

Tennessee Young Lawyer

A QUARTERLY PUBLICATION OF THE TENNESSEE BAR ASSOCIATION YOUNG LAWYERS DIVISION

A Young Lawyer's Crash Course on the Enforceability of Limited Liability Clauses

By Katrina Atchley

In many contracts entered into by a business or an individual today, it is commonplace to find a limitation of liability clause. A limitation of liability clause is a provision in a contract that confines the amount of exposure a company or individual is subject to in the event a lawsuit is filed or a claim is made. When enforced by the courts, limitation of liability clauses hold the benefiting party accountable for some degree of agreed liability exposure and reflect the parties' mutual recognition that non-liability in excess of the specified amount is an agreed risk that one of the parties will accept. However, the question of when and why courts choose to enforce or to strike down these clauses is an area of constant consideration by most young attorneys, especially those with professional clientele.

Contractual limitation of liability provisions is enforceable under Tennessee law.¹ However, in the case of a professional person

or business operating in the area of public interest, this rule of law may not always be applicable depending on the court's interpretation of the nature of the limited liability provision — i.e., does the clause truly seek to limit liability or is it exculpatory? In the case of *Olson v. Molzen*,² the Tennessee Supreme Court refused to enforce a limitation of liability provision by interpreting the clause as exculpatory and void against public policy. In *Olson*, the plaintiff/patient agreed, prior to a surgery, to release the defendant/physician from any present or future legal responsibility. In its holding the court reasoned that in cases involving a professional person, operating in an area of public interest, and pursuing a profession subject to licensure by the state, further analysis is required when the professional person is attempting to avoid all liability. Within *Olson*, the court adopted the California Supreme Court's six-factor test, as set forth in the case of *Tunkl v. Regents of Univ. of California*,³ to determine what characteristics of an exculpatory contract would be against public policy. Those factors are:

1. The contract concerns business of a type generally thought suitable for public regulation.
2. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
3. The party holds himself out as willing to perform his service for any member of the public who seeks it, or at least

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A Word From Your Editor

By Hanson Tipton

I am pleased to announce an exciting change for the *Tennessee Young Lawyer* this year: beginning with the next issue, TYL is moving to an all-digital format. There are several reasons for this change, not the least of which is to cut down on the considerable cost of printing and delivering TYL to the members of the TBA Young Lawyers Division (YLD). Cost-savings aside, however, we prefer to think of it as the YLD "going green."

What this means to you, our loyal readers, is that future issues of TYL will come to you in the form of a PDF file attached to an e-mail from the TBA YLD. You will be able to read TYL from the comfort of your own computer screen, or if you are like me and prefer

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THE PRESIDENT'S CORNER

A Growing Voice

By Jason Long

There was a glitch in the system. For the past five or six years, we've been reporting that the YLD membership in this state totals approximately 1,500 attorneys, give or take a few. This year, that number jumped to 2,120 (according to the most recent report I read — it's likely even higher now). That's right. In this bar year, when the membership of the Tennessee Bar Association crested 10,000 attorneys for the first time in history, more than 20 percent of the current members are "young lawyers."

Some of you may be asking yourselves "so what?" Well, I'm glad you asked. The increase in our ranks is significant for several reasons. First, it means that during my year as chair, the Young Lawyers Division has seen its greatest membership increase in history (I attribute that directly to my dynamic personality and outstanding leadership). Second, it means that, if we wanted to, we could challenge the Kentucky Young Lawyers to a fight and stand a better than even chance of winning. Third, it confirms the long-held presumption that we are becoming an increasingly significant voice in the affairs of the profession. And finally, it means that we have an ever-increasing capacity to affect truly positive results.

Two Thousand One-Hundred and Twenty. That just sounds impressive. If each of us averages 40 billable hours per week (I

realize that many of you work more than that, some work less, and many have no billable hour requirements at all, but I used 40 as a conservative estimate), then we are collectively billing 84,800 hours per week and 4,409,600 hours per year. That's a lot of legal expertise being brought to bear in the state of Tennessee! It's important that we take an active role — through the provision of CLE programs, participation in mentoring programs and other informal processes — to ensure that those hours are dedicated to upholding the highest standards of our profession. We should take part in policing our profession because we have a larger role in presenting the public face of the profession. That means it's incumbent upon young lawyers, now more than ever, to adhere to the ethical standards of our profession, work congenially with our colleagues, foster respect and civility throughout the bar, and contribute to the dialogue on what it means to be an ethical attorney and what our profession should look like in the next 50 years.

Two Thousand One-Hundred and Twenty. Think about the tremendous collective capacity we possess to affect positive change in the lives of Tennesseans across the state. It takes less than one hour per week to comply with the public service goal — 50 hours per year per attorney — suggested by the Tennessee Supreme Court. That minimal contribution would produce 106,000 hours of public service per year. What could we do with that time? I can proudly tell you what the YLD could do with it. We'd start off dedicating around 5,000 hours to our signature program, the Mock Trial Competition. For that minimal contribution we could provide the coaches, scorers, judges and coordinators needed to expose nearly 3,500 students across the state to the judicial process and the rule of law in a meaningful and interactive way. We could take another 500 hours to educate students in each judicial district to make good personal life choices and stress



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On a side note, I didn't want this last issue of the year to go to print without a word of thanks to the many volunteers who have made the YLD so successful. Thank you all. It has been another special year.

the importance of exercising our constitutional right to vote through the Building Healthy Relationships Program and the Voter Awareness Project. With another 1,500 hours, we could fully staff Public Service Day projects in each YLD district in the state (in fact, that benefit is so great, we should double it and do two projects in each district at the cost of 3,000 hours). Next, with about 5,000 hours, we could provide basic estate planning for at least 5,000 first responders and emergency personnel through the Wills for Heroes Project. By my calculation, we could fully staff and even expand these worthy YLD service projects and still have 92,500 hours in the bank.

With programs such as CASA, the Pro Bono Project, Saturday Bars, charitable boards and other endeavors, there are limitless possibilities to assist individuals in need of legal representation. In my experience, I have rarely been called upon to spend more than five hours on a pro bono case. Many pro bono legal issues can be resolved even more quickly. However, using a conservative estimate of five hours per pro bono client, it's easy to calculate that Tennessee's young lawyers could provide legal services to approximately 18,500 Tennesseans with those leftover 92,500 hours (this, at a time when the economic

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CASA Volunteer of the Year Honored

During the Tennessee Bar Association's Leadership Conference this year, the Young Lawyers Division presented the 2008 CASA Volunteer of the Year Award to Don Merzlak of Mosheim. This annual award recognizes a court appointed special advocate who goes the extra mile in his or her work with a CASA program in the state.

Don Merzlak has served as a court appointed special advocate in Greene County for seven years, handling 34 cases and going well beyond the call of duty in helping children find safe and stable environments in which to live and grow. In nominating this volunteer, Stephanie Sanders, executive director of CASA of Northeast Tennessee, referenced two instances in which his commitment to the CASA mission solidified the agency's presence in northeast Tennessee. First, Sanders cited Merzlak's level of commitment and standards of excellence, which she says, established credibility for the program with local judges. In fact, she went so far as to say that the positive relationship between the CASA staff and the Greene County Juvenile court "is a direct result of Don's skillful and genuine approach to every case." A second lasting contribution Merzlak made to the local program, she says, was his decision to remain an active volunteer during a time when the agency was struggling to survive. Many volunteers abandoned the program at that time, but Merzlak remained a strong voice for abused and neglected children. As a result of that commitment, the agency was able to

A Growing Voice

continued ...

downturn will almost certainly drive pro bono needs to a record high). Regardless of how we choose to divide up the pie, there's no doubt that we have a tremendous capacity to make a profound and personal impact upon our communities.

