Snakebit
Poisonous Serpents and Religious Expression

ALSO: When Can You File for Divorce in Tennessee?
Pregnancy and End-of-Life Care
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Announcement

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ON THE COVER
“Snake-handling” in religious services is against the law in Tennessee and 11 other states. How does this square with religious freedom of expression? Cover photo: iStock.
engage us in battle directly but instead tries to elude detection.

While we as lawyers are the ones fighting the battle, protecting the legal profession is only our secondary goal. We are fighting this battle primarily to protect the public. The war of which I speak is being fought against those engaging in the unauthorized practice of law (UPL). Unfortunately, it is one that I am not sure we are winning at present.

You need only open your email inbox, turn on the television, or use the Internet to realize that we are facing a new breed of UPL issues. Everywhere you look there are advertisements for forms to allow consumers to do such things as start a business, prepare a will or get a divorce, to name a few. While the selling of a legal form in and of itself has been determined not to constitute the practice of law, many form providers are no longer stopping there. They are working with consumers to complete or customize these forms. It is there that the fine line is easily crossed, and many of these advertisers are indeed engaging in the practice of law by providing services that call for the “professional judgment of a lawyer.” While this unlawful conduct certainly has the potential to be harmful to lawyers’ practices across our state, the ones who suffer the most financially are innocent consumers who believe that they have been provided with legal advice and guidance at a bargain rate, when they have been provided nothing more than a cookie cut form that is just as likely to cause harm as to assist them with their legal matter. After all, how many of us have met with members of our communities who used a form kit to prepare their “will” only to learn from us that the document is invalid because it was not properly completed and/or executed.

While we are waging war against those engaging in UPL on this new front, we also continue to face more traditional UPL issues as well. Some notary publics continue to prey on the Spanish-speaking members of our communities, holding themselves out as “notarios,” a term which in some Spanish-speaking countries is used to describe a person who is especially well-trained in the law. We also continue to see some paralegals set up shop and offer their services as if they were licensed attorneys.

In order to wage war more effectively against those engaging in UPL, we must know what to do when we observe or learn about UPL issues. Tenn. Code Ann. § 23-3-101, et. seq. defines the unauthorized practice of law and provides guidance as to how the issue may be redressed. Our courts have also weighed in and made clear that when determining whether particular conduct constitutes the practice of law, the inquiry is very fact-specific. So, how

Continued on page 4
should this knowledge inform the action that we take when we learn of activity that may constitute UPL?

First, you should gather all of the information that you possibly can about the situation. Try to obtain the following:

1) the name of, and contact information for, the person or business at issue;
2) the name of the person who was the specific contact for the consumer affected;
3) where the consumer heard about the services offered;
4) the questions the consumer was asked by the document preparer;
5) whether the document preparer was the one who determined what form the consumer should purchase;
6) whether the preparer customized the form(s) purchased in any way; and
7) whether the preparer made any statements about their legal knowledge or ability or made any statements that led the consumer to believe that they were providing legal services.

Once you have gathered this information the question becomes where do we turn to try to stop the UPL activity and assist the consumer who has been victimized?

Engaging in UPL is actually a crime, so your first call might be to your local District Attorney’s Office. On the civil front, any judge who observes a UPL issue or has one brought to his or her attention can immediately enjoin the party who is engaging in UPL. The impacted consumer may also bring an action against the offender for treble damages. In those actions, courts have the authority to grant an award of attorney fees and investigation and suit expenses, among other relief. This is in addition to the treble damages award.

**Murrell Worse Than James?**

Thank you for Russell Fowler’s interesting article about Milton Brown and John Murrell (“Milton Brown and the Trial of John Murrell,” March 2014 Tenn. Bar Journal). Murrell is apparently not as obscure as I supposed. Coincidentally, I just read a long account of John Murrell in Mark Twain’s Life on the Mississippi. Twain mentioned Murrell’s Tennessee connections, saying Murrell hid out at Island 37 near Memphis. Twain also described at length Murrell’s truly bad character, writing that, “[Jesse] James was a retail rascal; Murrell, wholesale.”

— Scott Peatross, Memphis

**Constructive Criticism**

I read your article published in the Tennessee Bar Journal about your experience in the A. A. Birch Courthouse (“My Day in Court,” by Suzanne Craig Robertson, March 2014). The Davidson County Sheriff’s Office is responsible and oversees the contract with G4S that provides security for the Courts. I want to thank you for an honest assessment of your experience and I am going to use this to improve the way our officers treat and interact with the public. Sometimes law enforcement becomes distant and unsympathetic and I want to try and ensure that our people treat the citizens of Davidson County and the guests at the Court as people.

— John L. Ford III, chief deputy, Davidson County Sheriff’s Office, Nashville

**LETTERS OF THE LAW**

**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 be typed and include the author’s name, address and phone number (for verification purposes). Please send your comments to 221 Fourth Ave. N., Suite 400, Nashville, TN 37219-2198; FAX (615) 297-8058; EMAIL: srrobertson@tnbar.org.
JASON LONG WILL BE TBA PRESIDENT IN 2016

Knoxville attorney Jason H. Long will be president of the Tennessee Bar Association in 2016-2017, according to election-qualifying results. No other candidate filed for the vice president position by the Feb. 15 deadline. After serving a year as vice president, Long will become president-elect in 2015-2016 before taking over the organization’s leadership in June 2016.

With more than 17 years of experience and more than a decade representing health care professionals in malpractice matters, Long recently joined Lowe Yeager & Brown in its established practice, representing and defending attorneys in disciplinary and malpractice matters. The firm’s new Knoxville offices are located at 2102 Riverview Tower, 900 S. Gay Street.

Long is a past president of the TBA Young Lawyers Division. He has extensive experience in complex litigation, including medical malpractice defense, corporate litigation, health care regulatory law and general plaintiff’s litigation. He earned his law degree at the University of Tennessee and his undergraduate degree from Emory University.

ELECTIONS
New Board Begins Work in June

Candidates who filed for the following Tennessee Bar Association positions will take office at the June annual meeting, as they did not draw opponents: Tasha Blakney, 2nd District governor; Donna Pierce, 4th District governor; Dan Berexa, 5th District governor; Michelle Sellers, 7th District governor; Lucian Pera, West Grand Division governor, Position 1; Brian Faughnan, West Grand Division governor, Position 2; Gary Shockley, Middle Grand Division governor, Position 1; and Andy Roskind, East Grand Division governor, Position 2.

Also winning without opposition are three TBA delegates to the ABA House of Delegates: Buck Lewis, Position 2; John Tarpley, Position 4; and Paul Campbell III, Position 5.

Results for the contested election for two TBA leadership posts were not complete at press time. For Middle Grand Division governor, Position 2, Nashville attorney Jim Cartiglia faces Franklin attorney David Veile. Knoxville attorney Sarah Sheppeard faces Chattanooga attorney David Mc-Dowell for the East Grand Division governor, Position 1 slot.

HONORS
Corporate Counsel Pro Bono Initiative

Attorneys from Caterpillar Financial Services Corp. in Nashville and the Knoxville office of Baker, Donelson, Bearman, Caldwell & Berkowitz were honored March 1 during the Eighth Annual Corporate Counsel Pro Bono Initiative Gala in Nashville. Baker Donelson was recognized for two projects undertaken in partnership with Legal Aid of East Tennessee: serving as a Pillar Law Firm, representing people seeking to obtain a conservatorship over a disabled adult and working to bring “Project H.E.L.P.” to the Knoxville Area Rescue Mission. CAT Financial was recognized for an ongoing partnership with Tennessee Justice for Our Neighbors (JFON), which offers immigration legal services, education and advocacy. In addition, the gala raised nearly $60,000 to support pro bono activities across the state.

COURTS
Amending Complaints Rule Clarified

In a unanimous opinion, Michael S. Becker et al. v. Ford Motor Company, the Tennessee Supreme Court has held that state law allows a plaintiff to add a defendant whose involvement was raised by the original defendant, even when the plaintiff was aware of the new defendant before the statute of limitations expired.

Freedom of the Press Buoyed

It has been 50 years since the Supreme Court of the United States’ decision in The New York Times v. Sullivan. This decision expanded first-amendment protection for the press, making it harder for celebrities, politi-
Sit, Stay, Comfort

The 19th Judicial District began using its first facility dog earlier this year. Orson, the two-year-old black lab/golden retriever mix, was bred and trained to serve those with special needs by Canine Companions for Independence (CCI). Assistant District Attorney Kimberly Lund was trained with Orson before bringing him home to Clarksville in November 2013. He has been present in the circuit courts of Montgomery County, the Child Advocacy Center and District Attorney’s Office since his arrival, bonding with child victims of physical and sexual abuse.

PRACTICE

Study the Numbers

Accounting, statistics and financial analysis skills are among the most important for equipping students to practice at a big law firm, a study from Harvard Law School says, according to the Wall Street Journal Law Blog. The school polled 124 lawyers at the 11 major firms that employ the most Harvard law grads and found that in addition to accounting, the attorneys advised students to take courses in corporate finance, negotiation, business strategy, corporations and securities regulation.

Meth Addicts Take Twice as Long to Help

The Davidson County Drug Court program serves about 200 current and recovering drug addicts, one in 10 of whom are because of methamphetamine. Led by Criminal Court Judge Seth Norman, the program has a success rate of more than 60 percent, the Tennessean reports. While alcohol, marijuana, cocaine and even heroin users typically take a little more than a year to complete the program, meth addicts take about 24 months, Norman said.

Youth Courts Grow

There are 16 Youth Courts in Tennessee — diversionary programs that allow non-violent, first-time offenders to have their cases heard by a jury of kids their own age. Denise Bentley, the TBA’s Youth Court coordinator, says fewer than 7 percent of respondents who participate in Tennessee youth courts re-offend within a year.

Find the links and more details for these stories at tba.org/journal_links
The Association for Women Attorneys (AWA) honored Linda Warren Seely (right) at its 34th annual banquet in January with the 25th AWA Marion Griffin-Frances Loring Award. In presenting it, Tennessee Supreme Court Justice Janice Holder called Seely “the fabric of pro bono in our community” and credited her for introducing the justice to pro bono. Seely is director of pro bono projects and Campaign for Equal Justice at Memphis Area Legal Services. Also at the banquet, scholarships were given to students at the University of Memphis Cecil C. Humphreys School of Law. Among them was TBA member Ariel Anthony, who received the Susan Clark Scholarship.

Nashville lawyer Julian L. Bibb has been elected to a one-year term as president of the Tennessee Board of Law Examiners. Bibb is a member at Stites & Harbison where he serves as chair of the Banking and Real Estate Service Group. He earned his law degree from Vanderbilt University School of Law in 1997.

