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Professional Excellence

In this issue

Events

A Very Exciting Next Chapter for the Louisville Bar Association

Dear Members,

On behalf of the Boards of the Louisville Bar Association and Louisville Bar Center, I am thrilled to share the news that our Bar Center is about to undergo a significant renovation – one that reflects the LBA's commitment to being a welcoming home for all its members. The thoughtful and innovative redesign of the space – which is home to both the LBA and the Louisville Bar Foundation (LBF) – will be a place our members feel welcomed and comfortable while taking advantage of state-of-the art technology for legal education and meetings. The new space will also offer a vastly improved physical working environment for the hardworking staffs of the LBA and LBF. You can read all about the new space and see renderings of the plans on pages 12 and 13.

I have three quick points to highlight about the renovation:

A Unique Chance to Honor Colleagues and Our Firms

First, I'd like to invite you to consider the unique opportunity this renovation presents to our members. The Bar Center is fortunate to be in a position to fund the renovation primarily through a combination of an investment account and lending through its longtime banking partner, Republic Bank. But we are counting on members, community partners and especially law firms to help raise the critical final dollars to make the plans a reality. Naming opportunities for the various spaces within the Bar Center will provide a unique and enduring way to demonstrate your commitment to our legal community.

For anyone who has visited the beautifully renovated Trager Jewish Community Center, you have a sense of how generous members have made investments to make community spaces a reality, and of the power of seeing names associated with particular spaces within the Center. The same will be true at the Bar Center, and commissioning a seminar room or gathering space within the Bar Center will both honor the donating individual or firm and also demonstrate your commitment to making our legal community better.

A Model of Cooperation and Collaboration

Second, I would like to underscore the tremendous generosity of time and energy from many members in bringing this project to fruition. The renovation is the result of intensive and sustained collaboration and coordination between LBA staff, members of the LBA's Board of Directors, members of a Bar Center Use Review Committee, members of the LBA Investment Committee and the generous pro bono legal counsel to the LBA – including Kent Wicker of Wicker/Brammell and Stephen Sherman and Jim Martin of Stoll Keenon Ogden.

> ***It has been inspiring and encouraging to see the dedication and commitment of so many busy people and their willingness to spend countless hours in thoughtful conversation about how we can be the best stewards of our premium space.***

It has been inspiring and encouraging to see the dedication and commitment of so many busy people and their willingness to spend countless hours in thoughtful conversation about how we can be the best stewards of our premium space. We are extraordinarily fortunate for the contribution and vision of these members, and I hope you will join me in thanking them for their leadership. The renovation would be impossible without the tenacity, perseverance, creativity and attention to detail of our Executive Director Kristen Miller and our Chief Financial Officer John Hardin.

Mark This Momentous Transition on October 10

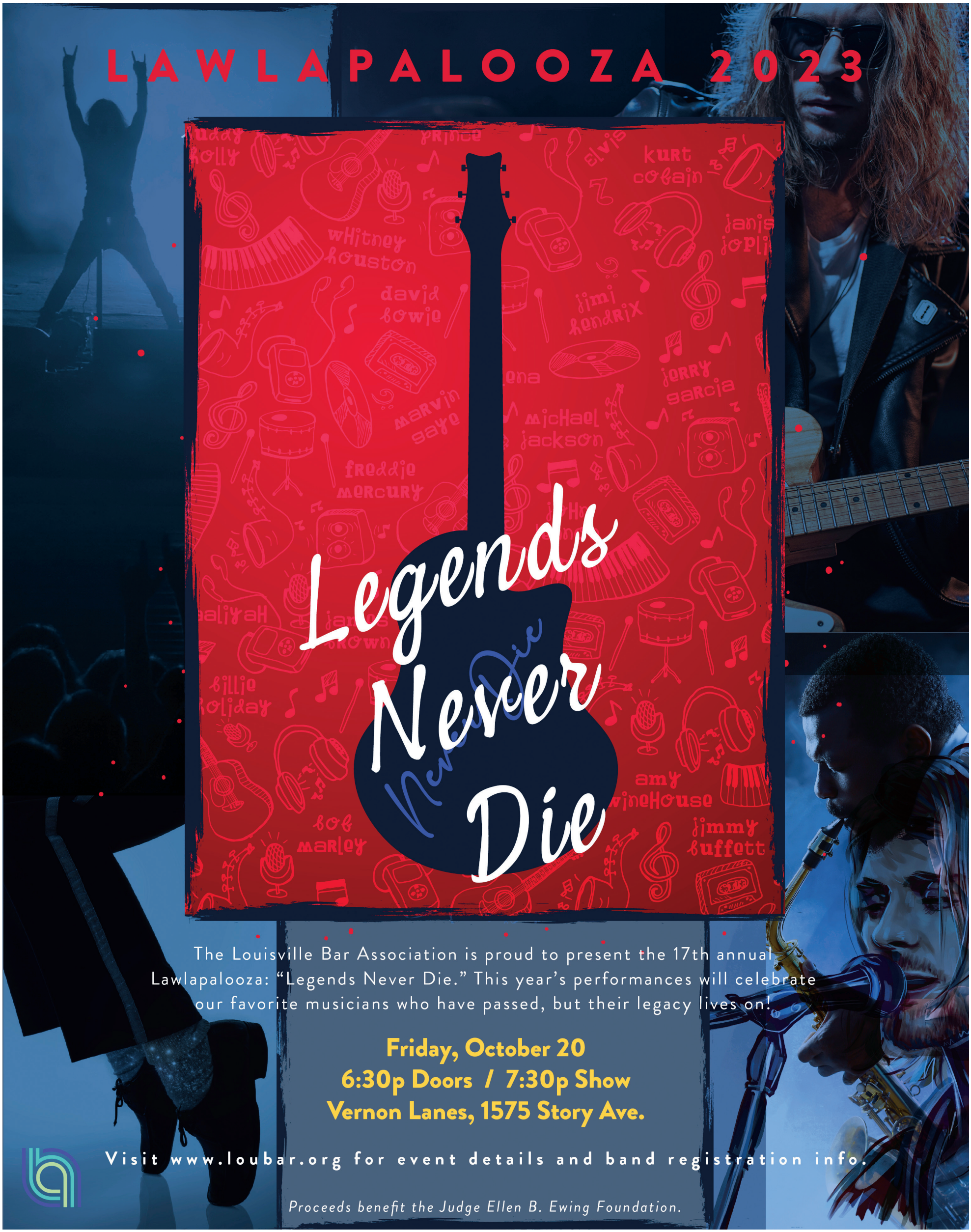
Finally, mark your calendars for October 10 at 5 p.m. to join us in saying farewell to our existing space before the renovation begins. We will gather at the Bar Center for a final look at the home that has served us well for many years. Then, we'll head across the street to the The Grady Hotel for a free happy hour at the hotel's restaurant, The Wild Swann.

That evening will be a chance to reflect on this exciting step forward in ensuring that the LBA, and its home at the Bar Center, remain a good fit for its members' needs and goals for years to come. Our new space, with its enhanced technology and practical and comfortable spaces for work and collaboration, will undoubtedly provide a tremendous benefit to our current members. But just as importantly, the renovated space will send a strong message to potential new members that the LBA is a thriving and energetic organization committed to supporting the next generation of lawyers.

Onward and upward!

Kate Lacy Crosby
LBA President

LAWLAPALOOZA 2023



Jefferson Family Court Update

This month you're hearing from my friend and colleague, Chief Judge Christine Ward, for an update on Family Court.
– Chief Circuit Court Judge Mitch Perry

I was deeply saddened when I heard the news of the passing of Jimmy Buffett. My dad introduced me to Jimmy when he played "Cheeseburger in Paradise" for me and my sister during a weekend at Lake Cumberland. I was about 10 years old and thought it was the greatest song ever. We must have played the cassette a hundred times that summer, learning every word and singing along. What good times we had. What love we shared.

What a legacy Jimmy Buffett left for the world; a legacy of building love and relationships with family and friends. With the unexpected early retirement of Judge Tara Hagerty in May, I have been thinking a lot about legacy. Will my work matter when I am gone? Am I making a difference now? I suspect this is an internal battle fought by everyone working in the legal profession at some point in their life. We give so much to our work. Wouldn't we all like to have a "Cheeseburger in Paradise" kind of legacy?

