TENNESSEE’S ‘FREE AND UNTRAMMELED JUDICIARY’

The Turmoil Over the Carmack Murder Case

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Closing Time

Serving as the president of the Tennessee Bar Association has been the thrill of my career so far, but it has also been a tremendous responsibility. The TBA is truly a remarkable organization, for which I take none of the credit. We have excellent relationships with the Court, law schools, rural bar associations, metro bar associations, our legislature and many other organizations.

Our nationwide reputation within American Bar Association circles and the access-to-justice community is second to none. The TBA provides excellent content, value and opportunities for our members through our sections, committees, programs and services.

I have tried to use this column to keep you updated on our work and projects at the TBA along the way, so for my final column, I will not provide you with a laundry list of all that we accomplished this past bar year. This will also allow me to avoid discussing everything else we wanted to do this year but simply ran out of time. But looking back now at the past 12 months, it has been an outstanding year at the TBA.

Serving as president has provided me with the opportunity to meet so many new and interesting people across the great State of Tennessee and across the country. Thank you for your words of wisdom, sage advice and unique perspectives on how to approach bar service. I had the pleasure of developing even closer friendships with TBA staff and my fellow volunteers. This was one of the best parts of my role as president.

For those of you who are not very active in the TBA, I strongly urge you to get involved in our many sections, committees and other areas of interest. We are so fortunate to have an excellent executive director and incredible staff members who can help you find a way to make a positive contribution to our association.

It has been my honor and privilege to serve as the president of the TBA. There are many people to whom I owe a huge amount of thanks: Sarah Neil Pilkinton for your love and understanding; my colleagues at Lewis Thomason for your support; Joycelyn Stevenson and each member of the amazing TBA staff; the Board of Governors; and every volunteer who made a contribution to the TBA this year. Thank you for this opportunity, your friendship and all of your hard work along the way. I will never forget it. Je me souviens.

Pannu’s Pairings: Côte de Beaune

The Côte de Beaune is located in the southern part of Burgundy’s Côte d’Or escarpment. The greatest white wines in Burgundy (and probably, the world) and some excellent red wines are grown on this stretch of land. The predominant grape varietals in this region are Chardonnay and Pinot Noir. In the August 2018 issue of this journal, I wrote about the northern part, the Côte de Nuits. Wines of the Côte de Beaune are also classified in descending quality as Grand Cru, Premier Cru, village wines, and regional wines. The best villages in this region from north to south are Pommard, Volnay, Meursault, Puligny-Montrachet and Chassagne-Montrachet.

Pommard is known for its powerful and structured reds while Volnay, only a few meters away, is known for its more elegant and floral reds. There is probably no better demonstration of the concept continued on page 4
Forms for Updated Rule in Different Location Now

This Letter to the Editor is in response to the “Ethics in Family Law Mediation” article (by Marlene Eskind Moses and Manuel Benjamin Russ) that was published on pages 32-33 of the Tennessee Bar Journal’s Volume 55, No. 1 edition in January 2019.

Following the Tennessee Supreme Court’s Oct. 3, 2108 Order amending Rule 31, the several forms are no longer housed within Rule 31 and are better suited to the newly codified Rule 31A, governing other types of alternative dispute resolution besides mediation.

The forms are still available at https://tncourts.gov. To access them, hover over “Forms and Publications” in the red bar at the top of the screen, click on “Court Forms,” and then click on “Mediation Forms.” The following forms can be found in the “Rule 31A – Alternative Dispute Resolution Forms” section; Form Agreed Order for Non-Binding Arbitration, Form Order for Case Evaluation, Form Agreed Order for Summary Jury Trial, and Form Agreed Order for Minitrial. The direct link is https://www.tncourts.gov/node/342.

The Alternative Dispute Resolution Commission is grateful that the amendments to Rule 31 were featured in the Journal and appreciate this avenue for educating members of the Bar. The ADR Commission hopes this clarification will allow those who are accustomed to using the ADR forms to continue to do so in appropriate matters.

— Edward P. Silva, ADR Commission Chair

JEST IS FOR ALL BY ARNIE GLICK

“Let’s bring our petiling into the 21st century. Let’s try to create a charitable remainder trust. Are there annuity tables for a grantor with nine lives?”

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.
MOCK TRIAL
Tennessee Team Wins National Mock Trial Competition
Tennessee’s State High School Mock Trial champion, Agathos Classical School, won the national title May 18 in Athens, Georgia. Columbia lawyers Jason Whatley and Cory Ricci were the attorney coaches for Agathos.
To qualify for the national competition, “more than 30,000 students participate in local high school mock trial competitions throughout the United States, Guam, South Korea and the Northern Mariana Islands,” the host city’s website says. The event this year was hosted by the State Bar of Georgia, its Young Lawyers Division and the Georgia Mock Trial Competition.
A Tennessee team has only won the national title twice before: Family Christian Academy of Chattanooga won in 2002 and 2003.

COURTS
Supreme Court Adopts Changes to Rule 21 on CLE
The Tennessee Supreme Court has adopted amendments to Rule 21 of the Rules of the Tennessee Supreme Court, which continues on page 6.
NEWS continued from page 5

governs Continuing Legal Education requirements. On Feb. 11, the court solicited comments and received them from the Knoxville Bar Association, the Chattanooga Bar Association and several individual attorneys.

CIVICS

Historical Society, YMCA Partner for Essay Contest Named for Justice Drowota

The Tennessee Supreme Court Historical Society has partnered with the Tennessee YMCA Center for Civic Engagement to sponsor an essay contest for high school students who participate in the judicial component of the YMCA’s Youth in Government program. The Justice Frank F. Drowota III essay contest, named for the late Tennessee Supreme Court Chief Justice, asked students to submit a 1,500 word essay on a legal topic of historic significance. This year’s topic was the Scopes Monkey Trial. The winning student received a commemorative plaque, a letter from the TSCHS and $250.

Matthew Goodbred, a student at Ravenwood High School in Brentwood, was the inaugural winner of the essay contest at a ceremony during the Youth in Government conference in Nashville.

ABA Law Day Poll Shows Gaps in Americans’ Civic Knowledge

In conjunction with this year’s Law Day theme, “Free Speech, Free Press, Free Society,” the American Bar Association conducted a civics study, finding that many Americans struggle with basic questions about the law and our government. The questions were pulled from the pool of 100 possible questions on the U.S. naturalization test.

Only 5 percent of those surveyed could correctly answer all 15 questions they were asked.

CRIMINAL LAW

Family of Man Executed in 2006 Calls for DNA Testing to Prove Innocence

Thirteen years after the state executed death row inmate Sedley Alley, his daughter is renewing a call to test DNA evidence in his case, the Commercial Appeal reported in May. His legal team says the results could prove he died an innocent man. Alley’s daughter April Alley, acting as the executor of her father’s estate, filed a petition for the testing in Shelby County Criminal Court. She also asked Gov. Bill Lee to order the long-sought tests. Sedley Alley was convicted in the brutal killing of Suzanne M. Collins, a Marine abducted while jogging at a Navy base north of Memphis in 1985. Sedley Alley was executed in 2006.

High Court Will Not Hear Challenge to Tennessee’s Lethal Injection Method

The U.S. Supreme Court will not hear a challenge to Tennessee’s lethal injection method, officially ending a battle over the controversial drugs used to kill death row inmates here, the Tennessean reported in May. That decision came days before death row inmate Donnie Edward Johnson, 68, was executed on May 16.

The challenge, brought by Johnson and 22 other death row inmates, argued that the state’s three-drug protocol, led by the sedative midazolam, does not keep inmates from feeling excruciating pain as they die.

ACCESS TO JUSTICE

23 Vandy Law Students Complete Pro Bono Pledge

At a recent awards ceremony, Vanderbilt Law recognized the 23 law students who completed the Pro Bono Pledge, a program that encourages community service and volunteerism amongst future graduates. Students pursuing a three-year law degree must complete at least 75 hours of service, while one-year students in the LL.M. program must complete 25. The students logged a combined 6,908 hours of pro bono legal work and community service activities.

YOUR TBA

TBA Executive Director Elected to National Board

Tennessee Bar Association Executive Director Joycelyn Stevenson in April was elected to the governing board of the National Association of Bar Executives. Stevenson, a Vanderbilt Law graduate, worked in private practice for 16 years before taking on the leadership role at the Tennessee Bar Association in 2017.

She will take her seat on the board at the group’s upcoming annual meeting in San Francisco and serve a two-year term. 
Nashville lawyer Christine Lapps has been named deputy commissioner of the Tennessee Department of Revenue. She took office on April 22. Lapp has spent the last 12 years working on state and local taxation issues for corporate clients at Ernst & Young. She previously worked at the Department of Revenue in the Legal and Administrative Hearing Office and was a litigator in the Tennessee Attorney General’s office.

Leticia Mason has joined the Nashville criminal defense firm of Freeman & Fuson where she will handle immigration-related cases. A native of Mexico, Mason earned a law degree and practiced law in her home country before moving to Nashville. After relocating to the United States, she went back to law school at the Nashville School of Law, graduating in 2008 and starting her own law practice. She later worked as the Spanish language court interpreter for the Davidson County Criminal Courts and as an assistant district attorney in Davidson County.

Wells & Associates PLLC opened a new law firm in Memphis in April. The firm is located at 81 Monroe Ave., Suite 400, Memphis 38103 and can be reached at 901-507-2520, info@thewellsfirm.com or online at https://thewellsfirm.com. The firm will focus on litigation for the injured and the accused, including a unique focus on hearing loss from the use of military-supplied ear plugs. TBA members who have joined the firm are Murray B. Wells, Aaron A. Neglia and NyKedra D. Jackson.

Patrick H. Morris has joined the Memphis office of Adams and Reese as an associate. He will focus on civil litigation involving breach of contract, torts, negligence, fraud and misrepresentation. He also has experience representing clients in arbitration and handling labor and employment disputes, unfair business practices and premises liability.

The Lawyers Association for Women (LAW) Marion Griffin Chapter recently awarded its 2019 Martha Craig Daughtrey Award to Chancellor Claudia B. Bonnyman, a founding member of LAW and the first president of the group. Bonnyman recently retired from the 20th Judicial Chancery Court after 16 years of service. Prior to serving on the bench, she was a partner with the Nashville law firm of Ortale, Kelley, Herbert & Crawford and worked as the Davidson County Chancery Court clerk and master.

Also, at the group’s annual meeting in April, new officers and leaders took office. TBA members among the group are President Christen Blackburn with Lewis Thomason, President-Elect Sara Anne Quinn with Butler Snow; Secretary Kimberly Faye Clark with Waller; Treasurer Leighann Ness at HCA Healthcare; First Year Director Shellie Handelsman with Shuttleworth; Second Year Director Kyonze Hughes-Toombs, deputy general counsel for the Tennessee Department of Health; and newsletter chairs Chambre Malone with Bridgestone Americas, Tabitha Robinson with Nashville Electric Service and Caroline Sapp with the Law Offices of John Day.

Bradley Arant Boult Cummings recently received the 2018 Chapter 11 Reorganization of the Year Award ($50 to $100 million) for the firm’s role in the case of Vanguard Healthcare and its 17 subsidiaries. Firm partners involved in the case were lead bankruptcy attorney William L. Norton III, lead corporate counsel Michael D. Brent, and lead litigation counsel Ty E. Howard. The award was presented during the 2019 M&A Advisor Distressed Investing Summit in March. Norton accepted the award on behalf of the group. All three practice in the firm’s Nashville office.

