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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.

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Losing Discrimination

In our rapid-fire era of social media, the term "discrimination" has an immediate negative connotation. One conjures discrimination based on race, sex, gender, religion, ethnicity, nationality and a host of other categories. The idea of someone "discriminating" against another individual or group of individuals on the basis of these factors alone is generally considered indefensible. If you google discrimination, the synonyms listed are "prejudice, bias, bigotry, intolerance, narrow-mindedness, unfairness, inequity, favoritism, one-sidedness, partisanship, etc."

Significantly, the second definition given for discrimination is: "recognition and understanding of the differences between one thing and another," including the "discrimination between right and wrong." Synonyms listed are: "differentiation, distinction, telling the difference," etc. It is this second definition which I will address—in part because it has been obscured and lost in the predominance of the first definition—but also because discrimination is essential to overcoming many of the darker elements that have arisen in our recent history.

I would postulate that in law, and in society in general, we are rapidly losing the capacity to intelligently discriminate, as in the ability to tell the difference between one thing and another, or stated somewhat differently, distinguishing between the subjective and objective and ultimately failing to discern truth from falsehood.

The societal examples of losing our power or ability to discriminate are replete. We are presented with overwhelming scientific consensus that our carbon footprint is producing global warming. Yet, some national leaders seem wedded to an irrational counterpoint, based on a narrow political agenda. A good percentage of the population seems unable to distinguish—or discriminate—between scientific fact and political goofiness. We once trusted scientists to develop the atomic and hydrogen bombs, put us on the moon and produce cures for countless diseases—but we now turn our backs on their consensus as to the origins and destructive endgame of global warming. In short, we've lost our power to discriminate.

[I]n law, and in society in general, we are rapidly losing the capacity to intelligently discriminate, as in the ability to tell the difference between one thing and another . . . and ultimately failing to discern truth from falsehood.

On the topic of societal mores, the advent of a long overdue examination of unwanted sexual advances by any gender has produced an odd dichotomy of positions on various ends of society's spectrum. Evangelical Christians have given a pass to our President's indiscretions—presumably because of his positions on abortion and support of other, purportedly Christian values. Conversely, elements of the liberal/progressive caucus seem unable to distinguish or discriminate between the allegedly (innocent until proven guilty) criminal advances of a Harvey Weinstein or Kevin Spacey versus the questionably comical actions of Al Franken or the touchy-feely intimacy of Joe Biden. The first group gave a pass to the leader of the free world. The second group forced a skilled voice to resign from the Senate and attacked, without apparent discernment, a respected and experienced past leader in his bid for the Presidency.

While religion has never been a topic for light cocktail banter, I remember a time when "freedom of religion" was a generally respected and accepted Constitutional right. People of all persuasions often disagreed but they were able to discern between differences in faith and outright Holy War. Now, no matter what religious scripture or belief system is at issue, there are entrenched individuals who are not only angry, but often violent, in their insistence of a rigid "my way or the highway." They have lost discernment.

Conversely, other segments of society categorically reject and even deride all religions because they view all Christians, Jews, Muslims, etc. in the same light as the radical, political iterations of those religions. Again, they have lost the ability to discern—or discriminate—between those who would politicize religious teaching and scripture and those who seek to provide a foundation for justice and hope.

There are countless other examples of losing discrimination, but one that continues to arise is our loss of discrimination regarding historical context. Perhaps because history and its analysis has taken a back seat in our secondary schools, our ability to discriminate between "then" and "now" has been substantially diminished. This phenomenon even has a name: "presentism" which is defined as "uncritical adherence to present day attitudes, especially the tendency to interpret past events in terms of modern values and concepts."

Controversy over historical figures and their public monuments underscores this trend. Washington, Jefferson, Madison, Monroe, etc. established our foundation for freedom for all—but were slaveholders. Lincoln made statements in his debates with Douglas which would never pass scrutiny today—but he presided over a Civil War that cost hundreds of thousands of lives to insure an end to slavery and laid the foundation for the yet unrealized vision of equal opportunity for all. Robert E. Lee chose home state over union, was defeated and went on to become a model citizen of Lincoln and Grant's idea of reconstruction and reintegration into the union. In the few years post-Civil War, before Lee's death he reinvigorated the failing Washington University. Yet, he and President Washington are both vilified by "presentists" who are unable to discriminate between a public figure's lasting contributions from their obvious faults when scrutinized by present mores. Locally, consider the controversy over the Castleman statue and the inability of some citizens to discriminate between Castleman's contributions to our community and the Commonwealth from his youthful service in the Confederacy as another example.

Moreover, the loss of discrimination has poured over into our legal community. In the course of litigation, counsel on both sides—civil and criminal—seem, at times, to have lost discernment regarding the subjective versus the objective realities of their case. Often we become lost in the weeds of our own desires. Our take on a case may overlook the reality of the "flip side of the coin." Zealous advocacy that lacks discernment may prompt us to lose sight of what is right and what is wrong, what is acceptable nuance and what is simply falsehood. Stated somewhat differently, we may thus blur the line between what is acceptable gamesmanship and what is probably unethical.

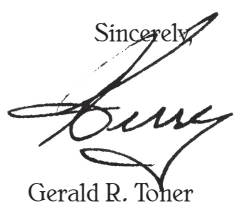
In the process of pre-trial discovery and motion practice, we often fail to discriminate between when and how to choose our battles. Our clients may understandably stand on the sidelines urging a "scorched earth policy" on even the simplest exchange of information during discovery. That's because the client is often suffering emotional turmoil and can't discern between legal battles on television/movies and reality. As lawyers, however, we need to be discerning counselors, ever conscious of the potential consequences of our words and actions. Again, our skill and ability to appropriately discriminate has a clear and obvious impact on our effectiveness.

Older lawyers often exchange anecdotes about judges who consistently favored one side or another, or seemed to cast a blind eye on a favorite lawyer's chicanery or obstructionism at every stage of discovery, or even trial. Those days have passed. Our current judiciary seems not to appreciate lawyers who engage in ad hominem attacks or bullying tactics, harassment or misrepresentation. Lawyers who have lost the ability to exercise wise discrimination in their practice choices often find themselves on the wrong side of a judicial ruling as a result. To the extent advocates fail to discriminate between the sensical and nonsensical, reality and gross hyperbole, they potentially do a disservice to their client.

The above discussion of studied and careful discrimination in day to day practice applies in a broader sense to our interactions as brothers and sisters in a shared profession. The whole concept of professionalism hinges on our ability to discriminate between our duties to our clients and our separate duties to our colleagues outside of practice. While there are obviously exceptions to every generality, common sense would seem to dictate that we always keep in mind the difference between our role as competitors and opponents versus our role as learned professionals with a host of common goals for the greater good of the Bar.

If everything set forth above seems so logical, simple and even obvious that one might question the need to raise it, I would agree. Unfortunately, as part of society as a whole, we are not immune from the seductions of a culture that seems to value anger over reason, diatribe over discussion, and self-deception over factual analysis. Lawyers don't live and function on a separate planet from humanity as a whole. I would urge us to consciously embrace and even proselytize the ability to exercise wise and reasoned discrimination … discernment … differentiation. In doing so we will preserve the integrity of our own profession and maybe—just maybe—help guide and lead our current culture away from its dark descent into divisiveness.

Sincerely,



Gerald R. Toner
LBA President

Calling All Lawyers!

Judge Lauren Adams Ogden

Did you know that two Fridays a month, between 10 a.m. and noon, attorneys, law students and legal assistants volunteer their time at the LBA's *pro se* divorce legal clinic in the training room on the first floor of the Judicial Center? Volunteers assist parties in need, who have purchased the divorce self-help forms from the Jefferson Circuit Court Clerk's office for a nominal fee, to properly complete the paperwork for their divorce case.

I am honored to currently represent the rest of the Jefferson Family Court Judges on the LBA's Pro Bono Consortium, a committee devoted to providing legal services to those in need. When I was in private practice, I was fortunate enough to have been recruited by attorney Melanie Straw-Boone to volunteer at the clinics for many years. I always left my time at the clinics not only with a positive feeling but also energized from having helped many people navigate, what can be to the layperson, a confusing family court system.

I often committed to volunteer at a few clinics per year. I enjoyed meeting the law students there needing volunteer hours, as well as seeing attorneys outside of my usual field of practice, like in-house counsel for GE or Humana.

The cases are not complicated and do not involve very much in the way of property or debt. There is usually an experienced family law practitioner there to answer any complex questions. Many parties may have a spouse who is incarcerated or who has not been in contact for decades. Sometimes parties come in with their spouse ready to fill out the forms together by agreement. Many of the questions asked are easy for any attorney from any practice area, such as which party is the petitioner. Most often, they just need an extra set of eyes to be sure no blanks are missed and to notarize signatures.

On one occasion, surprisingly, I was retained by a client who met me at the clinic. The woman was not from America and did not realize she could afford an attorney based on her spouse's significant income, even though she did not work outside the home. Sometimes a good deed can be rewarded instead of punished, despite the old saying to the contrary.

The clinics for the second half of this year are still substantially lacking in the number of volunteer attorneys, although there are more than enough legal secretaries available to help type up the VS300 and other necessary forms. The LBA has such high demand for assistance from *pro se* litigants that, due to the lack of volunteers, they regularly turn people away, even when the parties may have taken off work or obtained child care to attend. To schedule the first half of this year's clinics, the LBA's Family Law section chairs forwarded a request for help to their members. With one exception, the same "regulars" (who are truly amazing and generous with their time!) responded. They need some new participants to give their time to this important effort.

The Family Court Clerks report that the clinic is very helpful to them in performing their duties, and the attendees express as well how useful it is to them. As a Family Court Judge, a significant portion of my time, and that of my colleagues, is devoted to issuing denial orders to *pro se* litigants with forms either missing or filled out improperly.

As you well know, in 1991 the Supreme Court of Kentucky established in SCR 3.130(6.1), Kentucky Rules of Professional Conduct, a goal for each Kentucky lawyer to provide a minimum of 50 hours of donated legal services to Commonwealth citizens in need. Please help by contacting Lea Hardwick at *lhardwick@loubar.org* for available clinic dates. I know you will not regret it.

Judge Lauren Adams Ogden presides in Division Four of Jefferson Family Court. ■

"Democracies Die Behind Closed Doors"

Judge Brian C. Edwards

(Adapted from remarks given at the Jefferson County Public Law Library's recent Law Day Celebration.)

In 2002, one year after the September 11 attacks on our country, 6th Circuit Federal Court of Appeals Judge Damon Keith authored an opinion prohibiting the George W. Bush administration from conducting deportation hearings in secret. In his opinion, Judge Keith wrote *"democracies **die** behind closed doors."* Judge Keith was just the sixth African American federal appellate judge in our nation's history and was a champion of civil rights and civil liberties. This past weekend, after a long and distinguished judicial career, Judge Keith passed away at the age of 96.

Over the course of our nation's history, there have been numerous examples of the harm that can occur when doors are closed, and free speech is threatened. Like Judge Keith's grandparents, famed journalist/educator/activist Ida B. Wells was born into slavery. After obtaining her freedom, Ms. Wells and her family moved from Mississippi to Memphis, Tennessee. After working as a school teacher, Ms. Wells purchased a newspaper called *Memphis Free Speech and Headlight* and served as its primary editorial writer. Throughout the 1880's and 1890's she wrote numerous articles which harshly criticized racial segregation, inequality and lynching throughout the southern United States.

Contemporaneous to this, the post-civil war reconstruction era was ending, and with the support of violent racist groups such as the Ku Klux Klan, southern lawmakers enacted laws mandating racial segregation while law enforcement officers and courts condoned, if not encouraged, intimidation and violence against African Americans. Laws were being created and upheld by the courts which were unambiguously intended to disenfranchise African Americans. In the course of advocating for these laws, lawmakers argued that they were necessary because African Americans lacked the intellectual fitness and moral well-being necessary to be trusted with the right to vote.

On March 5, 1892, three African American grocery store owners who were personal friends of Ms. Wells were arrested and accused of shooting at a group of white men. Four days later, a mob of white citizens broke into the jail, removed the three African American men from their cells, took them to a railway yard approximately one mile away, and executed them. No one was ever charged or prosecuted for these murders.

Ms. Wells wrote a detailed story about what happened to her friends in her *Memphis Free Speech and Headlight* newspaper and the story was picked up and ran in African American newspapers throughout the country. In retaliation for her shedding light on this and other injustices, in May of 1892, the offices of the *Memphis Free Speech and Headlight* newspaper were burned down, forcing Ms. Wells and her family to leave Memphis. Once again, no one was ever charged with this crime.

Fortunately, Ms. Wells would not be intimidated or silenced. She moved to Chicago where she continued her writing and her public criticism of race and gender-based discrimination. She became one of the founding members of the NAACP and one of our nation's most prominent advocates for civil rights and civil liberties.

[P]ublic disagreement and civil discussion is far healthier than private suppression of opinion and the encouragement of intimidation of those with whom we may disagree.

Because of Ida B. Wells' unrelenting voice, because she did not allow her dream for democracy for all to die in the darkness, a light was shed on the horrible and prolific injustices perpetrated against women and African Americans within our nation. By using her voice and her platform as a journalist to shed light on these issues, we have all been provided with a lasting example of the importance of a free and unencumbered press.