Working with those going through Family Court is especially hard because it is where people are forced to face their own brokenness and the broken relationships of their lives. How can we build love and relationships when we work in divorce and violence?

If you are not familiar with what we do in Family Court, let me offer a quick synopsis. Family Court handles cases of divorce and custody – dependency, neglect and abuse – paternity (including child support and parenting time issues), juvenile status offenders, domestic violence protective orders, termination of parental rights and adoptions. There are 10 Family Court judges serving Jefferson County. We each hold dockets covering all practice areas, preside over subcommittees covering each of these areas, serve on community boards and share rotating on-call for after-hours Emergency Custody Orders. Family Court subcommittees meet regularly to address any problems in those practice areas and exchange ideas for improving upon what we do. The volume and intensity of work can be overwhelming, and we could not do it without the support of awesome staff, clerks and community partners.

As for leaving a legacy, this year the Family Court Term and bar have focused efforts on revising our local rules of practice, which were last updated in 2015. We began this process by seeking input through the various subcommittees that serve Family Court. Many practitioners contributed great suggestions. Review of the Rules led to three major decisions being made by the Term.

1. The Term approved moving from the current alphabetical assignment model to a random case assignment model. This will be a big change. We expect some bumps in the road, but we are working closely with Circuit Court Clerk David Nicholson's office to iron out the process for a smooth transition. We believe the new process will better reflect the integrity of an impartial court system and better enable the Clerk's office to manage judicial workload. We anticipate this new process will be approved by the Supreme Court since Jefferson County is the only county in Kentucky that does not use random assignment for Family Court matters.
2. The Term voted to keep the Families in Transition program, however acknowledged that the program needs revamping. We are working with Dr. Becky Antle, Dr. Joe Brown (the original developer of the Families in Transition Program) and the University of Louisville's Center for Family & Community Well-Being to develop an updated program. The goal is to develop a synchronous, online program that can cover the basics and connect families with additional in-person support services if needed and desired.
3. We voted to eliminate a required pretrial conference docket after receiving feedback from the leadership of Mike O'Connell's team at the County Attorney's office that the process was not efficient.

While the Term has approved a revised version of the local Family Court rules, there are several more steps in the approval process including a public comment period, so be on the lookout for that before the end of the year.

Perhaps the legacy for our generation as a legal community will be in how we embrace the best of technology, but not lose the best of humanity. I am proud of how the Family Court legal community navigated Covid and adapted so quickly to the technology required to keep court going in a way that we could all stay safe. I am always glad to see people in person, and I hope we never lose that ability again, but we have kept remote appearance options available in Family Court. We can go back to all remote if needed.

Within the last month, I had witnesses appear in my courtroom via Zoom from Germany and India like it was no big deal. Remote court options have increased participation in courts by folks who otherwise would not have been able to appear due to not having transportation. It has enabled parties to miss less work for court appearances. Keeping a remote option has enabled overburdened social workers to be more efficient by not having to sit in court for hours waiting for their cases to be called and reduced crowded lobbies during domestic violence dockets where keeping people safe is an issue.

One remaining challenge regarding virtual court is how to encourage in-person interaction and the development of personal and professional relationships. These relationships help us build trust with one another and enable us to build a legacy of helping hurting people without adding to the pain of divorce, removal of children and violence.

With every interaction in Family Court, you are helping people navigate their darkest hour. You have an opportunity to plant seeds of hope and carve out a path to restoration, wholeness and peace, whether helping someone get through their divorce or overcome substance addiction so they can be reunited with their children. Take care of yourselves, your families and loved ones, so that you can give your best to your clients and those you serve through your work. I hope we all can have a "Cheeseburger in Paradise" kind of legacy.

A. Christine Ward is Chief Judge of Jefferson Family Court. ■

Jefferson District Court Receives Money for Eviction Diversion Program

Jefferson District Court announced that it has received a grant from the National Center for State Courts' Eviction Diversion Initiative to strengthen eviction diversion efforts and improve housing stability across the county. The Court is one of 10 state and local courts selected through a competitive application process and reviewed by an advisory council of state court chief justices and court administrators. NCSC is a nonprofit based in Williamsburg, Va. that is dedicated to improving the administration of justice by providing support to state courts.

Each court will use the grant funding to hire dedicated staff to implement holistic, sustainable and community-driven strategies for resolving legal problems. Jefferson District Court is seeking an eviction diversion case manager. Successful eviction diversion programs provide landlords and tenants with the time, information and resources necessary to resolve their housing problems in the least harmful way, according to NCSC.

The goal is to leverage community resources including legal aid and mediation services, housing and financial counseling, and rental assistance programs, according to NCSC. Visit *ncsc.org/eviction* for more information about NCSC's Eviction Diversion Initiative. ■

Brandeis Law Professor Developing Generative AI Toolkit to Aid Legal Writing Instruction

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BRANDEIS SCHOOL OF LAW

By Jill Scoggins

While many are wary of artificial intelligence and its feared effect of supplanting the human creation of content, one University of Louisville professor is leading an effort to help her colleagues use it in the classroom.

Susan Tanner, assistant professor of law at UofL's Brandeis Law School, has won a teaching grant from the Association of Legal Writing Directors to develop a toolkit that law professors anywhere can use to incorporate generative artificial intelligence (genAI) into their legal writing curricula.

GenAI is technology that can create text, images, videos and other media in response to prompts inputted by a user – otherwise known as a human being. Of the various types of genAI software currently available, ChatGPT is probably the best known.

Over the next year, Tanner and her team will design, develop and test resources that will become open-source materials for use in teaching legal writing and other law subjects. As the word infers, "open-source" means the materials will be open to anyone, free of charge.

Tanner wants the legal community – particularly those, like her, who teach legal writing – to accept that genAI is becoming part of the teaching environment, and having resources that enable an instructor to use it is key to making it work effectively in the classroom.

Photo courtesy of UofL Photo

"Generative AI will change the way we teach. Some professors worry that a sea change is on the horizon – that we will not be able to assess student learning the way we did pre-ChatGPT," she said. "Undoubtedly, we will have to adapt. And though generative AI will challenge the way we teach, there is also significant potential for innovation."

The toolkit will help curious teachers without much prior preparation in genAI to develop knowledge and skills that will help them to embrace it in a way that enhances rather than deteriorates their sense of competency. "A law professor who teaches legal writing will be able to use the toolkit to continue developing their teaching identity rather than be threatened by the increased tempo of technological change," Tanner said.

"We intend to show instructors how to frame teaching objectives that either work around or embrace generative AI, giving them a framework that is adaptable to evolving technologies. We also will provide examples of how to align teaching objectives with student outcomes."

The toolkit also will enable those who use it to customize their use of genAI. "We do not intend for this to be a prescriptive approach to legal writing instruction nor one-size-fits-all writing assignments. Instead, it will focus on principles that each professor could adapt for their own purposes."

Working with Tanner on the project are Tracy Norton, professor of law, and William Monroe, assistant director for instructional technology, of the Paul M. Hebert Law Center at Louisiana State University.

The toolkit is expected to launch in fall 2024.

Jill Scoggins is Director of Communications at the University of Louisville Brandeis School of Law. ■

Kentucky Supreme Court Decides Not to Reconcile State and Federal Disability Law

Joe Dunman

In August, the Kentucky Supreme Court decided the case of *Joyce Turner v. Norton Healthcare, Inc.*, __ SW.3d __, 2022-SC-0004, (Ky. 2023), which presented an important question of statutory interpretation: whether the definition of disability in the Kentucky Civil Rights Act (KCRA) is the same as in the amended Americans with Disabilities Act (ADA).

Norton employed Joyce Turner as a nurse when she sought treatment for breast cancer, but rejected her accommodation requests and soon after fired her. She sued under the KCRA, alleging discrimination on the basis of both an actual disability and a perceived disability.

