

Tennessee Young Lawyer

A QUARTERLY PUBLICATION OF THE TENNESSEE BAR ASSOCIATION YOUNG LAWYERS DIVISION

YLD Election Results

The Tennessee Bar Association Young Lawyers Division gathered on June 16 at the Peabody Hotel in Memphis for its annual meeting and elections. As the first order of business, the president's gavel officially passed from Memphis attorney Danny Van Horn to Springfield lawyer Lisa Sherrill Richter. Jason Long of Knoxville automatically advanced from the position of vice president to that of president-elect.

In addition, the following individuals were elected without opposition to leadership positions in the division:

- Katrina Atchely (Sevierville),**
District 2 Representative
- Effie Bean (Memphis),** Secretary
- Tasha Blakney (Knoxville),**
East Tennessee Governor
- David Changas (Nashville),**
Middle Tennessee Governor
- Brian Faughnan (Memphis),**
District 14 Representative
- Sarah Henry (Nashville),** Treasurer
- Rachel Moses (Cookeville),**
District 6 Representative
- Ray Runyon (Clarksville),**
District 10 Representative
- Michelle Sellers (Jackson),**
Vice President
- Wes Shumate (Dyersburg),**
District 12 Representative
- David Thompson (Nashville),**
Assistant Treasurer
- David Veile (Lebanon),**
District 8 Representative

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Patent Protection In China: Myth Versus Reality

By Susan Bennett Fentress

Over the past 25 years, China has adopted laws protecting intellectual property, but the perception that China does not protect intellectual property persists.¹ Recent developments in Chinese patent law, however, challenge that perception. On March 8, China's Ministry of Commerce announced a plan to revise 17 intellectual property rights related laws and regulations including trademarks, copyrights and patents. Recent criminal enforcement also has added teeth to the laws.

The patent law of the People's Republic of China provides for protection of "patents of invention, utility models and industrial design."² Once a patent right is granted, "no entity or individual may, without authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to use, sell or import the product directly obtained by the patented process ..."

To obtain a patent in China, the patented subject matter must possess novelty

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THE PRESIDENT'S CORNER

Change Is Coming!

By Danny Van Horn

By the time you read this, a new bar year will have begun and Lisa Richter will be your new president. That's change folks (in this case positive change!). In the midst of that change, I thought it would be appropriate to talk about the changes I see coming to our profession and our society. In short, I see major ones, and we have to decide now if we are going to master them or be mastered by them.

The biggest change on the horizon for our profession and society is the retirement of the baby boom generation. A quick survey of law firms in my home town, and indeed across the state, indicates that many of the biggest names in our profession will be retiring in the next ten to 15 years. It may be true that lawyers never really retire, but it is also true that they do lose favor and influence. The retirement of these boomers likely will lead to increased instability in many law firms and practices. But this also will create new opportunities for young lawyers to step up and take on significant positions of leadership. Someone is going to have to do all that estate planning. Someone is going to have to handle the elder law issues that arise. Someone will have to become the new rainmaker and firm builder. Why not you?

Another big change that is coming is the increasing economic clout and population of minority communities and persons of color. Some demographic studies say that America will be a majority minority

country by as early as 2024. Others peg that date as late as 2050. There is no doubt, however, that the face of our society will change dramatically. Again, this change comes with opportunities. If diversity in hiring practices is not something your firm or practice has adopted, you would be well advised to rethink that position. You also might want to learn to be conversant in Spanish.

Having a diverse work force and being fluent in multiple languages will be basic necessities in the very near future.

A change that already has begun, but will continue, is the increasing importance of using technology and low cost alternatives to deliver high-quality legal services at cheaper costs. That may well include off shoring certain legal services to foreign lawyers. For example, there are Indian accounting firms that handle tax returns far cheaper than American accountants can do the work, and American firms big and small are working with these Indian firms to have them handle routine work. Recent anecdotal evidence suggests that this trend now has moved to the provision of some legal services such as large document reviews and very basic due diligence in transactional work. Off shoring may



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well have a significant impact on the practice of law, requiring all of us to change the way we approach our profession.

Change, whether positive, negative or indifferent, is coming. We can't stop it and we can't completely eradicate the pain that it sometimes causes. But we can start to anticipate it and we can position ourselves, our practices and our communities not only to survive change, but to thrive in the midst of it. The real question is, "What are you doing today to anticipate change and what are you doing to take advantage of it?"

It has been a sincere pleasure and honor to lead you this last year. Change has come to the YLD, as it does every year. Best of luck to you as you manage the change that is happening right now in our organization and the change that is coming to our profession. ■

Staff

- ▶ DANNY VAN HORN, PRESIDENT
- ▶ APRIL BERMAN, EDITOR
- ▶ RAE OLIVER, ASSISTANT EDITOR
- ▶ STACEY SHRADER, YLD DIRECTOR
- ▶ LANDRY BUTLER, DESIGN & PRODUCTION



Election Results

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And what began as a contested race for West Tennessee Governor ultimately came down to an unopposed race with Andrew Sellers of Jackson being elected without opposition.

Following the election of new leaders, President Lisa Richter addressed the group and outlined her vision for the coming year. Her plans include training lawyers to be better equipped when called on to offer

legal advice in the wake of natural disasters and strengthening the continuing legal education programs the division offers to young lawyers.

If you did not make the meeting, mark your calendar now for the 2007 YLD Annual Meeting & Election, which will be held Friday, June 15, 2007 at the Sheraton Music City in Nashville! ■

Patent Protection In China: Myth Versus Reality

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inventiveness and practical applicability.⁴ It should be noted, however, that patents are not granted for:

1. scientific discoveries;
2. rules and methods for mental activities;
3. methods for the diagnosis or for the treatment of diseases;
4. animal and plant varieties⁵; and
5. substances obtained by means of nuclear transformation.⁶

To file nationally in China, foreign applicants not having a residence or establishment in China for filing a patent application must appoint as agent one of the agents specially designated by the China Intellectual Property Office to represent foreign parties. An application based on a U.S. utility application may be filed in China by two routes. First, it may be filed through the Paris Convention within 12 months of filing the U.S. priority application. If this route is selected, the Chinese translation of the U.S. patent application is considered the priority document. Errors in translation cannot be corrected. Another route for submitting a patent application in China is the Patent Cooperation Treaty (PCT). The English language PCT application is considered the priority document if the PCT route is selected; thus, if an error in translation occurs, recourse can be made to correct the translation.

The election of the route to file relates to the subject matter. For example, if the patent application relates to a pharmaceutical composition or a method to make a pharmaceutical composition, it is best to file via the PCT route as the filing procedure allows correcting the translated application. A PCT application is submitted within 12 months of the U.S. priority application and is considered the international phase. The applicant has 30 months from the date the U.S. priority application is filed to file an application in a specific country, in what is known as the national phase.

The major types of patents are patents of invention, utility models and industrial design patents. The duration of protection for a patent of invention is 20 years from the date of filing the application in China

China [is] a very attractive market. Patentees are missing an opportunity for patent protection based on the myth that patent laws are not respected in China.

