

BAR *briefs*

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

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Jefferson County Trial Courts Seeking New Chief Court Administrator



The Chief Court Administrator oversees the daily administrative operations of the Jefferson trial courts. This position is responsible for supervision of court administration staff and ensuring all necessary administrative functions of the court are addressed completely and timely. This position provides support to the judges of the Circuit, District and Family Courts and Jury Administration. The Chief Court Administrator reports to the Supreme Court Justice of the 4th Supreme Court District.

See the LBA website, www.loubar.org, or an upcoming issue of eBriefs for a complete job description and information on how to apply.



A big thank you to those who participated in the LBA's Back to School Drive!

See page 10 for more.

A Reflection on our Roots

On a recent walk to Motion Hour, I stopped to read the historical marker devoted to the Louisville Bar Association that has stood outside the courthouse since 2000. I had passed it countless times, but I'm a little embarrassed to say that I had never before taken the time to read it. In case I'm not alone in being distracted on my way to and from court, here is what it says:

Louisville Bar Association

Roots traced to 1871, with meetings of lawyers advocating legal reform. Those efforts led to state law guaranteeing that a witness could not be barred from testifying on basis of race or color. Officially established on January 13, 1900, the LBA is Kentucky's oldest continuously operated bar association. The LBA, with the Louisville Women's Club, was instrumental in establishing Louisville's Legal Aid Society in 1921, to provide legal aid for the poor. The LBA was also active in securing passage of the judicial article of 1975, which barred non-lawyers from serving as judges and created a unified court system.

I was curious about the "roots." Who were these "lawyers advocating legal reform" in 1871? And what prompted their meetings? A couple of trial subscriptions to academic journals, some kind help from the Filson Society and several hours later, I have at least a start of an understanding. With your indulgence, I offer this brief and general summary of what I have learned, thanks in large part to scholarship published in the 1970s by Victor B. Howard, a Professor of History at Morehead State University.

As Professor Howard explained in his article, *The Black Testimony Controversy in Kentucky, 1866-1872*, *The Journal of Negro History*, Vol. 58, No. 2 (Apr. 1973), after the Civil War, Kentucky was one of many states that still prohibited Black people from testifying against White people in court. With this state law on the books, federal courts began hearing cases and receiving testimony from Black witnesses through the application of the federal Civil Rights Act of 1866. Those same witnesses would have been denied the right to testify in Kentucky's state courts.

One such federal prosecution involved the brutal murders in August 1868 of four members of the Foster family, a Black family, by two White men, George Kennard and John Blyew. As Professor Howard described, "The only witnesses were the surviving members of the family," a 16-year-old boy, Richard, who was gravely injured but gave testimony on his deathbed, and an eight-year-old girl, Laura, who was unharmed and provided a written statement. Richard's and Laura's testimony would have been inadmissible in Kentucky courts because they were Black. In the federal court case, their statements were admitted into evidence, and Blyew and Kennard were convicted in the fall of 1868 and sentenced to death.

Around the time of the Foster family murder trial, on November 30,

1868, *The Courier-Journal* published proposed legislation to change the evidence laws to allow testimony by all persons in state court. The publication in the newspaper included a statement that the proposed legislation "has been agreed upon by several members of the Louisville bar, and they request others of the profession throughout the State to get up petitions and ask its adoption by the next Legislature. Parties in interest are admitted to testify in almost every other State, and no member of the legal profession who has seen its workings would be willing to recede from it. It has been a good deal debated in our State, and it is now hoped that the reform will be carried out." Along with this focus by Louisville lawyers, formerly enslaved Kentuckians were also organizing and trying to secure their equality within the state courts, along with their right to vote.

I was disappointed, but not surprised, to learn that many of the reasons stated by the lawyers for repealing the state's ban on testimony by Black people focused not on concerns for equality for formerly enslaved people, but on ridding the state of the Freedmen's Bureau and unwelcome intervention by federal courts whose judges seemed determined to protect civil rights. That truth does not contradict our historical marker, but it does place in proper context the motivations of at least some members of the legal community at the time.

By 1872, the Fayette and the Kenton County Bar Associations and the Kentucky Bar Association had joined the Louisville lawyers' and newly enfranchised Black voters' calls to change state law concerning Black testimony. That year, the legislature finally passed legislation securing the right of Black people to testify against White people in Kentucky. In Professor Howard's assessment, "The influence of the law profession was of considerable importance" in bringing about the 1872 law.

I would be remiss if I did not include a note about the last chapters in the trial of the murders of the Foster family. Within months of Kentucky's enactment of the right of Black people to testify, the U.S. Supreme Court reversed the convictions of Kennard and Blyew, holding that the federal court had lacked jurisdiction to try the men because the Civil Rights Act of 1866 did not extend to secure the right of testimony by Black victims of crimes who were not themselves criminal defendants. The men were re-indicted. Blyew escaped for several years, but eventually both men were tried in state court under the new law permitting testimony by Black people and both were convicted again. However, separate governors pardoned Kennard in 1885 and Blyew in 1896.