A Jefferson Circuit jury held Norton liable and awarded Turner much than $1 million in damages. Norton moved for judgment notwithstanding the verdict, which the trial court denied. Norton then appealed, arguing that Turner's cancer was not a sufficient impairment to qualify her as disabled under the KCRA. Turner countered that the KCRA should incorporate the ADA's amended provisions, under which cancer qualifies as a disability.

The original ADA enacted in 1990 defined "disability," as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). In 1992, the Kentucky General Assembly amended the KCRA to include an identical definition, KRS 344.010(4), along with a statement that the statute was meant "to provide for execution within the state of the policies embodied" in the ADA. KRS 344.020.

At the time, neither statute defined key terms like "impairment," "substantially limits" or "major life activities." As administrative complaints and lawsuits rolled in, both the Equal Employment Opportunity Commission and federal courts tried to resolve the ambiguity. They did so in ways that greatly restricted the ADA's protected classifications.

> ***Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) to undo the federal courts' restrictive interpretations which undermined the ADAs purpose to eliminate discrimination through strong enforceable standards.***

By 2004, the federal courts' constrictive interpretations of the ADA were firmly entrenched into the KCRA. In *Howard Baer v. Schave,* the Kentucky Supreme Court adopted and applied the narrow rules of two Supreme Court cases, *Sutton v. United Air Lines,* 27 U.S. 471 (1999), and *Toyota Motor v. Williams*, 534 U.S. 184 (2002), to reverse a jury verdict for a disabled truck driver who filed suit under the KCRA. 127 S.W.3d 589 (Ky. 2003). A year later, the Kentucky Court of Appeals affirmed the dismissal of a KCRA "regarded as" claim, citing *Sutton*, *Toyota Motor* and *Howard Baer*. *Hallahan v. Courier-Journal,* 138 S.W.3d 699 (Ky. App. 2004).

Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) to undo the federal courts' restrictive interpretations which undermined the ADAs purpose to eliminate discrimination through strong enforceable standards. Pub. L. No. 110-325. In the ADAAA's "Findings and Purposes" section, Congress declared that the original ADA's definition of "disability" had been misinterpreted and denounced Sutton and Toyota Motor by name. Congress blamed the U.S. Supreme Court for why "lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities." According to Congress, federal courts had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and too strictly interpreted terms like "substantially" and "major."

The ADAAA did not alter the ADA's definition of "disability," but it did clarify the key term "major life activities" by explicitly stating they include "major bodily functions" and by providing non-exhaustive lists of examples. 42 U.S.C. § 12102(2)(A)-(B). "Major bodily functions" include "functions of the immune system" and "normal cell growth" which, if substantially limited, constitute a "physical impairment" sufficient to qualify a plaintiff as "disabled." "Major life activities" now explicitly extends to most basic tasks, from "eating, sleeping, walking, standing" to "learning, reading, concentrating [and] thinking."

Now, federal courts apply the ADA's amended language to disability claims, having retired *Sutton* and *Toyota Motor* as superseded authority. See, e.g., *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 318-319 (CA6 2019).

Meanwhile, the Kentucky General Assembly has done nothing in response. It has not amended the KCRA to reject (or include) the clarifying provisions added to the ADA. The KCRA still retains only the original, vague definition of disability, raising the questions whether the KCRA should be interpreted consistently with the amended ADA or whether superseded federal case law—which Congress explicitly stated was wrong from the start—should still narrowly dictate its scope.

Before *Turner*, state and federal courts had gone both ways. Some federal courts had ruled that the KCRA and ADA should remain coextensive despite the General Assembly's inaction. See, e.g., *Gesegnet v. J.B. Hunt Transp., Inc.*, 2011 WL 2119248 at *2 (W.D.Ky. 2011). Other (and sometimes the same) courts had ruled the opposite, that the General Assembly's silence meant the KCRA should remain bound by pre-amendment interpretations of the ADA, despite their abrogation. See, e.g., *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F.Supp.2d 653 (W.D.Ky. 2012). So too the Kentucky Court of Appeals, which first applied the ADA's amended language to a KCRA claim in 2017 but then reversed course the next year. See *Tanner v. Jefferson Cnty. Board of Education*, 2017 WL 2332681 (Ky. App. 2017) and *Larison v. Home of the Innocents*, 551 S.W.3d 36 (Ky. App. 2018).

And in *Turner* itself, the Court of Appeals reversed the jury, ruling that even though "[o]ne need not be an oncologist to see the merit in Turner's position that cancer limits normal cell growth," the term "'normal cell growth' appears only in the ADAAA definition of what constitutes a qualifying disability," not in the unamended KCRA. *Norton Healthcare v. Turner*, 2021 WL 4228329 at * 4 (Ky. App. 2021). The court held that "[u]ntil such time as the Kentucky Supreme Court or General Assembly speaks on this issue," it would constrain the KCRA

(Continued on next page)

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to the ADA's pre-amendment interpretations. Cancer, for now, could not be the basis for a disability claim without proof that it limited the plaintiff's "major life activities" as narrowly defined by *Sutton* and *Toyota Motor*.

The Kentucky Supreme Court granted discretionary review in *Turner* "to answer whether the KCRA incorporates the ADAAA." Both parties to the case extensively briefed and argued the issue, and the Kentucky Commission on Human Rights, the state agency that administers the KCRA, filed an amicus brief arguing that the KCRA and ADA should remain coextensive. (Disclosure: the author of this piece was the principal author of KCHR's amicus brief in *Turner*).

Nevertheless, the Court in *Turner* punted. Noting that it had been 15 years since the passage of the ADAAA, the Court "call[ed] upon the General Assembly to bring clarity to this issue, one way or another," because determining "whether the KCRA should be updated in line with the ADAAA is ultimately not within this Court's authority to decide." Assuming the Court is correct that legislative deference is warranted, it did not explain why it took a different approach in *Turner* than it had five months earlier in *Hughes v. UPS Supply Chain Solutions*, __ S.W.3d __, 2021-SC-0444 (Ky. 2023), when it ruled that the Kentucky Wage & Hour Act incorporates the federal Portal-to-Portal Act despite much longer legislative silence on the question.

For Joyce Turner, the Court said, it did not matter either way. She would lose under both the state law (bound by pre-ADAAA precedent) and the amended federal law.

To determine that Turner had failed to prove a disability under the KCRA, the Court applied the narrow, employer-friendly rules from cases like *Howard Baer*, *Hallahan* and *Sutton*. Turner's evidence, the Court said, failed to prove her cancer interfered with her "major life activities" as defined by pre-ADAAA case law.

Meanwhile, if the KCRA were to incorporate the ADA's new provisions, the evidentiary standard for plaintiffs may be even tougher. To dispatch Turner's claim under the amended ADA's more favorable clarified terms, the Court primarily relied on the unpublished Sixth Circuit opinion of *Baum v. Metro Restoration Services, Inc.*, 764 Fed.Appx. 543, 546 (CA6 2019), to suggest that a party alleging cancer as a disability must produce expert testimony to prove it. According to the Court, "even if the ADAAA applied, Turner's claim would still fail as she did not submit expert testimony regarding normal cell growth." Contrary to the Court of Appeals ruling below, the Supreme Court signaled that one actually would "need be an oncologist to see the merit in Turner's position."

This is a significant departure from the consensus of federal courts, which have repeatedly held under the amended ADA that no experts are necessary to prove the disabling nature of conditions that "plainly fall within the universe of impairments that a lay jury can fathom without expert guidance." *Mancini v. City of Providence* by and through Lombardi, 909 F.3d 32, 41–42 (CA1 2018); accord, e.g., *Morrissey v. Laurel Health Care Company*, 946 F.3d 292, 299-301 (CA6 2019). Such was the case before the ADA was amended, too. See, e.g., *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 643–44 (CA7 2010). *Baum*, aside from being a poor source of authority, simply "does not compel the use of expert testimony to establish disability." *Ball v. Upshift Work LLC*, 2020 WL 4748541, at *4 (S.D.Ohio, 2020). And as for cancer specifically, the Eighth Circuit has held that "even in remission," cancer "is clearly a covered disability under the ADA," and no expert testimony is required. *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 756 (CA8 2016).

