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Respecting Judicial Independence and the Rule of Law

I recently had the honor of speaking at the investiture of Hon. Mark S. Norris at the United States District Court for the Western District of Tennessee in Memphis. It was such a privilege to share the stage with dignitaries such as Governor Bill Haslam, Senator Lamar Alexander, Justice Holly Kirby, and many others. While I was sitting on the stage with all of these individuals, one part of an executive branch of government, another part of a legislative branch, and the third part of a judicial branch, I started to think about what an important role the judiciary plays in our society.

In recent years, it seems as though attacks on the judiciary have increased, while the public’s understanding of the role of the judiciary has dwindled. Our judiciary is increasingly facing criticism at both the state and federal levels. Judicial independence is a fundamental principle of our democracy. The independence of the judiciary must not ever be up for negotiation, because an independent judiciary protects all citizens. For centuries, our society has relied on fair, neutral and independent courts to prevent government overreach and to maintain constitutional rights without regard to the politics of the other government branches. A system of impartial courts provides an independent body to interpret the fairness of laws created by the executive and legislative branches. This separation of powers into equal branches of the government, enshrined centuries ago when this country was founded, is especially relevant today.

The concept of judicial independence and the rule of law are not partisan issues. These are issues of paramount importance to all citizens, and especially to all lawyers. The judiciary is limited from publicly defending itself due to constraints placed on it by the applicable rules of judicial conduct. Judges are limited in their ability to publicly defend themselves from criticism at the time when it is most relevant for them to do so, which is in the midst of a controversial issue. Our profession has both a duty and an interest to advocate for judicial independence when judges and the judicial system are facing attack. If we fail to defend the principle of judicial independence when it is under attack, we risk an unwanted erosion of the rule of law.

The average member of the public does not usually understand how judicial independence helps to safeguard the rule of law. It is up to our profession to explain the significance of a separate judicial branch being free from partisan pressure. It is a critical time for us as lawyers, and our association, to remain committed to protecting the independence of the judiciary at all costs. During this time where the judicial system is increasingly under attack, an organized bar association can step in to directly and vigorously address the issue and defend the judiciary.

The Tennessee Bar Association is not a partisan organization. In defending the independence of the judiciary, the TBA must remain non-partisan in all respects. After all, regardless of your political views, protection for the rule of law is not a partisan issue. Likewise, respect for the independence and

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny.”

– James Madison in The Federalist Papers No. 47
A Long History of Judicial Robes

In regard to the discussion in the Tennessee Bar Journal on judicial robes, I wanted to note that simple black robes have a long history and strong defenses. The first U.S. Supreme Court justices wore black and crimson robes and long wigs similar to those of their British counterparts. They abandoned the wigs and crimson after being followed by small boys in the street shouting, “Lobsters! Lobsters!” Plain black robes and no wigs became the norm for the court. And even though Tennessee judges did not commonly wear robes until the early 20th century, there is an account of Andrew Jackson doing so while conducting trials on circuit as a judge of Tennessee’s Superior Court in the 1790s.

Black robes are more than tradition in America, although tradition has value. While robes of various colors and trim may be in fashion in some courtrooms, the austere black robe symbolizes that on the bench a judge no longer has personal preferences or individuality of any relevance. Judges become the neutral and composed voice of the law. The black robe also conveys the seriousness and solemnity of the proceedings, proceedings where fortunes, reputations and lives can be saved or lost. These justifications are far more important than a judge having another opportunity for self-expression before a captive audience.

— Russell Fowler, Chattanooga

Serious Good Wishes

Note: This letter was written to Bill Haltom, who was the Journal’s humor columnist for 25 years. He retired in December 2018.

Thanks for your column in our bar journal magazine (as you now go out the door). As you say, you intended to veer your columns toward being light-hearted; that said, I never read anything in one of your columns, that if I put it into practice, made me a worse person toward my fellow man (and that’s not true of a lot of today’s syntactic screeds …). A personal favorite column (definitely a “keeper” with me) was your “Can We Talk?” column (June 2017), in which you lament how amongst all our electronic connectivity we seem to have gotten away from good ol’ face-to-face talking. “… [L]et’s enjoy each other’s company,” you wrote. Amen.

Familial communications aside, just as lawyers, let’s meet and hash problems out — not just unilaterally bombarding each other’s inboxes with three-times-a-day/tag-you’re-it emails. (On that subject, I think there is a new book out, #Do Not Disturb, (?) that I want to read, as soon as I select my next set of materials to read — perhaps for the winter.)

Back to your column: no, you weren’t quite “Paine on Procedure,” but who has been? Those big shoes remain unfilled yet. With your writing and with what, I take it, you set out to do, you succeeded. You wrote things worth reading, even when for fun only, consistently providing our bar journal with quality content for a lot of years.

Serious good wishes to you as you now step away from “But Seriously, Folks.”

— Steve Jordan, Nashville

WRITE TO THE JOURNAL! Letters to the editor are welcomed and considered for publication on the basis of timeliness, taste, clarity and space. They should include the author’s name, address and phone number (for verification purposes). Please send your comments to Suzanne Craig Robertson at srobertson@tnbar.org.

JEST IS FOR ALL BY ARNIE GLICK

“[T]he secret to happiness I can tell you . . . but please don’t ask me to explain the Rule Against Perpetuities.”
GENERAL ASSEMBLY
31 New Faces at Capitol as Legislature Set to Begin Session
The 111th Tennessee General Assembly began Jan. 8, with 31 new members and without several longtime leaders. Former House Speaker Beth Harwell and former House Minority Leader Craig Fitzhugh are among those gone, paving the way for new leadership.

In early January, new committee chairs were named in the House and Senate to oversee judiciary and legal matters. In the Senate, Sen. Mike Bell, R-Riceville, will chair the Judiciary Committee, with vice chairs Sen. Jon Lundberg, R-Bristol, and Sen. Dawn White, R-Murfreesboro. House Speaker Glen Casada named Rep. Michael Curcio, R-Dickson, as chair of the House Judiciary Committee, with Rep. Johnny Garrett, R-Goodlettsville, serving as vice chair. Rep. Mike Carter, R-Ooltewah, will chair the Civil Justice Subcommittee; Rep. Mary Littleton, R-Dickson, will chair the Children & Families Subcommittee; Rep. Andrew Farmer, R-Sevierville, will chair the Criminal Justice Subcommittee; and Rep. Micah Van Huss, R-Jonesborough, will chair the Constitutional Protections & Sentencing Subcommittee. Comptroller of the Treasury Justin Wilson and Tennessee State Treasurer David Lillard Jr. were reelected. They will continue to serve in those positions for at least two more years.

COURTS
SCOTUS to Consider Hot-Button Issues in 2019
During the U.S. Supreme Court’s 2018-2019 term the court is likely to hear a number of high-profile cases that will be divisive. Issues before the court may include separation of church and state, citizenship questions related to the 2020 Census, power of executive agencies, Deferred Action for Childhood Arrivals, the military ban against transgender individuals and partisan gerrymandering.

Calls for Comment on New System for Judicial Discipline
The Tennessee Supreme Court has requested comment on a proposed new system and procedure for disciplinary enforcement with respect to judges, as the Board of Judicial Conduct will cease to exist on June 30, 2019. A draft of a new Supreme Court Rule 10C is available for review on the court’s website.

The deadline for submitting written comments is March 29. Comments may be sent to appellate-courtclerk@tncourts.gov or mailed to James M. Hivner, Clerk, Re: Supreme Court Rule 10C, Tennessee Appellate Courts, 100 Supreme Court Building, 401 7th Avenue North, Nashville 37219.

Death Sentences Down for 4th Straight Year
A recent report shows that for the fourth year in a row, U.S. courts imposed fewer than 50 new death sentences and states performed fewer than 30 executions in 2018, the ABA Journal reports.

continued on page 6
This year the death row population reached a 25-year low, and Washington became the 20th state to abolish the death penalty. Tennessee executed three men in 2018 and has four scheduled to die this year.

Memphis Attorneys Provide Clothes for Clients Who Cannot Afford Dress Attire
The Shelby County Public Defender’s Office has taken a novel approach to criminal defense, maintaining a closet of clothing for defendants who cannot afford dress attire to wear in court. The Commercial Appeal reports. On whether what a defendant wears to court matters, attorney and supervisor for Shelby County Public Defender’s Office Gregg Carman said that “it probably shouldn’t. But jurors can’t always set aside appearance. As soon as a client walks into a courtroom with a jury, that jury is making judgments about them from the way they present themselves, whether it’s their demeanor, their attitude, their walk, or their clothing, their hairstyle.” The story reports that the Shelby County District Attorney General’s office also has a clothes closet for victims and witnesses.

LAW SCHOOL
ABA Data Shows Law School Enrollment Up
New data from the American Bar Association shows that enrollment of first-year students at accredited law schools is up 2.9 percent, the ABA Journal reports. An even greater bump came in non-JD enrollment — there was an 8.2 percent increase in individuals signing up for LLMs, masters and certificate programs.

YOUR TBA
TBA YLD Accepting Applications for 2019-2020 Board Positions
The TBA Young Lawyers Division is accepting applications for appointed board positions for the 2019-2020 bar year, serving with future TBA YLD President Troy Weston. To be eligible to submit an application, you must be 36 or younger on June 14, 2019, or be in the first five years of your practice. Attorneys appointed to positions will be required to attend all mandatory meetings. Submissions are due by Feb. 28. Read more and view the full application at www.tba.org/node/104560.

2019 Diversity Leadership Institute Class Selected
The TBA Young Lawyers Division Diversity Committee recently selected 13 law students for the 2019 Diversity Leadership Institute, a six-month leadership and mentoring program for law students.

Leadership Law Opens for 16th Year
The TBA Leadership Law (TBALL) Class of 2019 kicked off in January with a three-day opening retreat at Montgomery Bell State Park. Now in its 16th year, the six-month program is designed to help law students develop skills to succeed both as students and attorneys, and empower them to contribute more to the legal community. It also matches students with mentors in a diverse variety of practice areas and helps them build relationships among students of diverse backgrounds.

TBA YLD President Jason Pannu, Abby Rubenfeld, Gordon Bonnyman and others. The group’s next session, “Issues in Policy & Politics,” will take place in Nashville in February.

* * *


News
continued from page 5
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138th Annual Tennessee Bar Association Convention

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This Year’s TBA Convention Returns to Downtown Nashville at the Renaissance Hotel June 12-16, 2019
New Tennessee assistant attorneys general recently were sworn in by Tennessee Supreme Court Chief Justice Jeff Bivins in the state Capitol’s Old Supreme Court Chamber. The annual ceremony recognizes attorneys hired by the Attorney General’s office in the last 12 months. Back row, from left: Matthew Jones, Garrett Ward, Rainey Lankford, Patrick Riley, Kyle Mallinak, David Wood. Front row, from left: Chief Justice Jeff Bivins, Jeffrey Ridner, David Rudolph, Amber Seymour, Gabrielle Mees, Dianna Shew, Matthew Gaske, Matthew Cloutier, Attorney General Herbert Slatery. Brian Mauk is not pictured.