The United States considers itself to be a nation of laws, all of which must fall within the ideological framework of our Constitution. Few, if any, segments of our Constitution are more important than the 1st Amendment which was designed to protect our citizens from being punished by our government for the words they say and the opinions they espouse. However, it is not merely enough for our government and our government officials to simply refrain from expressly punishing people for their espoused words or political opinions. It is also the responsibility of our government to not incite or encourage others to take actions against citizens such as Ida B. Wells who may espouse beliefs or opinions which are unpopular.

When Ida B. Wells criticized those in law enforcement and within the judicial system for failing to hold accountable those responsible for lynchings and race-based violence, the elected officials of that day responded by vociferously criticizing her and implicitly calling for her to be silenced. When Ms. Wells opined in her newspaper that the real reason for many of these lynchings was not the professed claim of violence by black men against white women, but they were in fact, motivated by a desire to stunt black economic progress, the response was the burning down of her business.

What Ida B. Wells said and published was not only unpopular and controversial, but it also presented a perceived danger to the status quo and power structure of the time. It contradicted what our government's leaders were advocating. And because of this, Ms. Wells was subjected to constant intimidation, her businesses were destroyed, friends of hers were murdered, and those in charge of our legal system implicitly condoned all of this by never holding anyone accountable for these actions.

As an elected member of the judicial branch of government, I try to remain mindful of the role that our system has in protecting all citizens' right to free speech. I believe that it is important that all elected officials, be they in the judicial, legislative or executive branch, be equally mindful of the impact that their words can have upon others. And I believe we must all remember that public disagreement and civil discussion is far healthier than private suppression of opinion and the encouragement of intimidation of those with whom we may disagree. Because once again, as the late judge Damon Keith said, *"democracies **die** behind closed doors."*

Chief Judge Brian C. Edwards presides in Division 11 of Jefferson Circuit Court. ■

Law Day

Law Day, held annually on May 1, is a national day set aside to celebrate the rule of law. Law Day provides an opportunity to understand how law and the legal process protect our liberty, strive to achieve justice, and contribute to the freedoms that all Americans share.

The 2019 Law Day theme—Free Speech, Free Press, Free Society—focused on these cornerstones of representative government and calls on us to understand and protect these rights to ensure, as the U.S. Constitution proposes, "the blessings of liberty for ourselves and our posterity."

History of Law Day

President Dwight Eisenhower established the first Law Day in 1958 to mark the nation's commitment to the rule of law. In 1961, Congress issued a joint resolution designating May 1 as the official date for celebrating Law Day, which is subsequently codified (U.S. Code, Title 36, Section 113). Every president since then has issued a Law Day proclamation on May 1 to celebrate the nation's commitment to the rule of law. ■

On Mediating after Mediation

Maureen P. Taylor

"It ain't over 'till it's over."

Whether you associate this saying with Yogi Berra or Lenny Kravitz, a baseball game or a love affair, it's a safe bet that when you hear it, one thing you *don't* think of is mediation.

But if you've participated recently in this form of Alternative Dispute Resolution, you may realize how applicable the saying is to this process. The parties have a disagreement and may be headed to a trial or an arbitration, but first they choose—or a contract or a court may require them—to try mediation.

So they meet with a trained mediator for a half day or a day to try to resolve their differences before a court or an arbitrator dictates the resolution to them. Perhaps they make some progress, coming to understand each other's positions somewhat better, and—if the dispute involves money, as most do—narrowing the gap a bit between what one party is willing to pay and what the other party absolutely must have. But at the end of the allotted time, there is still no agreement. Is that the end of it?

No. At least, not necessarily. Recently, more mediators have shown dogged determination in following up with the disputants and their attorneys, pursuing—by phone, e-mail and sometimes even a second day of in-person mediation—that seemingly elusive "yes, okay," followed by a signed settlement agreement.

How does this post-mediation procedure work, and is it successful? To discover the answer (or several answers), I talked to six experienced mediators who all use it occasionally and who shared their insights, answered questions and provided some advice for future mediations. Here is some of what they said.

What Kind of Case is a Good Candidate for this Approach?

According to several mediators, they use post-mediation efforts most often in multi-party cases. John W. Hays, of Jackson Kelly PLLC in Lexington, Kentucky, says he continues to work toward resolution in about 15 to 20 percent of his cases, the really complex ones. This often means there are more parties, and the failure to resolve the dispute in one session may be just a function of time. How often can you confer with each party in a day's time when you have 10 or more parties?

Why not just schedule the multi-party case for a two-day session to begin with? Hays has tried this, but he finds it inefficient. Often the first day may be wasted when everyone knows there will be a second.

Stephen Calardo agreed. In his work with Calardo Mediation Service in Cincinnati, Ohio, he has found that really complicated cases—like construction disputes (also Hays' specialty)—are most likely to settle post-mediation. Calardo estimates that 70 percent of his cases settle at mediation, and half of the rest settle afterward.

Sam Wampler, of SansCourt in central Ohio, also mediates a number of construction disputes, and he uses post-mediation techniques in about 10 percent of his cases. These work particularly well, he notes, in cases requiring payments or a division of money. (And what mediation doesn't, you say?) One day of mediation may be enough for the parties to get to know each other and identify the impediments to settling, but just not enough to resolve those impediments.

Known for his "never-say-die" approach, John Van Winkle, of Van Winkle • Baten Dispute Resolution in Indianapolis, Indiana, will make post-mediation efforts in almost any case that doesn't settle initially. Still, he cautions against going into a mediation with the assumption that one session won't resolve the dispute. In a large percentage of cases, it will.

Often, a dispute doesn't settle initially because something needs to happen first:

- A witness—expert or fact—may need to be deposed, according to Hon. Ann Shake, of Retired Judges Mediation and Arbitration Services in Louisville, Kentucky.
- Or one or both sides need to assess case value. Plaintiffs come with sky-high expectations, or defendants don't come to the mediation with enough money or authority, Shake also finds.
- Authority can also be a problem in FINRA (Financial Industry Regulatory Authority) cases, according to Calardo, who mediates a number of them. These disputes may take longer to resolve because there are levels of authority that need to be worked through—something difficult to accomplish in one day.
- In one case mentioned by Tom Williams, of Stoll Keenon Ogden PLLC in Louisville, Kentucky, the parties weren't ready to settle while a motion for summary judgment was pending. Once that was denied, they were ready to try a second mediation session.
- Shake and Wampler both stressed that some parties just aren't ready for the initial mediation. They aren't adequately informed, or they tend to over-value or under-value their case. They may need extra time to adjust to reality, to inform themselves, to achieve "buy-in."

What Techniques are Most Effective?

Mediation is "more art than science," according to Wampler, and almost everyone agreed. Shake mentioned following her instincts to decide which unsettled dispute might respond to a gentle nudge. Calardo, too, felt that after a day of mediation he could figure out if a follow-up attempt with the parties might succeed. But he doesn't really view that follow-up as a continuation of the mediation; it is more of a "re-kindling," as he sees it.

Williams, who handles a number of labor-related disputes, also stresses the emotions involved. He likes to use a restorative justice model, particularly if the mediation involves current employees, and the relationship needs to continue. A meeting of the parties seeks to repair the harm by discussing three questions: What happened? Who has been impacted? What can we do to make it better? Williams views his job as "keeping the emotional temperature in the room good." When this continues after the initial meeting, he works to keep the lines of communication open, checking back with both sides and "translating messages" so that the other side can hear them.

In addition to instincts, emotions, and art ("reading the chemistry," as Wampler called it), several specific techniques were mentioned by at least one of the mediators:

- Sometimes dealing with only the lawyers after mediation works, according to Hays, as there is "less theater." It helps to eliminate posturing.
- But both Shake and Wampler stressed that sometimes the parties are involved in post-mediation discussions. "The dispute is a puzzle," according to Wampler, "and the parties have the knowledge to solve it." It may work to get the parties on the phone with their attorneys, he suggests, as there is no "filter."
- When the mediator initiates an after-mediation call, it is particularly useful, Calardo says, as it isn't a party signaling weakness or appearing over-eager to settle.
- Optimism often proves successful, according to Calardo, who wants to remain the most optimistic person throughout the process.
- According to Van Winkle, it helps to make an early decision on what rules will apply if negotiations are needed after the mediation. The same rules on confidentiality, immunity and sanctions that applied during the mediation should still apply, he believes, and he recommends following the Uniform Mediation Act (even though neither Indiana nor Kentucky has adopted it).
- When there are multiple parties involved, Wampler has found it useful to set up post-mediation communications with each attorney, with just one ground rule: Do not talk to each other. This worked well in a seven-party case, which finally settled after five months of post-mediation efforts.
- It may help to "plant a seed" when the mediation session begins. Wampler said he may start the mediation session by explaining how the process works, including that it can continue beyond the initial day-long meeting.
- Sometimes the parties need to know what the mediator thinks. Hays has found it useful to tell them, and he considers himself an "evaluative mediator."
- But Van Winkle cautions that a "mediator's proposal" should not be automatic. He has two requirements for presenting one to the parties: (1) all parties must approve of the technique, and (2) he must believe that there is a "reach" point that might work for everyone. Also, it should not be used too early in the process. When he

uses it as a post-mediation procedure, his report back to the parties is either "both sides accepted the proposal" or "we did not have both sides accept the proposal."

- Perhaps the best technique of all was summed up by Hays in one word: persistence.

How Often Do You Get a Post-Mediation Settlement?

The consensus seemed to be that at least half of the disputes that don't settle during mediation will settle afterward.

If the parties want to continue, Hays said, there will eventually be a settlement. Both Williams and Calardo estimated that only about 30 percent of their cases do not get resolved at the mediation, with about half of those settling afterward. Only about 15 percent never settle. The statistics were about the same for Wampler, who noted that 85 to 90 percent of the disputes he mediates do settle. Shake, too, estimated that as many as 90 percent settle at mediation, and most of the others may take days or months longer, but eventually they also settle.

She credited this success rate to the fact that lawyers are more familiar with the mediation process than they once were, and resolution is in the best interests of everyone—often including the lawyers.

Have Parties Ever Objected to Continuing the Efforts?

Objections appear to be almost non-existent. Williams credited this to the parties' giving up a bit of control to a mediator they trust. Neither Shake nor Wampler recalled any objections. She noted that even when the case is not resolved, the parties are at least willing to try. Wampler agreed but had one caveat: he suggests continued efforts only when he and the parties both see some hope of resolving the problem.

Hays did note that, on rare occasions, he would suggest continuing the efforts to settle and have a party say, "No, thank you." But that is rare. Calardo, too, recalled that once in a great while, someone would say, "We've spent all the mediation money we are going to spend."

How Do You Bill for Post-Mediation Efforts?

That leads to the question of billing. Again, objections are few. According to Hays, if people feel they got value, they won't object. It is "actually a bargain," and if his post-mediation time is nominal, he won't even bill for it. Calardo noted that he, too, often makes a follow-up call without even billing for it. So some post-mediation work turns out to be free. Shake agreed; she considers the follow-up calls she makes to be client development. Van Winkle bills after the mediation session *only* if there is an additional formal session.

Billing by the hour is most common. That is what Wampler does, but he emphasizes that he bills only when he is done. Williams waits to see the outcome, and if the dispute doesn't settle, he often discounts the bill.

Any Advice for Lawyers or Clients?

Given the opportunity to offer some final advice to lawyers or their clients, Williams recommended a book that has really influenced his thinking—*Beyond Reason: Using Emotions as You Negotiate*, by Roger Fisher and Daniel Shapiro. The book, which, like *Getting to Yes*, arose from the work of the Harvard Negotiation Project, provides a framework for dealing with emotions at all stages of the mediation process.

Both Shake and Hays proposed more involvement by the parties' lawyers. She suggested that lawyers assess whether their clients are willing to move off their final position and let the mediator know. Suggestions for reaching a final resolution are also welcome. Somewhat surprisingly, Hays thinks lawyers come to depend too much on mediators; they can do more negotiating on their own. But he sees mediation as popular because lawyers like to have third parties confirm what they have been telling their clients all along.

Wampler likes to point out to parties what happens if there is a trial and they lose: More than money is involved, as those who hear about the result may conclude that the losing party gave testimony that wasn't trustworthy. Reputations are at stake, and often the parties haven't considered this.

Wampler also disagrees somewhat with the old saying that it is a good resolution if everyone is a little bit unhappy with the result. He has seen people—both attorneys and their clients—relax and become jovial when the end is in sight. He attributes this to the certainty about to be realized by resolution of their dispute. For the first time in weeks, months or years, the parties can see light at the end of the tunnel, and that is not a reason for unhappiness.

Although he didn't put it this way, Calardo's advice could well be, "Listen to the mediator." He tells a story that many mediators could probably echo—a case where he prepared an "evaluative recommendation" to let the parties know how he thought a trial might resolve the dispute if there was no settlement. There was no settlement. The parties went to trial, and guess what? The jury came back with exactly the number he had predicted in his recommendation!

Calardo also noted that there were fewer "settlements on the courthouse steps" now than there used to be—a development he attributes to the growing use of the post-mediation process to ease the parties toward an earlier settlement. The growing realization that efforts to mediate the dispute need not end just because the "mediation" has ended—that "it ain't over 'till it's over"—may be leading to more permanent and satisfying resolutions for all.

Maureen P. Taylor is a member of Conliffe, Sandmann & Sullivan in Louisville, Kentucky. ■

Louisville Law is Proud Home of City's Only Free Mediation Service

Dean Colin Crawford

In the year-and-a-half it has been operating, Louisville's only free mediation service has gotten 73 referrals from divisions of the Jefferson Family Court. In that short time, the mediation service has registered an impressive success rate of 90 percent: a full 52 of its 58 cases have reached an agreement.

