BARbriefs

Louisville Bar Association

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

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

Lauren Butz, Managing Editor
Kimberly E. Kasey, Graphic Designer

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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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The 2019
Bench & Bar Social

Food, fellowship and fun ruled the night at the annual Bench & Bar Social on January 31. See photos from this premier networking event on pages 12-13. Additional photos can be viewed at www.loubar.org.

About the Cover: This month's cover features a photo detail of the Thomas Jefferson monument that sits in front of Louisville Metro Hall. It was shot by Steven Rush, Chief Deputy for Community & Government Affairs in the Office of the Jefferson Circuit Court Clerk.

In this issue

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Past, Present and Future

Departing from my first columns relating personal and philosophical observations, I now address the "mother ship"—the Louisville Bar Association—what it has been, is presently, and needs to be in the future. I do so with two definitive questions. First, what do you, the LBA's members, expect and desire from the LBA; and just as importantly, what do your colleagues who are *not* LBA members desire that might be keeping them from current membership? Second, if we are not meeting the expectations of the Louisville Bar, how can we do so?

Let's start with some basic history. The LBA's roots can be traced to 1871 when local lawyers began meeting to advocate for legal reforms, leading to a state law guaranteeing that a witness could not be barred from testifying in court on the basis of color or race. By 1900, the LBA was officially founded and remains Kentucky's oldest continuously operating bar association.

Over the years, the LBA has played an important role in the civic life of both Louisville and the Commonwealth. Along with the Louisville Women's Club, it helped establish the Legal Aid Society in 1921. It helped secure passage of the Judicial Article in 1975, and another constitutional amendment establishing family courts in 2002. More recently, it has advocated for adequate funding by Congress of the Legal Services Corporation (parent organization of legal aid offices nationwide), adequate funding by the Kentucky General Assembly of the Kentucky Court of Justice, improved pay for prosecutors and public defenders and increased funding for addiction treatment services to combat the opioid epidemic.

Turning to present activities, the LBA busily pursues its mission of promoting justice, professional excellence and respect for the law; improving public understanding of the legal system; facilitating access to legal services; and serving members of the association. In rapid fire summary, it:

- Promotes professional development of attorneys through more than 100 continuing legal education programs yearly.
- Operates the Kentucky Lawyer Referral Service, which helps connect members of the public with attorneys equipped to handle their particular legal matters.
- Publishes 12 issues of *Bar Briefs* yearly along with the pictorial roster.
- Partners in Doctors & Lawyers for Kids a medical-legal partnership that helps low-income children and families overcome barriers to healthy living.
- Annually participates in and monetarily supports the Attorney Bowl, Ramble 5k, Lawlapalooza, Back to School Drive, Santa's Court Toy Drive, and Stuff a Truck charitable efforts
- Fosters the future of the legal profession through the Summer Law Institute and Summer Intern Program.
- Promotes diversity through the Black History Month program, Trailblazer Award, Hispanic Heritage Month celebration, and the newly established Gender Equality Committee.

The activities benefit the legal community and have a remarkable impact on the community at large. But are these substantive and significant good works the reason why an individual lawyer makes the decision to pay even a modest membership fee to join a voluntary bar association? I would postulate that while the LBA's myriad functions, projects and invaluable causes are the "engines" that give it purpose, the "gasoline" that fuels the "engine" and the "grease" that keeps it running smoothly are more disarmingly simple: pride in the profession, collegiality among our peers and the basic desire for human interaction with folks we appreciate—even when they are positioned as competitors or opponents in daily life.

Many years ago, as an associate at what was then Stites, McElwain & Fowler, I worked for a very skilled, but underappreciated trial lawyer named Lloyd Cardwell. Lloyd at times had the demeanor of a Marine drill sergeant—though his well-hidden soft heart often emerged in random acts of kindness. What really lit him into smiles was the annual LBA "winter cruise" which, I presume, lasted seven to ten days in the Caribbean. When he spoke about that cruise, it was clear that the opportunity to socialize on a day-to-day vacation with lawyers he might otherwise curse and connive to defeat during the rest of the year was a highlight in his life.

The annual dinner was once an impressive and fairly prestigious event. Sam Stallings in his interview for *Kentucky Lawyers Speak: Oral History from Those Who Lived It*, humorously recounted former President Harry Truman's dinner speech, complete with his question "where can a guy take a pee?" when he thought the microphone was dead. For many years the annual golf outing was a "must" event for a healthy cadre of the bar. The mid-winter cruise and the golf outing faded away, as did the annual dinner when the LBA board astutely recognized that post-dinner speeches and awards were drowned out in after dinner chatter. And under Susan Phillips' presidency, she wisely transformed the dinner into a smorgasbord and lengthy cocktail social.

Times changed and annual events faded away to be replaced by others, but the goal remained the same—to provide an open to all, shake hands, trade a brief story or two forum, usually over a drink—and to enjoy each other's company in a non-adversarial, stress-free venue. (As a side note, the Judicial Reception, primarily for the benefit of younger lawyers and the Awards Luncheon have been successful additions to the "gasoline" and "grease" aspects of bar membership.)

Personally I am a softball junkie, I've played nearly every year since I was six. Long before I had any active interest in the administrative/leadership functions of the LBA, the best evenings of my summer were spent on the OBT "LBA League" team. Long after my younger partners retired—and refused to mount a comeback—I found immense pleasure this past summer strapping on knee braces and returning to the field. I played (not too badly) with lawyers half my age, making new and rewarding friendships as the LBA team coasted to a perfect 0-7 season.

> ***[F]or all the community good that the LBA is committed to, and for all the conviviality universally felt by all who attend existing social events, the cold, hard facts are that the LBA has for several years seen a reduction in membership and a concomitant loss of revenue over expenses.***

Not to sound too much like a cruise ship's "yippy-skippy" program director, I'd love to see more and creative social events. Unlike Harry Truman, Presidents Clinton, Bush and Obama would be unlikely to accept our invitation to speak after a fancy dinner—but would you come if they did? What about an LBA members' bike outing that ends in a barbecue at a bucolic setting somewhere? How about a summer/fall concert with a Lawlapalooza band down by the river?

Now the splash of "cold water"—for all the community good that the LBA is committed to, and for all the conviviality universally felt by all who attend existing social events, the cold, hard facts are that the LBA has for several years seen a reduction in membership and a concomitant loss of revenue over expenses. Stated even more bluntly, we have been running in the red—reliant upon income from our endowments to make up for short-fall. That short-fall is not immense, but it's substantive and it grows yearly.

The officers and board of the LBA have anecdotally discussed this problem for several years. It's a fact that notwithstanding the excellence of the LBA's CLE, competition from multiple sources, including a plethora of internet webinars at extremely low prices, have presented quick and easy CLE from other sources. Lawyer referrals have probably suffered from increased media, billboard and bus advertising. Yet even more significantly, membership has slowly decreased. Do millennials find the above services, along with this publication, community service and collegiality not worth the fairly modest membership fee?

We will be vigorously examining this dilemma and accompanying questions over my term and that of President-Elect Peter Wayne. But we need your help. Obviously, since anyone who reads this is already a member, I am arguably preaching to the choir. But your input and the information we can share from colleagues who decline membership is vital to our understanding. Tell us what makes our bar association relevant. Are we spreading ourselves too thin—or are we not doing enough? Would member and non-member lawyers respond well to the "social" events loosely thrown out above? (Or any alternatives?) Would more "mentoring" programs be appreciated or would they be seen as an intrusion in an 8-10 hour day absorbed in work, e-mail, texts and Facebook? Is the need for and value of intermingling and camaraderie lost in the world of Facebook and tweets? And can we salvage and preserve some *real* facetime if it is? We want your feedback. Drop me (*tonerg@obtlaw.com)* or any office or board member an e-mail. You will be heard.

Sincerely,

Gerald R. Toner
LBA President

New Public Administrator Appointed

Chief District Judge Anne Haynie administered the oath of office to Scott Barton

Scott J. Barton was sworn in as Jefferson County Public Administrator on January 22. He was appointed to the four-year term by the Jefferson District Court Term and succeeds Chris Meinhart who had served in the position since 1999.

Prior to his appointment, Barton was in private practice as a criminal defense lawyer. He previously served as an Assistant Commonwealth's Attorney.

The Public Administrator acts as administrator of decedents' estates when no personal representative is available or if an executor is removed. The Public Administrator also handles oversight of financial settlements for minors. ■

Sen. Neal Receives Trailblazer Award

At ceremonies held on February 28, Sen. Gerald A. Neal, who represents the 33rd district in the Kentucky Senate, received the Justice William E. McAnulty Jr. Trailblazer Award. Named in memory of the first African American to sit on the Kentucky Supreme Court, the award honors those who have had a significant impact in improving racial and ethnic diversity in the legal profession.