(subject to the payment of annual fees; no extension). Patents for invention are substantively examined for novelty, inventive step and industrial applicability. Utility models relate to new technical devices concerning a shape, structure or combination of these in an article that is suitable for practical application. Utility model applications are only examined for form; that is, they are examined to determine whether they are properly filed. The length of the patent term is ten years from the date of filing the application in China (subject to the payment of annual fees; no extension). Industrial design patents last ten years from the date of filing the application in China (subject to the payment of annual fees; no extension). An industrial design patent covers the unique appearance of an object. For example, objects such as fans, dental implants and backpacks can be the subjects of design patents.

Chinese statistics indicate that between 1985 and 2004, more than 7.8 million patent applications were filed with the State Intellectual Property Office of the People's Republic of China (SIPO). Statistics also show that filings increased 38 percent from 2002 to 2003.⁷

Enforcement

Chapter VII of patent law in the People's Republic of China provides a mechanism to enforce patent rights. A patentee or an interested party may institute legal proceedings in the people's court or request the administrative authority for patent affairs to handle the matter.⁸ In the administrative

procedure, an applicant files a complaint with the local patent administrative authority. An administrative decision is rendered. Either party may appeal for judicial review to the Intermediate People's Court and the High People's Court. The remedies in the administrative process are cessation of the following activities: manufacture of the infringing product, use of the patent process, and the sale or import of the infringing product or products directly obtained through the use of the patented process. It should be noted that damages are not awarded through the administrative process.

Another route is the judicial protection of patent rights. The Chinese court system has four branches: the Supreme People's Court, the High People's Court, the Intermediate People's Court and the Basic People's Court. Patent infringement cases are filed in the Intermediate Court if the alleged damages are less than 100 million RMB (approximately \$12 million). If the alleged damages are greater than 100 million RMB, then the action is filed with the High Court. There are 31 high courts in China located in various districts. An appeal is taken to the Supreme Court. Potential remedies include an injunction against further infringement of the patent claims. Additionally, monetary damages and criminal penalties are provided. It is important to note that there is a two-year statute of limitations from when the patentee knew or should have known the patent rights were infringed.⁹

One of the key issues relating to Chinese patent law is whether the law is being applied so as to permit effective action against infringers. One recent case, *Kuimiai Chemical v. Jiangsu Institute of Economics, the Fourth Experimental Plant* (Civil Judgment Suminsanzhongzi No. 14), involved a Japanese company as the defendant suing two Chinese entities alleging infringement of two herbicide formulation patents: CN 88108904.4¹⁰ and CN 92112424.4¹¹. In this case the trial court, Nanjing Intermediate Court, held that the defendant directly infringed the patents. The defendant appealed to the appellate court, Jiangsu High Court, arguing that it did not infringe.

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The appellate court also found contributory infringement for making, selling and offering for sale the product in question. This decision indicates that evidence of infringement can be advertisement, a registration certificate of the herbicide¹² and administration authority or sales receipt.

One interesting problem with enforcement is a lack of reporting of decisions. This is an area that will have to be improved for patentees to gain more confidence in the enforcement system.

Invalidity Proceedings

The validity of an issued patent can be reexamined by SIPO upon request by a third party to the Reexamination Board. The grounds for reexamination are inventiveness and adequacy of the description. "Inventiveness" means that compared with the existing technical solution, the invention has prominent substantive features and represents notable progress.

"Prominent substantive feature" means the invention is not obvious in view of the prior art. SIPO employs the U.S. Graham factors. These well-known factors include: level of ordinary skill in the art, scope of content of the prior art, difference between the claimed invention and the prior art, and secondary consideration. Additionally, the specification must support described claims.

An example of a validity challenge is the Viagra case. The drug's manufacturer, Pfizer, received a use patent for Viagra in China in 2001. A request was filed by a dozen domestic pharmaceutical companies to cancel Pfizer's patent rights. In July 2005, SIPO's reexamination committee cancelled the patent because it did not comply with Article 26 of China's patent laws.¹³

The basis for the rejection was that the compounds patented for use were not specifically identified in the patent specification among a large group of compounds. The decision to cancel the Viagra patent was generally seen in the western press as a flagrant violation of intellectual property law.¹⁴ Notably however, a similar patent in the United Kingdom was invalidated (based on prior art) without publicity. Pfizer filed an appeal in Beijing No. 1 Intermediate People's Court.¹⁵ While under appeal,

the patent remains in effect but Pfizer is unable to collect royalties from infringers.

On June 2 a Beijing court overturned the SIPO ruling of patent invalidity in the Viagra case. The decision is being heralded as a "landmark ruling in support of greater intellectual property rights protection for foreign companies in China ..."¹⁶ Pfizer now can bring suit for patent infringement for Viagra made or sold in, or exported from, China.

Conclusion

The patent laws in China are in compliance with TRIPS¹⁷ requirements. Additionally, several economic factors, such as low annual annuities and the cost to obtain and enforce patents (which are low compared to the cost in the U.S.), make China a very attractive market. Patentees are missing an opportunity for patent protection based on the myth that patent laws are not respected in China. ■

Susan is a member of the Business Services Group at Butler, Snow, O'Mara, Stevens & Cannada PLLC in Memphis where she handles domestic and international patent matters with an emphasis on cases before the European Patent Office and in China and India. She can be reached at susan.fentress@butlersnow.com.

Notes

1. U.S.-China Agreement on Trade Relations – 1980. China accedes to the World Intellectual Property Organization (WIPO); trademark law adopted – 1982. Trademark law implementing regulations adopted – 1983. Chinese patent law adopted – 1984. Chinese Patent Office established; China accedes to the Paris Convention on Industrial Property – 1985. Protection for service marks introduced; trademark law implementing regulations adopted – 1988. China first applies for membership in the General Agreement on Tariffs and Trade (GATT); U.S.-China Memorandum of Understanding on Enactment and Scope of PRC Copyright Law – 1989. China agrees that copyright legislation will include computer programs as a specific category; China accedes to Madrid Trademark Argot – 1990. China agrees to registration of trademarks through WIPO's International

Bureau; Chinese copyright law adopted – 1991. U.S.-China Memorandum of Understanding extending protection to computer software, as well as to literary, artistic and scientific works; China agrees to extend copyright protection to foreign owners of software, books, films, sound recordings and other mediums previously unprotected – 1992. China accedes to the Berne Convention on the Protection of Literary and Artistic Works; Chinese copyright law adopted – 1993. China accedes to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Geneva Convention); Chinese patent law adopted; China accedes to the 1994 Patent Cooperation Treaty – 1994. China enters the WTO and revises more than 1000 laws – 2001. China enacts new regulations for intellectual property protection – 2004.

2. Patent Law of People's Republic of China (adopted at the 4th Meeting of the Standing Committee of the Sixth National People's Congress on March 12, 1984. Amended in accordance with the Decision of the Standing Committee of the Seventh National People's Congress on Amending the Patent Law of the People's Republic of China at its 27th Meeting on Sept. 4, 1992. Amended again in accordance with the Decision of the Standing Committee of the Ninth National People's Congress on Amending the Patent Law of the People's Republic of China adopted at its 17th Meeting on Aug. 25, 2000), Chapter 1, Article 1.