Nashville lawyer firm SIMS-FUNK has added Robert A. Peal as a partner. Peal’s experience includes representing clients in business, construction, products liability, entertainment and aviation-related litigation; white collar criminal defense; False Claims Act defense and prosecution; crisis manage-

To submit career moves, awards, appointments and other notable achievements to Success!, TBA members may go to the online submission form at www.tba.org/success. Your entry will appear online at www.tba.org/success/news after approval, and in the next available print edition. News is subject to editing and pictures are used on a space-available basis. Save photos as a tiff or jpeg (with no compression), minimum resolution 200 dpi, and at least 1”x1.5”.

Success! is compiled by Stacey Shrader Joslin and Linda Murphy. If you have questions, contact Linda at lmurphy@tnbar.org. For information on paid advertisements, please contact Stacey at advertising@tnbar.org.
SUCCESS! continued from page 8

Lucinda Smith has left the firm after 16 years. Smith has led Legal Aid Society's pro bono work since joining the firm in 2003. She initiated the firmwide Volunteer Lawyers Program in 2014, helping to expand pro bono support from two to 48 counties in Middle Tennessee by developing and strengthening partnerships with law firms in Nashville. In this position, she created partnerships with law firms and lawyers that provided volunteer lawyer resources to represent up to 2,500 clients annually.

Andrae P. Crismon Sr., managing attorney of Legal Aid Society’s Murfreesboro office, has been promoted to take over Smith’s role. Bone McAllester Norton has added attorney R. Colton Jones to its Hendersonville office. He will handle general civil litigation, estate planning, intellectual property issues, and commercial and employment litigation. Prior to joining the firm, Jones focused on insurance defense at the Nashville law firm of Brewer, Krause, Brooks & Chastain. He earned his law degree from the University of Kentucky and worked as a staff attorney at the Warren County Circuit Court in Bowling Green before moving to Nashville.

Amanda Eager has joined the Tennessee Bar Association’s Continuing Legal Education department as a section and CLE coordinator. She has worked in operations and accounting roles for real estate, construction and health care organizations in Tennessee. She has extensive experience in customer relations, project/program management and she is a notary public. Eager received her bachelor’s degree in political science from UT Knoxville and her master’s in business administration with a concentration in business management from MTSU.

MEMORIES

Memphis attorney and former TBA President JAMES FRASER HUMPHREYS JR. died on May 6. He was 93. Humphreys graduated from the University of Tennessee College of Law in 1950. A veteran of the U.S. Army Air Corps in World War II, he practiced law for more than 50 years in Memphis and was senior partner of Humphreys, Dunlap, Wellford, Acuff and Stanton. Humphreys served as TBA president in 1993-94, and was also a former president of the Memphis Bar Association and the Memphis Bar Foundation. He served many years on the boards and as a fellow of the American Bar Foundation and Tennessee Bar Foundation. In lieu of flowers, the family requests that memorials be sent to Idlewild Presbyterian Church, LeBonheur Children’s Hospital, Church Health or the University of Tennessee College of Law.

Memphis lawyer ROBERTSON “BOBBY” LEATHERMAN died April 25 at the age of 59. A graduate of the McCallie School in Chattanooga, Leatherman attended the University of Mississippi as well as the university’s School of Law. Following graduation, he returned to Memphis to work at the law firm of Armstrong Allen. He later left to practice on his own and focus on complex commercial litigation, business matters, personal injury and nursing home cases. At the time of his death, he was the TBA Tort and Insurance Law Section chair.

In lieu of flowers, memorial donations may be made to St. Jude Children’s Research Hospital, 262 Danny Thomas Place, Memphis 38105 or at www.stjude.org/donate.

Retired judge JAMES B. “BUDDY” SCOTT JR., of Oak Ridge, died on May 9. He was 83. A 1965 graduate of the University of Tennessee College of Law, Scott became the Anderson County Circuit and Criminal Court Judge in 1978 and was reelected every election thereafter until retirement in 2005. Prior to becoming a judge, he served as the assistant district attorney general for Roane, Loudon, Blount, Meigs and Morgan counties. In lieu of flowers, the family requests donations be made to the American Heart Association at www.2heart.org.
YOU NEED TO KNOW

LICENSURE & DISCIPLINE

DISABILITY INACTIVE

The Tennessee Supreme Court transferred the law license of Shelby County lawyer J. Lester Crain to disability inactive status on April 18. Crain may not practice law while on inactive status. He may return to the practice of law after reinstatement, which requires a showing of clear and convincing evidence that the disability has been removed and he is fit to resume the practice of law.

REINSTATED

Davidson County lawyer Travis Waymon Tipton was reinstated to the practice of law on April 16. He had been temporarily suspended on July 2, 2018, for failure to substantially comply with a Tennessee Lawyers Assistance Program (TLAP) monitoring agreement. After the initiation of formal disciplinary proceedings by the Board of Professional Responsibility, Tipton resumed compliance with the agreement.

Hamilton County lawyer James Ellis Ward was reinstated to the practice of law on April 3. He had been on inactive status since March 1, 2004. Ward filed a petition for reinstatement on April 3. The Board of Professional Responsibility found that the petition was satisfactory and recommended that the court reinstate him. The court issued the order on April 18.

DISCIPLINARY DISBARRED

David W. Lanier was disbarred from the practice of law by the Tennessee Supreme Court on April 24, 1998. On July 11, 2018, he filed a petition for reinstatement. On Dec. 20, 2018, a hearing panel of the Board of Professional Responsibility recommended the court dismiss the petition, which the court did. Lanier therefore remains disbarred and subject to all conditions provided in the original order.

On April 3, Sullivan County lawyer Everett Hoge Mechem was disbarred from the practice of law by the Tennessee Supreme Court. The court also directed him to pay $30,000 in restitution to one client. The court found that Mechem represented clients in a personal injury lawsuit and accepted a settlement that was not authorized by the clients. Then after depositing the settlement funds into his trust account, he misappropriated the funds and made no distribution to the clients. Mechem entered a conditional guilty plea admitting that he violated Rules of Professional Conduct 1.1, 1.2(a), 1.3, 1.4, 1.15, 8.1 and 8.4 (a), (b), (c) and (d). Mechem was previously disbarred on April 28, 2017, and has not been reinstated from that disbarment.

Gregory Eric Schwartz, an attorney licensed to practice law in Tennessee and Florida, was disbarred by the Tennessee Supreme Court retroactive to Jan. 20, 2019. Schwartz’s license to practice law in Florida was revoked by the Supreme Court of Florida on Nov. 21, 2018. On Feb. 27, the Tennessee Supreme Court entered a notice of reciprocal discipline directing Schwartz to demonstrate why the discipline imposed in Florida should not also be imposed in Tennessee. Schwartz did not respond. The court entered its order on April 2.

Knox County lawyer John O. Threadgill was disbarred on April 25 after being convicted for felony income tax evasion in the U.S. District Court for the Eastern District of Tennessee. After a hearing panel of the Board of Professional Responsibility recommended disbarment, Threadgill appealed the decision to the Knox County Chancery Court, which affirmed the decision. Threadgill then appealed that decision to the Tennessee Supreme Court of Tennessee, which also affirmed the decision and imposed a disbarment on him for the third time.

Censured

Shelby County lawyer Joyce Diane Bradley received a public censure from the Board of Professional Responsibility on April 18. On Aug. 22, 2018, Bradley’s license to practice law was suspended for CLE noncompliance. Despite the suspension, Bradley continued practicing law by appearing in court and discussing clients’ cases with other attorneys. The censure was imposed for violations of Rule of Professional Conduct 5.5.

Compiled by Stacey Shrader Joslin from information provided by the Board of Professional Responsibility of the Tennessee Supreme Court. License 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.
On April 16, Shelby County lawyer Lewis K. Garrison was publicly censured by the Tennessee Supreme Court after the court determined that he improperly provided financial assistance to a client. The court found that in representing a client in a personal injury claim, Garrison paid a deposit so the client could rent a car and advanced money to the client so he could pay rent. The Board of Professional Responsibility determined he violated Rules of Professional Conduct 1.8(e) and 8.4(a). The board also noted that Garrison had been disciplined on four prior occasions for improperly providing financial assistance to clients.

Maury County lawyer Kevin S. Latta received a public censure from the Board of Professional Responsibility on April 30. The board found that over the course of two years, Latta failed to respond to five orders from the Court of Appeals instructing him to report on the status of an appeal for his client, a criminal defendant. The board also found that he failed to respond to three orders from the court setting filing deadlines for an appellate brief, and that he did not adequately communicate with or respond to inquiries from his client. In mitigation, the court permitted the client's appeal to move forward. Latta's actions were determined to violate Rules of Professional Conduct 1.3, 3.4(c), 1.4 and 8.4(d). The board conditioned the censure on the requirement that Latta engage a practice monitor for one year to monitor management of his law office.

Hamilton County lawyer Lisa Bowman Luthringer received a public censure from the Board of Professional Responsibility on April 8. After being retained in a child visitation case in November 2012, Luthringer waited more than seven months to file a motion for mediation. The case then languished another 13 months until October 2014, when she finally filed a motion to modify the parenting plan. Finally, Luthringer waited another 19 months to file a motion to set the case for a hearing. By the time the parties completed discovery, another year and a half had passed. The board determined her failure to take reasonable steps to litigate the case in a timely fashion violated Rules of Professional Conduct 1.3 and 3.2.

Benton County lawyer Alan George Ward received a public censure from the Board of Professional Responsibility on April 8. The board determined that Ward failed to timely file (1) a motion for new trial for a criminal client, which limited appellate review solely to sufficiency of the evidence; (2) an appeal, which resulted in the dismissal of the client's appeal; and (3) appellate briefs for the client even after being directed to do so by the court. Based on these actions, Ward was determined to have violated Rules of Professional Conduct 1.3, 3.2, 3.4(c) and 8.4(a)(d).

On April 11, Hamilton County lawyer Justin Grey Woodward received a public censure from the Board of Professional Responsibility. The board found that while representing a client in a domestic relations matter, Woodward created a conflict of interest by exchanging sexually explicit text messages and emails with his client. According to the board, this created a significant risk that Woodward's personal interests materially limited his representation of the client. It also found that the action violated Rule of Professional Conduct 1.7(a)(2).

**BOARD OF JUDICIAL CONDUCT**

Shelby County Circuit Court Judge Robert Weiss was recently reprimanded for unreasonable delays in rulings on two cases. The public reprimand, issued Jan. 18 by the Tennessee Board of Judicial Conduct, found that Weiss took up to five years to make a ruling in one case and three years in another. In the first case, Weiss delayed a ruling in a domestic relations case despite indicating to the parties that a ruling would be forthcoming. In the second case, Weiss delayed responding to a question from the Tennessee Supreme Court in a remand involving a jury award in a motor vehicle accident. The board also reports that Weiss failed to respond to its inquiry for information about these two complaints. In meeting with the board, Weiss admitted his error in failing to promptly file these orders and committed to not letting future matters become overdue in his court. The board determined that his actions violated Canons 1 and 2 of the Code of Judicial Conduct.

