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Winter 2014

## The Advocate Winter 2014

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CENTER FOR ADVOCACY  
& DISPUTE RESOLUTION

*"Educating Today the  
Successful Lawyers  
of Tomorrow"*

# the Advocate

## Students Benefit from Alumni Expertise at Advocates' Prize

By Cassie Kamp, 2L



Students at UT Law are fortunate to have an active group of alumni who give back to the college. During the annual Advocates' Prize competition held in October 2013, many alumni served as judges during preliminary rounds of competition. Judges posed thoughtful questions and offered constructive feedback in order to help students improve their oral appellate advocacy skills.

For many of the judges, this year's Advocates' Prize was not the first time they had accepted the college's invitation to judge. Some alumni serve repeatedly because of their desire to help students develop practical skills before they become members of the bar. However, even those first-time alumni judges have a connection to the Advocates' Prize competition.

Scott Griswold (LAW '07) was chair of the Moot Court Board during his time at UT and organized Advocates' Prize as a third-year student. Although he did not participate as a student, he was a member of the trademark moot court team and competed in the Jenkins Trial Competition.

"Advocates' Prize and intramural competitions paired with the academic rigors of the classroom help complete the lawyer's education," he says. The competition "gives you a slight flavor of what its like to have clients and to experience the thrill of interacting with judges in an adversarial setting."

First-time judge Brennan Wingerter (LAW '12) agreed to be a judge not only because she enjoys giving back to the college as often as possible, but also because she participated in Advocates' Prize as a student and found it to be a great experience.

"Advocates' Prize is not just a great chance to practice giving an oral argument, but also an opportunity to take an appellate case from start to finish in a short period of time," Wingerter says. "Getting feedback and questions from people who actually do this work for a living is invaluable."



UT LAW

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## In the Mind of an Ordinary Competitor

By LaToya Trotter, 3L

I cannot do this story justice (no pun intended) without writing about the partnership between my co-counsel, Anna Swift, and me. It was one of the most interesting aspects of my advancement in the Advocates' Prize competition. Originally, we both anticipated tackling this competition without a partner, but thankfully we were united by one of our classmates. It turned out to be a great match between two individuals with very little in common besides our hard work and dedication. In the end, those common attributes were what led us to victory.

Before we committed to the competition, we made a pact to "go big or go home." We agreed that our goal was to win the competition and not simply settle for receiving the credit hour or being part of the Moot Court Board. However, shortly after we started drafting our brief, the anxiety set in, our zeal began to waiver and our goal seemed far from our grasps.

We pressed on and put forth our best effort to draft the brief and perform well during the preliminary rounds of oral arguments. Our confidence was at its lowest point right before the winners of the Best Brief and finalists were announced. Words cannot express how ecstatic and amazed I was when we won Best Brief and advanced to the final round.

The next day was filled with a lot of emotions and even more preparation for the final round. I had observed the final round of Advocates' Prize the previous year, so I knew that I had to be at the top of my game or run the risk of embarrassing myself and my partner in front of a large number of UT students and faculty members.

Most importantly, I wanted to represent UT well as we presented

before three United States Circuit judges, including Judge Martha Daugherty of the Sixth Circuit, Judge Roger Gregory of the Fourth Circuit and Judge James Graves of the Fifth Circuit. The following day, I was extremely anxious about the competition. I tried to carry out the day as normal, attending class and work, but all that I could think about was the competition. The best way that I can describe it is that it was like the night before Christmas—it lingered forever.

Later that afternoon, I arrived at the room where the final round was being held. I sat next to Anna, who is so punctual that it did not surprise me that she was already seated and ready to begin. I frequently turned around to view the growing crowd that formed in the audience behind us. I saw familiar faces with expressions of encouragement and support. Surprisingly, my nerves started to subside. Was it the realization that I was finally about to showcase all of my hard work or was it the calm before the storm? At that moment, I did not know. In retrospect, it was a little of both.

When the judges arrived, I felt honored to stand before them. I started to wonder, "How did a girl from a small, rural town in Mississippi make it here to present a hypothetical case before three esteemed judges?" Although my family was not there to see what I had accomplished, I remembered the faces that I saw in the audience and I was empowered. I was motivated. I was ready!

As counsels for the respondent, Anna and I presented after our competitors. As a naturally competitive person, every sentence that they uttered compelled me to immediately rebut their argument. However, we jotted notes that later guided us when it was our time to present. Anna argued the first issue with great poise—no wonder she won Best Oralist.

