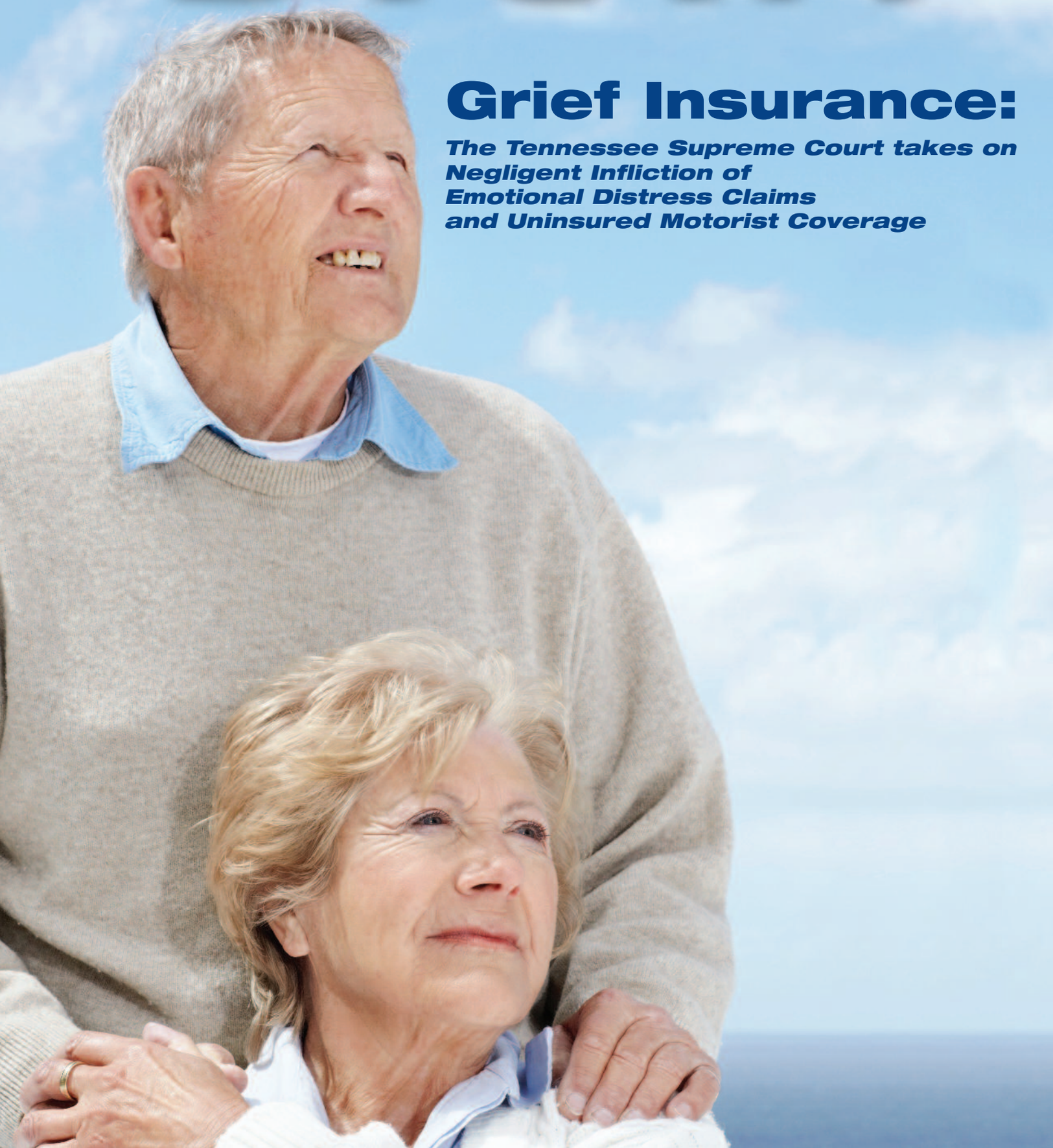
A Monthly Publication of the Knoxville Bar Association | November 2012

DICTA



Grief Insurance:

The Tennessee Supreme Court takes on Negligent Infliction of Emotional Distress Claims and Uninsured Motorist Coverage

The Knoxville Bar Association joined with the UT College of Law and the LMU Duncan School of Law on September 27th to sponsor a Minority Law Student Reception. The event was held at Carleo's in the Old City and 70+ members and law students participated. We were honored to have as our guest speaker City of Knoxville Mayor Madeline Rogero.

Participating Law Firms

Anderson Busby PLLC
Arnett, Draper & Hagood
Bill Hotz & Associates, P.C.
Dunn, MacDonald & Reynolds, P.C.
Eldridge, Blakney & Trant, P.C.
Hodges, Doughty & Carson, PLLC
Holbrook Peterson Smith PLLC
Jolley & Eldridge
Kennerly, Montgomery & Finley, P.C.
Knox County District Attorney General's Office
Knox County Public Defender's Community Law Office
Kramer Rayson LLP
Law Office of Robin Gunn
Law Office of Ursula Bailey
Law Offices of A. Philip Lomonaco
Lewis, King, Krieg & Waldrop, P.C.
Lincoln Memorial University - Duncan School of Law
London & Amburn, P.C.
Merchant & Gould P.C.
Pitts & Lake, P.C.
Reeves, Herbert & Anderson, P.A.
Stone & Hinds, P.C.
Tennessee Valley Authority
U.S. Attorney's Office
U.T. College of Law
Vowell & Associates
Woolf, McClane, Bright, Allen & Carpenter, PLLC
Young, Williams & Kirk, PC

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Knoxville Bar Association

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DICTA

DICTA **is the official publication of the Knoxville Bar Association**

DICTA is published monthly (except July) by the Knoxville Bar Association. It is designed to offer information of value to members of the local bar association. The news and features should illustrate the issues affecting the bar and its members. The opinions expressed do not necessarily represent those of the Knoxville Bar Association.

All articles submitted for publication in DICTA must be submitted in writing and in electronic format (via e-mail attachment). Exceptions to this policy must be cleared by KBA Executive Director Marsha Wilson (522-6522).

DICTA subscriptions are available for $25 per year (11 issues) for non-KBA members.

In This Issue

November 2012

Cover Story

Critical Focus

Conventional Wisdom

Common Ground

section notices

There is no additional charge for membership in any section, but in order to participate your membership in the KBA must be current.

Alternative Dispute Resolution

The ADR Section meets regularly for a CLE program typically on the first Monday of the month at 5:30 p.m. For a complete listing of the CLE programs, please refer to the CLE insert included in DICTA. If you have program topic or speaker suggestions, please contact **Kim Burnette,** the ADR Section Chair, at 546-7000.

Corporate Counsel

The Corporate Counsel Section provides attorneys employed by a corporation or who limit their practice to direct representation of corporations with an opportunity to meet regularly and exchange ideas on issues of common concern. The section has a CLE planned on November 7th at 5:30 p.m. at Sullivan's in Franklin Square. Please see the CLE insert for all of the program details. If you would like further information on the Corporate Counsel Section, please contact the Section Chairs for 2012, **Marcia Kilby** (362-1391) and **David Headrick** (599-0148).

Criminal Justice

The KBA Criminal Justice Section represents all attorneys and judges who participate in the criminal justice system in Knox County. To have your name added to the section list, please contact the KBA office at 522-6522. If you would like further information on the Criminal Justice Section, please contact **Jonathan Cooper** (524-8106) or **Hon. Steve Sword** (215-2508).

Environmental Law

The Environmental Law Section meets regularly and presents speakers on topics relevant to both practitioners of environmental law and lawyers with an interest in the area. The Environmental Law Section provides a forum for lawyers from a variety of backgrounds, including government, corporate in-house, and private firm counsel. For more information about the section, please contact Section Chairs **LeAnn Mynatt** (lmynatt@bakerdonelson.com) or **Jimmy Wright** (jwright@bvblaw.com).

Family Law

The Family Law Section typically meets on the third Tuesday of each month. The section has speakers on family law topics or provides the opportunity to discuss issues relevant to family law practice. To have your name added to the section list, please contact the KBA Office at 522-6522. For more information about the section, please contact Section Chairs **Elaine Burke** (tbpc@bellsouth.net) or **Niki Price** (nprice@bwmattorneys.com).

Government & Public Service

The Government & Public Service Section is open to all lawyers employed by any governmental entity, state, federal, or local, including judicial clerks and attorneys with legal service agencies. If you would like further information on the section, please contact **Suzanne Bauknight** (545-4167) or **Debbie Poplin** (545-4228).

Senior Lawyers

The Senior Section meets quarterly for lunch, and the next luncheon is scheduled for December 12 at 11:30 a.m. at Chesapeake's. The cost is $25 for the luncheon. Details regarding the speaker will follow in next month's DICTA. For information on the Senior Section, please contact Chair **Jim MacDonald** at 525-0505.

Solo Practitioners & Small Firm

The goal of the Solo & Small Firm Section is to provide and encourage networking opportunities and CLE. For more information on the section, please contact Section Chairs **Marcos Garza** (540-8300) and **K.O. Herston** (971-3757). The section has planned a Small Firm Toolbox CLE series. For more information, check out the CLE insert. To have your name added to the section list, please contact the KBA Office at 522-6522.

Event Calendar

November

- 2 Extended CLE
- 2 LawTalk - O'Connor Senior Center
- 3 LawTalk - Fellowship Church
- 5 ADR Section CLE
- 6 CLE Committee
- 7 Fee Dispute Committee
- 7 In Chambers CLE Program
- 7 Corporate Counsel Section CLE
- 8 Lunch & Learn
- 8 Judicial Committee
- 9 Family Law Extended CLE
- 13 Professionalism Committee
- 14 Small Law Firm Section CLE
- 14 Barristers Monthly Meeting
- 15 After Hours Brew Social
- 16 Memorial Service
- 20 Family Law Section Meeting
- 27 Unmet Legal Needs of Children Committee
- 28 Board of Governors

December

- 3 ADR Section CLE
- 5 Fee Dispute Committee
- 7 Ethics Bowl CLE Program
- 11 Professionalism Committee
- 11 Family Law Section CLE
- 12 Barristers Elections
- 13 Lunch & Learn
- 13 Judicial Committee
- 14 KBA Annual Meeting & Elections
- 20 After Hours Brew Social
- 27 Barristers Volunteer Breakfast

Mark Your Calendar:

KBA Annual Meeting & Elections

December 14

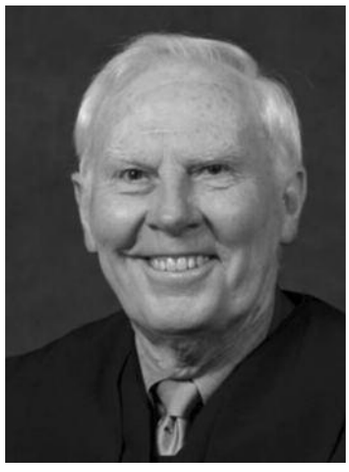
By: J. William Coley
Hodges, Doughty & Carson, PLLC

AN OPEN LETTER TO JUDGE WHEELER A. ROSENBALM

Dear Judge Rosenbalm:

I was surprised to learn recently that you have decided to retire as Circuit Court Judge for the 6th Judicial District, Knox County, Tennessee, effective January 1, 2013. My surprise was not that you are retiring, because I have been aware, generally, that you have been contemplating retirement at the end of your current term. My surprise was that you were retiring so soon.

Your retirement will mark the end of a consummate legal career. Your presence, demeanor, and competence will be missed among the bar and judiciary in this area. I know I am joined by all of our community in wishing you the very best in your retirement.



It is only natural, at the time of your retirement, to reflect on your career. I am certain you will have ample opportunity to share your perspective. On this occasion I would like to share mine.

My first opportunity to observe you as a lawyer was during a construction lawsuit, apparently shortly before you went on the bench in 1990. Having received my law license in 1985, I was a relatively new associate at our law firm and was assisting Doug Dutton in representing a local construction company in a lawsuit by an employee of a subcontractor for injuries he had received on a construction project. You represented the architect and engineer as a co-defendant. During the course of that suit the discovery deposition of an engineering expert for the plaintiff was taken in Chattanooga. I was sent to "cover" the deposition for our client. What I observed was a textbook demonstration by you of how to take the deposition of an expert witness offered by the opposition. I will never forget the impression you made on me as a young lawyer. You were obviously well prepared, very smart, experienced, and by systematic and methodical questioning you eliminated all of the underpinnings of the opinions of the expert who had been offered against your client. I remember reporting to Doug that the plaintiff's lawyer (himself an outstanding local lawyer) might be able to "get to the jury" against Wheeler's client, but he was not going to do so with that expert. I want you to know that without even knowing it, you made a strong positive impression on me by demonstrating the right way to represent a client in defense of a personal injury construction lawsuit. You also helped me understand during that lawsuit, in an acute way, the importance of the language of an indemnity clause in a construction contract.

My next personal recollection of you was as a candidate for Circuit Court Judge. Perhaps because of the positive impression you made on me in that construction lawsuit, I attended an early morning gathering at Shoney's Restaurant in Bearden where you spoke as a candidate. Without much experience in politics, I arrived expecting a campaign speech. What I heard instead was a well prepared and thoughtful explanation from you about why you wanted to be a Circuit Court Judge and your qualifications for the job. Your competence and sincerity were apparent that day, and on many others, as you were elected to Circuit Court Judge in 1990, 1998 and 2006.

Most of my other recollections of you have been as Circuit Court Judge in the 3rd Circuit Court for Knox County. As our Circuit Court Judge you have always been thoughtful, prepared and courteous to practitioners before you. I am sure you are aware that we lawyers get asked from time to time by out-of-town lawyer friends, associate counsel, or clients about what to expect from a particular judge. My bet is that the response by virtually all lawyers in our community when asked about you have been similar to mine: "Judge Rosenbalm is very smart, will be well prepared and has a strong understanding and appreciation for the Rules of Civil Procedure and Evidence. He will make hard decisions fairly and will allow the lawyers to 'try their case'. All parties will get a fair and impartial trial in Judge Rosenbalm's court."