**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. ☞
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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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TENNESSEE’S ‘FREE AND UNTRAMMELED JUDICIARY’

The Turmoil over the Carmack Murder Case

By Russell Fowler

Edward Ward Carmack (1858-1908)
Because of their indispensable duty to expound the law and resolve disputes, courts cannot avoid controversy. Therefore, throughout history Tennessee’s judiciary has had to overcome many challenges and unwarranted attacks. One of its greatest challenges was occasioned by the death of Edward Ward Carmack, a Tennessee political powerhouse of the early 20th century.

Carmack’s writing and speaking skills were second to none. A former U.S. Senator and Democratic candidate for governor, many considered him a potential presidential nominee. At his demise, he was editor of Nashville’s Tennessean newspaper and had previously been the editor of the Memphis Commercial Appeal and editor and founder of the Nashville Democrat.1

Carmack’s editorials were often vehemently racist and incited great violence against black Tennesseans across the state, including the 1892 burning of a newspaper owned and operated by civil rights pioneer Ida B. Wells in Memphis.2 Carmack also assumed the mantle of a leader of the Prohibition movement in Tennessee and the chief opponent of the powerful political organization commanded by anti-Prohibition Democratic Governor Malcolm R. Patterson of Memphis.3

Carmack was born in 1850 in Sumner County and learned the law in Columbia law offices. He was admitted to the Tennessee bar at 21 and entered politics as a member of the Maury County Court. He was elected to the General Assembly in 1884. After relocating to Memphis, he defeated the incumbent congressman, Gov. Patterson’s father, and served in the U.S. House and later the U.S. Senate.4

Although losing a bitter race to unseat Gov. Patterson in the 1908 Democratic gubernatorial primary, which included a series of fiery debates, Carmack’s political future was undiminished as Prohibition forces gained strength. While pondering his next political move, Carmack launched an avalanche of anti-Patterson administration editorials in the Tennessean.5

Carmack’s Murder

However, on the afternoon of Nov. 9, 1908, Carmack’s life came to a sudden and bloody end on the corner of Union Street and Seventh Avenue in downtown Nashville as two bullets passed through his heart and another severed his spinal cord. Even more shocking was the arrest and indictment of Col. Duncan Cooper, a close friend and advisor of the governor, and Cooper’s son, Robin, a young lawyer, for the first degree murder of Carmack.6

Furthermore, it was discovered that the elder Cooper had warned Carmack that if his name appeared again in the Tennessean, “one or the other of them must die.”7 Carmack, undeterred, had published another stinging attack on Cooper the very day of the deadly encounter.8 Ironically, Col. Cooper had once employed Carmack as the editor of a newspaper he had owned, the Nashville American.9

The killing of Carmack enraged the press and public, and memorial services were held across Tennessee. In a eulogy, future U.S. Senator William R. Webb said, “Edward Ward Carmack was the largest asset Tennessee had. His blood was too precious to be wasted on the cobblestones of Nashville.”10 Methodist Bishop E. E. Hoss declared Carmack was silenced “not for what he had written, but for what they knew he would write.”11 The Tennessean pronounced it “murder premeditated, deliberately planned, and executed in cold blooded style” and a “dastardly crime without parallel in the annals of [continued on page 14]
the state.” Future Gov. Ben Hooper later observed:

In fact, some of the circumstances preceding the killing of Senator Carmack led to the belief among the people that Governor Patterson himself had not been altogether blameless for the tragedy in that he knew its imminence and did not properly exert himself to prevent it. The murder, therefore, in the popular mind, bore many of the aspects of political assassination.

Carmack was now a martyr, more powerful in death than in life. Accordingly, in his honor, the Prohibitionist General Assembly enacted measures over the governor's veto outlawing the sale and manufacture of intoxicants in Tennessee, although widely ignored in the larger cities. These laws were subsequently upheld by Tennessee's Supreme Court.

With several of Nashville's leading lawyers taking part, the Coopers' 1909 two-month jury trial in the Davidson County Circuit Court was followed "with breathless interest." Evidence indicated Carmack fired first and wounded Robin Cooper in the shoulder and throat. Robin then responded with his fire. Yet there were allegations Robin fired first.

It was clear Duncan Cooper, although armed, did not draw his gun, but he had purchased his pistol over the objections of his family in the event he encountered Carmack. Despite the supportive testimony of Gov. Patterson himself, both Coopers were found guilty of second-degree murder and sentenced to 20 years in prison.

The Tennessee Supreme Court

An appeal of the convictions reached the Supreme Court as the 1910 judicial election approached. All five Democratic justices would be up for reelection. Yet to the outrage of the ever-growing ranks of the governor's opponents, the Patterson-controlled Democratic state executive committee changed the method of selecting judicial nominees to an odd indirect primary system that potentially gave the governor the power to override the popular vote in each county. Justices Bennett Bell and William McAlister agreed to take part in the new process. Justices John Shields, M.M. Neil and Chief Justice William Dwight Beard of Memphis refused.

After 10 weeks of consideration, the Supreme Court released its long-awaited three-to-two decision in the Cooper case on April 13, 1910. It upheld Duncan Cooper's conviction and reversed and remanded Robin Cooper's case due to evidentiary and jury instruction errors. Justices Shields, Neil and McAlister voted to uphold the conviction of Duncan Cooper, and Justices Beard, Bell and McAlister voted to reverse Robin Cooper's conviction.

A few minutes after the court issued its opinion, Gov. Patterson executed a full pardon of Duncan Cooper. In doing so, the governor stated: "It took the Supreme Court seventy-two days to decide this case and it decided it the wrong way. It took me seventy-minutes and I decided it the right way."

Although a longtime friend of the governor's father and having voted to overturn both convictions, Chief Justice Beard, along with Justices Neil and Shields, felt the electoral changes were related to the Cooper case, a charge denied by the governor. Moreover, right before the Cooper decision was announced, rumors were rampant that Patterson had tried to influence Beard's decision and "control the courts."

The chief justice famously responded that he would only stand for a "free and untrammeled judiciary" and denounced Patterson. Beard also said he and Justices Neil and Shields would not run in the Democratic primary but would be Independent candidates.
Independent Democrats gathered in Nashville and nominated incumbents Beard, Shields and Neil along with Graf ton Green and David Lansdon. They adopted the slogan: “A Free and Untrammeled Judiciary.” After conferring with GOP President William Howard Taft, the Republican Party determined not to field nominees and endorsed the Independent Democrats.

The Regular Democrats nominated incumbent Justices McAlister and Bell and three newcomers, but the Regulars attracted little notice from the press or public. Both factions also nominated candidates for the Tennessee Court of Appeals.

In the campaign, the Independents focused on Patterson and his “machine.” The governor and the Regulars defended the pardon and alleged that Beard, Neil and Shields were using the Cooper case for political purposes. They further accused the Independent justices of playing politics in the appointment of the Tennessee attorney general and the court librarian. Yet on Election Day in August, the Independents carried Republican East Tennessee and won by 40,000 votes statewide.

The Independent Democrats reciprocated by supporting the Republican nominee, the young and charismatic Ben W. Hooper of Newport, for the governorship in the fall campaign. Gov. Patterson, although re-nominated, withdrew from the hopeless contest and the Regular Democrats nominated U.S. Senator and former Gov. Robert Love Taylor.

Hooper, a former assistant U.S. attorney and a highly skilled lawyer, easily won the election and hence became Tennessee’s first Republican governor since the 1880s. He was reelected two years later still with strong Independent Democratic support. Hooper became one of Tennessee’s greatest governors and brought trust, stability, reform and bipartisanship during his two consequential terms from 1911 to 1915.

Gov. Patterson returned to Memphis and became a Circuit Court judge and surprised the state by switching positions on alcohol by becoming an advocate for Prohibition. Justice Beard relinquished the chief justiceship but stayed on the court. He was found dead of a heart attack in his Nashville hotel room five months after winning reelection, to be remembered as a hero of Tennessee’s judiciary. At his second trial, Robin Cooper’s case was dismissed. Many years later, Robin was killed in a nighttime fracas under mysterious circumstances in Kentucky. A towering statute of Edward Ward Carmack was erected before the Tennessee Capitol Building. It still stands overlooking Nashville.

Russell Fowler is director of litigation and advocacy at Legal Aid of East Tennessee (LAET) and since 1999 he has been adjunct professor of political science at the University of Tennessee at Chattanooga. He served as the law clerk to Chancellor C. Neal Small in Memphis and earned his law degree at the University of Memphis in 1987. Fowler has many publications on law and legal history, including many in this Journal.

Notes

4. See Kenneth McKellar, Tennessee Senators 461-73.
5. See Corlew at 427.
8. Id.
10. McKellar at 479.
11. Hooper at 51.
12. Corlew at 428.
13. Hooper at 56.
15. Ely at 200.
16. Hooper at 56.
17. Corlew at 428.
18. McKellar at 475.
20. Ely at 194.
21. See id. at 195.
22. See id.
23. Corlew at 428.
24. See Ely at 196.
25. Corlew at 430.
26. Id.
27. Id.
29. See Hooper at 57.
30. See Ely at 196-97.
31. Id. at 198.
32. Id.
33. Corlew at 430.
34. See id. at 431.
35. Hooper at 48.
36. Id. at 56.
The Mistrial

By Melissa Brodhag

“We’ll dynamite ‘em!” he said as he pounded his fist on his desk. His green banker’s lamp shook, and the Tennessee Code shelved neatly behind him seemed to shudder. He placed his right index finger into his pattern jury instruction book to save the charge he wanted and quickly rose from his mahogany swivel chair.

As he opened his chamber door, the Plaintiff’s attorney and I filed out. The judge winked at me with that mischievous gleam in his eye just like he used to when I clerked for him six years ago. His blood was up! I believe he loved jury trials even more than his University of Tennessee Volunteers.

His name was Robert James Lowery, and he was probably one of the most respected trial judges in Tennessee. He was famous for his knowledge of the rules of evidence, his award-winning storytelling, and his fairness to lawyers. He was an old soul who loved the art of practicing law and would sooner “jump off the Chimney Tops in the Smokies than conduct legal research on a dad-blamed old computer.”

“Celeste,” he used to say to me in my law clerk days, “I wish you could have been around in the good ole days of the wild, wild west when your entire case file fit in a small manila folder, and you had no idea what the other side was going to do at trial. You had to be quick on your feet, and you were always in court. The art of lawyering, the art of storytelling has been all but lost. All lawyers do now is shuffle paper and go to mediation.”

I felt fortunate to have had him as a mentor for my first year out of law school. I had been encouraged to apply for a clerkship with him by my husband’s uncle Charles “Charlie” Robbins, who was a lawyer in Judge Lowery’s county. He said I would learn more from Judge Lowery in one year than I could learn in five years of legal practice. I believe he was right.
Now Charlie and I practice law together. We handle general civil litigation matters, but we mostly work for a few insurance companies, handling their business in Hutchens County in East Tennessee.

And it was on an insurance company case that I found myself when Judge Lowery decided he was going to “dynamite” the jury. It was a typical car accident case. My elderly client had rear-ended the Plaintiff who complained of neck and back pain that lacked an objective medical diagnosis. The insurance company and the Plaintiff simply could not come to terms. As we had no defense to liability, I did the best I could to focus the jury’s attention on the lack of objective proof of the Plaintiff’s injuries.

