BARbriefs

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

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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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In this issue, a judge, a former prosecutor who has worked extensively with police and a veteran criminal defense attorney offer their perspectives on recent protests against racial inequities in law enforcement and the justice system.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." – 19th Amendment of the U.S. Constitution

These 28 words, added to our country's foundational governing document 100 years ago next month, were the culmination of over 70 years of advocacy. Learn more about some of the websites, exhibits, books and events commemorating this milestone in American history.

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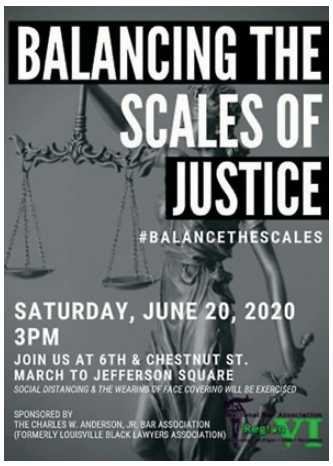
About the Cover: *These images were captured at the Balancing the Scales of Justice march/rally on June 20. Organized by the Charles W. Anderson Chapter of the National Bar Association (formerly Louisville Black Lawyers Association), legal professionals and supporters gathered and walked from 6th & Chestnut Streets to Jefferson Square where speakers called for systemic criminal justice reforms and pledged support for those working to bring them about.*

Be Proud of What You See in the Mirror

The following remarks were presented on my behalf at the Balancing the Scales for Justice march/rally on June 20, 2020.

The last few weeks have been educational, thought provoking, and at times, uncomfortable. I believe I am an open-minded and caring person, but my emotional response to the recent events has forced me to take a long look in the mirror. Am I making the impact that I want in our community, in our city and in our country? Am I helping develop a safer and more just world for my children? Am I the role model I aspire to be for my family?

The honest answer to these questions is that I can do more, that I must do more and that we all must do more. It is my responsibility to leverage the opportunities I have benefited from throughout my life into making a positive impact on others and our community. Failing to recognize this responsibility is simply selfish and ignorant.



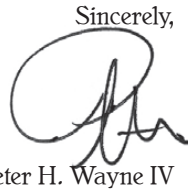
I am guilty of believing our country was maturing past the abhorrent racial inequities within our justice system and common life that have plagued previous generations. Recent events, however, have reminded me that we are not there yet—not even close. Unfortunately, we still live in a world where people are profiled, punished, beaten, arrested and prosecuted, and in some instances, killed, simply on the basis of race. This is absolutely unacceptable, and we must do better. Therefore, it is incumbent upon the leaders in our community, such as the Louisville Bar Association, to advocate and make the changes necessary within the system to stop this behavior. We cannot let this moment slip away.

In order to make a long-lasting and discernable difference in our community, our city and our country, the LBA is committed to taking a leading role in promoting racial justice both within the legal system and the Louisville community at large. The LBA is reviewing what steps will prove most effective, but we are dedicated to living out our mission of promoting justice, professional excellence, and respect for the law—more than ever before—by hosting community conversations focused on racial equality while also working with community leaders and elected officials to implement laws and regulations that promote a world we are all proud to live in.

We will make mistakes and some of our efforts will fail, but success is never a straight line. True leaders, however, are unafraid of failing. Rather, they seize a moment where people want to be led and help those same people achieve the successes they dream about.

The LBA recently issued a statement in support of the Black Lives Matter protests (see below) and we are committed to turning our words into action. Providing support today is our first step. The LBA is full of some of our community's greatest leaders, and over the next few weeks, months and years, the LBA's membership, and the organization itself, will help move this community and Commonwealth forward so that our children can one day look in the mirror and be proud of what they see and the community they live in. Until that day comes, however, we are committed to making sure we don't stop until our country's atrocious racial inequities are truly a thing of our past. Change is never easy, but nothing right and just ever is.

Sincerely,



Peter H. Wayne IV
LBA President

LOUISVILLE BAR ASSOCIATION
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Statement from the Louisville Bar Association on the Black Lives Matter Protests

June 4, 2020

The Louisville Bar Association's mission is to promote justice, professional excellence and respect for the law; improve public access to the judicial system; provide law-related services to the community; and serve our members.

Recent events within our city and across our nation are highlighting current and historic grievances regarding abhorrent racial inequities within our justice system and common life. During this critical moment in the history of our community and our country, the Louisville Bar Association and its members have both an ethical and a moral responsibility to change long-standing systemic issues of racial injustice. Existing and historical policies and practices within our community have resulted in racial disparity, inequity and injustice, and recent events have created a flashpoint to ignite protests focused on these injustices.

Our country relies upon the rule of law, and the application of that rule must be fair to everyone. Therefore, it is imperative that the legal community play a restorative role to help dismantle institutional barriers, both within the legal system and beyond, to address the biases that prevent people of color from enjoying equal protections under the laws of our Commonwealth and this country, and to build a better justice system and life for all of our citizens, regardless of race, ethnicity, or skin color.