When she finished, I tapped her on her shoulder and whispered, "great job." Those words were the last words that I specifically remember saying. The next 15 minutes were a blur, but I recall that my mannerisms and mindset were similar to those of a vicious dog unleashed. This was not the right approach because my presentation became more argumentative and less like a conversation. I was confident in the points that I made, but my delivery was a bit combative. When my time was up, I did not want to sit down. In fact, I did not immediately end my presentation. I subconsciously attempted a sly trick by asking to wrap up an answer but including additional arguments that I did not address during the 15 minutes that I was allocated. Judge Daugherty immediately let me know that she was on to my scheme, and I was forced to give my closing after we all laughed off my blunder.

As the competitors gave their rebuttal, I attempted to recall my arguments, but was unsuccessful. My adrenaline flowed until Anna and I were announced as the winners, and the feeling of relief and joy overwhelmed us. I wanted to jump out of my chair. I saw that everyone else was still in decorum, so I opted to not dramatize the situation by acting as if I had just won a million dollars.

I encourage students to compete in Advocates' Prize. I had doubts about my ability, but decided to work hard to win the competition. It goes without saying that what I did, any student can accomplish. Hard work, dedication and a great partner who understands the main goal are essential to succeeding. Any ordinary competitor can do it!

# Advocates' Prize an Opportunity for Experience and Practical Development

By Matt McLeod, 2L

One of the primary reasons I applied to the College of Law was the impressive number of opportunities to gain practical legal experience to supplement the quality instruction. My knowledge of those opportunities was limited to the strong clinical program, externships and journals that I'd read about in American Bar Association materials. After having participated in Advocates' Prize as a bailiff last year and a competitor this year, I can confidently say that the competition stands shoulder to shoulder with UT's most prestigious practical experiences.

Advocates' Prize provides students a forum to strengthen several key legal skills. First, the competition allows a student to hone research strategy, writing proficiency and public speaking. For the most part, my coursework to this point in law school has provided me pre-selected cases from a textbook to learn basic legal doctrine. However, the problem presented in Advocates' Prize required our team to find the applicable law without the help of a casebook or a supervising professor.



*Matt McLeod and Jeremy Miller placed second, while Anna Swift and LaToya Trotter took first place in the 2013 Advocates' Prize competition.*

One of the aspects I most enjoyed about the competition was the challenge and freedom of finding a point of law that my opponents had not uncovered, while at the same time working to ensure that my partner and I would not be surprised by anything presented by the other teams.

Another benefit of Advocates' Prize is that it allows students to have their writing critiqued without having to stress about a grade. Professor Michael Higdon gave several hours worth of persuasive writing instruction that I would not have received had I not participated in the contest. Our briefs also were read and critiqued by law faculty and local attorneys specializing in legal writing. Having my work critiqued anonymously by the experienced members of the legal community before I graduate was an opportunity I could not pass up, and I found their comments on our work to be insightful and constructive.

*Continued on page 7 →*



## First-Time Competitors Advance to Final Round

By Jeremy Miller, 2L

Competing in the Advocates' Prize competition this year has definitely been my most memorable law school experience to date. When my partner, Matt McLeod, and I agreed to compete, we had no idea how much time we would end up devoting to the competition. As a 2L, the competition was my first opportunity to practice what I had learned thus far in a "real world" experience. It proved to be invaluable.

The first task was to put together our 35-page brief. Since the competition problem was neatly divided into two issues, we split them up and got to work. Although the research and writing took several weeks, I began to get nervous as the deadline neared. Since a large portion of the score was derived from the written product, I was hoping we had a competitive brief. By the day we were to turn in the brief, we had passed it back and forth so many times I had lost count. Once we were satisfied (and the actual hour of the deadline was looming), we "filed" our brief. It was the longest written product I had ever completed.

Once we filed our brief, we began to prepare for oral arguments. I must admit, preparing for the oral arguments seemed like a breeze compared to the amount of time we put into writing our brief. In the preliminary round, the judges asked some tough questions, but we remained poised. Although we were pleased with our performances, as a couple of rookie 2Ls, we weren't sure that we had fared well enough to advance to the final round. We were excited, yet a bit shocked, when they called our names as finalists.