Two Thousand One-Hundred and Twenty. That's a lot of lawyers. A lot of young, energetic, idealistic young lawyers with a chance to make a difference. Let's do it. ■



CASA Volunteer of the Year Don Merzlak receives his award from Children's Issues Co-Chair L. Blair Bennington Cannon of Chattanooga.

regain its footing and grow to be a strong, solid presence in northeast Tennessee.

In addition to these major contributions to the CASA program, Merzlak has made — and continues to make — significant daily contributions in the lives of the children he represents. As Sanders says, "Don gives his all to every case ... showing the same type of dedication and perseverance that he would ... to his own children if necessary." Sanders also remarked that he approaches each case with a sense of urgency and importance, and that the quality of his advocacy has never "dipped below the mark of excellence." Finally, she noted that Merzlak's commitment is infec-

tious. Soon after becoming a CASA volunteer, he recruited his wife Pat to join the cause. After she completed the training process, they began to work as a team and together have impacted the lives of dozens of children and families.

In choosing Don Merzlak as this year's award recipient, the YLD selection committee focused on the longevity of his service, his reputation as a CASA advocate and the lasting contributions he has made to the program in northeast Tennessee. Both Merzlak and the agency that nominated him received a cash award and were recognized at a Young Lawyers Division's board dinner in Nashville. ■

This issue of the *Tennessee Young Lawyer* has been sponsored by the Knoxville law firm of London & Amburn PC in honor of firm attorney Jason Long's year of service as president of the Tennessee Bar Association Young Lawyers Division.

London & Amburn is a general civil practice firm that represents clients in the areas of insurance defense, medical malpractice defense, health care law (including mergers and acquisitions, contracts, managed care, corporate and regulatory matters), products liability, trucking litigation, general corporate, general litigation in federal and state courts, and mediation.

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SPOTLIGHT ON TENNESSEE LAW SCHOOLS

This Year at Vanderbilt University Law School ...

By Katherine Poulos

Charitable Work

Vanderbilt University Law School students delighted the Nashville community, faculty and staff, and themselves by donating unprecedented amounts of time and money to philanthropic causes this year.

The Vanderbilt Bar Association spearheaded many of the events. First, VBA in conjunction with OutLaw organized AIDS Awareness Week to increase awareness, promote conversation and prevent the spread of HIV/AIDS in our local, national and global community. The week culminated with over 80 students, faculty, and staff participating in the Nashville AIDS Walk. VULS was the event's third largest fundraiser, raising \$3,129 for Nashville Cares. VBA also organized a book drive to collect books and money for

Book'em, a local organization that promotes reading and provides books to underprivileged children throughout Middle Tennessee. VULS donated 4,362 books and \$1,324 — the single largest donation Book'em has received during the holiday season. VBA also encouraged over 70 students to take a break from exam studying to create festive holiday greeting cards for senior citizens. The Christmas, Hanukkah, Kwanzaa and general "Happy Holidays" cards were delivered to Belcourt Terrace Nursing Home. Finally, VBA sponsored a St. Patty's Day party, collecting over \$1,000 in donations for the Red Cross and the National Sudanese Center.

In addition to the VBA philanthropic drive, many independent student organizations also held fundraisers and organized

community service events. The International Law Society and student Brett Sander organized a pancake-eating competition to raise money to support the Addis Ababa Fistula Hospital in Ethiopia. Students, faculty and staff donated approximately \$1,100 to help provide free fistula repair surgery to some 1,200 women every year. The Women's Law Student Association held a "mock baby shower" with gifts donated to a local women's shelter. In celebration of Black History Month, the Black Law Student's Association organized students to participate in a Habitat for Humanity building project. The Legal Aid Society's Street Law program provided free legal education programs for community members at nine project sites, including a homeless site, a juvenile site

This Year at the University of Memphis School of Law...

By Chris Collins

In the midst of all the buzz regarding the law school's upcoming move, two students recorded an outstanding performance at the ABA National Appellate Advocacy Competition National Finals in Chicago. Students Jennifer Bellott and Michael Goodin advanced undefeated through the regional advocacy competition, and went on to defeat Seton Hall and Texas Wesleyan in the preliminary rounds of the National Finals. They also defeated UC-Berkeley and Washington University, and then eliminated Seton Hall in the Final Four. That left Memphis and Harvard as the final two teams. During the final round, despite a strong showing, they lost on a split decision. In addition to the impressive accomplishment of making it to the final round, Bellott was named National Best Advocate, the award given to the best oral advocate in the competition. Special recognition also goes to Associate Dean Barbara Kritchevsky, who served as the team coach. Approximately 180 teams entered the competition and the top 25 advanced to the National Finals. All Tennesseans should be proud of these future lawyers!

The biggest news on campus, however, is the upcoming move downtown. The school has finished raising funds to move to



In August 2009, the Cecil C. Humphreys School of Law will move to the historic customs house, courthouse and post office — pictured above — in downtown Memphis.

its new location and the postmaster handed over the keys to the building on Dec. 3. Taking possession of the historic downtown customs house and post office at 1 North Front Street brings the law school one step closer to its goal of beginning classes there in August of 2009. "We launched this fundraiser on a dime ... [and] Memphis law firms were a galvanizing force during this

process," says University of Memphis Vice President Julie Johnson of the efforts that began in April 2006.

The school has already received \$5.3 million of the \$9.8 million in pledged funds from 16 area law firms, individuals and foundations. "We have a lot of U of M alumni and have had good experience

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and a women's site. The Legal Aid Society also raised approximately \$76,000 for Public Aid Interest Stipends to fund students' unpaid public interest summer employment. Finally, the Entertainment and Sports Law Society sponsored the Alumni Golf Tournament to raise money for the Tennessee Volunteer Lawyers for Arts.

Special Events

In addition to charitable events, VULS's student organizations sponsored and organized a full year of scholarly programming. The VULS Hyatt Fund helped student organizations bring several high profile speakers to campus. These events included:

- A presentation by Jim Cooney of Womble Carlyle Sandridge & Rice PLLC on the Duke Lacrosse Case, organized by the Entertainment and Sports Law Society.
- A speech by Mayor Karl Dean (VULS Class of '81), organized by the Legal Aid Society, the American Constitution Society and Vanderbilt Law School Democrats.
- A panel discussion on whether the Gardasil vaccine should be mandated for school-aged children, which was sponsored by the Women's Law Student Association.
- "Beyond Scottsboro" a talk organized by the Black Law Student Association and the Social Justice Program.
- A seminar on "Restorative Justice in Action" featuring Marty Price, which was organized by the Student Advisory Board to Social Justice Program, Vanderbilt Bar Association and Student Affairs.
- A presentation on "The Burden of a Gift: Fisk University and the Stieglitz Collection" by John Branham and Stacey Garrett of Bone McAllester Norton PLLC, which was organized by the Vanderbilt Art and Cultural Property Law Association.
- An appearance by Iraqi Judge Zuhair Al-Maliki, who discussed the challenges facing Iraq's new legal system and the promise of establishing the rule of law in Iraq.



