

BAR *briefs*

Louisville Bar Association

February 2023

BLACK HISTORY MONTH



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Professional Excellence

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Don't let this be your **LAST ISSUE***

***If you have not renewed your 2023 LBA membership, it is not too late!**

If you need a copy of your renewal statement, contact the LBA at (502) 583-5314 or email mmotley@loubar.org. You can also renew by logging onto our website, www.loubar.org.

Staff has big plans for our members in 2023 and we hope you will continue to be part of our community!

Why the Struggle for Truth – in Law and in History – Determines our Future

“We are not makers of history. We are made by history.”
– Rev. Dr. Martin Luther King, Jr.

Legal work involves learning the underlying facts of a case and presenting those facts to a judge or jury. We strive to portray facts in a light most favorable to our client's position. As lawyers, we owe duties of candor to tribunals and fairness to opposing parties and counsel. Witnesses take an oath to “tell the truth, the whole truth, and nothing but the truth.” The ethical and procedural rules governing court proceedings are designed to create an adversarial process through which a factfinder can consider competing narratives of a dispute and then discern the truth, ultimately leading to a just result — or at least that is the hope. The courthouse, then, is a place where a struggle unfolds about how the history of a particular dispute will be told and reported in a judgment or opinion by a higher court.

In communities across the country, we are witnessing struggles of a different sort over how history will be reported and told to our children and the generations that follow them. Unlike in a courtroom, in a classroom there are no fixed rules or standards to decide the credibility or completeness of a historical narrative or account of past events. Instead, students are expected to trust that the information that their teachers and professors convey to them is accurate and as complete as possible. Unfortunately, in Kentucky and in other states, efforts are afoot to control and dictate how history is taught in schools. As Daniel Bessner, an associate professor at the University of Washington observed recently in a guest essay in *The New York Times*, “The interpretation of the American past has not in recent memory been as public or as contentious as it is now.”

When legislatures dictate what speeches and documents must be the focus of public education, there is a real risk that students will receive only a sanitized account of history — an incomplete version that strips and minimizes the most important lessons, including lessons that may help us to avoid repeating the same mistakes and atrocities that have marked our country's past. Compounding this risk is the alarming persistence of “alternative facts,” which threaten to erode confidence in our public institutions even as these “facts” are proven to be nothing more than lies.

Indeed, the importance of history — and the struggle to make certain that our account of it does not omit shameful historical events (most notably the institution of slavery) — is part of why education is such an important pillar of the mission of the LBA (prominently featured in our new tagline: Law. Community. Education). As lawyers, we have a special interest in truth seeking and truth telling, and in ensuring that the historical record is as complete and accurate as possible. We have the power to do good when we use our skills and training to help guard against efforts to distort the truth or diminish the role of history in education.

As we celebrate Black History Month, I hope that we will stay vigilant for efforts to control or suppress education relating to historical events. I hope we will remember that the struggle and experience of those in our community who have been least empowered is often most worthy of our study and attention. We can challenge and expand what we think we know about history, and even build skills to help us be better consumers of information and avoid biases that may prevent us from discerning the truth. We can recognize that for too long, the historical narrative of our community has been written and shaped by only a narrow set of its members.

As you may recall, the last song in *Hamilton* contemplates the role of a historical narrative, asking “Who tells your story?” The LBA is committed to promoting opportunities for a wide range of voices within the legal community to tell their stories. We are committed to celebrating and elevating the many accomplishments and achievements of Black lawyers and activists in our community. At the same time, we are also committed to making opportunities available to educate ourselves about the history and devastating legacy of racist practices in our community that for too long were protected by the rule of law, including segregation and redlining. By becoming dedicated, curious and lifelong history students, we will be better equipped to chart a path toward justice for all members of our community.



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of our community.***

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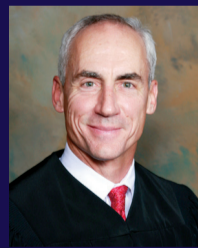
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**LBA Young Lawyers
Section**

Join your colleagues for a time of networking and community during your lunch hour on Thursday, February 16 from noon to 1 p.m. Speaker/agenda: TBA. As always, lunch is provided for those with advanced registration. Please indicate if a vegetarian option is requested; other dietary restrictions cannot be guaranteed. To register contact Lisa Anspach at lanspach@loubar.org.

These monthly meetings serve as an opportunity to network with other members of the legal community. Be sure to invite a guest to attend with you! Guests may attend two meetings prior to joining the section (membership is \$15 annually). The LBA's Young Lawyers Section (YLS) is open to every member of the LBA who is under the age of 36 or in their first five years of practice, regardless of age.

LBA YLS Leadership: Al'Lisha Hanserd, Issacs & Issacs, Jackson Rice, Office of the Commonwealth's Attorney and Jenny Beth Willis, Duncan Galloway Greenwald. ■

**Women Lawyers
Association**

Please join the Jefferson County Women Lawyers Association (WLA) for its monthly membership meeting on Thursday, February 9 at noon. Location TBD. The guest speaker will be Libby Gray, Principal Partner and Chair of Litigation for Gray Ice Higdon. Libby will discuss the Federal Trade Commission's proposed rule that seeks to ban the execution of non-compete clauses, as well as nullify all of those currently in existence. For questions or to RSVP, please contact WLA President, Tricia Lister at tricia.lister.esq@gmail.com. ■

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Following the Kentucky Supreme Court: A Brief(s) Guide

Kurt X. Metzmeier

Last year lawyers were vividly reminded of the importance of the Supreme Court of Kentucky in upholding the state Constitution when the court struck down the so-called “trigger law” banning abortion in the case of *Cameron v. EMW Women’s Surgical Center* (Aug. 18, 2022). Later the court invalidated the General Assembly’s efforts to fund charter schools in a manner that violated the Kentucky Constitution’s common-schools clauses in the case of *Commonwealth ex rel. Cameron v. Johnson* (Dec. 15, 2022).