Sen. Neal, a graduate of the University of Louisville School of Law, was elected to the Kentucky Senate in 1989, becoming the first African American male to serve in that body. Returned to Frankfort at every subsequent election, he is now the longest serving African American member of the Kentucky General Assembly. He served as Senate Democratic caucus chairman in 2015-2017.

A strong advocate for senior citizens, youth, minorities and the disadvantaged and a staunch supporter of education, economic development, healthcare and penal code reform, he sponsored legislation amending the Kentucky Constitution to remove segregation by race, prohibit racial profiling by law enforcement and prevent the execution of a person when evidence shows racial bias in prosecution. He was recently chosen as parliamentarian of the National Black Caucus of State Legislators.

Also recognized at the awards ceremonies were students in Central High School's Law & Government magnet program who were winners of an essay contest and Kaylee J. Raymer, a second-year student at the Brandeis School of Law who received a $1,000 scholarship from the LBA Diversity Committee.

The awards ceremonies followed the LBA's annual Black History Month program which featured a screening of the biopic *Marshall* about future U.S. Supreme Court justice Thurgood Marshall's involvement in a racially-charged criminal case early in his career as an NAACP lawyer. ■

ABA House of Delegates Report

Maria Fernandez

It was both my honor and privilege to represent the LBA as its delegate at the recent meeting of the ABA House of Delegates in Las Vegas. This year the ABA heard from numerous speakers, honored several individuals with Spirit of Excellence Awards, elected new officers and heard numerous resolutions on many different topics.

ABA President Bob Carlson spoke in defense of an independent judiciary and celebrated the profession's commitment to pro bono efforts citing the more than 1,400 pro bono events hosted by more than 700 bar associations and other organizations, from all 50 states, D.C., Puerto Rico, the U.S. Virgin Islands, Canada and Hong Kong. He also discussed one of his top priorities, lawyer wellness, and asked delegates to spread the word about the ABA Working Group to Advance Well-Being in the Legal Profession.

Some of the resolutions drew more discussion than others. For example, the House rejected a major change in the bar passage standard for U.S. law schools. The proposal would have required that that 75 percent of a law school's graduates pass the bar exam within two years. This resolution drew a great deal of discussion before being voted down.

One resolution that passed put the ABA on record as opposing laws that authorize teachers, principals or other non-security school personnel to possess a firearm in or nearby a pre-K through high school. The new policy also urges banning public funds for firearms training for teachers, principals or other non-security personnel or for firearm purchases for those individuals.

Another approved resolution, sponsored by the Young Lawyers Division, encourages federal, state, local, territorial and tribal legislatures and court systems, in conjunction with state and local bar associations, to support and assist with the establishment and maintenance of lactation areas in courthouses for members of the public, including lawyers, jurors, litigants, witnesses and observers.

The mid-year meeting also offered delegates the opportunity to attend meetings and CLE programming on such diverse topics as "Better to Be Rich & Guilty? How Implicit Socio-Economic Bias Influences Outcomes," "Maybe There's an App for that: New Legal Technologies" dealing with access to Justice, and "10 Ways to Change the World: ABA Public Interest Law and Pro Bono Opportunities."

In the last year, the ABA has made a concerted effort to reach out to more attorneys and provide more benefits to its members starting with its Wellness Challenge, one of President Carlson's priorities.

The next meeting will be the annual meeting in August 2019. As a local bar association, we are able to present resolutions of interest to our local bar association and community. Please let the LBA board know if there are issues that you feel should be addressed to the ABA on behalf of the LBA and its membership.

Maria Fernandez is the LBA's representative in the ABA House of Delegates and serves on the LBA Board of Directors. She is a partner at Fernandez, Haynes & Moloney. ■

Litigation Preparedness in the Age of E-Discovery

Part 1: Information Management and Data Preservation

Dr. Andy Cobb

The buck stops with in-house counsel when it comes to how litigation is handled. While many in-house counsel rely on outside counsel's expertise for certain areas of law, like complex litigation or litigation involving electronic discovery, in-house counsel should still have a general awareness of the issues involved. In this article, we'll review key areas important to the preparation and execution of litigation involving electronically stored information (ESI).

Information Management

Information management relates to how the data in your organization is stored, retained and purged. Data retention/destruction policies outline how this data should be handled to support business, legal and compliance requirements. Being prepared for handling litigation all starts with good policies related to the data that your organization stores

Technology, with all of its benefits, produces larger and larger amounts of data from daily activities. Knowing the different types of data your organization produces, who produces it and where the data is stored becomes critical when litigation hits or is on the horizon. The importance of a solid information management strategy cannot be understated as a key factor of litigation preparedness. Here are a few steps to take to help ensure you're ready:

- Identify what types of data your organization regularly produces—e-mails, text messages, documents, drawings, database records. The types of data produced are largely dependent upon the type of organization. While a real estate firm may store scores of contracts, disclosures and the like, a manufacturing plant will likely have complex technical plans, and lengthy inventory lists in a database.
- Determine the physical location(s) of the data. Do you have servers onsite, offsite or in the cloud? All of the above? Do data custodians have the freedom to store their documents at their discretion or does the organization mandate that files be stored a specific way?
- For each of these data types and locations, list the custodians of the data. Keep in mind that your information technology department may be the custodian for certain types of data, like centralized databases or file servers.
- Create a data map—Data mapping, a grid or database that tracks each custodians' data, allows one to see custodian data "at-a-glance." This can be invaluable when you get a data preservation request from opposing counsel on a Friday afternoon.
- Consider a data custodian hierarchy—i.e. identify key players frequently or reasonably likely to be involved in litigation. Again, this is highly dependent upon the industry. This list will be your short list that you will want to make sure to keep updated.

Data Retention Policies

Develop retention/destruction policies for the different types of data in your organization. Often there is a "push-and-pull" between business, legal and compliance needs. For example, tax documents may need to be retained for 7 years, but businesses must find a secure way to store and back-up this data. Information technology and legal departments, for different reasons, might be interested in retaining as little information as possible, while compliance departments are bound by minimum retention requirements. In-house counsel should consider policies for certain specific areas that may arise during litigation. A few common areas to consider are:

- Bring Your Own Device (BYOD) policies for mobile devices and laptops
- Cloud storage use, including remote access
- Social media use
- Centralized storage, like file servers, i.e. do individuals and departments have their own areas where they can store files?

Keep in mind that any data retention policy may need to be suspended when the duty to preserve the data arises. Which brings us to our next section, data preservation.

Data Preservation

When the duty to preserve arises from a "triggering event," custodians of the data must be notified via a litigation hold letter that deletion of relevant data must be suspended. What is relevant data? It's best to assume a broad definition—or over-preserve. Often preservation just means formal and written notice to the data custodian indicating "don't delete." The consequences of not preserving relevant data can be significant (read devastating) in litigation. Failure to preserve can result in sanctions and adverse-inference instructions to the jury. The steps below can help ensure your organizations' compliance in the event of litigation.

- Develop a standard litigation hold process, preferably with written acknowledgement by each custodian and periodic, preferably automated, reminders.
- Ensure that personnel and systems are capable of suspending automatic purging, preferably on a granular level, so the data of only certain custodians can be managed.

Recognize that particularly contentious matters require conscientious attention to detail. While proper preservation of data is critical in any legal matter, it is crucial in high stakes litigation. If data is not properly preserved the analysis and conclusions that follow can be called into question.

- Consider preserving the data by having it collected and held by a qualified third party forensic expert.
- New Federal Rules of Evidence, specifically FRE 902, requires that data, in order to be authenticated for litigation, must be collected in a way that is verified and by a qualified person, meaning a person capable of testifying before the court.
- Forensic experts ensure data is collected in a way that is verifiable and whose authenticity is accepted in court.

Information management policies should be clear and effectively communicated to the custodians, and should support streamlined data preservation, should the need arise. One of the main purposes of good information management policies and procedures is to help ensure data preservation happens properly to avoid the legal pitfalls if it is done improperly. In the second part of this series, I'll discuss searching and filtering documents as well as document review and production.

Dr. Andy Cobb currently serves as Partner at One Source Discovery, a local, full service eDiscovery firm. He developed the strict procedures used during forensic collections and analysis to ensure accuracy, verifiability and repeatability, and he is the creator of BlackBox, the patented remote forensic collection software tool. ■

Attorneys' Room Access Upgrade

The access control system for the Attorneys' Room (Room 255) at the Jefferson County Judicial Center was recently replaced. As a result, old cards used to unlock the door will no longer work. LBA members desiring an access card compatible with new system should contact the LBA at (502) 583-5314. There will be a one-time $10 charge to obtain a new card.

The Attorneys' Room—which has wireless internet, telephones, copy and fax machines—is a place for attorneys to relax, work or regroup between court appearances. Access to the room is an LBA member benefit. ■

Professor Rick Nowka on Why He Keeps Coming Back to the 'Puzzle' of Secured Transactions

Dean Colin Crawford

This month's column begins with a bittersweet bit of news. After 40 years on the faculty at the University of Louisville School of Law, Rick Nowka, Wyatt Tarrant & Combs Professor of Law, is embarking on a well-earned retirement this spring.

