BARbriefs

Louisville Bar Association

June 2021

Philip Bogdanoff
Attorney & Instructor

Sean Carter
MESA CLE

Bill Eddy
High Conflict Institute

Rick Horowitz
Prime Prose

Jim Jesse
Rock "n" Roll Law

LOUISVILLE BAR ASSOCIATION

2021 CLE National Speakers

Ellen "Ellie" Krug
Human Inspiration Works

Paul Mellor
Success Links

Joel Oster
Comedian of Law

Stuart Teicher
The CLE Performer

Paul Unger
Affinity Consulting Group

LOUISVILLE BAR
ASSOCIATION
Pride in the profession. Service to the community.

VOLUME 21, NO. 06

Editorial Offices:
600 W. Main Street, Ste. 110
Louisville, KY 40202-4917
Phone: (502) 583-5314 • Fax: (502) 583-4113
admin@loubar.org • *www.loubar.org*

Shannon Greer
Managing Editor

Kimberly E. Kasey
Graphic Designer

BAR BRIEFS is a monthly paper published by the Louisville Bar Association. The LBA does not necessarily share or endorse any particular views expressed in this paper by contributors thereto. The views are those of thoughtful contributors. Advertising does not imply endorsement by the LBA of products or services or any statements made concerning them.

The mission of the Louisville Bar Association is to promote justice, professional excellence and respect for the law, improve public understanding of the legal system, facilitate access to legal services and serve the members of the association.

CONTENTS

FEATURES

6
Don't Be "Snakebit": ESI Pitfalls to Avoid
A recent federal opinion illustrates how attorneys' failure to properly handle electronically stored information can result in costly sanctions and bad outcomes for clients.
By Jennifer M. Barbour

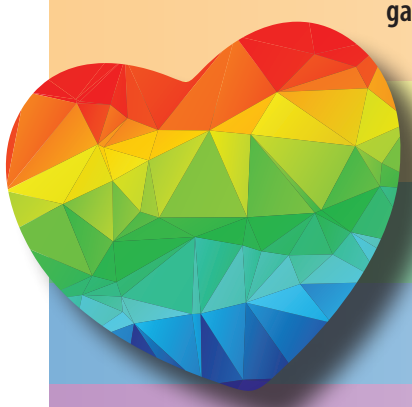
9
Product Liability Principles Involving Artificial Intelligence
As technology advances, so does the need for a framework to determine laibility when things go wrong.
By Shane O'Bryan and Samantha Wright

22
The Increasing Complexity of Defamation Law in #MeToo Era Lawsuits
Thorny legal issues are emerging from the intersection of #MeToo era lawsuits and defamation law.
By Jamie R. Abrams

24
Data Security, Ethics & Technical Competence
What Every Lawyer Should Know
Practical steps for ensuring that client's confidential information remains confidential.
By Paul J. Unger, Esq.

LGBTQ+ Pride

June is Pride Month, a celebration of LGBTQ+ people and the impact they have had in the world. It also commemorates the Stonewall Riots, which occurred in June 1969 and kicked off the first major demonstrations for gay rights in this country. In this issue, we feature personal perspectives about an uptick in proposed anti-transgender legislation, what it's like to be "other" in present-day America and lessons learned from participation in the Kentuckiana Pride Parade.



Is Hope Ahead?
Paths to Defeating a Rash of Rising Anti-Trans Legislation
By Sam Brinker

An Altered Perspective: Becoming "Other" in America
By Ellie Krug

Confronting Hate at the Pride Parade
By Scott Furkin

p.18-21

In this issue

4 **Judge as Villain?**
Oscar-nominated film "The Trial of the Chicago 7" reminds us of the importance of judicial independence
By Chief Judge Angela McCormick Bisig

5 **Court News**

10 **The Tiger King Trial, Murder for Hire Webinar**
By Philip Bogdanoff

26 **Classifieds**

27 **Members on the Move**

Events

11 **CLE**

16 **Sean Carter, MESA CLE**

22 **Juneteenth**

27 **LBA Night at Lynn Family Stadium**

27 **Meeting Announcements**

Departments

8 **Legal Aid Society**
Brush, Bottle, and Barrel at Home

Charles Darwin and Italian Cream Cake

This month in *Bar Briefs* we celebrate Diversity and Inclusion. As you probably know, the LBA has had a Diversity Committee for a number of years. This year, we decided to rename it the *Diversity & Inclusion Committee* to better reflect the committee's goal: for the LBA to more closely reflect the community we serve by encouraging persons from groups historically underrepresented in the legal profession—such as racial and ethnic minorities, women, LGBTQ and the disabled—to pursue careers in law and to facilitate full participation by attorneys from such groups in bar programming and activities. This year, the Diversity & Inclusion Committee has added new committee members and is in the process of creating additional programming and events to better reflect, celebrate and foster our diverse membership. Several CLE programs sponsored by the Committee are scheduled for later this month and are detailed in this edition of *Bar Briefs*.

Once again, my mind wandered as it seems to do when I write these articles, and I further wondered what exactly does it mean to be diverse and why is inclusivity so important? Interestingly, when you search "diversity" on the internet, almost all of the definitions that pop up are related to workplace and social diversity. Oxford Dictionary defines diversity as "the state of being diverse; variety; the practice or quality of including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, etc." I would take it a step further and add that diversity should include not only gender, race and ethnicity, but also age/generational, sexuality, language, disability, religion, education and socio-economic backgrounds.

Diversity is a good thing. Charles Darwin wrote an entire treatise, *On the Origin of Species*, that discusses the diversity of creatures, how essential diversity is to life, and that in a nutshell, productivity increases with species diversity. Simply stated, diversity is what makes each of us unique. In the workplace, diversity enhances creativity and a broad range of ideas and perspectives, which then in turn provides a groundwork for better decision-making and problem-solving. We can all learn from each other and that learning is enhanced when we understand the different perspectives that inform a particular issue. Diversity also helps to dispel negative stereotypes and personal biases about different groups. Diversity also supports and encourages respect and value for the differences among people.

So, what about inclusion? Inclusion happens when people are welcomed, valued and respected regardless of their personal characteristics and circumstances. It is a sense of belonging and being supported by an organization. It is the creation of an environment and community that enables everyone to participate and thrive. It's "how" you make a diverse group feel like they belong. You can have diversity without inclusion, what I'll call diversity for diversity's sake, but it falls pretty flat when you do. I am borrowing a great analogy of how to understand diversity and inclusion and their relationship to each other: think of it as if you were making a delicious Italian cream cake—you bring together lots of different ingredients to make this cake, but the ingredients are quite different and separate from each other. Inclusion is how you put those ingredients together to create that amazing Italian cream cake. Diversity is the ingredients, but inclusivity is what makes it so wonderfully delicious.

Diversity and inclusion are clearly a societal issue that people care about. People want to hire and work for organizations that don't just look diverse but are also inclusive. Businesses want to create or provide products and services for a broader group of customers. And customers want to see that businesses support and promote diversity and inclusion; those businesses that do not do so, risk alienating their customer-base at their peril. For example, I know an in-house counsel who evaluates whether a firm has diversity within its attorneys and what kinds of public service and community involvement they engage in. That particular in-house counsel culled some long-time law firms from his go-to list and decided that no future legal business would be sent to those firms that did not have diversity in their ranks.

Since 2015, the KBA has held a biennial Diversity & Inclusion Summit to provide resources and ideas for legal employers to implement diversity and inclusion programs within their own organizations, including how to empower diverse attorneys to become successful and thrive within their workplaces. Seminars have included exploring unconscious bias, the Mansfield Rule (a pledge that women or minorities will make up to 30 percent of leadership or governance positions), how to build a diversity initiative, language access in the courts, and a diversity pipeline program to encourage young people from diverse backgrounds to enter the legal profession.

Everyone has a role to play in creating both a diverse and inclusive culture. I admit I have my own personal growth to do on the subject. Last year's protests regarding racial equity within the criminal justice system as a result of the deaths of Breonna Taylor and George Floyd brought that starkly to light for me. Stepping outside of my comfort zone to improve my understanding of people who do not look like me or have the same experiences and opportunities that I have had has not been easy. It requires me to plan and think about how to better expand my horizons and learn more about different cultures, opinions, lifestyles and points of view. I have realized that I have held my own personal implicit biases and I am working to let those go. I know that exposure to different people, cultures and ideas can only make me better—a better communicator, a better problem solver, a better leader for the LBA and a better overall member of our community.

> ***... (E)xposure to different people, cultures and ideas can only make me better—a better communicator, a better problem solver, a better leader for the LBA and a better overall member of our community.***

I encourage all our members to look at what they are doing to foster diversity and inclusion within their own spheres of influence, be it in the legal community or elsewhere. The LBA can be a resource for you and I encourage you to reach out to our Diversity & Inclusion Committee for ideas or assistance if you need it.

I also wanted to share with you some additional updates in and around the LBA:

KPRC Rule 8.4. Two years ago, the LBA created its Gender Equity Committee whose focus is to ensure fairness of treatment for women, men and gender-diverse people according to their respective needs. The Gender Equity Commission has been championing an amendment to KPRC Rule 8.4 that would add harassment and discrimination in the practice of law to the list of prohibited actions that constitute professional misconduct. The amendment is pending before the KBA Board of Governors and we hope to see its passage in the next few months.

Executive Director Search. As most of you know, Scott Furkin has announced his retirement, and will step down as Executive Director at the end of this year. The LBA's search for a new Executive Director continues. The LBA engaged Ashley Rountree, a local consultant group, to assist in the process. We have posted for the position and have received responses from potential candidates both locally and from across the country. Our consultants will assist the LBA Search Committee to winnow down the candidates and then the Search Committee will begin interviews with those candidates starting this month.

Bar Center Re-Opening. The LBA Board of Directors has discussed the re-opening of the Bar Center. Currently, we are targeting July 1, 2021 as the re-opening date, subject to change as the Governor's Executive Orders and CDC pandemic guidance changes. We will post information on the LBA's website and in eBriefs on the definitive re-opening date.

CLE. If you haven't checked out all of the CLE offerings the LBA has for you, please do! June 30 is just around the corner and our CLE Director, Lisa Anspach, has put together an outstanding group of seminars for all of your annual CLE requirements. We essentially have a CLE program available to you every day of the week. If you cannot attend a live CLE via webinar, check out the LBA's on-demand library. And don't forget you can buy a "CLE pass" that provides an additional discount on LBA CLEs! Contact Lisa Anspach at the LBA for more information.

I am looking forward to seeing many of you again in person this summer as we re-open the Bar Center and begin to hold in person social events. For those of you with children graduating, congratulations and if you are vacationing this month, travel safely! Stay safe and be well!

Sincerely,

Deena G. Ombres
LBA President

Judge as Villain?

Oscar-nominated film "The Trial of the Chicago 7" reminds us of the importance of judicial independence

Chief Judge Angela McCormick Bisig

Movies and television are often a window into what issues grab the attention of society at any given time. This is perhaps even more true as we try to move forward past a year of lockdowns due to a world health pandemic. A common topic of social conversation this year involves what shows and movies people are watching.

An excellent indicator of its infusion into mainstream consciousness is when a film is nominated for "Best Picture" for the Academy Awards. This year one of the top film's clear villains was a judge holding trial. The judge was the antagonist because he repeatedly showed bias, prejudice and a callous attitude and put on higher than mighty airs.

I have a tradition where my (now adult) children and I try to watch the movies nominated for Oscar's Best Picture. I then invite them over for a party to watch the awards. This year, Aaron Sorkin's *Trial of the Chicago 7* depicted in true Hollywood fashion the drama surrounding the famous jury trial of 1968 Democratic National Convention protestors. While understanding that Sorkin's version is an artistic depiction of the events, Judge Julius Hoffman, who presided over the trial, was a textbook example of a bad judge. He was hostile, rude, mean-spirited and holier than thou. I was sorry for all to see such a horrific depiction of a judge. It can be summed up by a wise text message my step-daughter sent after seeing the film, "Hey that Judge Hoffman that was the judge for the Chicago 7, did he ever get reprimanded for the things he did in that case?... me and my roommates hate him."

I started my series of columns for *Bar Briefs* by writing an article about the importance of courtroom formalities and decorum in maintaining confidence in the legal institution. Integral to that faith and decorum is a judiciary that leaves personal opinions, biases and pre-judgments at the door. The citizenry looks to the legislative and executive branches of government to set the policies we all live under. This is why those branches are high profile and the battles over legislation hard fought. The judicial branch is not responsible for policy making, but policy applying.

This results in the judiciary being lower profile, most of the time, than the other branches. We are the referees and umpires of the institution of government, which is why we don't get much attention until society believes we've made a wrong call, or like Judge Hoffman, shown a bias for one side or the other. As the umpires, it is appropriate that we do not wear the jersey of any team. While legal proceedings are far more serious and consequential than sporting events, the analogy helps highlight the importance of judicial independence.

> *(T)he culture of court and the judge impart the fairness that is valued, and indeed, required of our justice institution to preserve public confidence.*

Judges staying outside of partisan politics frees them from allegiance and input from the platform of any political party or movement. Judges should maintain the ability to do what is right, and not necessarily what is popular with any organized group. Judges are a necessary check and balance to the other branches of government. Or as Justice Sandra Day O'Connor said: "The framers of the Constitution were so clear in the federalist papers and elsewhere that they felt an independent judiciary was critical to the success of a nation." My colleagues in Jefferson County and I are all elected in nonpartisan elections by the citizens of the community in which we live.

This brings me to the next point about Judge Hoffman's tutorial on how not to be a judge, the importance of respect in the courtroom. Litigants and those accused of crimes should be treated with dignity in the courtroom. The law speaks for itself in imposing sanctions and rendering judgments for money damages. No place in any statute or rule of court does the law dictate that part of the punishment for a crime is having a judicial authority belittle or talk down to someone in court. Those accused of crimes should be treated with the same dignity as attorneys and witnesses in court. They are citizens of the community in which we serve charged with violating our laws. If found guilty, they should be held accountable for their actions.

Judge Hoffman is depicted in the film treating those before him in court as though they are already determined to be hooligans and criminals. There is no presumption of innocence in his tone, nor is there basic respect for their dignity as humans. The defendants in the trial are also depicted as poking at Judge Hoffman. For example, as the Judge explains to the jurors that he and defendant Abbie Hoffman are not related, Abbie quips back "Man, I don't think there's much of a chance they're going mix us up." Instead of rising above such comments and realizing he is a representative of dispassionate justice, Judge Hoffman jumps right on the disrespect wagon and treats them all with disdain. While real life is often more subtle than a Hollywood role, the film is an excellent reminder to the bench to set aside any bias when hearing cases.

As the viewers, and particularly members of the LBA, we see Judge Hoffman as a villain and a threat to the institution we all work within because he falls far short of the independence, integrity and impartiality we expect of judges. Just as with courtroom protocols, the culture of court and the judge impart the fairness that is valued, and indeed, required of our justice institution to preserve public confidence. Such public confidence in turn inspires public willingness to accept the outcomes reached in court and to accept the judicial resolution of disputes as fair, neutral and based in law rather than other inappropriate considerations.

Here in the Commonwealth, the Kentucky Code of Judicial Conduct serves to ensure that judges faithfully adhere to these core values of independence, integrity and impartiality. I think I can speak not only for myself, but also for all of my colleagues in saying that we both hope and expect the members of the Bar and the public more generally will not encounter the type of behavior exhibited by Judge Hoffman, but rather judicial conduct in conformity with the Code of Judicial Conduct and the values it serves to protect. While Judge Hoffman's behavior served to make a great villain, it is entirely inappropriate in the courtrooms of our Commonwealth.

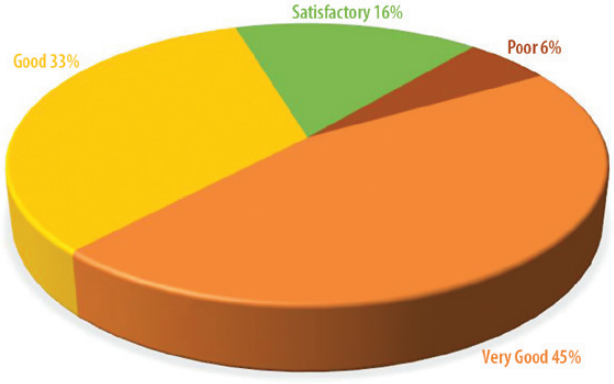
Chief Judge Angela McCormick Bisig presides in Division 10 of Jefferson Circuit Court. ■

Circuit Court Clerk's Attorney Survey Results

David L. Nicholson, Circuit Court Clerk

The Office of the Circuit Court Clerk conducted its 13th Annual Attorney Survey February 15-28 to solicit feedback from practitioners in order to gauge our performance during 2020, a year unlike any other.

As you well know, the administration of justice continued during the pandemic, albeit in a much different manner with protocols in place to protect the health and safety of all. I am proud of the way that our deputy clerk TEAM responded to the many changes, remaining dedicated to providing the highest level of service and staying agile in order to adapt to new processes necessitated due to the coronavirus.



The results have been tabulated, and I am pleased to report that 94 percent of respondents ranked our overall customer service as Very Good, Good or Satisfactory in 2020. In the three other overall categories, our TEAM scored 99 percent (combining Very Good, Good and Satisfactory rankings) in professionalism, 96 percent in accuracy and 93 percent in efficiency.

Considering the challenges brought on by the unprecedented public health crisis and the fact that we processed 90,666 new circuit, family and district court cases in 2020, these ratings are strong. While I am pleased with the results of the survey, I would like to emphasize that we will continuously measure our performance and utilize data-driven decision-making as we strive to continue providing the highest level of service to the Bar and all our customers year-round.

I would like to express my gratitude to all the attorneys who took the time to complete the survey and to those who offered comments, suggestions and concerns. Rest assured that I thoroughly review, discuss and consider all of your comments with my operational management TEAM. Additionally, I appreciate your input on the survey topics of eFiling and remote court; your feedback will be helpful going forward.

In closing, I would like to thank the Louisville Bar Association, Kentucky Bar Association, Jefferson County Public Defender's Office, Jefferson County Public Law Library and other judicial partners for their assistance promoting our survey. As always, I consider it an honor and privilege to serve as Circuit Court Clerk and lead our TEAM of dedicated and hard-working deputy clerks who do important work each and every day serving the citizens of Jefferson County. ■

Changes to Federal Electronic Filing Coming in the Fall

In September 2021, the U.S. District Court for the Western District of Kentucky will upgrade its CM/ECF system to NextGen CM/ECF (NextGen). This will require filers to take steps to prepare for NextGen in order to continue to electronically file.

