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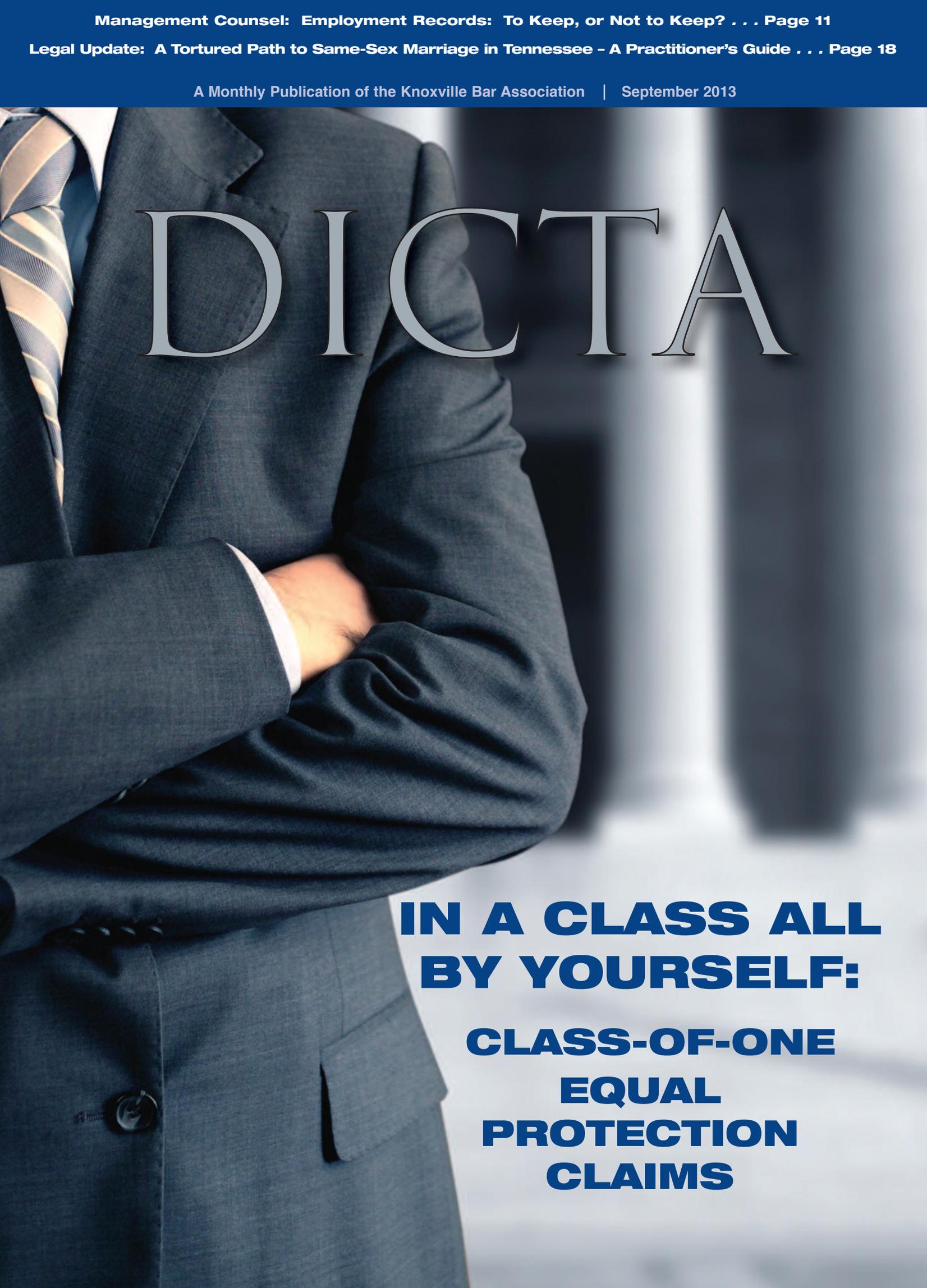
September, 2013

Legal Update: A Tortured Path to Same-Sex Marriage in Tennessee - A Practitioner's Guide

Akram Faizer



Available at: https://works.bepress.com/akram_faizer/4/



DICTA

**IN A CLASS ALL
BY YOURSELF:**

**CLASS-OF-ONE
EQUAL
PROTECTION
CLAIMS**

Knoxville Bar Association & Knoxville Barristers Annual Charity Lawyers Link Up

Golf Tournament

Friday, September 20, 2013
Avalon Landmark Golf Club

11:30 a.m. - 12:30 p.m.
*Registration, Practice Range Privileges
& Box Lunch*

1:00 p.m.
Shotgun Start

The Barristers and the Knoxville Bar Association are joining forces to co-host the annual four-person golf scramble. The entry fee of \$100 per player includes green fees, cart, range balls, box lunch, a commemorative tournament gift, 2 tickets for beverages during the tournament, great prizes, and a delicious cook-out following the tournament. All entries & payments must be received by September 5.

Following the tournament, players are invited to a BBQ dinner for the presentation of prizes and recognition of tournament winners.



The proceeds will benefit the various charitable endeavors of the Knoxville Barristers.

Participants may sign up as individuals or teams, but each team must include at least one lawyer.

Firm/Company Name: _____ Designate one contact person if registering as a team.

_____	Shirt Size	_____	Shirt Size
_____	Shirt Size	_____	Shirt Size

Entry Fee: \$100.00 per golfer or \$400.00/team
Team Trash Package: \$80.00 per team
Each member of the team will receive 1 of the following:
Move up to the Women's tee
A mulligan (do over)
A "hand or foot" wedge
Or, you may use a golf pro to drive for you at the designated hole.

Cancellation/Refund Policy: Reservations cancelled less than 48 hours before the tournament are subject to the penalty of the entire amount. Substitutions may be made. Please deliver or mail check and registration form to the Knoxville Bar Association Office at 505 Main Street, Suite 50, P.O. Box 2027, Knoxville, TN 37901-2027. Register online at www.knoxbar.org.

Send me information about being a hole sponsor.

Reservation Deadline: September 5th

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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.

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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 will not meet again until the fall. If you have program topic or speaker suggestions, please contact the ADR Section Chairs **Kim Burnette** (546-7000) or **Dana Holloway** (643-8720).

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. Check out the section's quarterly newsletter on the section's webpage at www.knoxbar.org. Plan now to attend the August 15th Corporate Counsel Section's extended CLE program. If you would like further information on the Corporate Counsel Section, please contact Section Chairs **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 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 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. The section is sponsoring a number of CLE programs this year, and we encourage you to participate. 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 September 4th at 11:30 a.m. at Chesapeake's. The program features **Tim Priest** for a "2013 Volunteers Football Preview". The cost is \$25 for the luncheon. The December 11th luncheon will feature Senator **Becky Duncan Massey** and the topic will be "What's Been Happening in Your Legislature this Year". For information on the Senior Section, please contact Co-Chair **Jim MacDonald** at 525-0505 or Co-Chair **Wayne Kline** at 292-2307.

Solo Practitioners & Small Firm

The goal of the Solo & Small Firm Section is to provide and encourage networking opportunities and CLE. To have your name added to the section list, please contact the KBA office at 522-6522. Please join other members of the Section on the first Wednesday of each month at the LunchBox at noon. CLE programs and an evening social at the Bearden Beer Market are being planned for this fall. For more information about the section, please contact Chairs **Greg Hall** (546-0080) or **Tripp White** (712-0963).

Event Calendar

September

- 4 Fee Dispute Committee
- 4 Senior Section Luncheon
- 4 Supreme Court Dinner
- 9 ADR Section CLE
- 10 Professionalism Committee
- 11 Work Life Balance Committee
- 11 Barristers Meeting
- 12 Judicial Committee
- 17 Family Law Section
- 18 Board of Governors Meeting
- 19 Lunch & Learn
- 20 Barristers Golf Tournament
- 23 Unmet Legal Needs Committee
- 24 CLE Committee
- 24 Minority Law Student Reception
- 26 Access to Justice Committee
- 26 Barristers Volunteer Breakfast
- 27 Workers' Comp CLE

October

- 2 Fee Dispute Committee
- 2 Solo & Small Firm Section
- 2 Extended CLE Program
- 4 Extended CLE Program
- 7 ADR Section CLE
- 8 Professionalism Committee
- 9 Work Life Balance Committee
- 9 Barristers Meeting
- 10 Lunch & Learn
- 10 Judicial Committee
- 15 Family Law Section
- 15 In Chambers CLE Program
- 16 Board of Governors Meeting
- 24 Access to Justice Committee
- 24 Barristers Volunteer Breakfast
- 28 Unmet Legal Needs Committee

Mark Your Calendar

Supreme Court
Dinner

Wednesday,
September 4

By: Heidi Barcus

London & Amburn

* Follow me on twitter @habarcus.



FINDING TIME TO BE PRESENT



Since December I have been telling myself that this time was going to come. The workload is not relentless. There is a break coming around the corner. I have been repeating this every day since the beginning of the year, and I was beginning to doubt that these statements were true. This is the madness of practicing law. When we are busy, we think we will suffer endlessly in the chaos. And then, when work returns to a normal pace, we worry that we are not busy enough. I have no advice about how to manage that mania, and I am about to resign myself to the fact that this is just the way lawyers are wired. That is a President's message for another day. Nonetheless, at last the break is finally here. After a grueling Spring, I have moved into a house I closed on in February. I am biking again and reading again. There are three books on the living room table. I move rapidly from one to the other, grateful for the diversion from the practice. I am even finding time to be present. What I mean by being present is finding a way to focus only on the task or person in front of me. The constant ping of my phone and the endless pile of deadlines has had me moving from one event to another, from one court to another, from one meeting to the next. I have been searching for the time to carve out for the one person or client in

front of me. I am forcing myself to ignore the instant messages on my phone and focus. Being present takes determination and practice. In *The Law Firm Associates's Guide to Personal Marketing and Selling Skills*, Catherine Alman MacDonagh and Beth Marie Cuzzone suggest the following exercise:

Make your next interpersonal encounter—whether it's with your spouse or a colleague or a stranger—an exercise in treating the other person like a millionbucks. Employ these tiny tactics: Listen. Don't interrupt. Don't finish the other person's sentences. Don't say, "I knew that." Don't even agree with the other person. If he praises you, just say thank you. Don't use the words "no," "but" or "however." Don't let your eyes wander elsewhere while the other person is talking. Maintain your end of the dialogue by asking intelligent questions that show you're paying attention, move the conversation forward, and require the person to talk (while you listen).

Actually listening to someone is not easy. It takes concentration and focus. It requires intention. While this exercise is lifted from a training manual for associates on how to generate business, I have been using this exercise in my personal life. I recently attended an all-day meeting in which I actually focused and listened. I forced myself to be completely present at that gathering. Reluctantly, I must admit that by 5:00 p.m., I was exhausted and spent. By the time I finished dinner, a trusted friend asked if I was okay and if we shouldn't call it an evening. We left dinner at Bella Luna as quickly and politely as possible. However, earlier in the day I had really been on, and people noticed. I remembered the names of complete strangers that I had met earlier in the day. I remembered what these people had said about themselves and was able to ask appropriate follow-up questions. It was amazing how much people appreciated when I asked, "So, when did you first start running?" instead of "Can you tell me your name again?" Certainly, this is a great way to treat clients and market your business. But, wouldn't it be amazing if I could find a way to be present not only for strangers, but for colleagues and friends? Do I listen that intently at the office? Or, do I glance at my instant messages, calendar and twitter account? What could I actually learn if I practiced being present? Sometime this month, find a moment to actually be present. Reread the excerpt above and work on developing this skill. You might find that you're missing what is happening right there in front of you. You might find your spouse is surprised by your attention. You might even get a phone call about a legal matter from that stranger you met at that birthday party.

You might find that you're missing what is happening right there in front of you.



By: Sarah C. Easter
The McKellar Law Firm, PLLC

MARKETING 101: CURING VISIOBIBLIOPHOBIA AND MAKING NETWORKING WORK FOR YOU

(Yes, "visiobibliophobia" is one of those new-fangled-made-up-on-the-interweb-words meaning fear of social media and networking. Sadly, I cannot claim to have originated it.)

So, I have to be honest. Although I can be very outgoing at times, networking was always difficult for me. Standing around making small talk with strangers, awkwardly exchanging business cards with someone you may never see again, or listening to a boring speaker over lunch made me want to run in the other direction. However, everywhere I turned it seemed as though I got the same advice, which was to network in order to achieve greater name recognition and meet more contacts that could potentially turn into client referrals. Although perhaps unwelcome, that advice is true. When you are a small firm or solo practitioner without a large marketing budget or the benefit of having been around so long that marketing is unnecessary, networking can be key. The trick is to find a networking group or method that works for you. For example, if you love to squeeze in a workout during lunch, network in the morning or after work; if you live and work in North Knoxville, don't commit to a regular meeting in Farragut. My personal networking niche fell into place when, with the help of some of my now closest friends, we recognized a vacuum in the market and started our own unique networking group. That group has grown tremendously and allowed me to see that this part of marketing my business can be both fun and fulfilling. Fortunately, it has also resulted in referrals.

Here is just a snapshot of a few networking opportunities in the area:

- **Chamber of Commerce.** The Knoxville Chamber regularly hosts events that are fun and unique and offer sponsorship opportunities. The Hispanic Chamber of Commerce of East Tennessee also has great events. Both organizations' calendars are available online.¹
- **Tight Ship.** A business coaching service that routinely offers low-cost networking events, including one that was recently hosted by Jewelry Television. They also have a website and online calendar.²
- **Business Network International – BNI.** Hosts groups of industry-specific meetings, which you can attend in the mornings before going into the office. There are several local chapters in Knoxville and surrounding counties.³
- **Phi Alpha Delta.** This organization is a law fraternity and has an alumni chapter here in Knoxville.⁴

As you meet new people through your networking efforts, incorporate those contacts with your social media endeavors. Marketing through blogging, Twitter, Facebook, and LinkedIn combined with networking can be mutually beneficial. Once you have someone's contact information, be sure to connect with them on these social platforms. That way, you are ensuring continued communication and interaction. Below, I will detail how I have used each platform and include a few tips on how to get started.

