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His Defense of Accused Rioters, His Near-Miss with a Lynch Mob

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TO PROTECT YOUR CLIENTS’ 
TENNESSEE JOURNAL SEPTEMBER/OCTOBER BAR  

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It might seem strange to quote the title of a Dr. Seuss book to begin my second column, but given the times we are living through—including the start of the school year for so many of us with children—it seemed appropriate. The story reminds us that there will be adventures, challenges, joys and yes, even pandemics in life and that no matter the ups and downs, there are always new adventures ahead. It is hard to believe that only a few months ago, we could travel, go to restaurants, and freely go into our courts and on airplanes without a second thought. The twists and turns of those first few months of the pandemic tested many of us and particularly our legal systems, highlighting creative and necessary ways to provide the best services for our clients in extraordinary circumstances. We are now facing new challenges with childcare, online schools, remote court appearances and more, all without a known end in sight.

We at the TBA understand the importance of providing stability and support to attorneys during this uncertain time when every dollar and every resource count. I have been pleased by how many of you have continued to believe in the value of your TBA membership and the importance of participating in CLE programs and serving as leaders in an organization dedicated to the well-being of Tennessee’s legal community. Even in times of a pandemic, our commitment to being a strong and effective voice for lawyers must remain strong.

In my address during the convention I outlined several areas of importance to the TBA this year in line with the strategic plan and long-range planning committee that I led for two years. That plan has been revised slightly in light of COVID-19 and its effects on our members and operations. Since we only have six editions of the Tennessee Bar Journal this year, I will take the opportunity in each of my columns to provide updates on our progress.

**DIVERSITY AND INCLUSION**

Mary Beard has been extremely busy in her first few months as Chief Diversity Officer working on proposed revisions to TBA’s Diversity Statement in the bylaws, creating a Diversity Task Force and Mission Statement and reviewing existing programs and initiatives devoted to issues of diversity and
inclusion. The members of the Diversity Task Force are listed on page 6 of this issue, along with the objectives for this distinguished group of members. The Task Force will meet quarterly and examine current TBA initiatives and make recommendations on collaborative opportunities to increase diversity and inclusion within the profession across the state.

MEMBERS IN THE NEWS
We are going to celebrate and acknowledge the resiliency of our members during these incredibly challenging times. We will be launching “Members in the News” weekly starting in TBA Today and on social media in September to showcase some of the important legal and service work of our Tennessee members. We will continue to spotlight members in our TBA BarBuzz and SideBar podcasts. We will also showcase bar leadership in our Tennessee Bar Journal and online TBJ Select throughout the year. If you would like recognition or know of an attorney who deserves it, please email our Executive Director at barED@tnbar.org.

VIRTUAL TOWN HALLS
Instead of our annual in-person court square series, we will host one-hour TBA Townhall/Q&A Events across our eight districts in Tennessee. We are working to schedule these town halls, with local panelists discussing issues of importance to members in those districts. I originally planned to travel across the state, but I am still committed to meeting as many of you as I can and addressing your needs and concerns.

My 20-year journey in this bar association has been so meaningful and provided an opportunity for me to appreciate the important work we can do together. My journey this particular year will take me virtually across the state and hopefully in person to many of you very soon. While it is not the year any of us expected, it is nonetheless a chance to learn and grow together in order to build a stronger bar and community.

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LETTERS OF THE LAW

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I always enjoy reading your articles in the Tennessee Bar Journal. “History’s Verdict” did not disappoint. Thanks for taking the time to share your deep knowledge of history and your fabulous storytelling skills!

— Ann Pruitt, Executive Director, Tennessee Alliance of Legal Services

WRITE TO THE JOURNAL!
Letters to the editor are welcomed and considered for publication on the basis of timeliness, taste, clarity and space. They should include the author’s name, address and phone number (for verification purposes). Please send your comments to Suzanne Craig Robertson at srobertson@tnbar.org.

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Tennessee lawyers are joining their colleagues across the country to honor the work to increase the meaningful access to justice and commitment to pro bono work.

October is “Celebrate Pro Bono Month,” an opportunity to provide free legal services to those in need and honor the good work performed by lawyers every day. Tennessee’s month-long celebration overlaps with the National Pro Bono Celebration, planned for the last week of the month. The theme for the national event is “Rising to Meet the Challenge: Pro Bono Response to COVID-19.”

Recent research shows that there are 1.6 million Tennesseans living in poverty and about 60% of them will face at least one civil legal issue per year. Most of these individuals will not receive adequate legal help, for a variety of reasons. Many do not recognize that they have a legal issue, or they don’t know where to go for help. Others are intimidated to seek help, fear being turned down, or just can’t access resources that are available.

Celebrate Pro Bono Month provides an opportunity to educate the public about legal issues and the available legal resources, as well as providing life-changing help to individuals in need.

Now in its 12th year, Tennessee’s statewide Celebrate Pro Bono initiative brings together legal services providers with local bar associations, law schools, law firms and individual volunteers to offer free services to those unable to afford a lawyer. This year hundreds of volunteers will participate in dozens of events and activities across the state that will offer assistance to Tennesseans in need. Planned activities include legal advice clinics, education programs, recognition celebrations and other events. Every year, Tennessee lawyers help thousands of clients by providing free legal assistance.

The month of October is an opportunity to focus attention on the significant need for pro bono services as well as a celebration of the outstanding work of those in the legal community who volunteer their services throughout the year. Events, including opportunities to volunteer, will be promoted in TBA Today, via social media and on the TBA website throughout October. If you have information on an event, please share it with TBA by emailing to tbat@tnbar.org.

Learn more about the National Pro Bono Celebration at www.americanbar.org/groups/center-pro-bono/celebrate-pro-bono, and TBA Celebrate Pro Bono 2020 at www.tba.org/cpb2020.

TBA Diversity Task Force Begins Work

TBA’s first Diversity Task Force will soon begin critical discussions to address diversity, inclusion and equity in Tennessee’s legal community.

Under the leadership of Nashville lawyer and TBA Chief Diversity Officer Mary Beard, the task force includes the following members to date:

- Deborah Yeomans Barton of Legal Aid of East Tennessee
- Brentwood lawyer Julie Bhattacharya Peak of Liberty Mutual Ins. Co.
- Harrison McIver, former director of Memphis Area Legal Services
- Knoxville attorney John Winemiller of Merchant & Gould
- Memphis attorney Lauren Holloway of McAngus Goudelock & Courie
- Judge Camille McMullen of the Tennessee Court of Criminal Appeals
- U. S. Magistrate Judge for

Deborah Yeomans Barton
Julie Bhattacharya Peak
Harrison McIver
John Winemiller
Lauren Holloway
Judge Camille McMullen

TENNESSEEBARJOURNAL
SEPTEMBER/OCTOBER 2020
the Eastern District Cynthia Richardson Wyrick, Mohamde Akram Faizer of the LMU Duncan School of Law in Knoxville; LaTonnysa Burney, the assistant dean of student conduct at Tennessee State University; Nashville attorney and TAPABA president Chris Javillonar, general counsel at Permobil Inc.; Knoxville attorney and TLAW president Loretta Cravens of Cravens Legal; Michelle Long, deputy director, Administrative Office of the Courts; Anica Conner Jones, attorney with the U.S. Department of Veterans Affairs; Ariel Anthony, attorney with Husch Blackwell; Joshua Wallis, attorney at The Landers Firm, Memphis; and Elizabeth Hernandez, managing attorney at the Tennessee Coalition to End Domestic & Sexual Violence. In addition, the task force is expected to include representatives from some of the state’s specialty bars, as well as leaders from key TBA committees.

The task force, which will begin meeting this fall, will analyze current and future diversity initiatives within the bar association, opportunities for statewide collaboration and the creation of strategic objectives related to promoting diversity, inclusion and equity in the legal profession. TBA will issue a formal press release with the final list of task force members and its mission in September.

To find resources collected to help and inform diverse attorneys, those seeking to diversify the legal profession, and about the diversity issues facing the profession and the country, go to www.tba.org/Diversity_Resources_Index.

Sanders, Gilbert Join Editorial Board

Two new members were named by TBA President Michelle Sellers to the Tennessee Bar Journal Editorial Board this summer for three-year terms. Craig P. Sanders, a partner with Rainey, Kizer, Reviere & Bell PLC in Jackson, joined the group in June. Sanders is a graduate of the University of Tennessee College of Law, where he was an editor of the Tennessee Law Review. He is a past president of the Jackson-Madison County Bar Association, a past president of the Jackson-Madison County Bar Association Young Lawyer’s Division, and a TBA Leadership Law graduate.

Lynda Gilbert joined the board in August. A graduate of the University of Memphis Cecil C. Humphreys School of Law, where she was a law fellow and a law review editor, she practices employment law at Gilbert Law in Chattanooga. She earned her masters degree in social work from the University of Tennessee. Gilbert has taught graduate school courses in social work law and social welfare policy.

Sanders and Gilbert join current members Andrée Sophia Blumstein of Nashville (chair), Wade V. Davies of Knoxville, Suzanne Landers of Memphis, Costin Shamble of Clarksville and Jonathan Steen of Jackson.

CONTINUED ON PAGE 8
Humbert Leads House of Delegates

The Tennessee Bar Association has two overseeing bodies: The Board of Governors and the House of Delegates. The Board governs, but what does the House do?

“The House of Delegates considers, debates and makes policy recommendations on matters of interest and concern to the legal profession,” according to its bylaws. “It acts on matters brought to it by the Board of Governors and can consider matters on its own initiative.” The House meets quarterly to conduct its business.

There are 73 seats in the House, led by a speaker, deputy speaker and secretary.

The House selected new officers in June during the TBA annual convention, with Meredith B. Humbert, a partner with Hunter, Smith & Davis LLP in Kingsport installed as speaker. A graduate of the University of Memphis Cecil C. Humphreys School of Law, she concentrates her practice in the defense of health care liability actions. She also handles personal injury actions and premises liability actions.

Charlotte Knight Griffin of Memphis Light, Gas & Water Division is deputy speaker. Shauna Billingsley, with the City of Franklin’s law department, is the House’s secretary.

“In my view,” Humbert explains, “the purpose of the House of Delegates is to consider and provide commentary on pieces of legislation that impact the practice of law in the state. As speaker, I will do my best to conduct orderly and efficient meetings, and I will ensure that each of our members has an opportunity to express their thoughts and opinions.”

Humbert says she anticipates that the group’s primary focus this year will relate to COVID-19 — both its impact on the practice of law, and on proposed legislation that attempts to minimize the negative impact of the pandemic on Tennesseans.

“I look forward to serving as speaker,” she says, “and I encourage members of the TBA to reach out to me if they want to discuss any topics that relate to the work of the House of Delegates.”
1970 TBJ Reflects the Times = New Rules, Changing Roles of Women

The contents page from the February 1970 Tennessee Bar Journal is a good snapshot of the practice of law at the time. For starters, look at the lions of the bar who were on the TBA Board of Governors! The officers were James D. Senter, Joe W. Henry, Frank N. Bratton, John W. Nolan III, Don G. Owens, Harlan Dodson, Foster D. Arnett. The other members of the board were Walter P. Armstrong Jr., F. Graham Bartlett, Leo Bearman Jr., Randall P. Burcham, G. Nelson Forrester, Roy Hall, William C. Keaton, Paul D. Kelly, William R. Kinton Jr., J.G. Lackey Jr., William W. Lackey, Judge William B. Leffler, Jack C. Raulston and (What is this? A woman??) Anne H. Schneider.

A TRIBUTE TO GOV. CLEMENT

Also included is a very dear resolution was adopted by the board Dec. 17, 1969 in memory of Gov. Frank G. Clement, upon his untimely death, including this section:

Whereas, Frank G. Clement was a man of great personal charm of manner, of impressive personal appearance, of keen intellect, and was blessed with a fine sense of humor. He was a worthy advocate in the courtroom and a fearless and effective campaigner in the political arena...
Section Showcase
Health Law Forum Forges into 32nd Year

“Tennessee, in my opinion, has one of the best health care bars in the country ... It’s abundantly clear that the talent level, knowledge and expertise among Tennessee lawyers really match what anyone has. The Health Law Forum has made a difference in developing that expertise.”
— David T. Lewis, Health Law Section founding member and chair, 1991-1992

For 32 years, the Tennessee Bar Association Health Law Forum has remained a must-do event for attorneys in Tennessee who maintain this focus, ultimately becoming the premier event for health law practitioners across the southern United States. The concentration of health care businesses in our state has led to a group of lawyers who are among the top in their profession, creating not only a need for such a seminar, but a robust Health Law Section to make it happen.

In these times of uncertainty, the question became how to build on the rich history of this program and deliver the quality content expected by members who look to this forum to provide the information they need to remain at the forefront of this ever-changing arena. Traditionally, the TBA has offered a two-day, 15-hour program. Of course, this is not a viable option in our current virtual world, where folks are relegated to participate remotely on a computer screen.

“This year has been particularly challenging.” Section Chair J. D. Thomas says. With COVID-19 cases rising through the summer and regular forum attendees expressing a strong preference for an online experience, the TBA Health Law Executive Council made the decision in July to go virtual.