Kramer Rayson has named Betsy J. Beck its new managing partner effective Jan. 1. Beck, who has been with the firm for 15 years, focuses her practice on employment law matters for clients in a variety of industries. She earned her law degree from the University of Tennessee College of Law in 2003.

Memphis attorney and former Juvenile Court Judicial Magistrate Claudia Haltom was nominated as the 2018 Memphis Person of the Year for her work on behalf of women and their families. Haltom founded A Step Ahead Foundation in 2011 to improve educational, economic and health outcomes for women and children in Shelby County by increasing access to long-acting reversible contraception. Haltom says her 17 years of experience on the bench inspired her to help women be emotionally, physically and financially prepared to provide for their children, plan for their futures and achieve their full potential.

Memphis lawyer Amy J. Amundsen, a partner with Rice Amundsen & Caperton, was recently honored at the Memphis Bar Association’s annual meeting with the association’s highest award, the Judge Jerome Turner Lawyer’s Lawyer Award. The award is given to a member of the association who has practiced law for more than 15 years and who exemplifies qualities of professional courtesy and conduct. Also at the meeting, the gavel was officially passed to new MBA president Annie Christoff and new board members were installed. Christoff works at the U.S. Attorney’s Office for the Western District of Tennessee.

Nashville corporate and securities attorney Lori B. Metrock has returned to Baker Donelson Bearman Caldwell & Berkowitz as a shareholder after a short stint at Nelson Mullins. Before moving to Nelson Mullins, Metrock had spent more than a decade at Baker Donelson. She will continue focusing her work on public and private securities offerings, corporate governance, regulatory compliance and Exchange Act compliance.

Matthew R. Muenzen was recently named assistant city attorney for the city of Franklin. He previously was an associate attorney with the Nashville firm of Freeman & Fuson and a lawyer with the Tennessee Department of Children’s Services. He also served as a police officer in New Jersey for six years. He holds a graduate degree in human resources management and training from Pace University in New York.

Sarah E. Smith has been named an associate at Burch, Porter & Johnson. She will focus her practice on commercial and business litigation. Prior to joining the firm, she served as a law clerk to Judge Bernice B. Donald of the U.S. Court of Appeals for the Sixth Circuit and Judge Sheryl H. Lipman of the U.S. District Court for the Western District of Tennessee. She also worked with the criminal justice reform organization Just City to launch the Memphis and Nashville Community Bail Fund program.

Labor and employment lawyer P. Maxwell “Max” Smith has joined the Nashville office of FordHarrison as counsel. Smith previously was an associate with Waller Lansden Dortch & Davis. He will represent management in a broad array of industries on employment law matters, federal and state litigation, and day-to-day counsel.

The Nashville Bar Association has elected a new slate of officers for 2019. Nashville Electric Service General Counsel Laura Smith is president of the organization. Laura Baker, a shareholder...
in the Law Offices of John Day, is president-elect. And Brant Phillips, chair of Bass Berry’s litigation group, was chosen first vice president-elect. The association also awarded its John C. Tune Public Service Award to Hal Hardin, a former judge and prosecutor, at its annual meeting.

Jonathan T. Skrmetti has joined the Tennessee Attorney General’s office as chief deputy. In his new role, Skrmetti will coordinate and oversee the legal work of all five sections of the office. He previously was a partner with Butler Snow, an adjunct professor at the University of Memphis School of Law and an assistant U.S. attorney for the Western District of Tennessee. He has experience handling complex civil disputes, civil rights crimes and criminal matters. He also is an expert in Cyberlaw and data security.

Former U.S. Attorney Edward L. Stanton III has been named an independent monitor of the Memphis Police Department. Stanton will review the steps the department is taking to end surveillance of protesters after it violated a consent decree barring such surveillance, and report his findings to U.S. District Judge Jon P. McCalla. Stanton served as the federal prosecutor for the Western District of Tennessee from 2010 to 2017. He now practices in the Memphis office of Butler Snow where he handles government relations and civil rights matters and leads the Commercial Litigation Group.

Derek W. Mullins has joined the Chattanooga office of Carr Allison where he will focus on commercial litigation, insurance, premises liability, transportation and other general litigation matters. He is admitted to practice in all Tennessee state courts and before the U.S. District Courts for the Middle and Eastern Districts of Tennessee. He previously practiced with Brewer, Krause, Brooks & Chastain in Nashville.

Nashville’s Music Row law firm Milom Horsnell Crow Kelley has added two named partners and changed its name. Matthew Beckett has joined the firm and Molly Shehan has been elevated from associate. The firm now will be known as Milom Horsnell Crow Kelley Beckett. Beckett was a recording engineer and production assistant on multiple Grammy-nominated albums before attending law school and setting up a solo entertainment practice. Shehan has been an associate at the firm since graduating from Belmont University College of Law in 2014.

The Chattanooga law firm of Grant, Konva-linka & Harrison has named two new directors. Brittany Thomas Faith, a member of the Immigration Group, focuses her practice on family- and employment-based petitions and humanitarian relief. She is vice chair of the America Immigration Lawyers’ Association Midsouth Chapter and a board member for La Paz of Chattanooga and Midsouth Immigration Advocates. She also serves as East Tennessee Governor for the TBA Young Lawyers Division.

Cody M. Roebuck handles governmental and administrative law matters, labor and employment cases, personal injury and wrongful death cases, and real estate law. He has litigated a wide variety of cases in state and federal courts throughout the region.

Chattanooga attorney Nancy Cogar recently received the Bruce Bailey Volunteer Lawyer of the Year Award from Legal Aid of East Tennessee for her work establishing the Chattanooga Gospel Justice Initiative. Through the effort, Cogar works to provide pro bono legal clinics throughout Chattanooga at places of worship. The concept is based on the belief continued on page 10.

Reach Your Target Market

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And now we have someone dedicated to handling your advertising needs. Former TBA staff member Stacey Shrader Joslin has rejoined the association after a three-year hiatus and stands ready to help you find the best way to get your message, product or service in front of our 10,000+ members.

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that many individuals first turn to leaders of their local houses of worship when facing legal issues. The initiative relies on the partnership of local attorneys, the Chattanooga Area Veterans Council, the Christian Legal Society, Legal Aid of East Tennessee and the Tennessee Faith and Justice Alliance (a project of the Supreme Court’s Access to Justice Commission).

Stites & Harbison recently welcomed two new attorneys to its Nashville office. Jamie Little will serve as counsel to the firm in the Construction Service Group. Her practice focuses on contract drafting, negotiation and disputes, as well as payment disputes and lien enforcement. She also has extensive alternative dispute resolution experience. Prior to joining the firm, she practiced in Nashville, as well as in Pennsylvania and West Virginia. Michael Schwegler has joined the Real Estate & Banking Service Group as a member of the firm. He represents lenders, creditors and businesses in commercial and consumer lending and litigation matters. He also has experience in real estate and bankruptcy matters. Prior to joining the firm, he practiced with a small Nashville firm and was an assistant attorney general for the state.

Bristol attorneys Randy M. Kennedy and Stephanie E. Stuart have formed the new law firm of Kennedy & Stuart Attorneys and Counselors at Law. The firm is located at 625 Anderson St., Bristol 37620. The firm can be reached at 423-764-7162 or online at kennedystuart.com.

Jackson lawyer Matthew R. West has joined Rainey Kizer Reviere & Bell where he will practice in the areas of estate planning, trusts, real estate, condominiums and business. A past president of the Jackson Madison County Bar Association, West also has a member of the Howell Edmunds Jackson American Inns of Court. Most recently, he was named a fellow of the American Bar Foundation. He earned his law degree from Cumberland School of Law at Samford University.

The Association for Women Attorneys (AWA) presented its Marion Griffin-Frances Loring Award to Memphis lawyer Jocelyn Dan Wurzburg at its annual meeting in January. The award recognizes outstanding achievement in the legal profession. In the 1960s, Wurzburg worked to facilitate racial reconciliation in the city following the assassination of Dr. Martin Luther King Jr. Those efforts led to appointment to the Tennessee Human Rights Commission, where she was instrumental in drafting Tennessee’s first anti-discrimination law. She then attended and graduated from the University of Memphis School of Law and formed her own firm, becoming Memphis’s first professional mediator. Wurzburg was a founding member of the AWA and a past president of the Memphis Bar Association. She retired in 2005, but continues to mediate select cases. Her recently released book, *Jocie: Southern Jewish American Princess, Civil Rights Activist*, recounts many of her life experiences.

Also at the AWA meeting, Laura Deakins of Lewis Thomason took office as president. A graduate of the University of Memphis School of Law, Deakins began her career as a judicial law clerk for the Hon. Holly Kirby on both the Tennessee Court of Appeals and Tennessee Supreme Court. She joined Lewis Thomas in 2015 where she focuses on medical malpractice and insurance defense. She is a hearing committee member for the Board of Professional Responsibility, member of the Leo Bearman Sr. American Inns of Court and recruitment chair for the Memphis Bar Association’s Annual Bench Bar Conference.

The Tennessee Association of Recovery Court Professionals recently presented its 2018 “Making a Difference Award” to Eighth Judicial District Criminal Court Judge Shayne Sexton and 13th Judicial District General Sessions Court Judge Bratten Cook. The pair were recognized for their leadership in addressing substance abuse among defendants in their courts. Judge Sexton started his district’s recovery court in September 2005 and personally works with defendants referred to the court. Judge Cook has instituted numerous programs to help juveniles and adults with substance abuse issues since 1998. In 2002, he co-founded the DeKalb County Juvenile Drug Court, and in 2005, he began a recovery court for adults.

Four Bradley Arant Boult Cummings attorneys have been recognized for their leadership roles in the Nashville Bar Association (NBA). Senior attorney Jeffrey L. Allen and associate Timothy L. Capria each received the President’s Award. Allen, a member of Bradley’s Intellectual Property and Media and Entertainment practice groups, was honored for his leadership as co-chair of the NBA Entertainment, Sports & Media Law Committee. Capria, a member of the firm’s Intellectual Property Practice Group, was recognized for his role as chair of the Diversity Summit. Associates Casey L. Miller and Tara S. Sarosiek both received the NBA Young Lawyers’ Division Enterprise Award.
PASSAGES

Longtime Chattanooga attorney and Signal Mountain resident THOMAS ALLISON CALDWELL Jr. died Dec. 12, 2018, at the age of 94. A U.S. Navy veteran, Caldwell served in Guam and Okinawa during World War II. He was discharged in 1946 and entered Harvard Law School. Following graduation he began working for the Marshall Plan in France, Indonesia, the Netherlands and Slovenia, and later in the general counsel’s office in Washington, D.C. He returned to Chattanooga in 1953 to work at the law firms of Witt, Gaither, Abernathy & Finlay and Stophel, Caldwell & Heggie, which through a series of mergers became Baker, Donelson, Bearman, Caldwell & Berkowitz. He primarily practiced in the areas of corporate, tax and estate planning. Caldwell was the first president of the Chattanooga Legal Aid Society, a member of the Chattanooga Bar Association Board of Governors and a fellow of the Chattanooga and Tennessee bar foundations. He received the Chattanooga Bar Association’s Ralph Kelley Humanitarian Award and just this past year was named a “Colonel Aide de Camp” by Gov. Bill Haslam. In lieu of flowers, the family asks that donations be made to the Tom Caldwell Society of the Orange Grove Center or to CADAS, a nonprofit alcohol and drug treatment facility in Chattanooga.