Like many of our current students, alums, staff and faculty, I am very sorry to be saying goodbye to Rick. In the short time I've worked with Rick, I've been impressed by not only his expertise—he, along with David Leibson, literally wrote the book on the Uniform Commercial Code of Kentucky—but by his collegiality and his dedication to his students. He is a strong institutional citizen and has over the years helped build upon the strong foundation of this School of Law. As I speak around town and the region and share the news of his retirement, I am constantly met by crestfallen looks or surprised reactions. The generations of students he has taught could not have greater respect or affection for him as an intellect and as a person.

I had the opportunity recently to talk with Rick about what is perhaps his signature course and certainly an area of expertise: Secured Transactions. Indeed, he is the author of Mastering Secured Transactions—UCC Article 9, now in its second edition.

"I've enjoyed everything I've taught, but I've always enjoyed teaching Secured Transactions because it is a puzzle and once you figure out how to do it, it works really well. It just takes a little effort to figure out," he says.

"There's always a right answer. It's not, 'What do you think the court will say?' No, it's statutory law—the Uniform Commercial Code. If you can figure out how to work in that statute, you're going to figure out exactly what you need to do in obtaining the result for your client that is in the client's best interest."

"I've enjoyed everything I've taught, but I've always enjoyed teaching Secured Transactions because it is a puzzle and once you figure out how to do it, it works really well."

Before he joined the faculty at Louisville Law, Rick's practice was commercial in nature. He was hired to teach commercial law and, over the years, taught several courses in the business and commercial areas, including Contracts I and II, Debtor-Creditor Law and Sales.

He lists several legendary Louisville Law faculty as his commercial law compatriots, including Jackie Kanovitz, Scott Thompson and David Leibson.

When it comes to Secured Transactions, Rick says he has a ritual of sorts with his students:

"It's a bar course. I always have a student interest poll in my classes: 'Who's taking this because they think they will or want to work in the area of finance?' (A couple) 'Who's taking this because it's a bar course?' (The large majority).

"But I always tell them, 'Listen, I think you're going to really like the course … I'm kind of a UCC nut because I enjoy it a lot—but I'm not alone. I've had students say, 'I never thought I would enjoy this at all but it's challenging.' "It's challenging"—Rick adds—"because you can figure it out. You don't have to guess at what will happen."

Rick's dedication to his students is evident and admirable—he has been awarded the Distinguished University Teacher Award from the University of Louisville and has twice been recognized for excellence in teaching by the Law Alumni Council.

Rick has requested to stay out of the spotlight as he approaches retirement, and I will respect his wishes by not gushing too much further here. But I feel confident in stating that Rick Nowka's influence will be felt among the Louisville legal community for years to come, and I thank him for his service and dedication. We hope he will not be a stranger to the School of Law community—and I know I am not alone in that sentiment.

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. ■

Where Are They Now?

Editor's note: This is another in a series of features looking back at how an LBA member's professional development was influenced by early involvement in bar association activities.

Hon. Sara Michael Nicholson

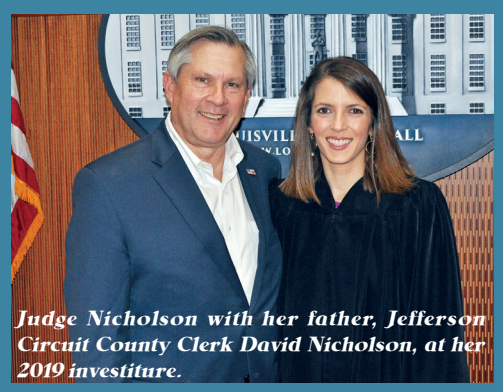

2006

In the summer of 2006, Sara Nicholson, then a rising senior at Sacred Heart Academy, was starting to think about her future. Contemplating a legal career, she applied and was accepted for participation in the Summer Law Institute, a weeklong residential "law camp" for high school students conducted by the LBA in partnership with the University of Louisville Brandeis School of Law and Bellarmine University. The experience solidified her decision to go to law school and launched her on the path to becoming a lawyer.

"I distinctly remember being influenced by the chaperones and hearing their stories about law school and practice," says Nicholson. "It was also my first time stepping foot in the law school and I was impressed with everything from the classrooms to the mock courtroom."

As a Brandeis School of Law student, Nicholson clerked in the Jefferson County Attorney's office. After gaining admission to the Kentucky bar, she briefly practiced real estate law before making a successful run for an open seat in Jefferson District Court in 2016. She was re-elected last November without opposition.

At the 2018 Summer Law Institute, Judge Nicholson welcomed to her courtroom a group of young participants and shared with them how, as a high school student, she had once stood in their shoes. She had come full circle — from aspiring lawyer to member of the judiciary.


Judge Nicholson with her father, Jefferson Circuit County Clerk David Nicholson, at her 2019 investiture.

> *"I distinctly remember being influenced by the chaperones and hearing their stories about law school and practice."*

2019 SUMMER LAW INSTITUTE Applications Available

Applications are now being accepted for the LBA's annual Summer Law Institute, a seven day, residential program for high school students interested in the law. The 2019 camp, scheduled for Sunday, June 16 through Saturday, June 22, is a partnership between the LBA, the Brandeis School of Law and Bellarmine University.

The application deadline is Wednesday, April 10 and application packets are available on the LBA website or by contacting Lea Hardwick, *lhardwick@loubar.org*. Tuition is $225 and a limited number of scholarships are available. SLI is funded by the Louisville Bar Foundation. ■

The Tax Man Cometh:

When Low-Income and Working Families Need Tax Attorneys to Preserve Crucial Tax Credits

Nicholas D. Maraman

When people think of tax attorneys, they probably do not think of tax attorneys who work with low-income or working families. But low-income and working families need tax attorneys just as much as middle-income and wealthy families. They especially need them when they have to prove to the Internal Revenue Service that they are entitled to crucial tax credits that can help lift their families out of poverty.

The Legal Aid Society has been a federally designated Low Income Taxpayer Clinic (LITC) since 2000. The IRS funds LITC in 49 states and the District of Columbia through its independent agency, the Taxpayer Advocate Service. These clinics are housed primarily at law schools and legal aid organizations, and employ tax attorneys and CPAs who represent low-income taxpayers with IRS disputes.

As LITC practitioners, one of the most common issues we see with low-income taxpayers involves examinations, or audits, of tax returns. In recent years, the IRS has made audits of low-income taxpayers a priority—and in doing so, the IRS will often "freeze" or keep tax refunds until low-income taxpayers prove they are entitled to the credits with supporting documentation.

The Earned Income Tax Credit (EITC) is run through the IRS. This credit increases the more a taxpayer earns, thus encouraging and rewarding work. For tax year 2017, more than 28 million American households claimed the EITC. The EITC is a refundable credit, meaning that a taxpayer can claim the credit and receive money back even if they have no tax liability. For 2018, a taxpayer with three children claiming Head of Household status can receive up to $6,341.

However, because a number of tax return preparers and fraudsters claim the EITC in error, the audit rate for those claiming the credit is quite high, especially when children are claimed. The investigative news website ProPublica recently reported that a household claiming the EITC is more than twice as likely to face an audit by the IRS as a household that makes between $200,000 and $500,000 annually.

The success rate for taxpayers for these types of audits at the administrative level can be very low. The IRS requires taxpayers to send in school records; day care records; records from a healthcare provider, a social service agency, a church, or a landlord—anything and nearly everything that would prove the children they claimed on their return actually lived with them and that the taxpayer provided more than half their financial support. When a taxpayer loses an audit, their only remedy is to petition the United States Tax Court, and many taxpayers are bewildered by the prospect of filing a *pro se* petition in federal court.

For example, "Ms. Davis" came to the Legal Aid Society after the IRS ruled against her in an audit and kept the $4,000 refund that she anticipated receiving. A 48-year-old grandmother, Ms. Davis loved spending time with her grandchildren. When Ms. Davis's daughter could no longer care for her daughter, the granddaughter moved into Ms. Davis's home. As allowed under the Internal Revenue Code, Ms. Davis claimed the child on her tax return and was set to receive favorable tax treatment, including Head of Household status, the dependent exemption, the Child Tax Credit, and the EITC.

Ms. Davis worked hard, but her $1,100 monthly income could barely cover all her expenses. She relied on her large tax refund each year to catch up on bills, buy clothes for her grandchild, and set some money aside for a rainy day.

Ms. Davis attempted to send in documents proving that she could claim her grandchild on her return, but the documentation she provided was not enough for the IRS. A Legal Aid Society tax attorney filed a petition on her behalf in Tax Court. After advocacy from the Legal Aid Society LITC, the IRS fully conceded the case in Ms. Davis's favor. She was allowed to claim her granddaughter, and she finally received the $4,000 refund. Without Legal Aid, Ms. Davis may have simply given up and waived her opportunity for the refund.