Considering all available options for the forum, the Council designed a hybrid program featuring two half-days of live, interactive virtual presentations, in addition to timely, prerecorded programming specific to this practice area — allowing attendees to learn on their own time.

“This is a big deal for the forum,” Thomas says, “which is one the TBA’s longest running and best attended CLE events. Nonetheless, working with TBA staff, we think we’ve put together a great program — one that will feature many of the traditional sessions that our attendees have come to expect, as well as some timely sessions on the impact of, and response to, the novel coronavirus pandemic.” Thomas is a partner at Waller in Nashville. A former federal prosecutor, he is a member of Waller’s Government Investigations, Healthcare and Litigation groups.

To replicate the interaction provided by attending a live event, the presenters for the prerecorded sessions will make themselves available for optional Q&A roundtables the week following the program to discuss their respective topics and answer any questions you might have after viewing their presentations.


“It’s a different year,” Thomas says, “but all of us are enthusiastically looking forward to the event.”
— Jarod Word

CONTINUED ON PAGE 12 >
Chattanooga lawyer **JOHN “JACK” SCOTT BALLMAN** died June 8 at the age of 93. A native of Chicago, he served in the U.S. Navy during World War I, and later earned bachelor’s and master’s degrees in accounting from the University of Michigan. He became a certified public accountant and worked in that field for 11 years. Ballman moved to Chattanooga in 1953 and obtained a law degree in 1959 from the McKenzie College of Law. In 1962, he was named treasurer and chief financial officer of Jorges Carpet Mills. In 1977, he started his own carpeting business, which he sold in 1999 when he retired. Memorial contributions may be made to the First Presbyterian Church’s World Mission Fund or Bible in the Schools program, 554 McCallie Ave., Chattanooga, TN 37402.

Retired Memphis attorney **MURRY J. CARD** died July 11 at the age of 87. He was a Korean War veteran and a communicant of St. Francis of Assisi Catholic Church, where he served as Eucharistic minister. He also volunteered at the St. Vincent DePaul Food Mission. Card earned his law degree from the University of Memphis Cecil C. Humphreys School of Law and was a “True Blue” Memphis University Tigers fan, attending games for more than 50 years. Memorial donations may be sent to St. Francis of Assisi Chapter of St. Vincent DePaul, 8151 Chimneyrock Blvd., Cordova, TN 38016.

Memphis lawyer **SUSAN “SUE” REEVES GREGORY** died June 14 at age 82. Gregory earned her undergraduate degree from Memphis State University (now the University of Memphis) and law degree from the University of Memphis Cecil C. Humphreys School of Law. She taught the sixth grade for two years, worked for the Social Security Administration for over 10 years, and practiced law for more than 40 years, most recently at Gregory & Gregory PC. Gregory was a past president of the Memphis Bar Foundation, was an avid runner and served two terms as president of the Girl Scouts Tenn-Ark-Miss Council (now Girl Scouts Heart of the South). She also was a communicant of Saint George’s Episcopal Church in Germantown. Memorial donations may be sent to the church at 2425 S. Germantown Rd., Germantown, TN 38138 or St. Jude Children’s Research Hospital, 501 St. Jude Pl., Memphis, TN 38105.

Nashville lawyer **LEWIS BERKELEY HOLLABAUGH** died Aug. 13 at the age of 85. A 1956 graduate of Vanderbilt University and a 1961 of the university’s law school, Hollabaugh started his career as an associate attorney at Manier, Crouch, White & Herod (now Manier & Herod). He remained with the firm during his entire 36 years of practice. He served as managing partner and on the executive committee of the firm over the years. Hollabaugh spent most of his career as a trial lawyer with an emphasis on professional liability. He also handled construction surety law. He is survived by his daughter Lela Hollabaugh, an attorney at Bradley Arant Boult Cummings, among others. Memorial donations may be made to St. Luke’s Community House, 5601 New York Ave., Nashville, TN 37209, or a charity of the donor’s choice.

Nashville lawyer **WILLIAM WAYNE LEROY** died July 25 after a struggle with cancer. Raised in Jasper, LeRoy studied journalism at the University of Tennessee and first explored careers in sports reporting, patent medicine sales and insurance before deciding to pursue law. He earned his law degree in 1966 from the YMCA Law School (now the Nashville School of Law) and joined McCarley, Hollins & Pride. He later was named senior partner at Schulman, LeRoy and Bennett. LeRoy was local counsel for Allstate Insurance Company and general counsel for Exchange Insurance Company. He was a lobbyist for Insuror’s of Tennessee and was actively involved in legislative issues and governmental relations for 30 years. His three daughters all followed in his professional footsteps, with two becoming attorneys and one a lobbyist. Memorial donations may be made to St. Philip’s Episcopal Church, Endowment Fund in Memory of Wayne LeRoy, 85 Fairway Drive, Nashville, TN 37214 or the charity of one’s choice.

Attorney **MATTHEW B. LONG** died July 19 at the age of 37. Long was a 2013 graduate of the Lincoln Memorial University Duncan School of Law where he served as Moot Court president and as an intern law clerk for then Tennessee Supreme Court Chief Justice Gary Wade. Long began his legal career at Gilreath & Associates in Knoxville but later moved to Nashville to open an office for the Atlanta-based Roth Firm. Long returned to Knoxville last August to open the Law Office of Matt Long. He was active in the Tennessee Trial Lawyers Association and served for many years in the Knoxville Barristers and on the

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DISABILITY INACTIVE

The Tennessee Supreme Court transferred the law license of New Jersey lawyer Deon Devall Owensby to disability inactive status on May 21. Owensby may not practice law while on inactive status. He may return to the practice of law by showing clear and convincing evidence that the disability has been removed and he is fit to resume the practice of law.

The Tennessee Supreme Court entered an order on June 12 transferring the law license of Maury County lawyer Angela Kay Washington to disability inactive status. She may not practice law while on inactive status. She may be reinstated if she can prove by clear and convincing evidence that the disability is removed and she is fit to return to the practice of law.

REINSTATED

Williamson County lawyer Christopher D. Birkel was reinstated to the practice of law on June 25, retroactive to June 2. Birkel requested reinstatement and the Board of Professional Responsibility found the petition to be satisfactory. He had been placed on inactive status in May 2009.

Williamson County lawyer Renata Dash was reinstated to the practice of law on June 5, retroactive to May 18. She requested reinstatement and the Board of Professional Responsibility found the petition to be satisfactory. She had been placed on inactive status in March 2012.

Williamson County lawyer David Dwayne Harris was reinstated to the practice of law on July 15. He had been suspended by the Tennessee Supreme Court on May 1 for two years with 60 days to be spent on active suspension. Harris filed a reinstatement petition and the Board of Professional Responsibility found it to be satisfactory.

Davidson County lawyer Newton S. Holiday was reinstated to the practice of law by the Tennessee Supreme Court on July 14. Newton had received a temporary suspension on June 18 for failure to respond to the Board of Professional Responsibility’s request for information. Holiday provided an appropriate response and filed a motion to set aside the suspension. The board acknowledged the sufficiency of the response.

California lawyer Tisha Leigh Morris was reinstated to the practice of law on June 24, retroactive to June 12. She had been placed on inactive status in June 2013. She requested reinstatement and the Board of Professional Responsibility found the petition to be satisfactory.

Sullivan County lawyer Kellye Lambert Walker was reinstated to the practice of law on July 16, retroactive to June 8. She had been placed on inactive status in July 2012. She requested reinstatement and the Board of Professional Responsibility found the petition to be satisfactory.

Arizona attorney Matthew Brian Wenzlau was reinstated to the practice of law on June 11, retroactive to June 3. He requested reinstatement and the Board of Professional Responsibility found the petition to be satisfactory. Wenzlau had been placed on inactive status in May 2012.

DISCIPLINARY

Disbarred

On June 10, the Tennessee Supreme Court disbarred Williamson County lawyer Matthew David Dunn from the practice of law and ordered him to make restitution in the amount of $95,621 to a client. The court took the action based on 31 separate disciplinary complaints. In 12 of those cases, Dunn promised to pursue timeshare
relief for clients. He did send a form letter to the time-share agency, but then abandoned each client. The remaining complaints involved Dunn assigning client files to associates at his firm. When the associates would leave, the client would remain with the firm, but Dunn failed to communicate with the clients or work on their cases. The court also found that Dunn abandoned his practice and failed to respond to the disciplinary complaints against him. Dunn admitted violating Tennessee Rules of Professional Conduct 1.2, 3.2, 3.4(c), 5.1, 5.3, 5.4(a), 7.1, 7.6, 8.1(b), 8.1(a) and (b), and 8.4(a) and (d).

The Tennessee Supreme Court disbarred Loudon County lawyer Arthur Wayne Henry from the practice of law on July 15. Henry consented to disbarment, acknowledging that he could not successfully defend the charges alleged in a complaint filed against him. The court found his conduct violated Rules of Professional Conduct 1.1, 1.3, 1.4, 8.1(b) and 8.4(a), (c), (d) and (g).

Washington County lawyer William E. McManus Jr. was disbarred from the practice of law on June 26. He consented to the action after acknowledging that he could not successfully defend himself against the charges filed against him. The Tennessee Supreme Court determined that McManus violated Rules of Professional Conduct 8.4(a), (b), (c), (d) and (e).

Suspended

On June 22, the Tennessee Supreme Court suspended Davidson County lawyer Andrew Harrison Maloney retroactive to Sept. 18, 2019, for 18 months, with 10 months to be served on active suspension and the remainder on probation. The court found that Maloney improperly used funds in escrow for business and personal use, failed to timely disburse funds owed to third parties, and failed to escheat certain funds to the state. The court directed Maloney to disperse $56,327.60 from his escrow account to third parties. During the probationary period, Maloney must engage the services of a practice monitor who will assess his case load and management, accounting and office management procedures, and compliance with trust account rules. Maloney also must ensure that funds are maintained in appropriate accounts, reconcile his trust account monthly, develop a written plan to promptly disburse funds owed to others, and ensure that his financial software accounts for all third-party funds received. Maloney entered a conditional guilty plea on May 29.

The Tennessee Supreme Court suspended Arkansas attorney Kimberly Ogden Sutton from the practice of law on June 5 after finding that she failed to respond to the Board of Professional Responsibility regarding a complaint of misconduct. Sutton is precluded from accepting any new cases and must cease representing existing clients by July 5. The suspension will remain in effect until dissolution or modification by the court.

Davidson County lawyer Kevin William Teets Jr. was suspended from the practice of law on June 10 for 30 days. For one year following reinstatement, Teets must engage a practice monitor. The Tennessee Supreme Court found that Teets assisted with the incorporation of a non-profit entity in exchange for being named treasurer of the group, and later admitted to misappropriating funds while in the role. His actions were determined to violate Rules of Professional Conduct 8.4.

On July 20, the Tennessee Supreme Court suspended Mississippi lawyer Candace Lenette Williamson from the practice of law for two years, retroactive to the date of a suspension imposed on Dec. 21, 2018. Williamson was directed to serve one year on active suspension, followed by one year of probation. The court took the action based on four complaints of misconduct and one self-reported instance of misconduct. The court found that Williamson failed to adequately communicate with clients, did not provide competent and diligent representation, engaged in the unauthorized practice of law, and failed to advise opposing counsel, clients and the court that she had been suspended from the practice of law. Her actions were determined to violate Rules of Professional Conduct 1.1, 1.3, 1.4, 1.16(d), 3.2, 3.3, 5.5, 8.1 and 8.4 (a) and (g).

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Censured

The Tennessee Supreme Court censured Jackson lawyer Bede O. M. Anyanwu on July 17 and stipulated that he must not seek payment for any outstanding balance owed by a client. The court found that Anyanwu raised claims in a civil pleading that had no factual or legal basis, and though he had an obligation to withdraw such claims upon determination that the claims could not be supported, he failed to do so. The court also found that Anyanwu failed to keep his client informed of fees billed, charged unreasonable fees for the work done, and revealed confidential information in his motion to withdraw. His actions were determined to violate Rules of Professional Conduct 1.4, 1.5, 1.6, 3.1 and 8.4(a) and (d).

On July 17, the Tennessee Supreme Court censured Sullivan County lawyer Steven Carl Frazier and ordered him to reimburse his client $2,500 within 90 days. The court found that Frazier (1) improperly shared a fee with an attorney outside his firm without obtaining the written consent of his client; (2) failed to diligently prosecute a civil action, which resulted in the court’s dismissal of the action for lack of prosecution (though he later was able to have the dismissal set aside); and (3) failed to adequately communicate with his client and the Board of Professional Responsibility. His actions were determined to violate Rules of Professional Conduct 1.3, 1.4, 1.5(e), 3.2, 8.1(b) and 8.4(a) and (d).