The drama of these cases was advanced at least for many lawyers by the fact that the briefs in these cases were publicly available and that the oral arguments were streamed live from the Court’s presence on Kentucky Educational Television (KET). This openness was fostered by outgoing Chief Justice John D. Minton, Jr. and will be one of his greatest legacies.

This easy accessibility to the products of the Supreme Court’s decision-making process is relatively new. Some attorneys who don’t need to watch the courts carefully might have difficulty navigating the tools needed to follow such proceedings. This article will focus on this skillset, taking readers through the various not-completely-integrated web tools one needs to use to follow the Kentucky Supreme Court as readily as that other Court on First Street NE in the District of Columbia.

Court Watching Tools

One challenge for researchers is that although many of the tools I’ll discuss are linked to the Supreme Court’s section of the Administrative Office of the Courts (AOC) website, <https://kycourts.gov/Courts/Supreme-Court/>, they are separate systems on their own platforms.

The primary tool for following the Court is C-Track, accessed from the AOC website using the Supreme Court Case Information navigation button or directly at <https://appellatepublic.kycourts.net/>. In 2016, the Supreme Court contracted with Thomson Reuters Court Management Solutions to use its appellate case management system, C-Track Public Access, to manage its case docketing. C-Track has been loaded with docket information on Kentucky cases back to the 1990s, but only for the last few calendar years does it offer access to full-text documents like briefs and orders.

The most straight forward way to search is by docket number under Case Search. (One tip: when searching by docket number, ignore the final subject code (WC, DG, MR, etc.). So, if you are looking for “2021-SC-0300-DG,” search “2021-SC-0300.”) If you don’t have a docket number, there is a crude Party Search feature. However, if you are looking for a criminal defendant named Jones or Smith, or cases where the Attorney General Daniel Cameron or his predecessor Andy Beshear intervened, you’ll have to click through a lot of hits.

The Kentucky Supreme Court’s AOC page still has current and older backfiles of two extremely useful documents lawyers are familiar with: the Supreme Court Minutes and the Oral Argument Calendars. The Minutes are issued monthly, usually on the fourth Thursday around 10 a.m. (unless a decision is issued mid-month, like the Court did in November 2018 when it struck down Gov. Matt Bevin’s pension reform law and August

2021 when they ruled on Gov. Andy Beshear’s COVID orders). They contain new decisions, a link to slip opinions in those cases, orders granting and denying discretionary review, as well as various other orders of the Court. Many appellate lawyers (and news reporters) have that day set on their Outlook calendar. The Oral Arguments Calendars, also released monthly, indicate the days where arguments are set for the upcoming month. They have short abstracts of the issues presented and since November 2012 have included links to the key briefs in the case.

An exciting new tool which has provided significant transparency is the live (and recorded) oral arguments before the Kentucky Supreme Court that are facilitated by KET. There is a link from Kentucky Supreme Court’s AOC page, but the best way to access the KET archive is through its webpage, <https://www.ket.org/program/kentucky-supreme-court-coverage/>. That page has a dropdown menu to the five “seasons” of coverage, 2018-2022. Generally, one to two dozen cases have been streamed and recorded each year.

Researching Briefs for Older Supreme Court Cases

Briefs for cases older than 2012 aren’t available on the state Supreme Court’s own tools, but some of these pre-2012 cases can be found at collections hosted by Kentucky’s law libraries. The University of Kentucky has scanned high court briefs for cases the court decided from 1970-1989 into its UKnowledge database, https://uknowledge.uky.edu/ky_appeals_briefs/. (The headers read “Court of Appeals,” but the cases are decisions from the old Court of Appeals from prior to 1976, when it was Kentucky’s high court, and the Supreme Court after that Court supplanted it.) The Law Library of NKU’s Chase College of Law has hosted briefs of the Kentucky Supreme Court online since 1999, https://chaselaw.nku.edu/new/library/electronic_resources/briefs_search.php, although technology and personnel changes have meant it hasn’t been regularly updated in recent months. Its search function is now most reliable when searching by docket number.

Researching Briefs for Older Supreme Court Cases

The UofL Law Library has a collection of hardbound printed Supreme Court briefs from 1976 to 2000. This collection briefs came from surplus copies provided by the state Supreme Court which, unfortunately, means that briefs from the hottest cases had been snapped up by court personnel before they were sent to us. In addition, we have selected and scanned some of the more important cases for legal history on a special collection, Kentucky Supreme Court Briefs, <https://louisville.edu/law/library/special-collections/kentucky-supreme-court-briefs>.

Supreme Court Archival Research (A Lawyer’s Guide)

However, each of these collections is incomplete. Complete files of the records and

briefs of the state high court can be found at the Kentucky Department of Libraries and Archives (KDLA). Don’t be afraid to ask for court records—as a Kentuckian you are constituents of the KDLA—but if you need them, do not put off asking. The archivists of the KDLA are very helpful but they are very busy and have endured staffing issues for years so they will need time to find and copy documents, many of which aren’t well-indexed. If you “need them yesterday,” you aren’t getting them in time. Be polite and patient and you will be pleased by the result.

I have been using legal records at KDLA for years and the following method has been the most successful. The first step is to go to the “How to Request Records from the Archives” page and fill out the Civil Case Record Request Form: <https://kdla.ky.gov/researchers/Pages/recordsrequestforms.aspx>.