If you have a low-income client who needs assistance with a tax matter—or if you would like to volunteer to take on a tax case *pro bono*—please contact the Legal Aid Society Low Income Taxpayer Clinic at (502) 584-1254.

Nick Maraman is the Senior Attorney in the Economic Stability Unit at the Legal Aid Society. To contact him, call (502) 614-3190 or e-mail nmaraman@laslou.org. ■

Courts in Qatar

Impressions from a Judicial Visit to the Middle East

Judge Angela McCormick Bisig

Many attorneys I know like to travel. I am one of them. Regrettably, it isn't often possible to have access to another country's justice system on vacation. Most of us in the legal community would jump at the chance to meet our counterparts and observe court proceedings abroad. For me, this kind of opportunity is as exhilarating as most would find a day at the beach. This is precisely why I seek out legal exchanges via the World Affairs Councils, USAID, Fulbright and other international organizations.

I had the occasion to discover the country of Qatar (Saudi Arabia to the west, and maritime borders with Iran and Bahrain) a few months ago. Qatar is a small nation of 2,600,000 and home to the U.S.'s largest airbase in the Middle East. To say that it "out punches its weight" in the region is an understatement. Qatar supplies 30 percent of the world's supply of liquid natural gas. It had the swagger to pitch and win a bid to host the 2022 FIFA World Cup Soccer championships.

I traveled to Qatar as a part of a fact-finding delegation of the World Affairs Councils of America along with 13 professionals from the U.S. We were guests of the Qatari Embassy in D.C., and two of its members served as our hosts. Further, due to my role in the judicial branch of government, I requested meetings with the Justice Ministry and a visit to the Qatari Courts.

Upon landing in Qatar's capital, Doha, my senses were heightened. My husband and I had done some research on the U.S. Dept. of State Travel Advisories website. They have a convenient color-coded map with designations such as white "Normal Precaution," yellow "Exercise Increased Caution" or orange "Reconsider Travel." The worst being the dreaded red "Do Not Travel" designation. At the time of my trip, Qatar was "good to go," but it was a small speck of white in a sea of red. I had never been to the Middle East, and my spirits were cloaked in a healthy anticipation of the unknown. I was alert and ready to make mental note of the details I found different about this place.

My first observations were a slight haze in the air and a monochromatic feel to the landscape. The air had a veneer of sand that gave everything a thin beige veil as we drove along the waterfront to the hotel. The women dress in all-black robes and head scarves; the men in all-white robes and head scarves secured with a black braid. Qatar's government is ruled by an Amir—the Al Thani family—and each ruler is designated by bloodline, father to son. As a result, the next major difference I noted was a drawing of the face of the current Amir, Sheikh Tamim bin Al Thani, on buildings, hotels and cars.

In the city of Doha, there are stone-looking, round, domed temple structures, mixed with modern sky scrapers and cutting-edge architecture. There are many cars in the street but a near absence of pedestrian traffic in the central region near our hotel.

The Amir's image was ubiquitous. At first, I thought perhaps there was some national law requiring the display of his highness' likeness in public spaces. I quickly learned that Qatar is currently (and for the past 200 days) subjected to a blockade by its neighbors. Lead by Saudi Arabia, Qatar's land border is closed to commerce and travel, rendering it a virtual island in the Persian Gulf. In Qatar, this blockade is a BIG DEAL. With commercial routes and trade partnerships thwarted, they had to quickly react and reorganize their economy to acquire simple staples like milk and vegetables. The Qatari leadership jumped to the challenge and established routes by sea and air and are moving at warp speed to make their economy more accessible to the world.

The Amir's omnipresent image was, in fact, a symbol of national pride for the citizens. Much like the flag posted on cars and buildings in the U.S. after the attack of 9/11, the Qatari citizens posted his image as a way of saying "Qatari Strong" in defiance of the blockade. The strategic thinking and planning by the leaders of government institutions we met on our trip were striking. In fact, if people ask me the most prominent "take away" from this mission, it is how impressed I was with the perpetual forward-thinking and future-planning psyche of this nation. Qatari citizens are wealthy because of oil resources, but rather than rest easy with this wealth, they are determined to plan and build for a future when the resources are exhausted.

I met via an interpreter with Dr. Osama Atout with the Qatar Ministry of Justice. He was a polite and friendly man who seemed eager to share information about his country's justice system. We struggled some in our communication because the legal concepts were not readily conducive to translation. For the nuts and bolts, Qatar adopted its first Constitution in 2005. The Constitution established a judicial branch of government as well as a new criminal code. There are three types of courts. These include a civil court for disputes between Qatari companies, the Qatari Financial Center Courts (for foreign corporations doing business in Qatar), and criminal/family courts. Judges are designated by the Prime Minister and are to be independent.

In the criminal courts, there is a mix of laws based upon the 2005 code and Shari'a law. The family courts are governed exclusively by Shari'a law. No women can be judges or attorneys in the criminal law courts. The complete absence of women in the criminal process is shocking. Lower level offenses are presided over by a single judge, while more serious offenses are decided by a three-judge panel. The application of what Dr. Atout described as a "morality" and Shari'a law are only to Muslim residents. Foreigners' cases are decided with the code.

In the civil law arena, Qatar is making great strides. The Financial Center has adopted a legal framework to attract foreign companies based upon British Common Law. They recruit highly-qualified retired judges (including women) from Europe to hear cases. I met with Registrar Christopher Grout who served a role we would view as a magistrate judge in the financial courts. He was highly intelligent and qualified. He explained the process and his job of handling pretrials and discovery issues. The courtrooms were like our own, except for a sound proof booth for interpreters to sit and simultaneously interpret many languages for participants.

While my head reeled at some of the information and my mind craned to absorb the contrasts, I fell into an easy conversation with Registrar Grout. As we both handle large complex civil litigation in our work, we shared a laugh about the difficulties of resolving large-scale corporate discovery disputes. We talked about the challenges in ordering information from parent companies outside of the scope of the jurisdiction where the litigation is filed. We walked through the courtroom together and discussed what we do and how we try hard to get it right. We also discussed our mutual respect for a strong legal system to give public confidence in government.

I start any voyage to a new country determined to notice the differences and report back to colleagues at home. It's interesting that by the end, I am generally touched by the things I learn we have in common. Mr. Grout and I shared the same headaches in our work and the same goal in wanting to be part of a fair process. Fatima, our Qatari Embassy liaison, shared pictures from a recent family wedding on her phone with me, and we ooohed and ahhhed about the dresses. The reporters at the Al Jazeera news network were worried about independence and impartiality. The Ministry of Education representatives wanted access to books and libraries for their students. These are all themes and ideas we know well from our own home.

By the end of the mission, I had an appreciation for the complicated conflicts in the Middle East and how they affect our diplomacy in the area. Our contacts in Qatar were keen for us to understand their position about the unfairness and illegality of the Saudi Arabian blockade. The murder of journalist Jamal Khashoggi dominated the media during our visit. Leaders pointed to it as evidence of rogue tendencies of Saudi leadership.

Our pre-trip briefing touted Qatar as America's strongest ally in the region, and they worked hard to highlight our mutual values. I noted significant efforts towards an independent and fair judicial process, with much additional work to be done in the criminal/family arena. Finally, as I digest all these observations, my overarching lesson remains—we all have so much in common. People of very different backgrounds and cultures all want a fair and impartial system of resolving disputes. We can all be glad to be a part of that process.

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

LBA Speaks

In 2018, the LBA in partnership with Jim Ray Consulting Services, launched LBA Speaks, a new video-based CLE program.

LBA Speaks features attorneys discussing legal topics in an interview format with Executive Director Scott Furkin. The interviews are then uploaded to the LBA's on-demand CLE library for viewing by other attorneys, increasing the likelihood of case referrals for the presenting attorneys.

For a one-time fee, presenting attorneys can position themselves as subject matter authorities in their practice areas and receive a high-quality digital copy of their interview to use for marketing purposes. Audio/video portions of the interview can be added to websites, blogs and social media channels or even uploaded to online attorney profiles such as AVVO (this can boost AVVO ratings). For more information or to book an interview spot, contact Lisa Anspach by e-mail at lanspach@loubar.org or call (502) 583-5314.

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.

Lies, Damn Lies & Legal Marketing: The Ethics of Legal Marketing

Wednesday, March 6 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit

What is effective advertising in other fields is rarely acceptable in the field of law. In this entertaining ethics course, Sean Carter examines in detail the ethical rules concerning marketing and their practical implications. The program also covers common advertising strategies employed by attorneys, and the pitfalls many attorneys will encounter.