The Tennessee Supreme Court censured Davidson County lawyer Jason Daniel Holleman on July 21 based on his representation of clients who sought to obtain a cemetery by adverse possession and move it to another location. Holleman filed a petition to quiet title and terminate the Rains Cemetery. He delegated to a non-lawyer the responsibility of contacting descendants of the Rains family and publishing notice of the petition though he did not provide appropriate direction. Holleman also misrepresented to the court that (1) notice of the petition to quiet title had been published when it had not, and (2) a descendant of the family buried in the cemetery had agreed to re-inter the bodies at a perpetual care cemetery. Holleman obtained a default judgment on pleadings that, at the time the motion was filed, were no longer true as the historic cemetery had been restored. The court found his conduct violated Tennessee Rules of Professional Conduct 1.1, 1.3, 3.1, 5.3 and 5.4.

Hamilton County lawyer Kent Thomas Jones received a censure from the Tennessee Supreme Court on July 6. Jones received a $2,000 flat fee for representing a client on a DUI. The client had signed a written fee agreement but the agreement did not state that the fee was nonrefundable. On the client’s court date, Jones appeared late and was acting erratically. Court personnel removed him from the courthouse and he was charged with public intoxication, though the charges eventually were dropped. By email later that day, Jones agreed to provide a full refund of the fee. Two and a half years later, Jones has made three partial payments amounting to $1,650. The court directed him to pay the remaining $350 within 60 days. The court also found that Jones did not keep the fee in a trust account. His actions violated Rules of Professional Conduct 1.5, 1.15 and 8.4(b) and (d).

Williamson County attorney Eric Trygve Olson received a censure from the Tennessee Supreme Court on July 8. Olson was hired in September 2016
as in-house counsel, but did not complete his registration with the Tennessee Board of Law Examiners within 180 days of the start of his employment. In January 2019, on his application for comity admission to the Board of Law Examiners, Olson incorrectly stated that he had never registered as in-house counsel. In April 2019, he went to work as in-house counsel for a different company, but did not notify the board of his termination with the first company and did not register as in-house counsel within 180 days of the date the second employment began. His actions were found to violate Rule of Professional Conduct 5.5.

Hamilton County lawyer Michael Eugene Richardson received a public censure from the Tennessee Supreme Court on June 10. Richardson represented a client in a detainer and eviction action and designated his fee as nonrefundable, but failed to obtain a written agreement signed by his client confirming that arrangement. His conduct was determined to violate Rules of Professional Conduct 1.5 and 8.4.

**Administrative Suspensions**

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

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**PASSAGES**

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Functions Committee of the Knoxville Bar Association. A celebration of life was held July 30.

**ROBERT WILLIAM “BOB” RATTON JR.** of Memphis died unexpectedly on June 11. Ratton received his law degree from the University of Tennessee College of Law and a master of laws in taxation from New York University School of Law. A tax and commercial attorney, Ratton practiced at several firms in Memphis and Washington, D.C., before becoming general counsel for Armstrong Relocation & Companies. He worked at the Memphis company for two decades. Ratton also was an avid aviation enthusiast, scuba diver and hiker. A memorial service was held June 16. In lieu of flowers, memorial donations may be made to Hope Church, 8500 Walnut Grove Rd., Cordova, TN 38018; Rotary Club of Memphis East Foundation, 504 W. Sanga Circle, Cordova, TN 38018; St. Jude Children’s Research Hospital, 501 St. Jude Pl., Memphis, TN 38105; or a charity of the donor’s choice.
He was known as “Mr. Civil Rights” for his consistent advocacy on behalf of racial justice and the dismantling of segregation. He argued before the U.S. Supreme Court in Brown v. Board of Education (1954), arguably the most important Supreme Court decision in history. He later became the first African-American to serve as U.S. Solicitor General and then in 1967 the first African-American to sit on the United States Supreme Court. Justice William Brennan once wrote that his friend and colleague was “the central figure in this nation’s struggle to eliminate institutional racism.” Justice Elena Kagan, formerly one of his law clerks, called him “the most important lawyer of the twentieth century.”

The man of course was none other than Justice Thurgood Marshall, “Mr. Civil Rights,” a giant in American law who served 24 years on the nation’s High Court. But, long before he ascended to the federal bench — and even before his path-breaking advocacy in Brown — Justice Marshall came to Tennessee to help defend 25 African-American men arrested in the wake of the Columbia Race Riots.

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A racial conflict turned into a conflagration after a confrontation at Castner-Knott appliance store on Columbia’s town square on Feb. 25, 1946. Gladys Stephenson, an African-American woman, had taken her children’s radio to the store for repair. She was charged more for the repair than the initially quoted price. Furthermore, the store had not repaired the electric cord as Ms. Stephenson had requested. She and her son James, who had served in the U.S. Navy since age 16, went to Castner-Knott to inquire about this and seek further repair.4

As the Stephensons were leaving the store, employee Billy Fleming walked behind them. James Stephenson stared back at Fleming as he was outside the store window. There is some dispute as to what transpired between Fleming and the Stephensons, but clearly the interaction was not pleasant. According to NAACP correspondence about the incident, Fleming had “slapped and kicked” Ms. Stephenson.5

This upset James Stephenson, who was, according to historian Robert Ikard, “one of the better South Pacific navy welterweight boxers.”6 After Fleming punched Stevenson in the back of the head, Stephenson hit Fleming with a fusillade of jabs, his last punch causing Fleming to crash through a store window.7

Authorities charged James and Gladys Stephenson with disturbing the peace but didn’t charge the instigating Fleming with anything.8 The incident enraged many local whites who were deadset on exacting revenge. A white mob later moved on Mink Slide, the name for the African-American section of the town. The sheriff, J. J. Underwood, wanted to avoid
impending violence and tried to keep the white mob from entering Mink Slide. Some African-Americans heard persons coming into Mink Slide and assumed it was part of the white mob. Gunfire raged with four police officers suffering wounds. The mayor contacted the governor and asked for help. The governor sent the State Guard and the Highway Patrol to Columbia. The State Guard and State Highway Patrol later swooped into the African-American section of town and at least some law enforcement officials allegedly terrorized individual families. Individual homes were searched and more than 300 weapons were confiscated. After the search, a curfew was imposed.9

More than 100 African-Americans were arrested. Two African-American men were shot in the jail, allegedly for trying to grab weapons and escape, but a judge later deemed these suspicious shootings justifiable homicides.10

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Later, 25 defendants were brought to trial. Maurice Webster, a lawyer from Chattanooga, came in to represent 25 African-American men charged with attempted murder. The legal team also consisted of legendary Nashville-based lawyer Z. Alexander Looby and Thurgood Marshall. Webster described the pattern of discrimination against the African-Americans:

The entire investigation has been carried on by the State with the greatest intimidation and coercion or milling mobs of authority so that Negro citizens held in jail have been alarmed and disturbed for their future safety and have been forced to make completely involuntary statements that may probably be in the future be held or used against them.11

Marshall planned to challenge the indictments on the basis of a racially discriminatory grand jury system—that no blacks had served on the grand jury. A judge later ruled that was insufficient to dismiss the indictments, but the judge did move the trial from Maury County to nearby Lawrence County.12

Marshall planned to actively participate in the criminal trials, as he had done in many other states. But, he fell seriously ill and had to go back to New York City to recuperate. Looby, Weaver, and Howard law professor Leon Ransom advocated well for the defendants. To the surprise of many—particularly the prosecutors—an all-white jury acquitted 23 of the 25 defendants. Historian Gail Williams O’Brien called the jury’s verdict “the greatest surprise in the Lawrenceburg case” and an “unprecedented verdict.”13

The district attorney, Paul Bumphus, later stated that the prevailing view in Lawrence County was that “Maury County had dumped its dirty laundry” on the people of Lawrence County.14 Historian Robert Ikard writes, however, that “[n]o single, superficial reason could explain the verdict. Rather, the jury had just fairly assessed the information given them and the manner in which it was presented.”15

Marshall later returned for the trial held in Columbia of two other African-Americans tried for firing shots at law enforcement. A four-day trial ended with one not-guilty verdict and one guilty verdict. It only took two hours for the jury to come back with its verdict. Many white citizens felt the results were not satisfactory and apparently a few plotted revenge on Marshall.

Marshall rode in Looby’s car along with
been drinking. Marshall replied: “No, but five minutes after I talk to you I will be.”18

Howard Ball writes: “On his arrival in New York, [Marshall] had more than one bourbon to try to erase the horrors of his past few days in rural, brutal Tennessee.”19

Of course we know that Marshall survived this ordeal in Columbia, and later achieved a string of victories in the U.S. Supreme Court, garnered a judgeship on the 2nd U.S. Circuit Court of Appeals, the solicitor generalship, and in 1967 his historic appointment to the United States Supreme Court. But, he never forgot his harrowing experience in Columbia, Tennessee.

NOTES
15. Ikard at 103.
16. Ikard at 102.
17. Quoted in Carl Rowan, Dream Makers, Dream Breakers, 169.
18. Quoted in Williams at 141.
Lessons from the Tennessee Supreme Court from Past Epidemics

By Donald K. Vowell

This is not the first time that things in Tennessee have been brought to a halt by an epidemic. Nor is it the first time that the Tennessee Supreme Court has given life lessons on what to do during an epidemic, the need to get things in writing, the benefits of making clients pay up front, the deference given to certain institutions, and the difficulties of statutory construction. While today the court is dealing with COVID-19, in the late 1800s, it was dealing with epidemics of yellow fever, smallpox and cholera.

While today the coronavirus has swept around the world with breathtaking speed due to airline travel, the yellow fever epidemic played out almost in slow motion in a world of sailing ships and steamboats. It rolled through North America for more than 200 years with the last outbreak being in New Orleans in 1905. It is thought that the virus jumped from non-human primates to humans in Africa, with the deed possibly being done by mosquitoes, the usual culprit. The slave trade took the virus from Africa to North and South America and it was further propagated by the steamboat trade from New Orleans to points north, including Memphis. Philadelphia, then the nation’s capital, was not spared,
with several thousand people, more than 9% of the population, dying. The national government, including President George Washington, fled the city.

**IN MEMPHIS**, possibly the hardest hit place in Tennessee, because of its proximity to the Mississippi River and the attendant mosquitoes, a reported decision of the Tennessee Supreme Court states that the yellow fever scourge visited the city in malignant form in 1879, at which time “all business and commerce were virtually suspended” for some six months with “most of the inhabitants” fleeing the city. The court took the opportunity to give the usual and now-expected deference to any bank that happened to come to court.

Just before the epidemic was declared, a businessman in need of money signed a promissory note to be due 120 days later. When the epidemic hit, the businessman was among those who fled the city. Upon his return, he was sued on the promissory note. The trial court held in his favor, but on appeal, the Supreme Court reversed, finding that the evidence was “sufficient to fix his liability.” The businessman’s defense had been based on a new Act passed by the legislature stating that whenever the health authority for a city announced that an epidemic was so malignant or dangerous that it suspended or seriously interrupted the transaction of business that the holders of indebtedness were excused from making demand while the epidemic prevailed. The Act also allowed an extension of 15 days after the epidemic was officially declared at an end to make demand. Our businessman defended by arguing that the Act was also intended to allow 15 additional days after the epidemic was over in which to pay the indebtedness. Unfortunately for our businessman, the Supreme Court held that the Act did not “bear that construction.” You don’t have to ask for payment during an epidemic, said the court, but you do have to pay, epidemic or no epidemic. The court observed that the Act was simply the re-enactment of the common law rule that excused the non-demand of negotiable paper under like circumstances, provided that demand was made within a reasonable time after the epidemic has terminated, with the exception that the Act fixed the date of the termination of the epidemic which theretofore had been a matter of proof and a “fruitful source of contention.” The Act also designated 15 days as the reasonable
time within which the demand might be made, thus eliminating another “fruitful source of contention.”

**IN NASHVILLE** at about the same time, at least in historical terms, the problem was cholera, the bacterial infection (not a virus) of the gut generally caused by unsafe drinking water or contaminated food. The problem was bad enough that the city passed an ordinance recognizing that the University of Nashville had, with “commendable zeal and enterprise,” set up a hospital called St. Vincent’s Hospital in which they proposed to treat all charity patients free of charge. The ordinance further noted that the effort was “eminently deserving of encouragement and assistance” and that the city would pay $1 per day for each charity patient who was treated at the hospital, which would cover the room, board and nursing at the hospital, but not medical attention, which the faculty of the University was to provide gratis. In 1873, when the cholera was prevailing, the mayor and sanitary commission sent a large number of cholera patients to the hospital to be nursed and taken care of. The matron of the hospital did so, furnishing “nursing, bedding, care, boarding, lodging, medicines, brandies, wines, etc., to a large amount and of considerable value.” The problem developed when the city failed to pay, apparently because of scarcity of funds. The matron of the hospital ultimately brought suit and won a jury verdict. But the city appealed, arguing that by the time the matron had filed suit, the statute of limitations had run. The Supreme Court took the opportunity to establish the maxim that you can’t fight city hall.