Iraqi Judge Zuhair Al-Maliki speaks on campus about the challenges facing Iraq's new legal system.

Conferences

VULS also hosted several important scholarly conferences this past year. In conjunction with the World Intellectual Property Organization, the International Confederation of Societies of Authors and Composers, BMI, ASCAP and SESAC sponsored a major conference to discuss changes to copyright laws, collective rights management practices, and business models capable of meeting the needs of today's rights owners. The conference brought together key players from these and other organizations, including content and services providers, developers of digital technology, lawyers, government officials (including U.S. Register of Copyrights Marybeth Peters) and legal scholars. VULS also sponsored a March symposium in which a distinguished group of scholars, journalists and activists grappled with some of the thorniest issues of immigration. Finally, VULS sponsored a conference on neglected judges. Participating scholars investigated the question of judicial reputation by examining the lives and work of Supreme Court justices who were notable in their own time but who have since received scant attention from scholars, lawyers or current judges.

Wellness Initiative

The Vanderbilt Bar Association, at the initiative of student Meredith Blount,

also started an important wellness initiative called "Stress-Free Week," which was timed to correspond with the release of first-semester grades. VBA worked closely with Tennessee Lawyers Assistance Program to promote awareness of various emotional, mental and physical health issues stemming from law school and the practice of law; provide outlets and resources to address and reduce the impact of these issues; and find ways to encourage sustainable wellness in the legal community at large. The week included a "dry-pledge" to encourage students to reflect on their drinking behaviors, chair massages to assist in relaxation, and a panel on stress and grades. The program was recognized by the American Bar Association.

Faculty Changes

In August 2007, VULS Professor Robert Covington, a scholar and teacher of employment law who served on the faculty for 46 years, retired from the law school faculty. Additionally, Professor Robert Rasmussen, an 18-year member of the faculty of the VULS, left to take the position of dean of the University of Southern California's Gould School of Law. Other faculty changes included the additions of Brian Fitzpatrick, formerly of New York University School of Law, to the program of law & constitutional theory; Daniel Sharfstein, also formerly of New York University School of Law, to the VULS programs in law & constitutional theory and social justice; Kevin Stack, formerly of Benjamin N. Cardozo School of Law of Yeshiva University, to regulatory law and law & constitutional theory programs; and Ingrid Wuerth, formerly of the University of Cincinnati College of Law, to the international legal studies and constitutional law & theory programs.

Academic News

This year, VULS joined nine other law schools throughout the country in a project aimed at improving legal education, which was spearheaded by the Carnegie Foundation for the Advancement of Teaching. The deans and two faculty members from each of the participating schools met for the first time in December 2007 to set the project agenda.

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Law Day Art and Essay Contest Results

The YLD announced the winners of the 2008 Tennessee Law Day Art and Essay Competitions this past May. The theme of this year's contest was: "The Rule of Law: Foundation for Communities of Opportunity and Equity." The theme focused on the law's effect on daily life, helping young people understand that the rule of law is essential for personal safety, access to education and employment, and economic opportunity.

Students received cash prizes for their winning entries. To see work from all the winners visit http://www.tba.org/YLD/artessay_2008.html

The YLD would like to thank Knoxville lawyer Kelli Guinn with Howard &

Howard for serving as the 2008 Law Day Art and Essay Contest coordinator.

Essay Contest Results

First Place

Monte Cole Flowers
Memphis Catholic High School, Memphis

Second Place

Makeshia Welch
Martin Luther King Jr. Magnet High School, Nashville

Third Place

Shelton Campbell
Hendersonville Christian Academy, Hendersonville

Art Contest Results

First Place

Justin Carrasco
Fifth Grade
Cedar Bluff Elementary, Knoxville

Second Place

Ryan Elmerick
Fourth Grade
Julia Green Elementary, Nashville

Third Place

Jessie Robertson
Second Grade
Grahamwood Elementary, Memphis



First Place — Justin Carrasco



Second Place — Ryan Elmerick



Third Place — Jessie Robertson

LAW DAY 2008

A Day of Celebration and Public Service

By Kelli Guinn

Law Day is the official national celebration of the rule of law in this country. This year's Law Day theme, as set by the American Bar Association was "The Rule of Law: Foundation for Communities of Opportunity and Equity." It is an expansive concept but at its core, this year's theme attempts to recognize and celebrate what we all decided, at some level, to dedicate our lives to — the justice system and the role it has played, and will continue to play, in the freedoms we all possess.

Law Day is not merely a day of academic reflection. It is a day for giving back. Each year in conjunction with Law Day, the ABA and state and local bar associations across the country hold community speaking events, fundraisers, panel discussions, volunteer events and numerous other service projects to benefit the public. May 1 is the official day of celebration, but Law Day-related events take place before and/or after that date. This year, as part of the TBA's Law Day celebration, young lawyers across the state organized various projects to serve the public. The following is a brief overview of the public service projects held in conjunction with Law Day 2008 in each of the 14 YLD districts:

District 1 (Counties: Carter, Greene,



YLD District 1 Representative Myers Massengill with lawyers who helped host and support a breakfast fundraiser for CASA of Northeast Tennessee. Pictured from left to right are Curt Rose, David Mullins, Laurie Miller, Brett Burrell, Erin Downs, Dan Coughlin, Carter Massengill and Myers Massengill II.

Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, Washington) — On May 3, Myers Massengill co-hosted a pancake breakfast fundraiser for CASA of Northeast Tennessee. The event raised approximately \$3,200.

District 2 (Counties: Anderson, Campbell, Claiborne, Cocke, Fentress, Grainger, Jefferson, Scott, Sevier, Union) — Katrina Atchley enlisted advocates to speak at local schools regarding important chil-

dren's issues. The presentations included information about the Safe Harbor Child Advocacy Center and what children can do if they experience abuse or know someone who is a victim of abuse.

District 3 (County: Knox)—In an effort to help expand the Imagination Library to low-income areas, Sonda Gifford organized a child sign-up day at the Kroger grocery store on Asheville Highway. The Imagination Library program provides free age-appropriate books to preschool children in Tennessee.

District 4 (Counties: Bledsoe, Blount, Bradley, Loudon, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane)—On May 9, Justin Martin hosted the 2nd Annual Charity Golf Tournament at Rarity Pointe Golf and Country Club to benefit local child advocacy agencies. Sixty-four golfers, including 20 lawyers, participated. The event raised \$9,500.

District 5 (County: Hamilton) — On July 21, David McDowell hosted a golf tournament at Moccasin Bend Golf Club to benefit the Orange Grove Center, a private non-profit organization serving adults and children with developmental disabilities.

District 6 (Counties: Clay, Cumberland, DeKalb, Jackson, Overton, Pickett, Putnam, Van Buren, Warren, White) — Rachel Moses will be organizing a

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Spearheaded by YLD District 10 Representative Ray Runyon, young lawyers in Clarksville presented backpacks, school supplies and toiletries donated for children in state custody to representatives from the Department of Children's Services. Pictured from left to right are Alyssa Johnson, Brad Carter, Ray Runyon, Marion Biggs and Joel Wallace. Not pictured: Marisa Combs and Jonathan Garner.

