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Litigation Lessons Drawn from 2018 Entertainment Law Cases

Also: Bill Haltom Writes His Closing Statement
Justice Edward Terry Sanford
Representing Individuals in ERISA Long-Term Disability Insurance Claims

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THE TENNESSEE BAR JOURNAL

The Tennessee Bar Journal’s Third Annual

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TENNESSEE BAR JOURNAL

DECEMBER 2018
We also must do better to be respectful when dealing with one another as lawyers.

Civility in Our Communities

Recently, at a breakout session I attended at a business conference, the CEO of an insurance company described the new approach his company was taking to address incivility. He decided that, given the political climate, there was no time like the present to address the corporate culture and what his company stood for as an organization. He led a conversation about how his company continually stressed civility and inclusiveness, while acknowledging that some employees held strong political views. The CEO emphasized to his management team that they need to be role models. He said his company did not want any member of the company to feel disregarded or excluded because of their political beliefs.

The lessons from the CEO of the insurance company can be applied to our communities. Civility is contagious. Our behavior as lawyers sets the standard for business and social interactions in society. The time is ripe for lawyers, as leaders in our communities, to support and unite our communities by promoting a more civil and inclusive environment. When we emphasize and practice ways to facilitate robust, but civil, discourse about controversial topics, we empower citizens to be constructive and engaged in an increasingly polarized world.

Civility with Other Lawyers

Civility with other lawyers is of paramount importance and is necessary to best serve the interests of justice. Civility is a mindset that requires us to respect others, remain open-minded, and engage in honest analysis and evaluation. We act civilly by understanding our inherent biases, listening carefully to others, recognizing our assumptions, and adhering to the Golden Rule: treating others as one would wish to be treated.

For me, there is not much more frustrating than talking with an opposing lawyer who is constantly “reloading” rather than listening. Civility de-escalates unnecessary conflict, which reduces costs and finds solutions that are in the best interests of justice. This, in turn, benefits a lawyer’s business by creating more satisfied clients. Civility also creates greater job satisfaction and reduces stress, which increases lawyer well-being and mindfulness. I do not understand how those lawyers who are constantly discourteous and uncivil to opposing counsel find satisfaction in their careers.

Let us also not forget that our Rules of Professional Conduct require us to maintain “a professional, courteous and civil attitude toward all persons involved in the legal system.”

So to borrow those immortal words

— Justice Sandra Day O’Connor
Pannu’s Pairings: Natural Wine

I am drinking more natural wine than any specific appellations at the moment. What is natural wine? There is no universal definition or certification.

Natural wine first starts with organic or biodynamic farming in the vineyard and then takes a low intervention winemaking approach in the cellar. That is to say, the process relies on wild yeast for fermentation and no additives, sulfites, or processing aids are used. Further, neither fining nor filtration are used in the winemaking process, which sometimes leads to an off-putting amount of sediment in the bottle for those who are not used to sediment. The end result of this minimal intervention approach is the “natural” taste of the wine.

Without the controls of chemicals, sulfites, industrial yeasts and filtration, natural wines can vary wildly in taste from vintage to vintage, barrel to barrel and even bottle to bottle. Natural wines tend to be lower in alcohol, tannins (for reds) and body, and many possess a subtle “barnyard funkiness” that I find so desirable. These wines are made to drink young and with little contemplation. The French affectionately refer to natural wine as “glou-glou,” which is named for the sound made after being gulped by wine drinkers (what Anglophones would call “glug”). Many natural winemakers eschew the stuffy and complicated appellation classification system and, instead, prefer to have their wines classified as simple table wines.

Natural winemaking is practiced in almost every winemaking region in the world but especially in Italy, Austria and France with the current king of natural wine being France’s Loire Valley. The 11th Arrondissement of Paris is littered with wine bars that focus on natural wine and is where the popularity of natural wine first exploded.

Since there is no legal definition of natural wine, the term can be abused by wine retailers and producers. One must carefully research the producer and winemaking process to determine whether it is truly a natural wine. Legendary wine importer Kermit Lynch was one of the first Americans to focus on importing low intervention wines into the United States. Natural wine production is often tiny, so you tend to not talk about your favorites, just as a fisherman does not like to talk about his/her favorite fishing spots. Some good natural wine producers include Guy Breton (France), Partida Creus (Spain), Christian Tschida (Austria) and Eric Texier (France).

Pairings: Nothing and everything ... there are no rules with natural wines. With their lower alcohol content, many natural wines are great on their own as an aperitif. There are so many different styles of natural wines that it is hard to talk about specific pairings. Experiment with different pairings or consult your friendly sommelier. 🍷

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 @jasonpannu.
YOU NEED TO KNOW
FOR THE RECORD

ABOVE: Terica Smith, left, and Chasity Grice participated in the TBA’s inaugural Public Service Academy this fall. BELOW: Members discuss running for office during a session of the Academy. Photos by Katharine Heriges.

LAWYERS TRAIN TO RUN FOR OFFICE AT PUBLIC SERVICE ACADEMY
The first class of the Tennessee Bar Association’s Public Service Academy graduated Nov. 10 in Nashville. The program was designed to support lawyers who intend to seek local public offices such as city council, county commission and school board. The program launched this year to give lawyers the skills and encouragement needed to run for office successfully.

The 29 attorneys studied topics such as strategy, campaign finance, work-life balance, messaging, budgets, field strategy and social media for their future campaigns as part of the academy.

Many of the bipartisan group also announced their intent to run in their upcoming municipal elections in 2019. 

YOUR TBA
TBA Board of Governors Adopts Policies, Creates Task Force The TBA Board of Governors and relevant committees met over the course of two days in October, discussing issues of importance to the association. Highlights of the meeting included the adoption of an official TBA Public Policy that recognizes and approves the Path to Lawyer Well-Being, which is the comprehensive report of the National Task Force on Lawyer Well-Being.

The Board also considered recommendations from TBA’s House of Delegates, approving several section-sponsored pieces of legislation reviewed by the House. In response to concerns raised by the House of Delegates related to Tennessee Supreme Court Sanctioned Pro Se Divorce Forms, the Board voted in favor of the creation of a task force to work with other legal organizations, including the Administrative Office of the Courts, to collect data from practitioners, judges and clerks in order to document and properly address those concerns.

ELECTION
Midterm Elections See Surge of Women, Minorities Elected DA The 2018 midterm elections in November saw a surge of new voices elected in legal and judicial positions across the country, including more women and minorities elected district attorney than ever before, The Brennan Center for Justice reported.

This trend represents a marked change from 2014, when a study found that 95 percent of the nation’s elected prosecutors were white, and just one percent were women of color.

COURTS
Gibson to Chair Board of Judicial Conduct Judge Brandon Gibson of the Tennessee Court of Appeals was recently named the new chair of Tennessee’s Board of Judicial Conduct.

The board is responsible for investigating and, when warranted, acting on complaints brought against state and local judges. It is composed of 16 members from all parts of the state, including lawyers, citizens, and judges from all levels of Tennessee’s court system.

First Videos of TSC Oral Arguments Now Online Videos from Tennessee Supreme Court oral arguments are now available online.
Election Notice

Run for TBA Office in 2019

During 2019, the following officers, governors and delegates of the Tennessee Bar Association (TBA) will be elected as set forth in the association’s bylaws:

**TBA Officers and Board of Governors**

A vice president (from the Middle Tennessee Grand Division — elected by the association’s membership-at-large). The vice president automatically assumes the office of president-elect in 2020 and president in 2021.

**District Governors**

District Governors in the 1st and 4th districts will be elected to three-year terms. These governors are elected by the members in their respective districts.

Those who currently hold those positions are:
- **East Tennessee:** Tasha Blakney (Position 1) and Troy Weston (Position 2).
- **Middle Tennessee:** Rachel Moses (Position 1) and Ramona DeSalvo (Position 2).
- **West Tennessee:** Mason Wilson (Position 1) and Trey Thacher (Position 2).
- **Tasha Blakney,** Mary Beth Maddox, Rachel Moses, Ramona DeSalvo and Trey Thacher are eligible for reelection. Mason Wilson is ineligible for reelection because of term limits.

**TBA Delegates to the ABA House of Delegates**

Two members to represent the TBA in the American Bar Association (ABA) House of Delegates will be elected for two-year terms by the TBA membership in 2019. The positions are designated positions 1 and 3.

To qualify, the petition must specify the particular seat the candidate is seeking in the designated Grand Division (Position 1) or (Position 2). Those who currently hold those positions are:
- **East Tennessee:** Tasha Blakney (Position 1) and Mary Beth Maddox (Position 2).
- **Middle Tennessee:** Rachel Moses (Position 1) and Ramona DeSalvo (Position 2).
- **West Tennessee:** Mason Wilson (Position 1) and Trey Thacher (Position 2).
- **Tasha Blakney,** Mary Beth Maddox, Rachel Moses, Ramona DeSalvo and Trey Thacher are eligible for reelection. Mason Wilson is ineligible for reelection because of term limits.

**Qualifying, Balloting & Elections**

The officers, governors and delegates to the ABA are elected by the membership as provided by election procedures with petitions due Feb. 15, 2019.

To qualify for any of these offices, a candidate must file a nominating petition with the executive director of the TBA. The petition must contain the names of 25 members of the association in good standing. The petition must be received at the TBA office on or before Feb. 15, 2019.

The Board of Governors has authorized an electronic balloting system supervised by auditors selected by the Board. The Tennessee Bar Association elections will be primarily carried out electronically — using online balloting. Most members are familiar with this electronic method, but those who still prefer to cast paper ballots will be able to choose that method. Members will be able to opt out of electronic voting either through the TBA.org website (http://www.tba.org/tba/members/election_prefs) or by providing written notice to TBA Executive Director Joyceelyn Stevenson at 221 Fourth Ave. North, Suite 400, Nashville, TN 37219. This notice must be provided by Jan. 31, 2019.

As in the past, TBA members voting electronically will receive an email with a link to the election site along with a password to use to cast their ballots. Tabulation of election results will continue to be carried out by an accounting firm selected by the board.

Candidates have until Feb. 15, 2019, to qualify to run in the 2019 elections. Voting will take place between March 1 and April 1, 2019.

Electronic voting will close at 11:59 p.m. on April 1, 2019. If a mail ballot is requested, those ballots must be received by the deadline at the office of the TBA auditors on April 1, 2019. If there is only one duly-qualified candidate for an office by Feb. 15, 2019, that candidate will automatically be declared elected.

**TBA House of Delegates**

Members of the TBA House of Delegates are elected in odd-numbered years. One member of the TBA House of Delegates from each Judicial District and one additional delegate from the 6th (Knox County), 11th (Hamilton County), 20th (Davidson County) and 30th (Shelby County) are to be elected in 2019. The following is a list of the current members of the House from each district whose terms expire this year:
- **1st District:** Rick Bearfield
- **2nd District:** Meredith Humbert*
- **3rd District:** Doug Collins
- **4th District:** Derrick Whitson
- **5th District:** Norman Newton
- **6th District:** Timothy Housholder and VACANT seat
- **7th District:** Tom Marshall
- **8th District:** Philip Kazee
- **9th District:** Kelly Freer
- **10th District:** Bridget Willhite
- **11th District:** Tim Michel and Pat Vital
- **12th District:** Mark Raines
- **13th District:** Hank Fincher
- **14th District:** Ed North
- **15th District:** Lisa Cothron
- **16th District:** Ted Goodman
- **17th District:** Jason Davis
- **18th District:** Keith Dennen
- **19th District:** John Holt
- **20th District:** Jim Cartiglia* and Marisa Combs
- **21st District:** Rebecca Blair
- **22nd District:** VACANT (seat

*Continued
NEWS continued from page 5

Court oral arguments held in October are now available online. This is the first time oral arguments have been video recorded and made available to the public.

“This Supreme Court is committed to openness and transparency so the public can see and understand the process and decisions we make,” Chief Justice Jeff Bivins said.

The videos will give lawyers, students and others a more realistic feel of the interaction between the court and attorneys during oral argument, which often includes unscripted questioning and debate. Watch the videos at http://tncourts.gov/node/5395811.

Court Welcomes New Attorneys During Admission Ceremonies. New Tennessee attorneys were welcomed by the Tennessee Supreme Court to the practice of law during ceremonies in November in Knoxville, Nashville, Jackson and Memphis.

Between the two Nashville programs, the Tennessee Bar Association hosted a welcome reception at the Music City Center to introduce the new lawyers and their families to the Tennessee legal community.

ETHICS

Formal Opinion: Lawyers Have Duty to Warn in Case of Cyber Attack. The American Bar Association Standing Committee on Ethics and Professional Responsibility released a formal opinion in October that reaffirms the duty of lawyers to notify clients of a data breach and details reasonable steps to be taken to meet obligations set forth in model rules.