In just a little over a year, we will celebrate the 125th anniversary of the official establishment of the LBA on January 13, 1900. We're already more than 150 years from the 1871 "roots" described on our historical marker, and in the intervening time, members of the Louisville Bar Association have made countless contributions to positive legal reform in the Commonwealth. As we prepare to commemorate our anniversary, I look forward to the chance to learn more about our collective history – both the parts that make us proud and the parts that hold painful lessons.

Kate Lacy Crosby
LBA President



“
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painful lessons.**

SAVE — THE — DATE

Family Court Judicial Forum
for Family Law Attorneys

Please join the Jefferson Family Court Judges and the LBA for updates, insights and open conversations regarding matters affecting all areas of practice of family law. Your questions, suggestions and input will be welcome. To help us be better prepared and to ensure we address your most pressing concerns, you may send your topics of interests or questions in advance to Kelly Williamson at kellyw@kycourts.net.

HOSTED BY: Family Court Term and the LBA

WHEN: Wednesday, September 20th at 4:00pm

WHERE: Jury Pool Room (2nd Floor Judicial Center)

LBA OFFICER NOMINATIONS

The LBA Board of Directors is seeking nominations for the elected positions of President-Elect, Vice-President/Treasurer and Secretary for 2024. Nominations may be made by written petition signed by not less than ten (10) active LBA members. Submit all nomination petitions to Executive Director Kristen Miller at kmiller@loubar.org no later than November 1st.

—Samuel Wardle, LBA Secretary

THE LOUISVILLE BAR FOUNDATION

There is still time to become a Foundation Partner for 2023

The Louisville Bar Foundation is pleased to announce that 25 local firms or corporate in-house legal departments have signed up as "Foundation Partners" in 2023. The Foundation Partners program was established to recognize those that help continue the good works of the LBF by making a \$45 minimum tax-deductible contribution to the Foundation for every member of the firm or legal department. Firms or legal departments with five or more attorneys are eligible for recognition as Foundation Partners.

The combined support from the attorneys represented by the firms and legal departments listed below is more than \$30,000. The generosity of the Foundation Partners and other individual LBA member attorneys makes it possible for the LBF to support and improve legal services for the poor, law-related public education and our judicial system.

The Louisville Bar Foundation thanks all contributing attorneys for their generous support. **It is not too late to join this list!** For more information about how you can become a Foundation Partner, please contact Jeffrey A. Been at (502) 292-6734 or at jbeen@loubar.org.

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KLRS

Kentucky Lawyer Referral Service

KLRS WELCOMES NEW MEMBERS TO THE SERVICE.

Jeremy Beck, Ackerson & Yann

Panel: Copyright/Trademarks

Nina Couch (rejoined), University of Louisville Brandeis School of Law

Panels: Labor & Employment, Professional Negligence/Product Liability and Tort Law

Angelo DiBartolomeo, DiBartolomeo Law, PLLC

Panels: Business and Real Estate Law

Alexander Coffin, Law Office of Alex Coffin, LLC

Panels: Business Law, Consumer, Insurance, Labor & Employment, Real Estate, Tax Law, Tort Law and Wills & Estates

In the past 8 months of 2023, KLRS has been forced to turn away more than 600 callers because we had too few attorneys available on certain panels to accept their cases.

Don't miss another potential client – help us make sure everyone gets a fair chance to pursue their claims!

PANELS NEEDED:

Tenant Rights, Police/Jail Misconduct, Auto Consumer Fraud and Adult Guardianship/Conservatorship.

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Jefferson District Court Update

This month I have asked my friend and colleague, Chief Judge Jessica Moore to give us an update on the Jefferson District Court. Enjoy! – Chief Circuit Court Judge Mitch Perry

On behalf of the Jefferson District Court term, we hope everyone had a great summer! You could say the Jefferson District Court is in our own “Barbie Era” with 16 female judges and our one outstanding “Ken” – Judge Anthony Jones. The district term has welcomed five new judges to the bench this year. Judge Anthony Jones currently presides in juvenile court and Judges Yvette De La Guardia, Mary Jude Wolford, Karen Faulkner and Megan McDonald currently preside over criminal dockets. The term continues to offer hybrid court appearances on certain dockets, and we continue working to implement practices and procedures to best serve our community and justice partners while adapting to the changing nature of the workforce and technology.

On August 30 in the Ben Shobe Jury Pool Room, we hosted a “Juvenile Services Summit” bringing together community partners, mental health and service providers, and program facilitators to meet each other and bridge communication gaps to better serve juveniles in this community.