The evidence showed that the mayor had, at some point in the years between the providing of the nursing care and the bringing of the suit, recognized the matron’s demands for payment as being “valid and subsisting demands against the city” and had promised that they would be paid “as soon as there was money in the city treasury sufficient to do so.” The matron argued that even though the statute of limitations might have otherwise run, the mayor’s recognition of the obligation served to rejuvenate the cause of action and extend the statute of limitation as provided at common law. The city argued that only the city council, not the mayor, had the authority to bind the city. According to the city, the mayor’s acknowledgment of the debt was essentially a legal nullity and did not extend the statute of limitations. The Supreme Court agreed, and the verdict was held for naught, even though the court recognized that the mayor’s promises served to “lull the plaintiff into security” and may have caused “a loss which to her may be serious.” Nevertheless, said the court, the promises of the mayor were “unauthorized and not binding on the defendant” and did not operate to prevent the bar of the statute.

**THINGS WERE MUCH THE SAME IN KNOXVILLE,** where the problem was smallpox, a virus of unknown origin that dates back to Egyptian mummies. And in Knoxville, just as in

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Nashville, another health-care provider was to be left unpaid, with the Tennessee Supreme Court again affirming the principle that you can’t fight city hall, while also upholding the legal principle that lawyers in General Sessions Court refer to as Rule 1, that is, make clients pay up front. The year was 1897, and smallpox was, according to the court, “prevailing to a greater or less extent in the city.” The health-care provider in question was a doctor who, in addition to having a private practice, was also the secretary of the municipal board of health, a position that paid a small salary. The doctor believed that he was the only physician in Knoxville who had any experience in the diagnosis and treatment of smallpox. He was, or at least he said that he was, called upon by city officials to render what service he could in suppression of the epidemic. He did so with the result that his private practice was almost totally destroyed owing to the fact that his patients would not employ him on account of his practice among smallpox patients.

The Chancellor found, and the Supreme Court agreed, that there was nothing to show that the city authorities accepted the services of the doctor or that they could have “prevented” his services. The city was not given notice, said the court, that the doctor was rendering the services or that he was relying upon the city for payment. And, said the court, although the doctor said that his duties as secretary of the municipal board of health were merely clerical and that the treatment of smallpox patients was not required by his official duties, the city authorities were “well warranted” in believing that the doctor was treating the smallpox patients in connection with his official position. The doctor also said that he was specially employed to treat some of the smallpox patients by the city physician. But the court noted that the city physician had sued the city for much the same cause of action in the previous term of court and that he had been denied with a warrant that he was entitled to no extra compensation beyond his regular salary for his services. At any rate, said the court, the city physician had no authority to employ a doctor to treat smallpox patients or to otherwise incur liability against the city. In conclusion, the court stated that although it “did not doubt that the doctor did render valuable services to the city,” it was constrained to hold the city not to be liable.4

IN CHATTANOOGA, as in Memphis, the problem was yellow fever, and again the difficulty was that of giving notice during an epidemic. The court took the opportunity to demonstrate that insurance companies do not get quite the deference that is extended to banks. It seems that at some point in 1878 the Chattanooga Chair and Furniture Factory had taken out a fire insurance policy on its boiler, engine, machinery and tools. The epidemic then hit Chattanooga with such a vengeance that everybody who was able to leave town did so, resulting in the factory being shut down. Eleven days later the factory building was consumed by fire. The insurance company refused to pay, basing its defense on a clause in the policy that provided that the policy would become void if the factory should “cease to be operated” unless they had a “special agreement” with the insurance company. The factory had “ceased to be operated” said the insurance company, and there was no “special agreement,” therefore, the policy had become void. But it turned out that the insurance agent was among those who fled the city to escape the epidemic and that the factory owner had made unsuccessful attempts to find him so as to give him notice that the operation of the factory had ceased and to procure his “special agreement” to continue the policy. The court did not bother with the question of whether the insurance company was available for the purpose of giving notice and seeking consent, but instead decided the case by simple contract interpretation. The question for the Supreme Court was whether under the terms of the policy a merely temporary cessation of the operation of the factory, such as that caused by a yellow fever outbreak, would void the policy; or whether the policy would be voided only by the permanent cessation of the operation. The court undertook its consideration of the question by reference to a few well-chosen examples. If the letter of the contract be alone looked on, said the court, the cessation of work on Sunday, the stoppage of operations to clean the boiler, by an accident to the machinery, or by a strike of the hands, might be held to vitiate the policy. But this was obviously not what was intended by the terms of the policy, said the court. By such an interpretation, the policy might be voided every day when the factory closed for the night or even if there was a smoke-break. Thus, said the court, if a temporary cessation of the operation of the factory by these and other common experiences would not void the policy, it can “scarcely be successfully maintained that a temporary cessation occasioned by the visitation of Providence in the form of a deadly epidemic shall have a greater effect.” The whole of the policy, said the court, showed that the parties contemplated that only a permanent cessation of operations would void the policy.5

THE LESSONS TO BE LEARNED FROM THESE CASES seem to be these: If you are dealing with the city, get it in writing, get it early and get it often. And make them pay up front. If you are dealing with an insurance company, get it in writing and be prepared to go to court anyway. If you are dealing with a bank, no law will ever be passed in your favor and the best you can hope for is a fruitful source of contention. And if you are dealing with a virus, stay at home and hope that everybody else does also.

NOTES
2. Said to be the predecessor of numerous educational institutions including Montgomery Bell Academy, Vanderbilt University Medical School, Peabody College and the University School of Nashville.
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Real Estate Essentials
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Summer Blast Package
15 Dual Hours

The Ethical Campaign
3 Dual Hours
Litigation Law Forum

September 17 9:00 AM - 3:30 PM
Member: 225
Section: 195
Non-Member: 400
(Includes TBA Complete Membership)

The program will feature a three-hour live virtual event, and include two additional exclusive online videos to watch on your own time — after the live event.

**Live Virtual Sessions 3-General:**
- Federal Courtroom Practice and Procedure
- State Procedure and Application
- Pre-suit Investigation Techniques and Ethics

**Webinars 1-General 1-Dual**
- Knowing Your Court: Key Differences Between Federal and State Appellate Practice
- Pre-suit Investigation Techniques and Ethics-Dual

**SPEAKERS/PRODUCERS:** William Clayton, Thomas Brothers, William Campbell Jr., John Day, Gadson W. Perry, Eli Richardson, Harold Rushton, Edmund Sauer

**SPONSOR:** Miller & Martin PLLC

Adoption Law Forum

September 24 12:00 PM - 3:45 PM
Member: 155
Section: 130
Non-Member: 330
(Includes TBA Complete Membership)

Presented by the Tennessee Bar Association’s Adoption Law Section, this program will take a deep dive into post adoption contact agreements; including recent changes, basics and ethics regarding PACAs.

We will also be joined by General Counsel from the Tennessee Department of Children’s Services who will provide legislative updates affecting the practice area.

**SPEAKERS/PRODUCERS:** Michael Jennings, Douglas Dimond, Susan Kovac, Lori Surmay, Robert Tuke

Tax Law Forum

Save the Date!
September 25
FACULTY SPOTLIGHT

Dan Norwood

Why do you love being a lawyer?
I love being a lawyer because, much like other professionals, we are a “helping” profession. In whatever field of law we work in, we help people, companies or other entities. I started my career as a general practitioner doing everything from writing wills to handling criminal cases to representing individuals and companies in all kinds of civil cases. Whenever I was helping people in those cases, it has almost always been rewarding work. As I began to work mainly in labor and employment law, I found the rewards to be more than I could have ever imagined. Since almost all of us have to work for a living, being able to help someone remedy a problem at their workplace that is interfering with or threatening to take away their livelihood is very rewarding.

Why is Labor & Employment law and practice so important right now?
In these uncertain times, labor and employment law is more important than ever. As employers make decisions about how to change or reduce their operations, there is a risk that unlawful discrimination based on race, sex, sexual orientation, disability or age will raise its ugly head. There is also the risk that employees who refuse to remain silent about unsafe working conditions will be retaliated against in response.

I have learned over my 42 years of practice that because you are a lawyer people believe you know all of the law and will ask you for guidance on whatever their most current legal problem is. These days a lot of those problems are going to fall into the field of labor and employment law, and even if you are a general practitioner or specialized in some other field than labor and employment, you might want to consider attending the upcoming Labor & Employment CLE/Webcast Series held at lunchtime each day from September 14-18 so you will be better able to help your clients, friends and family with the questions they are going to throw at you and expect you to be able to answer.

So sorry we can’t meet you on the road this Fall, but we hope to connect and provide the same great CLE and member resources you expect from TBA.

Stay Tuned for more details at cle.tba.org
Labor & Employment: Lunchtime Webcast Series

September 14 to 18 12:00 PM - 1:00 PM
Member: 45 per webcast
Section: 35 per webcast
Non-Member: 75 per webcast

Although the 24th Annual Labor & Employment Forum was unable to take place this Spring, the Executive Council has planned a week-long lunchtime webcast series in order to offer high-quality programming to practitioners. Join us at noon CT / 1 p.m. ET each day beginning on Monday, Sept. 14 and concluding on Friday, Sept. 18.

SCHEDULE:
Monday, Sept. 14: “Case Law Update” by Stan Graham (1 Gen.)
Tuesday, Sept. 15: “Navigating the Legal Landscape of Workplace Privacy” by Greg Grisham and Maureen Holland (1 Gen.)
Wednesday, Sept. 16: “Hot Wage & Hour Developments from the Plaintiffs’ and Employers’ Perspectives” by J. Russ Bryant, Bradford Harvey and Gordon Jackson (1 Gen.)
Thursday, Sept. 17: “Things Your Arbitrator Wants You to Know” by Charles Dorsey, John Roach, Aaron Schmidt and Michael Russell (1 Gen.)

Creditors Practice Annual Forum

September 30 1:00 PM - 4:00 PM
Member: 135
Section: 105
Non-Member: 310
(Includes TBA Complete Membership)

The Creditors Practice Annual Forum will offer attendees the opportunity to earn 2 general and 1 dual CLE hours. The program will begin with a judicial panel featuring Hon. Lynda Jones and Hon. Phyllis Gardner. The next session will discuss the future of collections and bankruptcy, and the program will conclude with a dual credit session focused on providing a legal technology update.

SPEAKERS/PRODUCERS: David Anthony, Kim Bennett, Hon. Phyllis Gardner, Lori Gonzalez, Monique Jewett-Brewster, Hon. Lynda Jones, Tracy Schweitzer, Carl Teel

Hot Topics in Real Estate

November 13 9:00 AM - 3:00 PM
Real Estate Law Section in conjunction with the Tennessee Land Title Association will host their annual Hot Topics Forum on November 13, 2020. Additional details about speakers and topics coming soon!
2020 Annual Health Law CLE


20th Annual Health Law Primer

October 7 11:30 AM – 4:00 PM
Member: 210
Section: 190
Non-Member: 385
(Includes TBA Complete Membership)

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

SPEAKERS/PRODUCERS: Amanda Busby, John Arnold, Jeremy Dykes, Richard Eiler, Stephanie Hoffmann, Richard Stewart, Daniel Swanson, Elizabeth Warren

32nd Annual Health Law Forum

October 8–9 10:00 AM – 2:30 PM
Member: 565
Section: 540
Non-Member: 740
(Includes TBA Complete Membership)

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

- Legislative updates
- Pandemic response
- Telehealth and privacy
- COVID-19 supplemental payments
- Fraud and abuse developments
- Practitioner databases
- and much more

For your convenience, all course materials will be made available online.

KEYNOTE SPEAKERS: Dr. Lisa Piercey, Tennessee Department of Health, Stephen Smith, TennCare

SPEAKERS/PRODUCERS: John-David Thomas, Andrew Beatty, Denise Burke, Molly Huffman, William Hullender, Julie Kass, Travis Lloyd, Robert McConkey III, Ellen Bowden McIntyre, Julia Morris, Christopher Puri, Brian Roark, Sanford Teplitzky, Sheree Wright

Administrative Law Annual Forum

November 20 12:00 PM – 3:00 PM
Member: 135
Section: 105
Non-Member: 310
(Includes TBA Complete Membership)

SPEAKERS/PRODUCERS: Rachel Newton, Laura Chastain

Additional details about speakers and topics coming soon!

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Federal Removal
Mechanics and Recent Developments

By Gil Schuette

While a plaintiff decides where to initially file its case, the defendant is not always subject to those whims — or strategic choices — of a plaintiff. One such opportunity for defendants to weigh in on the forum choice is the federal doctrine of removal. There are a variety of reasons why a defendant may want to remove a state case to federal court (a perceived potential juror bias in state court, rules governing expert testimony, or consolidation of mass litigation through multidistrict litigation procedures, etc.). This article focuses on the mechanics of removal, and recent developments in the area of federal removal.

WHAT IS REMOVAL?
Removal is the process of transferring a case from state court to federal court. It is provided for by federal statute. 1 State courts play no role in the removal process — a “defendant”
can remove a case if (a) he elects to do so, and (b) the case could have been filed in federal court in the first place (with some exceptions).