Limited Liability Clauses

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- for any member coming within certain established standards.
4. As a result of the essential nature of the service, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.
 5. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
 6. As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

The *Olson* Court determined that these factors were present in the relationship between the plaintiff and her physician. In particular, the physician held himself out to perform abortion; he was in an advantageous bargaining position; the patient had no opportunity to purchase an alternate agreement; and the physician had been licensed by the state of Tennessee.⁴ The court reasoned that is not necessary for all six criteria to be present, but that “generally a transaction that has some of these characteristics would be offensive.”⁵

Additionally, in the cases of *Russell v. Bray*⁶ and *Carey v. Merritt*,⁷ the Tennessee Court of Appeals applied the six-factor test adopted by the Tennessee Supreme Court in *Olson* to limitation of liability provisions which limited the plaintiff’s recovery to the amount of fees which were paid for services. These cases involved home inspectors who failed to discover defects in the plaintiffs’ homes and as a result were sued for their negligence. In *Russell*, the contract contained a provision that limited the defendant’s liability to the lesser of the cost of repair or the amount of the inspection fee, \$225.00.⁸ Similarly, in *Carey*, the contract included a clause that limited the liability to the mere cost of the report.⁹ In both of the cases, the Court of Appeals held that the clauses were exculpatory and unenforceable as they were contrary to public policy and void. The

court reasoned, in both opinions, that because the home inspectors provided their expert analysis and opinion they were “professionals” who were subject to the *Olson* analysis.¹⁰ In each opinion, the court characterized the limiting clauses as exculpatory without providing any rationale for that characterization. Presumably, this author believes, it can reasonably be inferred that because the clauses limited the amount of exposure assumed by the inspectors to such a nominal amount in comparison to the risk assumed by the plaintiff homeowners, the court viewed the clauses as insufficient to discourage negligence, therefore exculpatory and subject to the *Olson* analysis.

Despite the aforementioned cases, the Tennessee Supreme Court also has refused on occasion to apply the *Olson* rationale to other cases involving limitation of liability provisions that would arguably fit the criteria for the *Olson* analysis. In *Affiliated Prof'l Services v. S Cent. Bell Tel.*,¹¹ the court declined to apply the *Olson* factors to a limitation of liability agreement. The plaintiffs sued the telephone company for omitting their ad from the yellow pages. The contract limited the liability of South Central Bell to the value of the advertisement. The court upheld the limitation without a public policy analysis, noting that *Olson* was not intended to disturb the traditional rule “except in limited types of cases discussed in the opinion.”¹² Similarly, in *Houghland v. Security Alarms & Services*,¹³ the Tennessee Supreme Court cited *Olson* but did not evaluate the contractual limitation according to its exculpation criteria. In *Houghland*, the plaintiffs sued their home security provider after the business failed to detect and respond to a break-in.¹⁴ The security contract included a provision limiting the liability of the security company to a fixed sum.¹⁵ Arguably, the situation in *Houghland* would appear to be very similar to that of *Russell* and *Carey*, yet the court refused to apply the *Olson* analysis.

Unfortunately, at this point there does not appear to be a magic formula within case law for the appropriate method of calculating what amount best exemplifies limited exposure significant enough to discourage negligence. However, one case

that has been adopted in other jurisdictions¹⁶ that provides some guidance on the issue is *Valhal Corp. v. Sullivan Associates Inc.*¹⁷ The dispute in *Valhal* centered on the enforceability of a limitation of liability clause in a contract between a real estate developer and an architectural firm.¹⁸ The plaintiff sued for damages in excess of \$2 million despite the fact that the service fees were only \$7,000 and the contract contained a provision limiting liability to the contract price or \$50,000.¹⁹ After a detailed analysis of Pennsylvania law, the court upheld the validity of the limitation of liability provision.²⁰

The *Valhal* Court began its analysis by recognizing the differences between exculpatory, indemnity, hold harmless and limitation of liability clauses.²¹ While the rationale of the first three clauses “immunizes a person from the consequences of his/her negligence,” a limitation of liability clause “has no such consequence.”²² As recognized by the *Valhal* court, with a limitation of liability clause, a party “remains liable for its own negligence and continues to be exposed to liability up to a [negotiated] ceiling.”²³ Because of this difference “between a contract which insulates a party from liability and one which merely places a limit upon that liability” the *Valhal* court found no cases “in which a limitation of liability clause has been disfavored or been tested by the same stringent standards developed for exculpatory, hold harmless, and indemnity clauses.”²⁴

The *Valhal* court recognized that “limitation of liability clauses are a way of allocating ‘unknown or undeterminable risks,’ and are a fact of every-day business and commercial life.”²⁵ The court went on to state that limitation of liability clauses will be upheld “so long as the limitation which is established is reasonable and not so drastic as to remove the incentive to perform with due care.” Accordingly, the appellate court concluded:

“Although it could be argued that the \$50,000 limitation is nominal when compared to the final verdict, we do not believe that to be the proper measure. The inquiry must be whether the cap is so minimal compared to Sullivan’s expected compensation as to negate or drastically minimize Sulli-

van's concern for the consequences of a breach of its contractual obligations. One can not seriously argue that a cap which leaves Sullivan exposed to damages that are seven times its expected fee insulates Sullivan from liability."²⁶

So how is a young attorney to advise clients on the status of the law regarding the enforceability of limited liability clauses? The good ole' law school response applies here: "It depends." Enforceability appears to depend upon the language of the limited liability provision, the players involved, the court's view of the particular services the business or individual is providing, and, perhaps most importantly, whether the amount of exposure is sufficient to discourage negligence. Whether drafting or seeking to enforce a limited liability provision, the key consideration is whether the court will interpret the provision as limiting exposure, but still allowing significant enough exposure to discourage

negligence. If not, the clause will likely be viewed as exculpatory and potentially will be held void against public policy. ■

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Notes

1. *Houghland v. Security Arms & Services Inc.*, 755 S.W.2d 769,773 (Tenn. 1988).
2. 558 S.W.2d 429 (Tenn. 1977).
3. 383 P.2d 441 (Cal. 1963). California's approach in *Tunkl*, which Tennessee adopted in *Olson*, has been adopted by a majority of U.S. jurisdictions.
4. *Id.* at 431-32.
5. *Id.* at 431.
6. 116 S.W.3d 1 (Tenn. Ct. App. 2003).
7. 148 S.W.3d 912 (Tenn. Ct. App. 2004).
8. *Id.* at 3.
9. *Id.* at 2.

10. *Russell* at 6; *Carey* at 10.
11. *Co.*, 606 S.W.2d 672, 671 (Tenn. 1980).
12. *Id.* at 671.
13. *Supra*, 755 S.W. 2d 768 (Tenn. 1988).
14. *Id.* at 722.
15. *Id.* at 771.
16. See, e.g., *Marbro Inc. v. Borough of Tinton Falls*, 688 A.2d 159 (N.J. Sup. Ct. 1996): "[Third Party Defendant] argues, and this court agrees, that the analysis undertaken by the Third Circuit in *Valhal Corp.* should be employed by this court in disposing of this motion for summary judgment." *Id.* at 417.
17. 44 F.3d 195 (3rd Cir. 1995) (Pennsylvania law).
18. 44 F.3d at 198.
19. *Id.* at 204.
20. *Id.* at 209.
21. *Id.* at 202.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 204.
26. *Id.*

A Day of Celebration and Public Service

continued from page 7

fundraiser for the Center of Hope.