And the mediation service has done all of this while also providing valuable hands-on experience for future lawyers.

The mediation service, I am proud to say, is operated by the University of Louisville School of Law.

Established in the fall of 2017 and supervised by Professor Shelley Santry—who also directs the Robert & Sue Ellen Ackerson Law Clinic—along with adjunct Professor Corey Shiffman, the clinic is open to 2Ls and 3Ls who have completed 40 hours of rigorous mediation training. The training is conducted by attorneys and Just Solutions mediators and is made possible thanks to funding from the Edwin H. Perry endowment.

Students come to the clinic as certified mediators ready to work with low-income, *pro se* litigants who have been referred by Jefferson Family Court judges. The students mediate cases involving divorce, paternity, child custody and post-decree divorce problems.

"Being the only free mediation service in Louisville is a huge benefit to the members of our community who simply cannot afford mediation otherwise. Being able to mediate actual solutions for the underprivileged community is a huge benefit to our law students," says Shiffman (Law '15). "Resolving some of these cases also helps to alleviate some of the stressful load on the Family Court judges and their staffs."

As a law school, we know well the need for students to gain hands-on experience before they graduate. The Mediation Clinic fulfills that goal well.

Third-year student Calesia Henson says she has gained valuable lawyering skills, such as client counseling, from her work with the clinic.

"The Mediation Clinic does a great job teaching us how to work with people," she says, adding that this skill has come into play when explaining to clients what to expect from the mediation process, in negotiating an agreement and in maintaining neutrality. "You're not just working with people—you're working with people who are very emotional."

After every mediation session, students participate in a self-reflection exercise, which Henson has also found valuable.

"I've learned that self-reflecting on what I do is also a big part," she says. "I can transfer that over to when I am a lawyer: being cognizant of what I am doing to facilitate this mediation or to counsel my client or in researching. What are the things that I'm doing that will help me do better next time?"

Nick Wheatley, a second-year student who has worked in the clinic for two semesters, says his listening and analytical skills have improved thanks to the clinic.

"I've learned to spot important facts and issues and to try to get more questions from people," he says. "I've gotten better at mediation, but I think I've gotten a lot better at listening."

In addition to the benefits the clinic has as a training ground for students, it serves a real and valuable purpose in our community in terms of access to justice and reducing the burden on courts.

Shiffman points to the value of mediation skills in legal careers, no matter the area of practice.

"Mediation has become so prevalent in most areas of litigation, particularly family law, that regardless of what they eventually practice, students will almost certainly be regularly involved in mediations. The skills they hone in our mediation clinic can serve them in good stead whether they act as an attorney for their client in mediation or as the mediator themselves," he says.

In addition to the benefits the clinic has as a training ground for students, it serves a real and valuable purpose in our community in terms of access to justice and reducing the burden on courts.

"Mediation is helping people come to some kind of solution to their problems that isn't a judge saying, 'This is what you're going to do, whether you like it or not,'" says Wheatley. "It keeps parties from having to go to court, and it keeps the court from having to keep hearing the same cases over and over about issues that should be able to be resolved."

Henson highlights the effect the Mediation Clinic's services can have on the families who access it. Most of the clinic's cases deal with parenting time arrangements.

"It does have an impact," Henson says. "You hope that the agreement that they come to works when they leave because at the end of the day, it's the child who has to deal with all of this chaos."

I am very proud of the clinic's impact in its still short history. I am pleased that our School of Law is providing this valuable service while offering law students real-world experience that will serve them in their careers for years to come.

Clearly, the work of the mediation clinic is making a difference. I hope we can continue to attract interest in and support it for many years ahead.

Colin Crawford, dean of the University of Louisville School of Law, serves on the boards of both the Louisville Bar Association and the Louisville Bar Foundation. ■

Legal Aid's Upcoming Free Clinics

The Legal Aid Society has announced the dates for free legal clinics offered during June (listed below). Please visit laslou.org for clinic descriptions, times, places, etc.

- Foreclosure Clinics
- Tenants' Rights Clinic: What You Should Know About Your Landlord's Obligations and Your Rights
- Project H.E.L.P. (Homeless Experience Legal Protection)
- Small Claims Clinic
- Debt Collection Defense Clinic
- Jefferson Co. Pro Se Divorce Clinic

OUR SINCEREST THANKS

LEGAL AID SOCIETY'S SIXTEENTH ANNUAL
BRUSH, BOTTLE, AND BARREL OF THE BLUEGRASS

With the support from sponsors, donors, and guests the Legal Aid Society raised over $60,000 to support our mission of **pursuing justice for people in poverty.**

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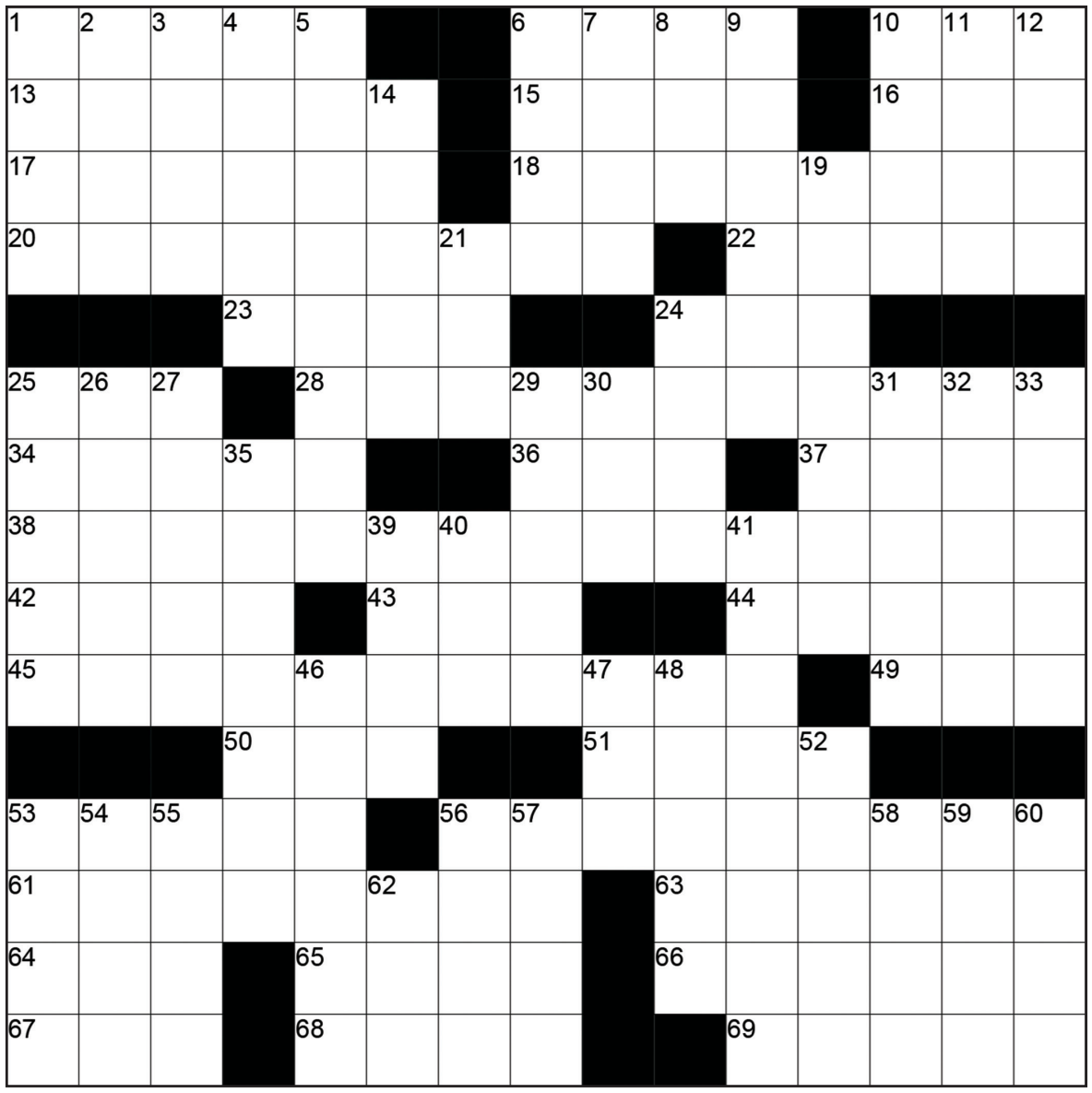
Paying Our Dues

Earl L. Martin III



Across

1 Pester, complainingly

6 Fifth pillar of Islam (variant)

10 One who minds the GAAP?

13 Saudi backing?

15 "Trust ___", song from 1967's *The Jungle Book*

16 Owns

17 The Thanksgiving Day parade's home before Macy's moved it to NYC in 1924

18 *Bribe, of a sort

20 *Equipment for aging bourbon

22 Egads!

23 Something heard here and there, in song?

24 Early H.S. math course

25 Type of session, for 56-Across

28 *Like many Pilot products

34 Accumulate

36 It can be found in MOMA

37 Stead

38 Org. central to the entries with starred clues?

42 Hodgepodge

43 "That's the spot..."

44 With an ___ (mindful of)

45 *They may have large or small mouths

49 Stamp on a returned check

50 Publication of the Legislative Research Commission (abbr.)

51 Popular laptop brand

53 It takes your breath away

56 *See 25-Across

61 *Candy invented in 1917 for shipment to World War I troops

63 Item on many back-to-school supply lists, familiarly

64 Fodder for horses

65 One of the greats?

66 Fix a book's cover

67 Little green men, for short

68 Certain court plea, informally

69 Skrull leader played by Ben Mendelsohn in 2019's "Captain Marvel"

Down

1 Small opening?

2 Length times width

3 Rubberneck

4 Addis ___

5 Fancy type of Italian cake

6 Raise sharply

7 Deep blue dye, and the shrub it comes from

8 "Walk This Way" group *Run* ___

9 Half of a Stevenson duo

10 Fellow

11 It might be picked up in a hurry

12 Poses, in a way

14 Birthplace of LeBron James

19 One for the highlight reel

21 Official name of Seoul's country (abbr.)

24 ___*Vista* (defunct search engine)

25 *The Wallflowers* lead singer Dylan

26 "Green Arrow" portrayer Stephen

27 Craziness

29 Noted Indiana political family

30 ADR option, for short

31 NFL Network host Rich

32 Fits closely inside

33 "__ May" (stellar emblem on flags of Uruguay and Argentina)

35 Inventory worker

39 Hail targets?

40 Hypnotic singer of 15-Across

41 Find a new subtenant

46 Featured creature in *Clash of the Titans*

47 Cul-de-___

48 Ridge formed by glacial movement

52 Brazilian dance

53 Yearn (for)

54 Subdivision drawing

55 Opposition votes

56 Track

57 Cookie with a creamy center

58 "Sweet Caroline" singer Diamond

59 Eponymous 1962 Bond film villain

60 Storage options for modern computers (abbr.)

62 "Don't tase me, ___!"

Answers on page 22.

Earl L. Martin III is a partner at Boehl Stopher & Graves. His crossword puzzles have appeared in The New York Times *and* USA Today. ■

LBA LABOR & EMPLOYMENT LAW SECTION IN PARTNERSHIP WITH THE LBA GENDER EQUALITY COMMITTEE BROWN BAG

Sexual Harassment in the Legal Profession: A Review of Kentucky Law and the Rules of Professional Conduct

Tuesday, June 4

You may have attended programs that discuss Kentucky law regarding sexual harassment, but this program specifically focuses on sexual harassment in the legal profession. While the program includes a review of Kentucky law, our panelists will also delve into how the Rules of Professional Conduct are implicated when sexual harassment occurs in the legal profession. In addition, panelists will review a series of scenarios to provide you with practical guidance for identifying and addressing these types of situations in your practice.

Speakers: **Demetrius O. Holloway**, Stites & Harbison, **Soha T. Saiyed**, Abney Law Office and **Robyn Smith**, Abney Law Office

Time: 10:45 a.m. — Registration; 11 a.m. – 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $80 LBA Members / $72 Sustaining Members / $20 Paralegal Members / $15 for qualifying YLS Members / $40 Government/Non-Profit Members / $160 Non-members
Add On: $15 printed handouts (electronic is included with registration fee) $8.50 for lunch, if ordered
Credits: 2.0 CLE Hours — Approved by KBA and Indiana Supreme Court

LBA BROWN BAG

A Financial Guide for Widows – Surviving the First Year

Tuesday, June 4

Widows encounter several financial issues in the first year after the loss of their partner; questions arise such as what options do I have with my spouse's IRA, when should I claim Social Security, and ultimately, do I have enough money to sustain my standard of living? Jeb Jarrell, CFP®, CAP®, CRPC®, APMA® and Dean Donohue, CFP®, MBA, CRPC®, APMA®, of Encore Wealth Management Group with Ameriprise, will walk you through the conversations that you should be having with your clients to lower their financial stress and allow them to focus on what is truly important.

Speakers: **Dean Donohue** and **Jeb Jarrell**, Encore Wealth Management Group | Ameriprise Financial Services, Inc.

