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In the 2017-2018 bar year, the Tennessee Bar Association retained a consultant to survey TBA members and some non-members on a variety of issues. One of the primary goals was to determine how the TBA might best assist and support its members. The end result, which became available in July of 2018, is a 182-page document containing a vast amount of information, distilled down to six recommendations. Those included the following:

**Update membership benefits package to include more reliable and cost-effective health insurance programs.**

Okay, so, how hard can that be? Once upon a time, health insurance programs and premiums were no big deal. Insurance companies wanted to insure. Employers wanted to provide insurance benefits. I can recall worrying much more about the cost of car insurance for a teenage son than the availability and cost of health insurance. But that was a number of years ago.

As time has passed, health insurance premiums have increased, coverage has decreased and availability has been more and more difficult. The number of bankruptcies resulting from people having no or grossly inadequate coverage is shocking, and it includes lawyers. The Affordable Care Act helped with certain aspects, such as pre-existing conditions. But for some group coverage, “affordable” is a relative term.

IPSCO, our partner in Tennessee Bar Association Member Services (TBAMS), has done a great job of brokering insurance coverage for our members in a number of areas, including but not limited to professional liability, long-term care, tele-health and cyber-security insurance. They have also brokered health insurance, helping our members find a company to provide coverage to a particular law firm.

The task at hand is different, however. While our membership fluctuates, we have approximately 13,000 members. With a larger group, the economies of scale kick in, and rates are typically significantly better than they would be for a three- or four-member firm with a handful of employees. Our TBAMS partner worked with us to find a way to establish a group insurance policy in which the group is the Tennessee Bar Association, not your law firm.

After some initial difficulties, and with the assistance of a team that included your executive director, general counsel, and some lawyers learned in ERISA, the problem was solved using a Multiple Employer Welfare Arrangement (MEWA), which permits multiple employers (in our case, law firms) to band together to form a group for purposes of coverage.

Implementing this approach required a bylaws change to meet ERISA requirements. The Board of Governors approved the change in August.

Here’s how it works: If you want to take advantage of our group policy and buying power, all of the lawyers in
your firm must be members of the TBA, although they need not all participate in the insurance plan. The firm can seek to have a non-voting law firm membership in the TBA. This triggers eligibility for your firm’s lawyers and qualified employees and their dependents to apply for coverage as part of the group.

Three facets of the group, which is through Humana, strike me as tremendously important. You won’t have to answer questions about the current status of your health. The rates are reportedly 20 to 30 percent below market rates. Also, the plan is fully insured. In other words, it’s not a self-funded plan in which the assets of the TBA are at risk.

As explained more thoroughly elsewhere in this publication and on our website, there are three different levels of coverage from which to choose. Open enrollment for 2020 runs from Oct. 1 to Dec. 1.

As always, when looking at insurance, the devil is in the details. If you are in the midst of treatment for a specific problem and want to stay with your current provider, you will want to check with Humana to determine whether that provider is covered. But for the rest of us, the opportunity to obtain cost effective coverage on a fully insured plan with no underwriting for pre-existing conditions is a marvelous member benefit. And under ERISA, this benefit is available not only for the large firm but, more importantly, also for the tiny law firm — the solo practitioner with only one W-2 employee who works 30 hours per week. And all size firms in between.

This bar year, we are focusing on providing benefits to the rural and small-firm practitioners. We hope this insurance program will be a game changer for some of them, as well as for the rest of you.

**SARAH Y. SHEPPEARD** is a shareholder in the Knoxville office of Lewis Thomason and a Rule 31 Listed Mediator. You can reach her at SSheppeard@LewisThomason.com.
YOUR TBA
TBA Board Approves Bylaws Change, Offers Group Health Insurance

The TBA Board of Governors in August voted in favor of proposed revisions to the organization’s bylaws previously published to the membership on July 31. The most substantive change created a category of nonvoting, law firm, employer-level membership. Under the revised bylaws, any law firm in which 100 percent of its Tennessee-based attorneys are members of the TBA will be eligible to become a law firm member of the association under rules established by the Board of Governors. TBA employer members will now have access to an affordable association group health insurance plan. Employer members include solo practitioners with at least one W-2 employee working a minimum of 30 hours per week. There are no health questions and no pre-existing condition exclusions.

For more information, see pages 3 and 14; or contact tbams@tnbar.org.

COURTS
General Assembly Approves, Court Sets Effective Date for 2019 Rules Changes

The Tennessee Supreme Court set Oct. 1 as the effective date for amendments associated with the 2019 rules package, which the Tennessee House of Representatives approved on Aug. 23 and the Senate approved on March 25. These rule changes include revisions to the Tennessee Rules of Civil Procedure, Rules of Evidence, Rules of Criminal Procedure, and Rules of Juvenile Practice and Procedure.

TBA President Sarah Sheppeard was the keynote speaker at the event’s Leadership Luncheon. Other highlights included the presentation of the Janice M. Holder Award to AOC Director Deborah Taylor Tate; the presentation of the Founder’s Award to Harrison D. McIver III; the presentation of the R. Riney Green Award to Jeannie Kosciolek; and presentation of New Advocate of the Year Awards to Lucy Boateng from Community Legal Center and Benjamin Danford from Legal Aid of East Tennessee. Chief Justice Jeffrey Bivins, Justice Connie Clark and former Justice Janice Holder all delivered remarks during the conference.

Public Service Efforts Recognized at EJU

More than 200 lawyers, law students and advocates gathered in August at the 2019 Equal Justice University (EJU) in Murfreesboro under the theme “One Voice, One Person, One Vote: Reflecting on Tennessee’s Role in the 19th Amendment and Exploring New Voting Rights Frontiers.”

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TOP: AOC Director Deborah Taylor Tate, left, received the Janice M. Holder Award during EJU’s Welcome Luncheon. ABOVE: Legal community leaders gather following the EJU Awards Dinner. From left, B. Riney Green, Ashby Pate, Joycelyn Stevenson, Sarah Sheppeard, Chief Justice Jeffrey Bivins and Ann Pruitt. Photos by Liz Todaro.

Three Tennessee attorneys were honored at the Equal Justice University Awards Dinner. Tennessee Supreme Court Chief Justice Jeffrey Bivins (far left) and Legal Aid of East Tennessee Executive Director Sheri Fox (far right) stand with honorees Jeannie Kosciolek, Lucy Boateng and Benjamin Danforth.
NEWS
continued from page 5

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 appellatecourtclerk@tncourts.gov or by mail to James Hinner, Clerk, Re: 2020 Rules Package, 100 Supreme Court Building 401 7th Avenue North Nashville, TN 37219-1407. The deadline for submissions is Dec. 13.

TSC Vacates BPR
Formal Ethics Opinion on Disclosure
In a recently released opinion, the Tennessee Supreme Court vacated the Tennessee Board of Professional Responsibility’s Formal Ethics Opinion 2017-F-163, first released in March 2018, which provided guidance to prosecutors about ethical duties under Rule 3.8(d) — the statute covering a prosecutor’s ethical duties to disclose evidence or information tending to negate the guilt of the accused or to mitigate the offense. On Jan. 15, the Tennessee District Attorneys General Conference filed a petition to vacate the opinion. In its unanimous opinion, the Supreme Court considered other states’ interpretations of prosecutors’ ethical rules and ultimately agreed with the position that a prosecutor’s ethical duties should be coextensive with the prosecutor’s legal and constitutional obligations.

CRIMINAL JUSTICE
Study Shows Sentencing Gap Closing
A new study shows disparities in sentencing based on race are on the decline, the ABA Journal reports. One reason for the decline at the federal level was the Fair Sentencing Act of 2010, which reduced the disparity in sentences for crack vs. powder cocaine, according to one of the study’s authors. The data was mixed on the sentencing gap between Latinos and white people at the federal level. The gap declined only when noncitizen Latinos were excluded from the data.

Federal Program Working to Reduce Violent Crime in Memphis
Three years ago, the Memphis Police Department was one of the first agencies to receive federal assistance through the National Public Safety Partnership to help combat violent crime. Since then, violent crime has decreased seven percent, including a reduction in carjackings and gun-related crimes. In early September, law enforcement officials from across the country were in Memphis to learn more about the program. Today, more than 30 cities have joined the program with the federal government dedicating $28 million in funding.

LAW SCHOOL
CJ Roberts Makes Surprise Visit
U.S. Supreme Court Chief Justice John G. Roberts Jr. was in Tennessee in September as a guest speaker at both the Nashville School of Law and Vanderbilt Law School. The unannounced visits took students by surprise but provided a unique opportunity to ask the justice questions. Judge Jeffrey S. Sutton of the U.S. Court of Appeals for the 6th Circuit also spoke to students and took questions. At Vanderbilt, Roberts addressed how he works with his four law clerks and his transition from an advocate in private practice to the judicial role. Both judges offered encouraging words to the students about their studies and ability to make a difference in the legal profession.

SEERSUCKER MATTERS
Lawyers Gather in Seersucker Solidarity to Mark End of Summer
In late August, the 8th Annual Seersucker Flashmob was held across the Volunteer State, signaling the end of summer as seersucker suits and dresses were put away for the rest of the year.

Bar groups across the state celebrated the cool cotton fabric at the end of August forming Seersucker Flashmobs, including the Chattanooga Bar Association, above. Photo courtesy CBA/Lynda Hood.
Baker Donelson lawyer George T. “Buck” Lewis was recognized with a Presidential Citation by the American Bar Association, which was presented by ABA President Bob Carlson at the 2019 ABA Pro Bono Publico luncheon in San Francisco as part of the ABA’s Annual Meeting in August. Lewis just completed three years of service as chair of the ABA Pro Bono and Public Service Committee and was honored for his work launching the country’s first interactive pro bono website now known as ABAFreeLegalAnswers. The free online legal service has been implemented in 41 states and in Great Britain and Australia. Lewis is a past president of the Tennessee Bar Association and Memphis Bar Foundation, as well as past chair of the Tennessee Supreme Court’s Access to Justice Commission.

The Knoxville law firm of Kennerly, Montgomery & Finley recently announced the addition of Douglas J. Toppenberg as Of Counsel. Toppenberg will handle family law matters and litigation, including divorce, child custody, child support and adoptions. Toppenberg is a past chair of the Knoxville Bar Association Family Law Section and a substitute Special Master in the Fourth Circuit Court. He also worked with the Tennessee Supreme Court updating the Rules of Juvenile Procedure and redrafting parenting plan forms.