“When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach,” Formal Opinion 483 says. “Lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach. The decision whether to adopt a plan, the content of any plan and actions taken to train and prepare for implementation of the plan should be made before a lawyer is swept up in an actual breach.” Read more at https://tinyurl.com/y9abjb5q.

TBA House of Delegates Qualifying, Balloting & Elections

To qualify as a candidate for the TBA House of Delegates a TBA member must file a declaration of candidacy that includes their name, principal place of law practice, district of interest, and contact information. This can be submitted with the executive director of the TBA via mail or email at jstevenson@tnbar.org on or before Feb. 15, 2019.

Questions? This notice is in accordance with bylaws of the TBA §15 and 40 through 46. For more information on running for any of these offices, visit the TBA’s website at http://www.tba.org/election-guidelines or call 615-383-7421 for an election handbook.
Georgetown Law Dean William Treanor, ABA President Bob Carlson, Supreme Court Justice Elena Kagan, ABA President-elect Judy Perry Martinez and past TBA President Buck Lewis gathered at Georgetown Law Center in Washington, D.C., in honor of the 10th anniversary of Celebrate Pro Bono Month. Justice Kagan served as the honorary chair this year and spoke at an event at Georgetown Law Center. Celebrate Pro Bono Month has grown to more than 1,300 events in all 50 states and other countries, including dozens of events in Tennessee involving hundreds of volunteer attorneys.


Jeffrey M. Ward, a partner in the Greeneville law firm of Milligan & Coleman, has been inducted as a fellow of the American College of Trial Lawyers. The ceremony took place at the group’s annual meeting in New Orleans. Lawyers must have a minimum of 15 years of trial experience before they can be considered for induction.

Ward has been practicing law for 25 years. He is an alumnus of The University of Tennessee College of Law and is the current president of the Tennessee Board of Law Examiners.

The Arts & Business Council of Greater Nashville announced the selection of 15 Nashville professionals to participate in its 2018 Arts Board Matching program. Members will be

Chattanooga lawyer T. Maxfield Bahner was honored with the 2018 American Inns of Court Professionalism Award for the Sixth Circuit at a U.S. Supreme Court ceremony in October. Bahner, a senior counselor at Chambliss, Bahner & Stophel, was selected for displaying “sterling character and unquestioned integrity” and “dedication to the highest standards of the legal profession and rule of law.” Bahner maintains a litigation and mediation practice. He has been active in the Chattanooga Inn of Court, Chattanooga Bar Foundation and Tennessee Bar Foundation.

Gov. Bill Haslam recently appointed Kathryn Wall Olita of Clarksville to the 19th Judicial District Circuit Court, which serves Montgomery and Robertson counties. The appointment fills a new trial court judgeship established this year by the Tennessee General Assembly. Olita has practiced law for 15 years in Middle and West Tennessee, most recently with the firm Batson Nolan in Clarksville. Her current practice also includes serving as board attorney to the Clarksville-Montgomery County School System.

State Senate Majority Leader Mark S. Norris and Nashville lawyer Eli Richardson were confirmed Oct. 11 to federal district court judgeships in Tennessee. Norris, of Memphis, was confirmed on the United States District Court for the Western District of Tennessee. He has been serving in the litigation practice group at Adams and Reese since 2006. He was first elected majority leader in 2007 and now holds the distinction of being the longest-serving majority leader in Tennessee history.

Richardson, who will serve on the U.S. District Court for the Middle District, was in private practice with Bass, Berry & Sims. Prior to that he served in the Department of Justice, including the U.S. Attorney’s Office and the FBI.

Frost Brown Todd has named Thomas H. Lee as member-in-charge of the firm’s Nashville office. He succeeds Mekesha Montgomery, who led the Nashville team for the past seven years and now will chair the firm’s Manufacturing Industry Team and Member Personnel Committee. Lee has nearly 25 years of experience in government relations, political strategy and business litigation.

Prior to his legal career, he worked in newspaper and television journalism. He joined Frost Brown Todd in 2010 and helped establish the firm’s government affairs subsidiary, CivicPoint, which he leads as managing principal.

Bradley Arant Boult Cummings partner J. Thomas Trent Jr. has been elected to the Board of Regents of the American College of Mortgage Attorneys at the group’s annual meeting in Tucson. He will serve a three-year term for the organization, which is made up of 400 real estate, finance and mortgage law attorneys. Trent is a member of the firm’s Real Estate Practice Group and chair of the Economic Development Practice Group. He focuses his work on real estate and economic development.

Baker Donelson announced that it has added a new member to its Knoxville office. Nicholas W. Diegel joins the Advocacy Department, where he will focus on labor and employment, construction, insurance defense and commercial litigation. He earned his law degree from the University of Tennessee College of Law in 2015.

The Arts & Business Council of Greater Nashville announced the selection of 15 Nashville professionals to participate in its 2018 Arts Board Matching program. Members will be

and employment, construction, insurance defense and commercial litigation. He earned his law degree from the University of Tennessee College of Law in 2015.
paired with nonprofit organizations and serve on those organizations’ boards while participating in sessions designed to educate them on how to become effective nonprofit leaders. TBA members among the group are Jason C. Palmer with Bradley Arant Boult Cummings, and Wells Beckett and Jacob Giesecke with Waller Lansden Dortch & Davis.

Bradley Arant Boult Cummings partner Ann Peldo Cargile was recently elected secretary of the American College of Real Estate Lawyers. She practices in the firm’s Nashville office and handles commercial real estate, lease negotiation and enforcement, financing and joint ventures. Admission to the college recognizes an attorney’s legal ability, experience and high standards of professional and ethical conduct in the practice of real estate law.

Nashville attorney John E. Quinn has joined Neal & Harwell as of counsel. Previously a partner at Manier & Herod, he has experience in all

died Oct. 26 after a long battle with an autoimmune disease and several complex medical conditions. He was 59. After graduating from the University of Tennessee College of Law in 1991, Christiansen joined the law firm of Finkelstein, Kern, Steinberg and Cunningham. He served there for more than 20 years. He was an elder in his church, an avid golfer and gardener. In lieu of flowers, the family asks for donations to the Arthritis Foundation, the First Presbyterian Church of Knoxville or any other appropriate charity.

Former Columbia attorney and longtime community banker Beverly Douglas Jr. died Oct. 17. He was 92. Born in Nashville in 1926, Douglas received his law degree from Vanderbilt University in 1950 and practiced law with the Nashville firm of Douglas and Douglas before joining the U.S. Navy and serving as an intelligence officer in the Korean War. In 1956, Douglas moved to Columbia to practice law with MacFarland, Colley and Douglas. He later left the firm to begin a long career at Middle Tennessee Bank. He retired when the bank was sold to First American in 1998.

Nashville lawyer James Alan Flexer died Oct. 29 at the age of 61. A 1981 graduate of Tulane Law School, he founded and operated the Law Offices of James Flexer in downtown Nashville. He was a member of the TBA Bankruptcy Law Section as well as the TBA Senior Counselors Up to Something (TBASCUS) group. He practiced in the areas of bankruptcy, insolvency and reorganization, general civil litigation, family law and juvenile law. In lieu of flowers, the family requests donations be made to Alive Hospice, 1718 Patterson St., Nashville 37203 or to the charity of one’s choice.

Claudia Jack, longtime public defender for Tennessee’s 22nd Judicial District, died Nov. 9 in Nashville. She was 75. A Vanderbilt Law School graduate, Jack was a past member of the Tennessee Bar Association’s Board of Governors and was currently representing her district in the TBA House of Delegates. Jack started her career teaching eighth grade and at community college before enrolling in law school at 37. She then clerked for Tennessee Supreme Court Justice William J. Harbison and served as an assistant district attorney. She then joined her husband, Billy C. Jack, in the Jack and Jack law firm before her election to the public defender post in 1998.

In lieu of flowers, memorials may be made to St. Peters Episcopal Church in Columbia, 311 West Seventh St., Columbia TN 38401 or St John’s Churchyard in Ashwood, 1116 West Seventh St. PMB75, Columbia, TN 38401.

Nashville attorney Courtney Elizabeth Knight died Oct. 23 at the age of 48. Born in Florida, Knight moved to Nashville as a child. She graduated from Washington University School of Law in St. Louis in 1997, and returned to Nashville after graduation to work as an attorney for the State of Tennessee. In lieu of flowers, the family requests donations to be made to the Tennessee State Parks Conservancy, P.O. Box 190640, Nashville 37219.

Nashville immigration attorney Harry Elliott Ozmint died Oct. 16 from complications following a stroke. He was 71. A 1975 graduate of Vanderbilt University Law School, Ozmint founded Ozmint Law and became known for representing underdog causes in the city, including representing a woman shackled during childbirth as she faced deportation, challenging the city’s involvement in the 287(g) federal deportation program and working to defeat a referendum that would have made English the official language of local government. He was a passionate advocate of civil rights and served as a Tennessee state representative for a time. Ozmint was active in the TBA and its Immigration Section. In lieu of flowers, donations may be made to the American Cancer Society.

Randolph “Andy” Veazey, a partner with the law firm of Veazey & Tucker, died Oct. 25 from pancreatic cancer. He was 66. A longtime resident of Davidson County, Veazey earned his law degree from the Nashville School of Law in 1978. Following graduation, he spent the first year as a clerk for the Tennessee Court of Appeals. He then joined Glasgow & Associates, which later became Glasgow & Veazey. He practiced in the areas of insurance defense, workers’ compensation, construction, products liability and tort liability. In lieu of flowers, the family requests that donations be made to Nashville School of Law, 4013 Armory Oaks Dr., Nashville 37204.
aspects of civil litigation, including commercial, professional negligence, personal injury, products liability, employment and insurance litigation. He also has extensive trial experience and has conducted more than 50 trials in both state and federal courts, as well as arbitrations in Tennessee and Europe.

Memphis lawyer J. Gregory Grisham has joined Fisher Phillips as of counsel. He has more than 25 years of experience counseling and representing employers in all aspects of workplace law, with a focus on helping employers avoid claims. Prior to joining the firm, he worked in the Nashville and Memphis offices of FordHarrison. Grisham is the immediate past chair of the Tennessee Bar Association’s Labor and Employment Section.

The Association of Corporate Counsel has named Brentwood attorney Sherie Edwards as the Jonathan S. Silber Network Member of the Year. This award recognizes participation in committee leadership, contributions to recruitment and participation, efforts in developing network programs and resources, contributions to ACC/in-house practice, and contributions to the community through volunteer work and pro bono activities. Edwards also serves on the Tennessee Bar Association Board of Governors.

Shelby Dodson is a new staff attorney in the Gallatin office of Legal Aid Society of Middle Tennessee and the Cumberlands. She previously was with the Tennessee Justice Center. She is a 2016 graduate of Belmont College of Law. Her work has focused on disability law, elder law and health law.

Jackson lawyers Robert V. Redding and Jonathan O. Steen have joined the law firm of Spragins, Barnett & Cobb. Steen is a former president of the Tennessee Bar Association. The pair previously practiced together at the law firm of Redding, Steen & Staton. Both handle civil litigation, including medical and legal malpractice defense, products liability defense, commercial and business disputes and appellate advocacy. Steen also has a strong interest in technology, particularly as it relates to electronic discovery issues, and has served as an ESI discovery Special Master in federal court. The lawyers say the move will allow them to provide additional services to their clients, including banking and business transactions, creditor rights, bankruptcy, employment law, real estate, estate planning and probate, elder law, family law and criminal defense.

Nashville attorney Samar S. Ali was recently honored with the 2018 White House Fellows Impact Award, which recognizes past fellows who demonstrate remarkable achievement and transformational contributions in their field. Ali was selected for her work at the White House, in the South African Supreme Court, with the state government of Tennessee, and as a consultant working to protect vulnerable communities around the world. She served as a White House Fellow from 2010 to 2011 and worked on bilateral negotiations with European and Middle Eastern countries, served on the White House American-Arab “Kitchen Cabinet” and advised on the U.S. response to the 2011 Arab Spring. Following her fellowship, she returned to Tennessee to serve as assistant commissioner for international affairs under Gov. Bill Haslam. She now practices law as an international counsel at Bass Berry & Sims.

Former TBA President Bill Halton and Amanda Swansons – the daughter of former TBA Presidents Charles Swanson and the Hon. Pamela Reeves – have co-authored Full Court Press, a book on how University of Tennessee women’s basketball coach Pat Summit, a high school student from Oak Ridge and a legal team changed the game of basketball for girls in Tennessee. Available from tpress.org (see page 28), the book also highlights how individual initiative can bring about social change. Halton is an attorney with the firm of Lewis Thomason in Memphis. Swanson worked as a women’s basketball operations assistant at Mount St. Joseph University and is currently a law student at the University of Virginia School of Law.