Time: 11:45 a.m. — Registration; Noon – 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $40 LBA Members / $36 Sustaining Members / $20 Paralegal Members / $15 for qualifying YLS Members / $20 Government/Non-Profit Members / $80 Non-members
Add On: $15 printed handouts (electronic is included with registration fee) $8.50 for lunch, if ordered
Credits: 1.0 CLE Hour — Approved by KBA and Indiana Supreme Court

CLE Cancellation Policy: All cancellations must be received by the LBA 24 hours in advance to receive a credit or refund. "No shows" or cancellations received the day of the program will require full payment. Substitutions will be allowed. Please Note: The cancellation policies for certain programs, e.g. the AAML/LBA Family Law Seminar, KY Commercial Real Estate Conference, MESA CLEs, etc., are different. Please visit our CLE Calendar at www.loubar.org for details.

LBA LITIGATION BROWN BAG

Ethics Jeopardy

Wednesday, June 5

Come have fun and earn your ethics credits with a friendly game of Ethics Jeopardy! Participants will get to refresh their ethics knowledge with a series of multiple-choice questions and explanations, answered in a group setting for no pressure and fun.

Speakers: Frost Brown Todd attorneys **Thomas C. Gleason** and **Samuel W. Wardle**

Time: 10:45 a.m. — Registration; 11 a.m. – 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $80 LBA Members / $72 Sustaining Members / $20 Paralegal Members / $15 for qualifying YLS Members / $40 Government/Non-Profit Members / $160 Non-members
Add On: $15 printed handouts (electronic is included with registration fee) $8.50 for lunch, if ordered
Credits: 2.0 CLE Hours — Approved by KBA and Indiana Supreme Court

The seminars listed here were scheduled at the time of printing. For a full list of CLE programs and for complete details or to register, visit the LBA website at www.loubar.org or call the CLE Department at (502) 583-5314.

LBA NATIONAL SPEAKER DAY-LONG

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

Thursday, June 6

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 didn't 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'll examine good and not-so-good writing to see what worked, what didn't, and why:

- What should you include, and what can you leave out?
- What's 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's a reason people tell lawyer jokes…)

Join us on Thursday, June 6, for this full-day workshop. You'll come away with new skills, new strategies, and new confidence.

More details on this program can be found on the LBA website, *www.loubar.org*.

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

Time: 8:45 a.m. — Registration; 9 a.m. – 4:30 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $240 LBA Members / $216 Sustaining Members / $75 Paralegal Members / $50 for qualifying YLS Members / $120 Government/Non-Profit Members / $480 Non-members
Add On: $15 printed handouts (electronic is included with registration fee)
Credits: 6.0 CLE Hours — Approved by KBA and Indiana Supreme Court

See Rick Horowitz's article, "More Effective Legal Writing! (And a Great Sandwich Place Right Around the Corner…)" on page 19.

LBA NATIONAL SPEAKER

Stuart I. Teicher

"The CLE Performer"

6/19/19

LBA NATIONAL SPEAKER ETHICS DAY-LONG

Wednesday, June 19

Speaker: Stuart I. Teicher, the CLE Performer

Tech Tock, Tech Tock: Social Media and the Countdown to Your Ethical Demise

(morning session)

Social media has become integrated with the practice of law, but the ethics rules are struggling to keep up. Sure, there are obvious concerns that everyone is talking about (like confidentiality), but there are hidden hazards that few people consider (our use of social media outside the office really matters). In this sometimes scary, sometimes empowering program, internationally renowned teacher Stuart Teicher, Esq., "the CLE Performer," will teach lawyers about the ethical dangers of using this new (and expanding) technology.

Topics include:

- The potential ways that lawyers might breach Rule 1.6 (Confidentiality)
- How LinkedIn profiles and other social media posts might trigger the rules governing attorney advertising
- How using social media to investigate lead to deceptive practices in violation of Rule 8.4
- The ethical concerns about related technologies like texting (communication issues, Rule 1.4), and using the cloud (Rule 1.15)
- And much more

Speaker: **Stuart I. Teicher**, CLE Performer

Time: 8:45 a.m. — Registration; 9 a.m. – 12:15 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $237 LBA Members / $214 Sustaining Members / $119 Paralegal Members / $75 for qualifying YLS Members / $120 Government/Non-Profit Members / $475 Non-members
Add On: $15 printed handouts (electronic is included with registration fee)
Attend BOTH sessions and save 15% (must call the LBA to register and receive the discount)!
Credits: 3.0 CLE Ethics Hours — Approved by KBA and Indiana Supreme Court

All cancellations must be received by the LBA 72 hours in advance to receive a credit or refund. Substitutes will be allowed.

The Fear Factor—How Good Lawyers get into Bad Ethical Trouble

(afternoon session)

The scariest stories that lawyers hear are those tales where responsible lawyers who care about acting in an ethically appropriate way and end up getting into disciplinary trouble. In this program, Stuart Teicher, Esq., "the CLE Performer," reviews key rules that most lawyers sort-of know but might not appreciate in detail. Learn the key things to watch out for in misrepresentation (Rule 4.1), conflicts (Rule 1.7), reporting misconduct (Rule 8.3), and more.

You'll leave this seminar a safer, stronger attorney.

Time: 12:45 p.m. — Registration; 1 p.m. – 4:15 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $237 LBA Members / $214 Sustaining Members / $119 Paralegal Members / $75 for qualifying YLS Members / $120 Government/Non-Profit Members / $475 Non-members
Add On: $15 printed handouts (electronic is included with registration fee)
Attend BOTH sessions and save 15% (must call the LBA to register and receive the discount)!
Credits: 3.0 CLE Ethics Hours — Approved by KBA and Indiana Supreme Court

All cancellations must be received by the LBA 72 hours in advance to receive a credit or refund. Substitutes will be allowed.

LBA LITIGATION BROWN BAG

Navigating Qui Tam Litigation Under the False Claims Act

Tuesday, June 11

The False Claims Act (FCA), 31 U.S.C. § 3729 et seq., is one of the most effective civil enforcement statutes used by the United States government to combat false or otherwise fraudulent claims for payment made to the Government in areas such as procurement and health care reimbursement. The FCA allows private persons to file suit for violations of the FCA on behalf of the government. These whistleblowers (referred to as "relators") can receive up to 30 percent of the government's recovery. They are also entitled to certain whistleblower protections under the FCA. Of the $2.8 billion in settlements and judgments obtained by the DOJ in fiscal year 2018 from civil cases involving fraud and false claims against the federal government, $2.1 billion arose from lawsuits filed under the Qui Tam provisions of the False Claims Act.

This program is designed for both plaintiff and defense counsel, regardless of experience level, who might represent whistleblowers or defend against FCA claims. The panelist will discuss what makes for preparing and filing an effective qui tam complaint along with approaches defense counsel should be aware of when responding to government investigations.

Topics:

- Introduce the False Claims Act (discussing the elements, defining a claim, damages, awards, retaliation, burden of proof, and statute of limitations)
- Walk through the anatomy of a qui tam case (uncovering and assessing the fraud, considering whether to inform the potential defendant, preparing disclosure statements, working under seal, the investigatory phase, and settlement discussions)
- Review common types of qui tam cases
- Review claims that are not actionable
- Key Defenses
- Emerging trends

Speakers include Western District of Kentucky U.S. Attorneys: **Hannah C. Choate** and **Jessica R.C. Malloy**

Time: 10:45 a.m. — Registration; 11 a.m. – 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $80 LBA Members / $72 Sustaining Members / $20 Paralegal Members / $15 for qualifying YLS Members / $40 Government/Non-Profit Members / $160 Non-members
Add On: $15 printed handouts (electronic is included with registration fee)
$8.50 for lunch, if ordered
Credits: 2.0 CLE Hours — Approved by KBA and Indiana Supreme Court

LBA IN PARTNERSHIP WITH JCUP

Establishing Evidentiary Foundations with A/V Presentation Equipment at Judicial Center

Thursday, June 13

The focus of the program will be on the method for establishing evidentiary foundations when using computers, projectors & projection screens, document cameras and tele-strators for the presentation of evidence, and how to make your record for appeal when using the digital technology in Jefferson Circuit courtrooms.

CLE will be held at the Judicial Center, 700 W. Jefferson Street

Speaker: **TBA**

Time: 11:45 a.m. — Registration; Noon – 1:15 p.m. — Program
Place: Jefferson Circuit Court, Division One, Courtroom TBA
Price: $100 LBA Members / $150 Non-Members / $20 Paralegal Members
Credits: 1.0 CLE Hour — Approved by KBA and Indiana Supreme Court

**This CLE program is repeated the second Thursday of each month.*

CLE Cancellation Policy: All cancellations must be received by the LBA 24 hours in advance to receive a credit or refund. "No shows" or cancellations received the day of the program will require full payment. Substitutions will be allowed. Please Note: The cancellation policies for certain programs, e.g. the AAML/LBA Family Law Seminar, KY Commercial Real Estate Conference, MESA CLEs, etc., are different. Please visit our CLE Calendar at www.loubar.org for details.

LBA NATIONAL SPEAKER DAY-LONG

The New Negotiation Advantage Winning Others Over vs. Winning Over Others

Thursday, June 20

DON'T BELIEVE IT! Don't believe for a second that being dogmatic … even when you get your way … is the same thing as being *influential*!

Strongly felt differences that end up in conflict initiate the intuitive path for most of us, whether in business or personal relationships – to win – EVEN at the EXPENSE of OTHERS. The road from confrontation to agreement is not the elimination of these differences. That is not even possible. So, how do you "win" the cooperation of others in an environment of such strongly felt differences? It is accomplished by mastering the negotiating principles consistent with and supported by both research and experience.

Ultimately, if people are critical to your success, you must know and master the means to win their hearts as well as their minds. Successfully guiding your client and/or opposing counsel to agreement will only come when you can – clearly – convincingly – persuasively communicate the benefit to them…to win them over not win over them.

INTERESTING is far removed from USEFUL! Therefore, this session is unlike any other program you have attended. It is not a listen and learn program; instead, you will – listen – learn – and do each of the following aspects.

Program Highlights:

- The 3 Negotiating Axioms that effect the outcome of every negotiation and the real world application of each
- The 3 Predictable forms of Resistance and how to overcome each
- Appropriate responses to each "critical choice point" of the "Cognitive Mind Map" leading to YES!
- Probing for and discovering underlying interests and motivations
- "Pre-Framing" Questions to redirect conflict to cooperation
- The 4 Basic Personalities and how to structure your presentation to accommodate each
- A research-based and experience proven strategy for creating and maintaining trust with your clients and/or opposition
- A 5-Step Strategy for handling and overcoming last minute objections

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

Speaker: **Edward D. Hatch**, The Professional Education Group

Time: 8:15 a.m. — Registration; 8:30 a.m. – 4:30 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $520 LBA Members / $478 Sustaining Members / $310 Paralegal Members / $299 for qualifying YLS Members / $210 Government/Non-Profit Members / $940 Non-members
Add On: $75 printed handouts (electronic is included with registration fee)
Credits: 6.0 CLE Hours — Approved by KBA and Indiana Supreme Court

{Registration includes: electronic course material, continental breakfast, and a box lunch}

Cancellation Policy: All cancellations must be received by the LBA by June 17, 2019 to receive a credit or refund. Sorry, financial commitments do not allow us to refund for cancellation or "no show" received by the LBA AFTER JUNE 17, 2019; however a substitute may attend for a registered participant.

P.E.G. guarantee of registrant satisfaction — if any registrant is not convinced that her/his understanding of the topic has improved as a result of attending the program, P.E.G. will refund 100% of that registrant's paid tuition.

FAMILY LAW DAY-LONG

Nuts & Bolts of Family Law

Friday, June 21

This annual primer on litigating the domestic relations case from A to Z is always a popular program. The program is a valuable update for those attorneys currently practicing family law and for those who might practice in this area in the future. Speakers will review the forms and procedures needed to take a case from client interview to entry of a decree and give tips on how to keep the case simple and keep it moving quickly to a resolution.

Up to **10** LBA members can attend this seminar **FREE** of charge by agreeing to represent **TWO** Legal Aid clients, pro bono, in their domestic relations matters. Please call the LBA CLE Department at 583-5314 for details.

Agenda and speakers to be announced.

Time: 8:45 a.m. — Registration; 9 a.m. – 5 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $240 LBA Members / $216 Sustaining Members / $20 Paralegal Members / $15 for qualifying YLS Members / $120 Government/Non-Profit Members / $480 Non-members
Add On: $15 printed handouts (electronic is included with registration fee)
Credits: 6.0 CLE Hours — Pending with KBA and Indiana Supreme Court

LBA IN PARTNERSHIP WITH THE KY CPA SOCIETY

Estate Planning Conference: Raise the Bar

Wednesday, June 26

This conference is designed for attorneys, CPAs and other professionals advising clients and/or planning their own or their organization's estates.

Topics:

- Ethics of trust administration: Advising clients on roles as a trustee
- Panel Discussion: Practical pointers on IRS audits
- Blended families
- Tax update panel
- Retirement benefits and wealth management

Speakers: **Kelli Brown**, Goldberg Simpson; **Christopher Egan**, Ackerson & Yann; **Bea Rosenberg**, DMLO CPAs; and more

Fee Includes: electronic manual, continental breakfast, lunch, and refreshment breaks. If you have special dietary or other needs, please contact the Society Office, (502) 266-5272.

Group Discount: Register four or more from the same firm or company at the same time and save $25 per person. All courses include electronic manuals. Printed copies are available for $30, please order when registering.

Registration: The LBA is not accepting registrations for this seminar. Register online at kycpa.org.