Unfortunately, I have not always won in your court. In fact, I have experienced a couple of very difficult losses of significant consequence to my clients. However, win or lose, I have always left your court with a belief that you understood the issues, gave thoughtful consideration to my arguments and reached a well-reasoned conclusion based on the facts and law of the case.

You have a unique way of considering motions by lawyers presented in your court. On many occasions I have watched as you, in conversational tone, ask questions of lawyers that often result in an acknowledgment by them of the futility of their client's position. It has happened to me as well. It appears to me that you have enjoyed those moments of scholarly debate.

I would also be remiss if I did not mention your jury instructions. No lawyer, litigant or juror can ever honestly say that he or she failed to receive sufficient jury instructions in your court. I have not attempted to research this matter, but I am willing to bet that you have never been reversed for failing to give adequate instructions to a jury.

Thank you for the demeanor with which you approached your job. You have always welcomed lawyers into your courtroom and in chambers with a smile and friendly demeanor that communicated to all that you enjoy the law, lawyers, and in particularly, your role as a judge.

As this year's President of the Knoxville Bar Association, I also want to thank you for your participation in bar activities, particularly in our continuing legal education programs. I recently had the occasion to hear you speak at the KBA's Circuit Court Practice Bench Bar Conference at which time you presented an overview of the recently enacted tort reform bill. As always, your research of the topic was thorough and your presentation resulted in a better understanding by all who attended of this new act and the practical effect on lawyers and litigants.

As our Circuit Court Judge you have always been thoughtful, prepared and courteous to practitioners before you.

I hope your retirement will not mean that you will stop having lunch with and among lawyers in downtown Knoxville. The chance to visit with you on those occasions has been valuable to all of us. I am also glad that I will have the opportunity to see you, and your lovely wife, Betty, at church on Sunday and will look forward to that continued association with you.

A lot has been written and said recently about the value of mentors in our profession. I hope you approach retirement with the satisfaction that for all of us who have been your students, practiced law with you, and appeared before you in your court, you have been a great mentor and great example of how to live out a legal career.

Thank you for all of that.

By: Melissa B. Carrasco
Associate, Egerton, McAfee, Armistead & Davis, P.C.

When Work is More than a Job

To be an employment lawyer, you must have three qualities. First, you have to know your alphabet. Like the artist formerly known as Prince (now known as some unpronounceable symbol), most employment statutes and the agencies that enforce them have lost their real names and are known only by their acronyms.[1] Plus, you have to know which acronyms are pronounced like words ("ERISA" and "OSHA") and which are pronounced by saying each letter ("ADEA" and "FMLA").

Knowledge of the law is critical to evaluating the strength of a claim as well as its potential value.

Second, you must be comfortable with variety. Employment law covers all of the kinds of law that you studied as a 1L. There are constitutional issues, statutes, regulations, cases, administrative agencies, contracts, torts, jurisdictional and procedural requirements, and ethical issues, all of which may be governed by federal law, state law, or both. It involves transactional work such as drafting handbooks, noncompetes, or severance agreements, and litigation, such as responding to an administrative agency's request for information or prosecuting a lawsuit on behalf of a former employee. Plus, it covers numerous topics—discrimination, immigration, overtime, background checks, and intermittent medical leave to name a few. And, did you know that the Patient Protection Affordable Care Act ("PPACA" or healthcare reform) is largely an employment law?

Jennifer Morton

Third, you must like working with people. Employment law is about people who are employees who need to work to keep food on the table. It is about people who must balance the demands of running a business while complying with the many laws and regulations that affect their relationships with their employees. It is about the tension between protecting the rights of people who are workers to work and protecting the rights of employers to build a successful business whose workforce is one of its greatest assets.

The interaction with people drew Mentor for the Moment, **Jennifer Morton,** to the practice of employment law. Jennifer is a solo practitioner who has practiced in the areas of employment law and civil rights litigation for twenty years. She primarily represents employees, maintaining an active litigation practice in both federal and state courts and administrative tribunals. She is also an experienced Rule 31 mediator. Early in her practice, Jennifer recognized the need for attorneys willing to take challenging cases, often under contingency contracts, to provide access to justice for individual employees against entities with greater resources.

Jennifer is passionate about her work and is eager to assist attorneys in finding the resources they need to represent their clients. This passion is evident in her work as the president of the Tennessee Employment Lawyers Association (TENNELA) the Tennessee affiliate chapter of the National Employment Lawyers Association.[2] Currently, TENNELA has about 70 attorney members across the state all of whom devote at least 75% of their employment law practice to representing employees in employment law disputes. Most TENNELA members are solo practitioners or work in small firms, so membership in the organization helps to level the playing field by providing support similar to that in a large law firm such as access to mentors and seasoned practitioners in the field. TENNELA also has a strong amicus committee, which has filed amicus briefs in several recent, important Tennessee cases.[3]

For those who want to practice in this area, Jennifer recommends two things. First, join an association of employment lawyers like TENNELA,[4] for employment lawyers who do plaintiff's work, or DRI's Labor and Employment committee for lawyers who represent employers or are corporate counsel.[5] Joining one of these organizations or another like them provides access to active listservs, where attorneys can post questions, discuss strategy, and receive advice from experienced employment lawyers. These associations also provide educational resources and will help you stay abreast of this ever-changing area of the law.

Second, learn to vet the cases. Knowledge of the law is critical to evaluating the strength of a claim as well as its potential value. An employee with a strong claim but minimal damages may benefit from counseling about the value of moving beyond the dispute rather than spending years in litigation over painful events. The credibility and likeability of the employee are primary considerations. If you do not truly like or fully trust the employee, neither will the court or jury. Strong employment history is always helpful, but not mandatory.

Even with a likeable, trustworthy employee, sympathetic facts, solid legal grounds, and significant damages, consideration should be given to the employer's side of the story and the cost of litigation. A small business faced with a difficult decision may be sympathetic to a jury, and collectability from a small business should never be an afterthought. Likewise, defense counsel's ability to quickly evaluate the strength of the parties' positions in an employment dispute is invaluable. Obtaining an early settlement after promptly recognizing a significant risk of liability may save the employer hundreds of thousands of dollars in defense costs and statutory attorneys' fees.

Most importantly, develop a sense for the cases that you believe are worth the fight. Look for cases that involve issues important to you, and consider taking those cases even if they are difficult or involve a lot of work. Those cases may be the most rewarding in the end, and your job will become something more than just work.

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[1] The employment law alphabet soup includes statutes such as the ADAAA, ADEA, COBRA, ERISA, FMLA, FLSA, GINA, INA, NLRA, OSHA, USERRA, and WARN. The agencies that interpret and enforce these statutes include the DOL, EEOC, NLRB, OFCCP, USCIS, and VETS. The Civil Rights Act of 1964 is known by its various titles (Title VI, Title VII, Title IX, etc.), and some employment lawyer associations go only by their acronyms.

[2] NELA is the largest association of plaintiff's employment lawyers in the United States.

[3] *See Perkins v. Metro. Gov't of Nashville & Davidson County,* No. M2010-02021-SC-R11-CV (Tenn. Aug. 22, 2012); *Webb v. Nashville Area Habitat for Humanity, Inc.,* 346 S.W.3d 422 (Tenn. 2011); *Sykes v. Chattanooga Housing Auth.,* 343 S.W.3d 18 (Tenn. 2011); *Kinsler v. Berkline,* LLC, 320 S.W.3d 796 (Tenn. 2010).

[4] https://www.tennela.org.

[5] http://www.dri.org/Committee?code=0080.

By: Chris W. McCarty
Lewis, King, Krieg & Waldrop

Jim Kyle

Rarely does one write an attorney profile for DICTA knowing that the person profiled will have a hard time reading it. I will have to ask Marsha to be sure, but I am fairly certain that we rarely mail this magazine to the United States Army War College. Jim is currently on hiatus from his position with Lewis-King to participate in this prestigious program in Carlisle, Pennsylvania.

Jim's path to the War College started at a young age. While growing up in Shelbyville, Tennessee, Jim sometimes tagged along when his father reported for duty with the Tennessee National Guard. At the ripe old age of 17, Jim decided to follow in his father's footsteps into the military.

After attending and graduating from Middle Tennessee State University, Jim began serving with the Med Service Corps. Graduating fourth in his class at the Officer Basic Course in San Antonio also allowed Jim to attend United States Army Airborne School in Fort Benning, Georgia.

Jim spent his first assignment overseas as a Medical Platoon Leader in Fulda, Germany. With "The Wall" down, however, the military soon found itself less in need of so many troops in Germany. Jim was soon ordered to serve as a Medical Platoon Leader in Vicenza, Italy.

While serving as a Company Commander in Vicenza, Jim met his wife, Ellen, then a nurse in the Army Nurse Corps. They hit it off immediately, but Jim started to worry. Within weeks of meeting Ellen, he was scheduled to report back to San Antonio for Officer Advance Course (OAC). Luckily for Jim, he quickly learned what takes most husbands a lifetime to figure out: all wives have a natural gift for leadership. Ellen was also set to leave Italy… to attend OAC in San Antonio.

A lot of guys might say they would walk a thousand miles on burning sand for their loved ones, but Jim Kyle really did brave a desert for his wife. Already engaged to Ellen during OAC, upon graduating Jim requested that they be stationed together. The Army agreed and sent Jim and Ellen to Fort Irwin, California. Fort Irwin is located over three hours northeast of Los Angeles, which places it in the Mojave Desert. Jim is still fairly certain that none of his fellow OAC classmates listed Fort Irwin as a "dream assignment," but he was happy for the opportunity to live and work at the same base as Ellen.

Jim remained on active duty with the Army through his time at Fort Irwin and Tripler Army Medical Center in Honolulu. In 2001, however, Jim finally left active duty and went back into the Tennessee National Guard. He also started law school at the University of Tennessee that same year, graduating in 2004.

I started as a clerk with Lewis-King in the summer of 2004, and one of my first memories of this firm involves Jim Kyle. On my first or second day with the firm, the other clerks and I attended a party for a former clerk who was shipping out to Iraq. That former clerk, of course, was Jim Kyle.

He was in Iraq until the end of 2005 and was awarded a Bronze Star for meritorious service. Unfortunately for Jim's mother, Jim was deployed to Iraq to serve alongside his father, Jimmy. Jim was already a Major and his father was a Command Sergeant Major, the highest rank one can obtain as an enlisted man.

Both Jim and his father returned home safely. Jim, of course, was greeted by family, friends, and the bar exam. He reported for duty so soon after graduating from law school that Jim never had a chance to take the bar. The next time you hear a new graduate complain about studying for the bar, please remind him/her of Jim Kyle. He studied for, took and passed the bar … having spent his first year and a half after law school at war.

During his time as a member of Lewis-King's construction group, Jim has remained active and involved with the Tennessee National Guard. In 2008, Jim was promoted to Lieutenant Colonel and took over as Deputy Commander for Administration for the Tennessee Medical Command of the Tennessee National Guard.

Just this year, Jim was notified that he had been selected to participate as a resident at the Army War College at Carlisle Barracks in Pennsylvania. Very few members of the military are selected to participate as a resident at the Army Way College. But Jim received the additional honor of being selected for the Army Medical Department's only fellowship, a position competed for by officers from the Army, National Guard and Army Reserves.

The Army War College is a ten month assignment that Jim will complete in 2013. During that same year, Jim will also be eligible to become a "full-bird" Colonel. Jim attributes a lot of his military success to wonderful family support. Ellen, his two girls, Elyse and Jenna, and his entire family are all certainly proud of Jim. His extended family here at Lewis-King is proud of Jim as well … but we are also hopeful that he will soon return to his office.

By: Matthew J. Evans
Paine, Tarwater, & Bickers, LLP

NON-PROFIT PRO BONO PROGRAM

With the creation of its Access to Justice Committee, the Knoxville Bar Association has sought innovative ways to assist with pro bono projects in East Tennessee. For the last several years, the Knoxville Bar Association has sponsored a project called the Non-Profit Pro Bono Program. Based on a model from the North Carolina Bar Association, this program is available for non-profit organizations in need of legal assistance.

What does the program do?

The program is designed to assist non-profit organizations with income of less than $1,000,000 per year. Like any other entity, these non-profits always have some type of legal question that needs to be answered or that requires a legal opinion. However, unlike most business entities, these non-profits often operate on a shoe string and do not have any ability to retain counsel. To meet this need, the Knoxville Bar Association sponsored a program where attorneys donate up to two hours of pro bono time to these non-profits to answer specific legal questions.

Since the creation of the program, the questions have run the gamut from real estate questions to liability to employment questions regarding employees. The goal of the program is to hopefully assist the non-profit in finding a quick and economical answer without straining the resources of the non-profit. In those instances where the question could not be answered within the two hour framework and a meeting with an attorney, the non-profits have also worked with the responding attorney to either answer the question at a reduced rate or through some other type of fee arrangement to meet the need.

How does a non-profit receive this assistance?

Requests were sent to all firms that are part of the Knoxville Bar Association. Individual attorneys were requested to complete forms if they were interested in participating in the program. The forms request that the attorneys select areas where they would be willing to assist non-profit and donate up to two hours of time to research a question and meet with representatives of the non-profit. The attorneys are allowed to select a large number of specialty areas from real estate transactions, employment law, contract and tort. The non-profits submit their request to the Knoxville Bar Association and the request is then screened for placement with the appropriate attorney. Once an attorney agrees to accept the assignment for the Knoxville Bar Association, the attorney is put in contact with the non-profit organization.

The biggest need of the program is community awareness. There are many non-profit organizations in East Tennessee that need legal assistance, and they simply do not know about this program. The Knoxville Bar Association's Access to Justice Committee will be doing an awareness campaign to make non-profits aware of this resource.

Likewise, the Knoxville Bar Association always has a need for attorneys that are willing to participate in the program. Participation is simple. A form is available from the Knoxville Bar Association and it only needs to be completed. Once completed with your areas of interest, the Knoxville Bar Association will match that attorney to the need.

Currently, this non-profit pro bono project is the only one of its kind in operation. The Knoxville Bar Association should be applauded for its efforts to find new ways to help these organizations as they struggle to meet the needs of the citizens of East Tennessee.