IfYou Can't Say Something Nice, Shut Up!: The Ethycal Imperative for Civility

Tuesday, March 12 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit

As children, we were all taught, "If you can't say something nice, then don't say anything at all." Well, that advice holds especially true for lawyers. Whether in open court, a deposition, or contract negotiation, lawyers who choose to "go low," run a high risk of bar discipline. Increasingly, disciplinary authorities are treating the once aspirational goal of civility as a mandate. Therefore, it's important for all lawyers to be reminded of their obligation to "play nice."

Don't Try This At Home: Why You Should Never Emulate TV Lawyers

Tuesday, March 19 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit

Lawyers on our favorite legal dramas—Boston Legal, The Practice, L.A. Law—often act in ways that would cause significant trouble for actual lawyers. In this multimedia presentation, legal humorist Sean Carter demonstrates some of the worst of TV lawyer behavior and explains how similar (although less severe) behavior sometimes creeps into the actual practice of law, decreasing a lawyer's ability to best serve his or her clients and uphold the ideals of the profession.

Legal Ethics Is No Laughing Matter: What Lawyer Jokes Say About Our Ethical Foibles

Tuesday, March 26 | 1:00 p.m. - 2:00 p.m. | 1.0 CLE Ethics Credit

In this one-of-a-kind ethics presentation, Mr. Carter explores the topic of lawyer jokes, whether they have any basis in fact and what they say about our adherence to the rules of professional conduct. He does so through the use of video clips dramatizing these jokes. He also will use audience polling and questions from attendees to spread the "laughter."

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 at: www.loubar.org/online-cle/

LBA IN PARTNERSHIP WITH JCUP

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

Thursday, March 14

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 newly installed digital technology in Jefferson Circuit Court, Division 1.

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

Speaker: **Patrick W. Michael**, Dinsmore & Shohl

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*

**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, and KY Wealth Management Conference, are different. Please visit our CLE Calendar at www.loubar.org for details.

28TH ANNUAL ALAN T. SLYN AND HON. RICHARD A. REVELL DOMESTIC RELATIONS UPDATE

Friday, March 22

Please join the LBA's Family Law Section for its 28th Annual Alan T. Slyn and Hon. Richard A. Revell Domestic Relations Update. We are pleased to welcome back guest speakers Diana L. Skaggs and Elizabeth M. Howell. They will address decisions that the Kentucky Supreme Court and the Kentucky Court of Appeals handed down during the 2018 calendar year, thereby bringing the practitioner up-to-date on the current state of Kentucky domestic relations law. A panel discussion will follow the presentations, as time permits.

Lunch will be included with advanced registration. Please indicate if a vegetarian option is needed.

Speakers: **Elizabeth M. Howell** and **Diana L. Skaggs** of Diana L. Skaggs + Partners, 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 / $180 Non-members
Add On: $15 for printed handouts (electronic is included with registration fee) Lunch included; please indicate vegetarian option
Credits: 2.0 CLE Hours – *Approved*

LBA ETHICS BROWN BAG

Annual Spring Ethics Program: 2019 Developments in Professional Responsibility

Wednesday, May 1

In this two-hour presentation, Professor Giesel will discuss recent developments in professional responsibility, focusing on recent ABA opinions, recent changes to the Kentucky Rules of Professional Conduct, and several recent national cases raising interesting ethics issues.

Speaker: **Professor Grace M. Giesel**, University of Louisville Louis D. Brandies School of Law

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

This CLE program hosted by The Louisville Bar Association in partnership with the University of Louisville Brandeis School of Law.

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 / $180 Non-members
Add On: $15 for printed handouts (electronic is included with registration fee) Lunch included; please indicate vegetarian option
Credits: 2.0 CLE Ethics Hours – *Approved*

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22ND ANNUAL AAML/LBA FAMILY LAW SEMINAR

APRIL 25 - 26, 2019

"We're Not Kidding Around"

The seminar is open to all interested individuals, but members of the legal community who practice family law are especially encouraged to attend.

SPEAKERS

You won't want to miss these national speakers: **Lynn P. Burleson**, Raleigh, NC; **Donald G. Tye**, Boston, MA; **Peter M. Walzer**, Woodland Hills, CA; and more! Not to mention many experienced local speakers and the always popular Judicial Panel!

TOPICS

Will include (but not be limited to): Child Custody Issues, Family Law Arbitration, Bias: The Enemy of Persuasion, Parental Alienation, Presumption of Custoday, and more! Agenda available online: www.loubar.org (subject to change without notice).

REGISTRATION

Sign up prior to March 28 and receive a discount! Early-birds: $540 for LBA and/or AAML members; $660 for non-members
After March 28: $735 for LBA and/or AAML members; $810 for non-members. Registration fee includes: electronic download of handouts (paper option available for additional cost), two continental breakfasts, two working lunches & networking opportunities. Cancellation Policy: All cancellations must be received by the LBA by April 22, 2019 to receive a refund or credit. Cancellations after April 22, 2019 will require full payment. Substitutions will be allowed.

Register now – space fills up quickly!
Call the LBA CLE Department (502) 583-5314, email lanspach@loubar.org, or visit www.loubar.org

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Bench & Bar Social
















The Louisville legal community came out in force for the Bench & Bar Social on January 31. The newly renovated Kentucky International Convention Center was the perfect venue for an evening of food, fellowship and fun. Drawing for raffle prizes added to the festivities and helped raise funds for the Louisville Bar Foundation.

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GRAND PRIZE
"Alluring Asheville"
Congrats Greg Haynes!

SECOND PRIZE
"A Foodie's Fantasy"
Congrats Maria Fernandez!

THIRD PRIZE
"Wildcats Ultimate Fan Package"
Congrats Laura Rothstein!

The Status of Kentucky's Right-To-Work Law

Thomas Birchfield

A bitterly divided Kentucky Supreme Court upheld the state's right-to-work law by a 4-3 vote last November ensuring Kentucky's status as one of 27 states to have such a law. The law originally went into effect in January 2017, but unions fought hard to resist accepting the reality of right-to-work and were hoping that this litigation would overturn the law. With the legal challenges denied, it is appropriate to review the law, the challenges to it and its potential impact on Kentucky employers.

Defining Right-To-Work

Before analyzing the litigation, let's review the law. A right-to-work law makes it unlawful to require a worker to be or become a union member, or to pay union dues, as a condition of initial or continued employment. The name derives from the concept that employees should be allowed to work without having to contribute money to organizations or causes that they do not support.

Union advocates argue that employees working in unionized organizations should share the cost of union representation. Right-to-work laws do not prevent anyone from joining or supporting unions; they prohibit requiring them to do so. That means that companies and unions can no longer negotiate what is known as a "union shop" provision in to a collective bargaining agreement that requires union membership for an employee to keep their job.

Unions now have to persuade employees that joining the union is in their best interest without threatening their jobs in the process. It is also true, however, that as the exclusive bargaining representative for all employees in a particular bargaining unit, the union has a legal obligation to fairly represent all employees, regardless of whether or not they belong to the union.

Brief History of Right-To-Work

In 1935, unions received greater political protection when President Franklin Roosevelt signed into law the National Labor Relations Act (NLRA). According to Roosevelt, the Act protected "the right of self-organization of employees in industry for the purposes of collective bargaining." Section 8(a)(3) of the Act specifically states in pertinent part, "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement …"

Thus, while imposing a duty on employers to engage in collective bargaining with unions, it also imposed a duty on workers to pay those negotiating unions under union security agreements that unions negotiated as part of the labor agreements they reached with employers. These agreements became known as "union shop" agreements.

By 1947, however, some members of Congress proposed changes to the pro-union structure of the NLRA and, over the veto of President Harry Truman, passed the Taft-Hartley Act. That Act amended parts of the NLRA, such as subjecting labor unions to claims of unfair practices and only allowing union shops in the absence of state law to the contrary. Specifically, Section 164 of the Taft-Hartley Act established the foundation for right-to-work laws by allowing states to prohibit union security agreements, or compulsory union membership.

Section 164(b) of the Act specifically states, "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." In other words, it would be unlawful for a union and company to negotiate a union shop provision in a state that prohibits such agreements.

Within a year of the Taft-Hartley Act's passage, 12 states, primarily in the Southeast, passed right-to-work laws. Several more followed suit throughout the 1950s. Things gradually began to change in the 1990s and early 2000s, with a few more states adopting such laws. By 2012, Indiana became the 23rd right-to-work state in the country, and started the recent flurry of right-to-work legislation. Following in its footsteps, Michigan, Wisconsin and West Virginia enacted such laws in the next several years.

> ***Labor agreements entered before January 9, 2017 are not impacted by the law, but it applies to extensions and renewals of such contracts made after that date.***

Kentucky Passes Right-To-Work Law

On January 9, 2017, Kentucky became the 27th state to put right-to-work into effect. (Another Midwestern state passed a right-to-work law later in 2017 when Missouri's state legislature took action, but state voters rejected the law in a 2018 referendum election and wiped it off the books.)