Regardless, *Turner v. Norton Healthcare* leaves in place the current status quo in Kentucky; in disability discrimination claims, the pre-ADAAA rules likely remain good law. That does not mean that cancer can never be considered a qualifying disability, but plaintiffs cannot rely solely on the ADA's new provisions to argue cancer is a disability per se. Proof that cancer substantially impairs a major life activity (as narrowly defined by *Sutton* and its progeny) would still be required. And even if the new provisions of the ADA do apply to the KCRA, plaintiffs nevertheless should be prepared to produce expert testimony that cancer interferes with the functions of the immune system and/or normal cell growth, contrary federal case law notwithstanding.

As for whether the Kentucky General Assembly will hear the Court's call to amend the KCRA in line with its federal counterpart, that remains to be seen.

Joe Dunman is an Assistant Professor at the University of Louisville Brandeis School of Law and formerly the Managing Attorney of the Kentucky Commission on Human Rights. ■

2023 KENTUCKY COMMERCIAL REAL ESTATE conference

October 17, 2023

7:30 AM Registration | 8:30 AM Conference

@ The Louisville Marriott East

Calling all real estate professionals! Get ready for an extraordinary day filled with invaluable insights and networking opportunities at the 2023 Kentucky Commercial Real Estate Conference. Our dynamic lineup of panel discussions features industry experts talking about the latest trends and challenges shaping the commercial real estate landscape. Whether you're a seasoned pro or just starting your career, this conference offers something for everyone.

	TRACK ONE	TRACK ONE SPEAKERS	TRACK TWO	TRACK TWO SPEAKERS
08:30 AM - 09:30 AM	**2023 Industrial Real Estate Panel**	Doug Lance, Tom Sims, Steve Stein and Robert Walker	**Ethical Considerations for Real Estate Professionals**	Sydney Lane and Emily Meyer Ziegler
09:40 AM - 10:40 AM	**2023 Current Office Market Trends**	Rick Ashton, Brent Dolen, Tony Fluhr and Michael Somervell	**Land Use/Zoning Law Update & Recent Regulatory Trends in Land Use -- A Look at Elizabethtown, KY and Its Spike in Land Use Development**	Jon Baker and Joe Reverman
10:50 AM - 11:50 AM	**Finance Panel**	Wes Crowdis, Bill Leffew, Doug Walter and Emily Ziegler	**Real Estate Investment: Choice of Entity & Structure**	Jake Smith and Josh Stearns
12:00 PM - 01:15 PM	**Lunch & Keynote Speaker "State of the CRE Market"**			Lonnie Hendry
01:30 PM - 02:30 PM	**2023 Commercial Real Estate Tax Update**			Andy Ackermann and Stephen Lukinovich
02:40 PM - 03:40 PM	**Illuminating Kentucky's Landscape Through Electric Vehicles**			Katie Smith and Mark Sommer
03:50 PM - 04:50 PM	**Panel Discussion: Commercial Leasing 2023**			Clay Hunt, Doug Owen, Tandy Patrick and Tony Schnell

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MESA ETHICS ONE-HOUR

A Nightmare on Ethics Street: Don't Fall Asleep on Your Ethical Obligations

Tuesday, October 31

Acclaimed humorist Sean Carter is back with all new tales of real-life ethical nightmares. In this fun (and sometimes, frightening) webinar, Carter draws upon recent disciplinary cases to demonstrate the danger for attorneys who fall asleep on their ethical obligations.

Speaker: **Sean Carter**, MESA CLE

Time: Noon – 1 p.m. — Program
Place: Zoom – A link will be sent prior to the seminar
Price: $55 LBA Members | $50 Sustaining Members | $25 Paralegal Members | $125 Non-members
Credits: 1.0 CLE Ethics Hour — Pending

LBA BROWN BAG

33rd Annual Alan T. Slyn and Hon. Richard A. Revell Domestic Relations Update

Friday, February 23, 2024

Lynch, Cox, Gilman & Goodman attorneys Emily Cecconi, Nathan Hardymon and Elizabeth Howell will address decisions the Kentucky Supreme Court and the Kentucky Court of Appeals handed down during the 2023 calendar year so you can get 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**, **Nathan R. Hardymon** and **Elizabeth M. Howell** all from Lynch, Cox, Gilman & Goodman

Time: 11 a.m. – 1 p.m. — Program
Place: Zoom – 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

LBA PROBATE & ESTATE PLANNING SECTION + KY CPA SOCIETY

6th Annual Estate Planning Conference

Friday, June 6, 2024

Save the date for the 6th Annual Estate Planning Conference. Watch the LBA website and/or your inbox for more details! Interested in sponsoring or speaking? Contact Lisa Anspach at *lanspach@loubar.org*.

LBA LABOR & EMPLOYMENT LAW SECTION + UofL BRANDEIS SCHOOL OF LAW

2024 Carl A. Warns, Jr. & Edwin R. Render Labor & Employment Law Institute

Thursday, June 20 – Friday, June 21, 2024

Save the date for the 2024 Carl A. Warns, Jr. & Edwin R. Render Labor & Employment Law Institute. Watch the LBA website and/or your inbox for more details! Interested in sponsoring or speaking? Contact Lisa Anspach at *lanspach@loubar.org*.

JEFFERSON FAMILY COURT JUDICIAL CANDIDATE FORUM

Candidate Forum

October 25, 6:00 pm
Seneca High School, 3510 Goldsmith Ln.

In an effort to provide our community with critical information about the upcoming Family Court judicial race, the Louisville Bar Association is working with several community partners to host a forum featuring each candidate.

The forum will be held at Seneca High School at 6 p.m. on Wednesday, October 25. The forum is open to the public and will be both live-streamed through The Courier Journal and recorded so it can be accessed online after the event.

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JEFFERSON COUNTY

The Louisville Bar Association Announces Major Renovations to the Bar Center

> ... the renovated space will send a strong message to potential new members that the LBA is a thriving and energetic organization committed to supporting the next generation of lawyers.
> – Kate Crosby, LBA President

In the spring of 2024, the Louisville Bar Association will welcome members home to a newly-renovated Bar Center.

After a nearly 18-month process, your local bar association is pleased to announce extensive changes coming to our space at the corner of 6th and Main Streets. As we undergo renovations, the Bar Center will be closed beginning in October and will reopen in the spring of 2024, ready to share exciting upgrades with our members.

Our goal for this renovation is to return the LBA's home back to its members. We want you to enjoy an environment that caters to you by providing a comfortable atmosphere for coworking, better technology for seminars and virtual sessions, expanded meeting space, and gives our organization a home for decades to come.

What to Expect

We plan to change how members and staff use the Bar Center for the better.

Our new entrance will be directly on Main St., elevating our public profile and drawing attention from both downtown workers and the many visitors who pass by our prime location on Louisville's Museum Row. Our lobby will include couches for relaxing with friends and colleagues, as well as outlet-equipped tables with comfortable chairs so you can easily connect to your work while visiting. The space will also include a hospitality bar for members to stop by and grab coffee. Whether you're between court appearances, arriving early for a downtown meeting or just taking a break from the office, we hope you'll find the upgraded Bar Center to be an environment that's both fun and productive.

Just off the lobby is a small catering kitchen and reception area, which will allow the LBA to host more events in-house and rely less on outside venues for small social gatherings. This event space will also be available for members or the community to rent.

The new Bar Center will also feature upgraded space for our hard-working staff members who make the LBA's wheels turn every day behind the scenes. Until now, staff worked from a small, cramped room in the back of the office, separating them from the members and community they serve. This renovation will move our staff from the back of the Bar Center to the current Seminar Room overlooking 6th Street. This will signal to our members and the general public that the LBA is open for business every day – and give members a front row seat to view the hard work that goes into the organization's operations.

The recent popularity of virtual sessions and the preference for smaller, specialized educational opportunities means the organization doesn't use our outsized Seminar Room in the same way we used to. With these renovations, the LBA is creating a more focused seminar area featuring the latest cutting-edge presentation technology. The renovation will also include a small "studio" for recording record high-quality CLE seminars and online educational content.