Chattanooga lawyer Max Bahner received the Kiwanis Club of Chattanooga’s Distinguished Service Award for outstanding leadership at a ceremony in January. Bahner, who serves as senior counsel at the law firm of Chambliss, Bahner & Stophel, is a past president of the Tennessee and Chattanooga bar associations. He also served nearly 17 years in the ABA House of Delegates and for three years on the ABA Board of Governors.

He graduated from Vanderbilt University Law School in 2004.

Ogletree, Deakins, Nash, Smoak & Stewart PC announces that Keith Frazier, a shareholder in its Nashville office, has been elected to the firm’s board of directors. He has practiced law nearly 30 years, 17 of them with Ogletree Deakins.

Nashville lawyer Raanon Gal has joined the Atlanta-based law firm of Taylor English Duma. He will practice in the Employment, Labor & Immigration Group and assist employers facing discrimination, harassment and wrongful termination claims.

He graduated from the University of Mississippi School of Law in 2007.

Bibb

continued on page 8
Ryan J. Moore was appointed city attorney for the town of Morrison in December 2013. In practice since April 2012, Moore’s primary legal focus is in all types of family and business law, handling a variety of cases from divorce and child custody to real estate and construction issues, and litigating criminal defense cases.

Pepper & Brothers PLLC announces the addition of two associates to its Nashville-based practice, whose focuses will include business litigation and employment law. Jeremy A. Oliver received his law degree, cum laude, from the University of Tennessee College of Law in 2010. Mitchell P. Ronningen received his law degree from Vanderbilt in 2011.

Robert A. Peal has been named partner at Neal & Harwell PLC. Previously he served in the U.S. Marine Corps. He earned his law degree from Vanderbilt University in 2006 where he was Order of the Coif and associate editor of the Law Review. At the firm, he will concentrate on criminal defense and civil litigation. Megan N. Deardorff has been named associate at the firm. Her practice will focus on civil and criminal litigation. She earned her law degree at the University of Memphis Cecil C. Humphreys School of Law, where she was awarded the Dean’s Award for Academic Excellence.

Leitner, Williams, Dooley & Napolitan PLLC announces four attorneys who have been named members of the firm. Memphis attorney Steven N. Snyder earned his law degree from the University of Arkansas School of Law in 2006. His practice focuses on general liability and workers’ compensation. Memphis attorney Frank L. Day earned his law degree from the University of Memphis, cum laude, in 2006. He focuses on labor and employment law, products liability and general civil litigation. Nashville attorney J. Paul Brewer earned his law degree from the University of Memphis in 2006, magna cum laude. He practices in the areas of liability, transportation law, workers’ comp and civil litigation. Oxford, Miss., lawyer H. Case Embry earned his law degree from the University of Memphis in 2006, magna cum laude. His areas of practice include construction law, liability and insurance coverage and defense.

Capella Healthcare has promoted Neil W. Kunkel to executive vice president.
Baker Donelson’s Nashville office continues to grow with the addition of Matthew T. Harris, Richard L. Pensinger and Anne Marie Kempf, all joining as shareholders. Previously with Waller, they join Baker Donelson’s Real Estate Group. Shareholder Christopher M. Caputo has moved from the firm’s Memphis office to its Nashville office. He leads the firm’s Tennessee construction practice. Samuel L. Felker has joined the firm as a shareholder and member of the firm’s Product Liability and Mass Tort Group in the Nashville office. He was previously with Bass, Berry & Sims. Michaela D. Poizner was named associate in the firm’s Nashville office. She is a member of the Health Law Group.

Morgan & Akins PLLC has added Shea Brakefield as an associate. She is a 2004 graduate of the University of Alabama School of Law, with eight years’ experience in civil litigation.

Adrienne Anderson, a founding member of Anderson Busby PLLC, has been certified as a Rule 31 Listed General Civil Mediator by the Tennessee Supreme Court Alternative Dispute Resolution Commission.

Burr & Forman LLP announce that Joshua A. Ehrenfeld has joined the firm as Nashville-based counsel. Ehrenfeld will assist clients on domestic and international taxation matters and corporate and business transactions.

Bradford PARAGRAPHS

Nashville lawyer SAMUEL ARTHUR BUTTS III, 63, died Feb. 4. For 38 years Butts worked as an ERISA and employee benefits lawyer. Among his many accomplishments, he served as president and member of the executive committee for the Middle Tennessee Employee Benefits Counsel. He earned his law degree from The University of North Carolina at Chapel Hill in 1975. In lieu of flowers, the family suggests donations be given to the South Cheatham Public Library, c/o Janet Walker, 358 N. Main St., Kingston Springs 37082 or Alive Hospice at St. Thomas, 4220 Harding Rd., Wing 3-B, Nashville 37205.

Retired Wilson County lawyer JON SETZER, 74, died Feb. 10 when a package sent to his home exploded, killing him and injuring his wife Marion, who later died. He was a graduate of the Nashville School of Law. A memorial fund has been set up in their names at Nashville First Church of the Nazarene, 510 Woodland St., Nashville 37206.

The New Standard In Mediation

In the world of mediation, experience is vital. That’s why John R. Cannon, Jr., Michael G. Derrick, and R. Joseph Leibovich have established Memphis Mediation Group, LLC. All are Tennessee Rule 31 Listed General Civil Mediators with decades of combined state and federal litigation and mediation experience. With their deep backgrounds and continual proven success in mediation, John, Mike and Joe are setting the new standard for mediation in Memphis.

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Compiled by Linda Murphy and Stacey Shrader Joslin
YOU NEED TO KNOW

LICENSURE & DISCIPLINE

ADMINISTRATIVE SUSPENSIONS NOW ONLINE Notice of attorneys suspended for, and reinstated from, administrative violations — including failure to pay the Board of Professional Responsibility fee, file the IOLTA report, comply with continuing legal education requirements and pay the Tennessee professional privilege tax — is now available exclusively on the TBA website.


REINSTATED
The law license of Washington County lawyer Michael D. Kellum was reinstated Feb. 10 by the Tennessee Supreme Court. He was suspended May 25, 2012.

DISABILITY INACTIVE
By order of the Tennessee Supreme Court Feb. 13, the law license of Rutherford County lawyer William Walter Burton Jr. was transferred to disability inactive status. The law license of Greene County lawyer Russell Dale Mays was transferred to disability inactive status Feb. 25. Both Burton’s and Mays’s license transfers are pursuant to Section 27.3 of Supreme Court Rule 9. They cannot practice law while on disability inactive status, but may return to the practice of law after reinstatement by the court upon showing of clear and convincing evidence that the disability has been removed and each is fit to resume the practice of law.

DISCIPLINARY CENSURED
On Feb. 13, Sevier County lawyer Elizabeth Catherine Cox received a public censure. She was retained to file a post-trial motion for consideration after the client was dissatisfied with the outcome of her divorce. Cox failed to communicate with her about the status of the matter and later alleged to her client and the Board of Professional Responsibility that she had timely filed the motion but that the judge had denied the motion without a hearing. After an investigation, it was determined she never filed the motion. By these acts, She violated Rules of Professional Conduct 1.3 (diligence), 1.4 (communication), 8.1(a)(disciplinary matters) and 8.4(c) and (d) (misconduct). A public censure is a rebuke and warning, but does not affect the attorney’s ability to practice law. Cox was also temporarily suspended in another matter (see below).

Knox County lawyer Stephen Todd Hastey was publicly censured Feb. 4. After receiving a client’s settlement proceeds, he issued a check to the client’s medical provider, who then failed to deposit the check for 10 months, at which time the funds were not in the trust account. Hastey then paid the medical provider from his personal funds. In another matter, he paid a filing fee for a client with funds from the trust account. Hastey later determined that the client had not given him funds to pay the fee. In another matter, Hastey used trust account funds to pay four personal and business expenses. By these acts, he violated RPC 3.4(c) (fairness to opposing party and counsel), 5.5(a) (unauthorized practice of law) and 7.1 (communications concerning a lawyers’ services).

SUSPENDED
Roane County lawyer Spence Roberts Bruner was temporarily suspended from the practice of law Feb. 19 upon finding that he has failed to respond to the Board of Professional Responsibility regarding a complaint of misconduct. Section 4.3 of Supreme Court Rule 9 provides for the immediate summary sus-
pension of an attorney’s license to practice law in cases of an attorney’s failure to respond regarding a complaint of misconduct. Bruner was already suspended by order Jan. 31 and shall comply with the requirements of Rule 9, Section 18, regarding the obligations and responsibilities of suspended attorneys. The order will remain in effect until dissolution or modification by the Tennessee Supreme Court.

Sevier County lawyer Elizabeth Catherine Cox was temporarily suspended Feb. 3 for failing to respond to the board regarding a complaint of misconduct. As of that date, Cox was precluded from accepting any new cases and must cease representing existing clients by March 5. She is not to use any indicia of attorney, legal assistant or law clerk nor maintain a presence where the practice of law is conducted. She was to notify all clients being represented in pending matters, co-counsel and opposing counsel about the suspension.

Nashville lawyer Edward L. Swinger was temporarily suspended Feb. 25 upon finding he failed to respond to the board regarding a complaint of misconduct. Section 4.3 of Supreme Court Rule 9 provides for the immediate summary suspension of an attorney’s license in a case like this. Swinger was precluded from accepting new cases as of that date and was to cease representing existing clients by March 27. He is not to use any indicia of attorney, legal assistant or law clerk nor maintain a presence where the practice of law is conducted. He was to notify all clients being represented in pending matters, co-counsel and opposing counsel about the suspension.

On Feb. 3 Jefferson County lawyer Carl Robert Ogle Jr. was summarily and temporarily suspended from the practice of law upon finding that he had misappropriated funds for his own use and poses a threat of substantial harm to the public. Ogle was precluded from accepting new cases as of that date and was to cease representing existing clients by March 5. He is not to use any indicia of lawyer, legal assistant or law clerk nor maintain a presence where the practice of law is conducted. He was to notify all clients being represented in pending matters, co-counsel and opposing counsel about the suspension.

Nashville lawyer Lee Michael Sprouse was temporarily suspended from the practice of law Feb. 4 upon finding he failed to respond to the board regarding a complaint of misconduct. Section 4.3 of Supreme Court Rule 9 provides for the immediate summary suspension of an attorney’s license in a case like this. Sprouse was precluded from accepting new cases as of that date and was to cease representing existing clients by March 6. He is not to use any indicia of lawyer, legal assistant or law clerk nor maintain a presence where the practice of law is conducted. He was to notify all clients being represented in pending matters, co-counsel and opposing counsel about the suspension.