When we reached the day of the final competition, I knew I would be nervous, but as the day progressed, I was surprised at just how nervous I was getting. I was about to argue in front of three real appellate court judges with my peers, professors and local attorneys looking on (not to mention the video camera recording and documenting my every word). To add to the pressure, since my partner and I were arguing on behalf of the petitioner, I was the "lead-off batter." Ultimately, I was able to work through my nerves, answer the judge's questions and complete my argument.

It was an honor to participate in the Advocates' Prize competition. I can't imagine there are many law schools that afford their students the same kind of opportunity. The entire competition will be one that I will never forget.

# Lessons on Oral Advocacy from Advocates' Prize

By Anna Swift, 3L

*Anna Swift was a member of the 2013 winning Advocates' Prize team and won the Best Brief Award. She was named Best Oralist in the final round. Here, she offers tips on how to become a winning appellate advocate before graduating from law school. Those of us who graduated long ago should consider Swift's tips before our next appellate argument.*

— Professor Penny White

This semester I participated in two oral arguments—one for Advocates' Prize and one for my Pretrial Litigation course. In preparation for my oral argument for Advocates' Prize, I focused on

internalizing the lessons I had come across throughout the preliminary rounds. In preparation of my oral argument for Pretrial Litigation, I received some material relating to the do's and don'ts of oral advocacy from my professor, who admitted that aside from Garner and Scalia's "The Art of Persuading Judges," not much advice exists on the art of oral advocacy.

Through my experience with Advocates' Prize, I was able to learn and practice many of the skills expected of the appellate oralist. My experience in oral advocacy can be summed up in three lessons:

**1. Be the expert.** When the oralist steps to the podium, the court is not looking for a lecture. Rather, the court hopes to engage with the oralist in a conversation about the issues of the case and the oralist's position on those issues. Therefore, the court is looking for an expert on the case who can answer any of its questions or concerns. Be the expert. Know your case inside and out, know the applicable rules and precedents. Know for what you are asking and why it should be granted.

There are several ways to achieve this, some of which include:

- Prepare a presentation for the court in case you do not receive many questions, but do not expect to get through the entire presentation during your allotted time.
- Be flexible and allow yourself to be interrupted by the court. For example, if the court wants to discuss an issue out of the order you had anticipated, go with the flow of the court. Then, when you have addressed that point, tie it back into your rehearsed points.
- Don't rely on notes where you can help it. Rely on your memory when presenting to the court.
- Do not take offense if some of the court's questions make aspects of your position seem nonsensical. You cannot help if your assigned position is not perfect.

**2. Perform for the judges, not a jury.** When the oralist steps to the podium, the oralist is not addressing a jury of laymen but rather individuals equally trained in the nature of the law. Natural-

ly, then, oral advocacy is not the time for large gestures, overly dramatic pauses or emotional buzzwords. Help the court focus on the pivotal points of the case, and do not distract the court

with emotional appeals that do not add to the facts of the case.

Some tips to keep in mind when presenting to judges include:

- Begin your presentation to the court with "may it please the court" and identify yourself. Present an overview of the issues, your position on those issues and your main points in support of that position.
- End your presentation to the court with your requested relief, and if the time has expired, always ask the court if you may complete your thoughts before proceeding to do so.
- Throughout your presentation to the court, address the judges as "your honor" or "Judge (name)."
- Maintain eye contact with all of the judges in turn when presenting your rehearsed points, but feel free to focus on a particular judge when addressing that judge's question.
- Throughout your presentation, address the court's questions immediately and suppress any urge to interrupt the judges as they are speaking.
- Throughout your presentation, try to fall into a rhythm and connect your points or answers to the court's questions as best as possible.

**3. Maintain your ethos.** When the oralist steps to the podium, all he or she really carries is knowledge of the case and his or her credibility. After all, the court can read the record of the case and research the applicable law on its own, but the court is interested in the attorney's thoughts (otherwise a hearing would not have been granted) and should be able to rely on those thoughts. The oralist must show the court that he or she is reasonable and credible in order to achieve any favorable impact on the court's ruling.

Strategies for maintaining your ethos include:

- Do not misrepresent anything to the court, no matter how big or small.
- When applicable, admit to the court what you cannot answer and offer to follow up on finding an answer.

- Concede to the court points that are not vital to your position.
- Acknowledge the court's concerns, but do not feel that you have to flatter the judges in the process. For instance, "Your honor brings up an excellent point," could be seen as unneeded flattery.
- Recognize questions from the court that suggest helpful arguments for your side and state your agreement with those questions rather than launching into an extended explanation. Not all questions from the court are meant to poke holes in your arguments.