3. *Id.* at Article 11.

4. *Id.* at Chapter II, Article 22.

5. Protection can be obtained under Plant Variety Protection Act.

6. *Id.* at Chapter II, Article 25.

7. Embassy of United States Beijing, China Policy Paper, page 2.

8. Chapter VII, Article 57.

9. Patent Law of People's Republic of China at Article 62.

10. CN 88108904.4 relates to a process for making an herbicide effective compound.

11. CN 92112424.4 relates to a composition of matter.

12. Invalidity proceeding.

13. Liu Li, *China Daily*, March 24, 2006.

14. "Pfizer reports China lifted its Viagra patent," *New York Times*, July 8, 2004; "Pharmaceutical companies feeling potent effect of

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SPOTLIGHT ON TENNESSEE LAW SCHOOLS

The University of Tennessee College of Law: New People, Same Tradition of Excellence

By Rachel Ralston & Jill Shotzberger

The big news at UT is people, people, people. After eight years of service to the UT College of Law, Dean Tom Galligan is leaving Tennessee to become president of Colby-Sawyer College in New London, N.H. Although he will be greatly missed, excellent leadership will not be sacrificed as Dean John Sobieski will assume the position of Interim Dean for the next two years. The UT community anticipates continuing success under his leadership.

Other personnel changes include the retirement of Professor Neil Cohen following 34 outstanding years on the College of Law faculty. Professor Jerry Black will serve as Interim Director of Clinical Programs next year, and Professor Penny White will serve as Interim Director of the Center for Advocacy and Dispute Resolution. With the departures of Dean Galligan and Professor Cohen, the law school most likely will search for two new faculty members next year to teach courses in their areas of expertise — torts and evidence.

In the fall, three visiting faculty members will enhance the already excellent line up at UT. The first is Professor Ron Carlson, who holds the Fuller E. Callaway Chair of Law Emeritus at the University of Georgia School of Law. He is a nationally renowned

expert in the area of evidence and will teach Basic Evidence and Advanced Evidence. The college also will host Professor Kai Xiao, a visiting professor of law from Shanghai Jiao-tong University in the People's Republic of China, who will teach a Chinese law course as well as the International Business Transactions class. Finally, visiting practitioner Jonathan Friedland, a partner in the Chicago law firm of Kirkland & Ellis, will teach Business Associations and a seminar on Distressed Businesses.

In the spring, Robert Blitt will join the UT College of Law faculty to teach international law. Blitt brings incredible experience to this position. After earning an MA, JD and LLM from the University of Toronto, he clerked for President Aharon Barak of the Supreme Court of Israel, and served as an attorney advisor to the Department of International Agreements of the Ministry of Justice in Israel. He currently is an international law specialist with the U.S. Commission on International Religious Freedoms in Washington, D.C.

While there may be several new faces at UT in the coming year, many aspects of the College of Law will remain the same. The Moot Court Board continues to host two intramural competitions for law students, and last year ten moot court teams represented Tennessee nationally in areas of law ranging from bankruptcy to constitutional law. The College of Law's three journals, the *Tennessee Law Review*, *Transactions: The Tennessee Journal of Business Law* and *The Tennessee Journal of Law and Policy* continue to thrive. Student organizations also continue to raise awareness and funds for philanthropic causes. The Student Bar Association hosted a successful event this spring raising money for the



Interim Dean John Sobieski replaces outgoing Dean Tom Galligan at UT College of Law

Allen Novak Emergency Loan Fund, while Law Women sponsored a chili cook-off to raise funds for the Maasai American Organization, which sends young women to boarding schools in Kenya. The Law Women also donated \$1,400 to the Tennessee Woman's Suffrage Memorial that will be unveiled this August at Krutch Park in Knoxville.

And our future looks bright this fall. The first-year class will consist of 156 students who were chosen from 1,388 applicants. The College of Law welcomes the outstanding academic achievements of the class of 2009 and looks forward to their contribution to the UT community. ■

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fakes," *Chicago Tribune*, Nov. 20, 2005.

15. *China Daily*, March 24, 2006.

16. "Pfizer Wins Key China Court Ruling," *Forbes*, June 6, 2006.

17. The World Trade Organization (WTO) is an international body created to establish rules for international trade (known as WTO agreements) and to provide a mechanism for resolving disputes based on violations of those agreements (Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, WTO Agreement). One such agreement is the Trade-Related Aspects of Intellectual Property (TRIPS).

Rachel is a rising 3L at UT and is employed by Hunter, Smith and Davis LLP in Kingsport. At school, she is managing editor of Transactions: The Tennessee Journal of Business Law, a Westlaw representative and past president of Law Women. She can be reached at rralston@utk.edu. Jill is a rising 2L and is working for the American Civil Liberties Union in Raleigh, N.C. She is a Student Bar Association representative and the current president of Law Women. Jill can be contacted at jshotzbe@utk.edu. The authors also actively participate in UT's Pro Bono Program through the Saturday Bar and the Tennessee Innocence Project.

FACE OF THE YOUNG LAWYER

How to Be a Cowgirl

By Mary Ann Miranda

Sonya Smith walked into the office ahead of me, trying to look nonchalant. “Sonya,” I exclaimed, “Are you okay?” The dark bruise on the side of her face stood out noticeably against her fair skin. She shrugged. “It’s nothing. One of the bulls got out of the pen this morning.”

Cowgirl-At-Law

An associate in the Nashville office of Baker, Donelson, Bearman, Caldwell, & Berkowitz PC, Sonya Smith’s legal practice focuses on health care and commercial litigation. In her work with long-term care facilities, she proactively assists her clients with in-house training on relevant topics. “Sonya will soon emerge as a leader in the long-term care industry,” says her mentor Christy Crider. “My clients love working with Sonya because she can connect with them on both a personal and professional level.”

To best understand Smith as a professional, one must take a closer look at her roots. A native of Lebanon, Tenn., Smith grew up in a close-knit family on a beef cattle farm. Even now, every weekend and many mornings before the drive in to her Nashville office, Smith can be found feeding and watering cattle and confronting the occasional renegade bull.

Her sentences are peppered with comfortable words — “y’all” and “supper” (never dinner, unless you are talking about lunch on Sunday) — that set people at ease, and her smile comes naturally. Those who work closely with her know, however, that this charm is matched by an unflappable quality born of the fact that nothing anyone can say or do in the courtroom begins to compare to the experience of calving at half past two in the morning.

Homeward Bound

Interning with Criminal Court Judge J.O. Bond while a student at Lebanon High School, Smith found that she enjoyed the legal process and the rhythms of the courtroom. Never a doubt in her mind, “I knew then that I would go to law school,” she says. Later, armed with an undergraduate degree in mathematics and criminal justice

from Cumberland University in Lebanon, Sonya left Middle Tennessee for the Emory University School of Law in Atlanta.