Clarksville Municipal Court Judge Charles W. Smith received the 2019 Sharon G. Lee Award of Excellence at a recent meeting of the Tennessee Municipal Court Judges Conference. The award, named in honor of Tennessee Supreme Court Justice and former Madisonville Municipal Court Judge Sharon Lee, is given each year to a municipal judge who has made a significant contribution to the conference. Smith was recognized for his work establishing the Tennessee Municipal Judges Association, which was the forerunner of the conference. In addition to serving as a local judge, Smith has maintained a private legal practice in Clarksville for the past 25 years.

Bradley Arant Boult Cummings recently announced that two of its partners have been named to Benchmark Litigation’s Top 250 Women in Litigation for 2019. Leigh Anne Hodge is a member of Bradley’s Healthcare Practice Group and assistant leader of the firm’s Litigation Practice Group. She is based in the firm’s Birmingham office. Lela M. Hollabaugh is the managing partner of the Nashville office, and has experience representing natural gas pipeline companies, infrastructure clients, pharmaceutical and medical device makers, and other manufacturers.

Mark A. Fulks has been named university counsel for East Tennessee State University. A native of Elizabethton, Fulks spent the past seven years as an attorney with Baker Donelson in Johnson City. Prior to that, he was senior counsel in the Criminal Justice Division of the Tennessee Attorney General’s Office. Fulks earned his law degree from the University of Memphis School of Law and a master’s and Ph.D. degrees in public administration from Tennessee State University. He is replacing longtime attorney Edward J. Kelly, who is retiring. The firm also announced that attorney Janus Pan has been appointed to the American Health Lawyers Association’s leadership development program. Pan’s practice focuses on assisting hospitals and healthcare providers with transactional and regulatory matters. She also advises healthcare clients on federal and state laws, regulations and administrative rule changes. Prior to joining Bradley, Pan clerked for the Office of the California Attorney General, handling matters related to hospital mergers and acquisitions.

Knoxville lawyer Jonathan Cooper will serve as president of the Tennessee Association of Criminal Defense Lawyers for the 2019-2020 year. He was installed at the association’s 46th Annual Meeting in Knoxville on Aug. 10. During his year in office, Cooper says he will focus on Gov. Bill Lee’s criminal justice reform initiatives and on legislation designed to strengthen the rights of all Tennessee residents. Cooper is a partner in the criminal defense firm of Knox Defense and has been in private practice for more than 25 years.

Cleveland law firm Logan-Thompson recently announced that Tim Hewitt has joined...continued on page 8

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.
the firm as a member. Hewitt will focus on litigation with an emphasis on criminal defense. A 2013 graduate of the University of Mississippi School of Law, Hewitt has been serving as assistant public defender with the Knox County Public Defender’s Community Law Office for the past six years.

Chattanooga lawyer Eric J. Oliver has joined Patrick, Beard, Schulman & Jacoway as a partner. He will focus on personal injury, medical malpractice, business, divorce and workers’ compensation litigation as well as business and intellectual property law. He previously spent 18 years at Lewis & Oliver.

The Miles Mason Family Law Group in Germantown recently announced that Miles Mason Sr. has authored the second edition of The Forensic Accounting Deskbook, which helps family law attorneys work with forensic accountants. The book is available from the American Bar Association Family Law Section. The firm also announced that Gil Buie has been named an associate attorney. Buie joined the firm as a law clerk in 2016.

Knoxville lawyer Gordon Ball has been named a 2019 “Trial Lawyer of the Year” by Public Justice, a nationwide nonprofit legal advocacy organization. Ball was recognized for his work on a 20-year-long class action lawsuit that resulted in a $250 million non-reversionary settlement that also highlighted the use of dark money in judicial elections. The case, Hale v. State Farm, centered on allegations that the insurance company used lower-quality automotive parts from nonbrand manufacturers to repair 4.7 million vehicles in the 1980s and 1990s. Some 1.5 million class members will receive a payout from the settlement.

Leslie Barrett Kinkead, the longtime court improvement program coordinator for the Administrative Office of the Courts (AOC), received the 2019 Meritorious Award from the Tennessee Juvenile Court Services Association. Kinkead was recognized for decades of service and significant contributions to the field of juvenile justice. As coordinator of the program, Kinkead provides training for judges and child welfare professionals, technical assistance to courts, and guidance to the group responsible for revising statutes and juvenile court procedural rules. Prior to joining the AOC, Kinkead was in private practice for five years and was an assistant district attorney for the Davidson County Juvenile Court.

A number of Tennessee judges recently received awards at the joint Tennessee Council of Juvenile Judges/ Tennessee Juvenile Court Services Association Conference. TBA members among the group were Hamilton County Juvenile Court Judge Robert D. Philyaw, who received the McCain-Abernathy Award for outstanding service to the juvenile justice system. Philyaw was appointed to the juvenile court in 2013. He previously served as municipal judge for the city of Graysville and was in private practice.

Williamson County Juvenile Court Judge Sharon E. Guffee received the association’s Leadership Award for investing in others and encouraging growth in the field. Guffee was an assistant district attorney in the 21st Judicial District for six years before entering private practice. She became a full-time magistrate in 2007 and was appointed to the juvenile court bench in 2013.

Finally, former Williamson County Juvenile Court Judge and current Magistrate Jane C. Franks received the “You Inspire Us All Award,” which honors an individual who inspires others to believe in children, the work of juvenile courts and the ability to make a difference. Judge Franks became the first female judge in Williamson County when she was appointed to the general sessions court in 1977. She became a juvenile court judge in 1980 and served there for 20 years. She now works as a part-time magistrate.

Allison Starnes-Angela, director of career services at the Lincoln Memorial University Duncan School of Law, recently hosted a successful orientation for second-year law students. The inaugural program, developed by Starnes-Angela, covered resume drafting and networking skills. Attending law students also received a complimentary professional headshot to aid in their job searches.

Nashville lawyer Charles Michels has been named a partner of Taylor Pigue Marchetti & Blair. Michels joined the firm in 2012 after graduating from Vanderbilt University Law School. He handles municipal, estate/probate, insurance, employment, government/regulatory, real property and general civil law cases.

Seth Ogden, Ph.D., senior associate at Patterson Intellectual Property Law, was recently named to the board of directors for Operation Stand Down Tennessee. The nonprofit organization engages, equips and empowers veterans and their families as they transition from military service to civilian life. The group also offers assistance with employment, Veterans’ Affairs Department benefits, networking and housing.

Stites & Harbison has welcomed Elizabeth Anne Bowden to its Nashville office. Bowden will practice...
MEMPHIS lawyer and former state legislator and judge THOMAS BOUSE AVERY died Sept. 10 at the age of 89. A graduate of Vanderbilt University Law School, Avery joined with his friend William H. Fisher III to form the law firm of Robinson, Fisher and Avery. Avery became active in local and state politics and served in the Tennessee House of Representatives from 1967 to 1971. In 1973, he was chief draftsman for the Shelby County Restructure Act, which provided the foundation for the current county commission. He later served three terms on the Shelby County Election Commission and in 1981 was appointed judge of the Circuit Court Division VIII. At the time of his death he was practicing with the firm of Fisher Avery Fisher. Memorial donations may be made to the organization of the donor’s choice.

Former TBA president and Humboldt attorney GEORGE GRIFFIN BOYTE died Aug. 26. He was 94. A graduate of Vanderbilt University School of Law, Boyte served in the U.S. Marine Corps during World War II, then returned to Humboldt, where he practiced law for more than 60 years. He also served as city judge and city attorney in Humboldt, as well as in the Tennessee legislature and the Tennessee Constitutional Convention. Boyte was president of the Gibson County Bar Association, and in 1978, president of the Tennessee Bar Association. Memorials may be sent to the Rotary Foundation, The Church at Sugar Creek, Gideons International, Young Life, or the donor’s choice.

Nashville lawyer BETHANY GAYLE CONOVER died July 31 at the age of 48. Originally from Tullahoma, Conover began her career as a social worker and probation/parole officer. She later attended the Nashville School of Law, graduating in 2007. She joined her family’s firm and practiced primarily in criminal and domestic law for two years before becoming an attorney advisor at the Social Security Administration Office of Disability Adjudication and Review in Nashville. In 2011, she moved to the agency’s new Franklin office to serve as a mentor and trainer. In lieu of flowers, memorial contributions may be made to St. John’s Lutheran Church, 3259 McGavock Pk., Nashville 37214, or the Legal Aid Society of Middle Tennessee, 1321 Murfreesboro Pk., Ste 400, Nashville 37217 or at las.org/ways-to-give/donate-now.

Former Knox County Chancellor WILLIAM “BILL” PIERCE NEWKIRK, age 87, died May 14. Originally from Chicago, Newkirk began his legal studies at the University of Cincinnati but transferred to the University of Tennessee College of Law and graduated in 1957. He served in the U.S. Army from 1953 to 1955. Newkirk practiced law in Knoxville before being appointed to the Knox County Chancery Court in 1969. He later served as a specially appointed judge for the Tennessee Court of Appeals and as an administrative law judge for the U.S. Department of the Interior and the Social Security Administration. Memorial donations may be made to Remote Area Medical, 2200 Stock Creek Blvd, Rockford 37853. Reach the organization may be at 865-579-1530 or at www.ramusla.org.

Hartsville attorney BETTY LOU TAYLOR, died Aug. 28 at the age of 65. A 1985 graduate of the YMCA Law School (now Nashville School of Law) in Nashville, Taylor practiced in Hartsville with Donoho, Taylor & Taylor. Donations may be made to Haley’s Hearts Foundation or the Trousdale County Animal Shelter.

Chattanooga lawyer KYLE RICHARD WEEMS died June 27. He was 82. Following graduation from the University of Tennessee College of Law, Weems joined the U.S. Army as a 1st Lieutenant in the Judge Advocate General Corps. After leaving the service, he began his legal career with the law firm of Roberts, Weill & Ellis, which ultimately became Weill & Weems. He later branched out on his own with smaller firms and practiced with several different partners and associates over the years. Weems was a well-known bankruptcy attorney with a focus on Chapter 11 business reorganizations. He also served as a Chapter 7 trustee for more than 25 years. Memorial contributions may be made to the First Centenary United Methodist Church, 419 McCallie Ave., Chattanooga 37402, or to the Fairview Cumberland Presbyterian Church Building Fund, c/o Bennie Malone, 4040 Snapps Ferry Rd., Afton 37616. 