Oral argument is a time for the court to lay out any concerns raised by counsels' briefs and the facts of the case. It is also a time for the oralist to address those concerns in his or her favor and to emphasize the key points that the oralist wishes for the court to remember.

The above tips, though not exhaustive, contribute to the oralist's ability to effectively advocate for his or her client because they reflect what I believe the court can reasonably expect from the oralist.



On the second night of preliminary competition for the Advocates' Prize, second-year students Karissa Hazzard and Natalie Greene wait patiently at their counsel table in matching pink and black suits. Ask Hazzard and she'll tell you with a smile, "I'm channeling my inner Elle Woods tonight." While these girls may not be afraid to joke before the competition, be certain that when they approach the podium, it's all business.

**Still a Winner**  
Non-finalists  
at Advocates'  
Prize take home  
experience and  
confidence

*By Cassie Kamp, 2L*

Before Greene begins her presentation on the issue of equal protection, she flashes the judges her winning smile. She takes a deep breath, and it begins.

As 2Ls, this may be both students' first time to participate in Advocates' Prize, but neither are strangers to taking the podium. Hazzard's enjoyment of public speaking began in high school where she acted as the captain of her school's debate team. She also got a taste for advocacy by participating in Advocacy Idol, placing in the top six by advancing to the final round. As a 1L, Greene was selected as a member of the James Clark McReynolds Trial Advocacy Team and competed in Washington, D.C. She finds both the mock trial and Advocates' Prize experiences to be valuable, as each has taught her skills that cannot be gained from the classroom.

From the beginning, they used each other's strengths to the benefit of the team. Each student decided to focus on researching one of the issues. When choosing their respective issues, the teammates considered their individual knowledge of the subject.

"Natalie had already taken Constitutional Law, so she was better equipped for the equal protection issue," says Hazzard. "I'm currently in criminal procedure, so I was better equipped to handle the Fifth Amendment issue."

From there, each teammate read the material in the packet and every cited case. The women further immersed themselves in case law by reading the best cases cited in the original cases before going on to craft their arguments. Greene and Hazzard set hard deadlines for themselves to stay on pace leading up to the competition, and they held each other accountable.

Even though she felt prepared, Greene wishes that she would have met with a member of the College of Law faculty to receive some tips before going into competition. For Hazzard, the only change she would have made to her preparation is crafting the adversarial position—that is the side on which the team did not write its brief—earlier in the process.

While both students had different reasons driving their decision to participate in Advocates' Prize—Greene participated for the challenge, and Hazzard hoped to gain experience in appellate advocacy and brief writing—both recognized that the greatest benefit from their participation was the practical experience. After going through the competition, Hazzard especially valued getting the experience of speaking in front of and receiving feedback from attorneys who do appellate work.

For Greene, it was the feeling of accomplishment from competing that was the most rewarding. "Advocates' Prize is a lot of work and consumes a lot of time, but the growth that occurs during the process, along with the knowledge and experience acquired, makes it all worth it in the end," she says.

Although they did not make it to the final round of competition, the two were not deterred from participating in Advocates' Prize again next year. In fact, the pair has already decided to team up again next fall for the competition. "It's such a unique thing that our school does to give you that sort of experience," says Hazzard.

Greene agrees. "There is so much to learn and gain from this experience, and I'm pretty sure I didn't catch it all the first time around, so I'm excited to compete again next year."

# Inaugural State AG Externship Challenges and Rewards

By Willie Santana, 3L

**Just what do state attorneys general do? My wife asked me that question when I mentioned an interest meeting for a State Attorney General externship for the spring of 2013. I couldn't answer. A year later, I can say that the answer to the question, like many others in the law, is: "It depends."**

I had the pleasure and honor of participating in the College of Law's inaugural State Attorneys General externship program taught by Dean Doug Blaze and adjunct professor Randy Hooper, a Minnesota attorney who associates with state AG offices across the country. The externship included both a classroom component during the spring semester and a field placement at an AG's office during the summer.

The classroom portion of the externship was enlightening. I learned that the reach and scope of the State Attorney General's office is often underestimated and that many state AGs do not fully exercise their power and authority. A state's attorney general can, and often does, make a real difference in the everyday lives of the citizens whom they serve.