By: J. Myers Morton
Morton & Morton PLLC

Representing Veterans:
The Scoop on Serving Those Who Have Served Us.

Inscribed at the entrance of the Department of Veteran's Affairs in Washington, D.C., is an Abraham Lincoln quote: "To care for him who shall have borne the battle and for his widow and his orphan."

The Supreme Court, in *Henderson v. Shinseki* 131 S.Ct. 1197, 179 L.Ed.2d 159, _____(2011), holds:

> ...The VA's adjudicatory `process is designed to function throughout with a high degree of informality and solicitude for the claimant.'...A veteran faces no time limit for filing a claim, and once a claim is filed, the VA's process for adjudicating it at the regional office and the Board is ex parte and nonadversarial...
>
> ...`The solicitude of Congress for veterans is of long standing.'...
>
> ...And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that `place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions,'..."
> *Id* at 1200-05. (Citations omitted.)

I. Law

Under title 38 of the United States Code, veterans are entitled to various benefits, including pension or compensation. Non-monetary benefits include vocational rehabilitation, medical care and treatment, educational opportunities, etc.

A veteran's surviving spouse, children, or parents are entitled to compensation based upon dependency considerations or death caused by "service connected" disabilities.

A "veteran" is a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable. 38 U.S.C. § 101

The term "pension" means a monthly or other periodic payment made by the Secretary to a veteran because of service, age, or non-service-connected disability, or to a surviving spouse or child of a veteran because of the non-service-connected death of the veteran. 38 U.S.C. § 101

The term "compensation" means a monthly payment made by the Secretary to a veteran because of a **"service-connected"** disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957. 38 U.S.C. § 101

There are "considerations" or "presumptions" that apply to filed claims for compensation.

1. Presumption of sound condition when accepted into service, 38 U.S.C. § 1111;
2. Presumptions relating to certain diseases and disabilities, 38 U.S.C. § 1112;
3. Presumptions of service connection for exposure to Agent Orange, 38 U.S.C. § 1116 (For lymphoma, soft-tissue sarcoma, Chloracne, Hodgkin's disease, respiratory cancers, multiple myeloma, Diabetes Mellitus, veteran's children born with birth defects, including spina bifida.);
4. Presumptions for disabilities in Persian Gulf War veterans, 38 U.S.C. § 1117 (for "undiagnosed" or "unexplained chronic multi symptom" illnesses.); and
5. Veterans engaged in combat with the enemy are entitled to a diminished or lowered burden of proving combat injuries, 38 U.S.C. § 1154.

38 U.S.C. § 5103A creates and describes the Secretary's "Duty to assist claimants" "in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." That assistance could include providing a medical examination and/or obtaining a medical opinion on causation.

If a veteran is successful, he is awarded compensation (monthly payments) starting on his "effective date." That effective date is when the veteran filed his claim. 38 U.S.C. § 5110.

One exception to "effective date" rule is when a veteran attempts to revise a previous dismissal of his claim because it was based upon "clear and unmistakable error". If successful, the "effective date" is the date of the previously erroneous decision. 38 U.S.C. § 5109A. (It is difficult, if not impossible, to convince this federal agency to admit that it made a mistake.)

A veteran can attempt to "reopen" previously disallowed claims by submitting "new and material evidence". 38 U.S.C. § 5108.

II. Adjudication

Claims are filed with the several regional offices located in each state, including Puerto Rico and The Phillipines.

Denied claims may be appealed to the Board of Veterans Appeals (BVA) in Washington, D.C. 38 U.S.C. § 7105. BVA denied claims may be appealed to the Court of Appeals for Veteran's Claims. 38 U.S.C. § 7266.

The Court of Appeals for Veterans Claims is an Article I Court founded in 1988 in the Veteran's Judicial Review Act ("VJRA"). Before 1988, there was no judicial review of Veterans Administration decisions and adjudications. The Board decision was final. 38 U.S.C. § 7251.

The Act creating the court allowed lawyers to represent veterans, for a reasonable fee, ***after*** the claimant's case was initially denied by the BVA. See also 38 U.S.C. § 5904. In successful appeals to the court, the court has discretion to award attorney fees pursuant to 38 U.S.C. § 2412.

Like Federal Courts, all filings are through a PACER type internet program. The court's website is https://efiling.uscourts.cavc.gov/ Cases before the Court are considered (and treated) adversarial. Appeals from this Court are to the Federal Circuit Court of Appeals. 38 U.S.C. § 7292.

Thereafter, *certiorari* to the U.S. Supreme Court.

III. Practical Considerations

Do not expect consistency.

For example: for decades, the Veteran's Administration refused to recognize a widely used, chemical defoliant, Agent Orange, as causing any human effect. This was despite testimony of private doctors stating Agent Orange caused any number of maladies to Vietnam (and Korean) Veterans. Eventually, in 38 C.F.R. §3.309(e), the DVA grudgingly decided to *occasionally* award compensation to veterans with certain enumerated and limited medical problems. There are dozens more maladies caused by Agent Orange that the DVA refuses to recognize, again despite medical testimony in favor of granting service connection.

On the other hand, in June of 2010, the U.S. Government gave the nation of Vietnam $300,000,000.00, to help them deal with the effects of Agent Orange in their country.

On or about September 29, 2012, there were 883,949, applications for compensation and pension pending. Over 65% of those claims were pending for more than 125 days.
http://www.vba.va.gov/REPORTS/mmwr/index.asp

I have represented any number of veterans in this claims process. One claim, among others, was pending for 20 years.

IV. Why represent veterans?

The obvious reason is because of what they did for us.
You also occasionally collect an attorney fee.

By: David E. Long
Leitner, Williams, Dooley & Napolitan, PLLC

"YES, VIRGINIA, THERE IS A PROTECTED FUTURE MEDICARE INTEREST IN LIABILITY SETTLEMENTS."

In terms of obligations pursuant to the Medicare Secondary Payer Act ("MSP") and the Medicare & Medicaid SCHIP Extension Act of 2007 ("MMSEA"), there are multiple areas of compliance issues. Perhaps the two areas most often dealt with by attorneys are the areas of repaying Medicare for conditional payments made prior to a lawsuit being settled and protecting Medicare's future interests. The legal issues potentially involved in conditional payments and/or future medical issues are varied and often complicated. The law is in a state of flux for various reasons. One reason is due to the slow, necessarily myopic progression of federal common law. Courts are designed to look narrowly at specific questions of law, not provide sweeping proclamations of legislative roadmaps as to how to practically apply or enforce laws. If agencies, such as Centers for Medicare and Medicaid Services (CMS), either do not have the power or the will to push specific regulation, attorneys and courts are left with uncertainty as to how to proceed. Without specific guidance, attorneys tend to retreat towards "safest" or "best" practice. Unfortunately, "best" or "safest" is not a settled definition. It is an argument, but in the MSP arena, it is a dangerous one in which no one is entirely safe from future challenges.

The MMSEA was the driving force behind the Government's ability to actually enforce the pre-existing MSP requirements that "primary plans" not only reimburse conditional payments but protect Medicare's future interests. Essentially, existing technology allowed the MMSEA to have teeth. Prior to the Internet, and in its infancy, the MSP had practical information problems. It was easier to follow workers' compensation cases than liability cases. Worker's compensation cases require specific final orders and other state filings. There was an information trail, albeit a paper trail giving an idea as to settlement proceeds. Liability case information was not as readily available. Generally, liability cases are settled with private releases. The only public evidence of a potential settlement is an order of compromise and dismissal filed with the court. The order rarely, if ever lists any amount(s). Add to that, the lack of manpower at CMS, and the threat of the MSP was largely ignored in past times. The MMSEA, upgraded computer technology, and the Internet changed the Medicare world. Section 111 of the MMSEA requires primary plans report settlements and judgment awards, or face severe penalties for not doing so. The practical upshot is now primary plans must file a MMSEA "tax return" or face penalties. The required information is being fed to CMS databases. The government worker can sit at her desk, drink coffee, and simply note it.

Attorneys now must take into account those issues in settling or otherwise litigating cases. In terms of conditional payments owed to Medicare, the issue is fairly straightforward: pay it. A party or its attorneys cannot avoid liability by paying a conditional payment over to the plaintiff and hoping she takes care of it. Calling it something else, such as loss of consortium, is not advisable, especially when the settlement documents have the derivative spouse releasing medical claims as well. 42 U.S.C § 1395y(b)(2)(ii) provides the statutory authority requiring the reimbursement to CMS/MSPRC. Any payment in the way of settlement, judgment or award requires that all of the parties make sure Medicare is reimbursed. When the final demand letter is received from Medicare, the reimbursement must take place within sixty (60) days to avoid penalty. If not, 28 U.S.C . § 3001 and the MSP take over with significant penalties.

The more amorphous issue is the future medical issue. While Medicare has provided some guidance on worker's compensation issues (i.e., the Patel Memo and various C.F.R.s), there has been little to no guidance regarding the issue of protecting Medicare's future medical interests in liability cases. Practitioners should not, however, confuse themselves with various cases at lower federal court levels that might lull them into thinking that CMS does not intend to assert that future interest. CMS has made it clear in a number of memoranda and interviews that it intends to require parties to consider those interests. There is a split in the federal circuits over the MSP Manual, and those memoranda as to whether they are binding law. Some courts hold that, absent regulation (C.F.R.s), CMS cannot enforce its "ideas" as opposed to law. Some courts, however, have adopted a philosophy more in line with *Chevron v. United States of America,* 467 U.S. 837 (1984), the administrative doctrine that essentially holds (1) if the statute is clear, follow it; (2) federal courts should develop federal common law to deal with various issues; and (3) if the statute is silent, the agency interpretation of it should be given deference if that interpretation is reasonable. The Court of Appeals for the Sixth Circuit, in *Hadden v. United States,* 661 F.3d 298 (6th Cir. 2011) which was denied certiorari by the U.S. Supreme Court, gave the nod in dicta to the *Chevron* standard. *Hadden* did not deal directly with the MSP issue or future medical interests (it was a conditional payment case). It interpreted the issue before the court narrowly under the MSP. By noting the *Chevron* doctrine, however, the Court of Appeals for the Sixth Circuit indicated the willingness to consider CMS' vision of its own authority.

Recently, CMS has invited the industry to comment on CMS-6047-Advance Notice of Proposed Rule Making. 6047 has indicated seven (7) proposed options to deal with liability settlements and future medical interests. It certainly shows the intention of the United States to have those interests protected by private litigants. CMS-6047-ANPRM may be accessed through CMS' website at www.cms.gov and typing "CMS-6047-ANPRM" in the search bar. It is not a regulation. It is an invitation for comments regarding proposed rule-making, from suggested "up front" payments to satisfy Medicare's future interest to invitations as to how to structure liability Medicare set aside reviews. The important message is that CMS intends to pursue parties that do not consider Medicare's future interests in liability cases.

By: Cathy Shuck
Wimberly Lawson Wright Daves & Jones, PLLC

Employee Rights and Employer Responsibilities under USERRA

In keeping with this month's focus on the military, it seemed natural for this space to consider the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq. ("USERRA"). USERRA provides broad employment protections to members of the uniformed services. Specifically, USERRA provides that an employee called up to serve in the uniformed services is protected from discrimination and is entitled to job-protected leave for a cumulative period of up to five years in most cases.[1] Uniformed services include the federal Armed Forces as well as the National Guard and Air National Guard.[2] All private and public employers are covered, regardless of size.[3]

Leave Requirements

USERRA requires employers to support service members by granting job-protected leave any time a service member is called up to active duty or to training. Like FMLA leave, the leave may be unpaid. Unlike FMLA, the employer need only continue health benefits for the first 31 days of leave; after that the service member may elect health benefits pursuant to rules similar to COBRA.[4]

A service member is entitled to five years of leave as to each employer (i.e., periods of service that occurred while the employee was employed by a previous employer do not count in calculating the five-year period as to the current employer).[5]

Note that the five-year leave limit does *not* apply with respect to several types of service. These include involuntary active duty during a national emergency for up to 24 months and service to fulfill periodic National Guard and Reserve training requirements.[6] Thus, the five-year clock ***does not tick*** during these certain types of service, but the employer must continue to hold the employee's job. Notably, many National Guard troops have been called up in the last decade pursuant to provisions that do not count against USERRA's five-year limitation. An employer must consult the service member's orders to determine the type of call-up.

USERRA's protections for National Guard service only apply where the call-up is pursuant to federal authority, as opposed to state authority.[7] However, Tennessee, like many states, does provide job protection to employees called up to National Guard service by the state. Tennessee's law applies only to *public* employees, however, but provides that those public employees (including local, as well as state government employees) are entitled to an *unlimited* leave of absence during their National Guard service, without loss of rights or benefits.[8]

Reinstatement Rights

USERRA sets forth four requirements for reinstatement: (1) the service member must give proper notice to the employer; (2) the service period must be less than five years, except as set forth above; (3) the employee must timely request reinstatement; and (4) the service member must separate from the military under "honorable conditions."[9] An employer may not impose any additional restrictions or conditions upon a returning service member before reinstating the service member. For example, in *Petty v. Metropolitan Gov't of Nashville & Davidson County,*[10] the Court of Appeals for the Sixth Circuit held that the employer violated USERRA when it subjected a returning police officer to the same return-to-work process that it required of all employees returning from a leave of absence, including a background check, drug screening, and meeting with a psychologist. The court emphasized that if a returning service member satisfies the four criteria in the statute, he or she must be immediately reinstated.[11]

Upon a service member's return to work, USERRA requires that the employee be restored to either the position he or she would have held absent the service, "or a position of like seniority, status and pay."[12] This is a heightened reinstatement requirement compared with the FMLA's reinstatement requirement.

Returning service members must be slotted back into the workforce pursuant to the "escalator principle," which requires that the employee be reemployed in position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites that he or she would have attained if not for period of military service.[13] Importantly, the position to which a returning service member is reinstated must not simply be the same in name; it must provide the same level of benefits and earnings opportunities. For example, in *Serricchio v. Wachovia Sec., LLC,*[14] the Second Circuit held that the employer violated USERRA's reemployment requirement by reinstating a financial adviser returning from leave to a position with the same pay structure as the position he had previously held, but with less desirable clients and fewer commission opportunities.

