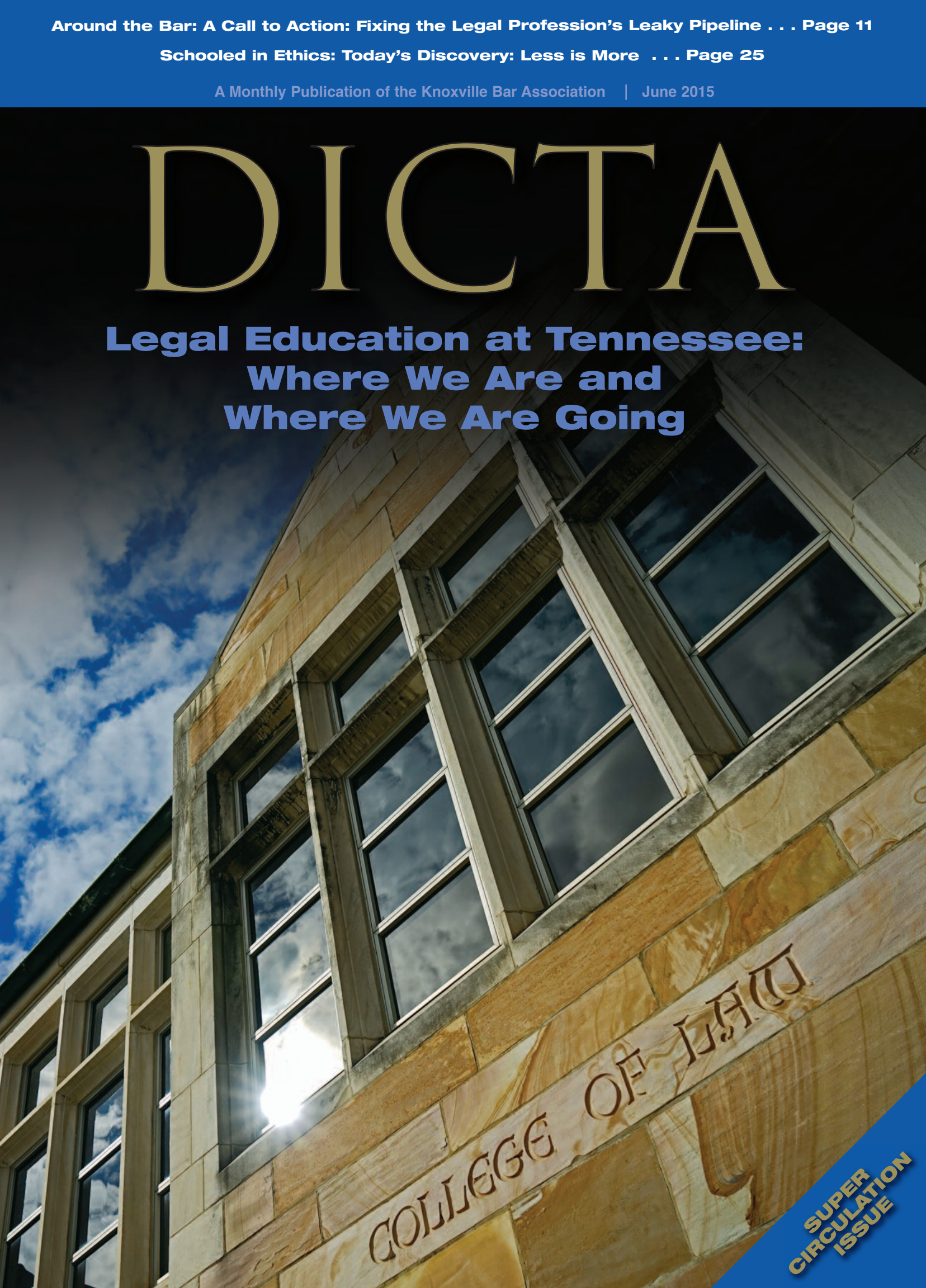


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Legal Education at Tennessee: Where We Are and Where We Are Going



COLLEGE OF LAW

**SUPER
CIRCULATION
ISSUE**

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COURTING BUSINESS IN TENNESSEE