Like other laws of its kind, Kentucky's right-to-work law prohibits any employer (public or private) from compelling a person to join or remain a union member as a condition of being hired or remaining employed. It also prohibits requiring any employee to pay dues, fees, assessments or similar charges to a labor organization, and prohibits requiring any employee to make payments to charities in lieu of payments to labor organizations.

Kentucky's law has a few special provisions that apply only to public sector employees. For example, it prohibits deducting dues and similar payments from public sector employees' pay without written consent, and allows them to easily withdraw consent. It also prohibits public sector employees from engaging in strikes or other work stoppages (private sector employees remain free to do so).

Labor agreements entered before January 9, 2017 are not impacted by the law, but it applies to extensions and renewals of such contracts made after that date. The law prohibits local governments from enacting inconsistent legislation. This means cities, counties or other municipalities can not pass their own measures contradicting right-to-work.

Governor Matt Bevin has credited the new law as being instrumental in the state's economic recovery. "With $13.5 billion invested in the Commonwealth since the passage of HB 1 in 2017 and business increasing by 40 percent this year, we are already reaping the benefits of this transformative legislation," said the governor last year. The Kentucky Chamber of Commerce says the law has resulted in a record number of commitments to economic developments over the past two years. Passage of a right-to-work law has been a Chamber priority for decades.

Supreme Court Rejected Union Challenge to the Law

Unions never agreed with these rosy economic assessments, however, claiming that right-to-work harmed their membership and their organizations. Unions maintain that right-to-work undermines collective bargaining (by creating a class of "free-riders" who benefit from the union's efforts while not sharing the cost), and ultimately drives down wages for all.

As a result, shortly after Kentucky's law went into effect, union members Fred Zuckerman (Teamsters Local 89) and William Londrigan (Kentucky State AFL-CIO) challenged the new law with the argument that it violated several state constitutional provisions. A lower state court tossed the lawsuit in September 2017, but the state Supreme Court agreed to hear the challenge without review by the state Court of Appeals. After more than a year of briefing and legal argument, the court ruled 4-3 in favor of the law on November 15, 2018.

Writing for the majority, Justice Laurance VanMeter pushed aside the union advocates' four main arguments:

- First, unions argued that the law violates the equal protections put into place by the state constitution. However, the majority said that the state had sufficient justification for passing the law—that is, shoring up the state's economy, attracting new employers and new jobs and increasing overall business—and that satisfies the constitutional test. The majority reasoned that the federal Taft-Hartley Act expressly permits states to pass right-to-work laws, which means that the court would examine the state's justifications with the lightest level of scrutiny.
- Second, the court dismissed the contention that the law was "special" legislation that had been outlawed by a 19th century revision to the state constitution. The court disagreed with the premise that the legislation singled out a certain class for harsher treatment than others. The majority stated, "The act applies to all collective bargaining agreements entered into on or after January 9, 2017, with the exception of certain employees covered or exempted by federal law. With the exceptions required by federal law, it applies to all employers and all employees, both public and private."
- Third, the unions argued that they would be forced to represent nonmembers without compensation, which violated the Constitution's "takings" clause. The Supreme Court disagreed, noting that the unions would still be compensated by being designated as the exclusive representative of whatever bargaining unit they represented and they would be acting on behalf of all of the workers in that unit. The majority pointed out that this gave unions a "tremendous" amount of power over the wages, benefits and working conditions of their membership, casting doubt on any "takings" challenge.
- Fourth, the unions contended that the labeling of the law as an "emergency" act was not proper. (An emergency act is permitted it to take effect immediately, by-

passing the traditional 90 days before implementation.) Again, the Supreme Court knocked aside the challenge because the state provided all the justification necessary to warrant the "emergency" designation and survived the challenge. The justification was that the new law would attract new business and investment.

What Can Kentucky Employers Expect?

Since the law has passed challenges, it is time for Kentucky employers to be fully compliant. If you are either negotiating or are about to negotiate a union contract, be sure that the final agreement does not violate the right-to-work law. This applies to existing contracts that are being renewed, renegotiated or extended. If your current union contracts include mandatory union membership and dues payment, you must remove that language when the contract is renegotiated.

While the "union shop" is now prohibited, it is still permissible for a union and employer to agree to a labor contract that contains a dues check-off provision. Such provisions require an employer to withhold union dues from an employee's paycheck and transmit them to the union. The only prerequisite is that the employee must voluntarily sign a dues check-off card authorizing the employer to withhold union dues. The dues authorization card, to be legal, must be irrevocable for no more than one year. In other words, employees must be afforded the opportunity to at least annually revoke the authorization.

It is important for employees to be informed about their rights to revoke their written authorization cards at least annually. If employees don't revoke the written dues authorization, the employer may still have a legal obligation to withhold dues from employees' paychecks and send them to the union. This may be contrary to the actual wishes of the employee to not belong to the union, so it is important that employees be informed of their rights in this regard.

Conclusion

Right-to-work elicits passions on both sides of the argument. The business community touts its benefits for economic development and the protection of employee free choice about what which organizations they choose to belong to. Organized labor, on the other hand, disputes its impact on economic development and complains about the unfairness of having to represent employees in collective bargaining who do not financially support the union. Despite these countervailing concerns, right-to-work is the law and must be followed, at least until the Kentucky legislature has a change of heart.

Thomas Birchfield, managing partner of the Fisher Phillips Louisville office, has represented employers exclusively for over 25 years in federal and state courts and before various administrative agencies throughout the nation. ■

Keeping Up with the Neighbors: Tracking Bills and New Laws from Other States

Kurt X. Metzmeier

With the 2019 session of the Kentucky General Assembly well under way, there has been a lot of energy about some issues that may not be taken up this year but are not going away. Medical marijuana, promotion of hemp agriculture in the wake of federal deregulation, criminal justice reform, gaming as a source of new tax revenue—these are issues that that won't go away or get resolved in one session.

They are also being discussed in states across the nation—some states a few steps ahead of Kentucky and others with innovative ideas being offered this year. Lawyers with clients in these areas might want to follow these bills and keep ahead of legislative ideas that can be imported to Kentucky. In earlier columns I've discussed how to track Kentucky bills; here I apply those lessons to the other 49 states, checking in on what Louis Brandeis called the "laboratories of democracy."

Lexis and Westlaw

For lawyers with access, Lexis and Westlaw have powerful tools for searching and tracking proposed and recently enacted legislation in all 50 states and the District of Columbia. There is a caveat: for every state these services may employ different third-party contractors to gather information, and this, along with differences in state legislative methods and calendars, mean that a certain unevenness is hidden behind Lexis and Westlaw's smooth interfaces.

The "select sources and search" method is required. Avoid the main search bar on the homepage. For Lexis this means that starting from the homepage, researchers should pick the Statutes & Legislation category. From there, choose Advanced Search and limit the search to Bill Tracking. After running the search, look at the left panel which allows for refining the search. You can click on individual states or use the date-range slide to tweak the timeframe (I suggest setting it to 12 months).

If you are a Westlaw subscriber, from the home page click Proposed & Enacted Legislation. The next step is important. Westlaw remembers the last jurisdiction you searched so you'll need to adjust this. On the top search bar, look at the jurisdiction. Click it and uncheck the box for every jurisdiction except All States. Run your search. From the results page you can set the date to the last 12 months.

Researching State Legislative Websites

If you want to dig deeper into a state's lawmaking activities, you can go to that state's legislative information website. The best way to find it is to Google "[state name] legislature." All states have such pages and while they are very different in design, they all try to provide their citizens information on the legislative process—with their highest mission being current and accurate about the laws being considered by the legislative session underway, upcoming or immediately concluded.

Before diving in, researchers should look around the site to find legislative guides and other educational documents—even videos—explaining the legislative process. Taking a little time here will save time later researching and analyzing what you find. These documents are the state legislature's opportunity to explain their institution to everyone from school children to reporters to lawyers, so these guides and tools are often well-designed, clearly written and very helpful to researchers.

Among the things to look for: the session calendar (when does lawmaking start and more importantly when does the legislature adjourn and the bills finally die), the legislative rules (both the basic how-a-bill-becomes-a-law-chart and the more detailed official rule book), and perhaps a glossary of the state-specific legislative jargon.

Next, find the search interface for the current session. This will likely be something specific to bill searching. On the Kentucky Legislative Research Commission website we have the Session Record to track legislation. (*https://apps.legislature.ky.gov/record/19rs/record.html*). Since you will likely be looking for a topic, rather than a known bill number, you will want to use a listing of subject headings (best) or a keyword search interface. I prefer tools like the Bill and Amendments Index Headings list on the LRC site; I'd suggest looking for something like it. (*https://apps.legislature.ky.gov/record/19rs/index_headings.html*). For example, legislation on marijuana is found under Drugs and Medicines; new hemp laws are found under Agriculture.

Other Tools Available at UofL

There are other databases available for any local attorney who walks into the UofL Law Library or the main or medical school libraries. If you have secured a parking place (this is the hard part) grab a seat and a WiFi guest account (*https://louisville.edu/it/departments/communications/wireless/wireless-access-for-guests*). Next go to the Uof Libraries website (http://library.louisville.edu) and find and click the All Databases A-Z link to find the databases I discuss below.