Protection from Discrimination and Discharge

Finally, USERRA protects returning service members from discrimination on the basis of their military service.[15] The statute further provides that returning service members reinstated pursuant to USERRA may only be discharged for cause, for up to one year following their reemployment.[16]

Prompt compliance with USERRA is an important way for employers to support those employees who serve in the uniformed services.

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[1] *See* 38 U.S.C. § 4311-4313.
[2] *Id.* § 4303.
[3] *See id.*
[4] *Id.* § 4316-4317. Note that if the employer has a pension plan, the returning service member must be treated as if he or she had no break in service. *Id.* § 4318.
[5] 20 C.F.R. § 1002.101.
[6] 38 U.S.C. § 4312(c)(4); *see also* 20 C.F.R. § 1002.103.
[7] 20 C.F.R. § 1002.57.
[8] *See* Tenn. Code Ann. § 8-33-109.
[9] *See* 38 U.S.C. § 4312. As to notice, deploying employees must only provide as much notice as is reasonable under the circumstances. *See* 20 C.F.R. § 1002.85. Returning service members must timely report to work or notify the employer of their desire to return to work; what is timely depends upon the length of military service. *See* 20 C.F.R. § 1002.115.
[10] 538 F.3d 431, 441-42 (6th Cir. 2008).
[11] *See id.; see also Petty v. Metropolitan Gov't of Nashville & Davidson County,* 687 F.3d 710 (6th Cir. 2012) ("Petty II").
[12] *See id.* § 4313.
[13] *See id.; see also* 20 C.F.R. § 1002.191.
[14] 658 F.3d 169, 185-86 (2d Cir. 2011).
[15] 38 U.S.C. § 4311.
[16] *Id.* § 4316. The protected period is one year if the employee was on military service for 181 or more days; it is 180 days if the period of military service was between 30 and 180 days. *Id.*

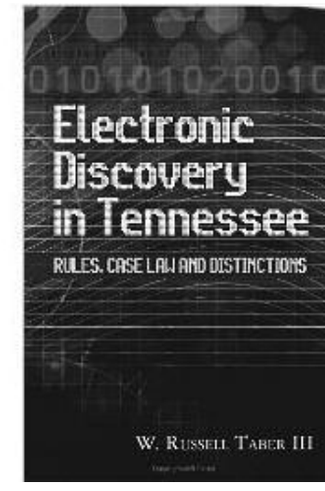
About this column:
"The cobbler's children have no shoes." This old expression refers to the fact that a busy cobbler will be so busy making shoes for his customers that he has no time to make some for his own children. This syndrome can also apply to lawyers who are so busy providing good service to their clients that they neglect management issues in their own offices. The goal of this column is to provide timely information on management issues. If you have an idea for a future column, please contact **Cathy Shuck** at 546-1000.

BOOK REVIEW

By: Jay Moneyhun
Egerton, McAfee, Armistead & Davis, P.C.

Electronic Discovery in Tennessee – Rules, Case Law and Distinctions

By: W. Russell Taber III



Note to Non-Litigator Business Attorneys (if you are still reading this article after seeing the title of the book): This book is for you, not just litigators. For instance, the book addresses questions such as: "Can the obligation to preserve electronically stored information ("ESI") really arise eight years before a complaint is filed?"[1] and "should I advise my client to implement a document retention policy and what should the policy include?"

Note to Civil and Criminal Litigators: This book is a valuable resource for every litigator that practices in Tennessee. For instance, the book also addresses whether the failure to issue a written litigation hold constitutes per se gross negligence.[2] Must a party hire an outside expert to develop search terms to avoid lawyers and clients going "where angels fear to tread" when attempting to locate responsive or privileged ESI?[3] Must every production of email be accompanied by nineteen "essential" fields of metadata?[4]

You may be thinking that the e-discovery cases that make the headlines generally involve extreme examples of misconduct or arise from litigation in the nation's largest metropolitan centers. But does that law really apply in Tennessee? This book answers the question by focusing on the electronic discovery law in Tennessee and how it compares with notable cases and authority in other jurisdictions. When I first heard about the book, I was skeptical that there would be enough Tennessee law to fill an entire book on the subject. However, I was surprised at the number of Tennessee cases and authority discussed in the book.

The book is organized into fifteen chapters and starts with a bold, yet supportable, premise: "The era of paper discovery in Tennessee is over," noting that ninety-eight percent of all information is created electronically, and over eighty percent of documents are never printed to paper. Chapters 1 and 2 provide a brief historical overview of e-discovery in Tennessee and discuss the two legal principles that have received particular attention in the context of e-discovery: proportionality (the concept that the cost of the discovery sought should be proportional to the amount in controversy, the information's relevance, and other factors) and cooperation (with opposing counsel).

Chapters 3-7 provide practical advice on preparing for e-discovery prior to a lawsuit (including document retention policies), preservation of ESI (including "trigger events" for when the obligation to preserve attaches and the steps a party should take to preserve ESI), "meet and confer" discovery conferences, the scope of productions, and collecting, processing, searching and reviewing ESI for litigation.

Chapter 8 reviews the rules in Tennessee state and federal courts regarding form of production and, in particular, when metadata should be produced.

Chapters 9-12 and 14 discuss specific e-discovery issues, such as discovery of ESI stored "in the cloud" (including social media websites), e-discovery from non-parties, spoliation sanctions, rules governing shifting of costs from the producing party to the requesting party, and electronic evidence in government investigations and criminal cases.

Chapter 13 addresses issues that affect invocation of the attorney-client privilege and the work-product doctrine when dealing with ESI, such as Rule of Evidence 502 and techniques for logging privileged materials.

Finally, chapter 15 discusses admissibility of ESI, as there is little point in spending the money and effort on e-discovery if the ESI is not admissible at trial.

In sum, this book is a well-organized commentary and summary of the surprisingly vast Tennessee e-discovery law and is a useful resource for not only the litigator, but also the non-litigator business attorney.

Final Note for both Litigators and Non-Litigator Business Attorneys: For more information on this subject, please join us for the upcoming CLE - *In-House Counsel Toolbox Series: Lessons Learned: e-Discovery Trends for Corporate America* - Wednesday, November 7, 2012

The KBA Corporate Counsel Section CLE will be held from 5:30 p.m. to 6:30 p.m. at Sullivan's at Franklin Square, 9648 Kingston Pike. Please try to arrive at 5:00 p.m. so that section members have an opportunity to visit before the CLE program begins at 5:30 p.m. The program features **Drew Lewis,** Baker, Donelson, Bearman, Caldwell & Berkowitz, **Todd Fulks,** Clayton Homes, Senior Litigation Counsel, **Jeff Stoneking,** DSI (e-Discovery Consultant) and **Jay Moneyhun,** Egerton, McAfee, Armistead & Davis (Moderator). Join us for a panel discussion regarding practical solutions to the increasing problems (and costs) faced by companies dealing with the issue of electronic discovery.
Approved for 1 Hour of Dual CLE Credit. Please see the attached CLE insert to register.

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[1] *See Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.,* 621 F. Supp. 2d 1173, 1191 (N.D. Utah 2009).
[2] *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs.,* 685 F. Supp. 2d 456, 465 (S.D.N.Y. Jan. 15, 2010).
[3] *See United States v. O'Keefe,* 537 F. Supp. 2d 14, 24 (D.D.C. 2008).
[4] *Nat'l Day Laborer Organizing Network v. United States Immigration & Customs Enforcement Agency,* No. 10 Civ. 3488 (SAS), 2011 WL 381625, at *6 (S.D.N.Y. Feb. 7, 2011), withdrawn (S.D.N.Y. June 17, 2011).

By: Taylor A. Williams
Paine, Tarwater & Bickers

THE STATE OF STUDENT LOANS

It is probably an understatement to say that writing an article about ballooning student loan debt is akin to beating a dead horse. And while postmortem equine thrashing is a practice with which I am unfamiliar, the issue of student loan debt is something I have seen my generation of lawyers deal with on a daily basis. At the outset, I do want to be clear that this article is not an attempt to air grievances about the cost of education or to provide political commentary on the student loan industry. Instead, as the title of this column suggests, this article is intended to merely present the issue of how the "State of the Profession" is affected by new lawyers beginning their practice saddled with seemingly insurmountable debt in the face of an uncertain legal marketplace.

The primary justification behind the liberal issuing of student loans, regardless of the industry, is the idea that whatever degree is obtained, the resultant salary will eclipse any debt and provide an avenue for repayment. In August of this year, NALP, the National Association for Law Placement, released an article reviewing legal salaries from the graduating legal class of 1991 through the graduating legal class of 2011.[1] In 1991, 40% of starting legal salaries were between $30,000 and $40,000; with a median salary of $40,000. At that time, "big firm" salaries of $70,000 or more only accounted for 6% of all starting jobs. By 2009, the last year before the effects of the economic downturn were felt, aggressive hiring by the "big firms" and the prevalence of the $160,000 "big firm salary" had skewed average salaries and hiring statistics for new lawyers upwards, causing the legal profession to appear to potential law students as a veritable goldmine. By 2011, however, the percentage of "big firm" salaries dropped, and salaries between $40,000 and $65,000 grew in prevalence, accounting for 52% of jobs. As of last year, the median salary for 2011 was $60,000. While NALP's numbers are based upon survey of approximately 20,000 new hires, it is possible that such numbers may not accurately reflect the Knoxville market. However, a review of the University of Tennessee's and the University of Memphis's employment statistics for the past few years gives some credence to NALP's numbers.[2]

From 1991 to 2011, the median salary for starting attorneys only increased 50% from $40,000 to $60,000, even with the influence of the $160,000 "big firm" starting salary. During this same time period, the rate of inflation was approximately 65%.[3] Accordingly, a $40,000 salary in 1991 would be equal to a $66,000 salary in 2011. Thus, strictly due to inflation, the practice of law provides starting attorneys with 15% less purchasing power than was available 20 years ago.

The fact that median salaries have failed to increase one-to-one with rate of inflation is only compounded by the increase in the cost of a legal education during this same time period. In 1991, an in-state student could attend the University of Memphis (or Memphis State) Cecil C. Humphreys School of Law for $2,370 a year. Also in 1991, an in-state student could attend the University of Tennessee College of Law for $2,228 a year. Twenty years later, a year's tuition in Memphis is $13,943, and a year's tuition in Knoxville is $14,044. Note that these numbers are strictly the "Maintenance Fee" and that both schools charge various fees which significantly increase the year costs. This twenty-year comparison demonstrates a 488% increase in tuition at the University of Memphis Cecil C. Humphreys School of Law and a 530% increase in tuition for the University of Tennessee College of Law. Based upon my personal and very unscientific survey of other state schools, it appears that the increases at both schools are in line with increases at other state schools.

Based upon these figures, a Tennessee state law grad from the Class of 1991 could expect a $6,600 debt load and an average salary of around $40,000. Thus, the graduate's law school debt would account for 16.5% of his or her starting salary. Twenty years later, this same graduate would have paid or borrowed approximately $39,000 over three years for tuition and could expect to obtain a salary around $60,000. Thus, the graduate's law school debt would account for 65% of his or her starting salary. Keep in mind that these numbers only reflect tuition. The actual costs of attending school, including books, room and board, and other various expenses, are much greater. Memphis and Knoxville estimate the total cost for a single year to be $33,067 and $36,996, respectively.[7] If these numbers are accurate, the actual cost of a legal education from a state school in Tennessee dances around six figures.

So how are these numbers affecting starting attorneys and thus, the "State of the Profession"? Although I cannot provide a definitive answer, I think it would be difficult to argue that these statistics have no affect on the morale of starting attorneys. The payment of lofty student loans puts financial stress on starting lawyers, which likely decreases overall satisfaction with the profession. Additionally, law school applications have significantly declined during the recession likely due to the increased cost of education and turmoil in the legal market.[8] Some law schools have even resorted to negotiating on tuition and providing scholarships to every student. Thus, for better or worse, there is little question that rising education costs and ballooning student loan debt are affecting and will continue to affect the "State of the Profession" in the foreseeable future.

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[1] Collins, Judith N., *NALP Research: Salaries for New Lawyers: An Update on Where We Are and How We Got Here,* NALP BULLETIN (August 2012), available at http://www.nalp.org/uploads/0812Research.pdf.

[2] Five-Year Graduate Employment Profile, http://www.law.utk.edu/administration/careers/salary-survey.shtml (last visited Oct. 10, 2012). Employment Statistics – Class of 2011 Employment within Nine Months of Graduation, http://www.memphis.edu/law/futurestudents/pdfs/2012_13factsheet.pdf (last visited Oct. 11, 2012). Employment Statistics – Class of 2010 Employment within Nine Months of Graduation, http://www.memphis.edu/law/futurestudents/pdfs/Fall11FactSheet.pdf (last visited Oct. 11, 2012).

[3] Consumer Price Index, U.S. Department of Labor Bureau of Labor Statistics, ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (last visited Oct. 10, 2012).

[4] Annual Maintenance Fees and Out-of state Tuition Schedule 1972-73 Through 2011-2012, Tennessee Board of Regents, http://www.tbr.edu/uploadedFiles/TBR_Offices/Office_of_Business_and_Finance/Programs_and_Services/Tuition_and_Fees/2011-2012_Tuition_and_Fees/Tuition%20chart%201972%20forward.xlsx (last visited Oct. 10, 2012).

[5] The University of Tennessee, Knoxville: Tuition & Fees, Academic Term Rates, http://web.utk.edu/~dfinance/docs/FEEHIST.pdf (last visited Oct. 10, 2012).

[6] For its 2012-2013 class, the University of Memphis Cecil C. Humpreys School of Law estimates tuition and fees at $16,854. Estimated Tuition & Costs, http://www.memphis.edu/law/futurestudents/cost.php (last visited Oct. 10, 2012). For its 2012-2013 class, the University of Tennessee College of Law estimates tuition and fees at $17,678. Tuition & Fees, Estimated Expenses, http://www.law.utk.edu/administration/expenses.shtml (last visited Oct. 10, 2012).