District 7 (Counties: Cannon, Coffee, Franklin, Grundy, Marion, Rutherford, Sequatchie) — On May 2, Amelia Luna hosted a 5-hour CLE entitled "Access to Safety and Justice for victims of domestic violence." Those who attended the CLE were encouraged to bring items or donations for Haven of Hope, a local domestic violence shelter. The event netted baby clothes, diapers, women's clothes and \$168.83.

District 8 (Counties: Macon, Smith, Sumner, Trousdale, Wilson) — David Veile recruited volunteers for a building project on May 3rd with the Wilson County Habitat for Humanity.

District 9 (County: Davidson) — On May 3, Kristal Hall Boone and 13 lawyers and other volunteers hosted a field day for Big Brothers/Big Sisters of Middle Tennessee at the McGruder Family Resource Center. Ten community partners, whose services target the low-income community, were able to distribute information to the parents of over 50 children who attended the event. In addition, several lawyers signed up to participate as a Big Brother or Big Sister.

District 10 (Counties: Cheatham, Dickson, Houston, Humphreys, Montgomery, Robertson, Stewart) — Ray Runyon organized a backpack drive to provide essential items to children taken into custody by the Department of Children's Services. The effort raised approximately \$3,000 in addition to in-kind donations of toiletries and backpacks.

District 11 (Counties: Bedford, Giles, Hickman, Lawrence, Lewis, Lincoln, Marshall, Maury, Moore, Perry, Wayne, Williamson) — On May 3, eight lawyers, under the direction of Patrick Carter, spread 30 yards of mulch for the Kings Daughter's School, a private, non-profit year round school for children with mental retardation in Columbia.

District 12 (Counties: Benton, Carroll, Crockett, Dyer, Gibson, Henry, Lake, Obion, Weakley) — Cristy Cooper organized a golf tournament in conjunction with a local civic group.

District 13 (Counties: Chester, Decatur, Fayette, Hardeman, Hardin, Haywood, Henderson, Lauderdale, McNairy, Madison, Tipton) — On April 11, Anna Banks Cash sponsored an Autism Aware-

ness Gala. She also assisted with a wine tasting on May 1, which raised \$2,500 to benefit the Yates Foundation.

District 14 (County: Shelby) — This fall, Emily Landry will host a clean-up day at Target House, a residential facility for St. Jude patients and their families. Volunteers will disinfect toys and common areas to make the space safe for children.

A heartfelt thank you goes out to the outstanding YLD district representatives highlighted above and all those who participated in Law Day events. The time, effort, and compassion that you have contributed to your communities have not gone unnoticed. We all have a stake in our communities, and we, as lawyers, are fortunate to have the opportunity to do our part to strengthen it. Contact your local district representative and get involved. You will not regret it! ■

Kelli is an attorney with the Knoxville firm of Howard & Howard PC and chair of the YLD's Public Service Committee. She can be reached at kelli@howardhowardlaw.com.

Misconceptions in the Generational Gap: The Times They are a' Changin'

By Matt Potempa

Imagine being able to meet your parents, grandparents and children on everyone's 26th birthday. After having a good laugh at each other's haircuts and clothes, we could have some pretty interesting conversations. Looking ahead at our futures, what do we expect out of life and our careers? Being young and ambitious, I imagine everyone would want to distinguish themselves among peers, move up the ladder of power and pay, and do interesting work they believe in with people they enjoy. Our careers are important, but we all want a life outside of work and resent a job becoming our sole defining factor.

So we're all on the same page? Not quite. The reality is that generational differences do exist and have very real consequences in the workplace. Different styles, expectations and priorities can lead to misconceptions that undermine employee morale and productivity.

Four generations, one workplace

With licenses issued up to a half-century apart, young and old associates bring vastly diverse perspectives to a law practice. For a profession steeped in history and tradition, the past few decades have brought about drastic changes to what it means to be a lawyer.

Labels and stereotypes are dangerous; generations cannot neatly be placed within brackets on a time-line but, arguably, there are four distinct generations practicing law today.

Traditionalists — In our hypothetical birthday party, our grandparents probably just got out of the service and have already started a family. Dutifully, the men embarked on their career with little expectation of work being fun. If a job didn't go as planned, they hung in there, made sacrifices and saved for rainy days. As lawyers, they were not expected to specialize, personally knew most members of the bar, and spent much of their time interacting face-to-face with clients and colleagues. This "greatest generation" is on its way out of the workplace along with the traditional hierarchies and regimented policies it put in place. And with it goes a great deal of

structure, cordiality towards peers and reverence for the profession.



Boomers — Now in their mid-40s to early-60s, this massive cohort is also leaving the working world in droves — about 10,000 turn 65 every day.¹ Not even the unruly decades in which they came of age could extinguish the strict rule-abiding ethic their parents instilled. Willing to define themselves by their work, both men and women sacrificed staying at home with children to build a career. Business and relationships seem to go hand-in-hand for this once-defiant set that eventually conformed to organize life around work, rather than work around life. Though they probably still have a personal copy of the Tennessee code, they have cautiously accepted technology's infusion with the law for better and for worse.

X-ers — The "Me," "MTV" and "everybody gets a trophy" generation has become known as impatient, self-reliant and intent on flipping the career paradigm on its head. Though socially aware and rather altruistic, X-ers are cynical of being wed to work, suspecting that their parents' loyalty and dual-incomes may not have been worth the costs. Viewing work as a way to make a living, X-ers have called

into question many aspects of career life that older generations saw as non-negotiable. Flexibility and efficiency are seen as the means of maximizing productivity at work and maintaining a balanced lifestyle outside the office.

Millennials/Nexters — Though the jury is still out on how this techno savvy, media-saturated generation will make its mark, the well-rounded credentials of its members are certainly impressive. Tolerance for diversity has led them to be called the "whatever" generation while their fondness of social networking sites has earned them the "look at me" label. They have never known a life without cell phones and instant answers to all questions have always been a mouse-click away. Telecommuting, casual dress and flex schedules will surely continue to be very popular with this group of new associates.

Perception of Young Lawyers

So what are the impressions of us "young 'uns" as a whole here in Tennessee and across the country? Demographers and those who study generational differences identify several general perceptions of today's young lawyer. They include:

- A lack of loyalty to employers and institutions
- A reluctance to take initiative without a clear personal benefit
- A requirement for clearly defined work assignments, steady feedback, quick answers, immediate rewards and constant praise
- A preference for using technology, rather than face time at the office, to communicate with others
- A belief that work is something to do in between weekends

Addressing Misconceptions

We are more prone to generalize the bad than the good. We assume that the bad is more potent and contagious.² Haven't society's elders always complained that younger generations don't work as hard, respect their elders or value the dollar like they did in their day? Not much has

changed but the question still remains: how do we create an atmosphere where all generations feel valued in the workplace? If we can get past the stereotypes of self-centered Boomers, abrasive X-ers and techno-obsessed Ys, maybe we can reach common ground. Few of us fall neatly into our generational profile and the more we learn about each other, perhaps through trial-and-error, can only enrich our lives at home and at work. Clearly, everyone has a part to play. Here's where to start:

Avoid generalizations — With so many practice areas, firm sizes and workplace environments, not to mention individual personalities and motivation levels, one should not paint all young lawyers with the same broad brush. The same should be said for labeling all senior lawyers with the monikers of relic, workaholic or stick-in-the-mud.