Having briefly considered a career in Atlanta, Smith was drawn back to middle Tennessee in 2004 by her family, an offer to become an associate at Baker Donelson and, yes, the cows.

Although all grown up with her own 12-acre farm, 15 head of cattle and a busy law practice, she still works closely with her parents at Horn Springs Angus Farms. Under the tutelage of her parents, Smith began showing Black Angus cattle when she was eight years old, leading the prized animals around arenas so that judges could scrutinize their physical attributes. The ribbons, trophies and cash prizes that came with her success at show remain an important tool for marketing her family’s farm and sale facility.

Even now, with her law practice in full swing, Smith has never stopped showing cattle, making time in her schedule for the National Western stock show in Denver and other annual events in Kansas City, Mo. and Louisville, Ky. As she has every year since she can remember, Smith will show her cattle at the Tennessee State Fair this September.

Community Matters

As the youngest board member serving the Tennessee Angus Association, Smith plays the role of junior advisor to 180 young association members between the ages of eight and 21 across the state. The association aims to promote agriculture and, specifically, Angus cattle in Tennessee, and Smith arranges shows and contests to keep these young people involved and interested in farm life. Smith sees to it that the young members of the association have ample opportunity to participate in public speaking competitions and scholarship programs as well.

Smith also serves as a board member for



Sonya Smith, Cowgirl-At-Law

Wilson County Habitat for Humanity and helped to organize the first Women Build in Wilson County in the fall of 2005. Based on the success of the first building project, a second Women Build was organized for 2006. Smith spends most weekends on the worksite and often turns to the legal community when

there is a need for helping hands. The Wilson County Women Build has welcomed teams of volunteers from Baker Donelson while Andrea Perry of Nashville’s Miller & Martin PLLC recently chaperoned a group of high school students involved in a summer internship program sponsored by the Nashville Bar Association’s Minority Opportunities Committee. The group assisted with landscaping and work on the exterior trim. Thanks to Sonya’s commitment, the home is scheduled for completion by the end of the summer.

Cowgirl Up

Recently, Smith and I were both working late. By the time I dropped by her office to catch up with her, the sun had long since set. We watched the downtown lights reflected in the mirrored surface of the office tower across the street as we chatted. Smith was looking forward to a well-deserved long weekend, visiting Montana’s Big Sky Country. She had finished a trial the day before and was intent on finishing a draft of a motion for summary judgment for a client before leaving. It had been a long week and even so, when I asked about the trial, she flashed her trademark smile and drawled “Y’all don’t even know...” ■

Mary Ann Miranda is an associate in the litigation department at Baker, Donelson, Bearman, Caldwell & Berkowitz PC in Nashville. She can be reached at mmiranda@bakerdonelson.com. For more information on the Tennessee State Fair visit <http://www.tennesseeestatefair.org>.

PRACTICE TIPS

Summary Judgement – Explain Yourself

By Jason Long

For those of us insurance defense lawyers who rely on summary judgment motions as the lifeblood of our practice, it may be time to consider revising our forms. A 2005 decision from the Tennessee Supreme Court, authored by Justice Janice Holder, has clarified the necessary content requirements for such motions.

*Jennings v. Sewell-Allen Piggly Wiggly*¹ was a premises liability case in which the plaintiff slipped and fell in a supermarket owned by the defendant. The trial court granted Sewell-Allen's motion for summary judgment and the Court of Appeals affirmed, finding that Jennings could not meet her burden of actual or constructive notice. The court set out the text of Sewell-Allen's motion for summary judgment as follows:

Comes now the Defendant, Sewell-Allen, and moves this court for Summary Judgment and for grounds would state to the Court that there is no genuine issue of material fact and Plaintiff [sic] is entitled to judgment as a matter of law. In support of this motion, Plaintiff [sic] would rely on its supporting memorandum of law and the entire record in this cause.

The court found that the above quoted language failed to comply with Tennessee Rule of Civil Procedure 7.02(1) requiring that motions state with particularity the grounds for the motion. The requirements imposed by Rule 7.02(1) ostensibly are intended to permit the parties and the courts to identify and understand the basis of motions.

In the *Jennings* case the defendant referenced a memorandum of law that was presented to the trial court in support of its motion, but that memorandum was not filed with the court and, therefore, did not become a part of the record. The court noted that even had the defendant properly filed its memorandum with the trial court, such action would not have assured that the memorandum would have been made a part of the record on appeal. In fact, Rule 24(a) specifically excludes briefs from the record going up on appeal. Such briefs would nor-

mally only be included where a party makes written designation through Tennessee Rule of Appellate Procedure 24(a) and (e).

To compound the problem, no transcript of the hearing on the motion had been made and the order of the trial court stated

**the defendant referenced
a memorandum of law
that was presented to the
trial court in support of its
motion, but ... was not
filed with the court and,
therefore, did not become
a part of the record.**

in summary fashion only that, based on the record, the motion should be granted as no genuine issue of material fact existed. In short, the record was entirely silent as to the grounds on which the defendant maintained it was entitled to summary judgment and further as to the basis or reasoning of the trial court in granting the motion.

The court acknowledged that the responsibility of ensuring that the record on appeal is complete and accurate lies first with the appellant, in this case, the plaintiff. However, under Tennessee Rule of Appellate Procedure 24(a), (b) and (d), the appellee (defendant) shares in that obligation. In quoting the Court of Appeals in *Church v. Perales*², the court stated “[w]e refuse to perform the equivalent of an archaeological dig and endeavor to reconstruct the probable basis for the [trial] court’s decision.” The court concluded that the appellate record was “inadequate...to determine either the appellee’s motion or the trial court’s judgment.” The grant of summary judgment was vacated and the case was remanded for trial.

The facts in *Jennings* present an extreme situation where there appeared absolutely no explanation for the basis of granting the motion for summary judgment. The

court literally was left to divine the positions of the parties and the reasoning of the trial court. *Jennings* should serve as a cautionary tale for those preparing and relying on such motions. There is, in a sense, a burden on the movant to justify why the motion was granted.

The all-too-common practice is to present a very general motion and then specifically outline the argument for summary judgment in a supporting brief, incorporating the latter into the former. Under *Jennings* and Rule 7.02(1) of the Tennessee Rules of Civil Procedure, it appears that the attorney who uses such tactic runs the risk of losing the motion. The better practice is to state the legal theories upon which the motion is sought in the motion itself. Additionally, if the motion is granted, it would be good practice to obtain clarification from the court as to the basis on which summary judgment was granted and include that language in a draft order submitted to the court. Other steps counsel may consider to avoid the *Jennings* pitfall include (1) obtaining a transcript of the motion for summary judgment hearing to be included in the appellate record and (2) designating, in the record on appeal, that trial briefs associated with the motion be included in the record. These latter steps may result in a cumbersome record and, if counsel has appropriately set forth the basis in the motion and order, it may be overkill. In the end, however, the goal is to create a complete record and ensure that those reviewing the appeal will be able to understand what has transpired and why. ■

Jason is an attorney with the Knoxville firm of London & Amburn PC and can be reached at [jlong@latlaw.com](mailto: jlong@latlaw.com). He is president-elect of the YLD and will assume the office of president in 2007.