This form is designed for trial court, not appellate, records but fill it out as best as you can and use the Notes field to make it clear you are looking for materials from a Kentucky Supreme Court (or Court of Appeals) decision. Be sure to include an e-mail address that you regularly check. (The request will cost \$10 but you will mail that later in the process.) The important result of this request is that it will start a work ticket.

The second step starts when you get an automatically-generated response back to the e-mail account you listed. Start an e-mail forwarding this report which, in plain language, restates your request with some details you couldn’t get onto the form. For example, the full record will have documents all the way back to the trial court. If you only want the briefs, say so. That could speed up the request because everything you request likely will need to be manually scanned. Send this e-mail to kdla.archives@ky.gov. You don’t have to do this second step, but it smooths things and opens an e-mail channel in case they have questions.

* * *

The Supreme Court of Kentucky heads a vigorous branch of government just as worthy of attention as the governor or the General Assembly. While it isn’t dogged by a viral “SCOKYBlog” and a phalanx of reporters like the U.S. Supreme Court, this article provides the tools to follow it yourself.

Kurt X. Metzmeier is the interim 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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For more information contact Leslie French at lfrench@shepherdins.com or call (502) 499-6880.



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Justice William E. McNulty Jr. Trailblazer Award



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The award was developed by the LBA in 2003 to honor those who have had a significant impact in promoting racial and ethnic diversity in the legal profession. Individuals who receive this award have been leaders in the legal community and have been at the forefront of legal and social change.

The Justice William E. McNulty Jr. Trailblazer Award is named in memory of the first African American to sit on the Kentucky Supreme Court.

When Race & Gender Meet: Experiences of Black Women in the Law

Celebrate Black History Month and International Women's History Day with us and our panel of speakers discussing the experiences of Black females in the legal profession.

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More details and registration online at www.loubar.org

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Public Interest Legal Professionals and Student Loan Forgiveness

Reflecting on 2022 and Looking Forward to 2023

Brian Fields

As of 2022, United States borrowers' total student loan debt is approximately 1.75 trillion dollars. The student loan debt crisis continues to create difficulties for countless Americans, with bureaucratic complexities and constantly changing rules preventing millions of Americans from accessing borrower programs and assistance they meet statutory requirements for. While over 42.8 million borrowers of all backgrounds navigated these complexities in 2022, the burden of high student loan debt often falls heavily on legal professionals. According to recent data, 71% of law students graduate with loans, with the average law school graduate owing \$180,000 in student loan debt from higher education.

This debt frequently impacts public interest attorneys and public servants. Many attorneys participate in the Public Service Loan Forgiveness (PSLF) program, created under the College Cost Reduction and Access Act of 2007 to provide borrowers a way out of their federal student loan debt burden by working full-time in public service while meeting specified payment and employment criteria. As of 2022, almost 175,000 public servants have already had more than 10 billion dollars in loan forgiveness approved via the PSLF program. Significant movement occurred in student loan law and policy in 2022, with even more significant changes coming in 2023. These changes will have a consequential impact on borrowers seeking relief from the crushing burden of student loan debt.

An Overview of the Public Service Loan Forgiveness Program

The PSLF program was passed as part of the College Cost and Reduction Act of 2007 (CCRA). While much of the CCRA focused on increasing funding for Pell Grants and reducing interest rates on federal loans, the bill also created the PSLF program. According to the legislation, "the Public Service Loan Forgiveness Program is intended to encourage individuals to enter and continue in full-time public service employment by forgiving the remaining balance of their Direct loans after they satisfy the public service and loan payment requirements of this section."

The statute lays out various requirements for forgiveness under the PSLF program. First, the borrower must maintain "full-time qualifying employment" with a public service organization for the period in which they make PSLF-eligible payments. While the scope of how the Department of Education interprets what constitutes a public service organization has changed in recent years, the statute generally defines them as one of the following: "A Federal, State, local, or Tribal government organization, agency, or entity," "A public child or family service agency," "a nonprofit organization under section 501(c)(3) of the Internal Revenue Code," a Tribal col-

lege or university," or any number of private organizations that provide the public services enumerated in 34 CFR § 685.219(v)(A). Private organizations that provide public interest law services are included on this enumerated list of qualifying types of public services.

In addition to working for a qualifying employer, borrowers must satisfy the following criteria: they must not be in default at the time of application for forgiveness, they must be employed full-time by a public service organization while 120 monthly qualifying payments are made, and must be on either an income-based, income-contingent or standard repayment plans. If the borrower satisfies these criteria, the statute directs that "the Secretary forgive the principal and accrued interest that remains on all eligible loans for which loan forgiveness is requested by the borrower." However, various administrative carve-outs and exceptions to the rules have resulted in confusion and rejection of forgiveness applications. In 2017, ten years after the creation of PSLF and the earliest that applicants for discharge could have reached 120 qualifying payments, the program had almost a 98% denial rate of applications. This number was comparable through 2021, with approval ratings of applicants for PSLF discharge remaining below 2.5%.

Even the American Bar Association challenged PSLF rejections and pushed back on ambiguity, suing on behalf of ABA employees who received certification that the ABA was a qualified employer from the Department of Education, which then rejected their discharge applications years later on the basis that the ABA did not meet the criteria as a qualified employer. While the ABA ultimately reached a settlement with the Department of Education and the ABA employees did receive their PSLF discharge, countless other public interest employees have had to navigate the complex issues surrounding the current structure of PSLF and the possibility that after a decade of public service, there is still a high likelihood that they get denied. For this reason, consumer advocates have pressed for significant changes in PSLF and broader student loan policy, with many coming in the last year.