For some reason, the jury was taking an inordinately long time to make a decision. When Judge Lowery said he was going to “dynamite” the jury, he meant that he was going to call upon the jurors’ sense of duty and citizenship to wrangle a decision out of them. In a “dynamite” charge, the judge explains that if no decision is reached, he will have to declare a mistrial. Then another jury will have to be empaneled, and the parties will have to start all over again. He emphasizes the waste of time and money that a new trial will involve.

After four hours the day before and three hours on that day, it seemed that we were headed for a mistrial unless the “dynamite” charge worked. After listening to Judge Lowery’s plea to the jury, we were told to come back in two hours. My client and I went our separate ways. I walked over to the Long Hunter Cafe for a bite to eat. Charlie was there with a couple of his retired friends. They were listening to one of his favorite stories.

It was the one about Buell Shed. Buell had had a hard-knock life and seemed to always be in trouble with the law. One morning he awoke to find himself newly incarcerated in the Hutchens County Jail. He shook off his drunken stupor and stumbled to the barred window for some fresh air. When he looked down from the third story, he saw his friend Carl Putnam walking along the courthouse square. “Carl! Carl! Carl!” Buell yelled. Carl Putnam, who thought the Good Lord was calling him home, dropped to his knees and clasped his hands together to say a hurried prayer. “Carl, get up. Look up here, it’s me, Buell.” Carl got up cussing and slapping his hat against his now dirtied trousers.

“Carl, please go find that lawyer Charlie Robbins and tell him to come get me outta here,” Buell said. Carl begrudgingly walked over to Charlie’s office and delivered the message. Carl then returned to the jail and yelled to Buell, “Mr. Charlie said it would be three hundred dollars to start your case.” Buell yelled back from his window, “I done started my case — I need him to finish it.”

I mouthed the words to the punchline as Charlie and his friends howled with laughter. How many times had they heard that one?

“Carl saw me. “Celeste, what’s the verdict?”

“Judge Lowery told them to keep trying, but he told us that he would declare a mistrial if there was not a decision within the next couple of hours.”

“Well,” he said, “you had better call the insurance adjuster and give him an update. Isn’t this your rear-ender with whiplash?”

“Yes,” I said, “and medical bills of about twenty thousand. I can’t imagine what the problem is. Liability is pretty clear — they must be hung up on damages.”

“That means you have given them something to think about,” he said, trying to pick my spirits up.

I sat to order lunch when the Plaintiff’s attorney walked through the door. His name was Joe Batch, a solo practitioner, an older lawyer like Judge Lowery who liked to be in court. He could never seem to find time for his office work and had the irritating habit of speaking in country colloquialisms:

“Joe, when are you going to send me those discovery responses?”

“Well, you know, Celeste, you can’t make good tomatoes grow any faster.”

It had taken me two years to get this little case to a jury. He walked up to me in the cafe.

“Hello, Celeste. What do you think is hanging ‘em up?”

“I don’t know Joe — could be any number of things,” I said.

“I sure don’t want to try this case again. Do you think the insurance company might move at all? You know you can’t catch a fish on an empty hook.” I told him I planned to call after I ate lunch.

In six years of practicing law, this was only my fourth trial, and I had a knot in my stomach the size of a watermelon. I decided to forego the blue plate special — pot roast with mashed potatoes, pinto beans and fried okra — for a small salad and a “super sweet tea.” Charlie called it “super sweet tea”; he would quiver with excitement when he described how Ms. Birdie added the sugar while the tea was still hot so that she could supersaturate it.

The door to our office now had a sign on it that read “Robbins & Robbins.” I had been quite proud two years ago when Charlie re-named the firm to add my name. He and my husband had thrown a big party to celebrate.

As I walked into the office after lunch, Olivia heard the door and came into the front foyer to see who was there. When she saw that it was me, she returned to the kitchen to eat her lunch. She did not say hello; she did not ask about the trial. Olivia Montgomery was Charlie’s secretary and the bane of my existence. Olivia had taken an instant dislike to me when I joined Charlie’s practice. She had made it quite clear that she worked for continued on page 18
Charlie, not me. In my opinion, she did not do much for him either. At least, she had now started giving me my telephone messages.

Charlie always asked me to be patient as Olivia had had a sad life. At the age of 17, she had married her high school sweetheart. At 18, she had a son. At 19, she became a single mom when her husband left town, never to be seen again. Olivia became a legal secretary to support herself and her son. Twenty years ago, Charlie hired her after her previous employer retired. Her bad luck continued. Charlie described her son as “about the most useless boy in Hutchens County.” He continued to live with her after quitting high school and rewarded her efforts at being a single mom about three years ago by learning to cook meth and selling it out of the basement of her house. He was arrested soon after and is now incarcerated in a federal penitentiary. I had worked tirelessly on his behalf without compensation and got not so much as a thank you.

After six years, we had settled into a callused stalemate like the German and Allied forces entrenched on either side of “No Man’s Land” during the first world war.

If possible, Olivia disliked Judge Lowery even more than she did me. Years ago, Olivia’s brother and an adjoining property owner became embroiled in a bitter boundary line dispute. Judge Lowery heard the case but did not make a ruling for many months. In the interim, the dispute between the men came to blows, and Olivia’s brother suffered a rather severe beating, including one or two broken bones in his face. Olivia blamed Judge Lowery.

I had noticed over the years that it seemed to take Judge Lowery a long time to make a ruling in non-jury cases. Charlie just said, “Judge loves trying cases, but he does not like deciding ‘em.” If you had a non-jury case in Hutchens County, you waited — and then waited some more — for a decision.

MELISSA BRODHAG is the author of the winning entry for this year’s Tennessee Bar Journal Fiction Contest. Her first effort at fiction, the story’s inspiration came from tales she heard while practicing in a small Alabama city “with two older gentlemen who taught me how to practice law and who told great stories. The vast majority of ‘The Mistrial’ comes from that experience,” she says.

“When I saw the writing competition announcement, I thought of this amusing story from my days in Alabama. I have no idea if it is true – it was just a story I was told. I filled in the rest of the story to complement the main story.”

Because she was once a young, female lawyer in a small town, she says she decided to use a similar character as the vehicle for the story.

“There were a lot of revisions, and I really appreciate my family’s patience as I worked through the story. It was a lot of fun for me!”

Brodhag reads mostly non-fiction but says she has “always enjoyed the short story,” especially admiring Eudora Welty and Willa Cather.

Brodhag, 51, is originally from a small town in Louisiana. She graduated from the University of Alabama School of Law, and after practicing in Alabama for a while, moved to Chattanooga in 2000, working for an insurance defense firm.

“I enjoyed living in Chattanooga,” she says. “It was like living in a picture postcard.” She then moved to Nashville in 2007 to work in the Tennessee Attorney General’s Office where she works today, representing the state in complex litigation matters.

In 2009, she married and they have an 8-year-old daughter.

Brodhag dedicates this story to the memory of Robert Lowery Gonce.
resolve disputes and administer justice. And on this day on his watch, the system had broken down. He quickly exited the courtroom. We were all asking the same question: what on earth could have been the problem with such a simple case?

After I shook Joe Batch’s hand, I turned to leave and heard him tell his client, “Well you can lead a horse to water, but you can’t make him drink.”

A month or so went by, and I found myself walking down the breakfast foods aisle in the local supermarket. Out of the corner of my eye, I noticed that the man walking down the aisle toward me was looking rather intently at me. It was Ken Foster, the jury foreman from the mistrial. He had sat in the front row, second to the left, in the jury box. He was an awkward, middle-aged pharmacist who talked so incessantly to his customers that the locals called his pharmacy the Bermuda triangle. If you went inside, you might not come back out. He wore thick, black-rimmed, coke-bottle glasses that reminded me of my father who, when I was a teenager, wore a similar pair of Navy-issue glasses to embarrass me in front of my friends. My father called them his “BCs”; “BC” was for birth control. As far as I knew, they had had that effect for Mr. Foster.

Judge Lowery did not forbid lawyers from speaking to jurors after a case, but you had to wait at least 30 days. I was counting the days in my mind as I fumbled with a bag of Starbucks. Providence had placed the jury foreman right in front of me. Surely, I was in the clear. I really wanted to know what happened in that jury room.

Then I heard, “Hello, Mrs. Robbins. I don’t know if you remember me. I am Ken Foster. I was on the jury for the case you tried last month with Joe Batch.” I gave him my best smile and shook his hand. Words swirled in my mind as I tried to find the most diplomatic way to broach the subject.

“I just wanted you to know how much I enjoyed participating in the legal process,” he continued. “I have always been curious about the law. It was very interesting, and we all thought you did a great job representing your client.”

“Thank you”, I said, “Say, do you mind —”

He cut me off. “You are not from around here, are you?”

There were not very many people in Hutchens County who were not from Hutchens County.

“No, sir, I’m from Chattanooga, but I was just curious.”

“I love Chattanooga. I took my nephew David to the aquarium last summer. They have a snapping turtle in one of those tanks. It is the size of a kitchen table. And their downtown! I don’t know if I have ever seen —”

“Mr. Foster, if you don’t mind,” I managed to cut him off.

“Say, that Starbucks coffee sure is expensive. You know I read that one of these other brands tastes just like it for half the price. Now let’s see . . . what was it?”

By this time I was wringing my hands. “So Mr. Foster, about the trial, why was the jury unable to reach a decision?” I had not meant to blurt it out, but I thought I would never get a word in edgewise.

“Oh,” he said, “that was a curious thing. After the judge gave us the jury instructions, is that what you call them, instructions? Anyway, we went to the jury room, and they elected me foreman. I thought it would be a good idea to let everyone discuss his or her point of view. I know I wanted to discuss the case. No offense, Mrs. Robbins, but most of us thought your client was at fault. Anyway, after everyone shared his or her point of view, I thought it would be a good idea to let everyone discuss his or her point of view. I know I wanted to discuss the case. No offense, Mrs. Robbins, but most of us thought your client was at fault. Anyway, after everyone shared his or her point of view, I thought we should vote. The problem was there were only 11 votes, and the judge was pretty specific that all 12 of us had to vote the same way.”

“Do you mean one person voted for my client?”

“No, ma’am, I mean one person refused to vote.”

“I beg your pardon, Mr. Foster, I am not following you.”

“Well, do you remember Jimmy Butterfield, the carpenter? He just sat there in his chair with his arms crossed, saying ‘I’ll decide this case when that judge decides my divorce.’”
Upcoming Programs

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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
- 🌐 Internet
- 🍳 Food

Faculty Highlight

AMY WILLOUGHBY BRYANT

Amy Willoughby Bryant has a heart for public service and leadership. Her work in family law, probate, real estate and health law has been a reflection of her professionalism and passion. Most recently, Amy served as senior attorney for the Division of TennCare, and was responsible for creating training materials, giving presentations and helping to develop a resource bank for the administrative appeals unit. As the new OCM director Amy will serve the Metro Nashville community of individuals with a disability. She says she views this as an opportunity to protect Nashville’s vulnerable adults. Currently serving as the president of Napier Looby Bar Association, Amy plans continuing education and community events for all members. She has served in leadership roles for numerous organizations including: Nashville Emerging Leaders, Young Leaders Council, Lawyer’s Association for Women, Tennessee Bar Association, Tennessee Bar Foundation Grant Funding Committee Member, National Bar Association Regional Secretary, Napier Looby Bar Foundation Board Member, W.O. Smith School of Music volunteer instructor, Latin Dance Instructor for Metro Parks, Walk Bike Nashville volunteer, and Napier Looby Bar Association, serving as historian and secretary. A Memphis native, Amy is a Tennessee State University alum with a bachelor’s of business administration in economics and finance. Amy continued her education by graduating from Saint Louis University School of Law.