Nashville attorney Hal Hardin stepped down as president of the National Association of Former United States Attorneys (NAFUSA) during the group’s recent annual conference in Nashville. Nashville Mayor David Briley and Tennessee Deputy Governor Jim Henry joined in welcoming NAFUSA to Nashville and proclaimed a “NAFUSA Week” in Nashville. Terry Flynn from the Western District of New York took over the reins of the organization from Hardin.

Kay Story is the TBA’s new continuing legal education coordinator. Prior to joining the TBA, Story spent 30 years at Bradley Arant Boult Cummings, in many different roles. Additionally, she worked with Waller, Lansden, Dortch & Davis as a technology trainer and technical support advocate. A Nashville native, Story brings to the TBA a strong background of project management, event planning, marketing and customer service.
DISABILITY INACTIVE

The Tennessee Supreme Court transferred the law license of Coffee County lawyer Harry B. Gilley to disability inactive status on Oct. 26. Gilley may not practice law while on inactive status but may return to the practice of law by showing by clear and convincing evidence that the disability has been removed and he is fit to resume practicing.

The law license of Shelby County attorney Jerry Francis Taylor was transferred to disability inactive status on Oct. 8. He may not practice law while on inactive status but may return to the practice of law by showing by clear and convincing evidence that the disability has been removed and he is fit to resume practicing.

REINSTATED

Sevier County attorney Joe Gene Bagwell was reinstated to the practice of law as of Oct. 10 pursuant to an order filed on Oct. 17. Bagwell signed a partial payment agreement with the Collection Services Division of the Tennessee Department of Revenue, provided the Board of Professional Responsibility with a letter of tax clearance, paid a delinquency penalty to the board and paid a reinstatement fee.

The Board of Professional Responsibility has reinstated a Texas attorney who was placed on inactive status more than five years ago. An order of reinstatement for Jacob D. Bashore of Harker Heights was filed on Oct. 12. After finding that he had met all requirements for reinstatement, the board made the reinstatement retroactive to Oct. 4.

The Supreme Court of Tennessee reinstated Williamson County attorney Michael Gibbs Sheppard to the practice of law on Oct. 25. Sheppard was suspended by the court on Aug. 13 for a period of 60 days, followed by two years of probation. He filed a petition for reinstatement and the Board of Professional Responsibility found the petition to be satisfactory. Sheppard must serve the remaining two years on probation under the supervision of a practice monitor and take 15 hours of continuing legal education on law office management and trust accounting procedures.

Arizona attorney Roy Lee Steers Jr. was reinstated to the practice of law in Tennessee as of Sept. 21 pursuant to an order entered on Oct. 8. He had filed a petition seeking reinstatement. Following review, the Board of Professional Responsibility recommended that the suspension be dissolved.

sibility stated that the petition was satisfactory and the requirements for reinstatement had been met.

Georgia lawyer Shellana Welch was reinstated to the practice of law in Tennessee on Oct. 22. The Tennessee Supreme Court noted that she had been on inactive status since February 2011. She petitioned for reinstatement and the Board of Professional Responsibility reported that the petition was satisfactory and she had met all requirements for reinstatement. The order was filed on Nov. 1.

On Oct. 19, the Tennessee law license of Candace Lenette Williamson of Southaven, Mississippi, was reinstated. Williamson was temporarily suspended from the practice of law on July 18 for failing to respond to the board regarding a complaint of misconduct. On Aug. 30, she filed a response and on Oct. 3, the Board of Professional Responsibility recommended that the suspension be dissolved.

DISCIPLINARY SUSPENDED

The Tennessee Supreme Court on Oct. 12 suspended Campbell County lawyer Michael Glen Hattmaker from the practice of law for five years, with a minimum of four years to be served on active suspension and the remainder to be served on probation. The court also made the probationary period contingent on engagement of a practice monitor and no new disciplinary complaints. Hattmaker executed a conditional guilty plea acknowledging he made material misrepresentations to clients and opposing counsel, and failed to expedite litigation, diligently represent clients, reasonably communicate with clients and properly maintain client funds in his trust account. The court found that his actions violated Rules of Professional Conduct 1.3, 1.4, 1.5, 1.15 and 8.4.

On Oct. 18, the Tennessee Supreme Court immediately suspended Lewis County lawyer Larry Joe continued on page 12
Hinson Jr. from the practice of law after finding that he misappropriated funds and posed a threat of substantial harm to the public. He is immediately precluded from representing existing clients by Nov. 18. The suspension will remain in effect until dissolution or modification by the court.

Shelby County attorney Clay M. McCormack was suspended from the practice of law on Oct. 5 for five years, with one year to be served on active suspension and the remainder to be served on probation. The Tennessee Supreme Court also made the probationary period contingent on engagement of a practice monitor and no new disciplinary complaints. The court found that McCormack closed numerous real estate transactions by inappropriately preparing settlement statements, writing and voiding checks, misleading lenders that sellers’ mortgages had been paid when they had not, and failing to obtain substitution of collateral. His actions were determined to violate Rules of Professional Conduct 1.1, 4.1(a) and 8.4(a) and (c).

The Tennessee Supreme Court suspended Sevier County lawyer Elizabeth Catherine Velasquez from the practice of law on Oct. 17 for five years, with three years to be served on active suspension and the remainder to be served on probation. The court also directed her to engage a practice monitor, pay restitution to a former client and contact the Tennessee Lawyer’s Assistance Program. The court found that Velasquez failed to communicate with and diligently represent her client, abandoned the client’s case and did not respond to a petition for discipline. Her actions were determined to violate Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.9(a), 1.16(d), 3.2, 8.1(b) and 8.4(a) and (d).

**Censured**

Lawrence County attorney Charles Matthew Bates received a public censure from the Board of Professional Responsibility on Oct. 24 for engaging in the unauthorized practice of law. The board found that Bates appeared in court on behalf of several clients while his license was administratively suspended for failure to comply with annual registration and IOLTA reporting requirements. His actions were determined to violate Rule of Professional Conduct 5.5.

On Oct. 15, Bradley County lawyer Douglas Neil Blackwell II was censured by the Board of Professional Responsibility. The board found that Blackwell (1) accepted a refundable retainer fee from a client but did not deposit the fee in his trust account until the work was done; (2) failed to diligently represent his client’s interest; (3) failed to properly communicate with his client; (4) failed to include critical documentation with legal pleadings; (5) failed to provide the former client with the client file; and (6) drafted a fee affidavit that was unreasonable and based on misrepresentations. These actions were determined to violate Rules of Professional Conduct 1.1, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 8.1(b) and 8.4(a)(c)(d).

On Oct. 15, Davidson County lawyer Wendell Cornelius Dawson received a public censure from the Board of Professional Responsibility. The board found that while representing a client who was applying for cancellation of removal before the immigration court, Dawson failed to call any witnesses other than the client to satisfy the significant burden of showing exceptional and extremely unusual hardship. In addition, the board found that Dawson failed to diligently represent his client by not meeting with the client to discuss the appeal and filing a one-page brief that lacked any citations to authority or the record, which reflected that the client had testified to the hardship his children would suffer if he were removed from the United States. In imposing the censure, the board found that Dawson violated Rule 1.3 of the Rules of Professional Conduct.

On Oct. 18, Davidson County lawyer James Gregory King received a public censure from the Board of Professional Responsibility. The board found that while representing a client in a domestic relations proceeding, King failed to take proper action to comply with a scheduling order, which led to dismissal of the client’s petition. Prior to the hearing on the motion to dismiss, King also made misleading statements to his client about the nature and significance of the motion and hearing. Finally, the board found that he accepted a refundable fee from a relative of the client without the client’s knowledge and consent, and then failed to deposit the fee in his escrow account. As a condition of the censure, King was directed to refund $2,500 in attorney fees to the relative of the client within 60 days. His actions were determined to violate Rules of Professional Conduct 1.1, 1.3, 1.4(a), 1.8(f), 1.15(c) and 3.2.
Williams Lampley was censured on Oct. 8 for engaging in the unauthorized practice of law. The Board of Professional Responsibility filed a petition for discipline against Lampley based on her self-reporting that she failed to pay her 2015 annual registration fee. She was administratively suspended by the Tennessee Supreme Court on Nov. 23, 2015. Before her license was reinstated she engaged in the practice of law. Lampley entered a conditional guilty plea acknowledging her conduct violated Rule 5.5 of the Tennessee Rules of Professional Conduct.

On Oct. 15, Montgomery County lawyer Cleveland C. Turner received a public censure from the Board of Professional Responsibility for engaging in the unauthorized practice of law. While his law license was administratively suspended, Turner practiced law for five days, including appearing in court at a hearing. His actions were determined to violate Rule 5.5 of the Rules of Professional Conduct.

Contempt
The Tennessee Supreme Court on Oct. 23 found Sumner County lawyer Andy Lamar Allman guilty of two counts of criminal contempt and sentenced him to serve 20 days in jail and pay a fine of $100 (10 days and $50 for each offense with the sentences to run concurrently). Allman was ordered to surrender himself to the Sumner County Sheriff’s Department within 15 days or be subject to arrest. The court’s actions were based on two petitions for contempt filed by the Board of Professional Responsibility and a report by the special master. The board had alleged that Allman engaged in the unauthorized practice of law and failed to comply with an earlier suspension order. Allman entered an agreement to plead nolo contendere alleging he violated his suspension by taking on two new, separate clients and accepting retainer fees totaling $9,000.

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

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

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To better serve our members, advertisers and sponsors, we are bringing advertising in-house! Whether you are looking for print, web or event promotion, the TBA has a range of communication products that reach thousands of Tennessee legal professionals.

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.

To learn more about our advertising and sponsorship opportunities, please call Stacey at 615-383-7421 or email advertising@tnbar.org.

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Courts this year have wrestled with issues such as rights in a band’s name, the intersection of new technology and copyright infringement, traditional claims of copyright infringement, rights in “monkey selfies,” the fair-use doctrine in the Copyright Act and the appropriate methodology for calculating attorneys’ fees for a prevailing party.

Although the cases discussed here focus on substantive issues arising in the context of the entertainment industry, the principles addressed by the underlying lawsuits apply to any civil-litigation practice.

The courts in these cases construed contracts and statutes and analyzed procedural challenges, such as preserving perceived errors at trial for review on appeal. One case explored the concept of statutory standing, and another clarified factors that courts may consider in setting a reasonable attorneys’ fee under particular circumstances.

The questions presented in these cases, absent the substantive entertainment concepts, could arise in civil litigation regardless of the
underlying subject matter. For instance, may a party, after a full trial, appeal a decision denying a motion for summary judgment? Also, what should a court do when a jury returns inconsistent verdicts in a multi-defendant case? Finally, how should a court weigh a lawyer's own reputational and public-interest concerns in calculating a reasonable hourly rate in a fee award due to a prevailing party?

Contract Interpretation and Course of Dealing: Commodores Entm’t Corp. v. McClary

In January, the United States Court of Appeals for the Eleventh Circuit concluded that Thomas McClary, a founding member of the musical group The Commodores, “left behind his common-law rights” to use the band name when he left the band in 1984. In reaching its decision, the court analyzed both (1) the contracts among the parties and (2) the parties’ efforts to control the quality and characteristics of the band by departing band members.

“The Commodores was formed in 1968.” The members and their manager originally formed a general partnership; the partners then registered the partnership as a corporation — Commodores Entertainment Corporation (CEC), and they eventually amended the general partnership agreement. Along the way, the group and its members consistently memorialized their agreements with each other and with their record label: Motown Record Corporation. Without exception, those agreements provided that rights to the band’s name remained with the group and that no leaving member was entitled to use the name.

Over time, many of the original members left the group. The two remaining original members, William King and Walter Orange, eventually “transferred their common-law trademark rights in the Commodores’ name and logo” to CEC. In 2001, CEC registered four Commodores-related trademarks with the United States Patent and Trademark Office.

In 2014, CEC filed suit against McClary, alleging a number of claims, including trademark infringement. The lawsuit arose out of McClary’s allegedly improper use of the marks.

The case went to trial in July 2016 on the issue of trademark-ownership rights between McClary and CEC. The district court granted CEC’s motion for judgment as a matter of law at the close of all proof, finding that McClary left behind all rights to the trademarks when he left the band in 1984 and that those rights remained with the group, including Mr. Orange and Mr. King. The trial court also found that the original members had acquired common-law rights to the trademarks and that McClary had walked away from those rights as well when he left the band in 1984, finding that “no reasonable juror could conclude that McClary had exercised any control over the quality and characteristics of the band since his departure.”

On appeal, the court wrote: “The essential question presented in the first phase of the trial was this: What happens to the ownership of a trademark in the name of a performing group when the group’s membership has evolved over time?” The court found that the proof was undisputed (1) that the group continued to use the name “The Commodores” after McClary’s departure, (2) that Mr. King and Mr. Orange were the only original members who remained with the group and (3) that “the common-law rights to the marks remained with the group members who continued to use and exert control over the group.”

