Into the ERISA Weeds: The Church Plan Exception to ERISA Part II

“The New Normal” – Internet Video Depositions During the COVID-19 Pandemic

Spoliation of Evidence

Letters from the Editor and our President

Firm Spotlight

Legislative Update

Event Photos

IN THE NEXT ISSUE:

TTLA Lifetime Achievement Award Winner, Michelle Benjamin and TTLA Trial Lawyer of the Year, Thomas Greer

TTLA 2020-2021 PRESIDENT PROFILE

John Griffith

Page 19
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**Brandon Bass**
Awarded Outstanding Trial Lawyer of The Year from the Tennessee Trial Lawyers Association and recognized by *Best Lawyers in America*.

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**TABLE OF CONTENTS**

---

**ARTICLES**

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative Update 2020</td>
<td>8-9</td>
</tr>
<tr>
<td>by Lauren Brinkley, Matt Hardin, John Griffith, Bryan Smith</td>
<td></td>
</tr>
<tr>
<td>Into the ERISA Weeds: The Church Plan Exception to ERISA Part II</td>
<td>12-17</td>
</tr>
<tr>
<td>by Eric Buchanan and Audrey Dolmovich</td>
<td></td>
</tr>
<tr>
<td>“The New Normal” – Internet Video Depositions During the COVID-19 Pandemic</td>
<td>20-21</td>
</tr>
<tr>
<td>by Brandon Bass</td>
<td></td>
</tr>
<tr>
<td>Common Enemy Rule in Jury Selection</td>
<td>39</td>
</tr>
<tr>
<td>by Eddie Schmidt</td>
<td></td>
</tr>
<tr>
<td>Spoliation of Evidence – When Does it Occur and What are the Potential Remedies?</td>
<td>40-41</td>
</tr>
<tr>
<td>by Jake VanAusdall</td>
<td></td>
</tr>
<tr>
<td>Saving Your Client’s Public Benefits – Special Needs Basics for Trial Lawyers</td>
<td>42-47</td>
</tr>
<tr>
<td>by Amelia Crotwell</td>
<td></td>
</tr>
</tbody>
</table>

---

**FEATURES**

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2020 - 2021 Calendar of Events</td>
<td>4</td>
</tr>
<tr>
<td>From the Editor</td>
<td>5</td>
</tr>
<tr>
<td>From the President</td>
<td>6-7</td>
</tr>
<tr>
<td>TTLA Past Presidents</td>
<td>7</td>
</tr>
<tr>
<td>TTLA Awards &amp; Recognitions</td>
<td>10</td>
</tr>
<tr>
<td>TTLA Officers &amp; Board of Governors</td>
<td>18</td>
</tr>
<tr>
<td>2020-2021 TTLA President Profile - John Griffith</td>
<td>19</td>
</tr>
<tr>
<td>TTLA Partners</td>
<td>22-25</td>
</tr>
<tr>
<td>TTLA Event Photos</td>
<td>26-28</td>
</tr>
<tr>
<td>Firm Spotlight: McElhaney Law Firm</td>
<td>30-31</td>
</tr>
<tr>
<td>AAJ Update</td>
<td>32-33</td>
</tr>
<tr>
<td>TTLA Sustaining &amp; Life Members</td>
<td>34</td>
</tr>
<tr>
<td>TTLA Membership Information</td>
<td>35-37</td>
</tr>
<tr>
<td>LIFT</td>
<td>50</td>
</tr>
</tbody>
</table>

---

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Editorial Staff: Donald Capparella, Theresa Grisham, Suzanne Keith, Amanda Gargus
2020

AUGUST 27
Family Law Seminar Online ............................................................................. Via Zoom

OCTOBER 15
Executive Comm., Board of Governors Meeting & LIFT ........................................ Via Zoom

OCTOBER 23
5th Annual Paralegal Seminar ................................................................................ Via Zoom

NOVEMBER 6
PLAY BIGGER: Maximize Your Case Results .................................................... Drury Plaza Hotel, Franklin & Online via Zoom

DECEMBER 10-11
Annual Review & Ethics ........................................................................................ Via Zoom

2021

FEBRUARY 22
Legislative Update & CLE .................................................................................... Law Offices of Neal & Harwell, Nashville

FEBRUARY 22
Circle Dinner ........................................................................................................ Maggiano’s, Nashville

FEBRUARY 23
Civil Justice Lobby Day ........................................................................................ Cordell Hull Building, Nashville

MARCH 5-6
TTLA New Orleans Seminar ............................................................................... Hotel Monteleone, New Orleans

APRIL 8
Family Law Seminar ............................................................................................. Drury Plaza Hotel, Franklin

APRIL 22
Executive Comm., Board of Governors Meeting & LIFT ...................................... Law Offices of Neal & Harwell, Nashville

JUNE 16-18
2021 Annual Convention ..................................................................................... Peabody Hotel, Memphis

SEPTEMBER 30
6th Annual Paralegal Seminar ............................................................................. Drury Plaza Hotel, Franklin

DECEMBER 2-3
Annual Review & Ethics ...................................................................................... Carnegie Hotel, Johnson City
We are all adjusting to the opinion in the Tennessee Supreme Court in *McClay* that found the statutory cap on damages to be constitutional. The decision was 3-2, and the dissents were compelling, but the $750,000 cap on noneconomic damages is now the law. With all its faults!

That being said, the fight for justice continues. For example, the Court of Appeals recently ruled that a spouse’s claim for loss of consortium is governed by its own separate $750,000 cap. In that case, the jury found for the plaintiff wife in a healthcare liability case, and awarded her $4 Million, all in noneconomic damages. Her husband also received a verdict of $500,000 for loss of consortium from the jury. The trial court found that there were two separate caps governing “each plaintiff,” and after reducing the wife’s claim under the cap statute to $750,000, found that her husband could recover the full amount of his damages.

The Court of Appeals affirmed. In examining the cap statute, Tenn. Code Ann § 29-39-102, and relying on the statute’s repeated reference that it applies to “each injured plaintiff,” the Court interpreted the statute to mean that the cap should apply to reduce damages awards to individual plaintiffs. The Court of Appeals, therefore, affirmed the judgment of the trial court and determined that the cap statute operates to give each injured plaintiff a separate, individual cap on their damages. It is not known what effect this case might have on wrongful death cases, where there are arguably multiple plaintiffs. *Yebuah v. Center for Urological Treatment, P.L.C.*, 2020 WL 2781586 (Tenn. Ct. App. 5/28/20). Randy Kinnard was lead counsel in the trial court, and I assisted during the post-trial phase and on appeal in that case.

This magazine contains several articles that I hope will be helpful to our membership. Finally, I renew my offer to answer the phone calls of any TTLA member who has questions about tort law or appeals. Good luck to everyone, and stay safe during COVID-19, and thanks again to Theresa Grisham for her amazing work on this magazine.

Sincerely,

Donald Capparella, Editor
I knew when I went to law school that I wanted to become a trial lawyer for the people. That was never in doubt. Out of college I had “un-lucked” into a claims adjuster position for a national insurance company. I was a field adjuster and I liked the job initially. After a while, I joined their CAT Team, or catastrophic team, which mainly involved our commercial insureds who had just been involved in a major wreck causing great harm (i.e. lots of exposure). My job required me to get notified of a loss in the middle of the night, get to the scene as quickly as I could, and basically shield all evidence of any wrongdoing from the police. Duplicate logbooks, pills in the cab, any statements of wrongdoing; it was my job to contain the damage and, to the extent I could, eliminate it. All within the bounds of law of course, but that still was not any moral justification for me. With cutbacks in the company in the workforce, salary and benefits in the face of enormous profits to the shareholders alongside increased pressure from the bubbas upstairs to significantly reduce claim payments to claimants, I began to detest my job.

Then one day I had a claim that changed the course of my life. I was assigned a claim where one of our drunk insureds had left a bar and t-boned a lady on her way home from the grocery store. This beautiful lady invited me into her home while using a walker and on pain medication due to injuries she received in the wreck. I left her home after a long visit with an uber successful/shockingly low settlement and a signed release. My supervisors congratulated me for getting the claimant to sign a release for pennies on the dollar.

The following week that same sweet lady called me and shared she had just received her first ER bill and it was much more than the amount I offered and paid her to settle her claim, and asked if I would take care of the remainder of the bill. She also told me she now needed a hip surgery. After telling her I could not honor her request because she signed a full and final release, she began sobbing. She called me later and told me “John, I trusted you, and now you have let me down! I hope you sleep well at night. I don’t know how you can hurt people like this.”

I did not sleep well that night. As a matter of fact, I did not sleep at all. Everything about my job culminated in that one phone call, and I knew I had to get out. I knew at that point the mission of my career had just begun. And I was on fire to get the hell out.

I immediately took the LSAT and was accepted to the Nashville School of Law. My first day of law school I was like a kid in a candy shop. I sat directly in front of Attorney General Tom Shriver and still remember that moment like it just happened. I knew I wanted to try cases and moot court could not come fast enough. Shortly after that I was trying real cases as a law student in my final year of law school under the tutelage of District Attorney Dan Alsobrooks and Assistant DA George Sexton. I would first chair a jury trial on criminal matters for the DA in Waverly, Tennessee and leave for night school while the jury was deliberating. I would receive a call from Assistant DA George Sexton usually by the time I pulled into the parking lot of NSL on Sidco Drive, apprising me of the jury’s verdict. I got such a kick and would laugh to myself when asked by my fellow law school buddies about what I did that day and responded, “Oh, I had a jury trial in a criminal case”… just like it was as mundane as buying a loaf of bread.

As I gained my wings and became a lawyer, my realization was that personal injury lawyers are somewhat isolated from other groups of lawyers. Maybe that was just my
perception, but to me it felt real (and still does). Some defense lawyers are my close friends and confidantes, but they are few. Still others think we just write demand letters, collect money and don’t do any real work. Every other type of lawyer thinks they can conduct a personal injury trial just like you would try any other general sessions type case and do just as well as any Inner Circle member. Hogwash! These people don’t realize that, for most of us, this is not a job; this is our life’s passion. My wife is amazed that I seldom read fiction. I’ve got too many trial books waiting in line to be read. It’s all I can do to keep up with Lanier, Friedman, Rowley, Mitnik, Mandell, Keenan, Ball, and all the other fantastic trial resources available now. In my earlier years my family paid a price for my overzealousness and passion to this job that I love. I have gotten much better as I have gotten older in separating my family time from work time. Experience and pain have taught me to temper my passion somewhat during after hours, but it will never die until I do.

It is with this backdrop that I attended my first TTLA convention long ago. I remember the greats that were in their younger prime at the convention. Randy Kinnard, Sid Gilreath, JD Lee, Steve Greer, Michelle Benjamin, Sadler Bailey, and so many more. To hear these stalwarts share their trial skills was exhilarating to me. I hung on their every word. The best of times were after hours where I shared dinners and conversation with these great lawyers who have time after time given me sage advice that I use to this day.

But all of this comraderie comes with a price. It is commonly said “The price of freedom is not free.” These lawyers sacrificed their family time and practice income to protect the cause of civil justice. TTLA is our unifying cause that advances the cause of the common man. Especially when the common man is not aware of it. The advance of the insurance lobby and special interests for the sake of the almighty dollar over the rights of people harmed by them or on their behalf never ceases. We must be on constant vigil for their direct, and indirect, attacks. For our fellow Tennesseans and all our visitors who come to this State I love, the Tennessee Trial Lawyers Association is the tip of the spear.

To all TTLA members who have gone before, I am humbly indebted to you. To all on board now, we have a fantastic group of motivated men and women from all diverse backgrounds who unite in our common cause. Our organization continues to grow in strength and significance. To you not heavily involved in TTLA, please consider serving on our board and committees. There is strength in our numbers and diversity. We need you!

Thank you for trusting me to lead over this next year. Candidly, my biggest fear is letting you down. I promise to do my best to not let that happen. Now, let's get to work!