Time: 7:30 a.m. — Registration; 8 a.m. – 4 p.m. — Program
Place: KyCPA Society, (Gratzer Education Center) 1735 Alliant Ave., 40299
Price: Early-bird (prior to June 12): $324
After June 12: $374
Add On: $30 printed handouts (electronic is included with registration fee)
Credits: 7.0 CLE Hours — Pending with KBA and Indiana Supreme Court

Thank you to our sponsor: Corporate Finance Associates

10TH ANNUAL LIVELY M. WILSON MEMORIAL LECTURE SERIES ON ETHICS, PROFESSIONALISM AND CIVILITY

Thursday, June 27

Mark your calendars for the 10th Annual Session of the Lively M. Wilson Memorial Series on Professionalism (formerly known as the Louis D. Brandeis Inn of Court Annual Ethics Program).

Speakers: to be announced

Lunch is included with advanced registration. Please indicate if a vegetarian lunch is requested.

This CLE is a partnership with The Louis D. Brandeis Inn of Court, the Louisville Bar Association and Stites & Harbison, PLLC

Time: 10:45 a.m. — Registration; 11 a.m. – 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $90 LBA Members / $81 Sustaining Members / $20 Paralegal Members / $15 for qualifying YLS Members / $45 Government/Non-Profit Members / $180 Non-members
Add On: $15 printed handouts (electronic is included with registration fee) Lunch included
Credits: 2.0 CLE Ethics Hours — Pending with KBA and Indiana Supreme Court

The seminars listed here were scheduled at the time of printing. For a full list of CLE programs and for complete details or to register, visit the LBA website at www.loubar.org or call the CLE Department at (502) 583-5314.

LBA IN PARTNERSHIP THE AMERICAN CONSTITUTIONAL SOCIETY

U.S. Supreme Court Review

Friday, June 28

The American Constitution Society and the LBA's Appellate Law Section invite you to their sixth annual U.S. Supreme Court Review CLE program. The seminar will address the key cases before the U.S. Supreme Court during October Term 2018. 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 include: **Michael P. Abate**, Kaplan & Partners and more, TBA

Lunch included with advanced registration.

Time: 10:45 a.m. — Registration; 11 a.m. – 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: $90 LBA Members / $72 Sustaining Members / $20 Paralegal Members / $15 for qualifying YLS Members / $45 Government/Non-Profit Members / $180 Non-members
Add On: $15 printed handouts (electronic is included with registration fee)
Credits: 2.0 CLE Hours — Approved by KBA and Indiana Supreme Court

CLE ON DEMAND

The LBA's CLE On Demand library makes your quest for credit hours easier than ever! There is a full list of on-demand videos currently available for purchase on www.loubar.org (click on CLE and choose CLE On Demand). Additional programs are updated frequently so check back often!

LBA Ethics Webinars Sean Carter Mesa CLE Seminars

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.

Ethics Webinars with SEAN CARTER, MESA CLE SEMINARS

Exit Row Ethics: What Rude Airline Travel Stories Teach about Attorney Ethics
Tuesday, June 4 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Stuart I. Teicher, CLE Performer

Thou Shalt Not Lie, Cheat & Steal: The Ten Commandments of Legal Ethics
Thursday, June 6 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Loose Lips Sink Partnerships (and Clients Too): The Ethical Way to Honor Client Confidentiality
Tuesday, June 11 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Legal Side of Blogging for Lawyers
Wednesday, June 12 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Ruth Carter

Legal Writing – Story Telling
Thursday, June 13 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Joel Oster, Comedian of Law

The 2019 Ethy Awards
Saturday, June 15 | 10:00 a.m. - Noon | 2.0 CLE Ethics Credits
Speaker: Sean Carter, Humorist at Law

Don't Be an Outlaw: The Ethycal Imperative to Follow the Law
Tuesday, June 18 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

If You Can't Say Something Nice, Shut Up!: The Ethycal Imperative for Civility
Wednesday, June 19 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Lying and the Law: A How (Not) to Approach
Thursday, June 20 | 1:00 p.m. - 3:00 p.m. | 2.0 CLE Ethics Credits
Speaker: Joel Oster, Comedian of Law

The 2019 Ethy Awards
Saturday, June 22 | Noon - 2:00 p.m. | 2.0 CLE Ethics Credits
Speaker: Sean Carter, Humorist at Law

Legal Ethics Is No Laughing Matter: What Lawyer Jokes Say About Our Ethical Foibles
Monday, June 24 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Why Twitter Is a Legal Ethics Disaster
Tuesday, June 25 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Stuart I. Teicher, CLE Performer

Yelp, I've Fallen for Social Media and I Can't LinkedOut: The Ethical Pitfalls of Social Media
Tuesday, June 25 | 6:00 p.m. - 7:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Show Me The Ethics!: The Ethycal Way to Bill for Legal Services
Wednesday, June 26 | Noon - 1:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

The Ties That Bind: Avoiding Inappropriate Entanglements in the Practice of Law
Wednesday, June 26 | 2:00 p.m. - 3:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

The Truth, The Whole Truth and Nothing But the Truth: The Ethycal Imperative for Honesty in Law Practice
Wednesday, June 26 | 7:00 p.m. - 8:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

The 2019 Ethy Awards
Thursday, June 27 | 10:00 a.m. - 1:00 p.m. | 3.0 CLE Ethics Credits
Speaker: Sean Carter, Humorist at Law

Sue Unto Others As You Would Have Them Sue Unto You
Thursday, June 27 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Stuart I. Teicher, CLE Performer

Don't Try This At Home: Why You Should Never Emulate TV Lawyers
Thursday, June 27 | 3:15 p.m. - 4:15 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

The Passion of the Barrister: An Ethical Lawyer is a Happy Lawyer
Thursday, June 27 | 4:30 p.m. - 5:30 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

It's Not the Fruit, It's the Root: Getting to the Bottom of Our Ethical Ills
Thursday, June 27 | 8:00 p.m. - 9:00 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Enough is Enough: Avoiding Vexatious Lawyering
Friday, June 28 | 11:00 a.m. - Noon | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Keep It Classy (and Ethical): How Not to Market Legal Services
Friday, June 28 | 12:30 p.m. - 1:30 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Fantasy Supreme Court League: The 2019 Season
Friday, June 28 | 2:00 p.m. - 4:00 p.m. | 2.0 CLE Credits (NO Ethics)
Speaker: Sean Carter, Humorist at Law

May It Displease the Court?: Keeping Your Head (and Your Law License) in Court
Saturday, June 29 | 10:00 a.m. - 11:00 a.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Technical Fouls: Even Minor Ethics Violations Can Have Major Consequences
Saturday, June 29 | 11:15 a.m. - 12:15 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

Yakety Yak! Do Call Back!: The Ethical Need for Prompt Client Communication
Saturday, June 29 | 12:30 p.m. - 1:30 p.m. | 1.0 CLE Ethics Credit
Speaker: Sean Carter, Humorist at Law

The 2019 Ethy Awards
Sunday, June 30 | 11:00 a.m. - 1:00 p.m. | 2.0 CLE Ethics Credits
Speaker: Sean Carter, Humorist at Law

Place Online. Visit the LBA website calendar for registration link: www.loubar.org/calendar/events

Price $55 LBA Members (per credit hour)
$125 Non-Members (per credit hour)
$25 Paralegal Members

Credits CLE Ethics Hour – Approved
Please note: This webinar counts as live CLE credit

Due to the partnership with Mesa CLE, the LBA will NOT be accepting registrations for these webinars.

A LINK TO REGISTER IS PROVIDED ON THE LBA WEBSITE'S CLE CALENDAR: WWW.LOUBAR.ORG.

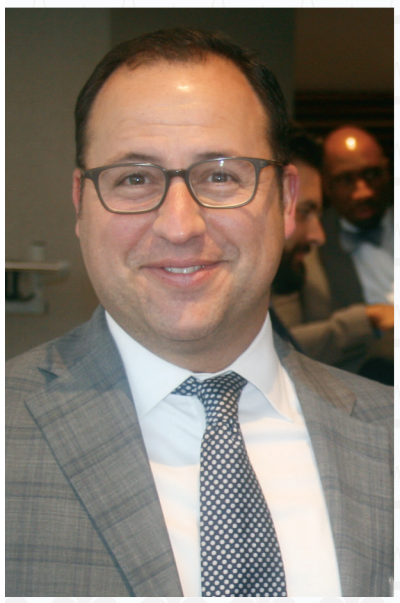
MISS A LIVE WEBINAR?
No worries! The LBA and MESA CLE have partnered to offer ON Demand CLE programs. Visit the On-Demand CLE page on the LBA website: www.loubar.org/online-cle/

Louisville Bar Association's 2019

Judicial Reception

In what has become a rite of spring for the Louisville legal community, the sixth annual Judicial Reception was held on May 9th at the Spire atop the Hyatt Regency. More than 100 attorneys—including several newly-minted members of the Kentucky bar—and judges from both the state and federal courts came together to enjoy food, fellowship and fun along with panoramic views of downtown Louisville.

To see a full gallery of photos, visit www.loubar.org.



The Evolution of Litigation

Ben Leonard

Today's court system is indelibly implanted in the minds of everyone. Whether it was O.J. Simpson's trial of the century or Judge Judy, every person has been exposed to the happenings in the courtroom. Moreover, Jack McCoy in *Law & Order* and Jake Brigance in *A Time to Kill* fired up wannabe criminal lawyers like Rocky Balboa training to *Eye of the Tiger*.

However, once lawyers begin to get the wheels of justice creeping forward in the litigation process, by writing demand letters, engaging in motion practice, attending countless pretrial conferences, working through mediations and eventually conducting trials, the ole' hurry up and wait mode becomes the reality. While it is easy to become disenfranchised, a journey through the evolution of the trial as known today actually leads to a greater appreciation for the current system.

Since the beginning of humanity, historical references are not needed to understand that physical altercations involving fists, axes and swords as well as other animalistic behavior settled disputes and the loser was the one on the ground. As society began to become more sophisticated, there was purported advancement in conflict resolutions through some kind of sanctioned process known as a trial.

One of the first known types of trial reflected in recorded history was known as a trial by ordeal. There are many forms of trial by ordeal. The earliest historical references to a trial by ordeal are seen around 500 A.D. and continued until around 1200 A.D. The trial by ordeal is believed to have Frankish origins or Germanic tribe origins.

One category of the trial by ordeal is often referred to as trial by superstitious ordeal. In such an ordeal, the medieval priests started this form of trial in which someone accused of a crime or seeking to defend his rights would pick up a hot iron and walk several steps. After putting the hot iron down, his or her hand would be bandaged and sealed. After three days, the hand would be inspected. If the hand was healing without suppuration or discoloration, he or she won his or her trial. If the wound was unclean, the trial was lost. Such was only one form of a trial by superstitious ordeal.

The next time a case is called last on the docket, be reminded that at least a hot iron, a chunk of bread, or floating or sinking in a pond will not be utilized at motion hour.

Other examples involved fire, immersing the hand in boiling water, and even complete immersion in a stream. When it came to immersion, the accused was thrown into a pond and if he or she sank he was guilty or liable. If he or she did not sink, he or she was seen as not guilty. Floating without the act of swimming was deemed evidence of innocence.

There were also decisions based on bread. A defendant would swallow a large piece of bread accompanied by a prayer that if it would choke him he was guilty. Notably, trials by ordeal were usually undertaken by only one party in a case and all required natural elements to behave in an unusual way. That is a hot iron or water not burning the innocent and cold water not allowing the guilty to sink.

Trial by battle or judicial duel was another form of a trial by ordeal used during medieval times. The form of trial originated in Germany as it was seen in the early law codes of the Burgundians, Lombards, Alamanni, Bavarians, Thuringians, Frisians and Saxons. There is written proof of the trial by battle as early as the sixth century and was a widespread custom from 500 A.D. to 800 A.D. The same was even introduced into England during the laws of William the Conqueror.

The thought behind the trial by battle, in large part, was it would inhibit perjured statements because what was said would have to be backed up with combat, where the victor of combat was the prevailing party regarding the underlying dispute. Some of these forms of battle were private acts and others were more formally regulated by some kind of a judiciary. There was an element of divine intervention thought to be in this process too. That is, God would presumably strengthen the arms of the part who had sworn truly to the justice of his or her cause.

Another type of trial seen during medieval times was known as a trial by compurgation. This form of trial was seen as an alternative to a trial by ordeal up to the twelfth century. In fact, a trial by compurgation is thought to have been a first alternative to the trial by ordeal. Under this form of trial, a defendant could establish his or her innocence or nonliability by taking an oath and by getting a required number of persons, typically 12, to swear they believed the defendant ' s oath. This led to official witnesses eventually being appointed whose duty was to attend all bargains or transactions so they could testify if an issue arose.

The plaintiff would prove his or her case by vouching a certain number of witnesses had been present at the transaction in question. The defendant, on the other hand, rebutted the witnesses by producing a larger group of witnesses and thereby outweighing the evidence. This was also known as canonical purgation and was initially used by the church. Presumably they would not endanger their immortal souls by sacrilege of false swearing. In the event the accused could not obtain the requisite oaths, a trial by ordeal may be the next alternative.

All of these forms of trial were seen at some point during the history of England and in other parts of the world. Eventually, a system was seen where recognitors were sworn witnesses. Many times, four knights from the neighborhood in which the dispute arose would be summoned and these knights would choose 12 knights cognizant of the facts. If they all knew the facts consistently, a verdict would be agreed upon. If some or all of the knights were ignorant, new knights would be named until 12 were found to agree. This method of decision making was formally known as afforcing the assize.

