

TENNESSEE BAR JOURNAL

MARCH/APRIL 2021 | VOLUME 57, NO.2

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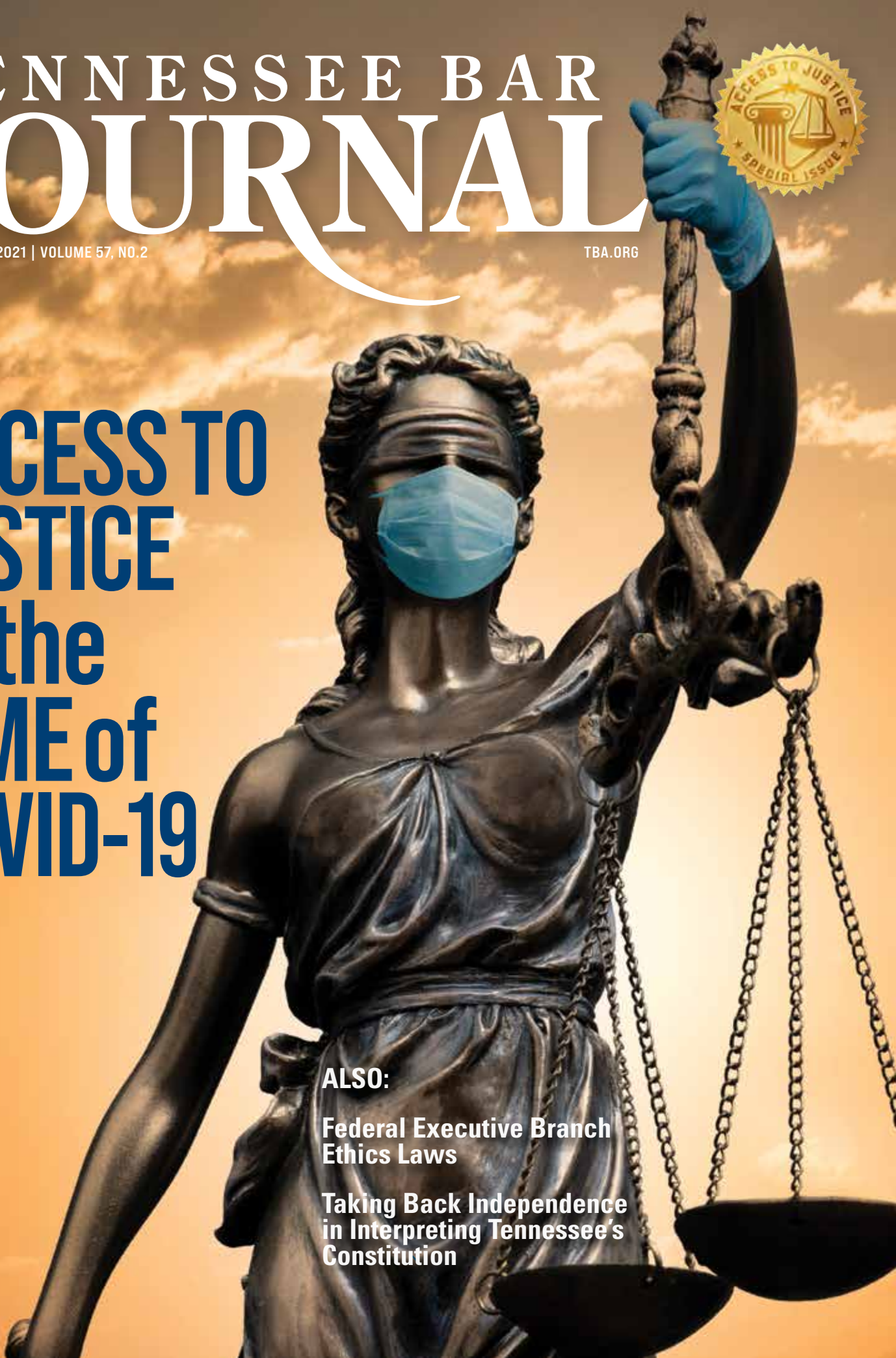


ACCESS TO JUSTICE in the TIME of COVID-19

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Throughout the current pandemic, the legal community has stepped up in many ways to ensure that everyone who needs it has access to the law.

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Lawyers Are Essential, Especially in a Crisis



Early on in the pandemic, I saw a meme on social media that presented a “new” definition of essential workers, including nurses, grocery store employees, delivery drivers and teachers, among others, who are part of our country’s critical infrastructure. There is no argument that we have a new appreciation for these frequently undervalued essential professions. Still, the meme went on to distinguish that we should never forget that we did not need attorneys during the crisis.

Although it may be the perception of some that attorneys were inconsequential in the context of the COVID-19 turmoil, that could not be further from the truth. In March 2020, Governor Lee declared attorneys essential workers, and Tennessee attorneys have lived up to that title. Attorneys not only continued to work, but they found creative and innovative ways

to serve their clients. Despite the many challenges, attorneys pushed forward. Although some attorneys could continue their practice remotely via Zoom meetings and telephonic communication, others could not. Many attorneys had no choice but to continue working in person, including court administrators, district attorneys, public defenders, guardians ad litem, appointed attorneys, attorneys handling juvenile emergencies, conservatorships involving abuse, protective orders, restraining orders, family law matters, criminal matters and many more. In reality, many attorneys faced considerable risks while serving their clients.

Tennessee attorneys continued to represent their clients’ interests, including the most vulnerable in our population, during this pandemic. Tennesseans needed attorneys for representation on family law matters, divorce matters, criminal matters and obtaining orders of protection. Advocacy on behalf of children and parents in

CONTINUED ON PAGE 11 >

MICHELLE GREENWAY SELLERS is a partner in the Jackson office of Rainey Kizer Reviere & Bell PLC. You can reach her at MSellers@RaineyKizer.com.

Henry's Profound Impact, One TBA President to Another

Thanks for the story about Justice Henry ("It's the Volunteer State, After All," by Suzanne Craig Robertson, January/February 2021 *Tennessee Bar Journal*). In the fall of 1979, I accepted an offer to serve as his clerk in 1980-81. I was never able to do that because on the morning of my hooding ceremony in the spring of 1980, he was out jogging and had a massive fatal heart attack.

There is one conversation I had with him that has stuck in my memory all these years. I asked him the previous fall about the best job he had ever had. Of course, I was expecting him to say that his job on the court was his best job. Instead, after pausing to think carefully, he said serving as TBA president was the best job he ever had. He said that the opportunity to advocate for the profession, travel the state, help lawyers and judges in trouble, and work to get the legislative branch to do the right thing was an amazing experience. Obviously, perhaps, that short exchange had a profound impact on me.

I have been told that Joe was the only Tennessee Bar president who could "strut sitting down." I was in the 10th grade in 1970-71 when he served. I wish I could have seen him in action.

— Buck Lewis, Memphis,
TBA President, 2008-09

Mental Health Article Resonates With Readers

The following letters (the most ever received about an article in the *Tennessee Bar Journal*) are a portion of what were sent to Kent Halkett, who authored the January/February TBJ's cover story, "Mental Health in the Legal Profession: A Crisis, a Case Study and a Call to Action." They are published anonymously to protect the responders' identities. Read all of them

online in a March issue of TBJ Select at www.tba.org/tbjselect.

Comments from current, former or retired attorneys, many from 'Big Law':

- You have done something important here ... It is interesting how sorrows often lead to great good. You'll likely never know, but lessons in what you have written and shared about things not easily shared will save lives."

- As you point out in your article, lawyer mental health is still taboo and I'm not sure anyone has written about it so nakedly before. We can tell our firms when we need parental leave or medical leave, or even when we have a body ailment. No one feels like we can tell our firm(s) that the pressure of the job is affecting our mental health.

- Kent, you are my classmate. My friend. I know you. Yet I was completely unaware of your mental health challenges. Thank you for writing this emotionally raw and honest article and sharing your story of hope.

- Your article makes me reflect on the harm I actually may have done some unsuspecting associate, and I sincerely hope I have not been even a partial cause of depression or related illness in any of my colleagues. But the truth is, our desire to do things right and spare clients from the slightest oversights exacts a price, and your article wisely asks our colleagues at the bar to reflect on the potential for dire consequences of obsessing over a desire for perfection.

- Law in general, and Big Law in particular, has become a VERY hard way to earn a living. The problem you discuss is real, both in the practice's effect on individuals and especially the culture that views "medical" issues so differently from "mental" issues and you have done a wonderful job explaining that.

- I was truly moved, and even a bit shaken, by your personal story. You are so brave to share this. What a burden to have carried over these many years. Your article sheds light on a topic people often avoid,

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JEST IS FOR ALL By Arnie Glick



"If you ever have a dog as an adverse witness, get him to admit that he likes to roll in the dirt and chase his tail. That should be the end of his credibility."

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but needs to be examined and better appreciated. I am confident your honesty will encourage others to seek help when they need it.

- Great article, Kent, and great courage to address this topic personally and for others. Everyone knows the truth of this and many have experienced lesser degrees without really even understanding. Good work!

- I have experienced the same problem and appreciated your article very much. I have moved out of full-time law practice...

- This is powerful. Thank you for authentically sharing your experience and insights. It is so critical to emphasize that just as there is no shame in diabetes, there should be no shame in mental illness. Unfortunately, shame becomes a prison that traps many from asking for help. I agree serious change is necessary to create a safe environment within law firms for attorneys to feel safe in asking for help.

- Mental health is as much a health condition as physical health and should not be stigmatized. I am encouraged by your courage in discussing your story, and the very important issue of addressing mental health matters without stigma, including in the legal profession.

- What brave words. What you said and Gabe's widow said about the culture of BigLaw totally disregarding mental health and depression is correct.

- It is an important and courageous article. While I haven't quite visited the same place, there have been times when I could see it from where I stood. You've captured very well the feelings of isolation and helplessness.

- I'm kind of speechless. I definitely recognize the concept described and I have

been taking an antidepressant for years.

- In addition to being very important, it is informative — especially to those in the legal profession who either don't know about the problem or are afraid to 'come out,' as it were — engaging and, ultimately, very courageous. ... EVERY lawyer should read this!

From a Suicide Prevention Advocate/Retired Military Officer:

- What you're doing to support the legal community is wonderful. They need you to feel comfortable talking about your experience and how they too can be healthy and happy at home and in their profession.

From state and federal court judges:

- Your article is well done and very timely. You have done a service to the profession by sharing your own story and observations.

- I commend you for your courage in writing the article. In my view an article like this truly has the power to change (and even save) lives.

From a law school administrator:

- Thank you for having the courage to write that piece. ... We are doing much more work at the school on these issues than would have been true in our respective days, but there is definitely more work to be done in the profession. III



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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.



Top row, from left:
Jennifer Vossler, Jarod Word,
Chelsea Bennett;
bottom row:
Maresa Whaley and
Michael Milligan.

TBA CLE Recognized for Excellence

The TBA's Year End CLE programming was recognized recently as the state's top continuing education program by the Tennessee Society of Association Executives. The TBA was forced to revamp its December course lineup because of COVID-19 restrictions, converting its live programs into virtual presentations, moving the annual last-minute blast onto YouTube and Mediasite platforms for distribution and packaging existing content into useful bundles. In all, nearly 10,000 hours of CLE was completed by Tennessee lawyers during the month-long span. The TBA's continuing legal education department is led by Jennifer Vossler, with team members Jarod Word, Chelsea Bennett, Maresa Whaley and Michael Milligan.

NAACP Launches \$40 Million Law Student Scholarship

The NAACP Legal Defense Fund recently announced a \$40 million scholarship program to support a new generation of civil rights lawyers who will pursue racial justice across the South following law school graduation.

Recipients of the new Marshall-Motley Scholars Program will have their legal education fully funded,

then complete a two-year fellowship and spend at least eight years doing racial justice and civil rights work in the South. The program, made possible by the generosity of a single anonymous donor, envisions supporting 50 students.

Survey: Partners Face Pay Cuts, De-equitization

A new survey released in February found that 43% of law firm partners took a pay cut in 2020 directly

related to COVID-19, the *ABA Journal* reported. Law360's inaugural "Law Firm Partner Compensation Survey: Partnership and Pay in an Unprecedented Year" also found that nearly half of those partners said their salary was cut by 20% or more, and the median pay decrease because of the pandemic was 15%. In addition, 34% of partners said their firms de-equitized partners, while 38% said their firms asked partners to retire. A third of the respondents also said their firms were reducing physical space in light of COVID-19. Director of surveys for Law360 Pulse Kerry Benn, says the results show that the pandemic has affected "a huge swath of the legal industry." The survey was conducted from September to October 2020 at law firms with at least 25 attorneys.

Survey: 1 in 5 Judges Have Depressive Symptoms

Data gathered from a new survey of judges shows that one in five respondents met at least one criterion for depressive disorder, the *ABA Journal* reported. The National Judicial Stress and Resiliency Survey was designed by the ABA Commission on Lawyer Assistance Programs and surveyed 1,000 judges before the COVID-19 pandemic.

The depressive disorder symptoms included lack of initiative, preoccupation with negative thoughts, feeling that work is no longer meaningful, depressed mood and more.

When asked about the cause of their stress, 79.7% said it was the importance and impact of their

CONTINUED ON PAGE 8 >

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- “Privacy in Trash,” by David L. Hudson Jr.
- Follow-up and Rebuttals to “The Five Greatest Legal/Courtroom Dramas of All Time,” by Steve Barton
- “Both Feet on the Ground, Ahead in the Cloud: Practical Considerations in Contracting for Hosted Services,” by Stroud Vaughn

decisions, followed by a heavy docket of cases at 73.2%. The study recommends that judges take steps to control their stress with good habits like exercise, better nutrition, stretching, mindfulness and more. It also recommended that leaders of courts and administrative agencies demonstrate that judicial well-being is a priority.

Nashville Creates Court for Eviction Cases

In an effort to prevent mass evictions, the Davidson County General Sessions Court has transferred nearly 2,000 pending eviction cases to a newly established housing court, the *Nashville Post* reported. The goal of the new court, to be overseen by Judge Rachel Bell in partnership with the Metropolitan Action Commission and Davidson County Circuit Court Clerk Richard Rooker, is to use nearly \$21 million in federal rental assistance to pay landlords on behalf of tenants at risk of eviction.

The Nashville Conflict Resolution Center is providing additional mediation work as part of the project. Supporters hope the effort will keep evictions off tenants’ records, a mark that can make it more difficult to find future housing.

Anderson County Family Justice Center to Open

Anderson County District Attorney General Dave Clark recently announced that a large grant has been secured to fund the creation of the Family Justice Center of Anderson County. The center is expected to open no later than July 1, the *Oakridger* reported. Family justice centers provide a centralized location for victims

of physical abuse, sexual assault, domestic violence and elder abuse to receive information and services from partner organizations in the community.

Clark said the \$572,052 funding came from the Tennessee Office of Criminal Justice Programs, which receives funding from fines, costs and seizures collected from those convicted of crimes in the federal criminal justice system.

New Mentoring Program Will Help Law School Applicants

A group formed by Harvard Law School students pairs mentors with under-represented individuals applying for law school and competitive scholarships. Last year, the program helped almost 500 candidates with LSAT prep, admissions essay review and applications for the Fulbright U.S. Student Program and Rhodes Trust.

The Dear Future Colleague program hopes to expand to other graduate degrees in the future, the *ABA Journal* reported. Volunteers do not have to be Harvard Law School graduates.

LSC Receives \$25 Million Spending Boost for 2021

The Legal Services Corporation received \$465 million in the omnibus FY 2021 appropriations legislation signed into law at the end of the year. The funding represents a \$25 million boost from last year and the largest appropriation in actual dollars in the organization’s history. Funding for the LSC was not included in the latest COVID-19 relief package, although the bill did include rental assistance and extended the eviction moratorium. ■■

Section Showcase

Section Competitions Help Hone Writing Skills



It's a fair assumption that legal writing is one of the most basic, necessary skills for a lawyer. In fact, studies¹ have shown that excelling in a legal writing course is one of the strongest predictors of law school success, with students who master first-year writing courses often maintaining better GPAs and performing better on exams than their peers who struggle in these classes. Suffice to say, such skills are necessary for developing the strategic and analytical acuity needed to become a good lawyer.

Considering this, the Tennessee Bar Association Administrative Law and Environmental Law sections have developed legal writing competitions to engage students and increase the profile of the TBA among these future lawyers and leaders. This is a natural fit for these sections, as the niche practice areas typically foster a congenial bar where personal relationships — in addition to effective written communi-

cation skills — are essential to a young lawyer's success. Building bridges is a critical first step in advancement, and involvement in these sections provides the perfect avenue to do so.

The Jon E. Hastings Memorial Writing Competition, established by the Environmental Law Section in 2004 to honor one of its founding members, has served as a template for this ambition.

"Since our bar association is a voluntary one, we have to begin early to engage future members," said Bill Penny, who was instrumental in developing the Hastings competition and its recently established Administrative Law counterpart. "It is important that the section not just be about holding CLE's, though that is important. Sections need to be a premier forum for the topics within the ambit of lawyers in the section. A writing competition helps strengthen that claim."

This past year has provided evidence, anecdotally at least, that these



Duncan Bryant and Austin Warehime

sections are succeeding in cultivating future involvement with law students. Last year's winners of these competitions, Duncan Bryant and Austin Warehime, respectively, have both become active TBA and section members. (Listen to Warehime when he cohosted the February "TBA BarBuzz" podcast!) We hope these opportunities not only continue to provide strong resume fodder and bragging rights to the winners but also serve as a great introductory experience to our organization.

You can find out more information on these contests by contacting Administrative Law Section Coordinator Chelsea Bennett (cbennett@tnbar.org), or Environmental Law Section Coordinator Jarod Word (jword@tnbar.org). The entry deadline for the Administrative Law Section's writing competition is April 5, with submissions for the Jon E. Hastings Memorial Writing Competition due by April 30. ■■■

NOTE

1. "Grades Matter: Legal Writing Grades Matter Most," by Jessica L. Clark, Georgetown University Law Center, George Washington University Law Center, 2013, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2246&context=facpub>.

JAROD WORD is one of the TBA's Section and CLE Coordinators.

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- *Tennessee Parenting Plans and Child Support Worksheets* - Amazon
- *Forensic Accounting Deskbook* - published by the ABA Family Law Section
- Tennessee Family Law Blog - legal updates, case law summaries, and commentary sorted by family law topics



dependency and neglect matters required the assistance of attorneys. Individuals needed attorneys to help fight evictions, represent landlords, enforce employee protections and represent employers. Attorneys assisted individuals needing powers of attorney, health care documents, wills and other estate planning documents. Advocacy by attorneys on behalf of indigent parties and the need for pro bono assistance to the most vulnerable increased.

As evidenced by the examples above, Tennessee attorneys have provided essential services in many different areas of the law. Attorneys have been involved in matters impacting constitutional and civil rights, protecting children and victims, criminal law, mental health law, end of life matters, health care, estate planning, employment issues, and proceedings directly related to the pandemic. Although

some may believe that they did not need attorneys during this past year, I'm sure many others are thankful for their attorneys' services.

Thank you to all of the attorneys who continued to serve their clients despite the challenges. Thank you to all attorneys providing pro bono services on behalf of those less fortunate who otherwise would be unrepresented. Thank you to all attorneys who dedicate their careers to serving the underprivileged. Thank you to the mediators who signed up to volunteer their services and assist with the Alternative Dispute Resolution (ADR) plan approved by the Tennessee Supreme Court to help with the backlog of civil cases caused by the pandemic.

Tennessee attorneys, we know you, and we see your great work. We appreciate you and your essential service to others. III

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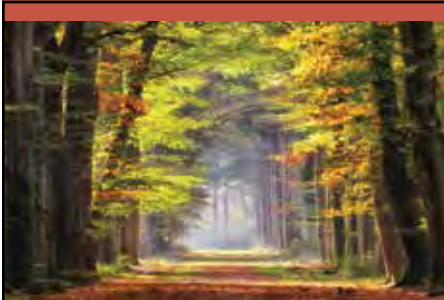
Mark your calendar so you don't miss this year's **TBA Annual Convention, June 16-19.**

Planning is underway, so look for a great lineup of programming, events and opportunities for catching up with friends and colleagues.

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Your Membership New Resource Helps in All Stages of Law Practice

The challenges of opening, building or maintaining a law practice are great enough during normal times, but in today's climate most everyone could use some help. That's why the TBA has partnered with the nationally recognized Affinity Consulting Group to develop a Practice Management Center for TBA members.

The new center contains resources for lawyers at all different stages of a firm's lifecycle — from starting up and developing a clientele to winding down a practice and starting on a new phase of life — all developed by professionals with years of service to lawyers and law firms.

"Since our founding, we are proud to have continually delivered on our promise to become our clients' trusted advisors and advocates," Affinity Senior Consultant Jeffrey Schoenberger says. "We do that by helping them to run more efficient and productive organizations by recommending solutions and strategies designed to meet their individual needs in the most cost-effective ways possible."

What Does the Center Look Like?

The TBA Practice Management Center is packed with comparison charts, check-

lists, whitepapers, recommended CLE programs, ethics rulings and more. In addition, all TBA members will be able to tap into the expertise of the consultants at Affinity through free 30-minute consultation sessions or use a dedicated email address to ask questions as simple as iWatch support issues, to as complex as moving files to a new server. The center will also provide eight to 10 tips/tricks a

month that will be showing up in many of the TBA's regularly scheduled communications to members.

One big focus of the center will be technology, which of course now touches on almost every part

of a lawyer's day. For law firms of any size, this can be overwhelming, especially now while many lawyers are working from home or remote locations.

A peek at a comparison chart for cloud document storage will show you free options, storage capacity, online editing options, mobile friendliness, offline access and more for Apple iCloud Drive, Dropbox, Google Drive, Microsoft OneDrive and other providers.

Whitepapers take a look at tech issues like two-factor authentication, wireless and email encryption, backup strategies, when to use a server, accounting systems and many more. III



An advertisement for JobLink. At the top, it says "JobLink" in a large, green, stylized font. Below that is a cartoon illustration of two people, a man and a woman, looking through binoculars. They are surrounded by various icons: a magnifying glass, a target, a location pin, a document, and a gear. Below the illustration, it says "Find a Job. Fill a Job." in a smaller font. At the bottom, it says "JobLink is the TBA's portal for attorneys seeking employment, as well as employers seeking qualified candidates. Check it out today at tba.org/joblink".

An advertisement for The Vowell Law Firm. At the top, it says "The Vowell Law Firm" in a large, bold font. Below that, it says "APPELLATE COUNSEL IN THE TENNESSEE AND FEDERAL COURTS OF APPEAL". There are several bullet points listing achievements: "Record on appeal since 1988: 28 wins, 6 losses, 2 draws", "7 time reversal of U.S. District Court decisions (6th and 7th Circuits)", "14 time reversal of Tennessee trial court decisions", "Won 6 out of 7 appeals to the Tennessee Supreme Court", and "Certified Civil Trial Specialist since 1997". On the right side, there is a photo of Donald K. Vowell, a man in a suit and glasses. Below the photo, it says "Donald K. Vowell" in a bold font. At the bottom, it lists contact information: "865-292-0000", "865-292-0002 (fax)", "info@vowell-law.com", and "www.vowell-law.com".