NextGen simplifies electronic filing by combining your CM/ECF and PACER accounts into a single Central Sign-On account. Through the PACER website, filers will use one log-in and password to electronically file in all NextGen courts where they have permission to file. You will no longer need a separate CM/ECF account for each NextGen court. All federal courts are expected to eventually adopt NextGen.

Before September 1, 2021, upgrade your PACER account at *https://www.pacer.gov* if you have not already done so. Each filer must have his or her own PACER account. Shared PACER accounts will not work with NextGen. Please note, PACER accounts created after August 11, 2014, are already upgraded accounts.

Beginning September 13, 2021, you must link your CM/ECF account to your PACER account in order to electronically file in the Western District of Kentucky.

Failure to complete these steps will stop you from electronically filing after NextGen goes live.

For questions about this, please contact the Western District's CM/ECF Helpdesk at (866) 822-8305. ■

Most State Court COVID-19 Restrictions Lifted

In two orders issued May 18, the Kentucky Supreme Court lifted most of the restrictions on state court operations imposed during the pandemic. The orders came on the heels of new guidelines from the Centers for Disease Control and became effective immediately.

Among other things, Administrative Order 2021-16 allows in-person access to judicial facilities for anyone with business before the courts (except individuals who have symptoms of, have tested positive for, or been exposed to COVID-19) and eliminates the mask requirement for fully-vaccinated individuals entering court facilities. While encouraging the continued use of remote technology, it allows judges to conduct in-person proceedings but also permits them to require individuals to wear masks in their courtrooms.

Similarly, Administrative Order 2021-17 lifts most restrictions on jury trials but requires continuances, postponements and recusals for attorneys, parties and jurors who are ill or at an increased risk of severe illness from COVID-19. Notably, it continues the suspension of night traffic courts in Jefferson County until further notice.

Chief Justice John D. Minton Jr. announced the changes in an internal communication to justices, judges, circuit court clerks and court personnel. "After the most challenging year in the history of the modern court system . . . the Supreme Court has lifted most of the COVID-19 restrictions for employees, elected officials and those entering court facilities across the Commonwealth," he stated. "I am grateful to all of you for the perseverance and commitment to safety that allows us to begin transitioning back to normal operations for the Kentucky Court of Justice." ■

Don't Be "Snakebit": ESI Pitfalls to Avoid

Jennifer M. Barbour

As attorneys, we have all heard the saying, "Ignorance is no defense." Despite the fact that the Federal Rules of Civil Procedure were amended to address Electronically Stored Information (ESI) over 15 years ago, many in the legal profession continue to practice without fully understanding their ESI obligations. The need for attorneys to be competent in ESI stems from the civil rules and the rules of professional conduct. The Federal Rules of Civil Procedure (as well as many state rules) address counsel's ESI obligations and include sanction provisions if ESI is not maintained properly once litigation is anticipated. Further, nearly every state bar association has addressed, in some fashion, the belief that rules of professional conduct regarding basic competence include obligations to be competent regarding ESI. *See e.g.*, California State Bar Opinion, No. 2015-193.

However, lawyers and law firms continue to struggle with ESI, and ignorance is no defense. As illustrated by the January 29, 2021 opinion in *DR Distributors, LLV v. 21 Century Smoking, Inc.*, 12-CV-50324, 2021 WL 185082 (N.D Ill.), an attorney's professed ignorance of technology can result in significant sanctions for both the attorney and his or her client. Significantly, the *DR Distributors* case highlights the importance of attorneys having an active involvement with ESI discovery and verifying information obtained from their clients. In a lengthy and scathing opinion, the court detailed the failures of both the client, 21 Century, and its counsel in not engaging in discovery in good faith and competently understanding the ESI obligations. The court's opinion sets the stage immediately:

> 'Snakebit' —That's how a former defense counsel described this case. But 'snakebit' connotes the unfortunate circumstances that befall unsuspecting victims. That didn't happen here. Instead, through a series of missteps, misdeeds, and misrepresentations, defendants and the former defense counsel find themselves looking down the barrel of a sanctions motion Howitzer. If any entity has been snakebit, it's this Court.

A. Factual Background

In this trademark infringement case, DR Distributors alleged 21 Century infringed upon its trademarks in the development of 21 Century's website. The website 21 Century developed included a metatag that utilized a mark belonging to DR Distributors. Metatags are part of a website's source code that search engines like Google and Bing search to identify website content. As a result, DR Distributors alleged that individuals performing internet searches for DR Distributors would be directed to 21 Century's website since the metatag contained DR Distributor marks. Due to the web-based nature of the infringement claims, the case would clearly be an ESI intensive one.

At the heart of the ESI debacle was 21 Century's use of e-mail and chat (think instant messaging) functions through GoDaddy and Yahoo! to communicate about its business, including with the search optimization consultant. The GoDaddy and Yahoo! accounts were entirely web-based, meaning the e-mails and chats were not stored locally on a hard drive or server. The only way for the e-mails or chats to be stored on a hard drive would be for an account user to download them from the web-based programs, something 21 Century never did. 21 Century's counsel was unaware of the web-based nature of the GoDaddy and Yahoo! accounts.

After the initial scheduling conference, discovery ensued over a six-year period. In its Initial Disclosures, 21 Century represented that all ESI was stored on four hard drives. This representation was made after lead counsel instructed an associate to contact 21 Century to draft the disclosures. Following the Initial Disclosures, counsel instructed 21 Century to perform a search of the four hard drives, believing incorrectly that those drives were the sole source for ESI. At the hearing, counsel explained, "I just don't have the technological background necessarily to make the technical distinction that escapes us here, which is that those e-mails would not be revealed in the search that was done of those four computers." In other words, counsel professed ignorance of web-based e-mail. 21 Century never corrected its counsel's mistake. To further complicate matters, 21 Century did not implement a litigation hold and auto-deletion functions on GoDaddy and Yahoo! accounts were not disabled.

> ***The Federal Rules of Civil Procedure (as well as many state rules) address counsel's ESI obligations and include sanction provisions if ESI is not maintained properly once litigation is anticipated.***

In 2014, DR Distributors questioned the paucity of e-mail production in discovery. As a result, 21 Century's counsel retained an ESI vendor to assist in producing all relevant and responsive ESI. The vendor suggested interviewing 21 Century to ensure complete and accurate ESI discovery occurred. For unknown reasons, counsel declined the interview and instructed the vendor to solely image the four hard drives. The vendor was never told by counsel or 21 Century about the GoDaddy or Yahoo! accounts. As a result, the vendor's production did not contain those messages or chats.

Thereafter, 21 Century's owner gave his deposition and testified he had searched all e-mail accounts to find documents, and had turned over all his records to defense counsel. As a result of his testimony and the ESI vendor's search, DR Distributors and the court believed all existing ESI had been searched and produced.

With discovery believed to be completed, the case moved procedurally into summary judgment motions in 2018. Around this same time, 21 Century retained new counsel. To try to overcome DR Distributor's motion, 21 Century's new counsel began scrambling to do a new search for ESI. The ESI vendor was contacted again, and this time allowed to do an interview. 15,000 new pages of e-mails were identified with many being highly relevant to the claims and damages sought. For instance, one e-mail contained online sales data from the period when the infringement was occurring. That data had never been produced in discovery. However, even this new search for ESI was incomplete because 21 Century did not disclose its use of the Yahoo! chat function to the vendor.

In responding to the summary judgment motion, over 100 new documents were attached as exhibits by 21 Century. An hour after filing the response brief, 21 Century supplemented its discovery with the 15,000 new messages. The supplemental discovery responses also disclosed the auto-deletion function that had been known by 21 Century since 2014 or 2015. DR Distributors quickly called foul and began filing motions to compel and motions for sanctions to determine where these previously undisclosed documents had been for the past six years. Those motions resulted in the ESI vendor finally performing a search for the Yahoo! chat messages. None were found, despite testimony establishing the chat function had been used by the owner and the search optimization consultant. No explanation was provided concerning why the messages were no longer available.

A lengthy 5-day evidentiary hearing was held on DR Distributor's motion for sanctions wherein DR Distributors effectively established 21 Century and its counsel had failed to reasonably search for ESI and respond to ESI discovery. The court utilized FRCP 26(g), FRCP 37(a), 37(b), 37(c) and 37(e) to impose and award sanctions against both the client and its counsel.

The court first ruled both the client and counsel should be sanctioned under FRCP 26(g) with regard to the initial disclosures. The court ruled that counsel has an obligation to prepare the initial disclosures following "reasonable inquiry." In that regard, the court affirmatively stated a "reasonable inquiry" meant a proper custodian interview wherein counsel investigated the information technology utilized by 21 Century to identify custodians and locations of all ESI. Counsel cannot rely on the representation of a single representative of the client as proof of "reasonable inquiry."

The court further chastised counsel for failing to develop an ESI plan. As a result, the court noted that the lead counsel had left associates with no guidance or monitoring for fully gathering ESI and had retained an ESI vendor but given instructions to the vendor that prevented the vendor from gathering all ESI. While the court recognized 21 Century's failure to be candid with its counsel played a significant role in the discovery issues, the court nevertheless held that counsel's failure to make a reasonable inquiry had permitted the client's subterfuge to succeed. As a result, the court ordered both the client and counsel to pay DR Distributors' attorneys' fees for the discovery motions and sanctions hearing.

The next basis for imposing sanctions from the court was FRCP 37(a) and 37(c). FRCP 37(a) permits an award of attorneys' fees once DR Distributors successfully moved to compel discovery unless 21 Century or counsel could prove their evasive or incomplete answers were substantially justified. FRCP 37(c) provides for an award of fees if a party fails to disclose or supplement initial disclosures. In awarding fees under this rule, the court sanctioned not only 21 Century and its former counsel, but also 21 Century's new counsel that had not become involved until 2018. The court apportioned much of the fee award to 21 Century and its old counsel, but noted new counsel also shared blame in the matter. In so holding, the court chastised new counsel for taking the client and former counsel at their word without any independent investigation. The court noted this was especially true given the ESI vendor's second search had returned 15,000 additional e-mails never before produced. In the court's reasoning, this should have triggered new counsel to begin afresh to ensure ESI was being properly searched for and produced.

The court also imposed sanctions under FRCP 37(b) for failing to comply with a discovery order issued in 2015. That order had granted DR Distributor's motion to compel communications with the search optimization consultant. Following the order, former counsel asked an associate to contact 21 Century to obtain the communications. 21 Century falsely represented that no documents existed, and counsel blindly took the client at its word. While again faulting the client for its deception, the court noted that counsel knew of the use of Yahoo! e-mail and chat at that time and did not question the client as to why no chats or e-mails had been produced. As a result, the court barred 21 Century from contesting the allegation that the search engine consultant was working for 21 Century when the metatag was inserted onto the website's source code.

Finally, the court addressed whether additional curative measures should be imposed under FRCP 37(e). With regard to the Yahoo! chats, the court inferred the absence of any chats meant they had been deleted. First, the court held that the jury would be allowed to hear of 21 Century's behavior resulting in the loss of ESI. Additionally, the jury would be instructed that 21 Century had a duty to preserve the evidence, had failed to do so, and that the evidence was relevant to the action. This in turn would allow the jury to infer 21 Century had intentionally destroyed the evidence because it was harmful to 21 Century's case. Finally, the court precluded 21 Century from placing blame for the metatag's presence on the website upon the search optimization consultant. The court reasoned that the chats would have resolved that defense, and since 21 Century had deleted the chats, it should be precluded from attempting to shift blame

to the consultant.

B. Lessons Learned for ESI Best Practices

The court's lengthy opinion detailed clearly the steps counsel should have taken to avoid being sanctioned along with its client. First, attorneys should educate themselves on ESI and continually stay abreast of changes in technology even when not actively participating in an ESI-intensive matter. This can and should include actively seeking continuing education courses on ESI. Having a basic competence will help attorneys be prepared to competently begin when representing the next client whose case involves ESI.

Second, attorneys should conduct an ESI interview early in the case. This interview should be designed to understand all methods of electronic communication and storage utilized by the client. It is not enough to understand what e-mail providers are used. Rather, counsel must understand how e-mails are stored and deleted and in what formats. Involvement of an ESI vendor can assist counsel in ensuring she is asking the right questions to fully understand the ESI landscape of her client.

Third, based on the information gathered in the ESI interview, counsel should develop an ESI plan. The plan is designed to ensure that all attorneys working on the case along with all client representatives involved in gathering ESI are fully gathering and responding to discovery. Importantly, counsel should never permit a party to gather ESI independently. The court repeatedly emphasized that counsel must supervise the client throughout its ESI search to ensure the client is fully and accurately searching and producing discovery.

Fourth, attorneys should ensure they fully understand their client's ESI retention and deletion policies or lack thereof. Simply sending a litigation hold letter without discussing the implementation of the hold with the client is not sufficient. The court emphasized that counsel had an affirmative duty to ensure the client had disabled auto-deletion functions in the Yahoo! chat function.

Finally, attorneys should be forthcoming with the court if they discover or suspect ESI may have been unintentionally destroyed. In *DR Distributors*, the former counsel for 21 Century knew in 2014 and 2015 about the auto-deletion problem with the chats, but never disclosed that in response to discovery. The court emphasized that if documents responsive to a discovery request no longer exist due to inadvertent destruction, disclosure of that fact should be made. While the delay in disclosure was one of many actions that made the court disbelieve counsel and 21 Century, it nevertheless was a contributing factor to the court indicating it did not believe any explanation offered years later to explain the missing chats.

C. Conclusion

The importance of maintaining basic competency in ESI remains crucial to the successful litigation practice. As the *DR Distributors* case illustrates, an attorney's ignorance of ESI can lead to costly sanctions and bad outcomes for the client. Following the order granting sanctions, the court instructed DR Distributors to file a petition for fees. The petition, which is pending before the court presently, seeks nearly $2.5 million in fees related to the discovery motions and summary judgment motions. While it remains unclear whether the court will award the totality of the requested fees, the significance of the court's sanctions ruling remains—counsel must actively participate and understand the ESI process in each case.

Jennifer Barbour is a director with Middleton Reutlinger. She is a litigator primarily practicing in officer and director liability litigation, fiduciary litigation, trade secret litigation, non-compete litigation and medical malpractice defense litigation. ■

LEGAL AID SOCIETY'S

BRUSH, BOTTLE & BARREL

at home

6.11.21

A CULINARY EXPERIENCE
BY ATRIA SENIOR LIVING

WE'RE BACK!

Brush, Bottle, and Barrel AT HOME distills everything you love about our signature event – great bourbon, great food, and justice - into an evening at home!

Prepare a three course meal with Chef Chad Welch of Atria Hospitality, who will be in your kitchen virtually, taking questions and guiding the process as you enjoy three Brown-Forman bourbon samples specifically paired with each course.

$150 PER KIT FOR 2

NOW ON SALE AT
YOURLEGALAID.ORG/BBB

Product Liability Principles Involving Artificial Intelligence

Shane O'Bryan and Samantha Wright

The year is 2021. A global pandemic, killer wasps, and now …killer robots? At this point, it is hard not to believe all of these as true. In fact, the reality is that all of these are truths. While killer robots sound like the plotline to 2004 science fiction film *I, Robot* (which ironically was set in 2020), artificial intelligence advancements have made these robots more than science fiction. Today, machines and robots have elite and sophisticated programming that make them both extremely helpful and potentially dangerous.

While the global pandemic has put a pause on many aspects of life, the progress and advancements in the artificial intelligence realm continue. Many industries are responding to this new norm and trying to understand the risks in this new and exciting field. One major question is how do we determine who is responsible when a machine utilizing artificial intelligence fails?

What is Artificial Intelligence?

Artificial Intelligence, or AI, is any computer system or program that is able to recognize an event or situation, and decide to do, or not do, something. These programs "think" and behave in a manner that mirrors that of a person, without the risk of fatigue or exhaustion. Efficiency is the goal for most companies and people in their daily life. AI robots provide an efficiency that humans simply cannot.

Manufacturing industries are utilizing AI to boost efficiency and production numbers. Assembly lines and machines can be programed to move and perform at levels far beyond that of a person. This capability allows for much greater production. Everyday we utilize a form of AI to make life easier.

We dictate our texts to Siri, and our phones contain and control everything from finances to how we arrive to work. We can lock our doors and set our alarms from hundreds of miles away with the press of a button. Alexa can wake us up, start the coffee maker, and order more pandemic snacks without us lifting a finger. Once upon a time, cruise control was the most our cars could do, now our cars can drive themselves.

The question is what do we do when these machines we have programmed to behave intelligently begin to "think" outside of the programming and capabilities of which we thought they were capable. Afterall, intelligence is the ability to acquire and apply knowledge and skills. It is not unrealistic to expect AI to learn and adapt as needed.

So, what happens when the AI expands beyond its programming and "malfunctions" to the point of causing an accident? Who is responsible? The manufacturer, designer, programmer, owner or operator? The unknown of AI makes the actual implementation of laws and regulations a difficult path to determine, but one of great importance. If AI is capable of causing damage to persons and property, someone (or something) will be held accountable. But should these claims be governed under a traditional product liability framework?

Is AI a Product or a Service?

In order to determine whether product liability principles will apply in the field of AI claims, the initial question that must be answered is whether the courts will consider AI to be a product or a service.

Software has not traditionally been considered a "product" for product liability purposes, under either the Restatement Second or Third of Torts. And although the designation of whether AI should be considered a product is not fully defined, one court has recently waded into the issue. In *Rodgers v. Christie*, 795 Fed. Appx. 878 (3d Cir. 2020), the Third Circuit Court of Appeals applied the definition of a product contained in the Restatement (Third) of Torts, in holding that a multifactor risk estimation software program, used in evaluating the risk to the community of prisoners considered for release, was not a product for purposes of a strict liability claim brought by the family of a man murdered by a recently released prisoner.

The court relied upon the Restatement Third of Torts, which defines a "product" as "tangible personal property distributed commercially for use or consumption." The court declined to deem the software system a product because it was "neither tangible personal property" nor "analogous to" it. Instead, it was an "algorithm" or "formula" that analyzed various factors to estimate the risk of an offender to the community. The court further found that the risk estimation software would not be deemed a "product" because "information, guidance, ideas, and recommendations" could not qualify as a product under the Restatement.