Eventually, local individuals were chosen to serve in this capacity as witnesses, but heard other witnesses, and were expected to ascertain the facts of the cases before them for decisions from documents and evidence which supplemented their own knowledge. Arguably, the trial by witness form of settling disputes evolved in to a trial by jury. Because of these so-called witnesses and investigators looking at documents, supplementing their own knowledge, and making an ultimate conclusion, there had to be some supervision over the admission of testimony, in order to exclude what was improper. This occurrence was beginning of evidence jurisprudence.

While the foregoing shows the evolution of trials, the American system of justice cannot be truly understood unless England is specifically mentioned. Under King Henry II (1154-1189), the courts of England were tremendously reformed. King Henry II disliked and distrusted the traditional forms of proof that have been highlighted thus far in this discourse.

King Henry II recognized that trials by ordeal were easily manipulated by the priests that administered such. Trials by battle or judicial duel were becoming inequitable and farcical. For example, in some cases, champions were employed by litigants. Champions were professional fighters hired by litigants whenever a party to a dispute could not represent himself because of age, sex or physical infirmity. Essentially, champions became professional fighters available for hire.

King Henry II also looked at a trial by compurgation as the most untrustworthy. That is, a trial by compurgation was too easy to win because it was a certain success for the party, however liable or culpable, who was fortunate enough to simply rely on his oath or his oath helpers. Put simply, perjury was running rampant in the compurgation system.

Under the leadership of King Henry II, a major change to the trial system of England emerged. In 1164 the Constitutions of Clarendon, a set of legislative procedures, were put into effect by King Henry II. In large part, these legislative procedures prescribed the use of 12 men to decide any dispute between laymen and clergy. More specifically, 12 knights

were chosen to answer all matters and pleads to the king and deal with trials. The knights would then engage in independent investigations and make recommendations.

Although there is deviation nowadays on the numbers of jurors for certain cases, some ponder as to where the original number of 12 jurors developed. There is much debate over this as some say that it has Biblical origins. Interestingly, there were 12 apostles, 12 prophets, 12 men sent into Canaan to seek and report the truth, and Jerusalem was built on 12 stones. Some believe the concept of 12 is based on the number of zodiac signs.

While there were other articles passed, King John had the Magna Carta passed in 1215. It was a document to make peace between the King and certain rebels and contained a provision for a trial by jury. Some historians argue that this was the beginning of the trial by jury as we know it today and helped to influence American constitutional provisions that are currently in place. While there was certainly an evolution in the settlements of disputes process, there is a tremendous dispute as to what country actually was the first to conduct an actual trial by jury that was most similar to the current form. Theories include, but are not limited to, Greece, Rome, Scandanavia, Germany, Iceland and England.

With this background information in mind, the first jury trial in America is believed to involve a man named John Billington as reflected in the history of the Plymouth Plantation. John and his family came to the colonies on the Mayflower. He and his family were not religious despite traveling over with a religious group. They settled in the colonies and eventually John Billington got into an argument with his neighbor in a field and killed his neighbor. The Plymouth colony actually empanelled a jury and John was found guilty of murder and was executed. This all was believed to happen around 1630.

All of this history eventually led to a trial by jury being a constitutional guarantee in the United States. Article III, Section 2 addresses "trial by jury." The Sixth Amendment addresses "speedy and public trial with impartial jury." Likewise, the Seventh Amendment addresses the general importance of trial by jury. Through case law a jury trial has been mandated in the states, however, there is some deviation that has been found to be constitutional.

For example, in the Commonwealth of Kentucky trials of juveniles, divorce cases, and small claims cases do not require juries. Misdemeanor cases only have to have a jury of six people and civil cases do not have to have unanimous verdicts in Kentucky. But nevertheless, the necessity and importance of jury trials from the U.S. Constitution has been recognized in each state's constitution. For example, Kentucky Constitution Section Seven reads as follows: "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

While this discourse is cursory based on the space allotted, it does help with perspective. The next time a case is called last on the docket, be reminded that at least a hot iron, a chunk of bread, or floating or sinking in a pond will not be utilized at motion hour. The next time a client complains about the broken system, remind the client that at least he or she does not have to track down knights or run around attempting to simply win by obtaining the most oath takers to testify or "testilie" as the case may be. Although attorneys may at times dread oral arguments due to an unreasonable and demeaning opposing counsel, be cognizant that at least he or she can only use words as opposed to a medieval spiked flail.

The positive progress of the current litigation system is obvious; it is simply a matter of perspective. That is not to say the current system is perfect, as there is always room for continuous improvement, through continued innovation and creativity.

Ben Leonard is an attorney at Leonard Law Firm, PLLC and has offices in Dawson Springs and Providence, Ky. Leonard received his B.A. in business administration from Eastern Kentucky University, a M.B.A in business administration from the University of Memphis, his J.D. from Saint Louis University, and a Master's of Laws Degree from Temple University. ■

Mediators Can Help Attorneys Help Their Clients

Molly Isaacs-McLeod

"You can't shake hands with a clenched fist."
– Indira Gandhi

"Peace is not the absence of conflict, but the ability to cope with it."
– Anonymous

"The pessimist sees difficulty in every opportunity. The optimist sees opportunity in every difficulty."
– Winston Churchill

Overview

Where there is a dispute, there is a potential role for mediation. Falling within the Alternative Dispute Resolution category, mediation is the process by which conflict between one or more people (or entities) is resolved through discussion and negotiation. When successful, this process renders an agreement all parties can at least live with, perhaps even happily!

During the course of mediation, clients have the opportunity to share their perspectives on a given situation, exchange proposed solutions with the other party or parties, and create an agreement that works. Compliance is more likely when an agreement reflects the input of the parties, and supports their expressed needs and priorities. Mediation strategies can be used not only to resolve current conflicts, but also to head off future conflicts.

Mediators come from all fields and disciplines, each offering their unique perspective, credentials and skillset. Some mediators are social workers or psychologists, others are attorneys, some may be members of the clergy, and still others may hail from construction, human resource or real estate backgrounds. Some mediators may be more directive in their approach to mediation, others take a more facilitative tack. What all mediators have in common is the desire to see their clients reach an understanding that results in a successful agreement, one that meets most of the needs of most of the people involved.

Areas of Mediation Practice

Domestic Mediation: Although mediation is an effective approach to many types of disputes, it is often most closely associated with domestic issues, especially those involving divorce, parenting time and custody. Domestic mediation can be initiated in several ways:

Self-Referred: Parties may contact a mediator on their own, or through counsel once represented. In an example of the former, a couple decides to divorce and approaches a mediator directly. Sometimes parties reach out to an attorney or other professional who has assisted them in matters that could be impacted by divorce (financial advisor, business attorney, accountant, etc.) for advice as to next steps, and may be referred to a mediator. Advantages of self-referred mediation include retention of control, tailoring terms to the best interests of the parties involved, privacy, cost savings, etc. Parties are encouraged to have agreements reviewed by counsel. Typically, these parties file for divorce *pro se*.

Court-Referred: More often, parties already involved in divorce proceedings may be ordered to mediation by the court to resolve issues that remain in contention. Mediation at this point provides an opportunity for the parties and their respective counsel to confidentially (and therefore openly) share concerns, discuss options and reach mutually acceptable terms regarding matters of contention. Advantages of court-referred mediation include support of counsel, oversight of the timeline and accountability by the court, structured process, etc.

Regardless of how a client reaches the mediator, the goal in mediating divorce cases is to assist the parties in creating an agreement that covers all areas in question (custody, parenting schedules, child support, division of property and spousal maintenance). Mediators support and guide the parties in creating a plan that addresses these issues and works for the parties and their children on a day-to-day basis.

Corporate Mediation: Referral to mediation of corporate clients can save money and provide the opportunity for development of carefully tailored solutions. Companies have internal and external conflicts. Whether business clients are confronted with an internal conflict, maybe an HR issue, or an external dispute, perhaps a contract issue, mediation can be used to reach successful resolution.

Elder Care Mediation: The era of the "sandwich" generation is upon us, with many middle age adults entering the last stages of launching their children, while caring for aging parents. Conflict and strong emotions are often part and parcel of helping an aging parent address major life transitions. Adult children are not always in agreement as to how to move forward. Because it is private, confidential and voluntary, mediation is uniquely suited to address the relational nature of the conflict between family members. In addition to reaching resolution to immediate issues, family members develop the constructive and collaborative problem-solving skills needed to best support their aging parent. As with many issues, the earlier this line of discussion and problem solving is opened, the more helpful it is to all concerned.

Estate Planning Mediation: Although parties to a will contest can mediate their issues of contention, estate planning mediation is most effective when engaged in preemptively. Estate planning decisions are made with a number of things in mind, including, but not exclusively, providing for one's family, planning for taxation and contemplating one's legacy. However, estate planning decisions are also based on the assumptions and beliefs of the client planning his or her estate about the goals and desires of potential beneficiaries. Open, honest, and confidential discussions, facilitated by an experienced mediator, can increase the likelihood that the estate planning client's testamentary wishes will be carried out while decreasing the chance of unaddressed issues and unwelcome surprises on the part of the beneficiaries.

Educational Mediation: Mediators can facilitate conversation and cooperative problem solving between schools and parents of students for whom school is not working. Under the Individuals with Disabilities Education Act (IDEA) dispute resolution process, the State Education Agency will appoint a mediator if mediation is requested by the parties. It is also possible to seek mediation services from an independent mediator when both the family and the school are willing to consider using mediation to resolve issues in the educational setting. Common issues include, but are not limited to: bullying, conflicts with a specific teacher, need for more challenging work, etc. Because mediation is more cooperative than adversarial, its use in school settings can be especially helpful when all parties are committed to the process.

Construction Mediation: When there is a perceived breach of contract or act of negligence regarding construction, working with a skilled mediator with experience in the field can be invaluable. The issues in these situations often involve hypertechnical fact patterns that require a level of expertise beyond that of most laypeople. Reaching an agreement facilitated by an experienced mediator can save the time and cost of educating a judge, jury and possibly opposing counsel on the finer points of the technical issues involved.

Environmental Mediation: Disputes involving personal property, development, planning and zoning can be resolved efficiently and economically when all parties are committed to developing a solution in a cooperative manner with the facilitation of an experienced mediator. For example, when citizen challenges to permits granted by the State (for development, building of various types of structures, etc.) are raised, mediation allows for the parties to come to the table, express their concerns, and make suggestions for an agreement that reflects the needs of all parties involved.

Why Suggest Mediation to Clients?

Mediation is applicable to nearly any dispute regarding a set of facts as to which reasonable people could disagree. This includes issues presented in personal and professional realms. Mediation has very few downsides. The process is entirely confidential. Information shared and offers made in the course of mediation cannot be used outside the context of mediation. Parties to mediation are either represented by counsel throughout the process or are urged to have counsel review the agreement before signing.

In the event mediation fails, litigation remains an option. In fact, on the business side, an attempt at some form of Alternative Dispute Resolution is a prerequisite to litigation. Other than those few instances where it is contraindicated (gross disparity of bargaining power, instances of domestic abuse, etc.) mediation can be used to resolve differences and points of contention in nearly any setting. Mediation saves money, time, and at least on the domestic side, heartache.

Tips for Attorneys Referring Clients for Mediation

- Provide the mediator with all requested information in timely manner
- Maintain a positive attitude toward the process
- Manage client expectations
- Arrange for as neutral a setting as possible (i.e. not opposing counsel's office)
- Support the parties when they are moving toward a positive outcome
- Notify mediator immediately of any change in schedule/cancellation of appointment

Tips for Mediators

- Ask for the information you need
- Ask that parties (including counsel) commit to the process
- Maintain a writing (digital or otherwise) as points are agreed upon to expedite production of a final draft
- When parties are represented by counsel, respect position of counsel

Conclusion

Mediation provides an opportunity not only for the parties to truly be heard, but perhaps even more importantly to hear one another. In personal and business realms alike, conflict is based on relationships and mediation provides an opportunity for those relationships to not only survive the conflict, but to grow and become stronger through building an agreement that works. That is "win-win" at its best.

Molly A. Isaacs-McLeod, J.D., LL.M., is an attorney mediator at Practical Resolutions, LLC, and co-chair of the LBA's ADR/Mediation Section. ■

More Effective Legal Writing!

(And a Great Sandwich Place Right Around the Corner...)

Rick Horowitz

File this under: "Why mess with a good thing?"

When Lisa Anspach invited me to Louisville last year to lead my **"More Effective Writing Makes More Effective Lawyers"** workshop, the date we picked was June 6. We'd spend the day, we agreed, talking about ways to close the gap between how well lawyers know their stuff and how well they're able to communicate it—in different kinds of documents, to different kinds of people, under a wide variety of circumstances.

Came the day in question, and attendance was strong. Conversation was lively, provocative—even, at times, contentious. These are lawyers, after all. It was just what I wanted! (And so, at lunchtime, was the perfectly terrific sandwich shop just steps from LBA headquarters...)

I typically mention at the start of the morning that my goal is plenty of back and forth, and with all the experience in the room, plenty of learning from one another, too. That if all they hear is *my* voice for the rest of the day, I've failed them.

I needn't have worried with this crowd.

The questions and tips and challenges flowed early, and late. There were confessions, and revelations. I collected insights and tips I've continued to share with other lawyers, at other bar associations, throughout the year. And the people in that room that day at LBA? They certainly seemed to feel that our time together was time well spent.

So Lisa was kind enough to invite me back for a return visit in 2019. And the date we agreed on for this year's session? **June 6**. Why not?