Amy Bryant will be speaking at the Elder Law Forum, July 12 in Nashville.
Real Estate Essentials

June 7 in Nashville, Tennessee Bar Center
Program: 1 p.m. - 4:15 p.m.
Credit: 2 General, 1 Dual

$110 Section Members
$135 TBA Members
$310 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Estate Planning, Probate
This annual favorite focuses on the intangibles every dirt lawyer should add to their practice. This year’s topics will include: drafting a deed with consideration to will and probate issues, general probate considerations, irregular transactions and more. Don’t sleep on this opportunity to learn from top players in the field with attorneys of a common focus.

Speakers: J. David Wiker Jr., James Lenschau

Topgolf CLE: Estate Planning Tee Off

June 19 in Nashville, Top Golf Nashville
Program: 9:30 a.m. - 2:00 p.m.
Credit: 3 General

$170 Section Members
$190 TBA Members
$370 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Estate Planning, Probate
The TBA Estate Planning and Probate Section will host a CLE event at Topgolf Nashville on June 19. The program will feature 3 hours of CLE programming, focused on information relevant to new attorneys interested in Estate Planning and lawyers who desire to add this area to their practice. The CLE package includes breakfast, lunch, plus two hours of Topgolf after the presentations. Don’t miss this unique opportunity to build your practice knowledge and fine-tune your drive game, all in one day!

Speakers: Newman Bankston, Michael Goode, David Parsons, Ashley Stearns.

This program is sponsored by the American Cancer Society.

TBA’s 1Click Series
The TBA’s 1Click series of CLE programs allows you to stay on top of practice developments with easy access to online programs. Look for sets of ethics programs and courses by practice area in our 1Click offerings.
Yoga, Mindfulness and Meditation in the City

June 21 in Nashville, Wild Heart Meditation
Program: 9:30 a.m. – 2:30 p.m.
Yoga 2:30 p.m. – 3:00 p.m.
Credit: 4 Dual

$260 TBA Members
$435 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Work Life Balance, Ethics
Relax your mind, enhance your meditation skills and establish your daily practice beyond the law practice. Learn about the benefits of meditation and yoga and how they can improve attorney well-being and ultimately your client’s experience. This course is open to anyone in law practice who is interested in a better work life balance; both new and experienced in yoga and meditation are welcome.

Lunch catered by Sunflower Cafe
Speaker: Joanna McCracken

LGBT Annual Forum

June 21 in Nashville, Tennessee Bar Center
Program: 11:30 a.m. - 4:00 p.m.
Credit: 2 General, 2 Dual

$155 Section Members
$180 TBA Members
$355 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: LGBT Law
This annual staple for LGBT advocates will be held to coincide with the Nashville Pride Festival. Topics for this year include legal concerns involving conversion therapy, discussion involving Vanderbilt’s Transgender Health Clinic, employment discrimination of LGBT persons and an open community advocacy panel.

Speakers: John Rice, Joshua Wallis, Jesse Ehrenfeld M.D, Maureen Holland, Chris Sanders

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Administrative Law Updates
1.5 General and 1.5 Dual (Ethics)

Construction Law Updates
5.75 General and .75 Dual (Ethics)

Corporate Counsel Updates
3.5 General and 1.5 Dual (Ethics)

Creditors Practice Updates
2 General

Criminal Law Updates
3 General

Elder Law Basics
4 General

General CLE
Complete 8-Hour Package

Health Law Basics
3 General

Juvenile and Children’s Law
3.5 General

Law Tech
4.5 Dual (Ethics)

Local Government Law
2.5 General

Tort and Appellate
2.75 General and 1 Dual (Ethics)
Elder Law Forum

July 12 in Nashville, AT&T Building
Program: 8:30 a.m. – 4 p.m.
Credit: 1 Dual, 5 General

For attorneys interested in: Elder Law, Estate Planning
This all-day forum offers essential and practical material for elder law attorneys and those interested in the focus. This year’s program will feature timely topics such as updates in TennCare, uniform powers of attorney, recent changes to VA benefits, annuities, ethics and more. Don’t miss this opportunity to connect with colleagues from across the state and catch up on the latest developments in the practice area.

Speakers: Julia Price, Amy Bryant, Dale Krause, Bailey Schiermeyer
This program is sponsored by the Elder Counsel.

$275 Section Members
$300 TBA Members
$475 Nonmembers (includes TBA Complete Membership)

Summer CLE Blast

July 17 in Nashville, Tennessee Bar Center
Program: 8:30 a.m. – 4 p.m.
Credit: 7 Dual

For attorneys interested in: Ethics
If you still need your hours for 2018 or 2019, the TBA is offering programs from 8:30 a.m. to 4 p.m. on July 17. The Summer CLE Blast will offer 7 hours of dual CLE credit. Take as many or as few hours as you need. Registration desk will be open all day.

Speakers: Christopher Sabis, Hon. Waverly Crenshaw Jr., Kyle Cummins, David Johnson, Michael Roden, Ron Tienzo

$50 per hour TBA Members
$75 per hour Nonmembers

Federal Law Forum

July 18 in Nashville, Tennessee Bar Center
Program: 12 p.m. – 4:15 p.m.
Credit: 1 Dual, 3 General

For attorneys interested in: Federal Law
Join the TBA Federal Practice Section for its annual CLE program on July 18. This program features presentations that are tailored to experienced federal court practitioners and those who are new to federal practice. Highlights include best practices for presenting a case in federal court, a panel discussion on how best to work with federal agencies, e-discovery, and an update on Federal Probation Office policies and procedures.

Speakers: Christopher Sabis, Hon. Waverly Crenshaw Jr., Kyle Cummins, David Johnson, Michael Roden, Ron Tienzo

$155 Section Members
$180 TBA Members
$355 Nonmembers (includes TBA Complete Membership)

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Tennessee Fast Track

Memphis:
August 2
Fed Ex Institute of Technology, Fishbowl Room, 365 Innovation Drive
Program: 8:30 a.m. – 5 p.m.

Nashville:
August 9
Tennessee Bar Center
Program: 8:30 a.m. – 5 p.m.

Knoxville:
August 23
UT Conference Center, 4th Floor
Program: 8:30 a.m. – 5 p.m.

For attorneys interested in: General-Solo-Small Firms
Don’t miss this opportunity to register and plan for 15 hours of CLE in one day. This annual staple offers tips and updates in diverse areas of law, designed to be relevant to a wide range of practice areas. The program will provide you with live general and dual credits with 8 prepaid credits to complete online anytime – at home or on your mobile device – allowing you to customize your learning to your schedule and fulfill all your Tennessee CLE requirements for the year.

$445 Section Members
$470 TBA Members
$640 Nonmembers (includes TBA Complete Membership)

Saturday Ethics

August 10 in Nashville,
Tennessee Bar Center
Program: 8:30 a.m. – 11:45 a.m.
Credit: 3 General

For attorneys interested in: Ethics
Don’t have time during the week to get your ethics hours? We have the solution for you! Join us at our annual Saturday ethics seminar on August 10, which offers three dual hours. Speakers will address timely, relevant topics designed to benefit and protect your practice.

Speakers: Timothy Chinaris, Sean Martin

$110 Section Members
$135 TBA Members
$310 Nonmembers (includes TBA Complete Membership)
19th Annual
Health Law Primer

October 16 in Nashville,
Tennessee Bar Center
Stay tuned for more info
Credit: 4 General

For attorneys interested in: Health Law

For newer health law practitioners, this program provides a general health law overview and discussion of hot topics by experienced health care leaders. Sessions provide practical tips to identify and avoid the pitfalls of real life situations in the heavily regulated health care industry.

Speaker: John-David Thomas
This program is sponsored by London Amburn.

31st Annual
Health Law Forum

October 17 & 18 in Franklin
Embassy Suites Cool Springs
Stay tuned for more info
Credit: 3 Dual, 12 General

For attorneys interested in: Health Law

Recognized as one of the premier health law programs in the country, this annual forum addresses key issues impacting our practice area. Sessions will provide insight from health law providers, practitioners and regulators.

Speakers: Monica Wharton, Andrew Beatty, Bill Dean, Ian Hennessey, Shannon Hoffert, Julie Kass, Ellen Bowden McIntyre, Jeffrey Moseley, Phil Pomerance, Brian Roark, John Roberts, Katherine Steuer.
This program is sponsored by Carnahan Group, London Amburn and Sherrard Roe Voigt & Harbison.

CLE Ski - 2020

January 25-30, 2020
Snowmass, CO
Credit: 3 Dual, 12 General

A TBA Tradition

The Stonebridge Inn is located in the heart of Snowmass Village, one of Colorado’s premier ski resorts. Just 10 miles southwest of Aspen, The Stonebridge Inn is central to four remarkable ski areas: Snowmass, Aspen Highlands, Aspen Mountain and Buttermilk.

As Snowmass premiere slope side resort, this luxurious ski lodge and condominium resort combines the amenities and services of an upscale hotel with all the comforts of home. Please join us for the opening reception on Saturday, January 25, to kick off this year’s program.

- Complete all 15 hours of CLE
- Beautiful ski resort setting
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- Plenty of time for sessions and skiing
Social Security Benefits
Strategies for Divorcing Spouses
By Miles Mason Sr.

Family law attorneys should anticipate and plan for the impact that divorce will have on their clients’ Social Security benefits, a key source of retirement income for most people. Although more retirement options are available to married couples, important choices are also available to single and divorced individuals.

For a client to get the most from Social Security, the attorney needs to know what retirement, survivor, and disability options are applicable to them, and then develop a benefits strategy before alimony and property settlement negotiations ensue in earnest.

What do you say when a divorce client asks:
• “How much will I get in Social Security?”
• “When is the earliest I can begin receiving benefits?”
• “What happens if I remarry?”
And the kicker, “You’re a smart lawyer. Shouldn’t you know this?” The right answer is both “Yes” and “No.”

While it matters in divorce negotiations, Social Security benefits strategies are more in the nature of financial advisory services. Nevertheless, all lawyers should have a basic understanding of what’s what. A quick disclaimer before getting started — this discussion is intended to be a general overview of the state of Social Security benefits and retirement as of the date of publications, and exceptions may apply.

Dancing Around Federal Benefits
In Tennessee divorce law, Social Security benefits are very much an enigma. From one perspective, Tennessee courts have no
authority to divide or impair Social Security benefits. The benefits are what they are. From another perspective, these benefits are terribly important for alimony analysis. The eligibility for retirement benefits and their payout both increase the supporting spouse’s ability to pay and reduce the supported spouse’s need. Benefits are often substantial.