LICENSURE & DISCIPLINE



DISABILITY INACTIVE

The following lawyers have been transferred to disability inactive status: Anderson County lawyer **Kevin Carmack Angel** on Dec. 9, 2020; Shelby County lawyer **Debra Dawnn Davis Antoine** on Dec. 2, 2020; Montgomery County lawyer **Robert Hamm Moyer** on Dec. 22, 2020; and New Jersey lawyer **Deon Devall Owensby** on Jan. 4

Campbell County lawyer **Jody Rodenborn Troutman** was placed on disability inactive status on Oct. 23, 2015, and subsequently suspended by the Tennessee Supreme Court on Dec. 21, 2020. On Oct. 13, 2020, she petitioned the court to remove her from disability inactive status. On Jan. 21, she also petitioned the court for reinstatement to active status. On Feb. 1, the court removed Troutman from disability inactive status but conditioned reinstatement on the resolution of pending disciplinary proceedings.

REINSTATED

The following lawyers have been reinstated:

- Louisiana lawyer **Monica Victoria Harris Bowers** was reinstated on Dec. 1, 2020, retroactive to Nov. 12, 2020;
- California lawyer **Cicely Alexander Dickerson** was reinstated on Feb. 3, retroactive to Jan. 19;
- North Carolina lawyer **Laura Beth Greene** was reinstated on Jan. 15, retroactive to Dec. 14, 2020;
- Davidson County lawyer **Greer Tidwell Jr.** was reinstated on Dec. 1, 2020, retroactive to Nov. 22, 2020;
- Maury County lawyer **Angela Kay Washington** was reinstated from disability inactive status on Dec. 10, 2020;
- Davidson County lawyer **David Scott Parsley** was reinstated to the practice of law on Feb. 3. He had been suspended on Oct. 12, 2020, for one year with three months to be served on active suspension and the remainder on

probation. The court reinstated him with the condition that he fulfill the conditions of his probation.

DISCIPLINARY

Disbarred

On Jan. 29, the Tennessee Supreme Court disbarred Williamson County lawyer **Matthew David Dunn** and ordered him to pay restitution of \$5,995. Dunn accepted a referral from an intermediary organization not properly registered with the Board of Professional Responsibility, received a fee from a client but did not perform any legal services, failed to respond to a client's requests for information and abandoned the client. His conduct violated Tennessee Rules of Professional Conduct (RPC) 1.3, 1.4, 1.5, 7.6 and 8.1.

The Tennessee Supreme Court disbarred Knox County lawyer **James Lester Kennedy** on Jan. 7. The court took the action after finding that Kennedy distributed attorneys' fees and personal expenses in a probate matter to himself and others who were not authorized to receive the funds. The court also found that Kennedy failed to demonstrate good faith, diligence, prudence, caution, loyalty and fidelity to his client and the estate. His actions violated Tennessee RPC 1.3, 3.4 and 8.4 (c) and (d).

Suspended

On Jan. 7, the Tennessee Supreme Court suspended McNairy County lawyer **Bobby Gene Gray Jr.** from the practice of law for three years, with eight months to be served on active suspension and the remainder to be served on probation. Gray admitted taking controlled substances from an evidence room while he served as an assistant district attorney. He pleaded guilty to official misconduct, theft of less than \$1,000 and simple possession of a controlled substance, and received judicial diversion. The court said these actions violated RPC 8.4 (b) and (c).

On Jan. 29, the Tennessee Supreme Court suspended Delaware lawyer **Matthew Ledvina** from the practice of law for six years, with four years to be served on active suspension and the remainder to be served on probation retroactive to March 11, 2020. The court also directed Ledvina to file a petition to surrender his Tennessee law license. The action was taken after Ledvina's felony conviction for conspiracy to commit securities fraud in the U.S. District Court for the

CONTINUED ON PAGE 14 >

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.

District of Massachusetts. Ledvina submitted a conditional guilty plea admitting his conduct violated Tennessee RPC 8.4(a), (b) and (c).

Lauderdale County lawyer **Jennifer Lynn Mayham** was suspended from the practice of law by the Tennessee Supreme Court on Jan. 29 for five years, with one year to be served on active suspension and the remainder on probation. The court also directed her to obtain an evaluation by the Tennessee Lawyer's Assistance Program, engage a practice monitor and pay restitution of \$4,700. Mayham was convicted of misdemeanor drug possession and pled guilty to misdemeanor perjury. The court found that she failed to reasonably communicate with seven clients regarding the status of their cases, and accepted retainers but failed to perform the work. She also failed to respond to the board's request for information during the investigation or comply with a suspension imposed in 2018.

The Tennessee Supreme Court suspended the law license of Shelby County lawyer **TeShaun David Moore** on Dec. 11, 2020, for six years retroactive to March 7, 2018, with four years to be served on active suspension and the remainder on probation. The court also ordered Moore to obtain an evaluation with the Tennessee Lawyers Assistance Program, engage a practice monitor and pay restitution to multiple clients. Moore admitted he failed to distribute settlement funds to clients and to insurance companies with liens, missed scheduled court dates, failed to communicate with clients, and failed to notify clients he had been suspended. Moore agreed to a conditional guilty plea acknowledging his conduct violated RPC 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 4.1, 8.1 and 8.4.

The Tennessee Supreme Court on Jan. 22 suspended Nashville attorney **Winston B. Sitton** for four years, with one year to be served on active suspension and the rest on probation. The court found that Sitton posted comments on Facebook with instructions on how to shoot someone and make it look like self-defense. The court exercised its discretion to review disciplinary recommendations from the Board of Professional Responsibility, overturning the BPR's recommended 60-day suspension. The decision reflects the first time the court has found that lawyers who make unethical statements may receive harsher discipline if they post those statements publicly on social media.

Censured

Knox County attorney **Nicholas D. Bunstine** received a public censure on Jan. 14. Bunstine represented a client in defense of a civil proceeding brought by the client's mother for rescission of a quit claim deed. While the suit remained pending, the mother of the client decided to no longer have the quit claim deed rescinded. Bunstine prepared an affidavit for the mother's signature, presented the affidavit to her mother, who proceeded to execute the affidavit. Bunstine filed a motion to dismiss the suit based on the content of the affidavit, which was granted by the court. The court found that at all relevant times, Bunstine was aware that his client's mother was represented by counsel. His actions were found to violate RPC 4.2.

Shelby County attorney **Addie Marie Burks** received a public censure on Jan. 15. The court found that Burks received funds from a client's case in November 2019, but did not distribute the funds until August 2020, when she directly distributed the funds to the client instead of resolving existing medical liens. According to the court, Burks also did not have a written fee agreement for a contingency fee, commingled a portion of her fee with client fund, and failed to timely distribute funds to a medical provider. The court directed her to attend a trust account workshop.

Hamilton County lawyer **Wilfred Shawn Clelland** received a public censure from the Tennessee Supreme Court on Jan. 20. In 2017, Clelland settled a client's personal injury claim and received settlement funds, but the proceeds were subject to outstanding medical bills and/or liens. The court found that Clelland performed little, if any, work in negotiating the liens for more than three years, and (1) failed to provide updates to the client, (2) held settlement funds in his IOLTA account for three years, and (3) provided false or misleading statements to his client. These actions violated RPC 1.3, 1.4 [a][3], 1.15 and 8.4.

Maryville attorney **Charles David Deas** received a public censure from the Tennessee Supreme Court on Jan. 26. The court found that Deas deposited personal funds in his trust account in order to issue a cashier's check, failed to adequately protect the bank checks for his trust account, and failed to have proper procedures in place to make sure his assistant was in compliance with the Rules of Profes-

sional Conduct. His actions were found to violate RPC 1.5 (safekeeping funds) and 5.3 (nonlawyer assistance).

The Tennessee Supreme Court issued a public censure for Shelby County lawyer **Jahari Mabry Dowdy** on Jan. 7. The court found that Dowdy violated RPC 1.15, 5.1 and 5.3 when she paid a portion of her client's rent arrears before receiving funds to cover the check, failed to take proper remedial action after becoming aware of the error, and eventually comingled personal funds with trust account funds to cover the check. In addition to imposing the censure, the court directed Dowdy to attend a trust account workshop.

Nashville lawyer **Samantha Flener** received a public censure on Jan. 13. Flener was licensed to practice law only in New York when she relocated to Tennessee and began working at a firm. She applied for permission to be admitted by UBE Score Transfer with the Board of Law Examiners. Her application referenced the need to apply for practice pending admission if she was working as a lawyer or in another law-related position. Flener did not apply for practice pending admission and was not authorized to practice law in the state until after she had been employed by a firm for eight months. Her actions violated RPC 5.5.

Nashville lawyer **Lawrence Buford Hammet II** received a public censure on Jan. 20. The court found that Hammet withdrew disputed funds from his client trust account and paid himself a fee that exceeded the amount to which his client allegedly agreed. The client filed a civil suit against Hammet that was appealed after trial. The appeals court found that Hammet failed to keep the disputed funds in

his trust account until the dispute was resolved and that he asked for unreasonable fees. The appeals court awarded judgment of more than \$67,000 and remanded the case to the trial court for a determination of pre-judgment interest. The trial court subsequently awarded interest of more than \$22,000. These actions were determined to violated Rules of Professional Conduct 1.5 and 1.15(e).

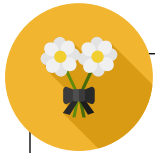
Shelby County attorney **Eric John Montierth** received a public censure from the Tennessee Supreme Court on Jan. 12 for failing to timely file an appellate brief in two criminal cases. The criminal court ordered Montierth to file the brief within 10 days; Montierth failed to do so and did not ask for an extension. He appeared before the court months later to explain his conduct in both cases and the court accepted the late-filed brief in each case. The court found that Montierth's conduct resulted in potential harm to his clients.

BOARD OF JUDICIAL CONDUCT

Lewis County General Sessions and Juvenile Court Judge **Michael E. Hinson** received a public reprimand from the Board of Judicial Conduct on Dec. 15, 2020. In a letter to Hinson, the board said he was being reprimanded for conducting judicial business outside the parameters of the COVID-19 plan approved for his judicial district, including failing to limit the number of individuals in the courtroom and enforce social distancing requirements. The board also noted that Hinson made a disrespectful comment about Tennessee Supreme Court Chief Justice Jeff Bivins. Hinson cooperated with the disciplinary counsel and accepted the reprimand.

The Board of Judicial Conduct entered into a deferred discipline agreement with Stewart County Judicial Commissioner **Joyce Tomlinson** on Feb. 1 in which she agreed to resign her position before Feb. 14 and not seek an appointed or elected judicial office in the future. The board alleged that Tomlinson "injected herself into an active criminal case involving a family member and acted in a discourteous and intemperate manner inappropriate for a judicial officer." The board says she "questioned and challenged" members of the sheriff's department; taunted an officer who had investigated the case; and was "sarcastic, argumentative, raised her voice, and banged her hands on the table." ■■■





PASSAGES

George Harrison Cate Jr., the first vice mayor of Metro Nashville and longtime community leader, died Dec. 18, 2020, at the age of 92. A 1951 graduate of Vanderbilt University Law School, Cate began his legal career as a partner with his father. In the 1960s, he was instrumental in the creation of the Metropolitan Government of Nashville and Davidson County. In 1962, he was elected the first vice mayor of Metro Nashville. He also served on the Metro Nashville Board of Education, including as chair. After leaving public service, Cate remained dedicated to promoting and preserving the history of Nashville government. Memorial contributions may be made to West End United Methodist Church, Vanderbilt University, Alive Hospice or the charity of one's choice.

Former Collierville and Germantown city attorney **Tom Cates** died Dec. 23, 2020, at 79. Cates earned his law degree from Vanderbilt Law School and practiced law for 48 years before retiring from Burch, Porter & Johnson in 2013. He became attorney for Germantown in 1991 and for Collierville in 1995, holding both positions until his retirement. During his time as Germantown attorney, Cates helped the city negotiate the development of Wolf River Boulevard and was a key legal adviser in the formation of municipal school districts in Shelby County suburbs.

Robert "Bob" Newman Covington, former professor at Vanderbilt Law School, died Nov. 29, 2020, at 84. Covington received his undergraduate degree from Yale before earning his law degree from Vanderbilt Law School in 1961. He taught labor and employment law for 46 years until his retirement in 2007. He received Vanderbilt's Thomas Jefferson Award in 1992, and when the law school

was expanded and renovated in the early 2000s, the Covington Room was named in his honor. Donations in Covington's memory may be made to the Community Foundation of Middle Tennessee "Covington Quality of Life Fund," which supports the Nashville symphony, opera, ballet and the Frist Art Museum; Vanderbilt Law School; or a charity of the donor's choice.

Clarksville lawyer **Alex Whitefield Darnell** died Nov. 24, 2020. He was 91. Darnell attended Vanderbilt University Law School. After graduation, he served two years in Germany with the U.S. Army and then returned to Clarksville where he was in private practice until he was appointed clerk and master of Montgomery County Chancery Court. He was appointed chancellor of what was then the 6th Chancery District and served more than 20 years on the bench. In lieu of flowers, gifts may be made to the Sarah Howser Darnell History Scholarship Endowment at Austin Peay State University or Urban Ministries Safe House in Clarksville.

Memphis lawyer **Robert Louis Green** died Jan. 24. He was 92. Green earned his law degree from Tulane Law School in 1956 and afterward was invited to join the law practice of Charles L. Neely. He was a partner at Neely, Green & Fargason for many years, focusing primarily on litigation, before ending more than 60 years of legal practice with Allen, Summers, Simpson, Lillie & Gresham. Green was a past president of the Memphis Bar Association and was selected for the Judge Jerome Turner Lawyer's Lawyer award in 2005. He also received the Pillars of Excellence award from the University of Memphis Alumni Chapter in 2011. He served with the Tennessee Board of Law Examiners for 19 years and frequently volunteered with Memphis Area Legal Services. Donations may be made in Green's honor to a veterans' organization of the donor's choice.

Memphis attorney **Virginia Watson Griffie** died Dec. 11, 2020. While in law school at the University of Memphis, Griffie served as comments editor on the *Law Review*. After graduation, she clerked for Judge Harry Wellford on the Sixth Circuit Court of Appeals. She then worked as an associate attorney for Armstrong Allen, and later as in-house counsel for Great Western Consumer Finance Group until the early 1990s. At the time of her death, Griffie was a solo practitioner, specializing in estate planning, wills and trusts, probate and elder law.

Knoxville lawyer **Emily Arline Winchester Guyton** died Jan. 30 at age 87. She graduated from the University of Tennessee College Law despite facing questions about whether the law was an appropriate profession for a woman and mother. Guyton opened a solo practice and later joined Myron Ely to form the firm of Ely, Hogin & Guyton. Later she and her son-in-law Matthew Frère formed Guyton & Frère, joined soon thereafter by her daughter, Kelly Guyton Frère. Guyton also served as a special judge in the Knoxville circuit and chancery courts. She retired in 2004. Guyton participated in the Knoxville Bar Association's Legal History Video project, which can be found on the KBA website. Memorial donations may be made to the Dr. James R. Guyton Jr. Leadership Scholarship Endowment c/o Bethel University, Office of the President, 325 Cherry Ave., McKenzie, TN 38201. The fund supports health care personnel serving rural communities.

Memphis Municipal Judge **Teresa Jones**, 61, died Jan. 2 after a battle with cancer. Jones earned her law degree from the University of Memphis and served as an adjunct professor there. She also served as a former Shelby County Schools board member and chair of the board, as well as chief city prosecutor. Jones was appointed to the Memphis Municipal Court in 2018 to fill a vacancy. She

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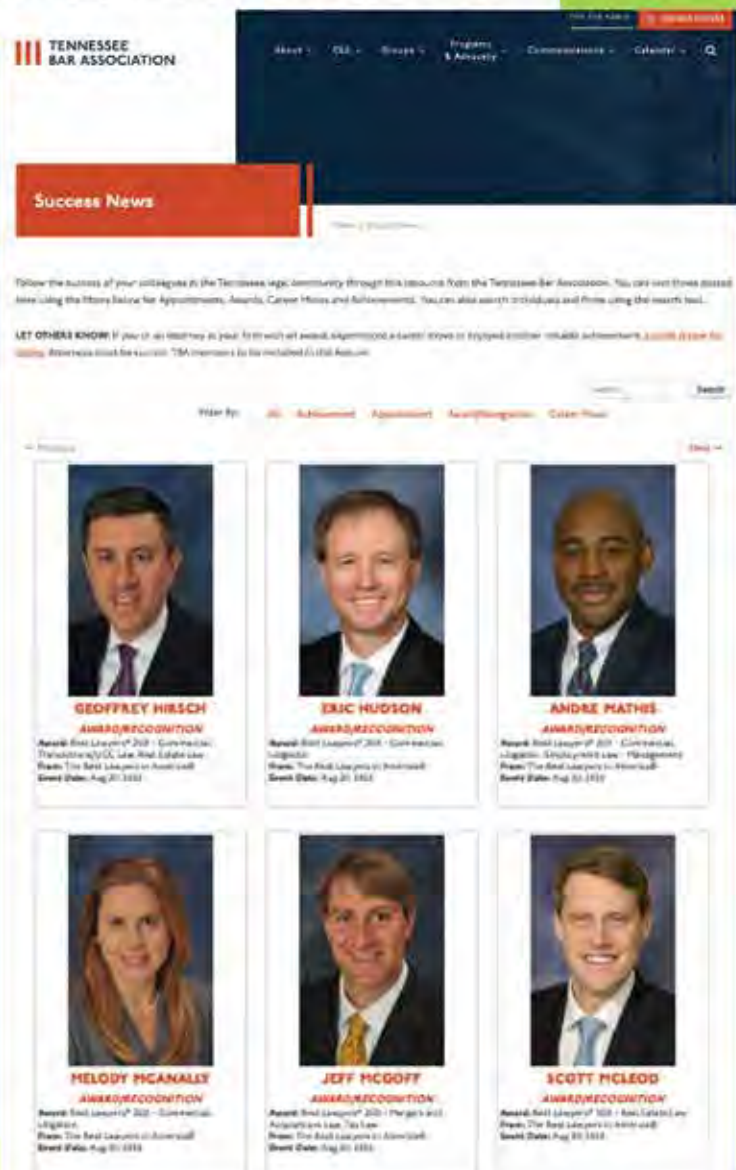
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Year By: All Achievement Appointment Award/Recognition Career Move

GEOFFREY HIRSCH
AWARD/RECOGNITION
Award: Best Lawyer® 2019 - Commercial Litigation/LLC, Law Real Estate Law
From: The Best Lawyers in America®
Award Date: Aug 20, 2019

ERIC HUDSON
AWARD/RECOGNITION
Award: Best Lawyer® 2019 - Commercial Litigation
From: The Best Lawyers in America®
Award Date: Aug 20, 2019

ANDRE MATHIS
AWARD/RECOGNITION
Award: Best Lawyer® 2019 - Commercial Litigation, Employment Law - Management
From: The Best Lawyers in America®
Award Date: Aug 20, 2019

MELODY MCANALLY
AWARD/RECOGNITION
Award: Best Lawyer® 2019 - Commercial Litigation
From: The Best Lawyers in America®
Award Date: Aug 20, 2019

JEFF MCGOFF
AWARD/RECOGNITION
Award: Best Lawyer® 2019 - The generalist
From: The Best Lawyers in America®
Award Date: Aug 20, 2019

SCOTT MCLEOD
AWARD/RECOGNITION
Award: Best Lawyer® 2019 - Real Estate Law
From: The Best Lawyers in America®
Award Date: Aug 20, 2019

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The Legal Life

PASSAGES CONTINUED FROM PAGE 16 >

ran for the seat in the general election, winning with 73% of the vote. Jones sat on the Memphis Area Legal Services board and served as a member and past chair of the Tennessee Lawyers Assistance Program. The family requests memorial donations be directed to Lane College in Jackson.

Longtime Vanderbilt Law School professor **Allaire Urban Karzon** died Jan. 24 at age 95. Karzon earned her law degree from Yale Law School and first worked at the U.S. Department of Justice. After moving to Nashville, she served as counsel to Performance Systems Inc. and Aladdin Industries and practiced as a partner at Neal Karzon and Harwell. She joined Vanderbilt's law faculty as a lecturer in 1971 and taught tax law until retiring in 1995. She was the school's first tenured female law professor. Contributions in her memory may be made to the Visiting Nursing Association of Western New York Inc.

Dayton City Judge **James Wendell McKenzie** died Jan. 2 at 76. A 1971 graduate of the Cumberland School of Law, McKenzie first practiced law with his father until 1998, when he was elected as the first Rhea County Family Court judge. He later

served as attorney for Dayton and Rhea counties and city judge for Graysville and Spring City. The grandson of Ben G. McKenzie — who was prominent in the prosecution of John T. Scopes in the landmark 1925 Scopes Trial — McKenzie often was cast in the role of his grandfather for the county's annual reenactment of the trial. Donations may be sent to the First Baptist Church of Dayton's Benevolent Fund.

Nashville lawyer **David Young Parker Sr.** died Jan. 23 after contracting the COVID-19 virus. He was 79. After earning his law degree from Vanderbilt Law School in 1966, Parker practiced law for 53 years, working for Provident Life and Accident Insurance Company, the State of Tennessee and GENESCO before entering private practice in 1975. Parker was also an adjunct professor at David Lipscomb College and served as a judge in Vanderbilt's Moot Court. He sat on the board of directors for the Tennessee Supreme Court Historical Society and was chairman emeritus of the Historical Committee and the Memorial Service Committee of the Nashville Bar Association. Donations may be made to the Second Harvest Food Bank or the Nashville Inner City Ministry.

Charles "Chuck" Edward Racine of Gallatin died Dec. 28, 2020, at 83. Originally from Chicago, Racine earned his law degree from the University of Toledo Law School in 1967 and started his career with the former First National Bank of Toledo. He and his family later moved to Gallatin where he opened a private practice.

Johnson City lawyer **T. Craig Smith** died Jan. 8 at 54. A 2003 graduate of the Nashville School of Law, Smith practiced as a criminal law attorney in Nashville and Johnson City. He also served in the Tennessee National Guard with the 176th Maintenance Battalion and served with his unit during Operation Desert Storm.

