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SPEAK UP.

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Speak Up
Tennessee’s New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights
by Todd Hambidge, Robb Harvey, John Williams, Braden Boucek and Dan Haskell

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Empty Mansions by Bill Dedmon and Paul Clark Newell, reviewed by Jim Ramsey

Tell Us a Story
by Suzanne Craig Robertson
I graduated from the University of Tennessee College of Law one December at the ripe old age of 24. I became a Doctor of Jurisprudence, but the elation of graduation was short-lived. You lawyers have been there. It quickly hit me that I was just weeks away from taking the scariest test of my life, the bar exam. Fail it and years of work might be for naught. Pass it and you’re in the club. Lawyer. On top of the world.

Boy, was that young woman naïve. My concerns were spot on about the exam and how much I didn’t know. I was totally unrealistic in thinking that passing a big test and getting a license meant I knew how to be a lawyer. I did pass, certainly another cause for celebration, but it only meant that I had potential. I didn’t even have a job. I quickly learned, though, that making mistakes and having mentors are two of the best ways to become competent.

My first employment was simply a contract gig. John Lockridge, a prominent Knoxville lawyer, had an appellate brief due in two weeks and hired me to write it. The brief turned out pretty well. Soon after I filed it, I asked him what happened next. He said “Oral argument. You did request oral argument, didn’t you?” Momentarily, the room went black. “If I did that,” I blurted out, “how did I do it?” A client arrived at that point, and John told me we would deal with this later.

Meanwhile, I was in a complete panic. How can this be fixed? I re-read the rules and learned what I should have done. I called the appellate court clerk in Knoxville, a very kind gentleman, and explained my dilemma, undoubtedly in a quasi-hysterical tone of voice. “Come to my office right now and bring a red pen,” he instructed. I rushed the two blocks to his office, red pen firmly in hand. With the whole office staff looking on, he had a little fun at my expense, having me hand write “ORAL ARGUMENT REQUESTED” on the original and all copies of the brief with my red pen.

I expected to be fired that day for making the biggest mistake in my four-week long career. Instead, I was told “Listen, kid (and I was a kid), other than letting the statute of limitations run, there are very few mistakes you can make that I can’t fix.” I don’t know, but strongly suspect, that he had already called the clerk before I did, knowing that I was desperate to correct my error. I do know that, on that day, I had an older, wiser lawyer who had my back. That was the first, but not nearly the last, time he either fixed my mistake or helped me to avoid one. He took me under his wing, dragged me to court all over East Tennessee, and let me watch and learn. How to try a case; negotiate a settlement; deal with unreasonable opposing counsel or a client with unrealistic expectations. And most importantly, how to deal with, and read the body language of, a trial judge.

As president of the TBA, I have had numerous conversations about how to help recent law school graduates transition into being competent lawyers. Even with the great job our law schools do in teaching analysis and writing skills, and providing some limited hands-on experience, their goals are tied to graduation and passing the bar exam.

Have You Helped a Lawyer Today?

We all need mentors. We should all be mentors . . . And if you or I ever reach the point we think we know it all, send us home, because we don’t.

PRESIDENT’S PERSPECTIVE SARAH Y. SHEPPEARD

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Another mentor was Don Paine, who, ironically, I got to know when we were adversaries in a shareholders’ derivative action. He encouraged me to become involved in bar work, taught me the importance of professionalism, that adversaries need not be adversarial outside the courtroom, and that research can be fun. He helped a shy young lawyer learn to speak to and teach a room full of several hundred people.

So what’s the point here? We all need mentors. We should all be mentors. Other lawyers watch us do what we do. And if you or I ever reach the point that we think we know it all, send us home, because we don’t. The newly admitted lawyer, no matter how bright or talented, has so much to learn, partly because he hasn’t had the opportunity to make the mistakes that most of us have. And the more seasoned among us, while we can and must be mentors to others to make this profession stronger, well, we still don’t know it all. And even if we did, the law is ever evolving.

Local bars and the TBA have mentoring programs, and the TBA’s is being re-evaluated. We all have a professional obligation to “pay it forward” with or without a formal program. But that obligation does not stop when your favorite young associate gets her sea legs. Or wins his first jury trial. I most recently helped a lawyer with an issue last week, and he had 25 years of experience. And another lawyer helped me yesterday, and the information I learned will serve my client well. I’m told the great Tennessee statesman, Howard Baker, was fond of saying that “Public life, in every aspect, is a collaborative enterprise.” So, my friends, is the practice of law. Have you helped a lawyer today? Please do. It makes our profession stronger.

SARAH Y. SHEPPEARD is a shareholder in the Knoxville office of Lewis Thomason and a Rule 31 Listed Mediator. You can reach her at SSsheppeard@LewisThomason.com.
SUPREME COURT SEeks Comment on Proposed Amendments

The Tennessee Supreme Court is seeking written comments concerning recommended amendments from the Advisory Commission on the Rules of Practice and Procedure, which met this summer to complete its 2018-2019 term. The commission made recommendations to Rule 5 of the Rules of Civil Procedure, Rule 26, Rule 33 and Rule 37. Written comments may either be submitted by email to appellatecourt-clerk@tncourts.gov or by mail addressed to James Hivner, clerk, 100 Supreme Court Building 401 7th Ave., North, Nashville 37219-1407. The deadline for submissions is Dec. 13.

COURTS

Court Abandons Doctrine of Abatement Ab Initio

The Tennessee Supreme Court in August ruled unanimously that the Court of Criminal Appeals should no longer vacate convictions when criminal defendants die during an appeal guaranteed by law, known as an appeal as of right from the conviction. In State v. Mutory, the court unanimously concluded that, because of changes in the public policy of Tennessee in the arena of victims’ rights, the doctrine of abatement ab initio should be abandoned. The court majority referred the issue to the Advisory Commission on the Rules of Practice and Procedure for further study and, if appropriate, for a recommendation of a procedure to replace the doctrine.

Grants to Assist in Child Support Cases Available

Money is now available from the Administrative Office of the Courts for developing or continuing programs that address the needs of never-married, self-represented litigants and focus on services to help them resolve any or all issues concerning parenting and visitation in child support cases or cases involving child support issues. These initiatives may include efforts such as mediation programs, self-help centers, legal clinics and unbundled legal services.

Report: Lack of Diversity Among State Supreme Courts

A recent report from the Brennan Center for Justice highlights a “critical but under-scrutinized” problem: the lack of racial, ethnic and gender diversity among state supreme courts. Twenty-four states currently have all-white supreme courts, and only 15 percent of seats on state supreme court benches are filled by people of color. Women currently hold 36 percent of state supreme court seats, though in Tennessee...
Women now hold three of the five seats. Tennessee, however, has not had a justice of color since the retirement of A. A. Birch Jr. in 2006.

**LEGAL**

**Legal Sports Betting Likely Won’t Be Ready for Football Season**

Though the Tennessee General Assembly passed a bill this year to legalize sports betting in the state, gamblers still might not be able to place wagers come football season, the Nashville Post reports. Senate Speaker Randy McNally told reporters in August that he would prefer that the full gambling regulatory body be seated before the group begins setting up rules for sports betting in the state. Gov. Lee opposed the sports betting proposal and allowed it to become law without his signature.

**AGs Urge Limited Tobacco Use in Streaming Content**

Tennessee Attorney General Herbert H. Slatery III joined a bipartisan coalition of 43 attorneys general in August in urging the streaming industry to limit tobacco use in their video content. Because of the growing use of tobacco products among teens, the attorneys general urged the streaming industry to take proactive steps to protect the lives of young viewers.

According to the Center for Disease Control and Prevention, the number of middle and high school students using e-cigarettes rose from 2.1 million in 2017 to 3.6 million in 2018.


**NATIONAL NEWS**

**TBA Represents at ABA Meeting, Lewis Honored**

At the American Bar Association’s annual conference in San Francisco in August, the TBA hosted the Tennessee delegation breakfast, which drew a number of ABA leaders, including current President Robert Carlson, President-elect Judy Perry Martinez, Treasurer Michelle Behnke and House of Delegates Chair William Bay.

Former TBA President George T. “Buck” Lewis presided over the 2019 ABA Pro Bono Publico Awards on Saturday as chair of the ABA Committee on Pro Bono and Public Service. Lewis has chaired the committee the past three years. Prior to the start of the program, ABA President Bob Carlson surprised Lewis with a Presidential Citation honoring his years of service and dedication to the cause of access to justice. The Pro Bono Publico Awards Ceremony honored attorneys and law firms from across the country who have dedicated significant time and resources to pro bono work.

**Law Day 2020 to Commemorate 100 Years of the 19th Amendment**

The ABA’s theme for Law Day 2020 is “Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100.” In 2019-2020, the United States is commemorating the centennial of the transformative constitutional amendment that guaranteed the right of citizens to vote would not be denied or abridged by the United States or any state on account of sex.

**CORRECTION**

An item in the August *TBJ* gave the incorrect account of sex. LAET was awarded $91,000, according to LAET’s Debra L. House. The amount listed was $91,000, according to LAET’s Debra L. House. The amount listed was the total amount to all grantees. The *Journal* regrets the error.

PAST TBA President John Tarpley shares a laugh with the newly installed president of the American Bar Association, Judy Perry Martinez of New Orleans, during a breakfast for Tennessee leaders during the ABA annual meeting. Photos by Barry Kolar.
The Tennessee Bar Association honored Franklin attorney Howard Wall during the American Bar Association Annual Conference in San Francisco. Wall is a past chair of the ABA’s Health Law Section and currently serves on the ABA Board of Governors. The reception in his honor drew a large crowd of Tennessee attorneys, friends and supporters to the annual event. With him are, from left, Jamie Thompson, Joycelyn Stevenson, Wall and former TBA President Lucian Pera.

Baker Donelson has selected Samuel T. Bowman to serve as the firm’s next pro bono shareholder. Bowman has served for more than 10 years as the chair of the Nashville office’s Pro Bono Committee, where he coordinated pro bono matters, assisted with local legal aid organizations and handled individual pro bono cases. In his new role, Bowman will be responsible for overseeing the continued development, growth and administration of pro bono programs across the firm’s 21 offices. He is also a member of the TBA’s Access to Justice Committee.

Miranda Christy has joined the Nashville law firm of Dodson Parker Behm & Capparella as a shareholder. Her practice will include finance, business transactions and real estate matters, in addition to working with nonprofit organizations. Most recently, Christy was in-house counsel at UBS Investment Bank. She previously practiced with Stites & Harbison.

The Williamson County Bar Association recently announced the election of new officers. TBA members among the group are President David Veile with Schell & Oglesby; Treasurer Whitney Harrington with Harrington Law; and Secretary Eric Larsen with Larsen Law. Katie Zipper with Zipper Law completed her term as president and now assumes the position of immediate past president. All practice in Franklin.