We're also introducing a new mini-conference center with rooms of all sizes, from two-person focus rooms to a 12-person conference room, perfect for meetings, mediations, depositions, focus groups or other gatherings. These conference rooms will be available to both LBA members and the community to rent (LBA members will receive a significant discount) and will include an on-site lounge space and hospitality bar.

Importantly, all our spaces will include enhanced, plug-and-play technology so users can easily connect to strategically-placed screens for online meetings, presentations and sessions.

Making this Decision

For more than 25 years, the Bar Center has served as a common ground for our local legal community – but as that community changed, our space has not adapted, remaining virtually untouched since its opening in 1998. That's why our Board of Directors set a goal to create a space that encourages working together, building connections and serving our community. With these renovations, we can better fulfill our duty to provide Law, Community and Education to our colleagues and our city.

These plans have been in the works for quite some time. On February 28, 2022, the LBA Board of Directors approved the creation of the Bar Center Use Review Committee, which was created to "consider how the association uses its physical space in

> "We are thrilled for the Louisville Bar Association's reinvestment in Downtown. The re-imagined workspace is exactly in line with our mission of increasing connectivity, enhancing vibrancy and expanding resources for everyone in the entire Downtown community."
> – Rebecca Fleischaker, executive director of Louisville Downtown Partnership

the Louisville Bar Center and how it can be improved for the benefit of its membership and the Louisville community at large." The committee hired local design firm ID+A in June of 2022, and in May 2023, the Board approved the firm's plans.

The LBA members who serve on the Bar Center Use Review Committee are: Chairperson Seth Gladstein, President Kate Lacy Crosby, Abigale Rhodes Green, Amy DeRenzo Hulbert, Ron Johnson, Jennifer Ward Kleier, Deena Ombres and Sam Wardle.

The decision to renovate the Bar Center did not come lightly – Board members considered a wide spectrum of options before committing to this plan. The LBA owns its space in the 600 W. Main St. building, and the Board and Bar Center Use Review Committee discussed selling the office and moving to another space downtown – however, that decision didn't feel right. The Bar Center's location serves so many purposes – we're close to the courthouses and many legal offices, serving as a way station for those heading to and from downtown. The Board also felt an obligation to serve our downtown community. A consultation with a local commercial real estate broker confirmed our thinking, calling our location a "trophy corner" in the central business district. We want to reactivate that trophy corner, and thereby play our role in reactivating downtown.

Behind the Numbers

A renovation of this kind doesn't come without substantial costs, but the Board has also approved a financing plan that makes good financial sense for the organization. With the help of outside legal and financial advisors, we have crafted a plan that pays for half of the renovations costs through financing provided by the LBA's longtime banking partner, Republic Bank. The remainder of the costs will mostly be funded by drawing down on an investment account wisely initiated by LBA leadership decades ago for large projects such as this one.

You as our members also have an opportunity to participate in this critical renovation project and help us make it our home for the future. We'll be offering naming opportunities for many of the newly-renovated spaces, allowing you or your organization to leave your legacy for years to come. There will be also additional opportunities to support the Bar Center renovations on an individual basis; more details will soon be forthcoming.

Looking to the Future

The LBA started this year with a major rebrand, and we're ending the year with an extensive renovation under development. The work we're putting into our organization is all about giving our members what they deserve – a modern bar association that represents them, celebrates their impact on our community and helps them get the most out of their membership, steering our entire legal community toward a brighter future.

We want to be a good steward of our space, make it our home for decades to come, and create positive change while honoring the past that has led us to where we are today.

legal aid society needs your help.
VOLUNTEER TODAY!

The need for civil legal aid far outpaces the resources. Volunteer attorneys play a critical role in helping us remove barriers to the courts and ensuring justice for all.

Legal systems are complex. The odds are against those left unrepresented and the impact of a legal crisis can have startling ramifications for years and sometimes generations. ATTORNEYS MAKE A DIFFERENCE. 80% of Legal Aid Society's clients, represented through our Volunteer Eviction Defense Program, avoided devastating eviction judgments on their records. Similarly, our domestic violence and debt collection programs depend on volunteers to make a tremendous difference in the outcome of the cases.

By July of this year, over 7,000 eviction cases and 2,000 domestic violence cases have been filed in Jefferson County courts alone. An overwhelming number of people involved are unrepresented – among them are single working mothers, struggling students, and Veterans.

Since the pandemic, Legal Aid Society has experienced a significant decline in pro bono participation. The conditions of remote court and remote office made it more challenging for attorneys to volunteer. We ask you to recommit to our mission of "pursuing justice for people living in poverty" and rejoin our Volunteer Lawyer Program. Together, we can ensure our justice system is fair and equitable for all!

"It is a blessing to practice with lawyers who are committed to making our community a more just place."

- PRO BONO CHAMPION KENYON MEYERS
ON THE IMPORTANCE OF VOLUNTEERING
AT LEGAL AID SOCIETY

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"I am proud of the commitment Dinsmore lawyers have made in providing legal counsel to the underserved. **Our lawyers make a difference in our neighbors' lives in a multitude of ways.** For example, seven of our lawyers have fought in court for clients at risk of eviction. Lawyers are a privileged lot. Sure, we have stressors, but we never worry about having a place to sleep in the future. Many of our neighbors are not so secure. We are blessed with the gifts of education and the ability to manipulate bureaucracies. The Firm puts an emphasis on serving the communities in which we're a part of and we are at our best when we use these gifts to help those in need. **This is what motivated most of us to be lawyers.** This is who we are and what we do. It is a blessing to practice with lawyers who are committed to making our community a more just place."

KENYON MEYER
Partner, Dinsmore & Shohl

"Working with the Legal Aid Society's Eviction Defense Project, we have had the opportunity to help tenants from all walks of life, including a college student, a nurse, a tenant on disability, an elderly grandmother, and a single mother, to name a few. **We have seen firsthand the difference that legal representation makes for tenants in eviction court.** Whether it is helping tenants understand the process and asserting their rights in eviction court or negotiating a resolution to the case, representation by a pro bono attorney can mean the difference between the beginning of a tenant's downward spiral leading to homelessness and an assortment of other problems or a chance to stabilize the tenant's housing situation. Unfortunately, the need for more pro bono attorneys to help tenants facing eviction in Louisville is still great. **It only takes a few hours to make a difference.**"

MICHELLE WYRICK & MITZI WYRICK
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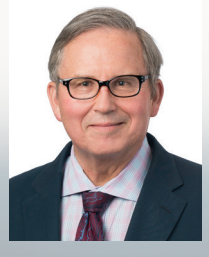
Prenuptial Agreements – Contracts or Wills?

By John R. Cummins and Thomas Monarch

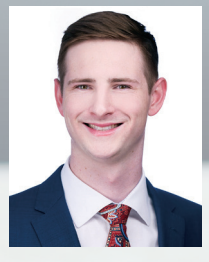
A prenuptial agreement is made by a couple before they marry. These agreements can cover a variety of topics, including the division of expenses and income during the marriage, the division of assets and income on divorce and the division of assets and income upon the death of one spouse. In some instances, these agreements are treated as contracts, but in other instances, they may be treated as testamentary documents, i.e., like a will.

In a recent Mississippi court case, the surviving spouse asserted that the prenuptial agreement with his late spouse was testamentary in nature. He argued that when his wife later made her will, leaving her estate to a trust for her niece and nephew, his wife revoked their prenuptial agreement. As a result, he tried to elect against her will, notwithstanding his obligation in their prenuptial agreement to waive this right.



He also argued that the prenuptial agreement was unconscionable and made without consideration, because his late wife had a much larger estate than he did. The husband then died prior to the resolution of his claims, so his family continued these claims and further asserted that the agreement was forced by the wife's relatives and was made only eight days before their marriage. When the couple married, both were 63-year-old retired school teachers.

The court held that the prenuptial agreement was not testamentary in nature. It was a contract about the parties' economic rights, but it did not involve any transfer of property. Rather, each party retained all of his or her separate property while entering into the prenuptial agreement.



The court also ruled that the Mississippi statute automatically renouncing a will which makes no provision for the surviving spouse was inapplicable here, due to the husband's waiver of his right of renunciation in the prenuptial agreement.