Notes

1. 173 S.W.2d 3d 710 (Tenn. 2005)
2. 39 S.W.3d 149, 157 (Tenn. Ct. App. 2000)

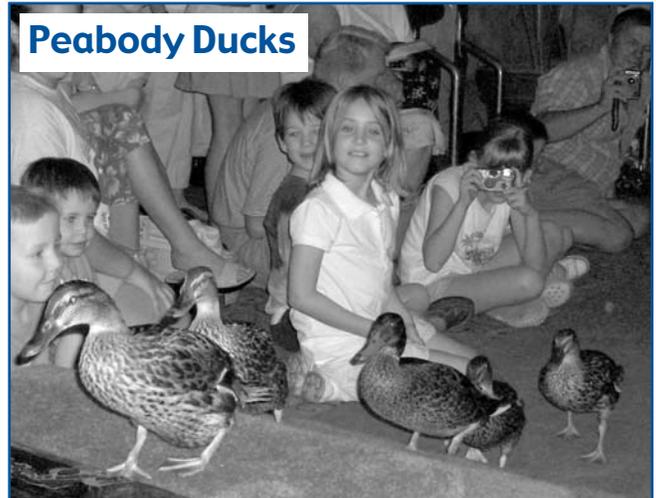
125TH ANNUAL TENNESSEE BAR ASSOCIATION CONVENTION Highlights from Memphis

Lawyers from across the state gathered at the Peabody Hotel in Memphis, June 14-17, to celebrate the American legal system, network with colleagues and just have a good time at the 125th Annual Tennessee Bar Association Convention.



Bench Bar Speaker

Steve Mikita, Utah's assistant attorney general, spoke to the annual Bench Bar Luncheon, which brings lawyers and judges together for the afternoon. Diagnosed with spinal muscular atrophy, Mikita was not expected to live beyond the age of two years. Now at age 43, he tells his moving and inspirational story to those who will listen. Mikita graduated from Brigham Young University's J. Reuben Clark Law School and clerked for the U.S. Senate Committee on the Judiciary while in school. He was appointed as an adjunct professor at the school in 1992 and has served in the Utah AG's office since 1982. Outgoing TBA President Bill Haltom looks on.



Peabody Ducks

Twice a day, the world-famous Peabody Ducks marched through the hotel, taking up residence in the lobby fountain in the morning and returning to their home on the hotel roof in the evening.



Law Day Art and Essay Contests

Winning entries in the YLD-sponsored Law Day Art and Essay Contests were displayed in the foyer of the Peabody, allowing lawyers and judges to enjoy Tennessee students' creative expressions of America's unique legal and political system.



In what became the talk of the convention, attendees of an ethics CLE traveled to the National Civil Rights Museum to hear from men who were with Dr. Martin Luther King Jr. the day he was shot. The museum sits on the site of the Lorraine Motel, where King was staying. His room is marked by a memorial wreath.



As it has for the last 25 years, the YLD sponsored Saturday morning's 5K Race Gestae. Pictured left to right are: (back row) Gail Ashworth, Steve Cobb (first place award), Steve Conley (second place award), Max Speight, Mason Wilson, Bill Haltom and Charles Swanson; (front row) Crystal Wilson (first female finisher award) and Shannone Raybon (first time participant award).

continued on page 10

Convention Highlights

continued from page 9



Fellows Dinner

Former presidents of the Young Lawyers Division line up for the ceremonial passing of the gavel. They are (from left to right) Allan Ramsaur, Bill Haltom, Randy Noell, John Tarpley, Pamela Reeves and Larry Wilks. Outgoing president Danny Van Horn tries to gain control over the group.

Also during the dinner, six former young lawyers were inducted into the Fellows of the Tennessee Bar Association Young Lawyers Division. They are:

- Beth A. Dunning, Nashville
- Marcia Meredith Eason, Chattanooga
- Stanley Eugene Graham, Nashville
- Erin McArdle, Kingsport
- Nathan Rowell, Knoxville
- Cynthia Richardson Wyrick, Sevierville

President Danny Van Horn also presented special recognition awards to April York Berman of Nashville for her work as editor of the *Tennessee Young Lawyer* and Jordan S. Keller of Nashville, for his service as chair of the 2006 Tennessee State High School Mock Trial Competition.



Tasha Blakney Receives Award

At the annual YLD Board & Fellows dinner, President Danny Van Horn presented the 2006 Young Lawyers Division President's Award to Tasha Blakney of Knoxville for her work as chair of the Children's Issues Committee, East Tennessee Governor and young lawyer delegate to the TBA House of Delegates. The award recognizes those who exhibit tireless dedication to the improvement of the legal profession and to the TBA YLD.

TECHNOLOGY AND THE LAW

Tech-etiquette

By Chad A. Dickson

This section of the *Tennessee Young Lawyer* usually is reserved for an article praising some technological advance, or some new gadget or some way in which your palm-berry-tooth is going to keep you connected no matter where you are. Blah, blah, blah. Well guess what? That ends right now. I am writing to offer a caution — a caution against allowing etiquette to be sacrificed on the altar of technology.

My apologies to Andy Rooney, but let me ask you a few questions. Have you ever had a partner at your law firm (or one of your bosses, if you are not at a firm) type an e-mail or check a Blackberry while you are trying to tell them something you think is important for them to hear? Have you ever been in a CLE and someone's phone rings, despite the fact that the instructors have asked everyone 1,000 times to turn off their phones? Have you ever been in a meeting and can't concentrate because the person next to you is hammering out a sequel to *War and Peace* on their Blackberry? Have you ever had someone hold up a "hush" finger to you when you are in the middle of a sentence, so that they can answer their phone?

I have and I do not like it one bit. Am I wrong to be a Luddite? Which reminds me, what is a Luddite anyway?

Luddites arrived on the British scene about 1811. They were organized, masked men, whose object was to destroy textile machinery. The use of the name Luddite was pejorative. In the time since then it has come to mean someone who has an irrational fear or hatred of science or technology. But that definition is incomplete, or perhaps just plain wrong.

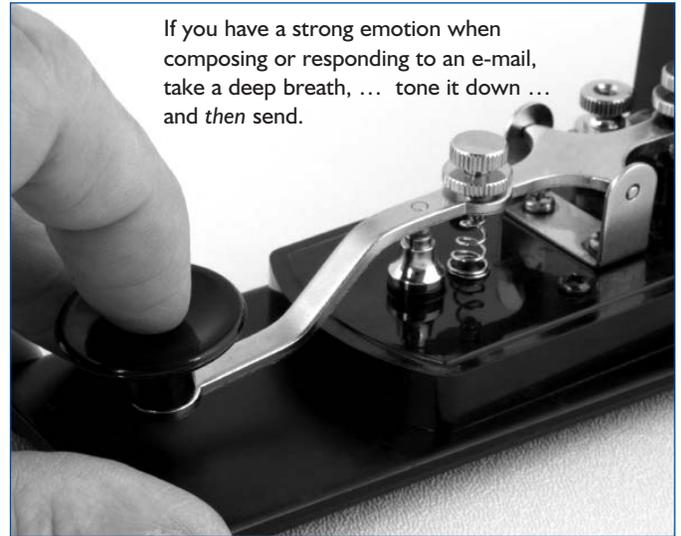
You see, the knitting machines had already been putting people out of work for well over two centuries. Everyone saw this happening. It was just part of daily life. People also observed that the machines more and more were becoming the property of men who did not work. They only owned and hired. The Luddites did not hate the machines, they hated what was being done with them. I will leave judgment on their particular motives alone. You can decide for yourself.