Dr. Martin Luther King, Jr. stated, "Life's most persistent and urgent question is, what are you doing for others?" The LBA will continue its work and extend our resources and expertise to help support and lead governmental and private endeavors focused on ensuring true and equal justice for all citizens, regardless of race or color, in our community. It is our moral and ethical responsibility not just as legal professionals, but also as human beings and citizens of our community to do so. We must demand better from our country, our government, our fellow citizens, and ourselves.

We hear you, we see you, and we stand with you – Black Lives Matter.

The Call for Our System to Treat Blacks Fairly and Justly — A Universal Truth

Chief Judge Angela McCormick Bisig

There are fervent pleas on the streets of Louisville each night that our nation reform it's system of criminal justice to ensure it treats Black citizens justly and fairly. The daily protests have been ongoing for weeks. There are gatherings of all walks of life, from mothers, fathers, teachers, doctors, students, members of faith communities protesting, chanting, and asking for change. Our legal system and our judiciary are included in that call for equality. We hear you. We see you. We are listening.

As the Chief Judge of the Jefferson County region, I felt it important to speak about racial issues, the current awakening happening in our country, and enduring pain expressed by so many in these protests and other forums. I must add that I have not vetted this column with my colleagues on the bench, so the opinions expressed here are my own.

As judges, we are governed by a canon of judicial ethics. Canon 5(a) prohibits a judge from engaging in political activity by campaigning as a member of a political organization. Canon 4 provides that any extra-judicial activities should not reasonably cast doubt on the judge's capacity to act impartially as a judge. Canon 3(2) states "A judge shall not be swayed by partisan interests, public clamor or fear of criticism." It is because as judges we are not law creators, but law appliers, that we are strident in our efforts to stay out of political issues.

We must be impartial when we do our job in courtrooms every day. If we are seen in support or opposition of a public issue, and then our job calls upon us to rule on issues involving those same interests, the erosion of the role of "judge" as the impartial arbiter of the dispute could result, or at a minimum, our impartiality could be called into question.

Judges should not ignore what is going on in our world. I cannot imagine the pain of a parent worrying about their child being pre-judged by the system in place to ensure justice in our world.

As judges, we are called upon to apply the law to specific situations and facts. We hung up our role as advocates when we chose to don the black robe. Lawyers advocate, judges listen and decide cases without the sway of outside influence. Justice demands that we not simply follow the swell of public opinion on any given topic, but instead apply the law to facts and people before us outside the dictates of that day's popular cause. Judges are trained to wait until we have all of the evidence in a case presented before making a decision.

I outline these ethical considerations to explain why you generally won't see judges out holding rallies, speaking out publicly on issues or organizing legislative responses to community concerns. Justice demands that our role be to apply any laws that our community determines govern us and the unbiased enforcement of the rules that a democratic majority vote into existence.

I often say that I believe a characteristic of a good judge is to be "non-judgmental." While at first blush this may cause you to scratch your head, to me, it means we apply the law as written, but with the understanding that we don't know the whole story of anyone's life who comes before us in court. Their journey, their experiences, their path. As a judge, we may only see a small sliver of the entire humanity of the individual before us. We don't know what decisions we would have made if we stood in their shoes. So we apply the law, but I argue we should not be judgmental. Everyone who comes before us should be treated respectfully, justly and with a knowledge that the court will follow the rule of law.

While keeping with our ethical obligation to remain impartial, we also can acknowledge what I remember from college philosophy class as a big T truth. Big T truths are universal truths. Not a factual determination or a little t truth, like the ones we make in court, but a standard so clear that it can be seen and acknowledged as truth. If you are a part of the government of the United States of America and the Commonwealth of Kentucky, you live each day with the premise that all men are created equal and should be treated equally in the eyes of the law. I do not think it is a political statement to acknowledge this truth. Without question our legal system must take responsibility to treat all people fairly.

However, because of our nation's long history of systemic discriminatory treatment towards its Black citizens, we must be particularly steadfast in our responsibility to treat them fairly. As a court system, we must turn a mirror on ourselves. It cannot be that every element of the criminal justice system looks outwardly to the other system partners (police, clerks, sheriffs, prosecutors, defense attorneys) as contributing to the problem (a portion of our community does not feel they are treated justly), but not at themselves. We must all look at what we can do.

Judge Denise Clayton, Chief Judge of the Kentucky Court of Appeals, leads a system-wide task force called the Racial Fairness Task Force, whose goal is to continually evaluate all elements of the criminal justice system, all entry points, to look for ways we can identify racial discrimination. Our judges have participated in implicit bias training as part of our state-wide judicial college. We also have a separate disproportionate minority confinement committee in our juvenile court. We are implementing restorative justice in our juvenile courts to attempt to repair the harm caused to crime victims in a way that allows offenders a deeper understanding of the impact of their actions. These are all good steps. But we are still here, there are still problems.

Judges should not ignore what is going on in our world. I cannot imagine the pain of a parent worrying about their child being pre-judged by the system in place to ensure justice in our world. An important point for this article is that the courts of the Commonwealth are open to the public. This is important because it ensures that the public can hold us accountable for the way we administer our responsibilities.