Twitter. At first blush, Twitter may seem irrelevant to marketing for law firms. However, using Twitter allows you to connect to an audience that you may otherwise never have reached. You can link to new blog posts, give helpful tips and information, and promote any announcements or news about your firm. Twitter is also another method of connecting with attorneys in other practice areas or geographic locations. Just as an example, many local attorneys and organizations are active on Twitter. Some of those include:

- Cohen Chuck-Smith @CohenChuckSmith
- Ted Kern @tedkernla
- Norman McKellar @McKellarLawFirm

- Leslie Logan Beale @LeslieLBeale
- Heidi Barcus @habarcus
- Brennan Lenihan @lawyermediator
- Howard Vogel @hhvogel
- Casey Carrigan @LawyerCasey
- Marsha Wilson @mwknoxbar
- Robert Kurtz @RobertKurtz
- UTK Law @UTKLaw
- Tennessee Courts @TNCourts
- US 6th Circuit @US6thCircuitCt
- SCOTUSblog @SCOTUSblog

Also, Twitter can be quite entertaining, so I can't resist these suggestions, just for good measure: Smokey Mascot @UTSmokeyMascot; Curiosity Rover@MarsCuriosity; and Grumpy Cat @RealGrumpyCat. I would recommend taking a look at the Twitter for Small Business Guide available in PDF format online.⁵

LinkedIn. LinkedIn can also help you connect with other lawyers, business people and networking events. In addition to these personal connections, you can join Groups and post Updates. Groups are topic-specific forums for members to exchange information, ask and answer questions, and plan events. For example, I am a member of the following Groups: Divorce and Family Lawyer Referral Group; Knoxville Business Builders; Networking In Knoxville, TN; and iPad Attorney.

Facebook. Creating a Facebook Business Page for your firm is a great way to get started with social media. On your Page, you can post photographs and informational videos, promote your blog, make announcements and connect with past and future clients. The more you interact with others on Facebook, the more reach your page will have. Therefore, make sure to "Like" other pages, "Share" content (both your own and others') and create running conversations with comments.

Blogging. Before starting a blog, figure out what purpose you want your blog to serve. Generally, blogs do two things—increase website visibility and provide information to potential clients. Therefore, a niche blog might be better for your practice than one that covers a wide range of topics. As my practice is primarily focused on divorce, I routinely blog about appellate decisions touching on family law and changes to our state family law statutes. Blogging can help build and expand your brand, bolster your credibility and knowledge base, and reach potential clients that may have specific questions. You can then promote your blog through Twitter and Facebook. There are several ways to get your blog up and running, but both Blogger and Word Press are great places to start.

Although it can be daunting to add these additional responsibilities when you are "goin' it alone," over time the effort is well worth the results. The key to both networking and social media is consistency. And, like me, you just might find that you have fun along the way.

¹ <http://www.knoxvillechamber.com/events-programs>; <http://www.hccet.org>

² <http://tightship.us/wordpress1/events/>

³ <http://www.bnin.com/index.html>

⁴ <https://www.facebook.com/groups/326243335348/?ref=ts&fref=ts>

⁵ https://g.twimg.com/business/pdfs/Twitter_Smallbiz_Guide.pdf.

⁶ https://www.blogger.com/tour_start.g; wordpress.com

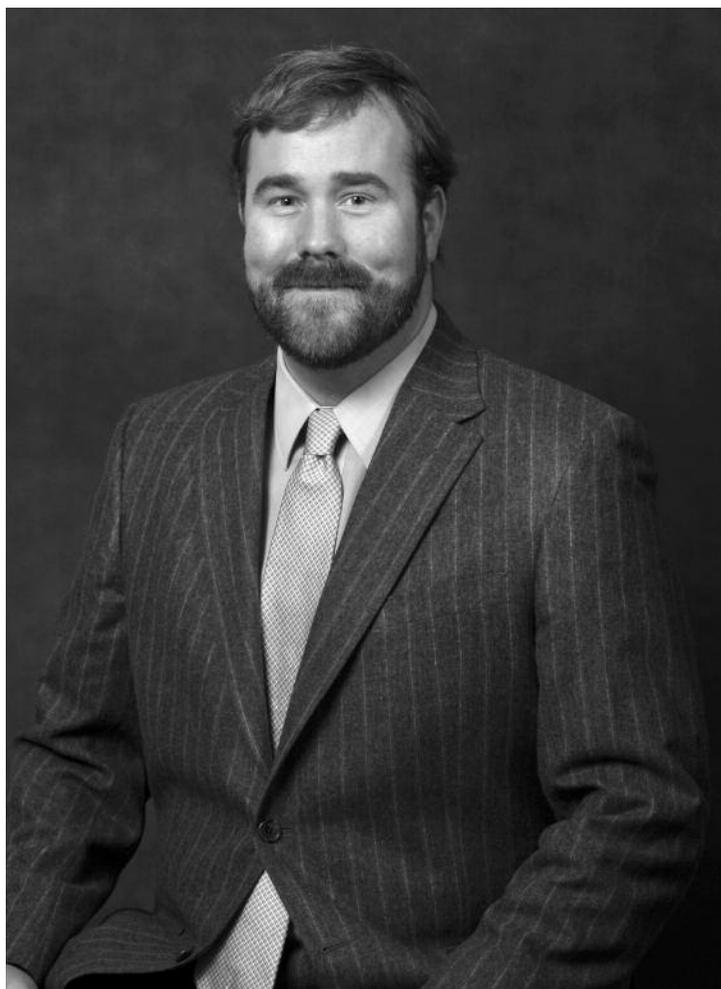
By: Joshua J. Bond and Wesley D. Stone

Hodges, Doughty & Carson, PLLC



OLIVER D. ADAMS

It is What it Is.



While in grade school, Oliver moved from Tazewell, Tennessee, to Seneca, South Carolina, where he graduated high school with multiple honors. He met his wife in 1997 while attending Seneca High School. Oliver chose to attend his parents' alma mater, Emory University, for his undergraduate degree. There, Oliver received his B.S. Degree in Economics with an emphasis in Business Policy.

While Oliver was attending Emory University, Lauren studied art education at the University of South Carolina. Oliver and Lauren continued their long-distance relationship throughout their college career. While completing his degree at Emory University, Oliver applied to several law schools. Though he was accepted to most, if not all, the law schools he applied for, he desired to return to his roots and receive his law degree from the University of Tennessee. On the same day Oliver received his acceptance letter from the University of

Tennessee College of Law, Lauren received an offer to teach art in Tennessee.

During law school, Oliver buried himself in his law school studies. However, he always made time for dinner and a dog walk with his wife. After his first year of law school at the University of Tennessee, Oliver accepted a clerkship position at the law firm of Hodges, Doughty and Carson, PLLC. Oliver graduated from law school *Summa Cum Laude* in 2007. He received the following honors at the University of Tennessee College of Law: Valedictorian, Outstanding Graduate for the Class of 2007 Award, Citation for Academic Achievement and Professional Promise Award, Knoxville Auxiliary to the Tennessee Bar Association Award, West Publishing Company Award for Outstanding Academic Achievement, Order of the Coif, and University of Tennessee College of Law Certificates For Academic Excellence.

Oliver accepted an Associate Position with Hodges, Doughty and Carson in 2007. Oliver became partner at Hodges, Doughty and Carson in 2013. He is a member of both the Knoxville Bar Association and the Tennessee Bar Association. His practice areas include Commercial Law, Bankruptcy and Creditor's Rights, Contracts, Financial Institutions, and Real Estate Law.

Oliver is licensed to practice law in the Tennessee Supreme Court and related inferior courts, the United States District Courts for both the Eastern and Middle Divisions, and the Sixth Circuit Court of Appeals.

He and his wife were married on June 10th, 2006. They are expecting their first child, a son, in November 2013. As will most likely be the case for their son, Oliver was born in the Fort and has commented many times that he bleeds orange.

Oliver's hobbies include fishing, anything Big Orange, hiking, and spending time with his wife. He is a huge Atlanta Braves fan and a Kyle Busch fan, and he enjoys a wide spectrum of music, including bluegrass and rock and roll.

From the beginning, Oliver was correctly perceived as a good fit for Hodges, Doughty and Carson. Thomas Dickenson interviewed Oliver for a position at Hodges, Doughty and Carson. Mr. Dickenson recalls Oliver being very down to earth and an excellent fit for both the present and future goals of Hodges, Doughty and Carson. Mr. Dickenson describes Oliver as diligent, loyal and exceptionally bright.

A lot of people do not know that Oliver is a famous trout fisherman, particularly below the Norris Dam. On one outing, Oliver and Wayne Kline took Lauren trout fishing below the dam. Apparently, she appealed to the other fisherman because when they all paused to observe her presentation, she landed a huge trout.

Of his many characteristics and qualities, including thoughtful, simple, compassionate and intelligent, Oliver is most considered by his colleagues as being honest and loyal. These are two of the best characteristics that describe an excellent attorney and someone we call Friend.



By: Kristina M. Chuck-Smith
Coben & Chuck-Smith, PLLC

MOBILE SCAN TO PDF APPS

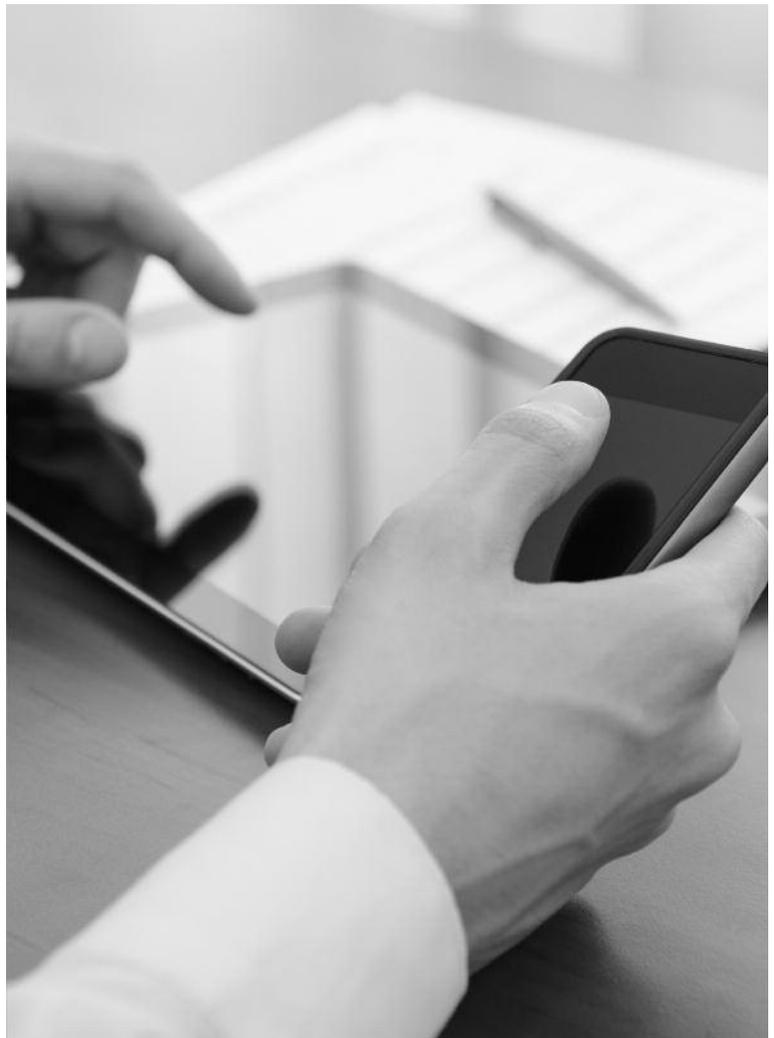
Have you ever been in court, and your client or opposing counsel showed you a document that you wanted a copy of? Or on-site with the same need? Have you needed your assistant to prepare a document similar to one that a colleague just showed you, but you are out of the office and need it ASAP? Need to declutter your work space? Trying to go paperless? Don't have space or funds for a desktop scanner?

Well, there are mobile apps for that. These apps take a picture of your document and turn it into a PDF. You can do single or multi-page documents. Also, you don't need to have a flat surface, as most of these apps will find the edges or allow you to choose what you want to be scanned in. Once you have scanned in the document using your smart phone or tablet, you can either upload it to the cloud or e-mail it to yourself.

Below are a few apps that you can use to scan your document to a PDF.

1. **CamScanner** (www.camscanner.net): The website states that you can search, add notes, merge and set passwords on your documents. It also states that you can share your documents with others via email, fax or saving to the cloud. You can also print your documents if you need to. It is available on iOS (iPad and iPhone) and Android platforms.
2. **DocScanner** (www.docscannerapp.com): DocScanner boasts that it can "tell the difference between document types and can auto-sort your documents to separate folders by their type." It also states that your scanned documents are searchable, as it comes with "a handy OCR feature." You are able to save your documents to the cloud so that you can access them easily wherever you are. It is available on iOS (iPad and iPhone) and Android platforms.
3. **JotNot scanner** (www.mobitech3000.com): According to the website, JotNot scanner can "automatically remove shadows, correct contrast and adjust white balance, so that your scanned documents come out looking as crisp and clear as possible every time. JotNot will attempt to automatically detect the document in the image making it easy to remove the information you don't want in the scan -- like the stuff lying around your desk: pens, coffee mugs, loose change, etc." This app, however, is only available on iOS.

So, now you can ensure that you can get copies of documents without the need for a copier or desktop scanner. Also, you can declutter your desk while saving your documents.



About this column:

The goal of this column is to provide timely information on technology issues of interest to local lawyers and their staff. If you have comments about this column or ideas for a future column, please contact **Kristina Chuck-Smith** at 329-3334 or Kristina@ccsgal-law.com.

Join the 100% Membership Club



All firms who participate in the 100% Club will receive a 5% discount on selected KBA events, including a table for the Supreme Court Dinner and a 5% discount on display ads in DICTA, and the online firm listings at www.knoxbar.org will feature the KBA's 100% Membership Club logo.

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Lauderback, P.L.C.

Winchester, Sellers, Foster & Steele, PC

Wolf, McClane, Bright, Allen & Carpenter, PLLC

Young, Williams & Kirk, PC

Don't miss this opportunity to show your commitment to the Knoxville Bar Association and the legal community as a whole. Be sure to sign up now for the 100% Club and receive the recognition you deserve.

Sign Up Today!

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*David Bell, President & CEO
ALPS Corporation*

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60+ Forms Available in KBA Forms Library

➔ Project Still Needs Your Support

Over the past year, the KBA Judicial Committee has compiled a forms library to help KBA members practice more effectively and efficiently. We anticipate that the forms library will be especially beneficial to new lawyers or practitioners new to a practice area. We need your help. Please pull together forms relevant to your specific practice area and submit them to KBA Executive Director Marsha Wilson (mwilson@knoxbar.org) by October 1, 2013.

Most lawyers find themselves in a constant search for new and better forms. Our goal is to compile a comprehensive library of forms for routine matters in all of our local courts. These forms are intended to be used by KBA members and not for use by non-attorneys. Lawyers typically have outstanding form libraries for pleadings, contracts, or other documents related to routine practice areas. The electronic versions of the forms are available for free to any KBA member in the members'-only section of the KBA website.

Do you remember how it felt to prepare an order for the first time? We have hundreds of new lawyers practicing in our community who are on their own without mentors or firm support. Please take a few minutes to pull together some documents that you routinely use to help your colleagues in the bar.