Largely on this basis, the court upheld the validity of the husband's waiver in the prenuptial agreement. *Estate of Bell v. Estate of Bell* (Ct App. Miss. 2023)

Partner John R. Cummins and Associate Thomas Monarch are based in Dentons' Louisville office and are members of the firm's Trusts, Estates and Wealth Preservation group. ■

The End of Affirmative Action in College Admissions: What Does It Mean for Employers and their DEI Programs?

Irina V. Strelkova

On June 29, 2023, the Supreme Court of the United States (SCOTUS) delivered its opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023), in which it put an end to affirmative action programs in public and federally funded college admissions. The decision upended the rule that race could be considered as one factor, among several others, when making admissions decisions in the higher education context.

The decision was received as controversial by many, with some under the impression that the holding will greatly alter hiring or employment practices and will hinder employment diversity initiatives. The impact of the decision in the employment context, however, should be minimal, because employers have never been legally permitted to consider race as a factor when making decisions such as hiring, firing and/or promoting.

"Affirmative action" is a phrase that has different meanings and implications in various settings. It has also morphed into a phrase that is commonly misunderstood, which warrants some clarification. "Affirmative action" in the employment context encourages "affirmative acts" to promote diversity *but actually prohibits* any consideration of race in making employment decisions. In contrast, "affirmative action" in the higher education context encourages diversity and has permitted consideration of race as one of multiple factors in college admission decisions until now.

Affirmative action in higher education allowed for the use of race as one "plus" factor in admissions decisions. These types of programs were previously upheld by a series of decisions, originally based on the premise that government interest in the educational benefits of a diverse student body could justify the use of race in admissions programs. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 310-12 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

However, the role of race was not unlimited. Race could only be used as a "plus" factor among other factors, and universities could not impose a quota system that reserved seats or percentages of admissions for individuals within preferred protected classes. *Bakke*, 438 U.S. at 315-318; *Grutter*, 539 U.S. at 334. Additionally, the *Grutter* Court opined that race-based admissions programs must "have a logical end" at some point. 539 U.S. at 342.

> ***The recent opinion of SCOTUS on higher education affirmative action programs should not impact legally compliant affirmative action or DEI programs of employers.***

The June 2023 SCOTUS decision on affirmative action involved two consolidated cases: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina et al.* The cases were brought by a group challenging the schools' policies that permitted consideration of a student's race as one aspect of a holistic review when making admission decisions. The Court determined that such policies violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, both of which protect equal treatment of all individuals regardless of race. The Court applied strict scrutiny review because race-based action by public and federally funded universities is "inherently suspect." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2147, 2163.

Using this two-part standard, the Court struck down the affirmative action programs at hand because it determined that consideration of race was not used to further compelling government interests and was not narrowly tailored to achieve those interests. In relevant part, the Court stated that the universities' interests were "plainly worthy" but were "not sufficiently coherent for purposes of strict scrutiny." *Id.* at 2167. The Court further noted that the goals of the affirmative action programs could not be measured, and there was no way to ascertain an appropriate end point for the programs, which the higher education affirmative action legal standard required. *Id.* at 2166-67.

The Court also found the programs in question resulted in use of race as a "negative" factor because "consideration of race has led to an 11.1% decrease in the number of Asian Americans admitted to Harvard" and its "policy of considering applicants' race … overall results in fewer Asian American and white students being admitted." *Id.* at 2168-69 (citation omitted). The Court did not address its ruling in any other contexts outside of higher education. Moreover, the SCOTUS majority opinion did not address Title VII which prohibits employment discrimination, although it observed that the compelling interest in the workplace differs from that in education. *Id.* at 2167.

In the employment context, mandatory "affirmative action" falls under the authority of the Secretary of Labor and Executive Order No. (EO) 11246, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), and Section 503 of the Rehabilitation Act (Section 503), all as amended, which govern equal employment opportunity plans and affirmative action programs for certain federal contractors and subcontractors. These laws apply only to businesses with certain federal contracts or subcontracts and federally assisted construction contracts, and require those contractors to take "affirmative action" to ensure that equal opportunity is offered in all aspects of their employment.

In essence, contractors subject to these laws are required to take "affirmative action" to employ and advance in employment members of the groups protected by them. As part of their "affirmative action" obligations, for example, contractors must perform an in-depth analysis of their total employment practices and processes to determine whether and where impediments to equal employment opportunity exist. However, even EO 11246 does not allow for race to be a factor in the decision-making process with respect to employment, nor does it allow for any sort of quota system based on race. In fact, it prohibits decision-making based on race, color, religion, sex, sexual orientation, gender identity or national origin. Nevertheless, there is a common misperception that EO 11246 mandates employers to give preference to women and minorities in employment decisions, which is simply not the case.

Many employers are not subject to these laws but are subject to other state and federal anti-discrimination laws which also prohibit the consideration of race as a factor in employment decisions. In our state, the Kentucky Civil Rights Act prohibits race discrimination with respect to the privileges, terms and conditions of employment, in addition to discrimination based on color, religion, national origin, sex, age, qualified disability or smoker status. Ky. Rev. Stat § 344.040(1).

On the federal level, Title VII prohibits employment discrimination based on race, color, religion, sex (including pregnancy, childbirth and related conditions, sexual orientation and gender identity) and national origin. Title VII also specifically prohibits programs that "limit, segregate, or classify his employees or applicants … in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Since being enacted, these laws have prohibited the use of race as a factor in making hiring, firing, promotion and other employment decisions.

Although employers are not subject to EO 11246, VEVRAA or Section 503, they can also establish voluntary affirmative action programs that are Title VII compliant if such programs strictly prohibit racial quotas or decision making that considers an applicant's or employee's race. Rather, these programs promote proactive measures to address barriers (e.g., college degree requirements) while treating all employees fairly through outreach, training, recruitment and other best practices.

Voluntary affirmative action programs governed by the EEOC are temporary and only permissible if the employer performs a detailed self-analysis that identifies specific past practices by the employer that have resulted in a manifest imbalance of race or gender. Such voluntary programs also cannot "unnecessarily trammel the interests" of non-minority em-

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ployees or non-beneficiaries. *See Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987).

The recent opinion of SCOTUS on higher education affirmative action programs should not impact legally compliant affirmative action or DEI programs of employers. Generally, workplace diversity and inclusion programs do not constitute "affirmative action" in the same sense as the SCOTUS decision, or even in the same sense as in EO 11246. Employment DEI programs should not, and typically do not, involve employers using race or any other protected category as a factor in making employment decisions. Instead, these programs usually consist of broader efforts for encouragement of a more diverse applicant pool and greater sense of belonging in the workplace.

Hours after the SCOTUS decision was issued, U.S. EEOC Chair Charlotte A. Burrow released a statement that the decision did "not address employer efforts to foster diverse and inclusive workforces" and it is still "lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

Despite this, recent legal challenges to employment DEI initiatives have already surfaced. American Alliance for Equal Rights has sued two law firms alleging that their diversity fellowships are unlawful because they excluded white students. The President of this organization, Edward Blum, is the same activist who founded Students for Fair Admissions, Inc., the Plaintiffs in the SCOTUS consolidated affirmative action cases. It remains to be seen how courts will decide these latest cases, but the SCOTUS decision should have little to no impact in the employment context.

This article is not intended to constitute legal advice.

Irina V. Strelkova is an Employment and Immigration attorney at Frost Brown Todd LLP, where she represents employers in a broad range of L&E matters, including federal and state employment litigation, arbitrations, and administrative proceedings like EEOC charges and NLRB unfair labor practice charges. Additionally, Irina advises clients on other aspects of the employer-employee relationship such as handbooks, workplace investigations, restrictive covenant agreements, unemployment disputes, and other personnel policies and concerns. Her practice also includes assisting clients with employment-based immigration matters such as obtaining temporary visas and green cards. ■

LOUISVILLE BAR ASSOCIATION

Welcome

The Louisville Bar Association would like to welcome our new and returning members!

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LBA Restorative Justice Forum with Volunteers of America Mid-States

On Wednesday, September 6, Volunteers of America joined the LBA for a discussion on restorative justice in Louisville. The conversation revolved around the movement, the work being done locally and upcoming items on the 2024 Kentucky legislative agenda.