Now, as for the present, I do not know that I am trying to stop a technological revolution or anything; and I do not plan on donning a mask, running into the nearest law firm and smashing everyone's Bluetooth. But I guess that I am a Luddite, nonetheless, when it comes to lawyers and our gadgets. I do not hate the machines (I even use many of them myself), I just get irritated when people use them improperly.

So as an olive branch to the offenders, or to anyone who has made it this far into the article (sadly, it is probably only the Amen chorus of fellow Luddites who have done so; everyone else had to take a call, write an "urgent" e-mail or do whatever else it is that they do), I have some suggestions. Give your full attention to whoever is in front of you. If your secretary comes to ask you a question, do not give her only half of your attention just because you can; there is no excuse for rude, including "pecking order." If you go to a CLE, a conference or a meeting, turn off your phone as you go in and do not turn it back on until you leave. Same thing goes for whatever wireless e-mail device you have.

I have not yet addressed the misuse or abuse of e-mail since it merits some special attention. E-mail seems to offer an invitation to informality and rudeness. It is not a spoken communication (obviously), yet people often use it just as informally. If you are sending e-mails from your personal account and you want to be the next e-cummings that is one thing; if you are sending the same e-mails from your work account, that is entirely another.

Let me provide some guidelines. Use meaningful subject lines that your reader will understand. Limit the list of recipients of your e-mails to those people who directly are involved with the subject.



If you have a strong emotion when composing or responding to an e-mail, take a deep breath, ... tone it down ... and then send.

Always use correct grammar, spelling, punctuation and paragraph structure (do not use all caps, because in the e-mail world that is SHOUTING). Avoid overuse of the "highest priority" option. We all think we are important, but let's be honest with ourselves and learn how to determine what is and what is not really that important. Never use emoticons. Use "read receipt" sparingly (or not at all). And here is the biggest e-mail hazard in the gladiatorial world of lawyers: impulsively sent shots across the bow. If you have a strong emotion when composing or responding to an e-mail, take a deep breath, write your response, walk away from it, come back to it, read it again, tone it down (if necessary) and then send. Unlike telephone and personal conversations, impulsive e-mail responses are there in writing. They can be printed out, circulated and acquire a level of importance you never intended.

Finally, if I have written anything that troubles you or causes guilt, you are more than welcome to contact me to discuss it. I am reachable by telegraph STOP Pony Express STOP and smoke signal STOP. ■

Chad is an attorney in the Memphis office of FedEx Trade Networks and can be reached at chad.dickson@fedex.com. He served on the YLD Communications Committee for the 2005-2006 bar year.

2006 Law Day Art and Essay Contest Winners Announced

Each May, the Tennessee Bar Association Young Lawyers Division holds a statewide art and essay contest to celebrate Law Day. The theme for this year's contest was "Liberty Under Law: Separate Branches, Balanced Powers." Students were asked to communicate how our founding fathers balanced the concept of creating separate branches of government to protect liberty with the concept of creating equal branches to ensure cooperation for the common good.

The first place winner in the grammar and middle school art contest was Anderson Estes of Knoxville, who recently completed fourth grade at Sequoyah Elementary School. Second place went to Cayenne Cribb of Nashville's Eakin Elementary School. The third place winner was Riley Campbell also of Knoxville's Sequoyah Elementary.

In the high school essay contest, the first place winner was Catherine Fields of Signal Mountain. Fields recently completed tenth grade at Girls Preparatory School in Chattanooga. An avid writer, her essay placed second in last year's Law Day contest. This year's second place winner was William Henry Pickering III of Chattanooga's McCallie School. Third place was awarded to Vikas Biliyar of Nashville's Martin Luther King Jr. Magnet School.

The purpose of celebrating Law Day is two-fold: to instill in young people an appreciation for the law and a greater understanding of the American judicial system, and to provide attorneys with opportunities to serve their communities. ■

EXCERPTS FROM THE 2006 LAW DAY FIRST PLACE ESSAY

Liberty Under Law: Separate Branches, Balanced Powers

By Catherine Fields

The United States Constitution, now in its third century of governance, immortalizes principles that transcend its eighteenth-century setting. The success of the Constitution is primarily due to the founders' fundamental understanding of man and the document's inherent adaptability. The Constitutional framers wrote with a realistic view of human nature. They recognized man's desire for freedom and his capacity to govern, but they also had a clear understanding of man's tendency toward selfishness and corruption by power. This attitude of distrust toward human nature led our founders to divide authority within the national government and to build in certain checks and balances to prevent the concentration and abuse of power.

As a safeguard against any group or individual gaining too much power, the Constitutional framers divided the federal power into three branches of

government. Our nation's founders were greatly influenced by the writings of French political thinker Montesquieu, who coined the term "separation of powers." He considered it vital to create separate branches of government with equal but distinct powers. Although separation of powers is often thought to be synonymous with checks and balances, there is an important difference. If there was only a division of power in the national government, then one branch could expand its powers and ultimately dominate the other branches. The principle of checks and balances thwarts such an accumulation of power ... thereby protecting personal liberty.

The Constitutional framers forged a working balance ... that has provided a cornerstone for ordered liberty, true self-government and personal liberties that [have] made America a model of governance ... ■



Congratulations to this year's winners

Grammar and middle school art contest

- First place — Anderson Estes, Sequoyah Elementary School, Knoxville
- Second place — Cayenne Cribb, Eakin Elementary School, Nashville
- Third place — Riley Campbell, Sequoyah Elementary School, Knoxville