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You Need to Know
Licensure & Discipline

Disability Inactive

The law license of Fayette County lawyer Drew Justin Canale Jr. was transferred to disability inactive status on Aug. 21. Canale 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.

Disability Inactive Status Removed

The Tennessee Supreme Court transferred the license of Williamson County lawyer Sandra Leah Wells to disability inactive status on Aug. 9. Wells 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.

Reinstated

Florida attorney Lynette Mayfield was reinstated to the practice of law in Tennessee on July 8. She had been placed on inactive status more than five years ago, on May 25, 2012. Mayfield petitioned the court for reinstatement. Tennessee rules require attorneys seeking reinstatement to pay a deposit and then file a petition. The court issued the order on July 9.

Reinstatement Denied

The Tennessee Supreme Court rejected a petition for reinstatement filed by Chattanooga attorney Nathan E. Brooks on May 7. The court noted that Brooks agreed to a two-year suspension of his law license, agreed to pay restitution on 12 complaints filed against him, and agreed to pay the costs of the disciplinary proceedings in 1998 in lieu of disbarment. In 2002, Brooks sought reinstatement of his law license but the request was denied because he never paid the agreed upon costs and restitutions. Brooks appealed to the Supreme Court arguing he was indigent and requiring him to pay the costs violated his constitutional right to due process. In 2004, the court rejected his appeal. Most recently, Brooks filed another reinstatement petition. Tennessee rules require attorneys seeking reinstatement to pay the deposit and then file a petition. The court issued the order on July 9.

Disciplinary Disbarred

The Tennessee Supreme Court disbarred Carter County lawyer Gregory Scott Norris from the practice of law on Aug. 22. In addition to disbarment, the court ordered Norris to pay $17,360 in restitution to eight former clients. The actions were taken after a hearing panel found that Norris failed to appear in court on numerous occasions, stopped corresponding with opposing attorneys, made incoherent arguments in court, took fees from clients for which he did little work, failed to advise clients of a temporary suspension, failed to communicate with clients, failed to return files, and abandoned numerous client matters. These actions were determined to violate Rules of Professional Conduct 1.1, 1.3, 1.4, 1.5, 1.15, 1.16(d), 3.2, 8.1(b) and 8.4(a), (d) and (g). The court also noted that a suspension imposed on Norris on Jan. 26, 2018, has been dissolved in light of the disbarment.

Suspended

Rutherford County lawyer John Paul Doyle was temporarily suspended from the practice of law on July 31. The Tennessee Supreme Court took the action after finding that Doyle failed to respond to a complaint of misconduct. Doyle must comply with all requirements of Tennessee Supreme Court Rule 9 regarding the responsibilities of temporarily suspended attorneys. The suspension will remain in effect until dissolution or modification by the court.

The Tennessee Supreme Court temporarily suspended the law license of Shelby County lawyer Thomas Francis Jackson III on Aug. 20. The court took the action after finding that Jackson failed to comply with its May 3 order directing him to contact the Tennessee Lawyers Assistance Program.

Compiled by Stacey Shrader Joslin from information provided by the Board of Professional Responsibility of the Tennessee Supreme Court. Licensure and disciplinary notices are included in this publication as a member service. The official record of an attorney’s status is maintained by the board. Current information about a particular attorney may be found on the board’s website at www.tbpr.org/for-the-public/online-attorney-directory.
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within 10 days for an evaluation to determine his capacity to practice law and defend himself against pending disciplinary complaints. Jackson must comply with all requirements of Tennessee Supreme Court Rule 9 regarding the responsibilities of temporarily suspended attorneys. The suspension will remain in effect until dissolution or modification by the court.

On Aug. 2, the Supreme Court of Tennessee suspended Greene County lawyer Edward Lee Kershaw from the practice of law for four months, with 30 days to be served on active suspension and the remaining three months to be served on probation pursuant to three conditions: (1) that he contact the Tennessee Lawyers Assistance Program (TLAP) for an evaluation, (2) that he comply with the terms and conditions of any TLAP monitoring agreement, and (3) that he incur no new complaints of misconduct during the probationary time. The court took the action after finding that Kershaw made comments toward the court and asked questions of a witness that were intended for no other purpose than to embarrass the witness and disrupt the judicial proceedings. The court also found that he published statements in a local newspaper about the court which he knew were untrue and were intended to call into question the judge’s qualifications and integrity, and published statements on social media that were made with reckless disregard and called into question the qualifications and integrity of all judges in the county. Kershaw’s actions were determined to violate Rules of Professional Conduct 3.5, 4.4, 8.2 and 8.4.

**ADMINISTRATIVE SUSPENSIONS**

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

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- TeleHealth Benefit Program
- Disability Insurance
- Critical Illness Insurance
- Accident Insurance
- Life Insurance
- Dental Insurance
- Vision Insurance

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BOOST YOUR PRACTICE
Take off with compelling programming from TBA CLE

INSIDE:
Health Law Primer, Oct. 16
Health Law Forum, Oct. 17-18
**HEALTH LAW 2019 FORUM & PRIMER**

**19th Annual Health Law Primer**

October 16 in Franklin
Embassy Suites Hotel, Franklin
1 p.m. - 5:15 p.m.
Credit: 4 General

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

Designed for new practitioners and those interested in joining the profession, this program provides a general health law overview and discussion of hot topics by experienced health care leaders. The perfect intro into the nation’s premier health law event, navigate through this heavily regulated industry while networking and building relationships with leaders across Tennessee. Now in its 19th year, this introductory program will be held in conjunction with the 31st Annual Health Law Forum, October 17-18.

This program is sponsored by Baker Donaldson and London Amburn.

**31st Annual Health Law Forum**

October 17 & 18 in Franklin
Embassy Suites Hotel, Franklin
Thursday, October 17, 8 a.m.-5 p.m.
Friday, October 18, 8 a.m.-4:30 p.m.
Credit: 3 Dual, 12 General and 2 Bonus hours

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

Tennessee remains at the forefront of the health care industry, so it’s only fitting that the nation’s preeminent health law forum is hosted here. This must-see event for Tennessee health law attorneys features timely programming designed to up your game and keep you on the forefront of the latest trends in the health care field. Learn from the state’s leaders in health law including providers, practitioners and regulators. Now in its 31st year, this forum program will be held in conjunction with the 19th Annual Health Law Primer on October 16.

**Program Highlights**
- Update on Fraud and Abuse Developments
- Antitrust and Healthcare
- TennCare Updates
- 2019 Cyber Threats in Healthcare
- Health Care Fraud Enforcement in Tennessee
- Managed Care Strategies & Disputes
- Tennessee Health Law Legislative and State Case Update 2019
- Cloud-Based Vendor Agreements
- Ethics: Time Management, Prioritization, and Work-life Balance
- Recent Enforcement Action Involving the Anti-Kickback Statute and the Stark Law

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As a registrant for the TBA annual Health Law Forum, you will automatically be registered for the following programs.

**Bonus Online CLEs**

**Professional Development: Mindfulness**
Flexible to your schedule
Speaker: Joan Heminway, UT College of Law

**Law Tech: Digital Evidence**
Flexible to your schedule
Speaker: Jim KempVanEe, LogicForce Consulting LLC
The Speakers You Want to Hear...

**Keynote: Martin “Marty” Makary**
A surgical oncologist and chief of the Johns Hopkins Islet Transplant Center, Dr. Makary is Executive Director of Improving Wisely, a Robert Wood Johnson Foundation project to lower health care costs in the U.S. by creating measures of appropriateness in health care. He is a leading voice for physicians, writing in *The Wall Street Journal*, and is the author of *The New York Times* best-selling book *Unaccountable* about patient safety and physician-led transparency efforts in health care.

**Keynote: R. Lawrence “Larry” Van Horn**
An entrepreneur board member, R. Lawrence “Larry” Van Horn is a leading expert and researcher on health care management and economics. He is the founder and CEO of Preverity Inc, a health care analytic firm comprised of data scientists that has created the risk prediction platform for medical malpractice in the U.S. serving commercial malpractice insurers. Van Horn has advised the state of Tennessee on health policy and is currently working with the Trump administration on issues related to price transparency in health care markets. His current research focus centers the shift to consumer purchase of health care and the impact it will have on new delivery models.
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!

**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.
The Ethics of Healthy Lawyering
Knoxville | Nashville | Memphis
Credit: 3 Dual

$145 TBA Members
$320 Nonmembers (includes TBA Complete Membership)

Join Chris Stiegemeyer from The Bar Plan as he evaluates a potpourri of the hottest topics in legal malpractice. In the first hour, take “the QUIZ” to evaluate your understanding of these topics. In the last two hours, learn to recognize risks and problematic behaviors and how to adequately respond to them: for you as the lawyer, colleagues and/or attorneys in other law firms and opposing counsel. Conclude the course, by addressing stress and burnout in the legal profession and how to navigate your way into Healthy Lawyering, with effective techniques to manage your work-life balance and ultimately improve your productivity at work.

Knoxville
October 2
UT Conference Center
9 a.m. - 12:15 p.m.

Nashville
October 3
Tennessee Bar Center
9 a.m. - 12:15 p.m.

Memphis
October 4
Fogelman Executive Conference Center
9 a.m. - 12:15 p.m.

Hot Topics in Real Estate

November 1 in Nashville, AT&T Building, Nashville
8:30 a.m. - 4 p.m.
Credits: 1 Dual, 5 General

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

For attorneys interested in: Real Estate Law
This program, produced in cooperation with the Tennessee Land Title Association, is a staple for Tennessee dirt lawyers, designed to keep you on the cutting edge of developments in your practice. The hot topics forum will include legislative updates, split closing issues, F.I.R.T.A, opportunity zones, ethics and more. Do not default on this opportunity to learn from seasoned professionals while building relationships with colleagues of associated practice.

Speakers: James Lenschau, Joshua Denton, Brian Faughnan, Joseph Kirkland Jr., Andy Maloney, Matthew McDonald, Ryan McNally, Charles Welch Jr.