Memphis attorney **John J. Thomason** died Dec. 24, 2020, at 91. Thomason earned his law degree from the University of Tennessee College of Law in 1952 and, after graduating, served in the Judge Advocate General's Corps until 1955. In 1967, he helped found Crawford, Thomason and Hendrix, which became Lewis Thomason in 2014. During his years in practice, he tried hundreds of jury trials in both state and federal jurisdictions. In 2002, after 50 years of practicing law, he retired. Thomason also was a prolific writer and went on to author three books. ■■■

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Access to Justice in



By ELIZABETH SLAGLE TODARO

COVID-RELATED CHALLENGES

Many in the legal community are seeking solutions to ordeals we did not face a year ago. We are working in different settings, forming new collaborations and recognizing the need for an unprecedented level of flexibility. Effectively serving clients during COVID-19 has required nearly all attorneys to make shifts in how they work, and legal services organizations are no different. Some of the challenges the access to justice community is grappling with are consistent with what other attorneys and business in general are also dealing with. However, given the vulnerable, low-income and isolated client populations legal service organizations are serving, some of the barriers are more formidable.

the Time of COVID-19

COMMON LEGAL ISSUES DURING PANDEMIC

Legal service organizations correctly anticipated that COVID-19 would bring more cases arising from the growing financial crisis: housing, unemployment, benefits, debt and bankruptcy. Also, not unexpected is an increase in divorces, other family law issues and adult conservatorships. Some organizations also report an increase in the eligible client population, as well as overall more intakes and cases, because of unemployment, reduced hours or other financially straining circumstances that clients are experiencing. Although the access to justice community commonly deals with these types of legal issues, there is a consistent sentiment that the frequency of these issues, particularly housing, has increased in the last year, and is expected to be an ongoing crisis in 2021.

TECHNOLOGY CHALLENGES

Even before COVID-19-induced isolation, utilizing technology was the norm

for many common undertakings: remote work, instant communications, online shopping, entertainment and social connections. In 2020, virtual communication and reliance on tech-based work-arounds became the norm for many professionals.

For those with unreliable internet or limited access to or comfort with technology, even simple tasks become overwhelming. The additional tension of navigating unfamiliar legal information under distressing circumstances can compound an individual's feelings of isolation and hopelessness. Even beyond challenges with accessing reliable internet and equipment for virtual communication, many legal aid clients have no access to scanners or printers, and they may lack comfort with unfamiliar applications, platforms and processes. The limited access may be because of a client's low income, their remote location or because they are a senior, have a disability or live in a residential facility.

CONTINUED ON PAGE 22 >



Moreover, the community resources that are best equipped to provide access and support are also severely hampered. In many counties, libraries, schools, and community and senior centers are closed or have inconsistent or limited hours and staffing.

Frequently, legal service organizations are taking on the task of coaching clients and navigating questions that have nothing to do with their need for legal assistance, but must be addressed before the legal issues can even be discussed.

Legal Aid of East Tennessee (LAET) is addressing these gaps by encouraging clients who do have the resources and feel capable to utilize the technological option, freeing up more staff time to provide support via phone or in-person to those who most need it.

“Attempts to have Zoom/Skype meetings and do remote signings often involve a lot of technological coaching on our part,” Amanda Simpson, attorney and pro bono coordinator in LAET’s Johnson City office, said. “In addition, attempting to help clients fill out forms online has sometimes presented a challenge and necessitated creative solutions like printing and sending hard copies of forms for clients to return.” Even when all parties are able to engage remotely with success, other aspects of legal support or representation suffer. For example, Legal Aid of Middle Tennessee & the Cumberland (LAS) notes that its attorneys sometimes struggle with effectively communicating with clients during online hearings. Something that used to be as simple as leaning over and quietly sharing information or asking a question now requires swift expertise with technology, from both the attorney

and the client.

UPDATE / ADAPT EXISTING PROGRAMS

In response to COVID-19, most civil legal aid programs shifted to virtual (phone or web-based) support, at least temporarily. Some clinics were able to transition smoothly and may maintain virtual elements going forward. Others had to make very specific changes in procedure to meet the needs of participants. All organizations are monitoring and evaluating how virtual services and events are serving clients, volunteers and staff. Some programs expressed concern that shifting from in-person events to a virtual model could result in decreased engagement from volunteers. Participating in a virtual clinic may require additional technology or steps, and even for volunteers with access to technology, the experience can be frustrating and less satisfying. For others, the virtual model has always been preferable, and now they may find more ways to provide pro bono service.

WILLS AND POWERS OF ATTORNEY FOR SENIORS

West Tennessee Legal Services’ (WTLS) Pro Bono Coordinator Andy Cole reports that “when the pandemic hit, the Senior Law unit had to quickly adapt to guidelines for the safety of staff and the senior clients. The unit typically sees many requests for Wills and Powers of Attorneys. This demand continued during the pandemic.”

“Fortunately, [WTLS was] able to use the Governor’s Executive Orders to facilitate this signing of many of these documents,” Cole said. “However, not everyone had access to the technology to complete this remotely. The unit adjusted to the problem by having drive-thru services. The clients would provide all the documents prior to the meeting. The attorney would then call the client and

walk through the documents. The client would then come to the office parking lot where they would stay in their car while the attorney and witnesses socially distanced with masks, and witnessed the signing of the documents.”

PRO SE DIVORCE CLINIC AND DOMESTIC VIOLENCE GENERAL ADVICE CLINIC

LAET has a well-established Pro Se Divorce Clinic, done as an in-person event before the pandemic. The shift to virtual clinic required additional planning, along with volunteer support. LAET compiles a list of low-income clients who are interested in filing for divorce but who don’t have access to an attorney. They have the opportunity to work with a private attorney who has prepared a form that asks all the questions clients need to be able to fill out the Pro Se Divorce forms. Once the clients have completed the forms, the private attorney will complete the client’s divorce packet and LAET sends it back to the client to have notarized and to file. For divorces that require notarization, LAET staff meet clients in the parking lot, with masks and social distance, to notarize their documents outdoors.

LAET has also delivered a general advice clinic for victims of domestic violence in a virtual environment, incorporating law students into the process. After LAET staff did initial intake, law students from University of Tennessee College of Law called the clients at a scheduled time to get factual information and to identify the relevant legal questions. Students drafted a report to assist attorneys’ preparation and to allow them to provide focused advice in a limited amount of time. These virtual clinics provided life-changing advice and assistance to domestic violence survivors, despite not being able to host in-person events.



LIZ TODARO is the Tennessee Bar Association’s Access to Justice director. She received her law degree from the City University of New York.



FOCUS DISABILITY RIGHTS TENNESSEE

SUPPORTIVE SERVICES FOR VETERANS AND FAMILIES

Memphis Area Legal Services (MALS) delivers a monthly Veterans Clinic for low-income veterans and family members who are homeless or in need of stable housing. In 2020, the monthly clinic shifted to a remote model, with MALS and pro bono attorneys continuing to provide legal and housing counseling, representation in court or at administrative hearings (other than at the VA), and negotiation with landlords. The project also provides assistance with benefit applications and accessing other educational, vocational, employment, healthcare and mental health services for qualified clients.

IN-PERSON CLINICS AND EVENTS

While many programs made a shift to remote services, some events have remained in-person, with significant safety protocols.

Legal Aid of East Tennessee shared information about two in-person events that it continues to participate in. First, LAET assists with the monthly Kingsport Bar Association Free Legal Clinic. The partnership is continuing to keep the event in person, but with social distancing and regular disinfecting. LAET and other sponsoring attorneys bring in disposable masks for attendees who do not have one, and social distancing is enforced in the seating throughout the room for intake and meetings. They also provide hand-sanitizer and wipes to disinfect the area and bring multiple pens that are disinfected once used.

LAET also continued its annual estate planning clinic with support from Wilson Worley PC in Kingsport. This was an in-person clinic, with all recommended precautions, including masking requirements, social distancing and sanitizing procedures. Staff prepared

Disability Rights Tennessee (DRT) is in a unique situation. Serving as the state's Congressionally mandated Protection & Advocacy (P&A) organization, it has responsibility for protecting and advocating for the rights of individuals with disabilities across Tennessee. DRT's investigatory responsibilities provide for unscheduled access to certain facilities, without having to obtain a warrant or court order. Prior to COVID-19, DRT was able to go into facilities to meet and interview individuals with disabilities and observe first-hand the conditions under which the persons with disabilities were living. This "access authority" is vital to DRT's ability to protect individuals from harm, especially vulnerable individuals who may not have the ability to physically protect themselves or communicate.

When COVID-19 hit, DRT was sent into a tailspin. For the safety of its clients and employees alike, DRT investigators could no longer go into facilities to do in-person investigations, except in very limited, including life-or-death, circumstances. For the first time in its history, DRT had to rely on technology, such as Zoom, WebEx and Facetime, to interview clients and conduct investigations. This posed many inherent challenges, such as not being able to physically be in the same space as clients who might have difficulties communicating over technology, having to schedule virtual

visits as opposed to showing up unannounced, and having to rely on facility staff to show DRT facility conditions over often unreliable video connection.

"Without in-person visits, it is impossible to get the look and feel of an institutional condition, including the smell, the level of cleanliness, the unexplained bruises, the pain in the person's face, and really ask the probing questions," explains Jack Derryberry, legal director of DRT. "It is also hard to avoid situations where residents are 'coached up' by facilities."

Given that the clients served by DRT are among the most at-risk individuals for complications from a COVID infection, DRT made COVID-related issues for persons with disabilities its main focus. One tangible change stemming from this new focus is that clients with COVID-19-related issues will be given priority access to DRT's services.

One of the first issues to arise was the Tennessee Department of Health and Humans Services' (HHS) guidance on rationing medical care and resources, such as ventilators, during the pandemic. According to 2016 guidelines, persons with certain disabilities, including traumatic brain injury and advanced-stage Multiple Sclerosis, could be denied ventilators if the rationing guidelines were implemented. DRT collaborated with other state and national disability rights organizations to file

an Office of Civil Rights (OCR) complaint and negotiate with the state attorney general to change the guidance to prevent serious harm to persons with disabilities. After the OCR complaint was filed, HHS issued a bulletin making clear that covered entities may not discriminate against persons with disabilities in making rationing decisions.

Other COVID-19-related issues DRT has assisted clients with include visitation in hospitals and aggregate care facilities, program access, personal protective equipment (PPE), and reasonable modifications to face mask policies. DRT has recently begun working on issues of vaccine dissemination for people with disabilities to ensure that vulnerable populations have access to the vaccine as quickly as possible.

DRT is also monitoring the impact of COVID restrictions on the state's children and youth, including children who have special education needs and those in psychiatric residential treatment and correctional facilities. At the residential facilities, children in crises have been cut off from family and friends because of the pandemic.

DRT is concerned about the enormously disproportionate impact the virus is having on persons with disabilities who are also persons of color. DRT's advocacy in this area emphasizes that that there should be no difference in how persons of color with disabilities receive health care during the pandemic. ■■■

CONTINUED ON PAGE 24 >



for the event by calling all the applicants and preparing as much of their estate planning documents as could be done over the phone. On the day of the event, a station was set up inside the conference room at Holston Terrace, the low-income apartment being served. All volunteers were masked and socially distanced from one another. Clients came one at a time to ensure they did not come in contact with one another and the space was thoroughly sanitized before and after each client.

NEW PROGRAMS IN RESPONSE TO COVID-19

While many projects made a shift to remote outreach and services, they continued to serve their client populations and address issues as they did pre-COVID-19. There has also been an opportunity for legal aid organizations to create new projects to specifically serve individuals and families impacted by COVID-19 and related issues.

Legal Aid of Middle Tennessee & the Cumberlandians has developed a project that provides COVID-19-specific support, relying on volunteers to handle brief advice and representation to COVID-19 impacted clients. The Attorney for the Day (A4D) project was able to assist 50 clients in the short three-month roll-out. This project and pro

bono support freed up LAS staff attorneys to take more extended service cases.

Legal Aid of East Tennessee created a Contract Attorney Program (CAP) after receiving a generous grant. This program allows LAET to engage local private attorneys to help handle COVID-19-related issues. When LAET receives a case, for example, an eviction that was spurred by COVID-19 job loss or illness, they are able to partner with the local bar to provide assistance for clients.

Memphis Area Legal Services is working with corporate partners to provide legal clinics and related assistance. The Pro Bono Partnership is spearheaded by International Paper and includes volunteers from the Tennessee Valley Authority (TVA), Baker Donelson, Butler Snow and other firms and companies.

Last fall, TVA launched the agency's first pro bono program, "Generating Justice," to provide free legal assistance to low-income individuals in need. TVA attorney Kendra Mansur chairs the program, which partners with several legal aid organizations and law firms to address community legal needs through virtual clinics and online portals, such as ABA Free Legal Answers.

"Attorneys and other professionals in TVA's Office of the General Counsel have the skills that can help fill the gap to help our neighbors in need of legal services," Mansur said.

THE DECISION TO CONTINUE TO WORK REMOTELY OR RETURN TO THE OFFICE

While there is some variation in how legal service organizations are handling staff working in the office versus remotely, all have policies in place that require basic safety protocols when physical presence in the office is required. All organizations are requiring masks when staff are in the office, cleaning of high-touch surfaces frequently, and social distancing. Some also require temperature checks upon entering and encourage staff to communicate their schedules to avoid unnecessary overlap in shared spaces.

"When the pandemic bore down on us, our organization took immediate steps to protect the health of our clients and our staff," LAET's Interim Executive Director Deb House said. "Our executive management invested in having all of our offices disinfected under OSHA and CDC protocols and we created home offices and worked safely together, but apart. We stayed home until midsummer. Collectively, we found new ways to communicate and interact with our clients and our colleagues through tools such as Zoom, Facetime, Skype and Teams. We helped our community learn these techniques also. The extended work-from-home safety measures were a challenge for some of our support staff. We have a tight-knit team, some of whom have worked together for many years. They miss being together and collaborating on problems; they miss having lunch together."

To aid in their efforts to restore staffing in offices, LAET assembled a COVID Coordinator group. Each office has a designated staff person who ensures sufficient supplies of masks, disinfectant and gloves are available. The coordinator monitors their office for health protocol compliance and communicates with the director of operations.

LAET also created a staffing team to

Medical-Legal Partnerships Working to Address Root Causes of Legal Issues

Medical-Legal Partnerships (MLPs) integrate health and legal services into a single program or service site, connecting lawyers with medical and social service providers to address root causes that may manifest as health issues. The TBA's MLP Working Group, first formed in 2014, brings together members of the access to justice and health care communities to support and promote these innovative projects. This year, the MLP Working Group is updating its outreach plans and wants to connect with developed and established MLPs across the state; programs are asked to complete a brief survey to help inform next steps. For more information on MLPs and to complete the survey, please visit the TBA website at www.tba.org/ATJ_MLP.



FOCUS

TENNESSEE JUSTICE CENTER'S SUPPORT FOR P-EBT

support the efficient execution of remote documents. Attorneys and paralegals from multiple grants created a system that allowed them to help execute documents for one another's clients to ensure maximum efficiency in assisting the clients and ensure that they could minimize the number of people coming into the office at the same time.

Legal Aid Society of Middle Tennessee & the Cumberland (LAS) has remained virtual since shifting to remote work in March. This shift required a significant investment in equipment and procedural updates. Among the items LAS added were 47 new computers to improve remote work capabilities and replacement of their on-premises phone system with a cloud-based VOIP to provide phone services to all staff from a desk phone, computer or smartphone application. They also installed Ring doorbells at each office for staff to communicate with office visitors and delivery services when the offices are not staffed.

CHANGES THAT ORGANIZATIONS WILL KEEP POST-COVID-19

Legal aid programs are well-known for their ability to achieve remarkable outcomes with limited resources and for implementing innovative, efficient ways to meet their clients' needs. Despite the challenges with being forced to quickly adopt pandemic protections, the investments in equipment, staff training and developing new procedures will have lasting positive effects for organizations.

Like many organizations, the Tennessee Justice Center made the abrupt shift in March 2020 to working entirely remotely. This required them to make several changes, predominantly for their casework team. Because they serve clients statewide, the bulk of TJC casework has always been done over the phone and through email. However, they still had to make some procedural

Tennessee Justice Center (TJC) has maintained a largely consistent client population, but it has had a tremendous increase in clients experiencing food insecurity. In response to this critical need, TJC began providing information and support for the Pandemic

Electronic Benefit Transfer (P-EBT) Program, in collaboration with other state advocates. P-EBT, part of the federal relief efforts, is intended to help children who receive free or reduced-price lunch in school, but who could not receive school meals because of school closures. This

program has been a lifeline for thousands of families dealing with food insecurity. TJC has helped at least 750 children in obtaining their P-EBT benefits or providing related information. They have also communicated information about P-EBT via the TJC website and social media. III

shifts. For example, TJC caseworkers transitioned to cloud-based phone numbers so that they could easily dial out to clients without using their personal cell or home numbers. While the office phone system allowed for calls to be transferred to cell/home phones, that did not solve the issue of calling out. This turned out to be a great shift because it has allowed TJC clients to text with their client advocate through the cloud-based system. This has been really helpful for some clients, especially those who work multiple jobs or have schedules that are not conducive to regular office hours.

TJC also developed a web-based intake form for prospective clients to use. This has also made it much easier for clients who have access to the internet or a smart phone to contact TJC for help.

Similarly, when Casa Azafrán in Nashville closed to the public in mid-March 2020, the nonprofits housed at the community center, including Tennessee Justice for Our Neighbors, had to pivot to remote work. For JFON, the immediate tasks included scheduling clients for virtual appointments; establishing systems for obtaining documents and signatures from clients; and providing clients with work permits, greens cards and other important documents. JFON activated features of a new on-line case management system that allows secure communication with clients and

exchange copies of documents. Ten months later, JFON is still operating remotely.

"Although we have had to change the way we work," Executive Director Tessa Lemos Del Pino said, "our entire staff remains committed to the organization's mission and to serving clients." III

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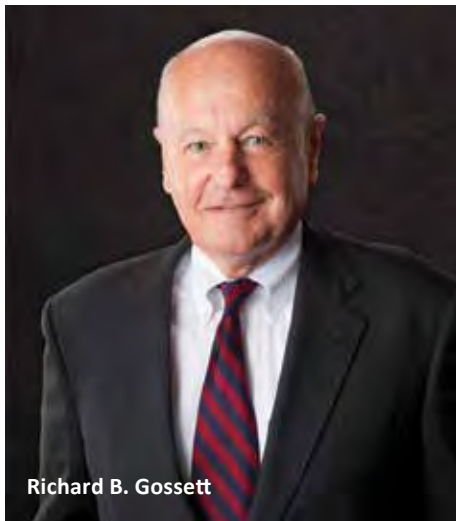
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Access to Justice Awards Recognize Outstanding Work

Each year the Tennessee Bar Association recognizes outstanding service by attorneys and law students who have dedicated their time to helping others. The awards given are the Harris Gilbert Pro Bono Volunteer of the Year, the Ashley T. Wiltshire Public Service Attorney of the Year and the Law Student Volunteer of the Year. Read the stories of those recognized here.



Richard B. Gossett

Harris Gilbert Pro Bono Volunteer of the Year

This year's Harris Gilbert award is presented to Chattanooga attorney Richard B. Gossett. The award recognizes private attorneys who have contributed a significant amount of pro bono work and have demonstrated dedication to the development and delivery of legal services to the poor. The award is named after Gilbert, a Nashville attorney and past Tennessee Bar Association president, who exemplifies this type of commitment.

Richard B. Gossett was surprised to learn he had logged more hours helping clients on TN Free Legal Answers this year than any other volunteer, and for that he'd been nominated and won the TBA's Harris Gilbert Pro Bono Volunteer of the Year award.

"I never see how much time I spend," he

says of the many hours he has devoted to doing pro bono. "I get wrapped up in it. It consumes me sometimes." In fact, he says, his wife has had to remind him to stop if it gets too late at the end of the day and he is still answering questions for people in need.

Gossett doesn't keep up with his hours, but Kirsten Jacobson, who nominated him for the prestigious award, does. TN Free Legal Answers is an innovative online question-and-answer legal clinic that enables low-income individuals to access legal advice from pro bono attorneys without the constraints of meeting in person. (Check it out at TN.FreeLegalAnswers.org.) The site is part of a national pro bono program of the American Bar Association. Jacobson is a lawyer with the Tennessee Alliance of Legal Services (TALS), which provides administrative support for the Tennessee-specific site. The ABA Free Legal Answers website, which originated in Tennessee a decade ago, has been licensed as a free service for low-income clients in 43 states.

"To date, Richard has answered 2,238 questions on TN Free Legal Answers," she says. "This represents over 10% of all questions asked on the site." And near the end of last year, he had answered 51.8% of the questions answered by attorneys for the year (1,070 questions out of 2,064 questions). "To put this in context, TN Free Legal Answers had 874 registered volunteer attorneys on the site as of Dec. 11, 2020. Richard is 1 of 874, yet he has answered a majority of the questions," she says.

"As you likely can imagine, the current pandemic and limitations on in-person pro bono have made the online platform more necessary than ever," Jacobson says. TN Free Legal Answers reached two important milestones in 2020. In March, the national Free Legal Answers program recorded the 100,000th question answered. On Dec. 1, Tennessee recorded the 20,000th question answered.

Gossett has helped more people than any other volunteer on Tennessee's site. "With a strong volunteer base of more than 800 people, this is a testament to Richard's commitment to access to legal care, to his willingness to provide pro bono help in any type of civil case, and to his full support of this important virtual platform," Jacobson says. She adds that he is an "exceptional" and "consistent volunteer, logging in multiple times per week to review and answer legal questions posted to the site. He needs no asking or reminders. Quite simply, Richard makes my job as site administrator much easier, because he is trustworthy, reliable and resourceful."

It's been a great fit. "During the pandemic it's been particularly good," Gossett says, "because most of us are working from home. It's online, so we don't have to go face-to-face. It's difficult sometimes, but this format lends itself to helping underserved populations."

When he began practice, right out of the University of Tennessee College of Law in 1965, he says he did pro bono work but soon found he didn't have the time. But, he says, "As I get older and start winding down in private practice," he realizes that there are a lot of people who need help. So, he began volunteering again in 2015, when a member of his firm asked for volunteers to prepare petitions on behalf of inmates in federal prisons serving, often life sentences for relatively minor drug charges.

"We have a very active pro bono effort at the firm," he says of Baker Donelson, where he is of counsel in the Chattanooga office. He gives credit to his colleague and partner Buck Lewis, who practices

FOCUS EVICTIONS

in Baker's Memphis office. "He has really been instrumental in getting this effort off the ground. We're following his lead. He is a shining star." Lewis and Baker Donelson helped develop the predecessor to TN Free Legal Answers (Online TN Justice).

Gossett, Jacobson says, "is a true team player: a steady and trustworthy volunteer who offers high-quality legal advice and referrals to Tennesseans seeking help regardless of the type of legal issue or the busy time of year. I know that our clients are in good hands when Richard chooses to respond to their question."

Gossett does this heroic work quietly, preferring to keep a low profile.