DISBARRED
Memphis attorney George Ernest Skouteris Jr. was disbarred by order of the Tennessee Supreme Court Feb. 21. He appealed the hearing panel’s decision but upon review the Tennessee Supreme Court agreed with the Board of Professional Responsibility’s evidence that after accepting and depositing settlement checks for six clients, Skouteris failed to maintain sufficient funds in his trust account to cover those settlements. He failed to provide competent representation and failed to respond to their requests for information. He failed to use written contingency fee agreements, failed to keep client funds separate from his personal funds and failed to respond to the board regarding three complaints of misconduct. He engaged in dishonesty, deceit and misrepresentation, and engaged in conduct that was prejudicial to the administration of justice. His actions violate RPC 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5(c) (fees), 1.15(a) and (c) (safekeeping property), 1.16(d) (declining and terminating representation), 8.1(b) (bar admission and disciplinary matters), and 8.4(a)(b)(c) and (d) (misconduct).

Problems are not signs of failure but opportunities for growth...

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1-877-424-TLAP

APRIL 2014

Compiled by Stacey Shrader Joslin from information provided by the Board of Professional Responsibility of the Tennessee Supreme Court. Licenses and disciplinary notices are included in this publication as a member service. The official record of an attorney’s status is maintained by the board. Current information about a particular attorney may be found on the board’s website at www.tbpr.org/consumers/attorneyssearch.
which is available. I must confess that I was not aware of the full range of remedies available to injured consumers.

You may also report these issues to the Tennessee Attorney General’s Office. The Attorney General’s Office has the authority to undertake civil prosecutions of UPL matters, and takes this responsibility very seriously. This route might be particularly helpful when you have some facts but not enough to pursue a claim on behalf of an injured party. While the Attorney General’s Office cannot comment on pending investigations, you never know when the information that you provide might be the key to allowing them to further an investigation already underway to the benefit of all concerned.

You will find an online complaint form and a wealth of other information about the issue of UPL at www.tn.gov/attorneygeneral/upl/upl.html. If it is your clients who has been injured by UPL, ask them for permission to provide their contact information to the Attorney General and prepare them for the fact that someone from the Attorney General’s Office may call to obtain further details relating to the complaint filed.

Given the explosion of UPL issues that we face, we can no longer afford to sit back and hope that our fellow attorneys or the Attorney General’s Office will address these issues for us and without our input and assistance.

Each of us has a responsibility to our profession, and an even greater responsibility to the public, to do all that we can to help win the war against the unauthorized practice of law. When we identify a UPL issue, we simply must take action. Let us not forget that “Together We Make a Difference!”

TBA President CINDY WYRICK practices law with Ogle, Gass & Richardson PC in Sevierville.

Ask the TBA Membership Maven

An Interview with Lionel

It’s renewal time! So, the TBA Maven sat down with her favorite attorney, Lionel, who also happens to be her big brother, to ask him why he renews his TBA membership year after year.

MM: Lionel! OMG! I’m so geeked we get to talk about TBA membership today! You’ve been a loyal TBAer since your graduation from Princeton Law School so many, many moons ago. April 1 began the renewal frenzy and I noticed you were the very first one! I’m so proud. What keeps you coming back?

Lionel: Hi Sis! I know you adore all things membership and … well … you know I’m loyal like a dog to anything that’s good for me. It’s sort of like the time Mom introduced me to kale smoothies and I drank them until my skin turned green. TBA membership has been SO good for me and my career that I don’t want to go even one nanosecond without it.

MM: Enlighten us, dear brother … what TBA bennies and services have been so good for you?

Lionel: Geez, there are so many, but here’s my short list …

- TBAToday – I can’t be without this critical burst of daily news.
- Free Fastcase – after years of wondering what it is, I finally tried it and now Free Fastcase saves me thousands each year. And Professional Relationships – these connections and the community within the TBA help protect and promote the profession, and I want to be part of that!

MM: Wow…no wonder I’ve always looked up to you.

Lionel: And, Sis, not to toot my own horn but I did get everyone at Ducksworth, Saver & Gross signed up for firm billing. We get one invoice for the whole office and just pay with one check. It’s so convenient and easy! I called the TBA and it only took 3 minutes to sign up — and I’m a slow talker.

MM: We are so RELATED! You love TBA membership as much as me! But … the very first to renew — that’s pretty OCD, Bro … even for you.

Lionel: Sis, I know! All of a sudden I’m up at midnight ticking down the seconds until I can PUSH THAT BUTTON! It’s all because paying early is a real time saver. It means no reminder emails, no paper invoices, no late night phone calls, just the news and information members want!

MM: I couldn’t have said it better myself, Dear Brother! Thanks so much for hanging today. Any parting words for our readers?

Lionel: Thank you, Sis! You’re the cat’s PJ’s. Parting words … geez … remember what’s good for you … renew your membership today!

To ask the TBA Membership Maven a question please email maven@tnbar.org or her alter-ego, Kelly Stosik, the Tennessee Bar Association’s membership director.
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Snakebit

Poisonous Serpents & Religious Expression in Tennessee

By Joe Jarret

“And these signs shall follow them that believe …
They shall take up serpents; and if they drink
any deadly thing, it shall not hurt them.” — Mark 16:17, KJV

It is a religious practice that finds its roots in Appalachia and goes back over a century. It is a ritual that is practiced in churches often referred to as “renegade” and “fiercely independent,” and most commonly looked upon by the uninitiated as a “dangerous and bizarre activity.” It is snake-handling, and in many Appalachian states, Tennessee among them, it’s against the law. According to the Appalachian Regional Commission (ARC), the region commonly referred to as Appalachia includes all of West Virginia and parts of 12 other states, to wit, Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee and Virginia. However, the practice of snake handling has been most commonly
observed in more southerly states, specifically, West Virginia, Kentucky and Tennessee.

The Practice of Snake-Handling

Although the practice of snake handling does not follow a prescribed format, there does appear to be some commonality in such rituals. During religious services, amidst the sound of music, a worshipper, according to Hood and Williamson, approaches a wooden box, specially designed to house the creatures, then “calmly extracts a venomous serpent. As others gather around the activity, participation in worship increases with a more compelling sense of God’s presence and direction, and other serpents are taken out and passed among the obedient.” In some churches, participants also entwine the snakes around their necks and bodies. This was a case of first impression for the Tennessee Supreme Court, albeit the court did not at all appear vexed by the facts of the case. Rejecting the appellants’ assertion that the statute made an exemption for religious services, or, in the alternative, violated their freedom of religion guaranteed by both the federal and state constitutions, court upheld the statute. In so doing, the court issued a final, determinative ruling that is as precise as it is pragmatic: “rattlesnakes are poisonous … and the practice of handling them is dangerous to the life and health of people.”

It would be almost 30 years before Tennessee courts were once again forced to wrangle with the practice of snake-handling. In 1975, the Tennessee Supreme Court granted certiorari in the case of State ex rel. Swann v. Pack to determine whether the state of Tennessee may enjoin a religious group from handling snakes as a part of its religious service. It ultimately ruled it could. In the instant case, the Circuit Court at Cocke County, Newport, permanently enjoined the defendant, Pack, pastor of The Holiness Church of God in Jesus’ Name of Newport, and one of his elders from “handling, displaying or exhibiting dangerous and poisonous snakes.” The court predicated its action primarily upon a finding that the handling of dangerous and poisonous snakes was in violation of Tenn. Code Ann. § 39-2208 and that the practice was done in the presence of children and other people attending church services. The Court of Appeals, in a split decision, found the injunction to be overbroad, subsequently modifying it to read that the respondents were permanently enjoined from handling, displaying or exhibiting dangerous and poisonous snakes in such manner as will endanger the life or health of persons who do not consent to exposure to such danger. Ultimately upholding Tenn. Code Ann. § 39-2208, and opting for an outright prohibition as compared to the modified prohibition offered by the Court of Appeals, the Supreme Court opined, in pertinent part,

Under this record, showing as it does, the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of “annointment,” we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so.

Despite the fact that the Supreme Court treated the case as a public nuisance matter, it nevertheless refused to sidestep the equally challenging subject of the free exercise of religion. The court went to great lengths to ensure that this important facet of the case was given its due regard. In its analysis the court ruled: We hold that under the First Amendment to the Constitution of the United States xiv and under the substantially stronger provisions of Article 1, Section 3 of the Constitution of Tennessee, xv a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society; but the action of the state must be reasonable and reasonably dictated by the needs and demands of society as determined by the nature of the activity as balanced against societal interests. Essentially, therefore, the problem becomes one of a balancing of the interests between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed in favor of religious freedom, and yet the balance is delicate. The right to the free exercise of religion is not absolute and unconditional. Nor is its sweep susceptible of discrete and concrete compartmentalization. It is perforce, of necessity, a vague and nebulous notion, defying the certainties of definition and the

Continued on page 16
niceties of description. At some point the freedom of the individual must wane and the power, duty and interest of the state becomes compelling and dominant. Certain guidelines do, however, emerge under both constitutions. Free exercise of religion does not include the right to violate statutory law.16

Just as adherents to the faith take exception with Tennessee's law regarding the handling of poisonous snakes, some legal scholars likewise have problems with the law as well as the manner in which our courts have interpreted it. Editors of the Washington University Law Review in particular opined that the Tennessee Supreme Court in both the Harden and Pack cases missed the mark. They opined that Pack is another case sustaining state health and safety regulations without serious consideration of the public interests or impartial balancing of those interests against defendants' right to free exercise of their religion. The court misunderstood Tennessee public policy and misread constitutional requirements. The Tennessee statute only prohibited snake-handling when performed in a dangerous manner. Both Harden and Pack assumed, without reliable evidence, that religious snake-handling was dangerous per se. The latter opinion considered handling a poisonous snake tantamount to a suicide attempt. The record contained no evidence supporting such a proposition: on the record the court could only have concluded that snake-handling presents no serious health threat.17

A contra argument is offered by legal scholar Robert W. Kerns Jr.,18 who suggests that “Snake-handling threatens not only the health and safety of its consenting adult practitioners, but also of children who, as seen in the historical discussion of handling, are within contact of the practice. Moreover, it threatens animal welfare which too must be a concern of the state.”19