Free Parking
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TBA’s 1Click Series

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

Tennessee Fall FastTrack

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

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

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

Save the date! Details for this program coming soon...
Speakers: Christy Allen, Laura Chastain, Tom Lee, Travis Brandon, Bill Penny

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

For attorneys interested in: Immigration Law
The TBA’s Immigration Fall Forum includes some of the most relevant topics in today’s constantly changing immigration landscape. Presented by experienced leaders and judges in the field, the CLE sessions will focus on how to get information from the government, how to litigate in immigration court, and how to litigate immigration issues in federal court.
Producer: Chay Sengkhounmany, Robert Free, Terry Olson, Charles Pazar

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

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<td>Construction Law Forum 2020</td>
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What’s new? At the Tennessee Bar Association, the answer is, a lot. New benefits, new services, new branding and a new website are all either in place or coming online soon. And during the coming year, even more changes will take place to better serve the Tennessee legal community.

“The TBA has never been content to sit on the sidelines and watch things pass it by,” TBA President Sarah Sheppeard said in outlining some of the new developments. “The practice of law is changing, and lawyers both urban and rural are facing new pressures and new challenges. We want to be there for Tennessee lawyers. We want to help maintain the values and the proud traditions of this profession.”
Association Group Health Insurance Plan
The recent launch of a new TBA Association Group Health Insurance Plan could make a huge difference to hundreds of Tennessee attorneys. Many have been struggling with the heavy financial burden of providing health insurance coverage for themselves, their employees and their families. This new plan provides guaranteed issue coverage, with no health questions and no pre-existing condition exclusions. Rates could be as much as 30% below what members are paying today.

The TBA worked closely with IPSCO, its partner in TBA Member Insurance Solutions (TBAMS), to find a plan that would serve as many TBA members as possible with quality coverage at a reasonable cost. All lawyers who employ at least one person and have 100% of the lawyers in their firm on the TBA membership roll are eligible to take part.

“We’ve worked with Humana for more than a year to make sure they understood the Tennessee legal community market and could provide a comprehensive package of plans that would serve this diverse group of lawyers,” Buck Orrison, vice president of Employee Benefits & Distribution at TBAMS, said. “We believe they’ve knocked it out of the park and delivered outstanding options with these plans.”

The Humana package offers three different plans for TBA members to choose from, depending on their needs. All plans are compliant with the Affordable Care Act and include annual well visits covered at 100%. (See the box on the next page for more details.)


New Logo and Branding for TBA
One of the more visible changes coming to the TBA rolled out this summer, when then-TBA President Jason Pannu unveiled a new logo and branding effort at the TBA annual convention in Nashville.

Developed by the Nashville design firm Proof Branding, the contemporary logo system utilizes abstraction to create levels of deep, integrated and subtle meaning.

The mark itself is made up of three bars, or columns, that dually nod to courthouse structures, while also showing equal representation of West, Middle and East Tennessee. The secondary mark brings in the tri-stars found on the Tennessee flag to further amplify the mission of the Tennessee Bar Association.

The semi-bold, sans-serif type uses all caps to create a sturdy and balanced mark. The type is angular and modern, allowing for a feeling of relevance and innovation. The color palette makes TBA stand out in a lively, current way. Ultimately this logo system is a modern and simplified approach that reflects the core of the TBA.

New Web Platform and Website
The platform you use to manage your TBA membership and all of the services you receive through the TBA is getting a major upgrade. When this project goes live in the next few weeks, you’ll be able to access information about your membership faster and easier than in the past and see new features to help continued on page 16
NEW SERVICES  
continued from page 13  
you stay up to date. 
The platform will be home to the TBA.org website, so it will also be getting a new look and an upgrade to its organization and functionality. As we get closer to launch, we’ll be providing plenty of learning opportunities to help you take advantage of the new features and products available on the site.

TBA Launches Podcast Network
Recognizing that TBA members span from the Millennial Generation to the Greatest Generation, the TBA is launching new vehicles for communicating with all of its members in channels they find most useful and comfortable. The new TBA podcast network is a great example of that.

“Podcasts are a great way for TBA members to find out about what’s going on at the bar and hear some really interesting stories about Tennessee lawyers,” TBA Executive Director Joycelyn Stevenson said. “We’ve already launched three channels and two more are coming this spring. Response has been fantastic.”

BarBuzz was the first channel released. This lively monthly program gives a fresh take on what’s been happening at the bar and what events are coming our way. Listen in as host Kate Prince and other TBA staffers give you the rundown on all things TBA.
Kate is also host to the bimonthly Sidebar podcasts. Kate will be interview- ing TBA members with interesting stories to tell of their lives and practices. If you like the tales on NPR’s This American Life, you’ll like Sidebar. Also produced bimonthly is a program from the TBA’s Attorney Well Being Committee. The first episode featured Nashville 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.

Coming this spring will be podcasts from the YLD and the TBA’s Governmental Affairs team reporting from the General Assembly.

All This, and More to Come
While these new products promise to move the TBA forward in serving lawyers across Tennessee, there are more to come.

“It is an exciting time to be leading the TBA,” Sheppeard said. “We are embracing the challenges facing the profession and providing Tennessee lawyers with benefits and services that we think will help make a difference in their lives and their careers. Every TBA member should feel proud of the differences the TBA is making.”

The TBA Association Group Health Insurance Plan
FAQ
The Tennessee Bar Association and TBA Member Insurance Solutions have combined to bring TBA members an affordable and quality association group health insurance plan. The plan provides guaranteed issue coverage, with no health questions and no pre-existing condition exclusions. Rates could be as much as 30% below what members are paying today. Open enrollment begins Oct. 1 and ends Dec. 1.

What is the name of the Insurance Carrier?
Humana.

Who is eligible under the plan?
Only the Tennessee-based personnel of Participating Employers are eligible to participate in the plan.

Who is eligible to become a Participating Employer?
Law firm members of the Tennessee Bar Association that meet all of the following qualifications:
• Is a Tennessee duly organized and validly existing professional corporation, limited liability company, professional limited liability company, general partnership,
limited partnership, limited liability partnership, sole proprietorship, or other entity that complies with the laws of the State of Tennessee;
• Maintains individual memberships in the TBA for all of its attorneys;
• Qualifies as an entity that provides Legal Services;
• Constitutes an employer as defined under ERISA § 3(5);
• Employs in the State of Tennessee at least one common law employee who works a minimum of 30 hours per week.
• Executes the Tennessee Bar Benefit Trust Participation Agreement; and,
• Elects to participate in the Plan.
What are my plan and network options?
There are three benefits options available:
• **The Simplicity Plan**: $0 Deductible with office visit copays of $25 for PCP, $40 for specialists and $75 for Urgent Care
• **The Deductible + Copay Plan**: First dollar coverage with office visit copays of $40 for PCP, $55 for specialists and $100 for Urgent Care. The individual deductible is $5,000
• **The High Deductible Plan**: Is HSA qualified with a $5,000 deductible 80% / 20% plan
All plans are ACA compliant and include annual well visits covered at 100%

In Nashville, the CPOS network includes the HCA and Ascension/St. Thomas hospitals. In Memphis, the CPOS network includes the Baptist, St. Francis, and Region One hospitals. In Knoxville, the CPOS network includes the Covenant hospitals, as well as UT Medical Center and Blount Memorial Hospital. In Chattanooga, the CPOS network includes Erlanger and the HCA hospitals. Nearly all major physician groups are in-net-work unless they are specifically aligned with those facilities (Nashville – Vanderbilt; Memphis – Methodist; Knoxville – Tennova; Chattanooga – Memorial), which are out-of-network. The Humana ChoiceCare network, for all other areas.

What are the eligibility requirements for dental coverage?
Same as medical, 2+ groups are eligible for coverage.

Does the plan require eligible employees to enroll in coverage in order for their dependents and spouses to obtain coverage?
✔ Yes

Are there limitations on pre-existing conditions?
✘ No

Are 1099 independent contractors allowed on the plan?
✘ No

Are nonattorney employees of Participating Employers eligible under the plan?
✔ Yes

Are solo practitioners eligible to become Participating Employers under the plan?
A solo practitioner may be eligible to become a Participating Employer if the solo practitioner employs at least one common law employee in the State of Tennessee and otherwise meets the requirements set for in the plan (see the topic above: Who is eligible to become a Participating Employer?).

If I am a licensed attorney engaged in another business with other licensed attorneys, can we qualify for the plan?
You would only be eligible to participate in the plan if you are employed by a Participating Employer.

Is it possible for non-attorneys who are in the legal services industry to be covered under this plan?
Yes, as long as you are employed by a Participating Employer.

What is the plan year?
Jan. 1 through Dec. 31 each year.

How do I determine whether I can remain with my current physicians if I use this plan?
Two ways: by checking the Humana network provider finder at www.Humana.com and/or with your physician’s office to confirm they are a provider in the above networks.

Who is the point of contact for any issues with open enrollment or plan administration?
Please contact your TBA Member Insurance Solutions representative at 423-629-2400 x264.

What happens to my coverage if I leave my firm or move to a status not otherwise covered under the plan?
You may have the option to elect COBRA coverage.

What is the membership and health plan coverage timeline?
Imagine, if you will, a different kind of doctor’s office visit. You arrive at the office and walk right into an exam room; your doctor pops in a couple of minutes later. You spend half an hour to 45 minutes discussing your symptoms, your stress level, the fact that you haven’t been sleeping very well lately; then you have some bloodwork done.

You leave with a prescription, and on your way past the fish tank out the door, no money changes hands, and no one asks for your insurance information. The next day, you text your doctor with a question that you had forgotten to ask, and you get a response before the afternoon is out.

This is the kind of health care experience that Tennesseans are seeking in growing numbers since the General Assembly passed the Health Care Empowerment Act of 2016. The legislation was designed to encourage Direct Primary Care (DPC), a trend in the practice of medicine that echoes ancient traditions while responding to modern health care market dynamics. The heart of the DPC model is a deeper, more personal relationship between physician and patient that can include longer visit times, more convenient scheduling, and a wider-ranging scope of practice that resembles that of the traditional family doctor. Third-party payers such as insurance companies and government programs are sidelined or cut out entirely, which reduces administrative burdens on doctors while making the process of choosing and paying for health care more transparent for patients.