"I feel obligated to do it," he says. "I'm trying to pay back a little bit to the profession." At 79, he is still doing client work, mostly in the areas of banking and business reorganizations. This, it should be noted, couldn't be less related to his pro bono efforts. Up until the pandemic began, he mostly answered questions about domestic and family matters. "It's trended in 2020 toward employment, loss of jobs, loss of places to live, lease terminations, evictions, unemployment benefits," he says. "Family-related matters, like custody, is still part of it, though."

Gossett usually keeps open the maximum allowed number of matters, 10, at a time on the site, looking for the questions that have been pending the longest. "For example," he says, at any time there may be "four or five questions that have been pending for two weeks. I'll address those first. I try my best to provide an answer."

In areas where he is least familiar, he spends time researching. "I keep a record of everything I've ever put as an answer on the site. I can go back through previous research, which saves time." But, he adds, "You have to do some fairly in-depth research that takes some time,

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There has been national attention focused on the housing and eviction crisis, and many Tennessee communities are dealing with this issue. In January, the Centers for Disease Control and the U.S. Department of Housing and Urban Development announced an extension of the eviction and foreclosure moratoriums until at least March 31. However, housing advocates say they expect an avalanche of evictions when moratorium protections end. The situation is complicated by the rapidly changing landscape of local, state and federal laws and regulations that offer protection to many but leave others at risk of becoming homeless.

The Legal Services Corporation (LSC) is conducting a national, yearlong study on the growing eviction crisis. The study examines the effects of state and local laws and highlights available legal resources. LSC is planning to "build a comprehensive database of state and local eviction laws and processes" intended to provide a "framework for understanding eviction legal requirements and how they vary by location." LSC is releasing research briefs as the study continues, with the first brief released in mid-January.

This first LSC research brief focuses on the eviction process in Shelby County. Shelby County was selected to highlight because, LSC notes, "it



is typical of many U.S. counties: its population is concentrated in a major urban center and housing costs and unemployment rates are both average." The initial review of Shelby County court data (2016-2019) found that landlords prevailed on their eviction cases 80% of the time, with only 1.3% of cases with a clear ruling for the tenant.

Tennessee's legal community is working with housing advocates, courts and government agencies to provide support and resources for both tenants and landlords facing eviction. In October, the Tennessee Supreme Court's Access to Justice Commission, along with the Tennessee Department of Human Services and the Tennessee Housing Development Agency, held a summit for stakeholders in housing and eviction matters. Summit participants shared updated information on pandemic-related eviction policies and examined how to address the needs of those at risk of losing their homes.

One innovative partnership is the Eviction Settlement Program (ESP), funded by the CARES Act through Shelby County and Memphis by Neighborhood

Preservation, Inc., which provided funds to rental property owners and free legal assistance to keep families most at risk of eviction stable in their rental homes and apartments. ESP is a partnership between the city of Memphis, Shelby County, Neighborhood Preservation Inc., the University of Memphis School of Law and Memphis Area Legal Services.

Over a five-month period in 2020, the Eviction Settlement Program stopped 1,155 evictions and paid \$1.8 million to rental property owners. Volunteer lawyers and law students provided advice and negotiating services to stabilize housing for families most at risk. The program established close working relationships with the eviction courts and with rental property owners and their lawyers. Additionally, they are working with high levels of eviction data access and have established automated intake procedures. Many clients also received financial and housing counseling services. Neighborhood Preservation Inc. indicates that new funding for the City and County to provide Emergency Rent and Utility Assistance is expected

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particularly these areas I'm not familiar with."

Gossett points out that using TN Free Legal Answers makes it easier to squeeze in pro bono work, and offers this advice for those wanting to help but feel they don't have time: "At some point in each day try to carve out a window of time at your desk, go online, and see if there is an answer you can provide. There is someone who needs it. It will be rewarding for you, not monetarily but professionally." He says, "The payment is that once in a while they'll send a message back, saying 'Thank you, I appreciate what you did.'"

"That makes it worthwhile," he says. ■■

— Suzanne Craig Robertson



Kaitlin Beck

Ashley T. Wiltshire Public Service Attorney of the Year

The Ashley T. Wiltshire Public Service Attorney of the Year Award is given to an attorney who has provided dedicated and outstanding service while employed by an organization that is primarily engaged in providing legal representation to the poor. This year's award is given to Kaitlin Beck of the Shelby County Public Defender's Office.

Before she was a lawyer, Kaitlin Beck was an actress. Her first role was that of the vengeful perjurer Abigail Williams in her high school's production of *The Crucible*,

a part she now finds ironic, considering her line of work. "False accusations are a real thing!" says Beck, who is an assistant public defender at the Shelby County Public Defender's Office.

Her love of acting is so strong, Beck nearly abandoned the traditional high-school-to-college pipeline to pursue the stage. Realizing she did not want to end up a penniless artist, Beck applied to Middle Tennessee State University (MTSU), confessing she listed pre-law as her major on the application because it sounded good.

While at MTSU, Beck found an outlet through which she could put her acting skills to work — the university's Mock Trial team, where she was promised she could act out the role of the witness, but eventually assumed the role of lawyer.

"I ... thought that probably what community theater said about me was that I had skills of improvisation and extemporaneous speaking and had a good public speaking ability," she says.

"Those were my inborn talents that drew me to community theater, but I could also maybe make an important social impact by leveraging those talents in the legal profession instead of on a stage."

Mock Trial made Beck realize that, more than anything, she wanted to be in the courtroom.

After graduating from MTSU, Beck landed in Memphis and began work as a victim witness coordinator for the District Attorney's Office. She used that time to apply to law schools, ultimately choosing the prestigious University of Chicago Law School.

Slowly, Beck's dream of being in the courtroom was "overtaken by the sociological importance of defending the most vulnerable citizens of Tennessee." And by mid-law school, her dream had evolved into a profession she knew could encompass both interests: a public defender.

"I'm just lucky that my interests aligned

with such a noble profession that I secondarily recognized but have since been lit with the fire of as well," she says.

Beck worked for the Public Defender Service for the District of Columbia while still at the University of Chicago and, after graduation, began a clerkship with U.S. District Court Judge for the Western District of Tennessee Sheryl Lipman. By the end of her clerkship, two job offers led her to a crossroads: return to Chicago to work for the American Civil Liberties Union (ACLU) or remain in Memphis and become an assistant public defender.

"I see those two jobs as very distinct and opposites of one another," Beck says. She describes the ACLU as "impact litigation," involving only a few clients, with the goal of attacking systemic issues. The Public Defender's Office on the other hand, she describes as "direct services," with a large number of clients and diminished ability to focus on systemic issues, "simply because your mental resources are being so exhausted by making sure individual clients have everything they need."

And, in 2018, Beck became a public defender.

"My day-to-day focus is on the individual client and making sure they have the most robust defense that is possible, that they understand their options, that they feel like they have autonomy over their cases, that they're the primary decision maker, that they feel like they've been heard and that they have a serious legal professional who is on their side and working toward their goals," she says.

Beck's journey from actress to attorney comes full circle when she begins to explain her approach to defending a client.

"I'm not acting in court, I'm being certainly very sincere, but it is kind of a whole production, isn't it?" she says, noting the significant role that storytelling plays in defending a client.

"One of the reasons our most vulner-



FOCUS

RESPONDING TO DISASTERS DURING A PANDEMIC

able citizens have such poor dispositions of their cases sometimes is that we can't fathom what it would be like to be in their position," she explains. "It's really important day-in-and-day-out work for a public defender to humanize their client and slow down and tell a story about them."

This sentiment is echoed by Gideon's Promise, a nonprofit public defender organization that provides intensive indigent defense training. In 2019, Beck spent more than two weeks completing one of its rigorous programs and hopes to go back for more soon.

"Their emphasis is so heavily on storytelling and I believe in that facet of it and I think it's really key."

Beck continues to fight to tell those stories, even in the thick of the COVID-19 pandemic.

"I've never stopped going to court because, as much as we ask, the sheriff's office and police department won't stop arresting people," she says jokingly.

Her tone becomes more serious when she begins to describe how she now finds herself on the frontlines of a pandemic.

"Every day I'm talking with people who have been in jail custody and, through no fault of their own, those people who have been in jail custody are also in an environment that is going to make it very likely that they contract COVID-19," she says.

"Courts shut down in March [2020] and I came in the next day and stood six feet away from someone who had been in jail custody at least overnight if not for several days. And I have spoken on the order of hundreds of people in jail custody four out of five days a week for the past 10 months," she says. The Tennessee Department of Health in December 2020 released updated guidelines to the state's COVID-19 Vaccination Plan, which included three phases of populations prioritized to receive the vaccine first. Lawyers were not included on that list.

A few weeks before the spread of COVID-19 necessitated social isolation, counties in Tennessee and Kentucky were hit by a series of destructive and deadly tornadoes. The Tennessee legal community quickly came together to plan and implement legal support for those impacted by the March 3 tornadoes that struck Davidson, Putnam, Wilson and Smith counties, among others in Tennessee and Kentucky. The response included free legal assistance to those affected by the storms, as well as resources and support for attorneys whose practices were damaged or disrupted. Among the groups partnering to respond to the disaster were the Tennessee, Nashville and Napier-Looby bar associations, Tennessee Alliance

for Legal Services (TALS), Legal Aid Society of Middle Tennessee & the Cumberland (LAS), Tennessee Fair Housing Counsel, NAACP, American Bar Association and others. Nearly 200 attorneys and law students responded to the requests for assistance. The groups organized pro bono opportunities, including phone, video and email-based legal clinics, answering questions posted to TN Free Legal Answers or that came in via HELP4TN, as well as taking on individual cases. Though in-person legal clinics were provided in the weeks immediately following the disaster, by the end of the month, those services all shifted to remote options in response to the COVID-19 precautions.

In early January, TBA joined the Nashville Bar As-

sociation, TALS and LAS to provide support for people affected by the bombing that occurred on Second Avenue, North, on Dec. 25, 2020. The groups recruited attorney volunteers and conducted community outreach to promote phone-based legal assistance for individuals and businesses facing legal issues as a result of the bombing.

The project focuses on providing brief advice, referrals and other assistance with property insurance claims; debt and bankruptcy issues; home repair contracts and contractors; replacement of wills and other significant legal documents lost or destroyed in the disaster; consumer protection issues such as price-gouging and contractor scams; and landlord-tenant issues. III

"Public defenders not being on the [vaccination] list is concerning."

Outside of work, 30-year-old Beck enjoys baking and is an avid runner who participates in the St. Jude Memphis Marathon. She had to run the marathon virtually in 2020, but still managed to raise \$1,100 for the charity.

Beck is also known to donate her old books to jail inmates. After corresponding with a former client who mentioned his love of the books in the jail, Beck worked with jail staff to make sure he had access to new books, even sending him some of her own.

"It seems to mean a lot to him," she says.

From her days as playing Abigail Williams, to acting as a witness in a trial advocacy exercise, to tirelessly telling the stories of her clients, it's clear that Kaitlin

Beck steals the show.

"Maybe they're not so different, acting and lawyering." Laughing, she says, "All the courtroom's a stage, right?" III

— Kate Prince

Law Student Volunteer of the Year

The Law Student Volunteer of the Year recognizes a Tennessee law student who provides outstanding volunteer services while working with an organization that provides legal representation to the indigent. This year's honoree is Gerald Bradner, a second-year student at the Cecil C. Humphreys School of Law of the University of Memphis.

Gerald Bradner has always been ready to serve, so it was no surprise that when

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professor Daniel Schaffzin asked for volunteers to help meet the heavy demands confronting the Eviction Settlement Program in Memphis, Bradner stepped forward.

During the next few months, he took on dozens of cases working under the supervision of a mentor, reviewing paperwork, meeting with tenants and landlords, and negotiating settlements. His work prevented many Shelby County residents from becoming homeless.

“During my career . . . I have never met a law student like Gerald,” Monique Beals, an attorney who works with the program says of Bradner. “His eagerness to help, his willingness to take the initiative, his refusal to take no for an answer to benefit his clients and his communication skills are unparalleled even by the standards of practicing attorneys.”

This wasn't the first time the 34-year-old 2L had stepped up to serve. As a recent high school graduate in rural Gladys, Virginia, he enlisted in the Army and after basic training was sent to Ramadi, Iraq, then a focal point of Al-Qaeda insurgency. During his 15-month deployment, he showed promise as a leader and was accepted into the Army's Green to Gold officer training program. That took him to James Madison University, where he earned a degree in justice studies and pre-law studies before being commissioned as an intelligence officer and being deployed to Kandahar, Afghanistan's second-largest city. During that era, it was known as the

assassination city of Afghanistan because of the large number of target killings taking place there.

“When I first started service in the Army, it felt like what I was doing really mattered,” Bradner says of his time in Iraq and Afghanistan. But his later service back in the states doing staff work led him to consider a second career.

“I wanted to pursue a career that I would consider as honorable and noble as I had considered serving in the Army,” Bradner says. That led him to the law, enrollment at the University of Memphis Cecil C. Humphreys School of Law and, eventually, his work with the Eviction Settlement Program.

The program was launched last summer by lawyers, judges and government officials in Memphis and Shelby County to help both tenants and landlords who had been hit hard by the COVID-19 pandemic. It is managed by Neighborhood Preservation Inc., with the cooperation of Memphis Area Legal Services, and the law school's Clinical Program, which is providing faculty, staff, and students to work on cases and assist volunteer attorneys in completing the program's work.

“We came up with the idea of trying to negotiate with landlords, making it more of a legal representation project that had the backing of a fund created by the city and county,” Memphis attorney Webb Brewer said in an earlier interview with the Administrative Office of the Courts (AOC). “Because landlords are hurting too from this and part of our belief was that a tenant in hand, especially if they had been a reasonably good tenant before this crisis, was better than the unknown, which might be not being able to rent the place.”

Memphis attorney Steve Barlow, the president and co-founder of Neighborhood Preservation Inc., joined Brewer in developing the program that uses CARES Act money to provide relief to those in crisis. Shelby County General Sessions Civil Court Judge Betty Thomas Moore, who presides over many eviction cases in her

courtroom, has also been deeply involved. Many of the people she sees in court facing eviction are “just everyday working people” who suddenly find themselves in a precarious financial situation, she told the AOC.

“They never thought it would happen to them. They've got a pile of bills that have to be paid. They may have four or five children and don't have any other place to go.”

That's the kind of case that stands out in Bradner's memory from his work in the program.

“One client was a CNA (certified nursing assistant) working in a COVID ward with three children,” Bradner says. “She was so happy when she found out she had someone in her corner that she dissolved into tears.”

In that case, Bradner discovered that there were close to 30 tenants at the same complex facing eviction. He remembered that Barlow had recently piloted a bulk settlement concept in a similar situation, so he went to him to see if it might work in this case. After getting the green light, he developed a proposal, met with the tenants and successfully negotiated a deal with the landlord and his counsel, keeping most of the tenants from being evicted.

Bradner found it satisfying to reach the settlement in that case and others, and found “amazing” the amount of support and guidance he received from Beals and the law school's Clinical Program and faculty, especially Schaffzin and Barlow. He also notes the strong support he received from the Memphis firm of Godwin, Morris, Laurenzi & Bloomfield, where he is working as a law clerk.

“If I can do something like that every year of my career, then I'll have a very long and satisfying career,” he says. ■■

— Barry Kolar

SUZANNE CRAIG ROBERTSON, KATE PRINCE and BARRY KOLAR are part the TBA's Communications Team.

Access to Justice Commission Looks Back on 2020, Highlights What's to Come

BY ANNE-LOUISE WIRTHLIN

2020 was an unprecedented year for the Tennessee Supreme Court Access to Justice Commission, as it was for all Tennesseans. The year kicked off with the Commission's strategic planning meeting in January where Commission members worked to develop goals to strive to meet over the next two years. In early March, the same week that vicious tornadoes tore through Middle Tennessee, the Commission hosted the national Self-Represented Litigants Network conference at Vanderbilt Law School. Two weeks later, the pandemic hit Tennessee, forcing the Commission to make a quick pivot, re-vamping many initiatives and projects.

COVID-19 RESPONSE

Following the onset of the pandemic, the Commission displayed its ability to facilitate and organize its partners by quickly modifying its original plan for its annual #Help4TNDay celebration. The themes of *Innovation* and *Responsiveness* arose, and the Commission promoted virtual and telephonic clinics throughout April. The Commission assembled a team of more than 65 professionals and created online resources for volunteer attorneys and Tennesseans impacted by COVID-19 and the recent tornadoes.

In the spring, the Commission learned from its law school partners that many law students lost their summer clerkship and employment opportunities because of COVID-19. The Commission tapped its network of legal professionals and developed a summer fellowship program, the A2J Fellows Program, for law students

to provide pro bono legal help remotely.

"The concept to build the A2J Fellows Program to pair law students with legal aid organizations, nonprofits and other partners who serve or create resources for vulnerable Tennesseans came together seamlessly," said Justice Cornelia Clark, Tennessee Supreme Court justice and liaison to the Commission. "I was excited to speak with the Fellows during the program to hear about the valuable and much-needed work they were able to provide to their placement organizations."

The Commission, with the leadership of the Administrative Office of the Courts, organized a statewide Evictions Summit held on Oct. 1, 2020. The Tennessee Department of Human Services and the Tennessee Housing Development Agency were also named sponsors. The Summit was designed for all stakeholders in evictions cases and matters. Participants learned about local, state and federal laws and orders on evictions enacted during the pandemic. They also had the opportunity to engage in problem-solving discussions to develop resources for both landlords and tenants to address the increasing number of pending evictions court filings.

RACIAL JUSTICE WORK

The Commission released its 2020 Strategic Plan in July, setting goals for the Commission to strive to meet over the next two years. For the first time, the Commission explored its role in addressing racism in the justice system as part of its Strategic Plan. Since the Commission

was created in 2009, it has worked to provide equal access to the court system to all underprivileged Tennesseans. Going forward, the Commission will refocus its efforts and address issues of racism and disparate impact on racial and ethnic minorities head on.

Initial action steps the Commission undertook to identify and eliminate barriers to racial and ethnic fairness were listed in the Strategic Plan.

"The Commission's vision is to provide collaborative leadership to create solutions and resources to ensure access to justice for ALL," said William "Bill" Coley, Access to Justice Commission chair. "We are dedicated to working for our mission to be true for all Tennesseans, including our Black and minority communities."

Among the initial action steps were the creation of live virtual training sessions on implicit bias, racial injustice, poverty, and related topics developed for all judicial and legal system participants. The first training in this series was Dec. 17, 2020. More than 600 people participated in this free online training event, by far the largest training event the Commission has ever sponsored.

The Commission's Faith-Based Initiatives Committee, specifically the Tennessee Faith & Justice Alliance, developed regional virtual town halls as part of its Pro Bono Faith Days celebration that takes place each October. Three town halls brought leaders together to discuss examples of racial injustice in their communities and develop action steps to address these issues. Participants also learned about existing legal resources including Help4TN.org, the Help4TN legal helpline, Tennessee Free Legal Answers, and their regional legal aid offices.

WHAT'S TO COME IN 2021

The Commission will carry on its Help4TNDay celebration in April, focusing on providing virtual pro bono opportunities and civil legal services to Tennesseans. Providing assistance to landlords and tenants in evictions matters will be a key priority. The Commission will sponsor and support virtual legal clinics and develop public awareness campaigns to

CONTINUED ON PAGE 32 >



help Tennesseans connect with pro bono lawyers and legal resources for evictions and other legal needs.

A second priority for Help4TNDay will be to move forward with a new project of the Tennessee Faith and Justice Alliance, the Legal Access for All project. This initiative is designed to connect interpreters with legal service providers that serve immigrant clients and clients who speak languages other than English. The TFJA plans to recruit and maintain a pool of interpreter volunteers similar to its pool of attorney volunteers. These volunteers will take referrals from the TFJA and its partners.

The Commission will continue its racial equity work with free quarterly virtual trainings on racism, poverty and other relevant topics for access to justice, judicial and legal stakeholders. The schedule

and topics will be announced throughout the year. The TFJA will continue to host virtual town halls in different communities across the state. The virtual town halls will be one of many methods the Commission will use to convene stakeholders to discuss issues of race. The Commission will examine policies that bring frustration and develop mechanisms to capture data on racial injustice.

COVID-19 has demonstrated that there are opportunities to reach people remotely in a more meaningful way. The Commission will sponsor the virtual A2J Fellows Program again this summer, offering law students an opportunity to work with legal service organizations and nonprofits that serve low-income and disadvantaged Tennesseans. Ongoing, the Commission will develop and release

new resources to raise awareness of its activities and spotlight its equal justice partners across Tennessee.

More information, including the full 2020 Strategic Plan, is available on the Administrative Office of the Court's website at www.tncourts.gov/programs/access-justice.

The mission of the Tennessee Supreme Court Access to Justice Commission is to provide collaborative leadership to create solutions and resources that address and eliminate barriers to justice for all. ■■■



ANNE-LOUISE WIRTHLIN is director of access to justice and strategic collaboration for the Administrative Office of the Courts

Save the Date

Mark your calendars for Legal Aid Society's third annual Breakfast of Champions!

Join us for a virtual celebration of comradery and compassion featuring special guest speaker, Olympic Gold Medalist, Scott Hamilton!

April 7, 2021
8am

For more details, including sponsorship opportunities, please visit las.org/boc21



OPPORTUNITIES FOR PRO BONO SERVICE DURING THE PANDEMIC

Tennessee is a leader in promoting access to justice and there are countless opportunities for pro bono service across the state. Though social distancing limits our ability to meet in person, there are still ways to volunteer to support low-income and vulnerable Tennesseans in need of civil legal assistance. Here are some of the local and statewide projects and providers just waiting to connect, with updated notes about how to connect and serve during this pandemic. **More information is available on the TBA website: www.tba.org/Pandemic_Pro_Bono_Service**

REMOTE LEGAL CLINICS (PHONE OR VIDEO)

For those looking for a traditional pro bono clinic experience, legal aid organizations, bar associations, law schools and the Tennessee Access to Justice Commission, among other groups, all support legal clinics. Some clinics are open for a variety of civil legal issues, while others focus on a particular area of law or client population. While in-person clinics may be on hold in most places, many organizations have shifted to phone or video-based events.

PRO BONO MATTERS

Pro Bono Matters (PBM) is an online platform for volunteer attorneys willing to take on extended representation matters through a regional legal service program. PBM offers synopsis versions of client cases (absent client identifying information) that attorneys wishing to volunteer can view anytime. Attorneys can browse the selection on

PBM based on their areas of practice and pick the counties that they are interested in providing their volunteer services:

- Legal Aid of East Tennessee, www.laet.org/pro-bono-matters
- Legal Aid Society of Middle Tennessee & the Cumberland, <https://las.org/volunteer/pro-bono-matters>
- West Tennessee Legal Services, <https://www.wtls.org/services-programs/pro-bono/pro-bono-matters>.

LEGAL SERVICE ORGANIZATIONS IN TENNESSEE

There are more than a dozen legal aid organizations in Tennessee, and each one has specific information about volunteer opportunities on their websites. Some organizations are statewide while others are geographically focused; many address a variety of civil legal issues and others concentrate on a particular issue or client population. Many groups have updated their websites with specific services and pro bono opportunities during the pandemic.