Go to "H" to find HeinOnline. This is a law library database, with many individual libraries of law reviews, state session laws, federal legislative histories and other documents. However, the best tool for this topic is the Subject Compilations of State Laws library. The Subject Complications database indexes law reviews, nongovernmental organizations and government reports to find multi-state references to state legislation. A single entry can send a researcher to citations to legislation in 50 states.

The UofL libraries also subscribe to journals that advise state governments and legislatures. Under "E" choose EBSCO Academic Search Complete to search current and older issues of *State Legislatures*, the monthly publication of the National Conference of State Legislatures (NCSL). To search just this journal, set one of the boxes to "search by ISSN" and type in 01470641.

Also under "E" is a related database, EBSCO MasterFILE Premier, which has another useful publication, *Capitol Ideas*, the journal of the Council of State Governments (CSG). Its ISSN is 21528489 and you can search it just like you search the other EBSCO database.

Nongovernmental Organizations

Advocacy organizations have considerable material on state legislation. Two nonpartisan groups I've mentioned earlier, the Council of State Governments (*https://www.csg.org*) and the National Conference of State Legislatures (*http://www.ncsl.org*), have great websites. However, much of the best material (like the two monthlies in EBSCO databases) are behind paywalls.

There are also more partisan nonprofits providing legislative information. The American Legislative Exchange Council (ALEC) (*https://www.alec.org*), is a state legislative organization with a conservative bent. It has dozens of state law surveys and publications, including model legislation. Recently, the State Innovation Exchange (*https://stateinnovation.org*) was set up by liberal groups as a "progressive ALEC." Its resources are thin compared to ALEC but it has a "Library of Legislation" database.

In addition to general legislative resources, there are subject oriented NGOs on every issue. Regarding the issue I opened this article with, marijuana, there are several groups that are tracking legislation across the 50 U.S. states such as the Drug Policy Alliance, (*http://www.drugpolicy.org*), National Organization for the Reform of Marijuana Laws (NORML) (*https://norml.org*), and The Marijuana Moment (*https://www.marijuanamoment.net*).

Kurt X. Metzmeier is the associate director of the law library and professor of legal bibliography at the University of Louisville Brandeis School of Law. He is the author of Writing the Legal Record: Law Reporters in Nineteenth-Century Kentucky, a group biography of Kentucky's earliest law reporters, who were leading members of antebellum Kentucky's legal and political worlds. ■

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MEETING SCHEDULES

LBA Section Meetings

Section meetings are held at noon at the Bar Center, 600 W. Main St., Ste. 110.

Thursday, March 28: Young Lawyers

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

Louisville Association of Paralegals

Check out upcoming educational programs and special events on the Louisville Association of Paralegals website, *www.loupara.org*. New member applications and membership renewals for 2019 are now available online. 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*. ■

Women Lawyers Association

Women Lawyers Association will host a breakfast meeting in Judge Jessica Moore's Courtroom (District Courtroom 302) on Thursday, March 14 at 8 a.m. (registration starts at 7:45 a.m.). Circuit Court Clerk David Nicholson will discuss the new KY Driver's License. No cost to attend. Please send your RSVP to *womenlawyersassociation@gmail.com*. If you cannot attend this month, please join us for our next lunch meeting on Thursday, April 11. ■

Legal Assistants of Louisville

The next regularly scheduled meeting of the Legal Assistants of Louisville will be held on Tuesday, March 19, at 11:30 a.m. at the Bristol Bar & Grille Downtown located at 614 W. Main Street. This month's speaker will be Dawn Johnson, of Kerith Resources. For more information about the organization, please contact Loretta Sugg, Vice President, at (502) 779-8546. ■

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Risky Business:

Delaware's Historic MAE Ruling Provides Guidance to M&A Attorneys on Risk Allocation

Ian. J. Busche

The Delaware Supreme Court made history at the end of 2018, affirming a lower-court decision that was the first of its kind. Vice Chancellor Travis Laster of the Delaware Court of Chancery recently issued a groundbreaking 246-page opinion upholding an acquirer's termination of a merger agreement due to a material adverse effect (MAE). The October 1, 2018, decision in *Akorn, Inc. v. Fresenius Kabi AG* marked the first time a Delaware court found an MAE, also known as a material adverse change or MAC, occurred in a mergers and acquisitions (M&A) context.

On December 7, 2018, Chief Justice Leo E. Strine, Jr. of the Delaware Supreme Court affirmed the decision in a two-page order. The case not only sets an important precedent for corporate law but also provides practical drafting advice for attorneys on handling risk allocation in merger agreements.

Merger Agreement Fallout

Fresenius Kabi, a German pharmaceutical conglomerate, entered into a merger agreement with Akorn, a U.S. generic drug manufacturer, where Fresenius would acquire Akorn in a deal worth $4.75 billion. Immediately after the two companies signed the agreement on April 24, 2017, Akorn's business performance "dropped off a cliff," according to Vice Chancellor Laster. Their financial outlook declined significantly into the 2017 fourth quarter, and by the following April, the company's 2018 projected EBIT plummeted from $239 million to negative $313 million.

The financial downfall of Akorn is only half of the story of this deal's demise, as Fresenius also received two whistleblower complaints about Akorn in late 2017. The complaints detailed issues with the company's quality control and product development, both of which affect the company's FDA regulatory compliance. As the court would later find, Fresenius already had reason to suspect issues with Akorn's regulatory compliance. In response to the complaints, Fresenius hired lawyers to investigate these alleged deficiencies and failures, uncovering serious and fundamental flaws in Akorn's data management. Akorn also allegedly misled Fresenius and the FDA regarding its compliance issues and correction efforts.

Despite Akorn's poor financial performance and regulatory complications, Fresenius continued to pursue a successful acquisition and made one last effort to salvage the deal by offering to extend the outside closing date by three months. Akorn declined the offer, and Fresenius terminated the agreement on April 22, 2018, claiming (i) an MAE generally occurred in violation of closing conditions and (ii) an MAE occurred based on Akorn's regulatory issues causing their representations and warranties to become untrue. Fresenius also asserted Akorn materially breached a covenant to use commercially-reasonable efforts to operate in its ordinary course of business after signing the merger agreement.

Akorn's Troubles Were Its Own

Upholding both alleged MAEs, the chancery court relied heavily on evidence showing Akorn intentionally misrepresented the company's stability and hid data-integrity issues. This evidence included fictitious information conveyed to the FDA and Akorn's own trial expert's testimony that the company was not transparent with the federal agency. Vice Chancellor Laster also determined Akorn's financial woes were not due to "industry headwinds" apparent to Fresenius and the entire market, as Akorn suggested, but they were rather the result of a prolonged downturn, specific to the company and showing no evidence of stopping.

The court noted Akorn dramatically underperformed compared to its competitors in the previous two fiscal years and predicted the cost of fixing Akorn's compliance issues would approach $1 billion. Given Akorn's intense negotiating for the original purchase price, Vice Chancellor Laster considered an unplanned $1 billion price increase to be material. Interestingly, the court noted the parties could have negotiated the MAE provision in the merger agreement to exclude certain risks Akorn knew of before signing the agreement.

Drafting a Better MAE Provision

Vice Chancellor Laster chose to dedicate a sizeable portion of the opinion to discussing pre-closing risk allocation and practical advice for drafting MAE provisions. He notes the provision "is best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner." One of Akorn's focuses throughout the trial was that Fresenius knew or contemplated certain risks associated with the merger, prohibiting the company from invoking the MAE provision.

The Vice Chancellor, however, disagreed with establishing a precedent for replacing bargained-for contractual provisions with a tort concept of assuming risk. The latter would emphasize a rear-looking analysis of what a buyer learned or could have learned during due diligence, instead of prioritizing freedom of contract—something Delaware has strongly promoted, except in cases of egregious public policy violations. In this case, the two parties were sophisticated businesses, so the court erred on the side of plain-language contractual analysis and not rewriting the deal between the companies.

For the benefit of practicing M&A attorneys, Vice Chancellor Laster recommended the MAE in this case go further to allocate risks between the parties, using specific exceptions and exclusions. For example, the parties could have excluded: (i) certain specific matters the seller believes will, or are likely to, occur during the anticipated pendency of the agreement; (ii) matters disclosed during due diligence; or (iii) risks identified in public filings.

Also, the parties could have defined the MAE as including only unforeseeable effects, changes, events or occurrences, but instead, they merely agreed upon a condition focusing on whether "an effect, change, event, or occurrence occurred after signing [the merger agreement] and constituted or would reasonably be expected to constitute an MAE." Their language does not retrospectively focus on due-diligence-related risks but rather on future events—events the court found were unforeseen and occurred post-signing.