Nashville lawyer Steve Groom has joined Franklin Synergy Bank as general counsel and executive vice president. He previously worked at Neal & Harwell and in executive and general counsel roles with two large public companies. He will serve as the bank’s first general counsel. Groom joins chief legal counsel Julian Bibb, who oversaw the hiring process for the new position.

Bradley Arant Boult Cummings lawyer Stephanie Hoffmann has been selected for the American Health Lawyers Association (AHLA) Leadership Development Program. She will participate in the “Hospitals and Health Systems Practice Group” segment of the program, which is designed to cultivate future leaders of the association. Based in Bradley’s Nashville office, Hoffmann serves clients in the health care industry on a range of regulatory, operational and transactional matters. She previously worked at a commercial health insurance company and an international women’s health organization.

In other news from Bradley, the firm recently announced that it has launched a Cannabis Industry Practice with a multidisciplinary group of attorneys dedicated to meeting the specific needs of cannabis and hemp industry clients. Finally, the firm announced that its attorneys were instrumental in U.S. House of Representatives’ passage of the Honoring American Veterans in Extreme Need Act or “HAVEN Act.” Over the last two years, firm attorneys have worked pro bono to change U.S. bankruptcy laws to better protect disabled veterans in financial distress. The legislation is designed to treat disability benefits the same as Social Security disability benefits, which are not included in the calculation of disposable income in bankruptcy.

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

Success! is compiled by Stacey Shrader Joslin and Linda Murphy. If you have questions, contact Linda at lmurphy@tnbar.org. For information on paid advertisements, please contact Stacey at advertising@tnbar.org.
proceedings. The bill is now pending before the U.S. Senate. Personal injury firm Cory Watson Attorneys recently opened a new office in Memphis, marking the firm’s second location in Tennessee (the firm previously opened offices in Nashville). Working out of the Memphis office are TBA members Hamilton Jordan and Tiffany L. Webber. Jordan, a graduate of Cumberland School of Law, previously worked for a plaintiff’s firm representing personal injury litigation clients. He also has experience with products liability, employment, sexual harassment and insurance litigation. Webber, a graduate of the University of Alabama School of Law, began her legal career at Nahon, Saharovich & Trotz, representing clients in complex personal injury and class action litigation. The new office is located in the Clark Tower at 5100 Poplar Ave., Suite 2700, Memphis 38137 and can be reached at 901-402-2000 or www.corywatson.com.

Davidson County Criminal Court Judge Jennifer Smith has officially been named presiding judge of the Davidson County Drug Court. She replaces former judge Seth Norman who retired in 2018. The drug court, founded in 1997, was one of the first residential drug court programs in the country and remains one of two such programs in the state. Smith was appointed to fill Norman’s seat on the 20th Judicial District Criminal Court last year.

Nashville attorney Wade B. Cowan has been elected president of the National Employment Lawyers Association (NELA), the largest professional membership organization in the country dedicated to promoting the interests of employees and lawyers who represent them. Cowan is a founding member and past president of NELA’s Tennessee affiliate, the Tennessee Employment Lawyers Association. He is a 1981 graduate of the Vanderbilt School of Law and a solo practitioner focusing on representing employees in employment discrimination, retaliation and civil rights cases.

Jones Wilson “J.W.” Luna has joined Butler Snow’s Nashville office. He will practice in the firm’s regulatory and government groups. Luna has vast expertise in government relations, environmental law, health care, administrative law and other regulatory areas. In previous positions, he managed the liquidation of a significant medical malpractice insurance company and worked for a major natural gas distribution company. He also served for eight years in the cabinet of former Gov. Ned. R. McWherter.

Christian Barker has joined the Nashville office of Lewis Thomason as special counsel to launch the firm’s Entertainment Law Practice. Barker worked for nearly eight years as a solo entertainment attorney with a focus on the music industry. He also has represented clients in the TV/film, fine arts and public relations/digital media realms. Barker began his career as an artist manager and continues to work as an artists & repertoire consultant providing talent scouting, song-plugging and career advising services to songwriters, artists, labels and publishers. The firm also announced that Michael Holder and Kaycee Weeter have joined the Nashville office as associates. Holder, a recent graduate of the Belmont University College of Law, has interned at the U.S. Attorney’s Office for the Middle District of Tennessee, the Tennessee Attorney General’s Office and the District Attorney’s Office for Davidson County. Weeter joins the firm’s Healthcare Practice Group where she will focus on malpractice defense. She previously worked at a boutique litigation firm where she handled health care liability actions.

Jamie Leaver joins the Nashville office and will practice in the areas of family law and insurance law. Nelson T. Rainey joins the Memphis office and will practice in construction and real estate law. Jennifer Dobbins Franklyn joins the Knoxville office and will practice in family law and insurance law.

William M. Leech joins the Chattanooga office and will handle transportation cases and appellate work. Contact Stacey Shrader Joslin sshraderjoslin@tnbar.org (615) 277-3211
Former Tennessee State Senate Majority Leader and Milan attorney WILLIAM “JERRY” FLIPPIN died on Aug. 3. He was 91. A founding partner of Flippin, Collins & Hill in Milan, he was a graduate of Vanderbilt Law School and had been an active member of the Tennessee Bar Association and other professional groups, serving for many years in the TBA House of Delegates and as chair of the Legal Section of the American Public Power Association. In a 2004 Tennessee Bar Foundation interview, Flippin talked about his life and his career in the law. (See it at www.youtube.com/watch?v=nJ_MGmSBmvY.) Memorials can be sent to The Mustard Seed, 2027 S. 2nd Street, Milan 38358, Samaritan’s Purse, P. O. Box 3000, Boone, NC 28607, or the donor’s choice.

Dunlap lawyer STEPHEN THOMAS GREER died on Aug. 6 at the age of 70. Greer attended the University of Tennessee College of Law, where he was a member of the Law Review, and graduated in 1973. He then returned to Dunlap, where he practiced for 46 years. He was a member of the Tennessee Trial Lawyers Association and served as its president from 2006 to 2007. Greer was also a member of the American Board of Trial Advocates and American College of Trial Lawyers. Contributions in Greer’s memory may be made to the Sequatchie County Library Foundation, 227 Cherry Street, Dunlap.

Germantown lawyer BERNIE M. KUSTOFF died July 19 at the age of 81. A native of Arkansas, Kustoff earned his law degree from the University of Arkansas and later moved to Memphis. He practiced law for 55 years and was active in the Tennessee and Memphis bar associations. He was named a TBA Senior Counselor in 2014. At the time of his death he was practicing as a solo lawyer at the Law Firm of Bernie M. Kustoff.

Clarksville lawyer JAMES E. “ED” MAURER died July 15 at the age of 74. A graduate of Ohio Northern University Petit College of Law, Maurer served in the Army during the Vietnam War. He then worked in private practice in Bolivar as well as an attorney for the Western Mental Health Institute before moving to Middle Tennessee. Maurer joined the Tennessee Department of Intellectual and Developmental Disabilities as general counsel and served there until retiring in 2002. Following retirement, he founded the Special Needs Law Center of Maurer & Gardner with attorney Cynthia Ellen Gardner, who will continue to operate the firm.

Livingston attorney BRUCE EDWARD MYERS died on Aug. 6. He was 76. Myers graduated from the University of Tennessee in 1966 with a degree in accounting; then after his service in the U.S. Army, he received his law degree at UT.

Memphis lawyer LANCELOT LONGSTREET MINOR III died July 16 at the age of 70. A native of Memphis, Minor earned his law degree from Memphis State University Law School and began practicing in 1977. He later was named a partner with Bourland, Heflin, Alvarez, Minor & Matthews firm where he continued to serve until earlier this year. Minor was a fellow of the Tennessee Bar Foundation and a member of the Downtown Memphis Rotary Club, University Club of Memphis and Christian Legal Society. Memorial donations may be given to Christ Community Church, 715 St. Paul Ave., Memphis 38126 or to First Evangelical Church, 735 Ridgelake Blvd., Memphis 38120.

Livingston attorney JOHN ROBERT OFFICER died on Aug. 6, at the age of 76. He was born in Overton County and graduated from the University of Tennessee College of Law in 1966. He practiced law in Livingston for 53 years until his death. He also served as Overton County General Sessions judge from 1998 through 2014 and was recognized for his work with the Genesis House, an organization for victims of domestic violence, with Child Advocacy Services, and with child abuse prevention and awareness in Overton County. Memorial donations may be made to the Genesis House or Child Advocacy Services CASA.

Memphis lawyer JOHN DANIEL “DANNY” RICHARDSON died April 11 at the age of 66. A 1978 graduate of Memphis State School of Law, Richardson started practicing as a trial lawyer and over the course of a 40-year career handled hundreds of jury trials. He was a Rule 31 Mediator and a member of the American Association for Advancement of Science, American Bar Association, Association of Certified E-Discovery Specialists, Association for Psychological Science, Defense Research Institute Inc., International Association of Privacy Professionals, Memphis Bar Association, Neuroethics Society, New York Academy of Sciences, Sedona Conference and Tennessee Defense Lawyers Association. Richardson was also active in the Tennessee Bar Association, serving as a member of the executive committee for the Law Practice Technology Section. In lieu of flowers, donations may be made to The Community Legal Center, 910 Vance Ave., Memphis 38126 or to The Dorothy Day House, 1429 Poplar Ave., Memphis 38104.

Crossville attorney and former county commissioner HARRY D. SABINE died July 31. He was 78. A University of Tennessee College of Law graduate, Sabine practiced law in Crossville for 51 years and was a long-time member of the TBA’s Estate Planning and Probate Section. He also served as a captain in the U.S. Marine Corps and a JAG officer during his deployment to Vietnam in 1967. In lieu of flowers, donations can be made in Sabine’s memory to the Art Circle Public Library in Crossville or the Cumberland County Chess Club.
DISABILITY INACTIVE
The law license of Washington County lawyer Tracey Alice Berry was transferred to disability inactive status on July 29. Berry may not practice law while on inactive status. She may return to the practice of law after reinstatement, which requires a showing of clear and convincing evidence that the disability has been removed and she is fit to resume the practice of law.

The law license of Knox County lawyer Charles Gilman Currier was transferred to disability inactive status on July 19. Currier may not practice law while on inactive status. He may return to the practice of law after reinstatement, which requires a showing of clear and convincing evidence that the disability has been removed and he is fit to resume the practice of law.

The Tennessee law license of North Carolina lawyer Cheryl L. McClary was transferred to disability inactive status on July 16. McClary may not practice law while on inactive status. She may return to the practice of law after reinstatement, which requires a showing of clear and convincing evidence that the disability has been removed and she is fit to resume the practice of law.