The conversation was moderated by Stoll Keenon Ogden attorney Tom Williams, and the panel included: Kentucky Supreme Court Justice Angela Bisig, Jefferson County Attorney Mike O'Connell and Libby Mills, Senior Director for Volunteers of America.

If you couldn't make it to our event, you can find a recording of the event and all past LBA forums at the LBA's YouTube page, @LouBarAssoc.

PICKLEBALL PALOOZA

SUCH A TRIUMPH!

The competition was fierce as law students, attorneys and judges hit the court to take on their colleagues in the LBA's 2023 Pickleball Tournament, sponsored by LMICK.

On Sunday, August 27, 10 teams gathered at Goodbounce Pickleball Yard to compete for the LBA Pickleball championship title. The tournament included five playoff rounds, until we arrived at our championship round. The game was close, but the victory went to Dentons attorney Garret Stone and his partner Harrison Payne. Our runners up were Anna Pierce and her partner, and the Strong Arms (LBA President-Elect Bryan Armstrong and Goldberg Simpson attorney Justin Key) in third place.

Congratulations to this year's winners and thank you to everyone who showed up for an afternoon of good connections and friendly competition! Stay tuned for future pickleball events coming in 2024.

LOUISVILLE BAR ASSOCIATION
HEALTH & WELLNESS COMMITTEE

Pictured above: Top (LtoR): The Anna Peirce team; Garret Stone and Harrison Payne; Justin Key and Bryan Armstrong. Bottom Left: Judge Jessica Moore and Justice Angela Bisig. Bottom Right: Courtney Risk from LMICK stands with winners Garret Stone and Harrison Payne.

Mary Jane, M.D.: What Should Kentucky Employers Know About the Latest Developments Concerning Medical Marijuana?

Aaron T. Vance and Rudy J. Ellis III

Nearly three decades after California first legalized medical cannabis usage, Kentucky is poised to join 37 other states across the country that have also legalized the medical use of marijuana with the passage of Senate Bill 47 earlier this year. The law, signed by Gov. Andy Beshear in late March 2023, follows his 2022 Executive Order on medical marijuana usage in the Commonwealth. Heading into the new law's 2025 enactment date, many questions remain concerning these recent developments. For employers in particular, what exactly does all of this mean concerning marijuana use by their employees and in their workplaces?

Is medical marijuana presently legal under federal law? And are employers required to accommodate its use by employees?

Currently, marijuana remains an illegal drug under federal law pursuant to the Controlled Substances Act. 21 U.S.C. ch. 13 § 801 *et seq.* The law does not provide any exception for medical use nor does any other federal law, such as the Americans with Disabilities Act (ADA).

The ADA requires employers to make reasonable accommodations for qualified workers with disabilities. 42 U.S. Code § 12101 *et seq.* The ADA, however, does not protect employees for illegal drug use (as determined by federal law) even when used for the purpose of treating a medical condition or disability. Federal courts have echoed this, including courts in the Sixth Circuit, which have even ruled that the ADA does not require a medical marijuana accommodation when a state statute exists legalizing medical use.

The Biden administration, however, has signaled a strong interest in marijuana reform on the federal level. On October 6, 2022, President Joe Biden released a statement concerning such reform and tasked Attorney General Merrick Garland and Department of Health and Human Services Secretary Xavier Becerra with reviewing marijuana's current scheduling under federal law and whether it should be rescheduled or descheduled (which the Controlled Substances Act allows the executive branch the power to do).

On August 30, 2023, the Department of Health and Human Services recommended rescheduling marijuana from Schedule I to Schedule III. This recommendation is subject to review and approval of the Drug Enforcement Agency. While this rescheduling does not legalize marijuana at the federal level, if approved, it will still have far-reaching effects — likely disrupting current guidance from federal agencies and possibly the current state of the law concerning accommodations for medical marijuana usage.

What are Kentucky's neighbors doing concerning legalized marijuana?

While marijuana remains illegal in all forms under federal law, Kentucky's neighboring states provide an illustrative sample of the current states where cannabis is legal. In Virginia, Missouri and Illinois, marijuana has been legalized for both adult recreational and medicinal uses. In West Virginia and Ohio, marijuana has been legalized for medicinal use (with Ohio hosting a referendum this November concerning its recreational use). In addition, in Indiana and Tennessee, neither medical nor recreational marijuana use has been legalized, however renewed pushes concerning medical marijuana legalization are expected in the coming legislative sessions in both states.

Is medical marijuana presently legal in Kentucky? And are employers required to accommodate its use by employees?

While Gov. Beshear's Executive Order, No. 2022-798, concerning the use of medical marijuana has yet to draw any legal challenges, various commentators have criticized the Executive Order as being on shaky legal grounds. The Executive Order itself doesn't actually authorize the use of medical mari-

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juana, but instead provides the parameters by which the governor has pledged to grant a pardon to anyone accused or convicted of using it for medical use. With over a year before the new law goes into effect, the Executive Order continues to be in effect and will likely remain if Gov. Beshear is reelected to a second term this November.

The most notable feature of the Executive Order is that it does not authorize medical marijuana cards (the future law, however, will use cards and recognize cards from out of state). Order 2022-798 § 4. Instead, individuals using medical marijuana must get a written certification from a physician which contains the following written certification information:

- The patient's name, date of birth, home address and telephone number
- The physician's name, address, telephone number and professional license number
- A statement that the physician has a bona fide physician-patient relationship with the patient
- A statement by the physician that, in his or her professional opinion, the patient suffers from a medical condition listed in the order

Id. at § 5. These certificates may come from a physician licensed in Kentucky or from the individual's state of residence. *Id.* at § 4. If an individual has one of these, they will be pardoned of any offense of possession under KRS 218A.1422. *Id.* at § 9.

Under this scope, the Executive Order, however, does not provide any guidance on whether certain forms are prohibited (i.e., combustible) and how this applies in the employment context — as such, employers are free to continue to completely prohibit the use of marijuana by their employers and are not required to provide any accommodations for its use.

Will the new law require employers to accommodate an employee's use of medical marijuana?

When Senate Bill 47 takes effect in January 2025, qualifying patients will be allowed to possess medical cannabis in specific forms to treat chronic illnesses and disorders outlined in the law. While the full regulatory framework of Kentucky's medical cannabis law has yet to be unveiled by the Cabinet for Health and Family Services (and is expected sometime in 2024), the law itself has been drafted in an attempt to provide substantial legal safeguards for employers in the Commonwealth.

First, under the law, medical cannabis may only be consumed in a non-combustible form. See SB 47 § 6(1)(g). Second, the use of medical cannabis is expressly prohibited "when doing so would constitute negligence or professional malpractice." *Id.* at § 6(1)(d). Finally, employers are not required to permit or accommodate the use, possession, distribution or sale of medicinal cannabis in the workplace and they may even:

1. Restrict the use and require their employees not use medicinal cannabis altogether;
2. Continue to operate as a drug-free workplace;
3. Prohibit medical marijuana usage through reasonable detection methods; and
4. Rely upon the statute as a defense in lawsuits and administrative proceedings.

Id. at § 7. Unlike other states, the new law does not provide any additional protections for an employee's off-the-clock usage of medical marijuana. Some states, like Illinois and New Jersey, for example, have codified an employee's right to use medical and recreational cannabis while off-the-clock, by prohibiting an employer from taking any adverse employment action against an applicant or employee for their use of marijuana or simply because the applicant or employee tested positive for cannabis in a drug screen. *See* 820 ILCS 55/5; *see also* N.J.S.A. 24:6I-52.

Kentucky's statutory regime seemingly offers employers the same protections that have been adopted by other states. States like Michigan and Massachusetts have expressly stated that employers need not accommodate an employee's of use medical marijuana and can continue to refuse to hire, can discipline or can discharge a person who tests positive for marijuana, otherwise violates a workplace drug policy, or comes to work under the influence of marijuana. *See* MCL § 333.26427(c)(2)); *see also* M.G.L. c. 94G § 2(e).

