appeals in Gerber v. Segal recently affirmed the proposition that a trial court's award of fees will be upheld if there is sufficient evidence contained in the trial record to support the fee.”

entered. Bell strongly supports the proposition that a lawyer-defendant should take care to “protect the record” and insure that the trial court has addressed the outstanding motions by the pro se party before the case is dismissed (and ultimately appealed).

Bell involved an appeal from a wrongful death suit filed by a murder victim’s family against the person accused of the murder. The family was able to obtain a default judgment on the

issue of liability and the trial court set a hearing on the issue of damages. Several months after a default judgment was granted, but before the trial on damages was to be conducted, the pro se defendant filed an answer and he also filed a motion to set aside the default judgment. The trial court failed to address these motions, apparently because no hearing date was set by the pro se movant. A subsequent jury on the issue of damages awarded a $680,000 judgment against the pro se defendant.

Predictably, the pro se defendant appealed. The appellate court vacated the lower court’s judgment and remanded the case to the trial court to address the outstanding motions filed by the prisoner. The appellate court’s directive on this issue is clear: “When a trial court has failed to rule on an incarcerated litigant’s pending motions, reviewing courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on the pending motions.” Bell reminds the careful practitioner that the trial court must examine and address a pro se litigant’s outstanding motions before entering a judgment in a case.

On the other hand, Bell also offers hope for Tennessee lawyers concerned about the seemingly endless avalanche of litigation often generated by dissatisfied pro se legal malpractice plaintiffs who are in jail. Such plaintiffs often ask the court to “stay” or hold their legal malpractice claim “in abeyance” until the plaintiff is released from jail or prison. Bell makes clear that whether the case should be held “in abeyance” pending the inmate’s release is a discretionary decision for the trial court. The trial court should balance the equities and weigh the competing interests of the prisoner to present competent proof against the burden on the judicial system and the defendant-lawyer of continuing the action for a number of years while waiting for the prisoner’s release.

Tennessee's appellate courts have also recently addressed issues involving the reasonableness of attorneys fees. Fee disputes between lawyers and their former clients are frequently resolved before reaching the appellate courts. Conventional wisdom by those conducting legal malpractice seminars suggests that a lawyer should rarely sue a client over a fee dispute. Depending on the amount of fees involved, the outcome of the underlying case, and the underlying facts (as well as the very real possibility that such a claim may provoke a legal malpractice counter-claim by the former client), such advice is often sound.

Nonetheless, the practice of law is still a business and a collection action is sometimes necessary. The Western Section of the Tennessee Court of Appeals in Gerber v. Segal44 recently affirmed the proposition that a trial court’s award of fees will be upheld if there is sufficient evidence contained in

(Continued on page 38)
Breaking the ninth commandment: Impeachment by contradiction and bias

By Donald F. Paine

My former law partner, Hon. D. Michael Swiney, has published a pornographic piece in (of all places) Tennessee Decisions! It’s Young v. Hartley, 152 S.W.3d 490 (Tenn. Ct. App. 2004). Because I am writing for the Tennessee Bar Journal rather than Penthouse, I’ll leave the salacious details to your private perusal. While I take second chair to no lawyer when it comes to interest in prurience, I’ll stick to evidence issues.

Donna Young sued Washington County physician Fred Hartley for allegedly unauthorized surgery in her private area during a consensual tubal ligation. She claimed constant pain in that area plus inability to engage in sex. The defense maintained that she fabricated her allegations to get out of debt. Apparently the jury concluded that Young was a perjurer, resulting in a defense verdict.

What is contradiction impeachment? Muller and Kirkpatrick write in Evidence (Third Edition 2003) at page 529: “Impeaching a witness by contradiction means something he said is not so.” In an ordinary wreck trial, assume plaintiff’s witness swears the light was red and defendant’s witness swears the light was green. To the extent that jurors believe one witness they necessarily discredit the other’s testimony. Impeachment by inconsistent statement is different, because one witness makes two statements. With contradiction we find two witnesses and two statements.

The defense called Alan Gates, Young’s former boyfriend. He contradicted her testimony about pain. She repeatedly rode a Sea Doo. Moreover, she rode an ATV over rough terrain. As to her testimony denying intercourse post-op, he estimated 100 sexual congresses during a relationship that ended short of a year. But did she feel pleasure? His answer: “Well, if she didn’t she was putting on a lot.”

Impeachment by bias centered on Young’s financial problems in her failing business, a shop called Seascape. She wrote bad checks. She failed to file tax returns or pay taxes. Mr. Gates had loaned her around $50,000 to buy a Mercedes. When he inquired about

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the trial record to support the fee.