“Our court system must do a better job serving the needs of businesses that provide jobs to Tennesseans.”¹ So stated Chief Justice Sharon Lee in the press release announcing a Business Court Pilot Project (“Business Court”) in Davidson County. Chancellor Ellen Hobbs Lyle presides over the Business Court, which began taking cases on May 1.² The Tennessee Supreme Court set forth several purposes in its order establishing the Business Court: (1) “to provide expedited resolution of business cases”; (2) to employ the skills of a judge with expertise in commercial litigation “who will provide proactive, hands-on case management”; (3) to develop precedent to make the outcomes of business cases more predictable for lawyers and litigants; and (4) to remove “complex and time-consuming business cases from the general docket.”³

The Business Court should not be confused with the workers’ compensation administrative system that began operating in 2014⁴ or with the medical malpractice administrative system proposed in the General Assembly earlier this year.⁵ In other words, it is not an administrative system established by the legislature to usurp judicial review in a particular subject area for public policy reasons. Rather, the Business Court was created through the Supreme Court’s administrative powers⁶ and is a part of the judiciary, albeit a court of specialized, rather than general, jurisdiction. Thus, it is akin to the criminal, juvenile, and probate courts already established throughout the state.⁷

Although the initiative has begun with only a single Business Court in Nashville, cases outside of Davidson County may be transferred there at the consent of the parties and the discretion of the Chief Justice.⁸ Moreover, the Chief Justice envisions the program being expanded statewide within a few years after Chancellor Lyle establishes best practices in her court.⁹ In considering the implications of this program, it is instructive to briefly review the both the history of such courts nationwide and the scope of the Tennessee Business Court’s jurisdiction.

Background on Specialized Business Courts

Tennessee joins a majority of states, including several others in the Southeast, which established specialized courts dedicated to handling business litigation.¹⁰ The first business courts were created in New York and Chicago over twenty years ago, with North Carolina setting up the first statewide program in 1996.¹¹ The number of states establishing specialized business courts has grown, with the rate of development accelerating in the first decade of the twenty-first century.¹²

Some have observed that Delaware’s Chancery Court may have been the model for these courts: the goal is not to fix results in favor of businesses or cap their potential losses, but rather to ensure “that a decision would be made within a reasonable time and that the decision would have an articulated core of legal principles shaping the court’s ruling.”¹³ However, the Chancery Court might not be the best model for the specialized business courts established outside of Delaware, because it hears primarily *corporate cases* (i.e., shareholder derivative suits and other claims involving the internal affairs of corporations) and only rarely hears *commercial cases* between business entities (i.e., breach of contract claims and property disputes).¹⁴ Indeed, in 2010, Delaware created a separate docket in its law court, the Complex Commercial Litigation Docket, to hear commercial cases. Specialized business courts in other states generally hear both types of cases, although their jurisdiction varies from state to state.¹⁵

Jurisdiction of Tennessee’s Business Court

Tennessee’s Business Court is authorized to hear both corporate and commercial cases alleging compensatory damages in excess of \$50,000 or primarily seeking injunctive or declaratory relief.¹⁶ The Business Court may hear suits involving corporate affairs, including actions between or among shareholders, partners, and managers, and claims involving director and officer liability; commercial contract and real property disputes, including construction claims, antitrust and securities suits, and commercial class actions; and intellectual property disputes. Of course, depending upon the particular claims and parties involved, federal jurisdiction may preempt the ability of any state court, including the Business Court, to hear some of these cases. Cases excluded from the Business Court’s jurisdiction include personal injury or wrongful death claims; professional malpractice and health care liability suits; residential landlord-tenant matters, including residential foreclosure actions; and employer-employee disputes, except where they may be incidental to a matter within the Business Court’s jurisdiction.¹⁷

Although the Tennessee Rules of Civil Procedure and Evidence apply to Business Court proceedings, it is an express goal of the Supreme Court that the Business Court develop its own “case management procedures for more efficient handling of cases and produce quicker resolutions with reduced litigation” consistent with Tennessee Rule of Civil Procedure 16.¹⁸ The lessons of the first state business court in North Carolina may be instructive. That court adopted its own rules of practice and procedure, which include expedited case management with an early focus on electronically stored information in discovery, a meaningful meet-and-confer requirement, and encouragement of e-filing.¹⁹

A Business Development Court?