It is interesting to note that the United States Supreme Court ultimately weighed in on the state's ability to regulate religious practices ostensibly protected under the Establishment Clause of the First Amendment. In Church of the Lukumi Babalu Aye v. City of Hialeah,20 the Supreme Court ruled as invalid, city ordinances enacted in an effort to prevent animal sacrifices in connection with rituals practiced by adherents of the Santeria religion. The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the orishas. The basis of the Santeria religion is the nurture of a personal relation with the orishas, and one of the principal forms of devotion is an animal sacrifice. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.21 The City of Hialeah, Fla., enacted several ordinances, the sum and substance of which rendered illegal, the “possession, sacrifice, or slaughter of an animal if it is killed in any type of ritual.”22 The Supreme Court invalidated the ordinances, noting the legislators are precluded from devising mechanisms, be they overt or disguised, that are designed to persecute or oppress a religion or its practices.23 In an opinion authored by Justice Kennedy, the Supreme Court ruled that a “law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.”24

Noting how laws affecting the free exercise of religion merit strict scrutiny, Justice Kennedy further opined that “a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.25

In 2004, the Supreme Court in Locke v. Davey26 considered the implications of Lukumi Babalu in a case involving a Washington State scholarship program for gifted students. In Davey, the state of Washington established the Promise Scholarship Program27 to assist academically gifted students with postsecondary education expenses. In accordance with the state constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology. When Joshua Davey, a scholarship recipient, was denied funding to pursue a theology program at Northwest, a private religious college, he filed suit in U.S. district court, claiming the state constitution's ban on funding religious instruction violated his First Amendment right to free exercise of religion. The
district court rejected Davey’s claim. The Ninth Circuit Court of Appeals reversed, concluding Davey’s free exercise rights were violated. The United States Supreme Court, in a 7-2 opinion delivered by Chief Justice William Rehnquist, ruled that a state does not violate the First Amendment’s free exercise clause when it funds secular college majors but excludes students majoring in devotional theology. The court rejected Davey’s argument that the state scholarship program was unconstitutional because it was not neutral toward religion. “The state has merely chosen not to fund a distinct category of instruction,” the court wrote. Similarly the Washington Constitution — which explicitly prohibits state money from going to religious instruction — does not violate the free exercise clause. Unlike laws and programs the court has struck down under the free exercise clause, nothing in either the scholarship program or the state constitution “suggests animus towards religion.”

States have a “historic and substantial interest” in excluding religious activity from public funding. Justice Rehnquist further observed that the “Establishment Clause and the Free Exercise Clause are frequently in tension.” Relying upon a metaphor purported to be a favorite of Justice Oliver Wendell Holmes, Justice Rehnquist asserted that the court recognized the “play in the joints” between the Establishment and Free Exercise Clauses. Justice Scalia, in a dissenting opinion with which Justice Thomas joined, argued that “in Church of Lukumi Babalu Aye Inc. v. Hialeah, the majority opinion held that “[a] law burdening religious practice that is not neutral … must undergo the most rigorous of scrutiny,” and that “the minimum requirement of neutrality is that a law not discriminate on its face.” Justice Scalia further opined that “when the state makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the state withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.”

**Other States**

Although the rituals exercised in churches that practice snake handling are fairly uniform, the states where such rituals occur differ in their approach to the practice. Tennessee’s serpent-handling law has remained virtually unchanged since its inception in 1947 and continues to make no specific mention of the use of poisonous or dangerous snakes in religious practices. Kentucky likewise outlaws the handling of poisonous snakes, albeit specifically renders, illegal “using, displaying, or handling any kind of reptile in connection with any religious service.” Kentucky’s Act remains unchanged since it was challenged in 1942 in the case of Lawson et al. v. Commonwealth.

In Lawson, the defendants were jointly indicted and convicted for violating Kentucky’s law against snake-handling, then codified as Chapter 60 of the Acts of the General Assembly, Kentucky Statute §1267 a-1. Taking a position akin to that assumed by the Tennessee Supreme Court in State ex rel. Swann v. Pack supra, the Kentucky Supreme Court upheld the defendants’ convictions and in so doing, relied upon the government’s police powers to curb breaches of the public peace. Justice Tilford, writing for a unanimous court, opined, laws enacted for the purpose of restraining and punishing acts which have a tendency to disturb the public peace or to corrupt the public morals are not repugnant to the constitutional guarantees or religious liberty and freedom of conscience, although such acts may have been done pursuant to and in conformity with, what was believed at the time to be a religious duty. Without violating the constitutional guarantees, the state, under the police power, may enact laws in order to promote the general welfare, public health, public safety and order, public morals and to prevent fraud.

Several decades ago, the state of Alabama enacted a law that says in pertinent part: “Any person who displays, handles, exhibits, or uses any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of another shall be guilty of a felony, and upon conviction shall be imprisoned for a term to be fixed by the court of not less than one, nor more than five years.” The Alabama law was challenged in the case of Hill v. State.

In Hill, the defendant was convicted in DeKalb County Court of displaying, handling or exhibiting a poisonous snake in a manner endangering the life and health of another. He appealed to the Court of Appeals, which held, on Jan. 17, 1956, that the statute did not violate the federal or state constitutional guarantees of freedom of religion. The Alabama Supreme Court denied certiorari.

The West Virginia Code currently makes no reference whatsoever to the practice of handling poisonous snakes. This is an interesting phenomenon considering the fact that in 2012, Pentecostal Pastor Mack Wofford died of a rattlesnake bite sustained while officiating at an outdoor service in West Virginia. Coincidentally, his father, a pastor in his own right, likewise died after being bitten by a poisonous snake in 1983.

**Snake-Handling: A Brief History**

Although historians don’t completely agree on the origins of snake handling, the practice is most commonly tied to the Holiness Movement of the late 19th and early 20th centuries. According to historians Ralph W Hood Jr., W. Paul Williamson and Thomas G. Burton, and a Tennessean by the name of George Went Hensley was responsible

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for spreading snake handling practices in the South in the early 20th century. Hensley is credited with founding the Holiness Church of God in 1909 at Sale Creek in Grasshopper Valley, Tenn., approximately 35 miles northeast of Chattanooga. Hensley, it is surmised, was motivated by a dramatic experience that occurred atop White Oak Mountain near Ooltewah, Tenn., on the eastern rim of the valley, during which he confronted and seized a rattlesnake. Unbitten, and armed with the snake, Hensley returned to the valley, entered Grasshopper Church of God, and admonished members of the congregation to follow his example and “take up or be doomed to eternal hell.”

Although illiterate, Hensley nevertheless became a licensed minister of the Church of God (Cleveland, Tenn.) in 1915. He, along with fellow church members, treated as an imperative a passage in the Book of Mark, Chapter 16, verses 17-18, King James version of the Bible, which reads: “And these signs shall follow them that believe; In my name shall they cast out devils; they shall speak with new tongues; They shall take up serpents; and if they drink any deadly thing, it shall not hurt them; they shall lay hands on the sick, and they shall recover.”

Just as historians continue to debate the precise ancestry of the Holiness Movement, biblical scholars continue to debate whether Mark 16:17-18 belong in the Bible. Specifically, noted Bible scholar Robert H. Stein has opined that the vocabulary used in Mark 16:9-20 differs notably from that which appears in the rest of the book (Stein refers to the vocabulary as “non-Markan”), surmising that the words were added by a scribe. Further, he asserts that the most trusted, ancient manuscripts fail to contain the verses.

Nevertheless, the practice continues despite the skepticism offered by scholars or the fact that George Hensley died of a snakebite in 1955. According to witnesses, during a Sunday worship service held in the town of Altha, Fla., Hensley handled a diamondback rattlesnake for approximately 15 minutes before it bit him. The Calhoun County Sheriff attempted to convince Hensley to receive medical treatment to no avail. The sheriff ultimately ruled Hensley’s death a suicide.

Summary

Despite laws that ban the practice and prosecutors willing to pursue charges against offenders, the practice continues. For example, recently the grand jury of Campbell County, Tenn., returned a no true bill of indictment against Andrew Hamblin, pastor of the Tabernacle Church of God, LaFollette, in response to charges brought against him when it was learned that he was handling poisonous snakes as part of religious services held in his church.

Further, the ceremony continues to fascinate the uninstructed, as evidence by the fact that National Geographic has devoted a reality TV show to the ritual titled Snake Salvation. This is a program advertised as one that “follows two pastors of this creed who frequently battle the law, a disapproving society and sometimes their own families to lead their faithful followers to righteousness.” Pastor Hamblin is one of those pastors being followed by prosecutors and TV crews alike. For now, it appears Tennessee’s courts find more compelling the argument that religious expression cannot go so far as to violate statutory law. And snake-handlers, well, it appears they will continue to follow a law they believe trumps anything the various state legislatures can promulgate, as evidenced by the untimely death of Kentucky pastor Jamie Coots (featured in Snake Salvation). Coorts died as a result of a bite received from a poisonous snake during a snake-handling ceremony in February after refusing medical treatment. “Judge not, and ye shall not be judged!”

Notes


2. The Appalachian Regional Commission (ARC) is a regional economic development agency that represents a partnership of federal, state, and local government. Established by an act of Congress in 1965, ARC is composed of the governors of the 13 Appalachian states and a federal co-chair, who is appointed by the president. Local participation is provided through multi-county local development districts.


5. § 39-2208 “It shall be unlawful for any person, or persons, to display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.”


7. Id at 710.

8. Id. at 713.

9. Id.


11. Id. at 102.

12. Id. at 103.

13. Id. at 113.

14. The First Amendment to the United States Constitution reads: “Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof, or a
briding the freedom of speech, or of the
press, or the right of the people peaceably to
assemble, and to petition the government for a
redress of grievances.”

15. Article 1, Section 3 of the Constitution
of Tennessee titled “Freedom of worship” reads:
“That all men have a natural and indefeasible
right to worship Almighty God according to
the dictates of their own conscience; that no
man can of right be compelled to attend,
erect, or support any place of worship,
or to maintain any minister against his consent;
that no human authority can, in any case what-
ever, control or interfere with the rights of
conscience; and that no preference shall ever be
given, by law, to any religious establishment or
mode of worship.”

17. Snakehandling and Freedom of Reli-
gion, State ex rel. Swann v. Pack, 527 S.W.2d.
99 (Tenn. 1975), 1976
Wash. L. Q. 353 (1976) at
363.

the Faithful from Their
Proposal for
Snake-Handling
Law in West
Virginia.” W. Va. L.

19. Id. at 732.
20. Church of the Lukumi Babalu Aye v. City of
Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L.
Ed. 2d 472, 1993 U.S.

21. 13 Encyclopedia of Religion 66 (M. Eliade
ed. 1987), 1 Encyclopedia of the American Reli-
gious Experience 183 (C. Lippy & P. Williams
e ds. 1988).