Significant Changes to Public Service Loan Forgiveness

Announced in 2021 by the Department of Education, the Limited Public Service Loan

Forgiveness Waiver (limited waiver) created limited-time changes to the PSLF program rules allowing borrowers to receive credit for past periods of repayment that would otherwise not qualify towards the 120 qualifying payments. The new rules continue various requirements for PSLF, such as making 120 qualifying payments and continued, full-time employment with a qualifying employer. However, some of the changes under the limited waiver expanded opportunity to receive credit for various types of payments that did not previously count including:

- Periods of repayment for federal loans under any type of repayment plan.
- Past periods of payment prior to consolidation if a borrower made payments on FFEL Program loans, Federal Perkins Loans and other federal student loans and then consolidated your loans.
- Past repayment periods regardless of whether the full amount of a payment was on time or whether you were on a qualifying repayment plan, with added flexibility in accepting late and lump sum payments.
- Forbearance periods of 12 consecutive months or greater and 36 cumulative months or greater.
- Loans spent in deferment before 2013 or economic hardship deferment on or after January 1, 2013.
- Discharge is permitted even if you are not currently employed by a qualifying employer at the time of discharge, as long as borrowers met all other criteria at the time of application.

Although the PSLF limited waiver ended on October 31, 2022, the Department of Education hopes that permanent rule changes announced the week before the limited waiver's end will allow for improvements in PSLF that will broaden the ability of public servants to obtain relief. Some of the permanent changes to the PSLF program include the following:

- The current rules for PSLF state that borrowers "must make each of the 120 monthly payments within 15 days of the scheduled due date for the full scheduled installment amount for that payment to qualify toward PSLF." The new rules will allow for late payments to count, including those that were made in lump sum or installments.

- New rules will also "include certain periods of deferment or forbearance to count toward PSLF and to count payments made on underlying loans prior to consolidation," a departure from current rules prohibiting payments from counting that were made prior to consolidation.
- Under the old rules, all qualifying PSLF payments made on undergraduate student loans were previously reset to zero if consolidated with graduate student loans. Under the new rules, a weighted average will balance payments made on loans before consolidation and payments made after. For example, if a borrower had \$100,000 in undergraduate student debt and made 60 qualifying payments and then took out \$100,000 in law school loans, which they subsequently consolidated, the new rule would arrive at a weighted average of 30 qualifying payments made credited towards PSLF.

While additional rule changes may be implemented before the new rules take effect on July 1, 2023, these set out a strong framework for expanding access to PSLF by public servants and lowering the incredibly high denial rate for borrowers applying for discharge.

The Consequence of PSLF Rule Changes for Public Servants in the Legal Profession

The PSLF program and other opportunities for loan forgiveness are important in ensuring that talented legal professionals can get student loan relief while giving back to their communities through public interest law. While full-time public service work is an incredibly rewarding way to give back to the community, pursuing a career in public interest law can curtail the ability of legal professionals to make the high salary often associated with lawyers as they still face educational debt commensurate with their private practice counterparts.

According to a recent study, the median salary for a law school graduate from the Class of 2020 in a public interest job ten months after graduation was \$55,000 yearly, compared to \$130,000 yearly for private practitioners. While existing disparities remain, effective discharge programs for public interest professionals provide much-deserved relief and attract service-oriented borrowers to join in that work.

Public interest legal professionals are the backbone of the legal profession. Often forfeiting higher pay to do meaningful and necessary work, public interest lawyers across the country have an additional incentive to work with government and nonprofit employers by having programs that subsidize their employment by rewarding them for giving back. En-

(Public Interest — Continued on page 11)

THANK YOU FOR YOUR SUPPORT!

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Thursday, March 2

5:30 – 8:00pm

The Mercury Ballroom

Please join the Louisville Bar Association at The Mercury Ballroom (611 S 4th St) for food and drinks at the legal community's premiere gathering, the 2023 Bench & Bar Social.

Pricing*

LBA Members: \$75

Government/Public Service Attorneys and YLS members: \$65

Non-Members: \$150

(Includes two drink tickets)

Firm/Company Table: \$600

(Includes 8 tickets & limited reserved seating)

*Please RSVP by February 26. Price goes up \$25 after February 26.
If you have any questions, contact (502) 583-5314 or mmotley@loubar.org.

Grand Prize for the LBF Raffle:

DEEP IN THE HEART OF TEXAS ... AUSTIN!

Tickets cost just \$25 each. Winner to be announced at the Bench & Bar Social on March 2; need not be present to win.



LBA BROWN BAG

32nd Annual Alan T. Slyn and Hon. Richard A. Revell Domestic Relations Update

Friday, February 24

Goldberg Simpson attorneys Emily Cecconi, Elizabeth Howell, Caitlin Kidd and K. Spencer Pierson will address decisions that the Kentucky Supreme Court and the Kentucky Court of Appeals handed down during the 2022 calendar year, bringing practitioners up to date on the current state of Kentucky Domestic Relations Law. A panel discussion will follow the presentations, as time permits.