While it is not listed as one of the purposes set forth in its order establishing the Business Court, the Supreme Court made no secret of the fact that it envisions the Business Court as a tool for recruiting and retaining businesses in Tennessee. In addition to stating that courts must “serv[e] the needs of businesses,” Chief Justice Lee stated “[w]e were losing our market share because we were not meeting the needs of our business customers,”²⁰ and “[i]n order to compete with our neighbors and other states for these investments, we needed a business court.”²¹

Putting aside the policy question as to whether the state court system should be used “as another tool to recruit, retain and grow businesses,”²² the evidence regarding the ability of specialized business courts to attract business activity appears limited. A 2012 article in the *William and Mary Law Review* surmised that, while claims that business courts will attract business activity to a state may be “facially plausible” and have “a certain surface appeal,” they are “ultimately unpersuasive.”²³ Studies cited by the author “suggest that business expansion decisions are driven largely by economic factors rather than by legal or regulatory factors.”²⁴ Furthermore, to the extent laws and regulations do affect a company’s decision to relocate to a new state, they are more likely to be those certain to affect the bottom line, such as tax policies or administrative regulations, rather than those governing litigation, a contingent event.²⁵

The story of Tennessee’s Business Court is only beginning to be written. Business interests and those who regularly interact with them – which means all of us – will be watching closely to see how the pilot

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LEGAL MYTHBREAKERS

By: David E. Long

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“The Rule...Most of the Time...”

Tennessee Rule of Evidence 615 is utilized so often in trials or other adjudicatory proceedings, it has lost its need to be named. It is simply known as “the Rule.” Everyone knows the Rule. It is like Elvis. Do we really need to say Elvis “Presley” or otherwise describe the person? The Rule is, well, the Rule. It allows for sequestration of nonparty witnesses to prevent them from being influenced by other testimony. The idea, of course, is to get to the truth as close as humanly possible.

Like Elvis, or other “stars,” fans of the Rule often make the legend larger than the reality. Many attorneys assume because the Rule allows sequestration at trial or other adjudicatory hearing, the Rule also crosses over to procedural discovery matters such as depositions. It is understandable attorneys assume the Rule can be enforced at depositions due to some of the language of the TRCP itself. For instance, TRCP 30.03 plainly states “[e]xamination and cross-examination of witnesses may proceed as permitted at trial under the Tennessee Rules of Evidence.” It seems such language would cover TRE 615 as well, but it does not.

TRE 615 states, among other things, it applies to “...trial or other adjudicatory hearing.” It does not mention depositions specifically, except in the Advisory Commission Comment (July 1, 1992). There it states “[u]nder Rule 101, the Evidence Rules apply to rulings in ‘trial courts.’ Strictly speaking, Rule 615 is intended to apply only to sequestration of witnesses at trial. A lawyer who wishes to exclude nonparties from oral depositions must resort to TRCP 26.03(5), allowing on motion a protective order “that discovery be conducted with no one present except persons designated by the court.” Moreover, there is no prohibition in TRE 615 that prevents or prohibits a witness from reviewing the depositions of other witnesses before testifying [in trial or other hearing]. Moreover, expert witnesses are generally considered “essential persons” that should not be sequestered at trial [and

presumably depositions as well] *TRE 615 Advisory Commission Comment (July 1, 1992); State v. Jackson, 889 S.W.2d 219, 223 (Tenn. Ct. App. 1993) perm. app. denied (Tenn., March 7, 1994); TRE Advisory Commission Comment (July 1, 2004.) (citations omitted).*

The Rule, however, contains an important concept: lay witnesses should testify from their memories of events and what their own senses have revealed, not based on what other witnesses say. The concept of guaranteeing truth is also important in its impact on impeachment, and trying to find out if a lay witness tends to lie. The Rule, however, must balance the right to sequester against the need to protect against the “star chamber” mentality.