Forms should be submitted to the KBA Office via email (mwilson@knoxbar.org) by October 1, 2013.



KBA Members Who Have Served in the Military: Let Us Recognize You!

As we express our gratitude, we must never forget that the highest appreciation is not to utter words, but to live by them. ~John Fitzgerald Kennedy



The KBA will recognize all of our members who have served in the armed forces in the November issue of DICTA. Please contact Melanie Connatser, Membership Services & Communications Coordinator, with your name and branch of service. We want to ensure that all of our veteran members are recognized in November. Please contact Melanie Connatser (mconnatser@knoxbar.org) to provide us with information about your military service. Deadline: October 1, 2013.

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Have a question? Call a Mentor

The Knoxville Bar Association created the Mentor for the Moment program to pair attorneys who have questions or problems in a particular area of legal expertise with the guidance of a more experienced mentor attorney. Volunteer mentors serve to create a more cooperative and collegial Knoxville bar. They know the importance of getting advice from others who have experienced similar problems and frustrations in their law practice. The list of mentors is available in the KBA Attorneys Directory and in the members only section of www.knoxbar.org.

The Mentor for the Moment is a membership service of the Knoxville Bar Association.



By: Catherine E. Shuck

Of Counsel, Wimberly Lawson Wright Daves & Jones, PLLC

Employment Records: To Keep, or Not to Keep?

Professional organizers often counsel that if an item or piece of paper hasn't been used for more than a year, you should throw it away. This may be good advice for dealing with household clutter, but it is lousy advice when it comes to dealing with employment records. The patchwork of state and federal laws that govern employment also come with retention requirements, virtually all of which exceed one year. Thus, employers must be careful not to discard documents before their time.

Following is a brief chart showing recommended retention periods for various types of employment records, based upon the limitations period for applicable causes of action, the retention requirement in the laws and regulations, or both. Of course, in the event of a litigation hold, all relevant records must be retained notwithstanding a regular destruction policy.

Item	Examples	Retention Period
Pre-Employment Info – applicants not hired	Application, Drug Screen, Reference Checks, Interview Notes	4 years
Pre-Employment Info – applicant hired. <i>* Note: pre-employment physical records should be kept separately.</i>	Application, Drug Screen, Reference Checks, Interview Notes	4 years after termination
I-9 Forms	Form plus photocopy of identification document(s)	1 year after termination / minimum of 3 years
Tennessee Lawful Employment Act (TLEA) documentation	E-Verify documentation or photocopies of identification document(s)	1 year after termination / minimum of 3 years
Payroll information	Weekly wages, pay rate, place of employment	7 years
Benefits records	Insurance enrollment forms	6 years
Medical records (kept separately)	FMLA certification	3 years
Health and safety records	Workers' compensation claim info; OSHA records	5 years; 7 years if employee returns to work; 30 years if hazardous exposure
General employee personnel records	Performance evaluations, disciplinary documentation	4 years after termination
COBRA Notice / HIPAA Certificate of Group Coverage		6 years after termination
Employment Taxes	Returns, quarterly reports, supporting documentation	4 years required; 15 years recommended
Workers' Compensation		5 years; 7 years if returned to work

In crafting a records retention policy, consider the following questions and issues:

- Ease of administration.** Although the required retention period for employment records varies from three years to thirty, consider whether it makes sense to divide records into broad categories and choose the longest applicable retention period.
- Where are the records?** This is a deceptively simple question. "Records" include all pieces of paper created or received by your practice, as well as electronically stored information, which may reside on servers, on individual computers (including employees' home computers), and/or on mobile devices.
- How will records be archived, backed up, and accessed if necessary?** Consider who creates employee records, who accesses employee records, and who should be responsible for storing the records.
- When will records be culled for destruction, and by whom?** Someone must be in charge of reviewing records on a regular basis—preferably twice per year, but at the very least once per year—and culling those records to be destroyed.
- Method of destruction.** Consider how documents will be destroyed once the retention period expires. Most hard copy records should generally be shredded; electronic copies should generally be destroyed in a manner that prevents a third party from reconstructing them.

Conclusion

An effective and consistent document retention policy is an important component of all office functions, not just human resources functions. This is definitely an area where a little organization and planning today can spare you significant headaches and frustration in the future.

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.



LEGAL FICTION

By: **J. Scott Griswold**
Holbrook Peterson Smith PLLC

“I WANNA BE SEDATED” - JOHN GRISHAM’S *THE PARTNER* (1997)

Thank you, Joey Ramone, for penning “I Wanna Be Sedated”.¹ The Ramones first cranked out this early punk song in September 1978. This 2:29 blast of energy embodies how I sometimes feel when waiting in traffic, working through a beautiful spring day, or hearing my toddler cry in the wee hours of the morning. “*Twenty-twenty-twenty four hours to go, I wanna be sedated. Nothin’ to do and no where to go—o-oh, I wanna be sedated. Just get me to the airport, put me on a plane. Hurry, hurry, hurry, before I go insane.*”

We would be hard pressed to find a person who has not felt that way at some point in his or her life. How nice to day dream about hurrying to a plane and jetting off to parts unknown. When those times strike me, I turn to John Grisham’s *The Partner*. Set in southern Mississippi, Grisham weaves a story of a young partner who hurries to a plane and sets off on a long adventure . . . with \$90 million of his law firm’s client’s money. It is fun to read how this enterprising young lawyer escapes a bad life in the pursuit of one he believes will be better. The level of planning that goes into the heist is impressive and makes me wonder how often Grisham thought about it when he was practicing law. But as Sir Newton warns us, every action has an equal and opposite reaction. And, as you can imagine, there are some bad reactions when a lawyer walks away with 90 million bucks.

This book is great to read on a plane (or at the beach) because it is mind-numbing good fun. It has fast paced, not-too-subtle plot lines, a beautiful foreign woman, inventive legal strategy, and enough twists and turns to keep you interested until you land or have to pack up the car and return to Knoxville. Somewhere along the way, I promised I would not write about John Grisham, but since I recently returned from the beach, I wanted to share this book. Life is serious enough, and there are many thought-provoking lawyers in film, television, and literature. But every now and then it is good to set our minds on autopilot and enjoy a taste of literary sedation.

“I can’t control my fingers, I can’t control my toes. Oh no, no, no, no. Just put me in a wheelchair. Ba-ba-bamp-ba, Ba-ba-ba-ba-bamp-ba, I wanna be sedated.”

¹ “I Wanna Be Sedated” is No. 145 on Rolling Stone’s *500 Greatest Songs of All Time*. See <http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407/ramones-i-wanna-be-sedated-20110526> (last accessed Aug. 8, 2013).

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By: **Melissa B. Carrasco**
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WHEN THE GOING GETS TOUGH, THE TOUGH DO YOGA

Yoga. The word conjures images of a quiet room, relaxation, calm, focused energy—exactly the environment of the average law firm. The legal profession has its own yoga. Instead of “Downward Facing Dog,” we have “Print the Brief,” (left leg planted on the ground, right leg extended, toe making contact with the printer), “Close the Deal” (shoulders hunched, chin tucked downward, head tilted to the left at a 37 degree angle—advanced practitioners can hold a cell phone between the chin and shoulder in this pose for 86 minutes while emailing on a second cell phone), and “Where’s the File” (hands and knees on the floor, moving head back and forth in a downward motion, small tear in right eye). Yes, that will add years to your life.

“Law firm yoga” may have negligible results, but the benefits of regularly incorporating yoga practice into your routine are real. Leslie Wagner can attest to that. A former teacher who transplanted to Knoxville after Hurricane Katrina left five feet of water in her New Orleans home, Leslie’s yoga practice helped her through this experience. After moving to Knoxville, she went back to school to become a certified Kripala yoga instructor to help others.

According to Leslie, yoga practice is ideal for attorneys. First, simple yoga moves are easy to incorporate into other activities when you would ordinarily just be standing or sitting—such as while standing on the sidelines at your child’s soccer game or in between telephone calls. That way, yoga does not have to be one more thing on your list of things to do. Second, anyone can do it—all body types and all fitness levels. If something hurts, stop. Third, unless you prefer a high energy form of yoga, it usually does not require sweating, making it easy to do during the day by substituting a quick lunch and short yoga class for a longer, sit-down meal (more about that later). Fourth, it gets the blood and other important fluids moving, helping with concentration during that inevitable afternoon slump. Finally, it helps to reduce the hormones released when the body is under stress (and which one of you isn’t stressed every day), which if allowed to remain at high levels, can have a destructive effect on the body.

Getting the health benefits of regular yoga practice may not be as hard as you think. All it takes is some floor space, a mat or carpet, and the willingness to think creatively. One example of that kind of creativity is right on Cumberland Avenue in the heart of Knoxville.

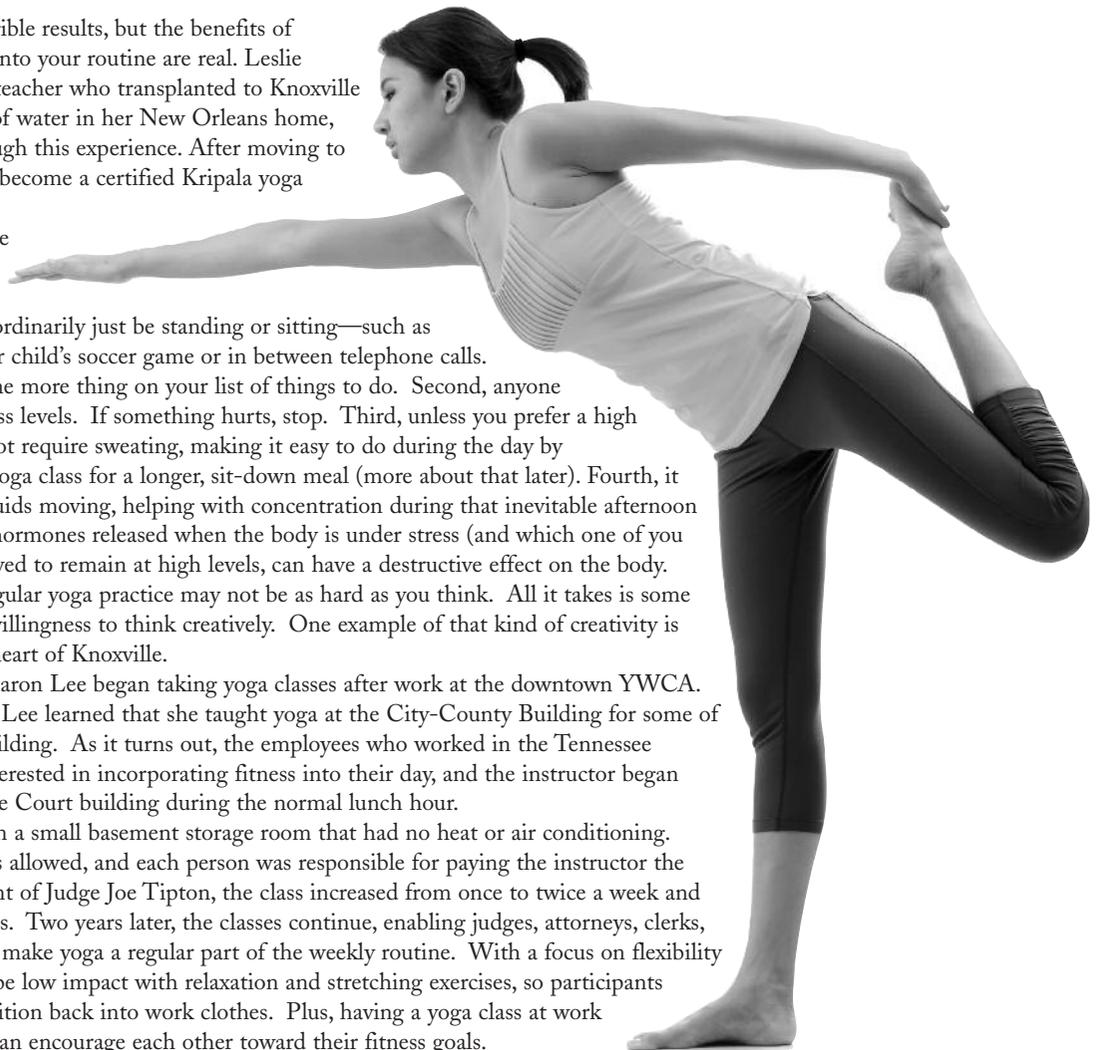
Around two years ago, Justice Sharon Lee began taking yoga classes after work at the downtown YWCA. After talking to the instructor, Justice Lee learned that she taught yoga at the City-County Building for some of the employees who worked in that building. As it turns out, the employees who worked in the Tennessee Supreme Court building were also interested in incorporating fitness into their day, and the instructor began teaching a private class at the Supreme Court building during the normal lunch hour.

It was nothing formal, meeting in a small basement storage room that had no heat or air conditioning. People attended when their workloads allowed, and each person was responsible for paying the instructor the per-class fee. With the encouragement of Judge Joe Tipton, the class increased from once to twice a week and then moved to an empty room upstairs. Two years later, the classes continue, enabling judges, attorneys, clerks, and staff who work in the building to make yoga a regular part of the weekly routine. With a focus on flexibility and strength, the class is designed to be low impact with relaxation and stretching exercises, so participants do not get sweaty and can easily transition back into work clothes. Plus, having a yoga class at work provides accountability as coworkers can encourage each other toward their fitness goals.

Justice Lee and Judge Tipton have also noticed the positive effects of regular yoga practice. For example, both have seen an increase in flexibility, balance and strength after incorporating yoga into their regular fitness routines. Justice Lee found having a yoga class in the middle of the day has helped alleviate neck and back pain because it stretches out those muscles that get tired from hunching over a desk or sitting all morning. Judge Tipton has used yoga as a great compliment to his regular exercise routine of speed walking and light weight lifting, increasing his flexibility and endurance, so he can do more of these other exercises. Both have found ways to incorporate yoga into their schedules, whether it is eating a light lunch in the office rather than going out to eat or staying at work late on yoga class day. As Justice Lee mentioned, if you count up the minutes you waste each day, everyone has an hour or two a week that could be spent doing yoga.

If you want to try incorporating yoga into your routine, there are a number of opportunities in and around town. If you are downtown, the YWCA offers yoga classes for members and nonmembers alike twice a week during the lunch hour. The Glowing Body Yoga Studio, which is just off Central Avenue, offers a “Body Glow on the Go” 50-minute class during the lunch hour for only \$5 a class.¹ The West Side Family YMCA offers similar classes around lunchtime. Or, you can push back the conference table and chairs, lay some mats on the floor, find a yoga instructor who will come to your firm, and take one hour twice a week to do something that will add more to your life than a billable hour. You have to be your own advocate for your health.