As more physicians and medical prac-
After each visit, the patient has access to the physician’s cell phone number or an after-hours answering line and is encouraged to check in periodically with health questions.

A DPC relationship offers a way to closely manage chronic and complex diseases such as diabetes, thereby reducing unnecessary specialty and hospital services for preventable complications. DPC can also reduce wasteful health care spending by redirecting the activities of insurance companies into covering high-acuity and high-cost health needs, and away from policing everyday interactions between physicians and patients. Furthermore, DPC could forestall a widely predicted shortage of primary care physicians by offering medical students a path into a career in primary care that promises autonomy and meaningful opportunities to serve patients.

Yet DPC is not a panacea. The periodic fee model presupposes disposable income and is therefore not an option for many people who rely on safety net programs. Furthermore, DPC remains a niche alternative that relies on the residual benefits of the mainstream health care system; this is proven out by the fact that most patients of DPC practices have “gap” insurance that covers traditional bills from specialists and hospitals when complex or catastrophic health issues arise. As such, it is unclear whether DPC can be scaled to serve large populations, and if so, how the DPC practices serving those patients would interact with the greater health care system that they have sought to insulate themselves from.

Why DPC Is Growing

The relationship between physician and patient in America today is often rushed: An average American primary care provider sees 30 to 40 patients per day, with 5 minutes allotted per patient. The average U.S. primary care physician maintains a practice panel of about 2,300 patients. Meanwhile, large-scale population health challenges such as obesity, diabetes, and heart disease continue to worsen, and national health care spending on medications, specialty procedures, and hospitalizations grows each year.

Over the last 30 years, DPC has gained traction as a philosophy and business model of medical practice that counters these trends by shifting the focus back onto the physician-patient relationship. For the patient, the difference in business practice may appear minimal. The difference between a copay at check-in under a traditional health insurance plan and a yearly retainer-type fee is not noticeable for the average middle-class family, and less mail is generated on the back end of every practice visit.

For the practice, however, the difference is enormous. First, payment arrives either in advance or at the time of service, which streamlines budgeting and cash flow management. In the traditional fee-for-service world, wherein health care providers bill per discrete service rendered, health insurance claims often lag for months. Second, the practice does not need to employ coding or billing staff to file paperwork.

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and jump through various hoops to secure payment from commercial insurers and other third-party payers such as Medicare. Finally, physicians, nurses, and other clinical providers are shielded from the myriad administrative burdens associated with insurance, such as identifying the proper diagnosis code from a list supplied by an insurer or checking to make sure certain screenings have been ordered to satisfy value-based care contracts with an Accountable Care Organization (ACO). Freedom from these burdens leaves more time to spend with patients, so visit times can be longer, and patient panels can be smaller. Thus, most DPC physicians limit their patient panels to no more than several hundred patients.7

Overview of DPC Legislation
From a regulatory perspective, the chief hurdle to any practice seeking to operate under a DPC model in any state is that state’s insurance commission. This is why 26 states have enacted legislation specifically excluding DPC practices from the purview of state insurance regulations.8 In three more states, insurance commissioners have issued official guidance exempting DPC practices from insurance regulation.9

A. DPC in Tennessee: Origins and Current Regulations
Tennessee law, specifically Tenn. Code Ann. § 63-1-501 et seq., exempts DPC practices from insurance regulations, and further states that DPC practices may provide services to patients who are enrolled in insurance plans, including TennCare and Medicare. Tennessee’s DPC law is substantially similar to Oklahoma’s.10 Interviews with physicians and attorneys indicate that there are no remaining substantial legal or regulatory barriers to DPC practice in Tennessee.11

When the legislation took effect on July 1, 2016, Tennessee became the 17th state to enact DPC legislation;12 West Virginia was the first, in 2006.13 DPC laws have often been motivated by a legislative desire to reassure cautious physicians and lower legal barriers to entering the DPC field.14 In Tennessee’s case, the motivation also included a desire to encourage meaningful choices for families in a healthcare market dominated by third-party payment arrangements.15

Tennessee’s DPC legislation includes several key components:

1. Exemption of DPC Practices from State Insurance Regulations
Like other states, Tennessee has created a “safe harbor” that shields DPC physicians and practices from insurance commission regulation.16 This protection is often included in DPC legislation because several DPC practices in other states faced insurance commission inquiries in the early

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2. Prescriptions for Contracting: Promoting Transparency and Fair Dealing

Tennessee DPC physicians are required to include the following disclosures and statements in their contracts with patients, which are intended to protect the patient and physician from confusion or miscommunication about precisely what is covered in a DPC patient agreement:

a. The DPC agreement must describe the scope of service covered by a periodic fee.
b. The DPC agreement does not constitute health insurance.
c. An uninsured patient may be subject to tax penalties under the Affordable Care Act (ACA) for failing to obtain insurance.
d. Patients who are on ACA-compliant health plans already have coverage for free preventive care.
e. DPC service charges may not count towards the patient’s health insurance deductibles and maximum out-of-pocket expenses.
f. Each patient should consult with his or her health insurance plan before signing a DPC agreement and receiving care.
g. A DPC physician who breaches the agreement may be liable for damages and may be subject to discipline by an appropriate licensing board.


Generally speaking, DPC practices must charge a periodic fee; must not bill any third parties on a fee for service basis; and must limit the amount of any per-visit charge to less than the monthly equivalent of the periodic fee. Tennessee’s DPC law requires that the patient contract specify a fee over an agreed period, provided that the patient is not required to pay for more than 12 months of service at one time. Tennessee DPC practices may arrange payment plans for their patients to pay for services on a monthly, quarterly, or yearly basis. If a patient needs additional services outside of what is covered in the patient agreement, the DPC physician cannot bill more than $50 per visit for those services.

4. Summary of Best Practices

Philip Eskew, an attorney and physician who has written extensively on DPC, has proposed a nonexhaustive list of practices that DPC practices should adopt to comport with state laws and insurance regulations:

1. Limit the number of patients in the practice’s panel;
2. Clearly define the scope of practice;

continued on page 22
3. Include contractual and marketing disclosures that the DPC practice is not insurance;
4. Recommend that patients purchase comprehensive insurance coverage;
5. Permit patients to terminate the DPC arrangement at any time with a pro-rated refund;
6. Hold any funds paid more than one month in advance in a separate escrow account and do not accept payments until the patient is “accepted” into the practice;
7. Require that all patients visit the practice at least annually;
8. Require that each patient sign a contract with the practice;
9. List a contractual cap on the number of office visits and/or charging a per-visit fee (in addition to the periodic fee); and
10. Bill the patient at the end of the service period rather than the beginning.21

B. Current Status of DPC in Tennessee
There are at least 33 DPC clinics operating in Tennessee or serving Tennessee residents from locations close to the state’s borders, according to DPC Frontier, a DPC consulting and advocacy organization.22 Most clinics are concentrated around the state’s largest metropolitan areas, with a handful of outliers in more rural areas such as Pulaski and Jackson. The number of clinics relative to the state’s size and population is comparable to that of most of the eight states bordering Tennessee save for North Carolina, which has significantly more DPC practices.

C. Physician and Attorney Perspectives on DPC in Tennessee
For physicians, DPC offers a way to operate in a primary care setting without the pressures of dealing with insurance companies and other third-party payers. Patient visits can last longer and cover more than acute health complaints. Many DPC practices approach contracting with their patients as an opportunity to demonstrate the difference in the scope of services they provide. “We try to engage with patients on a very transparent basis so they understand exactly what they are getting from us for what they are paying,” said Eric Potter, M.D., who practices at Sanctuary Functional Medicine, a DPC practice in Franklin, Tennessee. “The patient does have to take more responsibility for understanding what’s going on, so we have to do a little more education for patients to help them understand what their responsibilities are.”23

Luanne Leeds, an attorney in Topeka, Kansas, has helped establish more than 160 DPC clinics. “I love doing this,” she said. “It just works. We need more attorneys who understand how to help set up these kinds of practices.”24 Leeds stated that Tennessee’s DPC law has created a favorable environment for DPC practices to flourish, but warned that vigilance is required to prevent regulatory creep or legislative modifications that make it more difficult for DPC practices to operate.

At the federal level, current efforts such as the Primary Care Enhancement Act may allow DPC doctors to privately contract with Medicare beneficiaries without opting out of Medicare altogether, as is now required by Medicare regulations and False Claims Act laws. Currently, if DPC providers want to provide services to Medicare beneficiaries, they must opt out of Medicare and mostly forego opportunities to “moonlight,” or otherwise render services to Medicare beneficiaries that are included on Medicare’s lists of covered services.25

Practice Considerations
Attorneys who wish to advise providers and organizations operating in DPC arrangements in Tennessee should carefully consider the following topics.

A. Health Care Liability
From a health-care-liability perspective, there is no evidence that the Tennessee legislature intended to modify health liabilities.
care liability statutes in passing the DPC statute. Of note, many medical malpractice insurers offer discounted rates for DPC providers, and the medical literature indicates that DPC and concierge medicine providers are less likely to face malpractice claims or regulatory complaints than their fee-for-service counterparts. Some DPC practices choose to forego medical malpractice insurance and require patients to arbitrate disputes pursuant to the Federal Arbitration Act. While arbitration agreements between physicians and patients are not per se invalid in Tennessee, they may be considered contracts of adhesion, subject to close scrutiny. Most DPC providers therefore choose to carry malpractice insurance, and it is difficult to imagine a scenario in which it would be wise to counsel a provider not to do so.

B. Contracting
The patient-physician contract is the foundation for the DPC physician-patient relationship and should follow the statutory guidelines outlined above. Many DPC practices attach a schedule of covered services as well as a non-exhaustive schedule of non-covered services to the patient agreement. It may also be prudent to conspicuously state that the contract is a periodic fee agreement and not a fee-for-service or insurance agreement.

It is also important for DPC practices to define the scope of access to care. One of the primary benefits of a DPC relationship is enhanced access to the physician, but DPC practices should not create the impression of unlimited access. DPC practices must also establish clear guidelines for emergent, specialty, and acute care needs: is there a particular walk-in clinic or hospital that offers favorable rates for continued on page 32
October is “Celebrate Pro Bono Month.” Let us look back to one of Tennessee’s earliest lawyers. He led an amazingly adventurous life and championed pro bono before Tennessee was even a state.