Former Circuit Court Judge SAMUEL HOUSTON PAYNE died Dec. 31, 2018, at the age of 85. A native of Chattanooga, Payne was a U.S. Air Force veteran of the Korean War, flying more than 25 combat missions. Following the war, he returned home to earn his law degree from the University of Tennessee College of Law. He first practiced with the law firm of Kefauver, Duggan & McDonald and then with Bean, Payne and Phillips. In 1966, he joined with Judge Clarence Shattuck to form the firm of Shattuck & Payne, where he practiced until his election as 11th Judicial District circuit court judge in 1974. Payne served on the bench for 32 years until his retirement in 2006. He was active in the Chattanooga Bar Association, receiving the group’s Ralph Kelley Humanitarian Award for service to the community, and the Chattanooga Legal Aid Society, serving as a member of the original board of trustees. Services were held in January at St. Peter’s Episcopal Church in Chattanooga. In lieu of flowers, memorial contributions may be made to CADAS, Episcopal Relief & Development, Metropolitan Ministries or the YMCA of Metropolitan Chattanooga.

Greeneville attorney JOHN TERRY MILBURN ROGERS died Dec. 21, 2018. He was 69. A 1974 graduate of the University of Tennessee College of Law, Rogers founded the John Rogers Law Group and practiced personal injury and criminal defense for more than four decades. In 1996, Rogers helped found the Center for Advocacy and Dispute Resolution at the University of Tennessee College of Law and served on its board of directors for 22 years. He also served as president of countless legal organizations, including the Greeneville Bar Association, and gave back to the community as coach of the Greeneville High School mock trial team for more than 14 years. A memorial service was held in December at First Presbyterian Church of Greeneville with burial following at the Historic Bethesda Cemetery in Morristown. In lieu of flowers, donations may be made to St. Jude Children’s Research Hospital in Memphis or the Alzheimer’s Association National Headquarters in Chicago.

The Tennessee Bureau of Workers’ Compensation has named Sam Keen as a new mediator in its Nashville office. Keen previously worked as a staff attorney with the Legal Aid Society of Middle Tennessee and the Cumberlands, where he defended low- and moderate-income renters and homeowners facing eviction or foreclosure. Keen also served as Legal Aid’s equal employment officer and limited English proficiency coordinator.

Butler Snow recently added two new attorneys to its Memphis office. Scott M. McLeod will practice with the Finance, Real Estate and Restructuring Group. He previously represented publicly traded real estate investment trusts, commercial real estate developers and private businesses in commercial real estate transactions. Shanell L. Tyler will practice with the Commercial Litigation Group. She focuses her work in the areas of litigation, labor and employment law, governmental relations and municipal law.
REINSTATED

Hamilton County attorney Katrina Akers Davis was reinstated to the practice of law effective Nov. 28, 2018. The Tennessee Supreme Court noted that Davis had been placed on inactive status in October 2013 but had filed a petition for reinstatement this past November. The Board of Professional Responsibility stated that the petition for reinstatement was satisfactory and met the requirements of Tennessee Supreme Court Rule 9. The court issued the order on Dec. 3, 2018.

DISCIPLINARY

Disbarred

The Tennessee Supreme Court disbarred former Davidson County lawyer and judge Casey Eugene Moreland on Jan. 2. The court previously had suspended Moreland on June 5, 2018, based on his guilty plea to obstruction of an official proceeding, conspiracy to retaliate against a witness, conspiracy to commit theft, destruction of records, and tampering with a witness. In imposing the disbarment, the court determined that Moreland's actions violated Rules of Professional Conduct 8.4(a) and (b). It also stipulated that the period of disbarment will be served consecutive to the incarceration. Moreland entered a conditional guilty plea to the disbarment. As a condition of reinstatement, Moreland must comply with any restitution ordered by the U.S. District Court for the Middle District of Tennessee, complete all CLE requirements, pay all outstanding registration fees and professional privilege taxes, and pay all court costs in the matter.

The Tennessee Supreme Court disbarred Bradley County attorney Michael John McNulty from the practice of law on Dec. 5, 2018. The court also ordered him to pay restitution to one client in the amount of $1,125. In January 2018, a petition for discipline was filed against McNulty based on two complaints of misconduct. In the first complaint, McNulty received $1,125 for legal work but provided minimal services and ultimately abandoned his client. In the second complaint, McNulty falsified an email communication related to a client matter when he sent an email purporting to be from an attorney who no longer worked at the firm. The court also noted that McNulty did not answer the petition for discipline or appear at the final hearing. His conduct was determined to violate Rules of Professional Conduct 1.3, 1.4, 1.5(a), 1.16(d), 4.1(a), 8.1(b) and 8.4(a) and (c). Finally, the court noted that a prior disbarment from Feb. 15, 2018, also remains in effect.

Suspended

The Tennessee Supreme Court suspended Knox County lawyer John Harley Fowler from the practice of law on Jan. 2 after finding that he failed to respond to complaints of misconduct and posed a threat of substantial harm to the public. Fowler was immediately precluded from accepting any new cases and was to cease representing existing clients by Jan. 20. The suspension remains in effect until dissolution or modification by the court.

Censured

The Tennessee Supreme Court
censured Williamson County attorney Timothy Alan Tull on Jan. 2. In imposing a censure, the court set two conditions: that Tull make restitution to a client in the amount of $2,000 and that he utilize the services of a practice monitor for one year. The practice monitor is to meet with Tull at least once per month and by phone weekly, and provide written reports to the Board of Professional Responsibility. The court found that Tull failed to advise a client of potential conflicts of interest or of the desirability of seeking independent legal advice, and failed to provide the client an opportunity to seek independent legal advice. In addition, the court found that Tull failed to reasonably communicate with another client regarding resolution of a discovery motion and the imposition of sanctions against the client. Tull agreed to a conditional guilty plea in which he acknowledged his misconduct violated Tennessee Rules of Professional Conduct 1.4 and 1.8(a)(2).

**Administrative Suspensions**

Notice of attorneys suspended for, and reinstated from, administrative violations—including failure to pay the Board of Professional Responsibility licensing and inactive fees, file the required IOLTA report, comply with continuing legal education requirements, and pay the Tennessee professional privilege tax—is on the TBA website at www.tba.org/directory-listing/administrative-suspension-lists. 

Compiled by Stacey Shrader Joslin from information provided by the Board of Professional Responsibility of the Tennessee Supreme Court. Licensure and disciplinary notices are included in this publication as a member service. The official record of an attorney’s status is maintained by the board. Current information about a particular attorney may be found on the board’s website at www.tbpr.org/for-the-public/online-attorney-directory.

Pannu’s Pairings: The Loire Valley

France’s Loire Valley, stretching from Nantes on the Atlantic Coast to Orléans, only 1.5 hours south of Paris, is home to a wide array of grape varieties and thousands of wine producers. The Pays Nantais region on the Atlantic coast of Brittany is known for the Muscadet appellation, the Saumur region is known for its eponymous Saumur appellation, the Touraine region is known for the Bourgueil, Chinon and Vouvray appellations, and the Centre-Loire region is known for the Pouilly-Fumé appellation. However, this article will focus on the Sancerre and Anjou appellations.

**Sancerre.** The Sancerre appellation, located in Centre-Loire, is home to the best Sauvignon Blanc in the world. It is located on the left bank of the Loire River and its vineyards blanket a series of hillsides. The nose provides citrus fruit and mild grassy or herbal notes, while on the palate you will find citrus fruit, minerality, and its best-known feature, crisp acidity. Some of my favorite producers in this region are Alphonse Mellot, Henri Bourgeois and Edmond Vatan.

**Food Pairings:** goat cheese and shellfish.

**Anjou.** The Anjou appellation has yet to gain widespread popularity in the United States market but is home to some of my favorite drinking red wines. Anjou is also home to significant white wine production with the Chenin Blanc grape being the dominant varietal. Red Anjou wine is dominated by the Cabernet Franc grape and then blended with Cabernet Sauvignon. Red Anjou provides red berry and floral aromas on the nose with fruit, earthy notes, and pleasant tannins on the palate. My favorite red Anjou producers are René et Agnès Mosse and Mark Angéli. Grolleau is a varietal that is indigenous to the Loire Valley and is used mostly to produce Rosé d’Anjou. However, more and more winemakers are using the Grolleau grape to produce red wines. Red wine produced from Grolleau in Anjou legally cannot use the Anjou appellation designation and instead take on the VdF (Vin de France) or “table wine” designation. Grolleau is light, acidic and lower alcohol, which makes it a food-friendly wine. My favorite producers of Grolleau in Anjou are René et Agnès Mosse and Domaine Chahut et Prodiges.

**Food Pairings:** mushrooms, peppers, root vegetables, steak fajitas.

JASON M. PANNU is a shareholder in the Nashville office of Lewis Thomason. You can reach him at JPannu@LewisThomason.com. Follow Jason on Twitter @jasonpannu and Instagram @jason.drinks.wine.
Closing argument is surely one of the highlights of any trial lawyer’s practice. While closing argument is undoubtedly thrilling, it is also very challenging. This article will introduce you to the most important aspects of giving a closing argument and provide sufficient information to give you confidence to do your first closing argument and give you a rudimentary framework upon which you may build your own confident and winning style of summation for future trials.
Do Closings Matter?
Many trial observers today believe that closings don’t matter because the jury decides the case shortly after the opening statement. So, the preliminary consideration is: Do closing arguments matter? There can be little doubt that closing argument is every bit as important as any other component of the trial. This is because the outcome of a trial is always in doubt until the final verdict is in. Everything that happens in a trial is potentially outcome determinative. In the immortal words of Yogi Berra: “It ain’t over till it’s over.”

This is not to exaggerate the importance of closing argument. If you haven’t done the preliminary work up until that point in the trial, your closing is not likely to save it. Poor closings can spoil winning cases; good closings will preserve the narrow margin of victory and can even turn the tide in your favor in close cases.