¹ The Glowing Body is owned by KBA member **Tammy Kaousias**, who purchased the practice two years ago after realizing that regular yoga practice helped her manage the inherent stresses and demands of her legal practice.





WORD PLAY

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

“Glee”

It appears that for some, the television show by the same name is quite popular, as was one of its stars, who recently met with an unfortunate and untimely death. But from where does the word come?

I always associated the word with happiness or the scholastic extracurricular Glee Club, but why “glee”?

Well, I find the sources of both quite interesting and very related.

“Glee” finds its origins going back as far as 700 A.D.; *glio*, entertainment, mirth, jest, from the Proto-Germanic cognation of the Proto-Icelandic *gly*, joy. We could go all the way back to the Greek, Old Lithuanian and Indo-European, all having the same general meaning, but let’s stick with English. In Old and Middle English, *glee* was basically used in poetry and became very rare after the 1400’s. Johnson’s Dictionary, published in 1755, dismissed it as a word to be used only in comic writing. However, by 1814 a group of singers organized to sing part songs, *glees* (songs of three or more parts); the meetings of such people who enjoyed this activity were known as “Glee Clubs”.

Well, now we know.



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By: **J. Michael Haynes**
Hodges, Doughty & Carson, PLLC.

POSITIVE IMPACT OF THE KNOXVILLE BAR FOUNDATION CONTINUES TO GROW

In 1992, a few thoughtful Knoxville lawyers along with the Knoxville Bar Association leadership shared a vision that would eventually become the Knoxville Bar Foundation. The idea was to create a vehicle that could help the KBA respond to and address some of the worthwhile opportunities for service projects and assistance throughout our community that were related to the legal system, but simply could not be pursued by the KBA due to the lack of financial resources. Those combined leaders realized that if they created a foundation as a way to support such projects and opportunities for service, it would provide a unique avenue for charitable gifts, particularly from the members of the Knoxville legal community. Support grew through those early years, and by 2001 the KBF decided to create a Fellows Program similar to several successful examples at other bar foundations around the country. The annual Fellows recognition allows the Foundation to both raise money for community services and projects and, equally important, provides a method for the Foundation to publically recognize and honor attorneys who have distinguished themselves in the practice of law and in service to the Knoxville community. Significantly, those chosen do not campaign for the honor, nor can they nominate themselves, but they are chosen through peer review by existing Fellows. Each "Class" is generally less than one percent of the active bar association at any one time, and I am proud to say has consistently represented quality practitioners in our community with the highest ethical and professional standards both in front of and on the bench. They are selected in the spring and honored at an annual dinner, which this year was held on June 4th at Cherokee Country Club. The highlight of the evening was the presentation of the new Fellows, individually introduced by other members of the Foundation. This year's class includes a very distinguished and well-known group of attorneys, and as I heard each of the introductions, I was struck by the tremendous and varied amount of volunteer service this group of men and women provide on a regular basis to our community. Collectively, they provide a great testimonial to the positive impact that our profession as a group can bring to our community. The 2013 Knoxville Bar Foundation Fellows are: **Heather G. Anderson; Charles E. Atchley, Jr.; Ursula Bailey; David A. Draper; Michael W. Ewell; Charles M. Finn; Bruce D. Fox; Monica J. Franklin; Celeste H. Herbert; Richard W. Krieg; T. Kenan Smith; Jack M. Tallent, II; and Mark K. Williams.**

Another important milestone was marked by the announcement of this year's annual grants. Since the beginning of the Foundation and particularly since the Fellows recognition program was begun, the Bar Foundation has been able to provide annual financial support to many worthy projects and activities that meet the stated goals of the Foundation including: (1) improve the administration of justice; (2) enhance the public's understanding of our legal system and build confidence in that system; (3) support open access to the legal system by all; and (4) serve the legal community in some unique way. In 2013, the Bar Foundation received twenty (20) formal grant requests (the most ever), which totaled over \$75,000.00. Each of these represented important community work and creative projects throughout our area. The Foundation's Board of Directors reviewed all of the applications carefully and after considering the various requests were pleased to award ten (10) grants totaling almost \$30,000.00 in financial support! This year's recipients included CASA of East Tennessee, Inc.; Catholic Charities of East Tennessee, Inc.; Community Mediation Center; Knox County Governmental Library; Knox County Juvenile Court; the Archives Committee of the KBA; the Knoxville Bar Association for the Community Law School and Law Talk Series; the Knoxville/Knox County Community Action Committee; Legal Aid of East Tennessee; and the YWCA of Knoxville in support of their victim advocacy program. With this year's grants, the Bar Foundation has now provided just under \$305,000.00 for local law-related projects and programs, demonstrating that the good work started by a shared vision back in 1992 continues to grow and blossom throughout East Tennessee.

The Board of Directors of the Foundation is presently comprised of **Tom Hale; John Harber, Reggie Keaton, Morris Kizer, Denise Moretz, Harry Ogden, Judge Deborah Stevens, Charles Swanson,** and me. If you are interested in making a contribution to the Foundation or learning more about the good work it carries out, you may contact the writer or any other Board member at your convenience. We look forward to another year of making a difference in our community.

Knoxville Bar Foundation Fellows Class of 2013

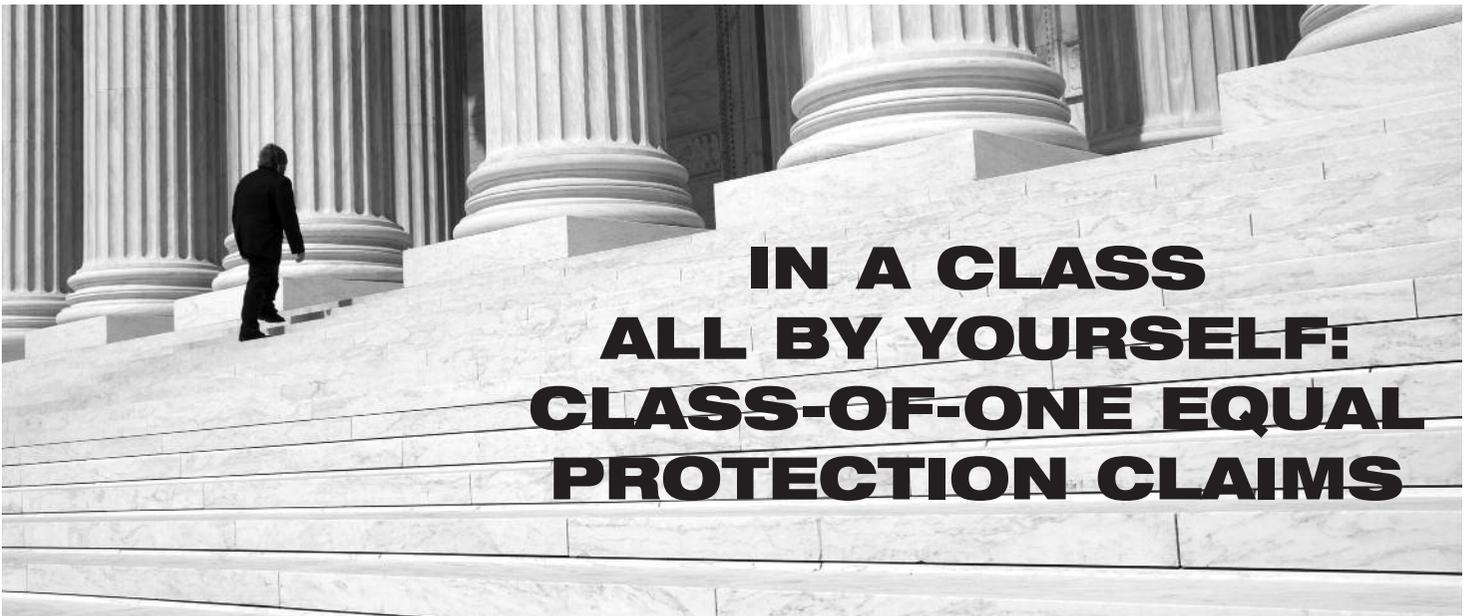
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IN A CLASS ALL BY YOURSELF: CLASS-OF-ONE EQUAL PROTECTION CLAIMS

You've probably been told that if someone doesn't want to like you, they'll find some reason not to—even if it is because of the color of your socks. Employees-at-will know this first hand. I knew from the start of my first job that at any time the boss could approach my desk, gape in disgust at my pink-and-white-striped socks with the individual toe-fingers, and bark, "Taylor, you're fired! Pack your things and get out!" Civil rights exceptions applied, of course, which kept the boss from peering into my office, staring goggled-eyed, and exclaiming, "Holy Smokes! You're really a woman? I thought those pink socks looked suspicious. Taylor, you're fired!" But the boss could still eject me for reasons that put me in a "class all-by-myself."

And then, just in time for the new millennium, came the "class-of-one" discrimination lawsuit bursting forth Athena-like from the collective, per curiam head of the Supreme Court in *Village of Willowbrook v. Olech*.² What in the world was this? The homeowners Olech had sued their village, claiming that the local government discriminated against them when it conditioned the approval of a municipal water connection to their house on the Olechs' agreement to grant a thirty-three-foot-wide easement in favor of the village, when all other village homeowners had been required to grant only a fifteen-foot-wide easement for the same water service. Mr. and Mrs. Olech pleaded that the village had intentionally treated them differently from other, similarly situated homeowners without any rational basis for the distinction and that the easement demand was "irrational and wholly arbitrary," in violation of the Equal Protection Clause. The Court found that this stated a claim for relief under the traditional equal protection analysis and that the Olechs could proceed with their suit, even though they were not representative of a group, and they did not present any evidence that the village had an illegitimate motive or animus against them.

Justice Breyer believed this last point to be a mistake, and he argued in his concurrence that the Seventh Circuit below had gotten it right by requiring evidence of "vindictive action," "illegitimate animus," or "ill will" on the part of the government, so as to avoid "transforming run-of-the-mill zoning cases into cases of constitutional right."³

While denying that this cause of action was anything novel, the Court officially christened the "class-of-one" claim in *Olech* and stated plainly that a person or group of persons not part of a traditionally identifiable group—like race or gender—may argue on equal protection grounds that a government actor⁴ intentionally treated them in a manner different from others similarly situated and without a rational basis justifying the disparate treatment. The result? Justice Breyer's prediction began to materialize, and the Court later slammed the floodgates shut for government employees seeking to bring class-of-one claims in response to situations like getting sacked for garish footwear. In *Engquist v. Oregon Dept. of Agriculture*,⁵ the Court held that prohibiting class-of-one claims in the government employment arena was permissible because employment decisions by their nature involved discretionary decision making based on a vast array of subjective, individualized assessments, and they did not involve the government's exercise of its sovereignty power over citizens which requires stricter adherence to the principle that people should be treated alike under like circumstances.⁶ So as it stands, government employees cannot avail themselves of this particular type of equal protection claim against their employers.⁷

But the field is largely open for the remaining masses who feel that some government actor has wronged them. A building permit denied. A 911 call-to-help ignored. A sprinkler-system citation that lands only at Tom's Tavern and not at Fred's Fire Trap and Grille or Carlos' Combustible Café.

Even legal materials withheld from a prisoner recently transferred to a new correctional facility. Courts will carefully consider these claims, though their appearance so far has been more limited and less successful in Tennessee's federal courts than in other jurisdictions, such as the Seventh Circuit, and the burden that plaintiffs bear in proving their cases is substantial.⁸ Nevertheless, this claim may just fit the situation of your client who seeks to challenge a government decision that appears to have been entirely irrational and unjust, and the contours of this type of claim are being refined with each new fact pattern.

To successfully plead the claim, the plaintiff or plaintiffs must allege that in violation of the Equal Protection Clause, they have been "intentionally treated differently from others similarly situated, and that there is no rational basis for the difference in treatment."⁹ Merely writing the term "equal protection" and and/or reciting the text of the clause will be insufficient.¹⁰ Plaintiffs should be able to demonstrate that they and the other individuals to whom they compare themselves (their "comparators") are "similarly situated in all material respects," and that that there could be no rational basis for the government actor's distinction between them.¹¹ This can be accomplished by either "negating every conceivable basis which might support the government action," or showing that the challenged action was "motivated by animus or ill-will."¹² Though meeting either prong of the rationality test will suffice for the Sixth Circuit, the Middle District of Tennessee has recently expressed its desire to smite those plaintiffs who cannot plausibly demonstrate in their pleadings some sort of malicious intent unrelated to the official's duties, on the rationale that most government actions are presumably valid and mistakes should not be actionable.¹³

Plaintiffs should pay attention to pleading details and not assume that facts, such as the identity of the comparators, can be supplied

By: Darian B. Taylor¹

later on. For example, in the Tenth Circuit case, *Kansas Penn Gaming, LLC v. Collins*,¹⁴ a casino developer failed to sufficiently state a class-of-one equal protection claim when he alleged that county officials ordered the issuance of property-nuisance citations to him that were not issued to other, similarly situated property owners, out of animus stemming from a prior contract dispute. The developer had made only broad allegations that there were other property owners with properties in the same or worse condition as his that did not receive notices, and the court found that this insufficiently pleaded the facts of the claim.

And in the Sixth Circuit, farmland owners, who brought a class-of-one claim when their re-zoning requests and subsequent variance applications for over 250 acres of farmland were denied, lost on the town's summary judgment motion because the Court of Appeals found that they failed to allege any specific examples of similarly situated landowners who were granted rezoning requests on a similar scale or with a similar impact.¹⁵ This second case illustrates the predilection of some courts to enforce "with particular rigor" the "similarly situated" requirement in land-use cases, on the rationale that zoning decisions will often treat one landowner differently from another and may only signal a change in policy and not discrimination.¹⁶

Be aware, also, that class-of-one claims are sometimes conflated with selective enforcement claims, which are similar, though in this context they require a showing of animus, whereas class-of-one claims, under *Olech's* guidelines, do not.¹⁷ Legal analyses of these claims are often combined when the challenged, government-agency action involves subjective, discretionary decision making authorized by legislation, and this type of fact pattern can end badly for plaintiffs who fail to allege animus. This is because courts have accepted any conceivable rationale basis for the action, even if it is not the real reason. For example, the Eastern District Court in *Gast v. Tennessee Valley Authority*¹⁸ barred a lakefront-property owner's "selective enforcement claim based upon a 'class-of-one' theory," which alleged that the TVA unfairly, though without animus, required the owner to remove his dock while at the same time letting other similarly-situated violators maintain their docks. The court largely conducted a selective-enforcement analysis, concluding that the United States Congress, in passing the TVA Act, granted the TVA broad discretion to achieve its legislative objectives; therefore, the TVA's decisions to

enforce or not enforce certain restrictions to achieve its stated goals were "discretionary" and non-reviewable under the principles of both *Engquist* and *Heckler v. Chaney*.¹⁹ And the court further doomed the class-of-one claim, in the alternative, because the TVA's decision could not be classified as wholly irrational, as the agency had limited resources and could have chosen to prosecute only the plaintiff because of the precise location of the plaintiff's land, even if this was not the actual reason why the TVA did prosecute only the plaintiff.