Reconsider recruitment — By limiting consideration of associates to the top percentage of law school grades, it has become customary for firms to equate law school exam performance with the ability to be the most motivated, all-around-effective lawyer. Beginning with on-campus interviews, firms court the top GPAs to the point of creating a sense of entitlement to the highest paying jobs with the best lifestyle. If the editor of the law review acts like he or she doesn't need their job, they don't! Employment for these few is easily replaceable. The top of the class is smart and sure to produce some of the best lawyers around, but firms hiring new associates solely on grades should not be surprised when they don't get what they paid for. Young lawyers can help change this dynamic by emphasizing and valuing a well-rounded approach to the law school experience – getting involved in the community, doing pro bono work and spending quality time with family and friends.

Guard against burnout — As law practice today becomes more business-like and billable hours rule, attrition stems from associates viewing themselves merely as “time keepers” or units of production in their firm. High-billing quotas may recoup big salaries in the short term, but money cannot buy passion for work. Burnout will end up costing firms big bucks in the long run if young associates are perpetually unsatisfied. Firms should consider matching associates with areas of practice they

enjoy and pay competitively for time spent in the office. This is especially true in smaller firms where associates resent having the same workload as those in big firms while earning far less. Young lawyers also must do their part to guard against becoming jaded. In the final analysis, burnout is something we do to ourselves.

Respect personal time — Advances in communication technology allow attorneys to be ultra-efficient and mobile. Rather than creating more time to “smell the roses” though, laptops, e-mail and Blackberries have brought an expectation that lawyers will always be tethered to clients and the firm. Young adults value their time in and out of the office. If becoming a partner means sacrificing life with family and friends, younger lawyers are less likely to buy in than older generations. Until expectations change, young lawyers need to take responsibility for their own sanity, put down the “crackberry” and go outside for a walk.

Conclusion

For the young lawyer, it is important to remember who signs the paycheck. Like it or not, firms set the standard for our profession in terms of earnings and work/play ratio. But, time marches on, generational

A Word from Your Editor

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the old-fashioned feeling of having a publication in your hand, you can print the document out and read it that way. The choice is yours. We also will provide a link to download the document from the TBA YLD website.

In order to ensure that each member of the YLD continues to receive the *Tennessee Young Lawyer*, I would like to ask everyone to make sure that the TBA has your current, up-to-date e-mail address. You can visit the Membership Central section of the TBA web site to update your contact information. The website is located at https://www.tba2.org/members/member_central1.php

If you know your password, you can enter it there and review or update your contact information. The website also allows you to request a password reminder or sign up for a password for the first time. It also would be a good idea to check the

differences develop quickly, and America's view of what it means to practice law continues to evolve. We are all in some degree products of the times in which we live. Today's young lawyers will one day steer the profession in deciding what traditions to cling to and what aspects of law practice are best left to the history books. Until then, we should begin to live out the legacy we want to leave. If our children follow in our footsteps, will they inherit a discontented, disingenuous and over-worked vocation? Or, will we pass on a learned profession of gratified court officers who treat each other with respect while diligently fighting for justice in our communities? We may disagree with our elders on a myriad of issues, but like them and every generation before, it's a question we cannot afford to ignore. ■

Matt is an assistant general counsel with the Tennessee Department of Human Services. He can be reached at matt.potempa@state.tn.us.

Notes

1. <http://www.employeeselect.com/pr16.htm>.
2. Quote attributed to American writer and philosopher Eric Hoffer.

spam filter on your e-mail provider to make sure e-mails from the TBA are not filtered out.

If you have any problems with updating your information, please contact TBA Membership Director Colleen O'Connell at (615) 383-7421 or coconnell@tnbar.org.

Author and biochemist Isaac Asimov once said, “the only constant is change,” but we know change can be hard. Therefore, we encourage you to submit feedback about the shift to electronic publishing to YLD Director Stacey Shrader at sshrader@tnbar.org. We take your input seriously and will use it in making decisions that affect the benefits the TBA offers to young lawyers. See you in your inbox next time! ■

Hanson R. Tipton, Editor
Tennessee Young Lawyer

New Law Provides Additional Protections Against Adverse Employment Actions for Tennessee's Volunteer Firefighters

By Brent Siler

On April 10, the Tennessee General Assembly amended *Tenn. Code Ann.* Title 50, Chapter 1, Part 3 by adding section 50-1-309, which protects volunteer firefighters from adverse employment actions because of time missed from work due to volunteer firefighting duties. Under prior law, an employer was prohibited from terminating an employee who served as a volunteer firefighter solely because the employee was absent or late to work "in order to respond to an emergency prior to the time the employee was to report to the employee's place of employment" (*Tenn. Code Ann.* § 50-1-307). However, employers could deduct time missed from the employee's pay. An employee who was terminated in violation of *Tenn. Code Ann.* § 50-1-307 could bring a civil action for reinstatement, back wages and reinstatement of fringe benefits and seniority rights. *Tenn. Code Ann.* § 50-1-309, which took effect July 1, provides additional protections for volunteer firefighters not previously available under section 307.

Flexibility to respond

While section 307 protected an employee who was absent or late because he or she was responding to an emergency "prior to the time the employee [was] to report to employee's place of employment," new section 309 provides that a volunteer firefighter may leave work to respond to an emergency. Thus, the new law protects firefighters who leave work to respond to emergencies that occur even after their shift has begun.

Pay and leave protected

One of the most important provisions in section 309 is that the employer cannot reduce the employee's "pay, vacation time, sick leave, or earned overtime accumulation" because the employee leaves work to respond to an emergency. Section 307 allowed employers to reduce the employee's pay and, presumably, require the employee to use available vacation or sick leave time when the employee missed work to respond to an emergency.

The new law makes clear that the employee's pay cannot be reduced and the employee cannot be docked a sick or vacation day when missing work to respond to an emergency.

Time off

Section 309 allows an employee assisting in fighting a fire or responding to an emergency for more than four hours to use a vacation or sick leave day on the employee's next shift (if the shift is within 12 hours of the emergency response) without a loss of pay. If an employee who assisted in fighting a fire or in responding to an emergency for more than 12 hours does not have sick or vacation days available, the employee may take a day of leave without pay.

Verification of absence

Finally, section 309 allows the employer to require an employee to submit a written statement from the chief of the volunteer fire department verifying the reason for the employee's absence and specifying the date, time and duration of the employee's volunteer activity. Section 307 previously allowed the employee to obtain a statement from his or her "supervisor or acting supervisor" providing the date and time of the emergency.

Sanctions

As under section 307, employers that violate section 309 may be subject to a civil action for reinstatement, back wages and reinstatement of fringe benefits and seniority rights.

Tips for employers

Employers in Tennessee who employ volunteer firefighters should take note of the enactment of *Tenn. Code Ann.* § 50-1-309 and adjust their policies and internal procedures accordingly. The issues they should consider include:

- training payroll personnel to prevent unauthorized deductions from pay, vacation time, sick leave or earned overtime accumulation because a volunteer firefighter/employee leaves work to respond

to an emergency.