TTLA Past Presidents

<table>
<thead>
<tr>
<th>Walter Buford</th>
<th>Gary R. Gober</th>
<th>John A. Day</th>
<th>R. Sadler Bailey</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joe W. Henry, Sr.</td>
<td>Olen G. Haynes</td>
<td>J. Anthony Farmer</td>
<td>Daniel L. Clayton</td>
</tr>
<tr>
<td>J. D. Lee</td>
<td>Robert T. Keeton, Jr.</td>
<td>James O. Lockard</td>
<td>Wayne A. Ritchie</td>
</tr>
<tr>
<td>James F. Schaeffer, Sr.</td>
<td>Clinton H. Swafford</td>
<td>William E. Farmer</td>
<td>Phillip H. Miller</td>
</tr>
<tr>
<td>Charles R. Terry</td>
<td>John T. Milburn Rogers</td>
<td>Steven W. Terry</td>
<td>B. Keith Williams</td>
</tr>
<tr>
<td>C. Allen High, Sr.</td>
<td>John A. Turnbull</td>
<td>Jeff Bloomfield</td>
<td>Bryan Capps</td>
</tr>
<tr>
<td>Sidney W. Gilreath</td>
<td>Ronald J. Berke</td>
<td>J. Mark Rogers</td>
<td>Bryan Smith</td>
</tr>
<tr>
<td>Ralph I. Lawson</td>
<td>Arnold Goldin</td>
<td>J. Randolph Humble</td>
<td>Jon Peeler</td>
</tr>
<tr>
<td>William L. Underhill</td>
<td>Thomas L. Reed, Jr.</td>
<td>T. James Emison, Jr.</td>
<td>Eric Buchanan</td>
</tr>
<tr>
<td>Robert J. English</td>
<td>Gary R. Brewer</td>
<td>Randall L. Kinnard</td>
<td>Thomas Greer</td>
</tr>
<tr>
<td>Julian P. Guinn</td>
<td>J. Houston Gordon</td>
<td>Jim Bilbo</td>
<td>Bruce Fox</td>
</tr>
<tr>
<td>Dennis L. Tomlin</td>
<td>Robert M. Garfinkle</td>
<td>Ricky Boren</td>
<td>Cameron Jehl</td>
</tr>
<tr>
<td>Jerry H. Summers</td>
<td>Donna R. Davis</td>
<td>John Pellegrin</td>
<td>Matt Hardin</td>
</tr>
<tr>
<td>T. Robert Hill</td>
<td>Jeffrey A. Garrety</td>
<td>Stephen T. Greer</td>
<td></td>
</tr>
</tbody>
</table>
The Tennessee Trial Lawyers Association (TTLA) plays an important role in the legislative process by working to ensure that Tennessee citizens are never deprived of their constitutional guarantee of access to justice. The Tennessee legislature prides itself on promoting a business-friendly environment. Many times, the interest of business conflicts with the rights of Tennessee citizens and occasionally the TN Constitution. TTLA works hard to ensure our legislators understand the impact legislation will have on the citizens of Tennessee. A prime example is detailed below in the COVID-19 legislation summary and the topic of retroactivity. Due to the hard work and collaboration of the leaders of TTLA, the civil justice lobby day attendees, members who served in the Attorney on Duty Program, and the lobbying team, we once again stood as a voice of reason and reliable counsel to legislators.

On January 14, 2020, the second year of the 111th Tennessee General Assembly began in normal fashion. When the COVID-19 pandemic started spreading across the country, legislative agendas changed dramatically. The focus turned to the constitutional requirement to pass a balanced budget. The spending plan projected no economic growth and required deep reductions from Gov. Bill Lee’s original proposed budget. Both chambers of the Tennessee General Assembly passed a bare-bones budget for the upcoming fiscal year. On March 19, 2020, with the uncertainty surrounding the COVID-19 pandemic, the General Assembly decided to halt the legislative session and stood in recess until June 1, 2020.

When the General Assembly reconvened, there was a fundamental disagreement between the Senate and House on what legislation needed to be discussed and passed. The Senate stood firm on only taking up bills that had to do with the pandemic, economic recovery, and the budget. The House continued their work on bills that were being considered before the pandemic hit and the House ran everything, even bills the Senate was not going to take up. Both houses looked quite different when session resumed. The Senate spaced their desks in the chamber to distance between members. The House installed plexiglass shields in between the seats. The House allowed members of the public to attend committee meetings and session, while the Senate decided to close off meetings and only allowed its members, staff, and the media to attend in person. Both houses made last-minute deals over bills to drop disagreements over the budget and wrap up their business. After a long and tumultuous night, the General Assembly adjourned sine die just after 3 am on Friday, June 19, 2020.

**TTLA BILLS**

**Auto Insurance Bill:** SB427/HB1287 (Sen. Gardenhire/Rep. Farmer) Last year we filed a caption bill dealing with auto coverage to use as a defense against a collateral source bill. Fortunately, a collateral source bill was not filed this session. (A caption bill is a placeholder bill that opens T.C.A. sections you want to amend in the future. All bills that were filed during the first year of session remain in the system during the two-year general assembly.)

**Increase the Medical Bill Presumption:** TTLA president Matt Hardin and the legislative committee made a push to use our caption bill to try to increase the medical bill presumption amount from $4,000 to a higher limit. The $4,000 presumption has not been increased in twenty years. Matt and the lobbying team were in negotiations with property and casualty lobbyists to see if we could come to an agreement. Unfortunately, when COVID-19 hit, the bill was stalled. This will be a key priority for TTLA in the 112th General Assembly.

**COVID-19**

There were rumors of COVID-19 immunity legislation before the start of the June 1st return to session. In several other states, governors had issued executive orders giving healthcare workers and healthcare facilities immunity for coronavirus care during the pandemic. The US Chamber had started to push broad coronavirus immunity legislation across the country. The Tennessee Chamber of Commerce, the U.S. Chamber and NFIB (National Federation of Independent Businesses) built a large coalition of supporters for a coronavirus immunity bill in Tennessee. TTLA leaders and the lobbying team spent countless hours on the phone with the bill sponsors, members of leadership and key committee members. We were able to negotiate changes to the legislation that were much more reasonable than the initial drafts through this hard work and our relationships with key legislators.

SB2381/HB2623 (Sen. Bell/Rep. Curtio) as amended, would have enacted the “Tennessee Recovery and Safe Harbor Act.” The amended language would have provided that a “covered entity” would not be liable for damages from injury or death that results from or is in connection with a “health emergency claim” related to coronavirus unless the claimant proves by clear and convincing evidence that: (1) The covered entity

continued to page 9
caused the damages, injury, or death by acting with gross negligence or willful misconduct; and (2) if public health guidance applicable to the covered entity had been issued, the covered entity did not substantially comply with any public health guidance applicable to the covered entity.

The House and Senate could not agree on one issue, retroactivity. The Senate was adamant that the liability protections reach back to the first reported case of the coronavirus which was March 5, 2020. The House stood firm that retroactivity was unconstitutional based on Article I, Section 20 of the TN Constitution which states “that no retrospective law, or law impairing the obligations of contracts, shall be made.” The Senate passed an amendment that was retroactive to March 5, 2020. The House passed an amendment that would have been effective on the date it would become law. Because of this disagreement, the bill had to go to a conference committee where appointed members tried to come up with an agreement on the bill. The conference committee voted to adopt the Senate version of the bill, which included the retroactive language. On June 19, during the last night of session at 2:45 am, after a long debate on the floor, the House voted to refuse to conform with the conference committee report due to the constitutionality of the retroactive language. The bill died on the House floor that night.

On July 1, 2020 Governor Lee issued Executive Order 53 which grants liability protections to healthcare workers and healthcare facilities in response to COVID-19 for the next 30 days except in cases where there is gross negligence or willful misconduct. In addition to this Executive Order Governor Lee announced that it is highly likely he will call a special session to take up liability protections related to other businesses and governmental entities.

**BILLS & RESOLUTIONS TTLA OPPOSED THAT DID NOT PASS**

**Constitutional Resolutions to Cap Damages: SJR176/HJR816**  (Lt. Governor McNally/ Speaker Sexton) Constitutional resolutions were refiled to propose an amendment to the Tennessee Constitution which would have authorized the legislature to limit the amount of noneconomic and punitive damages that may be awarded in civil actions and specified that these limits do not diminish the right to trial by jury.

The TTLA lobby team and legislative committee members continued to voice our strong opposition by meeting with the chairman and members of the committees early in the session. Ultimately, the resolution was not presented in either committee due to the Tennessee Supreme Court’s majority opinion in *Jodi McClay v. Airport Management Services, LLC*, where they held that Tennessee’s statutory cap on noneconomic damages in civil cases does not violate the Tennessee Constitution.

**Contingency Fee Agreements with Political Subdivisions: SB981/HB1103** (Sen. Kelsey/Rep. Daniel) The U.S. Chamber filed a bill that would have restricted the ability of local governments to contract with outside attorneys working on a contingency fee basis to assist with complex litigation. This was filed in response to the litigation against opioid manufacturers regarding the national opioid crisis. The U.S. Chamber Institute for Legal Reform released a report in March calling for states to strip municipalities of the ability to initiate litigation, or, barring that step, forcing municipalities to get approval from a state’s attorney general before they file a lawsuit. This legislation was introduced here in Tennessee as well as in Texas. Tennessee’s big 4 cities, the Tennessee Municipal League, local district attorneys general and other municipalities opposed this bill. Ultimately, this bill stalled due to COVID-19.

**GOING FORWARD**

TTLA will continue to fight to protect the civil justice system. Our organization, which often stands alone, strives to protect the rights of Tennessee citizens against the many well-funded special interest groups. There will never be a time when we do not have a battle before us.

We want to thank all members of TTLA for their support, dedication, and hard work throughout the year. Thank you to the members of the trial lawyer political action committee LIFT (Lawyers Involved for Tennessee) and to the Circle of Advocates who help fund our lobbying team and legislative program.

TTLA would not be able to have a meaningful presence in the General Assembly without trial lawyers being involved. Thanks again to all members that served as Attorney on Duty, in our leadership, and our lobbying team.

We urge all members of TTLA to get to know your local legislators and develop relationships with them. Visit their offices and invite them to visit yours. Your relationships help more than you know.

Lauren Brinkley, TTLA Legislative Counsel
Matt Hardin, TTLA President
John Griffith, TTLA Legislative Chair & President Elect
Bryan Smith, LIFT Chair
RANDY KINNARD

Randy Kinnard has been named the 2020 recipient of the Pursuit of Justice Award! The award, which is given annually by the American Bar Association Tort Trial and Insurance Practice Section (TIPS), is given to a lawyer or judge who has demonstrated outstanding merit and excelled in insuring access to justice. It requires nomination through the TIPS Standing Committee on Plaintiffs Practice and, ultimately, approval by the elected members of the ABA TIPS Council. Randy was selected unanimously and, further, was approved unanimously by the Council. This national award considers an extraordinary pool of candidates, and Randy was the obvious and unanimous choice.

Please join us in congratulating ABA TIPS Pursuit of Justice winner, Randy Kinnard!

ROGERS, SHEA & SPANOS

The law firm of Rogers, Kamm & Shea will now be known as Rogers, Shea & Spanos in recognition of Lawrence Kamm taking “of counsel” status, and George Spanos having become a partner last year.

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Insurance companies, health care plans, and collection agencies love to argue that ERISA applies to our clients’ insurance policies because ERISA offers advantages and makes it harder for people insured under policies to get or keep promised benefits. ERISA often applies to insurance and other benefits offered through work. ERISA claims are litigated differently from state law claims and have substantive rules that often favor insurance companies.

Insurance companies and others often argue that ERISA applies, when it does not. Knowing whether ERISA applies to a health care subrogation/reimbursement claim, or to a claim for long term disability, health care, or life insurance makes a huge different. ERISA claims are litigated differently from state law claims and have substantive rules that often favor insurance companies.

Our previous article began a discussion of one way that some insurance policies may avoid ERISA preemption. If benefits are offered through a church or church-related employer, ERISA may not apply. In part one, we discussed how church plans are usually exempt from ERISA. We discussed what type of organizations qualify as churches or can maintain church plans, and whether church-run organizations qualify as a sponsor of a “church plan” (like a Catholic high school, Baptist university, or Jewish hospital). We also covered how courts determine if a particular institution is controlled “enough” by a church to count.

In this second part, we will dig deeper into questions regarding church plans, such as whether a separate entity can maintain the plan, and yet still have it fall under the church plan exemption? Or, as some argued, must the plan be maintained by a separate entity?

Also, we will look into the issue that, unlike government benefit plans, which can never be subject to ERISA (if the benefits are provided through a government employer), church plans have the option of “opting into” ERISA. This also raises some commonly litigated questions, such as: What must a church do to have its benefits plans subject to ERISA? Once a church “opts in” can the election be undone (spoiler alert: the answer is a simple “no” to this one). If someone is getting benefits under a church plan (like ongoing LTD benefits or pension benefits) when the church plan opts in, do claims related to their benefits become subject to ERISA?