Finally, the court found a second, independent reason that McClary had no remaining rights in the name “The Commodores.” “Reviewing the terms of the various agreements, the contracts establish that leaving the group meant leaving behind any rights to the group’s name.”

Statutory Interpretation: BMG Rights Mgmt. (US) LLC v. Cox Communications Inc.

In February, the United States Court of Appeals for the Fourth Circuit decided that Cox Communications Inc., and CoxCom LLC (collectively, “Cox”), were not entitled to protection for claims of copyright infringement based upon the safe-harbor defense contained in the Digital Millennium Copyright Act (DMCA). The court engaged in a fact-specific analysis in determining whether the statutory defense applied to the facts presented.

The DMCA provides a safe harbor to any internet service provider (ISP) that “has ‘adopted and reasonably implemented … a policy that provides for the termination in appropriate circumstances of subscribers … who are repeat infringers.’” The Fourth Circuit held that “Cox failed to qualify for the DMCA safe harbor because it failed to implement its policy in an consistent or meaningful way — leaving it essentially with no policy.”

Cox is an ISP, and “some of Cox’s subscribers shared and received copyrighted files, including music files, using a technology known as BitTorrent.” BitTorrent is a particularly efficient method of file sharing for two reasons: a user can download a file from multiple users simultaneously, and a user can begin sharing a piece of a file while continuing to download the rest of the file.

The court summarized Cox’s 13-strike policy, noting that Cox never automatically terminates a subscriber under that policy. Each strike results in notices to the subscriber, and the notices are followed by responses that could fairly be characterized as anemic.

The district court granted summary judgment in favor of Plaintiff regarding defendants’ defense of immunity under the DMCA, holding “that no reasonable jury could find that Cox implemented a policy that entitled it” to DMCA safe-harbor protection. “The jury found Cox liable for willful contributory infringement and awarded BMG $25 million in statutory damages.” Cox appealed.

“Cox’s principal contention is that ‘repeat offenders’ means adjudicated repeat infringers: people who have been

continued on page 16
First, the court of appeals addressed the challenge by the Thicke Parties to the district court’s order denying summary judgment. “The order is not reviewable. The Supreme Court has squarely answered the question: ‘May a party … appeal an order denying summary judgment after a full trial on the merits?’ Our answer is no.”

The court next addressed whether the district court abused its discretion in denying the Thicke Parties’ motion for a new trial. “We may reverse the denial of a new trial only if the district court ‘reaches a result that is illogical, implausible, or without support in the inferences that may be drawn from the record.’” The court then reviewed the record and determined that reversal was not warranted.

Regarding damages, the court of appeals found that the award of actual damages was not based on speculation and that the award of lost profits was not clearly erroneous. The court also found that the trial court’s award of equitable relief in the form of a 50 percent royalty going forward was not an abuse of its discretion.

At trial, the jury had returned mixed general verdicts: the jury found in favor of the Interscope Parties and Harris but found that More Water from Nazareth Publishing Inc., Williams and Thicke infringed. The district court overturned the jury’s verdicts in favor of Harris and the Interscope Parties.

On appeal, the court reversed the district court’s decision to impose liability on Harris and the Interscope Parties. Although the verdicts had been inconsistent, “in most cases where a jury renders inconsistent verdicts, the trial judge must allow those verdicts to stand because ‘it is unclear whose ox has been gored.’”

In July, the court of appeals denied the petition for rehearing en banc and amended its opinion. The amendments do not affect this analysis.

Appellate Motion Practice and Standing: Naruto v. Slater
In April, the United States Court of Appeals for the Ninth Circuit denied a Joint Motion to Dismiss the Appeal and Vacate Judgment in the case widely known as the Monkey-Selfie case. The court noted that the language of the applicable rule of appellate procedure was permissive, and that “[t]he grant of a voluntary dismissal is not mandatory, and sometimes neither is advisable.”

The request was made nearly two months after oral argument. The court concluded that “courts must be particularly wary of abetting ‘strategic behavior’ on the part of institutional litigants whose continuing interest in the development in the law may transcend their immediate interest in the outcome of a particular case.”

Ten days later, that same panel decided the appeal and concluded that “animals other than humans [ ] lack standing to sue under the Copyright Act.” The court also concluded that counsel for the Defendants were entitled to recover attorneys’ fees and costs.

“Naruto was a seven-year-old crested macaque that lived — and may still live — in a reserve on the island of Sulawesi, Indonesia. In 2011, David Slater left his camera unattended in the reserve, and Naruto took several photographs of himself.” Defendants published a book containing those photographs. The book identified Defendants as the copyright owners.

“In 2015 People for the Ethical Treatment of Animals … filed a complaint for copyright infringement … as Next Friends on behalf of Naruto.” The district court concluded that Naruto failed to establish statutory standing under the Copyright Act” and dismissed the case.
In affirming the dismissal, the court noted both that its own prior precedent controlled the answer to the question of whether an animal had standing to sue under the Copyright Act and that precedent was binding on this panel “until and unless overruled by an en banc panel or the Supreme Court.”

The court analyzed the four statutory factors. With respect to the first factor — the purpose and character of the use, the court found that Violent Hues’s use was transformative and not commercial, concluding that these factors favored a finding of fair use. The court found Violent Hues’s use to be transformative in function and purpose: Brammer’s purpose was “promotional and expressive,” while Violent Hues’s purpose “was informational: to provide festival attendees with information regarding the local area.” The court found that Violent Hues’s was not commercial, “because the photo was not used to advertise a product or generate revenue.”

The court next noted that Violent Hues’s use was in good faith and highlighted three facts supporting its conclusion: Violent Hues’s owner (1) found the photo on line and saw “no indication that it was copyrighted.” (2) believed the photo was “publicly available,” and (3) removed the photo from the website as soon as he knew it might be copyrighted. A party’s good faith is not a statutorily enumerated factor, but the four statutory factors are not exclusive.

Considering the second factor — the nature of the copyrighted work — the court noted that the use of factual works, rather than more expressive works, favored a finding of fair use. The court concluded that the second factor favored a finding of fair use because “Violent Hues used the photo purely for its factual content, to provide festival attendees a functional depiction of the Adams Morgan neighborhood.”

The court moved to the third factor: “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” The court found that the third factor favored a finding of fair use because Defendant had cropped about half of the photo for use on its website, taking “no more of the photo than was necessary to convey the photo’s factual content and effectuate Violent Hues’ informational purpose.”

Finally, the court found “no evidence that Violent Hues’ use of the photo had any effect on the potential market for the photograph.” The lack of effect on the market, combined with the Plaintiff’s testimony that he “currently makes no effort to market the photo,” led the court to conclude that the fourth factor likewise militated in favor of a finding of fair use.

The questions presented in these cases … could arise in civil litigation regardless of the underlying subject matter.

Statutory Interpretation: Brammer v. Violent Hues Productions LLC
In June, the United States District Court for the Eastern District of Virginia found that the use of a photograph by film-festival organizer Violent Hues Productions LLC (Violent Hues), was a fair use. Plaintiff Russell Brammer took a time-lapse depiction of a neighborhood of Washington, D.C., at night, and he posted the photo on several image-sharing websites.

“Violent Hues posted a cropped version of Brammer’s photo on its website.” Brammer’s lawyer sent a demand letter; Violent Hues immediately removed the photo from its website, and Brammer sued.

The court analyzed the four statutory factors. With respect to the first factor — the purpose and character of the use, the court found that Violent Hues’s use was transformative and not commercial, concluding that these factors favored a finding of fair use. The court found Violent Hues’s use to be transformative in function and purpose: Brammer’s purpose was “promotional and expressive,” while Violent Hues’s purpose “was informational: to provide festival attendees with information regarding the local area.” The court found that Violent Hues’s was not commercial, “because the photo was not used to advertise a product or generate revenue.”

In July, the United States District Court for the Southern District of New York awarded Plaintiffs attorneys’ fees of $352,000 plus certain costs in an action that resulted in the Defendants’ either losing or agreeing not to claim certain rights in the musical composition “We Shall Overcome” (the “Song”). Previously, the court had determined that the lyrics and melody in two verses of the composition “were not sufficiently original to qualify for copyright protection.” As the case approached trial, Defendants “tendered a covenant-not-to-sue over … [the remaining verses and] argued that this mooted the claims as to the remaining verses of the Song, and allowed judgment to be entered.”

“Section 505 of the Copyright Act provides that a district court ‘may … award a reasonable attorney’s fee to the prevailing party.’ The ‘touchstone’ of the analysis of who prevails is whether a material alteration of the legal relationship between the parties occurred. The change may either be in the form of ‘some relief on the merits’” or “settlement agreements enforced through a consent decree.”

Plaintiffs “obtained a summary judgment decision in their favor.” They therefore are the prevailing parties. The court analyzed the “Fogerty factors” in evaluating whether to award fees to a prevailing party in a case arising under the Copyright Act and determined that Plaintiffs were entitled to a fee award.

In setting the fee, the court recognized that a fee award under “Section 505 … [is based on] the fee that a ‘reasonable, paying client would be willing to pay.’” The court analyzed the hours expended. “As an overall matter, comparison with the time spent by defense counsel on this litigation indicates this request is a reasonable reflection of the investment in time made by skilled counsel representing continued on page 18
the plaintiffs.” In determining an appropriate hourly rate, the court noted that a “reasonable client wishes to spend the minimum necessary to litigate the case effectively” and might negotiate a fee based, in part, on an attorney’s “desire to obtain the reputational benefits that might accrue from being associated with the case.” “Cases that would be attractive to many talented lawyers, either as candidates for pro bono or reduced-fee representation, or because they fulfill a lawyer’s own reputational and societal goals,” provide the client with significant negotiating leverage; the court therefore reduced the hourly rates by 65 percent.

Notes

1. Commodores Entm’t Corp. v. McClary, 879 F. 3d 1114, 1121 (11th Cir. 2018).
2. Id. at 1122.
3. Id. at 1122 – 1123.
4. Id.
5. Id. at 1123.
6. Id.
7. Id. at 1125 – 1126.
8. Id. at 1131.

9. Id. at 1132 – 1133.
10. Id. at 1137.
12. Id. at 301 (Quoting 17 U.S.C. § 512 (i) (1) (A)).
13. Id. at 305.
14. Id. at 298.
15. Id. at 298 – 299.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 301.
21. Id. at 301-302.
22. Williams v. Gaye, 885 F. 3d 1150, 1182 (9th Cir. 2018).
23. Id.
24. Id. at 1159.
25. Id. at 1160.
26. Pharrell Williams, Robin Thicke Clifford Harris, Jr., and More Water from Nazareth Publishing Inc., comprise the “Thicke Parties.”
27. Id. at 1166 (internal citation omitted).
28. Id. at 1167.
29. Id.
30. Id. at 1172 – 1174.
31. Id. at 1174.
32. Interscope Records, UMG Recordings Inc., Universal Music Distribution and Star Trak LLC, comprise the “Interscope Parties.”
33. Id. at 1162.
34. Id.
35. Id. at 1175.
36. Id. at 1176 (internal citations omitted).
37. Williams v. Gaye, 895 F. 3d 1106 (9th Cir. 2018).
39. Id.
40. Id.
41. Id. at *5 (internal citation omitted).
42. Naruto v. Slater, 888 F. 3d 418, 426 (9th Cir. 2018).
43. Id.
44. Id. at 420.
45. Id.
46. Id.
47. Id.
48. Id. at 420 – 421.
49. Id. at 421 (internal citation omitted).
50. Id. at 426.
52. Id. at *1.
53. Id. at *2.
54. Id.
55. Id. at 4.
56. Id.
57. Id.
58. Id. at *5 – *6.
59. Id. at *5.
60. Id.
63. Id.
64. Id. at *7.
66. Id. at *4 – *5.
67. Id. at *6 – *7.
68. Id. at *8.
69. Id. (internal citation omitted).
70. Id. (quoting Buchhannon Board & Care Home Inc. v. West Virginia Dept of Health and Human Resources, 532 U.S. 598, 602 – 03, 121 S. Ct. 1835, 149 L. Ed. 2d 855 & n. 4 (2001)).
71. Id. at *8 – *9.
72. Id. at *10 – *15.
73. Id. *16.
74. Id. at *18.
75. Id. at 19 (internal citation omitted).
76. Id. at *22 – *23.
Edward Terry Sanford
The Man Behind the Robe

By Stephanie L. Slater

In the sweltering heat of September 1934, when the last thing anyone probably wanted to think about was wearing an additional layer of clothing, a movement began among Knoxville Bar Association’s members to get Knox County judges to adopt the custom of wearing robes while on the bench. The supporters of the movement “point[ed] to the fact that the late Justice Edward Terry Sanford, of the United States Supreme Court, a Knoxvillian, introduced the custom in Tennessee” while he was a federal district court judge and cited “the added dignity that the wearing of the black robes brings to the bench, the robe being the symbol of the judiciary, which is in turn the embodiment of the people’s majesty as applied to the settlement of legal controversies.”