LSC REGIONAL ORGANIZATIONS WEST TENNESSEE

• **Memphis Area Legal Services (MALS)**. MALS is the primary provider of civil legal representation to low-income families in the western Tennessee counties of Shelby, Fayette, Tipton and Lauderdale. MALS helps individuals and families facing critical, sometimes life-threatening, situations, including domestic violence, mortgage foreclosure, eviction or homelessness, wrongful denial of health care, food stamps, unemployment compensa-

tion and other assistance, consumer fraud or predatory lending and special challenges of children and the elderly.

• **West Tennessee Legal Services (WTLS)**. WTLS provides assistance in civil cases to individuals, families and communities, with the goal of making this service available to the underserved populations of Benton, Carroll, Chester, Crockett, Dyer, Decatur, Gibson, Hardeman, Hardin, Haywood, Henry, Lake, McNairy, Madison, Obion and Weakley counties.

MIDDLE TENNESSEE

• **Legal Aid Society of Middle Tennessee & the Cumberland (LAS)**. LAS works to advance, defend and enforce the legal rights of low-income and vulnerable people in order to secure for them the basic necessities of life. LAS is Tennessee's largest nonprofit law firm that takes a comprehensive approach to providing high quality, free, civil legal services and community education for people to protect their livelihoods, their health and their families.

EAST TENNESSEE

• **Legal Aid of East Tennessee (LAET)**. LAET works to strengthen communities and change lives through high-quality legal services across 26 counties, from Chattanooga to the Tri Cities. LAET works with the elderly, victims of domestic violence and other low-income families facing legal challenges without the vital help they need.

STATEWIDE AND REGIONAL ORGANIZATIONS

• **Tennessee Supreme Court's Access to Justice Commission**. The Access to Justice Commission was created by the Tennessee Supreme Court to develop a strategic plan for improving access to justice in the state. Information on resources and pro bono opportunities is available at www.justiceforalltn.com.

• **Community Legal Center (CLC, Memphis)**. CLC provides civil legal

CONTINUED ON PAGE 34 >



services to those with limited means and those at risk, including populations not served by other legal aid organizations. Among CLC's focus areas are the Immigrant Justice Program, which offers a variety of legal services to immigrants who live within the jurisdiction of the Memphis Immigration Court (Tennessee, Arkansas and northern Mississippi). CLC also has specific programs for elder law issues and a pro se divorce clinic, as well as providing access to civil legal counsel for Shelby County residents.

• **Disability Rights Tennessee (DRT).** DRT provides free legal advocacy services to protect the rights of Tennesseans with disabilities, serving as the state's Protection & Advocacy Network. DRT provides legal advocacy services to people with disabilities for numerous issues, including employment discrimination, safety in schools, abuse and neglect, and access to community resources and services.

• **Tennessee Justice for Our Neighbors (JFON).** Tennessee Justice for Our Neighbors provides affordable, high-quality immigration legal services to immigrants, educates the public and faith-based communities about issues related to immigration, and advocates for immigrant rights. For more information about volunteer opportunities, training and events visit www.tnjfon.org.

• **Tennessee Alliance for Legal Services.** Tennessee Alliance for Legal Services (TALS) strengthens the delivery of civil legal help to vulnerable Tennesseans. Licensed Tennessee attorneys are invited to volunteer with tn.freelegalanswers.org or 1-844-HELP4TN.

• **Tennessee Justice Center.** Tennessee Justice Center (TJC) advocates for Tennessee's most vulnerable families and children, so that all Tennesseans can enjoy the dignity, security and opportunity that are every person's right. To learn about the pro bono opportunities, visit www.tnjustice.org/pro-bono-attorney-opportunities. To join the email list for pro bono referrals, email Cady Kaiman at ckaiman@tnjustice.org.

• **Volunteer Lawyers & Professionals for the Arts** (The Arts & Business Council). The legal arm of VLPA exists to provide pro-bono legal assistance to the sectors of the creative community that need it most. VLPA screens each client for residential and financial eligibility and ensures they have a specific, ripe legal issue before pairing them with a volunteer attorney.

TENNESSEE AND ABA FREE LEGAL ANSWERS

For some attorneys, a better option is volunteering remotely and responding to client questions via email. Fortunately, **Tennessee Free Legal Answers** provides a way for attorneys to review, select and research legal questions posed by low-income clients. These questions are screened and categorized, making it simple to find and answer questions in a variety of areas. The website Help4TN.org and a toll-free telephone hotline at 888-HELP4TN or (888) 395-9297 provide referrals and legal advice for Tennesseans in need as well as other options for pro bono service. (Read more about volunteer Richard B. Gossett in the story beginning on page 26.)

ABA Free Legal Answers (ABA FLA), a program sponsored by the American Bar Association Standing Committee on Pro Bono and Public Service, is an online virtual legal clinic through which income-eligible clients can post civil legal questions to be answered by pro bono attorneys from their jurisdiction. The program grew out of OnlineTNJustice, which was developed in Tennessee more than a decade ago through a collaboration between Baker Donelson, the TBA, Tennessee Alliance for Legal Services and the Tennessee Access to Justice Commission. To date, the program has received more than 136,000 inquiries and more than 8,600 lawyers have volunteered to answer questions.

The online legal clinic model has many advantages for both client and volunteer attorney, and ABA Free Legal Answers has experienced remarkable growth over the last year. Throughout the COVID-19 pan-

demic, ABA FLA has served as a valuable pro bono resource for attorneys and clients as it is entirely virtual and can address many basic legal questions that arise, both typical and pandemic-based.

Between March 2020 and January 2021, ABA FLA received 45,003 submitted questions, representing a 47% increase over the same period in 2019. In January alone, 4,960 questions were submitted to the program, many related to the pandemic, representing an overall 61% increase in questions submitted last January. Overall, legal questions in matters commonly associated with the pandemic increased since March 2020. For instance, 6,373 housing-related questions and 2,876 employment related questions were submitted, representing a 61% and 138% respective increase over the previous year.

ABA FLA attorney registrations have also increased since the pandemic hit. Since March 2020, 1,952 volunteer attorneys registered to answer civil legal questions on the platform, representing a 77% increase over last year.

In January, the ABA launched **Federal Free Legal Answers** to offer additional support for immigration and veterans' questions. For immigrants and asylum-seekers, lawyers at Free Legal Answers can answer questions about such subjects as deportation, green cards, DACA and naturalization.

For veterans, eligible dependents and survivors, lawyers can answer questions about VA benefits, discharge upgrades and other issues.

Learn more about ABA Free Legal Answers at https://www.americanbar.org/groups/probono_public_service/projects_awards/free-legal-answers.

CONTACT THE TBA ACCESS TO JUSTICE COMMITTEE

The TBA Access to Justice Committee welcomes updates and inquiries about pro bono projects and events. Contact TBA ATJ Director Liz Todaro at ltodaro@tnbar.org. ■■■



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|--|---------------|---|
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| Litigation Law Ethics Forum | March 30 | 3 Dual |
| Tax Law Webcast Series: IRS Update | April 7 | 1 Gen. |
| Communication Law Forum | April 16 | Visit CLE.TBA.ORG for updates |
| Corporate Counsel Forum | April 21 | 3 Gen., 1 Dual |
| Tax Law Webcast Series: Biden Administration and Tax Plan | April 28 | 1 Gen. |
| Juvenile and Children's Law Forum | April 29 | 4 Dual |
| Local Government Forum: 2 Days | April 29 & 30 | 3 Gen., 1 Dual |
| 25th Annual Labor & Employment Law Forum: 2 Days | May 6 & 7 | 5 Gen., 1 Dual |
| Immigration Law Forum | May 6 | 2 Gen., 1 Dual |
| Entertainment & Sports Law Forum | May 13 | Visit CLE.TBA.ORG for updates |
| Business Law Forum 2021: 2-Days | May 20 & 21 | 5 Gen., 1 Dual |
| Elder Law Forum | July 16 | 2 Gen., 2 Dual |
| Federal Practice Forum | July 23 | Visit CLE.TBA.ORG for updates |



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Communication Law Forum

April 16

Topics include Anti-SLAPP, recent developments in liable defamation and a session on attorney well being.

CREDITS
TO
COME



SPEAKER/PRODUCER: Ronald Harris



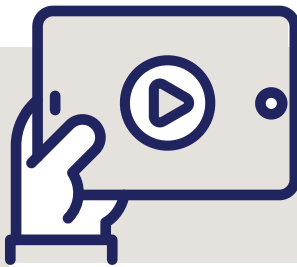
Mastering the Deposition and E-Discovery

Coming this April

Live Virtual Event

This annual staple is back, with topics essential to every lawyer including preparation and strategy, the do's and don'ts of depositions, written discovery, and a technology panel discussing current events and updates in e-Discovery law.

CREDITS
TO
COME



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

Attorney Wellness Package
6 Dual

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International Law: The Global Market & COVID-19
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Law Tech
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Litigation Law
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Tort & Insurance
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What to Watch Out for in a Post-COVID World
3 Dual

Register now at CLE.TBA.ORG



Corporate Counsel Forum

April 21

Join the Corporate Counsel section for its annual forum providing the latest updates for this practice area. For a complete listing of speakers and topics visit us at cle.tba.org.

1 Dual
—
3 General



SPEAKER/PRODUCER: Jason Little



Juvenile and Children's Law Forum

April 29

Get the latest updates and discuss the issues impacting Tennessee, including human trafficking, the impact of COVID-19 in education and diversity, equity and inclusion.

4 Dual



SPEAKER/PRODUCER: Lanis Karnes



Local Government Forum: 2 Days

April 29 & 30

Government law is an ever-changing practice area with a unique blend of constitutional, statutory and case law. This program will address intangibles of the practice area, along with topics such as ethics for municipal employees, law enforcement use of force, Municipal Court jurisdiction, blasting policies and more.

1 Dual
—
3 General



SPEAKERS/PRODUCERS: Jennifer Noe, Rebecca Ketchie



25th Annual Labor & Employment Law Forum 2021: 2 Days

May 6 & 7

This year's annual forum will be a virtual program split over two days. Attendees may register for the entire program, day 1 or day 2 programming.

1 Dual
—
5 General



SPEAKERS/PRODUCERS: Robert Bowman, Bruce Buchanan, John Burgin Jr., Stacie Caraway, Heather Collins, Casey Duhart, Stanley Graham, Greg Grisham, Stewart Harris, Jennifer Morton, Paul Prather

Day 1: Thursday, May 6:

8:30 a.m. CT / 9:30 a.m. ET: *Case Law Update* by Stan Graham and Casey Duhart

9:30 a.m. CT / 10:30 a.m. ET: *U.S. Supreme Court and Constitution Overview* by Stewart Harris

15-Minute Break: 10:30 - 10:45 a.m. CT / 11:30 - 11:45 a.m. ET

10:45 a.m. CT / 11:45 a.m. ET: *ADAAA, FMLA, and Other Hot Topics in the COVID-19 Era* by Stacie Caraway and Heather Collins

Day 2: Friday, May 7

8:30 a.m. CT / 9:30 a.m. ET: *Masters of the Bar* by Jennifer Morton and Paul Prather

9:30 a.m. CT / 10:30 a.m. ET: *Biden Administration: What Employment and Labor Law Changes Are on the Horizon* by Bruce Buchanan and Greg Grisham

15-Minute Break: 10:30 - 10:45 a.m. CT / 11:30 - 11:45 a.m. ET

10:45 a.m. CT / 11:45 a.m. ET: *Ethics for Dummies — Employment Lawyers Edition* by Jack Burgin



Immigration Law Forum

May 6

This year's Immigration Law Forum will address what immigration law looks like during, and in the wake of, the new administration's First 100 Days.

2 Dual
—
1 General



SPEAKER/PRODUCER: Bruce Buchanan



Entertainment & Sports Law Forum

May 13

This program addresses the most cutting-edge legal issues in the music and sports industries today. Carefully crafted panels will provide timely and practical information that will benefit practitioners of all levels.

CREDITS TO COME



SPEAKER/PRODUCER: Jenna Harris



Business Law Forum: 2 Days *Valuation Considerations for the Tennessee Business Lawyer*

May 20 & 21

The TBA's Business Law Forum provides specialized and practical information on a range of business law topics. This year's forum will focus on the legal aspects of business valuation in Tennessee.

1 Dual
—
5 General



SPEAKERS/PRODUCERS: Ward Nelson, Michael Collins, Paul Davidson, Joan Heminway, Glenn Perdue



Elder Law Forum

JULY 16

This highly-regarded forum offers essential and practical material for elder law attorneys and those interested in the practice area. This year's program will feature information on undue influence, the CREVAA adult abuse review, Medicaid updates, the Katie Beckett Waiver and more. Don't miss this opportunity to learn from seasoned experts and catch up on the latest developments in the field.

2 Dual
—
2 General



SPEAKERS/PRODUCERS: Kathryn Moss, Amelia Crotwell, Bryson Eubanks, Barbara McGinnis, Julia Price

IN-PERSON CLE REQUIREMENT WAIVED

Supreme Court suspends CLE Rule to allow unlimited online learning

EFFECTIVE IMMEDIATELY the Supreme Court has entered a new order allowing attorneys to use unlimited online hours to establish their compliance for the 2021 compliance year. Attorneys seeking reinstatement in 2021 are also covered by the order. In addition attorneys will be able to carry forward a maximum of 15 hours of online CLE from 2020 toward their 2021 CLE requirement. This order is in effect through December 31, 2021.



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Getting to Know the Federal Executive Branch Ethics Laws

A Primer: Part I

By Jack H. McCall Jr.
and Jill E. McCook

A SUMMARY OF THE FEDERAL ETHICS REGIME

Until news reports over the last four years provided a “ripped from today’s headlines” aspect to the topic,¹ most American citizens were unaware that a robust and complex corpus of federal laws and regulations exist to prevent conflicts of interest from arising among federal executive branch employees. These were crafted in many cases as a direct congressional response to prior executive branch ethical shortcomings of the Nixon administration. Many persons who deal with federal employees — including lawyers in private practice — do not know that actions and requests that are taken for granted in the business world cannot be engaged in by federal employees — at least, not without negative consequences to themselves and their agencies. These can be matters seemingly as mundane as offering to pay for a federal employee’s lunch; offering an employee tickets to a sporting event; or asking to review a federal worker’s resume “just in case we have a job vacancy open up sometime.” This article is intended to survey the most common federal ethics rules and their application and will hopefully provide a useful and perhaps eye-opening explanation of the basics of these rules and how they may crop up in one’s dealings with federal employees.

The federal ethics regulatory regime is distinct from that applicable to lawyers via states’ legal ethics and professional responsibility requirements. Unlike the latter — governed under the Rules of Professional Conduct adopted by each state or the District of Columbia, as applicable to those attorneys licensed in that jurisdiction — federal ethics are essentially codified in the 18 U.S.C. §§ 200-series conflict-of-interest laws and the federal executive branch’s Standards of Ethical Conduct, which is under the aegis of the federal Office of Government Ethics. These are applicable to all Executive Branch employees, both lawyers and nonattorneys.

The 1970s saw the development and consolidation of a federal executive branch ethics regulatory regime. In the wake of Watergate and other notable governmental ethics-related crises, Congress passed the Ethics in Government Act of 1978.² Besides serving as the statutory basis for the promulgation of agency-wide ethics regulations, this law was the genesis for the United States Office of Government Ethics (OGE).³ Following the promulgation of OGE's regulations, each federal agency was required to have an ethics staff and appoint a Designated Agency Ethics Official (DAEO) to oversee its ethics staff's work. The work of each DAEO is further overseen by OGE, which has among its duties the role of conducting periodic reviews of agencies' ethics programs.⁴

The cardinal principle for the federal executive branch ethics program is found at the beginning of OGE's regulations that form the Standards of Ethical Conduct for Employees of the Executive Branch (the Standards). It is the first of 14 general principles that apply to every federal executive branch employee:

Public service is a public trust, requiring employees to place loyalty to the

Constitution, the laws, and ethical principles above private gain.⁵

We now review the essential criminal conflict of interest laws and the Standards that form many of the typical ethics matters relevant to most federal employees and agencies' DAEO staffs. Given the nuances and breadth of many of these laws and regulations, this is necessarily a basic overview. These categories include conflicts of interest; gift-related questions (both from outside sources and among federal employees); employment-related issues (i.e., "seeking employment" while still a federal employee and post-employment matters); use of federal resources; and political activity.

AN OVERARCHING THEME: AVOIDING THE APPEARANCE OF IMPROPRIETY

A common theme across the federal ethics rules is a clear expectation for federal employees to take suitable actions to avoid the appearance of impropriety. This is clearly embodied in 5 C.F.R. § 2635.502:

Where an employee knows that a particular matter involving specific parties

is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the *circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter*, the employee should not participate in the matter unless he has informed [an agency designee; often, the DAEO] of the appearance problem and received authorization from the agency designee⁶

Hence, this requires analysis of the particular matter; what specific parties are involved; whether a "direct and predictable effect" will exist on the financial interest of a "covered relationship"; and whether — the most highly subjective element — a reasonable individual with knowledge of the relevant facts would question the employee's impartiality. Under this "appearance" test, a "covered relationship" comprises any of (a) a person who has or seeks a business, contractual or other financial relationship; (b) a member of the employee's household or a relative who has a close personal relationship; (c) a person from whom the employee's spouse, parent or dependent child is serving or seeking to serve as an officer, director, trustee, general partner, contractor or employee; and (d) a person for whom the employee has, within the last year, served as an officer, director, trustee, general partner, agent, attorney, consultant or employee.⁷

In practical application: if a specific situation is not covered by a black-letter ethics rule but one is concerned that the impartiality of a federal employee could be questioned, under this standard, one must consider whether a reasonable member of the general public, apprised

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of all the facts, will perceive the conduct to be improper. As one can see, this is highly subjective. Sometimes called by DAEOs and ethics staff “the front page of *The New York Times/Washington Post*/(your paper’s name here) test,” it can often be prudent and not inappropriate for a federal employee, applying this test on his or her own, to decide that a possible course of action may be ethically inappropriate.⁸

CRIMINAL CONFLICT OF INTEREST STATUTE AND FINANCIAL DISCLOSURES

Not only should federal employees be concerned with avoiding the appearance of impropriety; they must be mindful of actual conflicts as well, and the potential criminal implications of such conflicts. Federal criminal law prohibits employees “from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.”⁹ This law “is intended to prevent an employee from allowing personal interests to affect his official actions, and to protect governmental processes from actual or apparent conflicts of interests.”¹⁰

Particular matters are those involving “deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.”¹¹ To participate “personally” means to “participate directly”¹² and to participate “substantially” means to be involved in a way that is “significant to the matter.”¹³ Substantial participation requires more than official knowledge or responsibility; substantiality is based on “the effort devoted to the matter” and “the importance of the effort.”¹⁴ Thus, any decision, approval or disapproval, recommendation, investigation, rendering of advice, or supervision of subordinate work is “personal and substantial participation.”

For purposes of this criminal statute, “financial interest” “means the potential

for gain or loss to the employee, or other person specified in section 208 [e.g., spouse, minor child, general partner, organization where the employee is an employee or officer, or an organization with whom the employee is negotiating employment], as a result of governmental action on the particular matter.”¹⁵ Importantly, it is any potential for gain or loss, regardless of how small or seemingly inconsequential.¹⁶ It includes stocks, bonds, mutual funds, real estate, a salary, indebtedness, or even a job offer.¹⁷ An action has a “direct and predictable” effect on these financial interests if “there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest” and it is “real, as opposed to a speculative, possibility.”¹⁸

OGE’s interpretive regulations provide detailed guidance and examples in 5 C.F.R. Part 2640, and federal employees analyzing potential conflicts of interest are encouraged to review them as they determine whether there is a conflict of interest that would require their recusal.

Finally, on this topic, we would be remiss if we did not mention that certain federal employees are required to file financial disclosure forms, which are intended to better identify and prevent risks of actual financial conflicts of interest.¹⁹ Likewise, many agencies require employees who engage in outside activities to obtain agency approval in advance, in order to prevent conflicts from occurring.²⁰

OTHER CRIMINAL ETHICS STATUTES

Before turning to other essential topics for those who interact with federal employees to be aware of, it is worth mentioning several other criminal ethics laws. First are 18 U.S.C. §§ 203 and 205, which restrict a federal employee’s representation of others before federal agencies or courts in connection with a matter in which the United States has a direct and substantial interest, regardless of whether compensation is involved. Second is 18 U.S.C.

§ 209. It restricts a federal employee’s receipt of compensation for his services as a federal employee from anyone other than the United States government. These statutes frequently come into play when federal employees are engaged in outside activities, such as serving on a charitable organization’s board of directors or engaging in pro bono legal work.

We next turn to another area that is frequently rife for ethical conflicts: that of gifts from prohibited sources.

GIFTS FROM OUTSIDE SOURCES

Gifts from outside sources have long been a problematic area for ethics investigations and inquiries. In assessing such gifts, the essential practical approach to be used by both federal employees and their agency ethics staffs follows a four-prong methodology:

- Is the item actually a gift?
- Even if the item is otherwise permissible to accept: *should* a federal employee accept it?
- If the item is a gift, is it from a *prohibited source*, or is it given because of *one’s official position*, and thus prohibited?
- If it is otherwise prohibited: does an exception apply?

Before an employee or agency ethics advisor looks to find a potentially applicable exception to the gift rules, the Standards require that person to apply the “appearance” test and first ask whether acceptance of such a gift would appear improper to a reasonable member of the public. Under the gift rules, “employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee’s integrity or impartiality as a result of accepting the gift.”²¹ Among the factors to be assessed, employees must consider whether the gift has a high market value; its timing creates an appearance that the donor is seeking to influence an official

action; the gift was provided by a person who has interests “that may be substantially affected by the performance or nonperformance of the employee’s official duties”; and its acceptance would provide the gift-giver with “significantly disproportionate” access.²² Hence, it may be prudent to decline a gift, even if an exception to the “no-gifts” rules otherwise exists.