Church plans also include plans maintained by separate organizations if the benefits are provided to employees of churches or church-affiliated non-profits.

We discussed in our previous article that the ERISA “church plan” exemption applies to traditional church entities, like a church, synagogue, or larger church organization. We also explained that ERISA’s church plan exemption could include church-affiliated entities that were not for profit, such as church run hospital and schools, especially after congress amended ERISA in 1980 to make that clear.

Even after Congress amended ERISA in 1980 to clarify that benefits offered by church-affiliated non-profits could be church plans, there was confusion among the courts as to whether the term “established” in ERISA §1002(33)(A) as applied to a plan not established by the church itself, but is maintained by a separate third party organization, such as an employee benefits committee, could qualify. Stapleton, 137 S. Ct. 1652, 1654 (2017). The Supreme Court addressed this question in Stapleton, whether a plan maintained by a benefits committee could be a church plan, even if some entity other than the church established it. The relevant part of ERISA explains that a church plan:

includes a plan maintained by an organization ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

29 U.S.C. § 1002(33)(C)(i); Stapleton, 137 S. Ct. at 1663. The Supreme Court recognized that the plans in question provided benefits for employees of church-affiliated non-profit hospitals, but that the benefits plans were maintained by separate committees. The Court found that plans maintained by such committees or similar organizations, referred to as principal purpose organizations (or “PPO’s”), qualify as a church plan, even if not originally established by a church, so long as the plan is maintained by a church-affiliated PPO.

In situations where the benefits plans are maintained by a separate “special purpose organization,” like a pension committee or trust, courts following Stapleton have developed a
three-part test to determine whether a plan maintained by a principal-purpose organization falls within the church-plan exemption:

1. Is the entity a tax-exempt nonprofit organization associated with a church?

2. If so, is the entity’s retirement plan maintained by a principal-purpose organization? That is, is the plan maintained by an organization whose principal purpose is administering or funding a retirement plan for entity employees?

3. If so, is that principal-purpose organization itself associated with a church?

A plan that satisfies each prong falls within the church-plan exemption.


Can a church-affiliated non-profit, like a church hospital or school directly maintain a plan, or does the plan have to be maintained by a principal purpose organization?

A recent argument made by insurance companies, that would prefer that ERISA applies, is that a church-affiliated non-profit cannot directly sponsor a church plan, but can only do it when the plan is maintained by a principal purpose organization (or “PPO”). The argument stems from the structure of the ERISA definition of church plans found at 29 U.S.C. § 1002(33).

The confusion comes from the fact that § 1002(33)(A) sets out the clear rule from the original text of ERISA before the 1980 amendments that a church plan is one “established and maintained ...for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26.” But when ERISA was amended in 1980, part of the new section (now § 1002(33)(C)(i)) says that plans maintained by PPO’s are also church plans. Rather than using clear, parallel language in the 1980 amendments that plans directly established and maintained by church-affiliated non-profits are also church plans, the language in § 1002(33)(C)(ii) states that:

The term employee of a church or a convention or association of churches includes— ... (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches;...

Because the language references employees or church-affiliated non-profits, some insurance companies who want ERISA to apply, argue that “employee of” language means that the language does not say that a plan directly established or maintained by an entity like a church hospital is a church plan. Thus, a church-affiliated non-profit must use a PPO, and cannot be the direct sponsor of the plan, so the argument goes.

The counter argument is, or course, that the plain language of that definition of ERISA quoted above clearly sets out that employees of such church-affiliated non-profits are covered by church plans, whether the benefits are offered directly by the church-affiliated non-profit or a PPO and that a plan maintained by a PPO is just yet another way a church plan can be established.

Fortunately for those who would prefer that ERISA not apply, few courts have agreed with this argument limiting the church plan rule. One case that has been cited to say that a PPO is required is Hanshaw v. Life Ins. Co. of America, No. 3:14-cv-00216, 2014 WL 5439253 (W.D. Ky. Oct. 24, 2014). However, this case was decided three years before the Supreme Court’s decision in Stapleton, in which the Supreme Court explained that the amendments to ERISA in 1980 were made specifically to include church-affiliated non-profits as exempt from ERISA, and nothing in Stapleton says that a PPO is required.

Further, both Hanshaw and Stapleton are cases where a PPO exists, so there was no need to directly answer the question whether a PPO was required, and any such language in Hanshaw would be dicta. Also, fortunately for those hoping ERISA does not apply, other courts addressing the question agree that a church-affiliated non-profit, like church hospitals and schools, can directly establish and maintain church plans. See, e.g. Rinehart v. Life Ins. So. of North America, 2009 WL 995715, *3 (W.D. Wash. April 14, 2009) (Finding the only proper question on this issue was whether the hospital is controlled by or associated with a church even though it was the direct sponsor and did not use a PPO. A church plan can be either one maintained by a PPO or one directly maintained by the church-affiliated organization itself, citing to the language in 29 U.S.C. § 1002(33)(C)(ii);) see also, Torres v. Bella Hospital, Inc., 523 F.Supp.2d 123, 142 (Dist. Puerto Rico 2007); Chronister v. Baptist Health, 442 F.3d 648, 652–53 (8th Cir.2006); and Friend v. Ancilla Systems Inc., 68 F.Supp.2d 969, 973 (N.D. Ill. Sept. 21, 1999).
What does a church plan have to do to “opt in” to ERISA and what happens when it does?

Unlike government plans, which can never become subject to ERISA, congress gave church plans the options to “opt in” to ERISA. Church plans are not subject to ERISA until they opt in, properly, under the rules; then once a church plan opts in, revocation is irrevocable.

Frequent questions include, “just what does a church plan have to do to “opt in” to ERISA? If a church plan has opted in, when is the election effective? If an employee is already getting benefits under a plan, like an LTD claim, does the ERISA election apply to that employee already on the claim?"

What does a church plan have to do, technically, to “opt in” to ERISA?

A church can elect to have participation, vesting, funding, and other provisions under the tax laws apply to its benefit plans if it “opts in” in the manner prescribed by the Secretary. IRC §410(d), 26 U.S.C. § 410(d). The Treasury regulations, at 26 C.F.R. § 1.410(d)-1 state that the election must be made by the plan administrator for the church plan. 26 C.F.R. § 1.410(d)-1(c) (2). The plan administrator’s election must be attached to the annual return filed for the first year such election is effective or attached to a written request for a determination letter. 26 C.F.R. § 1.410(d)-1(c)(3). The statement’s technical requirements are that it “shall indicate (i) that the election is made under section 410(d) of the Code and (ii) the first plan year for which it is effective.” 26 C.F.R. § 1.410(d)-1(c)(5). Once made, the election is irrevocable. 26 C.F.R. § 1.410(d)-1(b).

Whatever the form of the election under IRC § 410(d), there must still be a specific, affirmative statement that a plan intends to be subject to ERISA.

Insurance companies and other plan administrators who want ERISA to apply to a claim often argue that benefits are subject to ERISA because the insurance policy and other documents reference ERISA or that the plan has filed a Form 5500 with the DOL.

Generally, filing a Form 5500 is not enough to turn a non-ERISA plan into an ERISA plan. See, e.g. Stern v. International Business Machines Corp., 326 F.3d 1367 (11th Cir. 2003) (in a non-church plan case, an employer’s filing of a Form 5500 does not make a non-ERISA plan into an ERISA plan). Filing those types of forms should not be enough for church plans, either, because the question for a church plan is whether it made the election required under the regulations.

There are few cases discussing that requirement. In Catholic Charities of Maine, Inc. v City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004), there was no dispute that the church plan had opted in to ERISA, but the court did discuss what requirements would satisfy the requirement of an election. The court found that rather than just filing a Form 5500, the plan satisfied the requirement to make a formal, specific election to opt in to ERISA as is required by 26 U.S.C. § 410(d): “[o]n July 22, 2003, Catholic Charities filed an election under the Internal Revenue Code Section 410(d), 26 U.S.C. § 410(d), for all of its plans, welfare and pension, stating its intent to be bound by federal law.” Id., 84. (D. Me. 2004). The administrator of the church plan properly elected in to ERISA “attaching” its election to Form 5500, and by “attaching a statement” that it elected to opt in to a Form 5500. Id. at 89, (emphasis added). The administrator did not simply file a Form 5500, but rather, to “opt in” properly the administrator attached a formal election that complied with the regulations to the Form 5500.

Other courts have explained that, while the exact form of the election to opt in may be debated, there must still be some affirmative election. Medellin v. Community Care HMO, Inc. (“whether the Court applies the precise requirements of the election regulations or merely looks for a ‘reasonable form and manner’ of election, there must be some form of affirmative election, which is notably missing from this case”). 787 F. Supp. 2d 1259, 1265-6 (N.D. Okla. 2011). The church plan in Medellin argued that because it has acted like ERISA applies it should be treated as if it had made the election to “opt in.” The plan had filed annual Form 5500’s, had communicated with the IRS or DOL about delaying any effects of ERISA in 1974, had other communications with the IRS as if it were an ERISA plan, had submitted a plan description to the DOL, and had issued “a Summary Plan Description made pursuant to ERISA.” Medellin, 787 F. Supp. 2d at 1262. The court found that none of that was good enough to turn the church plan into an ERISA plan, “based on the absence of any affirmative election in the record.” Id., at 1266.

Other courts have similarly held the critical question is whether the church plan has made a specific affirmative election. See, e.g., Rinehart v. Life Insurance Co. of North America, 2009 WL 995715, *5 (W.D. Wash. April 14, 2009) (because the defendant did not make a specific and affirmative election under 410(d), the plan was not governed by ERISA); see also Torres v. Bella Vista Hospital, Inc., 523 F. Supp. 2d. 123, “141 (D.P.R. 2007) (“Because no § 410(d) election was made, ERISA will not apply if the plan is in fact a church plan.”). The Torres court further explained that considering the “irrevocable nature of the election after it is made,” the court agrees that the “strict election” in 410(d) must be made. Id. Therefore, an affirmative election is required even for welfare benefit plans.
Can an election under 26 CFR § 1.410(d)-1 apply retroactively to claims that have already been made, or does it apply to pending claims when the election is made?

An IRC § 410(d) election does not apply retroactively to claims arising before the election was made, even if the claim is later denied and appealed. *Geter c. St. Joseph Healthcare Systems, Inc.*, 575 F. Supp. 2d 1244, 1250 (D.N.M. Aug. 28, 2008). In *Geter*, the Plaintiff applied for Unum LTD benefits offered through St. Joseph Healthcare System, under Catholic Healthcare Initiatives, in 2001 and started receiving benefits in February 2002. *Id.*, at 1247. The court explained the timeline was that after 2002, “Catholic Health Initiatives elected to have the long-term disability plan be governed by ERISA,” filing a formal election on January 12, 2004, and paying taxes back through the year 1998. *Id*. Plaintiff filed his lawsuit in state court on October 3, 2007; Defendants removed to federal court claiming ERISA applied in November 2007. *Id.*, at 1247-8. The court did not have subject matter jurisdiction, because the court determined that *was at the time the claim arose*. *Id.* at 1248 (emphasis added). The claim arose in 2002, two years before the election was made. *Id.* ERISA “does not authorize retroactive preemption for claims that arose when the church plan was still exempted from ERISA’s provisions.” *Id.* at 1250.

Similarly, the court in *Robinson v. Metropolitan Life Ins. Co.*, found that a 410(d) election could not apply retroactively even if the plaintiff had become disabled but had not started receiving benefits. 2013 WL 1281868, *6* (E.D. Cal. March 12, 2013). In *Robinson*, the plaintiff became disabled on June 19, 2007, she met her elimination period on December 16, 2007, and the 410(d) election was executed in October 15, 2007. *Id.* at *5*. The defendant argued that the 410(d) election applies to the plaintiff’s claim because it was made before she was due benefits. *Id.* The plaintiff argued that the 410(d) election occurred after her disability date and it would be unfair if the defendant was able to change the applicable law during the elimination period. *Id.*

The court reasoned that the plain text of 29 U.S.C. § 1003(b) (2) states that until a 410(d) election is made, the church plan is exempt from ERISA and the statute does not state that it can apply retroactively and there is “no basis for inferring it.” *Id.* at *6.* The court found that “disability claims arising before the election are therefore not governed by ERISA, and claims arising after the election are.” *Id.* Therefore, the court found that the plaintiff’s claim began on the date she became disabled, even though she had not filed a formal claim form until later, so that 410(d) election was not effective to make the plaintiff’s claim governed by ERISA. *Id.*

Does the 410(d) election apply to ERISA welfare benefit plans or just pension plans?