[7] *See supra* note 6.

[8] Phipps, Chelsea, *More Law Schools Haggle on Scholarship,* WALL STREET JOURNAL, Jul. 30, 2012, at B4.

Grief Insurance:

The Tennessee Supreme Court takes on Negligent Infliction of Emotional Distress Claims and Uninsured Motorist Coverage

The relatively recent emergence of the tort of negligent infliction of emotional distress ("NIED") has provided Tennessee tort lawyers with an interesting and tricky framework with which to evaluate claims by individuals who suffer little or no injury in a given accident but nonetheless either witness someone else suffer a serious injury or witness the immediate aftermath of that injury. These so-called "bystander" NIED claims have taken on a new wrinkle with regard to uninsured/underinsured motorist ("UM")[1] coverage in that the Tennessee Supreme Court has now addressed two "bystander" claims against a UM carrier with starkly different results.

The first notable decision involving bystander NIED claims and UM coverage came in 2008 when the Court handed down its ruling in *Eskin v. Bartee.* The *Eskin* case stemmed from an incident in which Brendan Eskin, one of his parents' three minor children, was seriously injured when he was struck by a minivan while waiting outside his Memphis elementary school.[2] His mother was not present at the accident scene, but received a telephone call from her neighbor who had been charged with picking up Brendan and was told only that her son had been hurt. Not realizing the severity of either the accident or her son's injuries, Ms. Eskin went to the school with her other minor son only to discover Brendan "lifeless" and "lying on the pavement in a pool of blood."[3] Ms. Eskin and her uninjured minor son eventually filed suit against the driver of the minivan, Shelby County, and the Shelby County Board of Education, and served their UM carrier with process pursuant to the UM statute. The Eskins' UM carrier, in turn, filed a motion for summary judgment arguing that its insureds could not recover under an NIED theory because the Eskins "did not observe the accident occur through one of . . . their senses."[4]

The Tennessee Supreme Court disagreed, and after outlining the history of NIED claims in this State, concluded that the Eskins had in fact stated a valid cause of action despite lacking "sensory observation" of the accident itself. The Court held that "[w]hen a plaintiff did not witness the injury-producing event, the cause of action for negligent infliction of emotional distress requires proof of the following elements: (1) the actual or apparent death or serious physical injury of another caused by the defendant's negligence, (2) the existence of a close and intimate personal relationship between the plaintiff and the deceased or injured person, (3) the plaintiff's observation of the actual or apparent death or serious physical injury at the scene of the accident before the scene has been materially altered, and (4) the resulting serious or severe emotional injury to the plaintiff caused by the observation of the death or injury."[5] While noting that the development of NIED common law in Tennessee had been "neither smooth nor linear," the Court also noted that "[t]he courts have not hesitated to permit the recovery of damages for negligent infliction of emotional distress when justice and fairness require it," and that the "the direction of the development of the law in the United States relating to negligent infliction of emotional distress claims has been to enlarge rather than to restrict the circumstances amenable to the filing of a negligent infliction of emotional distress claim."[6]

Importantly, the UM carrier in *Eskin* does not appear to have argued that its insureds could not recover under their UM policy because of any particular exclusion or coverage limitation within the policy itself; rather, the carrier argued that the Eskins had simply failed to state a legally cognizable right of action based on the Tennessee Supreme Court's prior holdings in *Camper v. Minor* and *Ramsey v. Beavers* which emphasized the "plaintiff's physical location at the time of the . . . accident and awareness of the accident" as part of a "general negligence approach" to foreseeability of the emotional harm.[7] In expanding the *Camper* rule regarding the criteria for NIED recovery, the Court thus only created a means by which the Eskins and other similar NIED claimants could potentially become "persons insured under [a UM policy] who are legally entitled to recover compensatory damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting from injury, sickness or disease" and potentially recover UM benefits pursuant to Tenn. Code Ann. § 56-7-1201(a).[8]

The *Eskin* decision at least partially set the stage for the Tennessee Supreme Court's May 2012 decision in *Garrison v. Bickford.*[9] The *Garrison* case arose from yet another tragic incident in which eighteen-year-old Michael Garrison was fatally struck by a car while riding a minibike near his home. The decedent's parents and younger brother heard, but did not see, the fatal collision, and arrived at the accident scene to find that Michael was "barely breathing [and] blood [was] flowing everywhere."[10] The Garrisons eventually filed wrongful death and NIED claims against the driver and owner of the vehicle which struck their son. They likewise served their UM carrier with process. Because the Garrisons heard the collision (i.e. had at least some sensory perception of the fatal event), it is certainly possible that their NIED claim would have been viable under the older *Ramsey v. Beavers* rule or the expanded cause of action outlined in *Eskin.* Regardless of whether the Plaintiffs

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David A. Chapman
Leitner, Williams, Dooley & Napolitan, PLLC

actually heard the collision which claimed their son's life, however, the Court's opinion in *Garrison* indicates that the Plaintiffs stated a valid claim for NIED against the driver of the car involved in the accident.[11]

The *Garrison* Court instead focused on the UM carrier's argument that although the Plaintiffs had stated a valid NIED claim, the UM policy itself did not provide coverage for the Plaintiffs' emotional distress damages because those damages fell outside of the definition of "bodily injury" contained within the policy.[12] The policy issued to the Garrisons defined "bodily injury" as "bodily injury to a person and sickness, disease, or death that results from it." In addition to arguing that this definition included emotional distress damages, the Garrisons argued, in the alternative, that the policy definition of "bodily injury" was more restrictive than the minimum coverage standard established by Tenn. Code Ann. § 56-7-1201(a) and, thus, the statute superseded the policy language.[13] The Court noted that while Tenn. Code Ann. § 56-7-1201(a) requires that UM policies provide coverage for damages incurred "because of bodily injury, sickness or disease, including death, resulting from injury, sickness or disease," neither the policy definition of "bodily injury" nor the statutory language "include damages for a mental or emotional injury by itself."[14] Holding that the phrase "bodily injury to a person and sickness, disease, or death that results from it" as used in the policy and "bodily injury, sickness or disease, including death" as used in the statute were both unambiguous, the Court concluded that both phrases "refer to physical, not emotional, conditions of the body."[15] In so holding, the Court observed that "it is now generally accepted that '[e]motional harm is distinct from bodily harm and means harm to a person's emotional tranquility' " and that "[t]his definition 'is meant to preserve the ordinary distinction between bodily harm and emotional harm.' "[16] The Court accordingly held that the UM policy did not provide coverage for the Garrisons' undoubtedly significant emotional distress damages.

The *Garrison* Court also interestingly noted that "[t]he majority of courts facing the question in various contexts have concluded that 'bodily injury' does not include mental or emotional harm absent a physical injury to the insured."[17] The Garrisons' case, however, would likely have been no different had they suffered some minor physical injury as a result of the accident which claimed their son's life. In *Flax v. DaimlerChrysler Corp.,* for example, the

Court noted that NIED damages such as those suffered as a result of witnessing the death of a child do not become "parasitic" to a personal injury claim just because a plaintiff suffers some form of actual physical injury.[18] The logical extension of *Garrison* is that had the Plaintiffs suffered some type of minor physical injury, they could not lump their physical and emotional injuries together in an attempt to bring both claims within the purview of "bodily injury" under their UM policy.

In the end, while *Eskin* provides an additional means by which a "bystander" may assert an NIED claim, *Garrison* affirms that "[n]otwithstanding any other law to the contrary, an insurer may exclude coverage pursuant to a contractual agreement; provided, that the exclusion complies with" the statutory scheme governing insurance contracts in Tennessee.[19]

[1] For the sake of simplicity, the authors refer to uninsured/underinsured coverage mandated by Tenn. Code Ann. § 56-7-1201, *et. seq.* as "UM" coverage.
[2] *Eskin v. Bartee*, 262 S.W.3d 727, 730-31 (Tenn. 2008).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 739-40.
[6] *Id.* at 734, 738.
[7] *Id.* at 736 (citing *Camper v. Minor,* 915 S.W.2d 437, 446 (Tenn. 1996); *Ramsey v. Beavers,* 931 S.W.2d 527, 529-31 (Tenn. 1996)).
[8] Tenn. Code Ann. § 56-7-1201(a) (2008).
[9] *Garrison v. Bickford,* No. E2010-02008-SC-R11-CV, 2012 WL 3590444 (Tenn. May 8, 2012).
[10] *Id.* at *1.
[11] *Id.* at *4 ("Nor is there any question, for purposes of this appeal, that the Garrisons were entitled to pursue negligent infliction of emotional distress claims against Andy Bickford, the driver of the vehicle that struck the deceased. Thus, this is not a case that requires us to address the parameters of the tort of negligent infliction of emotional distress as we have done a number of times before.").
[12] The policy likewise contained coverage limits of $100,000 for "Each Person," and the carrier had paid the Garrisons $75,000 following their settlement of their wrongful death and NIED claims against the driver of the vehicle for $25,000 each. The UM carrier thus argued that the Garrisons' emotional distress damages fell within the "Each Person" limit applicable to the decedent, and that the policy limits had accordingly been exhausted.
[13] *Id.* at *5 (citing *Christenberry v. Tipton,* 160 S.W.3d 487, 492 (Tenn. 2005) ("[I]f the terms of an automobile insurance policy fail to comport with the statutory requirements, then the statute takes precedence, supersedes the conflicting policy provisions, and in effect becomes part of the insurance policy itself.").
[14] *Garrison,* 2012 WL 3590444 at *8.
[15] *Id.* at *8.
[16] *Id.* at *9 (citations omitted); cf. Tenn. Code Ann. § 29-39-101(2) (2011) (including "physical and emotional pain" within the definition of "noneconomic damages")
[17] *Id.* at *5.
[18] *Flax v. DaimlerChrysler Corp.,* 272 S.W.3d 521, 530 (Tenn. 2008) ("[T]he emotional injuries alleged by Ms. Sparkman are not parasitic to the minor injuries she sustained in the accident but rather are the result of witnessing the death of her child. Even if Ms. Sparkman had chosen to bring a claim for her minor physical injuries, her NIED claim would remain a 'stand-alone' claim because the emotional injuries sustained from witnessing the death of her child are completely unrelated to any physical injuries she may have sustained.").
[19] *See* Tenn. Code Ann. § 56-7-121 (1995) ("Notwithstanding any other law to the contrary, an insurer may exclude coverage pursuant to a contractual agreement; provided, that the exclusion complies with this title."); *Purkey v. American Home Assurance Co.,* 173 S.W.3d 703, 708 (Tenn. 2005) ("By stating that section 56-7-121 controls 'notwithstanding' any contrary provisions, the Legislature clearly intended for this provision to trump all others.").

Snapshots

CHILDHELP VISIT

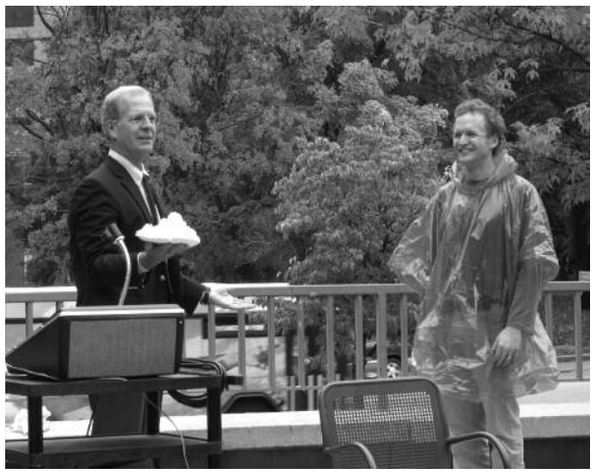
Members of the KBA's Unmet Legal Needs of Children Committee met on August 9th with Hugh Nystrom, the Director of Program Operations & Development at Childhelp Tennessee. Committee members toured the Childhelp facility to learn more about how their agency serves children in our community. Pictured left to right: **Hugh Nystrom,** Childhelp; **Kati Goodner,** Paine Tarwater & Bickers; **Cheryl Rice,** Egerton McAfee Armistead & Davis; **Wynne Caffey,** Ramsey Elmore Stone & Caffey; and **Charlotte Tatum,** Egerton McAfee Armistead & Davis.

CORNHOLE THROWDOWN

The Barristers Hunger & Poverty Relief Committee Fundraiser for Charity Cornhole Throwdown was held on Saturday, October 6, 2012. More than $1,100 was raised for CASA and Wesley House. Congratulations to our winners!

PRO BONO FALL FESTIVAL

The Second Annual Pro Bono Fall Festival was held on October 9th at the U.T. College of Law. A silent auction was held featuring great food that was donated from generous sponsors such as Chipotle and Mellow Mushroom. There was also an auction for students to bid on an opportunity to pie their professors in the face. However, if the professor doubles the bid, they can pie the bidder in the face. Thanks to generous support from students and faculty, we were able to raise approximately $4000 for our Pro Bono programs, specifically our Alternative Spring Break where many students travel around the South helping indigent clients through various programs. Last year's ASB students went to Fort Campbell to help JAG officers assist indigent clients on the base.



By: Richard Gaines
LMU Duncan School of Law

THE STOLEN VALOR ACT:
Patriotism and The Law

When practicing law in the constitutional field, sometimes patriotism comes in strange forms. The Stolen Valor Act is an attempt by our Congress, no doubt also by many good meaning people who lobbied for the act, to restrict the false claims of people who misrepresent they received our Nation's highest medals of honor. Title 18 U.S.C.A. § 704 made it a crime for anyone who claims, in any way, that they have been awarded a decoration or medal authorized by Congress when in fact they have not. The statute also enhances penalties for persons who claim falsely that they received the Congressional Medal of Honor, with lesser enhancements for those who falsely claim that they have received the Air Force Cross, the Navy Cross, or a Purple Heart. The statute made these claims punishable by six (6) months in prison, or for the enhancement, one (1) year.