The Standards caution that federal employees may never accept a gift that is solicited or coerced — particularly from a prohibited source — or given because of the employee’s official position. A gift given to influence a federal employee’s official act may violate the illegal gratuities statute, 18 U.S.C. § 201(c)(1)(B), and under certain facts, may be a violation of the federal anti-bribery statute, 18 U.S.C. § 201(b).²³ What constitutes a *prohibited source* is also a critical element in the gift rules: this means any person who (1) seeks official action by the employee’s agency; (2) does business or seeks to do business with the employee’s agency; (3) conducts activities

regulated by the employee’s agency; (4) has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties; or (5) is an organization, a majority of whose members are described in the foregoing four items.²⁴

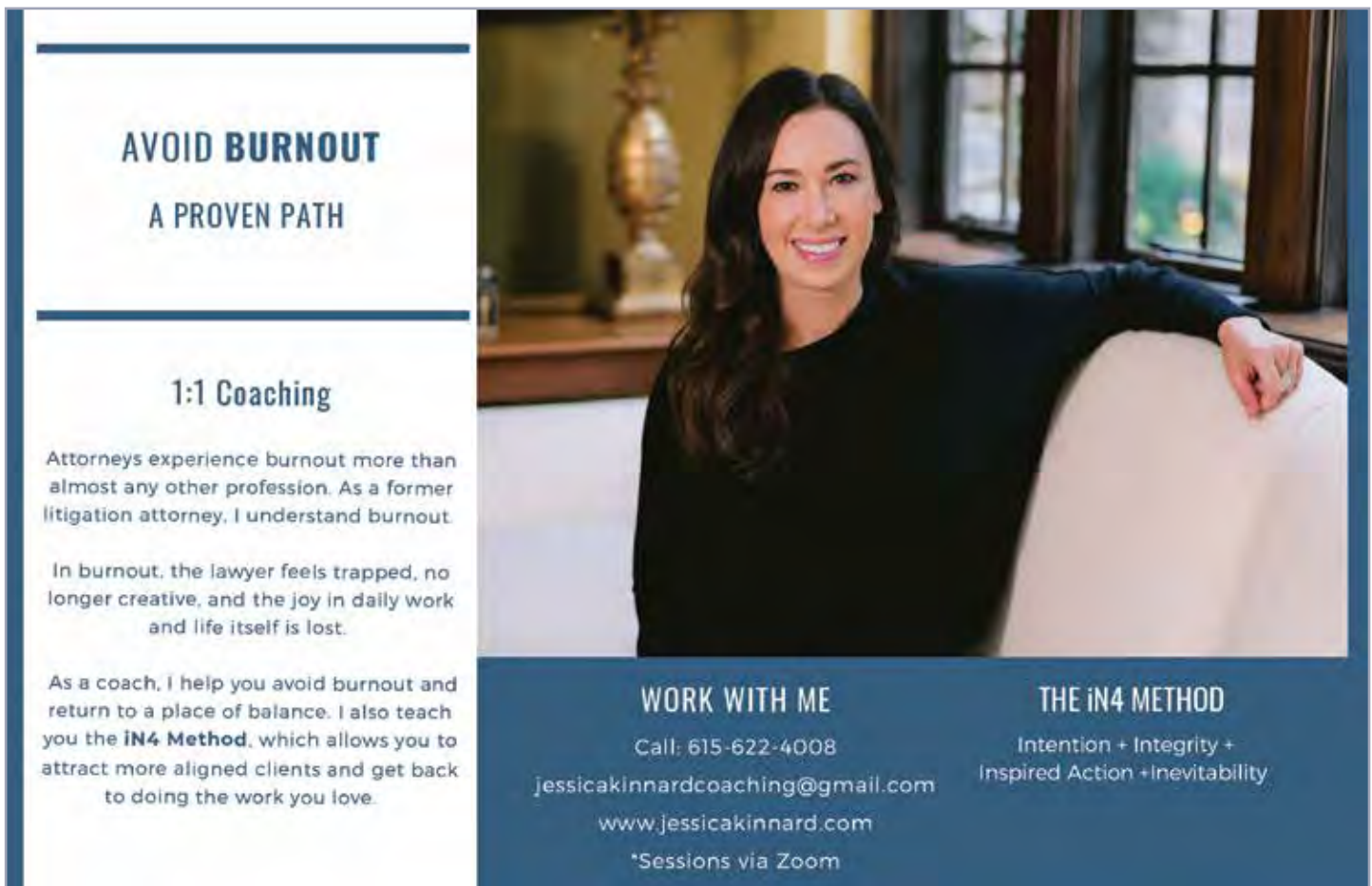
The Standards define a “gift” as anything of monetary value. This includes any gratuity; favor; discount; entertainment; hospitality; loan; forbearance; training (e.g., CLEs); transportation; travel; meals; or lodging. However, by definition, certain items are not deemed to be gifts. These definitional “non-gifts” include modest items of food and refreshment (e.g., coffee, soft drinks and donuts; note, alcohol is not considered to be among these “modest items of food”); items with little extrinsic value (e.g., greeting cards, certificates, trophies or plaques); loans from banks and other financial institutions on terms generally available to the public; favorable rates/commercial discounts if they are available to all federal government employees; rewards and prizes given to competitors

in contests or events open to the public; pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a current or former employer; and anything paid for by the federal government or secured by the government under government contract.²⁵

Besides the definitional “thou-art-not-gifts” just summarized, the Standards provide specific exceptions to the general no-gifts-from-prohibited-sources rule. These include the most commonly used gift exception, the so-called “20/50 Rule.” This permits acceptance of unsolicited gifts with an aggregate market value of \$20 or less on any one occasion, not to exceed \$50 in a given year. This does not apply to cash gifts — cash gifts being a stringent “no-no” under the gift rules — or gifts of investment interests, such as stock or bonds. The rule provides cautions as to how to aggregate gifts (and how not to do so) to ensure compliance with the 20/50 Rule.²⁶

Specific exceptions exist for gifts based

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The Music of Confrontation

Taking Back Independence in Interpreting Tennessee's Constitution

By Nathan L. Kinard

Our legal culture treats American courts like an orchestra, with the U.S. Supreme Court standing at the center guiding the music. True, the Supremacy Clause justifies this focus as to federal law. But as for all other topics, from state constitutional law to secured transactions, the better picture is Nashville on a pre-pandemic weekend, a city full of jazz trios, rock stars and country bands, each on their own stage playing their own music.

Article 1, section 9 of the Tennessee Constitution guarantees “[t]hat in all criminal prosecutions, the accused hath the right ... to meet the witnesses face to face.” This right traces back over a thousand years¹ and ranks in importance alongside the trial by jury.² Yet the Tennessee Court of Criminal Appeals, in *State v. Seale*,³ gave center stage for interpreting this right to federal cases interpreting the similar provision in the U.S. Constitution. The result is that a Tennessean’s right to meet witnesses “face to face” is not required but merely “preferred,” so, at least in some cases, an accused may be convicted by the testimony of a witness appearing through two-way video. *Seale* thought precedent required it to follow federal doctrine, but a close inspection reveals that was a mistake. And while Tennessee’s right to “meet ... face to face” probably meant the same thing as the Sixth Amendment right to be “confronted,” it is doubtful that current federal doctrine correctly interprets the

right. The Tennessee Constitution guarantees that witnesses testify in the physical presence of the accused.

Our courts must not allow themselves to “be reduced to mere conduits through which federal edicts would flow.”⁴ The people of Tennessee deserve to hear our state’s constitutional tune.

STATE V. SEALE

The court in *State v. Seale* examined whether two-way videoconferencing technology satisfied the confrontation rights in the federal and Tennessee constitutions. The defendant in *Seale* is charged with first-degree murder. The prosecution sought to offer live testimony of four Virginia residents through technologies like Skype and Microsoft Teams, and the trial court granted the request, reasoning it was “exactly the same” as in-person testimony.⁵ The defendant filed an interlocutory appeal, claiming violation of the U.S. and Tennessee constitutions.⁶

As for the Sixth Amendment, the *Seale* Court looked to the U.S. Supreme Court’s opinion in *Maryland v. Craig*.⁷ The Sixth Amendment to the U.S. Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” *Craig* involved testimony of a child witness by one-way video.⁸ According to *Craig*, face-to-face confrontation is “prefer[red],” but can be overcome by a case-specific and

witness-specific determination that doing so “is necessary to further an important public policy interest and only where the reliability of the testimony is otherwise assured.”⁹ The *Seale* court decided the *Craig* standard applies to testimony by two-way videoconferencing.¹⁰ It is not the same as testifying in person.¹¹ Testimony through a video monitor simply does not have the same “truth-inducing effect” as physical presence.¹² Because the trial court failed to determine in the first instance whether a sufficiently important need overcame the preference for in-person testimony, the court reversed and remanded for the trial court to make that determination.¹³

The Tennessee Constitution received no independent analysis. While the Tennessee Constitution literally says a criminal defendant has the right to “meet the witnesses face to face,” the *Seale* court deferred to federal doctrine, which, under *Craig*, makes “face to face” confrontation a “preference.” The *Seale* court apparently felt bound by the Tennessee Supreme Court’s application of federal Sixth Amendment doctrine to Tennessee’s confrontation right in other cases.¹⁴ This was a mistake. Tennessee cases regarding the analogy of federal and state confrontation are admittedly muddled, but no case requires applying federal doctrine to the question of Tennessee’s confrontation right in the context of witness testimony at trial.

TENNESSEE CONFRONTATION PRECEDENTS

The earliest relevant case, *Johnson v. State* from 1821, examined the interplay between the Tennessee and North Carolina confrontation rights. The court said they were “substantially the same” and that “the expression in both means the same thing.” This is important because the North Carolina Constitution, like the federal constitution, uses the term “confront,” unlike the “meet ... face to face” phrase used in the Tennessee Constitution.¹⁵

A century and a half later, *State v. Armes*, 607 S.W.2d 234, 236 (Tenn. 1980), directly addressed the analogy to the federal constitution. *Armes* unitarily analyzed the federal and state confrontation rights because, a few years earlier, it had purportedly said the “same criteria” apply to both, in *State v. Henderson*, 554 S.W.2d 117, 119 (Tenn. 1977).¹⁶ *Henderson* actually said no such thing. The *Henderson* opinion was almost entirely a quotation from the lower court, concluded by a brief, tepid statement that the high court “concur[ed]” with the lower court.¹⁷ The *Henderson* court’s decision was so ambiguous the government sought rehearing, asking the court to clarify whether the basis of its decision was the federal or Tennessee constitution. The court declined to rehear, saying only that both constitutions were violated.¹⁸ Nowhere did *Henderson* say the same criteria apply to the federal and state confrontation questions.¹⁹

1990 brought the U.S. Supreme Court’s decision in *Maryland v. Craig*, discussed above. Just two years later, the Tennessee Supreme Court decided *State v. Deuter*, 839 S.W.2d 391, 395 (Tenn. 1992), which, like *Craig*, addressed the right to confrontation in the context of witnesses at trial. The *Deuter* Court said the Tennessee Constitution’s “face to face” provision “imposes a higher right than that found in the federal constitution.”²⁰ The court’s discussion of the Tennessee Constitution’s confrontation right was substantial, quoting at length from a Pennsylvania case holding that their constitution (identical to the Tennessee Constitution on this point) required rejecting *Craig*.²¹ This part of *Deuter*, however, was all dicta: “[T]he extent to which our constitution exceeds the protection provided by the federal constitution need not be decided in this case.”²²

Over the next several decades, numerous cases said that the Tennessee confrontation

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right follows the federal analysis. One case, *Lewis*, acknowledged the dicta in *Deuter* but then noted no case had actually provided greater protection to a defendant under Tennessee's constitution.²³ Importantly, these cases, like *Henderson* and *Armes*, were in the context of admission of prior statements, not testimony at trial like in *Deuter*.²⁴ Two modern cases have recognized that this is a distinction with a difference.

State v. McCoy, a 2014 case regarding admission of a prior statement, claimed to tackle head-on the potential distinction between the Tennessee and federal confrontation clauses.²⁵ As for prior statements, the court concluded “the same standard governs both” the federal and state clauses.²⁶ Interestingly, *McCoy* did not criticize *Deuter*'s description of Tennessee's confrontation right as “higher,” or even call *Deuter*'s discussion dicta, which would have been accurate, but instead distinguished it. Witnesses at trial are an “entirely different issue” than admission of prior statements, and the *McCoy* Court was only concerned with the latter.²⁷ *McCoy* was following the path laid in 2006 by *Maclin*. Also involving prior testimony, the *Maclin* Court said that Tennessee has “largely adopted” the federal standard.²⁸ But in the very next paragraph, *Maclin* asserted the Tennessee Constitution provides a “higher right” “[w]ith respect to the right to physically confront one's accusers,” recognizing the distinction.²⁹

In sum, *Seale* was not bound, one way or the other, regarding whether the *Maryland v. Craig* standard applies to in-person testimony under the Tennessee Constitution. So what should *Seale* have done? Is Tennessee's right “higher”? Tennessee's current constitution dates to 1870, but identical confrontation provisions appear in article 1, section 9 of the 1834 Constitution, and article 11, section 9 of the 1796 Constitution, so the clause should bear the same meaning as it did in 1796.³⁰ A review of founding-era evidence suggests the Tennessee Supreme Court has already stumbled across the answer in dicta: Tennessee's right to “meet ... face to face” is a “somewhat

more specific” version of the federal right to “confront.”³¹

FACE TO FACE CONFRONTATION AT RATIFICATION

The first thing to notice is the constitutions use different words. Tennessee guarantees “[t]hat in all criminal prosecutions, the accused hath the right ... to meet the witnesses face to face.” The Sixth Amendment to the U.S. Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” At least some Tennesseans had contemplated a right that used the term “confront.” In 1785, a convention to form the ill-fated state of Franklin adopted a Declaration of Rights lifted from the North Carolina Constitution, guaranteeing a right “to confront the accusers and witnesses with other testimony.”³² Tennessee's 1796 convention also started with North Carolina's Constitution,³³ but ultimately enacted a constitution using the phrase “meet the witnesses face to face.” Perhaps, in 1796, Tennessee's framers desired a “higher” confrontation right. Or maybe it was just a stylistic change. Sadly, there are no records of the debates at the 1796 Tennessee constitutional convention,³⁴ and not even a record of the votes regarding the confrontation provision.³⁵ Despite the textual difference, the available evidence³⁶ suggests consonance between a defendant's right to “confront” and a defendant's right to “meet ... face to face.”

Early Americans believed a defendant's confrontation right was “vital.”³⁷ As for describing the concept with the term “face to face,” the first to do so in a constitution was John Adams in 1780, drafting the Massachusetts Constitution. The phrase was a natural fit. In the King James Bible, Festus refused to hand Apostle Paul to the Jewish chief priests because Romans did not “deliver any man to die, before that he which is accused have the accusers face to face. ...”³⁸ Similarly, several English treason statutes required proof by witnesses “face

to face.”³⁹ By 1789, six states guaranteed a right to “confront,”⁴⁰ while two guaranteed a right to “meet ... face to face.”⁴¹ The following year, Pennsylvania adopted a new constitution, switching its guarantee from a right to be “confronted” to a right to “meet ... face to face.”⁴²

When the U.S. constitutional convention proposed a constitution lacking a declaration of rights, it triggered many (now called the Anti-Federalists) to argue against ratification.⁴³ A “chief demand” of the Anti-Federalists was an amendment to preserve the “trial by jury, and incidents such as vicinage and confrontation...”⁴⁴ In essays and speeches, Anti-Federalists criticized the proposed constitution for failing to protect an accused's right to “meet his accuser face to face.”⁴⁵ The Anti-Federalists won out. The constitution was ratified with an understanding that amendments would thereafter be passed, and Congress then distributed a series of amendments, the Bill of Rights, for ratification by the states.⁴⁶

The proposed amendments included an accused's right to be “confronted with the witnesses against him.”⁴⁷ If a right to “confront[]” meant something less than the right to “meet ... face to face,” one might expect to see evidence of blowback — claims that the proposed amendment provided only a watered-down version of the right several Anti-Federalists had publicly demanded and which several states guaranteed.⁴⁸ Yet the historical record does not appear to show any publicized discomfort with the proposed Bill of Rights' use of the “confront” phrase.⁴⁹

Also consider evidence from John Adams. Before the colonies declared independence, he defended John Hancock before a vice-admiralty tribunal, arguing, “[I]f We are to be governed by the Rules of the common Law. ... Every Examination of Witnesses ought to be in open court, in Presence of the Parties, Face to Face.”⁵⁰ He also drafted the Massachusetts Constitution to guarantee the right to “meet the witnesses against him face to face.”⁵¹ Yet only a few years later, he asserted that the safety of a

man's "life, liberty, or property ... depend upon ... the confrontation of parties and witnesses. ..."52 It seems unlikely he would have chosen the latter phrase if he did not understand it to mean the same thing as meeting a witness face to face.⁵³

Another hint is from a 1787 essay by the Anti-Federalist "Brutus," who asserted that "the bills of rights of most of the states have declared ... [t]he witnesses against him shall be brought face to face."⁵⁴ In 1787, eight states had a confrontation provision but only two of them used the "face to face" phrase⁵⁵ rather than the "confront" phrase, so unless "Brutus" understood those phrases to be coterminous, his characterization of the confrontation right in "most" states was quite incorrect.

Perhaps it could be argued that familiarity with the phrase "face to face" was regional. But the state constitutions guaranteeing a "face to face" right by 1796 included New Hampshire, Delaware, Massachusetts, Pennsylvania and Kentucky. And the First Continental Congress, composed of delegates from all 13 colonies except Georgia,⁵⁶ used the term. Hoping to convince the residents of Quebec to join the cause, the Congress described the rights they sought to secure as including a right to trial by jury "face to face," suggesting the term had purchase across the colonies.⁵⁷

Finally, the Tennessee Supreme Court⁵⁸ and U.S. Supreme Court⁵⁹ have both defined the scope of a defendant's confrontation right in reference to a pre-existing right at the time of the founding.⁶⁰ It seems unlikely Tennessee's framers sought to draw upon a different source than the federal framers. Give the same sheet music to two pianists and you should expect both to play the same notes.

Much of this evidence is indirect and considered separately proves little. But aggregating it leads to a conclusion that Tennessee's right to "meet ... face to face" was understood in 1796 to mean the same thing as the Sixth Amendment's right to "confront," the former being a more concrete and specific version of the latter. *Deuter* was probably wrong that the Tennessee Constitution's confrontation right is "higher" than the federal constitution's

— wrong, at least, to the extent *Deuter* was describing the meaning of federal and Tennessee confrontation rights at the time of the founding. Maybe *Deuter* was instead contrasting Tennessee's confrontation right with *Maryland v. Craig's* interpretation of the federal right. Just because the provisions ought to be interpreted similarly does not mean the federal courts have gotten it right. Tennessee courts must analyze whether the U.S. Supreme Court's interpretation in *Craig* harmonizes with our state's constitution before giving it the solo.

TENNESSEE'S CONFRONTATION MELODY

Indeed, *Maryland v. Craig* is not consistent with Tennessee's constitutional tune. *Craig* did not engage with the evidence, discussed above, suggesting that the right to "confront" requires no less than the right to meet "face to face."⁶¹ Also, *Craig* treated the idea of meeting witnesses "face to face" as judicial gloss, while Tennessee's framers left no doubt, inscribing the words into the

Constitution's text.⁶²

The two core justifications *Craig* offered are not compelling under Tennessee law. First, *Craig* argued the Sixth Amendment's purpose is to obtain reliable evidence, and other means besides face to face testimony may be used to ensure reliability.⁶³ In contrast, the Tennessee Constitution, which while having the aim of obtaining a fair trial, actually guarantees specific procedures to be followed.⁶⁴ The procedure at issue here is that trial witnesses must meet the accused face to face. Two-way video does not comply. Recall John Adams' argument that, under the common law, "Every Examination of Witnesses ought to be in open Court, in Presence of the Parties, Face to Face."⁶⁵ Perhaps Adams had read a recent case from the King's Bench, *Rex v. Vipont*, in which defense counsel argued successfully that a conviction could not stand because "no evidence is stated to have been given in the presence of the defendants," that the defendants "had a right of cross-examining

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the witnesses, upon their giving verbal evidence face to face....”⁶⁶ These arguments accord with numerous English and American treatises that framed witness confrontation as involving physical presence.⁶⁷

Second, *Craig* claimed a right to confront “face to face” is not absolute, but subject to a balancing analysis since certain prior statements like dying declarations are permitted yet cannot be made face to face.⁶⁸ But even if some kind of balancing is appropriate for prior statements, a question this article does not answer, it would not establish that the physical presence of trial witnesses may similarly be balanced away. In *Sam v. State*, 31 Tenn. 61, 64-65 (1851), the court explained a juror cannot secretly give testimony during deliberations but “must be sworn as a witness, and give his testimony openly in court.” This was “emphatically” true for criminal prosecutions because of the “absolutely secured” right to “meet the witnesses face to face.”⁶⁹

Moreover, the Tennessee Constitution enumerated a pre-existing right that had pre-existing limitations. In *Anthony v. State*, 19 Tenn. (Meigs) 265 (1838), a defendant claimed that admission of a dying declaration violated his right to meet the declarant face to face. The court disagreed. Exclusion of dying declarations would be an innovation, and the Constitution meant only to “preserve and perpetuate” a right to confront which had been “fully acknowledged and acted upon before and at the time of our Revolution.”⁷⁰ Other early Tennessee confrontation cases used similar logic, as have cases involving other constitutional rights. Consider the closely related “right of trial by jury” in article 1, section 6. No exceptions to that guarantee are stated, yet its scope is limited to cases for which a jury trial was available at Tennessee’s founding.⁷² The right to meet the witnesses face to face also has a scope. Admission of evidence outside that scope does not make the core of the right subject to judicial balancing.⁷³

CONCLUSION

The Tennessee Supreme Court’s authority

as the “final arbiter of the Tennessee Constitution”⁷⁴ comes with a correspondingly solemn duty to give it full voice. Tennesseans, especially those facing imprisonment or death, should receive no less than what our state’s great Constitution guarantees. The court’s wisdom from more than 170 years ago resonates today: “the success of the defence is all important to the individual accused.”⁷⁵

Wise or foolish, the physical presence of witnesses is a requirement engraved in our Constitution, “a rule to be demanded in order to guarantee ultimate fairness.”⁷⁶ It does not matter that Tennessee’s founders could not have dreamed of testimony by two-way video. Our Constitution guarantees to criminal defendants a specific procedure to be followed, to “meet the witnesses face to be face,” not whatever procedure the judiciary or legislature thinks is a sufficient approximation.

Under *Seale*, Tennessee courts must follow *Maryland v. Craig* regardless of its discordance with Tennessee’s Constitution. The Tennessee Supreme Court needs to take the stage and clarify that the Tennessee Constitution guarantees the physical presence of trial witnesses in criminal cases. ■

NOTES

1. See Frank R. Herrmann & Brownlow M. Speer, “Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause,” 34 *Va. J. Int’l L.* 481, 545 (1994).

2. *Kendrick v. State*, 29 Tenn. (10 Hum.) 479, 485 (1850).

3. No. M2019-01913-CCA-R9-CD, 2020 WL 4045227 (Tenn. Ct. Crim. App. July 20, 2020).

4. *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979), overruled on other grounds by *State v. Pruitt*, 510 S.W.3d 398 (Tenn. 2016).

5. *Seale*, 2020 WL at *1-4.

6. *Id.* at *4.

7. *Id.* at *8.

8. *Maryland v. Craig*, 497 U.S. 836, 841 (1990).

9. *Id.* at 850, 855-56.

10. *Seale*, 2020 WL at *8.