Notwithstanding the Restatement Third definition, the ultimate designation of AI as a product or service is far from settled. Resolution of this issue is extremely important, however, because if AI is a product, strict liability principles apply; if AI is a service, it will not.

Strict Liability

Strict liability claims fall into one of three categories: Defective design, defective manufacturing and failure to warn. Some commentators argue that strict liability is the best response to the growing AI industry as these intelligent machines pose an increased risk of harm to individuals. If AI causes an injury or spontaneously malfunctions, negligence will not have to be proven, and an innocent party will not bear the financial burden of such an accident.

It is not yet clear how these principles will be applied in more concrete applications such as self-driving cars. Self-driving cars are a convenience that appeal to many consumers. Even if the car is not fully autonomous, the smart systems in place allow the car to do a lot for the operator. These cars can stop themselves to avoid an accident or parallel park with only the press of a button. However, once the car takes control, is the operator still at fault? If the car is programmed to think and react, one might assume the operator can rely on this intelligence. This may seem true, however, the car is still a car.

With regard to partially autonomous vehicles, strict products liability may not be the best liability structure because an operator should still have ultimate control and responsibility over the vehicle. Of course, the product should be provided with full and adequate warnings and instructions about the limitations of the AI and the role of the operator.

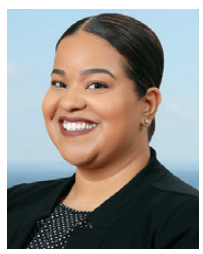
In contract, some argue the application of strict liability principles to accidents involving fully autonomous vehicles is fair because the manufacturer has implicitly promised to provide a fully autonomous vehicle that does not need human intervention to safely operate. But what is the standard to apply in determining whether a defect exists in the AI? Some jurisdictions apply the consumer expectations test to product liability claims. Arguably in those jurisdictions a plaintiff could argue they reasonably expected the vehicle to avoid collisions as a matter of course. But many jurisdictions apply the risk utility analysis to determine whether a product is defectively designed, asking whether the product creates such a risk of an accident that an ordinarily prudent manufacturer would not have put it on the market. How do you determine whether a defect in the AI exists under this standard? Should you compare the accident incident rate of the autonomous vehicle with that of a human driver? Surely, the autonomous vehicle will have a significantly lower accident rate than human driver. If this is the standard, how are injured persons expected to recover?

An interesting proposal in the AI world is to offer insurance to drivers for accidents involving fully autonomous vehicles. The policy would be used to offset the damages caused by accidents related to AI malfunctions. States could require this insurance for autonomous vehicles. Similar to a warranty with a product, this insurance would provide some protection to the victim, the owner, the manufacturer, and those responsible for designing the AI.

Conclusion

The technological advancements we have made with regard to AI are vast and profound. The AI industry is thriving. But in order for this industry to continue to advance we will need to determine how to allocate the risk of loss when things go wrong. Product liability principles seem to provide an obvious framework for determining liability, but as shown above, it is not always that simple and we still have long way to go.

Shane O'Bryan is a director in Middleton Reutlinger's litigation practice group. His practice is primarily in litigation with an emphasis on product liability, utility law, transportation law, insurance coverage litigation, insurance defense and commercial litigation. Samantha Wright is an associate attorney in Middleton Reutlinger's litigation practice group. She is a graduate of the University of Louisville Brandeis School of Law. ■



The Tiger King Trial, Murder for Hire Webinar

Philip Bogdanoff

If you were to recall your worst meal out, you can probably remember the restaurant and have a mental picture of swearing never to return to the scene of this digestive nightmare. Now, can you recall your worst continuing legal education (CLE) experience?

In 1986, I attended a three-hour ethics class at the Ramada Inn in downtown Akron taught by a retired law professor from the University of Akron. The professor read from his notes, never looked up at his audience, and talked in a monotone voice about cases that had absolutely no relevance to my practice as an assistant prosecutor. Unfortunately, no computers, no cellular phones and no reading material.

An hour into the presentation, Assistant Prosecutor Thomas Walters who was sitting next to me started tearing sheets of his legal pad into little pieces. I thought he was going crazy. Five minutes later he turned to me and said, "Phil, if I have to listen to this guy any longer, I am going to go nuts, let's play a game of chess." Mr. Walters had drawn a chess board on his legal pad and had creatively labeled those torn pieces of legal paper into chess pieces. We spent the remainder of the class playing a competitive game of chess.

Fast forward 35 years, I am now a CLE speaker providing creative and entertaining CLE. I have done over 150 presentations for thousands of prosecutors, police officers and attorneys. On June 22, through the Louisville Bar Association I will be presenting The Tiger King Trial, Murder for Hire.

1. Why Entertaining CLE?

When I first started doing CLE presentations for the Ohio Prosecuting Attorneys Association in 2012, I would usually have at least 250 prosecutors attending the seminar. During a presentation on arson by an Assistant Ohio State Fire Marshall, his PowerPoint consisted of various statutes and did not contain one photo of a fire scene or a film clip of a fire investigation. Instead, his entire talk was on the Ohio statutes that gave the state fire marshal jurisdiction to investigate fires. While he was speaking, I walked around the room and noticed that most of the prosecutors were looking at their phones or on their computers shopping, playing fantasy sports, or working on various cases.

I realized one essential point, if you cannot maintain the attention of your audience, you cannot effectively teach CLE. Therefore, whenever I start working on a new webinar, my first goal is to create an entertaining presentation to capture and keep the attention of my audience. As one attendee noted in his evaluation of the Tiger King CLE, "Entertaining excellent CLE on an interesting matter of recent publicity." I have found that attorneys want to attend presentations that are both informative and entertaining.

2. Film clips are excellent teaching tools and make presentations entertaining

It is estimated that 65% of attendees are visual learners in that they retain what they see and not what they hear. One study found that after three days, a user retained only 10-20 percent of written or spoken information but almost 65% of visual information. There is an old proverb, "What I hear, I forget; what I see, I remember; what I do, I understand." I always use numerous film clips in my webinars to engage the attendees and spur discussions of various legal issues.

In the Tiger King presentation, I use film clips to encourage attorneys to be better story tellers in the courtroom. We also examine film clips to determine whether there were any possible defenses in this case. Most importantly, attorneys like the entertainment value of the film clips and I find them to be a great teaching tool. An attorney commented on this webinar that, "I liked viewing this popular Netflix series through a legal lens and learning about different trial techniques and tactics based on the prosecution of Joseph Maldonado Passage."

3. Attorneys like presentations that are interactive and engaging

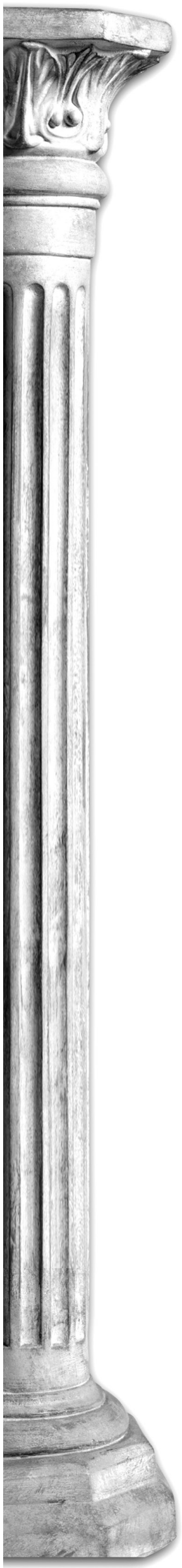
Whenever I do live CLE, about half of my presentation will be interacting with my audience. The title of my business is Interactive Presentations, with the motto, "Where Attorneys Get Engaged." Every attorney comes to my webinar with experience from their law practice and my job is to get them to talk about their practice. An attendee summarized the Tiger King webinar by stating, "The best part of the course was having engaging conversation with the presenter while the presentation was ongoing. This was a lovely surprise, and very insightful as to his additional questions, *and the advice/comments provided by other attendees.*"

As a prosecutor, I never had to persuade a client to take an offer from opposing counsel. However, I am able to engage my attendees on how they interact with their clients when discussing a negotiated settlement on a civil case. Further, many of the attorneys have great advice on how to prepare an expert witness. It is important that CLE speakers engage their audience in order for attorneys to learn from the experiences of others in their legal community. Further, attorneys love webinars that are interactive: "This was very interesting and fun. I loved that the presenter interacted with everyone in the chat and posed questions to us."

4. The Tiger King Trial is an intriguing trial

As an assistant Summit County prosecutor for almost 30 years, I worked on some high-profile cases including the Jeffrey Dahmer case since he was raised near Akron and his first homicide was committed in Summit County. The Tiger King trial is a fascinating trial based on the flamboyant nature of Joe Exotic, the exotic animals he displayed at his zoo and the thousands of hours of film documenting the rivalry between Joe and his nemesis, Carole Baskin. It is extremely rare where a real-life crime is captured on film. Further, many of the attendees of the CLE enjoy this presentation even though they have not watched the documentary, "Entertaining and well presented … Loved this even though I have never seen Tiger King." If you are looking for a unique presentation that is engaging, informative and entertaining, I hope you will attend The Tiger King Trial, Murder for Hire webinar on June 22. For a short video on this presentation, visit *www.youtube.com/watch?v=y_nxoVDyqQQ.*

Philip Bogdanoff is a nationally recognized continuing legal education speaker. He served as senior assistant prosecutor in the Summit County, Ohio Prosecutor's Office for more than 27 years. More information about Bogdanoff is available on his website, www.philipbogdanoff.com. ■



LBA WELCOMES BACK THE ROCK & ROLL CLE

The Zeppelin CLE: The Essentials of Music Copyright Law

Tuesday, June 1

This course is meant to give attendees an overview of music copyright law concepts but drilling down when necessary to discuss the sources of revenue songs can generate and other pertinent areas.

The seminar covers the basics of music copyright law, including how to establish and register a copyright for your music, and what is a copyright and how to get one. Attendees will also explore the exclusive rights you get when you have a copyright and what those basic rights mean under federal law. Further, attendees will learn the basics of music licensing and the two copyrights in every song. We will explore how the music industry has changed over the years and how that affects the law. At the same time, we listen to music and audio clips to elaborate on the law. All the while, we will follow the career of Led Zeppelin, one of the most seminal rock bands.

We will also focus on some of copyright infringement cases. You will learn the basic rules regarding proving a copyright infringement case, along with defenses such as fair use, and damages in a copyright action. Then we will focus on Zeppelin's many copyright issues, including a full analysis of the "Stairway to Heaven" case.

The course focuses on the unique issues faced when representing an organization with both The Beatles and Rolling Stones as clients. Attendees will learn all the overlap between the two bands that contributes to ethical dilemmas. Specific emphasis is placed on the ABA's Model Rules of Professional Conduct 1.7 (conflict of interest—current client); 1.13 (organization as a client); 1.14 (client with diminished capacity); and 2.1 (role as advocate).

Speaker: **Jim Jesse**, Rock "n" Roll Law

Time: 9 a.m. – 4:30 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $240 LBA Members | $216 Sustaining Members | $75 Paralegal Members | $75 for qualifying YLS Members | $75 Solo/Small Practice Section Members | $75 Government or Non-Profit Members | $480 Non-members
Credits: 6.0 CLE (including 1.0 Ethics) Hours — Pending with KBA / Approved with IN

LBA WELCOMES JOEL OSTER, COMEDIAN OF LAW

Trials of the Centuries: Learning from History

Friday, June 4 | Friday, June 25 | Wednesday, June 30

This class will remind the lawyer about the true essence of being an attorney. We go back in time as review the most significant, precedent-setting, cultural-impacting cases over the last several millennia. We look at the trial strategies, the issues involved, the outcomes, and how those cases can make you a better lawyer today.

For more information and the agenda, please visit the LBA website at www.loubar.org.

Speaker: **Joel Oster**, Comedian of Law

Time: 9:20 a.m. – 5:30 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $300 LBA Members | $270 Sustaining Members | $15 Paralegal Members | $75 for qualifying YLS Members | $75 Solo/Small Practice Section Members | $150 Government or Non-Profit Members | $600 Non-Members
Credits: 7.0 CLE (including 2.0 Ethics) Hours — Pending with KBA and Indiana

LBA ONE-HOUR

What My Facebook Posts Teach About Lawyer Mental Health

Wednesday, June 2

Stuart Teicher, Esq., posts some funny stuff while on the road as a full-time CLE teacher. He sees some interesting celebrities and meets some not-so-courteous people. The one thing those Facebook posts all have in common is that they actually teach some important lessons about substance abuse in the practice of law and lawyer mental health.

Speaker: **Stuart Teicher, Esq.**, The CLE Performer

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Hour — Approved with KBA / Pending with Indiana

LBA WELCOMES NATIONALLY RECOGNIZED SPEAKER, ELLEN KRUG

Getting Past the Bumpiness™: White Fragility and Skin Color

Thursday, June 3

Americans are undergoing seismic shifts in how we relate to each other, particularly toward those who are considered "other" because of their skin color. Many understand that we need to have difficult conversations about how white-color people have historically treated people who are not white. Those conversations are challenging because most are fearful of impacting sensitivities—people do not want to feel "uncomfortable," either for themselves or others. Sometimes, we will do almost anything to avoid experiencing discomfort, something that one commentator has described as "white fragility."

On the other hand, Ellie Krug's work has revealed that most Americans are very compassionate and caring toward each other, regardless of skin color. It is just that we don't know how to exercise compassion or empathy with anyone who's outside of our comfort bubbles.

Yet, to understand America in the '20s, we need to talk about skin color and how the color of one's skin impacts their opportunities for success on many fronts. This is particularly true for the legal profession, which has lagged behind society in general in tackling this important subject.

How can lawyers begin these exceedingly difficult but necessary conversations? And in the process, can we accept the idea of providing grace or a reprieve from judgment to all involved? Can we further understand that being human means we will sometimes stumble?

Please join Ellie as she talks about challenges that the legal profession faces relative to skin color. You will come away with a better understanding how our profession (and country) got here and how individuals, organizations and the community at large can go forward, together.

Speaker: **Ellen J. Krug**, Human Inspiration Works, LLC

Speaker bio: In 2009, when she was a civil trial attorney in Cedar Rapids with 100+ trials, Ellen (Ellie) Krug transitioned from male to female; she later became one of the few attorneys nationally to try jury cases in separate genders. The author of *Getting to Ellen: A Memoir about Love, Honesty and Gender Change* (2013), Ellie has trained on diversity and inclusion to court systems, law firms, Fortune 100 corporations, and colleges/universities on nearly 1000 occasions.

A hopeless idealist, Ellie has presented her inclusivity training, Gray Area Thinking®, across the country. In 2016, *Advocate Magazine* named Ellie one of "25 Legal Advocates Fighting for Trans Rights" and in 2019, OutFront Minnesota conferred Ellie its Legacy Award. She is also a monthly columnist for *Lavender Magazine* and *Minnesota Women's Press*, and a weekly radio host on AM950 radio. Her monthly e-newsletter, *The Ripple*, reaches 9000+ readers and can be found at *www.elliekrug.com*. Ellie presently lives in Minneapolis and is the founder and president of Human Inspiration Works, LLC, *www.humaninspirationworks.com*.

Time: 11 a.m. – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $80 LBA Members | $72 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $160 Non-members
Credits: 2.0 CLE Hours — Approved with KBA and Indiana

LBA ONE-HOUR

The Cybersecurity Attorney: Counsel's Role in the Systems Development Life Cycle

Friday, June 4

Participants will learn how companies commonly implement their systems development life cycle and how to provide value to their organization in each step. From initial requirements gathering to deployment, attorneys can help companies design systems that mitigate future legal risks. Should the company suffer an attack, participants will learn the basics of managing the security incident including engaging law enforcement and reporting to regulators.
Topics will include:

- The systems development life cycle
- Latest U.S. and European security regulations
- Incident response management
- Federal and state enforcement actions related to information security
- Answers to common client questions regarding cybersecurity

Speaker: **Kyle W. Miller**, Dentons Bingham Greenbaum

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Hour — Pending with KBA / Approved by Indiana

LMICK ONE-HOUR ETHICS SERIES

Cyber Liability Threats Trends & Coverage

Monday, June 7

This presentation will examine the current cyber landscape and real-life case studies. At the end of the session you will have practical tips to protect your firm, your clients and your reputation.

Speakers: **J. Allan Cobb**, Cobb Law and **Angela L. Edwards**, LMICK

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with KBA and Indiana

Have you checked out the "Legal Humorist" Sean Carter?

Look for a list of Sean Carter's ethics webinars on page 16.

LBA ONE-HOUR

Everything You Need to Know About Google My Business for Your Law Practice

Tuesday, June 8

In this comprehensive workshop, you will learn how to claim and optimize your Google My Business listing. This will include how to add rich content and generate reviews for greater engagement with your potential clients. We will also show you how to understand the analytics generated and what it means to the success of your overall strategy. You will gain an understanding of the overall importance of optimizing your Google My Business listing and how to make your existing listing even better!

Speaker: **Kerry DeMuth**, RevLocal

Time: 9 – 10 a.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Hour — Pending with KBA and Indiana

LBA ONE-HOUR

Implementing Our Constitutional Oath: Baker v. Carr and Rucho v. Common Cause and Pending Redistricting Challenges for Lawyers and Lawmakers and Their Impact on the Practice of Law

Tuesday, June 8

This presentation will examine the following questions.

- Will judicial elections become partisan?
- Will tort reform happen?
- Will child support guidelines increase? Should there be guidelines for maintenance?
- Will wages and unemployment insurance and workers' rights change?
- Will the state pay for coal mine cleanup?
- Will corporations be subjected to higher taxes?
- Will the costs of probate increase?
- Will the money from the federal COVID legislation help Kentucky and how?

Speakers: **Susan Perkins Weston**, Prichard Committee for Academic Excellence and **Delores "Dee" Pregliasco**, Mediator

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Hour — Pending with KBA and Indiana

RSVP LAnspach@loubar.org or www.LouBar.org

A reservation is required in advance of all CLE webinars. Registrants will receive a confirmation e-mail prior to the event which will contain a link to join the meeting via Zoom, as well as attachments of the handout material, the CLE activity code, and instruction on how to file with the KBA and Indiana Supreme Court (PDF files).