- adopting a company-wide policy requiring written verification of the employee's absence in order to avoid inconsistent requirements between managers and departments.
- creating a time limit within which the employee must provide verification of an emergency response absence. ■

Brent is an associate attorney in the Memphis office of Baker Donelson Bearman Caldwell & Berkowitz PC. He practices in the firm's business litigation group and focuses on labor and employment law. He can be reached at bsiler@bakerdonelson.com.

This Year at Vanderbilt University Law School ...

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The school experienced other exciting academic changes. In the fall, Vanderbilt University and VULS launched a new J.D/Ph.D. program in law and economics. The new program offers a specialized interdisciplinary approach that integrates law and economics within a rigorous curriculum. It is designed for students who wish to pursue careers in universities, research institutions or government. Another exciting change for VULS was its rise in the 2008 *US News and World Report* law school rankings to number 15.

Vanderbilt University Law School has continued to evolve to better prepare students for the needs and challenges of the legal profession and everyone here is excited to see what the coming years will bring. ■

Katherine Poulos is a rising 3L at VULS. She will be spending her summer working at Irell & Manella LLP in Los Angeles. Last summer she was a summer associate at Womble Carlyle Sandridge & Rice PLLC in Charlotte and at Smith Moore LLP in Raleigh, N.C. She can be reached at katherine.m.poulos@vanderbilt.edu.

FACE OF THE YOUNG LAWYER

New YLD President is Born Leader

By Mary Petrinjak

Lyndy Michelle Greenway Sellers was born in ... Okay, to be honest, I am not sure where Michelle was born. I do know that she grew up in Kennett, Mo., attended the University of Mississippi as an undergraduate and earned her law degree from the University of Tennessee College of Law. Michelle is married to Andrew Sellers who is also an attorney. They live in Jackson, Tenn., with their five-year-old daughter Sydney and two-year-old son Aubrey.

I am certain that no one who knows Michelle would be surprised to learn that our new president was head cheerleader in her younger days, as well an avid athlete. Michelle is a natural leader. Quite simply, Michelle gets involved and gets things done.

During law school, Michelle served as vice president of the Student Bar Association, was a member of Phi Alpha Delta and received the Distinguished Student Attorney Service Award from the UT College of Law Legal Clinic. After law school, she joined the law firm of Rainey, Kizer, Reviere & Bell PLC and has maintained a successful practice with the firm as a medical malpractice defense attorney. In 2002, she was awarded the annual Pro Bono Award from West Tennessee Legal Services for her volunteer work as a pro bono attorney. She serves on her law firm's marketing committee and has been selected to oversee the firm's summer associate clerkship program for the last

several years.

Michelle is a member of the Jackson-Madison County Bar Association where she has served on the Board of Directors and held the offices of treasurer, vice president and president. Additionally, she has been an active member of the American Bar Association, the Tennessee Bar Association and the TBA Young Lawyers Division. In that group, she served as a district representative and held the position of West Tennessee Governor before being elected vice president in 2006. This June, Michelle took office as president of the division.

I first met Michelle when I started working at Rainey Kizer. From the beginning I realized she was was a living, breathing Wonder Woman. When we met, she was just returning to work after having her first baby, Sydney. In addition to easily transitioning back to her full-time law practice, instead of slowing down her community involvement, she seemed to speed things up. She was president of the Jackson-Madison County Young Lawyers that year, and I remember being impressed that she attended our service projects with Sydney in tow. The following year, she was elected vice president of the Jackson-Madison County Bar Association and assumed the office of president several months early when the then-current president was called to active military duty. True to form, she took over with ease. Shortly thereafter she was

elected vice president of the Tennessee Bar Association Young Lawyers Division. Believe it or not, while all of this was going on, she and Andrew had their second child, Aubrey.

In addition to being Wonder Woman, Michelle is highly principled. For example, I recall one time that she held fast to her principles when we were dining with a group at a local Japanese restaurant



Sellers

(which shall remain nameless). The restaurant charges tax on the tip when gratuity is added to parties of six or more. I assume this is due to some inadvertent glitch in their computer system. Anyway, Michelle spent more than 10 minutes arguing with the staff over \$1.50 tax on the tip. That's right, one dollar and fifty cents. As the staff was calling the manager at home, I tried to talk Michelle into just paying the \$1.50 and leaving. She calmly explained to me that she would not — it was the principle of the matter, and I greatly admire her principles.

I have often wondered if Michelle ever sleeps. Between her full-time law practice, billable hours, children's doctors' appointments and soccer games, she still finds time for bar activities and pro bono work. Michelle has the rare ability to balance family, work, and community. She is a giving, caring woman who has managed to maintain a successful career as a lawyer while raising two beautiful, well-adjusted children — and never missing a school function. She has earned the respect not only of her family, friends, and professional colleagues, but also of the community at large. ■



The Sellers family (l to r): Andrew, Sydney, Michelle and Aubrey

Mary is an associate attorney at Rainey, Kizer, Reviere & Bell PLC in Jackson. She can be reached at mpetrinjak@raineykizer.com.

BARELY LEGAL

You Too Should Be A 'Pro Bono' Lawyer

By Brian S. Faughnan

By the time you are reading this (unless the superdelegates overturn the will of the people), the Tennessee Bar Association will be under the leadership of a new president, Buck Lewis. As you are well aware by now, Buck is dedicating his year as president to increasing access to justice in Tennessee. What you may not know is that the centerpiece of Buck's plan involves cutting the hourly rates charged by all Baker Donelson lawyers down to \$1 for his year as president. Of course, I just completely made that up. I am writing this prior to the launch of his plan and have no way of knowing what the centerpiece will be. He might only cut those hourly rates down to \$10. We will just have to wait and see.

What I am sure of, though, is that Buck will spend the next year traveling around the state exhorting and encouraging Tennessee lawyers to step up their commitment to providing legal services for free to those who cannot afford needed legal services. Any doubt that the number of people finding themselves in that position is increasing every day can be erased by a trip to your local gas station where, as I type this, regular unleaded is going for about \$4.04 a gallon. (By the time this column makes it to your mailbox, if the U.S. Postal Service can still afford to put gas in a mail truck to get it to your mailbox, gas probably will be more like \$5 a gallon.) All signs appear to be pointing to an economic crisis that people in our part of the world have not experienced for a long, long time. Thus, Buck's message and call to action could not be more timely.

In our profession, we call providing free legal services to the poor "Pro Bono" work. Especially because I happen to chair Adams and Reese's Pro Bono Committee, I feel really sheepish revealing my ignorance, but I don't know why we call it that. At no point when my firm was crafting a new Pro Bono policy — one that makes Pro Bono work mandatory for every lawyer in our firm (and one that during the first year of implementation resulted in a 500 percent increase in Pro Bono hours performed) — did I ever think to ask someone why this type of work is called "Pro Bono."

When I am confronted with my own

ignorance, I like to comfort myself with the fact that there must be others out there who are as ignorant as I am. As the humor columnist for *TYL*, the most widely read TBA publication, I feel I have an obligation not just to find the answer for myself but to share it with others who share my ignorance. (What is that you say? You had



"Take a look around you when others need your time." — Bono

no idea that *TYL* was the most widely read TBA publication? Take comfort in the fact that I didn't know that either until I just typed it a few seconds ago. See how good that feels? You're welcome.) Thus, your intrepid columnist decided to go straight to the source to get the answer to this question by seeking an interview with the man himself — Bono, the legendary front man of the Irish rock band U2.