11. *Id.*

12. *Id.* at *7-8 (quoting *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005)).

13. *Id.* at *9.

14. *Id.* at *4-6.

15. *Johnston v. State*, 10 Tenn. (2 Yer.) 58, 59 (1821).

16. The long gap is because the Confrontation Clause was not incorporated against the states until *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

17. *Henderson*, 554 S.W.2d at 122. The lower court’s opinion identified criteria applicable to federal confrontation doctrine, analyzed the statements at issue under those criteria, and then concluded without any further explanation that “they must likewise fall under the guarantees of the Tennessee Constitution.” *Id.* at 119-21.

18. *Id.* at 123.

19. *Id.* at 119.

20. *Deuter*, 839 S.W.2d at 395. Constitutional rights do not have length, width or height. The term “higher” probably meant more favorable to the defendant.

21. *Id.* at 395-96 (quoting *Commonwealth v. Ludwig*, 594 A.2d 281, 284 (Pa. 1991)).

22. *Id.* at 396.

23. *State v. Lewis*, 235 S.W.3d 136, 144 (Tenn. 2007).

24. *State v. Davis*, 466 S.W.3d 49, 68 (Tenn. 2015); *State v. McCoy*, 459 S.W.3d 1, 12 (Tenn. 2014); *State v. Dotson*, 450 S.W.3d 1, 62 (Tenn. 2014); *State v. Parker*, 350 S.W.3d 883, 897 (Tenn. 2011); *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010); *State v. Cannon*, 254 S.W.3d 287, 301 (Tenn. 2008); *Lewis*, 235 S.W.3d at 144; *State v. Maclin*, 183 S.W.3d 335, 343 (Tenn. 2006), abrogated on other grounds by *Davis v. Washington*, 547 U.S. 813 (2006); *State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn. 1992); *State v. Causby*, 706 S.W.2d 628, 631 (Tenn. 1986).

25. *McCoy*, 459 S.W.3d at 12 (stating that the court was “address[ing] the nature and extent of confrontation rights afforded by the state and federal constitutions”).

26. *Id.* at 14 (quoting *Dotson*, 450 S.W.3d at 62).

27. *Id.* at 12-13.

28. *Maclin*, 183 S.W.3d at 343. The “largely” qualifier mildly infers Tennessee’s confrontation analysis does not entirely follow the federal analysis. Several cases have also used that qualifier. See *Lewis*, 235 S.W.3d at 144 (quoting *Maclin*, 183 S.W.3d at 343); *Parker*, 350 S.W.3d at 897 (same); *Franklin*, 308 S.W.3d at 809 (same). *Maclin* got the term from *State v. Bush*, 942 S.W.2d 489, 511 n.2 (Tenn. 1997).

29. *Maclin*, 183 S.W.3d at 343; see also *State v. Stephenson*, 195 S.W.3d 574, 591 (Tenn. 2006) (stating, without explanation, that Tennessee’s confrontation right is “higher”), overruled on other grounds by *State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012).

30. See *Eason v. State*, 65 Tenn. 466, 469-71 (1873).

31. *State v. Pilkey*, 776 S.W.2d 943, 949 (Tenn. 1989); cf. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 371 n.9 (Mass. 1988) (referring to the Massachusetts Constitution's confrontation provision as using "more explicit language to convey unequivocally their meaning").

32. See Samuel Cole Williams, *History of the Lost State of Franklin* 340 (rev. ed., 1933); Joshua W. Caldwell, *Studies in the Constitutional History of Tennessee* 50 (2d ed. 1907); John Haywood, *The Civil and Political History of the State of Tennessee from Its Earliest Settlement up to the Year 1796* 170 (Nashville, W.H. Haywood 1891) (1823).

33. Caldwell, *supra* note 32, at 133-34.

34. Edward T. Sanford, *The Constitutional Convention of Tennessee of 1796* 17 (Nashville, Marshall & Bruce 1896) (citing J.G.M. Ramsay, *The Annals of Tennessee to the End of the Eighteenth Century* 652 (Charleston, John Russell 1853)).

35. See Lewis L. Laska, "A Legal and Constitutional History of Tennessee, 1772-1972," 6 *Mem. St. U. L. Rev.* 563, 593 (1977).

36. A full investigation of primary, founding-era sources is beyond the scope of this article.

37. See 30 Charles Alan Wright & Kenneth W. Graham Jr., *Federal Practice and Procedure* § 6346, at 611 (1997). The historical background for that belief is far too rich to relate here. See generally *id.* §§ 6342-46; Herrmann & Speer, *supra* note 1.

38. Wright & Graham, *supra* note 37, § 6342, at 240 & n.285 (quoting *Acts* 25:16 (King James)).

39. Seditious Act 1661, 13 Car. 2 c. 1, § 5 (Eng.); Act Against Seditious Words and Rumors 1580, 23 Eliz. c. 2, § 13 (Eng.); Treasons Act 1571, 13 Eliz. c. 1, § 9 (Eng.); Act Whereby Certain Offenses be Made Treason 1558, 1 Eliz. c. 5, § 10 (Eng.); Act of Supremacy 1558, 1 Eliz. c.1, § 21 (Eng.); see Wright & Graham, *supra* note 37, § 6342, at 227.

40. Va. Decl. of Rights § 8 (1776); Penn. Decl. of Rights § IX (1776); Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights § XIX (1776); N.C. Decl. of Rights § VII (1776); Vt. Const. ch. I, § X (1777).

41. Mass. Const. pt. 1, art. XII (1780); N.H. Const. of 1783, pt. 1, art. 1, § XV (1784). Note that Kentucky's 1792 constitution and Ohio's 1802 constitution also used the "meet ... face to face" phrase. Ky. Const. art. XII, § X (1792); Ohio Const. of 1802, art. VIII, § 11 (1803).

42. See Penn. Const. art. IX, § IX (1790). Delaware made a similar change in 1792. See Del. Const. art. 1 § 7 (1792).

43. See Wright & Graham, *supra* note 37, § 6347, at 661-62, 713.

44. *Id.* at 704-05.

45. *Id.* at 709-10 (discussing a prominent speech at the Massachusetts ratifying convention). An essay by "Federal Farmer" argued in favor of enumerating "particular essential rights" including "a right to ... meet the witnesses against him face to face." *Id.* at 724-25. An essay by "Brutus" exclaimed "the great importance ... that the

witnesses should be examined face to face." *Id.* at 734. "Brutus" elsewhere asserted the proposed constitution failed to provide security "[t]hat he shall see the witnesses against him face to face" *Id.* at 726. Note that some of the Anti-Federalists suggested constitutional amendments before ratification using the exact "confront" phrase that ultimately appeared in the Sixth Amendment. See *id.* at 692-93.

46. *Id.* at 713, 760-66.

47. *Id.* at 764.

48. The persuasiveness of this argument depends on the probability that blowback would occur and that evidence of it would remain. See generally Douglas Walton, "Nonfallacious Arguments from Ignorance," 29 *Am. Phil. Q.* 381 (1992).

49. See Wright & Graham, *supra* note 37, § 6347, at 766-76 (summarizing the response to the proposed amendments related to confrontation issues, not noting any opposition to the use of the "confront" phrase).

50. *Id.* § 6345, at 521-22.

51. *Id.* § 6346, at 601, 612.

52. 1 John Adams, *A Defence of the Constitutions of Government of the United States of America* 375 (London, C. Dilly & John Stockdale 1787).

53. See also Murl A. Larkin, "The Right of Confrontation: What Next?," 1 *Tex. Tech L. Rev.* 67, 76-77 (1969) (asserting that George Mason, who drafted the Virginia Declaration of Rights to include a right to "confront," "doubtlessly meant to require the meeting of witnesses face to face").

54. Wright & Graham, *supra* note 37, § 6347, at 686-87 (emphasis added). "Brutus" called this right a "necess[ity]." *Id.*

55. See *supra* notes 40-41.

56. 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law — Substance and Procedure* § 1.1(b) (2012).

57. Larkin, *supra* note 53, at 73.

58. *Anthony v. State*, 19 Tenn. (Meigs) 265, 278 (1838); *State v. Atkins*, 1 Tenn. (1 Overt.) 229, 229 (1807) (per curiam), overruled on other grounds by *Kendrick v. State*, 29 Tenn. (10 Hum.) 479, 485 (1850).

59. See Robert Kry, "Confrontation Under the Marian Statutes: A Response to Professor Davies," 72 *Brook. L. Rev.* 493, 552-53 (2007).

60. Some Tennessee rights are keyed to North Carolina law as it stood in 1796, see *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992), potentially being a source of distinction. I am aware of no such distinction here. It should also be noted there is dispute about the degree to which the confrontation right was English or uniquely American. Compare John G. Douglass, "Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay," 67 *Geo. Wash. L. Rev.* 191, 235-36 (1999), with Randolph N. Jonakait, "The Origins of the Confrontation Clause: An Alternative History," 27 *Rutgers L.J.* 77, 81 (1995).

61. Justice Scalia's scathing, four-Justice dissent did argue that to "confront" meant meeting "face to face," but based primarily on 20th-century precedent. See *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

62. See *State v. Vineyard*, 958 S.W.2d 730, 734 (Tenn. 1997) (noting that a textual difference is a basis to disagree with federal interpretations of similar federal constitutional provisions).

63. *Craig*, 497 U.S. at 845-47.

64. *State v. Henley*, 41 S.W. 352, 360 (Tenn. 1897). Justice Scalia also made this argument, vindicated in *Crawford*. See 30 Daniel D. Blinka, *Federal Practice & Procedure* § 6386 (Westlaw, Oct. 2020 Update).

65. See text accompanying *supra* note 50.

66. *Rex v. Vipont* (1761) 97 Eng. Rep. 767, 767-69. *Vipont* was reported in 1766 in 2 James Burrow, *Reports of Cases Adjudged in the Court of the King's Bench* 1163 (London, J. Worrall & B. Tovey 1766), a volume which Adams acquired at some point. See *Catalogue of the John Adams Library in the Public Library of the City of Boston* 41 (Lindsay Swift ed., 1917).

67. See 3 Joseph Story, *Commentaries on the Constitution of the United States* 662 (Boston, Hilliard, Gray & Co. 1833) (explaining the Sixth Amendment requires witnesses to give testimony "(at least in capital cases) in the presence of the accused"); Zephaniah Swift, *A Digest of the Law of Evidence in Civil and Criminal Cases* 125 (Hartford, Oliver D. Cooke 1810) ("In criminal cases, it is a very important principle, that no evidence shall be received against a prisoner but in his presence."); 4 William Hawkins, *A Treatise of the Pleas of the Crown* 418 (Thomas Leach ed., London, G.G., J. Robinson & J. Butterworth 7th ed. 1795) ("It is a settled rule, that in cases of life no evidence is to be given against a prisoner but in his presence."); William Boscawen, *A Treatise on Convictions on Penal Statutes* 62 (London, E. & R. Brooke 1792) ("[T]hat the evidence was not given in his presence ... has, in many cases, been held fatal."); Geoffrey Gilbert, *The Law of Evidence* 69 (Phila., Joseph Crukshank 5th ed. 1788) ("On an Appeal of Murder ... it is necessary to have his Accusers Face to Face."); 1 Richard Burn & John Burn, *The Justice of the Peace and Parish Officer* 415 (London, A. Strahan & W. Woodfall for T. Cadell 16th ed. 1788) ("[T]he evidence ... must be given in presence of the defendant"); see also 3 William Blackstone, *Commentaries on the Laws of England* 373-74 (Oxford, Clarendon Press 1768) (noting that the judges' "presence" will inspire witnesses with "respect and awe"); Matthew Hale, *The History of the Common Law* 286, 290-91 (Charles Runnington ed., London, W. Strahan & M. Woodfall for T. Cadell 4th ed. 1779) (noting the "method and manner" of a "trial by a jury," such as the "open course of evidence to the jury in the presence of the judge, jury, parties, and

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Taking Client Confidences on the Road



Someday, we might get to travel again. If so, most lawyers will still be wed to our electronic devices.

A lawsuit recently filed by an immigration lawyer and covered in the *ABA Journal* made me wonder whether it is possible to travel internationally while fulfilling our ethical responsibilities to clients to preserve confidential information without falling under suspicion of obstruction of justice.

Attorney Adam Malik has sued the U.S. Department of Homeland Security after its agents detained him and seized his iPhone at the border.¹ He alleges that an agent also told him that he was chosen “at random” for heightened screening. If that is true, it seems highly coincidental given that Mr. Malik has active cases against the agency (and was himself a former Department of Homeland Security agent). The lawsuit alleges that agents tried to ask him questions about specific clients. The agency stated that it intended to break the password and subject his phone to enhanced forensic inspection.

Regardless of how Mr. Malik’s case comes out, it reminds us that crossing U.S. borders is not simple for lawyers.

THE GOVERNMENT MAY EXAMINE AND COPY ELECTRONICS AT THE BORDER

Mr. Malik’s case presents a dramatic example, but there is no question that it is the position of the United States government that federal agents may examine electronic devices of anyone crossing the border, and they may do so without a warrant and without having to show any objective reason for their suspicion.

U.S. Customs and Border Patrol (CBP) has a Directive that distinguishes between basic and advanced searches. A basic search involves the agent examining the contents of the phone itself. An advanced search involves extraction of the contents for forensic examination. An advanced examination requires “reasonable suspicion” or a “national security concern.”²

According to the Department of Homeland Security’s “Privacy Impact Assessment” for its digital forensics program, it may “extract or later identify and retain” information from an electronic device including:

- Contacts
- Call Logs/Details
- IP Addresses used by the device
- Calendar Events
- GPS Locations used by the device
- Emails
- Social Media Information
- Cell Site Information
- Phone Numbers
- Videos and Pictures
- Account Information (User Names and Aliases)
- Text/chat messages
- Financial Accounts and Transactions
- Location History
- Browser bookmarks
- Notes
- Network Information
- Tasks List.³

If you have ever seen a cell phone extraction in discovery, you know that forensic software can create a timeline using the above information that sets out almost everything the user did by correlating texts, email, calls, location, social media (and don't forget other smart devices now collect health information)

The purpose of this column is not to debate whether that authority should exist. As a practical matter, the authority does exist, and those seizures are carried out thousands of times per year. There is, however, a circuit split regarding whether the more invasive forensic searches can be done without suspicion.⁴

'PRIVILEGE REVIEW'

Apparently in response to an American Bar Association request in 2017, the search directives for agencies within the Department of Homeland Security have been updated to include what purports

to be a privilege review process.⁵ But that review puts the burden squarely on the attorney to identify privileged material. The CBP policy provides that when a subject of the seizure objects on the ground of privilege, "[t]he Officer shall seek clarification, if practicable in writing, from the individual asserting this privilege as to specific files, file types, folders, categories of files, attorney or client names, email addresses, phone numbers, or other particulars that may assist CBP in identifying privileged information."⁶ Would you be able to identify in writing the files on your phone or your laptop that are arguably privileged? I don't think so. The policy also does not acknowledge that lawyers have a duty to preserve confidential information far beyond what the attorney-client privilege covers.

The policy provides that claims of privilege will be handled through CBP/ICE counsel and U.S. Attorney's offices using a "Filter Team" approach. In other words, the government will examine the allegedly privileged information to determine whether it should be protected. At least one United States Court of Appeals has pointed out serious issues with a "filter team" approach.⁷

TENNESSEE RULES OF PROFESSIONAL CONDUCT

Tennessee lawyers have a duty to use reasonable care to assure that client confidentiality is protected and client property is safeguarded.⁸ Additionally, a lawyer has a duty to maintain reasonable technological competence.⁹ This would include an understanding of what confidential information is accessible on your electronic devices. An attorney with managerial authority must also see to it

that associates and employees protect confidences on their electronic devices.¹⁰

ARE THERE BEST PRACTICES FOR LAWYERS CROSSING THE BORDER?

There has been a good deal written about what lawyers should do to protect client confidences when crossing the border.¹¹ So what is the best way to fulfil your duty? One way to handle the issue is just to cross the border and object if the agents seize your phone. The New York City Bar has suggested that this approach satisfies an attorney's ethical obligations as long as the attorney makes reasonable efforts to assert the privilege upon being requested to turn over the device.¹²

While I am sure that no one would be disciplined by the Tennessee Board of Professional Responsibility after taking this approach, given the difficulties I see in effectively asserting the privilege, the fact the policy only applies to privileged information and not all confidences, and considering the dangers of "filter team" review, I'm not sure that is enough. I do like the New York City Bar's suggestion of carrying a copy of the Directive with you in order to point to the policy on privilege.

Most of the articles suggest first to not take unnecessary devices. But even if you leave your laptop at home, it isn't realistic for most of us to travel without a smart phone. An ABA column suggests the use of a "burner phone." Would that solve the problem, though, since attorneys are probably going to access client information before coming back across the border?

COULD SAFEGUARDING CONFIDENCES BE INTERPRETED AS ILLEGAL?

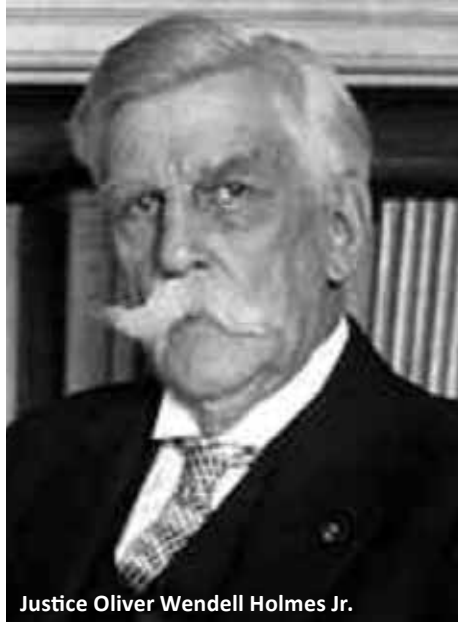
The Directive does not allow agents to use the devices to access material stored in the cloud. Many of the articles and the New York City Bar opinion suggest

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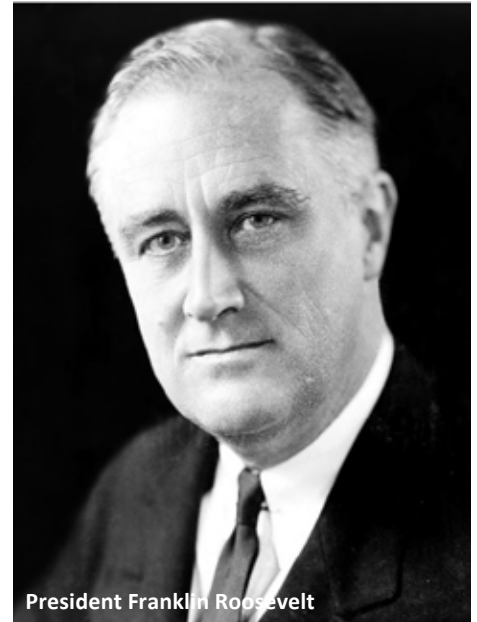
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Black Monday and the Court-Packing Plan



Justice Oliver Wendell Holmes Jr.



President Franklin Roosevelt

With the Supreme Court's decision of *Allgeyer v. La.*¹ (1897), a majority of the justices finally adopted the constitutional doctrine of "substantive due process." This pro-property, pro-business doctrine, long advocated by Justice Stephen Field, viewed the due process clause of the Fourteenth Amendment as having a dual nature: procedural and substantive.

Under the clause's newly recognized substantive side, there are certain things government cannot do regardless of the procedure followed. In other words, the due process clause's words "life, liberty or property" contain vested rights not enumerated anywhere else in the Constitution. This included most notably the right of "liberty of contract."

Accordingly, the court proceeded to strike down state laws regulating economic activity as violating the right of corporations and even employees to enter into contracts. (But this is often exaggerated, for court alignment would shift and sometimes such laws were upheld.) The doctrine was extended to federal laws under the due process clause of the Fifth Amendment in *Adair v. U.S.*² (1908).

A critic of this new approach was

Justice Oliver Wendell Holmes Jr. He charged that the court's activist majority was simply reading into the Constitution popular notions of social Darwinism's "survival of the fittest" and fueled by a fear of socialism.³ He said in *Lochner v. N.Y.* (1905):⁴ "A constitution is not intended to embody a particular economic theory."⁵

Although Justice Holmes often personally disagreed with state and local measures regulating economic activity, such as wage, hours and safety laws in the workplace, his judicial restraint compelled him to oppose second-guessing the will of the people as expressed through their representatives. Holmes wrote: "[I]f my fellow citizens want to go to Hell I will help them. It's my job."⁶

BLACK MONDAY

Holmes left the court in January of 1932, at the age of 90, with substantive due process well entrenched despite his warnings. The same year, Franklin Roosevelt was sent to the White House to combat the Great Depression, and this he energetically did under the banner of the "New Deal." Although much of the endeavor was trial and error, it marked a titanic shift in power to the national

government and to the executive branch in particular.

Yet the Supreme Court remained a citadel of conservatism and still committed to substantive due process. Although the court at first sent mixed signals about the New Deal, a judicial thunderbolt struck on May 27, 1935, a date to be known as “Black Monday.”

An ultra-conservative block of the court, known as the “Four Horsemen,” which included Justices Willis Van Devanter, James McReynolds, Pierce Butler and George Sutherland, were united by devotion to substantive due process, but they were a minority unless they could bring along at least either one of the less doctrinaire conservatives, Justice Owen Roberts or Chief Justice Charles Evans Hughes, known as the “roving justices.”⁷ This they managed to do and then some.

In one day, the Supreme Court struck down three central features of the New Deal. The most important decision was *Schechter v. U.S.* (1935)⁸ in which the court unanimously declared the National Industrial Recovery Act (NIRA) unconstitutional. This act permitted the president to regulate industry in an attempt to raise prices after severe deflation and stimulate economic revival. A devastated Roosevelt responded that the court had a “horse-and-buggy” definition of interstate commerce.⁹

The following year, in *U.S. v. Butler* (1936),¹⁰ an opinion written by Justice Roberts, the court struck down the Agricultural Adjustment Act (AAA), another key part of the New Deal, which paid subsidies to farmers to remove land from production, thereby increasing prices. The court said it was a state issue and



violated the 10th Amendment. Other anti-New Deal decisions followed. The court had never struck down so many laws in so short a time. FDR feared “the nine old men” would next strike down the Social Security and National Labor Relations Acts.

THE COURT-PACKING PLAN

Roosevelt determined to act. He first pondered amending the Constitution to require a two-thirds vote of the justices to find a federal law unconstitutional, but that would be too difficult and slow. He settled upon what would be called by its detractors “the court-packing plan.” Under the pretense of wanting to help an aging and overworked court, he proposed a bold bill: Whenever a federal judge or Supreme Court justice with 10 years of service or more did not retire within six months of reaching the age of 70, the president could appoint an additional judge or justice to the applicable court.