Historically, based on some old DOL advisory opinions, there was some question whether an IRC §410(d), 26 U.S.C. § 410(d) election could be made for church welfare benefit plans (for benefits such as health insurance, LTD, etc.) or could only be made for church pension plans. Most courts now agree that the church plan election can be made for both types of plans. *Flynn v. Ascension Health Long Term Disability Plan*, is one of the better cases that examines this question thoroughly. 73 F. Supp. 3d 1080, 1084 (E.D. Mo. 2014) ( HOLDING that nothing in the ERISA statute or case law prevents a welfare plan from opting into ERISA under § 410(d).)


*Flynn*, 73 F. Supp. 3d at 1084.

Additionally, rather than just following this extensive line of cases holding that welfare plans could opt in under § 410, the court also conducted its own analysis of the statutory and
regulated language. The Flynn court explained that the controlling Treasury Department regulation, 26 C.F.R. § 1.410(d)-1(a), states, “[i]f a church or convention or association of churches which maintains any church plan, as defined in section 414(e), makes an election under this section, certain provisions of the [IRC] and Title I of [ERISA] shall apply to such church plan as if such plan were not a church plan.” Flynn, 73 F. Supp. 3d at 1085 (emphasis added by the court). Further, the court explained that the definition of “church plan” found in Section 414(e), (which the regulations incorporate) includes welfare benefit plans:

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both.

Flynn, 73 F. Supp. 3d at 1085, quoting from 26 U.S.C. § 414(e) (3)(A) (emphasis added by the court). The Flynn court concluded, “the applicable Treasury Department regulation for a § 410(d) election expressly incorporates a definition of church plans eligible for the election that includes welfare benefit plans.” Id.

On top of all that, the Flynn court explained that the ERISA provision that allows “church plans” to be exempt or to “opt in,” 29 U.S.C. § 1003(b), incorporates the definition of a “church plan” found in ERISA’s definitions section found at 29 U.S.C. § 1002(33). Flynn, 73 F. Supp. 3d at 1085. That section of ERISA refers to a “plan established and maintained ... by a church or by a convention or association of churches ...” Id. (emphasis added by the court). The court then explained that the word “plan,” is “defined in the same section of ERISA to mean ‘an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension plan.’” Id., citing § 1002(3) (emphasis added by the court). Thus, the Flynn court concluded, “under the relevant definitional provisions of both ERISA and the IRC, it appears clear that § 410(d) elections may be made with respect to both pension and welfare benefit plans.” Id.

How do you get information to determine if ERISA applies to employees of churches and church-affiliated non-profits?

Ask. In a letter, sent certified.

One of the good rules about ERISA is that ERISA administrators have a fiduciary duty to answer questions truthfully, when asked, and to provide information the employee did not know to ask. Another good rule under ERISA is that the official plan administrator (usually the employer, by default, or whoever is named in the plan documents) can be sued for up to $110 per day for any day over 30 days that the plan administrator fails to provide plan documents after a written request. ERISA § 502(c), 29 U.S.C. 1129(c).5

If your client works for a church or church-affiliated non-profit, you should write a letter to the employer and ask questions like: Is Mr. or Ms. X’s (your client’s) health care plan (or LTD plan, etc.) subject to ERISA? If it is subject to ERISA, please send me, on behalf of my client, the ERISA master plan document, any insurance policy, any summary plan description (SPD), a copy of any form used to make an election to be covered by ERISA, and any other document under which the plan is maintained and operated. If you don’t have any plan documents already, your letter should ask the employer to identify the plan administrator, if there is one, and to pass on your request to that plan administrator.

Not infrequently, if you ask these questions pre-suit, the church or church-affiliated non-profit will claim they don’t have to answer the questions because they are a church plan not subject to ERISA. This will make it much harder for the insurance company later on to claim ERISA applies once you end up in court.

If ERISA does apply, then the employer, as plan administrator, has a duty to answer those questions and provide the information. If they don’t, the failure to provide that information might cause some liability for the employer, both in terms of a breach of fiduciary duties and for ERISA plan documents penalties. This can make it uncomfortable when the insurance company that offered the benefits later tries to argue the plan is subject to ERISA, and has been all along.

ABOUT THE AUTHORS

Eric Buchanan represents disabled people and other policyholders across the United States in both ERISA and non-ERISA disputes, focusing primarily in the areas of disability, life, and health insurance. Eric became certified as a Specialist in Social Security Disability Law by the National Board of Trial Advocacy in 2007, but now the focus of his firm’s practice is helping policyholders who have been denied insurance benefits, whether under ERISA or state contract and bad faith

Eric served as President of the Tennessee Trial Lawyers Association for the year 2015-2016. Eric is the past-chair (2007-2008) of the AAJ Social Security Disability Section, past chair (2006-2007) of the AAJ ERISA Health Care Finance and Disability Litigation Group, is a past President of the Chattanooga Trial Lawyers, and is past-chair (2005-2006) of the Tennessee Bar Association Disability Law Section.
Eric graduated from the Washington and Lee University School of Law, Magna Cum Laude, and top 10% of his class. At W&L he was inducted into the Order of the Coif and the Omicron Delta Kappa honorary leadership fraternity. Eric graduated from the Virginia Military Institute, and served as an officer in the U.S. Navy from 1989 to 1994 where he served as a naval aviator (pilot), plane commander, and mission commander of P-3C Orion aircraft.

Audrey C. Dolmovich represents people who have been denied insurance benefits. Audrey has become successful at convincing insurance companies to pay claims during the “administrative” phase, i.e. the pre-litigation phase in ERISA cases, helping clients get the full benefits due under policies without having to take cases to court.

She enjoys her job because she has a passion for helping people and appreciates getting to know her clients on a one-on-one basis. She knows that each of her clients has his or her own set of challenges, and it is important to Audrey to know them well and do the best job possible to get her clients the benefits they deserve. Audrey’s clients come to her after their lives have been turned upside down by their medical conditions and their insurance company, and she takes pride in being able to ease their burden as much as possible.

2  The term ‘church plan’ means a plan established and maintained … for its employees … by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26.
3  A Form 5500 is form containing some basic information about a plan, and required to be filed by certain ERISA plans.
4  The issue before the court in Catholic Charities of Maine was whether a welfare plan (a plan offering LTD, health, life or similar benefits) as opposed to a pension plan, could opt into ERISA. Like most cases discussing that issue, the court decided that the rules were the same for both types of plans and that a church welfare plan could also opt in to ERISA. Id., at 88-89, 96.
5  See the additional discussion of this issue, infra.

For a detailed paper on the best way to ask for plan documents and collect penalties if they are not provided, please visit our website at: https://www.buchanandisability.com/helpful-resourcesandarticles/erisa-502c-actions/
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256 Seaboard Lane, Suite E-106
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www.griffithinjurylaw.com
john@griffithinjurylaw.com
615.807.7900

IMMEDIATE PAST PRESIDENT
Matt Hardin, Nashville
Matt Hardin Law PLLC
207 23rd Avenue North
Nashville, TN 37203
www.matthardinlaw.com
matt@matthardinlaw.com
615.200.1111

PRESIDENT ELECT
Tony Seaton, Johnson City
Law Offices of Tony Seaton, PLLC
118 East Watauga Avenue
Johnson City, TN 37601
www.toneyseaton.com
tony@tonyseaton.com
423.282.1041

VICE PRESIDENT/EAST
Danny Ellis, Chattanooga
Truck Wreck Justice
1419 Market Street
Chattanooga, TN 37402
www.truckwreckjustice.com
danny@truckwreckjustice.com
423.265.2020

VICE PRESIDENT/WEST
Carey Acerra, Memphis
Jehl Law Group
5400 Poplar Avenue, Suite 250
Memphis, TN 38119
www.jehllawgroup.com
cacerra@jehllawgroup.com
901.322.4232

VICE PRESIDENT/MIDDLE
Mark Chalos, Nashville
Lieff Cabraser Heimann & Bernstein
150 4th Ave. N., Suite 1650
Nashville, TN 37219
www.lchb.com
mchalos@lchb.com
615.313.9000

SECRETARY
Brandon Bass, Nashville
Law Offices of John Day, PC
5141 Virginia Way, Suite 270
Brentwood, TN 37027
www.johndaylegal.com
bbass@johndaylegal.com
615.742.4880

TREASURER
Troy Jones, Knoxville
Law Office of Troy B. Jones
418 S. Gay Street, Suite 204
Knoxville, TN 37902
www.troybjoness.com
troy@troybjoness.com
865.456.5901

PARLIAMENTARIAN
Caroline Ramsey Taylor, Nashville
Whitfield, Bryson & Mason LLP
518 Monroe Street
Nashville TN 37208
www.whitfieldbryson.com
caroline@wbmllp.com
615.921.6500

AT LARGE EXECUTIVE APPOINTEES:

Audrey Dolmovich, Chattanooga
Eric Buchanan & Associates, PLLC
414 McCallie Avenue
Chattanooga, TN 37402
www.buchanandisability.com
adolmovich@buchanandisability.com
877.634.2506

Jim Higgins, Nashville
The Higgins Firm
525 4th Avenue South
Nashville, TN 37210
www.higginsfirm.com
Jsh@higginsfirm.com
615.353.0930

George Spanos, Nashville
Rogers, Kamm & Shea
2205 State Street
Nashville, TN 37203
www.TheWindInTheWillowsLaw.com
g.spanos@thewindinthewillowslaw.com
615.320.0600
The Tennessee Trial Lawyers Association recently elected John Griffith as president for the 2020-2021 term. Griffith, a Franklin attorney, replaces Matt Hardin of Nashville who served as president from 2019-2020. Hardin now assumes the role of immediate past president and Tony Seaton of Johnson City advances to the office of president-elect.

“John will be a true asset to the Association and the citizens of Tennessee,” stated TTLA immediate Past President Matt Hardin. “As an experienced personal injury lawyer, he fights on behalf of deserving people and will do a tremendous job leading the state’s top trial attorneys as president.”

For the past 20 years, John has relied on his ability to form important relationships with clients, juries, peers, and the community to help him successfully represent personal injury victims across Middle Tennessee. In 2012, he was selected to attend the prestigious Trial Lawyers College, which is conducted by Gerry Spence, one of the most unbeatable and prestigious lawyers in U.S. history. And in 2013 and 2014, John was selected by his peers as the “Best of the Bar”—an award that recognizes Tennessee’s top lawyers and corporate counsel.

In 2018 John Griffith received the 2018 TTLA Outstanding Trial Lawyer Award which is given to a trial lawyer who is an advocate of a noble cause and who has demonstrated superior skills. The award recognizes the trial lawyer that has achieved outstanding results for clients against great obstacles.

The American Association for Justice listed John as one of the “Top 100 Trial Lawyers” in 2008 and 2009. He is also a member of the Tennessee Bar Association, the Nashville Bar Association, and the American Association for Justice. When he is not in the office or coaching his children, you’ll find him pursuing his love of music and playing the guitar, working hard on his farm, and spending time with his wife and 5 children.
“The New Normal” – Internet Video Depositions During the COVID-19 Pandemic

by Brandon Bass

Years ago, lawyers would depose a witness in one conference room while gathered hundreds of miles away in another conference room. The picture quality was terrible. Neither the deposing attorney nor the later jury could make out any of the deponent’s facial expressions. There was an inherent lag in the audio, which led to people speaking over one another. It was like taking a deposition via fax machine.

Anyone who had the misfortune to participate in one of those depositions would be understandably reticent about attempting another remote video deposition today. However, the costs and benefits of using the internet for video depositions have changed dramatically. The technology is lightyears better than what we dealt with a decade ago and a fraction of the cost. Importantly, in the midst of a pandemic that has claimed more than half a million lives, it is critical that lawyers utilize technology to best protect the public health.

Mandates for Internet Video Depositions

Setting the stage for a remote video deposition requires an agreement among all participants or a court order. Rule 29 of both the Federal and Tennessee Rules of Civil Procedure enable the parties to stipulate regarding the manner of taking any deposition. Federal Rule of Civil Procedure 30(b)(4) specifies that “remote means” may be used for a deposition either by stipulation or by court order. While the corresponding Tennessee Rule of Civil Procedure 30.02(7) addresses only remote depositions using telephones, trial courts are empowered by Rule 26.06(5) to set “limitations on discovery [...] as are necessary for the proper management of discovery in the action.” In a nutshell, the parties can either agree to conduct a deposition using internet video or can move the court to order it.