Closing Arguments and Closing Pitchers
For me, the closing argument is like a closing pitcher in baseball. A closing pitcher is brought in at the end of a close game to get the last three outs and preserve the win for his team. There is something magical in the lore of baseball about a ballplayer who can consistently do this, and the sport recognizes this special talent with a separate statistical category called “saves.” A save has a technical definition, but what it boils down to is credit given to a pitcher for preserving his team’s narrow lead in the late innings of the game. In a sport heavily influenced by folklore and superstition, a dominant closer often takes on mythical proportions among players and fans.

For the World Champion New York Yankees that heroic figure was Mariano Rivera, the Yankees’ closer for 17 seasons. A thirteen-time All-Star and five-time World Series champion, he is Major League Baseball’s career leader in saves (652). In the 1999 World Series, Rivera recorded a win and two saves out of the four games that were played. His second save clinched the championship, and for his performance he received the World Series MVP Award.

Closing arguments at trial are like closing pitchers in baseball. A closing pitcher only comes in during the late innings after most of the game has been played. Closing argument comes only after days, weeks, or even months of intense struggle at trial. A closing pitcher only comes in when the game is on the line. Similarly, closing argument is made while the outcome of the trial is still in doubt. Finally, a closer is of little use and will not come into a game that is not close at the end. Likewise, a closing argument is no good if what has gone before is not sound. To be a winner in baseball, you must have an effective closing pitcher. To be a winner at trial, you must have an effective closing argument. So the next time you’re wondering whether your closing argument is worth the effort, think Mariano Rivera.

continued on page 16
When you stand up to
give your closing
argument, craft and
deliver it with the skill
and artistry of Mariano
Rivera throwing strikes
where they can’t hit ‘em.

Preparation

As in every aspect of trial, thorough preparation is essential to a successful closing argument. The first rule of preparation for closing is to begin as soon as possible. You should begin working on your closing after you have gathered sufficient facts to create an outline of your closing. A rule of thumb here might be after the first round of discovery is completed.

From the outset, you have to develop themes and labels you want to use in the case. Themes are emotional anchors and images for the jury to take back with them to the jury room. Labels are convenient identifiers of the parties. It is critical for you to develop and settle upon a theme for your case early on. If you do nothing else in your closing argument, you should communicate a theme to the jury. There are as many potential themes as there are ways of looking at life. A theme may be as simple as “corporate greed” or “an accident waiting to happen” or more sophisticated themes such as “the jury system is the only equalizer that we have.”

Equally important, you must develop your theory of the case. The theory of the case is the factual story most favorable to your side based upon the facts established at trial. It must be consistent with the undisputed evidence as well as your version of the disputed facts. It must explain why the people in the story acted the way they did. If you do not present a clear and simple story of what happened to the jury, it will construct one without you – or worse, accept your opponent’s theory.

Create a trial notebook with a section devoted to the closing argument. In it, put anything that you think might be useful in closing. This will include themes and labels and your theory of the case, as well as analogies, stories, exhibits, and ideas for video or demonstrative aids. Thereafter, outline your closing argument and then periodically update and adjust it to the additional facts as they become known.

Next, get a good scouting report on the judge. Does she have any standing orders with respect to closing arguments? How does she handle jury instructions? And what rules of closing argument does she observe? Find out her views on other technical matters, such as where you should stand during closing, how you may use exhibits and demonstrative aids in your closing.

At the bench conference after the evidence is in, ask the judge about anything that was not included in your scouting report. Know exactly which jury instructions the judge will use and exactly what she is going to permit you to say about the instructions. Clarify what the time limit will be on your closing argument.

Finally, I can’t emphasize enough the fact that you need to rehearse your argument. You need to actually say and hear the words coming out of your mouth. Rehearse in front of a
mirror, friends or family members, or your colleagues at work. In especially important trials, you will rehearse your closing before a mock jury.

Organization
Organizing your closing argument is every bit as important as deciding what themes and substance to include in it. Keep in mind that a trial is the re-creation of reality. So, when you sit down to organize your closing argument, remember to tell a story. Primacy and recency should also govern the construction of the closing. Information presented at the beginning and the end of your argument tends to be retained better than information presented in the middle. Make a point to start strong and end strong.

A Bold Introduction. Begin with a striking introduction to your closing argument. The attention span of the average juror is short, so you must use the opening moments of closing argument effectively. Put together a short executive summary of the closing that is to follow. Write it out in its entirety (but do not read it to the jury). Communicate your theme, why you should win and your enthusiasm for the case. Deliver that summary without notes, making as much eye contact with the jurors as possible. It will get you off to a strong start – one the jurors are likely to remember. Let’s take a look at a classic introduction given by Thomas Moore, taken from Joel J. Seidemann, In the Interest of Justice: Great Opening and Closing Arguments of the Last 100 Years (2004) 292:

Allow me to borrow a statement made a long time ago by Edmund Burke, an Irish statesman and orator ….

Burke said, “Something has happened upon which it is difficult to speak and impossible to be silent.”

Ladies and gentlemen of the jury, you have seen unfold in this courtroom events that would make Edmund Burke’s words as applicable today as they were over 200 years ago. It is not only that this child was damaged through negligence and carelessness. It is not that they had chance after chance that went begging time and time again to save him, and they did not.

As horrible and terrible as that is, what’s difficult to speak upon, yet impossible to remain silent is that in this courtroom … there was a deliberate, orchestrated, fraudulent effort to deprive this child of justice.

Burden of Proof. Discuss the burden of proof. You will probably need to disabuse the jury of the reasonable doubt standard, the one most jurors have heard about before coming to court as a juror. You should develop a boilerplate burden of proof discussion to use in all your closing arguments.

Review the Evidence. The distinguishing feature of closing argument is argument. Present your case to the jury as a cohesive, logical and understandable story. Marshal the evidence for the jury and draw inferences and conclusions from the facts; talk about witnesses’ credibility, motivation, or demeanor while testifying; explain the significance of the evidence; and discuss why an event occurred the way it did. Take the patchwork of testimony, documents, and other evidence, and weave it into something the jury can understand.

Deal with Your Weaknesses. In addition to developing your own themes and telling your own story, you’ll also have to deal with the facts against your case. Do not make the mistake of thinking that you can ignore difficult evidence and hope that the jury will not notice. Your job is to neutralize bad facts in closing. At least, you want to raise your weaknesses before your opponent does.

Anticipate and Attack Your Opponent’s Case. Anticipate your opponent’s case and force him to argue his weaknesses. You must also attack your opponent’s case. Orienting the jury to your theory of the case should always be your first objective. But once you’ve argued the positives of your case, you must attack the strengths of your opponent’s case.

Jury Instructions. Perhaps the weakest link in a common law trial is the court’s jury instructions. Jurors are routinely expected to comprehend complex legal principles like proximate cause, burden of proof, preponderance of the evidence, etc., after one brief discussion by the trial judge. Talk to the jury about the instructions they will hear and create boilerplate explanations of these instructions.

Verdict Form. Show the jury how you want them to fill out the verdict form. Do not risk a hung jury because it did not properly understand how to fill out a seemingly uncomplicated verdict form.

The Law of Closing Argument
As you craft your closing, you need to remember that there are some things that you cannot do or say. Most prohibitions are matters of common sense or courtesy, but I will mention a few highlights. Don’t misstate the law or the evidence. Don’t argue facts “off the record,” such as jury awards in similar cases. The prohibition against arguing

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Closing Pitch
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off the record does not mean the lawyer is limited to what is in evidence and nothing else. It is permissible to argue common sense, general knowledge, and common understanding. Don’t state personal beliefs or vouch for a witness’ credibility. Don’t appeal to passion or prejudice. Finally, do not urge irrelevant use of the evidence introduced.

Presentation
During the actual presentation of your argument to the jury, keep these performance-enhancing tips in mind. Educate the jury as to what the trial is about. Simple things like the fact that the defendant in a civil case will not go to jail often needs to be explained. Use the themes and labels that you have developed during the trial. Make sure the jury understands your theory of the case. Tell the jury your theory of what actually happened based upon the facts that they have seen in the trial. Use exhibits and visual aids during your closing.

Analogies and stories are time-honored methods of communicating with the jury. Using commonly shared experiences or relying on a story that everyone knows or can readily appreciate allows you to show the jury what you mean. Never underestimate the power of understatement. All of us think that the best ideas are the ones that we thought of ourselves; ergo, the views the jurors will defend most vigorously, and the ones they are least likely to abandon, are the ones they believe they figured out for themselves. Also, empower the jury. Jurors should harbor no doubts that, under our system of justice, they are authorized to give you the verdict you seek.

You can spend hours crafting a perfect closing argument, but if it is delivered in a monotone, with your face in your script, and your feet bolted to the floor, all of your efforts will have been wasted. To be persuasive you must be interesting and use all of the tools at your disposal. Do not read from a script. Instead, work from an outline that will enable you to establish eye contact with the jurors.

Pace your delivery. Lower the pitch, moderate the tone and volume, and vary the tempo of your voice. Stand directly in front of, but not too close to, the jury. Maintain an open stance that enhances your believability with the jurors. Move around as much as the court permits and be conversational – like a friendly neighbor giving advice on a serious matter over the backyard fence.

The conclusion of your argument will be the last words that the jury hears from you — make them count. Write the conclusion out word for word. Leave the jurors with something stirring and ringing in their ears. Let’s look at the conclusion from a recent closing argument by Patrick Malone.

[You are] here to render justice that will value a human life and that will say that, no matter if a person is of modest means and no matter if he is in the twilight decade of his life… you will say in your verdict and in your speaking of the truth that his life is precious and his independence and his productivity and his mobility and his dignity cannot be taken away from him without a heavy value being placed on what he has lost.

Conclusion
If you enjoy being a trial lawyer, you love to give closing arguments. For when all is said and done, your job as a trial lawyer is to argue your clients’ case. Closing argument is your last, best opportunity to do just that. You owe it to yourself to give it your best. So, when you stand up to give your closing argument, craft and deliver it with the skill and artistry of Mariano Rivera throwing strikes where they can’t hit ‘em. Little else that we do compares with how you will feel when the jury returns its verdict in the case in which you have just delivered the winning closing argument.

TIMOTHY B. WALTHALL is a trial lawyer for the U.S. Department of Justice. The views expressed here are those of the author alone and not those of the Department of Justice.

Mr. Walthall has been battling in courtrooms for more than 40 years. He has been a trial attorney at the Justice Department (DOJ), the Federal Trade Commission and in private practice. He has conducted numerous jury and non-jury trials in courts and tribunals in the Washington, D.C., area as well as in federal courts. He has been a trial attorney for the DOJ’s Environmental Torts Section and the Guantanamo Detainee Litigation Team. He has also been a lecturer at the Attorney General’s National Advocacy Center’s Trial Advocacy Programs. Before his legal career, he was a semi-pro baseball player.