The year was 1793. What we know today as Tennessee was the Southwest Territory, the transitional stage as a federal domain between being North Carolina’s isolated western lands and statehood. There were only seven lawyers on this rough-and-tumble frontier serving a scattered population of nearly 100,000 from the Virginia line to Nashville.1

A group of these territorial attorneys published an announcement in the Knoxville Gazette. “[T]ired of being ridden as free horses,” notice was given to the public that they would no longer give advice “without being paid the fees established by law.”2 Nevertheless, one lawyer boldly dissented and published his own stirring mission statement in the same Knoxville newspaper, which included his personal code of professional conduct and a commitment to pro bono work for the poor and powerless. It reads as follows:

Fiat Justicia
Having adopted the above motto as early as I had the honor of admission to the bar, I have covenanted with myself that I will never depart from it; and on this foundation I have built a few maxims which afford my reflections an unspeakable satisfaction.

1. I will practice law because it affords me opportunities of being a more useful member of society.
2. I will not turn a deaf ear to anyone because his purse is empty.
3. I will advise no man beyond a comprehension of his cause.
4. I will bring none into law who, my conscience tells me, should be kept out of it.
5. I will never be unmindful of the cause of humanity, and this comprehends the fatherless, widow, and those who are in bondage.
6. I will be faithful to my client; but never so unfaithful to myself as to become party to his crime.
7. In criminal cases I will not underrate my abilities; for if my client proves a rascal, his money is better in my hands, and if not, I hold the option.
8. I will never acknowledge the omnipotence of the legislature,
or consider their acts to be law beyond the spirit of the constitution.

9. No man's greatness shall elevate him above the justice due my client.

10. I will consent to no compromise when I conceive a verdict essential to my client's future reputation or protection; for of this he cannot be complete judge.

11. I will advise the turbulent with candor, and if they will go to law against my advice, they must pardon me for volunteering against them. [Conflict rules were less developed in 1793].

12. I will acknowledge every man's right to manage his own cause if he pleases.

The above are my rules of practice; and I will not (at any critical juncture) promise to finish my business in person, if the public interest require my removal hence, I will do everything in my power for those who like them, and endeavor to leave it in proper hands if I should be absent.

WILLIAM TATHAM
Knoxville, March 21, 1793

On the Tennessee Frontier

William Tatham was born in England in 1752, the oldest of five children of a minister. He was raised by his maternal grandmother until her death in 1760. Before finishing his education, the slight 16-year-old was sent by his cold, aristocratic family to make his own way alone in America with only one guinea in his pocket. He luckily obtained a position as a clerk with the Virginia mercantile house of Carter and Trent on the James River.

In 1776, Tatham moved to North Carolina's Watauga Settlement (in present-day Upper East Tennessee), the first English settlement west of the Appalachians, to start his own mercantile business and learn surveying from William Bailey Smith, a Watauga resident. The independent, self-reliant Watauga settlers had formed the Watauga Association in 1772, organized under the first written compact for civil government west of the mountains.

Bitter for how his family treated him, Tatham was dismayed by the unlimited kindness Tennessee's pioneer families showed him. He later said of the Wataugans he came to love:

In thirty years knowledge I have witnessed an almost universal open door to the stranger, [and] the needy . . . . I scarce know a door that I could not enter as my home in the hour of distress. . . . I went among them a stranger and they took me in . . . . I was homeless and they gave one common shelter; I was bewildered in the forest; they conducted my footsteps.

With the advent of the American Revolution, young Tatham enthusiastically supported the Patriot cause, further alienating his relatives in England. Yet the Wataugans took him further to heart and selected him as their government's clerk. In that capacity, and displaying excellent penmanship, he drafted a petition in 1776 for the community asking North Carolina to recognize the area as part of that state, the Washington District (the first locality named for George Washington), and, in anticipation of acceptance, he conformed the association's laws with those of North Carolina. The petition was granted and Washington County was established the following year.

Also in 1776, Tatham, as adjutant, was one of the valiant defenders of Fort Caswell on the Watauga River (originally Fort Watauga) when a pro-British Cherokee force of 700 warriors laid siege to the small log garrison as 200 terrified settlers crowded inside. After the defeat of the Cherokee by rescuing militia from Virginia and North Carolina, Tatham helped to supervise construction of Fort Patrick Henry at present-day Kingsport.

During treaty negotiations between Virginia and North Carolina and the Cherokee chiefs, Tatham served as assistant clerk to the North Carolina commissioners and wrote a historically invaluable description of each of the chiefs reflecting his admiration of his former enemies. The next year, he was quartermaster of Fort William on the Nolichucky River under Gen. John Sevier, who would later be Tennessee's first governor.

Revolution, the Law and Politics

After trying tobacco speculation on the Watauga, and it is believed he taught school, Tatham relocated to Virginia in the fall of 1777 to go into the mercantile business, but soon volunteered for the Continental Army and was assigned to the cavalry. Recognized for exceptional bravery fighting the British, he came to the notice of Virginia Congressman Samuel Hardy. Hardy, a leading lawyer, convinced Tatham to study law under his tutelage.

In 1780, after finishing his legal apprenticeship, Tatham was retained to reorganize a shamble of a land office in western North Carolina, served as a contract officer making purchases for the army, and found time to work on a history of the frontier. His research led to a friendship with the governor of Virginia, Thomas Jefferson. These pursuits, however, were interrupted by the war.

Tatham joined the American troops under George Washington besieging Yorktown and took part in the final charge, along with Alexander Hamilton, on the
British fortifications on the night of Oct. 14, 1781. Yorktown was the last major land battle of the Revolution.13

Undoubtedly because of Jefferson’s influence, Tatham was appointed clerk to the Board of Privy Council of Virginia and was sent by Jefferson to Cuba to discuss the United States acquiring Spain’s territory on the Mississippi. After completing the diplomatic mission (and surviving a shipwreck on the New Jersey shore in 1782), he studied the law of North Carolina under Gen. William R. Davie and was admitted to the North Carolina bar on March 24, 1784 at the age of 32.14

Even though a new lawyer, Tatham had many other pursuits. In 1784, he went on an expedition searching for a North Carolina river connecting with the Mississippi, and in 1786 he planned and named the North Carolina town of Lumberton. He was elected to the North Carolina legislature in 1787 representing Fayetteville.15

In the assembly, Tatham fought tirelessly to protect the land rights of the Chickasaw Indians in present-day West Tennessee, saying the Chickasaw, “instead of deserving the ingratitude shown in trespassing on their rights, have ever shown us an example worthy of imitation and a magnanimity far above our reach.” He lost a bid for Congress, but his fellow legislators elected him lieutenant-colonel of the Fayetteville militia district.16

After a visit to his estranged family in England, where Tatham said he was treated “politely,” he was named the first state geographer of Virginia by Governor Beverly Randolph. He authored an “Analysis of the State of Virginia” in 1790 and in 1791 crafted plans for a topographical survey of the nation. He also worked with Thomas Jefferson to initiate postal service for the frontier, including the Tennessee region. Virginia Governor Henry Lee, the father of Robert E. Lee, was accompanied by Tatham on a tour of southwest Virginia. At the end of the journey, Tatham visited his friends on the Watauga and decided to stay.17

While in Britain, Tatham corresponded on a variety of topics with President Jefferson, including the value of the invention of the lifeboat, and served as Jefferson’s agent for the purchase of scientific equipment. He also renewed his friendship with James Monroe, who was in London on a diplomatic assignment. Since Tatham wanted to return to America, Monroe wrote a glowing letter of introduction on his behalf to Secretary of State James Madison and hailed Tatham’s expertise in hydraulics.22

Back to America

Upon his return to the United States in 1805, Tatham’s newfound fame preceded him. He was a regular guest at Jefferson’s Monticello, where he designed a better means of bringing spring water to the mansion and an apparatus for circulating wine decanters around Jefferson’s dinner table.23

Like Jefferson, Tatham’s creative mind was ever active. Tatham was the first to propose a national library. This would come about with the establishment of the Library of Congress.24 He further suggested a “maritime infantry” as an auxiliary to the navy: the Marine Corps,25 and recommended the use of steam engines to move boats on canals instead of horses.26

Although unsuccessful in having a U.S. Department of Public Works founded, its purposes would later be fulfilled by the departments of Agriculture, Interior and Commerce.27

At President Jefferson’s request, Tatham designed a plan for an intercoastal wa-
terway. Because of this and his earlier plan for a national survey, he has been called the “Father of the United States Topographical and Coast Surveys, and the Coast-wise Canal.” While conducting his survey of the East Coast, he reported daily to Jefferson on the movement of a British squadron lurking off shore as tension rose between the U.S. and Britain preceding the War of 1812. He also observed and reported to the President the proceedings of the 1807 treason trial of Jefferson’s enemy, former Vice President Aaron Burr, in Richmond.

By the time Tatham was in his 60s, his financial situation and health had rapidly declined, while he repeatedly failed to persuade the government to purchase his vast collection of maps, manuscripts and books. President Madison came to his aid with a much better paying position managing the U.S. arsenal on the James River near Richmond. Nevertheless, illness, loneliness, alcoholism and sporadic delusions that he was an English lord closed in and he had to abandon his post. Existing in Richmond and frequenting the Swan Tavern, he was mercilessly stalked by creditors’ agents. Having never married and childless, he survived on the charity of a kindhearted Mrs. Buseey, who lived across from the tavern.

**A Tragic Ending**

It was Feb. 22, 1819, Washington’s Birthday; and a huge, joyous multitude gathered before the Virginia Capitol Building in Richmond to hear a military band and observe the firing of two cannon in salute. An inebriated 67-year-old Tatham approached the musicians saying: “I am going directly into eternity, and have but one request to make you: play the long roll, crescendo and diminuendo, until it dies away as if in the far distance. Throw your soul into that fife!”

The air was thick with smoke from previous volleys as the commanding officer gave the order: “Left gun, fire.” At that second, Tatham jumped in front of the barrel and was blown to pieces, dying instantly. His body parts were scattered on the capitol lawn. After some commotion, the band played over his broken remains as Tatham had asked only minutes before. Many in the crowd wept. The Virginia House adjourned in respect.