It was a Wednesday last year. It's a Thursday this year. But that won't be the only difference. Since I'm constantly tweaking the program based on the feedback I receive from prior attendees, you can call it "New & Improved!" And since there are new folks in the room each time, with different interests and concerns, the conversation always changes from one session to the next.

Still, there are some all-too-common afflictions on Planet Law—in fact, I'll stand by my list of woes from last year's invitation—and we'll definitely take another whack at them:

> *"Writing that goes on and on. Documents that lack organization, or a logical thread, or even the occasional signpost to guide the reader through the muck. Language that's thoroughly impenetrable to a client who doesn't happen to have a law degree—a client who simply needs a crisp, clear answer to some pressing question...."*

Among the things we're likely to discuss:

- What should you include, and what can you leave out?
- What's the most effective structure for *this* document, and for *this* audience?
- Should you use an outline? Are there better options?
- How do you get past that blank-screen panic?
- How do you balance "complete" and "concise"?
- Can you steer clear of those grammar and usage potholes that undermine your credibility?
- And do you really need all that legalese?

Plus other topics yet to be discovered. What *else* I suspect won't be different? An LBA session every bit as lively, every bit as useful, as the first one. I hope you'll plan to be there—register now, and be part of the discovery.

See you on June 6. Of course.

Details about Rick Horowitz's June 6 CLE, "More Effective Writing Makes More Effective Lawyers: Useful Strategies, Crucial Details, and Lots of Practical Tips" can be found on page 11.

Rick Horowitz is the founder and Wordsmith in Chief of Prime Prose, LLC, offering writing, editing, and messaging services to institutions and organizations across the country. ■

In Memoriam

Mitchell A. Charney, age 74, died on April 19 following a battle with cancer. A graduate of the University of Louisville Brandeis School of Law, his practice included litigation and mediation with an emphasis on family law. A partner with Goldberg Simpson for more than 35 years, he previously practiced with Gittleman, Charney & Barber. He was a Fellow of both the American Academy of Matrimonial Lawyers and the American Academy of Adoption Attorneys. Also a civic leader, he was a past president of Jewish Family and Vocational Services and the Ronald McDonald House.

He is survived by his wife, three children and six grandchildren. Memorial gifts can be made to Jewish Family & Career Services, Ronald McDonald House or Congregation Adath Jeshurun. ■

Five Key Facts about *Qui Tam* Lawsuits

Hannah C. Choate & Jessica R. C. Malloy

When a business falsely verifies the quality of military equipment, it sends brave men and women into harm's way with inadequate protection. When providers submit false claims to Medicare, they undermine the financial integrity of the Medicare program. When medical providers falsify medical records in order to justify the amount billed to Medicaid, they often fail to provide satisfactory health care to their patients. And when entities implement kickback schemes, consumer costs rise, competition is undermined and independent decision-making is distorted.

One retort? The *qui tam* provision of the False Claims Act, 31 U.S.C. 3729 *et seq.* (FCA). And the industry is booming.

In 2018, 645 *qui tam* actions were filed across the country, and as a result of this type of litigation, the Department of Justice recovered $2.1 billion dollars. By effectively enforcing the FCA, DOJ protects the taxpayer, deters bad actors, protects victims and works to level the playing field in the markets.

So what do you need to know? A lot. An entire body of law has developed out of the FCA, and this article cannot address every facet. But it sets forth a good place to start with five "*qui*" notes for litigating *qui tam* actions.

1) The Department of Justice Prioritizes Prosecution of Meritorious *Qui Tam* Actions.

As explained by Deputy Associate Attorney General Stephen Cox in an address on January 28, 2019, "[e]nforcing the False Claims Act is a top priority for the Department." Indeed, the FCA is the primary civil remedy for redressing false claims involving federal government contracts, grants and federally-funded programs. These cases originate in one of two ways: (i) actions brought by the DOJ, or (ii) actions brought by whistleblowers, known as relators, who are entitled to a portion of the proceeds recovered and attorney's fees in a successful action.

Whistleblowers are also protected from retaliation by their employers for protected activity in furtherance of an FCA claim; the FCA affords "all relief necessary to make the employee whole." In actions brought by whistleblowers, called *qui tam* actions, the case is filed under seal and the Government is given a period of time to evaluate the allegations and decide whether to intervene (*i.e.* take over the case). If the Government declines to intervene, the relator may proceed with the action (*see #4*).

The partnership between the federal government and whistleblowers is central to the many successful stories behind DOJ's recoveries. This partnership is crucial, because whistleblowers are uniquely situated to bring fraudulent practices to light—misconduct the Government might never discover without their assistance. And the indiscretions are vast.

Fortunately, in *Cook County v. U.S. ex rel. Chandler,* 583 U.S. 119 (2003), the Supreme Court affirmed that the FCA is applied broadly, opining "Congress wrote [the FCA] expansively, meaning to reach all types of fraud, without qualification, that might result in financial loss to the Government." As a result of this broad application and the breadth of spending by the federal government, many successful cases have been brought in federal courts within Kentucky involving a wide variety of government programs.

For example, the United States Attorney's Office for the Western District of Kentucky's investigation recently led Natera (a genetic testing service) to pay $11 million to resolve false claims allegations. Further, Lockheed Martin agreed to pay $5 million to settle alleged violations of the FCA and the Resource Conservation and Recovery Act. And a former officer of Nationwide Fence and Supply Co. paid $358,707.06 to settle allegations of false claims involving disadvantaged-business-enterprise requirements. Clearly, the Office prioritizes prosecuting meritorious *qui tam* actions.

2) Pre-filing Preparation by Relator's Counsel is Key to the Success of a *Qui Tam* Action.

The DOJ intervenes in only about one in five *qui tam* cases filed. Thus, a relator who has worked diligently with thoughtful counsel to prepare a complaint has a distinct advantage. As an initial matter, a relator *must* be represented by counsel to file a *qui tam*. This ensures that relator's allegations are adequately investigated by counsel in advance of filing an action that will require Government investigation.

Before filing, relator's counsel should identify key documents that support the relator's allegations and individuals and entities critical to proving FCA liability. Once the facts have been collected and parties with liability have been identified, counsel should consider issues unique to the FCA. While there are too many potential FCA pitfalls to address them all here, they include:

(i) An FCA action generally may not be filed against a federal agency or federal personnel acting in his or her official capacity or a state, state entity or state personnel acting in his or her official capacity;

(ii) The FCA contains statutory bars concerning whether relator is the "original source" of the allegations and whether the allegations at issue are already the subject of administrative proceedings or litigation in which the Government is a party;

(iii) The FCA contains its own statute of limitations and jurisdiction provisions, contained in sections 3731 and 3732; and

(iv) Finally, an FCA complaint must satisfy Federal Rule of Civil Procedure 12(b)(6) and the FCA claims must be pled with particularity under Rule 9(b).

Beyond the *qui tam* complaint, counsel must also prepare a written disclosure statement, which is served on the United States and contains "substantially all material evidence and information the person possesses" under section 3720(b)(2). This is counsel's first opportunity to set forth his or her vision of the case for the Government. It should include the facts and evidence discovered while investigating relator's allegations and enclose any relevant documents in relator's possession. The strongest disclosure statements also identify individuals with knowledge of relevant facts and suggests a path forward for the Government's investigation.

3) Counsel should be Alert to Specific Requirements for Filing and Service of a *Qui Tam* Action.

The FCA contains several specific provisions regarding filing and service of a *qui tam* action. First, every *qui tam* action must be filed with the court under seal. This means that in Kentucky's federal courts, relator's counsel must file the FCA complaint in person with the court clerk—the complaint

may not be filed electronically.

Once the complaint is filed, counsel must serve the complaint and disclosure statement on the Government. Crucially, counsel must serve both (i) the U.S. Attorney's Office where the action was filed *and* (ii) the United States Attorney General. Failure to properly serve the Government through this two-step process may be an impediment to proceeding with the *qui tam* action.

Thereafter, the *qui tam* complaint remains under seal for at least 60 days, while the U.S. investigates the allegations set forth. Nearly all FCA investigations take longer than 60 days, so the U.S. will likely seek court approval to keep the complaint under seal while the investigation is completed. During this time, the relator may not disclose the existence of the *qui tam* action and may not serve the complaint on the defendant, until so ordered by the Court.

4) The United States Department of Justice can Move to Dismiss a False Claims Act *Qui Tam*.

Since a 1986 amendment to the FCA, the DOJ has had the ability to move to dismiss an FCA case—even over the objections of a relator. Rather than exercising the right, however, DOJ generally opted not to intervene. And as a result, most relators voluntarily dismissed a declined *qui tam*, because the economic and emotional expense of bringing an FCA case were too high to continue pursuing without DOJ's assistance. This is no longer the case. *Qui tam* litigation has now expanded and morphed into a commodity-like business. For many, that means it is more affordable for relators to continue pursuing a claim without DOJ's assistance.

In response, on January 10, 2018, Michael Granston, Director of the Commercial Litigation Branch, Fraud Section of the Department of Justice, issued an internal memorandum to DOJ attorneys handling FCA cases, titled *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*. Therein, DOJ trial attorneys and Assistant United States Attorneys are asked to consider dismissal of declined *qui tam* suits. More commonly referred to as "The Granston Memo," it does not change DOJ's historical position, but reflects the factors DOJ historically considered in deciding to dismiss a case.

Nevertheless, much ink has spilled discussing the rationale behind the memo. Thus, on January 28, 2019, Stephen Cox delivered remarks explaining the Department's reasoning. "The Granston Memo is about [DOJ's] gatekeeping role," he said. "[W]hen *qui tam* cases are non-meritorious, abusive or contrary to the interests of justice, they impose unnecessary costs on the Department, on the judiciary and on the defendants. Bad cases that result in bad case law inhibit [the Department]'s ability to enforce the False Claims Act."

Cox also discussed the impact of meritless *qui tam* on DOJ resources; "[W]hen the Department's resources are consumed for other things, [DOJ has] less time to fulfill [its] priorities." This, however, should not suggest that the Department will move to dismiss a pending *qui tam*, merely because a False Claims Act defendant is pursuing extensive discovery.

As Granston clarified in his March 1, 2019 address to the Federal Bar Association's *Qui Tam* Section, "[j]ust because a case may impose substantial discovery obligations on the government does not necessarily mean it is a candidate for dismissal."

More strongly, he warned that "[d]efendants should be on notice that pursuing undue or excessive discovery will not constitute a successful strategy for getting the government to exercise its dismissal authority." To that end, he explained that "[t]he government has, and will use, other mechanisms for responding to such discovery tactics." (Such methods may include: (i) moving to quash a subpoena, as DOJ takes the position that it is a third party in non-intervened cases for purposes of discovery; or (ii) utilizing the *Touhy* regulations, which prescribe requirements private parties must satisfy in order to obtain discovery from a government agency.) In conclusion, Granston cautioned that DOJ's dismissal powers will be used "judiciously" and proffered that motions to dismiss "will remain the exception rather than the rule."

But when an exception is made and dismissal motions are filed, courts are split on the deference that should be granted to DOJ's request. The Ninth and Tenth Circuits apply the "rational relationship" test established by *United States ex rel. Sequoia Orange Company v. Baird-Neece Packing Corporation*, 151 5.3d 1139 at 1145-47 (9th Cir. 1998). That standard requires the government to justify its decision by showing that dismissal is related to a valid governmental purpose. The District of Columbia Circuit, however, holds that the government's right to dismiss is completely unfettered, under *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). The Sixth Circuit has yet to weigh in on this debate.

5) False Claims Act Defendants can Receive Credit for Cooperating in a False Claims Act Investigation.

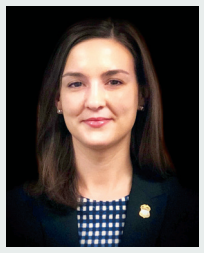
As a preliminary matter, the Department is committed to rewarding companies who invest in strong compliance programs. Not only are strong compliance programs "good for business and fair competition," Cox explained, but they also "raise awareness of legal obligations, they mitigate risk of legal jeopardy and they promote reporting up."

To that end, the Department is also committed to rewarding companies who cooperate with DOJ investigations into wrongdoing. And there is no longer an all-or-nothing approach to awarding credit to companies who cooperate in civil investigations. As Cox put it, a company does not "have to boil the ocean in an effort to identify every employee who played any role in the conduct in order to receive any credit for cooperation." Instead, the company must honestly and meaningfully assist in the government's investigation to be eligible for cooperation credit. This includes voluntary disclosure and other efforts "such as sharing information gleaned from an internal investigation and making witnesses available," said Cox.

One such example of an entity receiving cooperation credit is the $270 million settlement between the U.S. and DaVita Incorporated. As the company voluntarily disclosed improper billings and worked together with the government in its subsequent investigation, the U.S. agreed to a favorable resolution of potential claims arising from the misconduct.

Thereafter, in April 2019, DOJ Criminal Division updated the guidance document titled *Evaluation of Corporate Compliance Programs*. Likewise, on May 3, 2019, Joseph Hunt, Assistant Attorney General for the Civil Division of the Department of Justice, issued an internal memorandum to all DOJ attorneys handling FCA cases, titled *Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters*.

Read in tandem, these two guidance documents provide insight into the Department's valuation of cooperation and the means by which it may credit such behavior. As Hunt explained more specifically, "[a]n entity or individual that seeks to earn maximum credit in a False Claims Act matter generally should undertake a timely self-disclosure that includes identifying all individuals substantially involved in or responsible for the misconduct, provide full cooperation with the government's investigation, and take remedial steps designed to prevent and detect similar wrongdoing in the future."