As Chief, I’ve implemented monthly continuing judicial education opportunities for the term. With the support of Justice Bisig and Chief Judge Perry, the trial court terms recently met for a half-day intensive training seminar on the 4th Amendment and Search Warrant review with Judge Mark McGinnis from Wisconsin. The district term is currently working on revising our local rules and protocols, along with ongoing meetings with our justice partners on how best to move the courts forward. To date, the district judges have married more than 529 couples in the Hall of Justice! And the term was excited to compete in the LBA’s Pickleball Palooza on August 27!

The district term is committed to the efficient, thoughtful operation of our courts. Please contact me if you have concerns or matters to address with district court.

Sincerely,
Judge Jessica Moore
JessicaAMoore@kycourts.net.



RESTORATIVE JUSTICE FORUM

Join the LBA and VOA for a discussion on restorative justice in Louisville. Learn about the movement, the work being done locally and upcoming items in the 2024 Kentucky legislative agenda. This event will include a discussion followed by a Q&A session.

PANEL:

Moderated by:

			
Thomas Williams Stoll Keenon Ogden	Justice Angela Bisig KY Supreme Court	Mike O'Connell County Attorney	Libby Mills Volunteers of America



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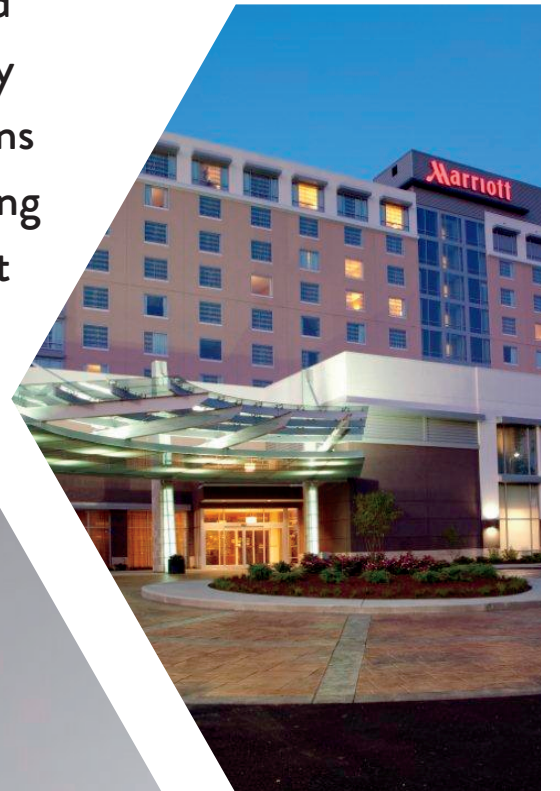
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Felony Mediation: You We Can Work It Out

Judge McKay Chauvin (Ret.)

There are only two types of cases on a judge's docket: (1) those that *can* be settled short of trial, and (2) those that *can't*. Statistically speaking, 97% of all cases on any judge's docket are resolved by agreement. Statistically speaking, 100% of the judges who preside over the trials of the remaining 3% think that 97% of those cases should have settled, too.

A recently retired judge, who shall remain nameless but who I think was brilliant, once wrote, and I quote: "Great trial lawyers only try the cases that *can't* be settled. Lesser trial lawyers end up settling cases because they don't have the skill to try them and/or try cases because they don't have the skill to settle them". What I meant by that ... I mean ... What I think that nameless-but-brilliant judge meant by that was, if settling cases is what trial lawyers spend most of their time doing, then they have to approach plea negotiations with at least the same level of interest, intelligence and intensity as they do trial work. Both lawyers representing the Commonwealth and lawyers representing the accused have a professional and ethical obligation to engage in meaningful plea negotiations. In cases where the lawyers think they have a case that *can* and therefore *should* be settled, that obligation may extend to asking for help from a mediator.

The idea of using mediation to help resolve *criminal* cases is relatively new. As such, it may take some time to get used to, or for us to come to appreciate the value of it – it did for me. I couldn't understand why, if the parties agreed that the case could and therefore should be worked out, they couldn't just – you know – work it out. There's no one answer. In fact, there's usually more than one answer in every case. I should have known that.

For years I had been giving my "I'm not telling you what to do" speech from the bench when a defendant was intent on turning down a deal *everyone* agreed they shouldn't, and my "we might as well go ahead and set this for trial then" speech when the Commonwealth's offer was the same or worse than what the defendant could reasonably expect to happen at trial. Plea negotiations get complicated because people (i.e., lawyers, defendants, victims, police officers and members of the defendant's or victim's families) are complicated, and sometimes they get in – and then can't get out – of their own way.