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Medical examiners understand that a family may disagree with a manner of death determination.¹ We are also acutely aware of the perceived stigma of a suicide manner of death determination. Some medical examiners may allow a suspicion of suicide to be overridden by reluctance to impose that stigma.² However, it is important to emphasize that cause and manner of death opinions are best offered in an unbiased manner free of undue influence from societal, legal or political pressures.³ This article addresses the need to balance medical examiner investigative independence with a family’s right to due process in challenging a manner of death.
Accurate cause and manner of death classification is imperative because death certification fulfills several major functions: informs families about specific conditions that led to death; provides local, state and national mortality statistics by cataloging morbidity and mortality; indicates priorities for funding programs and policy making for public health and safety issues; and, serves as the legal and administrative documentation of the death. Without objective mortality data about the circumstances of death, it is impossible to identify risk and risk-groups accurately, and thus design, target and evaluate appropriate clinical, public health and justice system interventions.

Given the understanding that suicide fatalities are likely grossly underestimated in death certificate data, misclassification of true suicides as other manners of death may have significant adverse impacts in intervention efforts and resource allocations.

Who Certifies Manner of Death?
Medical examiners and forensic pathologists are physicians who possess the necessary specialized knowledge, training, skills and experience for standardized death investigation, and are responsible for medicolegal death investigations by Tennessee statute.

For people who die under suspicious, unnatural or unusual circumstances, which includes cases of known or suspected suicide, medical examiners have authority to investigate and certify cause and manner of death. This gives medical examiners the mandate to look into, document and classify manner of death objectively.

Fortunately in Tennessee, regional forensic centers that perform autopsies are required to be accredited by the National Association of Medical Examiners (NAME). This inspection and accreditation process ensures that death investigation and forensic pathology is professionalized, basic medical examiner community standards are being met, and that the accredited offices adhere to basic tenets of standardized medicolegal death investigation.

Manner of Death: A Medical Opinion
There are few issues that are potentially more problematic in medicolegal death investigation than determining circumstances surrounding death, also known as manner of death (MOD). MOD determination, especially suicide, can be particularly difficult for many reasons, and decades of debate about it among medical examiners continue.

Potential difficulties in MOD determination include: administrative and procedural variations among medical examiner offices; ambiguities in case facts or investigative information; family, political or law enforcement influence; variations in medical training; and, true differences in professional judgement and practice. Professional guidelines must be used in conjunction with professional judgment in all fields of medicine, and MOD classification is no different.

MOD is determined after a complete investigation based on scene information, medical history, examination of the body and additional studies such as toxicology. According to NAME, MOD “was added to the death certificate in 1910 by public health officials to assist in clarifying the circumstances of death and how an injury was sustained — not as a legally binding opinion — and with a major goal of assisting nosologists who code and classify cause-of-death information from death certificates for statistical purposes.” Accurate manner of death information is imperative for determining the scope of health and safety concerns and to help ensure they receive funding and policy priorities.

In most jurisdictions, there are five options for manner of death: natural, accident, homicide, suicide and undetermined. There is no one authoritative text or widely recognized single standard for cause and manner of death classification in all situations. The general recommendations for classifying manner of death are as follows:

Natural: Solely due to natural disease process or aging (heart attack, cancer, emphysema, cirrhosis of the liver, etc.).

Accident: Injury or poisoning caused or contributed to death with little to no evidence that it was intentional (blunt trauma from a car crash, hip fracture from a fall, drug overdose from recreational drug use, drowning, etc.).

Homicide: Results from a volitional act by another person, including legal determination of acts of “self-defense.”

Suicide: Injury or poisoning from an intentional, self-inflicted act that was meant to, or has an inherently high risk of, causing death.

Undetermined or “could not be determined”: Either insufficient information is available to choose one of the above manners of death, or there are equally compelling arguments to be made for two or more manners of death.

Importantly, the medical determination of the manner of death is independent from the legal determination. For example, medical examiners typically classify motor vehicle related deaths as “accident,” but that does not prevent legal proceedings against an impaired driver in the collision for some charge of homicide or manslaughter.

Suicide, Medical Burden of Proof and Differing Standards of ‘Intent’
While there are various generally accepted definitions of suicide, admittedly, there is no universally accepted definition of suicide among medical examiners or forensic pathologists.

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Most definitions include some variation of intent:

- “the decedent intended to die and delivered the means”12;
- “the mechanism was self-inflicted, and the decedent intended to die”13, and
- “determination of intent to kill oneself.”14

According to the guide to manner of death determination from NAME, determination of suicide is dependent on two main principles: acceptable level of burden of proof and the concept of “intent.”15 NAME states that the legal standard of “beyond a reasonable doubt” is not necessary for medical suicide determination; however, the evidence burden should exceed “more likely than not.” NAME further clarifies that “in general, requiring a ‘preponderance of the evidence’ is a reasonable practice when deciding whether to classify a death as suicide.”

Similarly, the medicolegal death investigation view of intent may differ from the legal viewpoint. The NAME declines to define intent explicitly but states:

Finally, one cannot escape the need to consider intent when classifying manner of death. However, the definition of, or need to consider “intent” may vary depending on the case. One basic consideration is beyond dispute: the concept of intent differs when manner-of-death classification issues are compared with other paradigms such as legal code and public health strategies. … The take-home point devolving from contemporary practice is that a singular definition and application of “intent” does not work in the context of manner of death classification.16

In other words, what may constitute “intent” for a proceeding in the legal context is not necessarily the same as for a medical MOD context.

How do medical examiners and forensic pathologists determine what constitutes sufficient “intent” to determine suicide? In short, it depends on the circumstances of any one individual case, reliance on recommendations from NAME, and using peer-based quality measures. It cannot be done reliably using a checklist or other pre-determined necessary pieces of evidence that would apply to all cases. There are, however, several useful explicit or implicit indicators of intentionality such as: verbal or nonverbal expressions of suicidal intent; explicit preparations for death; signs of farewell; expressions of hopelessness; great physical pain; previous suicide attempts; attempts to avoid rescue; efforts to learn about means of death or rehearsing fatal behavior; and, serious mental illness including depression or bipolar disorder.17

These indicators may come from witness reports, computer searches, social media, evidence of suicide directions such as Final Exit, previous suicide attempts, suicide notes, medical records, testimonials from witnesses, relatives, and caregivers, and recent life crises.18

A common misconception is that a suicide note must be present to conclusively infer suicidal intent. In fact, suicide notes are present in only 20 to 35 percent of suicides.19 Although rare, it is known that suicide notes may be removed from the scene by family or other concerned parties prior to arrival of first responders, law enforcement or death investigators. Conversely, “suicide notes” in and of themselves are not always conclusive of suicide, as some written declarations found at a death scene are ambiguous in nature and require subjective interpretation of the writer’s state of mind.

A medicolegal suicide is a classification of professional opinion based on forensic investigative information after a complete investigation. It is never possible to “second-guess” what was in a decedent’s mind; we must rely on explicit or implicit evidence of intent, while acknowledging that there may potentially be more than one interpretation of some evidence. The determination of suicide is only made after careful consideration. Ultimately, the medical examiner may certify suicide after integration of the scene and other investigative information, medical history review and postmortem examination findings, if the totality of the evidence indicates the decedent intended to take his or her own life.

**Suicide and Drug Overdoses**

Deaths from drug overdose are perhaps the most difficult to determine manner of death. Drug-related deaths are often complex and require extensive investigation (interviews with family and friends of decedent, social media, scene findings, medical records, prescription history, prescription monitoring program, etc.).20 This information is used in conjunction with autopsy and toxicology to certify MOD. Depression, chronic pain, opioid-use disorder and

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**Medical Examiners continued from page 21**

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**Faculty Highlight**

**Newman Bankston**

Egerton McAfee & Davis, P.C.

**Newman Bankston**’s primary focus is estate and business succession planning. He regularly works with clients to create a plan for passing their assets to the next generation, while minimizing the state and federal transfer taxes associated with such transactions. This consists of preparing wills, trusts, powers of attorney and living wills for clients, as well as creating family limited liability entities. He also helps clients carry out their charitable aspirations by coordinating with nonprofit entities (i.e., private foundations, public charities and donor advised funds) on a particular giving plan. Newman has assisted several nonprofits in their formation, application for tax-exempt status, and throughout their life cycle as a business.

Newman also represents executors, administrators, trustees, creditors and beneficiaries in the probate and trust administration process. This involves assisting both corporate and individual fiduciaries in the implementation of estate plans after death, and advising trustees, creditors, and beneficiaries on estate and trust issues. He regularly aids clients with state and federal inheritance, and estate and gift tax returns.

**Faculty Highlight**

**Newman Bankston**

Egerton McAfee & Davis, P.C.

**Newman Bankston**’s primary focus is estate and business succession planning. He regularly works with clients to create a plan for passing their assets to the next generation, while minimizing the state and federal transfer taxes associated with such transactions. This consists of preparing wills, trusts, powers of attorney and living wills for clients, as well as creating family limited liability entities. He also helps clients carry out their charitable aspirations by coordinating with nonprofit entities (i.e., private foundations, public charities and donor advised funds) on a particular giving plan. Newman has assisted several nonprofits in their formation, application for tax-exempt status, and throughout their life cycle as a business.

Newman also represents executors, administrators, trustees, creditors and beneficiaries in the probate and trust administration process. This involves assisting both corporate and individual fiduciaries in the implementation of estate plans after death, and advising trustees, creditors, and beneficiaries on estate and trust issues. He regularly aids clients with state and federal inheritance, and estate and gift tax returns.

**Register Today**

At [CLE.TBA.ORG](http://CLE.TBA.ORG)
Law Tech Blast

February 15 in Nashville, Tennessee Bar Center
Program: 9 a.m. - 4:45 p.m.
Credit: 6.5 Dual

For attorneys interested in: Law office tech, management, ethics
Find out what’s next in technology for your law practice and law office at this year’s Law Tech Blast on Feb. 15. Earn up to 6.5 hours of Dual CLE credit. You can create your own schedule and take as many or as few hours as you need. The registration desk will be open all day, so you can come and go for the hours you need when it is convenient for you.

Producer: Tom Shumate

Welcome to CLE for Tennessee.
This special section uses the icons below to indicate which amenities are included with featured CLE programs. The icons appear between the title and pricing information.

Parking  Premium Coffee
Food  Internet
Estate Planning & Probate Forum

February 22 in Franklin. Embassy Suites
Program: 8:30 a.m. – 4 p.m.
Credit: 5 General, 1 Dual

For attorneys interested in: Estate planning, probate, ethics
This event provides six hours of CLE, including an hour of dual credit and will be focused on timely, relevant topics to help you stay on top of trends affecting this area of law. Legislative updates and the ever-popular Clerk & Masters Panel will ensure that you leave with the knowledge necessary to advance your practice. Do not miss this opportunity to fulfill CLE requirements while networking with attorneys who share your focus and cultivating relationships with fellow practitioners. Section members receive a discounted rate for the program.

Networking lunch provided.