22. City of Hialeah Ordinance 87-52.
23. Church of the Lukumi Babalu Aye v. City of
Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L.
Ed. 2d 472, 1993 U.S. at 547.

24. Church of the Lukumi Babalu Aye v. City of
Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L.
Ed. 2d 472, 1993 U.S. at 546.

25. Id.

26. Gary Locke, Governor of Washington, et
al., Petitioners v. Joshua Davey, 540 U.S. 712,
124 S. Ct. 1307; 158 L. Ed. 2d 1; 2004

27. The Washington State Promise Scholar-
ship, created by the state legislature in 1999,
provided college scholarship money to
talented, needy students.

App. LEXIS 14461 (9th Cir. Wash., 2002).

29. Id. at 1309.
30. Id. at 1313.

31. “Great constitutional provisions must be
administered with caution. Some play must be
allowed for the joints of the machine, and it
must be remembered that legislatures are ultimate
guardians of the liberties and welfare of the
people in quite as great a degree as the
courts.” Lowry, Walker. “Mr. Justice Holmes:
The Community vs. The Individual.” California

32. Id. at 1311.
33. Id. at 1317, 18.
34. Id. at 1316.

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TBA Honors CASA, Marks Child Abuse Prevention Month

By Stacey Shrader Joslin

Across the state, numerous organizations work to make Tennessee a better place for children and families. One such group is Court Appointed Special Advocates (CASA), which currently serves families in 47 counties through 30 local agencies. During the month of April, a number of these local agencies will host events to mark Child Abuse Prevention Month and raise awareness of their work.

The Tennessee Bar Association Young Lawyers Division also recently recognized the work of CASA with the presentation of its annual CASA Volunteer of the Year Award to Jack McNew of Harriman, who serves with CASA of the Ninth Judicial District. McNew has volunteered with the agency since its founding in 2008, and over the course of his involvement has worked with nearly 24 children.

According to Sandra Weaver, executive director of the agency, McNew “has been a mainstay” of the program: serving as part of a small group that undertook a strategic planning process to determine whether to form the agency, working to develop management guidelines, loaning the program the finances it needed to get off the ground, serving as one of the first volunteer advocates, and presiding as the first president of its board of directors.

Over the last five years, McNew also has served as the agency’s interim treasurer and liaison to the county commission. In that role, he successfully obtained office space in the courthouse for the CASA staff. He also often speaks to community groups and potential funders about the organization. Most recently, he has become a peer coordinator, supervising six new volunteers.

In addition to this outstanding...
commitment to his local agency, McNew exhibits sincere love and concern to all the children he represents. In nominating him for the award, Weaver noted two cases in particular that demonstrate that concern.

In the first case, which is also the agency’s longest running case, McNew has been a constant presence in the life of a young man. Though he has yet to find a permanent home for him, McNew has stuck by this teen through many bad times and good.

In the second case, McNew helped a young man find a more supportive home, though his efforts to encourage behavioral changes met with limited success. McNew finally told the teen that he had done what he could and the rest was up to him. A year later, McNew received word that the young man, who was about to graduate from high school, later told McNew.

Without you, I would not be here,” he later told McNew.

Whether the case requires dogged determination, compassion or tough love, Jack McNew comes through for the children he represents — and that is why the YLD selected him for the 2014 CASA Volunteer of the Year Award.

McNew and Weaver were recognized for their work by Knoxville lawyer Katrina Atchley Arbogast, chair of the YLD Children’s Issues Committee, at the YLD’s winter board meeting in Nashville. This year also marked the 10th anniversary of the award, a milestone that was celebrated with a video presentation featuring all previous award recipients.

Stacey Shrader Joslin is media relations coordinator and Young Lawyers Division director at the Tennessee Bar Association.

Learn More

Child Abuse Prevention Month
- See a listing of related events in the state at www.tba.org/journal/child-abuse-prevention-month-events
- Learn more about child abuse and how to report suspected abuse at www.tncasa.org/LearnMoreAboutChildAbuse.html.

CASA Volunteer of the Year Award
Each year, the YLD honors a CASA volunteer who goes the extra mile in his or her work with children in the state. The award recipient is selected from nominations made by Tennessee’s local CASA agencies.
- See a list of past recipients and more about this year’s winner at www.tba.org/programs/casa-volunteer-of-the-year

Tennessee CASA
CASA professionally trains and carefully screens volunteers to become advocates for abused and neglected children in juvenile court. Volunteers are appointed by judges to advocate for the best interests of abused and neglected children and to ensure that children do not get lost in an overburdened legal system or languish in an inappropriate group or foster home. The goal of every CASA volunteer is to find a safe, permanent home for victimized children.
- Find a CASA agency near you at www.tncasa.org/TNCASAPrgrams.html

Religious Expression
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Any person who displays, handles or uses any kind of reptile in connection with any religious service or gathering shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100).


37. Id.

38. Id at 976 citing 16 Corpus Juris Secundum, 599.

39. Act No. 45, General and Local Acts 1950 (effective October 31, 1950) stated: “Section 1. Any person who displays, handles, exhibits, or uses any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of another shall be guilty of a felony, and upon conviction shall be imprisoned for a term to be fixed by the court of not less than one, nor more than five years.” In 1953, the penalty was reduced to a misdemeanor, with a $50 to $150 fine or up to six months in jail. Both acts have since been repealed.


41. Id.

42. The Holiness movement originated in the first half of the 19th century in the United States as a renewal movement within American Methodism but soon became trans-denominational. It sought to recover the emphasis of evangelist John Wesley on the perfection of love in the lives of believers and followers of Jesus Christ. Hood & Williamson at 1-12.

43. Id. at 42-45.


49. Matthew 7:1-3, King James Bible.
Postjudgment Interest

I wrote about this topic in September 2005. Much has changed since then.

What is the rate? In the good old days the victor got a 10 percent rate. That got whittled down effective July 1, 2012. Now postjudgment interest is “equal to 2 percent less than the formula rate per annum published by the Commissioner of Financial Institutions.”

**A deadbeat parent will owe lots more money quickly, a just result.**

Tenn. Code Ann. §47-14-121. You can find this rate on the Administrative Office of Courts website at www.tncourts.gov. The rate has been 5.25 percent.

**What Date Governs the Rate?**

Interest shall be computed on every judgment from the day on which the jury or the court, sitting without a jury, returned the verdict without regard to a motion for new trial.

— Tenn. Code Ann. §47-14-122

Many judgments are challenged by appeal. Take a look at T.R.App.P. 41. Appellate affirmance of dismissal doesn’t change things. But “if a judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, the mandate shall contain instructions with respect to allowance of interests.”

**What About Child Support?**

Buried in lengthy Tenn. Code Ann. §36-5-101 is subsection (f)(1), which reads in part:

If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage, at the rate of 12 percent per year.

The subsection goes on to state that “all interest that accumulates on arrearages shall be considered child support.” Consequently we can see that a deadbeat parent will owe lots more money quickly, a just result.

**Is the Rate Simple or Compound?**

We find the answer at a list of definitions in Tenn. Code Ann. §47-14-102. The sixth definition tells us that the effective rate of interest “is the simple rate of interest, i.e., the ratio between the interest payable on an obligation and the principal for a period of time, including the result of converting compound, discount, add-on, or other nominal rates of interest into simple rates of interest.”

DONALD F. PAINÉ died Nov. 18, 2013. He was a past president of the Tennessee Bar Association and at the time of his death was of counsel to the Knoxville firm of Paine, Tarwater, and Bickers LLP. He was member emeritus to the Tennessee Bar Journal Editorial Board. He wrote his columns months in advance, and as a result, “Paine on Procedure” will continue through mid-2014. Read remembrances about him at www.tba.org/news/don-paine-legal-community-shares-thoughts-memories
Plan your summer escape to the Great Smokey Mountains now to ensure that you’ll be a part of the largest annual gathering of the Tennessee legal community when the Tennessee Bar Association meets for the 133rd time June 11-14 in Gatlinburg.

You will be surrounded by natural beauty at the convention’s host hotel, the newly renovated Park Vista Doubletree. Inside you’ll find the compelling and insightful programming you expect at the TBA Convention.

PROGRAMMING
It starts with the Bench Bar Program on June 11 when author and political insider Keel Hunt and journalist John Seigenthaler take you behind the scenes to bring to life the dramatic transition of power from Gov. Ray Blanton to Gov. Lamar Alexander, and continues through Friday with 12 hours of CLE programming that is included in your registration. Among the programs will be Brian Faughnan’s lively look at ethics issues facing lawyers, an examination of how new laws are changing the “wine and shine” industries, and a return of the popular Better Next Year programming.

SOCIAL ACTIVITIES
There will also be plenty of social activities so that you can visit with your colleagues from across the state. Along with Bench Bar and Lawyers Luncheons, there will be an exciting journey through the Titanic Museum, where you will experience what it was like to walk the hallways, parlors and cabins of the Titanic while surrounded by more than 400 artifacts directly from the COVEN TION CENTRAL
The newly renovated Park Vista Doubletree Hotel provides unparalleled views of the Great Smokey Mountains, and a convenient location near an endless supply of shopping, adventure and outdoor recreation. Make your reservations now to get the special TBA room rate of $117 per night. The deadline to reserve your room is May 23, so either visit www.parkvista.com or call 800-421-7275 today.

FAMILY FRIENDLY GATLINBURG
When you’re not busy with convention activities, Gatlinburg offers a wealth of activities for visitors of all ages. As gateway to the Great Smokey Mountains National Park — the most visited national park in the United States — Gatlinburg is a perfect starting place for exploring the natural wonder and breathing sights that await. You can also explore Appalachian Art at the Great Smokey Mountains Arts and Crafts Community. Just three miles from downtown, it hosts the largest group of independent artisans in North America.

There are plenty more attractions and shopping venues throughout the downtown area, including Ripley’s Aquarium of the Smokies, the Dollywood theme park and the Gatlinburg Aerial Tram.

The 2014 TBA Annual Convention
Sign Up Online Now At
www.tba.org/info/2014-tba-annual-convention

Get Away to the Smokies This Summer!
The conventional wisdom is that Tennessee has a six-month durational residency requirement for divorce pursuant to Tenn. Code Ann. §36-4-104(a). While that is correct, it is not always determinative.

There is a prevalent misperception among domestic attorneys that Tenn. Code Ann. §36-4-104(a) does not just impose a strict durational residency requirement in certain situations, but that this durational residency requirement is in fact a prerequisite to file any divorce action in the state of Tennessee. It most certainly is not. There are situations where the durational residency requirement does not have to be met, despite the sound public policy behind it. The Tennessee Supreme Court’s decision of Carter v. Carter almost 110 years ago very bluntly stated the purpose of the durational residency requirement, which was two years at that time, when it stated:

The purpose of this section was to prevent this state from being made a dumping ground for the marital scandals of other states, and so to protect the people of this state, to a degree, from the demoralizing influence that must be experienced by any community which opens its courts without restraint to the class of cases referred to. [Emphasis added.]