The Tennessee Supreme Court denied the transfer of Shelby County lawyer Paul James Springer Sr.’s law license to disability inactive status on July 23. On June 19, Springer contended he was suffering from a temporary disability or infirmity that prevented him from responding to a disciplinary proceeding. The court ordered Springer to provide medical documentation of his disability within 10 days and when he did not, granted him two extensions. At the conclusion of these extensions, the court denied the request.

REINSTATED
Blount County lawyer Ted Austin Burkhalter was reinstated to the practice of law after having been suspended for one year on June 18, 2018. Burkhalter filed a petition for reinstatement one year later on June 18. The Board of Professional Responsibility found that the petition was satisfactory and recommended that the state Supreme Court reinstate him. The court issued the reinstatement order on July 9.

Davidson County lawyer Sherrie Durham was reinstated to the practice of law after having been placed on inactive status in February 2014. The Board of Professional Responsibility found that the petition was satisfactory and recommended that the state Supreme Court reinstate Durham. The court issued the reinstatement order on July 15 with an effective date of July 3.

Missouri lawyer Loni Jennifer Hodge was reinstated to the practice of law after having been placed on inactive status in May 2013. The Board of Professional Responsibility found that the petition was satisfactory and recommended that the state Supreme Court reinstate Hodge. The court issued the reinstatement order on July 9 with an effective date of June 18.

DISCIPLINARY DISBARRED
The Tennessee Supreme Court disbarred Loudon County lawyer Arthur Wayne Henry from the practice of law on July 24. The Board of Professional Responsibility determined, and the court accepted, that while handling an estate matter, Henry misappropriated client funds, forged a document, made misrepresentations to clients that their cases were progressing normally, failed to act diligently, failed to adequately communicate with clients, failed to place unearned fees in his trust account, and failed to advise clients he had been suspended. After being terminated from representation, Henry failed to refund clients’ unearned fees, return files and respond to the board’s requests for information. His actions were determined to violate Rules of Professional Conduct 1.3, 1.4, 1.15(b) and (d), 1.16(d), 3.2, 8.1(b), and 8.4(a), (b), (c) and (g). As a condition of reinstatement, Henry must also make more than $55,000 in restitution to six clients.

SUSPENDED
Rutherford County lawyer Robert John Foy was temporarily suspended from the practice of law on July 3. The Tennessee Supreme Court took the action after finding that Foy misappropriated a client’s funds and posed a threat of substantial harm to the public. Foy was immediately precluded from accepting any new cases. The court also directed Foy to provide a list of financial insti-

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.
Supreme Court also found that Abioto: (1) was not diligent in the preparation and filing of a civil complaint; (2) filed the complaint in the wrong venue; (3) failed to comply with a court order setting a deadline for serving defendants; (4) relied on Mississippi’s statute of limitations deadlines instead of Tennessee’s, which had expired at the time of filing; (5) filed an action in a Mississippi court without the knowledge or consent of her clients; and (6) formally withdrew from representation without serving any of the defendants in the case. Her actions were determined to violate rules 1.1, 1.2, 1.3, 1.4, 3.1, 3.4(c), 7.1 and 8.4(a)(d).

Hawkins County lawyer Gerald Todd Eidson was censured on July 10 based on one complaint of misconduct. Eidson had been appointed to represent an incarcerated client who had filed a pro se petition for post-conviction relief. The Tennessee Supreme Court found that he failed to adequately communicate with his client and did not act diligently. As a result, the petition was dismissed by the trial court. Eidson was able to have the dismissal set aside and the client was appointed new counsel. Eidson agreed to a conditional guilty plea acknowledging that his conduct violated Tennessee Rules of Professional Conduct 1.3, 1.4 and 8.4(a). In addition to imposing the censure, the court directed Eidson to engage a practice monitor for one year and meet with the monitor on a monthly basis to review basic office procedures.

On July 18, Lewis County lawyer Larry Joe Hinson received a censure for violating Rules of Professional Conduct 1.5, 3.4(c) and 8.1(b). Hinson was paid $1,500 to represent a client in a divorce action. He did not have a written fee agreement and was suspended from the practice of law before he could conclude the representation. Hinson offered to reimburse his client $750, but failed to respond to requests from the Board of Professional Responsibility to ensure compliance with the offer. Hinson finally confirmed that he reimbursed his client but failed to comply with notice obligations for suspended attorneys, which required filing an affidavit with the board.

Williamson County lawyer Tiffany Marcilyne Johns received a censure on July 24. Johns was hired to defend a client on a petition for contempt. The petition alleged the client had sent text messages to a neighbor in violation of an order of protection. Prior to any evidentiary hearing on the matter, Johns recommended the client settle the matter by paying the neighbor’s alleged lost wages and attorney fees. Johns and opposing counsel believed the clients had reached an agreement, but later Johns’ client contacted her to say the matter was not settled. Opposing counsel then provided a draft order stating that Johns’ client would pay the neighbor $5,500. Without any documentation of the lost wages and without providing a copy of the agreement to her client, Johns told opposing counsel to sign her name to the order. These actions were determined to violate Rules of Professional Conduct 1.1, 1.3 and 1.4.

On July 12, Davidson County lawyer James Gregory King received a censure for actions taken while representing a married couple pursuing civil claims after being harassed on social media. King failed to adequately confirm the scope of the representation or the amount of his fee and did not deposit unearned fee payments into escrow. King also took no action on behalf of his clients and failed to maintain good communication during the representation. His actions were determined to violate Rules of Professional Conduct 1.1, 1.3, 1.4(a), 1.5(b) and 1.15. The Tennessee Supreme Court also directed King to refund $795 in fees to his clients within 60 days.

Shelby County lawyer Edwin Charles Lee Lenow received a censure on July 12 for actions taken while representing a client in a contested divorce proceeding. A special master was appointed to oversee a hearing to equitably divide marital assets and liabilities. Lenow’s client brought a letter to the hearing, which was purported to be from the plan administrator of pension funds within the marital estate. Lenow’s client referenced the letter during her testimony, but the letter was not introduced into evidence. After
Blount County lawyer

Lawrence Emory Little received a censure on July 18 for actions taken while representing a client’s estate. The Tennessee Supreme Court found that he failed to (1) diligently administer trust and estate matters; (2) adequately communicate with beneficiaries; (3) safeguard trust and estate funds collected on behalf of beneficiaries; (4) keep adequate records; (5) provide the complete file to successor counsel; and (6) provide a full and accurate accounting of the estate within 30 days. The court determined that these acts violated Rules of Professional Conduct 1.3, 1.4, 1.15(d), 3.4(c), 5.7 and 8.4(a)(d).

On July 15, Shelby County lawyer Urura Mayers received a censure for failing to supervise a legal assistant who used her trust account to pay personal expenses. Mayers was also disciplined for causing an overdraft in her trust account by writing a check for a court filing fee before depositing client funds to cover the cost. Her actions were determined to violate Rules of Professional Conduct 1.15 and 5.3.

Davidson County lawyer Harold Scott Saul received a censure on July 15 based on two complaints of misconduct. In one case, Saul delayed drafting and executing a divorce settlement and then failed to file the documents with the court. In another case, Saul agreed to draft a buy-sell agreement but took no action for six months. In both cases, Saul failed to respond to client phone calls and other inquiries about the status of his work. His actions violated Rules of Professional Conduct 1.3 and 1.4.

Putman County lawyer Elizabeth Ann Shipley was censured on July 16 based on two complaints of misconduct. In the first complaint, Shipley was tardy in the payment of restitution to a former client—a requirement that was a condition of an earlier censure. In the second complaint, Shipley was alleged to allow an overdraft of her trust account. In October 2018, Shipley received $500 from clients in a custody case. The funds were for the prepayment of attorney fees to the court-appointed guardian ad litem. Shipley initially deposited the funds into escrow but later transferred them to her operating account. In December 2018, Shipley instructed her assistant to forward the funds to the court clerk's office but failed to specify that the funds were no longer in escrow. The assistant issued a check on the trust account, resulting in the overdraft. These actions were determined to have violated Rules of Professional Conduct 1.2, 1.3, 1.4, 1.5, 1.15(d), 1.16, 3.2, 3.4(c), 5.3 and 8.4(a)(d). In addition to imposing the censure, the Tennessee Supreme Court directed Tennyson to reimburse $2,500 in fees to the client.

John Terence Tennyson was censured on July 19 for numerous violations of the Rules of Professional Conduct while representing a client in a federal civil matter. The Tennessee Supreme Court found that Tennyson was not diligent in the preparation and filing of the matter and his nonlawyer assistant inappropriately discussed legal matters directly with the client. The client then terminated representation. After being terminated, Tennyson filed the case in state court without the client's consent. He also failed to timely serve summons on defendants and failed to formally withdraw from the action. The case was ultimately dismissed for lack of prosecution. Tennyson’s actions were determined to violate Rules of Professional Conduct 1.2, 1.3, 1.4, 1.5, 1.15(d), 1.16, 3.2, 3.4(c), 5.3 and 8.4(a)(d).
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Welcome to CLE for Tennessee.
This special section uses the icons below to indicate which amenities are included with featured CLE programs. The icons appear between the title and pricing information.

| Premium Coffee | Parking | Internet | Food |

**Faculty Highlight**

**LAUREN POOLE**

Lauren Poole is an attorney at Taylor, Pigue, Marchetti & Blair PLLC where she practices civil litigation, including creditors’ rights and bankruptcy. Poole currently serves as managing editor of the Nashville Bar Journal. She is a 2016 graduate of Belmont University College of Law. She will present at the Creditors Practice Annual Forum on Sept. 18 in Nashville at the Tennessee Bar Center.

**Nashville Hot Chicken or Memphis BBQ?** Hot chicken is one of my favorite foods!

**What’s the first (or most recent) album you purchased?** My most recent album purchase was *Arc of a Diver* by Steve Winwood.

**If you could have dinner with five people, living or dead, who would they be?** Salvador Dali, Oprah, Vincent Van Gough, Thom Yorke, Stevie Nicks.

**What is the meaning of life, in 10 words or less?** Follow your instincts and you will find what you need.

**What have you always wanted to try but never found the courage to do?** Skydiving! I think it would be such a rush, but I’m not sure I could get out of the plane.