Who is Allowed in the Room with the Deponent

In planning for a remote video deposition, one consideration is whether to impose any limitations on those on-site with the deponent. If an attorney or other individual is in the room with the deponent, they may “cue” the deponent about the questions being posed. In an in-person setting, other counsel may interject if someone is inadvertently (or deliberately) coaching the witness. With participants scattered in different locations using internet video, there is less opportunity to detect and stop such conduct.

It may be helpful, then, to set a ground rule that no one will be present in the same room as the deponent. However, this may not be a workable solution. For one, Tennessee Rule of Civil Procedure 30.02(7) specifies that, at least for telephone depositions, nothing in the Rule prohibits a party deponent from having their counsel on-site with them. Likewise, the Advisory Commission Comment to Rule 30.03 makes clear that a deponent’s lawyer may communicate with the client about the substance of their testimony even during a deposition. Thus, the Rules do not contemplate that a deponent would ordinarily be barred from having at least their lawyer in the room with them, including during a deposition using remote means.

Another solution is to require that any person who is in the room with the deponent appear on live video during the deposition. This assures all other counsel operating remotely that there is no cause for concern. (It also facilitates better communication between counsel about any objections, exhibits, or logistical issues that may occur.).

Planning for Technology Requirements

One attorney should have the designated responsibility to assure the deponent has the technological means to participate in the deposition. The deponent will need: (1) a reliable, high-speed internet connection; (2) a device with a monitor large enough to see any exhibits (i.e., not just a smartphone); and (3) a constant power supply for the device, rather than a battery that could run out at any time. If the deponent is represented, their attorney is in the best position to communicate and coordinate with the deponent about those issues.

It may be helpful to have some contingency plans in case technology fails during the deposition. For example, can the deposition proceed if designated participants lose connection? Can some participants connect by telephone audio only if their
data connection fails? If the court reporter or videographer loses their connection, can the deposition proceed with the remaining recording method?

### Using Exhibits

There are three primary ways to share and use exhibits, each with their own pros and cons.

First, counsel can pre-mark exhibits for identification only. Counsel can send exhibits to the court reporter and all participants in advance, eliminating any logistical difficulties of sharing documents in real-time. The downside, of course, is that pre-marking exhibits means showing all adversaries what documents might be used.

Second, counsel can send exhibits during the deposition using the software’s instant messaging feature. With Zoom, for example, the user simply clicks “chat” at the bottom of the screen, then selects “file” from the chat menu. The document is instantly sent to all participants. Everyone can review the exhibit at their own pace. On the other hand, counsel cannot display the exhibit on video for the jury that way.

Third, counsel can use the screen sharing feature to display a document. In Zoom, the questioning attorney clicks “share screen” at the bottom, then chooses a specific window to display. The deposition video shows that window with a small, live video of the deponent in a “picture-in-picture” display. Counsel’s mouse pointer stays on the recorded video, and counsel can edit the document live on the deposition video. Using screen sharing, counsel can point the deponent and later jury to key parts of an exhibit and highlight or circle them on the fly. However, for a lengthy document that the deponent or others may want to review in detail, the questioning attorney must scroll through the document on video.

Perhaps the best method for using exhibits is to use all three methods at once. For example, counsel can pre-mark generic documents like pleadings and deposition notices, saving time without giving away any strategy. During the deposition, counsel can send additional exhibits using the instant messaging feature, then display and control them on video using the screen sharing feature. The combination of all three methods gives counsel maximum control.

Before using any exhibit in an internet video deposition, counsel should see that the computer file is ready for sharing. Name each file something intellectually honest that does not give away counsel’s thoughts about the importance of the document. Convert to PDF format to ensure the document is readable and appears the same on any participant’s computer. Close any unused programs to avoid accidently displaying privileged or work product information in a screen share.

During the COVID-19 pandemic, internet video depositions allow cases to progress without the unjustified risk of many in-person depositions. Beyond the pandemic, lawyers may find the process much more efficient, while the resulting video depositions are at least as effective as a traditional in-person deposition. Internet video depositions may be “the new normal” simply because they work better anyway, and lawyers only needed a crisis to incentivize trying them out regularly.

### ABOUT THE AUTHOR

Brandon Bass was named Trial Lawyer of the Year by TTALA in 2017. He has been named to Best Lawyers in America for personal injury, medical malpractice, and products liability. He is the author of multiple articles published nationally by Trial Magazine and other publications and has given more than a hundred CLE speeches throughout the Southeast. Brandon’s practice is statewide, and he can be reached at 615-742-4880 or bbass@johndaylegal.com. Brandon serves as Secretary for the TTLA.

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Silver Partners continued from page 23

SILVER PARTNERS CONT.

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Everybody Wins
 Almost 20 years ago, Rocky McElhaney set out on a mission to fight for injury victims and level the playing field against big insurance companies. In that time, he and his elite band of “gladiators in suits” at the Rocky McElhaney Law Firm have changed countless lives for the better and successfully obtained tens of millions in recoveries for deserving folks throughout the state and beyond. Among scores of other accolades, Rocky has been voted “Nashville’s Best Attorney” 5 years in a row by Nashville Scene’s annual readers’ poll.

In tandem with that success, the firm has experienced unprecedented growth year after year, expanding to 6 offices across the state and employing a small army of seasoned trial lawyers and legal professionals.

Though it would seem that Rocky’s dream has been realized, he says “Our mission is far from complete. We’ve worked really hard and we’ve done really well but we know we are only as strong as the community we serve. To Penny and I, being in a place where we can give back and help people beyond what we do at the firm is the true mark of success.”

When deciding where to focus the firm’s philanthropic efforts, Penny’s and Rocky’s hearts were pulled to supporting organizations that help families and children persevere through tough times and significant challenges – “Tough times like those our clients endure,” she says. The dynamic duo, who are parents of 4 little ones themselves, feel that investing in and promoting the growth of young hearts and minds is a gift that keeps giving: “Kids are the most vulnerable but promising demographic in our communities. We know from our work in personal injury that all it takes is one accident, job loss, or unstable domestic situation to impede that child’s ability to thrive. We want to be part of changing the future for kids in these situations,” says Penny McElhaney.

(From the left: Jake, Luke, Isla, Penny, Rocky, and Tate)
And for the last 5 years, that’s exactly what RML has been doing! Through generous financial support, promotion, education, and service, the firm has been able to lift up a myriad of local non-profits and help them transform deficit into surplus, plans into action, and despair into hope for our community’s youth and their families.

**Gallatin CARES**

In 2016, Rocky McElhaney Law Firm joined the fight against hunger by kicking off its inaugural food and donation drive for Gallatin CARES, a local non-profit food pantry that helps struggling families across Middle Tennessee. Through the magnanimity of each employee and the firm’s matching gift, RML has donated nearly $25,000 to Gallatin CARES over the last 4 years and stocked the shelves with truckloads of goods to help make up that critical food deficit during lean times in the community.

**Sumner County CASA**

As President of the local non-profit, Penny McElhaney has pounded the payment, knocked on doors, made cold calls and poured her heart into helping sustain the life-changing work that Court Appointed Special Advocates (CASA) volunteers provide to abused and neglected children in Sumner County. Her leadership and the firm’s support have also aided the organization in the development of creative and exciting annual fundraising events which have resulted in significantly more contributions, exposure, and volunteer support.

**S'MORE Reading Camp**

A child who can’t read, can’t learn. But teaching a child to read can change the trajectory of their life, and make learning fun! S'MORE Reading Camp is an intensive 4-week summer reading program developed to motivate reading activities and elevate reading levels among rising 2nd and 3rd graders who are struggling with reading competency. RML has proudly supported this initiative since 2019 and has even hosted story time with the children on the last day of camp.

**Annual Scholarship**

Rocky and Penny believe supporting education is important at every age. In 2015, They established the Max McElhaney Memorial Educational Scholarship to honor the life and legacy of Rocky’s late Uncle Max who also was a proponent of endless learning and self-reinvention. Since its inception, the firm has chosen four bold young leaders to receive scholarships who represent the best and brightest of colleges and universities across the US.

**Speaking Out and Getting Involved**

Rocky is deeply dedicated to helping guide and prepare our youth for the future by tackling some of the toughest issues they face head-on. In 2019, he spoke to several middle school and high school audiences on topics ranging from driving safety to vaping to learning how to make better decisions in life and always doing the next right thing.

In addition to supporting numerous schools and extracurricular activities that help kids to develop discipline, teamwork, and respect for others, in his downtime, Rocky loves coaching little league. Penny and Rocky volunteer at school, at church and are always creating thoughtful ways to give back to teachers and local law enforcement who protect the families that their firm serves.

By leading the way with their commitment to paying their blessings forward, the McElhaneyes are helping staff to realize their own goals of helping others. Rocky says, “Creating a workplace culture that supports our team in their own service-based initiatives raises morale and the firm’s overall stamina for increased community involvement in years to come. It’s exciting to see what we can do together!”
I’m pleased to report some positive legislative news on very important issues for you and your clients.

The U.S House of Representatives has passed the House Surface Transportation bill which would increase commercial trucking insurance minimums from $750,000 (the amount since the late 1980s) to $2 million; the new amount will also be tied to inflation. AAJ will continue to fight for justice for truck crash victims and their families.

In addition, the bill would eliminate Amtrak’s despicable use of forced arbitration against injured or killed passengers, restoring rights to millions of passengers who rely on their services every day.

We know how critical these issues are for you and your clients, and we will keep you posted as this moves to the Senate.

Below are some other highlights of how AAJ is working to protect your practices, your clients’ rights, and the future of civil justice.

**AAJ Resists Broad Immunity**

We successfully fought demands for broad immunity in previous COVID-related legislation. However, Mitch McConnell and his allies in corporate America want blanket immunity to limit liability for employers and health care workers in the next COVID-19 stimulus package.

And now, with the introduction of the Cuellar/Graves “Get America Back to Work” Act in the U.S. House of Representatives, we are seeing the latest attempt to erode your clients’ rights. The bill is a corporate wish list of immunity proposals which would grant broad immunity for COVID-19 injuries and deaths—allowing companies to evade responsibility when they fail to act reasonably to protect health workers and consumers. The bill also prohibits the Occupational Health and Safety Administration from issuing citations to employers for forcing their workers into unsafe working conditions.

We remain focused on ensuring that corporate America and the U.S Chamber don’t succeed in using the COVID-19 crisis to achieve their anti-worker, anti-consumer agenda. Watch this space for more updates.

**George Floyd Justice in Policing Act**

AAJ is strongly advocating for the accountability and policing reforms in the George Floyd Justice in Policing Act (H.R. 7120). The U.S. House recently passed this bill, 236-181. It would eliminate qualified immunity for police officers; ban choke holds; and eliminate racial and religious profiling. In addition, it would establish independent prosecutors for police investigations, a national police misconduct registry, and funding for community-based policing programs.
For over 50 years, the qualified immunity doctrine has shielded law enforcement officers from lawsuits for civil rights violations against those they are sworn to protect. In the last two years, AAJ has joined six amicus curiae briefs fighting to overturn this unjust policy.

The House bill is a strong first step towards comprehensive reform in policing. Lawmakers who opposed this bill wanted to amend it by offering the Senate version of the bill. This was not an acceptable alternative. For example, while the current House bill would end qualified immunity in policing, the Senate version does not.

AAJ issued a strong statement against the Senate proposal when that bill was introduced.

**AAJ Works with State TLAs on Qualified Immunity**

While Congress is debating policing reform legislation, state governments are also taking action to increase accountability. In June, Colorado Governor Jared Polis signed into law CO SB20-217 to implement several important police misconduct reforms. The bill includes a repeal of the state’s qualified immunity doctrine and municipal caps on damages as applied in police misconduct claims, as well as language requiring attorneys’ fees to be provided to a successful plaintiff in both damage and injunctive relief cases. Other states will consider measures to increase accountability later this year in special sessions or will address the issue during the 2021 sessions.

AAJ State Affairs will continue to work with the state TLAs in their efforts to hold wrongdoers accountable for their misconduct.

**Fighting for You and Your Clients**

Thank you for your support. Despite these difficult times, AAJ continues to fight all attempts to deny access to justice. We will keep you informed about important developments and welcome your input. You can reach me at [advocacy@justice.org](mailto:advocacy@justice.org).