In "So You Wanna Be A Settlement Lawyer, Huh?", the last chapter of the textbook I wrote for my trial practice class: *Trial Practice Makes Perfect*, I cover what I think should be the basic parameters for plea negotiations. It starts with the idea that a plea agreement is a contract. The terms of that contract cannot be prohibited by law but are otherwise limited only by the attorneys' imaginations tempered by a realistic assessment of the *value* of the case. The "value" is determined through a realistic assessment by counsel of what will happen if the case goes to trial – the "best," "worst" and "most likely" outcome scenarios – which informs the prosecutor's plea offer and the advice defense counsel gives his or her client as to whether to accept that offer. It may be that the devil is in the details, but if the parties agree that the case should be settled, then everything else is *just* a detail. Some of those details will be more important than others, and it won't always be the same details in every case. The key to reaching a plea agreement in any case is to correctly identify which of those important details are *essential*. When the lawyers agree that the case should be settled but get bedeviled by the details, that's when a mediator can help.

It's a matter of perspective or, more accurately, perspectives. Everyone interested in the negotiation is entitled to theirs, and from their respective perspectives, things can look and *feel* very different. A mediator can provide a reality check on how realistic the lawyers' assessments of the value of the case are. A mediator can help the lawyers identify and focus on what is *essential* and help them hash out some of those devilish details. A mediator can also bring his or her experience to bear in helping the lawyers structure the final agreement so that it does what they want it to do. But as useful as all those things can be in helping to reach a plea agreement, none of those things are *the* thing that I have come to believe is the *best* thing a mediator can do.

From *my* perspective, having done ten or more felony mediations at this point, a successful mediation is one where the parties have reached an agreement that no one really wanted but *everyone* can live with. A mediator can make that happen by creating a *shared* perspective for the defendants, victims and the people who care about them. That's different than *changing* their perspectives.

A shared perspective is one that allows them to recognize and accept the legitimacy of the plea agreement without surrendering their own legitimate thoughts and feelings about what's "right" or "fair," or feeling ignored or marginalized in the process. This is important to the individuals involved in the criminal justice system in that it impacts how well they are able to put that experience behind them and move on with their lives. It is also important to the criminal justice

system as an institution because inspiring faith in that system is essential to an institution that only "works" to the degree that people are willing to place their faith in it.

The Administrative Office of the Courts has worked very hard and very thoughtfully in creating the Felony Mediation Program. The goal of the program is to help get cases that should settle get settled as soon as practicable and as fairly as possible. When the parties agree that they need help reaching an agreement, all they have to do is ask the presiding judge to ask the Felony Mediation Program to ask the Supreme Court to appoint a Special Judge. Ok – that *sounds* complicated. All they have to do is ask the judge to fill out and send in an AOC-MED-ADR-14 form. Ok – "AOC-MED-ADR-14" *sounds* complicated, too. I *promise* it isn't. It's easy and it's free. The Special Judges – who are "Special" because the Supreme Court Order appointing them says so, and because in addition to being experienced (aka retired) judges, they have been specially trained as

mediators – are definitely willing and may be able to help. What their experience and training tells them is that mediation is a lot like meditation. It doesn't work by getting rid of thoughts and emotions but by moving through them without getting stuck. For more information go to www.kycourts.gov. We can work it out.

Judge McKay Chauvin (Ret.) was first appointed to the Jefferson Circuit Court in 2004. He retired in 2023 but continues to serve the community as a member of the Retired Judges Program through the Administrative Office of the Courts, provide mediation services in criminal cases and teach trial practice at the University of Louisville Brandeis School of Law. He is the author of the Trial Practice Makes Perfect workbook and View From the Bench: How Way Down There Looks From Way Up Here. For more information go to www.mckaychauvin.com. ■



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Know a Luminary of our Legal Community? Nominate them for an LBA Award!

The LBA is seeking nominations for its highest honors—the annual LBA Awards. Each year, we recognize our members who personify the best of our legal community with their work and professionalism. Do you know someone who deserves recognition? Read below for a description of each award and how you can make a nomination.

Justice Martin E. Johnstone Special Recognition Award

This award is the highest recognition bestowed upon an LBA member for outstanding participation and partnership within the legal community. An individual deserving of this award has made a significant impact in the Louisville community through professional or volunteer efforts and exemplifies what it means to be a lawyer.

Judge Benjamin F. Shobe Civility & Professionalism Award

Individuals receiving this award have consistently demonstrated adherence to the highest standards of civility, honesty and courtesy in their dealings with clients, opposing parties and counsel, the courts and the general public. They have shown sustained excellence through leadership in the profession.

Robert & Frank E. Haddad Jr. Young Lawyer Award

Nominees for this award must have been practicing as a trial lawyer—either criminal or civil—for less than five years. Nominees must demonstrate an ability to handle complex or unusual trials or appeals and they must have garnered the respect and admiration of the judiciary and of their colleagues.