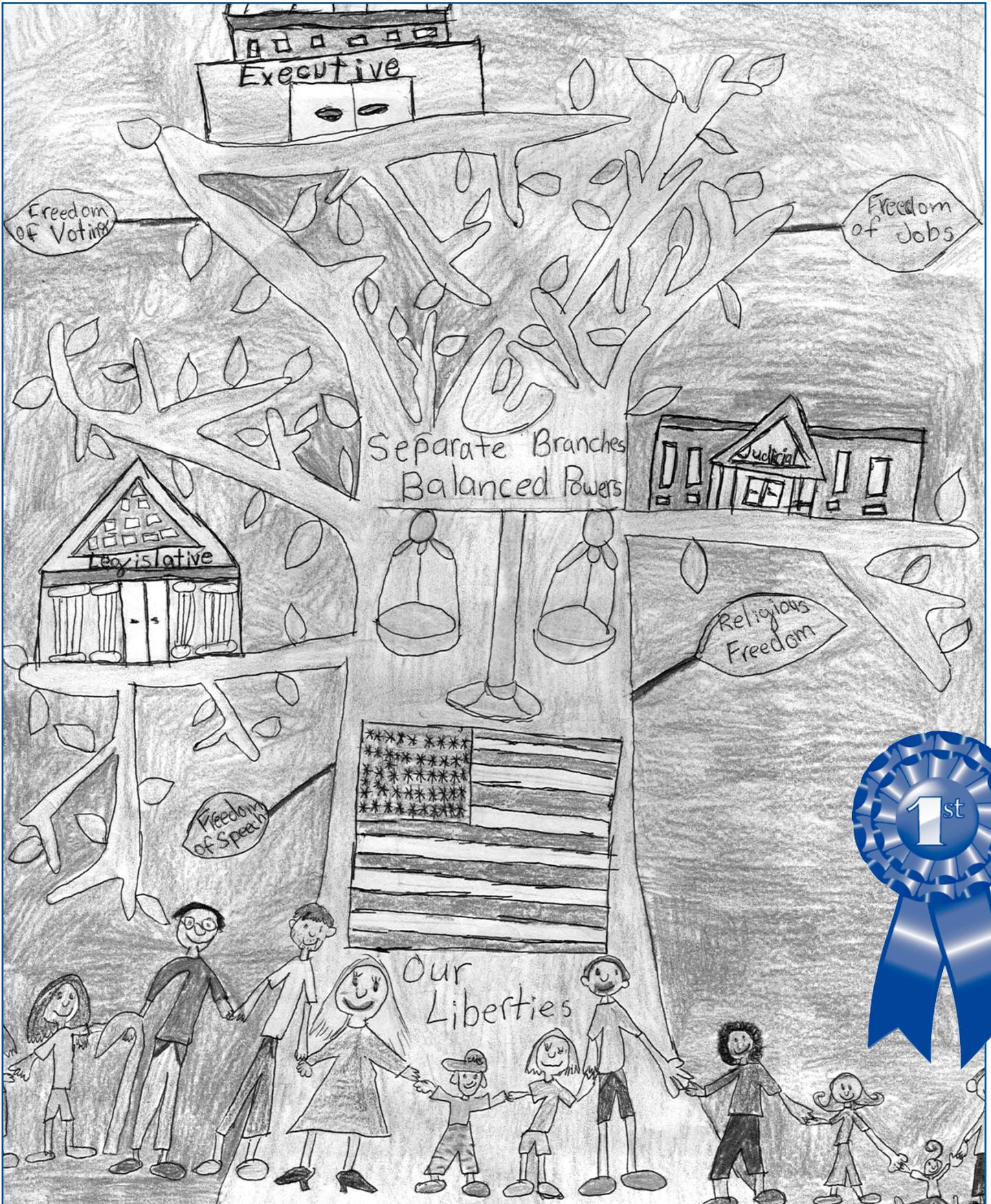
High school essay contest

- First place — Catherine Fields, Girls Preparatory School, Chattanooga
- Second place — William Henry Pickering III, McCallie School, Chattanooga
- Third place — Vikas Biliyar, Martin Luther King Jr. Magnet School, Nashville

For a listing of all the winners, go to <http://www.tba.org/ylld/contest/2006.html>



Separate Branches, Balanced Powers



The first place winner in the grammar and middle school art contest was Anderson Estes of Knoxville. See this image in full color at <http://www.tba.org/yld/contest/2006.html>

YLD IN THE COMMUNITY

Young Lawyers Participate in Service Projects Around the State

By Jenny Coques Rogers

The YLD's Public Service Committee is responsible for organizing one of the most extensive volunteer projects sponsored by the division each year. The committee is comprised of 14 district representatives who are responsible for choosing a volunteer activity and recruiting attorneys in their districts to perform the project. The work of the committee is specifically designed to coincide with Law Week, an annual program sponsored by the ABA-YLD.

For several years, the committee selected one day for attorneys to join hands and give back to their communities across the state. Some of the wonderful projects that were undertaken during this time included construction of several Habitat for Humanity houses; construction of wheelchair ramps for disabled individuals; and maintenance work at schools for disabled children, abuse shelters, community centers and animal shelters.

Beginning in 2005, under the leadership of then-President Cindy Wyrick, the committee used the Statewide Public Service Day primarily to raise money for and awareness about a single, deserving agency — Court Appointed Special Advocates or

CASA. CASA is a non-profit organization with the sole purpose of recruiting and training volunteers who are appointed by judges, to "speak up" for abused and neglected children in court. Many of the districts, especially those in which a CASA office was located, were able to garner great financial and volunteer support for the deserving children of CASA.

For 2006, President Danny Van Horn continued this vision by encouraging district representatives to use the Statewide Public Service Day as an opportunity to benefit CASA. He also encouraged district representatives to choose projects that would reflect the TBA YLD's commitment to the ABA-YLD's outreach program for people living with HIV and AIDS, known as "Answering the Call." To achieve the goal of having a successful Statewide Public Service Day, Van Horn called on the district representatives to identify and plan their projects as early as possible and to coordinate their projects with the YLD Fellows so that more members of the senior bar could participate.

This year, several district representatives chose a project to benefit CASA, while two district representatives broke

new ground with projects to benefit HIV/AIDS services organizations. Another district representative added the March of Dimes as a new beneficiary of our hard work. The remaining district representatives went the classic route of hands on work such as helping with the construction of Habitat for Humanity houses or other general maintenance work for deserving organizations. The following is a list of the results of some of the projects undertaken as part of the 2006 Statewide Public Service Day.

In District 1, Myers Massengill and seven young lawyers held a pancake breakfast fundraiser for CASA, raising approximately \$3,500 to benefit children in Kingsport.

District 3's Michael Brezina and between 20-25 attorneys, including YLD Fellows and former TBA Presidents Pamela Reeves and Charles Swanson, built the sub-floor of a Habitat for Humanity house in Knoxville.

In District 6, Rachel Moses and another attorney walked in the March of Dimes WalkAmerica, together raising more than \$1,400.

Jeff Cherry and 30 other workers in District 8 cheered up residents of a non-profit assisted living facility by landscaping the building in Wilson County.

District 11's Wes Bryant and all the young lawyers in Maury County sold Krispy Kreme doughnuts, raising over \$700 for CASA.

And in District 13, Anna Banks and ten volunteers handed out several hundred pamphlets about CASA at a local fair and donated \$300 to their local CASA agency.

The members of the Statewide Public Service Day Committee and all volunteer participants were proud to donate their time to such worthwhile efforts. For the past six years, our projects have made a tremendous difference in the lives of Tennesseans, especially children, across the state. ■



YLD District 10 purchased backpacks and school supplies for foster kids in their area. District Representative Ray Runyon presented the donations to workers from the Montgomery County Department of Children's Services.

Jenny is chair of the YLD Public Service Committee. She can be reached at jcoro@bellsouth.net.

BARELY LEGAL

Mirror, Mirror on the Wall, – Who’s the Worst Client of All?