Negotiating alimony and property division from a position of strength requires a benefits strategy that encompasses Social Security, a nonnegotiable federal program. Spouses may include settlement terms in their Marital Dissolution Agreement (MDA) to optimize those federal benefits. Yet there is nothing spouses might agree to, attorneys might draft, or a judge might order that can alter either spouse’s individual right to Social Security benefits. This makes planning for the client’s future absolutely crucial.

**Social Security Benefits for Divorced Spouse and Current Spouse**

Whether for a divorced or a current spouse, Social Security benefits are a key component of retirement. What is the benefit at full retirement age (FRA)? Will the earnings cap result in forfeited benefits? How much will annual cost-of-living adjustments (COLA) help? As a marital strategy, spouses coordinate their benefit claims. As a divorce strategy, an economically dependent spouse should seek support and property resources that complement benefits for a comfortable post-divorce lifestyle.

The supporting spouse is better off with a strategy that builds on the supported spouse’s optimized benefit. It is the duty of the counsel representing the supporting spouse to assist the client in negotiating favorable divorce terms that recognize both spouses’ need to optimize benefits and ease the financial burden of support obligations and marital asset and debt division.

Spouses negotiate and mediate alimony, equitable distribution of marital property, and parenting plan issues. The divorce attorney is in a position to guide the client toward a settlement that considers both parties’ Social Security benefits. Before negotiating financial issues for the parties’ MDA, it is crucial to obtain and review the client’s official schedule of benefits from the SSA.

**Social Security Planning for Aging Spouses**

We have been warned for two decades about the phenomenal number of Baby Boomers heading into retirement. Boomers are now retiring at a rate of about 10,000 per day, and many are divorced or will be. Social Security benefits make up half or more of most people’s retirement income at age 65 and older. Clearly, clients who are Gen-Xers, Millennials and same-sex spouses also require strategies for optimizing benefits.

Various divorce strategies build on Social Security retirement, survivor, disability and children’s benefits. For general retirement planning, get information directly from the Social Security Administration (SSA.gov) website. Utilize the online Retirement Estimator. Certain rules and exceptions apply to public employees and important exceptions may apply to the client’s particular situation. Family lawyers don’t know everything about Social Security benefits, so be willing to refer technical retirement benefits questions to a Social Security benefits lawyer, financial advisor, or tax attorney, especially if related to income taxes. For additional reference, Mary Beth Franklin, CFP, contributing editor of Investment-News, has a book on the topic, *Maximizing Social Security Retirement Benefits*, available at InvestmentNews.com/MBFebook.

**Benefits Based on Other Spouse’s Work Record**

A benefit strategy should strive to obtain the maximum allowable benefit after divorce for when it’s finally time for the client to retire. Full retirement age depends upon your client’s birth year but will not be later than age 67. Note that a worker may delay retirement to age 70, the maximum age for delayed credits. Explain to your client that his or her decision to optimize personal benefits takes nothing away from the former spouse’s benefit or from his or her current spouse if remarried. (Did a spouse intentionally evade FICA tax during the marriage by earning cash on the side thereby reducing the benefit amount? Keep an eye out for this occurrence and for similar clues warranting deeper investigation into the possibility of concealed income and hidden assets.)

To develop a fact-based strategy, each divorcing spouse should obtain his or her own Social Security Statement from SSA.gov. The official report is the only way to know with certainty what benefits will be paid based upon each spouse’s own work record.

Not a first divorce for your client or the other spouse? Fortunately, or unfortunately, the same rules apply. Benefits are collected on an individuals own work record and on the work record of one former spouse. There is no stacking marriages or combining work records to increase benefit amounts — that’s a myth and is not permitted.

**What Percentage of Social Security Benefits for Divorced Spouses?**

Say that you represent the economically dependent spouse. Assuming the client qualifies, to determine how much his or her benefit will be as a divorced spouse, the SSA compares the client’s work record with the other spouse’s work record (divide in half as though still married). Your client will receive the larger amount. The maximum spousal benefit is 50 percent of the former spouse’s retirement benefit at FRA. This is critical for the stay-at-home parent or the spouse who managed the family business but never drew a salary.

Statistically in divorce, women suffer economically more than do men. Look for ways in which those financial negatives may be turned around. Divorcing spouses of both sexes need to make decisions based on knowledge, not guesswork.

*continued on page 22*
Recommend that your clients consult with financial advisors and planners about personal retirement planning. Have a local referral list ready, too. It’s that important.

How Much Social Security Does an Ex-Spouse Get?
Qualifying for Social Security benefits generally requires accumulating 40 credits in lifetime earnings—this is one’s work record. If the client does not qualify on his or her own work record or it’s insufficient, then the client may qualify on the former spouse’s work record (former spouse as in after the divorce). A few rules determine the client’s right to collect on a former spouse’s benefit:

- The client must have been married at least 10 years to that former spouse. Is the marriage hovering at 9.5 years? Hold off filing for divorce. Divorce proceedings already pending? Delay them. The divorce decree must be entered after 10 years of marriage, not a day sooner.
- The client must be at least 62, the earliest retirement age.
- The client must be unmarried. Benefits accrued under the prior marriage are revoked by remarriage but are unaffected by the former spouse’s remarriage. (If the client’s new marriage ends in death, divorce or annulment then the right to an earlier former spouse’s benefit revives.)
- The client’s work record must provide less benefit than what the client would collect based on the former spouse’s work record.
- The former spouse must qualify for Social Security before the client begins collecting on that benefit.

Is the former spouse still not collecting benefits? If both parties are at least 62 years of age and have been divorced at least two years, then the client can start collecting on the former spouse’s benefit.

How much an ex-spouse gets depends upon his or her full retirement age (FRA) and FRA depends upon year of birth. The chart above shows the decrease in benefit amount for claiming early retirement at age 62.

Earliest Retirement Age
The individual decides when to retire, not the SSA. However, age 62 is the earliest anyone can start collecting retirement benefits. By claiming early retirement benefits (any time before the client’s FRA), the amount is forever reduced. Collect early, collect less for life.

Life expectancy matters. How is the client’s health? Does longevity run in the family? What kind of work can the client do? Will the MDA provide sufficient resources to spend down if retirement is postponed until age 70? At 70, the retirement benefit maxes out on one’s own record. A tailored alimony schedule and well-crafted property settlement could make postponing retirement feasible.

For instance, a 65-year-old may implement a divorce strategy wherein alimony is the primary source of support until age 70. Perhaps larger alimony in futuro payments for the first five years with a substantial reduction in alimony (or termination) coincident with collecting benefits at age 70. Be aware, too, that about 40 percent of claimants must pay income taxes on their benefits. Another reason for the client to consult with a financial advisor and crunch the numbers.

Later Retirement
Collect later, collect more for life. By waiting until age 70 to claim the benefit on one’s own work record—the age at which Social Security maxes out—Boomers born before 1960 enjoy maximum delayed retirement credits of 32 percent. (Waiting until age 70 will not increase the spousal benefit however.) Those whose FRA is 66 enjoy an 8 percent per year delayed retirement credit, a significant plus. For those whose FRA is 67, maximum delayed retirement credits at age 70 drop to 24 percent. In either case, develop a strategy that allows the client to collect the most—simply by delaying retirement to age 70.

Importantly, the maximum spousal benefit is 50 percent of the other spouse’s primary insurance amount (PIA) benefit at FRA. However, that does not include delayed retirement credit amounts! (That’s not true for survivor benefits as discussed below.) The chart on page 23 shows the percentage spousal benefits are reduced if claimed early, before reaching FRA.

Earnings after Retirement
An individual can claim Social Security benefits and continue working, for a price. If the client is earning wages at FRA, there is no reduction in benefit amount—the earnings cap is lifted. Early retirement triggers the earnings cap. Countable earnings are wages and salaries or self-employed net earnings. Fortunately, there is no limit on income from investments, pensions, rents, government benefits and the like.

How does the earnings cap apply? If the client retires early at age 62 and has employment income, then the benefit amount will be reduced by what he or she earns above the earnings limit. In 2018,
for instance, $1 was forfeited in benefits for every $2 earned above the $17,040 earnings limit. (Be sure to visit SSA.gov for current-year earnings limits.) The SSA withholds monthly benefit payments until the earnings cap is satisfied. Months could pass with no benefit payment at all. Furthermore, excess benefits received from SSA must be repaid. A professional whose salary is well above the earnings cap may find early retirement a bad strategy. There are exceptions.

In the months just preceding full retirement age, the SSA allows greater wages to be earned without forfeit. For instance, the 2018 earnings cap in the months before full retirement age (FRA) was $45,360 with benefits reduced $1 for every $3 earned above the limit. Impress upon your client the importance of determining exactly what the earnings cap will be before that early retirement date closes in.

What happens to early retirement benefits not paid because wages exceeded the earnings cap? At FRA, the SSA recalculates the benefit and gives credit for those months in which no benefit was paid due to the earnings limit. Determine the benefit amount with various earnings and retirement dates. Calculate benefits. Then head into settlement negotiations.

**Age-Related Options and Other Things Divorce Lawyers Need to Know**

Some older individuals have options not available to their younger counterparts. Divorce attorneys must identify the rare client who qualifies for one of two Social Security claiming strategies (receiving more later by collecting less initially). These benefit strategies were closed to most retirees by the Bipartisan Budget Act of 2015. Take a closer look.

**File and Suspend Option**

The “file and suspend” option allowed a qualifying individual to file for benefits at FRA and then immediately suspend benefits to keep working. Why did this make economic sense?

- Upon claiming, the dependent spouse and minor child became eligible for auxiliary benefits.

  - The qualifying spouse could continue working to age 70, accruing 8 percent per year in delayed-retirement credits.
  - A lump-sum payment for suspended benefits was an available option.

  The strategy for a married couple was a coordinated effort to receive less now and more later.

**Grandfathered Beneficiaries**

Only those who claimed benefits at full retirement age (FRA) before the April 29, 2016, deadline by selecting the “file and suspend” option were grandfathered in. Between married spouses under prior law, only one could “file and suspend” and one could file a “restricted claim for spousal benefits” (discussed next). If they were divorced and both 62 years old or older on Jan. 1, 2016, then at FRA each could file a “restricted claim for spousal benefits” on the other’s work record. This allowed one’s own benefit to continue growing until age 70.

  - Client not grandfathered in? A limited “file and suspend” claim at FRA is still available to qualifying individuals. Under current law, delayed retirement credits can accrue until age 70, but during suspension no benefits can be collected by anyone.

** Restricted Claim for Spousal Benefits Option**

The “restricted claim for spousal benefits” option is another benefit optimization strategy, but it is for a dwindling number of divorcing spouses. By restricting a claim to spousal benefits, the individual claims the former spouse’s benefit at FRA while continuing to work, thereby increasing his or her own benefit until it tops out at age 70. It’s the best of both worlds!

**Option Eligibility**

Who is eligible? This option is available only to those born on or before Jan. 1, 1954. If born after that date, whether married or divorced, an individual is deemed able to file for both spousal and retirement benefits. The SSA compares records and pays the higher amount. The result is different with survivor benefits.