Once a case has been removed from state court to federal court, the state court no longer has jurisdiction over the matter, but the federal court may remand the action back to state court. Cases may be remanded for a variety of reasons if the federal court does not find that the defendant established federal jurisdiction. For example, where the basis for federal jurisdiction is “federal question” jurisdiction (where a claim is based on federal law) and that claim is later dismissed, leaving only state law claims, the federal court may decline to exercise jurisdiction over the remaining state law claims, which would then be re-filed in state court.

Only a “defendant” can remove a case to federal court. If a plaintiff has filed in state court, then the plaintiff has selected that forum and cannot change it to federal court.

**RIGHT TO REMOVE, GENERALLY**

In order to remove a case to federal court, the federal court must have subject matter jurisdiction. Federal subject matter jurisdiction, generally, comes in two different varieties: Federal Question Jurisdiction and Diversity Jurisdiction.

**Federal Question Jurisdiction – 28 U.S.C. § 1331**

Federal question jurisdiction exists when a claim arises pursuant to a federal law. For example, if a plaintiff alleges a claim pursuant to the Defend Trade Secrets Act, the Civil Rights Act, etc., then the case presents a “federal question” and may be removed to federal court. Certain state claims that present a “substantial federal question” may be removed on the basis of federal question jurisdiction, and certain state court-claims are pre-empted by federal law, which also presents a federal question.

**Diversity Jurisdiction – § 28 U.S.C. 1332(a)**

Diversity jurisdiction is now broken down into two categories:

- Standard diversity jurisdiction: exists when there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000.
- Complete Diversity
  - For “complete diversity” to exist, no plaintiff can be a citizen of the same state of any defendant.
  - Corporate Citizenship: corporations are citizens of (a) the state of its incorporation and (b) its principal place of business
  - LLC Citizenship: LLCs are citizens of every state in which its members are citizens. As discussed below, this can be a complex maze of individuals and entities, so it is crucial to determine member citizenship as soon as possible.
  - Limited Partnership Citizenship: same as LLCs, Limited Partnerships are citizens of every state in which any of its partners, limited or general, are citizens.
  - National Bank Citizenship: national banks are citizens of their “main office” as specified in their articles of association.

**Amount in Controversy**

- In diversity cases: amount in controversy exceeds $75,000
- In CAFA cases: amount in controversy exceeds $5 million
- Standard: preponderance of the evidence – not “legal certainty”
- *Halsey v. AGCO Corp.*, 755 F.App’x 524, 527 (6th Cir. 2018) (“this is not a ‘daunting burden’ that requires the defendants to ‘research, state and prove the plaintiff’s claim for damages.’ … Instead, the defendants need only ‘show that it is more likely than not’ that the plaintiff’s claims exceed $75,000. … We calculate this amount at the time of removal.”)
- If state law does not permit plaintiff to assert a damages amount, then the defendant may assert an amount in controversy in the Notice of Removal if the initial pleading seeks non-monetary relief or a money judgment. 28 U.S.C. § 1446(c)(2)
- If a defendant lacks the information with which to appropriately plead an amount in controversy to remove within the 30-day window, then the defendant may take discovery in state court to establish the facts necessary to establish a sufficient amount in controversy.

**CONTINUED ON PAGE 28 >**

**GIL SCHUETTE** is a trial lawyer whose practice includes a wide range of commercial disputes in state and federal courts, administrative agencies, and all forms of alternative dispute resolution. He represents individuals and businesses of all sizes in varied claims such as: breach of non-compete agreements, business torts, trade secrets, breach of contract, professional liability, Telephone Consumer Protection Act, and personal injury claims.
• Class Action Fairness Act of 2005 (CAFA) jurisdiction⁴ — applicable in putative class action cases.

REMOVAL TIMELINE
A defendant must remove within 30 days of receiving summons and complaint. In other words, the trigger is the receipt of formal legal process.³ There are certain situations where other “papers” like motions, discovery responses or other documents are received that contain sufficient notice to demonstrate a removable case. Those circumstances merit their own article, but suffice it to say that defendants must be vigilant as the information they receive may impact cases filed and/or pending.

There was a previous circuit split concerning the “earlier served” defendant versus the “later served” defendant’s ability to remove.
• “First-served” jurisdiction: the deadline runs from the date of service on the first defendant served.
• “Last-served” jurisdiction: each defendant gets a full 30 days to decide whether to remove the case.

This circuit split was resolved by the Act, which abrogated the minority “first-served” rule, and codified a version of the “last-served” rule stating that “each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons … to file the notice of removal.”⁵

If a case becomes removable later (e.g., all of the federal claims are dismissed in a federal question removal scenario), the defendant has 30 days from the receipt of the amended complaint or pleading that makes the case removable. In no event, however, can a case be removed more than one year after filing unless it is a class action removable pursuant to CAFA.

These deadlines are jurisdictional and cannot be extended by agreement of the parties or even by order of the court.

CO-DEFENDANT CONSENT
All co-defendants who have been served with the summons and complaint must consent to the removal of a case before it can be removed. Circuit courts differ in the level of consent they require.

The Fifth and Seventh Circuit Courts require formal filings by each of the co-defendants, which acknowledge their consent.⁷ All other Circuit Courts, including the Sixth Circuit, simply require that such consent is acknowledged in the Notice of Removal.⁸ This is an important step and a removing defendant’s failure to properly notify the court of all co-defendants’ consent is grounds for sua sponte remand, even on appeal.

NOTICE OF REMOVAL
The key document to removal from state court is the Notice of Removal. It should be drafted as if it were a motion seeking to establish federal jurisdiction. It should be supported by evidence, including any necessary affidavit(s) and documents supporting the factual allegations. The Notice should cite to the state court complaint to the extent the complaint contains allegations that bear on federal jurisdiction. All of the pleadings filed in the state court must be attached to the notice of removal.

Once the Notice has been filed, the removing defendant must inform the state court that the case has been transferred. This is done through filing a “Notice of Filing of Removal” in the state court. In certain situations, discussed below, the timing of these filings versus the time of service can make the difference between successful removal and remand.

PLAINTIFF’S POTENTIAL MOTION TO REMAND
A motion to remand is the mechanism for the plaintiff to return his case to state court. Such motion can be based on an argument that the federal court lacks jurisdiction (e.g., the parties are not diverse, the complaint does not pose a federal question, the amount in controversy is less than $75,000), or that the removal was procedurally inadequate (e.g., untimely, a co-defendant does not consent, etc.).

• The plaintiff has 30 days to file a motion to remand based on a problem with the procedure of removal.⁹
• Lack of subject matter jurisdiction can be raised at any time!
• Federal courts strictly construe the removal statute in favor of remand and against removal.
• The removal statute contains a fee shifting provision. If there was no “objectively reasonable basis” for the removal, the court can award fees and costs to the plaintiff for seeking remand.
• Orders remanding cases to state court are generally not reviewable.
• There is an exception for cases removed pursuant to CAFA. An order remanding such case may be appealed.¹⁰

POST-REMOVAL DEADLINES
Once the case is removed to federal court, the response (motion to dismiss, answer or other pleading) deadline for a defendant who did not answer in state court is the longer of (a) 21 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief, (b) 21 days after being served with the summons for an initial pleading on file at the time of service, or (c) 7 days after the
notice of removal is filed.11

FORUM DEFENDANT RULE

While diversity jurisdiction is primarily intended to protect out-of-state defendants, diversity jurisdiction is not limited to lawsuits against defendants from other states. 28 U.S.C. 1332(a)(1) grants federal courts diversity jurisdiction over cases between “citizens of different States” where the $75,000 amount-in-controversy is met. So, a lawsuit between an out-of-state plaintiff and an in-state defendant can also fall within the federal courts’ diversity jurisdiction.

Just because the federal court may possess jurisdiction over a diversity case against an in-state defendant, however, does not necessarily mean that an in-state defendant may remove that case to federal court. Herein lies the “forum defendant rule,” which is codified at 28 U.S.C. § 1441(b)(2), and prohibits a defendant from removing a diversity case “if any of the parties in interest properly joined and served as defendants” in the case “is a citizen of the State in which the action is brought.” Courts have justified this “forum defendant rule” on grounds that when at least one defendant is a citizen of the forum state, there is less reason to think that the state court may treat that defendant less favorably.

To demonstrate how the forum defendant rule works, consider a Kentuckian sues a Tennessean in Tennessee state court for $100,000. A federal district court in Tennessee would likely have diversity jurisdiction over the lawsuit because the parties are citizens of different states and the amount in controversy exceeds $75,000. Nevertheless, unless the federal court had some other jurisdictional basis (e.g., federal question) to hear the matter other than diversity jurisdiction, the “forum defendant rule” would typically bar the Tennessean defendant from removing the case to federal court because he is a “citizen of the state in which” the Kentuckian filed his state court lawsuit, Tennessee. Under these circumstances, the case would proceed in the Tennessee state court instead of federal court, even though the Kentuckian could have filed his lawsuit in a federal district court in Tennessee if he so chose.

‘SNAP’ REMOVAL

Interestingly, however, 28 U.S.C. § 1441(b)(2) only bars removal when any of the parties “properly joined and served” as defendants is a citizen of the State in which such action is brought.” Here, the “and served” language refers to formal service of process. Courts have generally viewed 28 U.S.C. 1441(b)(2)’s “properly joined and served language” as Congress’ attempt to prevent plaintiffs from defeating removal by suing additional, nominal in-state defendants that the plaintiff does not intend to actually serve or pursue in litigation.

In recent years, however, an increasing number of defendants — particularly pharmaceutical and medical device manufacturers named defendants in products liability cases — have used this “properly joined and served” language for a different purpose, avoiding application of the forum defendant rule by removing these diversity cases before the plaintiff has formally served the in-state defendants. This practice is referred to in various opinions as snap removal, pre-service removal, and my personal favorite — jack rabbit removal. Multiple commentators have attributed this recent acceleration in snap removals to the expansions of electronic filing and internet access to state court dockets, which allow potential defendants to constantly monitor state court dockets and remove to federal court before they have been physically and formally served with process.

Not all courts have agreed that 28 U.S.C. § 1441(b)(2) allows defendants to remove diversity cases before the plaintiff serves the in-state defendants. Courts considering this issue have typically taken one of two competing interpretive approaches. Courts allowing snap removal usually reason that the “properly joined and served” language unambiguously permits defendants to remove diversity cases where the plaintiff has not yet “properly … served” any of the in-state defendants. Courts not permitting snap removal, by contrast, have typically focused on the policy purposes behind the forum defendant rule. According to those courts, snap removal improperly allows defendants to reliably “avoid the imposition of the forum defendant rule so long as they monitor the state docket and remove the action before they are served by the plaintiff.”12 Because, in at least some jurisdictions, effectively serving a lawsuit takes longer than satisfying the procedural requirements for removing a case, these courts reason that permitting snap removal empowers in-state defendants to ensure all diversity cases brought by out-of-state plaintiffs end up in federal court. Those courts further reason that such a result encourages forum shopping and does not advance the primary policy underlying diversity jurisdiction — providing a neutral forum for suits against out-of-state defendants.

PROCEDURAL CONSIDERATIONS FOR SNAP REMOVAL

Several recent district court decisions address the procedural steps necessary to execute a successful snap removal. Of note, they hold that removal is not complete until the Notice of Removal (NOR) is filed in both federal and state courts. These opinions focus on 28 U.S.C. § 1446, which sets forth the procedural requirements for removal.13


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state defendant filed NOR in federal court at 2:24 p.m., plaintiff served forum defendants at 3:51 p.m., but defendant did not file NOR in state court until 7:05 p.m.),


• Dutton v. Ethicon, 423 F.Supp.3d 81 (D.N.J. 2019) (noting forum defendants removed various cases filed by multiple out-of-state plaintiffs, and the court grouped these cases for rulings on motions for remand. Court held “by language alone,” § 1446 requires three steps for effectuating removal to federal court: defendant must file the notice of removal in federal court, provide written notice to all adverse parties, and file a copy of the notice with the clerk of the state clerk. In cases where defendant met all three steps, the cases were removed, where it did not, they were remanded).

• Brown v. Teva Pharmaceuticals, 414 F.Supp.3d 738 (E.D. Penn. 2019) (remanding case after plaintiff filed complaint at 10:06 a.m.; defendants file NOR in federal court at 1:55 p.m.; plaintiff served defendants at 2:15 p.m.; defendants file NOR in state court at 4:11 p.m. Court stated “[t]iming was everything, and plaintiff has won the race”).

SNAP REMOVAL DECISIONS BY CIRCUIT


• Woods v. Dr. Pepper Snapple Group Inc., 2020 WL 917284 (W.D. Okla. Feb 26, 2020) (noting that snap removal is prohibited unless plaintiff has had a reasonable opportunity to serve the defendant).