In times of war or peace, a statute like this is meant to shore up the patriotism of our veterans and attack those who would falsely claim honors in which they never received. Xavier Alvarez was such a person: a California resident, and a habitual liar. Alvarez was a board member on the Three Valley Water District Board of Clairmont, California. During his first public meeting, he stated the following: "I am a retired Marine of twenty-five (25) years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." All of these claims were false. None of these claims were made for the purposes of gaining employment, or benefits, or any kind of pecuniary gain at all. They were made purely in an attempt to gain respect.

Alvarez was charged with a violation of 18 USC § 704(b). Alvarez pled guilty in the United States District Court for the Central District of California, but he preserved his right to appeal his claim that the Stolen Valor Act violated the First Amendment of the United States Constitution.

Anyone who practices law, and many who do not, know that the First Amendment is a strange piece of jurisprudence. Our forefathers, foreseeing the day that this country would need a vent, made freedom of speech the *First* Amendment. The First Amendment often protects things that are directly in contravention to many of the very beliefs that make this country great. Hate speech, symbols of slavery, and criticism of our leaders or our warriors during war are all protected by the First Amendment. In my criminal defense practice, I defended the Fourth, Fifth, Sixth, and Eighth Amendments, generally, but rarely did I ever get a chance to use the First Amendment in the defense of the criminally accused. Mr. Alvarez had that chance.

The United States Court of Appeals for the Ninth Circuit, in a divided panel, found the act invalid under the First Amendment, and reversed Mr. Alvarez's conviction. The Court refused to hear the case *en banc* in 2011. As is often the case, another circuit, the Tenth Circuit, found that The Stolen Valor Act was, in fact, *constitutional. United States v. Strandlof,* 667 F.3d 1146 (2012). As any Supreme Court scholar knows, a Federal Circuit split is perhaps the surest way for the United States Supreme Court to take a Writ of Certiorari, and in fact, the Court did.

It was without dispute that Mr. Alvarez made false statements regarding his possession of a Congressional Medal of Honor. Neither side argued that point. Instead, the question was whether his lie was protected speech. The government argued that false speech was not protected under the First Amendment. The government cited some examples, including 18 USC §1001, which makes a crime a false statement or communication to government officials in communications concerning official matters. It can be difficult to prove, but it is a tool the government knows very well. The government also argued that perjury was not protected speech. A false statement made under oath is not protected under the law. As the Supreme Court pointed out, however, perjury is not a crime because the statements are false, but because the false statement undermines the "function and province of the law and threatens the integrity of judgments." Finally, the government pointed to statutes that make a crime for a person to attempt to represent that they are government officials or government agents. The Supreme Court found that unpersuasive. In *United States v. Alvarez,* 132 S.Ct. 2537 (June 28, 2012), the United States Supreme Court found that the Stolen Valor Act was unconstitutional in the section that prohibits persons who claim falsely that they have been awarded a decoration or medal authorized by Congress for the Armed Forces of the United States.

The Supreme Court acknowledged that the government has a strong, compelling interest in protecting persons who received our Nation's highest medals. The Court refused, however, to grant the government the broad powers the Stolen Valor Act appears to provide it. Stating that the compelling interests "do not satisfy the government's heavy burden when it seeks to regulate protective speech," the Supreme Court found that "the remedy for speech that is false is speech that is true...[t]his is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight out lie, the simple truth." *Alvarez,* 132 S.Ct. 2550. The Supreme Court also stated that when the government seeks to regulate protective speech, the restriction must be the "least restrictive means available, effective alternatives," and that the community's expression of outrage toward Alvarez was a societal self-enforcement of the lies of Mr. Alvarez.

The Stolen Valor Act is an example of one of those things that sounds like a good idea. As a son of a retired Air Force colonel, and now as a law professor who sees many students going to war on a semester basis, my first reaction to hearing about the Stolen Valor Act when it was enacted was "that's a darn good idea." Why should we allow somebody who's never served or taken arms to claim that they have? Why should we allow someone to claim that they have the Congressional Medal of Honor when they don't? These lies dishonor the men and women who have received these medals and honors. Whether the Supreme Court was right or wrong on a moral sense, or even in my opinion, is not really the point. The First Amendment is the first bulwark of the society to protect itself against government intrusion. The staunchest conservative and the liberalist democrat all agree on that, if nothing else. While I hate there are people lying about honors and going unpunished in the legal system, I firmly believe that the greater protection should go to the First Amendment and that we should keep that amendment as strong as possible. Sometimes patriotism is hard to find in the legal field, and in this case, it appears ironic. But you don't have to look very hard to find it here as well.

Postscript:

On September 14, 2012, the House of Representatives passed an amended version of the Stolen Valor Act, narrowing the restriction to those who lie about service medals to gain a benefit or pecuniary award. The Senate has yet to act on this bill.

barrister bullets

EVERYONE INVITED TO BARRISTERS MONTHLY MEETING

Join us for the next Barristers Meeting on Wednesday, November 14, 2012, at 5:00 p.m. at the Bistro (807 South Gay Street). Everyone is welcome to attend. There are many opportunities to get involved, so please contact Barristers President **Josh Bond** at jbond@hdclaw.com for more information.

HUNGER & POVERTY RELIEF COMMITTEE

The Barristers Hunger & Poverty Relief Committee Fundraiser for Charity Cornhole Throwdown was held on Saturday, October 6, 2012. More than $1,100 was raised for CASA and Wesley House. See photos on page 16. The Hunger & Poverty Relief Committee will be sponsoring a Coats for the Cold drive November 1 through November 16. Please see the insert for details on drop-off locations. If you are interested in becoming involved with the Hunger & Poverty Relief Committee or would like more information, please contact **Scott Griswold** at 525-0880 or **Adam Moore** at 521-5274.

BARRISTERS ANNUAL MEETING AND ELECTIONS

The Barristers' Annual Meeting and elections will be held on Wednesday, December 12, 2012 at the Bistro at 5:00 p.m. All Barristers-eligible lawyers are invited to attend.

The following offices for the 2013 bar year are open for nominations:

- Vice President
- Secretary/Treasurer
- (2) At-Large Executive Committee seats

Please notify **Marsha Wilson** at 522-6522 or mwilson@knoxbar.org if you would like to nominate someone or are interested in running for a Barristers office.

ACCESS TO JUSTICE COMMITTEE

The Barristers' Access to Justice Committee is seeking volunteers to serve on the committee. The Barristers' Access to Justice Committee's mission is to facilitate and encourage the KBA Barristers in their efforts (1) to ensure access to the justice system by all persons without regard to income; and (2) to provide direct pro bono service to low-income persons in our community through participation in various community initiatives. Volunteer for the following Saturday Bar dates by contacting **Terry Woods,** Pro Bono Project Director. *Knox County Saturday Bar* - November 10; December 1. *Blount County Saturday Bar;* November 10; December 1. For more information about the Barristers' Access to Justice Committee, please contact **Troy Weston** at 544-2010 or tweston@ebtlaw.com.

VOLUNTEER BREAKFAST

The Volunteer Breakfast Committee would like to thank **Josh Bond** *(Hodges, Doughty & Carson, PLLC)* and **Kati Goodner** *(Paine, Tarwater, and Bickers, LLP)* for helping with August's breakfast. Thank you also to **Kristina Chuck-Smith** *(Cohen & Chuck-Smith, PLLC)* and **Jay Moneyhun** *(Egerton, McAfee, Armistead & Davis, P.C.)* for helping with September's breakfast. The Volunteer Breakfast Committee is seeking to serve breakfast at the Volunteer Ministry Center on the fourth Thursday of the month. Contact **Sheila Needles** (292-0000 or sheila.needles@gmail.com) or **Will Kittrell** (546-0500 or wkittrell@emadlaw.com) to get involved.

WORD PLAY

By: Peter D. Van de Vate
Law Office of Peter D. Van de Vate

"Knock wood"

How many times have we heard that? ("The jury should return a verdict for us, knock wood.")

It seems that as far back as time remembers human mythology has held the belief that gods, spirits, resided in trees. The Greeks worshipped the oak as it was sacred to Zeus, the Celts believed in tree spirits; both believed that touching a sacred tree would bring good fortune. The Irish would touch a tree to thank a leprechaun for a bit of luck. Most cultures have woven "dendrolatry" into their spiritual fabric in some way.

The Christian tradition has coopted many traditions from a pagan past and some think that knocking wood for luck evolved into to knocking on wood as looking to the wooden cross for good fortune.

A Jewish reference traces the origin of knocking wood back to the Spanish Inquisition of the 15th century. Persecuted Jews often fled to synagogues (presumably built of wood) and would deliver a coded knock to gain entrance and refuge. Hence knocking on wood saved a life, certainly a good fortune.

Other examples of trees featured in mythology are the Banyan and the peepal (*Ficus religiosa*) trees in Hinduism, and the modern tradition of the Christmas Tree in Germanic mythology, the Tree of Knowledge of Judaism and Christianity, and the Bodhi tree in Buddhism. In folk religion and folklore, trees are often said to be the homes of tree spirits. Historical Druidism as well as Germanic paganism appear to have involved cultic practice in sacred groves, especially the oak. The term *druid* itself possibly derives from the Celtic word for oak.

By: Judy M. Cornett
Associate Professor
University of Tennessee College of Law

WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE

When I practiced law, I would return from lunch and find my slot in the little plastic carousel on the receptionist's desk stuffed full of those little pink phone message slips. Most of those slips represented calls from clients. What went through my mind on those occasions?

It depended on the client. We all have those dream clients who respond promptly to our requests for information, call us to report legally significant events, and otherwise leave us alone. We all have those clients who call us incessantly, seeking status reports or conveying trivial bits of information or just sharing their feelings. And some of us – especially those who represent the poor and downtrodden – have clients whom we can't contact because they don't have phones, computers, handheld devices, or even a stable address. Instead, they have a cousin with a phone, or sometimes access to a friend's cell phone, or sometimes a place to stay overnight. Sometimes they check in with us, sometimes they don't.

What are our duties to all of these clients? Tennessee Rule of Professional Conduct 1.4 provides as follows:

(a) A lawyer shall:
  (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
  (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  (3) keep the client reasonably informed about the status of the matter;
  (4) promptly comply with reasonable requests for information; and
  (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

It is crucial to "reasonably consult with the client," to "keep the client reasonably informed," and to "promptly comply with reasonable requests for information." As one member of a Board of Professional Responsibility hearing panel once told me, "We may not find a violation on the underlying substantive charge, but we will probably find a violation based on the failure to communicate." This year's disciplinary statistics bear that out. From January 1 through October 3, 2012, there were 65 disbarments, suspensions (other than temporary suspensions), or censures issued by the Board of Professional Responsibility. Of those 65 cases, 26 (40%) were based in part on violations of Rule 1.4.

How does a lawyer comply with Rule 1.4? According to Comment [3] to the Rule, "paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation." As a practical matter, this requirement means that a lawyer should provide clients with copies of pleadings or other litigation or transaction documents. One Tennessee lawyer was disciplined last year in part because she "failed to provide her clients with copies of pleadings she prepared on their behalf." *See* Tennessee Board of Professional Responsibility, "Memphis Lawyer Suspended," Aug. 2, 2012. But the Comment also clearly does not require the lawyer to copy the client on every piece of correspondence; in the typical case, not every letter or email constitutes a "significant development" in the representation.

Keeping the client informed also means that lawyers must deliver bad news to their clients, such as the denial of a motion, dismissal of a case, or an unsuccessful appeal. Because it isn't pleasant to be the bearer of bad news – especially when the lawyer's performance itself may be implicated in the adverse decision – lawyers sometimes delay or totally fail to inform clients of bad news. But this can be disastrous, because it can lead to even more adverse consequences, such as missing a deadline for appeal. Last year a Tennessee lawyer was censured in part because he "failed to notify his client that the notice of claim was denied and that the lawsuit was dismissed." *See* Tennessee Board of Professional Responsibility, "Hamilton County Lawyer Censured," April 16, 2012. A cover letter or phone call can contextualize the bad news for the client. You may be fired, but that's better than being reported to the Board for failing to keep the client informed.

Perhaps the most vexing aspect of client communication is those phone calls and emails. But in addition to keeping the client informed, the lawyer has a duty to "promptly comply with reasonable requests for information," including those "What's happening on my case?" inquiries. Comment [4] to Rule 1.4 advises:

> A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. *Client communications, including telephone calls, should be promptly returned or acknowledged.* (Emphasis added).

Returning phone calls and emails consumes time and energy – that's why it's acceptable to bill your time in doing so, and to let your clients know up front that you will be billing them for your time in responding. Notice that Comment [4] also endorses the common practice of handing the message off to a staff member to handle. So call your client back or have a staff member respond to those messages, but don't just ignore the client communications. The Board of Professional Responsibility recently censured a lawyer in part because "[h]e failed to return numerous messages." *See* Tennessee Board of Professional Responsibility, "Hamilton County Lawyer Censured," April 16, 2012.

Finally, it's important to document how you respond to client communications, and in the case of clients who are hard to reach, how you attempt to reach those clients in order to consult with them and keep them reasonably informed, as required by Rule 1.4. When I was in practice, I used to staple those pink slips to a legal pad sheet and write beside the pink slip how I responded to it. I often had several pink slips on one sheet of paper, with "returned call, no answer" written beside each one. Similarly, when I tried to contact a homeless client, I would actually write a narrative of who I called, the person I spoke with, and the message I left. Those records of my compliance with Rule 1.4 went into the clients' files.

These days, when voice mail shows up on your email screen, and with email, texting, and videoconferencing, an electronic record can be kept of client communications and your responses to them. Your firm may have a policy on storing electronic records, or you may develop one yourself. But you need a dependable, secure, confidential way of keeping the proof of your compliance with Rule 1.4 so that when a client complains that you violated your duty to "reasonably consult," "keep the client reasonably informed," and "promptly comply with reasonable requests for information," you'll have the proof you need.

Knoxville Bar Association Annual Memorial Service

Friday, November 16, 2012
3:00 p.m.
Tennessee Supreme Court Courtroom
505 Main Street, 2nd Floor

Dennis L. Babb
Lawrence R. Dry, Jr.
Jay Arthur Garrison
Jo Helm
Robert Shields Holland
Carolyn Faye Jeter
Col. Charles David Lockett
Barbara Stearns Maxwell
Sharon Ann Murphree
Ann Kirby Nigro
Laura Jane Rule
John Edgar (Ed) Schmutzer
William Freel Searle, III
Donald Ray Sproles
Gene Augustus (Chip) Stanley, Jr.
Sarah Dunn Ward

We gather, not for the purpose of grieving, but rather to celebrate the careers of, and to honor, applaud, and express our gratitude to, those members of the Knoxville bar who passed away in the last year.