**What would be your super power?** Unlimited one-line zingers.

**What accomplishments are you most proud of?** Being the first lawyer in my family and having my art work selected as part of the UT’s Permanent Collection.
Creditors Practice Annual Forum

September 18 in Nashville, Tennessee Bar Center
Program: 11:30 a.m. – 3:45 p.m.
Credit: 1 Dual, 3 General

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

For attorneys interested in: Construction, Creditors, Bankruptcy

This annual forum gives practitioners in the creditors practice field the opportunity to earn 3 general and 1 dual CLE credits. Attendees will learn about construction liens, hear tips for bankruptcy and judgement collection and learn how to ethically collect debt while avoiding FDCPA violations and potential lawsuits.

Speakers: David Anthony, Jarred Johnson, I’Ashea Myles-Dihigo, Gray Waldron, Griffin Dunham, Lauren Poole

Producer: Nathan Lybarger

For attornies interested in: Tax Law

September 20 in Nashville, Tennessee Bar Center
Program: 9 a.m. – 4:15 p.m.
Credit: 1 Dual, 5 General

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

For attorneys interested in: Tax Law

This year’s tax forum will have several substantive sessions focusing on trust taxation, qualified opportunity zones, sales tax, international tax, QBI and attorney well-being.

Speakers: John Bunge, J. Christopher Coffman, Carla Lovell, Brian McCuller, Shane Morris, Terrence Olsen, Hannah Smith, Venerable Panamwela Thero

Producer: David Mittelstadt

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Register now at cle.tba.org
TBA CLE is coming to a town near you for our annual Court Square Series! Each location will offer 3 hours of CLE credit, engaging content and presenters, networking opportunities and member benefits to meet your needs. As a member of the Tennessee Bar Association you can attend at no cost when you use your prepaid credits. Just register within 5 days of the program!

CLARKSVILLE
September 12, 2019

KINGSPORT
September 24, 2019

MURFREESBORO
September 26, 2019

COOKEVILLE
October 1, 2019

JACKSON
October 22, 2019

COLUMBIA
October 23, 2019

DYERSBURG
October 23, 2019

CHATTANOOGA
October 25, 2019

Stay tuned for more information! Visit cle.tba.org for the latest.
19th Annual Health Law Primer

October 16 in Nashville, Tennessee Bar Center
1 - 5:15 p.m.
Credit: 4 General

$190 Section Members
$210 TBA Members
$385 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Health Law

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

Speaker: J.D. Thomas

This program is sponsored by Baker Donelson, London Amburn.

Free WiFi

With every CLE program

31st Annual Health Law Forum

October 17 & 18 in Franklin Embassy Suites Cool Springs
Thursday, October 17, 8 a.m.-5 p.m.
Friday, October 18, 8 a.m.-4:30 p.m.
Credit: 3 Dual, 12 General

$540 Section Members
$565 TBA Members
$740 Nonmembers (includes TBA Complete Membership)

For attorneys interested in: Health Law

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

Speakers: Monica Wharton, Andrew Beatty, Bill Dean, Ian Hennessey, Shannon Hoffert, Julie Kass, Ellen Bowden McIntyre, Jeffrey Moseley, Phil Pomerance, Brian Roark, John Roberts, Katherine Steuer, Sanford Teplitzky, Sheree Wright

This program is sponsored by Baker Donaldson, Carnahan Group, Health Care Appraisers, Horne LLP, LBMC, London Amburn and Sherrard Roe Voigt & Harbison.

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- Creditors Practice Updates: 3 General and 0.75 Dual (Ethics)
- Criminal Law Updates: 3 General
- Elder Law Basics: 4 General
- General CLE: Complete 8-Hour Package
- Health Law Basics: 3 General
- Juvenile and Children’s Law: 3 General and 1.25 Dual (Ethics)
- Law Tech: 4.5 Dual (Ethics)
- Real Estate Advanced: 2.75 General
- A Lawyer’s Roadmap to Discovery: 2.5 General
- Intellectual Property Law Advanced: 1 General and 1.5 Dual (Ethics)
- Disability Law: 1.75 General and 1 Dual (Ethics)
- Tort and Appellate: 3.75 General and 1 Dual (Ethics)
- Estate Planning and Probate: 3.75 General
- Environmental Law Updates: 3 General
- Construction Law: 5.75 General and 0.75 Dual (Ethics)
- Business Law: 4.75 General and 1 Dual (Ethics)
- Labor & Employment: 5.25 General
- Family Law: 3.25 General and 1 Dual (Ethics)
- Local Government: 4 General and 1 Dual (Ethics)
- Litigation and Appellate: 3 General and 2 Dual (Ethics)
- Real Estate Essentials: 2.5 General
- LGBT Law: 2 General and 2 Dual (Ethics)
- Federal Practice Law: 1 General and 1 Dual (Ethics)
- Elder Law: 3.75 General

Tennessee Fall FastTrack
November 8 in Nashville
Tennessee Bar Center
8:30 a.m. - 5:00 p.m.
Credit: 3 Dual, 12 General

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

Don’t miss this opportunity to register and plan for 15 hours of CLE in one day!

This annual staple offers tips and updates in diverse areas of law, designed to be relevant to a wide range of practice areas. The program will provide you with 7 hours of live general credit and 8 prepaid credits to complete online anytime – at home or on your mobile device; allowing you to customize your learning to your schedule and fulfill all your Tennessee CLE requirements for the year.

How it works:
After registering, you will receive 8 hours of prepaid credit to use immediately on any of the 250 plus online programs, or at any live CLE presentation. When you attend the program on Nov. 8, you will earn your 7 live credits. Please use the prepaid credits by June 30, 2020. Have more questions? Email Section Coordinator Jarod Word.

Speakers: James Romer, Timothy Chinaris, Melanie Lane, Sean Martin, Shayne Sexton
CLE for TENNESSEE
Register now at cle.tba.org

Administrative Law Annual Forum
November 15 in Nashville, Tennessee Bar Center
9 a.m. - 12:15 p.m.
Credit: Dual 1, 2 General

Save the date! Details for this program coming soon...

Immigration Law Fall Forum
November 22 in Nashville, Tennessee Bar Center
12 p.m. - 4 p.m.
Credit: 3 General

Save the date! Details for this program coming soon...
Producer: Chay Sengkhounmany

Construction Law Forum 2020
January 24 in Nashville, Tennessee Bar Center
8 a.m. - 4:30 p.m.
Credit: TBA

Save the date! Details for this program coming soon...
Producers: Adam Knight, Jason Shade, David Taylor

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

A TBA Tradition
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- Ethics credit
- Plenty of time for sessions and skiing

SAVE THE DATE!
Tennessee’s New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights

By Todd Hambidge, Robb Harvey, John Williams, Braden Boucek and Dan Haskell

Tennessee recently adopted a Strategic Lawsuit Against Public Participation (“Anti-SLAPP”) statute to provide additional protections for certain fundamental constitutional rights. The Tennessee Public Participation Act (TPPA),¹ sponsored by Sen. Steve Dickerson, R-Nashville, and Rep. Bob Ramsey, R-Maryville, was passed without opposition in the 111th General Assembly and signed into law by Gov. Bill Lee, effective July 1, 2019.
The purpose of the TPPA is to “encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury.”2 The TPPA provides “an additional substantive remedy to protect the constitutional rights of parties and to supplement any remedies which are otherwise available[.]”3 The TPPA discourages and sanctions frivolous lawsuits and permits the early disposition of those cases before parties are forced to incur substantial litigation expenses. The Act had the support of a wide spectrum of organizations. With the TPPA, Tennessee joins more than 30 other states with anti-SLAPP statutes.

Although the TPPA is new to Tennessee, anti-SLAPP statutes are not a recent development, nor are the infringements of constitutional interests that these statutes are intended to remedy. States began enacting anti-SLAPP statutes in the 1980s in response to an increasing number of lawsuits that were filed for the purpose of discouraging the exercise of constitutional rights, often intended to silence speech in opposition to monied interests rather than to vindicate a plaintiff's rights. Aside from silencing individuals, such lawsuits were — and continue to be — used to punish media outlets for doing the investigative work that we expect of them. The cost of defending such lawsuits can be prohibitive not only for individuals, but also bloggers, internet newspapers, and substantial media organizations, which must weigh the expenditure of defense costs against the substantial costs of developing, producing and distributing new content. Numerous cases recognize that the fear of lawsuits, even frivolous ones, creates a detrimental “chilling effect” on the exercise of First Amendment rights (and rights protected by the Tennessee Constitution), which must be avoided.4

While Tennessee has had a limited anti-SLAPP statute since 1997, that statute applies only where, “in connection with a public or government issue, [any person] communicates information regarding another person or entity to any government agency regarding a matter of concern of that agency.”5 Accordingly, a person making a complaint to law enforcement might have some protection against a retaliatory lawsuit, but even that protection can be divested in limited circumstances.

The TPPA broadens anti-SLAPP protection. It does not limit its protections to communications to a government agency. The TPPA expressly applies to — and protects — the constitutional rights to petition, to speak freely (including religious expression), to associate freely, and to participate in government. Among other claims, the TPPA will apply to lawsuits claiming libel, slander or false light invasion of privacy, where the challenged statements (including publications) involve a matter of public concern, as is often the case where a SLAPP plaintiff would like to silence others or control the public messaging regarding an issue. Matters of “public concern” are broadly defined, and include issues related to: “(A) Health or safety; (B) Environmental, economic, or community well-being; (C) The government; (D) A public official or public figure; (E) A good, product, or service in the marketplace; (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or (G) Any other matter deemed by a court to involve a matter of public concern.”

continued on page 16
Given that Tennessee had only a limited anti-SLAPP statute prior to this year, it is important for the Bar to educate itself about the TPPA and consider how it may be used to protect constitutional rights and quickly dispose of frivolous lawsuits. In short, when a legal action is filed against a person (including companies or nonprofit entities) based upon the exercise of First Amendment rights in connection with a matter of public concern, that person may file a petition to dismiss any of the claims or the entire legal action.6

Specifically, the TPPA provides that a party named in a legal action involving protected rights may file a petition for dismissal “within sixty (60) calendar days from the date of service of the legal action or, in the court’s discretion, at any later time that the court deems proper.”7 Upon the filing of a petition for dismissal, discovery is automatically stayed pending a ruling on the petition, unless the trial court determines that the plaintiff has a need for specified and limited discovery in order to file an opposition.8 A petition based on legal grounds that do not require factual development will avoid expensive and time-consuming discovery, which drives up litigation costs. This includes cases subject to the constitutional “actual malice” standard under New York Times v. Sullivan and its progeny. The opposing party (usually a plaintiff) may file a response in opposition to the petition, but must do so “no less than five (5) days before the hearing or, in the court’s discretion, at any earlier time that the court deems proper.”9 In determining whether the opposing party has pled a claim, the trial court must consider any supporting and opposing affidavits, which must be admissible and competent evidence, and not speculation or legal statements.10