Speakers include **Emily T. Cecconi, Elizabeth M. Howell, Caitlin P. Kidd and K. Spencer Pierson** all from Goldberg Simpson

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



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FAMILY LAW SECTION ONE-HOUR

Streamlining and Documenting Co-Parenting Communications and Expenses via Our Family Wizard

Thursday, March 23

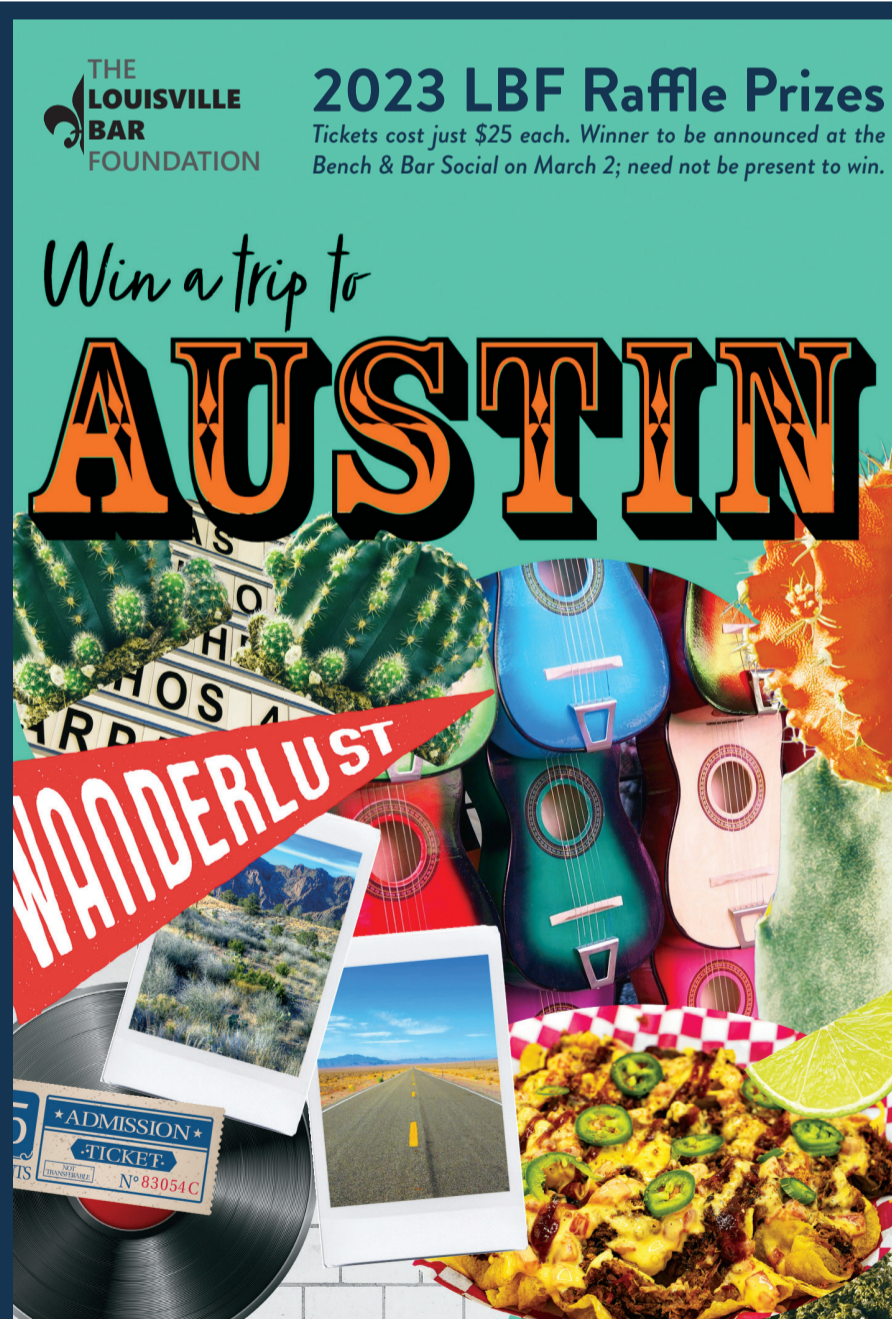
Communication problems continue to present challenges for co-parents, attorneys and the court system. These challenges result in additional strain on children and families. Currently, most of the co-parent communication takes place via e-mail and texting. However, these forms of communication are often unreliable, can be easily manipulated and present admissibility concerns. Furthermore, they have the potential to ignite conflict rather than minimize it. This presentation will advise family law professionals of communication technology that is increasingly being ordered by courts and recommended by attorneys in custody cases.

Participants will learn how they, as practitioners, can simplify and strengthen their knowledge of communication and expense-sharing between their clients and their clients' respective co-parents using online tools. Each participant will receive examples of court orders currently being utilized to mandate the ways in which parents will make use of such tools to increase the effectiveness of the parents' communication with one another. A related appellate case from Kentucky will be reviewed.

Speaker **Danielle Kestnbaum**, Our Family Wizard

Time: Noon – 1 p.m. — Program
Place: Zoom
Price: \$40 LBA Members | \$32 Sustaining Members | \$15 Paralegal Members | \$15 for qualifying YLS Members | \$25 Solo/Small Practice Section Members, Government or Non-Profit Members | \$80 Non-members
Credits: 1.0 CLE Hour — Pending

Family Law Section Leadership: **Macauley J. Campbell, Kellner Green and John H. Helmers Jr.**, Helmers + Associates



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2023 LBF Raffle Prizes

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- A \$600 VISA Gift Card. Austin offers stand-up paddle boarding and music venues for every taste to eclectic restaurants and vintage shopping finds. Enjoy your days and nights exploring Austin's many delights and know that you have \$600 to spend on your indulgences.

(Package Value: \$1,500)

2nd Prize: Deep in the Heart of NuLu ...**Staycation at Hotel Genevieve!**

Be among the first to enjoy a stay at Louisville's newest boutique hotel in the heart of the East Market District. Opening in Spring 2023, Hotel Genevieve is a new hotel project from Austin's acclaimed hospitality group Bunkhouse—the first located in Louisville. Package includes a one-night stay at Hotel Genevieve (certain blackout dates apply; one night stay needs to be redeemed on a Sunday - Thursday); and \$100 gift card to be used at the hotel's restaurant, Rosettes. (Package Value: \$600)

3rd Prize: Deep in the Heart of Bourbon Lovers ... A tub full of Bourbon!