FRAUDULENT JOINDER/MISJOINDER

Fraudulent joinder has long been recognized as an exception to the complete diversity rule. This occurs when a plaintiff includes a frivolous claim against a non-diverse party for the sole purpose of defeating a defendant’s removal efforts. The standard to determine whether a party has been fraudulently joined is whether there is any reasonable basis in fact or law to support a claim against a nondiverse defendant.15

A more recent exception to the complete diversity rule is the fraudulent misjoinder doctrine, which has been adopted by some courts.16 This occurs when a plaintiff sues a diverse defendant for a claim that destroys diversity because the claims bear no relation to one another.17 In this procedural posture, some courts have concluded that diversity is not defeated where the claim that destroys diversity has “no real connection with the controversy.”18

In the latest Tennessee federal district decision to address fraudulent misjoinder, the court denied the opportunity to adopt that doctrine noting that the Sixth Circuit not adopted fraudulent misjoinder and that the doctrine was ambiguous with unclear standards.19 Specifically, the Spence, Sr. court questioned whether the misjoinder must be “egregious” or just something more than “mere misjoinder.”20

THIRD-PARTY COUNTERCLAIM DEFENDANTS CANNOT REMOVE CASES TO FEDERAL COURT

A recent Supreme Court decision clarified the definition of “defendant” in the removal statutes. In a 5-4 decision, Justices Ginsburg, Breyer, Sotomayor and Kagan joined Justice Thomas’s opinion holding that two removal statutes — the general removal provision and the removal provision in the Class Action Fairness Act of 2005 (CAFA) do not permit third-party defendants from removing a suit from state to
federal court. The court held that only original defendants named in the complaint are able to remove under either statute, even in the circumstance where a third-party defendant who was previously uninvolved in the case and had no role in selecting the forum was added to the lawsuit.

**Background**

Citibank brought a debt-collection suit in North Carolina state court against a consumer for charges incurred on a Home Depot credit card. The consumer then answered the complaint and filed (a) a counterclaim against Citibank, and (b) a third-party class action claims against Home Depot and Carolina Water Systems for an alleged scheme between Home Depot and Carolina Water System to induce homebuyers to buy water treatment equipment at inflated prices. After Citibank dismissed its claims against the consumer, Home Depot filed a notice of removal to federal court. The consumer, however, moved to remand to state court arguing that precedent barred removal by a “third-party/additional counter defendant like Home Depot.”

The District Court granted the motion to remand and the Fourth Circuit affirmed, holding that neither the general removal provision, 28 U.S.C. § 1441(a), nor the removal provision in CAFA, 28 U.S.C. § 1453 allowed Home Depot to remove the class-action claims filed against it.

**Supreme Court Analysis**

The Supreme Court considered whether either 28 U.S.C. §§ 1441(a) or 1453(b) allows a third-party counterclaim defendant to remove a lawsuit to federal court or whether removal authority is limited to the original defendant under those statutes.

28 U.S.C. § 1441(a). As in all statutory construction cases, the Court analyzed the plain language of the statute along with the statutes structure and context. The statute allows “the defendant or the defendants” to remove “any civil action” from state court to federal court when the federal district court has “original jurisdiction” over the action. Notably, the court held that “the defendant” is limited to the defendant in the original complaint, not a party named as a defendant in a counterclaim.

The court then identified several bases for its interpretation that the term “defendant” had this limited purpose.

- First, the Federal Rules of Civil Procedure distinguish

When removing to federal court based on diversity jurisdiction, the state of incorporation is irrelevant; instead, the citizenship of each individual member is what counts.

28 U.S.C. § 1453(b). Likewise, the court held that the Class Action Fairness Act’s (CAFA) removal provision, 28 U.S.C. § 1453(b), does not permit a third-party counterclaim defendant to remove. CAFA “provides district courts with jurisdiction over ‘class action[s]’ in which the matter in controversy exceeds $5 million and at least one class member is a citizen of a State different than the defendant.” That statute states that “[a] class action may be removed … without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.”

The court held that this statute only alters two rules concerning removal:

- If at least one defendant is a citizen of the forum state, the action cannot be removed; and;
- All defendants must consent to removal.

But, the court noted, 28 U.S.C. § 1453(b) does not alter § 1441(a)’s limitation on which parties can remove to federal court. The court opined that this omission suggested congressional intent to retain the scope of § 1441(a) in its current state.

CONTINUED ON PAGE 32 >
In the final calculation, the court, acknowledging the four-justice dissent that this interpretation permits savvy defendants/counterclaim plaintiffs to tactically prevent removal by third-party defendants, placed the onus on Congress to amend this statute.38

LIMITED LIABILITY COMPANIES – DIVERSITY JURISDICTION – MEMBER CITIZENSHIP

When removing to federal court based on diversity jurisdiction, the state of incorporation is irrelevant; instead, the citizenship of each individual member is what counts.39 This is often problematic in potential removal scenarios because an initial pleading might not set forth the LLC members or their citizenship.

When a party seeks to remove based on diversity jurisdiction, it must show that: (1) the amount in controversy exceeds $75,000; and (b) the parties’ citizenship is completely diverse (no plaintiff is a citizen of any state where a defendant is a citizen). The party removing a case to federal court has the burden of demonstrating diversity of citizenship.

This burden to prove complete diversity can become complicated when an LLC is a party. “For purposes of diversity, a limited liability company holds the citizenship of every member, sub-member, and sub-submember.”40 Thus, to determine the citizenship of an LLC (or other unincorporated entity), a party must look to the citizenship of each member of the LLC. LLC member information and/or citizenship is often not fully described in an initial complaint or other pleadings. Further complicating the matter, this information is not always readily available from various secretary of state information portals.

The failure to thoroughly investigate the citizenship of each LLC member can have disastrous consequences. Thermoset Corp. v. Bldg. Materials Corp of Am. is a case in point.41 Thermoset illustrates any litigator’s (and client’s) worst nightmare — successfully litigating a case to conclusion only to have the judgment tossed out over a jurisdictional technicality.

Thermoset involved a dispute arising from the alleged failure of a roofing system in the Bahamas. Thermoset, the roofing contractor, filed suit in a Florida state court against the manufacturer and distributor, alleging several Florida state law claims. The manufacturer, Building Materials Corp. of America (BM), removed the case to federal court on the basis of diversity jurisdiction. BM alleged that Thermoset was a citizen of Florida; BM was incorporated in Delaware, with its principal place of business in New Jersey; and the distributor, Roofing Supply Group Orlando (RSGO) was incorporated in Delaware with its principal place of business in Texas. Almost a year of litigation ensued: the
defendant moved for and won summary judgment.
Thermoset appealed, but did not raise any jurisdictional issue. The Eleventh Circuit, however, *sua sponte* raised a jurisdictional question and asked whether diversity jurisdiction was present because the parties did not identify or provide the citizenship of each member of RSGO, an LLC. As it turned out, diversity jurisdiction did not exist at the time of removal because one of RSGO’s members was a Florida citizen (same as the plaintiff). Defendants tried to save their judgment arguing that RSGO was a nominal party and should be dismissed under Fed. R. Civ. P. 21 to preserve diversity jurisdiction. The Eleventh Circuit, however, rejected that claim, stating that permitting the case to continue without RSGO would “unfairly reward BM for the jurisdictional defect it created and should have known about all along.” The case was vacated and remanded to state court.
The *Thermoset* decision is a grim reminder for litigators to thoroughly research and properly plead the citizenship (not residence!) of each and every member of the LLC when considering whether to and filing to remove a case to federal court. **III**

**NOTES**
2. The Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the “Act”) (effective January 6, 2012) provided an update to several of the removal statutes, so keep in mind this date when searching for relevant decisions on removal. Not all past decisions are irrelevant, but some are.
3. Wachovia Bank v. Schmidt, 546 U.S. 303 (2006). There are a few district court decisions holding that a national bank is a citizen of both the state in which its “main office” is located and the state of its principal place of business. The majority of decisions, however, hold that a national bank is only the citizen of one state—the state in which its “main office” is identified in the articles of association.
4. 28 U.S.C. § 1332(d)
7. Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254 (5th Cir. 1988) and Roe v. O’Donohue, 38 F.3d 298 (7th Cir. 1994).
8. See e.g., Harper v. AutoAlliance Intl, Inc., 392 F.3d 195 (6th Cir. 2004); Mayo v. Bd. Of Educ., 713 F.3d 735 (4th Cir. 2013); Griffioen v. Cedar Rapids & Iowa City R.R. Co., 785 F.3d 1182 (8th Cir. 2015); Proctor v. Vishay Intertechnology, Inc., 584 F.3d 1206 (9th Cir. 2009).
9. 28 U.S.C. § 1447(c)
11. Fed. R. Civ. P. 81(c)(2)

**CONTINUED ON PAGE 36 >**
The law of interpreting statutes? No self-respecting tort lawyer needs to spend much time thinking about that sort of thing; understanding the “thou shall stop at a stop sign” statute does not require an injury lawyer to spend $3,332 for the privilege of having Sutherland Statutes and Statutory Construction in her library. No — knowledge and application of the law of statutory construction has historically been an arrow in the quiver of lawyers who go to Chancery Court.

Not anymore. Largely gone are the days when our legislature passed laws that created affirmative duties to not do things that posed a risk of injury or death to the citizenry — laws that put the meat on the bone of a negligence per se claim or created a private cause of action. Instead, in the last 44 years, and especially in the last 12, the Tennessee General Assembly has enacted scores of laws limiting the rights of those who want to bring tort claims. Starting with the first medical malpractice legislation in 1976 and including a recent modification to Tenn. Code Ann. §70-7-205, the General Assembly has consistently chipped away at the right of an injured person to bring a tort claim, succeed on the claim or, if the claim is successful, collect a full measure of damages. Since 2008, about 150 such laws have been enacted in Tennessee.

Let us leave for another day whether these laws reflect good public policy. The laws exist, which means that tort lawyers on both sides of the “v” need to bone-up on their knowledge of the law of statutory construction.

Do you think I am exaggerating the importance of this issue? Consider the last four Tennessee Supreme Court opinions in tort cases:

- **Jackson v. Burrell**: Court reaffirmed the existence of the “common knowledge” exception to Tenn. Code Ann. §29-26-115 (ordinarily requiring expert testimony in health care liability cases) and held that if the common knowledge exception applied, a certificate of good faith was not required under Tenn. Code...
What is the law of statutory construction? An entire edition of the Tennessee Bar Journal could not cover the law on this subject. But we can start here:

The primary goal of statutory interpretation is to carry out legislative intent without expanding or restricting the intended scope of the statute. In determining legislative intent, we first must look to the text of the statute and give the words of the statute “their natural and ordinary meaning in the context in which they appear and in light of the statute’s general purpose.” When a statute’s language is clear and unambiguous, we enforce the statute as written; we need not consider other sources of information. We apply the plain meaning of a statute’s words in normal and accepted usage without a forced interpretation. We do not alter or amend statutes or substitute our policy judgment for that of the Legislature.14

No, the law of statutory construction is not just for those before traditional courts of equity. The increasing codification of tort law now means that tort lawyers will be called upon to understand the “Rule of the Last Antecedent”15 and the “dog didn’t bark” canon.16 Do not get caught one arrow short. III

NOTES
3. The existing statute was modified to expressly permit the mandatory exculpatory agreements white water rafting companies use to be kept or displayed in electronic format.
5. ---S.W.3d --- (Tenn. 2020).
6. 600 S.W3d 908 (Tenn. 2020).
7. Tenn. Code Ann. §§ 47- 18-101 to -132 (2013 & Supp. 2019). The TCPA is one of the exceptions to the assertion in the text that the legislature has not been friendly to injured persons since 1975. However, the legislature has inflicted several blows to this law, most significantly in 2011 when it eliminated the private enforcement of the “unfair and deceptive” practices catch-all provision of § 47-18-104(b)(27). That change was made as a result of the Tennessee Civil Justice Act of 2011, 2011 Pub. Acts, c. 510 §14.
8. 600 S.W3d 322 (Tenn. 2020).
15. State ex rel. McQueen v. Metro. Nashville Bd. of Pub. Education, 587 S.W. 3d 397, 405 (Tenn. Ct. App. 2019) (this rule provides that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”)
16. Chisom v. Roemer, 501 U.S. 380, 396 n. 23 (1991) (presumption that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule).

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§1446(d) states: “Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal an the State Court shall proceed no further unless and until the case is remanded.

No reported decisions were located for the First, D.C., or Federal Circuits.

See e.g., Walker v. Philip Morris USA Inc., 443 Fed. Appx. 946 (6th Cir. 2011).

Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1360 (11th Cir. 1996) – Case in which the doctrine of fraudulent misjoinder was created.

Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1360 (11th Cir. 1996).

Id. at 594.


Id. at n. 10.


Id.

Id.


See Home Depot, 139 S. Ct. 1743, at *1747.

Id. at *1746 (quoting 28 U.S.C. § 1441(a)).

Id. at *1748.


See Home Depot, 139 S. Ct. 1743, at *1749.

Id. (citing 313 U.S. 100 (1941)).

Id. at *1749 Section 1446(b)(2)(A) provides that “[w]hen a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.”

Id. at *1763 n.4 (quoting 11 U.S.C. §1453(b)).

Id. at *1750.

Id.

Id.