The TPPA provides that the petitioning party has the burden of making a prima facie case that a legal action against it is “based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.”11 If that burden is met, then the court must dismiss the legal action if: (i) the plaintiff fails to establish a prima facie case for each essential element of the claim in the legal action or (ii) the petitioning party establishes a valid defense to the claims in the legal action.12 If the court dismisses a claim or entire legal action pursuant to a TPPA petition, the dismissal is with prejudice.13 If the petition is denied and the legal action continues, the determination that the opposing party established a likelihood of prevailing on a claim may not be admitted into evidence, and this initial determination by the court does not affect the burden or standard of proof in the legal action.14

The TPPA also provides that if the trial court denies the petition to dismiss, the petitioning party may file an immediate appeal, as of right, to the Court of Appeals.15 This is the same procedure followed under the Tennessee Reporter’s Privilege/Shield Law.16 If the trial court grants the petition to dismiss, the opposing party also may file an appeal as of right.17 The standard is de novo, not abuse of discretion.18

If the court grants a petition to dismiss, the court must award to the moving party that party’s costs and reasonable attorney’s fees.19 The court also may award additional sanctions against the opposing party if deemed necessary to discourage similar behavior by that party or similarly situated parties.20 The cost and fees requirement, coupled with the threat of sanctions, discourages similar future litigation by the opposing party or by similarly situated parties who wish to pursue SLAPP litigation. If the court denies a petition to dismiss on the basis that it is frivolous or filed solely for delay, the court may award costs and attorney’s fees to the opposing party.21

Thus, the TPPA provides a new substantive remedy to protect those sued for exercising First Amendment rights. At the same time, its limit on discovery; potential quick disposition of SLAPP lawsuits; and the imposition of costs, fees, and possibly sanctions on a SLAPP filer discourage would-be plaintiffs from attempting to use the courts to trample First Amendment rights. 22

NOTES
4. See, e.g., Nike, Inc. v. Kasly, 539 U.S. 654, 664 (2003) (Ginsburg, J., concurring) (“protecting … participants [utilizing their right to free speech] from the chilling effect of the prospect of expensive litigation is … a matter of great importance”); id. at 668 (Breyer, J., dissenting) (“threat of a civil action, like the threat of a criminal action, can chill speech”); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (“Fear of large verdicts in damage suits … even fear of the expense involved in their defense, must inevitably cause publishers to ‘steer … wider of the unlawful zone,’ and thus ‘create the danger that the legitimate utterance will be penalized.’”)
7. Id.
18. Id.; Tenn. R. App. P. 13(d).
Collaborative Family Law is an alternative process for achieving agreements to dissolve marriages, developing parenting plans, and resolving other family law issues. Its most distinctive features relate to the role of attorneys and the place of discovery.

On April 1, 2019, the Tennessee Supreme Court adopted its newest rule, Rule 53 – Collaborative Family Law. The Rule gives definition to collaborative practice and guidelines for practitioners.

Collaborative lawyers are hired for the limited purpose of assisting clients in their efforts to reach mutually acceptable and durable agreement with their spouse or partner. If resort to courts for resolution of contested issues is required, collaborative attorneys must withdraw, and litigation attorneys replace them. Thus, there is a premium on settlement, not only the parties, but also the attorneys. Attorneys in the collaborative environment are more like transactional lawyers; their focus is on, and their only mark of success is getting a deal done within the bounds of the law.

Formal discovery is replaced by automatic, complete and candid disclosure of relevant information — a process collaborative lawyers find more efficient than responding to form interrogatories.

The History Behind Rule 53
Rule 53, based on the Uniform Law Commission’s Uniform Collaborative Law Rule/Act, was proposed by the Tennessee Bar Association after lengthy study.

In early 2014, then-TBA President Cindy Wyrick appointed an ad hoc sub-committee to study collaborative law. A year later, a draft Rule was presented to the TBA’s Family Law Section for review. After a full year of amendments, TBA members voted to support the Rule; it was then sent to the Tennessee Supreme Court for consideration.
Rule 53 gives definition to collaborative practice and guidelines for practitioners. …

Attorneys in the collaborative environment [are focused on] and their only mark of success is, getting a deal done within the bounds of the law.

committee on Collaborative Law to serve jointly with the Sections on Family Law and Dispute Resolution. Members of the subcommittee were Jeff Levy, Nashville; Cathy Allshouse, Chattanooga, who was then immediate past Family Law Section chair; Linda Seeley, Memphis; Ann Barker, Knoxville; former Judge Marietta Shiple, Nashville; Jackie Kittrell, Knoxville; then DR Section chair Cindy Pensoneau, Memphis; Barry Gold, Chattanooga; Helen Rogers, Nashville; then Family Law Section Chair Amy Amundson, Memphis; Grant Glassford, Brentwood; and myself.

In December 2014, after numerous meetings, the subcommittee voted to recommend adoption of a proposed amendment to Tennessee Supreme Court Rule 31 to govern the practice of Collaborative Family Law. The Rule 31 Amendment was approved for recommendation to the court by the TBA House of Delegates and the Board of Governors on Jan. 22 and 23, 2016, respectively.

Before the rule was formally proposed to the court, the Tennessee Alternative Dispute Resolution Commission heard a presentation about the proposed rule from TBA representatives and referred the proposal to a subcommittee chaired by ADR Commissioner Larry Bridgesmith.
The TBA considered proposing the rule as a free-standing court rule rather than as an amendment to Rule 31. Bridgesmith made the point that collaborative family law is by definition voluntary and never court ordered. Rule 31, on the other hand, focuses on court-annexed alternative dispute resolution. Bridgesmith and the ADR Commission’s point was persuasive; the TBA petitioned the court to adopt the UCLR/A as a separate rule on June 13, 2017. The court asked for comments, as usual, and received almost unanimously positive comments on the proposed rule including those from the Tennessee Board of Professional Responsibility, the Nashville Bar Association, the Knoxville Bar Association, and numerous Tennessee attorneys practicing family law. The court asked the TBA to respond to comments, which it did on Feb. 9, 2018.

The response acknowledged the positive feedback from the organized bar and individual attorneys but focused on suggestions by the Nashville Bar Association and some individuals. Although it was very supportive of the collaborative rule, the NBA suggested that the court consider a minimum training requirement for collaborative practitioners, and also that the mandatory withdrawal provision for collaborative lawyers be strengthened.

The TBA replied that it had considered a training requirement as part of the rule but rejected it. It was accepted that “training by those who would practice collaborative family law would be beneficial and that training is likely to develop more skilled practitioners.” However, the TBA saw value in adopting a uniform rule and stated “…none of the 18 jurisdictions that have to date adopted the UCLR/A have established a training requirement.”

The TBA continued, “The TBA sent the rule to the court without a training requirement with the understanding that attorneys practicing collaborative family law will be bound by Rule 1.1 of the Rules of Professional Conduct, which provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The TBA continued, “Consideration should be given to the comments to Rule 1.1, including Comment [2]:

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

As a matter of practice, most collaborative attorneys become members of organizations of collaborative professionals. One such organization is the Middle Tennessee Collaborative Alliance (MTCA), a group of collaboratively trained collaborative lawyers, financial professionals and collaborative facilitators. It adopted as a requirement for admission to the group, the training standards set by the International Academy of Collaborative Practitioners (IACP). The IACP requires, members to complete a two-day 14-hour basic training and complete either a 40-hour mediation training or 30-hour interest-based negotiation training.

Some on the TBA Collaborative Subcommittee, including this author, initially argued for a training requirement in the collaborative rule similar to that adopted by the MTCA. Eventually though, the importance of adopting a uniform rule and the roadblocks that administering a training requirement would pose persuaded the TBA to refrain from proposing a training requirement. Upon deeper reflection, this author came to agree with the position. Memphis attorney Lucian Pera, a former president of the TBA, who was actively involved in the discussion of the rule proposal, recently summarized his thoughts, with the understanding that here he speaks for himself and not the TBA: “After all, our regulations let any licensed lawyer practice the most sophisticated forms of law — tax law, ERISA law, probate law — and use the most sophisticated tools, even if that would, frankly, be stupid for those of us who aren’t experienced or trained.”

Regarding the NBA suggestion that the court “consider the addition of language emphasizing that the mandatory withdrawal provision contained in the collaborative family law participation agreement may not be contractually waived by the parties and their counsel if the collaborative family law process is not successful.” The TBA replied that mandatory withdrawal is required by Sections 4(b)(3) and 4(c), but it would not object.

continued on page 20
The most division on the court was detected on the issue of whether to require training of collaborative practitioners. Ultimately, the court adopted the ... rule without a training requirement.

if the court felt further clarification were needed. The final rule does not add any language to the uniform rule.

Following the close of the comment period and the reply period, the court asked the TBA to appear on Oct. 4, 2018, and address “1) the general necessity of the proposed rule; 2) the appropriate regulation of compliance with the rule; and 3) the necessity of a training requirement, and if imposed, the administration of such a requirement.” From the outset, justices expressed approval of the collaborative process for family law, but questioning indicated that members were wrestling with these three areas of focus.

The TBA argued that it was important for Tennessee to join the other 18 states and District of Columbia in part as a matter of consumer protection. As more divorcing couples seek collaborative divorce as an alternative to traditional litigation, it is imperative that there be a definition to what constitutes a collaborative approach. The rule gives that definition and is more fully discussed below. At the same time, the rule gives practitioners and clients certain protections and guidance to trial courts about handling collaborative cases.

The rule would be enforced in the same manner as other court rules. Trial and appellate courts would enforce the UCLR/A through usual mechanisms such as motions. For example, if an attorney who previously represented a client in the collaborative setting attempted to represent the client in a subsequent adversarial proceeding, their withdrawal would be demanded by the opposing party, or on the motion of the court, and the Supreme Court rule would be enforced. In situations involving ethical breaches related to the rule, for example, competence, the rule could be enforced by the Board of Professional Responsibility.

During oral argument before the court, it seemed the concern with enforcement was part of the inquiry about a training requirement, then a new mechanism such as the Alternative Dispute Resolution Commission would be required.

The TBA argued that there would be no need to establish a new ADR Commission or to add enforcement of the UCLR/A to the Commission’s mandate.

The most division on the court was detected on the issue of whether to require training of collaborative practitioners. Ultimately, the court adopted the collaborative rule as it now appears, without a training requirement.

Provisions of Rule 53
Elsewhere in this edition Ben Russ and Marlene Eskind Moses thoroughly describe how a typical full-team collaborative case differs from a traditionally litigated family law case (see page 23). They illustrate steps often used by experienced practitioners using a team of professionals in the process. While there are roadmaps, there are many routes that can be taken to get from departure to arrival at a mutually satisfactory agreement. What route is taken depends on the complexity of each case. Rule 53 sets forth the rules of the road.