**LINDA LIPSEN**
CEO, AAJ
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Please complete all applicable sections for your level of membership and return the application to:
Tennessee Trial Lawyers Association
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<th>First Name</th>
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(Please indicate how you prefer to have your name appear on any printed nametag)

Law Firm  or Office Name

Office Address | City/State/Zip

Office Phone # | Office Fax #

Cell Phone # | Email address

Law School Attended | Bar Admit Date | BPR #

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My practice is approximately ___% Plaintiff ___% Defense (If Defense: ___% Criminal ___% Civil).

Please indicate your gender (optional):  □ Male  □ Female

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(*Years in practice should indicate total number of years in law practice – in any state. (**Paralegals applying for membership must be associated with a current TTLA plaintiff attorney member.)*

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If your practice involves negligence or workers’ compensation cases in which you represent the defendant 51% or more of the time, you will be an Associate Member at whatever level your “years in practice” indicates. This category of membership does not include the right to vote, hold office, or attend plaintiff-only seminars.

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Signature ____________________________

I was referred to TTLA by ____________________________

PARALEGAL: I hereby certify that I am a paralegal who is qualified through education, training and/or experience to perform substantive legal work under the direction of an attorney. The majority of my present work (over 50%) is on behalf of the plaintiff and is in accordance with the purpose of Tennessee Trial Lawyers Association.

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TTLA Amicus Curiae Committee works to keep abreast of important judicial decisions. They review cases and file briefs involving civil issues that have a far-reaching impact beyond the isolated facts of the case. TTLA also provides a moot court experience for appellate cases.

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TTLA hosts local networking events across the state several times a year. These events give members a chance to socialize with attorneys and judges from their area.

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For more detailed information, rates and cut-off dates, please contact Theresa Grisham at tgrisham@ttla.org

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Please contact Suzanne Keith (skeith@ttla.org) to be added to the Women’s Caucus listserv or Carey Acerra (cacerra@jehllawgroup.com) for more information.
At its most simplistic basis, jury selection is one of de-selection; it is not who we would like on the jury so much as who we don’t want on the jury. Who or what kind of person will be against me or my client? Stereotypes and demographics can serve as warning signals and can be dangerously misleading. What if we just don’t know about someone or are not sure? What if there is someone in the venire we couldn’t ask anything of or said nothing or volunteered nothing? Or worse, what if your presiding Judge recently returned from Judge school and announced that in his courtroom, he will voir dire the venire. In those instances Gerry Spence suggests the application of what he calls the “common enemy rule.” Since I have only heard Gerry Spence talk about this, I attribute this to him.

Here is how it works: ask yourself who is the common enemy of a juror as between the plaintiff and defendant? I’ve been involved in several medical negligence trials in which my co-counsel insisted a nurse or a medical technician would be a “good” juror because of professional antagonism with a defendant doctor. Such reasoning violates the common enemy rule. The plaintiff filing suit, the complaining patient, the trouble-maker, is the enemy common to the juror nurse and the defendant doctor; regardless how much the nurse may dislike arrogant doctors, when it comes down to a potential professional threat, the nurse will almost always side against the common enemy.

Take a premise liability case against a major retailer such as a slip and fall, trip and fall, falling inventory, etc. On the venire is an assistant store manager of the defendant’s retail competitor. Think the assistant store manager will want to “stick it to his retail competitor if selected to the jury?” Not if the common enemy rule applies. Same reasoning applies to a product engineer on a product liability trial; any law enforcement officer in a Sec. 1983 case.

The common enemy rule does not apply to lawyers. I’ve had more than one trial in which a particular juror I really favored found against my client because of the common enemy rule.

And as with almost any rule, there can be exceptions to the common enemy rule. The key to finding an exception is getting information from the juror which sometimes doesn’t happen, thus the value of the rule. In order to determine if the common enemy rule applies, one must explore the depth of affiliation between the juror and defendant. For example, Gerry Spence relates how he was in jury selection on an insurance bad faith case. On the venire was an executive of a major insurance company. On the face of it, the plaintiff was a common enemy of this juror and the defendant. However, in further examination Mr. Spence learned that the juror was not in the risk assessment or casualty part of the company but rather on the investment side. The juror was also an avid outdoorsman and environmentalist and was active in ecology groups. Mr. Spence did not strike this member who later became the jury foreman on a multimillion-dollar verdict.

As for me, several years ago I was trying a medical negligence case in a small town. On the venire was a former employee of the defendant hospital. On its face a potential common enemy to my client. Upon questioning this juror was not in the healthcare field but rather had some sort of office/clerical job. More importantly, I decided not to strike this juror because of how she responded to my question about how she felt about my client filing a lawsuit for the death of her husband. This juror responded, “if this happened to me, I’d do the exact same thing,” and was part of a jury that returned a significant wrongful death verdict.

Keeping in mind the exceptions, I have found the common enemy rule a valuable tool in every jury selection.

ABOUT THE AUTHOR

Eddie Schmidt, originally from Louisiana, attended Vanderbilt undergrad and LSU Law School. In 1998 Eddie attended the Gerry Spence Trial Lawyers College and currently serves as a member of the teaching faculty. Eddie also regularly writes and speaks about trial practice. Eddie has tried all types of civil and criminal cases and obtained significant verdicts in medical malpractice, products liability, unfair trade practices and civil rights in both state and federal courts. He has a long history of strong beliefs in legal and ethical equality. Eddie is a long time supporter of TTLA and his law practice is currently in Nashville at www.eschmitdlaw.com. eddie@eschmidtlaw.com.
Spoliation of Evidence – When does it occur and what are the potential remedies?

by Jake VanAusdall

In my practice, I often find myself defending a motion for sanctions for spoliation of evidence or offensively raising spoliation as an issue that warrants sanctions due to the negligent or intentional alteration of evidence. As a trial lawyer, it is important to know the relevant applicable law in order to properly brief these issues for the Court and to obtain the best available remedy for your client.

The Seminal Tennessee Supreme Court Case

In 2015, the Supreme Court addressed this issue in a case known as Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734 (Tenn. 2015).

In Tatham v. Bridgestone Americas Holding, Inc., Plaintiff was in a serious car accident and filed a products liability suit against the seller and manufacturer of the tire of the car. Plaintiff alleged that the car accident occurred due to the failure of a new tire purchased from Defendants. At the instruction of her insurance company, Plaintiff transferred title of the vehicle (and tire) to a third-party wrecker service. In ordinary practice, the wrecker service destroyed the tire and car. After the car and tire were destroyed, Plaintiff filed suit against Defendants. Defendants filed a Motion for Summary Judgment and sought sanctions by requesting the court dismiss Plaintiff’s case because the tire was destroyed. Defendants asserted they were prejudiced because they never got a chance to inspect the tire. The trial court refused to award sanctions after finding Plaintiff did not intentionally destroy or otherwise spoliate the tire. Defendants appealed, arguing the trial court abused its discretion. This issue was addressed by the Tennessee Supreme Court. The Supreme Court upheld the trial court’s decision not to award sanctions and in the process developed a new four (4) factor test for trial judges to use when determining whether to impose sanctions on a party who may have intentionally or negligently spoliated evidence.

The Four Factor Tatham Test

(1) The first factor is the culpability of the spoliating party in causing the destruction of the evidence. In examining Factor #1, the Court will determine if the conduct was intentional or accidental. If it is proven that a party willfully destroyed relevant evidence, then this factor will help the non-spoliating party. If it is accidental, this factor may benefit the party who destroyed the evidence. Importantly, an intentional act is not required for a Court to award sanctions.

(2) The second factor is the degree of prejudice suffered by the non-spoliating party because of the absence of evidence. Factor #2 concerns how much each party is harmed by their ability/ inability to examine the relevant evidence. In Tatham, neither party was able to review the tire in question, so the Court did not weigh this factor heavily to help or hurt Plaintiff or Defendant. If one party had the ability to inspect the tire but the other did not, then the Court would have likely viewed this factor differently. Oftentimes, Defendants in construction defect cases who have not had an opportunity to review construction defects prior to repair will seek sanctions with this factor as the primary reasoning.

(3) The third factor examines whether, at the time the evidence was destroyed, the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation. Factor #3 is important because opposing parties commonly disagree on when litigation is “reasonably foreseeable” and it may vary from case to case. For instance, if a party is seeking to obtain the video of an injury that occurred at a business and they inform them of this by sending a litigation/legal hold letter immediately after the accident, then litigation should be considered “reasonably foreseeable” upon their receipt of the litigation hold letter.

(4) The last factor requires a court to impose the least severe sanction available to remedy any prejudice caused to the non-spoliating party. Lastly, factor #4 states that the court should show restraint in sanctioning a party for destroying and/or spoliating evidence.

continued to page 41
According to this factor, the Court should show significant restraint prior to awarding severe sanctions.

**How Might a Court Punish a Party who Destroys Evidence?**

Prior to sanctioning a party, a trial court should examine each scenario on a case-by-case basis using all four (4) factors listed above. A trial court may choose to impose sanctions under Rule 37 of the Tennessee Rules of Civil Procedure and has the discretion to award a variety of different types of sanctions. When a court, specifically a federal court, is adjudicating a dispute, it is adjudicating a discretion to award a variety of different types of sanctions. When a court, specifically a federal court, is adjudicating a dispute, it is adjudicating whether to award sanctions, similar to tenets. A trial court may choose to impose sanctions under Rule 37 of the Tennessee Rules of Civil Procedure seeking sanctions. The Trial Court’s inherent authority to sanction bad-faith conduct means a party can move the Court under several different Rules of Civil Procedure and obtain sanctions.

**Practice Tips: Seeking Sanctions & Holding Wrongdoers Accountable**

1) Be creative in proposing sanctions.

Courts have wide discretion to award sanctions in this area but are limited by the fourth prong of the Tatham. Upon taking a case with an important evidentiary item that is not in your client’s custody or control, immediately send a litigation hold notice so that the third factor of the Tatham analysis is met and has notice to preserve the relevant item. Some examples of these items may be the product in a product liability case, a “smoking gun” email located on company servers, “black box” data in a trucking case, etc.

2) Document thoroughly.

If you represent a plaintiff in a construction defect case or case where the item in question needs to be immediately repaired or altered, it is best practice to, at a minimum, document thoroughly with photos. It is even better practice to immediately attempt to schedule a Rule 34 Inspection prior to the alteration of any important evidentiary items.

3) From a Defensive perspective: Rely on the fourth Tatham factor.

If you are in a situation where a party either intentionally or inadvertently destroyed evidence, remember that the fourth(4th) factor of the Tatham analysis indicates that the Court should apply the “least severe sanction.” This factor combined with the Court’s broad discretion may result in a small sanction rather than one that is detrimental to your client’s case.

**ABOUT THE AUTHOR**

Jake VanAusdall is the Managing Attorney at Cole Law in Brentwood, TN. Jake dedicates his practice to business litigation, construction disputes, employment law, and general civil litigation. He can be reached at [www.colelawgrouppc.com](http://www.colelawgrouppc.com) or via email at [jvanausdall@colelawgrouppc.com](mailto:jvanausdall@colelawgrouppc.com)

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1 “Federal courts have the inherent authority to sanction bad-faith conduct, as well as conduct that is ‘tantamount to bad faith.’” Plastech Holding Corp. v. WM Greentech Auto. Corp., 257 F. Supp. 3d 867, 872 (E.D. Mich. 2017) (quoting Metz v. Unizan Bank, 655 F.3d 485, 489 (6th Cir. 2011)).


3 Tenn. R. Civ. P. 34.
Saving Your Client’s Public Benefits – Special Needs Basics for Trial Lawyers

by Amelia Crotwell, CELA*

As a former trial lawyer, I know that wrangling a settlement on behalf of a client – getting to “yes” with the other side – is only half the battle. The devil is in the details and, many times, complications can arise as you prepare to close the case. Maybe the client says, “Oh, by the way, how will this affect my SSI?” Substitute any number of benefits in place of Supplemental Security Income (SSI) – food stamps, TennCare, subsidized housing, and Medicare Savings Programs. Sure, the best practice is to plan ahead for these things, and I encourage you to incorporate questions in your intake documents to verify what, if any, means tested benefits the client is receiving so you can grapple with that in the context of settlement and not afterward. But if you are ever surprised by a client last minute, here is the skinny on a complex topic.¹

For purposes of this article, I am assuming that the settlement you have negotiated belongs to your client. This is not an article about estate planning for parents of a disabled child. When considering special needs planning for a disabled client receiving a settlement, there are three fundamental questions: (1) What benefits are available or at risk? (2) How large is the net settlement and what is the best device available to preserve benefits? and (3) What are the future ramifications?