Quite frankly, Tennesseans did not want their tax dollars footing the bill for its courts to hear marital problems of parties from other states. Yet, the Tennessee Supreme Court’s decision in Carter went on to say that:

A divorce may be granted for any of the aforesaid causes, though the

**The relatively obscure decision from Carter has very clear and serious implications for any attorney who practices in the field of domestic law.**

**Six Months or Six Days: When Can You File for Divorce in Tennessee?**

By Helen Sfikas Rogers and George Spanos
acts complained of were committed out of the state, or the petitioner resided out of the state at the time, no matter where the other party resides, if the petitioner has resided in this state two years next preceding the filing of the petition.

The Court of Chancery Appeals was of opinion that the provision requiring two years’ residence prior to the filing of the bill applied only to cases wherein the grounds for divorce arose out of the state.

We are of the opinion that this is a correct construction of the section of the Code referred to. [Emphasis added.]

Clearly, there is a litmus test in determining when a divorce can be filed in Tennessee. The first prong lies in the location of the grounds for divorce listed in Tenn. Code Ann. §36-4-101 and not in the six-month durational residency requirement. The most important question to ask a new client is simply “Why are you seeking a divorce?” Essentially, what are the grounds your client wants to rely on to obtain a divorce? The state of Tennessee’s public policy decision to not foot the bill for nonresidents to file for divorce in Tennessee was never meant to block or delay new residents in the state from obtaining relief from their spouse who committed an act or acts within Tennessee that constitute grounds for divorce. The Tennessee Supreme Court clearly explained this notion in Carter where it stated:

[It] could never have been intended that two years’ grace was to be allowed to all offenders against marital duty, even though their acts should be committed in this state, and against citizens of this state, as must be maintained under the opposite construction. 4

This decision, while not widely known, did not fade into obscurity. In fact, this point of law has never been overturned but has been propagated by the courts of this state throughout the years. In 1915, the Tennessee Supreme Court’s decision in Fitzpatrick v. Fitzpatrick5 cited its prior opinion in Carter stating:

If facts sufficient for the purpose occurred in this state, the divorce could be properly granted, although the complainant had not resided in the state for two years. 6

This point of law was again relied upon by the Tennessee Court of Appeals in 1945 in that court’s decision in McFerrin v. McFerrin. 7 It was later agreed with and cited in the Court of Appeals’ 1951 decision of Holman v. Holman8 and again in the same court’s 1958 opinion of Murrell v. Murrell. 9 Admittedly, the statutory schemes and the statute numbers have changed over the years as this interpretation has been utilized, but this point of law has never been overturned. More recently, the Tennessee Court of Appeals’ 1995 unreported opinion in the matter of Barnes v. Barnes 10 clearly followed the Carter decision and its progeny by stating:

As noted by the chancellor, the six months’ residency requirement applies where the grounds for divorce arose outside of Tennessee. In the case at bar, there is proof of Husband’s inappropriate conduct that occurred in Tennessee. 11

The question that appears to be the most important in this analysis is “Why are you seeking a divorce?” However, this question also raises the biggest issue to the analysis. Obviously not all grounds for divorce are the same. Some grounds are clear and easy to establish. Your client may have lived in Tennessee for two weeks when some type of physical abuse occurred or his or her spouse may have committed adultery within the state. The problems may have also occurred in your client’s previous domicile, but if they occur even once in Tennessee, while your client is a domiciliary of the state, you can file for divorce even if they have only been in the state for a few days or weeks.

What do you do when the grounds are not as clear or as easy to establish as verbal or physical abuse or adultery? There are, after all, 15 separately listed grounds for divorce found in Tenn. Code Ann. §36-4-101. The 1951 decision by the Tennessee Court of Appeals of Holman, a progeny from the Tennessee Supreme Courts 1904 Carter v. Carter decision, provides the necessary answer to this analysis. In this decision, the Tennessee Court of Appeals drew a distinction between grounds that are “continuing” and those that are “non-continuing.” 12

The Holman decision further clarified that grounds that are “non-continuing in character” are defined as grounds whose acts are complete once the fault has occurred because the cause of action then exists or has been established. Examples of non-continuing grounds for divorce could be a single act of adultery, single instance of abuse, or committing a crime that the spouse was convicted of. These grounds that are non-continuing in character invoke the durational residency requirement of Tenn. Code Ann. §36-4-104(a). Therefore, the plaintiff spouse must have resided within this state for the required period of six months prior filing, in order to rely on such acts to prove grounds for divorce. 13

The Holman decision goes on to define grounds that are “continuing in character” as grounds that continue to exist once the fault has arisen. These are the grounds that attorneys frequently hear when they meet with new clients, such as they have finally reached their breaking point because of verbal abuse, the constant fighting, repeated threats, and/or breaking yet another promise. In fact habitual drunkenness and drug use14 and abandonment by a spouse who continually fails to support the plaintiff spouse despite the ability to do so15 are also grounds for divorce in Tennessee and appear to be ones that could be viewed as continuing in nature by their very definition. If the plaintiff spouse is domiciled in Tennessee and the other party continues the act while the plaintiff is in the state of Tennessee, then the plaintiff may rely upon those acts that are “continuing in character” as

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grounds for divorce. 16

When grounds for divorce are continuing in character, clients will be able to file for divorce in this state, despite their recent move. The client does not have to be advised to wait for six months to have passed prior to filing any legal action, and have to risk their spouse filing in the previous domicile. While most attorneys practicing in family law are rarely surprised by what they hear, they are rarely told the same story twice. Grounds continuing in nature can vary based on the circumstances, but are present more often than many attorneys believe.

This is the point when an attorney can fall back onto the residency requirement. If the grounds did not occur in Tennessee and are not continuing in character, a potential client must have six-month residency established in Tennessee. If the grounds did occur in this state or are continuing in nature, then you can move to the second step of the analysis: When did my client establish his or her domicile in this state?

It must be established that your client was a resident of the state. In fact, the word domicile is more properly suited for this analysis. The Tennessee Supreme Court has very clearly defined how one becomes a domiciliary in a new state, and this goes back to Old English law. In its decision of Denny v. Sumner County, the Tennessee Supreme Court stated:

To constitute a change from a domicile to another domicile of choice, as is claimed in the instant case, three things are essential: (a) Actual residence in the other or new place; (b) an intention to abandon the old domicile; and (c) an intention of acquiring a new one at the other place. 17 [Emphasis added.]

Determining one’s domicile is and always will be a fact-specific analysis, but one the Tennessee Supreme Court has simplified. If you can show that your client moved to Tennessee and intended for this state to be his or her home and had no desire to return to the previous home state, you are well on your way to filing for divorce in Tennessee. However this clearly depends on whether you can show grounds also occurred here.

Despite these hurdles, it is often appropriate to file for divorce in Tennessee based on the factual circumstances of your client’s case. However, there is one issue that has to be considered and adjudicated concurrently with the Carter holding: What role does the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) 18 play in your client’s case? Obviously, this only arises when your client has minor children of the marriage; however, it must be complied with in order to obtain proper relief, and while grounds for divorce may have occurred in Tennessee, Tennessee may not be found to be the child’s home state.

Courts are not likely to assert jurisdiction over a divorce case when there is a minor child involved, regardless of the decision in Carter, unless the court can also assert jurisdiction over the minor child. Tenn. Code Ann. §36-6-216 19 provides for how a court may assert jurisdiction over a minor child in any proceeding that will involve the custody of the minor child. However, even if the minor child’s prior home state appears to have a claim for jurisdiction over the minor child, the opposing spouse would need to commence the proper court action in the prior domicile. For practical purposes, a court of this state would prefer not to dismiss a suit based on the UCCJEA on the basis of a foreign state having jurisdiction, if the opposing party was not attempting to assert jurisdiction there. Otherwise, a spouse could obtain a dismissal in this state based on the UCCJEA, and then simply file as the plaintiff here at a later time in order to obtain an advantage.

Even if the opposing spouse files a competing divorce petition in the state of his or her prior domicile, there may still be good cause to have the divorce heard in this state. Tenn. Code Ann. §36-6-213 20 permits courts in different states to communicate with one another to determine the proper jurisdiction for minor children. Parties are allowed to present facts and legal argument on the issue to help the courts determine the proper jurisdiction as part of that discussion. This is likely to be a very fact-driven scenario.

Additionally, Tenn. Code Ann. §36-6-215 21 permits Tennessee courts to require courts in other jurisdictions to hold evidentiary hearings regarding the jurisdictional disputes and issue orders necessary to have witnesses appear, and for testimony and other evidence to be produced. Tennessee courts are further permitted to consider whether the jurisdiction is convenient based on the distance to travel, whether domestic violence has occurred, location of witnesses, the financial circumstances of the parties, and several additional factors specified in Tenn. Code Ann. §36-6-222. 22 While the UCCJEA adds to the complexity of filing for divorce in the state when minor children are involved, it should not always prevent a case from being filed in this state.

The relatively obscure decision from Carter, established almost 110 years ago, has very clear and serious implications for any attorney who practices in the field of domestic law. Grounds for divorce that arise between residents of this state were never intended to be blocked by the durational residency requirement and cause a spouse to suffer and be unable to file for or obtain a divorce. The key in being able to help your client is found in the acts giving rise to grounds for divorce, specifically,
where the acts occurred. The UCCJE A may add a layer of complexity, but will not cause your petition to be dismissed at the outset of the case. If your client’s spouse committed an act constituting a ground for divorce while your client was domiciled in Tennessee, your client can get the relief they may be desperately seeking.

Notes

1. Tenn. Code Ann. §36-4-101(a) states, “A divorce may be granted upon any of the causes referenced in § 36-4-101 if the acts complained of were committed while the plaintiff is a bona fide resident of this state or if the acts complained of were committed out of this state and the plaintiff resided out of the state at the time, if the plaintiff or the defendant has resided in this state six (6) months next preceding the filing of the complaint.”
3. Id. Emphasis added.
6. Fitzpatrick, 173 S.W. 444 at 45 (Citing Carter, 82 S.W. at 309).
13. See Id.
16. See Id. at 280-81.
18. Tenn. Code Ann. §36-6-201 et seq.
19. Tenn. Code Ann. §36-6-216 is titled “Initial custody determination; jurisdiction.”
20. Tenn. Code Ann. §36-6-213 is titled “Communication between court and parties.”
21. Tenn. Code Ann. §36-6-215 is titled “Court Requests.”
22. Tenn. Code Ann. §36-6-222 is titled “Declining to exercise jurisdiction; inconvenient forum.”