Every single day, the work we do in Jefferson County is transparent and accessible to anyone who would like to observe. We record everything that happens in our courts with audio and visual. When we make a decision, it is done on an open court record, or memorialized in written documents. If you want to request to watch a day in my or my colleagues' courtrooms, the 3rd floor circuit clerks can provide you with a recording of our handling of every case. You can observe what we do. We embrace the accountability an open and transparent court process affords. We must not be tone deaf to the world around us, the echoes of history and the unique experiences of others.

Therefore, we all have a responsibility to look at ourselves. Lawyers also have a responsibility to examine their role in our justice system in light of these events. I hope that the isolation we all feel as a result of the virus constrictions is seen as an opportunity for reflection and action for those in the legal community. Please hold us accountable. We are listening.

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

Chief Justice Minton Sworn In to 4th Term

On May 28, 2020, John D. Minton Jr. was sworn in remotely to a fourth term as Chief Justice of Kentucky. Deputy Chief Justice Lisabeth T. Hughes administered the oath of office via Zoom from their respective chambers in Louisville and Bowling Green. When his fellow Supreme Court justices elected him to another four-year term May 18, he became only the second chief justice in Kentucky chosen to serve four terms.

Pictured above: John D. Minton Jr. (top right) was sworn into his fourth term as Chief Justice of Kentucky by Deputy Chief Justice Lisabeth T. Hughes (top left) on May 28. Joining him by Zoom were his wife, Susan Page Minton, and son, John D. Minton III (bottom right), and daughter and son-in law, Page Minton Smith and Corbin Smith (bottom left).

Proposed Constitutional Amendment Would Raise the Bar for Kentucky Judiciary

Judge Stephanie Pearce Burke

With passage of House Bill 405, the 2020 General Assembly provided the electorate with an unprecedented opportunity to ensure a more experienced and qualified judiciary. Specifically, House Bill 405 proposes amending Section 122 of the Kentucky Constitution by raising the experience requirement for candidates for district court judge from two-year bar licensure to eight-year bar licensure, commensurate with every other level of Kentucky's unified court system. The bill provides a "grandfather clause" which states that the eight-year licensure requirement shall not apply to any person serving as a district judge on the effective date of this amendment.

At a time when district court judges are facing more and more responsibilities, including increased roles in dealing with societal issues involving mental illness, substance use disorders, and criminal justice reform, the proposed amendment in House Bill 405 will further benefit Kentuckians by raising the bar for candidates to the district court bench.

Kentucky's 116 district court judges preside over more than 700,000 new case filings each year and despite being a court of limited jurisdiction, district court judges are not limited in the scope of their work or the reach of their efforts to help Kentuckians.

Our district court judges must be prepared to handle all cases involving the following: city and county ordinances; juvenile offenses (public and status); misdemeanors; preliminary felony proceedings; violations; traffic offenses; probate matters; small claims complaints involving amounts of $2,500 or less; civil matters involving amounts of $5,000 or less; involuntary commitments; guardianship petitions; petitions for emergency protective orders and interpersonal protective orders; petitions for dependency, abuse and neglect; actions seeking involuntary inpatient treatment for substance use disorders ("Casey's Law"); and actions seeking court-ordered assisted outpatient treatment for the seriously mentally ill ("Tim's Law"). District court judges also preside over many of Kentucky's specialty courts, including veterans treatment courts, mental health courts and drug courts.

Without question, a candidate for any judicial office should be an experienced attorney and the depth and breadth of that experience and the competence with which it was performed should be considered. The citizens of the Commonwealth are more likely to come into contact with a district court judge than any other elected official. Both professional legal experience and life experience are required for one to be a capable jurist.

The district court bench should not be viewed as a training ground but as a position one should aspire to achieve. A more experienced bench benefits all Kentuckians and raising the licensure requirement will serve only to improve the public perception and confidence in the district court judiciary.

House Bill 405 also proposes to amend Sections 97 and 119 of the Constitution of Kentucky by extending the terms of Commonwealth's Attorneys and district court judges to eight years for the purposes of aligning the elections of judges and prosecutors to enable recircuiting or redistricting. Currently, every circuit court judge, family court judge, court of appeals judge, and Supreme Court justice serves an eight-year term while district court judges serve four-year terms. Commonwealth's Attorneys currently serve six-year terms.

The legislature has engaged in the process to realign the trial courts over the last several years based on judicial workload studies. The Kentucky Constitution first requires the Supreme Court to certify any necessity for redistricting with the General Assembly, which must then agree, via legislation, with the proposed changes. It is not uncommon to have multiple-county circuits with a circuit court judge, with an eight-year term, and a Commonwealth's Attorney with a six-year term. To modify the particular circuits to meet the necessity of the various regions, the two positions must be selected at the same time.

House Bill 405's primary sponsor, Rep. Jason Nemes, testified in committee that the purpose of the amendment was "not out of convenience, but necessity. To accommodate the need of the Supreme Court and the legislature, we need to marry the two terms to coincide, and that is with eight-year terms."