Coming in third does not mean coming in last — not for bourbon lovers! The person holding the winning raffle ticket for this prize will receive our signature "barrelful of brew," and a potential stash of cash. The winner will haul away a tub containing a selection of Kentucky's best bourbons. Invite friends over and create your own flights using this tub of exotic and exquisite bourbons. And, while you're sipping, sort through the pile of Kentucky scratch-off lotto tickets you've won and see how much cash is yours! (Package Value: Priceless)

(Public Interest — Continued from page 8)

ensuring that public interest legal professionals are taken care of as our country works to resolve the crisis of student loan debt and higher education costs is key to maintaining a strong public interest workforce and, in turn, a strong legal profession that cares about full-time public service.

The above is an excerpt from a longer piece covering student loan legislation, executive forgiveness and Department of Education reforms to loan discharge impacting public interest professionals. To read the full piece please visit yourlegalaid.org/news/public-interest-student-loan-forgiveness.

Last year, Legal Aid Society hosted a federal student loan clinic on October 27, 2022 to help borrowers navigate the Public Service Loan Forgiveness Limited Waiver application due on October 31, 2022. In addition to helping community members, the clinic also advised interested public interest legal professionals on navigating the paperwork required for PSLF discharge. To keep up to date on future events, make sure to follow Legal Aid Society on Facebook and subscribe to our newsletter at <https://yourlegalaid.org/newsletter-sign-up>.

Brian Fields is a 2022 graduate of the University of Louisville Brandeis School of Law and a staff attorney at Legal Aid Society in the Economic Stability Unit, where his practice areas include debt defense, consumer advocacy, bankruptcy, tax and expungement law. He welcomes correspondence and can be reached at bfields@yourlegalaid.org. ■



Commodification of Our State Courts

Melissa Weinstein

Over the past couple of years, I have had the privilege of using this forum to educate the legal community about the prevalence of consumer debt collection lawsuits in our state courts. Many attorneys I have discussed this issue with are surprised to learn about the predominance of debt collection lawsuits in state court, large numbers of default judgments and lack of legal representation for defendants in these cases. This problem cannot be addressed with a single solution; it goes beyond the courts. The disputes underlying these cases highlight the cause and effect of economic and social marginalization, and they disproportionately involve people of color. Here, I am discussing only one facet of the greater issue because it is easily exposed and, I believe, it can be mitigated through greater involvement from our legal community and court reform policies.

Our state courts have been overtaken by the debt collection industry

In a recent article, Daniel Wilf-Townsend (*Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704 (2022)) focuses on how plaintiffs from the debt collection and financial service industry have become responsible for a large

percentage of civil filings in state courts. Wilf-Townsend refers to this phenomenon as “assembly line litigation” which he describes as litigation in which “a sophisticated corporate plaintiff brings a high volume of similar, small-value claims against individual natural-person defendants who are almost universally unrepresented and who often do not appear in court.”

His article presents the first nationwide study of “assembly line plaintiffs,” examining the top civil filers in state courts across the country. He found that in many court systems, the same top ten corporate filers account for between one-fifth and one-third of all civil litigation. Anyone who is privy to our state court civil dockets can attest that this is commonplace in Jefferson County and statewide. A majority of my clients are sued by one of the same six debt collection plaintiffs, which are either creditors, subprime lenders, debt buyers or a non-profit hospital. All of them employ this same assembly line litigation practice.

Assembly-line litigation business model

Our courts are the key player in the business model centered around litigation and highly

routinized, low-cost-per-case systems for filing complaints, obtaining judgments and proceeding with garnishment.

There are practical reasons why this particular type of litigation has become status quo for collecting debts. First and foremost, it works. Suing people for debts generates a profit because courts are such effective collection tools. The risks most litigants consider before filing a lawsuit, like losing time and money litigating a claim, do not exist in these cases. Unlike a traditional debt collection method, there is no need to coerce a person to pay voluntarily. After acquiring an easy judgment, the money can be automatically seized from a person’s wages or bank account. Second, once these debts become judgments, they can live and grow forever. If consumers do not satisfy their judgment, it will continue to grow interest at either the 6% statutory rate or the higher original contract interest rate, and they may be pursued effectively forever. In Kentucky, a judgment has a 15-year statute of limitations but it can be renewed indefinitely by any attempt to execute it. Third, the opportunity for these low risk/high yield lawsuits is inexhaustible because so many Americans

depend on credit for basic necessities and are just one unforeseeable event away from being unable to repay.

Why this is a problem

Affordable resolution of valid claims is important. The problem is that this type of low-cost litigation does not operate to serve the public interest. This model remains cost efficient because substantive and procedural protections of the defendant are not prioritized when the majority of defendants do not respond to the complaints filed against them and the court does not scrutinize the claims in their absence. However, there is good reason to question whether the claims that end up being enforced are valid. This is only exacerbated by rise in identity theft.

I recently had a client who had a credit card taken out in her name when her identity was stolen. When she learned that she owed \$1,100 that she was not responsible for she disputed debt with the creditor and filed a police report. She did everything required by law and the creditor to support her identity theft claim and assumed the issue was resolved.

(Continued on next page)

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(Continued from previous page)

Two years later she was sued for the debt and inevitably a default judgment was entered against her. Ensuring the accuracy of each claim is antithetical to how an assembly line is run and an unnecessary cost for a plaintiff that builds the supposition that claims will go unchallenged into its business model.