Rule 53, Section 1 Introduction is a definition of the practice of collaborative family law, and it might be said that the remainder of the rule is commentary. In Section 1 we find out that collaborative law is:

- Voluntary.
- Contractually based.
- An alternative dispute resolution process.

The Participation Agreement
A participation agreement is defined at Section 4. A participation agreement is a contract that may include any agreement the parties wish about the collaborative process as long as it does not conflict with the rule. But, most important to the collaborative process, the participation agreement required by Section 4, must include a provision that the parties will not go to court to resolve any issues that arise while the parties are using the collaborative process. This is the “withdrawal provision.” It is at the heart of the collaborative process and intended to assure that the parties and counsel are focused on the transaction of entering an agreement rather than preparing for a trial where each side may be trying to make the other look as bad as possible.

If the parties cannot reach an agreement to settle their matter, the attorneys must withdraw. It is not optional for the parties and their lawyers to waive the withdrawal provision; Rule 53 states that withdrawal is mandatory “if one or both of the parties chooses to terminate the collaborative process and in fact moves...
the matter into litigation."²⁰

In addition to the mandatory attorney withdrawal provision, the participation agreement anticipates that neutral professionals, experts and advisors may be jointly hired.¹⁰ In practice, this usually, but not always, means that all advisors must be neutral. In some cases, a party may wish to consult with a financial advisor whom they have used in the past or plan to use after the divorce. However, the participation agreement often will state that non-neutral advisors will be hired only with the knowledge and consent of both parties. Where one side does use their own advisor with the consent of the other party, care should be taken to maintain the confidentiality of communication.

The Participation Agreement is also a vehicle to inform clients, and remind attorneys, of other provisions of Rule 53 that may become helpful. For example, a provision may be added that entering the collaborative process does not preclude the use of other forms of alternative dispute resolution that do not require court intervention, such as mediation.¹¹

Section 5 makes clear that a collaborative case is voluntary, and parties cannot be ordered by a court to participate in the collaborative process,¹² and states that “[a] collaborative family law process begins when the parties sign a collaborative family law participation agreement.”¹³

A collaborative case may end when one party gives notice to the other that they are withdrawing from the process or, consistent with the intent that collaborative matters by definition not involve a court in an adversarial proceeding, Section 5(d) provides that a collaborative process ends when one party files contested matters with the court. Of course, a collaborative matter may also end when a court approves a settlement and enters a final decree.

Often a collaborative participation agreement will contain a provision requiring notice of intent to withdraw from the process and a cooling off period before filing any court proceeding that would affect the termination of the collaborative proceeding. The cooling off period is intended to avoid surprise and prejudice to the nonterminating party and may be used to support a request for a postponement of any hearing scheduled by the terminating party. The cooling off period also gives the terminating party time to reflect on the decision and consult with litigation counsel. Certainly, the opportunity to consider the time and expense involved in beginning anew in the litigation process may encourage a rekindled commitment to the collaborative process.

Rule 53’s Section 6 provides that when there is a case related to the collaborative matter on file with a court, notice will be given of the collaborative participation agreement and that notice will operate as an application for a stay of proceedings. The necessity of a stay is important in venues where cases are automatically set for trial on the court’s own motion or where cases may be dismissed after a period of apparent lack of activity.

Section 7 provides that nothing “in a collaborative participation agreement will prevent a court from issuing emergency orders to protect the health, safety, welfare, or interest of a party, members of a family or household.”¹⁴

A pivotal and innovative provision of collaborative practice is reflected in Rule 53 Section 12, Disclosure of Information. The discovery section, states:

a. Except as otherwise provided by law, during the collaborative family law process a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party shall also update promptly any previously disclosed information that has materially changed and/or which becomes available.

b. The parties may define the scope of the disclosure under Subsection (a) during the collaborative family law process.

Of course, this is a profound departure from the usual practice of using form interrogatories and requests for production of documents or other discovery devices. Seasoned attorneys know what information constitutes a full and candid disclosure of information and therefore, what they need to disclose; you provide what information you would want to know if you were on the other side in order to make informed decisions. If you do not have information you need, or there are gaps in what is received, you ask for it.

In practice, a neutral financial professional such as a CPA, financial planner or a business valuator is often a central member of the collaborative team and is in charge of the information-gathering process.

Some may question whether an added professional, such as a financial neutral, makes the collaborative process more expensive and out of reach of average parties. But the financial neutrals work replaces much of the duplication of effort clients together pay for when their attorney and their staff gather and review documents before they are produced and which are again reviewed any analyzed by the attorney and staff representing their spouse. Instead, one experienced neutral professional does the work and produces analysis for both sides.

Ronald Reagan’s “trust but verify” adage is alive and well in Section 12(c), which is intended to insure the fullness and candor of disclosure of information. It provides:

The parties shall each sign, under oath, a joint sworn complete statement of assets and liabilities, . . . verifying that they have fully disclosed all marital and separate property . . . A jointly retained financial neutral may prepare the sworn statement. The parties shall make available documents to verify their sworn statements.

Sections 16 through 19 are critically important to the collaborative process although the discussion here is limited. Those sections set out the scope of confidentiality and privilege of collaborative communication. Prior to adoption of the rule, participants relied on contractual provisions in collaborative participation agreements and in agreements with nonparty neutrals. Rule 53 formalizes the protection of collaborative communication.¹⁵

Section 14 of Rule 53 obliges a collabor- continued on page 22
Certainly, minds have changed. Like mediation, collaborative family law practice offers an opportunity for couples to avoid increased animosity that often goes hand in glove with divorce litigation.

If the lawyer believes there may be a history of family violence the lawyer may not begin or continue in the collaborative matter unless the victim requests to begin or continue the process and the collaborative lawyer believes reasonable steps can be taken “to address the concerns regarding family violence.”

Conclusion
By adopting Rule 53, the Supreme Court acted to protect potential consumers of legal services by giving definition to what can and cannot be called a collaborative matter and by requiring collaborative attorneys to give potential clients information about the potential benefits and risks of the process. Equally important, it gave guidance to collaborative practitioners.

At the same time, the court gave its official imprimatur to an innovative and effective means of dispute resolution. The careers of many family lawyers span the period of time from mediation being introduced until the introduction of collaborative family law and adoption of Rule 53. It seems like yesterday that some family lawyers and judges opined that if parties could mediate their cases, they would not be getting divorced.

Certainly, minds have changed. Like mediation, collaborative family law practice offers an opportunity for couples to avoid increased animosity that often goes hand in glove with divorce litigation. Is it perfect? Attorneys whose only experience with collaborative cases is with cases that do not work out know it is not perfect. Is it more successful than the litigation process? Anecdotally, I believe so; the great majority of collaborative cases taken by MTCA members do end up in settlement.

What is certain is that I have never been hugged by the party on the other side at the end of a contested litigation case; in collaborative cases, more than once.

IRWIN KUHN was chair of the Tennessee Bar Association Subcommittee on Collaborative Law when the TBA proposed that the Supreme Court adopt what would become Rule 53. In that capacity he appeared before the court to argue for adoption of the rule. Kuhn was among the first Tennessee lawyers to be trained in collaborative family law practice and one of the most experienced. He is co-chair of the American Bar Association Committee on Collaborative Law. He is a founding member and past president of the Middle Tennessee Collaborative Alliance. He is also a member of the International Academy of Collaborative Professionals and serves on its Access to Collaboration Committee that focuses on new and streamlined approaches to collaborative practice. He is a member of Venick Kuhn Byassee Austin & Rosen PLLC in Nashville.

NOTES
3. Ibid.
9. Ibid. sec. 4(b)(3).
10. Ibid. sec. 4.
11. Ibid. sec. 22.
12. Ibid. sec. 5(b).
13. Ibid. sec. 5(a).
14. Ibid. sec. 7.
15. A scrivener’s error in section 16 was corrected by the court on July 15, 2019. It should read: A collaborative family law communication is confidential to the extent agreed to by the parties in a signed agreement.
16. §14(b).
17. §14(c)(1-3).
In collaborative law, the parties begin the process on the premise that full-disclosure and a free flow of information between the parties will propel their case toward a more timely and satisfactory resolution.

A Paradigm Shift to Collaborative Law

Resolving family law matters often includes a lawsuit with a plaintiff versus a defendant or a petitioner versus a respondent. By the very nature of the style of the case, it is adversarial. While there are numerous benefits to both practitioners and their clients by opting for the collaborative process, family law practitioners often find it difficult to switch gears and settle into the mental state needed to be successful advocates for their clients in the collaborative “ring” when the threat of litigation is off the table — especially litigators who have spent their entire careers advancing cases from start to finish and preparing clients for a courtroom battle in the event settlement negotiations go south.

Does a Resolution Have to Be Adversarial?
The answer is no. Collaborative law, unlike traditional litigation, approaches family law issues from a different and seemingly common perspective anchored in mutual self-interest.

In traditional litigation, the parties and their respective counsel seek to find out about their own side and the other side of the lawsuit largely through the discovery process. In most cases, it is relatively easy gaining access to the facts you need to discover on your side of the lawsuit. The challenge comes in uncovering all there is to know about the other side of a contentious lawsuit and the facts that often only come to light when litigation is threatened or pursued. Thus, in the traditional litigation arena there is an underlying need and ongoing pressure to complete a more formal discovery process, which often includes interrogatories, requests for production of documents, requests for admissions, depositions and even subpoenas being issued before settlement negotiations may even begin. More often than not, it also unfortunately becomes necessary to file motions to compel and seek court orders to force a party to cooperate and participate in the discovery process, not only to prepare, but to advance a case towards a timely and final resolution. As a result, trying to “simply” find out what the other side has and even what they want is a mystery to be solved often by flashing or flexing a practitioner’s litigation muscles.

In collaborative law, the parties begin the process on the premise that full-disclosure and a free flow of information between the parties will propel their case toward a more timely and satisfactory resolution. The parties share their wants, needs and interests openly as they explore their options. The parties are able to do this in what most see as an emotionally safe space with assistance of a team of trained professionals who help them maneuver through the collaborative process and navigate toward a more tailored resolution to their family law matters without the threat or fear of being forced into the courtroom to defend themselves.

What Is Collaborative Practice?
The International Academy of Collaborative Professionals (IACP) defines collaborative practice as “a voluntary dispute resolution process in which clients resolve disputes without resort to any process in which a third party makes a decision that legally binds a client.”

In general, the collaborative practice is a voluntary process in which the parties and counsel contract to follow certain protocols when negotiating settlement of a dispute. At the heart of the process is the
agreement that collaborative attorneys will be hired pursuant to limited scope representation agreements. If settlement cannot be reached, the parties may pursue more traditional litigation in court to resolve their differences; however, their collaborative attorneys are required to withdraw from representation.