The eight-year term for district court judges would take effect following the 2022 general election, while the eight-year term for Commonwealth's Attorneys would not take effect until after the 2030 general election due to the current disparity in term lengths and the misaligned election cycles of the prosecutors and judges.

Although numerous constitutional amendments were proposed during the 2020 legislative session, only House Bill 405 and Senate Bill 15, more widely known as "Marsy's Law," passed both chambers to earn submission to Kentucky voters on November 3. House Bill 405 received overwhelming bipartisan support from both legislative chambers, passing the House of Representatives by a 76-7 margin and the Senate by a 25-7 margin. Rep. Nemes was joined by co-sponsors Rep. Derek Lewis, Rep. C. Ed Massey, and House Speaker David Osborne. Senate Bill 15 will be listed first on the ballot as Constitutional Amendment No. 1, while House Bill 405 will be listed second as Constitutional Amendment No. 2. The entire text of each amendment must be presented to voters on the statewide ballot pursuant to a ruling by the Kentucky Supreme Court in 2019.

The Board of Directors of the Louisville Bar Association, the Commonwealth's Attorneys' Association, the Kentucky District Judges Association and District Judges for a Better Commonwealth support passage of Constitutional Amendment No. 2 on the November 3 ballot. To read House Bill 405 in entirety, please visit *https://apps.legislature.ky.gov/recorddocuments/bill/20RS/hb405/bill.pdf.*

Judge Stephanie Pearce Burke presides in Division 14 of Jefferson District Court. ■

Family Court Election in November

A special election for a seat in Jefferson Family Court (Division 3) will be on the November 3 ballot. Three candidates are vying to serve the remaining two years of the term of Judge Deborah Deweese who retired at the end of 2019.

In January, attorney Ellie Kerstetter was appointed by Gov. Andy Beshear to fill the vacancy until the outcome of the special election. She is running to keep the seat.

The other candidates are Lori Goodwin, an attorney at the Legal Aid Society, and Daren Neel, an Assistant Jefferson County Attorney. ■

Estate Planning specialists
share insights on special needs, elder law

When I learned that the theme of this issue was estate planning, I was eager for the opportunity to speak with two practitioners and Louisville Law alumni who have specialized their estate planning practices.

First, I spoke with Jefferey Yussman. Not only is Jeff an accomplished estate planning lawyer — he is a partner at Wyatt Tarrant & Combs LLP, where he is a member of the Estate Planning Group — but he also runs the firm's special needs planning practice.

Yussman Special Needs Law, established about three years ago, marked Jeff's segue into the special needs practice area. Now, he estimates, 60 to 65 percent of his practice focuses on special needs law.

Jeff Yussman

"I realized a few years ago that there were a lot of people who needed this service and not many lawyers who focus on it," he says. "Like most things in the practice of law, the more you do, the more you attract. It met a sweet spot for me in terms of helping clients, and I also learned an awful lot from my clients."

Jeff and his wife are the parents of two adult children with special needs.

"I started growing with them," he says. "I learned that the depth of my knowledge of special needs trusts wasn't deep enough."

Not many lawyers practice in special needs law, which, while very fulfilling, can be a frustrating practice, Jeff says. Lawyers must interact with large agencies such as Medicaid and Social Security, where regulations change often and with little notice.

"With the tightening of government benefits, the regulations have also tightened," he says. "It's very frustrating for clients to have the ball moved on them and to not understand why."

One way Jeff is addressing this frustration is through his work with the Special Needs Alliance, an invitation-only professional organization for lawyers working in disability and public benefits law.

As President-Elect, Jeff will continue the alliance's mission of improving the education and quality of service of special needs lawyers around the country.

Like, Jeff, many of the alliance's members have personal ties to the area of special needs law.

"It certainly gives an extra load of motivation to any lawyer who has a personal stake in the matter," he says.

When counseling clients, Jeff works to put them at ease and is able to give guidance as someone who has walked a similar path. Talking about topics like where your child will live or how they will be protected from exploitation can be very emotional.

"When you have a child who can never be on her own, that's something you never quit worrying about," he says.

Despite the bureaucratic frustrations of his practice, Jeff says the ability to help his clients benefit their loved ones makes for an extremely rewarding career.

"It's a personally fulfilling practice whether you have a special needs relative or not," he says.

After speaking with Jeff, I spoke with Misty Vantrease, a partner at Kentucky Elder Law, PLLC. Our conversation turned to the impact of the coronavirus pandemic on the practice of elder law.

"This virus makes everything more difficult," she says. Misty reports that in April, about four times the average number of her clients passed away, whether directly from COVID-19 or from indirect causes such as delayed hospital visits or isolation and depression.

"The families are very concerned because they can't see their loved ones," she says. "A really important part of having someone in care is being able to monitor that care."

And while technology offers opportunities for connection, many elderly clients are hard of hearing or suffer from dementia, making video chats difficult.