Unfortunately, even after using the interwebs, locating Bono's contact information was a wee bit difficult. And then, to make matters worse, he wouldn't return my calls. I felt pretty foolish having already worked up a set of probing questions to help get definitive answers about Bono's connection to providing legal services to the poor. So, I decided to go ahead and put my questions to Bono anyway and let the things he has already said to the world serve as the answers. After reading the entirety of the interview below, I think you will agree that the reason why we call it Pro Bono is abundantly clear.

BSF: Mr. Bono, it is an absolute pleasure to talk to you today.

Bono: I like the sound of my own voice.¹

BSF: Okay. I assume your publicist told you why I wanted to have this interview?

Bono: Desperation is a tender trap. It gets you every time.² A man will beg. A man will crawl.³

BSF: Deadlines, what can you do? Anyway, I'm trying to get to the bottom of why we lawyers refer to free legal work for the poor as "Pro Bono." Many artists and musicians are pretty outspoken on issues of economic injustice, but why you? Why not "pro Geldof"?

Bono: No one, no one is blinder than he who will not see.⁴

BSF: I'm not sure I understood your answer.

Bono: Yocoma way amy samwesay oma yocoma way oma say.⁵ Are these words distraction to the words you wanna hear?⁶

BSF: Yep. Come on, this is starting to just become silly.

Bono: Am I bugging you? Don't mean to bug ya.⁷ Maybe this is my last chance.⁸ Don't go away.⁹ Give me one more chance and you'll be satisfied.¹⁰

BSF: Okay, last chance. What's your connection?

Bono: It's no secret that a conscience can sometimes be a pest. It's no secret ambition bites the nails of success.¹¹ I don't believe in excess, success is to give.¹²

BSF: Success is to give. That's pretty good. Can you tell me more about why you and not some other musician?

Bono: No I won't, I won't wear it on my sleeve. I can see through this expression ... But I won't let others live in hell.¹³ We fought for justice and not for gain.¹⁴ We need new dreams tonight,¹⁵ and we can break through.¹⁶

BSF: Well, that settles that I guess.

Bono: Is that all you want from me? Is that all? Is that all?¹⁷

BSF: No, no. I've got another question or two. Why should more lawyers engage in Pro Bono?

Bono: Sometimes I feel like I don't know¹⁸ I don't know how to say what's got to be said.¹⁹

BSF: Can you try? I mean there is not really going to be much payoff to all this effort on my part, if you don't.

Bono: What's at stake?²⁰ I can't believe the news today. I can't close my eyes and make it go away.²¹ This desperation, dislocation, separation, condemnation, revelation, in temptation, isolation, desolation.²² Sadie said she couldn't work out what it was all about and so she let go. Now Sadie's on the street.²³ She is running to stand still.²⁴ Take a look around you when others need your time.²⁵

BSF: And what might things be like if lawyers stopped doing Pro Bono?

Bono: And today the millions cry.²⁶ 'Help me. How can you help me?'²⁷ And mothers, children, brothers, sisters torn apart ... we eat and drink while tomorrow they die.²⁸ Who heals the wounds? Who heals the scars?²⁹

BSF: If you had the chance to speak directly to lawyers out there who were trying to find the time to do Pro Bono, what would you say?

Bono: Don't say that later will be better.³⁰ You got to do what you should.³¹ I believe in you.³²

BSF: I also understand that you have a

few inspirational words from some Pro Bono clients that you wanted to share?

Bono: His smiling face I can't forget.³³ You give yourself, you give it all away.³⁴ And you give, and you give³⁵ ... I was a stranger you took me in.³⁶ "You put me back together again."³⁷

BSF: Truly uplifting words, Bono. Thanks very much.

Epilogue

After the interview, it dawned on me that, although my search on the interwebs for Bono's information went nowhere, maybe a search for "Pro Bono" might be a good idea. Funny story. Not only was I not pronouncing it right, turns out "Pro Bono" is Latin meaning "for the good." Upon reflection, that makes so much more sense. I hate to impose on you, but I need to ask a favor: please don't tell Bono. He would be devastated. ■

Brian is a partner with Adams and Reese LLP in Memphis. If you also did not take Latin in high school or college and wish to empathize, he can be contacted at brian.faughnan@arlaw.com.

Notes

1. "All Because of You" from *How To Dismantle An Atomic Bomb*.
2. "So Cruel" from *Achtung Baby*.
3. "The Fly" from *Achtung Baby*.
4. "I Threw A Brick Through A Window" from *October*.
5. "A Sort of Homecoming" from *The*

Unforgettable Fire.

6. "Two Hearts Beat As One" from *War*.
7. "Silver and Gold" from *Rattle and Hum*.
8. "Two Hearts Beat As One" from *War*.
9. "I Still Haven't Found What I'm Looking For" from *The Joshua Tree*.
10. "Even Better Than The Real Thing" from *Achtung Baby*.
11. "The Fly" from *Achtung Baby*.
12. "God Part II" from *Rattle and Hum*.
13. "Like A Song ..." from *War*.
14. "Van Diemen's Land" from *Rattle and Hum*.
15. "In God's Country" from *The Joshua Tree*.
16. "New Year's Day" from *War*.
17. "Is That All?" from *October*.
18. "Ultraviolet (Light My Way)" from *Achtung Baby*.
19. "Two Hearts Beat As One" from *War*.
20. "A Day Without Me" from *Boy*.
21. "Sunday Bloody Sunday" from *War*.
22. "Bad" from *The Unforgettable Fire*.
23. "Surrender" from *War*.
24. "Running To Stand Still" from *The Joshua Tree*.
25. "Like A Song ..." from *War*.
26. "Sunday Bloody Sunday" from *War*.
27. "The Refugee" from *War*.
28. "Sunday Bloody Sunday" from *War*.
29. "Tomorrow" from *October*.
30. "Stuck In a Moment You Can't Get Out Of" from *All That You Can't Leave Behind*.
31. "One" from *Achtung Baby*.
32. "Elevation" from *All That You Can't Leave Behind*.
33. "Stranger In A Strange Land" from *October*.
34. "Indian Summer Sky" from *The Unforgettable Fire*.

This Year at the University of Memphis School of Law...

continued from page 4

with the students and graduates from the school, so we thought it would be a sound investment," Johnson says. According to her, "the American Bar Association takes into account the condition of the facilities when granting accreditation, and the law school's accreditation was challenged. I've been in the current law school building — they needed to move."

The next goal is to raise \$12 million in private funds by 2009 to add to the \$42 million committed by the state for renovations, according to Shawna Engel, director of development for the law school. Con-

struction is due to begin immediately on the 160,000-square-foot building, which is a vast improvement from the 50,000 square feet to which the law school is accustomed, she says.

Future law students at the University of Memphis will be able to study in a beautiful, historic building that has a background closely associated with the law. They also will be taking their classes in close proximity to the offices of lawyers and judges and the courts in downtown Memphis. The university is grateful to the U.S. Post Office for its cooperation in making this

unique opportunity possible.

After viewing the drawings and renditions of the student areas and facilities, it's an anxious feeling for students and faculty alike. While I'll be finishing a semester before the move, I will most assuredly be taking my fair share of CLE at the new location. ■

Chris Collins served as the TBA YLD's second-year liaison to the University of Memphis School of Law this past year. He can be reached at gcollins@memphis.edu.

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