Perhaps, in his time of need and desperation, William Tatham would have found protection and peace by going home to his family, his true family, the people of Watauga, the people of Tennessee. Historian and Tennesse Supreme Court Justice Samuel Cole Williams concluded:

Tatham was truly a victim of his own versatility. He lacked the concentration and persistence for the accumulation of wealth. He was indeed brilliant, but with that brilliance there went a sanguine temperament that led to a dissipation of his powers in diverse endeavors.

Another historian said:

William Tatham, clerk, frontiersman, soldier, merchant, lawyer, legislator, engineer, geographer, cartographer, author, civil servant, world traveler, self-styled diplomat, and book collector, exemplifies the fact that colonial and early America were indeed the land of opportunity. Where else would one have been able to display such diversity and mobility?

Despite his disappointments, William Tatham’s accomplishments were real, visionary and some lasting. He also left us a timeless pronouncement of what it means to be a Tennessee lawyer.

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**It’s Celebrate Pro Bono Month!**

October is “Celebrate Pro Bono Month,” and Tennessee lawyers are joining their colleagues across the country to provide free legal services to those in need and honor the good work performed by lawyers every day as part of the annual National Pro Bono Celebration. Now in its 11th year, the TBA’s statewide Celebrate Pro Bono initiative brings together legal service providers with local bar associations, law schools, law firms and individual volunteers to offer free services to those unable to afford a lawyer.

This year hundreds of volunteers will participate in dozens of events and activities across the state that will offer assistance to Tennesseans in need. Activities include legal advice clinics, education programs, public presentations and other events. Every year, Tennessee lawyers help thousands of clients by providing free legal assistance.

The month of October is an opportunity to focus attention on the significant need for pro bono services as well as a celebration of the outstanding work of those in the legal community who volunteer their services throughout the year. Events, including opportunities to volunteer, will be promoted in TBA Today, via social media and on the TBA website throughout October.

The full list of Celebrate Pro Bono Month activities is available at www.tba.org/info/celebrate-probono-month-2019.
Recognizing and Addressing Dementia in Your Clients

You just met with John, a client of many years. He was driven to your office by his son, and during the meeting he was confused and forgetful. For the first time in your presence he had angry outbursts and used profanity, causing you to feel very uneasy.

You assume that John is suffering from dementia — probably Alzheimer’s because you read somewhere that Alzheimer’s disease is the most common type of dementia. You note your “diagnosis” in John’s file, then draft a letter to terminate your attorney/client relationship because you believe you can no longer represent a client with dementia.

Let’s back up a few steps before we jump to conclusions. Then let’s discuss why it’s important for attorneys of all disciplines to have at least a basic understanding of cognitive impairment (CI).

The topic of CI is complex because there are many medical conditions having a diagnosis of CI that mimic one another, and a CI condition in one person may progress differently in another person. Problems with clear and focused thinking, memory loss, and dramatic changes in personality traits show up in many different medical conditions. Some of those conditions can be treated with the realistic goal of a cure, and some can only be managed with palliative care in the hope that the client will die with dignity and in as little pain as possible. The correct diagnosis will not only assist you in whatever business and/or estate planning you may be doing for the client, but may also determine your client’s eligibility for certain government benefits.

Before you assume your client has a disease as serious as Alzheimer’s ask whether testing has been done for “acquired” cognitive deficits that can arise out of food and environmental allergies, high blood pressure, diabetes, dehydration, excessive alcohol consumption, depression, sleep apnea, certain drugs, and even high cholesterol. All of these can be treated with a reasonable expectation that some or all cognition can be restored.

If cognitive deficits have been ruled out or successfully treated, but your client still appears to be “out of it” at times or mentally “slipping” when faced with familiar tasks, you still cannot assume that decline of cognitive functioning is a result of dementia. A condition known as Mild Cognitive Impairment (MCI) has become a popular diagnosis for persons who have problems with mental functions but those problems are not so severe that they significantly interfere with daily activities. Although there is no medical cure for MCI, some MCI clients never worsen into one of the diseases with dementia — and some MCI clients actually get better on their own.

If acquired deficits have been diagnosed and treated, or ruled out, but your client has cognitive problems that are consistently and negatively affecting their personal and/or financial safety then a thorough medical evaluation should be done to determine whether they are suffering from one or more of the many types of dementia diseases that have now been identified. The disease mentioned most often is Alzheimer’s disease because it is the most common cause of dementia. It’s also the scariest because there is currently no cure, there is no absolute determination as to its cause (although there is a genetic component to some cases of early onset Alzheimer’s), there are worsening stages of the disease through which people travel at different paces, and the victim can “die” cognitively long...
Other incurable dementia diseases are becoming more often diagnosed. Frontotemporal disorder, referred to as FTD (or, Pick’s disease) directly affects personality, social skills and emotions so it’s hard to recognize at first that it’s a dementia disease. Angry outbursts and use of profanity can be an indication of FTD. Another is Lewy Body disease which is determined by abnormal protein deposits. Parkinson’s disease is a form of Lewy Body if the victim of Parkinson’s also develops dementia. The list goes on and is further complicated by the fact that a person can have more than one type of dementia at a time. Alzheimer’s and Vascular dementia are often seen together.

Why this much medical detail for nonmedical professionals? Because the attorney may be incorrectly assuming an irreversible and degenerative condition exists that may actually be curable or at least improved to the point where our state’s presumption of sufficient mental capacity is not easily challenged. Even if the diagnosis is one of the known incurable dementia diseases, those diseases all worsen in stages, meaning that a diagnosis is not an absolute bar to the client’s ability to participate — at least for a while — in his or her legal matters.

Knowing what type of dementia disease your client has may directly result in money in their pocket or government-provided long-term care. For example, do you have a client who worked in a hazardous materials environment and now has Parkinson’s? An additional diagnosis of Parkinson’s disease can result in a greater federal compensation benefit or the provision of direct personal care. Long-term care insurance policies that provide coverage for mental decline will give a definition of what a diagnosed impairment requires to trigger the payment of benefits. Because there are stages of dementia that may require only assistance for an extended period of time (as opposed to hands-on care) understanding both your client’s condition and the availability of any private or public benefits could mean the difference between affording care or financial crisis.

It may feel awkward at first, but there are times when you should get very personal with your clients, especially if you note a change in function or personality or if a family member expresses concern.

Ask: Are you sick, or worried you might be sick? Have you been diagnosed with any condition, disease or disorder? What medications are you taking; what treatments are you receiving? Has anyone close to you expressed concern about your actions, behavior, or memory? And a biggie: Has anyone stated that you shouldn’t be driving?

Have you heard anyone in your client’s personal or professional world associate the word “combative” with your client? That’s a buzz word. The use of it will extremely limit the availability of long-term care facilities and home health care agencies willing to provide services to your client. Even adult day care facilities that specialize in dementia clients may refuse to admit a client with a combative designation in their medical records.

Not only can you continue to represent your client who exhibits diminished mental capacity, but you have the guidance of RPC 1.14, “Client with Diminished Capacity” to take protective measures to help you maintain as “normal” a client-lawyer relationship as possible. You may even become adversarial to a client at risk through the process of a conservatorship, and you may find yourself disclosing client information that is otherwise privileged. [RPC 1.14(c) and RPC 1.6] Excellent resources for in-depth information can be found through the National Institute on Aging at www.nia.nih.gov, through Mayo Clinic at www.mayoclinic.org (search using the individual dementia type), and Alzheimer’s Tennessee at www.alztennessee.org.

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Tennessee Whistleblower Claims: A Tale of Two Cases

We’re in the midst of the most glorious time of year: college football season. Tailgates, fight songs, packed stadiums (okay, well maybe this depends on who you root for), and the blistering sound of referees’ whistles dominate this revered season in the South.

Football referees, though, aren’t the only ones blowing the whistle.

It should come as no surprise that employee litigants continue to rely upon Tennessee’s whistleblower statute, the Tennessee Public Protection Act1 (TPPA), in asserting retaliatory discharge claims against their employers. In fact, we’ve written about it a couple of times in years past.2 In this article, we contrast two cases, one from Sevierville and one from Nashville, with starkly different results.

TPPA plaintiffs face a difficult, but not insurmountable, burden in overcoming motions for summary judgment. With this framework in mind, let’s turn to our two cases.

Weinert v. City of Sevierville6

Weinert worked as a police officer for the City of Sevierville. In 2014, she made a complaint of sexual harassment to her supervising officer. Shortly thereafter, she also complained that she had witnessed two officers using excessive force during an altercation that took place some 18 months prior. These two complaints would later form the basis for her claim under the TPPA.

In 2015, Weinert was counseled about a number of performance issues, including avoiding dispatch calls, safety violations and failing to provide back-up to fellow officers. This counseling upset Weinert, and she complained that she was being singled out and subjected to a “witch hunt.” The police captain called a meeting with Weinert and her direct supervisor to discuss her performance and attitude.

During the heated meeting, Weinert said she was resigning due to a “toxic environment.” She reaffirmed this decision even after being asked to reconsider. The captain then advised her that her resignation would have to be in writing, and Weinert took a few days to ponder her decision. When she returned to work to inform the captain that she would not be resigning after all, she was told by human resources that it was too late and her oral...
resignation had been accepted. (If you think this is foreshadowing an upcoming dispute over whether a discharge occurred, you’re right.)

Weinert filed suit under the TPPA and the trial court granted the City’s motion for summary judgment because it concluded that she could not show that her complaints were the sole cause of her termination. Several questions were raised on appeal.

First, did Weinert identify an illegal activity that she refused to remain silent about? The Court of Appeals held that Weinert did cite to authorities showing that the sexual harassment and excessive force complaints were illegal activities. Nevertheless, the Court of Appeals recognized that the trial court did not grant summary judgment on the illegal activities ground.

Second, did the police department terminate Weinert’s employment? Weinert claims she did not resign because she never provided written notice as requested. The police department claimed it was entitled to rely upon her oral resignation, despite the request for written confirmation. The Court of Appeals agreed with the trial court that there were disputed issues of material fact on this point, so summary judgment (on this element alone) would have been improper.

Third, were Weinert’s complaints of illegal activities the sole cause of her termination? Like most whistleblower cases under the TPPA, this is where Weinert’s claim goes south. The police department had counseled her for several performance-related issues, one of which was her 18-month delay in reporting the excessive force. (Ironically, this was one of the complaints supporting her TPPA claim.) Notably, at the time she was disciplined, Weinert did not claim that any of the performance issues for which she was counseled were unfounded. In light of her disciplinary record, the Court of Appeals concluded that Weinert could not show that her complaints were the sole cause of her termination and affirmed summary judgment.