Speakers: Michael Goode, Newman Bankston, James Barry Jr., Jennifer Exum, Robin Miller, David Parsons, Albert Secor, Brian Shelton
Producer: Michael Goode

Winter CLE Blast

February 27 in Nashville, Tennessee Bar Center
Program: 7 a.m. – 6:45 p.m.
Credit: 11 Dual

For attorneys interested in: Ethics
Looking for CLE and fast? The TBA is hosting its annual Winter CLE Blast, offering programs from 7 a.m. to 6:45 p.m. on February 27. Earn up to 11 hours of Dual CLE. You can create your own schedule; take as many or as few hours as you need. We will provide the coffee, too!

Fastcase Legal Research Training (Live)
February 21
Tennessee Bar Center
Schedule: 1:00 p.m. - 4:15 p.m
BYOL (Bring Your Own Laptop) and maximize your time with a complete program on Fastcase. Learn how to use the Fastcase legal research tool and enhance your research skills. Representatives from Fastcase will be reviewing the basics and new features for a comprehensive training.

Speakers: Jeff Asjes, Erin Page
Cannot attend? View our Webcasts at your convenience on February 22. Topics include: Introduction to Legal Research, Boolean (Keyword) Searches, Advanced Tips for Enhanced Legal Research.
Ethics: Drug Dealers and Celebrities

February 20 in Nashville, Tennessee Bar Center
Program: 9 a.m. – 12:15 p.m.
Credit: 3 Dual

$155 TBA Members
$330 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Ethics
Believe it or not, the legal problems faced by some of the most notorious drug dealers actually allow us to understand the requirement to eliminate the barriers to justice for all. Plus, the issues that celebrities face give us a chance to talk about conflicts, inclusion and substance abuse. Join the CLE Performer, Stuart Teicher, Esq., as he examines the intersection of several aspects of professional responsibility – access to justice, ethics, substance abuse and diversity – all in a way that will keep you engaged!

Speaker: Stuart Teicher

Become a Persuasive Legal Writer

February 20 in Nashville, Tennessee Bar Center
Program: 1:30 p.m. – 4:45 p.m.
Credit: 3 Dual

$155 TBA Members
$330 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Ethics, Writing
Distilling legal documents to their most basic elements is the key to creating effective persuasive legal writing. The problem is ... it’s not so easy to achieve. Join the “CLE Performer” Stuart Teicher, Esq., as he teaches us how to make our legal writings clear, concise and direct.

Get down and dirty with some technicalities of sentence structure, get the lowdown on Stuart’s “Shortwriting” method for reducing long sentences, and get the skinny on “the only punctuation you’ll ever need to know.”

Speaker: Stuart Teicher
**Tort, Insurance & Appellate Practice Forum**

**March 28 in Nashville, AT&T Building**
Program: 9 a.m. – 4 p.m.
Credit: 4 General, 2 Dual

$265 Section Members  
$290 TBA Members  
$465 Nonmembers (includes TBA Complete Membership)

**For attorneys interested in: Torts, insurance**
This year join tort, insurance practice and appellate lawyers from across the state to learn about the topics that will impact your practice. You will hear about the latest updates in appellate law and the newest developments in tort and insurance practice.

**Networking lunch provided.**

**Speakers:** Robertson Leatherman Jr., Kyle Wilson  
**Producer:** Bobby Leatherman

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**Local Government Forum**

**March 28 in Nashville, Tennessee Bar Center**
Program: 8 a.m. – 4:30 p.m.
Credit: 5 General, 1 Dual

$265 Section Members  
$290 TBA Members  
$465 Nonmembers (includes TBA Complete Membership)

**For attorneys interested in:**
Government, employment law, ethics

Government law is an ever-changing practice area with a unique blend of constitutional, statutory and case laws. This program will address intangibles of the practice area, along with topics such as ABC laws, government employment law, legal ethics in a government setting and more. A networking event will follow the program.

**Networking lunch provided.**

**Speaker & Producer:** Charlotte Knight Griffin
For attorneys interested in: International Law

The International Law Section 2019 Annual CLE forum is focused on providing both the experienced, and the new business attorney, corporate counsel, employment law attorney, technology law attorney, and others exposure to the current and changing international law issues and events affecting Tennessee companies, individuals, and beyond the border. The program will consist of three international business panels with representatives from government and private international manufacturing perspectives, international sourcing, importing & exporting perspectives and international entertainment and tourism perspectives. The Section will be hosting a reception at the conclusion of the program.

Networking lunch provided.

Speaker: Terry Olsen

International Law Forum

February 22 in Nashville, Tennessee Bar Center
Program: 1 p.m. – 4:15 p.m.
Credit: 3 General

$130 Section Members
$155 TBA Members
$330 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Adoption law, family law

This forum will feature speakers on a range of topics relevant to this program presented by the Tennessee Bar Association’s recently formed Adoption Law Section will focus on changes to adoption law. Lunch will be included with registration, and the forum will be followed by a social hour.

Networking lunch provided.

Speaker: Jason Long
Producer: Susan Kovac

Adoption Law Forum

March 6 in Nashville, Tennessee Bar Center
Program: 12 – 3:15 p.m.
Credit: 3 General

$130 Section Members
$155 TBA Members
$330 Nonmembers (includes TBA Complete Membership)
Corporate Counsel Forum

April 5 in Nashville, Tennessee Bar Center
Program: 9 a.m. – 4 p.m.
Credit: 5 General, 1 Dual

$265 Section Members
$290 TBA Members
$465 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Corporate law, Ethics
This forum will feature speakers on a range of topics relevant to in-house counsel, including the latest in law department technology, dealing with immigration policies and managing a dual legal and business role.

Networking lunch provided.

Speakers: Alicia Oliver
Producer: Alicia Oliver

Disability Law Forum

April 12 in Nashville, Tennessee Bar Center
Program: 9 a.m. – 3 p.m.
Credit: TBD

$245 Section Members
$270 TBA Members
$445 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Disabilities Laws, Ethics
The TBA Disability Law Section is offering a stacked program with a diverse lineup of speakers and topics, including Kim Joseph of the Tennessee Disability Determination Services. She is presenting a session focused on effective representation at DDS and will provide attendees with a much-needed Q&A period to ask those challenging questions. Additionally, the section’s chair Chris George of George & George will cover an hour of ethics, including how to handle ethical dilemmas and more. The day will end with Administrative Law Judge Robert Martin from the Office of Disability Adjudication and Review who will share his unique perspective as a former private attorney and current judge.

Networking lunch provided.

Speakers: Christopher George, John Dreiser, Kimberly Joseph, the Hon. Robert Martin
Producer: Chris George

REGISTER TODAY AT CLE.TBA.ORG
For attorneys interested in: Bankruptcy, ethics

The 16th Annual Tennessee Bar Association Bankruptcy Forum will take place April 5-7, 2019, at the Hilton Garden Inn in Gatlinburg, Tennessee. Please make plans now to join us in this wonderful and relaxing setting for an informative, unique retreat that is applicable to a wide variety of bankruptcy attorneys. Ten hours of CLE credit are available for this program, including three hours of ethics.

This high-quality program will begin on Friday afternoon with two CLE sessions. First, there will be a presentation highlighting bankruptcy case law updates. The second session will feature an experienced panel of practitioners who will discuss important differences in bankruptcy practice across the three Grand Divisions of the state. Included in the cost of the program is a Friday evening dinner and networking reception. Attendees are welcome to bring guests to the reception for an additional $75 per guest.

On Saturday, attendees will be organized into small groups with a discussion leader drawn from a faculty of prominent bankruptcy judges. These small group discussions will focus on case problems that bring into focus recent developments in the law and real world problems that bankruptcy practitioners face. The judges will encourage the participants to analyze, discuss and argue different approaches to the case studies. There will be an optional group hike planned for Saturday afternoon.

Networking lunch provided.

Speakers: Laura Ketcham, Lawrence Ahern III, Erika Barnes, the Hon. Suzanne Bauknight, the Hon. Paul Bonapfel, Joel Giddens, Gregory Logue, Michael McCormick, John Newton, the Hon. Shelley Rucker, the Hon. Charles Walker

Producer: Laura Ketcham
medication abuse often coexist, which further complicates issues regarding intent. Toxicology results alone, such as a markedly elevated concentration of a drug, cannot be used to infer manner, because of drug tolerance and post-mortem redistribution. In addition, an overdose investigation is further complicated by the rise of illicit fentanyl and fentanyl analogs, which may be difficult to detect in routine toxicology.

Given the ambiguity of definitions and circumstances of a particular case, one might argue that “undetermined” manner might be a better option. Various studies show this falsely decreases the suicide rates and potentially harms public health and intervention efforts for suicide. This is especially true with overdoses, where undercounting of suicides is likely far more common than with other more overt and active suicide methods such as firearm deaths and hanging.23 In fact, some studies show that medical examiners are less likely to certify a death as suicide with knowledge that a decedent had a history of substance abuse.22 NAME recommends classifying “deaths from the misuse or abuse of opioids without any apparent intent of self-harm as ‘accident.’”23 The position paper also states:

... assigning ‘undetermined’ as the manner of death as a matter of course for deaths due to intoxication does not serve the public good, nor does this practice support efforts to intervene and prevent future intoxication deaths of a similar sort ... reserve ‘undetermined’ as the manner for rare [emphasis added] cases in which evidence supports more than one possible determination.

If medical examiners begin to default or skew toward undetermined or accident for manner of death for overdoses, or in the absence of a suicide note, it will be impossible to track the true incidence of suicide fatalities.

Medical Examiner Independence and a Family’s Right to Due Process

Medical examiners and forensic pathologists are well aware of the stigma of suicide and the potential social, religious, legal and financial implications of the certification of suicide. It is well understood that a suicide ruling may cause additional suffering and grief for family and next-of-kin. We also have a professional and ethical obligation to certify manner of death in an unbiased way. NAME states that medicolegal death investigation should be “objective and neutral,” and it is important that medical examiner findings should be free of “political or legal pressure by individuals or offices seeking to influence the pathologist’s findings.”24 The recommendations state that manner of death “should not be made to ‘facilitate prosecution, avoid challenging publicity, building a political base, or promoting a personal philosophy or agenda.'”25

Families and next-of-kin have the right and need to understand how their loved one died.26 They should have the opportunity to discuss, in-person if requested, any concerns, disagreements or questions regarding the investigation with the medical examiner or forensic pathologist responsible for the determination of cause and manner of death.

Medical examiner communication with family should be open, honest and timely. Family can often provide valuable information and insight regarding someone’s mental state, medical history, previous suicide attempts and emotional state when last known alive that may impact the manner of death ruling.

Should a medical examiner discover new information, he or she should be willing to reconsider a MOD, if appropriate. Sometimes a medical examiner’s manner of death determination is in error, and critical review of cases is an important continuing quality improvement effort. However, a family’s satisfaction or agreement with the cause or manner of death is not a prerequisite measure for a professional and complete death investigation.27 Even after open communication and discussions, the medical examiner and family may still disagree about the most appropriate MOD.