"There's a loss of physical and emotional connection," Misty says.

As an elder law attorney, Misty is accustomed to providing a caring and personal touch when working with clients who are planning care for themselves or loved ones — "Hugs were a regular part of what I did," she says. "I don't know that we'll ever be back there and that makes me sad."

But even with social distancing and remote work policies in place, Misty and her office are able to continue to provide services through video and phone consultations and contactless document signing.

Misty Vantrease

She notes that the pandemic has had another impact: more people are thinking about estate planning.

"People that are generally healthy are more aware now of how quickly things can change because of sickness and want to make sure they have things in order," she says, noting she has also worked with frontline healthcare workers who have been exposed to the virus and want to solidify their estate plans.

This increased awareness of the need for estate planning reflects a wider trend in the practice. As more people join the "sandwich generation" — a generation responsible for raising children while caring for aging parents — the need for advance planning becomes more evident.

"People have become more aware of the cost of care as they age," she says. "When I first started, it was much more what we call crisis planning. Now, I see a much greater percentage of what we call pre-planning, which is great, because there's so much more that I can do if they come to me earlier."

Talking with Jeff and Misty, I am reminded of the many important ways that estate planning can bring families a sense of peace when looking to the future. I thank Jeff, Misty and the entire estate planning bar for using their skills and knowledge to counsel clients during these necessary conversations.

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

TOGETHER LAWYERS CAN

MAKE A DIFFERENCE CHANGE LIVES SOLVE PROBLEMS HELP OTHERS PURSUE JUSTICE BUILD COMMUNITY **RESTORE HOPE**

Together Lawyers Can is a collaboration between Legal Aid Society and Kentucky's other legal aid programs to encourage, recruit, and train attorneys from across the Commonwealth to provide pro bono assistance to Kentuckians impacted by COVID-19.

To learn more about the program and how you can join Together Lawyers Can team, visit www.yourlegalaid.org or contact Tracey Leo Taylor at ttaylor@laslou.org.

www.togetherlawyerscan.org

Pandemic Thinking: How to Keep Your Head in the (Long) Game

RJon Robins

The COVID-19 pandemic is crippling and toppling many U.S. small businesses. Often called "the backbone of the economy," small businesses that are managing to survive face an uncertain future.

As states start to reopen, consumer spending is in steep decline while unemployment skyrockets and many people remain hesitant to venture out. But RJon Robins, founder/CEO of How To Manage A Small Law Firm (*www.howtomanageasmalllawfirm.com*), says some entrepreneurs find their businesses in trouble because they had the wrong mindset toward customers all along.

"Small business owners everywhere are infected by pandemic thinking," Robins says. "But they were infected with this thinking before the pandemic. It's only now the strategic weakness of short-term, fear-based, transactional thinking in all different kinds of businesses is becoming more obvious. Pandemic thinkers ask the wrong question, 'What can you do for me today?' Rather than, 'How can we work together to build a long-term mutually-profitable relationship?'

"Business owners who built long-term relationships with customers and clients can weather this storm. Those who didn't think this way before can adopt elements of this kind of thinking and they'll start seeing the benefits almost right away."

Robins offers small business owners three tips on how to develop long-term relationships that benefit both customers and businesses:

- When first meeting, look ahead at the relationship 10 years from now. "The scale of a person's thinking has a lot to do with whether they win the game," Robins says. "Look for all opportunities to be of service, even in some small way, to earn the right to call the person a client. Every deal doesn't have to be a grand-slam. Just get on base. Just get into the game. That way you can discover opportunities to be of greater service and have a client for life."
- Show you care. "A lot of people don't know how to show that they care. Ask yourself when is the last time you called to check on a former client to find out what's happened in their life or business since the last time you did business together?" Robins says, "What are their plans for the future? What can you take off their plate and help them with today even if what they need is just someone to help them think things through? Good relationships built over time are especially evident during the pandemic. Ironically, though, a pandemic is a perfect time to begin a marketing campaign like this and besides, you probably have a lot of free time on your hands anyway."
- Have a long-term business plan. "A business being run without a 12-month, forward-looking budget is like a car being driven with a windshield covered in mud, and on an unfamiliar road with no particular place to go," Robins says. "A business that is being run without weekly cash-flow projections is like a person stumbling around in the dark in an unfamiliar house. To take an active, consistent interest in your clients and develop programs encouraging them to keep coming back, it helps to have a long-term written plan for your own business."

"Businesses generate revenue by solving problems for their clients and customers," Robins says. "And right now there's an abundance of problems, which is another way to say there's an abundance of opportunities. Whether you already have or decide to begin developing great long-term relationships with clients, it's an investment that will pay long-term dividends."