Judge of the Year Award

This award is presented to a member of the judiciary who has shown judicial integrity and professionalism. A nominee for this award has contributed to the community by volunteering in civic organizations to help promote the image of the legal profession and has established a reputation for integrity, scholarship and professionalism.

Paul G. Tobin Pro Bono Service Award

This award recognizes the work of LBA members who have unselfishly given time to improve the quality of society through their legal work. Worthy nominees will be LBA members who helped deliver legal services to the disadvantaged through a pro bono program or cause.

Daniel M. Alvarez Champion for Justice Award

This award is given to a lawyer demonstrating a strong devotion to serving underrepresented individuals or groups by giving a legal voice to those who would otherwise be voiceless. These groups include, but are not limited to, the Hispanic and Latino communities, documented and undocumented immigrants, the LGBTQ community, incarcerated juveniles and indigent criminal defendants.

Judge Richard A. Revell Family Law Award

This award is presented to attorneys who have been in the forefront of new developments in the practice of family law. They have exhibited dedication to families and children through work both inside and outside the courtroom. Award recipients have made significant contributions to public service in the area of family law and have demonstrated innovation in the performance of their duties.

SUBMIT A NOMINATION

To nominate a deserving candidate, please submit a letter including the following:

- Your nominee's name and the award for which you are nominating him or her.
- Detailed information about how he or she meets the specific award's criteria.
- Information about the nominee's service to the LBA and the community.
- Any other additional details that will assist the committee in its deliberations.
- Both your and your nominee's contact information, address, phone number and e-mail.

Nominations forms are available online at www.loubar.org. Nominations may also be submitted either via e-mail to Kristen Miller at kmiller@loubar.org or postal mail to: LBA Awards, Louisville Bar Association, 600 W. Main St., Ste. 110, Louisville, KY 40202.

NOMINATIONS ARE DUE FRIDAY, OCTOBER 6.



Member Appreciation & Awards Luncheon

The LBA will be honoring those who have helped make the Louisville legal community great this year!

Thursday, November 16 11:00a – 1:00p
Ice House 226 E. Washington St.



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

ATTORNEYS

Sana Abhari, Kentucky Commission on Human Rights

Matthew D. Bearden, Pitt, Frank, Distler, Bearden & Henderson

Vincent Iron Brodbeck, Attorney at Law

Natalie J. Colliersmith, Mory & Colliersmith

Emily K. Craddock, Attorney at Law

Katherine Marie Dittmeier Holm, Attorney at Law

Quita Doss-Bunton, Baptist Healthcare System, Inc.

Julie J. Greenlee, Jefferson County Attorney's Office

Janet M. Hall, Jefferson County Attorney's Office
(Child Support Division)

Glenn A. Hollinghurst, Jefferson County Attorney's Office
(Child Support Division)

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BACK TO SCHOOL

A big thank you to those who participated in the LBA's Back to School Drive and helped to provide essential school supplies to Jefferson County Public Schools and the West End School. This year we worked directly with the Family Resource Coordinators at Atkinson, Frayser, Rutherford and Semple elementary schools. These schools were chosen due to a high percentage of students on free or reduced lunch program. Thanks to the generosity of our members more than \$4,400 was raised! THANK YOU to members of the following firms and individuals:

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Six Success Tips for Young Professionals

Starting your career can be both an exciting time and a daunting experience. While there's no secret formula to becoming successful in the workplace, there are steps you can take and skills you can build during the early stages of your career that can help you move toward your long-term goals.

Many young professionals face unique challenges, but with the right guidance and advice those obstacles may lead to opportunities for personal and professional development. Passionate about mentoring young professionals and sharing her methods for success, Morgan DeBaun, founder and CEO of digital media and technology company Blavity, partnered with Sharpie to share these tips.

Be proactive: Take initiative and identify areas you can contribute beyond your assigned tasks. Instead of waiting to be asked to do something, draft an e-mail, spreadsheet or project board that could benefit the team. Showing a willingness to go above and beyond may lead to additional projects or responsibilities being sent your way in the future.

Write everything down: Putting your dreams and goals to paper can help you commit to them, track progress and stay on course to achieve them. Additionally, particularly in meetings, your brain is processing new information, ways of thinking and operational systems all while you are trying to come across as engaged and personable. Jotting down key action items and learnings along the way can save you later. Being an active listener and note-taker can increase your ability to retain information and contribute to your team.



Identify useful productivity tools: Look for tools and programs that can help make you more productive and successful then leverage them in your personal workflow. Whether it's an e-mail scheduling tool, calendar software or favorite writing utensil, ensure you are taking advantage of things that can help you succeed.