LBA ETHICS ONE-HOUR

Bias has Been Eliminated… Hypothetically Speaking

Wednesday, June 9

The occurrence of stereotypically outlandish bias has decreased in recent years (thankfully). But that doesn't mean that we've eliminated bias from the profession. In fact, it unfortunately continues to exist in more subtle ways. Join the CLE Performer, Stuart Teicher, as he explores implicit bias, uses several hypothetical examples to reveal how bias manifests itself in the practice… and gives a few ideas about what lawyers can do to eliminate it from the profession.

Speaker: **Stuart Teicher, Esq.**, The CLE Performer

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with Indiana / Approved with KBA

LBA WELCOMES JOEL OSTER, COMEDIAN OF LAW

Killing it in Court: Litigation Tips from a Courtroom Comedian

Wednesday, June 9 | Monday, June 28

John Cleese of Monty Python fame said, "He who laughs most learns best." This applies equally to CLE and to persuading others in court. Learn practical tips that will make you more effective, efficient, and persuasive in court. We will hit the best deposition practices, ethical pitfalls in litigation, cross examining like Vinny Gambini, and how to avoid the dreaded bench slap.

For more information and the agenda, please visit the LBA website at www.loubar.org.

Speaker: **Joel Oster**, Comedian of Law

Time: 9:20 a.m. – 5:30 p.m. — Program
Place: Online – a link will be sent prior to the seminar program
Price: $300 LBA Members | $270 Sustaining Members | $15 Paralegal Members | $75 for qualifying YLS Members | $75 Solo/Small Practice Section Members | $150 Government or Non-Profit Members | $480 Non-members
Credits: 7.0 CLE (Including 2.0 Ethics) Hours — Pending with KBA and Indiana

LBA WELCOMES BACK RICK HOROWITZ

More Effective Writing Makes More Effective Lawyers: Useful Strategies, Crucial Details, & Lots of Practical Tips

Thursday, June 10

Knowing the law is essential—but so is being able to communicate about it. Join writing coach and former attorney Rick Horowitz for a lively and practical session that will reintroduce you to your legal-writing toolbox, including a few tools you did not know were in there.

This class explores the fundamentals (and the critical details) of creating clear, well-organized, persuasive legal documents. Briefs, memos, client letters, even daily correspondence benefit from your deeper understanding of what goes into successful writing, so we will examine good and not-so-good writing to see what worked, what did not, and why:

- What should you include, and what can you leave out?
- What is the most effective structure for this document, and this audience?
- Should you use an outline? Are there better options?
- What has to happen between "first draft" and "send"?
- How can you steer clear of those grammar and usage potholes that undermine your credibility?
- How do you survive the in-house editing process?
- And do you really need all that "legalese"? (There is a reason people tell lawyer jokes...)

You will come away with new skills, new strategies, and new confidence. Sign up now—and spread the word!

More details on this CLE program can be found on the LBA website: www.loubar.org.

Speaker: **Rick Horowitz**, Prime Prose, LLC

Time: 9 a.m. – 4:30 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $240 LBA Members | $216 Sustaining Members | $75 Paralegal Members | $75 for qualifying YLS Members | $120 Government/Non-Profit Members | $480 Non-members
Credits: 6.0 CLE Hours — Pending with the KBA and Indiana

LBA IN-HOUSE COUNSEL, LABOR & EMPLOYMENT, AND LITIGATION SECTIONS BROWN BAG

What Clients Want from Outside Counsel: In Their Own Words

Friday, June 11

Join a panel of in-house counsel who regularly select and manage outside counsel. Hear in their own words what makes the relationship succeed or causes it to fail. The panel will also offer insights on how their relationships with outside counsel have evolved in a post-pandemic and remote work environment. You will not want to miss this important and practical information!

Speakers: **Melissa S. Gruner**, Signature Healthcare, **Brad Harris**, Alltech, **Michael Kopp**, KCC Manufacturing, and **Ellen McCoy Sharp**, Central Bank & Trust Co.

Time: 11:30 a.m. – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $60 LBA Members | $52 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $120 Non-members
Credits: 1.5 CLE (Including 1.0 Ethics) Hours — Pending with KBA and Indiana

LMICK ONE-HOUR ETHICS SERIES

Emerging Trends in the Landscape of Legal Malpractice & Ethics

Monday, June 14

As busy lawyers there are a myriad of case and practice-related issues that keep you up at night. In this presentation, Lawyers Mutual of Kentucky will discuss some emerging and developing issues that should be keeping you up at night. The sophistication of cyber criminals is likely outpacing what you are doing to safeguard your practice. Are you engaged in the unauthorized practice of law in the provision of services to out-of-state clients? These topics and more may lead to some restless nights.

Speaker: **Jane Broadwater Long**, LMICK

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with KBA and Indiana

LBA WELCOMES BACK PAUL MELLOR!

Winning Your Case with a Better Memory

Tuesday, June 15

The benefits of improved memory are endless!

- Save time in court preparation.
- Make polished presentations to jurors and judges without notes.
- Become a better listener in the courtroom.
- Cross-examine with confidence—no more missed opportunities because your memory failed you.
- Remember names of jurors in trials and clients in other professional settings.
- Develop better concentration.
- Reduce stress, worry less about forgetting to make a crucial point.

Join nationally recognized memory training consultant Paul Mellor for a session that will improve the way your mind retains facts. Learn techniques to improve your memory and learn how to apply these techniques to your everyday practice. Mellor's objective is to show you how a trained memory can increase your efficiency and productivity in all aspects of law. He will shred the myth that memory cannot be enhanced and help you lay a foundation for total recall.

Invest in a better memory. You have invested years in becoming an attorney and you invest months preparing a case. Invest one afternoon to strengthen your mind and achieve these goals:

- Think quickly and clearly without fumbling for notes.
- Remember important information about a jury and use it to win cases.
- Effectively recall facts and figures from research and interview to argue cases in court.

As attorneys we seldom leave home without our computers and iPhone. They are convenient, affordable, and most of all, come with a lot of memory. Unfortunately, one of the most powerful memory tools we own is seldom plugged in and often fails us. Brain freeze? Memory lapse? Senior moments? Whatever you want to call it, thousands of attorneys have experienced it. The good news? You can do something about it.

Would you like to have more time, less stress, and better concentration? If so, sign up today ... before you forget.

BONUS: Your registration includes the book, *Memory Skills for Lawyers*.

For full agenda, information on the seminar and speaker visit the LBA website: www.loubar.org.

Speaker: **Paul Mellor**, Success Links

Time: 9 a.m. – 12:15 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $140 LBA Members | $126 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $280 Non-members
Credits: 3.0 CLE Hours — Approved with KBA and Indiana

LBA ETHICS ONE-HOUR

Protesting Puts Lawyers in a Precarious Position

Wednesday, June 16

Lawyers can certainly protest and engage in civil disobedience. But there are limits on our behavior that don't exist for the rest of society. What happens when a protest escalates to violence? How is criminal behavior evaluated under Rule 8.4? Join The CLE Performer, Stuart Teicher, as he evaluates the limits on lawyer's free speech and the ethical implications of all sorts of criminal behavior.

Speaker: **Stuart Teicher, Esq.**, The CLE Performer

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with KBA and Indiana

LBA WELCOMES JOEL OSTER, COMEDIAN OF LAW

A Comedic De-Briefing of the Law

Friday, June 18 | Tuesday, June 29

This class is a comprehensive de-briefing of the law. Starting with ethics, we review the crazy predicaments in which some ethically challenged attorneys have found themselves. You will have to decide based on the severity of the facts and the relevant model rule, would you take a deal for that violation.

While Hollywood might not be setting the finest examples when it comes to actual morals and ethics, they do a good job of exhibiting legal ethics. We will explore the Model Rules through the eyes of Hollywood. From Hollywood, it's not a long journey to our legal rock stars—the Nine! The Supreme Court, aka, the Real League of Justice, has been busy exerting their superhero legal powers. We will review recent landmark Supreme Court cases. For example, Masterpiece Cakeshop and stale white wedding cake: discrimination or a valid excuse to skip your cousin's wedding? Finally, we will take a countdown of the Top 10 Wacky cases. You might be surprised what you will learn about legal strategy from these headline cases.

For more information and the agenda, please visit the LBA website at www.loubar.org.

Speaker: **Joel Oster**, Comedian of Law

Time: 8:20 a.m. – 4:40 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $300 LBA Members | $270 Sustaining Members | $15 Paralegal Members | $75 for qualifying YLS Members | $75 Solo/Small Practice Section Members | $150 Government or Non-Profit Members | $600 Non-members
Credits: 7.0 CLE (including 3.0 Ethics) Hours — Pending with KBA and Indiana

LBA WELCOMES NATIONAL SPEAKER, BILL EDDY

Solving High Conflict Mediations

Friday, June 18

This 3-hour training will start with the dynamics of five high conflict personality disorders which most frequently impact legal disputes, in and out of court: narcissistic, borderline, antisocial, histrionic, and paranoid. This will include DSM-5 factors and recognizing their conflict behavior patterns. Then, tips for working with them as individual clients will be addressed, including what to do and what NOT to do. This will include EAR Statements for calming them, BIFF Responses for responding to emails, and setting limits. Next, tips for litigating the high conflict case will be addressed, including questions to ask clients, evaluations, taking depositions, presenting patterns of behavior to the court and requesting court orders to restrain high conflict behavior. Then methods for managing mediation with high conflict parties will be presented, including structuring the process, managing outbursts, and getting thoughtful participation in making and analyzing proposals.

For more information on the seminar and the speaker please visit the LBA website www.loubar.org.

Speaker: **Bill Eddy, LCSW, Esq.**, High Conflict Institute

Time: Noon – 3:15 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $120 LBA Members | $108 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members | $60 Government or Non-Profit Members | $240 Non-members
Credits: 3.0 CLE Hours — Pending with KBA and Indiana

LMICK ONE-HOUR ETHICS SERIES

The Zoom Boom: The Ethics of Remote

Monday, June 21

Due to the pandemic, attorneys were thrust into the remote/virtual practice of law beginning in March of 2020. The "Zoom Boom" was born and continues still. While technology has enabled the legal system to move forward, albeit slowly, that same technology has posed an array of challenges. Lawyers' ethical duties to their clients and within the profession have NOT changed because of COVID-19, but the ability to discharge those duties has become more difficult. In some instances, new and different ethical concerns have arisen. This presentation will review important ethical requirements and discuss how to meet those responsibilities in the current climate.

Speaker: **Jane Broadwater Long**, LMICK

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with KBA and Indiana

LBA WELCOMES NATIONAL SPEAKER, PHILIP BOGDANOFF

The Tiger King Trial: Murder for Hire, the Prosecution of Joseph Maldonado-Passage

Tuesday, June 22

Tiger King was the number one rated show on Netflix drawing over 34 million viewers in its first 10 days. However, the documentary reveals only part of the story. In this interactive presentation attendees will learn the complete story of the trial of Joseph Maldonado-Passage for two counts of murder for hire in violation of 18 U.S.C. 1958 (a) and several wildlife offenses.

We will examine the trial testimony and discuss the prosecution attempts to use other acts evidence to show defendant's other attempts to solicit a hit on Carole Baskin, their attempt to protect the identity of the undercover FBI agent, and their efforts to prevent the defense from introducing evidence that someone else had committed these offenses. Attendees will review defense attempts to dismiss the indictment and prevent the joinder of wildlife offenses with the murder charge. Attendees will also discuss how to impeach the victim, Carole Baskin, the informant, James Garretson, and the hit man, Allen Glover.

We will examine the trial testimony and discuss the prosecution attempts to use other acts evidence, their attempt to protect the identity of the undercover FBI agent, and their efforts to prevent the defense from introducing evidence that someone else had committed these offenses.

For more full agenda and more information on the speaker, visit the LBA website at www.loubar.org.

Speaker: **Philip Bogdanoff**, Attorney and Instructor

Time: 9 a.m. – 12:15 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $120 LBA Members | $108 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $240 Non-members
Credits: 3.0 CLE Hours — Approved with KBA and Indiana

LBA ONE-HOUR

Four Digital Marketing Strategies That Improve your Google Ranking

Wednesday, June 23

In this workshop you will learn the top four strategies that impact your law practice's Google ranking, including the importance of having your business show up in local search results and how you can leverage online reviews to attract more clients. We will also show you ways you can use different types of paid ad strategies to get in front of more of your target market. Lastly, we will touch on using social media to build your brand and create a more personalized experience for your followers. You do not want to miss this!

Speaker: **Kerry DeMuth**, RevLocal

Time: 9 – 10 a.m. — Program
Place: Online – a link will be sent prior to the seminar program
Price: $40 LBA Members | $36 Sustaining Member | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Hour — Pending with KBA and Indiana

LBA ETHICS ONE-HOUR

Cash, Coin, Cheddar, Dough: Ethical Issues with Money and Billing

Wednesday, June 23

Lawyers make all kinds of mistakes when billing and dealing with client funds. Sometimes they are accidental, other times more nefarious. Join The CLE Performer, Stuart Teicher, as he explores these concerns. Rules 1.5, 8.4, and 1.15 will be discussed.

Speaker: **Stuart Teicher, Esq.**, The CLE Performer

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with KBA and Indiana

LBA WELCOMES NATIONALLY RECOGNIZED SPEAKER, PAUL J. UNGER

Cybersecurity & Ethical Pitfalls of Everyday Law Office Computing

Thursday, June 24

Practicing anywhere at any time is no longer just a dream for lawyers—it's a reality. However, that reality also comes with responsibility and risks! Under Model Rule 1.6 lawyers must take reasonable precautions to protect client info and data that is in their custody! In this seminar, we will discuss the ethical and malpractice pitfalls of mobile, cloud, and general everyday law office computing. We will learn about Cloud options and address how to safely store documents, data, and programs in the cloud and on mobile devices. Learn what programs and features you should and must use with Cloud storage options like Dropbox, Box & OneDrive. We will also discuss security vulnerabilities related to documents, e-mails and metadata associated with those files. We will also discuss how to properly delete client data, assign passwords, and dispose of computer equipment while protecting client privacy. Finally, we will discuss the essential elements of your firm's cybersecurity plan.

Speaker: **Paul J. Unger**, Affinity Consulting Group

Paul J. Unger is a nationally recognized speaker, author and thought leader in the legal technology industry. He is an attorney and founding principal of Affinity Consulting Group. Mr. Unger has provided trial presentation consultation for over 400 cases.

Time: 9 a.m. – 12:15 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $120 LBA Members | $108 Sustaining Member | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $240 Non-members
Credits: 3.0 CLE Ethics Hours — Approved with KBA and Indiana

YOUNG LAWYERS ETHICS ONE-HOUR

How Millennials Will Change Some Key Ethics Concepts

Friday, June 25

The most talked about generation in a long time is bringing a changed mindset to the practice, and that is good. And there is a big chance that the changed way of approaching the practice is going to morph some key ethics concepts. In this program, The CLE Performer, Stuart Teicher, will provide a warning to all—the changers and the changes. He will focus on the impact of Rule 1.4 Communication, 5.1 Supervision, and 2.1 Advisor.

Speaker: **Stuart Teicher, Esq.**, The CLE Performer

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with KBA and Indiana

LMICK ONE-HOUR ETHICS SERIES

The Top Five Ethical Violations Found in Malpractice Claims

Monday, June 28

This seminar is based on the ABA's 2011 Spring National Legal Malpractice Conference program "Top Five Ethics Violations and Resulting Claims for Legal Malpractice." Kentucky professional responsibility rules covering client identity, scope of representation, conflicts of interest, doing business with a client, and fee disputes are analyzed with a view to avoiding malpractice claims by knowing the rules and applying good risk management practices.

Speaker: **Angela L. Edwards**, LMICK

Time: Noon – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $40 LBA Members | $36 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $80 Non-members
Credits: 1.0 CLE Ethics Hour — Pending with KBA and Indiana

11TH ANNUAL LIVELY M. WILSON MEMORIAL LECTURE SERIES ON ETHICS, PROFESSIONALISM AND CIVILITY

"It's Been a Long Time Coming": Change in Legal Education Before, During and After the Pandemic

Tuesday, June 29

Legal education has been under fire for many years by those who claim that it has failed to adjust to changing social and economic needs, even as other professions have adopted arguably more nimble educational methods relevant to professional preparation. This talk will evaluate those claims and discuss the changing landscape of legal education, from the gate keepers who shape admission to those who certify licensure once law school is completed. It will also highlight what law schools are—and are not—doing to try and adapt to changing realities and discuss the impediments to change. The talk will assess the impact of the trends that are pushing law schools to change, from the technological shifts that have been hastened by the COVID-19 pandemic to the again louder claims to shatter systemic inequities in society and the profession. Finally, the talk will consider the extent of our obligations as lawyers to embrace these changes in order to comply with our ethical and professional duties.

Speaker: **Dean Colin Crawford**, University of Louisville Brandeis School of Law

This CLE is a partnership with The Louis D. Brandeis Inn of Court and the Louisville Bar Association.

Time: 11:30 a.m. – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $80 LBA Members | $72 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $160 Non-members
Credits: 1.5 CLE Ethics Hours — Pending with KBA and Indiana

LBA IN PARTNERSHIP WITH THE AMERICAN CONSTITUTIONAL SOCIETY

Annual U.S. Supreme Court Review

Wednesday, June 30

The American Constitution Society and the LBA's Appellate Law Section invite you to their seventh annual U.S. Supreme Court Review CLE program. The seminar will address the key cases before the U.S. Supreme Court during October Term 2020. The court will recap key opinions from the previous year, discuss any new or continuing trends at the Court, and preview the upcoming Term.

Speakers: **Michael P. Abate**, Kaplan Johnson Abate & Bird and more, TBA.

Time: 11 a.m. – 1 p.m. — Program
Place: Online – a link will be sent prior to the seminar
Price: $80 LBA Members | $72 Sustaining Members | $15 Paralegal Members | $15 for qualifying YLS Members | $25 Solo/Small Practice Section Members, Government or Non-Profit Members | $160 Non-members
Credits: 2.0 CLE Hours — Pending with KBA and Indiana

Sean Carter, MESA CLE

Join lawyers from across the country and enjoy the witty one-liners, clever pictures and video clips, intriguing poll questions and hilarious anecdotes that have made his "lawpsided" programs popular with attorneys in more than 40 states.

1 HOUR

Yelp, I've Fallen for Social Media and I Can't LinkedOut: The Ethical Pitfalls of Social Media
Wednesday, June 2, 1:00 – 2:00 p.m.