Id. The dissent opined that the majority read an irrational distinction into both removal statutes, ignoring their plain meaning and the greater context. Home Depot, 2019 WL 2257158, at *7 (Alito, J., dissenting). Justice Alito wrote that the CAFA allows removal by third-party defendants because they fall within the scope of “any defendant.”

Citizenship is not the same as residence!

Delay v. Rosenthal Collinsgroup LLC, 585 F.3d 1003, 1005 (6th Cir. 2009).

849 F.3d 1313 (11th Cir. 2017).
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A committee tasked with reviewing and making recommendations to the Tennessee Child Support guidelines recently completed an approximately two-year review and revision of those guidelines, a process that led to numerous revisions and amendments. The changes that will be implemented in 2020 after this review process alter several specific provisions for modifying a party’s child support obligation throughout Tennessee. While most of the amendments will not cause significant changes to the eligibility or methodology for modification, they are still the most significant alterations to the law since 2005 when the income-shares model was instituted. In a May 11, 2020, press release, the Tennessee Department of Human Services wrote that these amendments will “help align all child support orders with changing family economics, improve the system for both custodial and non-custodial parents, and meet new federal requirements.” All family law practitioners should be aware of the changes as they may well impact your daily practice. Although the new Child Support Guidelines went into effect on May 7, 2020, to delay the impact of these changes and to prevent a flood of new modification petitions, a petition to modify child support will still require both a material change in circumstance and a significant variance in the support ordered, until Nov. 7, 2020. After Nov. 7, a material change in circumstance will no longer be required, and a petitioner may obtain a child support modification by only showing a 15% significant variance.

NOTEWORTHY CHANGES
One of the more significant changes from the previous guidelines relates to child support worksheet credits for health and dental care. Under the current provisions in the code, if a parent remarries and their new spouse’s insurance covers their child for health care, dental or vision, the parent does not receive any credit on the child support calculation for this. This is because as a party to the support determination, they are not directly contributing. One of the amendments to the guidelines would now give the party credit for the contribution of their new spouse to the health care of the child or children. This change is impactful, and it signals a shift to a more equitable understanding about the way modern families are constructed and the contribution that each side makes to the welfare of the children from a marriage whether that be direct, or more indirect.

The new Guidelines also increased the list of factors that a tribunal may consider in determining the amount of income to impute to a parent that is voluntarily unemployed or voluntarily underemployed. These factors include: assets; residence; employment and earnings history; job skills; educational attainment; literacy; age; health; criminal record and other employment barriers; records of seeking work; the local job market; the availability of employers willing to hire the parents; prevailing earnings level in the local community; and other relevant background factors. Moreover, if imputation of income is authorized, but the tribunal does not have adequate or reliable evidence of income, the gross income for the current and prior years shall be determined by imputing annual gross income of $43,761 for male parents and $35,936 for female parents. These figures repre-
sent the full-time, year-round workers’ median gross income, for the Tennessee population only, from the American Community Survey of 2016 from the U.S. Census Bureau.

A further change to the guidelines sets a minimum of $100 per month for the non-custodial parents unless that is excused under certain circumstances. This minimum payment may be excused for both specific and discretionary reasons. It shall be excused when the obligor's only source of income is Supplemental Security Income (SSI); when the federal benefit for a child results in a calculation of support owed to be less than the minimum amount; or when the Parenting Time Adjustment results in an amount less than the minimum child support order. Additionally, the minimum payment may be excused by the court where, “in its discretion” the court “may deviate from the minimum child support order by either setting a higher or lower support order.”

Given this catchall, it is not clear how many people this would apply to, or not — since the tribunal would have the discretion to relieve a party from the minimum payment by conducting the normal process for setting support, if that process resulted in a lower monthly payment than the $100 minimum. However, the delay in the full implementation of the changes until Nov. 7 and the caveat that interim modifications must also have a material change in circumstance, reflected the belief that the courts would otherwise be inundated with modifications. Presumably, it was this change to the guidelines that the committee had in mind when it determined that they would stagger the effects of the changes by holding off on the unfettered use of these amendments as it would be the one, most likely, to affect the largest group of payors in the state.

Another significant change was the establishment of the “Self Support Reserve” for people who are obligated to pay support. The goal of the reserve was to insure “obligors have sufficient income to maintain a minimum standard of living based on 110% of the 2018 federal poverty level for one person ($1,113 net income per month).” This clause acts as a cap on the support that an obligor will owe so that they will not pauper themselves to pay the support that is produced by the standard worksheet calculations. It is quite detailed as to the method for determining which obligors will benefit from this provision. The important take away is that, again, the committee found the necessity of providing some relief to those with limited means in relation to their child support obligation. As with several other clauses, this may or may not affect a significant number of people seeking a modification, but it is important to bear in mind.

CHANGES INVOLVING THE CRIMINAL JUSTICE SYSTEM

Changes that alter the current guidelines for a smaller segment of the population (but in a significant way for that segment) creates a basis for a change in the support awarded. Typically, a modification to child support requires that there be a “significant variance” between the child support obligation ordered and the calculated obligation determined by the guidelines. This usually arises from a change in the amount of income of the parties, or some other cause that necessitates a change to the child support award. Examples of this are if a party had an additional child or if the medical needs of a child changes before it is permissible.

One of the new provisions in the guidelines creates a new circumstance that allows for a modification. Parties that are serving a term of incarceration in excess of 180 days are now permitted to use that as a basis to seek a modification of their child support obligation. Before, this would have been permissible only if that led to a significant variance in their income that then warranted a change to their support obligation, which may or may not have been substantiated. Though this may only affect a minority of persons in Tennessee seeking a modification of their support, it nonetheless represents a significant difference and creates a major impact on those who fall into this category.

Another change reflecting the committee’s focus on problems in fulfilling child support obligations based on a party’s criminal history is an addition to the considerations when imputing income as a basis for support. The guidelines provide instruction to a court or tribunal setting support in the circumstance where the income of a party is not readily ascertainable due to lack of records, lack of employment or both. The tribunal has been given a list of factors to consider when determining the imputed income of a party as it “must take into consideration the specific circumstances of the parent to the extent known.” Under the changes made by the committee, the tribunal must now also consider the “criminal record and other employment barriers” when setting an imputed income amount. As with the previous change, this may only affect a small segment of the population that is ordered to pay support, though a larger segment than those who are incarcerated during the pendency of a modification. However, it reflects the recognition on the part of the committee that many people who have support orders may also face significant difficulty finding gainful employment because of a prior criminal record and that circumstance does not reflect an unwillingness to pay support. Be that as it may, there are no instructions in the section regulating imputed income about the weight that the tribunal must put on this factor, or any other. It remains to be seen how impactful this change will be on those who have difficulty paying support because of lack of lucrative employment because of a prior criminal record.

While none of the changes to the guidelines represented tectonic shifts in the calculation of child support, they all are important in their own right and reflect the ever-evolving nature of support in modern times. Being cognizant of them and their import for your clients will, likewise, be important to your practice.

NOTES

6. Tenn. Code Ann. § 36-5-101(g)

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Bostock v. Clayton County
An Expansion of Title VII

When Congress passed the Civil Rights Act of 1964, Title VII of the Act prohibited employment discrimination “because of … sex.” That language has not changed. Its meaning has. On June 15, 2020, the United States Supreme Court issued its landmark and much-awaited decision in the consolidated case of Bostock v. Clayton County, Georgia. Justice Gorsuch, writing for the 6-3 majority, held that an employer who fires an employee because the employee is homosexual or transgender violates Title VII’s prohibition on sex-based discrimination.

How did the Supreme Court reach this landmark decision? How far-reaching is Bostock? And how, if at all, does it affect claims under the Tennessee Human Rights Act, Tennessee’s counterpart to Title VII? We address all that below.

’BECAUSE OF SEX’ — BOSTOCK V. CLAYTON COUNTY, GEORGIA
The Supreme Court granted certiorari to resolve a circuit split regarding Title VII’s application to employees who claim they were discriminated against because of their homosexual or transgender status. The case consolidates three appeals from lower courts in which the employers all acknowledged they fired their employees “for no reason other than the employee’s homosexual or transgender status.” In the first case, Gerald Bostock, a child welfare advocate, was fired after his employer, Clayton County, Georgia, learned of his participation in a gay softball league. In the second case, Donald Zarda was a skydiving instructor who was fired after telling his employer he was gay. In the third case, Aimee Stephens, born male, worked at a funeral home until she was fired after telling the company she was going to transition to life as a woman.

All three employees alleged discrimination on the basis of sex under Title VII. The Eleventh Circuit dismissed Bostock’s case on summary judgment. The Second Circuit refused to dismiss Zarda’s case, concluding that discrimination on the basis of sexual orientation violated Title VII. And the Sixth Circuit refused to dismiss Stephens’ case, holding that Title VII bars discrimination on the basis of gender identity.

The issue before the Supreme Court turned on the interpretation of three words in Title VII’s prohibition on discrimination: “because of … sex.” The majority concluded that discrimination on the basis of homosexuality or transgender status cannot be separated from discrimination on the basis of sex. The court noted that the overarching message of this Title VII language is that “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions.” The court proffered two examples to explain its holding.

In the first example, there are two employees, both of whom are attracted to men. The two individuals are, in the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague (i.e., being attracted to men). This, the court held, is discrimination because of sex.
In the second example, an employer fires a transgender person who identified as a male at birth but who now identifies as a female. If the employer, simultaneously, retains an equally qualified employee who identified as female at birth, then the person who identified as male at birth has been penalized, the court reasoned, for traits or actions that it tolerates in the other employee. The court capped off this example by stating that “[a]gain, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”

What about where an employer terminates both a male and a female based on their sexual orientation? That’s not showing preferential treatment “because of sex,” right? This argument was flawed, the court held, because Title VII requires courts to analyze acts of discrimination against individual employees, rather than classes of employees. “Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women,” the court held, “[i]nstead, the law makes each instance of discriminating against an individual employee because of that individual’s sex an independent violation of Title VII.”

Justice Gorsuch readily and immediately admitted that those who voted for the Civil Rights Act of 1964 likely did not contemplate the statute’s language would, someday, protect homosexual and transgender employees from employment discrimination. The expectations of those members of Congress, the court held, did not trump the express terms of the statute. (i.e., “because of . . . sex”). Indeed, as Justice Gorsuch wrote, “[s]ometimes small gestures can have unexpected consequences.”

**BOSTOCK HAS ITS LIMITATIONS**

The court specifically declined to address how its decision impacts sex-segregated bathrooms, locker rooms, and sex-specific dress codes in the workplace, reasoning that such situations were “before” the court. Some may cite this as a prime example of judicial restraint. Others, however, see it as a textbook example of puniting on issues that may yield controversial results. Indeed, Justice Alito’s minority opinion takes the majority to task for dodging this “matter of concern.”

Toward the end of the majority opinion, the court suggested that concerns for religious liberty may, under the appropriate circumstances, “supersede” Title VII’s protections. In support of this mostly hypothetical position, the court referenced the exemption in Title VII for religious institutions, the First Amendment exception to the application of anti-discrimination laws, and the Religious Freedom Restoration Act, which the court categorized “as a kind of super statute.” Despite forecasting what might be the outcome of a battle between religious liberty and Title VII, the court ultimately held this was a question best left for another day because that precise issue was not before the court. Interestingly, Aimee Stephens’ employer, the funeral home, had lost on its RFRA-based defense in the Sixth Circuit but chose not to pursue it in its certiorari petition to the Supreme Court.

**BOSTOCK’S IMPACT ON THRA CLAIMS**

The Bostock decision was limited to an interpretation of Title VII’s language. Keep in mind that Title VII only applies to employers with 15 or more employees. The Tennessee Human Rights Act (THRA), on the other hand, applies to employers with eight or more employees. So, for those employers subject to the THRA, but not Title VII, what is the impact of the Bostock decision?

The language prohibiting discrimination on the basis of sex is the same in Title VII and the THRA. Both statutes prohibit discrimination “because of sex.” In fact, one of the stated purposes of the THRA is to “[p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972.”

And Tennessee courts have been encouraged to “examine federal law when analyzing issues under the Tennessee Human Rights Act.”

However, Tennessee courts “are neither bound by nor limited by the federal law when interpret-
Few Americans are subject to the federal estate tax, a tax on the right to transfer assets. Out of an estimated 2.7 million American deaths in 2020, only 1,900 will have estates large enough to require paying estate tax. That is because the current exemption is so large — $10 million per transferor, indexed for inflation since 2011. For a married couple, the exemption is "portable" between them by filing certain documentation, ensuring a full $20 million combined exemption between them.

But not much longer. Under current law the unindexed $10 million exemption will drop in half to $5 million for deaths after 2025, exposing more citizens to tax. These are the "middle wealthy," whose estates are sensitive to the size of the estate tax exemption.

Moreover, Congress could change the law at any time, even retroactively, to reduce the exemption or to increase the tax rate. If the November election gives Democrats both the White House and control of Congress in 2021, it is quite feasible that law changes later in 2021 or even in 2022 could apply retroactively to deaths as early as Jan. 1, 2021. Be prepared for a potential flurry of planning activity this December.