Develop and strengthen your organizational skills: Regardless of what role you are in, being systemized and structured in the way you work can help keep you on track as you grow in your career. Whether it's a smartphone app, old-fashioned to-do lists on paper or desktop reminders on your computer, find a system that works for you and stick with it – refining the approach as you go – for best results.

Embrace teamwork and learn from your peers: Across your company, you are likely working with bright, talented people who may have completely different skill sets and ways of working and thinking than you. Set up 15-20 minute virtual coffee chats to meet people not on your team during your first 90 days as a way to connect with your coworkers and learn more about not only them but the company and its environment as a whole.

Say yes to opportunities: Whether it is a work event, new project, meeting or class, take advantage of prospects presented to you. Taking advantage of opportunities to network, learn and grow in your career can help lead you on the trajectory you are aiming for.

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Enforcement of Appellate Procedural Rules: A New Day?

Todd Lewis and Raymond Smith

Observant appellate practitioners may have noted what has seemed like a more vigorous enforcement of the rules of appellate procedure in just the last two or three years. This move seems to have been led mostly by the Court of Appeals, but has included Supreme Court action as well. The formalization of appellate rules into their own Kentucky Rules of Appellate Procedure, out of the Rules of Civil Procedure, in just the last year, seems to have occurred on a historical parallel with this move toward more vigorous enforcement. The purpose of this article is to briefly survey and summarize some of these recent decisions as a helpful reminder to practitioners, rather than a complete review of how or why this trend seems to have suddenly emerged.

Practitioners with a decade or more experience will be familiar with the appearance of occasional statements in appellate decisions referencing what the Court sees as lax attention to procedural rules. In the most famous and oft-cited passage on the topic, Supreme Court Justice Palmore stated the following:

It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules “do not exist for

the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated.”

Brown v. Commonwealth, 551 S.W.2d 557 (1977).

Most of these older decisions, however, seem to walk up to the line of serious enforcement, but ultimately forgive the offending practitioner, short of the most serious sanctions, particularly dismissal. In *Brown*, for example, the Court was addressing a failure by appellate counsel to demonstrate proper preservation of error, but seems to have ultimately forgiven the oversight, since all issues were otherwise addressed and disposed of in the opinion.

It's not clear exactly what case led the charge in the recent attack on perceived appellate rules violations, but as early as 2019, the Supreme Court struck an entire brief and dismissed an appeal taken by the Commonwealth in a criminal case. In *Commonwealth v. Roth*, 567 S.W.3d 591 (Ky. 2019), Chief Justice Minton authored the opinion which found that

the appellant's brief contained no citations to the record (not just insufficient citations, but no citations at all). The ultimate dismissal decision, however, provoked a dissent by two justices, Keller and Wright, indicating that the punishment of dismissal was too harsh. *Id.*

Roth was followed at the Supreme Court by *Martin v. Wallace*, 651 S.W.3d 753 (Ky. 2022), authored by Justice Nickell, which discussed the procedural briefing failures of both parties (mainly, failing to cite to the record for factual propositions), but choosing the old familiar path of issuing no sanction, except to “remind the parties and future litigants that failing to comply with the civil rules is an unnecessary risk the appellate advocate should not take.” *Id.*, 651 S.W.3d at 756. Probably because of the lack of sanctions, there was no dissent.

Following *Roth*, however, a panel of the Court of Appeals took an even more direct tack. In *Hamburger v. Plemmons*, 654 S.W.3d 99 (Ky. App. 2022) Judge Acree authored an opinion, citing *Roth*, in which Judge Dixon concurred, which ordered both appellant and appellee's briefs stricken for several rule violations. “Their discord is obvious, but neither brief illuminates the issue or issues,” *Id.*, at 101. The violations included failing to cite to the record, failing to cite legal authority and failing to complete a proper appendix. *Id.*, *passim*. Judge Thompson “strongly” dissented from the dismissal sanction of the majority, in an opinion emphasizing the harm to the parties caused by the failures of their attorneys. This was not the only recent time Judges Acree and Thompson split over the same issue, and the split provoked the Supreme Court at least once to order the case unpublished, *Wilson v. Clem*, 2018-CA-000300 (Ky. App. 10/11/19), ordered unpublished, 2019-SC-00652 (3/18/20).

Recent issues of concern for appellate courts have included the following: briefing issues in civil cases which were not raised in the prehearing statement (which are required to be set out and filed in AOC Form 070), *Miller v. Skiles*, 591 S.W.3d 426 (Ky. App. 2019); failure to offer pinpoint cites to the record in support of factual claims and arguments, *Roth*, *Hamburger*; and failure to make a clear and specific enough statement of preservation of error, *Martin v. Wallace*, 651 S.W.3d 753 (Ky. 2022).