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A Time to Be Born and a Time to Die: Pregnancy and End-of-Life Care

“To every thing there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die …”

— Ecclesiastes 3:1-2

Two recent heart-wrenching news stories highlight the struggle between a woman's constitutional right to refuse medical treatment and the state's legitimate interest in protecting the life of her baby. The stories also serve as reminders of the importance of advance directives.

On Nov. 26, 2013, Marlise Munoz, a Texas woman 14 weeks pregnant, fell unconscious, did not breathe for one hour prior to being placed on a ventilator, and soon thereafter was declared brain dead. It appeared that her baby had been deprived of oxygen and would not develop normally. Munoz had no written advance directive or living will, but her husband, Erick, who like Mrs. Munoz was a paramedic, asserted that she had made very clear to him that she did not want to be on life support.

A battle ensued for two months over the proper application of a Texas statute that prohibits withdrawing or withholding “life-sustaining treatment … from a pregnant patient.” The hospital believed it was legally bound to implement all procedures that might give the baby a chance to be born. Mr. Munoz and other family members argued that the baby could not survive and, further, that the statute did not apply because the procedures could not sustain life when Mrs. Munoz was already dead and that she, therefore, was no longer a patient. Ultimately, a court ordered that medical treatment be withdrawn and the baby did not survive.

Shortly after Christmas 2013, a similar story began to play out in Victoria, British Columbia. Robyn Benson, 22 weeks pregnant, suffered a brain hemorrhage and was declared brain dead. Unlike the Munoz case, Benson's husband Dylan and the doctors agreed to keep her on a ventilator until the baby could be delivered by C-section. The Bensons' son Iver was delivered on Feb. 8 and Mrs. Benson's ventilator was removed.

Advance Directives and the Right to Control One's Health Care

Questions about care in terminal situations came to the forefront of the nation's consciousness in the 1970s and 1980s, as advances enabled medical care providers to keep respiratory and circulatory processes going when they previously would have ceased. States adopted legislation authorizing individuals to execute advance directives to declare their wishes for end-of-life care, and Congress passed the Patient Self-Determination Act for facilities receiving Medicare and Medicaid dollars. The stories of Karen Ann Quinlan and Nancy Cruzan provided faces for the difficult questions and led to well-publicized litigation of the ethical and legal issues. In Cruzan v. Director, Missouri Department of Health, the U.S. Supreme Court affirmed that every person has a Due Process Clause liberty interest in refusing unwanted medical treatment, but ruled that a state
may require clear and convincing evidence that an incompetent person would not want life-sustaining care in a persistent vegetative state.7

Tennessee enacted its Right to Natural Death Act in 1985, allowing Tennesseans to refuse care in the event of a terminal condition8 and, in theory, holding medical providers accountable for not following the patient’s directions.9 Spurred by the publicity of the Quinlan and Cruzan cases, living wills and other advance directives have become foundational estate planning documents.

Death and Pregnancy
What generally is clear regarding the right of a woman to control her end-of-life health care can become quite cloudy if she is pregnant. Most states, declaring a state interest in the life of the unborn child, limit a pregnant woman’s right to terminate life-sustaining treatment. The limitations generally take one of six approaches10: (1) an advance directive has no effect while a woman is pregnant;11 (2) an advance directive has no effect if it is probable, possible12 or supported by medical certainty that the fetus will develop to live birth; (3) an advance directive has no effect if the fetus is “viable”;13 (4) an advance directive has no effect if there is a medical certainty that the fetus can develop to birth and physical harm or pain to the woman can be alleviated;14 (5) medical care can be withdrawn if there is a medical certainty that the fetus will not be born alive; and (6) there is a presumption that care should be continued, rebuttable by contrary provisions in an advance directive or clear and convincing evidence of the patient’s contrary wishes.

The Texas hospital struggled to determine whether the Texas statute, which absolutely prohibited discontinuing care, applied to a woman who was brain dead. News accounts of both stories illustrated the struggle by referring to the women as first being declared “brain-dead” and then later “dying” after medical procedures were withdrawn.

What would the result be in Tennessee? Tennessee is among 37 states that have adopted the Uniform Determination of Death Act,15 which provides that an individual is dead if she has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain, including the brain stem. Brain death is contrasted with a “persistent vegetative state,” where the patient has only the most basic brain function but no signs of emotion, willful activity or cognition.16 In the former situation, medical care generally is to be administered only for so long as is necessary to harvest organs for donation (if desired). In the latter, the outcome generally is determined by advance directives or the decisions of a health care agent or surrogate. Tennessee has no statutory limit on discontinuing life-sustaining care for a pregnant woman or the implementation of an advance directive, so Tennessee hospitals should have no legal impediment to carrying out a woman’s wishes regarding end-of-life care simply because she is pregnant.

Planning for End-of-Life Care in Tennessee
Though limited in their facts, these stories remind all Tennesseans of the importance of planning for end-of-life care. The primary documents available to do that are living wills, durable powers of attorney for health care and advance care plans.

A living will is a direction to health care providers that, if the principal suffers from a terminal condition, she wishes to die naturally without the administration of care to prolong life. The statutory form allows declarations of wishes regarding withholding of tube

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These bad guys, often perpetrating their crimes from thousands of miles away, don’t have to say “stick ‘em up” to get their prizes. One recent bank heist that netted more than $45 million has been the stuff of cyber-geek legend. The Associated Press reported in May 2013, that a small team of “highly skilled hackers penetrated bank systems, erased withdrawal limits on prepaid debit cards and stole account numbers.” Seven people were arrested in this country, accused of operating a New York cell of what prosecutors said was “a network that carried out theft at ATMs in 27 countries from Canada to Russia.” More than a dozen countries were involved in the investigation, which was led by the United States Secret Service.

Cybercrime blogger Willie Jones posted on July 26, 2013, that the “idea that cybercrimes are the work of miscreants or gangs of hackers picking targets at random is outmoded.” The criminal underground has learned that it’s easier to hack into a bank than it is to break into it.

Banks and their customers share in the responsibility to combat this invisible crime. Banks are required to have fraud detection systems. They undergo comprehensive examinations by their state and federal banking regulators that are designed to detect weaknesses in their systems. Nevertheless, hacking still happens, sometimes because of customer carelessness. While the bank’s malware protections are typically good, often customers do not have the same sophisticated protections on their own computers. In one recent case, a bank customer’s employee took work home and used her personal computer to enter data. That system was hacked, sending what appeared to be a legitimate message to the bank to make transfers. Before it was caught, thousands of dollars were out the window and on their way to Russia.

The Federal Trade Commission requires financial institutions and certain other companies that may be creditors to implement written identity theft prevention programs designed to detect the warning signs — or red flags — of identity theft. We all understand what a financial institution is, but the Red Flags Rule applies to any business or organization that regularly provides goods or services first and allows customers to pay later. The Red Flags Rule, found at www.ftc.gov/redflagsrule, sets out the circumstances under which a business must establish a written identity theft prevention program. Simply put, a business must have the written program if it has “covered accounts,” defined as either (i) consumer accounts designed to permit multiple payments or transactions, or (ii) any other account that presents a reasonably foreseeable risk from identify theft.

If a financial institution or other business covered by the Fed Flags Rule discovers a breach of data security or even a possible breach, the FTC regula-
tion sets out remedial protocols, including notice to affected customers of the possibility of breach. While situations may differ, the following are examples of appropriate responses depending on the circumstance:

- Monitoring a covered account for evidence of identity theft
- Contacting the customer
- Changing passwords, security codes or other ways to access a covered account
- Closing an existing account
- Reopening an account with a new account number
- Not opening a new account
- Not trying to collect on an account or not selling an account to a debt collector
- Notifying law enforcement
- Offering the affected customer(s) identity theft insurance for a period of time
- Determining that no response is warranted under the particular circumstance.

Many years ago now, one of my son’s so-called friends allegedly swiped my credit cards and proceeded to run up bills. I tell people that two positive things happened next: I disposed of all of my credit cards except American Express (which I never leave home without), and I met a cute cop. That identity theft was pretty easy to curb, but cybercrime can be devastating. In more recent times, I was notified by Macy’s that someone in the Bronx had tried to use my AmEx card number to purchase a full set of living room furniture, and while it may be that I could use a make-over at home, I had not made the purchase. Macy’s caught it, American Express refused the charge, and I have to presume that the New Yorker who wanted new chairs, sofa and accessories has had to do with the old stuff — unless they hacked someone else’s computer. During that process, I discovered that my home computer had been hacked and that was probably the way my credit card number was stolen. A couple of thousand dollars later for upgraded malware detection and antivirus protections on my personal computer and iPad, I feel relatively secure but check the AmEx website every day to be sure that no one has used the card number except its rightful owner. Banks and other financial institutions spend a small fortune trying to ensure that their systems are safe — yet another cost of doing business that is passed along to customers.

The Internal Revenue Service reported dozens of examples of identity theft schemes that occurred during 2013 — here are just two:

- On Sept. 30, 2013, in Los Angeles, Michael Williams of Palmdale, Calif., was sentenced to 33 months in prison and ordered to pay $787,086 in restitution. Mike Niko, of Los Angeles, was sentenced to 15 months in prison and ordered to pay $104,662 in restitution. According to court documents, from May 2009 through July 2010, Williams and Niko conspired with others to defraud the United States by using the personal identifying information of various individuals to file false tax returns claiming fraudulent tax refunds. A co-conspirator stole names and social security numbers from the California Department of Public Social Services’ computer system. The fraudulent returns claimed the First Time Home Buyer Credit and/or Earned Income Credit. Purporting to be tax preparers, Williams and Niko established bank accounts for the purpose of receiving the refunds claimed on the false tax returns.
- On Sept. 3, 2013, in Montgomery, Ala., Angelique Djonret was sentenced to 24 months in prison for her involvement in a million dollar identity theft tax fraud scheme.

Djonret pleaded guilty on April 19, 2013, to identity theft. According to court documents, between October 2009 and April 2012, Angelique Djonret’s sister, Antoinette Djonret, orchestrated a tax refund scheme using stolen identities to file over 1,000 false tax returns that fraudulently claimed over $1.7 million in tax refunds. Antoinette Djonret obtained stolen identities from multiple sources, including Alabama state databases. She also established an elaborate network for laundering the refund money. Antoinette Djonret recruited her sister, Angelique, into the conspiracy, whose role was to obtain prepaid debit cards in her name and others’ names for purposes of receiving the fraudulent tax refunds. Angelique Djonret also assisted in the filing of false tax returns using stolen identities. Antoinette Djonret was in February 2013 sentenced to 12 years in prison.