Because the higher exemptions are "use it or lose it," the obvious planning solution is to give away most or all of the estate irrevocably during life, locking in the benefit of the higher exemption. Final "anti-clawback" regulations issued by the IRS clarify the effectiveness of that strategy. However, none of my middle wealthy clients are interested in impoverishing themselves merely to save taxes upon their death.

What the middle wealthy need is a way to make a sizeable gift to an irrevocable trust with three key requirements: (1) potential later distributions back to the Grantor if needed or desirable; (2) a completed gift upon funding to utilize the higher exemption; and (3) no inclusion of the trust assets in the Grantor's estate upon death.

How can we do so? Let me count the ways.

1. TENNESSEE INVESTMENT SERVICES TRUST (TIST)

A Tennessee Investment Services Trust (TIST) is a domestic asset protection trust (DAPT), authorized by law in 19 states, including Tennessee, and is a statutory exception to the general
rule that creditors can reach a self-settled trust. If all the requirements are met, the Grantor can fund a TIST that includes himself as a discretionary beneficiary, prevents his creditors from reaching the trust assets, and creates a completed gift.

IRS rulings have been generally favorable in not including a TIST in the Grantor's estate at death. Understandably, the IRS requires a review of all the facts and circumstances, but most important is the lack of any evidence of an understanding or prearrangement between the Grantor and the Trustee about distributions back to the Grantor.

2. SPECIAL POWER OF APPOINTMENT TRUST (SPAT)

Instead of giving a Trustee (or Trust Protector) discretionary authority to make a distribution back to the Grantor, an irrevocable trust could be created for beneficiaries other than the Grantor, but one or more individuals who are not the Grantor (and who may or may not be a beneficiary) are given a special power of appointment to appoint trust assets among a class of individuals that happens to include the Grantor. The class must not be so narrow as to include only the Grantor, nor should the class include the powerholder.

With a Special Power of Appointment Trust (SPAT), the Grantor is technically not a “beneficiary” of the trust at all and so it is not a self-settled trust. Furthermore, the holder of the power of appointment is not a fiduciary and may exercise broad discretion without regard to the interests of other beneficiaries of the trust, eliminating the conflicts that a Trustee has as a fiduciary with duties to all beneficiaries. Again, however, there must be no evidence of any prearrangement or agreement between the Grantor and the holder of the power of appointment.

3. SPOUSAL LIFETIME ACCESS TRUST (SLAT)

A Spousal Lifetime Access Trust (SLAT) is simply a “credit shelter trust” created for the Grantor's spouse's benefit during life rather than at death, creating a completed gift, avoiding inclusion in the Grantor estate at death, and making assets available to the spouse during the spouse's life, and therefore indirectly back to the Grantor. It also provides creditor protection for both the Grantor and the spouse.

If the spouse predeceases the Grantor, the spouse could exercise a limited power of appointment broad enough to appoint assets back in trust for the Grantor (perhaps only with the consent of a non-adverse third party). Or a Trust Protector could be authorized to add the Grantor as a beneficiary of the trust if and when it continues beyond the spouse's death.

Broader yet is for both spouses to create SLATs for each other, ensuring trust access for both during both lives. However, such a plan would not work if the trusts are considered “reciprocal,” which treats each trust as having been created by the beneficiary rather than by the alleged grantor, voiding all the desired benefits. Considerable planning is required to make them non-reciprocal.

4. GRANTOR RETAINED INCOME TRUST (GRIT)

One of the three requirements discussed for an ideal trust is for such trust not to be included in the Grantor's estate at death. Prior proposed anti-clawback regulations had stated that the higher exemption would be respected for larger gifts “whether or not included in the gross estate,” leading commentators to recommend that the Grantor of a trust deliberately retain an income interest without losing any of the benefit of the higher exemption at the time of the gift. However, the Preamble to the final “anti-clawback” regulations suggests that the Treasury is considering adding an “anti-abuse” section for trusts that are included in the Grantor's taxable estate, perhaps limiting the Grantor's estate to only the reduced exemptions at death despite having used larger exemptions during life, a nightmare scenario. This threat by the IRS has created a huge “chilling” effect on GRITs, though some advocates remain.

CONCLUSION

The “middle wealthy” in America who hope or expect to outlive the availability of currently high gift and estate tax exemptions have options to “use it before they lose it,” but the options are not simple.

CONTINUED ON PAGE 44
WHERE THERE’S A WILL  continued from page 43

NOTES
1. The gift and estate tax exemption is technically known as the Basic Exclusion Amount.
2. The gift tax and estate tax exemptions are “unified,” in that gifts during life are nontaxable to the extent sheltered by the exemption, but exemption used during life reduces the amount of exemption remaining at death. Thus, the exemption for transfers during both life and death is one combined cumulative exemption.
3. For transfers in 2020, the indexed exemption is $11,580,000 per transferor, or $23,160,000 combined for a married couple. For simplicity, this column uses only the non-indexed numbers.
4. How many “middle wealthy” exist? In 2017, when the exemption was the unindexed $5 million, there were 5,500 taxable estate tax returns filed, compared to an estimated 1,900 in 2020. That suggests that if the exemption drops in half, about 3,600 additional estates per year will pay estate tax that would otherwise not be taxable. Over a decade, that means at least 36,000 additional taxable estates, or about 800 in Tennessee, whose population is a little over one-fiftieth of the U.S. population.

6. We have been here before. The 2012 indexed exemption of $5,120,000 was scheduled to drop to only $1 million in 2013. In December 2012, many clients made gifts in excess of $1 million in order to utilize the higher exemption while it lasted, only to see Congress the next year extend the higher exemption indefinitely, effective retroactively to Jan. 1, 2013, creating “buyer’s remorse” for some. In any event, many clients in 2012 could afford to make gifts in excess of $1 million ($2 million per married couple), compared to the 2020 conundrum of needing to make gifts in excess of the indexed exemption of $5,790,000 ($11,580,000 per married couple).
7. Note that merely giving away an amount equal to the halved exemption does not help, since it is only the top half of the exemption (disappearing in 2026) that must be used now to benefit. A corollary is that married couples making gifts to use up their larger exemptions are better off using all of one spouse’s larger exemption before the other spouse starts dipping into the bottom half of their exemption.
8. Final “anti-clawback” Regulations §20.2010-1(c), T.D. 9884, 84 Fed. Reg. 64995 (Nov. 26, 2019), clarify that lifetime taxable gifts using the higher exemptions prior to 2026 will successfully lock in the benefit, even if the taxpayer dies later when the exemption is much lower.
9. A trust is not necessarily required. Here are four potential non-trust solutions to avoid tax on the portion of an estate in excess of the federal exemption. (1) Add a formula to the Will that leaves to charity whatever portion of the estate would exceed the federal exemption. A surprising number of clients like this approach. (2) Buy commercial annuities on the life of the client (or the joint lives of spouses) with all assets in excess of the federal exemption. The underwriting matches the annuity payment with the health and life expectancy of the client. Such annuities guarantee income security for life but are not included in the taxable estate at death since they terminate at death. Authors Stephen Pollan and Mark Levine in their 1988 book Die Broke garnered attention for advocating extensive purchase of annuities for this and other reasons. (3) For clients with charitable intent, buy charitable gift annuities instead of commercial annuities. Charitable gift annuities...
are calculated without underwriting, which favors healthier clients, and also provide a charitable income tax deduction upon purchase. (4) Set up a private annuity between the client and a younger family member, which annuity terminates at client’s death, leaving nothing in the estate (except annuity payments actually received). This typically works only with a client whose life expectancy is clearly shorter than the IRS mortality tables predict, who can still qualify to use those tables under IRS guidelines, and who then actually dies earlier.


11. To be a TIST any transfer to the trust must not be a fraudulent conveyance; the grantor cannot be insolvent at the time of the transfer nor rendered insolvent by the transfer, the trust must have a spendthrift clause; and the Trustee must be a Tennessee resident.

12. In IRS Private Letter Ruling 2009-4002, the mere retention by the Grantor of a current permissible interest, in the Trustee’s discretion, did not by itself result in an incomplete gift or a retained interest at death. IRS Revenue Ruling 2004-64 agreed with the PLR and further stated that in order to prevent inclusion in the Grantor’s estate at death there must not be any understanding or prearrangement between the Grantor or Trustee. It is also crucial that the TIST succeed in precluding creditors’ claims, as creditor access can create inclusion in the Grantor’s taxable estate at death. Although creditor protection is clear for a Tennessee resident with a Tennessee creditor, there exists a remote possibility of loss of creditor protection in some other state in which the Grantor of the TIST has a judgment creditor and whose state public policy is not to recognize any creditor protection in a self-settled trust. In such case the IRS could conceivably argue inclusion of the trust in the Grantor’s taxable estate.

13. Two ideas may make a TIST safer from IRS attack. First, a TIST might provide objective standards for any distributions back to the Grantor, for example requiring occurrence of an act of independent significance, such as a spouse’s death, an objective health need, or a net worth below some fixed amount. Second, a TIST could provide that the Trustee has no discretion to make distributions to the Grantor, but instead a Trust Protector under Tenn. Code Ann. §35-15-1201 et seq. is authorized to make discretionary distributions to the Grantor. The Trust Protector is a fiduciary, however, so the same requirement exists to avoid any prearrangement or understanding.


15. Of course, nothing prevents a creditor from attempting to claim that a SPAT is analogous to a self-settled trust. However, the Grantor’s interest is not a potential appointment back, which could treat the new trust created under a self-settled trust as the Grantor’s estate at death. There are no cases yet on the same issue extending to a self-settled trust.

16. The choice of powerholder matters for income tax purposes. Under Internal Revenue Code §677(a), if the powerholder is not an adverse party (i.e., a beneficiary with a substantial beneficial interest), then the trust is generally a “grantor trust,” meaning that the Grantor will be treated as the owner of the trust for income tax purposes and taxed on all the income, whether or not the Grantor actually receives any distributions. This might be desirable for some Grantors, for whom the taxes paid act as an additional tax-free gift to the beneficiaries of the trust. For Grantors who do not wish to have such income tax burden, either the powerholder must be an adverse party or else the distribution must require the consent of some other person who is an adverse party. Note that for the Grantor’s protection against the powerholder’s unexpected appointment of substantial assets to appointees not intended by the Grantor, any exercise of the appointment can require the consent of some other third party, such as the Grantor’s attorney or other neutral party, not acting in a fiduciary capacity.

17. A SPAT is not usually also a TIST, since the Grantor does not name himself as a potential beneficiary, so it should accomplish its purposes regardless of which state laws might apply as to creditors. However, a SPAT might be designed with all the elements of a TIST other than naming the Grantor as a potential beneficiary, under a “belt and suspenders” approach, in case a creditor argues that it should be treated as a self-settled trust.


19. A major concern would be the doctrine of relation back, which could treat the new trust created by the spouse’s exercise of a power of appointment as having come from the original grantor’s own assets. This could allow the IRS to claim that the original grantor had retained powers over the trust that brings the entire trust back into the grantor’s taxable estate at death. There are no cases yet on this issue. Tenn. Code Ann. §35-15-505(1) states that a person who becomes a beneficiary as a result of the exercise of a power of appointment will not be considered the settler of the trust. However, that statute may apply only in the context of blocking creditor’s rights and may not preclude the doctrine of relation back for estate tax purposes.

20. In U.S. v. Grace, 395 U.S. 316 (1969), the Supreme Court held that two trusts created by spouses for each other, identical in terms, at about the same time, and of equal value, were interrelated and left the grantors in approximately the same economic position as if they had created trusts naming themselves as beneficiaries. Thus, minimizing the reciprocal trust risk necessarily requires maximizing the differences between the two SLATs, requiring careful thought both in design and in actual administration after their creation. For example, PLR 2004-26008 held that two quite similar trusts between spouses were not reciprocal when husband did not become a beneficiary of the wife’s trust unless and until he survived more than three years after wife’s death, and then only if his net worth or income fell below certain levels.


22. Most commentators recommending a GRIT have suggested retaining a right to all the income of the trust for life, causing the trust to be includible in the Grantor’s taxable estate under Internal Revenue Code §2036, but not any rights to principal. Under Internal Revenue Code §2702, if the trust is for the benefit of family members, and the income stream is not a fixed amount, then for gift tax purposes the taxable gift equals the entire gift to trust, despite a retained income stream. During the term of a GRIT, if the assets appreciate, the Trustee could distribute principal of the trust to other family beneficiaries to keep the value of the trust within the remaining estate tax exemption of the Grantor when the trust is included in the Grantor’s estate. This seemed to provide the Grantor with both a completed gift and a direct income interest for life, like having your cake and eating it too. Some even suggested a GRIT could still accomplish the desired tax results even if “enhanced” by including additional provisions for the benefit of the Grantor, such as (1) the right to receive discretionary principal under a broad standard, so long as no such distribution took the principal below a fixed amount, and (2) a retained testamentary power of appointment over the assets at death. This is known as an Enhanced GRIT, or E-GRIT.

“Courage is being scared to death ... but saddling up anyway.”

— John Wayne
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