Most recently, just before this article went to press, the Supreme Court weighed in with some uncharacteristically harsh and in-depth language about the failure to cite the record for preservation of error. In *Gasaway v. Commonwealth* (2021-SC-0457) (June 15, 2023) (Slip Op.), which otherwise deals with a discretionary review of a Court of Appeals decision on search and seizure of a parolee, the Court launched a multi-page analysis of the requirement that a brief “contain at the beginning of

the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” The Court determined that the appellant's brief did not properly contain such a citation to the record. The Court ultimately reviewed the record itself and determined that at least two issues presented were only “partially preserved.” This then led to a lengthy discussion under the heading “General Principles of Error Preservation,” which discussed the matter as a constitutional jurisdictional requirement, and summarized cases dating back 80 years.

Gasaway is curious and instructive for several reasons. Not only is it one of the more in-depth discussions of a single principle of appellate procedure ever issued by the Supreme Court, it occurred in a strange context. First is the fact that Appellant's counsel was a highly experienced full-time appellate practitioner with many very important victories on her resume. Secondly, *Gasaway* was a review of a Court of Appeals decision in which the preservation issue never arose, and the Commonwealth never objected on this point nor raised the issue. *Gasaway*, at 7. “The Court of Appeals addressed each of Gasaway's claimed errors as if they were properly preserved for review.” *Id.* The Supreme Court even noted that the Court of Appeals panel below had expressly urged it to take up a constitutional issue which the Supreme Court ultimately concluded was never preserved in the first place.

In sum, *Gasaway* instructs that citations to the record demonstrating preservation of error are probably the most important procedural requirement of appellate briefing to the Supreme Court and that such a requirement will not be excused no matter how the lower appellate court treated the issue, nor even whether the appellee raised the issue or objected.

Whatever one thinks about the wisdom of imposing more serious sanctions for appellate rules violations, it seems to be a movement which has gained traction and is likely here to stay. This will perhaps not be controversial for experienced appellate advocates, but it is a good warning for dabblers to steer clear of appellate practice if they are not willing to do serious homework on the procedural requirements.

F. Todd Lewis, Lewis Law, and Raymond G. Smith, Smith Investment Group, serve as chair and vice-chair of the LBA's Appellate Law Section. ■



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The forums will be held on the following dates:

- November 1
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- November 15
- November 29

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Please join us to meet and talk with the distinguished members of our local judiciary. If you have any questions or topics you'd like the forums to cover, please submit them to kmiller@loubar.org.

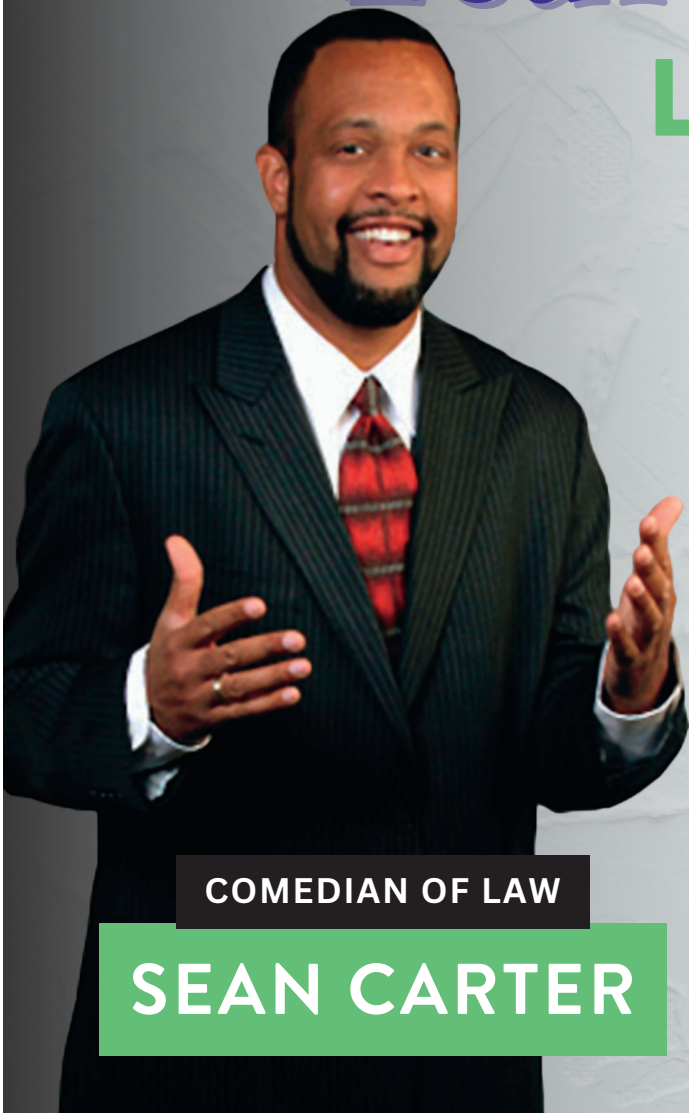
**The LBA is also partnering with Family Court on a previously scheduled forum to be held on September 20. No forums will take place the week of Thanksgiving.*

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Due to the partnership with Mesa CLE, the LBA will not be accepting registrations for these events. Please note MESA CLE cancellation policy.