In Tennessee, families have several avenues of recourse if they disagree with the final medical examiner MOD determination. Discussion with the medical examiner or forensic pathologist who certified the death is the best initial step. Two, as outlined in Tennessee Department of Health Vital Records Rules, the next-of-kin may petition the municipal or county court in the county of the decedent’s death to amend any section of the death certificate.28 Third, as described in the previously described Tennessee Bar Journal,29 the family can petition the medical examiner, through a series of defined steps of appeal and mediation, to change a suicide MOD determination.
Further consideration

In summary, misclassification of suicide as “accident” or “undetermined” manner of death adversely impacts suicide mortality surveillance, which makes the identification of high-risk groups for targeted evaluation and interventions difficult. Medical examiners and forensic pathologists have the medical and scientific expertise to offer unbiased rulings for manner of death. Allowing physicians to continue to use professional medical judgment, investigative facts and recommendations from professional practice societies, peer-review and the Medical Examiner Advisory Council, rather than adhering to rigid statutory definitions or rules, will best serve the citizens of Tennessee. 

Notes

1. A recent publication in the July 2018 Tennessee Bar Journal discussed perceptions and realities about manner of death certification by medical examiners in Tennessee (“Manner of Death: If ‘Suicide’ Is on a Loved One’s Death Certificate, You Can Now Seek to Change It,” by Yarnell Beatty, Tennessee Bar Journal, July 2018, vol. 54, no. 7). This article is a general discussion about death certification and is not intended to reference the details or offer opinions of any particular case.


Also, supra notes 2, 4.


8. “Suicide Determination and the Professional Authority of Medical Examiners,” Timmermans S., American Sociological Review 70(2) April 2005.


National Center for Health Statistics, medical examiners’ and coroners’ handbook on death registration and fetal death
The Pinnacle at Symphony Place
Downtown Nashville
Saturday, April 6, 2019, 6 p.m.

Featured Speaker – Eve Runyon, Pro Bono Institute

Sponsorship opportunities and tickets available now at www.tba.org.
ensure that our republic remains a “government of the people, by the people, for the people.”

Axiomatic in the concept of representative democracy is that “the people” — the constituents, those electing these governing officials — must have the ability to communicate with their local, state and national elected officials. Without the ability to communicate their views and concerns, citizens are left powerless to influence those in the governing bodies. But what about when a public employer takes umbrage when an employee exercises this right? What happens when communicating with a public official impacts one’s job?

Enter Tennessee’s Public Employee Political Freedom Act (PEPFA). PEPFA makes it “unlawful for any public employer to discipline, threaten to discipline or otherwise discriminate against an employee because such employee exercised that employee’s right to communicate with an elected public official.” PEPFA’s purpose is “to facilitate free and open communication between public employees and elected officials by deterring the public employer from taking discriminatory actions against an employee because of such communication.”

But is PEPFA really necessary? Doesn’t the First Amendment already provide enough free speech protection? We’ll dive into that first and then break-down the basics of PEPFA claims in recent litigation.

PEPFA and the First Amendment

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for redress of grievances.” Do public employees really need PEPFA in light of the protections afforded by the First Amendment? The simple answer: it depends on the nature of their speech. Is the speech related to their official duties? Or is related to their role as private citizens?

The United States Supreme Court has held that when public employees make statements as part of their official duties, they do not speak with the same First Amendment protections as private citizens. When a public employee makes statements pursuant to her official duties, the court has held, she is speaking not as a citizen but for her employer, even if her speech relates to a matter of public concern. However, when the employee speaks on matters outside of her official duties — as a private citizen — she retains First Amendment protection because that is the kind of activity engaged in by persons who do not work for the government.

PEPFA, on the other hand, specifically provides protection to employees...
who communicate to elected officials about their official duties. The Act provides that “[n]o public employee shall be prohibited from communicating with an elected public official for any job-related purpose whatsoever.” 6

Simply put, the First Amendment provides protection for speech that is outside a public employee’s official duties; PEPFA provides protection for speech that falls within a public employee’s official duties as long as the speech is directed to a public official.

**PEPFA Basics**

The retaliation prohibited by PEPFA is broader than what is proscribed by the Tennessee Public Protection Act, for example, which only prohibits termination for refusing to remain silent about or refusing to engage in illegal activities. 7 Instead, under PEPFA, a public employer can’t discipline, or even threaten to discipline, or otherwise discriminate against an employee for communicating with an elected public official.

To fall within PEPFAs protections, the employee’s statements must be (1) job-related and (2) true. PEPFA does not prohibit “reprimanding an employee for making untrue allegations concerning any job-related matter to an elected public official.” 8 The employee must show that the communication with an elected official was a “substantial or motivating factor” in the discriminatory action taken by the employer. 9 PEPFA also provides for treble damages and reasonable attorney fees. 10

**Recent PEPFA Decisions**

Jones v. Wilson County, a 2018 case out of the Sixth Circuit, highlights the requirement that an employee’s statement to public officials must be true. 11 If the statement is untrue, then the plaintiff has failed to satisfy a statutory element, and it may provide a non-retaliatory basis for the adverse action. There, the plaintiff was a probation officer for Wilson County where she was required to answer questions about probationers before the General Sessions Court. In this case, the County terminated her employment after it found that she provided the court with false information regarding a criminal defendant’s ability to attend drug and alcohol counseling. The plaintiff argued that she was terminated for communicating in open court with the judge, an elected public official. The Sixth Circuit affirmed summary judgment for the County, holding that the plaintiff was terminated not for communicating with the judge, but for providing false testimony, dooming her PEPFA claim.

In another 2018 case, Green v. Campbell County, Judge Curtis Collier held that the plaintiff could rely on multiple illegal motivations for retaliation, including a violation of PEPFA, and that it was not necessary for her to show that she was terminated solely for communicating with elected officials. 12 This holding is important because it allows plaintiffs to pursue multiple theories for the adverse action. For example, a plaintiff could allege that she was threatened with discipline for communicating with public officials (a PEPFA violation) while simultaneously alleging that she was later terminated for refusing to engage in illegal activity (a TPPA violation).

**Keeling v. Coffee County** exemplifies how the treble component of PEPFA can allow for significant damage awards. 13 There, the plaintiff worked in the Code Department as a permits clerk making $23,000 annually. She alleged that she was terminated after communicating with the county mayor about the department head’s unwillingness to meet with members of the public. The jury found that the plaintiff had proven her PEPFA claim and awarded her $10,000 for humiliation and embarrassment. The trial court then awarded equitable damages (back pay, front pay, loss of benefits and prejudgment interest) totaling $154,379.41, which were tripled to amount to $463,138.24. The Court of Appeals affirmed that award.

**Conclusion**

PEPFA, as opposed to the First Amendment, provides public employees protection from retaliation for speaking to elected officials about their job duties. If a plaintiff can prove that her statements to a public official are true, related to her job duties, and that the statements were a substantial factor in the adverse action, then the damages can be quite significant. While PEPFA has been on the books since 1980, it’s only recently (in the last 10 years or so) seen an uptick in litigation. However, we suspect that that trend will only continue.

**Notes**


**EDWARD G. PHILLIPS** is a lawyer with Kramer Rayson LLP in Knoxville, where his primary areas of practice are labor and employment law. He graduated with honors from East Tennessee State University and received his law degree from the University of Tennessee College of Law in 1978 with honors, and as a member of The Order of the Coif. He is a former chair of the Tennessee Bar Association’s Labor and Employment Law Section.

**BRANDON L. MORROW** is an associate with Kramer Rayson LLP in Knoxville where his primary areas of practice are labor and employment, and litigation. He earned a bachelor’s degree from the University of Tennessee and a law degree from UT College of Law in 2012.
Powers of Attorney for Seniors Are Different

Are you drafting Powers of Attorney for financial decisions with language that is different for seniors than the ones you draft for younger clients? Or, are you referencing the powers enumerated in Tenn. Code Ann. §34-6-109 and relying on those provisions to create a complete document? Perhaps you’ve created a form over the years that you believe works for any adult. The world of finances, government assistance benefits and medical care can change dramatically once people enter their senior years. In fact, the authority given in Tenn. Code Ann. §34-6-109, sections (6) (supporting others) and (15) (paying club dues), may actually work against your senior client if the possibility of applying for means-tested benefits is on the horizon.

It is extremely important that Powers of Attorney are written to address the issues often faced by seniors. Following are typical provisions for dealing with specific issues.

■ Always include the agent’s authority to apply and plan for assistance benefits.

EXAMPLE: Application for Benefits.
My agent shall have the authority to make application on my behalf for any type and/or form of public and/or private assistance, including, but not limited to, Medicare, Social Security, Social Security Disability, Veteran’s, Medicaid, Railroad Retirement, TennCare and the like. If, as part of the planning process to qualify for benefits, my agent deems it appropriate to make transfers of my assets to other persons, including to the agent him/herself, then my agent shall have the authority to do so, even if such transfers are irrevocable in nature. My agent shall have the authority to change my residence for benefits purposes. “Residence” changes may mean county to county, state to state, facility to facility. My agent has my specific authority to create and execute a Qualified Income Trust (QIT, “Miller Trust”) if such is needed to qualify for assistance benefits, and has my authority to act as my Trustee under such trust.1

■ Many clients hire family members to act as caregivers, but are concerned that paying a family member will inflame the transfer penalty rules. Using this provision, along with the appropriate family caregiver contract, will satisfy TennCare’s concerns about inappropriate transfers. (The caregiver will have to report any pay for services as income on his/her personal income tax return, but doing so further confirms the existence of a valid contract.)

EXAMPLE: Compensation for Care Services.
If an individual provides personal care giving services to me that enable me to stay out of a long-term care facility (retirement, assisted living and/or nursing), or provides care management services to me while I am residing in such a facility or in a hospital, that individual may be paid a reasonable fee based on the value of the services I receive, and shall be paid either periodically or lump sum, depending on my financial status. My agent shall have the authority to enter into a written caregiver contract setting out payment for services if such contract is deemed...
Many clients do not want their mail forwarded to their long-term care facility where it is easily misplaced or ignored. The following language will satisfy the U.S. Postal Service.

EXAMPLE: To Receive Mail. To enter any mail box which I shall have hired, whether at a United States Post Office or elsewhere, and to surrender the box and terminate the lease in the agent’s discretion; to sign for any certified and/or registered mail directed to me, and to execute any order required to forward mail to any location selected by my agent.

Many seniors are not comfortable signing a financial Power of Attorney because they are aware that there is no formal supervision of the agent’s activities, and because we are typically advising them to appoint only one family member to serve at a time. That concern is greatly alleviated by using the following provision.