Hooper and Blaze adeptly made the class equally academic and practical. To a large extent, they accomplished this balance through a variety of engaging speakers. The class had the opportunity to hear from three state attorneys general—Kentucky's Jack Conway, Mississippi's Jim Hood and Tennessee's own Robert Cooper. Additionally, the class hosted Bill Guidera, NewsCorp's vice-president of government affairs and Robert Stephens, the founder of Geek Squad.

While the three AGs spoke about their individual offices and how they exercise authority for the benefit of those they serve, Guidera and Stephens provided unique perspectives on the impact that social media and technology have had on society. Of particular interest to the class was Guidera's description of NewsCorp's negotiations with a coalition of state AGs on the issue of Internet safety for children, and Professor Hooper's discussion of his experience working with state AGs to negotiate the historic multi-state settlement with the tobacco industry.

The class closed with a series of student-led presentations on different areas in which state attorney general offices operate. The

presentations ranged from a historical account on the multi-state tobacco settlement to a presentation on how state attorney generals in states with planned spaceports could shape the future of space-tourism liability law. As I would soon find out, the classroom was only the beginning of our learning.

Armed with what I thought was extensive knowledge of a state AG's office, I set out to Nashville for a four-week field placement in the Tennessee Attorney General's office. I was assigned to the Civil Litigation & State Services (CLASS) division, one of 17 divisions in the office. CLASS represents the state's educational institutions, deals with state purchasing and personnel matters and represents the state in employment and construction litigation.

From the get-go, I had the opportunity to do some real lawyer work. I promptly received my first assignment from an assistant AG regarding a lease dispute between the state and a private party. I was to help with a response to a Rule 60 motion. The plaintiff's attorney missed the 30-day window to appeal and was seeking post-judgment relief, but my research indicated that the reasons noted for the failure to file the appeal on time were insufficient to justify Rule 60 relief.

After completing the research, I put my findings in a memorandum to the assistant AG. To my surprise, the assistant AG asked me to draft the motion in opposition to the plaintiff's petition. After some minor editing, the motion I wrote was filed in court. The assignment turned out to be quite rewarding.

Armed with that confidence, I tackled every subsequent project with fervor. Throughout my time in Nashville, I had the opportunity to research new and complex legal issues. Learning about these issues in the context of real-world situations was exciting. For example, I had a series of research assignments involving subordination, non-disturbance and attornment agreements that several state agencies signed, which impacted the state's ability to cancel certain leases. I researched whether a commercial lender could rely to its detriment on government leases between its borrowers and the state. Lastly, I had to determine whether certain conduct on the part of state actors constituted workplace discrimination. It was all extremely challenging work, but a lot of my research and writing made its way into pleadings filed before various courts and administrative bodies, which was quite gratifying.

While my research was interesting and satisfying, the overall experience at the Tennessee AG's office made the field placement uniquely memorable and worthwhile.

I attended a series of depositions at the Tennessee Department of Safety Complex and visited the Tennessee Bureau of Investigation's headquarters, where I learned about the TBI's history, function and capabilities. I was impressed with the TBI's unique organization and capabilities that rival those of any major metropolitan state. I attended motion hearings, administrative proceedings and status conferences with various state AGs. I



watched as assistant AGs mooted appellate arguments ahead of real arguments and was gratified when these assistant AGs sought feedback concerning their arguments, presentation and preparation from me and the other externs.

After observing the moots, I was able to attend sessions of both the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals when they sat in Nashville as well as a session of a specially appointed Supreme Court, which heard oral arguments on the constitutionality of retention elections for appellate judges in Tennessee. I cannot imagine many other summer clerkships where one could have been exposed to such a diverse set of enriching experiences.

Finally, the externship also provided us with an opportunity to get to know students from other law schools. Most of the students attended law school at Vanderbilt, Belmont, and Memphis, but there were several that attended law schools in Virginia, North Carolina, Missouri and Indiana. We met at least weekly for breakfast to talk about our work in the AG's office and about our various law schools. Many of our perspectives were similar, but there were differences as well. I answered many questions about the College of Law's clinical offerings and was surprised to learn that many other law schools do not have such a variety of clinical offerings. Getting to know law students from other law schools greatly enriched my time in Nashville.



*Interns from the inaugural State Attorney General externship.*

The opportunity to participate as a member of the College of Law's inaugural State Attorneys General externship program was a unique and rewarding experience. Because of the smorgasbord of issues that state AGs handle, the experience can be more varied and diverse than many summer clerkships. That diversity of experience coupled with the understanding I gained about the role of the State Attorney General's Office will prove invaluable as I transition to a career practicing law.