For those defending these types of claims,

an accused party may be able to invoke qualified immunity, depending on whether and how the parameters of class-of-one claims continue to evolve, as this defense can be utilized if a constitutional right is not clearly established at the time of the alleged discriminatory action and a reasonable person would not have known of that right.²⁰ But whether you are defending or complaining, one thing is evident: neither party should wear pink-and-white-striped socks to court, as the decision to remove the fashion offender--whether "discretionary" or not--will be surely be final.

¹ Darian Taylor, a former Assistant Attorney General for the states of Tennessee and New York and staff attorney for the Superior Court of Maricopa County, AZ, now writes about criminal and constitutional issues and regularly contributes articles to Thomson Reuters's *American Law Reports*.

² *Village of Willowbrook v. Olech*, 528 U.S. 562, (2000) (*per curiam*).

³ *Olech*, 528 U.S. at 566, (Breyer, J., concurring).

⁴ This includes counties and municipalities, but not sub-governmental units, like police and fire departments. See C.J.S., Civil Rights § 433.

⁵ *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, (2008).

⁶ *Engquist*, 553 U.S. at 598.

⁷ See *Hines v. Town of Vonore*, 2012 WL 6046160 (E.D. Tenn. Dec. 5, 2012) (barring city employee's class-of-one claim based on *Engquist*); *Franklin v. City of Cookeville, Tenn.*, 2012 WL 5193988 (M.D. Tenn. July 31, 2012) (same).

⁸ Class-of-one claims are generally filed pursuant to 42 U.S.C. § 1983, but they can also be raised in prisoner petitions, such as habeas petitions filed pursuant to 28 U.S.C. § 2254 and § 2255.

⁹ *Assoc. of Cleveland Firefighters v. City of Cleveland, Ohio*, 502 F.3d 545, 549 (6th Cir. 2007).

¹⁰ See, e.g., *Pruitt v. Lewis*, 2008 WL 80334, at *6 (W.D. Tenn. Jan. 7, 2008) (dismissing class-of-one claim against Tipton County by son of a mentally incompetent inmate who was permitted to leave the county jail before the son's arrival and was never seen again because the plaintiffs merely summarized the facts of the case and cited to the Equal Protection Clause in a request for further discovery); *Pruitt v. Lewis*, 2007 WL 4615947, at *5 (W.D. Tenn. Dec. 28, 2007) (same, dismissing class-of-one claim against Tipton County Sheriff); *Hill v. Bowles*, 2005 WL 3466005, at *7, n.10 (W.D. Tenn. Dec. 16, 2005) (refusing to entertain a "class of one" claim brought by plaintiffs contending that they had been retaliated against for disclosing information to the P.O.S.T. Commission and causing the chief of police's resignation because plaintiffs simply wrote that they suffered a violation of "equal protection" and gave a recitation of the text of the clause, and this did not fairly present the claim).

¹¹ *Taylor Acquisitions, L.L.C. v. City of Taylor*, 313 Fed. App'x 826, 836 (6th Cir. 2009); *Yi Zhang v. City of Chattanooga*, 2001 WL 4479262, at *5 (E.D. Tenn. Sept. 26, 2001); see generally, Kevin D. Caton, Annotation, "Class-of-One Equal Protection Claims Based Upon Real Estate Development, Zoning, and Planning," 68 A.L.R. 229 (2011).

¹² *TriHealth, Inc. v. Bd. Of Comm'rs*, 430 F.3d 783, 788

(6th Cir. 2005); *Yi Zhang*, 2001 WL 4479262, at *7.

¹³ See, e.g., *Arnold v. Metro. Gov't of Nashville et al.*, 2009 WL 2430822, at *4 (M.D. Tenn. Aug. 6, 2009) (noting that a class-of-one claim will generally fail where it lacks "facts that suggest the defendant possessed personal animus against the plaintiff or some other malicious motivation"); *Hardy v. Montgomery County Jail*, 2009 WL 1674824, at *6 (M.D. Tenn. June 15, 2009) (rejecting class-of-one claim because plaintiff, who was an inmate at the jail, offered no evidence "beyond conclusory allegations" of a discriminatory intent or purpose in pleading class-of-one claim).

¹⁴ *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210 (10th Cir. 2011).

¹⁵ *Braun v. Ann Arbor Charter Township*, 519 F.3d 564 (6th Cir. 2008), cert. denied, 555 U.S. 1062, 129 S. Ct. 628 (2008).

¹⁶ See, e.g., *Yi Zhang*, 2001 WL 4479262, at *5 (rejecting class-of-one claim brought by converted triplex owner because owner could not meet the heightened "similarly-situated" requirement that applied with "particular rigor" in the land-use context).

¹⁷ See, e.g., *Cobb v. Pozzi*, 363 F.3d 89, 109-11 (2d Cir. 2003) (distinguishing class-of-one claims, which arise from differential treatment without a rational basis, from selective enforcement claims, which arise from differential treatment based either on (1) race, religion, or an intent to punish the exercise of a constitutional right or (2) a malicious or bad faith intent to injure a person).

¹⁸ *Gast v. Tennessee Valley Authority*, 2011 WL 864390 (E.D. Tenn. Mar. 10, 2011).

¹⁹ *Heckler v. Cheney*, 470 U.S. 821, 105 S. Ct. 1649 (1985) (holding that a federal administrative agency's decision not to take enforcement action was not judicially reviewable where Congress provided the court with no meaningful standard against which to consider the agency's exercise of discretion).

²⁰ *Compare Hanes v. Zurick*, 578 F.3d 491, 496 (7th Cir. 2009) (refusing to apply qualified immunity because even though there was indecision within the circuit over the animus requirement for class-of-one claims, it had always been unconstitutional to arrest a citizen based upon bad animus, and this was the crux of plaintiff's claim); *with Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1210 (11th Cir. 2007), *reh'g and reh'g en banc denied*, 255 Fed. Appx. 504 (11th Cir. 2007), *cert. denied*, 553 U.S. 1004, 128 S. Ct. 2055 (2008) (applying qualified immunity because it was not clear that the principles of *Olech* applied to this complex type of case involving environmental, regulatory action against a poultry rendering plant).



LEGAL UPDATE

By: M. Akram Faizer

Assistant Professor of Law

Lincoln Memorial University's Duncan School of Law

A TORTURED PATH TO SAME-SEX MARRIAGE IN TENNESSEE - A PRACTITIONER'S GUIDE

The United States Supreme Court recently issued a decision on the constitutionality of a provision of the federal Defense of Marriage Act (DOMA) that has no direct effect on states, like Tennessee,¹ that disallow same-sex marriage. The tenuous logic of the Court's decision, however, will most likely mandate the recognition of same-sex marriage nationwide. Tennessee practitioners should prepare to serve their clients accordingly.

*United States v. Windsor*² involved a constitutional challenge to DOMA's Section 3,³ which denies federal marriage and survivor benefits to same-sex couples because it defines marriage as solely between opposite-sex couples.⁴ The plaintiff, Edith Windsor, a New York resident whose same-sex marriage was legal under New York law, brought suit seeking a refund of federal estate taxes paid by her deceased spouse's estate because DOMA denied marital estate tax exemptions to surviving same-sex spouses.⁵ Windsor prevailed in the lower courts, and the Supreme Court granted an appeal by the House of Representatives' Bipartisan Legal Advisory Group (BLAG) because the Obama Administration refused to defend the law in court.⁶

In the majority opinion by Justice Kennedy, the Court affirmed the Second Circuit Court of Appeals and concluded that Section 3 of DOMA is unconstitutional because it denies federal benefits to same-sex couples who are married and living in states where gay marriage is legal. The Court, in effect, concluded that in providing federal marriage benefits, the federal government must "piggy back" on a state's marriage definition.

This holding would be coherent if it were based on the U.S. Constitution's Tenth Amendment, which confirms that states have residual police powers in our federalist system and that "the several States," not the federal government, have authority to define marriage.⁷ The Court, however, did not do so, potentially because the liberal justices who joined Justice Kennedy's decision are, for historical reasons, loath to jurisprudentially expand the Tenth Amendment's scope. The Court instead concluded that DOMA's Section 3 is unconstitutional because it violates the Fifth Amendment's Due Process Clause, which requires, among other things, that the federal government grant all Americans the equal protection of the law.⁸ Justice Kennedy writes:

[DOMA] imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. *This opinion and its holding are confined to those lawful marriages.*⁹

This rationale is contradictory. How is the federal government's obligation to recognize same-sex marriages limited only to couples who both were married and are currently living in states that have legalized same-sex marriage? Wouldn't the Court's rationale require recognition of same-sex marriages entered into in states where same-sex marriage is legal, but where the couple has since relocated to a state, like Tennessee, where it is illegal? What about same-sex couples who want to marry in states where same-sex marriage is illegal?

The influential Washington Post columnist, Charles Krauthammer, noting this contradiction, writes:

Why should equal protection apply only in states that

recognize gay marriage? Why doesn't it apply equally — indeed, even perhaps more forcefully — to gays who want to marry in states that refuse to marry them? If discriminating (regarding federal benefits) between a gay couple and a straight couple is prohibited in New York where gay marriage is legal, *by what logic is discrimination permitted in Texas, where a gay couple is prevented from marrying in the first place?*¹⁰

While the Court's holding might make sense if it were based on the Tenth Amendment, its reliance on an equal protection rationale strengthens the argument of those like Justice Scalia, who, in dissent, writes that the decision is an illogical *elitist diktat* that will mean nothing less than the eventual reversal of all laws limiting marriage to opposite-sex couples.¹¹ Justice Scalia is indeed correct that the *Windsor* holding is destabilized by a volatile equal protection rationale that could undermine the legality of state marriage laws nationwide.

By way of example, *Windsor* did not adjudicate the constitutionality of DOMA's Section 2, which provides that no jurisdiction need recognize a same-sex marriage entered into in another state that has legalized these marriages. Section 2's constitutionality, however, is rendered untenable by *Windsor*. On July 22, 2013, an Ohio federal district court used the Court's equal protection rationale in *Windsor* to enjoin application of a provision in Ohio's marriage law that refuses to recognize same-sex marriages entered into in states that permit these marriages.¹² Should this decision be affirmed by the Sixth Circuit Court of Appeals, same-sex marriage will, by way of Tennessee's federal courts, be forthcoming in this state, notwithstanding the Tennessee Constitution, due to the U.S. Constitution's Supremacy Clause.¹³

Windsor does not directly affect Tennesseans because the Court's holding does not require the provision of federal marriage benefits in states that disallow same-sex marriage. The Court's rationale, however, for so limiting its decision is untenably underinclusive, and recognition of same-sex marriage may, therefore, soon be mandated nationwide. Tennessee lawyers should be prepared.

¹ "The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state." TENN. CONST. art. XI, § 18.

² 133 S. Ct. 2675 (2013).

³ 110 Stat. 2419.

⁴ *Windsor*, 133 S. Ct. at 2683.

⁵ *Id.*

⁶ *Id.* at 2683.

⁷ The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

⁸ *Windsor*, 133 S. Ct. at 2695-96. Note that the Court's jurisprudence sets forth that the Fourteenth Amendment's Equal Protection Clause is made applicable to the federal government by way of the Fifth Amendment's Due Process Clause.

⁹ *Id.* (emphasis added).

¹⁰ Charles Krauthammer, *National Gay Marriage, Now Inevitable*, WASHINGTON POST, June 27, 2013, available at http://www.washingtonpost.com/opinions/charles-krauthammer-nationalized-gay-marriage-now-inevitable/2013/06/27/e7b9e890-df5d-11e2-b2d4-ea6d8f477a01_story.html (emphasis added).

¹¹ *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

¹² See *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013).

¹³ "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, § 2.



By: Don Paine
KBA President, 1983



THE LAST MAN HANGED: JOHN MCPHERSON'S TRIAL

John McPherson fatally shot Deputy Sheriff William F. "Will" Walker on Sevierville Pike late Saturday night, July 14, 1906. How did that come about?

Earlier the same evening John (age 25) shot and stabbed to death Grant Smith on Florida Street in Knoxville. His father, Dr. M.A. McPherson, loaded John and his prostitute girlfriend Lizzie Winstead into a horse drawn carriage to hide out in Sevier County with Doc McPherson's brother.

The carriage for some reason slowed to a stop at the Minnis School House. Approaching from behind came another carriage with Dr. Joseph M. Wardell, who had dozed off. His horse and carriage rammed the McPherson carriage, whereupon John struck Wardell's skull twice with a pistol butt. Then the McPherson party continued eastward on the Pike.

Doc Wardell went to the nearby home of Deputy Walker and fetched him. They chased the McPhersons.

Some five miles out of the city Doc McPherson stopped at Thomas Burnett's house to get a pistol. He went to the door as son John stayed with the carriage, working on the harness broken during the collision.

Then Deputy Walker arrived and attempted an arrest. John McPherson shot him. He died a week later on Saturday, July 21, 1906. John fled Tennessee.

Dr. M.A. was quickly tried, convicted of second degree murder, and sentenced to ten years in the penitentiary. He was familiar with that prison, having earlier served seven years for the homicide of Dr. Thomas Pickens.

Authorities found John at Welch, West Virginia, in May 1907 and brought him back to Knoxville. He was tried in August for murdering Deputy Walker. Judge David D. Anderson presided; Reuben L. Cates prosecuted; N.N. Osborne and John C. Houk defended.

Here's some defense testimony from Lizzie Winstead:

- Q. Now how long after the Wardell difficulty before you started on from that point?
A. Just a few minutes.

- Q. Where did you next stop at?
A. Up there where Walker was shot.

- Q. What had you stopped there for?
A. The harness of the buggy was broke and Dr. McPherson got out and went up there to Mr. Burnett's house and John was trying to fix it.

- Q. What did you hear there and see?
A. Mr. Walker laid his gun over the horse's shoulders and John said, "What do you want?" And he said "I want you." He was on one side of the horse and John on the other.

- Q. After the shot was fired and Walker was down on the ground, what did he say?
A. He said "This is Will Walker, the deputy sheriff; you got me."

The jury returned a verdict of first degree murder with mitigating circumstances. The judge rejected mitigation and sentenced John McPherson to die. The motion for new trial was overruled.

The unreported Supreme Court opinion by Justice John Knight Shields was filed on Saturday, October 19, 1907. I have from the State Archives (thanks to archivist Darla Brock) the opinion with the Justice's handwritten revisions. The key paragraph states the Court's holding:

We have no hesitancy in holding upon the facts as herein found that the homicide in question was murder in the first degree. Every element of that high offense is present. Deliberation, premeditation and cool purpose and malice are all clearly and distinctly proven.