Potential legal defenses that a defendant might benefit from asserting are waived when they do not appear. They also lose the opportunity to invoke consumer protection laws that allow consumers to bring affirmative claims against a plaintiff if they violated certain laws. I have seen instances where debt collection lawsuits have been filed and disposed of so hastily that there is no actual record of service. This obviously raises significant due process concerns and it is very difficult to prove post-judgment, especially when the defendant does not discover that they were sued for months or even years after the judgment was entered. In cases where a defendant has notice, they have 20 days to respond and the unavailability of affordable counsel still often has the same end result.

There is also less opportunity for any judicial intervention from the higher courts with these cases because they usually go unchallenged or are settled outside of court. These types of cases are unlikely to reach the stage of written opinions, much less published appellate opinions.

Gender and Racial Disparities

Race and gender play a large unspoken role in these cases. Unlike the criminal justice system, the entrenched relationship between race and civil courts has been largely ignored. Regardless of the lack of data, anyone who practices in civil court or presides over it, and certainly the litigants themselves, are aware of the pervasive influence of race. Studies of other state court dockets have found that debt collection and eviction actions are disproportionately likely to involve women, particularly women of color. This is an unsurprising consequence of the financial burden caused by social and economic marginalization of these groups. Legal outcomes from these cases, such as garnishment of wages or assets, can further exacerbate discrimination and economic distress. Indebtedness is inherently racialized. By allowing this type of litigation to proliferate, the civil courts have normalized and legitimized the extraction of resources from poor, predominantly minority communities.

Of the 46 clients I have represented in consumer lawsuits, 40 of them have been women, 38 of them have been people of color. Our state court system is being used to financially destabilize groups that are already marginalized. I have had conversations with clients, who are typically single mothers, about how they chose which bill to prioritize and which can risk going unpaid because they are losing 25% of their net wages to garnishments—al-

ways in anticipation of the next inevitable lawsuit to collect the most recent unpaid debt.

Need for Reform

The scale and nature of the assembly line litigation begs the question most frequently asked in public interest law: how can the justice system ensure fair and accurate outcomes for pro se litigants?

The most obvious solution is more legal representation. I cannot overstate the impact of legal representation in these cases. Defendants who are represented by counsel almost certainly will have better outcomes, ranging from dismissal of the lawsuit to settlement on more favorable terms.

If certain consumer protection violations are discovered, the defendant can assert affirmative claims against the plaintiff. Attorneys who represent consumers in these cases can still make money. Many consumer protection laws, such as the Fair Credit Reporting Act, have attorney fee shifting. Keeping a defendant out of default can stave off many of the devastating consequences I touched on. It also serves to disincentivize problematic debt collection litigation practices. There is a serious dearth of attorneys who take these cases. A larger pool of volunteer attorneys can help bridge this gap. Legal Aid Society has an excellent volunteer lawyer program, if you are interested in pro bono representation, go to <https://yourlegalaidsociety.org/volunteer> to learn more.

Parallel to the need for more legal representation is the need for funding this work. Non-profit legal service providers aim to provide high quality civil legal assistance to low-income persons in need. While it is ideal

to match representation with demand the reality is the areas that are funded receive the most resources. The most widely shared challenge facing organizations assisting individuals with debt-related cases is a lack of dedicated funding for this type of work. Foundation grants or individual gifts earmarked to pay for consumer defense work would help legal aid organizations prioritize and increase representation in debt collection cases.

The other solution is less direct and requires intervention from the civil courts to restructure the way these cases are handled. Assembly line litigation has altered the function of our state courts from a system that presided over bilateral disputes to one that primarily receives and processes petitions for the redistribution of financial assets. This gap between our idealized justice system and reality highlights the fact that our courts are not serving a significant portion of the public. The courts should create programs aimed to mitigate this problem.

It may not be feasible for a judge to scrutinize every debt claim on their docket to the extent necessary to identify the inaccurate and invalid claims given the mass filings. However, there are other already tested approaches that will work. The state courts have identified other types of cases that benefit from alternative adjudication programs. There are multiple specialty courts and specific dockets for cases that need greater oversight or just risk overburdening the regular dockets. The court administration has routinely created positions like case managers and district civil court judicial advisors to triage and review certain types of claims when they saw the demand. Restructuring the procedures

for processing debt claims using a similarly tailored program would facilitate greater judicial oversight while still managing costs. Programs dedicated to consumer protection will steer the courts back towards an institution that protects public welfare.

Some judges have already taken up this cause in their divisions. At least one circuit court judge sets motions for default judgment for show cause hearings, giving the defendant a final opportunity to be heard. There are plans in the works to take this a step further and connect defendants who appear with a volunteer attorney who has agreed to be part of the initiative.

These solutions are not exclusive of one and other. They should work in tandem to pull our state courts away from being a cost-efficient tool for automated debt recovery and back towards an institution of integrity that serves the public. As attorneys we have a professional responsibility to be “mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.” (SCR 3.130 preamble VII.) We need to ensure that our justice system is not used to facilitate the exploitation of poor and unrepresented people for profit.

Melissa Weinstein is the senior attorney of the Economic Stability Unit at Legal Aid Society. She represents individuals in consumer debt collection claims, student loan collection litigation and administrative discharge, bankruptcy and tax controversies. Weinstein is chair of the LBA's Public Interest Section. ■



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PICKLEBALL

Interested in becoming a pickleball professional? The LBA may not be able to take you that far — but we are gathering a group to participate in pickleball lessons. The classes would be held at an indoor facility in the early part of 2023. More details coming soon — those interested can contact Kristen Miller at kmiller@loubar.org.