Hannah C. Choate and Jessica R. C. Malloy are Assistant United States Attorneys for the Western District of Kentucky. ■

Hannah C. Choate and Jessica R. C. Malloy will be at the Bar Center on Tuesday, June 11 to present "Navigating Qui Tam Litigation Under the False Claims Act." See page 12 for details.

PUBLIC SERVICE

Mother's Day Card Drive a Success

The Louisville Bar Association's Public Service Committee provided 100 cards with pre-paid postage to the Louisville Metro Department of Corrections so that some inmates—including those in the Enough is Enough substance abuse recovery program and the 1 on 1 Work Aid Program—could send good wishes to their moms on Mother's Day. Despite what are likely difficult times for these mothers, we hope that receiving a card from their child on Mother's Day helped bring some joy to their day.

Thank you to Jonathan Ricketts for spearheading this effort and to Laurel Hajek (University of Louisville Brandeis School of Law), Jenny Bobbitt (Bingham Greenebaum Doll) and the LBA staff for their donations. ■

MEETING SCHEDULES

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*. ■

Legal Assistants of Louisville

The next regularly scheduled meeting of the Legal Assistants of Louisville will be held on Tuesday, June 18, at 11:30 a.m. at the Bristol Bar & Grille Downtown located at 614 W. Main Street. This month's speaker will be McKenzie Cantrell, a graduate of the UofL Brandeis School of Law, nonprofit employment attorney and Dem. State Representative House District 38. For more information about the organization, please contact Loretta Sugg, Vice President, at (502) 779-8546. ■

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 $20. To learn more about the benefits of LAP membership, visit *www.loupara.org*. ■

Vacation Spot

Beachfront Home to Rent:
3 bdrm., 2 bath, Gulf Front Home, boating, pool, tennis located in gated enclave on Palm Island, Florida b/t Sarasota and Ft. Myers. Home comfortably sleeps 8 with new queen sleeper sofa. View details at VRBO #1433280, call Rebecca Smith at 502-396-1764 or Michelle at 941-445-2621 for booking.

Help Wanted

Through the LBA Placement Service

Downtown Litigation Attorney:
The LBA is currently working with a mid-sized law firm based in Louisville KY, that is seeking a Litigation Attorney for their downtown Louisville office. The successful candidate will have at least 3-5 years of civil litigation experience, (preferably on the defense side) and excellent references. This is a full-time position that may require some travel. Salary is based on experience, plus benefits. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

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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.
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Office Space

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Law Offices for Rent:
Two offices side by side for rent at 125 South 6th Street. Includes surface parking next to building, utilities, phone, basic office supplies, copier, fax & internet. Call Lowen & Morris at 587-7000.

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Office Space Available:
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1 office with adjoining room that can be used for secretarial office(s) or office with adjoining secretarial room. Approx. 8' x 10' each
1 large open space with enough room for 3 desks for support staff
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Access to conference rooms, copy machine, fax and postage machine, and full kitchen. Free parking. Available January 1, 2018. For more details email mmalaw1@aol.com or call Laura Garrett at 502-582-2900.

SPOILER ALERT!

Paying Our Dues

Crossword Puzzle by Earl L. Martin III on page 10

1 N	2 A	3 G	4 A	5 T	■	■	6 H	7 A	8 D	9 J	■	10 C	11 P	12 A
13 A	R	A	B	I	14 A	■	15 I	N	M	E	■	16 H	A	S
17 N	E	W	A	R	K	■	18 K	I	C	K	19 B	A	C	K
20 O	A	K	B	A	R	21 R	E	L	■	22 Y	I	P	E	S
■	■	■	23 A	M	O	O	■	■	24 A	L	G	■	■	■
25 J	26 A	27 M	■	28 I	N	K	29 B	30 A	L	L	P	31 E	32 N	33 S
34 A	M	A	35 S	S	■	■	36 A	R	T	■	37 L	I	E	U
38 K	E	N	T	U	39 C	40 K	Y	B	A	41 R	A	S	S	N
42 O	L	I	O	■	43 A	A	H	■	■	44 E	Y	E	T	O
45 B	L	A	C	46 K	B	A	S	47 S	48 E	S	■	49 N	S	F
■	■	■	50 K	R	S	■	■	51 A	S	U	52 S	■	■	■
53 A	54 P	55 N	E	A	■	56 R	57 O	C	K	B	A	58 N	59 D	60 S
61 C	L	A	R	K	62 B	A	R	■	63 E	L	M	E	R	S
64 H	A	Y	■	65 E	R	I	E	■	66 R	E	B	I	N	D
67 E	T	S	■	68 N	O	L	O	■	■	69 T	A	L	O	S

MEMBERS on the move


Cornell


Franklin


Holloway


Logsdon


Wright

The law firm of **Goldberg Simpson** announced that as of May 1, the Louisville and Southern Indiana Divorce and Family firm, Key Law Group, is now part of Goldberg Simpson.

Fisher Phillips announces two practice group and industry team leaders in Louisville. **Todd Logsdon**, a partner in Fisher Phillips' Louisville office, has been named to co-lead the firm's Workplace Safety and Catastrophe Management Practice Group. Laurel Cornell, a partner in Fisher Phillips' Louisville office, has been tapped to co-lead the firm's Health Care Industry Team.

Dinsmore & Shohl is strengthening its public finance offerings in Louisville with the addition of partner **Mark S. Franklin**. Franklin has practiced more than 10 years as bond counsel, issuer's counsel, borrower's counsel, underwriter's counsel and lender's counsel. His work has spanned public utilities to arena finance to nonprofit educational institutions. Franklin received his J.D. from the University of Louisville Brandeis School of Law.

Dinsmore & Shohl ranks among the top U.S. law firms for its percentage of black attorneys, according to the newly released *Black Student's Guide to Law Schools & Firms*. The report, published by nonprofit organization Lawyers of Color, is the first comprehensive listing of black attorney percentages across nearly 400 firms. Lawyers of Color recognized firms with a black attorney percentage of 3.8 or more as "D&I Leaders." Dinsmore's percentage is 5.7, placing it at the 17th spot overall.

The American Diabetes Association (ADA) of Kentucky has elected **Demetrius Holloway** to its Community Leadership Board. Holloway is a partner of Stites & Harbison. A seasoned litigator with over 18 years of experience, Holloway represents employers in the defense of employment-based claims asserted under both Kentucky and federal law including, but not limited to, claims asserted under the ADA, ADEA, FMLA, Title VII and the Kentucky Civil Rights Act. His experience includes defending civil actions filed in both state and federal court, as well as defending against administrative actions before state and federal administrative agencies. He is the chair of the Louisville Bar Association's Labor & Employment Section.

Fund for the Arts has elected **Terry Wright** to its Board of Directors. He will serve a three-year term. Fund for the Arts is a regional nonprofit committed to building a vibrant community through the power of the arts. Wright is a partner of Stites & Harbison and chair of the Intellectual Property & Technology Service Group. His practice focuses on designing and implementing intellectual property protection strategies. As part of his practice, he routinely focuses on multiple areas of intellectual property protection, including trademark and copyright issues, licensing agreements, and patent-related aspects of intellectual property, such as patent drafting, patent prosecution and counseling clients on infringement, validity and patentability. ■

Are "Silent" Investors Now a Matter of Public Record?

Kentucky Court of Appeals Considers Key Issue of Public Access and Economic Development

Samuel W. Wardle & Thomas P. O'Brien III

On May 17, 2019, the Kentucky Court of Appeals issued a significant ruling on public access to information and economic development in the Commonwealth, *Com. of Kentucky, Cabinet for Economic Dev't v. The Courier-Journal, Inc.*, 2018-CA-001131. The court affirmed Franklin Circuit Court Judge Philip Shepherd's order requiring the Kentucky Cabinet for Economic Development to produce documents containing the names of shareholders in a private company that had received state economic-development incentives.

The appeal arose from a multi-million-dollar incentive package provided by the Commonwealth of Kentucky to Braidy Industries, Inc., meant to induce Braidy to build a high-tech aluminum mill in the eastern part of the state. The Braidy incentive package has received heavy media coverage, most recently due to news of a Russian company's commitment to invest $200 million in the mill. Although the circumstances and particular structure of the incentive package are complex, the Court of Appeals characterized them simply: "$15 million in public funds were used to purchase a 20 percent ownership stake in a private company."

The central issue in the appeal is whether the Kentucky Open Records Act mandates the public disclosure of documents identifying "silent" shareholders in a company that receives public economic-development incentives. Specifically, after the state incentives to Braidy were announced, the Kentucky Cabinet for Economic Development (KCED) fielded requests for public records relating to the incentive package. Among those was a request from the Louisville *Courier-Journal* for documents identifying Braidy's non-public shareholders.

The KCED declined to produce records identifying Braidy's non-public private investors, contending that such information is exempt from disclosure under the privacy and confidentiality exceptions to production set forth in KRS 61.878(1)(a) & (c).1. The *Courier-Journal* disagreed and challenged the KCED in court.

The business confidentiality exceptions frequently present difficult interpretive questions for the Kentucky Attorney General (who has the statutory first crack at Open Records Act disputes) and the courts. Many different state agencies and quasi-public entities in Kentucky administer various forms of grants, incentives and tax credits that are given to private companies to foster and encourage economic growth. Although the procedures and requirements differ by agency and incentive, as a general rule, the recipient companies are required to turn over detailed and often-sensitive information to the administering agency to even be considered for an incentive.

Unsurprisingly, sensitive business information is a frequent target for requests under Kentucky's Open Records Act, from the media, concerned citizens and even competitors. And the agencies tasked with administering the incentives are often reticent to produce, contending that information provided to them in connection with a grant or incentive application is exempted from production under KRS 61.878(1)(a) & (c).1.

In a few seminal decisions, the Kentucky Supreme Court has affirmed that KRS 61.878(1)(a) & (c).1 exempt "confidential and proprietary" business information from production, but the courts' decisions leave many questions unanswered. On one end of the spectrum, obviously confidential financial information such as trade secrets, balance sheets and profit projections are clearly exempted from production in response to a public records request.

It becomes more difficult, however, when applied to broad categories of business information that do not neatly fit into the language employed by the courts and the Open Records Act, such as shareholder and director information, contracts, business plans and the like. Although these kinds of documents are not always obviously "confidential and proprietary" under Kentucky law, most businesses would prefer to keep them out of the public domain for competitive and privacy-related reasons.

The Braidy shareholder list is a prime example of one of these gray areas and presented an issue of first impression for the appellate courts. The KCED argued that such information is often closely guarded by companies, and its public disclosure would harm economic development efforts in the Commonwealth. The *Courier-Journal* argued, on the other hand, that there is a strong public interest in identifying those who benefit from public funds.

The Court of Appeals took the latter view, republishing and adopting the decision and rationale of the Kentucky Attorney General—who had reviewed the matter in an administrative proceeding before the Franklin Circuit Court ruled on it. The Attorney General reasoned the names of Braidy's shareholders are "unquestionably a matter of public interest," and that the shareholders' privacy interests "do not outweigh the public interest in disclosure." The Court of Appeals also affirmed the circuit court's finding that the KCED had "willfully" violated the Open Records Act, thus entitling the *Courier-Journal* to an award of prevailing-party attorneys' fees.

Notably, while conceding the absence of direct precedent on this issue, the Court of Appeals said that the imposition of fees was warranted because the KCED "had no legal basis for denying" the *Courier-Journal's* request for documents identifying Braidy's shareholders.

The Court of Appeals—like the Attorney General and Franklin Circuit Court—appears to have based its decision, at least in part, on the "extraordinary" circumstances of the incentives offered to Braidy. However, the court's reasoning will no doubt be used in the future to support requests for documents containing the names of shareholders in other companies that received more traditional incentives, such as grants, tax credits and the like. It remains to be seen how the courts will balance the public interest with investor privacy in such cases.

Meanwhile, the Braidy litigation has not gone unnoticed by the General Assembly. In the spring session, a House bill was introduced to amend the Open Records Act to clarify and tighten the "confidential and proprietary" exemptions, and to explicitly exempt shareholder names from Kentucky's definition of a "public record." After significant criticism in the media, the bill died in committee.

The KCED has publicly stated that it is reviewing the ruling and deliberating on whether to appeal it to the Kentucky Supreme Court. Simply put, for the foreseeable future, the confidentiality of shareholder information—at least when that information comes into the possession of a public entity—is an open question.

Samuel W. Wardle currently serves as vice-chair of the LBA's Litigation Section. Wardle is a senior associate in Frost Brown Todd's Louisville office, where he primarily practices litigation. A former newspaper reporter, Wardle has a particular interest in issues and disputes involving public records.

Thomas P. O'Brien III is a member of Frost Brown Todd. In a diversified practice, O'Brien practices in the firm's intellectual property and business litigation groups. ■

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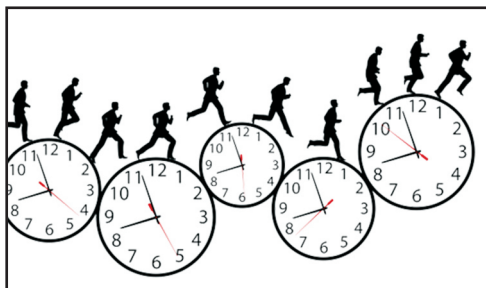

TIME IS NOT ALWAYS ON YOUR SIDE...
BUT WE ARE!

CLE season will be over soon and we have you covered.
See seminars on pages 11-14.