The means to exclude witnesses from depositions, however, does not end there. TRCP 26.03(5). Upon motion, the Court may for good cause shown order discovery be taken with only designated persons present. Obviously, the Court has broad discretion as it does in other matters of discovery. I do not suggest one utilize TRCP 26.03(5) to make an excuse to argue about sequestration on a continual basis in every case. If you do want to push the argument in every case, please do not quote this article to the Court(s). Judges have enough to do without having to constantly decide on-going discovery disputes, and in my experience, most do not wish to do so. Moreover, most of the time counsel can work it out by simply discussing the issues ahead of time.

At some level, discovery is a good faith process. In other words, you have to play nice in the sandbox, and share your toys. My suggestion, in cases where an attorney thinks the sequestration issue could be a problem, is to file a motion for a TRCP 26.06 discovery conference, and/or try to work it out ahead of time. The discovery rules pursuant to the TRCP are, in many ways, self-regulatory (See TRCP 26.04). If a discovery conference is needed, however, the attorneys should plan such a conference prior to depositions beginning to avoid the argument while everyone is sitting in the room waiting to start.

LEGAL UPDATE: COURTING BUSINESS IN TENNESSEE (Continued from Page 13)

program develops.

¹ Administrative Office of the Courts, *Supreme Court to Introduce Tennessee Business Pilot Project in Davidson County* (Mar. 16, 2015), available at <http://www.tsc.state.tn.us/news/2015/03/16/supreme-court-introduce-tennessee-business-court-pilot-project-davidson-county>.

² *Id.*

³ Order Establishing the Davidson County Business Court Pilot Project, No. ADM2015-00467 (Mar. 16, 2015) (“Mar. 16 Order”), at 5, available at http://www.tsc.state.tn.us/sites/default/files/docs/order_est_davidson_county_business_court_pilot_project_3-16-2015.pdf.

⁴ Workers’ Compensation Reform Act of 2013, ch. 289 (Apr. 29, 2013).

⁵ SB 507/HB 546, 109th Tenn. Gen. Assembly, available at <http://www.capitol.tn.gov/Bills/109/Bill/SB0507.pdf>; see also Josie Beets, *Bill Would Overhaul Medical Malpractice Law*, Tennessee Bar Association (Mar. 23, 2015), available at <http://www.tba.org/news/bill-would-overhaul-medical-malpractice-law>.

⁶ See TENN. CODE ANN. § 16-3-502.

⁷ See Mar. 16 Order, *supra* note 3, at 1.

⁸ *Id.* at 1-2.

⁹ Scott Harrison, *Suing Another Company? What You Need to Know About TN’s New Business Court*, NASHVILLE BUS. JOURNAL (Apr. 23, 2015), available at <http://www.bizjournals.com/nashville/blog/2015/04/suing-another-company-what-you-need-to-know-about.html>.

¹⁰ Mar. 16 Order, *supra* note 3, at 1.

¹¹ Lee Applebaum, *The Steady Growth of Business Courts*, FUTURE TRENDS IN STATE

COURTS 2011, National Conference of State Legislatures, at 70, available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/traffic/id/54>.

¹² *Id.* at 71-72.

¹³ *Id.* at 70.

John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1925 (2012).

Id. at 1924-25.

Mar. 16 Order, *supra* note 3, at 2.

For a complete list of the types of cases eligible for and excluded from the jurisdiction of the Business Court, see Mar 16 Order, *supra* note 3, at 2-4.

Mar. 16 Order, *supra* note 3, 11 5.

Hon. Ben F. Tenille & Corinne B. Jones, *Developments at the North Carolina Business Court*, FUTURE TRENDS IN STATE COURTS 2011, National Conference of State Legislatures, at 90, available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/traffic/id/53>.

J.R. Lind, *State’s First Dedicated Business Court Readies for Debut*, NASHVILLE POST (Apr. 23, 2015), available at https://www.nashvillepost.com/news/2015/4/23/states_first_dedicated_business_court_readies_for_debut.

Harrison, *supra* note 9.

Id.

Coyle, *supra* note 14, at 1938-39.

Id. at 1939-40.

Id. at 1940-42.