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Landrum & Shouse is pleased to announce that **Denise Basford Askin** has joined the firm as an associate attorney. Askin earned her law degree from The University of Detroit Mercy School of Law and has a background in worker's compensation law and has also done some subrogation. Her primary area of practice is insurance defense.

Stites & Harbison welcomes attorney **Scot A. Duvall** to the firm's Louisville office. He joins the firm as a member (partner) in the Intellectual Property & Technology Service Group. Duvall has more than 25 years of experience in trademark and intellectual property law, including representing Top Fortune 500 companies. He works directly with business owners, general counsel, vice presidents of marketing and CEOs. He represents clients in trademarks, trademark registration, brand development and clearance, licensing, contracting, due diligence and IP-related aspects of business transfer and franchise agreements. He also handles pre-litigation disputes as well as litigation and appeals in the Trademark Trial & Appeal Board and the federal courts.

Cynthia L. "Cindy" Effinger has been named Co-Managing Member of the Louisville office of McBrayer. Effinger will share duties with Member Ivan J. Schell and will work closely with him to grow the office and transition leadership over the coming years. Effinger has been with McBrayer since 2011, when McBrayer's first office on Shelbyville Road was only a few years old. Since then, the office has grown from around seven attorneys to 25 attorneys and now occupies an entire floor at 500 West Jefferson Street downtown.

Stites & Harbison is pleased to announce that **James Hayne** has been promoted to Counsel. Hayne is part of the firm's Intellectual Property & Technology Service Group. His practice focuses on patent preparation and prosecution, both foreign and domestic. He has extensive experience prosecuting utility patent applications covering a wide range of subject matter including electronic hardware and software, consumer goods and manufacturing equipment. He also has experience prosecuting design patent applications for ornamental products such as home goods, children's toys and soft goods such as bags and blankets. He is a Registered Patent Attorney.

Matthew Marino is excited to announce he has joined Duncan Galloway Greenwald as an associate attorney, where he is a member of the firm's litigation practice group. He earned his law degree from the University of Cincinnati College of Law in 2022. While in law school, Marino served as the Executive Editor of the University Cincinnati Law Review, appeared as a national finalist at the New York City Bar Association's 42nd Annual Moot Court Competition and worked as a judicial extern for Judge John K. Bush of the United States Court of Appeals for the Sixth Circuit. Marino has since remained involved with the University of Cincinnati's Moot Court program as an assistant coach.

McBrayer is ringing in 2023 with a bang as it welcomes eight new attorneys and five new staff to its Louisville office. All come to McBrayer from longstanding Louisville firm Middleton Reutlinger, which dissolved in December after nearly 170 years in business. **Mark S. Fenzel** will work with the firm's professional liability, school law and commercial litigation groups as a Member. **Blaine Lewis** will work with the firm's litigation group as a Member, with focuses on transportation, product liability, commercial litigation and insurance defense. **Kenneth S. Handmaker** joins the firm's alcoholic beverage regulation, employment law, administrative law and litigation practices as a Member. **Patrick Shane O'Bryan** will work with the firm's litigation group as a Member, with focuses on product liability, utility law, transportation law, insurance defense and commercial litigation. **William A. Hoback** joins as Of Counsel as a litigator with over 50 trials under his belt. **Kevin L. Charlson** joins the firm's commercial litigation and alcoholic beverage regulation practices as a Member. **David J. Kellerman** joins as a Member and will continue his practice as a trial attorney. **Sherry L. Hurley** joins as a Senior Associate working with the firm's litigation group. **Marie Field** will join McBrayer as a paralegal. ■

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Help Wanted

Through the LBA Placement Service

Medical Malpractice Attorney:

The LBA's Placement Service is currently working with a boutique defense litigation law firm located in downtown Louisville that is looking to hire a highly-motivated associate attorney to join its medical negligence defense team. Candidates must have strong academic credentials, excellent skills in legal writing, analysis, organization and self-management, committed work ethic, experience in taking depositions and arguing motions, attention to detail, and client relations skills. The ideal candidate will have at least one to three years of experience. Work hours: Billable expectation - 1600 hours. Salary: Competitive salary and benefits commensurate with experience. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

Kentucky Foreclosure/Real Estate Litigation Attorney:

The LBA is currently working with a multi-state law office that is seeking to add an attorney to their Louisville office. The firm specializes in real estate matters and representing mortgage lenders. Primary duties will include real estate transactions and litigation in the state of Kentucky. Must be licensed to practice in KY and in good standing, along with at least one to two years of relatable experience. Competitive salary with excellent benefits offered. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

Family Law Attorney:

The LBA Placement Service is currently working with a medium- to large-size law office located on the east side of Louisville that has a varied practice. They are seeking to add an attorney to their Family Law group. Candidate must be licensed to practice in KY, in good standing and have at least two+ years of experience with family law. Salary package is based on experience, plus excellent benefits and perks. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

Help Wanted

Through the Legal Aid Society

Staff Attorney - Veterans Unit

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Welcome



The Louisville Bar Association would like to welcome our newest members of the LBA!
The following were approved at our December's Board meeting.

Resident Attorney

- *Rhys Edward Cundiff, William F. McMurry & Associates
- *Easton Depp, Attorney Law
- Brian Michael Jasper, Thomas Law Offices, PLLC
- Sydney A. Lane, Frost Brown Todd
- *Ha Lam Nguyen, Frost Brown Todd
- Leslie L. Pescia, Thomas Law Offices, PLLC
- Kevin P. Weis, Thomas Law Offices, PLLC

Government Attorney

- Maegan Cole Pirtle, Legal Aid Society
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