Join us as we remember our colleagues who have passed away. The service will be led by The Honorable Gary R. Wade, The Honorable Sharon G. Lee and Rev. Charles W.B. Fels.

By: Jason Long
London & Amburn

Civics 101

I thought I had come up with a great idea for this month's Dicta article. In anticipation of the upcoming general election, I was going to write about the woeful state of civics education of our electorate. Jim London showed me an article about two months ago referencing a poll taken that showed the majority of Americans could not name the Chief Justice of the United States Supreme Court and indicating that over 60% of Americans could not name the three branches of our federal government (among the popular guesses of that 60%, a number said that the three branches were democrat, republican and independent . . . sigh). The article was going to be chock full of numerous similar surprising statistics and would humorously poke fun at how ill informed we are as a country as we head to the polls to elect our next Commander in Chief. Alas, the more research I did, the more despondent I became about the whole project. It is shocking, to say the least, the lack of education among the general populace today.

While less than 40% of our countrymen know that the federal government is divided into an executive, legislative and judicial branch, over half of our country can name at least four characters on the Simpsons. Only one in seven Americans can locate Iraq on a map (and this is a map where the word "Iraq" is printed on the country). Twenty four percent cannot name a single right guaranteed by the First Amendment. Fifty two percent did not know there are 100 U.S. Senators. Twenty nine percent can not name the Vice President and 73% percent could not say why we fought the cold war. Sadly, our ignorance has been handed down to the next generation. Among a sampling of 1000 college students, the average score on a basic civics test was 54 out of 100. Fourteen percent of seventeen-year-olds believed that Abraham Lincoln wrote the Bill of Rights. For those interested in fact checking these glum statistics, please feel free to contact me for my list of sources (I actually did some research on this topic. Brevity prevents disclosing all of my sources here, plus that would go against the tradition of this column to write unsupported information and leave the reader to wonder whether I made it up). On a side note, I discovered that one in five Americans believe that the sun orbits around the earth. Really? Haven't we already settled this one?

Our lack of education and unreasonable expectations has led to a lack of confidence in our leaders.

Where does this lack of basic knowledge leave us when it comes to selecting the leaders of our country? We complain about politics as usual and lament that we cannot find leaders who can "fix" the country. However, I believe that lack of education is a primary source of our frustration. Americans expect our politicians to accomplish things that are impossible and become angry when they cannot deliver. We demand that the President present a balanced budget that reduces the national debt while at the same time maintaining our current spending on Social Security and Medicare and not raising taxes. When asked, a majority of Americans believe this can simply be done by reducing waste and cutting aid to foreign countries, which, on average, Americans estimate to constitute 29% of our budget. In fact, foreign aid comprises less than 1% of the federal budget and, while I agree that waste exists in our current federal spending, it is nowhere near the 50% of our budget many Americans believe and is not the cure all for our economic woes.

As a result of these unreasonable expectations, our leaders are required, in order to get elected, to make promises they cannot keep. President Obama tells us that he will only raise taxes on the wealthy and maintain current social spending levels while Governor Romney is going to kill off Big Bird and we all praise them for coming up with the magic bullet that will save our economy. In the end, neither promise will cure the problem and our debt keeps skyrocketing.

It is easy to sit here, as an attorney, and think that the pervasive ignorance of civics and our government is an ailment of only the great unwashed who have not been trained to understand how things actually work. Sadly, I have to acknowledge that I fall prey to the ignorance as well. Four years ago, I thought Barack Obama represented a real change to politics as usual. He spoke of transparency in government and sounded to me like a man who would usher in a new era of politics. I admit, I bought into the illusion. I like to think that President Obama was being honest about what he thought he could do once elected and only changed course when political reality forced him to. In any event, four years later, I am disappointed that the transparency he promised has not been realized. But I shouldn't be. None of us wants to see how the sausage is made. In a country this large, total transparency can only lead to gridlock and frustration. Intellectually, I know that a certain amount of governance must occur behind closed doors on a need to know basis only, both for civil and foreign stability and safety. I shouldn't judge our President for my own unreasonable expectations.

I don't blame our politicians. They are only playing the game we have created. Our lack of education and unreasonable expectations has led to a lack of confidence in our leaders. By and large, our public servants are good people legitimately attempting to find solutions, we have simply made the game unwinnable for them and we lament the leaders of the past who could accomplish great things in a simpler time when our electorate was better educated.

You can see the problem with my original idea for this article. It isn't funny. Still, I didn't want to waste the research I had done so I wrote it anyway. I, for one, am resolving to better educate myself as I approach this election. Moreover, I think we as attorneys should pledge to redouble efforts at civics education in the electorate. This is a cause attorneys can fight for. Whether democrat, republican or other, we should all be able to agree that a citizenry that better understands our government will lead to a better government. It is a constant, like the earth orbiting the sun.

The Knoxville Barristers

are hosting an informal cocktail hour to meet the

New Admittees of the Bar

Monday, November 5, 2012
The Speakeasy on the 2nd floor of
The Preservation Pub

Help us welcome our newly admitted attorneys to the Knoxville Bar Association!
This event is open to all KBA members and new bar admittees. Members are encouraged to attend this festive occasion. KBA members will enjoy mixing and mingling with colleagues of all ages and stages of practice in a relaxed, informal environment.

Please RSVP to the KBA Office at 522-6522 or online at www.knoxbar.org.

LRIS
Knoxville Bar Association
Lawyer Referral & Information Service

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KBA
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WELCOME NEW MEMBERS

THE KNOXVILLE BAR ASSOCIATION
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Daniel Eric Setterlund
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Shawn M. Tyrell

Rebecca C. Vernetti

By: Donald F. Paine
KBA President, 1983

THE TRIAL OF FALLON TALLENT: A SURPRISE WITNESS

Sergeant Jerry Mundy

Driving from Knoxville to Nashville on Interstate 40, have you noticed the two white crosses on the roadside at the Mount Juliet exit? Do you know why they're there? Here's why.

Fallon Lynn Tallent was born on January 23, 1982. By age fourteen she was living with a grandmother and committing crimes. By age twenty-one she had amassed lengthy rap sheets in the counties of Blount, Sevier, and Knox.

At the beginning of July 2003, she was released from jail in Sevierville. Immediately she went on a diet of crack cocaine and beer. She drove a stolen Mercedes purchased with $50 of crack. On Tuesday, July 8, she hooked up with her former lover (and Knoxville prostitute) Dorothy Cash.

Early Wednesday morning, July 9, a Knoxville policeman spied the pair at the Walter P. Taylor housing project. He approached to investigate regarding the stolen vehicle, but they sped away.

Entering I-40 at the interchange with Asheville Highway, Fallon drove westward with Dorothy riding shotgun. The fabricated reason for the trip was to visit Fallon's probation officer in Nashville.

Fueled by crack, Fallon drove at speeds up to 130 miles per hour while swerving in and out of traffic. Many 9-1-1 calls caused officers to give chase without success.

Deputy John Musice

Sergeant Jerry Mundy of the Mount Juliet Police Department decided to deploy spike strips (aka "stinger" strips) at Exit 226. Wilson County Deputy John Musice was also on the scene.

A surprise witness . . . was Kathleen Griffith, a registered nurse at Vanderbilt Hospital when Fallon was a patient in the emergency room.

Fallon knew about spike strips, having been stopped by some only four months before. As she approached the exit she had a choice. She could have taken the high occupancy vehicle ("HOV") left lane and dodged the strips, which covered only the two right lanes. Instead she told Dorothy "Watch this." Then she made what many witnesses described as a controlled right turn.

She murdered officers Mundy and Musice with her Mercedes. Crime scene photographs depict their horribly mangled and dismembered corpses.

The Wilson County trial, with a jury transported from Blountville, began on June 23, 2004, and ended on June 30. Judge John Wooten presided; Tommy Thompson and Robert Hibbett prosecuted; David Boyd and Craig Garrett defended.

A surprise witness testified for the State. She was Kathleen Griffith, a registered nurse at Vanderbilt Hospital when Fallon was a patient in the emergency room. Fallon asked Ms. Griffith to make a telephone call to her grandmother. Chatting with the patient, the nurse asked why she was in the hospital. Answer: "I'm the one that killed those f---ing cops." The nurse dialed the grandmother's number twice but got busy signals. Fallon's expression of appreciation: "F--- you."

Fallon Lynn Tallent

Although nurse Kathleen Griffith was not listed as a witness on the indictment, the Court of Criminal Appeals found no reversible error. *See State v. Tallent*, filed by Judge Wedemeyer at Nashville on January 10, 2006, perm. app. denied May 1, 2006.

Fallon Lynn Tallent was convicted and is serving two consecutive life sentences.

This "members only" column is published each month to share news and information among KBA members. Submissions should be limited to 50 words and will be edited for space and other considerations.

ACTIVITY BAG COLLECTION DRIVE SUCCESSFUL

At their September meeting, the KBA Unmet Legal Needs of Children Committee assembled almost 150 activity bags which were delivered to Fourth Circuit and Juvenile Courts using supplies purchased by the KBA with donations collected at the Supreme Court Dinner (over $400), and with small used books donated from the Friends of the Library. These activity bags will be distributed to young children attending court with family members. The Committee wishes to express its thanks on behalf of the families and children who will receive these items to all who donated materials and funds toward this project. If you are interested in serving on the Unmet Legal Needs of Children Committee, please contact **Kaye Ford** (637-0055) or **Cheryl Rice** (546- 0500).

SUPREME COURT HISTORICAL SOCIETY

Join us on December 4th to celebrate the 75th Anniversary of the dedication of the Supreme Court Building in Nashville with the opening of the Tennessee Judiciary Museum. The Tennessee Supreme Court Historical Society will host a cocktail reception. Attendees of the event will be given an exclusive preview of the new Tennessee Judiciary Museum and will see the original 1796, 1835, and 1870 Constitutions of Tennessee which will be on display to the public for a very limited time. A presentation will take place at the Hermitage Hotel ballroom with doors opening at 5:45 p.m. The presentation will begin promptly at 6:00 p.m. followed by the cocktail reception until 9:00 p.m. A continuous shuttle service to the museum will be provided throughout the evening so guests can tour the museum at their leisure. Tickets are $100 per person and can be purchased by contacting **Joy Day** at 615-771-5008 or jday@sutter-law.com. Reservations are limited to 250 people, so buy your ticket today.

JUDGE VARLAN BECOMES CHIEF DISTRICT JUDGE

U.S. District Judge **Thomas A. Varlan,** who presides in Knoxville, will become the chief judge of the Eastern District of Tennessee on October 8. He succeeds U.S. District Judge **Curtis L. Collier** of Chattanooga, who has served as chief judge for the past seven years. The Judicial Conference of the United States, the policy-making body of the federal judiciary, adopted the chief judgeship program to address the increasing judicial administrative duties in each district. The chief judge serves as the administrative judge for the district. Judge Varlan becomes the fourth district judge based in Knoxville to hold the chief judgeship since that position was established in 1948.

ONLINE CLASSIFIEDS AT WWW.KNOXBAR.ORG

The purpose of the Online Classifieds is to provide an opportunity for KBA members and non-members to post and view employment opportunities, office share/rental options, as well as lawyer-to-lawyer services and other specialized categories. You might be a member looking for a fresh start in a new position or a firm seeking to increase your reach in looking for the perfect person to fill that vacant role in the office. We can set your employment listing as a blind box ad so that interested parties respond to the KBA and the emails are forwarded to you by our staff. You might have some available office space for sale or for lease or maybe you want to find someone interested in sharing space you already occupy. KBA members may post classifieds for free.

NEED GUIDANCE IN A SPECIFIC PRACTICE AREA?

One of the best kept secrets of the Knoxville Bar Association is our Mentor for the Moment program. We want to let the secret out and make sure that our members use this wonderful resource. It's really simple to ask a question of our helpful volunteer mentors. Log in to the members' only section of www.knoxbar.org or check out the list in the KBA Attorneys' Directory and begin your search! Our easy-to-use website allows you to search by last name or by subject area experience.

BE PART OF A HUMANITARIAN NEED

Centro Hispano provides a free legal clinic one Saturday per month to honest, hard-working, low-income, Spanish speaking immigrants who cannot otherwise obtain legal help. Please donate an early Saturday morning to this humanitarian project to make a difference in the lives of these families. Interpreters are provided. Contact **Mercedes Strollo** via e-mail at mcstrollo@charter.net. Visit the Centro Hispano website at www.centrohispanotn.org.

SMOKY MOUNTAIN PARALEGAL ASSOCIATION

The Smoky Mountain Paralegal Association meets the second Thursday of each month at noon in the Main Conference Room of the U.S. Attorney's Office in the Federal Courthouse (corner of Main & Locust). The speaker for our November 8, 2012, meeting will be **Beverly Nelms,** Esquire of Frantz, McConnell & Seymour, L.L.P. presenting the topic Medical Records for 1.0 hour program. Lunch buffet is available with reservations. Email president@smparalegal.org to reserve a lunch.

JUDGE HERSCHEL P. FRANKS PORTRAIT UNVEILING

Tennessee's longest serving State Judge, **Herschel P. Franks,** Presiding Judge of the Court of Appeals, has announced that he will be retiring from the Court on December 31, 2012. A portrait unveiling will be held in the courtroom of the Tennessee Supreme Court in Knoxville on December 3rd at 10:30 a.m. A reception will follow.

OFFICE SPACE AVAILABLE:

- Approximately 420 square feet available, space for one to two individual offices. Includes high speed Internet, utilities, and access to conference room. Free parking. Convenient Middlebrook Pike and Weisgarber location. Contact **Michael Cabage** at 539-4500.