In Gerber, the attorney-plaintiff represented the defendant in her divorce from her husband of 28 years. The defendant-widow testified during the divorce that she still owed her attorney more than $54,000 in fees plus $7,500 in accounting fees. As part of the divorce decree, the husband agreed to pay $15,000 of his former wife’s legal expenses.

After the conclusion of the divorce, the wife’s attorney subsequently filed his collection action against his former client to collect his outstanding fees. Evidence was introduced during the lawsuit over the fee showing that attorney had ultimately billed the client approximately $98,000 in fees. The former client stated that she had already paid her former lawyer approximately $60,000. The former client asserted that paying any more fees would be excessive, and “unconscionable and inequitable” under the circumstances. The former client also complained that the fees billed by her lawyer “were almost as much as she was awarded in the divorce.” Indeed, the former client maintained that, “when the divorce proceedings were over, she was unable to pay [the lawyer] any money and [she] was forced to file bankruptcy to save her home.”

Although observing that the fee charged was “very high and certainly out of proportion to the total marital estate in this case,” the Gerber court nonetheless affirmed the trial court’s award of the fees by stating, “The trial court’s application of the Conners factors to the facts of this case was supported by evidence in the record. Therefore, we affirm the trial court’s decision.”

For the record, the factors that should be considered in setting a reasonable fee were established by the Tennessee Supreme Court in 1980 in Conners v. Conners, and include the following:

1. the time devoted to performing the legal service,
2. the time limitation imposed by the circumstances,
3. the novelty and difficulty of the questions involved and skill requisite to perform the legal service properly,
4. the fee customarily charged in the locality for similar services,
5. the amount involved and results obtained, and
6. the experience, reputation, and ability of the lawyer performing the legal service.

Tennessee Rule of Professional Conduct 1.5 adds several additional factors to this list including whether fee is fixed or contingent, any prior advertisements or statements by the lawyer regarding his fees, and whether the fee agreement is in writing. The same rule also now provides that “a contingent fee agreement shall be in writing, signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of litigation, trial, or appeal; other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.”

Notes
5. See e.g. Martin v. Sigmore, 78 S.W.2d 429, 273 n.14 (Tenn. Ct. App. 2001) (“...at least one] panel of this court has stated in dicta that the same locality rule that applies to physicians also applies to lawyers giving expert opinions in legal malpractice cases.”).
6. Citing Spalding v. Davis, 674 S.W.2d 710, 714 (Tenn. 1984) over’d on other grounds, 849 S.W.2d 748, 752 (Tenn. 1993).

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procedure

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repayment, she answered that she would have sufficient funds after victory at trial.

He testified: “She told me that she was going to be the richest bitch in Johnson City.” But because she lost at trial and on appeal, I’ll bet she is in worse financial straits today and that the loan remains in default. Ain’t life a bitch? 

More on post-judgment interest

Concerning my September column on post-judgment interest and other subjects, David Riddick of Jackson wrote to remind me that Tenn. Code Ann. §47-14-121 allows a rate other than 10 percent in some cases. That section allows a higher rate if permitted by another statute. Also, by contract the rate can equal the formula rate, which is 4 points above the average prime loan rate under Tenn. Code Ann. §47-14-102(6). I thank David for this helpful information.
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(Continued on page 40)

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itor petitions the court for appointment of a PR, the court might select a PR other than the beneficiary’s choice. Finally, your duty as an attorney under Rule 2.1 of the Tennessee Rules of Professional Conduct may include the moral and ethical implications, which could include advice to open the estate before 12 months anyway, or to pay a legitimate creditor even if the 12-month deadline has passed.

If you represent a PR, you may advise that a PR is not required to open an estate within any particular time frame, so that the PR may legally honor a beneficiary’s request to delay the opening beyond 12 months from date of death. Nor is a PR required to serve even when named in a will, so any delay in opening an estate should not make the PR liable for any negative consequences of the delay itself. On the other hand, delay may cause administrative difficulties, especially with wasting assets or with regard to tax deadlines. If the PR does qualify before the 12-month outside limit, you must advise the PR to take the duty of notice to known or reasonably ascertainable creditors very seriously indeed, or the PR may become personally liable. Worse, you may in turn become liable to the PR if you have not properly advised the PR to give such notice.

If you represent (or are) a title attorney, Luck is good news. It helps quiet title in certain cases, especially where there is probate of a will without administration, for muniment of title only. Tenn. Code Ann. §§ 32-2-111 and 32-5-109.

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**Notes**


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