Interestingly, Vice Chancellor Laster posited that even if Akorn's risk-assumption theory was correct, the company would still lose its argument in this case due to Delaware's lack of a general standard of risk allocation when interpreting broad MAE provisions.

Representations and Warranties to the Rescue

Despite this new precedent, Professor John Coates of Harvard Law School recently stated that buyers are better off focusing on contractual representations and warranties, not MAE provisions. The Delaware court addressed this issue too, noting that parties to merger agreements address and allocate risks found during due diligence through representations and warranties. "The existence of the representation evidences the seller's knowledge of a risk, and the representation constitutes an effort by the parties to allocate that risk." Vice Chancellor Laster also noted the important interplay between the scope of representations and using disclosure schedules to limit that scope.

Fresenius had reason to suspect Akorn's regulatory compliance issues and bargained for a specific representation in the merger agreement because of this. The parties used the representation to allocate the associated risks, and the representation was qualified. It would become untrue or inaccurate if something sufficiently serious happened that would reasonably be expected to have a material adverse effect. In keeping with its emphasis on contractual freedom, the court acknowledged Fresenius's mere knowledge of regulatory issues and use of representations could not be held against it or used to invalidate its invocation of the MAE provision. In essence, its bargaining for the representation further protected it from Akorn's arguments.

MAEs on the Rise?

Chancery judges have previously held that double-digit declines in quarterly financial performance were not adequate grounds for an MAE, as in 2008's *Hexion v. Huntsman* and 2001's *IBP, Inc. v. Tyson Foods*. Vice Chancellor Laster distinguished the Akorn case stating:

> "Akorn understandably has tried to cast Fresenius in the mold of the buyers in *IBP* and *Hexion* by accusing Fresenius of having 'buyer's remorse.' In my view, the difference between this case and its forebearers is that the remorse was justified. In both *IBP* and *Hexion*, the buyers had second thoughts because of problems with their own businesses spurred by broader economic factors. In this case, by contrast, Fresenius responded after Akorn suffered a general MAE and after a legitimate investigation uncovered pervasive regulatory compliance failures."

When read together, the *Akorn*, *Hexion*, and *IBP* cases collectively illustrate the difficulty of proving an MAE. Brian Quinn, Associate Professor at Boston College Law School, recently stated, "This case is so far over the line that if it weren't [an MAE] you should not even write the provision into agreements."

Akorn's appeal to the Delaware Supreme Court (No. 535, 2018) claimed the trial court "rewrote Delaware law" by creating a "new blueprint for remorseful buyers to exit Delaware merger agreements." Relying on the trial court's extensive analysis, Chief Justice Strine simply concluded Fresenius had no obligation to close the merger and properly terminated the merger agreement. Following the lost appeal, Akorn's CEO, Raj Rai stepped down, and Douglas Boothe took over the same position on January 1, 2019.

Parting Thoughts

The extreme facts of the failed Akorn-Fresenius merger should still give companies pause before invoking an MAE to terminate a deal. Professor Coates believes this case will likely become the rare exception and not the common rule. A thoughtfully-drafted MAE clause with proper risk allocation can offer better protection to both sides and help avoid costly litigation. It is not a boilerplate provision to simply copy and paste from the last merger agreement one drafted. Attorneys should also carefully examine their use of representations and warranties, as they can insulate buyers and sellers from future complications.

Ian J. Busche is an associate at Bingham Greenebaum Doll and a member of the firm's Business Services Department. He is a 2018 honors graduate of Emory University School of Law. ■

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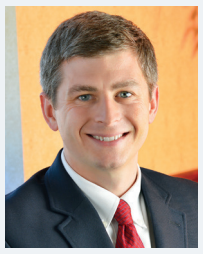
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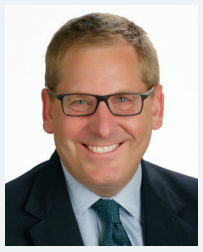
Grohmann

Stites & Harbison announces the addition of **Grace Greenwell** and **Jennifer Henry Jackson** to the firm. Greenwell is a member of the Business Litigation Service Group and an adjunct member of the Creditors' Rights & Bankruptcy Service Group. She received her J.D., *magna cum laude*, from the University of Kentucky College of Law in 2018. Jackson joins the Torts & Insurance Practice Service Group. She graduated from the University of Kentucky College of Law, *magna cum laude*, in 2018.

Morgan & Morgan is pleased to announce that **Isaac Fain** has joined the firm. Fain is a graduate of the University of Louisville Brandeis School of Law. He will work in Morgan & Morgan's Louisville office as part of its litigation group, and his primary focus will be Kentucky based personal injury cases.


Jackson

DBL Law is pleased to announce that **Bill Brammell** has been elected to the Kentucky SHRM State Council. KYSHRM is the state affiliate of the Society for Human Resource Management. KYSHRM serves over 3,000 human resource professionals and advanced the HR profession in Kentucky through local chapters as well as through student chapters. Brammell practices primarily in the areas of civil and commercial litigation, including defending employment discrimination claims, administrative law, contract negotiation and white collar criminal defense. He received his J.D. from the University of Kentucky College of Law.

Applegate Fifer Pulliam is pleased to announce that **Jackie R. Clowers** has joined the firm as an associate. Clowers obtained his J.D. from the University of Louisville Brandeis School of Law in 2012. He is admitted to practice in Indiana and Kentucky. He will concentrate his practice in the areas of commercial litigation, business planning and transactions, and probate matters.


Lomond

Applegate Fifer Pulliam is pleased to announce that **Abbey Fargen Riley** has been named partner at the firm. Riley joined the firm as an associate in January 2016, and her practice has been focused on representing lenders, buyers and sellers in commercial real estate transactions. She is a graduate of University of Louisville Brandeis School of Law and chair of the Louisville Bar Association's Young Lawyers Section.


Myre

O'Bryan, Brown & Toner is proud to announce that partner **James P. Grohmann** has assumed the role of Managing Partner of the firm as of January 1, 2019. Grohmann focuses his practice in the areas of medical and legal malpractice defense and appellate litigation. Grohmann is a fellow of the American Academy of Trial Lawyers and earned his J.D. from the University of Kentucky College of Law.

Seiller Waterman is pleased to announce that **Phillip A. Pearson** has become an associate with the firm. He received his J.D. from the University of Louisville Brandeis School of Law, graduating *magna cum laude*. Pearson was a former law clerk for Seiller Waterman. He is a member of the firm's Estate Planning Group. His practice includes estate planning and estate administration, and corporate law.


Pearson

Kopka Pinkus Dolin is pleased to welcome **Kristin M. Lomond** as a senior attorney. Lomond is an experienced litigator having represented clients in a variety of insurance defense matters, including appeals, nursing home defense, insurance coverage disputes, as well as bad faith claims. She will represent clients in the practice areas of transportation, professional liability, premises liability, construction, product liability, automobile, coverage, bad faith litigation, employment law, medical malpractice, large loss, complex commercial disputes, workers' compensation and much more.


Riley

Wyatt, Tarrant & Combs is pleased to announce that **Mike Fine** and **Tad Myre** received the 2019 Nonprofit Advocacy Partner Award from the Kentucky Nonprofit Network (KNN). The award, presented during KNN's 14th Annual Kentucky Nonprofit Day in Frankfort, Kentucky, in February, recognized Fine and Myre for their work in helping KNN clarify language and educational resources relating to new legislation governing Kentucky's nonprofit organizations. Fine and Myre are partners in the firm's Health Care Service Team. Fine was named one of Business First's "Forty Under 40" in 2018 and is a is a frequent speaker and author who has written numerous publications. Myre is an Adjunct Professor of Health Law at the University of Louisville Brandeis School of Law where he has assisted the law school in the development of a health law certificate program. He also serves as co-chair and moderator of the Kentucky Health Law Institute (UK/CLE). ■

In Memoriam

Robert M. Brooks, age 63, died unexpectedly on January 21. A graduate of the University of Kentucky College of Law, he joined Boehl Stopher & Graves where he spent 37 years as a civil litigator whose practice focused on commercial and construction law.

He is survived by his wife and three sons.

Memorial gifts may be made to the American Heart Association or the Leukemia & Lymphoma Society. ■

Mother's Day Card Drive

"All that I am, or hope to be,
I owe to my angel mother."
–Abraham Lincoln

Mother's Day is around the corner and the Public Service Committee is collecting Mother's Day cards and postage for inmates at the Louisville Metro Jail. Cards and stamps can be dropped off at the front desk at the LBA and the committee will ensure they get to the inmates of the recovery dorms, who can then write to their mothers in time for Mother's Day. Cash donation in lieu of cards is also welcome. Make checks payable to the Louisville Bar Center. Please indicate "Mother's Day Card drive" in the memo line. Deadline for donations is Wednesday, May 1, 2019. Please contact Jonathan Ricketts at (502) 896-2303 or *jricketts@rickettslawoffices.com* for more information. ■

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