In mid-December, Target learned that criminals had forced their way into the retailer’s system, gaining access to credit and debit card information. Customer names, mailing addresses, e-mail addresses and telephone numbers were left vulnerable. Up to 70 million customers could have been affected by the theft before it was discovered and the access point plugged on Dec. 15, 2013. The company said that the breach occurred between Nov. 27 and Dec. 15, 2013 — at the height of Christmas shopping season.

As identity thieves become more sophisticated — less rummaging through our trash for non-shredded personal papers and more computer and PDA hacking — predictions are that future efforts for preventing identity theft will probably come through technological advancements that incorporate some physical aspect of a person’s body in

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order to verify identity. Known as biometrics, this type of authentication uses unique physical characteristics such as fingerprints, iris/retina scans, facial structure, speech, facial thermograms, hand geometry and written signatures. As much like science fiction as that sounds and as much as it begins to creep into our Constitutional rights of personal privacy, the justice system will no doubt ponder and debate the delicate balance between protecting our privacy and protecting our identities by using personally identifying features. Our law firm already uses fingerprint scanners for access to sensitive areas of our offices.

As I sit in my office surrounded by my photos of Jesse James, Bonnie and Clyde and Willie Sutton, I have to wonder what they would make of all this high-tech crime, but I also know that if I had only stuck to my manual Underwood typewriter, I wouldn’t have to worry about the FBI’s 10 most wanted cyber criminals worming their way into my privacy and bank account. All you needed to do back then was shred the ribbon! ☞

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Notes

1. The Red Flags Rule was issued in 2007 under Section 114 of the Fair and Accurate Credit Transaction Act of 2003 (FACT Act), Pub. L. 108-159, amending the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681m(e). The Red Flags Rule is published at 16 C.F.R. 681.1. See also 72 Fed. Reg. at 63,771 (Nov. 9, 2007). You can find the full text at http://www.ftc.gov/os/fedreg/2007/november/071109redflags.pdf. The preamble B pages 63,718-63,773 — discusses the purpose, intent and scope of coverage of the rule. The text of the FTC rule is at pages 63,771-63,774. The Rule includes Guidelines B Appendix A, pages 63,773-63,774 — intended to help businesses develop and maintain a compliance program. The Supplement to the Guidelines — page 63,774 — provides a list of examples of red flags for businesses and organizations to consider incorporating into their program. This guide does not address companies’ obligations under the Address Discrepancy or the Card Issuer Rule, also contained in the Federal Register with the Red Flags Rule.


Where There’s A Will

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feeding and hydration when a terminally ill patient cannot swallow and regarding organ and tissue donation. Women of child-bearing age who do not want their living will to be implemented during pregnancy should add a statement to that effect in the living will.

Durable powers of attorney for health care, established pursuant to the Tennessee Durable Power of Attorney for Health Care Act, authorize an agent to make health care decisions on the principal’s behalf if she is unable to communicate her wishes regarding such care. Among the issues that can be addressed in a health care power of attorney is whether to give the agent authority to override the principal’s living will or other advance directive, including a specific direction whether or not to implement the advance directive during pregnancy.

Pursuant to the Tennessee Health Care Decisions Act of 2004, the Tennessee Department of Health promulgated a document titled “Advance Care Plan,” intended to serve the functions of both a health care power of attorney and a living will. The advance care plan provides for naming health care agents and for defining in more detail the principal’s wishes for care in various terminal or irreversible conditions. It also has a space for special instructions, where wishes regarding care during pregnancy can be noted.

In the absence of a health care agent under a power of attorney or advance care plan, the Tennessee Health Care Decisions Act provides a process for appointing a health care surrogate. While that ensures that someone is authorized to make health care decisions for the patient, the surrogate might have no idea what the patient would have wished regarding end-of-life care while pregnant.

As medical technology continues to develop to sustain life functions and to measure death, new questions will arise...
and existing answers might prove inadequate. However, Tennesseans have the constitutional right and the effective means to declare their wishes for such care, and those wishes apparently will not be ignored solely because the patient is a pregnant woman.

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Notes


3. The language of Tex. HS. Code Ann. §166.049 seems to leave open the possibility that the fetus is the life to be sustained.


8. Tenn. Code Ann. § 32-11-101 et. seq. “[E]very person has the fundamental and inherent right to die naturally with as much dignity as circumstances permit and to accept, Continued on page 34

The focus now is to pass the Bar exam and they call me a lawyer, and they tell me better luck next time (Ouch!).

I LIKE TO BELIEVE that people making hiring decisions are also taking a long view in which looking out for the interests of their firms involve considering not only whether applicants can do the jobs but also whether the jobs will be good ones for those young lawyers.

The end of the tunnel is drawing near, and other than a quick roadblock called the bar, life as a lawyer waits on the other side.

My twenty years of education is coming to an end.

One thing that I’ve enjoyed about my final year has been an opportunity to read books that don’t appear on a syllabus.

What’s on your list?

Law Office Management Course: The professor is doing a great job at teaching and scaring those wanting to start out of their own.
Where There’s A Will
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refuse, withdraw from, or otherwise control decisions relating to the rendering of the person's own medical care, specifically including palliative care and the use of extraordinary procedures and treatment. " Tenn. Code Ann. § 32-11-102. "Terminal condition" is defined as "any disease, illness, injury or condition, including, but not limited to, a coma or persistent vegetative state, sustained by any human being, from which there is no reasonable medical expectation of recovery and that, as a medical probability, will result in the death of the human being, regardless of the use or discontinuance of medical treatment implemented for the purpose of sustaining life, or the life processes." Tenn. Code Ann. § 32-11-103(9).

9. Tenn. Code Ann. § 32-11-108. It is the author's professional and personal experience that the provisions of a patient's living will or other advance directive sometimes are ignored if family members or health care agents object.


11. This is the most common form of limitation. Alabama and South Carolina are neighboring examples. See Ala. Code § 22-8A-4 (2014); S.C. Code Ann. § 44-77-70 (2013).


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Last month, UT students held their second annual “Sex Week.”

I’m a proud graduate of the University of Tennessee, having obtained my Bachelor of Conservative Arts Degree in 1975 and my Juris Doctorate from the Big Orange Law School in 1978. I was very involved in student affairs during my years on The Hill, but I don’t recall the student body (so to speak) ever having a “Sex Week,” at least not officially. Heck, I was just hoping for an occasional sex night. I never dreamed of an entire week.

I do recall several unofficial sex-oriented student activities, such as the streaking fad that dashed across the campus and on to the Cumberland Avenue strip (again, so to speak), on a few warm nights in the spring of 1974. But “Streak Week” was not sponsored by the Student Government Association, the Inter-Fraternity Council, or even the Young Republicans. It appeared to be a spontaneous event, the forerunner of the modern flash mob, and in the case of “Streak Week,” it literally was a flash mob.

But Sex Week at UT last month was an official student event sponsored by a group called “SEAT” (Sexual Empowerment Awareness at Tennessee). It was apparently a big success, as more than 4,000 students participated.

Now let me quickly add what I mean by “participated.” Despite its provocative title, Sex Week at UT was much tamer than the unofficial Streak Week was in 1974. Sex Week was a series of lectures and workshops on topics such as “Avoiding Sexual Violence and Harassment,” “Sexual Health,” and even a discussion on the importance of abstinence, a topic for which I was an expert during my undergraduate years at UT.

Sex Week also featured a forum called “Long Term Intimacy: Commitment and Sex.” Interestingly enough, that forum was organized by one of the largest Christian groups on campus. Frankly, the whole thing sounded more like the 1969 Billy Graham Crusade than 1974 Streak Week.

But this did not stop Tennessee lawmakers from going berserk. When news of UT Sex Week reached Nashville, many members of the Tennessee General Assembly reacted like Claude Raines did in the movie Casablanca, when he learned that gambling was going on at Rick’s night club. They were shocked, shocked to find out that UT students were talking about sex!

Rep. Richard Floyd (R-Chattanooga) filed a resolution condemning UT Sex Week, and the resolution was co-sponsored by 28 other members of the Tennessee legislature. By my UT math, this means that close to a third of the State House of Representatives condemned UT Sex Week.

State Sen. Stacy Campfield of Knoxville also joined in the hue and cry.
Sen. Campfield should be a speaker at UT Sex Week, as he is outspoken on sexually related issues. A couple of years ago, he attracted national attention for his “Don’t Say Gay” bill that would have limited all sexually related instruction in Tennessee public schools to “natural human reproduction science.” I am not quite sure what this means, but something tells me that Tennessee lawmakers would still not be happy if next year UT students changed the name of “Sex Week” to “Natural Human Reproduction Science Week.”

Sen. Campfield is trying to nip future UT Sex Weeks in the bud with a bill that would require student fees to be distributed proportionately to the school’s organizations based on membership. However, given that 4,000 students participated in the most recent UT Sex Week, SEAT might attract so many members that under Sen. Campfield’s proposed law, Sex Week would get more student money than the homecoming queen contest.

Sen. Campfield is apparently also worried about UT bringing in outside speakers to talk about sex, or for that matter, any other dangerous liberal topics. He has proposed a bill that would prohibit the use of any UT revenue to pay for guest speakers. This would include outside commencement speakers. Among the radicals that UT has brought in to be commencement speakers in recent years have been Tom Brokaw and … Dolly Parton.

Yes, Dolly Parton, the Jane Fonda of Sevierville.

In the weeks following UT Sex Week, UT Chancellor Jimmy Cheek made frequent trips to the State Capitol in Nashville to tell Tennessee lawmakers that crucial First Amendment issues are at play. “A great university allows the free exchange of ideas,” Chancellor Cheek said. “If we don’t have different ideas, if we don’t have controversial ideas expressed, then we are not really accomplishing the real mission of the university.”

Unfortunately, many members of the Tennessee legislature feel the real mission of the university is to promote football and discourage sex.

Well, as a Tennessee alum, I have a solution that will allow free speech to flourish at the University of Tennessee while not offending Tennessee lawmakers. Next year, the featured speakers for UT Sex Week should be Rush Limbaugh, Newt Gingrich and Bill O’Reilly. These are three conservative men with broad experience in sexual relationships.

BILL HALTOM is a shareholder with the firm of Lewis Thomason. He is a past president of the Tennessee Bar Association and a past president of the Memphis Bar Association. Read his blog at www.billhaltom.com.
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