## Advocates' Prize an Opportunity for Experience and Practical Development *(continued from page 3)*

The competition also allows participants an opportunity to practice public speaking and to receive critical feedback from local attorneys and judges. While UT is privileged to have impressive professors, arguing in front of and hearing the criticism of members of the local bench and bar was a nice change of pace from the routine of class and the Socratic Method. Professor Penny White and the competition's organizers do an outstanding job of bringing in the most distinguished judges to hear the final round. In my two years at UT, spectators and participants of the final round have enjoyed Justice Elena Kagan and the rest of the outstanding bench of 2012, as well as the three U.S. Courts of Appeal judges who decided this year's final.

Advocates' Prize provides the opportunity

to further develop time management skills, initiative and teamwork. Many of us already have challenging schedules between class, study, work, social and family responsibilities. Adding another commitment on top of these demands helps prepare for life after graduation when we will be even busier than we are now. Similarly, our future employers want young attorneys who do more than simply what is required of them. Participation in Advocates' Prize demonstrates a willingness and ability to take on extra projects.

Finally, you cannot complete the requirements of the competition without working with a partner to make it happen. Many law students are perfectionists who would rather do something on their own than risk someone else doing it "wrong." Working with your

partner to produce a collaborative brief and argument helps to identify your strengths and weaknesses as a teammate at a time in our educational careers when virtually all of our work is an individual effort.

The outstanding practical learning opportunities available at UT Law enhance our reputation as a one of the finest law schools in the country. Our clinical and externship programs are outstanding, we lead in pro bono work and our journals are among the best in the region. Advocates' Prize has emerged as another opportunity where students can apply the knowledge gained in the classroom with the skills expected of practicing attorneys. It was a privilege to be a finalist this year, and I look forward to participating in this exceptional event next year.

## McMillan Helps Students Develop Negotiation Skills

By Greg Talley, 3L

Adjunct faculty members are an integral part of the College of Law community. In addition to their professional service throughout the boardrooms, conference rooms and courtrooms of Tennessee, adjunct faculty also serve in the classrooms of the College of Law as instructors, mentors and guides to the next generation of the legal profession. Through the service of adjunct faculty, law students develop the skills necessary to become lawyers. One such vital member of the UT College of Law Community is Greg McMillan.



Adjunct faculty member Greg McMillan teaching a negotiation course at the College of Law.

McMillan is special counsel with the law firm of Lewis, Thomason, King, Krieg & Waldrop. His practice at Lewis Thomason involves casualty defense and commercial and civil litigation, as well as domestic relations and mediation. He is licensed to practice in Tennessee, admitted to the Federal District Court for the Eastern District of Tennessee and the Sixth Circuit Court of Appeals, and certified as a Tennessee Supreme Court Rule 31 Mediator. McMillan also has served in a number of leadership positions within the Knoxville and Tennessee Bar Associations, and he is considered by his peers to be distinguished for ethical standards and legal ability. In addition, he has been honored for his service to the bench and the community, receiving the Tennessee Bar Association President's Distinguished Service Award and the Knoxville Bar Association President's Award.

In addition to his professional service, McMillan has served as an adjunct professor at the College of Law, teaching negotiation, for nearly a decade. In

that time, he has received consistently excellent course reviews. His interest in helping students learn to be better negotiators by developing their understanding of the preparation, strategies, tactics and techniques necessary for success in negotiation is clearly evident to those taking his class. McMillan's students are particularly complimentary of how relevant and useful his teaching is for developing the practical skills necessary in their future careers.

During the past two years, he has been instrumental in redeveloping and refining the curriculum for the negotiation course at the College of Law. Among the recent changes, students now spend more time taking part in video recorded simulations of negotiations with classmates that are later reviewed in a small group setting with their professor. Using video review in this way helps students improve at negotiation in the same way that football players and coaches improve player performance by reviewing video of past games. The close professional contact afforded by these review sessions, along with the time spent in lecture and class discussion, allows McMillan's students to benefit greatly from the knowledge and experience that have enabled him to become a distinguished attorney.

McMillan is indeed an important member of the College of Law Community. His commitment to professional development along with the knowledge and experience he brings to the classroom result in our students entering the profession prepared to negotiate competently on behalf of their clients.