Sanford had died suddenly in 1930, and memories of the man who had been recognized as “one of the ablest lawyers in the country,” “one of the more prominent and personable Tennesseans of his time,” and as his hometown’s “most illustrious son,” were still fresh. Who was this trendsetter?

Despite growing up in a home where guests of the family included the likes of presidents Benjamin Harrison and Theodore Roosevelt along with future president William McKinley, Sanford’s adoption of the judicial uniform of “the good old days of British aristocracy” when “being a judge … was a privilege enjoyed exclusively by the members of the nobility” was not revealing an elitist attitude. Nor was he forgetting the desire of Founders like Thomas Jefferson to purge the country of English aristocracy.

Edward Terry Sanford
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critic symbols that promoted the “need-less official appeal” of judges, a view particularly shared in the South.11 Sanford, ever the historian, was well versed in the history and spirit of American institutions and viewed the robe as symbolizing “centuries of honorable judicial function and contribution” and a reminder “to uphold justice and fairness at all times.”12 As for the judicial robe trend Sanford began in Tennessee, Judge Xenophon Hicks, Sanford’s successor on the United States District Court for the Eastern District of Tennessee, “followed Judge Sanford’s example,” and the custom was continued by Judge George C. Taylor.13 “In the meantime, first the Tennessee Supreme Court, then the Court of Civil Appeals … adopted the custom.”14

Edward Terry Sanford was born in Knoxville a few months after the conclusion of the Civil War on July 23, 1865. Growing up in East Tennessee, an area that experienced constant suffering, deprivations, and dislocations related to the war, left a lasting impression on him. These post-war conditions influenced Sanford’s career and the choices he made in it. Fortunately for Sanford, his father recognized how to turn the adverse conditions to business successes. The family soon became one of the richest and most prominent in Knoxville.

Sanford entered the University of Tennessee at the age of 14 and excelled at his studies. He earned two bachelor’s degrees and graduated at the head of his class. At the graduation exercises in June 1883, his valedictory oration, “Danger Ahead,” warned “against the dangers of Communism in America.”15 Backed by the financial resources of his father, Sanford continued his education at Harvard, where he was awarded another bachelor’s degree, a master’s degree and a law degree. He served as one of the first editors of the Harvard Law Review, which was established while Sanford was a student. For the remainder of his life, Sanford stayed active in the affairs of the University of Tennessee and Harvard.

Upon completion of his educational pursuits, Sanford returned to Knoxville and became an accomplished attorney and a lecturer at the University of Tennessee’s law school, teaching courses in corporation law and federal practice and procedure. From a young age, Sanford was fascinated with history, so it was no stretch for him also to teach a course on the history of the state in the undergraduate department. He remained a constant advocate for the university, serving twice as president of the alumni association and on the board of trustees.16 Sanford also became widely known as a writer and public speaker upon legal, historical, and educational subjects. He further worked as a booster for improving education across the South, as he believed that “the best resource of the South is its people,” and “the best way to develop [this resource] is to develop the capacities of its people.”17 Sanford served on the executive committee of the Conference on Education in the South, a body that supported public education in the region. His support for public school education in the South was also demonstrated through his involvement with the George Peabody College for Teachers, the leading school for training teachers in the South.

Sanford’s father was active in politics and encouraged his son to follow suit. Sanford campaigned on behalf of the Republican national tickets in 1896, 1900 and 1904. In 1896, he gave numerous speeches across the state in support of presidential candidate William McKinley. Press reports regarding an event in Lenoir City noted that Sanford’s speech had decried the economic radicalism of McKinley’s opponent, William Jennings Bryan, the congressman from Nebraska. Sanford had further described Bryan’s famous “cross of gold” speech as an effort “to force the nation into bankruptcy.”18 By the late 1890s, Sanford was being described as “one of the most prominent politicians in Tennessee.”19 In 1904, Sanford made his only try for elective office, seeking the Republican nomination for governor.20 Despite not gaining the nomination, Sanford, with his high sense of public duty and involvement in numerous civic activities, remained extremely popular across the state and continued to be mentioned frequently as a candidate for governor.

Characteristics Sanford did not share with his father were an innate business sense and a “consuming desire for wealth as an end in itself rather than as a means of worthier ends.”21 Yet, as an attorney, he represented his father’s many banking, railroad, mining and manufacturing interests and was intimately involved as a director and stockholder. In one lawsuit considered significant in Tennessee labor history, Knoxville Iron Company v. Harbison, Sanford challenged an 1899 state law barring companies from paying employees in scrip all the way to the United States Supreme Court.22 But his speeches betrayed his true beliefs. In a speech given eight years before his father’s death in 1902, Sanford condemned “the arrogance of wealth” and “our national absorption in things material.” As Sanford noted: “Instead of being the owners of wealth for nobler uses; we are fast becoming its diggers merely, its watch dogs and its slaves.”23 During the 1920s, Sanford continued to criticize greed and the seeking of wealth:

We are wasting time on things that count for nothing, on the joys that
Faculty Highlight
Chay Sengkhounm any

Chay Sengkhounm any practices law in Murfreesboro, handling a variety of immigration matters, and has extensive experience in humanitarian immigration relief. She has practiced immigration law since 2004. Prior to going into private practice, Chay worked at the Legal Aid Society of Middle Tennessee and the Cumberlands, and directed the Middle Tennessee Medical-Legal Partnership (MTMLP) between the Legal Aid Society, the United Neighborhood Health Services and Shade Tree Clinic. Through the MTMLP, Chay handled general civil legal matters for the patients of the medical clinics and provided training and education to the medical staff and students. Before joining Legal Aid Society in 2007, Chay worked as a staff attorney for the Immigrant Legal Clinic of the Tennessee Coalition against Domestic and Sexual Violence. She is a 2009 graduate of the Tennessee Bar Association’s Leadership Law Program. She received her law degree in 2003 from Georgia State University College of Law.

Chay is speaking at the annual Criminal Law Forum, December 7 at the Tennessee Bar Center and is featured in the Immigration Basics webcast, at cle.tba.org.

Upcoming Programs

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Year-End BLAST

December 11 in Johnson City
December 17, 26-28, 31 in Nashville

MEET YOUR CLE GOALS
by December 31

Juvenile Law Forum

December 6 in Nashville
Tennessee Bar Center
Program: 8:30 a.m. – 4:15 p.m.
Credit: 5.5 General, 1 Dual

$292.50 Section Members
$312.50 TBA Members
$487.50 Nonmembers (includes TBA Complete Membership)

The Juvenile Law Forum will feature the Juvenile Justice Reform Act, new adoption laws, updates in case law and a session on ethics and professionalism.

Speakers: Greta Locklear, Dawn Coppock, Douglas Dimond, Hon. Steven Hornsby, Leslie Kinkead
Ethics Roadshow 2018
Back to Basics: Sailing the Five C’s of Ethical Lawyering

Many ethical issues can be complicated and nuanced. Often those issues are the ones that lend themselves to public presentation because of the layered issues and academic rigor with which they can be tackled. But, sometimes, it is important to step back and focus on the basics. Most instances in which situations really go sour and lawyers end up on the receiving end of discipline involve failures to comply with fundamental ethical obligations.

This year’s Roadshow is going to offer an opportunity to get “back-to-basics” and take a look at significant developments in the world of lawyers during 2018 focused on the Five C’s that make up a recipe for ethical lawyering no matter what kind of law practice you have: the ethical duties of Competence, Confidentiality, (Avoiding) Conflicts, Communication and Candor.

December 4 in Chattanooga
December 5 in Knoxville
December 11 in Nashville
December 12 in Memphis
December 18 in Jackson
December 18 in Johnson City

Credit: 3 Dual
$145 TBA Members
$320 Nonmembers (includes TBA Complete Membership)

For more information and to register visit cle.tba.org.
Criminal Law Forum

December 7 in Nashville
Tennessee Bar Center
Program: 11 a.m. – 3:45 p.m.
Credit: 3 General, 1 Dual

$175 Section Members
$200 TBA Members
$375 Nonmembers (includes TBA Complete Membership)

When practicing criminal law, it is important to stay on top of trends and developments in this ever-changing arena. This annual staple for Tennessee lawyers will address essential, timely topics designed to enrich your practice and keep you at the forefront of the field. Do not miss this chance to learn from seasoned experts, while cultivating relationships with lawyers with a similar focus.

Speakers: Roger Neil, Katherine Cross, Hon. Steven Hornsby, Stephen Johnson, Chay Sengkhoumany

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.

- Administrative Law Updates
  3.5 General and 1 Dual (Ethics) Hours
- Class Action CLE Updates
  3.75 General Hours
- Construction Law Updates
  4.5 General and 1 Dual (Ethics) Hours
- Corporate Counsel Updates
  3.5 General and 1.5 Dual (Ethics) Hours
- Creditors Practice Updates
  2 General Hours
- Criminal Law Updates
  3.75 General and 0.75 Dual (Ethics) Hours
- Drafting Legislation Package
  3 General Hours
- Elder Law Basics
  3 General Hours
- Environmental Law Basics
  2.75 General Hours
- Estate Planning Advanced
  3.75 General and 1 Dual (Ethics) Hours
- Ethics Roadshow Package
  2 Dual (Ethics) Hours
- General Practice Updates
  4.75 General
- Health Law Basics
  4 General Hours
- Juvenile Law Updates
  4 General Hours
- LGBT Law Updates
  2 General and 1 Dual (Ethics) Hours
- Law Tech Updates
  5.25 Dual (Ethics) Hours
- Local Government Law
  2.75 General Hours
- Real Estate Advanced
  3 General Hours
- Running an Ethical Campaign
  2.75 Dual (Ethics) Hours
- Special Needs Trusts Package
  2 General and 1 Dual (Ethics) Hours
- Tax Law
  3.50 General and 1 Dual (Ethics) Hours
- Tort and Appellate
  2.75 General and 1 Dual (Ethics) Hour
- Transactional Practice
  5.25 General Hours

Watch for the 1Click logo for these and more CLE program sets at cle.tba.org.

Visit TBA’s social media for more info
The Tennessee Bar Association is your solution for quality Ethics and End-of-the-Year CLE! Join us for a variety of convenient options, including:

- Ethics Roadshow
- End-of-the-Year CLE Blast
- Convenient Online CLE
- And Much More!

Check it out at cle.tba.org
CLE Ski 2019

February 2 – 7, 2019 in Olympic Valley, Calif.
Program: 7:30 a.m. – 9 a.m. mornings
4:30 p.m. – 6 p.m. evenings
Credit: 12 General, 3 Dual

$195 Law Student
$795 TBA Members
$857.50 Nonmembers
$920 Non-Attorney

For attorneys interested in: General, Solo, Small Firms, Ethics
Join us for the Tennessee Bar Association’s 34th Annual CLE Ski. Located in the heart of Olympic Valley with direct lift service to Squaw Valley — site of the 1960 Winter Olympics — the Resort at Squaw Creek offers an ideal base camp for your Lake Tahoe ski vacation. Known for deep snow, an extensive network of chairlifts, and an incredible variety of terrain for all ages and abilities, Squaw Valley is a must-visit destination for skiers and riders from around the world.

Please join us for the opening reception on Saturday, February 2, to kick off this year’s program.


16th Annual Bankruptcy Law Forum
April 5 – 7 • Gatlinburg

Hilton Garden Inn
Credits: 7 General, 3 Dual
$495 Section Members
$525 TBA Members
$700 Nonmembers (includes TBA Complete Membership)

The 16th Annual Tennessee Bar Association Bankruptcy Forum and retreat will take place April 5-7, 2019, at the Hilton Garden Inn in Gatlinburg, Tennessee. Please make plans now to join us in this wonderful and relaxing setting for an informative and unique presentation of current issues of interest to a wide variety of bankruptcy attorneys.

Speakers: Laura Ketcham, the Hon. Suzanne Bauknight, the Hon. Paul Bonapfel, the Hon. Charles Walker
Edward Terry Sanford continued from page 20

are alluring but that lead nowhere that we should be led. Greed is with us, instead of unselfishness; avarice, the making of money at the expense of one’s fellows; the feverish desire of people not to cooperate with their neighbors, but get ahead of them, the dividing into camps of hatred, of jealousy, of suspicion, between men and classes of men. 24

Despite the opportunities his family’s wealth had provided to him, Sanford looked unfavorably on his father’s tireless pursuit of financial gain.