**Ex-Spouse Social Security Benefits after Death**

Another consideration for divorcing spouses is the Social Security survivor benefit for widows, widowers, and divorced former spouses. Survivor benefits are still available to those born on and after Jan. 1, 1954. A surviving divorced spouse chooses which benefit to collect first — his or her own benefit or the survivor’s benefit on the deceased former spouse. By collecting the survivor’s benefit first, one’s own retirement may be postponed in order to accumulate delayed retirement credits until age 70. Alternatively, the divorced spouse could start with his or her own benefit and switch to the survivor benefit at FRA.

To collect the survivor benefit on a former spouse, the client must be at least 60 years old (50 if disabled) and they must continued on page 29
What steps can employers take to mini-
mize this behavior in the workplace? And
what liability does an employer face for the
behavior of its employees?

In 2014, the General Assembly passed
the Healthy Workplace Act, which
provided public employers immunity for
workplace bullying claims if they adopt-
ed a model policy.1 Recently, though, the
General Assembly amended the Healthy
Workplace Act (on a unanimous vote, no
less) to extend its immunity to private em-
ployers. It was signed by Gov. Lee on April
23, 2019, and took effect immediately.

Currently, a Tennessee employer may be
subject to claims for “infliction of mental
anguish based on its employees’ abusive
conduct” if a worker believes they have
been the victim of bullying. We have seen
intentional and negligent infliction of
emotional distress claims in the employ-
ment context paired with hostile work
environment claims under the Tennessee
Human Rights Act (THRA) or Title VII.2
However, under the new law, an employer
can obtain legal immunity if it adopts the
model policy created by the Tennessee
Advisory Commission on Intergovernmen-
tal Relations (TACIR)3 or adopts a similar
policy that satisfies the same goals set forth
in the new statute.

Bullying, Mental Anguish
and Emotional Distress
The term “bullying” is the more common
usage of the legal terms “mental anguish”
and “emotional distress.”4 The Tennessee
Supreme Court has construed “mental an-
guish” to be synonymous with “emotional
distress.” The court has also held that
“emotional distress” claims require a show-
ing of “serious or severe mental injury.”5
These claims do not include “every minor
disturbance to a person’s mental tranquil-
ity,” but only “serious or severe emotional
injuries.”

The Tennessee Supreme Court has
provided six “nonexclusive factors” to
determine whether a plaintiff has “suffered
a serious mental injury”:

1. Evidence of physiological manifesta-
tions of emotional distress, including
but not limited to nausea, vomiting,
headaches, severe weight loss or gain,
and the like;

2. Evidence of psychological manifesta-
tions of emotional distress, including
but not limited to sleeplessness, depres-
sion, anxiety, crying spells or emotional
outbursts, nightmares, drug and/or
alcohol abuse, and unpleasant mental
reactions such as fright, horror, grief,
shame, humiliation, embarrassment, an-
ger, chagrin, disappointment and worry;

3. Evidence that the plaintiff sought
medical treatment, was diagnosed with
a medical or psychiatric disorder such
as post-traumatic stress disorder, clinical
depression, traumatically induced neu-
rosis or psychosis, or phobia, and/or was
prescribed medication;
4. Evidence regarding the duration and intensity of the claimant’s physiological symptoms, psychological symptoms, and medical treatment;

5. Other evidence that the defendant’s conduct caused the plaintiff to suffer significant impairment in his or her daily functioning; and

6. In certain instances, the extreme and outrageous character of the defendant’s conduct is itself important evidence of serious mental injury.7

Immunity for Employers Under the New Law

Under the new law, private employers can receive the same immunity for emotional distress claims that was formerly only available to public employers. The law now immunizes an employer (private or public) from suit for negligent or intentional infliction of emotional distress based on its employees’ abusive conduct, but only “if an employer adopts the model policy created by TACIR pursuant to § 50-1-503(a) or adopts a policy that conforms to the requirements set out in § 50-1-503(b).”8

It’s also important to understand what the law does not do. First, the new law does not alter the burden of proof on emotional distress claims. As it has always been, a plaintiff suing a private employer for negligent or intentional infliction of emotional distress based on the abusive conduct of an employee bears the burden of proof.9 All the new law does is provide immunity for employers that have satisfied the requirements of Tenn. Code Ann. § 50-1-504. It does not alter the burden of proof in a civil lawsuit against a private employer.

Second, the new law does not create a private right of action for plaintiffs if their employers choose not to adopt the model policy. Indeed, in Tennessee, for a new law to create a private right of action, “the legislation must contain express language creating or conferring the right.”10 Here, there is no such language. The law only creates an affirmative defense — not a private right of action — should the employer choose to take advantage of this new opportunity for immunity.

Third, the new law does nothing “to limit the personal liability of an employee for any abusive conduct in the workplace.”11 So while employers may now have an affirmative defense to bullying claims, the new law does nothing to protect the alleged bullies themselves.

Finally, this new law does not affect discrimination, harassment or retaliation claims based on membership in a protected class. Keep in mind, that claims of unlawful harassment and discrimination invoke an entirely different framework than “bullying,” which falls under the umbrella of emotional distress claims.

The Model Policy: A Path Toward Immunity

Adopting the model policy — or one that similarly satisfies the goals of the statute — is the only means by which an employer can achieve immunity for emotional distress claims. The TACIR’s Model Policy contains the following provisions:

1. Defines “abusive conduct.”

Abusive conduct includes acts or omissions that would cause a reasonable person, based on the severity, nature, and frequency of the conduct, to believe that an employee was subject to an abusive work environment, which can include but is not limited to: repeated verbal abuse in the workplace, including derogatory remarks, insults, and epithets; verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or the sabotage or undermining of an employee’s work performance in the workplace. Abusive conduct does not include routine coaching, reasonable disciplinary procedures, or policy-driven disciplinary procedures.

2. Employer responsibility. The policy sets forth expectations for supervisors, which include setting good examples through courteous and respectful behavior, and that complaints will be addressed in a timely manner.

3. Employee responsibility. Employees are expected to treat all other employees with dignity and respect in an effort to promote fairness and equity in the workplace.

4. Anti-retaliation. Employees shall not be retaliated against for exercising their rights under the Healthy Workplace Policy.

5. Training for Supervisors and Employees. The policy encourages supervisors and employees to participate in training on the policy, which should identify factors that contribute to a respectful workplace, familiarize participants with responsibilities under the policy, and provide steps to address an abusive conduct incident.

6. Complaint Process. The policy should clearly outline the process for filing complaints, the procedures for investigation, and the resulting actions for the various parties involved. The complaint process should mirror existing disciplinary processes.

The newly enacted law may prove beneficial to both Tennessee employees and their employers. Employees benefit from the establishment of a policy defining and prohibiting bullying which provides an avenue to complaint, and ultimately obtain relief. Importantly, this policy relates to bullying conduct that is not otherwise covered by the THRA and Title VII, and other discrimination and retaliation laws. Employers who enact the Model Policy continued on page 29
Health Care Directives for Seniors

In our February 2019 column we asked, “Are you drafting Powers of Attorney for financial decisions with language that is different for seniors than the ones you draft for younger clients?” Now we’re asking you the same question regarding Health Care Directives. In the hope that people will

use some type of substituted decision-making authority for medical decisions, Tennessee now recognizes seven different ways that this can be done. Drafting a document that is tailored to your client, and that will be accepted by health care providers, will hopefully result in the most appropriate care for that client.

Health Care Power of Attorney (Tenn. Code Ann. §34-6-201 et seq.) The “traditional” health care directive. The statutes governing the HCPOA were adopted in Tennessee in 1990, and the use of this document is still the best document for your clients to have to address their medical needs. In its simplest form this document gives blanket authority for one person to make health care decisions for the principal when the principal is unable to do so. But there is no reason for this document to be simple. In fact, you and your client should consider the following possible provisions:

Unorthodox treatment: Give the agent the authority to order unorthodox treatments and/or therapies, even though Medicare may not pay for them. Biofeedback, massage therapy, acupuncture, water mattresses, and unusual treatments and devices can relieve the symptoms of many afflictions common to seniors. Sufferers of diseases such as Alzheimer’s, Lewy Body dementia and Parkinson’s can all benefit from treatments and therapies not normally covered by insurance.

Chemical Restraints: Give the agent specific authority to order chemical restraints. That may be the only way that a long-term care facility will allow an otherwise combative or uncontrollable patient to enter or remain, which in turn keeps the patient in a safe environment.

Implanted Devices: If your client has a defibrillator or pacemaker or any other type of implanted device, then say so in the HCPOA. Specify under what circumstances that device is to be deactivated. Failing to deactivate a device when the body is otherwise trying to shut down can result in the device continuously going off. That is a gut-wrenching process to watch, is physically distressing to your client, and emotionally distressing to the family.

Religion: Does your client practice a religion that has certain end-of-life ceremonies, or certain instructions and/or restrictions for the dying/death process? For example, persons who are Catholic, Jewish, Seventh Day Adventist, Shinto, Jehovah’s Witness or Christian Scientist may want to execute a health care power of attorney that complies with his or her religious doctrines.

EXAMPLE: I am Jewish. It is my desire and I direct my Agent to make health care decisions in accordance with my religious and moral beliefs and the tenets of Jewish law and custom (Halacha) as determined in accordance with Orthodox interpretation and tradition. Should this directive be unclear in any way, or if any questions arises as to the requirements of Jewish law and custom, I direct my Agent to consult with and follow the guidance of an Orthodox Rabbi whose guidance on issues of Jewish law and custom my Agent in good faith believes I would respect and follow.

EXAMPLE: I am Catholic. As preparation for the final journey of his life, if I suffer from serious illness and infirmity, I direct
my agent to arrange for my reception of the Roman Catholic sacrament of Anointing of the Sick and the Eucharist of Viaticum. I further request that my family, the Catholic community and all my friends join me in prayer and sacrifice as I prepare for death; remembering always how I love life as given to me by God. I further request, after my death, others continue to pray for me that, with God’s grace, I will enjoy eternal life.

Funeral/Burial: Does your client have specific directions for disposition of his or her remains? The agent under a health care power of attorney has authority to direct such disposition. If your client wants to be cremated, then you will help the family avoid a lot of hassle at the time of cremation if the crematory can rely on the specific language in the power of attorney. We always have on hand copies of the permit needed to scatter ashes in the Great Smoky Mountains National Park, and we freely hand out the site contact for a free (yes, free!), green burial available in Tennessee. Clients find information about sea scattering services, artificial reef placement, glass artwork containment, and fireworks deployment of ashes to be very interesting.

Advance Directive/Advance Care Plan
This is the one we do not use, although it is the one presented on the www.TN.gov website with the instruction, “This form replaces the old forms for durable power of attorney for health care, living will, appointment of agent, and advance care plan, and eliminates the need for any of those documents.” Good intentions, but many seniors, their families, and health care providers do not like it. So, we quit using it a month after the first version came out in 2004 and have used the traditional HCPOA — without problems — ever since.

Declaration for Mental Health Treatment
(Tenn. Code Ann. §33-6-1001 et seq.) Seniors suffer from mental illness just like any other demographic. This advance directive allows a person to give preferences for treatment, medications and hospitalization that are specific to his or her mental illness. Unlike the traditional health care POA this declaration will automatically expire two years from the date of signing unless a lesser time limit is specified in the document or it has otherwise been revoked. For a number of reasons these documents can be difficult for a client to sign; however, once signed they are consistently accepted and utilized by health care providers, and work very well to avoid a conservatorship proceeding.