Show Me The Ethics!: The Ethical Way to Bill for Legal Services
Wednesday, June 9, 1:00 – 2:00 p.m.

YouTube Videos: A Marketing Dream for Lawyers
Thursday, June 10, 1:00 – 2:00 p.m.
Speaker: Ruth Carter, MESA CLE

Boston (Il)legal: From the Don't Try This At Home Series
Wednesday, June 16, 1:00 – 2:00 p.m.

I Think, Therefore I Am ... Biased: How Implicit Biases Manifest in the Legal Profession
Tuesday, June 22, 1:00 – 2:00 p.m.

The (Mal)Practice: From the Don't Try This At Home Series
Wednesday, June 23, 1:00 – 2:00 p.m.

Legal Ethics Is No Laughing Matter: What Lawyer Jokes Say About Our Ethical Foibles
Tuesday, June 29, 2:00 – 3:00 p.m.

Nice Lawyers Finish First
Tuesday, June 29, 3:15 – 4:15 p.m.

Yakety Yak! Do Call Back!: The Ethical Need for Prompt Client Communication
Tuesday, June 29, 4:30 – 5:30 p.m.

Ally McSteal: From the Don't Try This at Home Series
Wednesday, June 30, 3:00 – 4:00 p.m.

Ethical Jeopardy: A CLE Game Show
Wednesday, June 30, 5:30 – 6:30 p.m.

Who Wants to be Disbarred?: A CLE Game Show
Wednesday, June 30, 6:45 – 7:45 p.m.

The Weakest Lawyer: A CLE Game Show
Wednesday, June 30, 8:00 – 9:00 p.m.

Place: Online – a link will be sent prior to the seminar

Price: $55 LBA Members | $50 Sustaining Members | $25 Paralegal, Solo/Small Firm Section, or YLS Members | $125 Non-members

Credits: 1.0 CLE Ethics Hour

Full descriptions can be found online at www.loubar.org/calendar/events

2 HOURS

The 2021 Ethy Awards
Saturday, June 19, 10:00 a.m. – Noon

Fantasy Supreme Court League: The 2021 Season
Wednesday, June 30, Noon – 2:00 p.m.

Place: Online – a link will be sent prior to the seminar

Price: $110 LBA Members | $99 Sustaining Members | $25 Paralegal, Solo/Small Firm Section, or YLS Members | $220 Non-members

Credits: 2.0 CLE Ethics Hour

3 HOURS

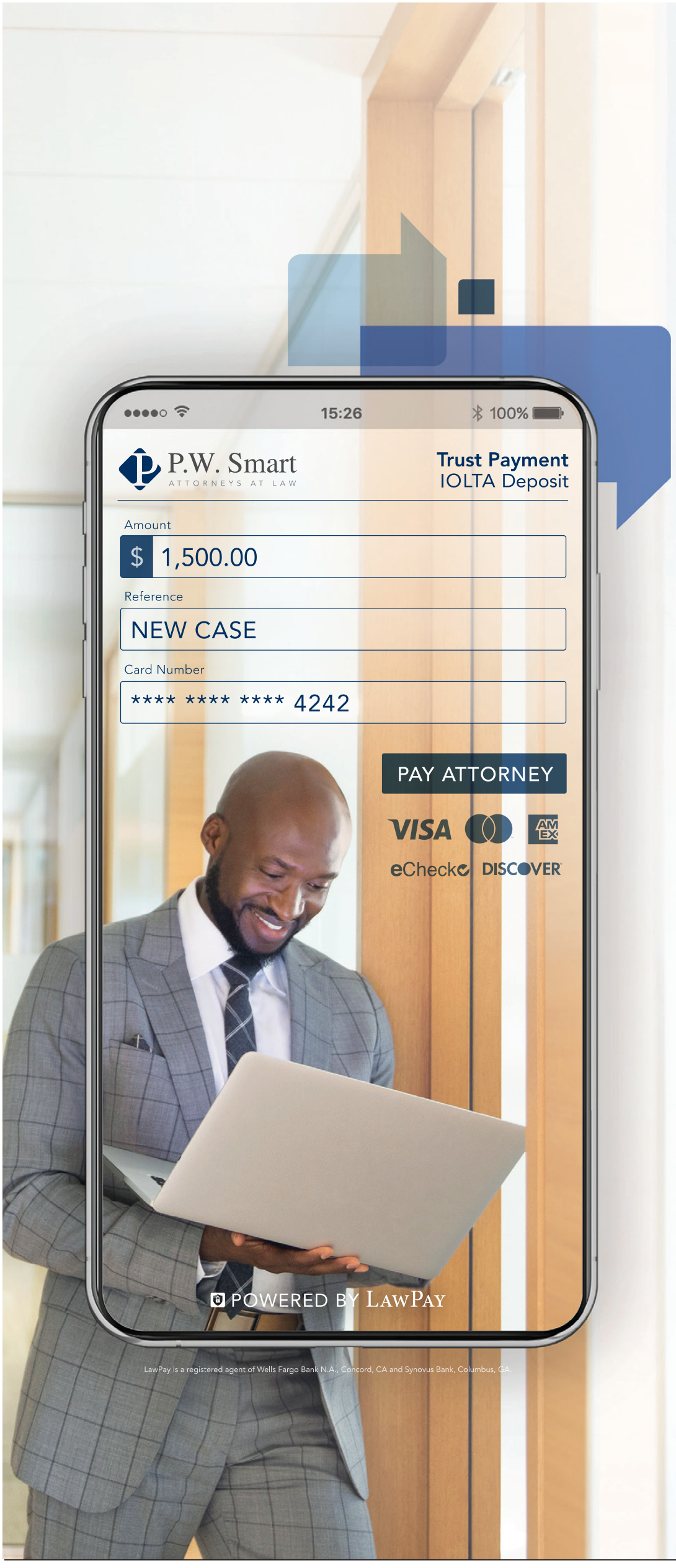
The 2021 Ethy Awards
Tuesday, June 29, 10:00 a.m. – 1:00 p.m.

Place: Online – a link will be sent prior to the seminar

Price: $165 LBA Members | $150 Sustaining Members | $25 Paralegal, Solo/Small Firm Section, or YLS Members | $330 Non-members

Credits: 3.0 CLE Ethics Hours

Due to the partnership with Mesa CLE, the LBA will NOT be accepting registrations for these webinars. Please visit the LBA website's CLE calendar for the link to register and the cancellation policy.



LawPay is a registered agent of Wells Fargo Bank N.A., Concord, CA and Synovus Bank, Columbus, GA.

LawPay®

AN AFFINIPAY SOLUTION

POWERING PAYMENTS FOR THE LEGAL INDUSTRY

The easiest way to accept credit, debit, and eCheck payments

The ability to accept payments online has become vital for all firms. When you need to get it right, trust LawPay's proven solution.

As the industry standard in legal payments, LawPay is the only payment solution vetted and approved by all 50 state bar associations, 60+ local and specialty bars, the ABA, and the ALA.

Developed specifically for the legal industry to ensure trust account compliance and deliver the most secure, PCI-compliant technology, LawPay is proud to be the preferred, long-term payment partner for more than 50,000 law firms.

LOUISVILLE BAR ASSOCIATION

Pride in the profession. Service to the community.

ACCEPT MORE PAYMENTS WITH LAWPAY

866-554-9202 | lawpay.com/loubar

Is Hope Ahead?
Paths to Defeating a Rash of Rising Anti-Trans Legislation

Sam G. Brinker

It's rare that an author doesn't give some biographical information somewhere in their writing—sometimes it's lurking on the sleeve of an inside book cover, other times it can be found in a footnote at the bottom of a webpage. In other cases it may only be evident from reading between the lines of any number of pages that author penned.

However, because of where this article both middles and ends—on the topic of the existence of trans people and the attempted regulation of that existence—it seemed not just important to put the context of the author's existence before the reader first, but rather: paramount—if for no other reason than to have a place to start.

Having a place to start, as it turns out, is a privilege that many trans people are not so fortunate to know. This author, in recognition of his many privileges (including this one), however, did have a place to start. He started out, over 31 years ago, with hope for the future—a future that would allow him to be who he is.

My name is Sam Brinker and—to get the basics out of the way—I'm a constant-work-in-progress, I grew up in Dayton, Ohio , I'm an advocate and board member , I'm a pretty decent home cook, I'm a planner, I'm an attorney and, yes, I am a trans man .

The beginning of my transition began in a very similar way to the beginning of the rest of my journey before that—with hope. The hope was, like biographical information of an author, sometimes prominent and clear—like in the support of my family, friends, and the law firm where I have spent my entire legal career—and other times it was harder to discern—like the fact that, even if I didn't know any other trans people yet, I wasn't going to be the first to ever be trans or to transition.

My hope now, as I middle my way through life, is that it won't get harder for other—especially young—trans people to find their own hope…that the hope doesn't turn into hoops to jump through or hurdles to jump over…that the end will be marked with just as much, if not more, hope as the beginning.

So now that you know I am trans you also know that trans people are not new. Jennifer Finney Boylan, a transwoman, recently wrote an Op/Ed for the *New York Times* in which she pointed out this obvious fact,

> Trans people have been a part of human history for as long as there has been history. But with the exception of a few brave souls until relatively recently, trans individuals were rarely in the public eye in the United States.

Jennifer F. Boylan, Opinion, *Keeping Trans Kids from Medicine Doesn't Make Them Disappear*, N.Y. Times (April 7, 2021).

Today, however, trans people are in the public eye in a big way. As primarily Republican-led legislatures focus in on trans legislation, increasingly and across the country legislation has been introduced that would: (i) prohibit or limit access to healthcare for transgender youth (by, for example, banning the use of puberty blockers); (ii) require identification documents to reflect a person's gender-assigned-at-birth (regardless of how that person identifies); and (iii) exclude transgender athletes from participating in sports amongst groups of athletes that are consistent with their gender identities. The areas of trans lives that are, thusly, under attack span from healthcare, to sports, and even simple forms of identification.

The chart below reflects the status of these kinds of legislation in the states in which it has been introduced as of the writing of this article.

Legislation	States Proposed	Legislation Still Pending	Died in Committee	Adopted	Statute
Prohibiting Healthcare for Transgender Youth	**20 states** AL, AR, AZ, FL, GA, IA, IN, KS, KY, LA, MS, MO, MT, NC, OK, SC, TN, TX, UT, WV	**14 states** AL, AZ, FL, GA, IA, KS, LA, MO, NC, OK, SC, TN, TX, WV	IN, KY, MS, MT, UT	**1 state** AR - HB 1570 – "The Arkansas Save Adolescents from Experimentation (SAFE) Act"	Makes it a criminal offense for a doctor to provide gender-affirming medical care for transyouth
Restrictions on ID Documents	MT, SD	MT - LC 2997 – Sent to senate 4/13/21	SD		
Excluding Transgender Youth from Athletics	**31 states** AL, AR, AZ, CT, FL, GA, HI, IA, KS, KY, LA, ME, MI, MN, MO, MS, MT, NH, NJ, ND, NM, OH, OK, PA, SC, SD, TN, TX, UT, WI, WV	**24 states** AL, AZ, CT, FL, GA, HI, IA, KS, LA, ME, MI, MN, MO, MT, NH, NJ, ND, OH, OK, PA, SC, TX, WI, WV	KY, SD (ve-toed), UT	**3 states** AR SB 450 – "Gender Integrity Reinforcement Legislation for Sports (GIRLS) Act" MS SB 2536 TN SB 0228	

Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021).

As you can see, legislation has specifically been introduced in the Kentucky General Assembly that would prohibit the provision of certain types of healthcare for transgender youth and would exclude transgender youth from participating in sports consistent with their gender identities. So far in Kentucky, however, all of this legislation has died in committee—not so, however, in other states where anti-trans legislation is apparently still under consideration.

The legislation which is still pending in the states of Texas and Alabama, for example, illustrate the sad, horrifying and hope-depleting features of anti-trans legislation. Texas Senate Bill 1646 would make it a crime for parents to allow their transgender children to access gender-affirming medical procedures and would even go so far as to authorize the removal of trans or gender-queer children from their homes if their parents affirm their gender identity. Alabama Senate Bill 10 goes to a different extreme—and would make it a felony for doctors to even offer gender-affirming medical care to trans children younger than the age of 19. This proposed legislation would also require teachers and other school employees to "out" trans children to their parents if their child shows any gender-nonconforming behavior or signs. Alanna Vagianos, *Transgender Children Across the U.S. are Fighting for Their Lives*, HuffPost (Apr. 16, 2021).

When Governor Asa Hutchinson of Arkansas, a Republican, recently vetoed anti-trans legislation in that state it signaled some potential hope. He said, "The bill is overbroad, it's extreme and, very importantly, it does not grandfather in those young people who are currently under hormone treatment, which means that those in Arkansas who are undergoing, under the doctor's care and the parents' care, hormonal treatment—that would be withdrawn in the middle of that.

That's a terrible consequence of this bill. This is the most extreme law in the country. Arkansas would be the first state to have adopted this bill. And I could not in good conscience sign it with the concerns that I have."

Lisa Lerer, *Asa Hutchinson on Arkansas's Anti-Trans Law and the G.O.P Culture Wars*, N.Y. Times (Apr. 9, 2021).

It is important to note that, to be effective, certain hormonal treatments—specifically, puberty blockers—to which Governor Hutchinson referred, must be administered before the onset of puberty. Once puberty has begun, and the further along it progresses, the more difficult and ineffective some gender-affirming medical treatment can become. Thus, legislation which forbids puberty blockers will have a permanent and most likely profoundly negative impact on trans children. Still, against the beacon of hope, the Arkansas legislature overruled Governor Hutchinson's veto.

Just one state to the south, however, hope remains as Governor John Bel Edwards of Louisiana, a Democrat, vetoed legislation which would have had similar effects as the bill passed in Arkansas—the Louisiana legislation would also restrict trans athletes' participation in sports and the availability of certain medical care for trans youth. In vetoing the bill (which veto so far has yet to be overridden), Edwards expressed concern to reporters, "about emotionally fragile people" and said that he is "hopeful" that the legislature in his state will not advance the bills further. Will Sentell, *John Bel Edwards won't support bills that ban transgender athletes, restrict medical treatment*, The Advocate (Apr. 19, 2021).

Notwithstanding the move by the Arkansas legislature, recent polling suggests that the American people may agree with Governors Edwards and Hutchinson and are largely *opposed* to anti-trans legislation—again, hope. Joseph Guzman, *New Poll Finds Americans Oppose Transgender Laws by Wide Margin*, The Hill (Apr. 16, 2021).

In fact, 66% of adults polled oppose legislation that would prohibit transition-related medical care for minors while only 28% support it. Moreover, 67% of adults oppose legislation that would bar transgender student athletes from joining sports teams that correspond to their gender identities. In response,

the United States Congress is considering the 2021 Equality Act which would prohibit discrimination based upon sex, sexual orientation and sexual identity. This legislation passed the House of Representatives on February 25, 2021 and is currently being considered by the Senate Judiciary Committee. H.R. 5, 117th Cong. (2021).

Although the Equality Act may hold the key to many locks, it hasn't been passed. So the rash of anti-trans legislation begs the question, does the hope of defeating the regulation of so many aspects of trans existence lie in the Constitution? It might. In some cases related to anti-trans policies the equal protection clause had already been invoked.

In *Ray v. McCloud*, an Ohio United States District Court considered a challenge to whether a policy of the Ohio Department of Health, which forbade transgender people from changing the sex marker on their birth certificates, violated the equal protection clause of the United States Constitution. The court held that trans people are a quasi-subject classification of people and, thus, are entitled to heightened scrutiny. No. 2:18-cv-272, 2020 WL 8172750, at *21 (S.D. Ohio Dec. 16, 2020).

The court so concluded based upon the application of the traditional factors associated with determining whether heightened scrutiny should be applied. Specifically, the court found that, "there is not much doubt that transgender people have historically been subject to discrimination including in education, employment, and access to healthcare." *Id.* at *21.

Additionally, the district court found that trans people: (i) are no less capable of contributing value to society than others; (ii) have a common immutable characteristic that defines them as a discrete group primarily in that their gender identity does not align with the gender they were assigned at birth; and (iii) constitute a minority lacking in political power given that they represent only approximately 0.6% of the adult population of the United States. *Id.* at *21-22.

Several United States Circuits Courts of Appeal and District Courts have likewise held that discrimination against transgender people is sex discrimination subject to heightened scrutiny and violates the equal protection clause of the United States Constitution. A good example is *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Specifically the Court found that:

> (i) "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Id.* at 1316.
>
> . . .
>
> (ii) Thus, "discrimination against a transgender individual because of [his, her, or their] gender-nonconformity is sex discrimination." *Id.* at 1317.
>
> . . .
>
> (iii) discrimination against a transgender individual because of [his, her, or their] gender-nonconformity is sex discrimination . . . that is subject to heightened scrutiny under the Equal Protection Clause." *Id.* at 1319.

Similarly, the Sixth Circuit held in *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) that, "[u]nder settled law in this Circuit, gender nonconformity . . . is an individual's 'fail[ure] to act and/or identify with his or her gender. . . Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."

Perhaps these cases or others like them will find a path to the United States Supreme Court to decide if hope in defeating the regulation of trans peoples' existence lies in the Constitution. Perhaps the hope lies in the Equality Act. Or perhaps the hope is more personal than that. Maybe it comes down to the power of the personal narrative, like this author's or Brandon Boulware's.

Boulware, a business lawyer in Missouri, in testimony before the Missouri House of Representatives, testified about a pending anti-transgender sports bill and his beloved daughter. This testimony heartrendingly illustrates the urgency of defeating anti-trans legislation and their efforts.

> One thing I often hear when transgender issues are discussed is: "I don't get it." "I don't understand". . . I didn't get it either for years. I would not let my daughter wear girl clothes. I did not let her play with girl toys. I forced by daughter to wear boy clothes and get short haircuts and play on boys' sports teams. . . . My child was miserable. I cannot overstate that she was absolutely miserable. Especially at school. No confidence, no friends, no laughter. I honestly say this, I had a child who did not smile. We did that for years. . . The moment we allowed my daughter to be who she is, to grow her hair, to wear the clothes she wanted to wear, she was a different child. I mean it was immediate. It was a total transformation. . . I need you to understand, that this language, if it becomes law, will have real effects on real people. It will mean she cannot play on the girl's volleyball team or dance squad or tennis team. I ask you please don't take that away from my daughter or the countless others like her who are out there. Let them have their childhoods. Let them be who they are.