Once out of the shadow of his father’s dominating personality, Sanford instead pursued a career in public service. 25 Sanford worked for the Department of Justice from 1904 to 1908, initially as a special assistant to prosecute the Fertilizer Trust. “The marked ability” Sanford exhibited in his work in the Fertilizer Trust cases helped secure his appointment to the position of assistant attorney general. 26 During his time in that role, Sanford served as lead prosecutor in the Government’s prosecution of Hamilton County Sheriff Joseph Shipp and others involved in the 1906 lynching of federal prisoner Ed Johnson, a black man who was the subject of a writ of habeas corpus issued by the United States Supreme Court. Despite the Court staying the execution of Johnson, Shipp allowed a mob to break into the Hamilton County jail and hang the prisoner from the Walnut Street Bridge over the Tennessee River. 27 At the conclusion of Sanford’s prosecutorial efforts, Shipp, the jailer, and four mob members were found guilty of contempt in the only criminal trial conducted to date by the Supreme Court, heard for the most part in the United States Custom House in Chattanooga. 28

By the time the Shipp decision was announced by the Supreme Court in May 1909, President Theodore Roosevelt had nominated Sanford in May 1908 to be the United States District Judge for the Eastern and Middle Districts of Tennessee. 29 The two districts covered a huge expanse of territory to be served by only one judge. For 15 years, from 1908 to 1923, he sat at Greeneville, Knoxville, Nashville, Cookeville and Chattanooga. The workload was soul-crushing, consisting of moonshining and Prohibition cases in particular. “Open-minded” and “scrupulously fair,” Sanford gained a reputation as a lenient, thorough and impartial judge. 30 His former law partner, James A. Fowler, once noted:

He was just as careful in trying and disposing of an accusation against the most humble mountaineer as in considering the most important litigation pending in his court. Never did a Judge have a keener sense of Justice, or was inspired with a greater determination to see that equal and exact justice was administered to everyone. If he deviated in any respect from that cause, it was on the side of mercy towards the many poor defendants who were arraigned before him. 31

In 1923, President Warren G. Harding named Sanford to the United States Supreme Court. When viewed through a modern lens, an amazing aspect of his selection was the support he received from Southern Democrats. For example, an eminent Democratic attorney from Tennessee penned the following support letter:

Without the slightest regard to party affiliations, the people of this State are behind Judge Sanford’s application. The Democrats will be as well satisfied with his appointment as if he were one of them. In fact his brand of Republicanism, as manifested in his loyalty to the Constitution and constant efforts to elevate the manhood of this State by an even-handed enforcement of the law, has tended largely to wipe out that prejudice which has kept the Southerner in the Democratic ranks. Every citizen who has served as a juror, every litigant and every lawyer who has been in any of his numerous terms of Court, is a better American citizen today than he was before for this experience. 32

Such a letter in today’s political climate is unimaginable.

Sanford’s greatest impact as a member of the Court came in the area of civil liberties. In 1925, Sanford, writing for the Court, penned the decision in Gitlow v. New York. In the opinion, Sanford expressed his most famous words as a supreme court justice:

For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States. 33

Prior to this decision, the Bill of Rights had been extended only to matters overseen by the federal government, as the only governmental institution mentioned in the Bill of Rights is Congress. In 1897, in Chicago, Burlington & Quincy Railroad v. City of Chicago, 34 authored by Justice John Marshall Harlan, the court had ruled
that some form of just compensation is required for property taken by state or local governments. However, in the court’s decisions in Maxwell v. Dow (1900) and Twining v. New Jersey (1908), Justice Harlan’s position was regulated to dissenting opinions. As late as 1922, in Prudential Insurance Co. v. Cheek, the court held that “neither the Fourteenth Amendment nor any other provision of the Constitution … imposes upon the states any restrictions about ‘freedom of speech.’” In Gitlow, Sanford stated that the Fourteenth Amendment’s due process clause allowed the application of the First Amendment to a state’s statute restricting speech. His pronouncement is recognized by many as the beginning of the process of incorporating the guarantees of the Bill of Rights and making them applicable to the states through the Fourteenth Amendment’s due process clause. In a speech at Harvard in 1885, a 20-year-old Sanford once expressed the desire to “cut[] the trail that progressive humanity may hereafter broaden into a highway” and recognized that he might toil “for a scant justice that can come only long after the clods have rattled upon his coffin lid.” He accomplished his goal by triggering the process that would eventually profoundly alter the American legal landscape, as there is no constitutional issue of greater practical interest to the everyday lives of Americans than the incorporation doctrine.

Over the years, Sanford had a close relationship with the Tennessee Bar Association, serving as its president for the 1903-4 term (filling a vacancy caused by the death of the sitting president) and in 1905-6. He constantly strove to improve and promote the legal profession. So active was he in the organization during his career that officials declared at a 1913 meeting that “there is no member of the Tennessee Bar Association who has contributed more to its success and to the success of its annual meeting.” In 1921, the Tennessee Bar Association was an early promoter of Sanford’s candidacy on the Supreme Court:

Edward Terry Sanford

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Sanford had a close relationship with the Tennessee Bar Association, serving as its president for the 1903-4 term … and in 1905-6. He constantly strove to improve and promote the legal profession.

As was noted in an editorial in The Knoxville News-Sentinel shortly after his death, Sanford went on to “attain[] an eminence that few men ascend to.” Yet, as once observed by United States Supreme Court Justice Sandra Day O’Connor:

[There are justices] who have served the country … usually with honor, but whom history has all but forgotten…. Each was shaped by, and shaped, his times and circumstances. And each reveals that the judge is more than his jurisprudence. Underneath their robes, so to speak, the Justices of the Supreme Court are real, often quite unique, people. With all the current focus on judges’ so-called ideologies, it is worth remembering that a judge’s personal history and character also matter.

Next time you look at a Tennessee judge in a robe, remember the legacy of Edward Terry Sanford.
STEPHANIE L. SLATER is the author of Edward Terry Sanford: A Tennessean on the U.S. Supreme Court. She is a three-time graduate of the University of Tennessee in Knoxville (B.A., M.S., J.D.). She has worked in the state and federal court systems in Tennessee since obtaining her law degree in 1990. In addition to her book, she has had articles appear in the Journal of Supreme Court History and Tennessee Law Review.

Notes
2. Id.
3. Id.
4. Sanford is buried in Greenwood Cemetery in Knoxville.
5. Letter from David W. Kuhn to Andrew W. Mellon (Jan. 6, 1923), Dept’t of Justice Records, Nat’l Archives, College Park, Md.
6. Lewis Laska, “Mr. Justice Sanford and the Fourteenth Amendment,” Tennessee Historical Quarterly, Vol. 33, No. 2 (Summer 1974) at 211.
8. “Society Welcomes Sanfords,” The Washington Post (Feb. 18, 1907) at 7; The Cincinnati Enquirer (June 1, 1913) at 5.
10. In his youth, however, he did utter comments about “pig-tail Chins[e]n,” “half-breed Mexican[s],” and “wild Indians.” Stephanie L. Slater, Edward Terry Sanford: A Tennessean on the U.S. Supreme Court (Knoxville: University of Tennessee Press, 2018) at 90-91.
14. Id. A photo of the 1909 Tennessee Supreme Court in the Supreme Court building in Knoxville reveals that the justices did not wear robes prior to 1920. In A History of the Tennessee Supreme Court, former Justice Samuel Cole Williams is cited as the source that “it was not until about 1923 that the court began the custom of wearing judicial robes.” James W. Ely Jr., ed. (Knoxville: Univ. of Tennessee Press 2002) at 225. According to Williams, “some of the justices saw such robing as undemocratic,” and one justice declared to his colleagues, “You who favor robes may appear on the bench so attired. For my part, I shall sit in citizen’s clothes.” Id. (citing William H. Combs & William E. Cole, Tennessee: A Political Study (Knoxville: Univ. of Tennessee Press, 1940) at 144-45; Samuel Cole Williams, Phases of the History of the Supreme Court of Tennessee (Johnson City, Tenn.: Watauga Press 1944) at 87).
15. Slater, Edward Terry Sanford, at 41.
16. Sanford was chairman of the committee overseeing the law school. The Tennessee Law Review observed that “[t]he College of Law, in particular, has reason to regret this departure, for Judge Sanford ‘gave constantly of his best efforts for the development and upbuilding of this college.’” Id. at 47.
17. Id. at 89 (quoting Edward T. Sanford, Blount College and the University of Tennessee: A Historical Address Delivered Before the Alumni Association and Members of the University of Tennessee, June 12, 1894 (Knoxville: Univ. of Tennessee, 1894) at 78).
18. Id. at 84 (quoting “At Lenoir City: Mr. Edward T. Sanford Made an Impressive Speech,” The Knoxville Journal, Oct. 29, 1896, at 4).
19. Id. at 113 (quoting The Atlanta Constitution, Feb. 20, 1897, at 6.
20. Id.
21. Id. at 43 (citing 6 The University of Tennessee Record, No. 2, at 261).
22. Id. at 77-78 (Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901)). Harbison “marked a major turning point in vindicating state legislative authority to supervise the manner of wage payments.” Ely, A History of the Tennessee Supreme Court, at 161.
23. Id. at 43 (quoting Edward T. Sanford, Blount College and the University of Tennessee: A Historical Address Delivered Before the Alumni Association and Members of the University of Tennessee, June 12, 1894 (Knoxville: Univ. of Tennessee 1894) at 78).
24. Id. at 108 (Edward T. Sanford Papers, MPA. 0303. Univ. of Tennessee Libraries, Knoxville, Special Collections).
25. Id. at 124.
27. Id. at 139.
29. Id. at 145.
30. Id. at 155.
31. Id. at 156 (quoting Fowler, “Mr. Justice Edward T. Sanford,” at 230).
32. Id. at 190 (quoting Fowler, id. at 232).
34. 166 U.S. 226 (1897).
35. 176 U.S. 581 (1900).
36. 211 U.S. 78 (1908).
37. 250 U.S. 530 (1922).
38. Slater, Edward Terry Sanford, at 281.
39. Id. at 51.
40. Id. at 304.
41. Id. at 97 (quoting 32 Proceedings of the Annual Meeting of the Bar Association of Tennessee (1913) at 228).
42. Id. at 189 (quoting “Resolution for Consideration and Nomination of Judge Edward Sanford as Justice of the United States Supreme Court, with Discussion,” 40 Proceedings of the Annual Session of the Bar Association of Tennessee (1921) at 50-55).
43. “Edward Terry Sanford,” The Knoxville News-Sentinel (Mar. 9, 1930) at 22.
In spring 1942, Manila, the Philippines’ capital and a place described as the “Pearl of the Orient,” fell to the Imperial Japanese Army. Before World War II’s onset, the city featured parks and wide boulevards designed by U.S. architects; a department store with air-conditioning; and ice cream shops. Its most famous expatriate American resident (and a man who, with good reason, considered it as his home town), General Douglas MacArthur, declared Manila to be an “open city” under international law. In doing so, he spared Manila from the wrath of combat.

MacArthur succeeded in saving Manila in 1942. On his return in 1945, however, not only would Manila be wracked by war, it would effectively be leveled. Its inhabitants would experience savagery on a magnitude experienced between 1937 and 1945 by Nanking, Warsaw and Berlin.

An award-winning former reporter, Scott’s work is a *tour de force* that fleshes out in considerable detail one of the crucial battles in the Pacific Theater and one that enhanced the bitterness and desires for retribution of U.S. and Allied troops as they fought against Japan during the war’s last months. For lawyers, the book brings to light an often-neglected side of the Allies’ war crimes prosecutions, given the prominence and notoriety of the Nuremberg Trials on the other side of the world.

For students of MacArthur, the “American Caesar,” this book fills in several life-story gaps not often depicted in other accounts of his career, humanizing this complex man. Yet, MacArthur’s delay in not appreciating the true nature and scope of the urban combat overtaking Manila — hardly aided by his planning for a victory parade after prematurely declaring victory just days into the weeks-long battle! — cost U.S. forces precious time. That lost time contributed to the bloodbath that engulfed Manila in February 1945. (The word “hubris” comes to mind.)

The term “bloodbath” hardly does justice to describing the hellscape of Manila in 1945. Scott pulls no punches: his survey of the barbarities inflicted on Manila’s citizens is on par with many accounts of the Holocaust. It makes for difficult reading, even for toughened lawyers and seasoned historians.

Any comparison of what Japanese troops and sailors under Admiral Sanji Iwabuchi — the diehard commander on the ground in Manila, out at all costs to avenge his own tarnished honor after losing his battleship at Guadalcanal — did in that city to the Rape of Nanking, or Warsaw’s 1944 obliteration, is entirely apt.

Violating orders from his higher commander, the conqueror of Singapore and Malaya, General Tomoyuki Yamashita, to withdraw from Manila, Iwabuchi vowed to fight to the death.
For lawyers, the book brings to light an often-neglected side of the Allies’ war crimes prosecutions, given the prominence and notoriety of the Nuremberg Trials on the other side of the world.

The disgraced admiral also rejected the open-city precedent of 1942, opting to turn Manila into an Asian Stalingrad.

Instead, Iwabuchi ordered his men not just to reduce the city to ashes, but essentially to kill every civilian they could find. This, his several thousand naval and army troops proceeded to do — sometimes within eyesight of helpless GIs, stranded on the other side of the Pasig River that subdivided the city.