RJon Robins is founder and CEO of How To Manage A Small Law Firm (www.howtomanageasmalllawfirm.com), the leading provider of management services for the solo and small law firm market. ■

Recommendations from an Ally for Rebuilding Trust in the Police

Benham J. Sims III

For years, I worked with police in Kentucky. I trained officers on how to testify in court. I trained a number of police departments on DUI detection and enforcement, traffic laws and a variety of other issues during my time as a prosecutor, judge and defense attorney. I rode with officers, observed their arrests, discovered what they looked for and learned their street tactics. I even helped introduce candidates to the Fraternal Order of Police (FOP) to secure their political endorsements. I write this so you understand my relationship with the police was not casual, it was part of my everyday work experience. In many ways, it was the best time of my career. I remain an unapologetic friend and ally of good police. But my heart is breaking at what I see and feel has occurred.

I am horrified by what I see in our community and cities all across the country. It is not a time to remain silent. Silence is violence. I am disgusted by officers who casually knock down a 75-year-old protestor in Buffalo resulting in his hospitalization in intensive care.

I watched, as have millions of Americans, as Officer Chauvin tortured and executed George Floyd. He placed his knee on Mr. Floyd's neck and did not care that people were filming. He did not care that Mr. Floyd was begging for his life, calling for his long-deceased mother. Members of the public confronted the officer begging him to stop. This execution took place in front of other officers who did nothing but watch this man die of police misconduct, torture and murder.

I watched the national news and witnessed a news crew being struck by officers with their shields and, while complying with the officer's orders to leave, continued to be struck by officers with their batons. They were reporters. They were complying with the order. Why strike them with a baton when they were leaving?

I witnessed a president in time of crises order the removal of peaceful protestors from Lafayette Park for a photo-op with a Bible. I see peaceful protesting erupt in violence and looting in cities across America, including here in Louisville, by people who have embedded in peaceful protests to sow seeds of distrust, fear, violence and destruction. I read on Facebook pages of police officers who are frustrated and disgusted at being told to stand down when looters are damaging a city they are sworn to protect.

I watched live the coverage on WAVE 3 and witnessed a reporter and her cameraman being shot with pepper bullets at close range by a SRT officer. The officer shot pepper bullets aimed, not at the ground, but at the reporters' faces and bodies. I listened to the studio anchors voice their shock and disbelief at what was happening.

I spent over a decade training police officers. I know that the training manuals for pepper guns specifically forbid the aiming of pepper bullets at protestors. The explosion of the bullets striking the pavement is designed to release a burst of pepper spray and cause protestors to move back. The manuals also require officers to allow protestors to retreat. This officer kept firing. This was not a mistake or inadvertent shot. He fired dozens of bullets at the bodies of the reporter and her cameraman. Where were the other officers and command staff running to immediately intervene and take his weapon away?

We should have expected that, when confronted with this conduct, the department(s), the mayor and the police would address this issue. How could they not? I would assume that every officer deployed was repeatedly reminded that these types of weapons are not to be shot at people.

Sadly, unexplainably, those reminders did not go out. How could this have been missed? How could every police department in America when confronted with the video not address this issue with their officers? In Louisville, how could the department not remind officers at roll call, at their deployment, at their staging areas and on their police radios the whole world is watching? Do not shoot these weapons at people.

Just a few nights later, the shooting of people with these same weapons was repeated at Dino's on 26th Street. Two police officers then wandered onto David McAtee's property firing at people, not at the ground. When officers starting shooting, Mr. McAtee's family, friends and customers ran into his restaurant. The cameras showed that Mr. McAtee had been busy all night grilling. I am sure those who ran into his business were screaming that they were being shot at. I know I would have. Apparently, from the limited camera releases, Mr. McAtee made a horrific decision to unholster his gun and return fire. He was killed by a Guardsman's bullet.

Whether you believe the police were justified in killing him or you believe that Mr. McAtee had a right to defend his property, his family, his customers—can we not all agree that better decision-making could have prevented this tragedy? As someone who trained officers, questions gush out of me like the old Louisville Falls Fountain.

Who deployed the National Guard to the West End? Did the Governor not specifically order the Guard to stay out of the West End to avoid such a confrontation? If the call was made to go to Dino's, why did the police direct fire toward Mr. McAtee's business? Could they have not simply waited before trying to forcefully remove people? What were the command's instructions on that night of deployment? Were the officers and National Guard instructed to limit their confrontation to Dino's or to keep going? Where were the command officers deployed on scene to supervise and make sure that officers were following their instructions? How could another night of officers shooting civilians with pepper bullets take place?

> ***For those officers advocating change, I applaud you. For those protestors who riot and demand we dissolve law enforcement I say, "You have lost your mind." There is a middle, logical, proper way to begin to address these issues that are tearing the fabric of our communities and undermining support for police across the nation.***

Where were the people who were being shot with pepper guns supposed to go? Police training in riot protocols instruct that you must also permit people to retreat. They all fled inside to his restaurant—why keep firing? In the heat of the moment, if you are a businessman and your family, friends and customers are being fired upon, what do you do instinctively? I do not suggest that Mr. McAtee was justified in firing on police. Others, including many of my defense lawyer friends, will disagree with me on this issue. They argue that Mr. McAtee had a right to defend his property, family and customers. The courts, legislative and executive bodies will make that determination.