The IACP defines the core elements of each party’s commitment to the collaborative process are to:

1. Negotiate a mutually acceptable resolution without having courts decide issues.
2. Maintain open communication and information sharing.
3. Create shared solutions acknowledging the highest priorities of all.3

Collaborative law may appear to be odd, less professional, conflictual and even dangerous to those who are not familiar with its techniques. However, the Tennessee Supreme Court has officially recognized collaborative practice and issued Tennessee Supreme Court Rules Rule 53, effective April 1, 2019.

What Does the Process Involve?4

1. After deciding that the family law matter is appropriate for the process and that the parties and their respective attorneys will follow the requirements, the clients sign a participation agreement. The participation agreement describes the nature and scope of the matter.
2. The clients voluntarily disclose all information that is relevant and material to the matter to be resolved.
3. The clients agree to use good faith efforts in their negotiations to reach a mutually acceptable resolution.
4. Each client must be represented by a collaborative lawyer whose representation terminates upon the undertaking of any proceeding as defined in the IACP Ethical Standards.5
5. The clients may engage mental health and financial professionals whose engagement terminates upon the

undertaking of any proceeding; and
6. The clients may engage other experts as needed.

Breaking Down the 10 Steps of the Process

1. **Beginning the process and selecting the experts.** In addition to the lawyers and the clients, experts are also hired. The types of experts vary depending on the needs of the parties and the matters to be addressed in the case. It is most helpful to engage a neutral, mental health expert to participate in the process and act as the “facilitator.” The job of the facilitator is to: meet with the parties; learn about their history; uncover the nature of the relationships in the family; become aware of triggering situations; and begin a discussion of the wants, needs and desires of the parties. The facilitator will prepare the agendas for the joint meetings and work with the lawyers and parties when communication is strained. It is also very helpful and often necessary to have a financial neutral participate in the process. This person will gather the financial information that is needed in the case and will prepare income expense statements for the parties. If a valuation expert and/or a forensic expert is needed, the parties will engage them jointly. In some cases where children are involved, a child specialist may also be beneficial.

2. **The participation agreement is then signed by the clients.** Confidentiality agreements are also signed by the parties with the professionals. When the lawsuit is filed in the collaborative setting, a notice is to be filed with the proper court stating that the parties have agreed to use the collaborative process.

3. **Discussing goals together.** Early in the joint meetings, the parties identify their goals and they discuss their interests. The sharing of the goals and interests allows the other party to hear what is truly important to the other side and why it matters to them. Among goals that are often revealed is the hope to get through the process with the least amount of animosity for the other party and with the ability to move forward peacefully with each party’s own respective lives. Other goals often include reduced costs, privacy, mutual respect, faster process and finality.

4. **Gathering the needed information.** The needed information includes the documents that define the parties’ assets and liabilities in a divorce case. The amount of expenses and the sources of income are also necessary to address any support issues. If assets need to be valued or appraised, gathering the information and documentation needed for the assets to be valued is undertaken at this stage. If children are involved, complete information regarding their health, education and welfare should also be relayed and collected at this stage in the process.

5. **Reviewing the gathered information together in joint meeting(s).**

6. **Problem solving.** After having defined the wants, needs and desires of the parties in defining their goals, the next step involves brainstorming all of the possible options for resolution of the outstanding issues to be resolved in a free and nonjudgmental setting. The possibilities are recorded and shared. Criteria can be established to ultimately evaluate the options.

7. **Choosing the final options to conclude the case.**

8. **Preparing the necessary documents to finalize the agreements reached.** Agreed Orders can be filed along the way if desired.

9. **Signing a joint sworn statement of assets and liabilities and sworn statement of income, if financial disclosure is involved.**

10. Filing the necessary documents with the court to conclude the matter.

11. Getting the agreements approved by the court with one or both of the parties present, if necessary.

Other Helpful Information and Best Practices

Inherent in the collaborative process is the confidential relationship with the client and his or her attorney. Attorneys and
their clients may meet before each joint meeting with the group to prepare for the next steps. Each lawyer will inform his or her respective client of their legal rights and responsibilities and advocate for such throughout the collaborative process.

It is often helpful for the neutral professionals to speak together or separately with attorneys (in person or on the telephone) from time to time at the onset of the case as well as before or after joint meetings without the parties present to gauge where everyone is at in the process and prepare for future sessions. The experts may choose to meet with the parties together or alone to assist with moving the matter forward. If the collaborative process breaks down, mediation can be scheduled. The lawyers do not have to withdraw under such circumstances, as mediation is another dispute resolution process. It is only if litigation ensues that withdrawal is mandatory.

It is important to have a clear agenda for each meeting with time allocated to each issue to be addressed during the joint meeting. Minutes are another helpful tool that may be used and distributed after each meeting.

Practitioners in the collaborative family law area vary in opinion as to who may benefit from this joint problem-solving process. However, most agree that if there has been a history of domestic violence in the family, the safety of the parties and the family should be addressed carefully and at the forefront of the case before signing on to the collaborative process.

Conclusion
Collaborative practice should be viewed as another alternative method in a practitioner’s toolbox to resolve issues in family law practice. Just as mediation has become well-recognized as a viable and now embedded part of the family law code in Tennessee and ordinary in practice, there is a place and a role that collaborative practice may play in the successful resolution of many family law cases. It is easy to see how a process rooted in open and sincere communication of each party’s wants, needs and interests combined with the assistance of neutral professionals and the advocacy of experienced counsel can lead to better and more lasting results as well as more stable and productive relationships between the parties long after their participation in legal process has concluded. 

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MANUEL BENJAMIN RUSS earned a bachelor of arts from Johns Hopkins University, a master of arts from University College London, and a law degree from the Emory University School of Law. He is in private practice in Nashville focusing primarily on criminal defense.

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That said, the conduct required by the “duty to mitigate” can mean one thing to one person and quite another thing to a different person, as we can see in the recent case of Kirby v. Memphis Light Gas & Water. Kirby suffered a back injury in a motor vehicle wreck accident primarily caused by one of defendant’s employees. Kirby’s neurosurgeon recommended before trial that he have spinal decompression surgery at L4-L5 and Kirby respectfully declined. Kirby explained that he previously had a similar surgery on L5-S1 more than 10 years earlier and that it took him 18 months to recover from the surgery. He testified that fact, coupled with the fact that his wife was in school (so he was the sole breadwinner), made it necessary for him to decline surgery at that time.

Kirby’s trial medical expert testified that future surgery would likely be necessary to relieve Kirby’s pain and that only surgery would correct the L4-L5 disk herniation. After a bench trial, the judge assigned plaintiff 30 percent of the fault and awarded him $150,000 in damages, which included an award for future medical expenses to cover a future surgery. On appeal, defendant argued that the award for future medical expenses was speculative, and that plaintiff had failed to mitigate his damages by stopping treatment when he did.

The Court of Appeals upheld the award, first noting that damages for future medical expenses are permitted if “reasonably certain,” but that standard “does not require proof to an absolute certainty.” The court found that the evidence supported the trial judge’s decision to include the cost of future surgery because (a) the doctor established the reasonableness of the charges for that surgery; and (c) Kirby has not ruled out having the surgery in the future.

On the “duty to mitigate,” the Court of Appeals explained that the duty cannot impose an “undue burden” or be “impossible under the circumstances.” Rather, the question is “whether the method [plaintiff] employed to avoid consequential injury was reasonable under the circumstances existing at the time.” The appellate court reviewed the evidence, found the trial judge was in the best position to determine Kirby’s credibility on the issue of why he declined surgery before trial and whether he was likely to have it in the future, and affirmed.

Did the trial judge and Court of Appeals reach the right result on the law? There are two issues. First, has a person who rejects doctor’s recommendation of surgery failed to mitigate as a matter of law? And second, does a person’s rejection of a doctor’s advice before trial preclude, as a matter of law, a recovery of costs to be incurred for accepting that medical advice in the future?

Most people will agree that no rational person would have surgery if it could be avoided or delayed with minimal risk or inconvenience. Every surgery has risks, not the least of which is infection, and economic consequences (the expense of the procedure and later medical care, loss of income, impact on a spouse’s income, etc.). A rational person (even one who can afford surgery and the related economic consequences) would weigh the risks and benefits of the surgery before agreeing to it. The fact that a doctor recommends the procedure is relevant but should not be
dispositive of the issue of whether the surgery must proceed when the doctor would prefer it proceed.

Likewise, one might reasonably forgo surgery today but plan to have it in the future. For example, a reasonable person might well say, “The surgeon says I would benefit a bilateral knee replacement today, but I am only one year from retirement. If I can put the surgery off until then I am more likely to have the time to actually do the appropriate therapy to achieve the best results from the procedures.” Health care decisions, like most decisions, frequently involve a cost–benefit analysis, and a rational person may well choose to defer treatment (and accept additional pain and inconvenience) in the short run, but still plan to address the issue at an appropriate later time.

In my judgment, the resolution of these two issues should ordinarily turn on the facts and not be resolved as a matter of law. Kirby should not be denied the right to present evidence on or argue why he elected to defer surgery. The defense should not be denied the right to introduce evidence or argue that Kirby’s decision was unreasonable, and the future surgery was unlikely to ever take place. But we should ordinarily count on factfinders, who are sworn to follow the law, to hear and see the evidence, make appropriate judgments about credibility and decide these issues. We should then count on the appellate courts to evaluate those decisions based on established standards of review.

Admittedly, this means it is difficult to predict with absolute certainty what will happen in any particular fact situation involving these issues. That is maddening for those who desire a “one size fits all” system of civil justice, where more “bright line” tests are applied “as a matter of law.”

Some bright line tests are necessary. But we must also recognize that (a) predicting how to fairly paint such lines is a very difficult task; and (b) we must use words to paint such lines, and we all know the challenges the English language presents in that regard. And, of course, the Yiddish proverb “Mann Tracht, Un Gott Lacht” (“Man plans, God laughs”) inevitably comes into play to frustrate even those with good intentions who attempt to create bright-line tests in a world filled with human beings.

The Kirby courts got it right on the law. And the law is right. 

John Day is a personal injury and wrongful death lawyer with offices in Brentwood, Murfreesboro, and Nashville. He wishes he had the wisdom, foresight, and mastery of the English language to be able to draft fair, bright-line tests in tort law that would result in predictable litigation outcomes in every injury or death scenario. Alas, he does not.