1. What benefits are available or at risk?

Nothing could be more effective for summarizing benefit programs than the almighty matrix. See Table One-Common Public Benefit Programs 2020.

2. How large is the net settlement and what is the best planning device available to preserve benefits?

For large settlements, e.g., $100,000+, the client needs a self-settled special needs trust authorized under 42 USC §1396p. The d4A trust, which gets the odd name from the statutory subsection authorizing its creation, is the gold standard for holding substantial settlements. The d4A permits a disabled person under the age of 65 to create a stand-alone trust, choose his or her own trustee, and participate in crafting the terms of the trust. This type of trust is commonly used and familiar to public benefit agencies. The d4A can be established by the person with the disability if he or she has capacity, or if capacity is lacking, then by the parent, grandparent, conservator or guardian of the person with a disability, or a court. The d4A is a “sole benefit” trust, so distributions should benefit only the beneficiary. A mandatory “payback” provision requires reimbursement after the death of the beneficiary to the state(s) that contributed to medical assistance during the beneficiary’s lifetime.

For smaller settlements, e.g., $15,000 to $100,000, think practically and do something simple. Spend it wisely pay off debt, purchase exempt assets, or take a vacation purchase or pay off a home and shop for contents (furniture, appliances, and electronics). Buy a vehicle of reasonable value – not a luxury car. At the end of this spend down period, retain no more than $2,000 in countable resources. If the settlement can be meaningfully spent in the calendar month it becomes available to the client, then you can avoid hand wringing over the potential loss of benefits. An itemized record of how funds were used during the spenddown period should be kept and provided to the benefits agencies within 10 days.²

There are two additional options for smaller settlements: an ABLE account and a pooled trust. Both of these options allow the client to “keep” the money – not spend it. An ABLE account is a cousin of the 529 qualified tuition plan authorized by Achieving A Better Life Experience, a law passed in 2014.³ ABLE accounts, established under IRC 529A and operated by the state Department of Treasury, are available to persons whose disability began before the age of 26. An ABLE account can receive up to $15,000 per calendar year. Tennessee has ABLETN.gov but many other states also have ABLE accounts. They are a low-cost option, offer several different types of investment platforms, and offer clients who typically have no savings the ability to set aside some money for future calamities. Some ABLE accounts can have a debit card associated with the account, which gives these particular clients a sense of autonomy and financial dignity they may never experience otherwise. Resource contributions to the ABLE from the beneficiary directly or from relatives are not “counted” as “available” to his or her for public benefits means testing. Importantly, withdrawals made by the beneficiary are not treated as In-kind Support and Maintenance (ISM) for Supplemental Security Income (SSI) purposes if spent on qualified disability

*Certified Elder Law Attorney by the National Elder Law Foundation

[continued to page 43]
expenses (QDE) in the month a withdrawal is received. Food and shelter falls within the definition of a QDE, – which is classic ISM territory. There are tax benefits, too. Akin to a Roth IRA or a 529, the corpus grows tax free and no tax or penalty is paid by the beneficiary on withdrawals if the funds are used for QDE within the month received.

So, when should we not use an ABLE account? When the client was disabled after age 26, or where the amount of money that cannot be meaningfully spent is over $15,000. In those cases, consider a d4C pooled trust which is named for its statutory subsection. A d4C trust is operated by a non-profit corporation for the benefit of a pool of beneficiaries who join a single trust declaration. The trustee maintains a separate sub-account for each beneficiary and oversees the investments and distributions. Like the d4A trust, this trust can be established by the person with a disability or by a parent, grandparent, conservator or guardian of the person with the disability, or a court. The statute itself is silent about age restrictions, which might lead one to believe this silence is an indicator that a person of any age can avail themselves of this wonderful tool. Unfortunately, that is not the case. In 2008, the Centers for Medicaid and Medicare Services (CMS) issued a memo that declared “only trusts established for a disabled individual age 64 or younger are exempt from application of transfer of assets penalty provisions.” Although a client age 65 or older may establish a d4C trust, the client will face a possible penalty for transferring their settlement into it. Transfer penalties cause disqualification for many means tested benefits – see Table One. Many states and the Social Security Administration impose penalties on age 65 and older clients establishing and funding such trusts. There is ongoing litigation in other states on this issue. In Tennessee, recent rules and policy follow this restrictive view. Prior to this rule amendment, Tennessee permitted the use of pooled d4C trusts for persons over age 64 and followed the precedent created in Ruby Beach v. DHS.

For a summary of the different planning devices, see Table Two - Comparison of ABLE Accounts and Special Needs Trusts.

3. What are the future ramifications?

After considering what device might be the best option for your client currently, the last step is evaluating what happens years down the road or when your client dies. For clients with larger settlements who choose to create a d4A, the state has a contractual right of reimbursement for all benefits paid out on behalf of the client over the client’s lifetime.

If your client opts against a trust altogether and spends the settlement funds wisely with the purchase of a home, vehicle, etc., all is well, right? Maybe not. Does your SSI client have resources necessary to maintain the home and pay required taxes and insurance? That can be hard to do when their total income is $783/month. If a third party pays that cost for the client, their SSI will be reduced because taxes and insurance are considered shelter costs and thus ISM (unless the proceeds come from an ABLE account). If the client marries, a subsequent divorce could result in loss of the home. The client may borrow against the home and ultimately lose it to foreclosure, or the client may sell the home and have an influx of disqualifying cash from the proceeds of the sale. Importantly, though if, at the time of the client’s death, they are not enrolled in LTSS or, if enrolled in LTSS but under the age of 55, there is no estate recovery claim or payback to the state.

With the d4C pooled trust, when the client dies, the state Medicaid agency is repaid the amount it paid on behalf of the client or the trustee keeps the entirety of the remaining funds. Therefore when funding a d4C, it is wise for the beneficiary to plan ways to spend the money meaningfully, including prepaying for burial or cremation, and generally expecting to spend close to the entirety of the funds over their anticipated life expectancy. At death of the client, the trustee is not permitted to pay for burial or cremation or make other distributions until the state claim has been satisfied. The claim amount made by the state Medicaid agency can add up quickly, making the availability of funds for burial or cremation arrangements uncertain. The state’s claim will account for payments made by the agency prior to and after the establishment of the trust and may contain hidden costs paid to managed care organizations that administer TennCare. Under federal law, if the trust does not contain enough money to fully pay the state’s claim, the d4C trustee may retain the funds and is not obligated to pay anything to the state agency. As you can imagine, this option has not been popular with TennCare and has prompted the following rule change intended to circumvent the federal law: “Trusts created pursuant to this section shall not include language disallowing repayment to the state in the event the claim exceeds the amount remaining in the trust.” TN Rules & Reg. 1200-13-20-08(i)(2)(iii)(Aug. 2019). This rule should be challenged as conflicting with federal law, but to date, it has not been overruled.

At the death of a client choosing an ABLE account, the agency receives reimbursement for Medicaid benefits received by the client since inception of the ABLE account. The statute provides that the state is not a beneficiary of the account but rather is a creditor and must file a claim in the probate estate of the deceased account holder to receive the ABLE account proceeds. The state is paid only an amount equal to what it has paid in total medical assistance during the lifetime of the ABLE account holder. An ABLE account can be transferred prior to an account holder’s death to a family member who also meets the age and disability criteria for such an account and in
this way a payback to the state can be avoided.\textsuperscript{12} If there are insufficient assets in the ABLE to pay the entire claim filed by the state, the state collects what it can via the probate estate of the account holder.

**Conclusion**

Given all the nuances involved, consider talking with an attorney competent in special needs planning early in your case before settlement is reached. Understanding all the available options and the implications will help you craft a better settlement, be better armed at mediation, and may open up paths that typically might now be considered available.

**ABOUT THE AUTHORS**

Amelia Crotwell, CELA by NELF, handles Life Care Planning, special needs trusts, elder law, wills, trusts, Medicare, Medicaid, Social Security, and VA matters at her firm, Elder Law of East Tennessee in Knoxville, TN.

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\textsuperscript{1} Caveat: there are many substrates here, so this article doesn’t substitute for good advice from an elder law attorney knowledgeable about special needs planning.

\textsuperscript{2} Changes in income or resources should be reported to TennCare within 10 days of the change. HCFA Division of TennCare Eligibility Policy Consolidated, Section 200.030(8) (March 18, 2019). Social Security requires changes in income or resources to be reported within 10 days of the end of the calendar month in which the change occurred. POMS SI 02301.005(3).

\textsuperscript{3} CMS memo from Gale Arden, Center for Medicaid and State Operations, Disabled and Elderly Health Programs Group (Baltimore) to Jay Gavens, Acting Associate Regional Administrator, Division of Medicaid and Children’s Health (Atlanta Region IV), April 14, 2008.


\textsuperscript{5} HCFA TennCare Eligibility Policy Consolidated, Section 110.055(4)(f)(March 18, 2019) and R. & Reg. 1200-13-20-08i)(2(iii).

\textsuperscript{6} No 09-2120-III in the Chancery Court for Davidson County (Sept. 8, 2010).

\textsuperscript{7} Tenn. Code Ann. § 71-5-116(c).

\textsuperscript{8} 26 USC § 529A(f).

\textsuperscript{9} Id. at 529A(A).

\textsuperscript{10} 42 U.S.C. § 1396p(d)(4)(C)(iv): “To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title [42 USCS § 1396 et seq.]”

\textsuperscript{11} 26 USC § 529A(A).

\textsuperscript{12} Id. at 529A(A).
<table>
<thead>
<tr>
<th>Benefit Program</th>
<th>Purpose/Beneficiary</th>
<th>Monthly Income Limit</th>
<th>Resource Limit</th>
<th>Exempt</th>
<th>Look-back</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Security Disability (SSDI)</td>
<td>Income to workers who become disabled prior to full retirement age</td>
<td>None, but can’t be capable of substantial gainful activity</td>
<td>None</td>
<td>N/A</td>
<td>N/A</td>
<td>5-month wait; Medicare 24 month wait; no waiting period for people with end stage renal disease or Lou Gehrig’s disease</td>
</tr>
<tr>
<td>SSDI for Childhood Disability Benefits (CDB)</td>
<td>Income to disabled, deceased, or retired worker’s adult child who is disabled prior to age 22</td>
<td>Based on worker’s Primary Insurance Amount (PIA) which depends on earnings</td>
<td>None</td>
<td>N/A</td>
<td>N/A</td>
<td>Medicare 24 month wait; may be coupled with SSI if CDB is under SSI upper limit and SSI rules are met</td>
</tr>
<tr>
<td>Supplemental Security Income (SSI)</td>
<td>Cash assistance to disabled person with inadequate work record; use for shelter and food</td>
<td>$783</td>
<td>$2,000 individual; $3,000 married</td>
<td></td>
<td>36 months</td>
<td>No waiting period; Medicaid automatic in SSI states, such as TN; if beneficiary receives financial assistance for food and shelter from a third party, this causes In-Kind Support &amp; Maintenance (ISM) reduction</td>
</tr>
<tr>
<td>TennCare/Medicaid</td>
<td>Health insurance</td>
<td>See SSI</td>
<td>See SSI</td>
<td>See SSI</td>
<td></td>
<td>automatic with SSI in TN</td>
</tr>
<tr>
<td>TennCare Choices Long Term Services and Supports</td>
<td>Health care services to aged, blind or disabled</td>
<td>$2,349</td>
<td>$2,000 individual or for married, one-half countable resources within caps of $25,728 and $128,640</td>
<td>See SSI</td>
<td>60 months</td>
<td>Eligibility begins on later of application date or date of eligibility for institutional care but date of enrollment for HCBS; a qualified income trust, aka, Miller Trust, is workaround for income cap</td>
</tr>
<tr>
<td>Food Stamps (SNAP)</td>
<td>Supplement access to food for working individuals or families</td>
<td>Depends on number of people in household; typical family of 4, $2,720, but if one is over age 60 or disabled, then $3,452</td>
<td>$2,250 per household or $3,500 if one is over age 60 or disabled</td>
<td>Home, vehicle with family purpose, cash value of life insurance, retirement account if job attached</td>
<td>3 months</td>
<td>20% earnings deduction permitted, as well as deductions for dependent care expenses, shelter, and utility allowance up to $552, and medical expenses up to $35 for over 60 or disabled</td>
</tr>
</tbody>
</table>