A huge number of letters and telegrams and petitions inundated Governor Malcolm Patterson's office, asking for commutation from death to life imprisonment. The effort was to no avail. After several delays, John McPherson was taken to the gallows on Monday, March 23, 1908. He was the last man hanged in Knox County.

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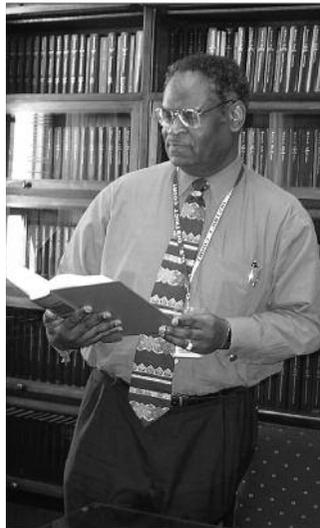
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Minority Law Student Reception

Tuesday, September 24, 2013
5:30 - 7:00 p.m.

Location:
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Guest Speaker:
Hon. Curtis L. Collier
United States District Judge
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MONTHLY MEETING

Everyone is invited to the Barristers monthly meetings held on the second Wednesday of every month at 5:00 p.m. at the Bistro by the Bijou (807 South Gay Street). The next scheduled meeting is on September 11, 2013. There are many opportunities to get involved, so please contact Barristers President **Katrina Atchley Arbogast** at KAtchley@lewisking.com for more information.

ACCESS TO JUSTICE COMMITTEE

The Barristers' Access to Justice Committee is seeking volunteers. If you are interested in learning more, please contact **Troy Weston** (tweston@eblaw.us) or **Ian Hennessey** (ihennessey@latlaw.com). The 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. If you are interested in participating in the Saturday Bar program, please contact **Terry Woods** (twoods@laet.org).

ATHLETICS COMMITTEE

Is your team signed up? The Barristers and the Knoxville Bar Association are joining forces to co-host the annual four-person golf scramble. This year's event will be held Friday, September 20 at Avalon Golf & Country Club. See page 2 for details.

HUNGER & POVERTY RELIEF COMMITTEE

The Hunger and Poverty Relief Committee would like to thank **J. Scott Griswold**, **William "Billy" Slater**, and **John Rice** for their time, energy, and efforts in organizing this year's Barristers' School Supplies Drive. Through their hard work and the donations of the Knoxville Bar and the greater business community, more than \$1000.00 worth of school supplies was donated to ChildHelp Foster Family Agency of East Tennessee. Save the date! Plan to join us for the Charity Corn Hole Tournament on Thursday, October 24, 2013.

VOLUNTEER BREAKFAST

VOLUNTEERS ARE NEEDED to serve breakfast at the Volunteer Ministry Center on the fourth Thursday of every month. Volunteer Breakfast is a great way to "get your feet wet" in the Barristers because you're only committing a couple hours of your time! The Committee would like to thank **Kati Goodner**, **Laura Rudder**, and **John Rice** who helped feed over 40 people on the morning of July 25. This month's breakfast will be served on August 22, please contact **Will Kittrell** (546-0500 or wkittrell@emadlaw.com) or **Alan Moore** (546-6321 or AMoore@s-hlaw.com) to get involved.

SUMMER PARTY

The Barristers Summer Party was held on Friday, July 19, 2013, at the Downtown Island Home Airport. More photos are available in the Photo Gallery on the KBA website.



(L to R, *Kati Goodner, Laura Rudder, and John Rice*)



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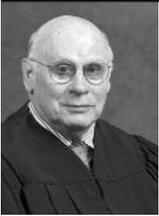


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By: Charles D. Susano, Jr.
Presiding Judge, Tennessee Court of Appeals

RETURN OF THE RED MASS

In 2000, the first Red Mass in East Tennessee was celebrated at Immaculate Conception Church in Knoxville. The Red Mass is a Mass celebrated for all who seek justice, particularly judges, attorneys, law school professors, and government officials. It is with great joy that I announce the re-institution in our community of this ancient tradition.

On Friday, October 18, 2013, at 7 a.m. Richard F. Stika, Bishop of the Roman Catholic Diocese of Knoxville, will celebrate the 2013 Red Mass at Immaculate Conception, 414 West Vine Ave., Knoxville. The Church is located next to the Crowne Plaza Hotel. Parking is available in the hotel garage, the municipal garages at the corner of Wall and Walnut and on Locust near Union, and other smaller parking lots in the area.

The Red Mass traditionally opens the judicial year in many jurisdictions around the world. Such is the case in Washington, D.C., where, on September 30, 2012, the 60th annual Red Mass in our Nation's Capital was celebrated at the Cathedral of St. Matthew the Apostle to mark the beginning of the October term of the United States Supreme Court. Six of the nine members of the Court were in attendance.

By celebrating this votive Mass of the Holy Spirit, not only Catholics but also all attending members of the legal community (judges, prosecutors, attorneys, law school professors, governmental officials, etc.) take advantage of the opportunity to reflect on the God-given power attached to their offices. Together, Red Mass participants ask God to

imbue all the members of the legal community with the virtues and gifts needed for the right and just administration of their respective offices.

The first recorded Red Mass was offered in France in the year 1245. During the reign of Louis IX (St. Louis of France), *La Sainte Chappelle* was designated as the chapel for the Mass. This magnificent edifice, erected in 1246, was used but once during the year, for the celebration of the Red Mass. The Red Mass became popular in England beginning about the year 1310. Traditionally, clerics wore red vestments; judges of the High Court of England and all doctors of law wore red robes or academic hoods. With so many participants in red, the Mass irrevocably became known as the "Red Mass."

Judges, law professors and others who will be attending this year's celebration in their robes are asked to assemble at 6:45 in the parish hall (in the basement below the Church) so they can process as a group into the Church.

Catholics who do not intend to receive Communion, and individuals of other faiths, are encouraged to come to the altar at the time of Communion to receive a blessing. To indicate your desire for a blessing, simply cross your arms over your chest as you approach Bishop Stika.

The Red Mass will last about one hour. A light breakfast brunch will be served in the parish hall immediately following the service. All attendees are invited.

Let's make this a great celebration of the forthcoming judicial year.

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CAN YOU ETHICALLY HAVE SEX WITH YOUR CLIENT?

By: Judy M. Cornett

Associate Professor
University of Tennessee College of Law



You may have read recently about the Pennsylvania lawyer who was suspended from the practice of law for one year for accepting oral sex as his fee in a criminal case.¹ The discipline was imposed under Pennsylvania's version of Model Rule of Professional Conduct 1.8(j), which reads: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

The Pennsylvania case was easy, given the lawyer's financial motive and possible extortionate behavior. A more difficult case exists when there is no financial motive, no explicit or implicit extortion, no unwelcome advances, no diminished capacity – when, in short, two competent adults consent to begin a sexual relationship during the representation.² Rule 1.8(j) makes no exception for this situation; it prohibits *all* consensual sexual relationships between attorney and client begun during the representation.

The rationale for the prohibition is threefold. First, because the lawyer has a fiduciary relationship with the client and because the client relies upon the lawyer's skill and experience, there is a power imbalance in the relationship. Commencing a sexual relationship with the client during the representation therefore carries the inherent danger of exploitation of the client's subordinate position in violation of the lawyer's fiduciary duty.³

Second, the commencement of a sexual relationship during the representation runs the risk of impairing the lawyer's independent professional judgment.⁴ As more fully explained in ABA Formal Ethics Opinion 92-364, the precursor to Model Rule 1.8(j), independent professional judgment requires objectivity and "emotional detachment."⁵ Engaging in sexual relations with a client may result in "emotion or bias." Furthermore, "[b]ecause of a desire to preserve the relationship, the lawyer may be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."⁶

Finally, combining the professional relationship with a sexual relationship creates problems in delineating the attorney-client privilege. Because "client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship," the lawyer who wears two hats – attorney and lover – endangers the privileged nature of any communications between them.⁷

A number of states have adopted a version of the Model Rules ban on consensual sexual relations between lawyer and client, including Arizona, Delaware, Minnesota, Montana, North Carolina, Washington, and Wisconsin.⁸ On the other hand, two jurisdictions— Georgia⁹ and the U.S. Patent Office¹⁰— have recently rejected Model Rule 1.8(j).

As my colleague Paula Schaefer pointed out in the January 2011 issue of DICTA, Tennessee has rejected Model Rule 1.8(j), substituting instead three comments to Rule 1.7, which address concurrent conflicts of interest. Rule 1.7(a) prohibits a lawyer from representing a client "if the representation involves concurrent conflict of interest." In the context of sex with a client, there would be a conflict of interest if "there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer."¹¹

Comment [12] to Rule 1.7 reminds lawyers of the dangers of sex with clients:

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest under paragraph (a)(2) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.

The last time the Rules were revised, effective January 1, 2011, the Memphis Bar Association urged the TBA Committee to include Model Rule 1.8(j) in the revisions. The Committee, however, refused to do so, commenting that "it was the committee's considered view that the proper place to address this issue was in the comments to Rule 1.7 because the

problem that is created by a sexual relationship with a client is a 1.7 material limitation conflict arising from the lawyer's personal interest."

Several points are noteworthy about Tennessee's peculiar treatment of sex with clients. First, as Paula Schaefer has pointed out, the comment cautions against entering into "any intimate personal relationship" with a client, not just a sexual relationship. Therefore, Tennessee's approach is broader than that taken in Rule 1.8(j).

Second, while the approach taken by Model Rule 1.8(j) is an absolute prohibition, Tennessee's approach contemplates that sex with clients will be permissible in some situations. This approach is indicated by the use of the phrases "may raise concerns" and "may create a conflict of interest" and by the comment that a sexual relationship may exist "in the absence of an actual violation of these Rules."¹² Thus, some, but not all, sexual relationships with clients are unethical in Tennessee.

Second, Tennessee's approach permits "informed consent" to the conflict of interest created by the sexual relationship. The lawyer who begins a sexual relationship with a client will not violate Rule 1.7 if the lawyer "reasonably believes" that s/he "will be able to provide competent and diligent representation" to the client; if the "representation is not [otherwise] prohibited by law"; and if the client agrees to continue the sexual relationship after the lawyer has "communicated adequate information and explanation about the material risks of and reasonably available alternatives to" the continued representation. Presumably, the material risks are those identified early on in ABA Formal Ethics Opinion 92-354 and reiterated in the comments to Model Rule 1.8(j). However, to the extent that informed consent requires an objective presentation of the risks and alternative, and a clear-headed evaluation of that information by the client, the ABA approach suggests that the possibility of informed consent is negated by the emotion and bias inherent in a sexual relationship.

Third, Tennessee's approach suggests that sex with clients, while not necessarily violating Rule 1.7(a), "may . . . violate other disciplinary rules."¹³ Which other rules might sex with clients violate? The only candidate appears to be Rule 8.4(d), which prohibits a lawyer from "engag[ing] in conduct that is prejudicial to the administration of justice." There is no longer a Rule apart from Rule 1.7(a) requiring the lawyer to exercise independent professional judgment. Rule 8.4(b) prohibits a lawyer from "commit[ting] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," but consensual sex between adults in the absence of extortionate demands would not be a criminal act.

In sum, Tennessee's refusal to prohibit the commencement of a sexual relationship with a client leaves gray areas in which the lawyer must exercise his or her judgment. As Paula Schaefer previously pointed out, "Fiduciary duty is still the guide even in a state that does not adopt Model Rule 1.8(j)." Because a fiduciary occupies "the highest position of trust and confidence"¹⁴ and is required to adhere to "the highest standards of ethical conduct,"¹⁵ a lawyer can begin a sexual relationship with a client only when doing so is consistent with that standard. Or, as my mother would say, "When in doubt, don't!"

¹ Martha Neil, *Lawyer Suspended for Violating No-Sex-With-Client Rule; He Admits Oral Sex was DUI Case Fee*, abajournal.com (Aug. 1, 2013).

² ABA Model Rule 1.8(j) as well as Tennessee's approach also applies to sex with a representative of an organizational client, at least one who "supervises, directs or regularly consults with that lawyer concerning the organization's legal matters." Model R. Prof. Conduct 1.8 comment [19]; Tenn. R. Prof. Conduct 1.7 comment [12b].

³ Model R. Prof. Conduct 1.8(j) comment [17].

⁴ *Id.*

⁵ ABA Formal Ethics Op. 92-364 (July 6, 1992).

⁶ *Id.*

⁷ Model R. Prof. Conduct 1.8(j) comment [17].

⁸ Ariz. R. Prof. Conduct ER 1.8(j); Del. Lawyers' R. Prof. Conduct 1.8(j); Minn. R. Prof. Conduct 1.8(j); N.C. R. Prof. Conduct 1.19; Wash. R. Prof. Conduct 1.8(j); Wash. R. Prof. Conduct for Attorneys 1.8(j).

⁹ Joan C. Rogers, *Georgia Opts for Highly Selective Approach in Choosing Model Rule Updates to Borrow*, 28 LAW. MAN. PROF. CONDUCT 66 (Feb. 1, 2012).

¹⁰ Tony Dutra and Joan C. Rogers, *New Ethics Code for PTO Practitioners Tracks Model Rules, with Modest Changes*, 29 LAW. MAN. PROF. CONDUCT 22.

¹¹ Tenn. R. Prof. Conduct 1.7(b).

¹² Tenn. R. Prof. Conduct 1.7 comment [12] (emphasis added).

¹³ Tenn. R. Prof. Conduct 1.7 comment [12].

¹⁴ Tenn. R. Prof. Conduct 1.7 comment [12].

¹⁵ ABA Formal Ethics Op. 92-364 (July 6, 1992).



AROUND THE COMMUNITY

By: Sally A. Goade
Judicial Law Clerk
Tennessee Court of Appeals

Cathy Shuck is Family at Lisa Ross Birth and Women's Center

As President of the Board at Lisa Ross Birth and Women's Center, Catherine E. Shuck is part of the family. Cathy, who is Assistant General Counsel at East Tennessee Children's Hospital and of counsel at Wimberly Lawson Wright Daves & Jones, PLLC, first learned of the Lisa Ross Center when she moved to Knoxville in 2003. She was 33 weeks pregnant and faced with little time to find the right provider and setting for her daughter Sierra's birth. Cathy remembers the Center welcoming her and giving her exactly the natural and nurturing experience she had hoped to find, including a waterbirth with a certified nurse-midwife in attendance. Six months after Sierra's birth, Cathy was invited to join the Center's Board.

This column spotlights KBA members who volunteer with nonprofit organizations for which they have particular passion, typically leading to board membership. When I toured the Center and interviewed Executive Director Carmen Pitt and Clinical Director Sherri Hedberg, I asked my usual question about why an attorney is of value on their board. Carmen and Sherri went right past the "attorney" part of the question to express their immense appreciation for what Cathy as a person has meant to the Center.