The Center for Advocacy and Dispute Resolution is grateful to McMillan, and to all of the adjunct faculty members, for their service to the College of Law and the next generation of the legal profession. We truly appreciate the integral role you play in our community.

# UT Law Performs Well at Dispute Resolution Triathlon

By Brooke Baird, Cara Rains & Ryan Franklin, 3Ls

In October 2013, a team of three third-year students from the College of Law participated in the Securities Dispute Resolution Triathlon for the first time in the school's history. The triathlon is a joint initiative of St. John's University School of Law's Hugh L. Carey Center for Dispute Resolution and the Financial Industry Regulatory Authority (FINRA).

For two days, student teams from law schools around the country gathered at St. John's Manhattan campus to negotiate, mediate and arbitrate a securities dispute. Teams represented either the investor or the broker-dealer, and members of FINRA's roster of experienced neutrals served as mediators, arbitrators and judges.

Two members of UT's team, Brooke Baird and Cara Rains, were both returning members of the Alternative Dispute Resolution moot court team that advanced to the regional finals in the 2013 ABA Representation in Mediation competition. Rather than return to the ABA competition, Baird and Rains were intrigued by the opportunity to experience all three of the primary ADR processes within one competition. Knowing that both students had an interest in gaining more exposure to business-oriented disputes, Professor Becky Jacobs entered the team in the FINRA triathlon. The team needed a third member, and 3L Ryan Franklin was selected.

The trio prepared first by sharing their knowledge with one another. While Baird and Rains had skills in ADR processes and advocacy, Franklin had more knowledge of securities law. The team embraced the opportunity to benefit from one another's strengths. Once they had an understanding of the securities laws and ADR processes involved in the competition problem, the team turned their focus to preparation of the competition's written components: a negotiation plan, a mediation representation plan and a statement of facts for arbitration.

After preparing these items, the team developed a strategy for implementing the goals articulated within their representation plans at the competition. They prepared opening statements for each round, concession strategies for negotiation and mediation, direct and cross-examinations, as well as a closing statement for arbitration.

The practice negotiations, mediations and arbitrations were perhaps the most valuable means of preparation for the team. They were fortunate to have the opportunity to work with John Selser and Mark Travis in their preparations.

Selser, a successful local mediator, provided feedback to the team following their moot mediations, while Travis, a distinguished mediator and arbitrator and an adjunct professor at the College of Law, helped the team prepare for the arbitration component of the competition. The team also was assisted by fellow 3L, Todd Skelton, who served as counsel to their counterparty in the moot negotiations and mediations.

During the competition, teams of three negotiated, mediated and arbitrated the securities dispute scenario. All three team members



Members of the UT Law team were (from left) Brooke Baird, Cara Rains, and Ryan Franklin.

participated in each round, acting either as attorney, client or settlement counsel. When awards were announced at the end of the three rounds of the competition, the UT team members were delighted and surprised by the announcement that they were co-champions in the negotiation round.

Team member Rains found that preparation for the competition was almost as beneficial as the competition itself, largely because of the ability to prepare with professional mediators and arbitrators. In addition to promoting improvement in the team members' ADR and advocacy skills, Baird says, "the competition also exposed us to the many challenges of securities law. It was such a valuable experience to work with both ADR and FINRA professionals."

Franklin shares Baird's thoughts. "For me, it was a fun and effective way to sharpen my advocacy skills," he says. "Gaining practical experience and pointers from actual FINRA neutrals was invaluable. The competition helped build my confidence in professional speaking scenarios. It provided me with teamwork skills, and I will always have a bond with my team members with whom I completed the competition."

Professor Jacobs, who served as the team's coach, praised the team's accomplishments. "This is such a talented group of students, and their achievement is even more meaningful because it was UT's first time at this competition," Jacobs says. "As well as being impressed by their skill and work ethic, I am incredibly proud of Brooke, Cara and Ryan for their professionalism and composure."

## The Value of Honest Negotiation By Greg Talley, 3L



**Should the zealous advocate use deceitful tactics during a negotiation, or can honesty be a better policy?**

In fall 2013, the Center for Advocacy and Dispute Resolution hosted Jeanette Nyden, co-author of “Getting to We,” as she presented, “Is That Ethical? A Brief Comparison of Negotiation Ethical Rules and Social Theory.”

Nyden, a lawyer, author and vested deal architect, posed a fundamental question to a large audience of lawyers, mediators and law students: “Why do we allow violations of social and ethical norms when negotiating?”