The most poignant accounts in Rampage are those of Manila’s civilians. The liberation of the long-suffering inhabitants of the Santo Tomas prison camp provides high uplift towards the beginning of the book. Afterwards, as Iwabuchi’s forces — with few orders from the distant (and out-of-touch) General Yamashita to halt the insubordinate admiral, or strip him of his command — began their orgy of rape, torture and slaughter, the account becomes increasingly grim, right up to the moment of the city’s final liberation.

The book’s last third comprises a gripping legal drama.

On trial for his life, Yamashita became the defendant in the Allies’ first war crimes tribunal in the Pacific Theater, a case that predated the Nuremberg Trials. Ordered to represent Yamashita — once the vaunted “Tiger of Malaya”; now, the “Louse of Luzon” — his American legal team was initially appalled by their mission, having themselves seen Manila’s fate first-hand. However, his lawyers rallied to advance the best defense available in the face of overwhelming evidence of the scope and ghastliness of the atrocities committed in Manila. Their representation of a hated defendant was zealous and highly professional, in the face of an antagonistic press, public and military hierarchy.

Yamashita’s case went before the U.S. Supreme Court. His defense team contended for the rest of their lives that what passed for “justice in Manila” was only that of a kangaroo court, with Yamashita served up for revenge at MacArthur’s behest. The wealth of information adduced by Scott on the structure, proceedings and deliberations of the court does give pause to the fundamental fairness of the case against the general. Yamashita’s pretrial plea to one American lingered: “How can I be convicted of crimes I did not even know about?”

Panoramic in its accounting of Manila’s agonies, detailed in its reporting, and compelling in its telling, Rampage amply — and graphically — reminds us of the destructiveness of modern warfare and the legalities that accompany it, calling into question the old Roman maxim, “In times of war, the laws are silent.” It is a gripping, and haunting, work of history.

Note
1. See In re Yamashita, 327 U.S. 1 (1946) (affirming the lawfulness of the creation and use of a military commission to try and sentence General Yamashita). After 9/11, this case garnered renewed interest with the 21st century use of military commissions to detain captured Al Qaeda terror suspects and other combatants in Afghanistan and elsewhere.

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Unilateral Withdrawals from a Joint Account: Equity Versus Certainty

In his seminal book, *The Common Law*, future Justice Oliver Wendell Holmes Jr. famously wrote: “The life of the law has not been logic: it has been experience.” This aphorism has endured, influencing one legal commentator to remark as follows:

Society creates law and law has to respond to society. Not slavishly and it can always guide society and you have to make choices and in the end someone’s going to decide in our society, we hope in some sort of democratic, small “d” manner what’s good. But you have to choose. You have to choose and of course the most horrible, difficult thing is to take responsibility and choose. And that’s what law is all about.¹

The tension (and often the choice) between logic and experience has profoundly animated the development of our law.

The recent Tennessee Supreme Court opinion in *In re Estate of Fletcher*² is a window into this tension between logic and experience, between certainty and the inevitable complexity of human interaction, perhaps nowhere more evident that in a marriage with issues.

In April 2012, Husband and Wife deposited joint funds into a checking account, with the account card specifically marked “JOINT – WITH SURVIVORSHIP (and not as tenants in common),” and with only one signature required for withdrawals.³ In January 2013, Husband withdrew $100,000 without the knowledge of Wife and obtained a certificate of deposit (CD) in his name only. In September 2013, Husband died and his Will left the residue of his estate to his children by a prior marriage. Wife filed a petition in probate court to claim the CD, testifying that she was unaware of the withdrawal and purchase of the CD until after Husband’s death.⁴

The probate court ruled that the CD was an asset of Husband’s estate, relying on the 1992 Tennessee Court of Appeals opinion in *Mays v. Brighton Bank*,⁵ which held that withdrawn funds cease to be tenancy by the entirety property upon withdrawal. The probate court found that Wife knew or should have known that the CD existed in Husband’s name (or at least that the funds were held in something other than their joint bank account); that she acquiesced in creating the CD; and that there was no proof of fraud since both the joint account bank statements and Husband’s CD bank statements came to their residence. Wife appealed.

The Court of Appeals reversed,⁶ ruling that the CD remained impressed as entireties property, relying on the 2008 Tennessee Court of Appeals opinion in *In Re Estate of Grass*,⁷ which held that a spouse’s ownership interest should not cease because the other spouse withdrew from the joint account. The appellate court further held that a tenancy by the entirety can be terminated only when both spouses convey; that the joint account agreement should not be construed as proof of prior consent to termination of the right of survivorship through unilateral with-
drawal; and that there was no evidence Wife agreed to relinquish her interest. Husband’s estate appealed.

This case was followed closely by estate lawyers and bankers, both of which were eager to know the rules.6 In a unanimous opinion, the Supreme Court reversed, holding that once one spouse withdraws funds from a joint bank account held as tenants by the entirety, the funds cease to be held by the entirety. The court noted that this was a case of first impression in Tennessee, with a split of authority not only within the Tennessee Court of Appeals, but also among those states that have considered this issue.

The Supreme Court noted that some states have adopted “the Pennsylvania approach,” under which funds withdrawn from tenancy by the entirety accounts continue to be entirety property. The Pennsylvania approach assumes that spouses’ joint accounts are for the benefit of both, even if one spouse can unilaterally withdraw, and that neither spouse may destroy the “true purpose” of the estate by the entirety by attempting to convert any part of it; or at least the account creates a rebuttable presumption that the joint interest follows the funds. In effect, the Pennsylvania approach recognizes and protects the other spouse’s ownership interests. Spouses place trust in one another, and a unilateral withdrawal could in essence breach that trust.

The Supreme Court noted that some other states have adopted “the Arkansas approach,” under which the fact that neither spouse is required to obtain the other spouse’s consent to withdraw from tenancy by the entirety suggests a joint bank account or by placing the certificate of deposit in his individual name. Therefore, we need not address the status of funds withdrawn from a joint account by one spouse under circumstances suggesting an intent to defraud, to avoid creditors, or to defeat the interests of a spouse in anticipation of divorce.

Footnote 3 gives petitioners a roadmap to overcoming the apparent presumption that a unilateral withdrawal terminates the entirety. Query whether Wife might have approached the case differently had she known that proof of fraud was necessary to overcome the presumption against her. Withdrawal from a joint account without your spouse’s knowledge in order to leave joint assets to your own children by a prior marriage suggests a prima facie case of intent to defraud.

The trial court’s finding that there was no fraud based solely on the account statements being mailed to the residence seems thin. Perhaps the case could have been remanded to the probate court for a hearing on fraud and the equities of the parties, in light of the Supreme Court opinion.

The holding in Fletcher stands in contrast to the holding in Coleman v. Olson,9 another recent unanimous Tennessee Supreme Court opinion from the same five justices. In Coleman, Wife filed for divorce, which triggered the statutory mandatory injunction10 prohibiting either spouse from changing the beneficiary on any life insurance policy naming the other as beneficiary. Within two weeks after filing, Wife became ill, changed the beneficiary from her husband to her mother in violation of the injunction, and then died. The trial court had imposed a constructive trust on the mother for the benefit of the only child of the marriage. The Court of Appeals reversed and awarded the death benefit to the husband.11

The Tennessee Supreme Court reversed, first noting that this was a case of first impression in Tennessee. The Court also noted that although the change in beneficiary was a violation of the injunction when done, Wife’s death abated the divorce action, so the injunction was no longer effective. The court more or less had two choices: it could either adopt a per se rule holding that changing the beneficiary in violation of the injunction necessarily voids such change, which would create certainty of result, or it could fashion an equitable remedy, which would require judicial determination. The Supreme Court chose the latter, remanding the case to the trial court for a hearing on the equities of the parties, however providing no specific guidance. No doubt many spouses experiencing a divorce may feel more encouraged to change their life insurance beneficiaries despite the
Where There’s a Will
continued from page 27

Injunction, on the basis that there may be little to lose and potentially much to gain, notwithstanding that the ultimate outcome will depend on a trial court’s equitable balancing.

In other words, in two recent Supreme Court cases, in Fletcher certainty trumped equity, but in Coleman equity trumped certainty.

Contrary to Holmes’ classic quote, perhaps both logic and experience, predictability and equity, are the life of the law. Both matter.

As Professor LaPiana remarked, “You have to choose.” But there is wisdom in this, too, according to Emerson: “A foolish consistency is the hobgoblin of little minds.”

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Notes


3. In Tennessee, a joint bank account held by husband and wife is presumed to be tenancy by the entirety absent proof to the contrary.

4. If this had been a divorce case after the withdrawal of funds rather than a probate matter, removal of funds from a joint account (which is marital property) would not negate the “marital” (and thus “mutually owned”) nature of the funds removed. Such funds can typically be easily recaptured for purposes of division of marital property, or else taken into consideration by the court in equitably dividing the marital property.


8. Notably, the Tennessee Bankers Association filed an amicus brief.


12. Ralph Waldo Emerson, Self-Reliance.

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Antitrust Issues in Bank Mergers

From time to time, mergers of banks doing business in the same markets make so much business sense as to cause us to wonder why they have not yet decided to “partner up.” As lawyers engaged in assisting in these transactions, the first job is almost always an analysis of whether or not there are anti-competitive factors that may stall or completely derail in-market mergers.

The antitrust standards in the Bank Merger Act of 1966¹ and the Bank Holding Company Act of 1956,² as amended, effectively mirror those set out in the Sherman Antitrust Act of 1890³ and the Clayton Antitrust Act of 1914.⁴ No bank merger may be consummated absent the approval of the Department of Justice and the federal banking agencies of “(1) any proposed merger transaction which would result in a monopoly or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States; or (2) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition or to tend to create a monopoly or which in any other manner would be in restraint of trade.”⁵ This article does not purport to be a comprehensive analysis of antitrust law in bank mergers (much scholarly work has been done in this area), but rather to remind practitioners that there are reasons other than regulatory defects that may cause a proposed bank merger to be disapproved.

Department of Justice Review

In addition to the prior approval of the prudential banking regulators, all bank and bank holding company mergers must be reviewed and approved by the Department of Justice. No bank or bank holding company merger may be consummated until the 15th day following the approval of the federal prudential banking regulator. If there are no market concentration issues, approval by the DOJ is usually pro forma, but in cases in which there are anticompetitive questions, the DOJ frequently asks for additional information.⁶ Once consummated, the DOJ may not challenge a bank merger, but a merger may not be consummated if the DOJ has filed a challenge until that challenge is satisfied. Our experience has been that the DOJ and the Federal Reserve Board caucus during the process, so it’s rare that the two 900-pound gorillas duke it out in the courts over whether a merger is anticompetitive.

One notable exception to the “let’s try not to argue in public” stance was the first case, decided 50 years ago, in which the United States Supreme Court considered a bank merger under the Bank Merger Act of 1966.⁷ In U.S. v. Third National Bank in Nashville, the District Court had ruled that the Bank Merger Act then in effect altered the antitrust standard applicable to bank mergers. The Supreme Court disagreed and ruled that the antitrust standard under the new law remained that of the Clayton Act and the Sherman Act. The Supreme Court noted that the “new

continued on page 30
A public interest standard included in the 1966 Act was a defense to an anticompetitive merger rather than part of the antitrust analysis itself. The court ruled that Congress intended bank mergers first to be subject to the usual antitrust analysis and then, if a merger failed that scrutiny, it was “to be permissible only if the merging banks could establish that the merger’s benefits to the community would outweigh its anticompetitive disadvantages.”

In August 1964, Third National Bank in Nashville and Nashville Bank and Trust Company, the second and fourth largest banks in Davidson County, Tennessee, merged. After the merger, the three largest banks had 97.9 percent of the total bank assets in the county, and the two largest banks had 76.7 percent. The DOJ’s suit challenging the merger had not come to trial when the Bank Merger Act of 1966 took effect. The Act did not provide antitrust immunity for the merger but did state that courts “shall apply the substantive rule of law set forth” in the Act to pending cases. Section 5 of the Act prohibits approval of a merger whose effect “may be substantially to lessen competition” unless the anticompetitive effects “are clearly outweighed in the public interest by the probative effect of the transaction in meeting the convenience and needs of the community to be served.” The District Court found that the Act altered the standards used in determining whether a merger violated Section 7 of the Clayton Act and Section 1 of the Sherman Act and required a return to United States v. Columbia Steel.

The District Court had found that Nashville Bank and Trust was a “stagnant and floundering bank,” suffering from ineffective management. It held that the merger would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by benefits to the “convenience and needs of the community.” The Supreme Court remanded the case to the District Court to consider again the Act’s application to the facts of the merger, noting that “since the District Court heard this case before Houston Bank was decided, it may wish to consider reopening the record to permit the presentation of new evidence in light of the intervening interpretations of the Act.”