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In Memoriam



Don Howard Major, 79, passed away on July 25, 2023. He leaves behind decades of service to the Louisville legal community. Major practiced criminal and civil law throughout his career. He tried, as first chair, capital murder cases in his 20s, 30s 40s, 50s, 60s and 70s. In his civil practice, he frequently handled motorcycle and wrongful death cases. Major received the Judge Shobe Civility & Professionalism Award (jointly presented by the Louis D. Brandeis Inn of Court and the Louisville Bar Association), the Frank R. Haddad, Jr. Professional Achievement Award (presented by the Kentucky Association of Criminal Defense Lawyers) and the LBA Pro Bono Service Award (presented by the Louisville Bar Association). He served as a long-time volunteer with the Kentucky Lawyer Assistance Program (KYLAP). For his extraordinary service, Major twice received the Robert F. Houlihan Award, the only two-time recipient of this prestigious honor in the history of its presentation. He also was a Master & Emeritus Member of the Louis D. Brandeis American Inn of Court and a Member of Citizens for Better Judges. ■

MEETING ANNOUNCEMENT

Association of Legal Administrators

The monthly chapter meeting of the KY Association of Legal Administrators will be held in person on Thursday, September 14th beginning at 11:45am 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. ■

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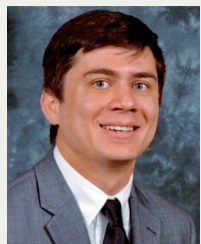
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Sheffer Law Firm welcomes attorney **Tomsen F. Leonard** to the firm. He will be working primarily in the areas of medical malpractice liability, short-term and long-term care facilities litigation, premises liability and product liability. Leonard earned his J.D. from the University of Louisville Brandeis School of Law and was a member of the Arbitration Moot Court Team.

Stites & Harbison is pleased to announce that attorney **Michael Denbow** has been named Chair of the firm's White Collar Practice Group. Denbow is a Member (Partner) of Stites & Harbison based in the Louisville office. His practice focuses on white collar criminal defense and other government and regulatory matters. He handles matters in federal and state courts throughout the southeast and represents clients when dealing with such government entities as the Department of Justice, the FBI, the SEC and the CFPB, among others. Denbow also routinely represents professional athletes and entertainers in contract negotiations, business advice and litigation matters.

The International Association of Defense Counsel (IADC) has appointed Stites & Harbison attorney **Whitney Frazier Watt** as Chair of its Product Liability Committee where she will serve a two-year term. IADC is an invitation-only, peer reviewed member organization comprised of the world's leading corporate and defense attorneys and insurance executives. IADC is dedicated to strengthening skills and professionalism, as well as fostering camaraderie to benefit its members, their clients and the legal profession. Watt is a Member (Partner) of Stites & Harbison based in the Louisville office. She has a wide-ranging litigation practice that includes product liability cases, toxic tort matters, mass actions, contract disputes, tortious interference litigation, coverage disputes and wrongful death cases.

Managing Intellectual Property (Managing IP) magazine recently selected Stites & Harbison attorney **Mandy Wilson Decker** to the 2023 edition of *Managing IP's* "Top 250 Women in IP." This is the ninth time Decker has been honored on this list, and she is the only attorney honored from Kentucky. The "Top 250 Women in IP" list recognizes the leading women IP lawyers at the international level. Decker is a Member (Partner) of Stites & Harbison based in Louisville and Lexington. She is a Registered Patent Attorney and 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.

Morgan Pottinger McGarvey is pleased to announce that **Keith Larson** has been named a shareholder. Larson's practice focuses primarily on bankruptcy and financial restructuring as part of the firm's banking and finance law practice group. Larson represents secured and unsecured creditors, equity interest holders, bankruptcy trustees, debtors and acquirers of troubled businesses in bankruptcy and workout matters. He has extensive experience litigating adversary proceedings in bankruptcy court. Larson attended the University of Maryland Francis King Carey School of Law and began practicing law in 2011 in Cedar Rapids, Iowa before moving to Louisville in 2015.

The Louisville office of McBrayer continues its explosive growth in 2023 with the addition of attorney **Kristen Johnson**. Johnson will join the firm's litigation group, with her practice focusing primarily on insurance defense. Johnson, who joins as an Associate, is a 2021 alumna of the University of Louisville Brandeis School of Law. She practiced insurance defense law at another Louisville firm for two years before her move to McBrayer. ■

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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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