Carmen, a social worker, and Sherri, a registered nurse, had both worked at the Center for several years when they were appointed simultaneously to their current director positions in September 2011 as the Center suddenly faced key administrative and board changes. The board needed a new president, and Sherri describes Cathy "jumping into the fire" to become president, a position she

had held once before. The administrators praise Cathy's ability to stay calm and focused on each needed step during a stressful situation, a quality we tend to expect from attorneys. They also describe a quality more difficult to cultivate—the ability to mentor with full support but step back once the mentees are ready to fly. Carmen and Sherri describe four-hour board meetings and long evening telephone calls to Cathy when they faced major decisions, such as recruiting a new medical director and planning the Center's budget toward a goal of 100% self-sustainment. Progress toward that goal is now measurable where it was once vague, and progress is good. Board meetings now last no more than 90 minutes, and when administrators are ready to present ideas for new grant applications or programs, they prepare answers to a checklist they know the board will review before giving its approval.

Developing a healthy, symbiotic, and familial relationship between administration and board is the result of hard work and passion. The seven-member board includes other members who, like Cathy, have been Center clients, including a dad of two babies "caught" by Center midwives. Staff members are often clients, meaning that a midwife may lead a parenting group one day and participate as a parent the next. Sherri enjoys visiting with her grandson, born at the Center in April 2013, when he attends a parenting group with his mom, Sherri's daughter Caitlin, who was born under the care of a midwife in another state. This Center has been serving families since 1991, long enough to

begin welcoming a second generation of parents and a first generation of proud grandparents.

As an increasingly popular alternative to giving birth in a hospital, the Lisa Ross Center, named for its former Director of Midwifery Services, provides birthing rooms decorated as welcoming, homey bedrooms, complete with state-of-the-art, discreetly placed medical equipment and specially equipped tubs for women who want to use water to naturally ease labor. It is the only facility in the Knoxville area currently providing a waterbirth option. A key belief is that "Childbearing is a

normal healthy event rarely requiring medical intervention." The skill and equipment for intervention are present if needed, and when a woman in labor needs to be transferred to a hospital, she is taken to the University of Tennessee Medical Center, where the Center's medical director, Dr. Walter Schoutko, is on staff. The Center also welcomes women who wish to benefit from its prenatal and postnatal programs but who desire or need to give birth in a hospital.

Another vital component is the onsite Breastfeeding Center, which is the only one of its kind in Tennessee. Clients are assisted individually by lactation consultants, can obtain prescriptions if needed, and can bill insurance for their visits. The Breastfeeding Center also facilitates mothers' support groups and co-sponsors special events. One hundred percent of mothers giving birth at the Center at least initiated breastfeeding in 2012, and any breastfeeding mother in the area can utilize the Breastfeeding Center, regardless of whether she was a client during her pregnancy.

Part of the Center's stated mission is to "close the gap in health disparity for women who are vulnerable to poor health outcomes." At the heart of the community atmosphere is the "Centering Pregnancy" approach to prenatal care, which combines clinical education, well-pregnancy medical checks, and peer support. Women, often with significant others, meet in groups based on their due dates. Their groups are led by skilled midwives who teach participants to take their own blood pressure and weight. With their due-date month as the common denominator, group members can be quite diverse in age, mothering experience, education, and socio-economic background. Carmen and Sherri note that such differences fall away when women are sharing the experiences of pregnancy, birthing, and early parenthood. The Centering Pregnancy program initially began with a Spanish-speaking model, expanded because of its success, and about half of the groups are Spanish-speaking today. Thanks to the new "Centering Parenting" program, client groups continue meeting for parenting education, well-baby medical checks, and support through their babies' third birthdays.

If you would like to be part of the Center's family, consider taking a guided tour, offered at 5:15 p.m. every second and fourth Tuesday. To register, call 524-4422, and be sure to visit the website at www.lisarosscenter.org for information and opportunities to contribute.



By: Jason Long
London & Amburn



TO BE PRECISE

I owe an apology to the Bar. More specifically, I owe an apology to our Supreme Court Justice, Janice Holder (yes, this is referred to as brown-nosing). In last month's article, as I was discussing the fall-out of the failure of the Tennessee legislature to continue the existence of the Judicial Nominating Commission, I wrote a paragraph that could be construed to indicate that Justice Holder was stepping down from the bench in August 2013. Of course, as I am sure all of you know, she is not set to leave office until the end of her term in August 2014. Please forgive me, Justice Holder, I did not mean to push you off the bench any earlier than you intended. I hope you stay as long as you want to serve. (Did I mention that I always sat in the front row of class?) It was poor writing on my part that resulted in the ambiguity.

It is frustrating to write an apology about my writing. I am not claiming to be the perfect writer (I know, many are shocked). I look around my office and see several attorneys whom I consider to be superior in that regard. In my own home, I know that I am, perhaps, the third best writer in the family and that is only because Janie has not learned to read. I can tolerate, although with a grimace, the occasional spelling error or comma splice. That is the result of poor editing, not poor writing. While certainly editing is crucial to the process, the reality is that I often turn these articles into Marsha at a very late hour and shortcut the editing process (that is not an excuse, merely an explanation). However, what I did in last month's article was flat-out poor writing. It lacked clarity and definition. As an attorney, that is a mortal sin.

When I was growing up, all I ever wanted to be was a writer. My parents had both graduated from the School of Journalism at UT, and dad worked in the newspapers for all of his life. He worked in circulation, but being with him allowed me to meet all of the reporters. I developed a fascination with their profession. While other kids enjoyed movies like *Superman* and *Return of the Jedi*, one of my favorite movies growing up was *All the President's Men*, the Robert Redford movie based upon Bob Woodward's book concerning the breaking of the Watergate scandal. (For the record, I recently re-watched this movie, and it stands the test of time. By the way, was there anywhere you couldn't smoke in 1972?) One of my favorite scenes in that movie is the interaction between Carl Bernstein (played by Dustin Hoffman) and Woodward (Redford) as they debate the best way to write the lead paragraph in one of their articles. I was a journalism nerd.

Fortunately my dad, knowing exactly how difficult that career is and how poorly it pays, talked me out of being a journalist. I instead decided that I would write novels and that surely I would be a bestselling author. Over time, that dream faded too, and I decided to go to law school. I could not have made a better decision. I truly enjoy the practice and believe that we are, at the core, professional writers. We are not creative writers in the sense that we illustrate a picture (some of that does occur, but in limited circumstances). We are writers who provide clarity. Whether writing to clients, the court, or opposing counsel on

topics ranging from litigation to the purpose and meaning behind specific contract provisions, we strive to make our writing simple and clear, directed to the audience at hand.

An argument can be made that our profession is the last bastion of such prose. Reading the newspaper or the internet these days reveals that journalists, by and large, no longer write with the precision and clarity that we once expected of a Woodward and Bernstein. They are less and less in the business of providing information and more and more in the business of sensationalism. The latter is often frustrated by clear writing. I don't blame the journalists for their ambiguous writing. I blame the public who loves to live in a world of grays where every story can be adapted to suit one's interest.

Law school starts up this week, and a whole new generation of English majors will be broken of their fetish for adjectives and descriptive prose in favor of simply pushing nouns against verbs to make a point. Many will decry that process as uninspiring and boring. In

fact, it is persuasive and powerful when done correctly. Another movie reference: I love the movie *A River Runs Through It* (another Redford production). My favorite scene is during the opening montage as the narrator explains his childhood, growing up the eldest son of a strict Presbyterian minister. The child was taught the value of hard work and frugality in all he did. As an example, the boy brings his father an essay he wrote. The father makes some edits, hands it back to the boy and tells him to rewrite it and make it "half as long." The boy does so and brings the essay back to his father. The minister reads it and hands it back and says "half as long

again." We could all take a page from the Presbyterians.

The very first article I wrote for DICTA, back in 1999, was titled "And the Horse You Rode in On." It was a dissertation (okay, that may be overstating, it was a quickly thrown together opinion piece) about commonly used colloquialisms and their ambiguous meanings. In that article, I opined that lawyers are paid to be precise, a skill lacking in today's society and one for which we are heavily criticized. When Bill Clinton sits in deposition and tells the questioner that his answer depends upon the definition of the word "is," he is thinking like a lawyer. While 99% of the population rolls their eyes, I hope that the legal community at least knows where he is coming from and can understand his efforts to be precise (or at least appreciate his efforts to use precision to avoid impeachment).

My wife, who is the best writer in our family, is often my harshest critic when it comes to my work. I am thankful for that. Not many people have an in-house editor as meticulous as she is. She is constantly pointing out my grammatical foibles, and I have learned not to argue with her, as she is invariably right (again, no great surprise here). When she read the paragraph concerning Justice Holder in last month's article, she told me that I may have nothing to write an apology for because the meaning of the paragraph was unclear. For that, I am truly sorry.





By: Althea Hickman Creel
Administrative Hearing Official
Division of Appeals and Hearings,
Tennessee Department of Human Services

DIVISION OF APPEALS AND HEARINGS

TENNESSEE DEPARTMENT OF HUMAN SERVICES

It's Monday at 8:45 a.m. I adjust the telephone headset and make sure that I have a good connection to the recording software so that all the parties in this morning's hearings will be able to understand each other. Glancing over the cases scheduled for today's Family Assistance docket, I see that I have several SNAP (f/k/a Food Stamps) benefit appeals, along with a Families First (TANF/AFDC) appeal and a couple of Medicaid appeals. This is a typical docket, with 12 total appeals to hear before 3:30 p.m. today. I am looking forward to a much shorter docket of child support appeals in Knox County later this week, and I say a silent prayer that most of those will be resolved without a hearing, so that those appellants can get on with their lives much sooner! Individuals appealing child support issues often become disgruntled waiting 30 or so days for a hearing, then learning that the Hearing Officer has no authority to modify a court's order or forgive arrears. Child support appeals may take longer because of the variety of administrative issues involved with implementing a court order or ensuring that an obligor is paying his/her current child support or arrearages in the proper amount, to the proper person or entity, and on time.

Family Assistance appeals are the majority of what I hear. Throw in occasional Child Care and Adult Day Care Licensing issues, Vocational Rehabilitation disputes, and Administrative Disqualification Hearings aimed at recouping overpayments of SNAP and Families First benefits (and those child support administrative hearings!), and you have 99% of a Hearing Officer's docket content for a typical month. Most of the appeals that are handled in the dozen or so program areas that the Tennessee Department of Human Services administers are by telephone, with a Hearing Officer, the appellant, and a lay representative from the Department providing evidence regarding the Department's actions in an individual's case. While an appellant has the right to appear in person before the Hearing Officer, when considering transportation costs and time, work, and family constraints, most appellants opt for the telephone hearings, which usually last about 30 minutes, depending on the complexity of the issues. Medicaid appeals tend to take a little longer to hear, especially if nursing home or community spouse allocations issues are involved. The appellants with these issues usually request in-person hearings and appear with an attorney in tow.

When I began in 2005 with the Department as a temporary Special Hearing Officer during TennCare disenrollment, my knowledge of the legal authority concerning Medicaid appeals, such as that contained in 42 U.S.C. §§ 1396, *et seq.*, and 42 C.F.R. § 435, was bare-bones. With excellent training and access to on-the-job mentors, I quickly learned the hearing procedures and how to apply the facts raised in those hearings to the federal and state laws, rules, and regulations. Many procedures have changed since 2005. By and large, however, the administrative hearing mandates in Tenn. Comp. R. & Regs. 1240-05-01, *et seq.*, remain the same. Administrative hearings are much more relaxed and less adversarial than a judicial court hearing or trial. Each program area the Department administers has its own time deadlines, federal and state statutes, and implementing rules governing a particular service. Additionally, considering the relaxed evidence standard set forth in Tenn. Code Ann. § 4-5-313, the process is designed to allow appellants to have their say.

My main goal as a Hearing Officer is to ensure that the appellant receives due process in determining what benefits he/she may – or may not – be eligible to receive. I strive to clarify all of the statutory and regulatory mumbo-jumbo so that an appellant understands why the Department did what it did in a particular case. That helps the appellant to understand what he/she needs to show in order for a Hearing Officer to find that the Department erred in some way. The hearing process includes holding both the appellant and the Department accountable for their actions and ensuring that the testimony and evidence presented at a hearing is sufficient to substantiate the actions in each case. The majority of the appellants who appear before me are on the brink of losing some of the basic benefits – health insurance (Medicaid), food (SNAP), or cash (Families First) – that keep their lives together from day to day. As a result, many times they are angry, upset, and tearful. When all is said and done, I must be sure that the brief Initial Order I issue has a specific explanation regarding each program's eligibility criteria to sufficiently explain the outcome – why, for example, \$1,000 of income in a SNAP case is treated differently from \$1,000 of income in a Families First or Medicaid case.

So, remember that when you are talking with a potential client during a Saturday legal clinic, the first place you will check for guidance on how to help someone with a notice from the Tennessee Department of Human Services is Tenn. Comp. R. & Regs. 1240-05. You may believe that your representation of an appellant has put you on a road fraught with seemingly contradictory legal authority and policy provisions. But at the end of the day, the Hearing Officer will scrub away the mold and lift the fog to provide a clear, concise explanation of what happened, which will assist you to determine what is to be done next to resolve your client's issue.

It's 9:00 a.m. and I have to contact the first appellant. Let's hope I'm successful in continuing to appear unemotional, impartial, open-minded, and willing to go the extra mile to be sure the administrative proceedings allow everyone – an appellant, the state, or another party – a fair hearing of the disputed issues on today's docket.

Disclaimer: The views expressed in this article do not represent the views of the Tennessee Department of Human Services or the State of Tennessee. They are solely the views of Althea Hickman Creel in my personal capacity. I am not acting as an agent or representative of the Tennessee Department of Human Services or the State of Tennessee in this activity. There is no expressed or implied endorsement of views or activities of Althea Hickman Creel by either the Tennessee Department of Human Services or the State of Tennessee.



By: **Cheri Huffman Jones**

Associate Professor of Accounting & Law, Tusculum College

DO NOT SIGN WHAT YOU HAVE NOT READ

Occasionally, we mentally chide others for producing and distributing documents that include errors. We urge our clients to carefully read any type of text that requires a signature. However, we often fail to follow our own good advice.

In our haste to meet client needs as quickly as possible, we may rely too heavily on our word processing software to identify any mistakes. We depend on the red lines under misspelled text to indicate the error. However, even our spell checkers are not infallible. The squiggly red lines will not identify missing words or words used out of context, as evidenced by the lesson of the sea sponge.