Living Will
(Tenn. Code Ann. § 31-11-101 et seq.) This document is confusing as named because so many clients think it has something to do with a traditional Last Will and Testament. We often refer to it as the “pull the plug document.” This dying declaration has not substantially changed since 1991, and is a very important document that begs for your explanation and guidance.

The choice about the use or discontinuance of “nutrition and hydration” (feeding tube) is written backwards, which results in clients making a choice that is the opposite of what they want. And, many seniors still shy away from being organ donors. When they choose “do not desire to donate” always ask, “Do you mean you will not donate to anyone, even family members?” You will be surprised how many will then change their mind and state on the document that they will donate “to immediate family members.” When they tell you that their organs are “too old” point out that there is no age limit. If it means staying alive a recipient would welcome an 85-year-old kidney!

General Presumption for Life
As Living Wills have gained acceptance and use, many seniors remain suspicious of their purpose and use — often fearing that the “plug” is pulled in haste. As an alternative we offer a document that directs the use, and expenditure of funds, for the continuation of care and treatment if such treatment will sustain any form of life.

POST (Physician Orders for Scope of Treatment)
Essentially replaces and expands the DNR (Do Not Resuscitate) to give more detail about life-sustaining measures, but does not replace the HCPOA.

Surrogacy Statute
[Tenn. Code Ann. § 68-11-1806 (c)] Within the Tennessee Health Care Decisions Act is a provision that outlines a procedure to allow a health care provider to appoint a health care surrogate for a patient who has either not appointed one in a HCPOA or other document, or the surrogate or agent so appointed is not reasonably available.

In either case the patient has to be currently unable to appoint such a surrogate or agent because of lack of capacity. The statute goes on to list by order of preference the person the health care provider should consider as well as other factors to consider in such a surrogate appointment. Theoretically, this provision makes sense as it provides an alternative way to make sure someone can have authority to make health care decisions. In real life, however, few doctors will use this authority. Think the process through to the end; the doctor chooses a decision-maker who agrees with the doctor so it is the doctor making the health care decision. Try getting that past their risk management office!

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.

NOTES
1. This trust is mandated by 42 U.S.C. 1. For assistance with specific religious forms please contact our office.
2. Tenn. Code Ann. §34-6-204(b).
Jocie

Jocie Wurzburg is a self-confessed Southern, Jewish American Princess, Civil Rights Activist. However, those labels only scratch the surface. This is the story of how a Jewish homemaker in Memphis, Tennessee, stepped forward at a pivotal point in the history of the Civil Rights Movement—making all the difference.

With great candor, Jocie tells her life story, never shirking from truth, regret or self-reproach. As the author states: “This is not a sad story of loss and sacrifice, although there was a lot of that and death in various forms.” What the reader will find is an entertaining voyage of discovery. Discovery of one’s worth, the worth of others and the worth of committing ourselves to the improvement of the community in which we live. This is the life of Jocie Wurzburg.

Her description of her early years, while often charming and heart-warming, reveals the lifestyle to which many young women were expected to submit before the Women’s Movement. With great insight, Jocie details the people who crossed her path, thereby making the difference in her life.

Jocie began her activist journey with the 1968 sanitation workers’ strike in Memphis, and the assassination of Dr. Martin Luther King, Jr., which she relates as “the most transformative event in my life.” As a result, she founded the Memphis Panel of American Women. The Panel program consists of five women (one Catholic, one Jew, one African-American, two Caucasians) plus a moderator, who speak from personal experience about prejudice. This concept was very successful, and, of course, led others to Jocie for her help with their important “projects” like the Police Community Relations Committee, the Tennessee Human Rights Commission and the Equal Employment Opportunity Commission. While she performed important work, she gathered an impressive array of colleagues.

From there, Jocie arrived at the White House to be installed on the National Commission on the Observance of International Women’s Year. A number of important appointments after that, Jocie gets her law degree, enters into the practice of law and changes the face of mediation in Tennessee.

This is what you will find in her book. Jocie personifies this quote from President Barack Obama: “Change will not come if we wait for some other person or if we wait for some other time. We are the ones we’ve been waiting for. We are the change that we seek.”

Along the way, as she changed her community, she collected “tales.” Now she reveals “lawyer tales,” “women tales,” “male tales,” “travel tales,” “music tales” and more. We learn the lessons she learned from her father. We can see how she applied those lessons as she boldly moved through life in good times and in bad times. If you are ready for a wild ride, this is the book for you.
have been married to each other for 10 years. The chart below shows the percentage the survivor receives on the deceased former spouse's benefit.

If the decedent postponed benefits until age 70, the survivor collects 100 percent of the former spouse's benefit with delayed retirement credits included!

What if the client remarried after the former spouse died? Timing matters. If remarried before turning 60 (50 if disabled), the survivor benefit is unavailable. As a strategy, maybe the client should wait to remarry.

When the client is raising the deceased parent's child, the child may also receive benefits on the decedent's work record. The child must be under age 18 or under age 19 if still a full-time high school student. The primary residential parent (PRP) could receive a benefit if the child is still under age 16. An older disabled child may also receive benefits on the deceased parent's work record.

What if the other spouse dies during divorce proceedings? Of course, the marriage terminates immediately with divorce proceedings dismissed. With regard to benefit collection, the marriage must have lasted nine months for a widow or widower to collect the survivor benefit, and they must have been married one year for the survivor to collect the spousal benefit.

### One Last Thought

Start preparing a Social Security benefit strategy early in the divorce representation. For purposes of retirement planning, the client needs to know what alimony arrangement and division of marital assets and debts will allow for comfortable living when added to retirement, disability or survivor benefits. Engaging a financial advisor in the process can help with optimizing the client's right to benefits.

The longer the marriage and the closer to retirement the spouses are, the more pressing this concern becomes. Divorce cannot add to or subtract from either spouse's benefit, but a tailored MDA can build nicely on a benefit foundation.

### Additional Resources

- Your Retirement Checklist (SSA Pub. 05-10377).
- How Work Affects Your Benefits (SSA Pub. 05-10069).

### NOTES

1. Thank you to Carol Lee Royer, CFP, CFA, CDFA, and Kathy Williams, CFP, CDFA, both with Waddell & Associates, for their contributions to this article. To learn more about the financial advisory services they provide, visit waddellandassociates.com.
4. Jeff Landers, CDFA, long-time Forbes.com contributor, often writes about addressing the financial negatives divorce can have on women.
5. “SSA. Early or Late Retirement?” (https://www.ssa.gov/oact/quickcalc/early_late.html).

### MILES MASON SR.
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### THE LAW AT WORK

are taking affirmative steps to improve their workplace environments, while at the same time receiving a legal shield for any emotional distress claims that may arise in the future.

Employers who wish to take advantage of this new legislation have no reason to delay — the law is already in effect.

### 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.

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### NOTES

2. See, e.g., Bazemore v. Performance Food Grp., Inc., 478 S.W.3d 628 (Tenn. Ct. App. 2015) (plaintiff’s sexual harassment claim was paired with claims for intentional infliction of emotional distress and negligent infliction of emotional distress, among others).
6. Id. at 208 (quoting Ramsey v. Beavers, 931 S.W.2d 527, 532 (Tenn. 1996)).
7. Id. at 209-210.
9. See, e.g., Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996) (noting a “plaintiff must present material evidence as to each of the five elements” required for a negligent infliction of emotional distress claim).
A Different Kind of Legal Writing

If you got to the back of this magazine without noticing that we have a piece of fiction in this issue, flip back to page 16 in a minute and read our 3rd Annual Fiction Contest’s winning entry. As a nod to that and lawyers who read fiction or dabble in fiction writing, let’s look at some who have made that leap.

We start not with the most obvious, but those with Tennessee ties. We know there are many more, so please let us know your faves. But to start, check out Robert Reuland, a Vanderbilt University Law School grad. He was an assistant district attorney in Brooklyn in the homicide bureau, and this is where his novels are set. His first novel, Hollowpoint, came out in 2001, and his second, Semiautomatic in 2004, both published by Random House. Soon after the first book was published, he was fired. Reuland brought and won a federal suit claiming infringement of his First Amendment rights. He then went into private practice, in homicide defense.

Two Tennessee lawyer-writers are Bill Haltom and Terry Price — they have juggled both lawyering and writing at the same time. Haltom’s books and columns are nonfiction but involve an enormous amount of creativity and dedication. Now retired, the Memphis lawyer brought laughter to readers of this magazine for 25 years, writing more than 260 columns. Price is a writer, photographer and creative coach, helping people hone their creativity through writing retreats and personal coaching. He also practices law in Nashville and Springfield.

Now we’ll get to Scott Turow and John Grisham because we know they are on your mind. Turow, a graduate of Harvard Law School, published Presumed Innocent in 1987, which many credit with the start of the modern legal thriller genre. Grisham is an Ole Miss Law School grad. His first novel, A Time to Kill (1988), was famously not a hit until his second book, The Firm, became a bestselling novel in 1991. So take heart, debut novelists! It is reported that 16 agents and 12 publishers turned down Grisham’s first try before it was published to lukewarm reviews.

Readers of a certain age will be rooting for Erle Stanley Gardner to be included here, and of course he is! His novels showcased the undefeated Perry Mason, who became an American legal icon. Gardner, a California lawyer, wrote nearly 150 novels, 82 of them about Mr. Mason, which were later adapted for television.

In 1958 Robert Traver, pen name of John D. Voelker, published Anatomy of a Murder. Traver, a 1928 University of Michigan Law School graduate, was a prosecutor and later a member of the Michigan Supreme Court. The novel was a success at the time, expanding its audience when Jimmy Stewart starred in its adaptation.

Lisa Scottoline, a 1981 graduate of the University of Pennsylvania Law School, published her first book, Everywhere That Mary Went, in 1994. She now has more than 40 books to her credit, with 30 million copies in print.

Novelist and comic book writer Marjorie M. Liu graduated from the University of Wisconsin Law School in 2003 but soon switched careers. As she writes on her website, “I loved law school. Did not like being a lawyer. Which is why I decided to become a writer.” Liu, has since written many urban fantasies and paranormal romances. She also wrote the last 21 issues of Marvel’s Astonishing X-Men comics, completing this work in October 2013.

As Meg Gardiner was considering being a writer, her father gave her some early career advice: “He said I could write novels after college and be another novelist who waits on tables or I could become a lawyer who writes novels.” So she graduated from Stanford Law School and practiced law in Los Angeles and also became a legal writing instructor. Gardiner, now a best-selling crime author who has written 14 novels, refers to herself as an “escaped attorney.”

We can’t leave this discussion without mentioning Harper Lee, who, although not a lawyer, did attend the University of Alabama School of Law for one year before quitting to work on To Kill a Mockingbird, published in 1960. She undoubtedly influenced the legal profession more this way than had she practiced law.

If you are an aspiring writer ready to bust out of that legal day job, or just wanting to supplement your life with creative writing, go for it! But you probably already know that the prospects are slim for making a living this way — for every John Grisham or Scott Turow there are thousands and thousands of wanna-be’s. Then again, the world already has those guys. What it needs is your voice, so go ahead and write. ☺

— Suzanne Craig Robertson
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