Nyden politely pushed the audience to confront the issue of candor during negotiation, pointing out that regularly used and widely accepted negotiation techniques such as posturing, bluffing and puffery would be considered deceitful and dishonest if used in non-negotiation settings. Lawyer-negotiators would be subject to discipline for using these techniques during trials or depositions. Why, then, should lawyers be allowed to use these techniques during a negotiation?

In place of the standard negotiation practice of gamesmanship, Nyden argued that negotiators should use a more col-

laborative approach, which would result in better outcomes for both parties by building trusting relationships between the negotiating parties. Parties engaged in this win-win approach focus on “getting to we,” rather than on maximizing immediate personal gain.

Do not be confused. The collaborative approach proposed by Nyden is more than just another “Getting to Yes” look-a-like. While both the “Getting to We” and the “Getting to Yes” approaches fall within the sphere of collaborative negotiation models, the “Getting to We” approach advocates a far more idealistic methodology for achieving a win-win agreement.

As described in its introduction, “The Getting to We” process changes the goal of the negotiation from the deal itself to the relationship, from a ‘what’s-in-it-for-me (WIIFMe) mindset’ to a ‘what’s-in-it-for-we (WIIFWe) mindset.’” This transition of mindsets is integral to the “Getting to We” approach because “WIIFWe is the philosophical mantra forming the architecture for a collaborative and trusting relationship,” the foundation of which consists of six social norms that act as guiding principles during negotiation: reciprocity, autonomy, honesty, loyalty, equity and integrity.

This approach may seem a bit naïve and easily exploited by those willing to deceptively signal honest cooperation, much like the naïve and trusting world encountered by actor Ricky Gervais in the movie “The Invention of Lying,” but there is merit to the use of the approach in certain negotiation settings, even during contentious negotiations.

The key to successful and mutually beneficial use of the “Getting to We” approach is to apply the WIIFWe mindset when negotiating agreements where the parties involved will have an ongoing relationship for the foreseeable future. It is in the context of ongoing relationships that developing a collaborative and trusting relationship can lead to better long-term results.

For lawyers, typically prone to engage in more competitive, aggressive negotiation tactics, Nyden’s approach offers a valuable point to remember: zealous advocacy during negotiation does not always involve the use of deceitful tactics. Sometimes clients receive greater long-term benefits from an approach that develops trusting relationships through the use of collaborative techniques guided by the principles of reciprocity, autonomy, honesty, loyalty, equity and integrity.

## DIRECTOR'S DICTA



*Students in Fall Trial Practice class sign a poster thanking Professor Jerry Black for his tutelage.*

when I think of Jerry not being at the UT Legal Clinic, standing beside our students in court, and helping soon-to-be lawyers learn the intricacies of trial practice. In addition to giving four decades of his life as trial practice instructor, clinical professor, and clinical director, Jerry utilized his vision and experience to help create the advocacy and dispute resolution curriculum. Then, along with others, he inspired donors to contribute the resources necessary to found the center and implement the curriculum. His never-ending enthusiasm and willingness to be involved have helped assure the center's continued vitality. While there is no doubt that Jerry deserves to "go the farm" as he has described his retirement, all of us associated with the Center for Advocacy and Dispute Resolution—full and empty glasses alike—agree that this is one change we wish we could avoid.

Heraclitus, the Greek philosopher, is credited with saying that "the only constant is change." There is, of course, much good in change and much that needs to be changed, but I frequently find myself avoiding change. I put off getting a new cell phone because I won't know how to use it. I resist moving out of my apartment because things there, although not so nice, are at least familiar. I cringe when I find that my computer has shut down for the purpose of adding "updates." Although glass-half-full people correctly note that change is central to growth and growth is a good thing, those of us with half-empty glasses often find ourselves dreading and deploring change.

Next year, the College of Law and the center will undergo a difficult change when Jerry Black retires from teaching. No glass-half-full attitude adjustment is going to alter the distress I feel



*Penny White*  
Penny White, Director  
UT Center for Advocacy &  
Dispute Resolution

# 2014

## Calendar of Activities

**March 10-12**

Jenkins Trial Competition

**March 26**

First-Year Advocacy Competition

**March 29**

Tennessee Journal of Law and Policy  
Tenth Anniversary Banquet

**April 22**

Center of Advocacy and Dispute  
Resolution Collaboration