New appointees would be limited to

six on the Supreme Court and 44 for all federal courts combined. Because there were only three justices below 70, Roosevelt could name as many as six new justices. That would bring the court to 15. Congress had altered the size of the court in the past, but never to such a degree.

The proposal inaugurated “the fiercest battle in American History between two branches of our government over a third.”¹¹ The debate over the plan raged in Congress and across the nation. Ten million letters poured in to Congress.¹²

In a radio address to the nation, Roosevelt called the court “a super legislature” and urged listeners to “save the Constitution from the Court and the Court from itself.”¹³ Considering the president’s political power, his powers of persuasion and his party’s dominance in Congress, the court and its supporters had good reason for concern. Yet the justices, because of tradition and decorum, remained silent.

At the suggestion of Justice Louis Brandeis, Senator Burton Wheeler asked the magisterial Chief Justice Hughes — a man respected across the political spectrum not only for his service as a justice but also for his years as governor of New York and secretary of state — to

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Chief Justice Hughes

prepare a letter to the Senate Judiciary Committee. (Future Justice Robert H. Jackson said Hughes “looks like God and talks like God.”¹⁴) Senator Wheeler dramatically read Hughes’s letter to the committee. He later said, “You could have heard a comma drop in the Caucus Room as I read the letter aloud.”¹⁵

Point by point, Hughes refuted FDR’s arguments. In detail, he explained that the court was not backlogged and how additional justices would only serve to make the court less efficient. Wheeler said, “The letter had a sensational effect.”¹⁶ The debate changed from the court’s obstructionism to judicial independence. Vice President Garner told the president: “We’re licked.”⁷

The Senate Judiciary Committee report stated:

We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle. . . . It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights. . . . Its ultimate operation would be to make this government one of men rather than one of law, and its

practical operation would be to make the Constitution what the executive or legislative branches of the government choose to say it is — an interpretation to be changed with each change of administration. It is a measure, which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.¹⁸

The bill was killed by a 70 to 20 vote in the Senate.¹⁹ Justice Sandra Day O’Connor later observed that “the Court survived one of the greatest crises in its history.”²⁰

THE SWITCH IN TIME THAT SAVED NINE

Even with the victory, the New Deal was safe. At Chief Justice Hughes’s urging,²¹ Justice Roberts switched to approving government intervention into the economy in *West Coast Hotel Co. v. Parrish* (1937).²² Although the *Parrish* decision was decided in conference before the court-packing plan was announced, it was called “the switch in time that saved nine.”²³ And a real, enduring shift in the court took place. Some believe criticism of the court and Roosevelt’s landslide re-election in 1936 may have had an impact.

In any event, Hughes would no longer roam between jurisprudential camps. He firmly adopted a broad interpretation of congressional power over interstate commerce, moved away from substantive due process, which he had always seen as embodying a qualified or limited right of contract,²⁴ and indicated that greater deference should be accorded legislation. Furthermore, FDR got to swiftly remake the court another way because of two deaths and six retirements. By 1941, the last of the Four Horsemen, a bitter and isolated James McReynolds of Tennessee, was gone.

Also gone was substantive due process concerning economic and contract rights. Henceforth, the Supreme Court

rarely limited Congress’s commerce regulating power. But that did not mean the justices had nothing to do. In famous footnote four in *U.S. v. Carolene Products Co.* (1938),²⁵ Justice Harlan Fiske Stone quietly announced the court’s new agenda. Emphasis would now be placed on personal liberty or rights instead of those of property. This new agenda would reach its height during the Warren Court to come. III

NOTES

1. 165 U.S. 578.
2. 208 U.S. 161.
3. See Oliver Wendell Holmes Jr., “Law and the Court” (speech to Harvard Law School Assoc. of N.Y.), 15 Feb. 1913, in *Collected Legal Papers* 291, 295 (1920).
4. 198 U.S. 45.
5. *Id.* at 75.
6. Oliver Wendell Holmes Jr., Letter to Harold J. Laski, 4 Mar. 1920, in 1 *Holmes-Laski Letters* 249 (Mark DeWolfe Howe ed. 1953).
7. Mary Ann Harrell, *Equal Justice Under Law: The Supreme Court in American Life* 80 (1975).
8. 295 U.S. 495.
9. Harrell at 81.
10. 297 U.S. 1.
11. Burton K. Wheeler and Paul F. Healy, *Yankee from the West* 339 (1962).
12. Sandra Day O’Connor, *The Majesty of the Law* 127 (2003).
13. Harrell at 92.
14. William M. Wiecek, *The History of the Supreme Court of the United States* 60 (2006).
15. Harrell at 129.
16. Wheeler at 333.
17. *Id.*
18. United States Senate Judiciary Committee Report, June 7, 1837.
19. Wheeler at 339.
20. O’Connor at 130.
21. Bernard Schwartz, *A Book of Legal Lists* 16 (1997).
22. 300 U.S. 379.
23. David M. O’Brien, *Storm Center* 58 (2008).
24. Charles Evans Hughes, *The Supreme Court of the United States* 204-5 (1927); Kenneth Bernard Umbreit, *Our Eleven Chief Justices* 487 (1938).
25. 304 U.S. 144.

on personal relationships given by an individual “under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee”; certain discounts and similar benefits; awards, honorary degrees and established programs of recognition; and attendance at certain widely attended gatherings, or “WAGs” and events where attendance at all or an appropriate part of an event must be in the interest of the attending employee’s agency because it will further agency programs and operations. A gathering meets the WAG definition of “widely attended” if a large number of people with mutual interests are expected to attend, and if the event is open to members from throughout a given industry or profession.²⁷

GIFTS BETWEEN FEDERAL EMPLOYEES

Not only are gifts from outside sources a regulated area, but other rules also apply to gifts between federal employees. These rules generally prohibit gifts being made to federal employees’ official superiors and to their supervisors, as well as those from employees receiving less pay, with some exceptions. One notable exception exists for gifts provided at *traditional gift-giving occasions*. On such occasions, gifts along the following lines may be ethically made and accepted: items, other than cash, valued at \$10 or less; items like food and refreshments that can be shared in the office; and personal hospitality provided at a residence, of a type and value customarily provided by an employee to one’s personal friends.

Subordinate employees can also provide gifts to superiors or employees making more pay when special infrequent occasions occur, such as a marriage, illness, the birth of a child, or an occasion that terminates the superior/subordinate relationship (think: retirement) — but not recurring events, like birthdays or holidays such as Christmas. In such cases, an employee may solicit purely voluntary

contributions of nominal amounts from fellow employees, but **not** from one’s subordinates.²⁷ III

IN THE CONCLUDING PART OF THIS TWO-PART SERIES, to be published in the next issue of the *Tennessee Bar Journal*, we will review the nuances of post-employment rules binding federal employees and issues arising when federal employees seek a new job; the ethics of the appropriate use of government resources; and the essence of political speech and political activities for federal employees, centering on the Hatch Act.

NOTES

1. See, e.g., Jacqueline Thomsen, “DOJ Files Federal Lawsuit Against Omarosa, Alleging She Violated Ethics Law,” *The Hill* (June 25, 2019) available at <https://thehill.com/regulation/court-battles/450319-doj-files-federal-lawsuit-against-omarosa-alleging-she-violated> (last visited Jan. 16, 2021); Coral Davenport, “Interior Dept. Opens Ethics Investigation of Its New Chief, David Bernhardt,” *N.Y. Times* (April 15, 2019) available at <https://www.nytimes.com/2019/04/15/climate/bernhardt-interior-department-ethics-investigation.html> (last visited Jan. 16, 2021); Alan Rappoport, “US OGE Declines to Certify Mnuchin’s Financial Disclosure,” *N.Y. Times* (April 4, 2019) available at <https://www.nytimes.com/2019/04/04/us/politics/steven-mnuchin-ethics-office.html> (last visited Jan. 16, 2021); Brady Dennis & Juliet Eilperin, “Embattled EPA Chief Scott Pruitt Resigns,” *Washington Post* (July 5, 2018) available at https://www.washingtonpost.com/news/energy-environment/wp/2018/07/05/embattled-epa-chief-scott-pruitt-resigns/?utm_term=.e3857f99cab0 (last visited Jan. 16, 2021); Joe Neel, “CDC Director Resigns Because of ‘Complex’ Financial Entanglements,” *Nat’l Pub. Radio* (Jan. 31, 2018) available at <https://www.npr.org/sections/health-shots/2018/01/31/582099166/cdc-director-resigns-due-to-complex-financial-entanglements> (last visited Jan. 16, 2021); Walter Shaub, “Kellyanne Conway Violated the Hatch Act. Will She Be Charged?,” *Washington Post* (Nov. 27, 2017) available at http://wapo.st/2hWA3Re?tid=ss_mail&utm_term=.8d50f6b5d8c3 (last visited Jan. 16, 2021).

2. Pub. L. 95–521, titles I–V, Oct. 26, 1978, 92 Stat. 1824–1867, as amended, codified at 5 U.S.C. app. § 101 et seq. Subsequent legislation pri-

marily intended to combat congressional insider trading, but also containing several executive branch ethics requirements, was the Stop Trading on Congressional Knowledge (STOCK) Act of 2012, Pub. L. 112–105, S. 2038, 126 Stat. 291, enacted on April 4, 2012.

3. See generally OGE’s website at www.oge.gov (last visited Jan. 16, 2021).

4. See 5 C.F.R. § 2600.101(a); 5 C.F.R. Part 2638.

5. 5 C.F.R. § 2635.101(a).

6. 5 C.F.R. § 2635.502(a).

7. *Id.* at § 2635.502(b)(1).

8. Note that some commentators have criticized the broad subjectiveness and relative “squishiness” of this test. See, e.g., Peter W. Morgan & Glenn H. Reynolds, *The Appearance of Impropriety: How the Ethics Wars Have Undermined American Government, Business, and Society* (New York: Free Press, 1997), at 3, 13, & 81-89.

9. See 18 U.S.C. § 208 & 5 C.F.R. § 2640.103 (OGE’s interpretative regulations as to 18 U.S.C. § 208).

10. 5 C.F.R. § 2640.101.

11. 5 C.F.R. § 2640.103(a)(1).

12. 5 C.F.R. § 2640.103(a)(2).

13. *Id.*

14. *Id.*

15. 5 C.F.R. § 2640.104(b).

16. 5 C.F.R. § 2640.104(a)(3).

17. 5 C.F.R. § 2640.104(b).

18. 5 C.F.R. § 2640.104(a)(3).

19. See, e.g., OGE Form 450, available at <https://www.oge.gov/Web/oge.nsf/Resources/OGE+Form+450> (last visited Jan. 16, 2021) (for confidential financial disclosure reports), and OGE Form 278e, available at [https://www2.oge.gov/web/oge.nsf/Resources/OGE+Form+278e+\(July+2020+Excel+version\)](https://www2.oge.gov/web/oge.nsf/Resources/OGE+Form+278e+(July+2020+Excel+version)) (last visited Jan. 16, 2021) (for public financial disclosure reports).

20. See, e.g., 5 C.F.R. § 7901.101 et seq. (supplemental standards for outside employment for Tennessee Valley Authority’s employees, for example).

21. 5 C.F.R. § 2635.201(b)(1).

22. *Id.* § 2635.201(b)(2).

23. *Id.* § 2635.203(d).

24. *Id.* § 2635.202.

25. *Id.* § 2635.203(b).

26. *Id.* § 2635.204(a).

27. *Id.* § 2635.204(b)-(g).

28. See 5 C.F.R. §§ 2635.301 et seq.

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council,” includes the “personal appearance” of witnesses). I have modernized outmoded spellings in some texts.

68. *Craig*, 497 U.S. at 847-50. Justice Scalia argued the term “witnesses against him” means witnesses that appear at trial, so prior statements are only regulated to ensure the core confrontation right is not “subvert[ed].” *Id.* at 865 (Scalia, J., dissenting). His interpretation of “witnesses against him” remains a subject of dispute. *See, e.g.*, Jeffrey Bellin, “The Incredible Shrinking Confrontation Clause,” 92 *B.U. L. Rev.* 1865, 1881-86 (2012). For purposes of this article, the more important point is that even academics critical of Justice Scalia agree that as for witnesses at trial, the founders contemplated in-person testimony. *See* David L. Noll, “Constitutional Evasion and the Confrontation Puzzle,” 56 *B.C. L. Rev.* 1899, 1931 (2015); Thomas Y. Davies, “Revisiting the Fictional Originalism in *Crawford’s* ‘Cross-Examination Rule’: A Reply to Mr. Kry,” 72 *Brook. L. Rev.* 557, 558 (2007).

69. *Id.* at 64-65.

70. *Id.* at 277-78.

71. *State v. Atkins*, 1 Tenn. (1 Overt.) 229, 229

(1807) (per curiam), tuned Tennessee’s confrontation right to what was “agreeabl[e] to Magna Charta,” probably meaning “Magna Charta” as a “generic term for all English rules of supposed constitutional significance,” *see Wright & Graham, supra* note 37, § 6345, at 466. *Atkins* was later overruled largely for inaccurately understanding the law at the founding. *See Kendrick v. State*, 29 Tenn. (10 Hum.) 479, 485 (1850).

72. *See, e.g., State ex rel. Timothy v. Howse*, 183 S.W. 510, 514 (Tenn. 1916).

73. The admissibility of dying declarations is an easy case; how to treat certain other prior statements is admittedly more complex. *See Bellin, supra* note 68, at 1888-93.

74. *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000).

75. *Kendrick*, 29 Tenn. (10 Hum.) at 488.

76. Penny J. White, “Rescuing the Confrontation Clause,” 54 *S.C. L. Rev.* 537, 620 (2003). Make no mistake, “[t]here are important reasons why live, in-person testimony is more desirable than remote testimony.” *Kelly v. Kelly*, 445 S.W.3d 685, 694 (Tenn. 2014).



FOCUS EVICTIONS CONTINUED FROM PAGE 27 >

soon. The partners in the Eviction Settlement Program are working closely with the City and County to incorporate a robust legal volunteer element. (Read more about this project in the profile of Law Student Public Service Award honoree Gerald Bradner, in the story beginning on page 24.)

In Nashville, the Davidson County General Sessions Court has transferred nearly 2,000 pending eviction cases to a newly established housing court. The goal of the new court, to be overseen by Judge Rachel Bell in partnership with the Metropolitan Action Commission and Davidson County Circuit Court Clerk Richard Rooker, is to use nearly \$21 million in federal rental assistance to pay landlords on behalf of tenants at risk of eviction. The Nashville Conflict Resolution Center is providing additional mediation work as part of the project. Supporters hope the effort will keep evictions off tenants’ records, a mark that can make it more difficult to find future housing.

Critical assistance has also been

provided by Bass, Berry & Sims attorney Marc Tahiry, who was appointed to serve as a full-time law clerk in the General Sessions court last fall. Mr. Tahiry’s service is through his firm’s Pro Bono Fellow program, with no cost to the Court. The role was designed to provide the court with legal and administrative counsel to help ensure cases are fully and fairly heard, in compliance with state and federal laws. He also provides assistance to parties in eviction proceedings in attempting to reach settlements that keep residents in their homes, as well as provide litigants information about resources for rental payment assistance.

Read more at www.tba.org/ TennesseeBar Journal about the eviction moratorium, the LSC eviction study, and the new programs housing advocates and legal service organizations are pursuing to protect those at risk of eviction on the TBA website. ■■■

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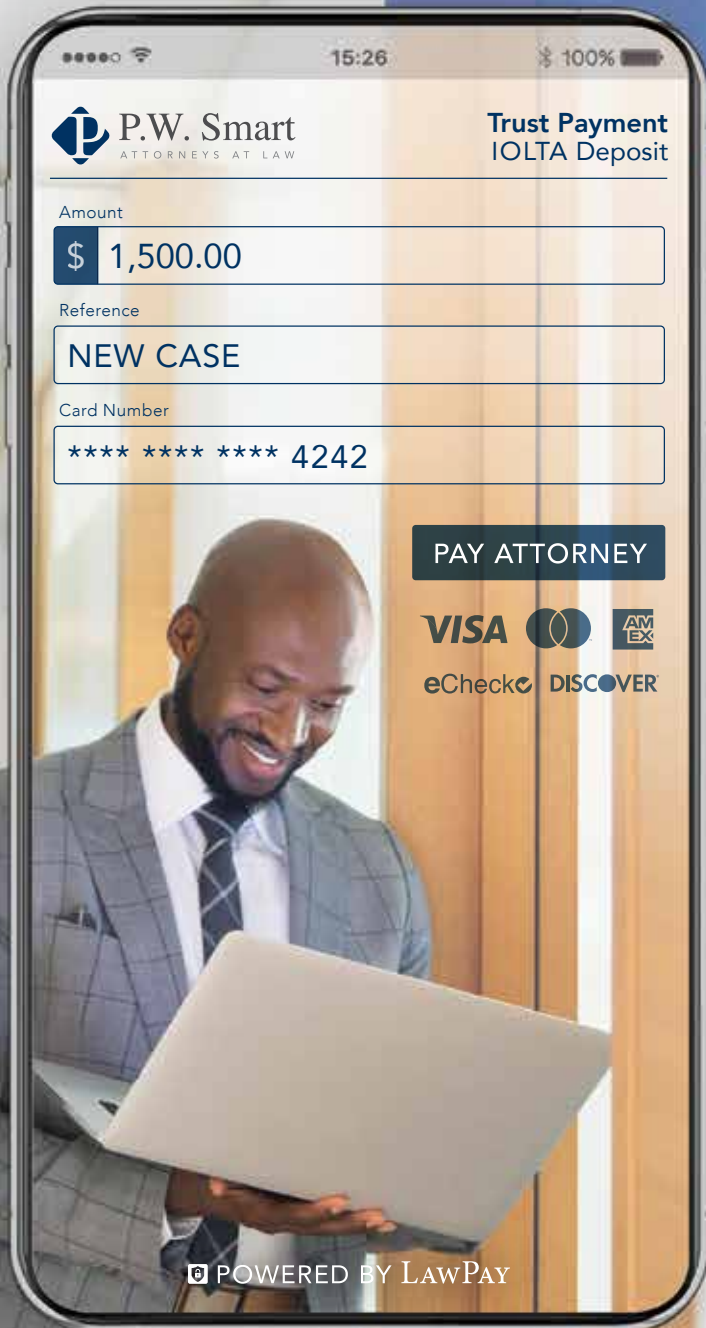
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deleting certain files. One approach would be to store all your files in the cloud and reformat your phone before crossing the border. That might fulfil your ethical duties.¹³

But would you be obstructing justice? Title 18 U.S.C. Section 1519 is sometimes referred to as anticipatory obstruction of justice because it has been interpreted to not require there to be an investigation underway. The statute criminalizes destroying, concealing, covering up, etc., any record or document with the intent to impede, obstruct or influence an investigation or proper administration of *any matter within the jurisdiction of any agency*. There doesn't have to be an actual investigation — destroying the documents only has to be “in contemplation” of such a matter.¹⁴ Could wiping your phone in contemplation of a border agent seizing it potentially be interpreted to violate the statute? While my personal view is that attempting to fulfil your ethical obligation should preclude a finding of criminal intent, people whose opinions count more than mine might well disagree.

CONCLUSION

This is the part of the column where I usually claim to know the answer to the question I've raised. I'm sorry but I'm not sure about this one. But if you are going to travel across the border, please have a plan in place for what to carry and how to best preserve client confidences in the event your electronics are examined or seized. If you are a member of a firm, make sure all your employees who have access to files do the same. ■■■

NOTES

1. *Malik v. U.S. Dept. of Homeland Security*, et al., Case 4:21-cv-00088-P (NDTX, filed 1/25/2021); Weiss, “Immigration lawyer sues over seizure of his cellphone at airport,” <https://www.abajournal.com/news/article/texas-immigration-lawyer-sues-over-seizure-of-hiscellphone-at-airport>.

2. “Border Searches of Electronic Devices,” CBP Directive No. 3340-049A, date Jan. 4,

2018, review date January 2021, available at <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf>.

3. “Privacy Impact Assessment for the U.S. Border Patrol Digital Forensics Programs,” Department of Homeland Security Reference No. DHS/CBP/PIA-053(a), dated July 30, 2020, available at <https://www.dhs.gov/publication/border-searches-electronic-devices>.

4. Gina R. Bohannon, “Cell Phones and the Border Search Exception: Circuits Split Over the Line Between Sovereignty and Privacy,” 78 *Md. L. Rev.* 563, 578 (2019).

5. Letter of Linda Klein, ABA President, to General John F. Kelly, Secretary of Homeland Security, May 5, 2017, available at [https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclientprivisue\(bordersearchesofattorneydevices,abaletter-to-dhs,finalversion,may5,2017\).pdf](https://www.americanbar.org/content/dam/aba/images/government_affairs_office/attyclientprivisue(bordersearchesofattorneydevices,abaletter-to-dhs,finalversion,may5,2017).pdf); Weiss, “Traveling out of the country: Lawyers should consider using ‘burner’ devices,” https://www.abajournal.com/news/article/traveling_out_of_the_country_lawyers_should_consider_using_burner_devices.

6. CBP Directive, section 5.2.1.1

7. *United States v. Under Seal* (In re Search Warrant Issued June 13, 2019), 942 F.3d 159 (4th Cir. 2019).

8. *See*, Tenn. Sup. Ct. R. 8, RPC 1.6(a) and 1.9(c).

9. *See* Tennessee Board of Professional Responsibility, Formal Ethics Opinion 2015-F-159, “Storing Client Information in the Cloud.”

10. Tenn. Sup. Ct. R. 8, RPC 5.1, 5.3.

11. E.g., Keith Fisher, “U.S. Border Searches of Electronic Devices: Recent Developments and Lawyers’ Ethical Responsibilities,” *Business Law Today*, March 13, 2018, <https://businesslawtoday.org/2018/03/u-s-border-searches-of-electronic-devices-recentdevelopments-and-lawyers-ethical-responsibilities>; Keith Fisher, “Update on Border Searches of Electronic Devices,” *ABA Business Law Today*, March 26, 2020, <https://businesslawtoday.org/2020/03/update-border-searches-electronic-devices/>; Candace M. Groth, “Crossing the Border: Tips for Attorneys,” *Bench & Bar of Minnesota*, August 2, 2019, <https://www.mnbar.org/archive/msba-news/2019/08/02/crossing-the-border-tips-forattorneys>; Weiss, “Traveling out of the country: Lawyers should consider using ‘burner’ devices,” https://www.abajournal.com/news/article/traveling_out_of_the_country_lawyers_should_consider_using_burner_devices.

12. New York City Bar, Formal Ethics Opinion 2017-5, <https://www.nycbar.org/member-andcareer-services/committees/reports-listing/reports/detail/formal-opinion-2017-5-an-attorneyethical-duties-regarding-us-border-searches-of-electronic-devices-containing-clientsconfidential-information>.

13. This would depend on the degree of online security in the host country.

14. *United States v. Kernell*, 667 F.3d 746, 753 (6th Cir. 2012)(rejecting constitutional challenge).

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