NOTES
1. No. W2017-02390-COA-R3-CV (Tenn. Ct. App. April 29, 2019). The Court of Appeals should be commended for releasing the decision in this case in less than 11 weeks after oral argument.
2. He also refused epidural steroid injections, which did not help him with his prior back issues.
3. The Court of Appeals opinion does not indicate whether defendant used the services of a medical witness to offer a contrary opinion.
4. Thus, the judgment entered for Kirby was $105,000.
5. Future medical expenses were determined to be $68,500. Because he did not receive medical treatment before trial, plaintiff gave up the right to seek damages for nonnegligent complications of surgery, such as all economic and noneconomic damages arising from infection, paralysis and death.
7. Id. at * 5.
8. Id.
W. A. Clark may have been “the most famous American whom most Americans today have never heard of.” At the time, his personal wealth rivaled the Rockefellers. When he died in 1925, Clark’s estate had an estimated worth of $3.4 billion dollars today. Clark’s fortune began in the copper mines of Montana, and included banking and railroad interests. Highlights of his life, well-documented in the book, include:

• One of 11 children born in a Pennsylvania log cabin;
• Personally funded a Salt Lake City to Los Angeles railroad, including a supply depot that became Las Vegas, located, not surprisingly, in Clark County;
• Resigned from a Montana U.S. Senate seat rather than being expelled for election fraud; and ultimately being re-elected, “perhaps honestly” the book notes;
• After his first wife’s death in 1893, stories of support for young women pursuing artistic careers and a paternity suit;
• In 1904, a surprise announcement of a secret three-year marriage in Paris to a 23-year-old woman, 39 years younger than Clark, and a two-year-old daughter, Andree. A second daughter, Huguette, was born in 1906. No evidence was found that a marriage had occurred; and
• Moving his family into a six-story, 121 room mansion he built in Manhattan, likely the country’s most expensive home.

When Clark died, Andree had predeceased him so his estate was inherited by Huguette and her four surviving half-siblings from his first marriage. His wife, Anna, received a small bequest, property from a prenuptial agreement and their beautiful “Bellosguardo” estate situated on 23 acres overlooking the Pacific Ocean near Santa Barbara, California.

With W. A. Clark’s death, the book turns its focus to the unusual life of Huguette Clark. Incredibly private, socially shy but intelligent, Huguette lived a life hidden from view of the outside world, studying to be a painter, assembling an impressive collection of art, building an exotic Japanese doll collection, and collecting rare Stradivarius violins.

After her father’s death, Huguette’s marriage to a childhood friend ended not long after the honeymoon. Huguette and Anna lived in separate luxury apartments in the same Fifth Avenue building and also spent many weeks at Bellosguardo. In 1951, Huguette also bought a 52-acre estate in Connecticut with more than 14,000 square feet in living space; however, the house remained unoccupied until it was eventually listed for sale in 2009 at $35 million. Huguette never visited the property.

When Anna died in 1963, Huguette
became even more private and reclusive. She inherited Bellosguardo and, because of memories with her mother there, she maintained it exactly as it had been during their stays. Sadly, she never visited again after her mother’s death, a period of more than 50 years.

In 1991, at the age of 85, Huguette sought medical attention in her apartment. The physician who visited found a tiny, frail woman in soiled clothes, suffering from several medical conditions. She was transported to a hospital and recovered to excellent health, but she never returned to her apartment, choosing to live the remaining 20 years of her life in a private hospital room, never leaving for walks, rides or trips.

During her lifetime, Huguette lavished gifts on friends and acquaintances, and even strangers whose stories moved her to action. Those gifts included real estate, cars and cash given to her private nurse valued in excess of $30 million. Her advisors scoured her bank accounts to prepare gift tax returns for millions of dollars of gifts because she did not keep track of them. She also resisted ongoing fundraising efforts by the hospital to bestow it with substantial gifts.

For years, Huguette ignored repeated advice to execute a will that expressed her wishes for the distribution of her property. Then, in 2005, at the age of 99, Huguette signed two wills within months of each other. The first left another $5 million bequest to her private nurse and the remainder to her father’s descendants. The second will established a Bellosguardo Foundation and also made large bequests and remainder gifts to her private nurse, goddaughter, doctor, assistant, caretakers, handyman, lawyer, accountant, and $1 million to Beth Israel Medical Center.

In May 2011, two weeks before her 105th birthday, Huguette died in Beth Israel Medical Center. To no one’s surprise, a $300 million will contest followed with allegations of undue influence and other actionable behavior.

Ultimately settled with the Foundation’s future in jeopardy, the lawyer and accountant relinquishing their bequests, $30 million in attorneys’ fees, and over $100 million in gift and estate taxes and penalties, the will contest was just the final cautionary tale so adeptly told in Empty Mansions.

The authors brought to life a riveting story of extravagant lifestyles, social status, and eccentric lives but also suggested “the Clarks may teach us something about the price of privacy, the costs and opportunities of great wealth, the aftermath of achieving the American dream.”

Don’t miss this story. As Mark Twain once noted, “Truth is stranger than fiction, but it is because Fiction is obliged to stick to possibilities; Truth isn’t.” Empty Mansions is a prime example.

JIM RAMSEY is a principal in the Nashville office of Diversified Trust Company Inc., a wealth advisory, investment management and estates and trust services firm. He is a graduate of Vanderbilt Law School. Diversified Trust recently hosted an event with Bill Dedman discussing his book and the lives of W. A. Clark and Huguette Clark.
Tell Us a Story

Kate Prince had never produced a Podcast before but that didn’t slow her down when she was given the assignment to develop a network of podcasts as another benefit for Tennessee Bar Association members. Not to be undone, she began researching how to do it. Prince is the TBA’s Leadership Development and Innovations Coordinator.

“I read through as many blogs and news articles about podcasting as I could,” she explains, “and based on that info, and with our budget in mind, chose the audio equipment I thought we’d need, the editing software and the hosting website that sends the shows out to all the platforms our listeners use.” The TBA’s podcasts are available on Spotify, Apple Podcasts, Google Play, Stitcher, TuneIn and the TBA’s website (at https://www.tba.org/node/108513).

It sounds intimidating but she points out she learned “there are no wrong answers — there are lots of ways to do it. It was a frustrating but enlightening process.”

Each episode starts with a great idea and then she sets up interviews — and then there’s the issue of editing the content once it’s recorded. “Editing is the most infuriating process in the world. It has made me want to throw my computer across the room plenty of times. But when you finish and have an end product that you’re really proud of, you ride that high ... until it’s time to do another one.”

There is pretty much always another one waiting to be produced now, since the TBA currently has three programs and plans to add one or two more. The programs in the TBA Podcast Network at the moment are Sidebar, BarBuzz and HealthyBar.

Sidebar features human interest stories from attorneys across the state. In the first episode, Prince interviewed a lawyer with an astounding story:

“I graduated from TSU with a degree in criminal justice and psychology in December of 2002,” Keeda Haynes tells her. “And I reported to Alderson Federal Prison Camp to start my sentence two and a half to three weeks later.” Today Haynes is an assistant public defender at the Metro Nashville Public Defenders’ Office. How did she get from point A to point B? Listen to the podcast and you will never forget her story of five years in federal prison and the winding road to law school and practice.

“This American Life is the best example of storytelling,” Prince says. “I want Sidebar to be like that — about attorneys in this state who people can relate to and take something meaningful away from it.”

Prince welcomes your story leads (send them to kprince@tnbar.org). She is especially interested in stories about attorney entrepreneurs who have “side hustles” in addition to practicing law, as well as attorneys who were in different professions before going to law school.

BarBuzz is a monthly rundown of TBA news and upcoming events at the local and state bar levels.

HealthyBar focuses on attorney well-being and offers best practices and tips to keep you healthy. The first episode features attorney Joanna L. McCracken, who is a founding partner of the Piper McCracken family law firm in Nashville as well as a meditation teacher and certified yoga instructor. She uses skills learned in these disciplines to educate the legal community on how to better handle occupational stress and how to use such skills to help clients. McCracken closes out the episode by walking Prince and listeners through an easy meditation exercise they can practice at home or in the office.

Some Reader Favorites

Here are some other podcasts you won’t want to miss:

• Stay Tuned with Preet Bharara, a former U.S. Attorney who breaks down legal topics in the news and engages thought leaders in a podcast about power, policy, and justice.
• The Lawyerist, a weekly show highlighting small firm lawyers with interesting practices, and business leaders with ideas for small firm management.
• Tennessee Court Talk, which brings together law experts “to discuss topics affecting judges, attorneys, law students and the people of Tennessee.” The Tennessee Administrative Office of the Courts launched it in August.
• Cold, a true crime series following the same case for 18 episodes. “Cold is a great example of good journalism,” Prince says, “and is so well produced. It takes confusing subject matter and breaks it down.”
• Also take a look at The Legal Talk Network, which groups law-related podcasts from a broad range of subjects like insurance, technology, solo practice, workers’ comp, law students, young lawyers and so much more.

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TENNESSEE LAW OF CIVIL TRIAL
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Whether used in your office while preparing for trial or in the courtroom, this book quickly and thoroughly explains the law of trial from scheduling orders through motions for new trial. The book also contains 75 of John’s tips on preparing to win at trial and forms to help you get ready for battle.

From the Table of Contents:
Chapter 1: Scheduling Orders
Chapter 2: Final Pretrial Conferences
Chapter 3: Motions in Limine
Chapter 4: Jury Selection
Chapter 5: The Rule
Chapter 6: Opening Statements and Closing Arguments
Chapter 7: Examination of Witnesses
Chapter 8: Use of Depositions at Trial
Chapter 9: Opinion and Expert Testimony
Chapter 10: Mistrials
Chapter 11: Motions for Directed Verdict
Chapter 12: Findings of Fact
Chapter 13: Jury Instructions
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Chapter 17: Motions for a New Trial and to Alter or Amend Judgment
Chapter 18: Remittitur
Chapter 19: Additur
Chapter 20: Motions for Judgment Notwithstanding the Verdict
Chapter 21: Preparing to Win at Trial

www.johndaylegal.com/tennessee-law-of-civil-trial.html

John A. Day is a board-certified trial lawyer in Brentwood, Tennessee. For more than 25 years, John has been recognized by Best Lawyers in America, and received its Nashville Area Lawyer of the Year awards for Medical Malpractice (2010 and 2014), Personal Injury (2009), and Bet-the-Company Litigation (2012).

A Fellow of the American College of Trial Lawyers and currently serving as Regent of the College for the states of Tennessee, Kentucky, Ohio, and Michigan, John has also served as President of the Tennessee Trial Lawyers Association, Chair of the Council of State Presidents of the Association of Trial Lawyers of America, and the President of the National Board of Trial Advocacy. John is also a member of the American Law Institute and the International Society of Barristers.

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