- For Rent: Nice office with a fireplace in a restored building located near I-75 and Merchants Road Exit 108 (8 minutes to courthouse). Rent is $425/month and includes use of reception area, conference room, full kitchen, janitor, utilities, and high speed Internet. Established attorneys able to refer business. Willing to do month to month lease. Call 865-687-8744 or 865-688-4060.

- Stanley & Kurtz, PLLC is conveniently located in downtown Knoxville on Gay Street in the Art Market Museum, next door to Downtown Grill & Brewery. Our suite is only two blocks from the Howard H. Baker Jr. Federal Courthouse and the Tennessee Supreme Court. The space is surrounded by shopping, retail, restaurants, hotels, and office buildings. We offer large or small office space with large windows, hardwood floors, high ceilings, reception area, two conference rooms, restrooms, kitchen, flexible terms, and rates. $500-750/mo.

- Office space available in The Regions Bank Building, Suite 500. Reasonable rates which include: phone, Internet, and receptionist services, etc. About one block from the courthouse. Please contact **Danny** at 524-2934 for more information.

Address Changes

Please note the following changes in your KBA Attorneys' Directory and other office records:

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cunderwood@geico.com

By: Terry D. Tucker, Esq.
State Attorney General's Office

Scenic Drives and Paper Maps

Many times the journey can be much more rewarding than the destination. While many people are now addicted to electronic devices, it hasn't always been that way. As a child growing up in East Tennessee, my Father would often take our family for a Sunday drive. Since this was before the interstates, we drove along two-lane state or county roads. Being the youngest in the family, it was my task to refold the well worn map of East Tennessee. Interestingly enough many of the roads we travel have a history dating back to Indian warpaths or trails. My work now carries me to 13 counties in East Tennessee and I must admit an addiction for the old two-lane state and federal routes. When I need to travel to and in these counties I resort to my "old school" map skills. I am usually rewarded with new (to me) ways of traveling, the more scenic and curvy the better!

I think you may find that you and your friends and family will enjoy this deviation from the norm also. So please indulge me, turn off all electrical devices, pull out a paper map (America Rides Maps on Facebook is a good source), decide how much time you have available, chart your course, and go on an "explore" with your family or friends.

I am usually rewarded with new (to me) ways of traveling, the more scenic and curvy the better!

Grab your map and let's look at a couple of "example" courses. We can start our journey on Kingston Pike – designated as Highway 11/70, since most of you know and travel it regularly. Traveling west, past Farragut, you will come to Dixie Lee Junction, an area with an interesting history which you might want to "Google." At Dixie Lee Junction you must choose between Highway 70, which is a scenic wind through the country side to Kingston, and Highway 11, which will lead you to Loudon.

If you choose Highway 70, it will take you to Kingston across the Tennessee River and into Midtown. There you will find one of the few remaining drive-in theatres in our area. If you arrive at dusk and in season, it can be fun, especially if a scary movie is playing! (Check Facebook sites for the Midtown Drive-in Theatre and/or the Parkway Drive-in Theatre in Maryville). In Rockwood, Highway 27 will lead you to Harriman where you can turn left on 328 and rollercoaster back in to 27 or just remain on 27, which will lead you to Wartburg. There, you can go to the Forest Service office (across from the courthouse) and learn about Big South Fork State Park and view the exhibits. And if you're hungry, there is an eatery next to the courthouse that serves a mighty fine "meat and two" lunch. If you decide to continue on 27 north, you will go through Sunbright and can then either turn left onto Highway 52 and discover historic Rugby or remain on 27 and discover Huntsville, the county seat for Scott County and home to former Senator Howard Baker.

If you choose Highway 11 to Loudon, there is a unique car lot there which has several '50s, '60s and '70s era cars to look at. Across from the Loudon County Courthouse is a good eatery and an ice cream shop. If you have sufficient time on this "explore," Highway 11 will take you all the way to Chattanooga. As you near the Philadelphia area, look for a farm on the right where you can buy freshly made cheese. Or, if you prefer, you can go to Sweetwater and pick up Highway 68, which will take you through Madisonville to Tellico Plains, and on to Turtletown, Ducktown and Copperhill. Highway 64 will take you past Ocoee where the whitewater games were held during the 1996 Atlanta Summer Olympics.

If you live north or east of town, you are familiar with Broadway, which is designated as Highway 33. Traveling north, you will cross Black Oak Ridge and drop off into Halls. There, you may turn left onto Highway 441 (after Waffle House on the right), which is also known as Norris Freeway, and it will take you to Norris Dam (discussed in a September 2012 Dicta article). There is a left turn at a traffic light onto Highway 61, then you turn back right on 441, or you can turn right onto Highway 61 and enjoy a fun drive through Andersonville back to Highway 33. If you stay on 441, you can drive across the dam and continue on to Lake City, where you can pick up Highway 116. North will take you parallel to I-75 and up to Highway 25W, where you can turn right and travel 1-2 miles to Cove Lake State Park (on your left). A nice lake and walking trails await. There is also a restaurant there – Rickard Ridge (www.rickardridgebbq.com) – which serves great BBQ and other items, including a slice of strawberry rhubarb pie warmed with ice cream on top! Try the good local bluegrass music on Thursday nights. One recent Thursday evening, I took my 85-year-old mother, who said upon leaving "that's the best time I've had in years."

Traveling south on Highway 116, it will turn right across from a ball field in Laurel Grove and then meander around past Frozen Head State Natural Area and past Brushy Mountain State Penitentiary where many a notorious felon has resided. Along the way look for the TVA windmills on the ridge tops. Highway 116 will bring you back to 62, which leads to Wartburg or Oak Ridge for a Big Ed's Pizza.

Too many wonderful roads meander through East Tennessee to list here. Two of my favorites are 25E to Tazewell. When traveling there look for the Veterans Overlook, old gas station in Tazewell, then travel on to Cumberland Gap. Also 92 from Chestnut Hill through Dandridge is a favorite. A stop at Tinsley Bible Drugstore (www.tinsleybibledrugs.com) is a must, then on through Jefferson City past Cherokee Dam, 375 is nice, or for those with good map skills, Owl Hole Gap Road and Mountain Road are two scenic roller coasters (hint: both terminate on 11W near Joppa School).

Hopefully this article has inspired you to go on an "explore." If you get lost, don't worry; just check your map and find a route back. Who knows, you may be writing an article soon on some less traveled road you have discovered or the most efficient way to refold a map.

Photo provided by Darryl Cannon (killboy.com)

PRO BONO PROJECT

By: Terry Woods
Project Director

Serving the Legal Community in Assisting
Low-Income Persons To Navigate the Justice System

More Paperwork

I know. I hate it too. Blame Congress. Or thank our diligent lawmakers for insisting on careful monitoring of how our tax dollars are spent.* You decide.

* Congress funds civil legal services through the Legal Services Corporation, which then distributes funds to local offices, including Legal Aid of East Tennessee. LAET gets a larger percentage of our funding from LSC than from any other source. To keep that funding, we must comply with a variety of regulations. See 45 C.F.R. Part 1600 et seq. The total federal allocation to LSC to fund its own operating expenses as well as its grants to local legal aid offices is currently 0.00012% of the total federal budget.

In any event, the Pro Bono Project is required to report to the Legal Services Corporation on the status of all files each year. If our records show that you have an open Pro Bono Project file, you should have already received a form to complete and return to us to report the status of the file. If you did not get a form, our records are wrong.

Why Our Records May Be Wrong

- The PBP referred a file to you in 1985, and you closed it in 1986. The PBP never recorded the file closure, so we still show the file in your name.
- The PBP referred a file to you but the client never contacted you. The PBP never recorded the client's failure to appear, so we still show the file in your name.
- The PBP referred a file to Lawyer A in 2002. Lawyer A retired in 2003 and turned the file over to you. The PBP never recorded the transfer to you, so we still show the file in Lawyer A's name.

Likewise, if you got a form but *do not* have an open PBP file, our records are wrong.

If you need a form, please use the form below **or** call (865-384-2175 – Terry's cell), fax (865-525-1162) or email (twoods@laet.org) to get a form.

Your name: _____

Client's name: _____

The file is

☐ Open. What is the current status? _____

_____

☐ Closed. What happened? _____

_____

Do you want us to report your time for CLE purposes*? ☐ Yes ☐ No

*You receive one hour of ethics credit for every five hours of pro bono service (prorated). You may have noticed a delay in the CLE Commission recording your pro bono time. This is because the Commission asked us not to report time until the Commission has resolved a dispute over whether to bill volunteers for the time reported. In the past, the Commission billed volunteers between $1.00 and $2.00 per credit hour. The Supreme Court recently enacted Rule 21, Section 4.07(c) to exempt volunteers from this charge.

Regardless of whether you want us to report your time, please give us the following information for our report to LSC and other funders:

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Thank You!

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By: Jack H. (Nick) McCall

Q: *I have heard a legend of a shadowy organization of identically dressed lawyers and their friends and families called "Team Swanson," devoted to truth, justice and the UT Volunteers. Is there any truth to these tales; how long has this annual rite of game day team shirts been going on; and what is it with the "power of the Team Swanson shirts" business, anyway?*

A: **"TEAM SWANSON"**

Charles Swanson, Pam Reeves, Sarah Sheppeard, *and Memphis visitor/diehard Vols fan (and bona fide KBA Fan Club member)* ***Bill Haltom***

(a collective answer, preceded by an equally collective sigh):

Pam: I don't know how long we've been doing this–since back in the '90s, at least?

Sarah: I think it first started sometime between 1988-91. It used to be mainly just the guys.

Charles: The numbers have varied, too, across the years. There were 20 or 23 of us when Team Swanson was in full bloom. Back then, we used to be mailing the annual "team shirts" all across Tennessee and the Southeast, and as far west as Colorado!

Bill: You've gotta understand that, in my book, there are only two true holidays: one is Christmas, and the other is "Shirt Day." That's the day every year when I get the latest Team Swanson shirt in the mail. It's now known as being a festive day not just across my law firm, Thomason, Hendrix, but all across Memphis. I think they even talk about it in the schools there. It's at least as good as Santa Claus day to me.

Last Word ("LW"): These shirts sound like they are something much more than the average UT fan's shirt....

Charles: Shirt Selection Day is quite a ritual, too! Typically, two Fridays before the beginning of UT football season, the Shirt Selection Committee meets. It's a very serious and highly exacting process....

Sarah: ...and the specifications can be quite precise and demanding. To be selected, the shirt has to have the right amount of orange--the shirt is not always solid orange, but if it's something other than wholly orange, it needs to have just the right amount of orange. The material used has to be just right, too....

Pam: And, at least one woman has to be on the Shirt Selection Committee to ensure that it will fit the women as well as it will the men. We got tired of wearing shirts that were cut for men and didn't look good on the women. Personally, the Hawaiian shirts were always my favorite.

LW: So, how many shirts can the Selection Committee evaluate before making a final selection?

Charles: It varies from year to year; we can look at and try on at least five or six styles before reaching a consensus. It can take up a good bit of a Friday to do this right, and it has to be done right. Too much pride is on the line!

Bill: And tradition, too; the right Team Swanson shirt is every bit as important to the team members as a good seersucker suit is to the wardrobe of a Southern gentleman, sir.

LW: You guys act like there's something almost magical about these shirts....

Charles (with a thunderstruck look): Magical, no; powerful, yes! You know, Pam and I are convinced that our wearing of these shirts was the principal reason why UT beat Arkansas in 1998 and got the Vols to the National Championship.

LW (with a bemused yet puzzled expression): Huh?!? Isn't that bit over the top?

Charles: You seem confused, so let me explain. In the fall of '98, while she was TBA President, Pam was invited to attend the formal opening of court in France. This is a really big deal; it is a very formal occasion. You've never seen so many robes, sashes and medallions in your life, and it's also a big opportunity for French lawyers to party. The first night we were in Paris, their equivalent of the Young Lawyers or Barristers threw a band party in a circus and carnival museum--if you've seen "Midnight in Paris," it was one of the places in the movie. Everybody's in tuxedoes and formal wear. Although we're six hours ahead of Neyland Field time, we get the word: "The band's taking the field!"

We hang in at this party as long as I can stand it, and then, I just can't take it anymore. I shout to Pam: "Call home!" We run back to our hotel; Judy the babysitter's at our home, and she tells us: "Oh, it's not good...five minutes left, and Tennessee's losing." The score was 24-22, Arkansas-UT. Pam and I were beside ourselves. Pam hung up, over my objections and I shouted: "Quick: we need the shirts!!!" I stripped off my tux and put on my Team Swanson shirt, and Pam put on her shirt.

So, we sat there like this in our hotel room for about fifteen minutes before calling back--it was the longest fifteen minutes ever, I'll tell you that; I was going nuts--and then we called Judy back. She's screaming: "Pam, Pam, you won't believe it! Clint Stoerner fumbled the ball, we recovered, scored, and won the game!" And that, as they say, was the game.

Now, am I saying that this would not have happened if Pam and I hadn't put on the Team Swanson shirts while we were in Paris? I'm convinced that UT won that game and made it to the National Championship because we put on our game day shirts in France....

Sarah: Hey, I get an assist on this one, too! I was doing the Law Institute in Nashville; with UT behind, I raced back to my room and put on my Team Swanson game day shirt, too, and look what happened next....

LW: Clearly, these are some kind of game day shirts.

Bill: You better believe it, buddy! Final element of proof: Charles and I flew out to Tempe for the Fiesta Bowl a few years back. We festooned our rental car with all kinds of Big Orange flags and gear. We looked like a slice of Neyland Stadium on wheels. Well, we decided that while we were in Arizona, we had to see Tombstone. As we pulled off the ramp to Tombstone, an Arizona cop pulls up behind us, lights flashing. He walked over, took one look at us, and said: "You guys ain't from around here, are you?" And that was it, no ticket; no lecture; nothing. He just let us keep going. Never doubt the awesome power of the Team Swanson shirts.

"The Last Word" column is coordinated by KBA Member Nick McCall. If you have an idea for a future column, please contact Nick at nick.mccall@gmail.com.

Knoxville Bar Association
P.O. Box 2027
Knoxville, TN 37901

Barristers Charity Golf Tournament
Friday, October 12, 2012

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