In my mind, his response guaranteed his death. The point is it should not have happened. It happened as a result of poor command decisions, poor training and response by officers. It happened because those in charge failed to take charge and limit the rules of engagement.

I am sure my comments will not satisfy the police or those who think that Mr. McAtee had a right to defend himself, his family and customers. No matter which side of the coin you land on, can we all agree that his death was all but certain? Can we also agree that better command control, command tactics, training, discipline, communication and recruitment could have prevented this?

I do not mean to gloss over Breonna Taylor's death. As a former judge, I signed a number of warrants for officers. I do not recall how many, if any, no-knock warrants I signed. But the use of no-knock warrants must now be questioned. I cannot conceive of a circuit or district judge not pausing when handed a no-knock warrant today. Such warrants should be abandoned. The risk to the "Breonnas" of our community, the risk to neighbors in the next apartment, those walking on their street or sleeping quietly in their home next door is simply too great. The risk to the officers themselves do not warrant the use of this type of warrant.

Some officers will oppose efforts to abandon the use of no-knock warrants. Some officers, and maybe a few prosecutors, will argue that the suspects will have time to flush drugs and evidence without no-knock warrants. One officer even claimed that Ms. Taylor's boyfriend, because he was warned, grabbed his gun and commenced to shooting at the police. But there is no video of this exchange. Common sense should inform us that if that kind of danger is real, those officers should not serve the warrant. My gut feeling is that if you don't have enough evidence without the risk of flushed drugs, your case may be too weak for a search warrant in the first place. Do we really want to freely employ such a dangerous tactic when the risk of a firefight is so high?

My lawyer friends criticized me because they saw and participated in only peaceful protests. I, safely ensconced in my den in the East End, saw protestors spitting at police, throwing water bottles, screaming in their faces and defacing public property with "____ the police." I know of the looting of George Stinson's property and the assault he endured. I watched the looting of Eddie Merlot's restaurant resulting in its permanent closure. I saw the defacing of my law office resulting in all windows on the first floor being boarded up. Why would I want to participate?

I have tried to engage my police friends. The response was not what I expected. I have been called disgusting by officers, including a former president of the FOP, for my comments. I want to clearly demonstrate for all the gulf between the mindset of most people in our community and how these officers see the problems. The police I have engaged with are good men. Some have demonstrated anger, many resentment, some just blind ignorance, but thank God, some get it, know it and want change.

In reaching out, I wanted to convey to the men and women who protect us to do better. Chris Rock is right when he compares police officers to pilots. We pay them to not get it wrong. They have to land the plane and not kill anyone each time, without fail.

There are a number of things the police department and the FOP can do right now to demonstrate good faith. Let me make this clear. The peaceful protestors are not the looters and rioters in our city. To paint with a broad brush is to deny reality. In the same way, the whole police department is not filled with racists, participating in a cover-up, violating the rights of citizens when and where they want. The police want us to believe that only a small percentage of officers are the problem, but many seem to casually lump protestors with the rioters and looters we watch on TV. Both sides are myopic on this issue.

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For those officers advocating change, I applaud you. For those protestors who riot and demand we dissolve law enforcement I say, "You have lost your mind." There is a middle, logical, proper way to begin to address these issues that are tearing the fabric of our communities and undermining support for police across the nation. A middle ground that does not bust heads nor dissolve the police departments. Let's work to find it. Let us reexamine and reimagine what we want from our police department and from our officers.

As an ally of the police, I have a few recommendations to make. First, admit it. There are bad cops, horrible hires, officers who cause violence instead of preventing violence. Racism exists in your department and likely every department in the country. True love for your community requires both compassion and empathy. These qualities do not demonstrate weakness, but just the opposite—they demonstrate strength, character, and understanding. Speak out, engage, help us help you and our community.

The second recommendation is to not continue to ignore a gift that was given to you recently. Five protesters came to the rescue of Officer Galen Hinshaw who was trapped in front of Bearno's on Main Street. These protestors formed a human chain to protect him. He was a stranger—a police officer separated from other officers—alone in the midst of a crowd of protesters. These five heroes found themselves confronted by fellow protestors screaming, "How can you protect him?" In their hearts, the response was obvious to these men, "How could they not?" The men, all strangers to each other, were protesting police brutality—but they stood up to prevent "any" brutality. They represent what is best in each of us.

Why have you not reached out to them? Why is their story not promptly displayed on your website or up on every FOP member's Facebook? LMPD and FOP, you want to make a difference? The clock is ticking down. The public wants to support you. Show them why they should. Why have you not invited these heroes to sit down and talk? Why has the department, or FOP, not held a meeting and recognized these men as heroes? They are the embodiment of what every citizen should be. They were protestors, they were perhaps lifesavers, why not give them a platform to talk about their concerns and why they were there protesting? Would that not send a message to the community, the real audience, that you are listening? Why not approach Dawne Gee, Stephan Johnson, Terry Meiners or Doug Proffitt to host a town meeting? Pretty good optics for you, don't you think?