Full transcript available at: *https://fox2now.com/news/missouri/missouri-dad-goes-viral-after-emotional-testimony-on-transgender-daughter-and-sports/.*

And this trans author would add to Boulware's plea—let them have hope. Let them have a place to start, which means finding the way—through the Equality Act, through the Constitution, or through stories of everyday people—to make this legislation end.

This article was written with great assistance and contribution from John E. Selent and Jameson Gay, each also of Dinsmore & Shohl — thank you to both for your hard work and input.

Sam Brinker currently resides in Columbus, Ohio and is also a self-proclaimed part-time New Orleanian, but he was born to be bearded in Dayton. Sam currently serves on the Board of Directors of Living With Change and of Rainbow Elder Care of Greater Dayton. Sam volunteers with a number of LGBTQ+ organizations such as the Point Foundation, his local cohort for the Human Rights, and Equitas Health. Sam has been an associate attorney at Dinsmore & Shohl since 2015 and currently works out of its Columbus, Ohio office. He focuses his practice on commercial real estate matters, primarily in the acquisition, disposition, development, and leasing spaces. Sam has been trans his whole life, but he began his transition in 2014 at the age of 24 — completing his medical transition in 2017 (an aspect of transition which, it's worth noting, is not part of every trans person's journey for a myriad of potential reasons). ■

An Altered Perspective: Becoming "Other" in America

Ellie Krug

We all know the saying: "Don't judge a person until you've walked in their shoes."

As a transgender woman, I am someone who has literally walked in a completely different set of shoes. A dozen years ago I transitioned from male to female; it was an intense emotional and physical journey that changed my perspective about so many things, including what it means to be "Other" in America.

Moving from One of "Us" to One of "Them"

First, how I got here.

For more than five decades, I presented as a white male—initially as a gangly awkward boy, then as a teen jock who sported a mustache, and ultimately as a short-haired male lawyer with a booming voice—something which gave me both privilege and simplicity.

I had privilege because my maleness, along with my white skin, put me at the top of society's pyramid.

It was simple because apart from needing to exercise initiative and work hard, there were no real obstacles in my pathway to great success. For example, I really never needed to worry about being stopped by the local police due to my skin color or because I was driving in the wrong neighborhood.

That was a good thing too, because often my buddies and I had beer in the car, drinking underage.

Despite all that I had in my favor, for decades I struggled with the idea that really, I was something other than male. Frankly, for the longest time I didn't want to figure out exactly *what* I was, and instead I desperately sought to shut out weird thoughts about my gender not being right. (The technical phrase for this is "suppression.") After all, it was the 1980s and '90s and by then I had married my high school sweetheart, who I loved with all my heart. I was certain that I would not only lose my wife but also my very lucrative law practice if the secret about my true gender ever came to light.

For nearly a decade, I met with therapists and demanded that they give me a magical mantra to help me stay male and married. Two different therapists bluntly advised that I needed to tell my wife about my true gender identity, and by then, my attraction to other men. They warned that I'd die by suicide if I didn't. I fired those therapists and was on yet another therapist when the unexpected happened: September 11, 2001.

It was on 9/11 when I really first thought about dying. Quite unexpectedly, the unforgiving takeaway was that despite all the love and wealth I had accumulated while living as a man, I was certain that I'd lay on my deathbed regretting that I hadn't been braver to be the true me: a woman. Thus, it was on the night of September 11th that I decided to leave my wife and start the long, arduous journey toward living my life authentically.

That journey culminated in 2009 when I became the first Iowa lawyer to ever transition genders. And, just as I had feared, I lost both my wife and my civil trial practice as a result. (Hold on—in the end, everything turned out just fine; I'm incredibly happy living as Ellie Krug.)

Why do I tell you this, and how does this relate to why we lawyers—and the legal profession at large—have so much difficulty around skin color?

The simple answer: when I came out as me—as a woman and not a man—I effectively moved from one of "us" to one of "them." Literally overnight, I became "Other," whom many in society feel perfectly comfortable shunning and marginalizing.

Indeed, as I prepared this article, I found that just this year, Kentucky elected officials, like those in at least 20 other states, introduced several bills targeting transgender children and youth, humans who are part of *my community.* Reading about that legislation hurt my heart and made me wonder why people—mainly white men who enjoy immense privilege—feel they have right to tell transgender people that they don't matter, that they're "lesser" compared to everyone else.

I never felt lesser or "Other" as a white man. Now, as a transgender woman who looks female but is still stuck with a masculine booming voice, I'm reminded almost every day that I don't quite fit the mold that society demands.

Tied to society's messaging about being lesser and "Other" is the very real experience of being marginalized (e.g., discriminated against). This stark reality registered shortly after I transitioned genders, when my health insurer saw fit to unilaterally cancel my insurance coverage simply because I was transgender. At age 52, I went naked without health insurance of any kind for six months—all because the system was against me, a transgender person.

Being made to feel lesser or "Other," and to then experience marginalization directly, is something that I deal with to this very day. I contend with those feelings despite also having the confidence of a successful former trial lawyer with more than 100 trials to my credit. You simply cannot escape the loss of dignity when those in power publicly message repeatedly and consistently that transgender people are unwelcome, or even a risk to children.

Now here is the point: my experience in being marginalized forced me to look around and open my eyes (and heart). As I did that, I quickly began to comprehend that transgender people have some things in common with people who don't have white-color skin. I realized that people of color are also treated as "lesser" or "Other" simply by virtue of who they are.

For example, long before Breonna Taylor's killing in Louisville, I had come to understand that policing and the use of excessive or deadly force are ways that Black and Brown people are marginalized by a system that messages they are a threat.

I also began to appreciate how people with darker skin colors are marginalized by uncaring, or ignorant, or structurally racist, education and health care systems. For example, according to a 2019 *The Nation's Report Card*, 75% of white-color Kentucky eighth graders read at basic expected standards compared to only 49% of Black eighth graders. This certainly isn't because Black kids aren't as smart as white kids. Rather, something else is at play here.

(By the way, Minnesota, where I live, has some of the worst skin color disparities in the country. In no way am I trying to single out Kentucky as being unique.)

After coming to understand America's problems around skin color, I started another journey: I signed up to be a Big Sister for a seven-year-old girl of mixed skin color identities (she identifies as Black), the daughter of a single mother. I've been with Jasmine (a pseudonym) for almost nine years now. In that time, she's greatly educated me about what it means to be non-white in America, like the time she announced that she was sure all white people have wonderful lives compared to hers. She's since told me several times that she wished her skin color were white.

Why in the world would a Black kid wish to be white?

Because society overtly and implicitly messages that by far, white is the preferred skin color. Just look at how the largely white-color U.S. Capitol insurrectionists were treated compared to how Black Lives Matter protestors (who are overwhelmingly peaceful) were treated last summer. The differences are striking, and people of color and their allies readily understand this. If you're Black (or Brown or Asian or of Indigenous heritage), it's a given that you're lesser and "Other" in America.

I know that what I've written above may very well make some white readers uncomfortable; some may even react with anger or denial and decide to skip my "Getting Past the Bumpiness" CLE training set for June 3 via the Louisville Bar Association as a result. If so, that would be too bad since those folks are precisely who I need to talk to.

The Legal Profession's Problem with Skin Color

Dominated by white men who enjoy all the fruits of success in a society that has historically favored whiteness over all other skin colors, the legal profession has long had a problem with letting in anyone who is "Other." At first, the door was shut to women, and then to Jews, and then later to anyone who identified as lesbian, gay, bisexual or transgender. While the profession has made great progress in opening the door to those groups of humans, we continue to struggle with skin color. The reasons for this vary, but it mainly comes down to fear or procrastination or both.

"What will our longstanding family business client (made up of all white people) that accounts for twenty percent of the firm's revenues think if we send Joe, a Black lawyer, to represent the company at the deposition, or god forbid, take the lead at trial?"

"We just can't find 'qualified' diverse candidates for the open associate positions." (Of course, "qualified" is always defined through the lens of a white person's biases and limited perspective.)

"I'm personally good with having a Black or Brown lawyer at the firm, but I'm worried about making some of the other folks here uncomfortable."

The list of excuses made by our profession is literally endless.

Thankfully, many national corporations are no longer putting up with the excuses. For example, this past January, Bradley M. Gayton, then Senior Vice President and General Counsel of the Coca-Cola Company, issued a blunt letter to each of the company's U.S. law firms. After noting that at current elevation rates, "Black equity partners will not reach parity with the Black U.S. population until 2391," he wrote:

> The hard truth is that our profession is not treating the issue of diversity and inclusion as a business imperative. We are too quick to celebrate stagnant progress and reward intention. We have a crisis on our hands and need to commit ourselves to specific actions that will accelerate the diversity of the legal profession. Our profession needs to be representative of the population it serves…. As a consumer of legal services, we believe that diversity of talent on our legal matters is a critical factor to driving better business outcomes. We will no longer celebrate good intentions or highly unproductive efforts that haven't and aren't likely to produce better diverse staffing. Quite simply, we are no longer interested in discussing motivations, programs, or excuses for little to no progress—it's the results that we are demanding and will measure going forward.

If your firm represented Coca-Cola and wanted to keep it as a

client, I think it safe to conclude that getting Mr. Gayton's letter was certain to motivate firm leaders to change their perspective and practices relative to hiring diverse attorneys.

(By the way, just to reinforce how difficult it is to change the legal profession's diversity landscape, in late April, Mr. Gayton resigned from Coca-Cola after only eight months on the job. There is speculation that his January letter was a factor; still, the company has now retained Mr. Gayton as a diversity and inclusion consultant for the next year. None of this detracts from the truths stated in Mr. Gayton's letter.)

In one form or another, letters similar to Mr. Gayton's have been going out to law firms across America from hundreds of Fortune 1000 companies. The question is whether lawyers can responsively overcome their fears and biases to actually make the legal profession more diverse.

It's certainly my goal to try to help with that.

Truthfully, this shouldn't be as difficult as we've made it out to be. Our clients in corporate America are way ahead of the legal profession on diversity and inclusion. They devote people and resources to making sure their workplaces and marketing reflect the broader America we all live in relative to skin color, country of origin, and all the other wonderful things that make us great.

We lawyers simply need to be more imaginative, determined, persistent and brave. As I often say, this isn't rocket science; rather, it's just about being human. With that comes understanding that we can't change the landscape by hiding in our offices and believing that life is rooted to six-minute increments.

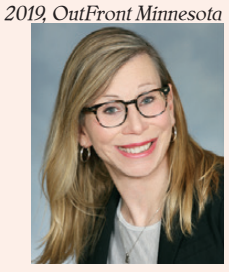
Finally, for those who may think the situation is hopeless, I highly recommend a short essay by the late writer and poet, Tony Hoagland, that appeared in the September 2018 issue of *The Sun* magazine. Titled, "The Cure for Racism is Cancer," Hoagland writes about how cancer is the great leveler where one comes to realize that the skin colors of the people struggling with cancer and those who care for them don't matter one iota. He went on to say that deep within each human is a "reset button" which allows for us to get past our skin color biases.

The problem, of course, is with reaching that button.

Ever the optimistic idealist, I think everyone has the capacity to reset. Will you join me on June 3 to explore these issues and start (or continue) your own personal journey toward finding your reset button? I would love to see you and I promise this: you won't be bored.

Together, we can make our profession more welcoming and diverse, and where someone being "Other" shouldn't be a reason for exclusion.

In 2009, when she was a civil trial attorney in Cedar Rapids with 100+ trials, Ellen (Ellie) Krug transitioned from male to female; she later became one of the few attorneys nationally to try jury cases in separate genders. The author of Getting to Ellen: A Memoir about Love, Honesty and Gender Change *(2013), Ellie has trained on diversity and inclusion to court systems, law firms, Fortune 100 corporations, and colleges/universities on nearly 1000 occasions. A hopeless idealist, Ellie has presented her inclusivity training, Gray Area Thinking®, across the country. In 2016,* Advocate Magazine *named Ellie one of "25 Legal Advocates Fighting for Trans Rights" and in 2019, OutFront Minnesota conferred Ellie its Legacy Award. She is also a monthly columnist for* Lavender Magazine *and* Minnesota Women's Press, *and a weekly radio host on AM950 radio. Her monthly e-newsletter,* The Ripple, *reaches 9000+ readers and can be found at* www.elliekrug.com. *Ellie presently lives outside Minneapolis and is the founder and president of Human Inspiration Works, LLC (*www.humaninspirationworks.com*).* ■



Confronting Hate at the Pride Parade

Scott Furkin

I donned a new t-shirt—imprinted with Springdale Presbyterian Church on the front and the watchwords "open, loving, thinking, doing" on the back—as I headed out to walk the eight blocks from my office to the staging area. I was about to march in my first Pride Parade.

Even before installing an openly gay pastor, Rev. Dwain Lee, in 2016, church members had discussed how to communicate to the wider community our commitment to inclusivity. Carrying our banner in the Pride Parade seemed like an effective and fun way to do just that.

Rev. Lee enthusiastically agreed but offered some advice: "We are going to be on LGBTQ+ turf, not the church's. We don't get to set the rules, they do." He cautioned that some might view our participation with skepticism or even be hostile to the presence of "church people" in their midst.

"LGBTQ+ people have come by whatever negativity they have for the church honestly and with good reason. Many, if not most, of us have stories of negative church experiences that would set your hair on end. We need to validate that and allow them their own reality," he said.

Knowing that parade participants and spectators often dress or behave in ways some find outrageous, we were counseled to consider the context. Yes, some folks would likely be "flamboyant" and go "over the top" to "flaunt" their differences from us. After all, celebrating difference is pretty much the whole point of the parade.

Rev. Lee reminded us that LGBTQ+ people have long faced rejection by both church and society. Some choose to "reject the rejection" by establishing a set of alternative social norms that are often intentionally contradictory to the norms of the groups that rejected them.

"So, if you see something jarring, understand that the outrageousness reaction has the initial rejection itself as its roots," he explained. "If the initial rejection hadn't occurred, the reaction wouldn't have either."

His points were well taken. Over time organized religion has been especially cruel to LGBTQ+ people, barring them from serving as clergy, refusing to acknowledge their marriages and, in some instances, expelling them from church membership. Thoughtful Christians must recognize their complicity in hurting them and humbly seek to build trust through acts of compassion and repentance.

As Rev. Lee noted, it's not enough to say "A lot of churches discriminate against LGBTQ+ people but we're not like that." We must also say "We were wrong, we're sorry and we're trying to be better now."

Rev. Lee also had some practical advice for handling potential confrontations with extremist religious or conservative protestors who might be at the parade. He offered three simple rules: Rule #1 – Do not engage. Rule #2 – Do not engage. Rule #3 – While not engaging, do not engage.

"Seriously, just ignore them," he advised. "They're only looking for attention and they obviously aren't interested in any meaningful discourse. We don't have to accept every invitation to an argument."

I was tested early in the parade. Near the start, just after rounding the corner from Preston Street onto to Main Street, we encountered a small but vocal group of sidewalk protestors—think of the Westboro Baptist Church folks and their appalling "God Hates Fags" rhetoric. As they shouted and waved signs warning that we would all be spending eternity in hell, I flashed my own sign which read "I (heart) My Gay Pastor."

Rev. Dwain Lee and Scott Furkin (June 2017)

What happened next lasted only a few seconds but seemed to unfold in slow motion. Apparently, my sign's message—that being gay and a Christian clergyman are *not* mutually exclusive—was too much for one of the protestors. For this nondescript middle-aged man, it was like pouring gasoline on a fire. We locked eyes as he stepped off the sidewalk and made a beeline in my direction. He was just a couple of feet away when, his face twisted in anger, he thrust a Bible toward me and snarled "Satan, I rebuke you! The blood of Jesus is against you!"

Springdale Presbyterian Church members (June 2019)

My fight-or-flight response kicked in, but I kept marching and my heart rate quickly returned to normal once I realized I was in no real danger. Reflecting on the incident later, I understood that what I experienced in those brief moments is but a taste of the hatred too many LGBTQ+ people routinely face in their daily lives. While the homophobia they endure may be more covert, it is nonetheless painful and wrong. To have it perpetrated against them in the name of God must be especially hurtful. It shows how much work remains to be done in the struggle for LGBTQ+ equality.

Happily, for me and my cohorts, there was no more ugliness on the parade route that day. To the contrary, cheering LGBTQ+ people and their allies lined both sides of Main Street. The mood was decidedly celebratory and I saw nothing more outrageous than I'd seen before on Bourbon Street during Mardi Gras or the Churchill Downs infield on Derby Day.

It may have been my first Pride Parade but it was not my last. And I still love my gay pastor.

Scott Furkin is the Executive Director of the Louisville Bar Association. ■

The Increasing Complexity of Defamation Law in #MeToo Era Lawsuits

Jamie R. Abrams

"Dizzying" is probably the single best word to describe how defamation law is transforming sexual assault and sexual harassment litigation in the wake of the #MeToo Movement. The #MeToo Movement ushered in cultural and legal reforms holding perpetrators of sexual assault and sexual harassment accountable for their harms. The social movement upended many social, legal and political norms, including litigation trends and patterns of interest to Kentucky attorneys.

Before the #MeToo Movement, the best that most victims of sexual assault and sexual harassment might generally hope for when suing an employer was a quietly negotiated settlement with a strict non-disclosure agreement securing financial redress. These closed door approaches, however, also often ended careers for the accusers and allowed powerful perpetrators to flourish unchecked within institutions and industries. These approaches only worked for industries and perpetrators with the resources to even negotiate a settlement.

The #MeToo Movement allowed victims to find their voices in new ways, tell their stories in different platforms, and find community with other victims. The #MeToo Movement brought accusers forward after years (decades even) of quietly navigating abusive co-workers and complicit institutions and systems protecting powerful perpetrators in all industries and sectors. The movement ushered in a new era of public accountability for systemic perpetrators as their patterns and behaviors were exposed by victims. The #MeToo Movement exposed in public what was often known previously only through hushed "whisper networks."