continued to page 46
<table>
<thead>
<tr>
<th>Benefit Program</th>
<th>Purpose/Beneficiary</th>
<th>Monthly Income Limit</th>
<th>Resource Limit</th>
<th>Exempt</th>
<th>Look-back</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualified Medicare Beneficiary (QMB)</td>
<td>Pays Part A &amp; Part B premiums; deductible; 20% co-insurance, copayments; pharmacy charges Ltd. $3.90 for Part D Rx</td>
<td>$1,084 individual or $1,457 married</td>
<td>$7,860 individual or $11,800 married</td>
<td>Home, vehicle, burial plot, $1,500 burial savings account, personal property</td>
<td>N/A</td>
<td>Must be eligible for Part A</td>
</tr>
<tr>
<td>Specified Low-Income Medicare Beneficiary (SLMB)</td>
<td>Helps pay for Part B premiums only</td>
<td>$1,296 individual or $1,744 married</td>
<td>See QMB</td>
<td>See QMB</td>
<td>N/A</td>
<td>See QMB</td>
</tr>
<tr>
<td>Qualifying Individual (QI)</td>
<td>Helps pay for Part B premiums only</td>
<td>$1,456 individual or $1,960 married</td>
<td>See QMB</td>
<td>See QMB</td>
<td>N/A</td>
<td>See QMB; first come basis with priority given to people enrolled previous year</td>
</tr>
<tr>
<td>Qualified Disabled and Working Individuals (QDWI)</td>
<td>Helps pay for Part A premium</td>
<td>$4,339 individual or $5,833 married</td>
<td>$4,000 individual or $6,000 married</td>
<td>See QMB</td>
<td>N/A</td>
<td>See QMB; for disabled worker under 65 who lost free Part A because of return to work</td>
</tr>
<tr>
<td>Section 8 Subsidized Housing</td>
<td>Limits housing cost to 30% of income, generally</td>
<td>&lt;50% median annual income in geog. area, adjust for family size; don’t count income if under 18; deductions for medical, childcare, etc.</td>
<td>Prior to HOTMA, no resource limit; under HOTMA, $100,000 net family assets</td>
<td>Irrevocable SNTs, but income distributed may be considered for rent purposes (contrary to case law preceding HOTMA)</td>
<td>24 months</td>
<td>Housing Opportunity Through Modernization Act of 2016 in process implementation; proposed regs published for comment 9/19. Final regs not published</td>
</tr>
<tr>
<td>Restriction</td>
<td>Self-Settled SNT-d4A</td>
<td>Spend Down Wisely</td>
<td>TN ABLE-529A</td>
<td>Pooled SNT-d4C</td>
<td></td>
<td></td>
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<tr>
<td>Age</td>
<td>Before age 65</td>
<td>Any</td>
<td>Disabled before age 26</td>
<td>Before 65?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Who controls</td>
<td>Any capable person</td>
<td>Client</td>
<td>TN Dept. of Treasury</td>
<td>Non-profit trustee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment discretion</td>
<td>Unlimited if reasonable</td>
<td>Client</td>
<td>14 options: growth to bank account</td>
<td>Somewhat limited</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distributions</td>
<td>Any want or need that will not disqualify from the benefit</td>
<td>N/A</td>
<td>QDEs w/o tax; non-QDEs, 10% penalty and income tax</td>
<td>Any want or need that will not disqualify from the benefit</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payback at death</td>
<td>Yes</td>
<td>Limited to LTSS costs for clients over age 55 and enrolled in Medicaid at death</td>
<td>Yes</td>
<td>Yes, if balance sufficient to pay claim; or retained by trustee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transferrable</td>
<td>Not until the state is reimbursed</td>
<td>Yes, after any claim paid</td>
<td>Yes, to another family member who is disabled before age 26</td>
<td>State is reimbursed or non-profit retains</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxes</td>
<td>Taxes must be paid on growth</td>
<td>Exclusion of gain on sale of primary residence</td>
<td>No taxes paid on growth if used for QDE; but non-QDE is taxed</td>
<td>Taxes must be paid on growth</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Funeral costs</td>
<td>Can pay before death</td>
<td>Can pay before or after death</td>
<td>Can pay before or after death</td>
<td>Can pay before death</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total balance</td>
<td>Any size</td>
<td>Best for smaller settlements</td>
<td>No more than $100,000 to keep SSI</td>
<td>Any size</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contribution limit</td>
<td>None</td>
<td>None</td>
<td>No more than $14k/year; $350k lifetime</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ISM effect</td>
<td>ISM to $0, lose Medicaid</td>
<td>ISM the month settlement received</td>
<td>QDE distributions are not ISM if used in month received</td>
<td>ISM to $0, lose Medicaid</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash to beneficiary</td>
<td>No</td>
<td>No</td>
<td>Okay; if beneficiary has a receipt for expense, will not lose SSI</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time to Prepare</td>
<td>Prepare in advance, time consuming</td>
<td>Spend in month received</td>
<td>Quick and on-line</td>
<td>Quick with use of forms</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Who needs affordable law firm financing?

The Facts

- **TTLA SBA Justice Loans** from $100,000 to $250,000 close in **under 45 days**.
- Borrow up to $5,000,000 for working capital.
- Borrow up to $14,000,000 to purchase real estate for your practice.
- Maximum Yearly interest rates capped at **2.75%** over prime for working capital, and **2.25%** over prime for real estate.

Modern litigation is expensive. Period. A TTLA SBA Justice Loan can be a life saver to **pay off existing expensive debt**, inject needed capital to expand your practice, or even purchase new office space.

The SBA Loan Group management team has **over 35 years experience** in legal funding and SBA backed lending.

**Make the call now:** 516-900-6905. A 10-minute conversation can determine if you qualify.
Participating Associations

Arkansas Trial Lawyers Association
Colorado Trial Lawyers Association
Connecticut Trial Lawyers Association
Delaware Trial Lawyers Association
Florida Justice Association
Georgia Trial Lawyers Association
Iowa Association for Justice
Kansas Trial Lawyers Association
Maine Trial Lawyers Association
Maryland Association for Justice, Inc.
Mississippi Association for Justice
Missouri Association of Trial Attorneys
Montana Trial Lawyers Association
Nebraska Association of Trial Attorneys
Nevada Justice Association

New Hampshire Association for Justice
New Jersey Association for Justice
New York State Trial Lawyers Association
North Carolina Advocates for Justice
Ohio Association for Justice
Oklahoma Association for Justice
San Francisco Trial Lawyers Association

Tennessee Trial Lawyers Association
Utah Association for Justice
Vermont Association for Justice
Virginia Trial Lawyers Association
Washington State Association for Justice
West Virginia Association for Justice
Workers' Injury Law & Advocacy Group
Wyoming Trial Lawyers Association

The TTLa SBA Justice Loans program assists you in solving one of the biggest problems of modern day law practices—financing your law practice.

SBA-Backed Funding is low-cost and permanent. It cannot be cancelled, modified, or force paydowns for the term of the loan, typically 10-25 years.

Don’t waste another minute, make the call now: 516-900-6905. A 10-minute conversation can determine if you qualify. Or, complete the form here: www.natle.org/SBAJusticeLoans.
How Do I Make a Contribution to LIFT-PAC?

Joining Lawyers Involved for Tennessee is simple.
An ongoing, monthly contribution to LIFT via credit card or bank draft is the easiest way to provide your support. See suggested monthly contribution allocation or indicate your allocation below.

Yes, LIFT Can Count on Me!

<table>
<thead>
<tr>
<th>Advocate</th>
<th>$500/mo.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diamond Plus</td>
<td>$400/mo.</td>
</tr>
<tr>
<td>Diamond</td>
<td>$300/mo.</td>
</tr>
<tr>
<td>Platinum</td>
<td>$250/mo.</td>
</tr>
<tr>
<td>Platinum</td>
<td>$200/mo.</td>
</tr>
<tr>
<td>Gold</td>
<td>$150/mo.</td>
</tr>
<tr>
<td>Gold</td>
<td>$100/mo.</td>
</tr>
<tr>
<td>Silver Plus</td>
<td>$75/mo.</td>
</tr>
<tr>
<td>Silver</td>
<td>$50/mo.</td>
</tr>
<tr>
<td>Copper</td>
<td>$25/mo.</td>
</tr>
</tbody>
</table>

(Referred by: ____________________________)

Federal Law Requires the Following Information:

Name ____________________________________

Occupation/Employer/Law Firm ____________________________

Address _______________________________________

City __________________ State ______ ZIP ______

Phone __________________ Fax __________________

E-mail _______________________________________

Check here, if your contribution will be made from a partnership account.

Contributions made from partnership accounts are assumed to be paid from your portion of the assets. If this is not the case, state what portion will be charged to you, as well as what partners will be responsible for the remainder of the contribution:

$ __________________

Other monthly contribution allocation:

If you wish to contribute according to a formula that differs from the monthly allocation schedule set forth above, please indicate the amounts to be paid to each:

$ _______ LIFT $ _______ TTLA $ _______ AAJ-PAC

LIFT and TTLA shall receive the full amount of the contribution so designated.

<table>
<thead>
<tr>
<th>Advocate</th>
<th>LIFT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diamond Plus</td>
<td>300</td>
</tr>
<tr>
<td>Diamond</td>
<td>170</td>
</tr>
<tr>
<td>Platinum</td>
<td>150</td>
</tr>
<tr>
<td>Gold</td>
<td>100</td>
</tr>
<tr>
<td>Silver</td>
<td>65</td>
</tr>
<tr>
<td>Copper</td>
<td>15</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Advocates</th>
<th>TTLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diamond Plus</td>
<td>120</td>
</tr>
<tr>
<td>Diamond</td>
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</tr>
<tr>
<td>Platinum</td>
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<tr>
<td>Gold</td>
<td>50</td>
</tr>
<tr>
<td>Silver</td>
<td>20</td>
</tr>
<tr>
<td>Copper</td>
<td>5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Advocates</th>
<th>AAJ-PAC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diamond Plus</td>
<td>40</td>
</tr>
<tr>
<td>Diamond</td>
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<tr>
<td>Platinum</td>
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</tr>
<tr>
<td>Gold</td>
<td>20</td>
</tr>
<tr>
<td>Silver</td>
<td>10</td>
</tr>
<tr>
<td>Copper</td>
<td>5</td>
</tr>
</tbody>
</table>

Suggested monthly contribution allocation:

Payment Method:

Personal check is enclosed (payable to “LIFT”)
Bank Draft (please complete requested info)

Bank Account Number ____________________________

Bank Name & Address ______________________________

Charge to: Mastercard VISA

Credit Card Number ____________________________

Exp. Date ____________________

Name (as it appears on account) ____________________

Signature _____________________________________

I request that monthly payments be deducted from my personal account according to the allocation schedule set forth herein to LIFT (State PAC), TTLA and AAJ-PAC (Federal PAC). It is agreed that (a) each payment, upon being charged to my account by the respective bank or credit card company, shall be my receipt for payment of the designated contribution; (b) I reserve the right to rescind this authorization by giving written notice to the institutions and authority to charge such drafts to my account shall cease upon delivery of written notice of revocation; and, (c) if any such draft is dishonored, whether with or without cause, whether intentionally or unintentionally, no liability whatsoever shall attach.

FEC Disclaimer – Federal law requires political committees to report the name, mailing address, occupation and employer for each individual whose contributions aggregate in excess of $200/year. Federal law prohibits federal political action committees from accepting corporate contributions. Contributions to political committees are strictly voluntary; no member will be subject to reprisal for declining to contribute. The contribution amount is merely a suggestion and each member is free to contribute more or less than that amount, although personal designation shall apply to those who contribute certain amounts.

IRS Disclaimer – None of these contributions is deductible as charitable contributions under federal law. Contributions to political committees are not tax deductible. The portion of your contribution paid to the TTLA which is used for lobbying and political purposes is not tax deductible. Contact TTLA (615) 329-3000 or refer to your TTLA dues invoice for the percentage of membership dues that is tax deductible.

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$7.5 MILLION Settlement in KY – Workplace Injury
$750 MILLION Settlement in MO – GMO Rice Contamination
$392 MILLION Settlement in TX – Whistleblower
$1.55 MILLION Settlement in KY – Trucking Accident
$25 MILLION Settlement in KY – Pharmaceutical Consumer Protection
$4.5 MILLION Settlement in KY – Automotive Product Liability

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- ERISA Welfare Benefits
- Health Insurance
- Life Insurance
- Long Term Care

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