EXAMPLE: Accountability. My agent (other than my spouse) shall provide an accounting, on an annual basis (or upon their request), of all receipts and disbursements made by said agent from my funds/assets to the following persons: [may choose other family members, financial advisor, friend, “referee,” etc.]. Failure to provide an accounting within thirty (30) days of its request shall be cause for removal of the acting agent.

Sometimes representing seniors means making investment decisions that seem “upside down” in that they are the polar opposite of the decisions a younger person might make. Because fiduciaries are, by law, expected to act prudently, conservatively, and in the best interest of the principal we need to give the agent the authority to act in ways that may seem adverse but serve the greater good of obtaining assistance benefits and planning for long-term care. In other words, we need to know how much money we have to work with going into the future.

EXAMPLE: Discarding Assets. My agent has my specific authority to abandon real property (e.g., deed, timeshare deed, timeshare contract) if the property cannot be sold, or if the attempt to sell such real property exceeds the anticipated value of the property. My agent has my authority to invest in (or, change investments to) low-return bank accounts, brokerage accounts, savings/certificates of deposit accounts, and the like in order to secure and/or maintain the principal amount of those investments and to avoid dramatic fluctuations in value. My agent has the authority to liquidate tangible items for fair market (or, best obtained) value even if such items are considered “collectibles” and insured as such.

“Facility Dumping” is a very real thing. It means that a senior will be admitted to a hospital or long-term care facility and the resulting bills are never paid. The senior has limited resources or no access to funds, and another person does not come through to make sure the bills are paid. More and more facilities, in an attempt to avoid being stuck with the bill, are requiring that either an agent under a power of attorney, or a conservator, be in place — and bonded — in order to admit the senior. (However, no admission can be conditioned on the presentment of a health care Power of Attorney.) The following language is helpful.

EXAMPLE: Bond. My agent shall not be required to purchase a bond unless my admission to a long-term care facility or the engagement of a home health care provider is contingent upon providing proof of such bond. Payment for bond shall be an expense of mine, to be paid out of whatever assets my agent deems most appropriate to finance this requirement.

Many of our clients come into our office with documents that have been prepared outside of our office. Many of those documents have “gifting” provisions as allowed by Tenn. Code Ann. §34-6-110. However, while many attorneys include a provision that is compliant with the statute, the provision is typically written as to limit gifts to comply with current gift tax limits. When you represent seniors you often have to choose the lesser of the evils — tax consequences often being a lesser evil than the cost of paying for long-term care. Because there are times when it is best to transfer large value assets we toss the tax consequences to the wind. This is a provision that really should be drafted specifically for each client because it deals not only with transfer issues, but also with self-dealing and the possible defeating of an estate plan by the agent.

EXAMPLE: Gifts. To make gifts of any item of real or personal property I own for any reason deemed appropriate by my agent, and of any value deemed appropriate, including gifts that the agent may make to him/herself [however, such gifts shall be made in a manner and in shares that are consistent with the distributions made to those beneficiaries designated in my most recently executed Last Will and Testament, or to my intestate heirs should I not have a Will in place].

Notes
1. This trust is mandated by 42 U.S.C. §1396p(d)(4)(B). QIT forms are fairly uniform and can be obtained from a number of sources, including our office.
2. If you would like to receive a sample Caregiver Agreement simply email one of us and we’ll be happy to send it your way.

MATT AND KELLY FRERE are husband/wife partners in the Elder Law firm Guyton & Frere in Lenoir City. They are members of the Council of Advanced Practitioners of NAELA. Matt was Tennessee’s first certified Elder Law attorney.
Full Court Press: How Pat Summitt, a High School Basketball Player, and a Legal Team Changed the Game

About 25 years ago when coaching my daughter’s 3rd grade basketball team, I unexpectedly was brought to tears when she got a defensive rebound, dribbled down the floor and scored. In other words, she went coast to coast … and with that hustle, she glowed.

That’s why I welcomed the opportunity to review Full Court Press, which tells the story of how Tennessee went from a six-on-six, half-court basketball game for women with rules to “protect us” to the five player full-court game for men.

Like so many dads who today encourage their sports minded daughters, James Cape, a former 6’6” walk-on basketball player at Michigan, was astounded in 1976 when he learned that in Tennessee, his 15-year-old daughter, Victoria, played a very different basketball game than boys. He was determined to rectify the situation.

After writing the Tennessee Secondary School Athletic Association (TSSAA) and getting nowhere, he contacted a local attorney, Dorothy Stulberg, whom he had met through the Oak Ridge League of Women Voters.

Dorothy Stulberg and her law partner, Ann Mostoller, were two years ahead of me at the University of Tennessee Law School. Both were impressive and smart, super confident and especially friendly and helpful to the small number of new women law students. Both were moms attending law school while living in Oak Ridge. The book recalls that despite their stellar academic records and achievements, neither received a job offer from any law firm in East Tennessee, a typical scenario for women graduates. So, in the fall of 1974, they opened their own law firm in their hometown, Mostoller & Stulberg, Tennessee’s first women’s law firm.

When they filed a lawsuit on behalf of Victoria Cape in 1976, Mostoller and Stulberg not only sued the TSSAA, but also the Board of Education of Oak Ridge, the superintendent, the Oak Ridge School athletic director, and Victoria’s head basketball coach.

Imagine the courage and moxy it took for these new “women lawyers” to sue all of these defendants they knew as community leaders and moms.

The book recounts the colorful career of Judge Robert Taylor, a former basketball player, and his family. Also told is the role of his law clerk, Charles Huddleston, my law school classmate, who, in addition to excelling as a lawyer, has excelled as an AAU women’s coach for some of basketball’s top players.

One of the best parts of the book recreates segments of direct and cross examination from Mostoller and TSSAA attorney Charles Hampton White, including Judge Taylor’s questions. Only a few months after the lawsuit was filed, Judge Taylor issued a ruling rejecting TSSAA’s position that the girls’ rule protected weaker and less capable athletes from harming themselves, including “clumsy and awkward girls,” a reference to TSSAA testimony about girls. However, on appeal, the Sixth Circuit reversed and upheld TSSAA’s classification due to the distinct differ-
ences in physical characteristics and capabilities between the sexes.

The book recounts that while the lawsuit was pending, Stulberg also pursued Title IX remedies with the Department of Health, Education and Welfare (HEW) to change the many inequities facing girl athletes, not only the half-court game. In 1978, HEW ordered a complete revamp of Oak Ridge’s athletic department, and the book recalls the shock waves across the nation. Stulberg is quoted as saying, “It seems such a simple and basic concept that every person is important.”

Still there was no change from the TSSAA.

Throughout the book, the authors weave an important thread about the upbringing, challenges and early success of Trish Head, later known as Coach Pat Head Summitt.

Full Court Press looks closely at Coach Summitt’s early years, how the game did and did not evolve by the time she took over the Lady Volunteers at age 22 in 1974, and her testimony in Judge Taylor’s court. How Coach Summitt found her voice that brought about the change in the half-court rule in 1979 is definitely worth the read. The book demonstrates how it took someone like Coach Summitt to change the rule, despite legal and social directives to do so.

Reading the book from start to finish (or coast to coast!) is a joy and fast read. As a UT alum and as a person who grew up in a culture where girls were overly limited, I am grateful that Full Court Press tells the story of how, in particular, strong and courageous women stood up and fought for what is right. Full Court Press also reminds us that the fight continues to this day.

A standing ovation at center court to Bill Haltom and Amanda Swanson for sharing and preserving his story of what it took for girls to go coast to coast!

MARGARET BEHM is a partner with Dodson Parker Behm & Capparella in Nashville.
Navigating Parental Leave

“As more companies offer their employees attractive leave benefits, law firms are following suit by offering their attorneys robust parental leave benefits,” Ogletree Deakins notes in a recent newsletter. Promoting a work-life balance, including flexible hours and leave, is key as a new generation ascends, requiring and expecting this culture of balance. Here is one person’s story:

DEBBIE ZIMMERLE BOUDREAUX, 33, has been a lawyer since 2011 and a mother since 2014. Her son Jack was born during her third year of practice, and daughter Mary came along 15 months later in November 2016. Daughter Lucy was born last October.

Boudreaux works in Lewisburg at the Law Office of David McKenzie, a small firm with offices located in Lewisburg and Fayetteville, providing services to clients including personal injury, criminal defense and general civil litigation. She focuses primarily on family law matters. Her husband Ross is also an attorney.

TENNESSEE BAR JOURNAL: Did your maternity leaves go as expected?
DZB: When I had Jack, I had intended to take a couple months off. I returned to work to handle a brief matter when he was about a month old and my “gradual” return to work ended up with me jumping right back in full force. When I had Mary, I was back to work within a month as well. I took two months off with Lucy.

TBJ: Did you find your type of work to be conducive to being away?
DZB: I am fortunate to have fantastic support at my firm and from the local bench and bar. Lucy was born three weeks early. I had a trial set and some motions set for the week after she was born. At the time I took leave, I was attempting to wrap up several matters for the year but she had different plans. With the help of my staff and technology, I was able to continue most pending matters and to work on pleadings that needed immediate attention from the hospital.

TBJ: What is your firm’s leave policy?
DZB: With our office being so small, we do not have an official maternity/paternity leave policy. My personal policy is finding balance between being available to my family personally but also available to provide for them financially. That can sometimes be a difficult balance to strike.

My secretary has been trained to draft pleadings and responses and was able to make drafts of any work that needed to be handled while I was away from the office. . . . I spoke with the office if not every day, at least every other day. With smartphones, email, Dropbox and the Westlaw App, I was able to complete a lot of work from my phone while caring for the baby.

TBJ: Did you have any guilt, regarding home or work?
DZB: I think that’s a normal reaction when you care so much about the career you’ve built and about your spouse and children. Time is precious and at the end of the day, there are only so many minutes to offer everyone.

TBJ: How was your experience when you returned to work?
DZB: There were a few tears on the drive in, certainly. However, once I immersed myself in the work, the day flew by. I found that becoming a mother made me a better attorney, too. I became more efficient and didn’t procrastinate as I could afford to do before children.

TBJ: Do you have any advice for new parents who practice law?
DZB: Friends and family want to help you. To many of us, it can be a humbling experience to have to rely on others. We are used to being the ones people come to for help so it can feel strange to ask others for the same. When people offer, accept it. Even if it’s just to hold the baby for an hour so you can nap or fold a load of laundry.

When you go back to work, consider a housekeeper. Do a cost-benefit analysis. Is it worth the money to have that added stress handled by someone else? Is it worth it to hold that new baby without feeling guilty that you need to be handling laundry? Does it make sense to pay someone to handle a few hours of housework at a rate lower than your hourly billable rate so you can focus on what you do best? ☛

Debbie Boudreaux has served as the District 11 Rep for the TBA YLD and is curriculum specialist for CATALYST, a YLD program in its inaugural year designed to encourage high school students to become engaged with their state government.

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