**Mathematical Anticompetitive Analysis**

Unlike the role of banking regulators, the DOJ is a law enforcement agency, and its approach to antitrust enforcement differs from that of the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency. Every administration since Reagan has stringently viewed antitrust issues as detrimental to the economy and consumers, with the most robust enforcement occurring under the Clinton administration. It is too early to predict how the Trump administration’s enforcement will stack up over time.

The DOJ and the Federal Trade Commission issued comprehensive *Horizontal Merger Guidelines* in 2010 and updated the Guidelines in 2015. The Guidelines describe a number of sources of evidence that are examined in merger reviews, as well as several analytic techniques that are commonly used. Most common in the analysis of bank and bank holding company merger analysis is the Herfindahl-Hirschman Index or the “HHI.” This is an accepted measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four banking firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600. The HHI also takes into account the relative size distribution of the firms in a market. The DOJ and the federal banking agencies consider markets in which the HHI is between 1,500 and 2,500 points to be “moderately concentrated,” and consider markets in which the HHI is above 2,500 points to be “highly concentrated.” Under the Guidelines, any transaction that increases the HHI by more than 200 points in highly concentrated markets or that result in a post-merger HHI of over 1,800 points is presumed to enhance market power. Happily for those of us who are mathematically challenged, there are reliable HHI calculators available that will demonstrate quickly whether market concentration is likely to be a negative factor in a merger transaction.

**Mitigating Factors**

The Federal Reserve Board may approve a merger or acquisition in a highly concentrated market where the HHI increase ordinarily would raise antitrust concerns if the board finds special circumstances or other mitigating factors that would tend to diminish any anticompetitive effects of the proposal. The board has approved bank mergers, despite market concentrations above accepted norms, where there were an
opportunities for expansion for other banks which scrambled to bid on branches in these competitively-concentrated markets, thus providing more competition and choices for consumers.

Consolidation

The wave of bank mergers and acquisitions has raised concerns about decreased competition and loss of local involvement, but it may be too early to tell whether consolidation will actually mean increased costs to consumers or fewer options for banking services. The last time we had a tsunami of bank mergers, we had a corresponding flood of de novo bank formations. In this business, all things are cyclical.

Divestiture

When an antitrust concern arises, the typical solution proposed by the DOJ involves the divestiture of certain assets to bring the HHI back in line with the Guidelines. For example, in 2006, when Birmingham-based Regions Financial Corp and AmSouth Bancorporation agreed to a stock swap valued at almost $10 billion, AmSouth sold 39 of its Alabama branches to RBC Centura Bank, a subsidiary of Royal Bank of Canada; six Mississippi branches to Citizens Bank of Russellville, Alabama; and seven Tennessee branches to FirstBank of Lexington, Tennessee (now domiciled in Nashville). The 52 divested branches held approximately $2.7 billion in deposits in Alabama, Mississippi, and Tennessee. The Regions/AmSouth merger followed the 1999 acquisition of First American Corporation by AmSouth in which the Board and DOJ required certain divestitures in the Rhea County, Tennessee, market where both companies were strong competitors. One First American branch with $41.4 million in deposits was divested to meet the Guidelines. These divestitures provided

Notes

6. See, FRB Order No. 2017-36, describing the merger of a Tennessee bank holding company and its subsidiary bank with an into a com.
8. 390 U.S. at 182.
11. 386 U.S. 361 (1967).
12. 390 U.S. at 192.

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DECEMBER 2018

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My wife, Claudia, is not exactly thrilled about my retirement plans. She says having a retired husband at home is like having a grand piano in your kitchen! I have also been warned that in my retirement, she will present me with a daily “honey-do” list that will make me want to retreat and return to the office. Nevertheless, I figure that after 40 years and more than 100 jury trials, it is time for this old trial lawyer to make his closing statement.

Now that I’m packing up my briefs and headed for assisted living, I believe it’s also time for me to give this not-so-bully pulpit to the next generation of full-time lawyers, part-time writers.

I hope you’ve enjoyed reading my columns over the years as much as I have enjoyed writing them. Writing about 500 words a month on the lighter side of a life in the law has been a real joy for me. I don’t play golf. I don’t hunt. I don’t fish. I write, and I’ve enjoyed churning out these crazy columns each month.

In this, my closing statement, there are several people I need to thank. At the top of the list is my dear friend Suzanne Robertson. As you know, Suzanne is the editor of the finest bar association publication in America … no, make that the world … the Tennessee Bar Journal.

Several times over the past quarter century, the readers of this column have been spared from some really poor or inappropriate writing on my part. From time to time, Suzanne has called me and diplomatically said something like, “Bill, are you sure you want to discuss this particular topic in your column this month?” Or, more directly, she might say, “You really need to take out the part where you say…..”

And Suzanne has always been right.

Second I want to thank the members of the Editorial Board of the Journal who have worked so closely with Suzanne to make sure I don’t write the wrong thing or say it the wrong way!

Third, I want to thank my partners (well, I think they call them shareholders now) at my law firm, Lewis Thomason, and its Memphis predecessor, Thomason, Hendrix, who have allowed me to devote hundreds of non-billable hours over the years to writing a column that could never be mistaken for either a trial or an appellate brief.

Finally, I want to thank you … the readers. Over the years I have received many notes, emails and texts about my columns. Such correspondence has often contained the following compliment: “Your column is the first thing I read in the Bar Journal!”

I really appreciate the compliment, but I have always responded that I know that it is not true. My column is not the first thing anyone reads in the Bar Journal. The first thing you and I read are the disciplinary notices. Let’s admit it. We know it’s true.

It’s like the old joke about the elderly man who would get up each morning, fix himself a cup of coffee, and then check the obit page in his morning newspaper. If he didn’t see his name on the list of the departed, he would then get dressed and head to the office.
Well, for me it’s always been a relief to never see my name listed in the disciplinary notices, and now that I’m retiring, it looks like I’m finishing my career unscathed.

I also received a back-handed compliment of sorts in 2005 when I was serving as president of the Tennessee Bar Association. During my tenure as president, I temporarily suspended my “But Seriously Folks!” columns in the back of the Journal in order to write the President’s Perspective in the front of the magazine. While my columns in the back of the Journal were always light and (I hope) funny, my president’s columns were serious. This prompted Journal reader Robert L. Huskey of Manchester, Tennessee, to write a letter to the editor, which was published in the November 2005 edition. Under the heading “Bring Back the Humor Column or Kick Out Haltom as President,” Mr. Huskey wrote,

If (Mr. Haltom) being President is going to mean that the column, “But Seriously Folks!” will no longer be included in the Journal, then I move to impeach him immediately.

I was not impeached, but I did rush back to the back of the Journal in July of 2006 after my year as TBA President ended.

Over the years I’ve also received occasional correspondence critical of my columns. Some such correspondence has been painful to read, and others have been downright funny.

For example, a few months ago I wrote a column titled “The Luxury of an Unexpressed Thought,” wherein I quoted the late great Howard Baker and urged all us lawyers to often keep our mouths shut. My old friend and fellow Memphian lawyer Irving “Lightning” Zeitlin, wrote me a devastatingly accurate one line note: “Regarding your most recent column, why don’t you take your own advice?”

On another occasion, I got a phone call from the ubiquitous John J. Hooker who was mad at me about a few comments I had made about him in one of my columns. I apologized to John J. and even wrote a public apology in a tribute column after his death. (Yes, I know. It was a little late.) In the public apology I stated that when I started writing this column decades ago I gave myself an important rule: Never make fun of any Tennessee lawyer, other than Bill Haltom.

I had violated that rule in my column about John J. I deeply regretted it. I still do.

But while I’m now leaving the back pages of the Bar Journal, I’m not going to quit writing. Here comes some shameless self-promotion: I have a new book out, Full Court Press: How Pat Summit, a High School Basketball Player, and a Legal Team Changed the Game, which I co-authored with a brilliant young writer named Amanda Swanson. It is the story of a game-changing lawsuit (and I mean that literally) back in the 1970s in which the late great Pat Summit testified as an expert witness. You can order it from Amazon.com, or from the University of Tennessee Press, buy it at your local bookstore, or get it from the back of my car. Yes, I make house calls in the Bill Haltom Book Mobile.

You can also read me 24/7 on my blog, www.billhaltom.com.

My hero and fellow Memphian, the late great Elvis Presley, famously said, “Never do an encore.”

And so, like Elvis, I will now leave the Tennessee Bar Journal building. Thank ya … Thank ya very much! 

BILL HALTOM is a shareholder with the firm of Lewis Thomason. He is a past president of the Tennessee Bar Association and a past president of the Memphis Bar Association. Read his blog at www.billhaltom.com.

The Editor Always Gets the Last Word

Bill probably felt obligated to say I was always right, but the real story is that he nearly always hit the nail square on the head and there wasn’t ever much to fix.

Bill served on the Journal’s inaugural Editorial Board, back in 1989, with Don Paine and Mary Martin Schaffner. I had been with the TBA for a few years by then and when that board came into my life I realized I hadn’t known what I had been missing, and how lucky I had gotten. (I am still grateful for it.)

At that time I think Bill was still pretending to be only a lawyer, not a writer, too. We immediately began speaking the same language — commas, publishers, hilarious takes on mundane topics. There were no other communications-types on staff then, and for him to understand me meant so much.

He had my back on several occasions (warranted and probably also unwarranted), the details of which we do not need to rehash here.

He became the board’s first chair, in 1993. He served until 2003 when he stepped down when elected TBA vice president. He never stopped writing, however, as he explains in his column at left.

He started writing “But Seriously, Folks!” in the July/August 1993 issue and here we are, 25 years and four months later. When Bill left the Editorial Board I missed him so much, but at least I had that monthly interaction where I was hassling him for his column or telling him to fix things. I will miss that. Bill, you are one of a kind, a friend, a writer. This magazine and I owe you so much. But seriously. 

— Suzanne Craig Robertson, editor

See the next page for a look at what will happen next in the space formerly known as “But Seriously Folks!”
Where Do You Find Inspiration?

This month we introduce a new feature, back here on the last page. After 25 years of reading Bill Haltom’s column on this page every month, there will be a big space to fill — we know you will need something fun to raise your spirits, to inspire you in your work. So we offer you “SPARK,” a rollicking page of random, light-hearted, law-related ideas and thoughts, with perhaps a spark of inspiration.

To kick it off, we asked our long-time columnist a few burning questions before we let him go:

TENNESSEE BAR JOURNAL: Where do you find inspiration for your writing? How does the magic happen?

BILL HALTON: People share stories with me, and I ask them if I can share their stories in my columns and books. It’s that simple.

We lawyers live in a world of words: the spoken word in court or in negotiations with other lawyers, and the written word in pleadings and briefs and correspondence. We lawyers are natural writers, and I tell lawyers who would like to write to follow the advice of the old Nike ads. Just do it.

Think of an experience that has inspired or challenged or amused you, and write about it. Preserve it for yourself, your family, your friends and even folks you don’t know. Everyone has their own unique story. Share it.

TBj: How or why did you come up with the idea for this column?

BH: The credit or blame for my column goes to United States District Judge Pamela Reeves. Back in the ’80s, she became the editor of the Tennessee Young Lawyers newsletter. She called me one day and said she remembered the humor columns I wrote for the UT Daily Beacon when we were undergrads at UT. She asked if I would like to write a similar column for the YLD newsletter on the lighter side of law practice. I did, and after Pam and I both “aged out” of the YLD, my column moved to the Journal.

TBj: What’s your favorite column?

BH: My column I most enjoyed writing was “The Lawyer’s Typewriter” (December 2012, TBJ). It was about the typewriter my father gave me for Christmas when I was in high school. I used that typewriter to write term papers in high school and college, case briefs in law school, and yes, my first columns for my high school newspaper (the Frayser High Ram Page), the UT Daily Beacon, and ultimately the Tennessee Bar Journal. The column brought back great memories of my wonderful father, and my lifelong love for writing.

TBj: When you passed the bar, you were a lawyer. When did you first realize that you are also a writer?

BH: Since I was a boy I always dreamed of being both a lawyer and a writer, and I have been able to be both! My life as a full-time trial lawyer and part-time writer has really been about the same calling. I love to tell stories. I have shared stories about my clients before judges and juries, and shared other stories in my columns and books.

TBj: What are you going to do in retirement?

BH: I plan to travel with Claudia, spend time with my kids (and someday, perhaps grandkids) and keep writing on my blog, in any newspaper that will print my stuff, and in more books. In other words, I plan to keep telling stories …

SPARK ★ AN INTERVIEW WITH BILL HALTON

This month we introduce a new feature, back here on the last page. After 25 years of reading Bill Haltom’s column on this page every month, there will be a big space to fill — we know you will need something fun to raise your spirits, to inspire you in your work. So we offer you “SPARK,” a rollicking page of random, light-hearted, law-related ideas and thoughts, with perhaps a spark of inspiration.

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