#MeToo era allegations have sometimes been brought in court through criminal and civil proceedings as in the cases of accused perpetrators like Bill Cosby and Harvey Weinstein. More often though the stories have been told on social media and in the "court of public opinion." From a legal standpoint, these social media spaces are dramatically less protective of speech for accusers than statements made in courts or government proceedings. These accusations are also capable of rapid dissemination with dramatic ease, thus increasing the potential reputational harm for the accused with fewer, if any, procedural protections. The #MeToo Movement has introduced new forums, channels and processes in which to report assault and harassment claims. These extra-legal approaches, in turn, wield varying degrees of accountability, liability and risk.

Defamation law dramatically shapes this changing legal landscape for both civil claims in court and accusations outside of court. Defamation is a false, defamatory, unprivileged statement of fact that is published concerning another causing harm. Defamatory statements are those that harm the reputation of another and lower their esteem in the community. Defamatory statements must be false based on provable facts. Truth is a defense to a defamation suit, thus yielding a trial within a trial when allegations of sexual assault are the source of the defamation suit. Some notable privileges also protect statements made in judicial proceedings or government proceedings as well as other privileges.

For statements uttered about private figures, the defamation plaintiff need only prove *negligence* in defendant's false and defamatory statement. Plaintiffs must prove actual malice for statements involving a celebrity or public figure because public figures have greater access to the channels to defend themselves from reputations harms. Individuals can become public figures for limited purposes, while otherwise retaining their private figure status. For example, Christine Blasey Ford likely became a public figure narrowly with respect to her allegations against Justice Kavanaugh, although she was otherwise an entirely private figure in all other matters.

Defamation law has emerged as both a proactive and a reactive litigation strategy in #MeToo era cases. The list of recent defamation cases reads as quite the "who's who" of litigants. President Trump, Roy Moore, Jeffrey Epstein, Ghyslain Maxwell, Alan Dershowitz, Harvey Weinstein, Bill Cosby, Johnny Depp, and more, are litigants on both sides of the "v." in defamation suits. The volume and pace of these high-profile cases will lead to rapid developments in this area of law.

The #MeToo Movement led many victims of sexual assault and sexual harassment to file civil lawsuits against the accused perpetrators. These lawsuits then spawned retaliatory defamation suits against the victim-accusers. Mother Jones reported in its article *She Said, He Sued* in February 2020 that 100 defamation suits have been filed *against* accusers since 2014. Three-quarters of these lawsuits involved defamation suits against college students and faculty accused of sexual misconduct suing their school and their accusers for defamation. A lawyer for the Victim Rights Law Center reported that about 5% of her caseload used to involve defending an accuser from a defamation suit while today *almost half* of her cases involved defamation defense of an accuser.

These defensive strategies for accused perpetrators are not surprising. The standard playbook popularly known for defending someone accused of sexual abuse and harassment is known by the acronym of DARVO—Deny, Attack, Reverse Victim and Offender. Defamation suits against the accusers are examples of each of those defense strategies. These retaliatory suits reflect a denial, an attack, and they flip the victim and the offender around.

The question becomes how can victims tell their stories safely and how can legal advocates protect them in doing so? Victims often need to tell their stories many times to obtain the various protections that the law allows. For example, victims may need to tell their stories of sexual assault and sexual harassment in seeking housing, registering for college classes, seeking counseling services, in various investigations, and in obtaining medical care.

The costs of being sued in a defamation suit are dramatic for survivors of sexual assault and harassment. To *bring* a lawsuit, victims do not necessarily need a lawyer to bring the suit, or they might find a lawyer to represent them on a contingent fee basis. In contrast, for a victim to become a *defendant* in a defamation suit, they likely do need to hire a lawyer, if able, in their own defense. Defending against a defamation claim can be very costly. One #MeToo accuser-defendant in a defamation suit reported spending $30,000 in her own defense. Just the *threat* of being a defendant in such a suit can create a strong deterrent headwind to plaintiffs coming forward.

Nor is it just accusers who might face defamation liability for allegations of sexual assault and sexual harassment. Lawyers, spouses/significant others, online posters and media outlets can also face liability for their coverage of the accusations. The *Rolling Stone* article about sexual assault allegations at the University of Virginia and the string of defamation suits it yielded is a good example of the scope of civil liability here.

But the strategic use of defamation law in sexual assault and sexual harassment cases has not been a one-way street in the wake of the #MeToo Movement. Accusers too are starting to use defamation law proactively to sue the accused for their denials, dismissals and deflections of the accused speaking of the accuser's claims.

Three particularly thorny issues are emerging in these back-and-forth defamation cases arising out of sexual assault and sexual harassment claims. For the purposes of linguistic clarity, the terms accuser and accused below are used to describe the accuser (alleged victim) and accused (alleged perpetrator) in the underlying public accusation of sexual assault and sexual harassment. The terms plaintiff and defendant are used to describe the parties in the resulting defamation suit.

(1) Fact v. Opinion. One interesting legal issue arises when accusers sue the accused for defamation arising from their public statements about the underlying allegations. This particularly arises when the accused go beyond simple denials and suggest publicly that the accuser is a liar or that the accused carries ill motives in the underlying lawsuit. Are these statements actionable fact or non-actionable opinion? In fact, most of the defamation cases considering this question are #MeToo era cases. For example, Summer Zervos sued Donald Trump for his statements suggesting she was a liar in public statements regarding her accusations against him. Trump argued that his statements were not actionable because they were just "fiery rhetoric, hyperbole and opinion." Donald Trump's statements that Stormy Daniels' allegations were "a total con job" were found to be just "rhetorical hyperbole" that was "exaggerated and heavily

laden with emotional rhetoric and moral outrage" and thus not actionable.

Likewise, women accusing Bill Cosby of sexual assault also sued Cosby, Cosby's wife and his lawyer for defamation after they suggested publicly that the victims were lying about their allegations. Reflecting the challenges of these cases, the same statements made by Cosby and others yielded different outcomes in different courts on the same question of whether the statements were fact or opinion. The Third Circuit held that Cosby's wife's and Cosby's lawyers' statements that the accusers' claims needed to be vetted were just opinion (and thus not actionable). The District Court of Massachusetts concluded that they were actionable statements containing facts.

There are three different jurisdictional approaches to the questions of mixed fact and opinion statements. Kentucky courts have held that a statement couched as an opinion can still support a defamation claim if it can be proven "verifiably false." The test is whether a "reasonable factfinder could conclude that an allegedly defamatory statement implied an assertion of fact." To be actionable, the statement must imply the allegation of undisclosed defamatory facts as the basis of the opinion.

(2) Public v. Private Figures. Another theme in these increasingly complex and public cases is the question of whether the public or private figure standard applies to allegations of sexual assault and sexual harassment. For defamation suits against public figures, plaintiffs must prove actual malice. The #MeToo Movement has powerfully brought claims into the public spotlight, thus suggesting that otherwise private individuals might become limited purpose public figures in their public accusations. The test is whether the defendants have inserted themselves into the public debate or been drawn into it. Accusers might paradoxically prefer the "limited purpose public figure" status when they are *defending* against a defamation suit because then the plaintiffs would have to prove actual malice on the part of the victim, a heightened burden of proof.

(3) Anti-SLAPP Statutes. Finally, Kentucky lawyers may be interested in how Anti-SLAPP laws affect this area of litigation. Kentucky does not currently have such a law, but one was introduced in the 2021 Regular Session. SLAPP stands for Strategic Lawsuit Against Public Participation. Anti-SLAPP statutes seek to prevent the filing of lawsuits to target those who petition the government and are sued as an effort to chill the petitioner's exercise of their First Amendment rights. Applied to the context of #MeToo lawsuits, these statutes would provide a procedural remedy to the accusers who are sued by the accused in defamation suits. There are 29 states that have such laws and 21 that do not. There has been a push to enact more of these laws after the #MeToo Movement.

Rep. Nima Kulkarni (D) of Kentucky's 40th District and Rep. Jason Nemes (R) of Kentucky's 33rd District co-sponsored House Bill 132 in the 2021 Regular Session. It was assigned to the Committee on Committees where it remained for the session. The bill would create a new Section of KRS Chapter 454 to create procedures to swiftly dismiss legal actions that chill a party's exercise of their First Amendment rights (a proposed Anti-SLAPP bill).

The focus of an Anti-SLAPP statute is on the *defendant's* activity that gave rise to the asserted liability and whether that activity is protected petitioning. In the context of a #MeToo era defamation claim filed against an accuser, the defamation defendant would be the victim alleging the harassment and misconduct of the accused-plaintiff. The accuser-defendant has to show that the accused-plaintiff's defamation suit is not meritorious. Anti-SLAPP laws can thus offer accusers a defense to retaliatory claims of defamation intended to chill accusers from coming forward with claims.

H.B. 132 applies to communications made in a "legislative, executive, judicial, administrative, or other governmental proceeding" or on an issue under consideration or review in such proceedings. It seeks to protect the accuser's constitutionally guaranteed "freedom of speech or of the press, the right to assemble or petition, or the right of association . . . on a matter of public concern." At least one California case has held that "violence against women" is a matter of pressing public concern protected by its Anti-SLAPP statute.

Kentucky's bill would allow the accuser-defendant in a retaliatory defamation suit to file a motion within 60 days of being served with a suit to show by good cause that the party is entitled to expedited relief to dismiss the proceeding. The moving party seeking dismissal would have to prove that the responding party cannot state a cause of action upon which relief can be granted. If successful, the accuser-defendant could stay all proceedings, motions, and discovery. The court can dismiss the underlying defamation cause of action with prejudice if the responding party cannot establish a prima facie case as to each essential element of the cause of action. Attorney's fees are available under some circumstances. The bill is intended to be broadly construed so as to protect First Amendment rights.

These three issues are a sampling of the thorny legal issues emerging from the intersection of #MeToo era lawsuits and defamation law. H.B. 132 offers important protections against retaliatory lawsuits and merits a more robust consideration by the Kentucky General Assembly next session. Lawyers using defamation law as both a shield and as a sword in litigation tactics will need to stay abreast of these rapid developments in strategy and law.

Jamie R. Abrams is a professor at the University of Louisville Brandeis School of Law. ■

Data Security, Ethics & Technical Competence

What Every Lawyer Should Know

Paul J. Unger, Esq.

In 2012, the American Bar Association added a "technological competence" component to Comment 8 of Model Rule 1.1. Since that time, all but eight states in the U.S. have followed suit. Kentucky adopted the rule change on November 15, 2017 (Order 2017-18). Kentucky added the duty of technical competence to Comment 6 to make clear that lawyers have a duty to not only be competent in the practice of law, but also in technology.

Kentucky SCR 3.130 (1.1) states:

> **Maintaining Competence**
> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Technology touches nearly every aspect of practicing law today, especially considering the Covid-19 pandemic. It is impossible to ignore. As Sarah Andropoulos observed, "…the clear takeaway for today's lawyers is that they will be unable to claim ignorance in the event of a technology-related ethical lapse and must undertake reasonable efforts to use technology in a manner that is consistent with their professional responsibilities."

A second set of important amendments relate to Model Rule 1.6 and its comments. The language imposes a duty upon lawyers to use reasonable efforts to prevent the inadvertent or unauthorized disclosure of confidential client information. In Kentucky, Comment 14 states a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure:

> (14) A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3

Comment 15 states that when "transmitting a communication," lawyers must take reasonable precautions to protect confidentiality and sets forth factors to be considered in determining reasonableness:

> (15) When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

While not adopting the ABA Model Rules word for word, Kentucky's language is still similar. At the end of the day, an attorney must act competently and must take reasonable steps to protect client confidential information, electronic or otherwise.

So, what should lawyers do to meet these obligations? The following are a few suggestions, but this is by no means a comprehensive list.

1. Develop and Follow a Written Information Security Program (WISP) for Your Office

In many states, such as my home state of Ohio which was the first state to adopt such a law (see Ohio's Data Security Protection Act, Ohio Revised Code § 1354), having a WISP that "reasonably conforms" to one of the following national data security frameworks provides organizations a safe harbor from negligence actions in the event there is a data breach:

- National Institute of Standards and Technology's (NIST) Cybersecurity Framework;
- NIST Special Publication 800-171 or Special Publications 800-53 and 800-53a;
- Federal Risk and Authorization Management Program's (FedRAMP) Security Assessment Framework;
- Center for Internet Security's Critical Security Controls for Effective Cyber Defense; or
- International Organization for Standardization (ISO)/International Electrotechnical Commission's (IEC) 27000 Family—Information Security Management Systems Standards.

The adoption of safe harbor laws has become a national trend. Just as important as providing businesses protection, having such a program and protocols in place will make everyone's data much safer. Such a written program should address the following security areas:

1. Designating employees responsible for the security program (a task force or committee)
2. Identifying and assessing security risks
3. Developing policies for the storage, access, and transportation of personal information
4. Imposing disciplinary measures for violations of the WISP
5. Limiting access by or to terminated employees
6. Overseeing the security practices of third-party vendors as well as contractors
7. Restricting physical *and* digital access to records
8. Monitoring and then reviewing the scope and effectiveness of the WISP
9. Documenting data security incidents and responses

There are many other technical protocols that you can add to your WISP. In our office, we have found that it is easier to maintain a single document that contains all of our security protocols instead of having 5 different documents. Here are other protocols that you can add to your WISP:

1. Business continuity and disaster recovery
2. Breach or incident procedure, checklist & notification procedure
3. Agreements with and training for independent contractors
4. Acceptable use policy
5. Equipment disposal & asset management
6. Onboarding and offboarding
7. How to secure and store passwords
8. Requiring two-factor authentication
9. Restricting access to PII on a need-to-know basis (aka adopting a policy of least privilege)
10. Encrypting email
11. Monitoring security systems
12. Updating firewalls, security patches, anti-virus, and anti-malware software
13. Regular training employees on security policies as well as the proper use of computer security systems.

I strongly advise law firms to work with a cybersecurity firm to help write and implement a data security program. Most IT companies are not equipped or qualified to do this unless they have undergone specific cybersecurity training.

2. Document and Email Retention Policy

This type of policy may be a separate document because it can get pretty complicated depending on your jurisdiction. You could also incorporate it in your WISP. If you hold onto every document and email forever, you can end up with so much irrelevant digital clutter that you're unable to find the things you actually need. Your policy should comply with any applicable federal or state laws, the Kentucky Rules of Professional Conduct and any other relevant regulations. Consider contacting your malpractice insurer to see what they recommend.

3. Ensure Proper Protocols Are Being Followed

Kentucky Rules 5.1 and 5.3 can make any lawyer with managerial authority responsible for the mistakes of subordinate lawyers and nonlawyer assistants. If you have managerial authority, it is incumbent upon you to make sure things are being done correctly.

For example, assume that a lawyer's practice requires the electronic filing of pleadings as PDF files, and that sometimes information must be redacted from the PDFs before filing. This is what landed Paul Manafort's attorneys in hot water in 2019. (See the Mother Jones story on this.) Assume that the lawyer has never redacted anything from a PDF herself because a legal assistant has always handled that task. The problems here are that the lawyer has no idea how to redact something on a PDF (a skill necessary to do her job), doesn't know whether the tool being used can properly do the job, or whether the legal assistant is using it correctly. None of these conditions are acceptable; and if a mistake is made, Rule 5.3 is likely to put the responsibility for the mistake on the lawyer, even if the lawyer didn't personally attempt the redaction.

To remedy this situation, law firms typically need the advanced or professional version of their PDF solution, like Acrobat Pro, Foxit Phantom for Business, or Kofax PowerPDF Professional. These applications can redact documents properly, but to do this right, a firm needs to:

i. Invest in the right tool
ii. Invest in training
iii. Document the instructions & process
iv. Store instructions & processes in a central location
v. Ensure that the process is being followed

These steps would satisfy the reasonableness test required by the rules; and in a pinch, the lawyer would even be able to redact without assistance by simply following the written instructions.

4. Strongly Consider a Cloud-Based Document Management System (DMS)

A DMS by itself offers numerous advantages for lawyers, such as email management, version control, searchability, collaboration, and many others. One of the primary benefits of a DMS is the centralization of documents. Forcing users to save everything into one platform with consistency and controls makes documents not only easier to find for your users, *but a DMS also makes client data infinitely easier to secure and govern*. It is extremely difficult to secure and govern documents that are saved and scattered across multiple locations and platforms. It is much easier to secure and govern documents that are in just one location.

Forcing users to save everything into one platform with consistency and controls makes documents not only easier to find for your users, but a DMS also makes client data infinitely easier to secure and govern.

Cloud-computing adds numerous advantages such as predictable monthly costs, low upfront pricing, no need to purchase software and servers, anywhere access, ease of use, updates and maintenance are included in the pricing, as well as data backup and/or redundancy. One of the primary benefits of a cloud based DMS is data security. Platforms such as NetDocuments, Worldox Cloud, iManage Cloud, and/or hosted infrastructure platforms such as ProCirrus (*www.procirrus.com*) have spent enormous amounts of money on data security and annual security certifications. These are certifications that would cost a firm hundreds of thousands of dollars, but because these platforms support hundreds of thousands of users, they can easily spread the costs associated with all that security.

Under Rule 1.6, an attorney may ethically allow client confidential material to be stored in a cloud repository provided the attorney takes reasonable case to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks. Factors to consider whether there are reasonable safeguards include, but are not limited to:

- Is the data encrypted in transit?
- Is the data encrypted at rest?
- Is the data segregated?
- Does law firm retain ownership of the data?
- Are there redundant servers?
- Do you have an option for local backup?
- Does the provider escrow money in the event of insolvency?
- Does the vendor have and maintain data security certifications?

Perhaps one of the best opinions in the United States addressing lawyers working remotely and cloud computing is Pennsylvania Formal Opinion 2020-300. See the Technethics story on this.

5. Encrypt All PCs and Mobile Devices

The idea here is to protect PCs, phones and tablets so that if they're stolen or misplaced, no one will be able to extract information from the devices without the appropriate credentials and authentication. As David Ries and John Simek, two national data security experts, accurately point out:

> "Not properly protected, laptops and portable media can be recipes for a security disaster. One survey reported that 70 percent of data breaches resulted from the loss or theft of off-network equipment (laptops, portable drives, PDAs, and USB drives). Strong security is a must. Encryption is now a standard security measure for protecting laptops and portable devices—and attorneys should be using it."