**Whitney v. First Call Ambulance Service**

Whitney was an ambulance fleet manager for First Call, which meant he was in charge of ensuring enough ambulances were available to handle demand and performing maintenance on the vehicles. He complained, on several occasions, to First Call’s upper management that the company was not following relevant safety rules and regulations promulgated by the State. On one occasion, Whitney told First Call’s CEO that he was “going to tell the truth” about these violations. In a surprising response, First Call’s CEO punched Whitney in the face and grabbed him by the throat. This was confirmed by First Call’s human resource department. Whitney was later terminated.

Not surprisingly, Whitney filed a claim under the TPPA. First Call moved for summary judgment, proffering three non-retaliatory reasons for Whitney’s termination:

1. A report from an independent consulting company outlining problems with Whitney’s conduct and performance;
2. Employee complaints about Whitney; and
3. Personality conflicts between Whitney and First Call management (no surprise here – the CEO assaulted Whitney).

In light of these three reasons, the trial court concluded that Whitney could not show that the sole cause of his termination was his complaints of illegal activity and granted summary judgment.

Whitney had better luck in the Court of Appeals than did Weinert. The Court of Appeals held that the trial court failed to follow the correct summary judgment standard in evaluating the evidence — primarily the independent consultant’s report — in a light most favorable to Whitney. Whitney, the Court of Appeals held, proffered evidence at the trial court stage that, if believed, would show that the report was pretextual and was only created as a means to terminate his employment. For example, the report faulted Whitney for several maintenance shortcomings related to First Call’s fleet. However, Whitney proffered evidence that each of these “shortcomings” was actually a directive from upper management to manage the fleet as “quickly and cost-effectively as possible.” The report also alleged the fleet managed by Whitney had significantly higher maintenance costs than the company’s Ohio operations. Whitney countered, explaining that there was a valid reason for higher maintenance costs in Tennessee: his fleet utilized more diesel vehicles and operated in more urban areas than the Ohio fleet.

Whitney’s responses to the consulting report were, the Court of Appeals held, sufficient to establish that First Call’s reasons were pretextual. As a result, the Court of Appeals vacated the trial court’s order of summary judgment and remanded the case for further proceedings.

What do these two cases tell us? The sole cause standard for TPPA claims continues to be an impediment for plaintiffs in overcoming motions for summary judgment. Weinert’s problem was that she did not really contest the validity of her performance problems. Moreover, in regard to her initial attempt to voluntarily resign, the Court of Appeals recognized that this could be a legitimate, nonretaliatory reason for her termination. After all, if an employer has learned that an employee wants to quit, it’s not unlawful to allow her to do so. Whitney, on the other hand, provides a textbook example of how to establish pretext. He took the independent consultant’s report disparaging his performance — the evidence relied on most heavily by his employer — and line by line refuted each claim with factual support.

Regardless of which side of the courtroom you may find yourself in whistleblower litigation, these cases provide a continued on page 33
patients of the DPC practice? What should the patient do if he or she needs care out of town or out of state? For these reasons, many DPC practices advise patients to buy a “wraparound” insurance policy that covers care out of state as well as hospital and specialty services.

Federal Tax Considerations

The IRS considers DPC practices to be “health plans,” and therefore periodic fees are currently not deductible as a qualified health expense for health savings accounts (HSAs). Efforts are underway to change these regulations, most recently in the form of the Primary Care Enhancement Act of 2019, H.R. 6317, which has been introduced in the United States House of Representatives. Despite language in the ACA as well as many state DPC statutes stating that DPC is not insurance, the IRS has taken the position that a DPC relationship is in fact “gap” insurance. The Primary Care Enhancement Act aims to address that difference in interpretation and also seeks to establish that a DPC relationship is not insurance with respect to the federal tax code and the ACA.

Medicare Considerations

As the baby boomer generation ages into Medicare, DPC physicians are confronted with a quandary: their largest pool of potential patients is entangled with a byzantine federal regulatory system that does not interact well with a streamlined practice billing model. In fact, many Medicare provisions are designed to discourage beneficiaries to seek care from a DPC provider or other health care arrangements that are not expressly compatible with the Medicare ecosystem. Thus, many DPC providers have chosen to opt out of Medicare altogether. This does not mean that they can’t see Medicare beneficiaries, however: Medicare regulations and False Claims Act laws allow Medicare beneficiaries to contract privately with DPC practices as long as the DPC practice has opted out of Medicare. The chief concern is double-pilling for primary care and preventive services, and as long as the DPC practice has clearly opted out of Medicare, that concern is obviated.

Phillip Eskew has offered five action items for practices who wish to opt out of Medicare:

1. Notify patients that the practice is opting out of Medicare;
2. File an opt-out affidavit with each Medicare carrier that has jurisdiction over the practice’s claims;
3. Draft a separate private membership contract for each Medicare covered patient (in addition to the standard DPC patient contract);
4. If the practice has been excluded from Medicare, the practice must disclose this to patients; and
5. Renew the practice’s opt-out affidavit every two years.

It is possible for DPC practices to contract with Medicare beneficiaries without opting out of Medicare, but since new maps are used to warn, here be dragons. The DPC practice must ensure that all periodic fees are for “non-covered services” according to Medicare’s schedule of services, which changes frequently. Billing for any of the services on Medicare’s covered services lists could trigger a fraud investigation. Generally speaking, the risk is not worth the reward, particularly since Tennessee’s statute expressly provides a safe harbor for DPC practices who have opted out of Medicare to privately contract with Medicare beneficiaries and even bill Medicare for other services.

Conclusion

Working with DPC practices can be a rewarding way for attorneys to help physicians and other health care providers return to the roots of medicine and reestablish meaningful, long-term relationships with their patients. While Medicare and federal tax implications are unsettled, Tennessee law has laid a foundation for this small but promising trend to grow, offering a simpler and perhaps more effective health care option for those who desire a more robust relationship with their health care providers.

NOTES

3. Rules of the Tennessee Board of Medical Examiners § 0880-2-14, Specially Regulated Areas and Aspects of Medical Practice, pp. 38-46.
9. Ibid.
10. Eskew, supra.
15. Email interview with Rep. Sabi “Doc”
helpful roadmap for how to succeed and what potholes to hopefully avoid.

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NOTES
8. Whitney, an Asian American, also filed a claim under the THRA for a racially hostile work environment and retaliation. In this article, we focus solely on his whistleblower claim.

KalMar, M.D., FACS, one of the sponsors of Tennessee’s DPC legislation.
17. Eskew, supra.
22. Ibid.
23. Ibid.
27. Eskew, In Defense of Direct Primary Care, supra.
31. Telephone Interview with Luanne Leeds.
34. Ibid.
Relaxed Practice

Are you stressed from people reminding you that the practice of law is stressful? Of course it is — you knew that going in! It turns out that even though we know stress is going to be there, it is our reactions to it that make the difference. “Many of us are in the human suffering business, where clients come to see us with complicated problems, both legal and emotional,” Jeena Cho writes in her blog On Well-being. “It’s a stressful profession where we necessarily place the client’s needs first. The stakes are often high, and there are many demands. Many times we’re asked to deliver nearly impossible results. The litigious nature of our legal system leads to incivility. Yet there’s little discussion about the toll this work takes on our well-being. Lawyers are often taught to ignore their emotional well-being, but that is a mistake both for the lawyer as a person and as an advocate for the client.”

Mindfulness, Meditation Can Help

Cho recommends practicing mindfulness and meditation, and to be aware of our own knee-jerk reactions. This helps open the door to changing our automatic thoughts and behaviors.

Also, just go for a walk. Trite, right? But it really can help clear your mind, cool you down, give you the bigger picture. Changing your environment, even for a short time, can interrupt the patterns of negative thoughts that are often followed by feelings of stress and panic.

Just try it — it’s free!

Aha! Self-Care! “Self-care is defined as any activities that you do for yourself where you take steps to identify your own needs and meet them, Cho writes. “It’s all about understanding your own needs.” That could be anything! Exercise, yoga, healthy eating — these are the ones we hear about a lot. But self-care is personal (it’s your self, after all), so figure out what works for you.

It’s all about balance, this self-care and anxiety-reducing awareness. According to Breathe magazine, to keep from slipping out of balance, do these things:

- Make a commitment to yourself, whether it’s a particular act of self-care, or just staying present and calm in the face of crisis.
- Connect with your body and mind by staying aware of what you need.
- Connect with other people — we need each other!

And that brings us to community. There’s no better group of folks to understand the good and bad of what you are going through than those who are in similar circumstances, day to day. (Hello, lawyers!) Reach out and ask for help if you need it, but also you watch out for others, too. Know the signs for you and them.

“I often reflect back on those brutal moments and wonder why I am still here,” lawyer Brian Cuban recently wrote in the Texas Bar Journal and on his blog. “People did not mind their own business at the right moment for intervention to occur before I completed the act of suicide.” Cuban recounts his years with depression, addiction and near-suicide, crediting family and friends who did not “mind their own business.” Cuban explains that even if you don’t want to get involved, if you suspect someone needs help, you should.

Cuban points out that lawyers are 3.6 times as likely as nonlawyers to suffer from depression, have the highest problem drinking rate, and are in fourth place in dying by suicide. You’ve probably heard similar stats before. So take that to heart. It may be as simple as “pledging to ask someone how he or she is doing.” We can do that little bit, right?

Check Out These Resources

- Breathe, breathemagazine.com
- Tennessee Lawyers Assistance Program, TLAP.org
- HealthyBar, a Tennessee Bar Association podcast focused on attorney well-being, offering best practices and tips to keep you healthy
- Tennessee Suicide Prevention Network, tspn.org

— Suzanne Craig Robertson
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Can We Help You Help Your Client?

It happens all the time. An existing client, a neighbor, a family member or someone else in your circle calls you needing help with a personal injury or wrongful death case. Maybe the case is outside your area of expertise or requires more experience than you currently possess. Perhaps appropriate prosecution of the case will require a greater investment of time or money than you have or you can afford to lose. You may have decided the complexities of comparative fault and tort reform should be left to those who work in the tort field every day. Or you may just be too busy to take on another case.

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