Notably, while the new statute seemingly provides coverage for Kentucky employers to restrict medical cannabis use, this does create some tensions with the Kentucky Civil Rights Act and whether disciplining an employee for off-the-clock usage of medical marijuana for a qualifying disability may constitute disability discrimination. Employers should be mindful of both of these issues and be on the lookout for further regulatory and guidance from state agencies and courts as they begin to interpret the contours of these employer protections.

What are the takeaways for employers?

Medical and recreational cannabis continues to be a hot legislative item across the country and recent developments in Kentucky make that apparent. Sluggish attitudes toward legalization at the federal level has resulted in a patchwork of varying laws and regulations as states have stepped up to the plate to experiment on this subject. Such experiments, however, often result in blind spots and growing pains as states adopt and fine tune their own legal and regulatory frameworks. And with a little under 18 months until enactment, similar pains are expected in Kentucky. While the statute attempts to put safeguards in place for employers, significant employment law issues remain in its forthcoming application and interpretation. As such, employers should approach this issue conservatively and thoughtfully prepare for the rollout of medical cannabis in the Commonwealth.

Aaron T. Vance is Chair of the LBA's Labor & Employment Law Section. He is an associate in Barnes & Thornburg's Labor and Employment Department in Indianapolis and licensed to practice in Kentucky and Indiana. Aaron advises and counsels clients on nearly all issues facing employers in the workplace to develop effective solutions in labor relations, employment disputes and compliance with federal, state and local labor and employment laws. He is a frequent author for the firm's Labor Relations blog at https://btlaw.com/insights/blog/labor-relations.

Rudy J. Ellis III is Vice-Chair of the LBA's Labor & Employment Law Section. He is an associate in Dinsmore & Shohl's Labor and Employment Department in Louisville and licensed to practice in Kentucky. He represents a variety of businesses ranging from local companies to Fortune 500 corporations in all areas of labor and employment law, as well as general litigation. ■

Member Appreciation & Awards Luncheon

THURSDAY, NOVEMBER 16 · 11:00A – 1:00P · ICE HOUSE · 226 E. WASHINGTON STREET

Please join the LBA as we thank and recognize members from the Louisville legal community. Awards to be presented include:

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Judge Benjamin F. Shobe Civility & Professionalism Award

Paul G. Tobin Pro Bono Service Award
Robert & Frank E. Haddad Jr. Young Lawyer Award
Daniel M. Alvarez Champion for Justice Award

Judge Richard A. Revell Family Law Award
Committee of the Year
Section of the Year

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This Member November, join the LBA for a series of open, informative conversations with our judiciary. These forums will focus on the nuts and bolts of practicing law in each of our local courts. The judges will also be available to answer questions from members. Have topics or questions you'd like to be sure we cover? Submit them in advance to kmiller@loubar.org.

MEMBERS *on the move*

Decker

Farris

Corporate Counsel has honored Stites & Harbison Chair **Marjorie A. Farris** as a "Managing Partner of the Year" in its 2023 Women, Influence & Power in Law (WIPL) Awards. She is one of six women honored in this category across the country. The WIPL Awards honor general counsel, in-house leaders and law firm partners who have demonstrated a commitment to advancing the empowerment of women in law as well as their commitment to diversity in the legal industry. In 2021, Farris became the first woman to lead Stites & Harbison since its founding in 1832. Prior to becoming firm Chair, she was the firm's Co-Chair of the Class Action and Multi-District Litigation Group and a member of the Torts and Insurance Practice. An accomplished trial lawyer, Farris has actively defended more than 75 class actions nationwide.

Stites & Harbison attorney **Mandy Wilson Decker** was elected as 2023-24 Chair-Elect of the newly-formed Kentucky Bar Association (KBA) Intellectual Property (IP) Law Section. The KBA's IP Law Section was established and became effective on July 1, 2023. Its mission is to provide information, foster a supportive environment and promote diversity and inclusion in intellectual property law. In addition, Kentucky Intellectual Property Alliance (KYIPA) has elected Decker as inaugural Chair of its Board of Advisors. She has served on the group's Executive Advisory Committee since 2021. KYIPA's mission is to cultivate the creation, protection and advancement of intellectual property in Kentucky by building relationships between statewide companies, organizations and innovators. Beyond KYIPA, Decker is active in a variety of professional and community organizations. She is a member of the American Intellectual Property Law Association and the Association of University Technology Managers. Her practice focuses on intellectual property protection strategy, including counseling clients on infringement, validity and patentability, transfer of intellectual property, patent drafting and patent prosecution. Decker is a Member (Partner) of Stites & Harbison based in Louisville and Lexington and is a Registered Patent Attorney.

The Trademark Lawyer Magazine has named Stites & Harbison to the 2023 Top 10 Trademark Firms and IP Practices in North America – South list. This is the firm's first year being honored. The editorial and research staff at *The Trademark Lawyer Magazine* reviews law firms by country and jurisdiction based on a variety of criteria for the Top 10 lists. Examples of research criteria include recent legal achievements, recognition by third party rankings and honor directories, client testimonials, regular articles or presentations on timely topics and active participation in intellectual property organizations. *The Trademark Lawyer Magazine* is one of the core platforms of CTC Legal Media founded in 2012. ■

In Memoriam

Debra K. Stamper, 60, passed away on Saturday, August 26, 2023. Stamper served as General Counsel and Executive Vice President of the Kentucky Bankers Association, where she spent 27 years of her career drafting industry-impacting legislation and caring deeply for the bankers she worked with. In early September, KBA President and CEO Ballard Cassady Jr. sent out an email in which he broke the terrible news of her passing. It stated, in part, that "Debra has been at the heart of the KBA family for the past 27 years, with uncommonly good sense and legal counsel that has made us the envy of all my counterparts."

Stamper had a career in banking which lasted more than thirty years, and just in the summer of 2023, was recognized as one of *Louisville Business First's* 20 People to Know in Banking. ■

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MEETING ANNOUNCEMENT

Association of Legal Administrators

The monthly chapter meeting of the KY Association of Legal Administrators will be held in person on Thursday, October 12th beginning at 11:45 am at the office of Frost Brown Todd in Louisville (400 W. Market St., Ste. 3200); and Lexington (250 W. Main St., Ste. 2800). Guests are welcome to join us for lunch. RSVP to Tina Kirkland, *tkirkland@fbtlaw.com*. ■

Help Wanted

Through the LBA Placement Service

Personal Injury Attorney:
Well-established Louisville-area law office is seeking a litigation attorney with a minimum of two years' personal injury experience, who will also offer some pre-litigation support. If you are excited by the prospect of fighting for justice and making money for everyone, including yourself, this is your job. Candidate must be licensed in Indiana and enjoy working as a team member. Licensed in Kentucky is a plus. Type: Full-time Pay: $85,000.00 - $120,000.00 per year. Benefits: 401(k), 401(k) matching, dental insurance, health insurance, life insurance, paid time off, referral program, vision insurance. 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 working with a well-established boutique law firm located off Westport Road that has a varied practice. They are currently seeking an experienced family law attorney with at least five years of experience to join the practice. Must be a licensed Kentucky attorney in good standing with a solid reputation. Salary is based on experience, plus benefits and perks. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

Litigation Associate:
The LBA Placement Service is working with a regional law firm seeking to hire a litigation associate with at least three to five years of experience for their downtown Louisville office. The candidate must be licensed in Kentucky and in good standing with excellent references. They will be representing a broad array of clients in regulatory matters, general civil litigation and government enforcement actions with a focus on health care law, government regulations, constitutional law, business litigation and employment law. Salary commensurate with experience, plus a generous benefits package. Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

Defense Litigation Attorney:
The LBA's Placement Service is working with a civil litigation firm, located on the east side of Louisville, that primarily does insurance subrogation and defense litigation. This office offers a great career opportunity for an attorney to obtain litigation experience. They would prefer one to two years of experience with civil litigation but will consider other applicants. The salary is commensurate with level of experience, with potential for pay raises and percentage-based pay in future years. They also pay malpractice insurance, agreed upon CLEs and two weeks' paid vacation (eligible for one week after six months; two weeks after a year of employment). Send resumes in MS Word format to the LBA Placement Service Director, David Mohr, dmohr@loubar.org.

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