Full Disk Encryption: I recommend full disk encryption on stationary desktop computers, in addition to laptops. The cost is minimal, so why wouldn't you? Mobile devices like laptops and smartphones are more vulnerable than a desktop computer, but desktops computers can be stolen as well. There are many choices for this type of solution, and it will likely cost you nothing or very little. For example, BitLocker is an encryption program included for free with certain versions of Windows 7, 8, 8.1 and 10. For Mac users, FileVault is included for free with OSX. If you utilize Windows Bitlocker, I strongly recommend that you backup your encryption key within your password manager (like Last Pass, Dashlane, Roboform, etc.). If you are part of an office with multiple users, your IT person or provider should be pushing out full disk encryption on all machines using group policy, disallowing users the capability to turn it on or off. In other words, full disk encryption should be mandatory, and users cannot disable it. The risk is way too high to *not* encrypt, and the cost is next to nothing to have it enabled.

Phone & Tablet Encryption: Every smartphone comes with encryption software that simply must be turned on. Android and iOS tablets also include free encryption software. If you are part of an office with multiple users, consider a Mobile Device Management (MDM) platform that will force encryption on all devices, as well as potentially GPS track lost devices and remotely wipe them in the event they cannot be immediately located.

Use Email Encryption: An extremely high volume of communication between lawyers and clients occurs via email. In most jurisdictions, including Kentucky, lawyers do not have to encrypt emails because email affords a reasonable expectation of privacy. See ABA Formal Opinion No. 99-413 and Rule 1.6, above. However, when transmitting sensitive information like PII, trade secrets, information subject to a protective order, or information that your client may deem sensitive, you should be using special security measures (i.e., encryption). Kentucky SCR 3.130 (1.6) specifically states: "Special Circumstances may warrant special precautions."

Here are some email encryption programs to consider:

Microsoft 365 w/hosted Exchange and E3 or higher licensing
www.office.com

Protected Trust
www.protectedtrust.com

Mail It Safe
www.mailitsafe.com

6. Use Wireless/WiFi Encryption

If you rely on a wireless internet connection at your office or home to work with sensitive client information, it goes without saying that your wireless router or access point should be properly encrypted. If you set it up yourself and aren't sure, then you should immediately secure the assistance of an expert to ensure that your security is properly configured. Sometimes, it's as easy as calling the technical support line for the manufacturer of your router.

If you sometimes use public WiFi connections to do legal work, then you need to be aware of the risks of doing so. Briefly, legally-obtainable software can be used to intercept and read the data you're transmitting. For a quick primer, consider reading: *Here's What an Eavesdropper Sees When You Use an Unsecured Wi-Fi Hotspot* by Eric Geier, and What Is A Packet Sniffer? by Andy O'Donnell.

You can better protect yourself from these risks by using a properly encrypted cellphone hotspot, other encrypted, portable broadband device (such as a MiFi), or using a virtual private network (VPN). There are many excellent consumer VPN services that are easy to install and use on your PC, tablet or phone. For example, consider:

- https://www.hidemyass.com
- https://www.purevpn.com
- https://nordvpn.com
- https://www.privateinternetaccess.com, or
- https://www.ipvanish.com

7. Two-Factor Authentication is Critical

Two-factor authentication (2FA) is a security process in which the user must provide two authentication factors to gain access. In other words, more than just a password is required. Putting in place two-factor (or multi-factor) authentication is probably more important today than changing passwords or using unique passwords. I still think unique passwords is important but changing passwords every 30 days has recently been regarded as a waste of time. 2FA is most important because without the second measure of authentication (usually via a tool like Microsoft Authenticator or Google Authenticator, providing a PIN, providing your fingerprint from your smartphone) a cybercriminal will not be able to login to an important account even if they have your credentials. Many software systems, VPNs and other legal-related services also offer 2FA. However, you have to enable it. Duo (*www.duo.com*) is a popular service that allows you to add potentially all your applications to a single 2FA platform. See CNET's story regarding Microsoft finally acknowledging this year that 2FA is critical and changing passwords is not very important anymore.

Single Sign-On (SSO)/Federated Identity with 2FA is what I recommend to most organizations. This is an authentication scheme that allows a user to log in with a single ID and password to any of several related, yet independent, software systems. True single sign-on allows the user to log in once and access services without re-entering credentials. It is very convenient to all your users because it minimizes the number of passwords that one has to maintain. When coupled with 2FA, it is a very secure tool.

8. Use an Encrypted Password Manager

I recommend that everyone should use an encrypted password manager. Password managers like Dashlane, LastPass, OnePassword, Roboform do the following:

- Secures all your passwords, credit cards, personal notes in a highly secure encrypted cloud-based vault that is accessible via your PC, laptop, tablet, smartphone, Apple device, or all of the above. When you update or create a password or secure note from one location, like your desktop computer, that password or secure note is updated in every location, like your smartphone.
- Generates and updates strong passwords for you.
- If desired and appropriate, these vaults allow sharing of certain passwords with co-workers. Many use them as estate planning vaults to share passwords with their life-partner or a family member.

9. Get Training!

Users represent the biggest hole in every organization's security. It is imperative that tools are provided, and that training is *mandatory*. The internet can be dangerous place; and it cannot be assumed that lawyers, staff or clients know how to protect confidential electronic data.

In a digital world, the exact meaning of "reasonable efforts" and "reasonable precautions" to protect client data may be subject to debate. However, taking no additional steps to protect client data is never going to meet the standard. You don't have to be a security expert or techie to protect yourself and your office. However, it's important to at least employ the steps outlined above to help ensure your and your client's confidential information remains confidential.

Paul Unger is a national speaker and author. He coaches lawyers how to be more efficient with time management by offering customized workshops. When he isn't speaking or writing, he is usually performing technology assessments throughout the United States and Canada. Paul began his career working for the Governor of Ohio, and then went on to law school. He practiced law for six years, specializing in litigation and bankruptcy, before starting a legal technology consulting company with partner Barron Henley in 2000. ■

Services

KBA Disciplinary Complaints:
Cox & Mazzoli, PLLC
Michael R. Mazzoli is accepting a limited number of attorney disciplinary matters. Mr. Mazzoli is talented, experienced and discreet (502) 589-6190 • mazzolicmlaw@aol.com 600 West Main Street, Suite 300 Louisville, KY 40202
THIS IS AN ADVERTISEMENT

False Claims Act / Qui Tams / Whistleblower:
Cox & Mazzoli, PLLC
Scott C. Cox and Michael R. Mazzoli, both former Assistant United States Attorneys, are accepting new clients who have knowledge of fraud and false billing claims against the federal government (502) 589-6190 / mazzolicmlaw@aol.com 600 West Main Street, Suite 300 Louisville, KY 40202
THIS IS AN ADVERTISEMENT

Discrimination Issues & Other Related Matters:
Samuel G. Hayward is available for consultation of discrimination and other related matters for either plaintiff's or defendant's practice. Mr. Hayward has over forty years' experience in this area with Title 7, 1983, and sexual harassment cases. Samuel G. Hayward, 4036 Preston Hgwy, Louisville, KY 40213, (502) 366-6456.
THIS IS AN ADVERTISEMENT.

Immigration Consultant:
Dennis M. Clare is available to practice immigration and nationality law. Member of the American Immigration Lawyers Association. Law Office of Dennis M. Clare PSC, Suite 250, Alexander Bldg., 745 W. Main St., Louisville, KY 40202, (502) 587-7400.
THIS IS AN ADVERTISEMENT.

Arbitrations Against Securities Brokers:
James P. McCrocklin, NASD/FINRA "Chairman qualified", has over 30 years experience as an arbitrator and Claimants Counsel before FINRA panels. Mr. McCrocklin is available for confidential and free case evaluations for clients who have experienced excessive losses in their investment accounts. Mr. McCrocklin has successfully collected millions on behalf of aggrieved investors. Call (502) 855-5927 or e-mail jmccrocklin@vhrlaw.com.
THIS IS AN ADVERTISEMENT

Missing Witness Service:
Will locate your missing witness anywhere in the country for the flat fee of $180 plus database expenses. Using our proprietary databases and the telephone, we will locate and talk to the witness and ask them to call you. If you don't want them contacted, we will furnish you their current address and cell number. Call Capital Intelligence, LLC 502-426-8100 or email jsniegocki@earthlink.net.

QDRO Preparation and Processing for:
Defined Benefit and Defined Contribution Plans. Military, Municipal, State and Federal Employee Plans. Qualified Medical Child Support Orders. Collection of past due Child Support and Maintenance. Charles R. Meers, 2300 Hurstbourne Village Drive, Suite 600, Louisville, KY 40299 Phone: 502-581-9700, Fax: 502-584-0439. E-mail: Charles@MeersLaw.com.
THIS IS AN ADVERTISEMENT

Advertising copy is carefully reviewed, but publication herein does not imply LBA endorsement of any product or service. The publisher reserves the right to reject any advertisement of questionable taste or exaggerated claims or which competes with LBA products, services or educational offerings.

Office Space

Office Space Available:
One Riverfront Plaza – river view; 1 to 3 offices available on 20th floor; library/conference room; secretarial services and/or space available. (502) 582-2277.

Attorney Office Space for Rent in Old Louisville Area.
(S. 4th Street)
1 large office approximately 16' x 16'
1 office approx. 8' x 10'
1 office approx. 8' x 10' – with adjoining Room that can be used for secretarial office Or storage/copy area
1 large open space with enough room for 3 - 4 desks for support staff
Access to conference rooms, copy, fax and postage machines and kitchen.
Free Parking. Rent one or all four – all on 3rd floor.
Call Laura Garrett @ 502-582-2900

Help Wanted

Through the Presbyterian Foundation

Senior VP General Counsel:
The Presbyterian Foundation, located in Jeffersonville, Indiana, is currently seeking a Senior Vice President General Counsel. This position supplies in-house corporate legal counsel and engages and manages outside counsel to support the policies, goals, objectives, of the Presbyterian Foundation as approved by the President and Chief Executive Officer and the Board of Trustees/Directors. The General Counsel position provides legal counsel and oversight at the executive level on all corporate issues with legal, fiduciary or regulatory implications for the Presbyterian Foundation. 7-10 years' legal practice experience in several of the following legal disciplines is required: Not for profit law and regulation (including tax laws), Charitable and family estate planning (including tax laws), State insurance, non-profit, and trust law as it applies to charitable gift annuities, and Human Resources. Valid license to practice law in Indiana or the ability to be licensed in Indiana required. The ability to quickly learn and work effectively within the polity, mission funding practices, and organizational structure of the Presbyterian Church (U.S.A.) is required. Competitive Salary (commensurate with experience) and excellent benefits offered. Send resumes to Lisa Pesavento, HR Coordinator: lisa.pesavento@presbyterianfoundation.org.

DOWNLOAD ADVERTISING RATES

Advertising Rate & Specification sheets are available for download visit www.LOUBAR.org, click on "Bar Briefs" select "Advertise."

Free

Kentucky Southwest Reporter Volumes:
Louisville law firm that is relocating offices will give, free of charge, a set of Kentucky Southwest 2d and Southwest 3d reporter volumes, to any firm or individual who will come and take them. Complete from Kentucky Southwest 2d vol. 1 through Southwest 3d vol. 610. About 262 books. Call (502) 632-5294.

Help Wanted

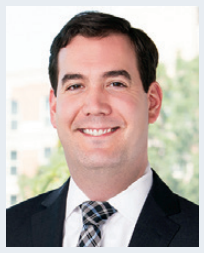
Through the LBA Placement Service

Associate Attorney:
The LBA Placement Service is currently working with a growing law firm located on the east-side of Louisville that is seeking to add an associate with a minimum of 1-2 years of civil litigation experience and licensed to practice in Kentucky. The firm primarily does a variety of defense for the public sector throughout Kentucky. Candidate must have excellent references and be in good standings. The firm offers a competitive salary and benefits package commensurate with experience. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

Estate Planning Attorney:
The LBA Placement Service is currently working with a well-established and respected law firm located in downtown Louisville that is seeking to hire a seasoned Attorney for their Estate Planning group. Candidate must have at least 5 years of experience with Estate Planning matters and be licensed to practice in the state of Kentucky. Candidate must be in good standings and have excellent references. The firm offers a competitive salary package to right candidate. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

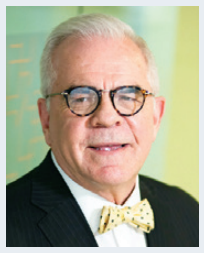
Litigation Attorney:
Well established downtown law firm is seeking a full-time litigation attorney with three or more years of civil litigation experience. The firm is looking for an entrepreneurial lawyer with a serious commitment to the long-term practice of civil litigation and a significant record defending clients at all stages of the litigation process. The ideal candidate must be a self-starter who can work independently with some supervision and who has excellent research and writing skills. This is a unique opportunity to join a firm with over 30 years' experience serving the needs of Kentucky and Indiana's business community. An ideal candidate would have experience in many of the following areas: Healthcare litigation, Employment litigation, Insurance litigation, Taking and defending depositions, Drafting motions, Responding to written discovery. Salary package is based on experience, plus full benefits. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

MEMBERS *on the move*


Hayne


Reisz


Snell


Tingley

The Leadership Louisville Center has selected Stites & Harbison attorney **James Hayne** to participate in the Ignite Louisville Class of Fall 2021. The six-month class teaches the key components of leadership to young professionals between the ages of 25 and 45 years old. Hayne is a Registered Patent Attorney and member of the Intellectual Property & Technology Service Group located in the firm's Louisville office. His practice focuses on patent preparation and prosecution, both foreign and domestic. Hayne has experience prosecuting patent applications covering a wide range of subject matter, including electronic hardware and software, consumer goods and manufacturing equipment.

Stites & Harbison announces it has opened a Cincinnati, Ohio office to better meet the increased needs of its clients in the region. The office will be led by Member (Partner), Robin D. Miller. The firm recently leased space in the Greater Cincinnati area of Mason and hopes to have several additional attorneys within the office by year's end. The firm currently has an office in the Towers of RiverCenter in nearby Covington, Kentucky.

Katie Reisz has joined Hosparus Health as Associate Counsel. She brings 10 years of litigation experience in a variety of fields, including commercial disputes, employment law, torts, and hospital and long-term health care defense. In her new role, she will assist the general counsel of the organization, advising on legal and risk matters. She earned her law degree from the University of Louisville Brandeis School of Law.

Wyatt, Tarrant & Combs is pleased to announce that **Virginia Snell** was named by the board of directors of the Kentucky Association of Criminal Defense Lawyers (KACDL) as the co-recipient of the organization's 2020 Distinguished Service Award, which is presented to lawyer advocates whose service to the KACDL and contributions to its mission have resulted in significant improvement of the criminal justice system. Snell received this award for her pro bono representation in the constitutional challenge to Marsy's Law. Snell chairs the firm's Appellate Advocacy Practice. Her experience encompasses a wide range of issues, including constitutional, contract, statutory, class action, regulatory, legal malpractice, trusts and estates, wrongful death, tax, healthcare provider, employment, and business disputes, over, for example, fraud, fiduciary duty, lender liability, shareholder rights, or covenants not to compete.

Graydon is pleased announce the addition of **William D. Tingley** to the firm's Family Law Practice. Tingely has been practicing family law for over 35 years, dedicating his career to helping people through complex divorce and child custody proceedings. He received his J.D. from Capital University Law School in Columbus, OH. Tingely is a Fellow of the American Academy of Matrimonial Lawyers and most recently served as the 2019 Chair of the Rules and Comments Subcommittee of the Kentucky Supreme Court's Standing Committee on Family Court Rules of Procedure and Practice. He now concentrates his practice on family law appeals. ■

In Memoriam

L. Stanley Chauvin Jr., age 86, died on May 12. A graduate of the University of Louisville Brandeis School of Law, he was president of the LBA in 1972 and president of the American Bar Association in 1989. In the latter capacity, he traveled the country and the world promoting the rule of law, equal access to the courts, juvenile justice, prison reform and an independent judiciary.

He is survived by his wife, C'Allen, three children and seven grandchildren. Memorial gifts can be made to the Kentucky Bar Foundation, Louisville Bar Foundation or Her Best Foot Forward. ■

MEETING ANNOUNCEMENTS

LBA Section Meetings

Please watch for announcements in eBriefs or e-mail blasts for confirmed meeting dates. Guests are welcome to attend a meeting before joining the section. For reservations or to join a section, call (502) 583-5314 or visit *www.loubar.org.* ■

Louisville Association of Paralegals

Check out upcoming educational programs and special events on the Louisville Association of Paralegals website at *www.loupara.org*. The LAP offers joint membership with the Louisville Bar Association for voting members and joint LAP/LBA members may attend most LBA CLE programs at the discounted rate of $15. To learn more about the benefits of LAP membership, visit *www.loupara.org*. ■

Women Lawyers Association

Women Lawyers Association will host its next lunch meeting on Thursday, June 10 at noon, and will be held over Zoom. The meeting will feature the Kentucky YMCA Youth Association. Guest speaker, Beth Malcolm, will discuss the organization as a whole, and specifically the ALA's work in youth and government and Mock Trial programming. There is no cost for the Zoom luncheons. Please send your RSVP to *womenlawyersassociation@gmail.com*. ■

Association of Legal Administrators

The Kentucky Chapter of the Association of Legal Administrators invites you to join our June meeting via Zoom on Thursday, June 10 from 11:45 am – 1 pm. This month we will hear from Yvette Hourigan, JD, CEAP, APSS Director for the Kentucky Lawyer Assistance Program (www.kylap.org).

As we emerge from 15 months in a worldwide pandemic that overwhelmed us with death, illness, fear, and isolation, how do we return to the workplace, engage with our colleagues, and either restore or create (maybe for the first time), a life with an intentional focus on well-being that improves our physical and mental health but also supports a renewed purpose in the practice of law? And as we rejoin our colleagues in the workplace and in the real world, how do we recognize when they are struggling post-pandemic, whether mentally or physically? And how do we offer assistance in a supportive, confidential, and respectful way? Join us as we discuss these and other topics of lawyer well-being as we transition into our new normal. If you would like to join us for this timely presentation, please e-mail us at KYALAchapter@gmail.com. We look forward to meeting you in June! ■

Louisville Bar Association
600 West Main Street, Ste. 110
Louisville, KY 40202-4917

RETURN SERVICE REQUESTED

PRSRT STD
US Postage
PAID
Louisville, KY
Permit # 708

BARbriefs
Louisville Bar Association

The LBA has you covered for all your CLE requirement* needs!

visit www.loubar.org for the full catalog

KY Deadline June 30, 2021
*24 CLE Hours (including 4.0 ethics)