One Santa Cruz attorney submitted an appellate brief in representation of a former judge charged with a series of traffic citations. The brief included the Latin term “sua sponte,” which means “of one’s own will” and is often used to reference a court taking action on its own initiative. The former judge soon called his attorney with a question about the brief’s repeated use of the term “sea sponge.” Apparently, the term *sua sponte* is not part of the WordPerfect dictionary. However, “sea” can be substituted for “sua,” and “sponte” was replaced as “sponge.” While sea sponge is a correctly spelled word, the term is rarely used in legal documents.

The final brief included such legally astute statements as, “An appropriate instruction limiting the judge’s criminal liability in such a prosecution must be given sea sponge explaining that certain acts or omissions by themselves are not sufficient to support a conviction,” as well as, “It is well settled that a trial court must instruct sea sponge on any defense, including a mistake of fact defense.” The Santa Cruz attorney almost certainly wished for a second opportunity to proofread this brief before filing.

Proofreading is a critical skill that will enable you to catch and solve errors before work is distributed to others. For optimum results, make sure that you proofread in a suitably quiet environment where you can concentrate without distraction. If possible, wait a few hours before proofreading a document you recently drafted. This gap in time helps your brain shift from a drafting to an editing mode.

A few additional tips to improve proofreading skills include:

1. Proofread lengthy documents in stages. The breaks between stages will refresh your mind and enable you to maintain the concentration required for appropriate attention and focus. You may also want to proofread important documents several times, once each for different types of mistakes. Read the first time for language choice and then for punctuation and then for spelling. You will be more accurate if you don’t try to focus on too many different types of possible mistakes at one time.
2. Proofread on paper. We read differently on a computer screen versus paper. A hard copy of your work may enable your eye to catch a mistake that would have gone unnoticed on a screen. Using double-spaced type for additional white space or a straight edge to limit your eyes to one line at a time can also help maintain your focus on the printed document.
3. Mark your mistakes. Use a different colored pen or pencil to correct your mistakes on the hard copy as soon as a mistake is identified. Stop immediately and highlight any mistakes in facts, figures, or proper names, as informational mistakes in your text can move from simply embarrassing to catastrophic in result.
4. Read your work. Slowly read your work out loud, and listen to the sound of your language to identify the sections that need to be changed. If possible, you may also want to read aloud to a partner. Taking turns between reading and listening is another way to maintain a fresh and focused approach. Your ear may catch a mistake that your eye would not.
5. Check for the common mistakes. You are aware of your own strengths and weaknesses. If spelling is your most common mistake, proofread twice for spelling or ask another to proofread your work. The most common mistakes found through proofreading include transposed letters and numbers (“from” versus “form”), confusing similar words (“accept” versus “except”) and mixed contractions and apostrophes (“their” versus “they’re”).

The extra time and effort taken to proofread your work will add credibility to your documents and increase your skills in this valuable area. In the words of Mark Twain, “In the first place God made idiots. This was for practice. Then he made proofreaders.”



Photo Ops

HABITAT 2013

Thanks to our volunteers



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.

RED MASS SCHEDULED FOR OCTOBER 18

The annual Red Mass for the Knoxville area legal community will be celebrated October 18 at 7:00 AM at Immaculate Conception Catholic Church located at 414 West Vine Avenue. Breakfast will follow immediately downstairs in the parish hall. Bishop Richard Stika will celebrate the Red Mass to invoke divine guidance and blessings on those involved in the legal profession. Members of the legal community are invited to join Bishop Stika in an ancient tradition that honors your work for justice and service to society. If you have any questions or suggestions, please call Deacon Joe Stackhouse at Immaculate Conception, 524-8514 or at home, 539-0451.

FREE ONLINE CLASSIFIEDS

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.

TENNESSEE JUDICIARY MUSEUM EVENT PLANNED

On December 5, 2013, the Tennessee Supreme Court Historical Society will unveil Phase II of the Tennessee Judiciary Museum. The evening will feature a short program with cocktails and heavy hors d'oeuvres at the Hermitage Hotel followed by a tour of the museum. If you would like more information on sponsorship options or tickets, please contact Linda Knight at 615-244-4994 (lknight@gstrm.com).

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 every other 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 Anabel Lino via e-mail at centro@centrohispano.org. Visit the Centro Hispano website at www.centrohispano.org.

SMOKY MOUNTAIN PARALEGAL ASSOCIATION

The Smoky Mountain Paralegal Association will hold its monthly CLE meeting on Thursday, September 12, 2013 at noon in the main conference room of the U.S. Attorney's Office at the Federal Courthouse (corner entrance facing Main Avenue). The meeting speaker will be Alex Long, Esq., with the University of Tennessee College of Law, presenting the topic of Ethics for 1.0 hour program. A lunch buffet is available at the cost of \$12/person with reservations. Please contact Barbara Miller at president@smparalegal.org or (865) 541-5284 for additional information and/or lunch reservations.

OFFICE SPACE AVAILABLE:

- Three offices are available for rent on Kingston Pike in West Knoxville. Rent includes utilities, phone, and access to printer/copier/scanner/fax. Great working environment, fun people, happy atmosphere. Easy to find. Close I-40 and Pellissippi Parkway. Contact **Robert Vogel** at 865-357-1949.
- 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.

Address Changes

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PRO BONO PROJECT

By: Terry Woods
Project Director

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

2013 Pro Bono Celebration

The annual Pro Bono Celebration was a rousing success, with almost 150 in attendance to see 27 members of the legal community recognized for their extraordinary service through the Pro Bono Project.

Ryan Gardner received the *Donald F. Paine Volunteer Law Student of the Year Award* for his outstanding service at the Knoxville Saturday Bar Clinic.

Richard L. Duncan received the *Advocacy Award* for his commitment to Saturday Bar clients at the clinic and beyond.

The *2013 Pro Bono Law Firm Award* was presented to **Paine, Tarwater, and Bickers, LLP**, for the second consecutive year.

Tennessee Chief Justice Gary Wade and Justice Sharon Lee also presented awards to the 2012 KBA Pro Bono Award winners:

Ali B. Abdelati	Emma A. Drozdowski	Ross B. Gray	J. Myers Morton
Adrienne L. Anderson	Richard L. Duncan	J. Scott Griswold	Sheila M. Needles
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The event would not have been possible without the generous financial support of our sponsors. Home Federal Bank was the Presenting Sponsor, and Luedeka Neely Group, P.C., sponsored the open bar. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.'s donation allowed us to offer reduced ticket prices to law students.

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*The Pro Bono Celebration was fun for all ages!
(KBA Award Winner Scott Griswold of Holbrook Peterson Smith PLLC
and daughter, Claire)*



Ryan M. Connor, Taylor A. Williams, Katherine S. Goodner, and John W. Elder accept the Pro Bono Law Firm of the Year Award on behalf of Paine, Tarwater, and Bickers, LLP, from The Hon. Sharon G. Lee.

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Q: Rick, please share with DICTA's readers how your practice in media and entertainment law came to be.

A: **RICHARD L. HOLLOW**
Hollow & Hollow, LLC

I was serving as Hamilton Burnett's second law clerk when the City created the job of Deputy Law Director. I applied for and got the job--a good thing too, since my clerkship was ending! City Court then handled General Sessions criminal actions: there were over 500 cases in abeyance, with about \$10,000 of forfeitures that had been left to languish, and many bail bondsmen were essentially practicing law. We set out to try those cases; we stopped an intolerable situation for City government. I attended all the City Council and Planning Commission meetings. Busy days: the City's taxpayers got their money's worth.

Several years later, Charlie Miller, UT Legal Clinic's director, launched a new initiative, which he asked me to join. It sounded great: I'd get a raise, and I'd be a faculty member. So, we inaugurated the Neighborhood Law Office: with two locations which we and law students staffed, it handled criminal and civil cases for those in real need. It was "cutting edge" stuff. There was an uproar: some local lawyers were convinced the program would take away fee-generating cases. I offered anyone with concerns to come to the Clinic, look at the cases we had, and take any case they wanted. Guess how many took a case?

My undergraduate major was in journalism; I had contacts from college and in newspapers. It sort-of matured over time, but I guess what launched it in large part was an incident that occurred at UT in late 1969 or early 1970. The UT students' Issues Committee wanted to invite the Black Panthers' leader H. Rap Brown to speak on campus. UT's administration essentially said, "No, we don't think that's a good idea." The students protested this decision as an infringement of free speech.

The students' original lawyer worked for UT; faced with potential loss of his UT job, he withdrew and gave the students my name. There was a small retainer, and the case looked interesting, so I took it and found myself teamed with William Kunstler. In a reported case from Judge Taylor, UT's action was held unconstitutional--void for vagueness.

Although his reputation was that of a radical firebrand, he was quite a gentleman: Bill allowed me to take the lead, and his personality was very measured, calm, and polite. He was a lot of fun to work with. We and the UT lawyers tried the case on stipulated facts; thus, we were able to dig into the law to an extraordinary degree. It was fascinating to watch Kunstler strike a rapport with Judge Taylor, even while parrying the judge's toughest questions. I learned the results when a *News Sentinel* reporter called me later to say, "You just won your case." That was a good day.

Soon after, a Cocke County judge wouldn't let a reporter review grand jury records. We got a writ executed, and I drove one Saturday morning to confront the judge. I left a copy of the writ with the local DA's office in Dandridge. You'd better believe that judge knew I was coming long before I reached his office.

When I arrived, on each side of the courthouse door stood plainclothes-men, exhibiting all the characteristics of men you wouldn't want to fool with in Cocke County. One asked: "Are you here to arrest the judge?" I replied, "No; I do have some papers for the Judge, though." "OK. Go on in." I entered a small office, where the judge, a smallish and slender man, sat behind a metal desk. He said, "Here," and tossed a thick docket book, which raised a cloud of dust when it hit his desktop. "This is all you need to see," he said. I thanked him--and I was gone, careful to not exceed the speed limits, stay in my lane, and be a model driver all the way out of Cocke County!

In 1972, I became General Counsel of the Tennessee Press Association. Litigation goes in cycles, and the years 1970-79 was a dynamic cycle for the First Amendment, defamation, and the privacy torts. Nationally, we had Watergate. In Tennessee, we had a "Ray of Blanton sunshine" and his issues with the press, countered by the Reporter Shield Law and Sunshine Law. (We can thank Victor Ashe for those laws, as he played a critical role in their passage, and he has long championed government transparency.) The courts were modifying their view of the *New York Times* standard, through *Gertz*, *Rosenbloom*, *Firestone* and related decisions.

As part of a wave of defamation cases in the 70s and 80s, I represented Larry Flynt, publisher of *Hustler Magazine*. One of these cases involved a young Hamblen County woman who claimed false light and invasion of privacy--her complaint was actually well-pleaded, if it actually had been true--alleging *Hustler* published topless photos of her. In fact, the photo was not of her at all; the source was a stock photo from a professional photographer, an East European émigré with photo studios in Paris and Corsica. The "friend" who had actually photographed the plaintiff was a biker...and his work? Let's say it was much less professional. I got the real photos and negatives for \$100 from the biker over a catfish lunch in the boondocks of Alabama.

A few years later, I was on an entertainment law panel with Flynt. He was--regardless of his reputation--a good client. He told me how much he paid his general counsel, an Ivy League lawyer. It was a considerable salary. Noting my surprise, he said: "Rick, I live and die in the courts."

Through a friend with the UT College of Communications, I worked with a State Department program for foreign journalists to see American-style journalism. Once, I made a passing reference in my talk to Larry Flynt. At a party that night, I learned that a group of them wanted to meet me and have their picture taken with me. Why? *Because I had represented Larry Flynt.*

That astounded me. Larry's reputation in the U.S., of course, needs no explanation, yet in the former Soviet bloc and other countries, he was a media icon and hero. In those former Communist countries, what was known was that he had stood up to the government in the name of the public's right to know--and Larry Flynt was these reporters' hero.

We Americans don't always recognize the full influence of things. Flynt is seen by many here as only a purveyor of smut, but elsewhere he stands for the power of free expression. There seems to be a wide gulf between Larry Flynt and another client and a longtime friend, Alex Haley. Maybe--viewed from a wider perspective--that gulf is not so wide after all.

"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.



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Join with us.

Knoxville Bar Association Annual Supreme Court Dinner

Each year, the Knoxville Bar Association hosts a dinner to pay tribute to the Justices of the Tennessee Supreme Court. The Justices of our Supreme Court, as well as the local judiciary, will be our guest for dinner on Wednesday, September 4, 2013. The dinner will be held this year at the newly renovated Holiday Inn World's Fair Park. Free parking is available in the hotel garage. The event begins with a reception in the Sundries Courtyard at 6 p.m. and will be followed by dinner in the Grand Pavilion at 7 p.m.

Tickets: \$50 each

Tables of 10 may be reserved in advance.

Please provide list of guests.

Free Parking is available at the hotel parking garage.

The Supreme Court Dinner is an opportunity for our entire legal community to gather as colleagues in the profession of law to honor the service of our Supreme Court Justices. The citizens of the State of Tennessee ask these individuals to develop the law in Tennessee by making final decisions on the most difficult and controversial legal questions possible. We want them to know that we appreciate their acceptance of that task and their fairness, graciousness, eloquence, and dedication in performing their duties.

Our Featured Speakers

Freddy & Isabel Rubio

Our keynote speakers will be Freddy and Isabel Rubio. The Rubios are respected professionals who work on a continuing basis with high level representatives of corporate America as well as both sides of the aisle in state legislatures, the United States Congress and in other governmental settings. They are committed to working with individuals with varying points of view in addressing immigration, which is surely one of the most significant issues of our time. A native of Puerto Rico, Freddy Rubio is on the ACLU National Board of Directors and is actively involved in immigration litigation. He received an accounting degree from the University of Alabama in Birmingham and a J.D. from the Cumberland School of Law. Freddy formed his own law firm, Rubio Law Firm, P. C., in 2009. Isabel Rubio is the founder and executive director of HICA, the Hispanic Interest Coalition of Alabama.



Knoxville Bar Association Supreme Court Dinner

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Cost: \$ 50 per person

Tables of 10 may be reserved in advance.

Please attach a list of guests.

Wednesday, September 4, 2013

Holiday Inn World Fair's Park

Cash Bar Reception: 6:00 p.m. - Sundries Courtyard

Dinner: 7:00 p.m. - Grand Pavilion

Bill of Fare:

Garden Salad

Salmon and Scared Breast of Chicken

Garlic Mashed Potatoes garnished with

thyme Roasted Asparagus

House Rolls with Butter

Choice of either Flourless Chocolate Torte or

New York Style Cheesecake Served with

Strawberry Compote

Vegetarian Option Available

Upon Request (by August 29)

Cancellation/Refund Policy:

Reservations canceled less than 48 hours before the program are subject to the penalty of the entire amount. Substitutions may be made. Please deliver or mail check and registration form to the

Knoxville Bar Association

P.O. Box 2027,

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