By Lee Dickinson

Now, stop for a second. Think about the worst client you have — the absolute worst. No, not the one with the unreasonably short deadlines. Not the one who always pays bills 90 days late. And not the one who asks you the same question multiple times, hoping your answer will change. Think non-traditional. No, it’s not a parent, a child, a sibling or even a third-cousin once-removed. Here, let me get you a mirror ...

That’s right. You are your worst client. That’s the other thing the serpent in the Tree of Legal Education failed to mention. There likely are two reasons you are your worst client. First, you’re not a paying client; a paying client can never be your worst client — given that relatives exist. Second, you are as fractious and litigious as a relative, but it’s much harder to say “no” to yourself — because you are smart and rational, right?

When a relative calls you up wanting (this one is real, I promise) to “sue the city because they violated the 14th Amendment by passing an ordinance saying dogs have to be on leashes in the park,” you can be polite, explain what little constitutional law you remember and calm them down. Even if the relative is absolutely right that the advertisement says “Peas 79 cents” even though he paid 99 cents, you can usually dissuade any petitions for extraordinary relief by explaining the cost and difficulty of legal action, often adding a consoling, “Well, I just wouldn’t do business with them any more.” You are often at your best when dealing with relatives: giving good, practical advice and serving as a forum for them to vent.

But God have mercy on the cable company that tries to assess a new \$1.05 “Federal Compliance Fee” against you one month.

It starts with a telephone call to the company. You hold for a bit while a seven-second loop that sounds like an obsessive-compulsive on a 1980 Casio keyboard causes you to clench your jaw. Forty-five channels of digital music and this is the cable company’s on-hold music? A customer service representative picks up after 15 minutes. You attempt to persuade

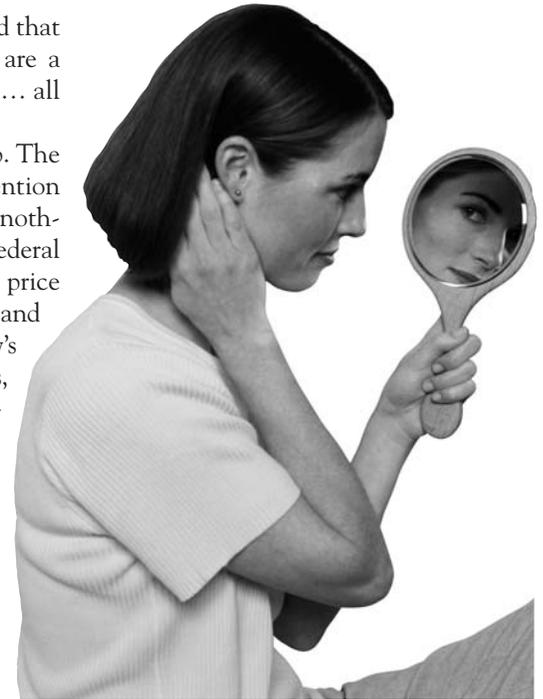
the indifferent voice on the other end that this new charge is unfair, that you are a good customer, that you pay on time ... all to no avail.

Then, you feel it start to bubble up. The conversation takes a turn. You mention that you have a contract and it says nothing about the company charging a “Federal Compliance Fee.” You agreed to a price and a term, you explain. You go back and forth a bit about the cable company’s ability to, as the deadpan voice says, “recapture costs of new federal legislation.” In an attempt to demonstrate the absurdity of the cable company’s position, you tell the customer service representative — who has now become as petulant as you — that you plan to pay them less given the recent property tax increase on your home. “How does that sound? I call it the Local Property Tax Recapture Credit.”

By this point, you have whipped yourself into a frenzy. And then it happens. Your lips form the phrase and it just comes out: “I’m an attorney, and ...” What follows is usually some variant of “we had a contract,” followed by references to consumer protection acts, good faith and fair dealing, class actions, and concluded with an emesis of foreign words that sound like a cross between Linda Blair and your high school Latin teacher.

At this point, you’re well over a half an hour into this, your blood pressure is 260 over 110 and you’re ready to kill. Not to mention the fact that you used the one phrase that makes you a Grade A Corn-Fed Jackass (that would be the “I’m an attorney, and ...” line). So, you hang up. And turn on your computer.

Over the next three hours, you draft a thoughtful, well-cited treatise on Tennessee consumer contracts addressed directly to the cable company. You mail it — certified mail — the following day. Two weeks later, you receive a letter from the cable company. The first thing you do is lick your thumb and run it over the signature to see if it’s real ink. It’s not. The letter says what all of these letters say, and what



Lily Tomlin immortalized: “We don’t care. We don’t have to.” You have only one card left. You reluctantly dial the cable company again. After another 15 minutes, you get a human being. “I’d like to cancel my service,” you say. (This is also known as cutting off your nose to spite your face.) The response: “We’re sorry to hear that. Would you consider staying with us if we were to give you one month’s credit?” You blink several times, going from resignation to awe. “W-w-well, yes. That would be fine.” You do the math again — just to confirm — that’s almost \$70, and all you wanted was the waiver of a \$1.05 per month fee for 11 months. You win! You win! Right?

Wrong. Add up your time and multiply by your hourly rate. And don’t forget to add the value of the three months you took off your life by planting the seed of an embolism in your brain. How much did you net? See, I told you. You are your worst client. ■

Lee is an associate with Baker, Donelson, Bearman, Caldwell & Berkowitz PC in Nashville, where he concentrates in the areas of corporate law, franchising and distribution, licensing and intellectual property. He can be reached at ldickinson@bakerdonelson.com.

Upcoming CLE for Young Lawyers

Finding & Challenging Experts

Aug. 2

Learn how to determine if an expert is needed, how to locate and select the best and how to prepare an expert for testifying.

Chattanooga

Sticky Fingers, 420 Broad Street, 423-265-7427

Knoxville

Downtown Grill & Brewery, 424 South Gay Street,
865-633-8111

Memphis

LoLo's Table, 128 Monroe Avenue, 901-522-9449

Nashville

BB King's, 152 2nd Avenue North, 615-256-2727



Wills, Uncontested Divorces & Basic Real Estate

Sept. 21

Learn the basics of preparing wills and obtaining uncontested divorces for clients as well as resolving real estate issues, which can complicate both of these areas of law.

Chattanooga

Sticky Fingers, 420 Broad Street, 423-265-7427

Knoxville

Downtown Grill & Brewery, 424 South Gay Street,
865-633-8111

Memphis

Owen Brennan's, 6150 Poplar Avenue, 901-761-0990

Nashville

BB King's, 152 2nd Avenue North, 615-256-2727

Choosing & Evaluating a Case

Oct. 4

Learn how to evaluate cases from both a plaintiff and defense perspective, with an emphasis on the monetary implications of choosing cases.

Chattanooga

St. John's Restaurant, 1278 Market Street, 423-266-4400

Knoxville

Downtown Grill & Brewery, 424 South Gay Street,
865-633-8111

Memphis

LoLo's Table, 128 Monroe Avenue, 901-522-9449

Nashville

BB King's, 152 2nd Avenue North, 615-256-2727

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