The third recommendation is just as obvious to our community. There are bad cops, some really bad. These officers threaten you more than any protestor, looter or rioter. While I will be the first to say there are many fine officers in the LMPD and in departments all over Jefferson County, we have endured more than our fair share of illegal and dangerous conduct by some officers. Officers that have gone to federal prison within your department, officers who forged time records, officers who forged judge's signatures on search warrants, officers whose false testimony led the imprisonment of three innocent men. I can't be the only one who sees both sides of this community issue.

You had a disaster as chief. An admittedly nice man, but not a leader of a department with significant issues and challenges. Talk publicly, but strategically, about your problems with the mayor. Talk about the sex abuse scandal involving your officers. Commit to reforming your own. Commit to expelling those officers whose conduct risks your life and the city's peace. When you have a tumor, you don't ignore, you treat it. We have had African Americans killed by officers who were cuffed and shot in the back. There is a history of African American complaints about how they have been treated. I know of no African American man who has not experienced this treatment.

Has the FOP taken a survey of minority officers and ask what they see wrong with the department? Has the police department taken that survey to see what the problems are? How do you fix the problems if you don't ask the questions? How many disasters do you have to have before you ask your own fellow officers what is the problem?

Finally, the elephant in the room for all of us—race. It seems to be the one word all of us recoil from. We know that the ugliness of prejudice stains our land and every one of our lives. Whether it is the liquor store employee who denied an African American woman from using the toilet off privileged Brownsboro Road or the pickup truck in Valley Station waiving a large confederate flag for all to see.

No entity is more familiar with racism than police, especially here in the South. Sadly, the police have a history of turning a blind eye to lynching and investigating the murders of African Americans for centuries. One only has to review the rolodex of civil rights martyrs to be reminded of police participation in the deaths of Emmett Till, Chaney, Goodman and Schwerner. The first African American prosecutor in Louisville was murdered and her murder remains unsolved by your department. There is a history of police misconduct and racism.

At the encouragement of a lawyer friend who chastised me for not protesting, I went downtown recently (yes, with a mask) and observed for two hours the protests during the light of day at 6th and Jefferson. It was my first time downtown since the outbreak of the pandemic. These protests could not have been more peaceful. The protestors broke rank and cleaned up the park while I was there. The protestors were white and black, rich and poor, young and old. They were, most important of all, Louisvillians who cared enough about their community to give voice against the violence they watched for 8 minutes over and over with Mr. Floyd's execution and the deaths of Ms. Taylor and Mr. McAtee.

They are demanding change and they are right. I have seen racism with my own eyes. I know it exists in our courts and in our police departments. Denying it, belittling it, saying it is not true by a lawyer, a judge or a police officer is akin to a surgeon going into a hospice room and saying to a terminal cancer patient your cancer is not that bad. Racism is our country's cancer—it continues to metastasize daily. Being silent only protects it, nurtures it and allows it to spread and kill. We have to cut it out of our lives, our courts and our police department before it destroys us all. We can start the healing in our community if we are wise enough.

Benham J. Sims III is a solo practitioner in Louisville, Ky. ■

LBA Health Plan and COVID-19 Pandemic

In January 2019 the Louisville Bar Association restarted its group health plan with Anthem Blue Cross and Blue Shield. This plan had long been an asset to LBA firms large and small through our partner Logan Lavelle Hunt. As we continue to promote awareness of the LBA Health Plan many questions have been asked about access and when is the best time to investigate getting pricing for member firms.

The short answer is NOW. Member firms who provide health insurance to their employees can obtain a pricing quote anytime throughout the year. There is no "enrollment period" if your firm is not currently participating in the LBA plan.

Some benefits to the LBA plan to consider:

1. Strong provider and hospital network
2. Group pricing that could bring significant savings on your health insurance expense
3. Anthem's best in class network discounts on medical services and prescription drugs
4. Small firms are welcome
5. Access to many additional employee benefit coverages

In today's uncertain business climate, take advantage of the LBA's member benefit programs designed and vetted with you, the member, in mind. If you are interested in knowing more, please call Logan Lavelle Hunt at (502) 499-6880 or e-mail stevechurch@llhins.com.

LOGAN LAVELLE HUNT
a Shepherd partner

Debriefing: The New Title IX

James J. Wilkerson

Since its enactment in 1972, Title IX of the Education Amendments has prohibited discrimination on the basis of sex in any federally funded education program or activity. In November 2018, U.S. Education Secretary Betsy DeVos proposed numerous changes to the legislation. On May 6, 2020, the Department of Education's (the Department) Final Rule arrived via a 2,033 page document.

The reaction to the new regulations has been divided. The Department stresses that the modifications "balance the scales of justice on college campuses." Assistant Secretary of the Office of Civil Rights, Kenneth Marcus, states that the rule seeks to serve students on either side of a sexual misconduct complaint. Marcus states that the regulations "mark the end of the false dichotomy of either protecting survivors, while ignoring due process, or protecting the accused, while disregarding sexual misconduct." Marcus continues, stating "there is no reason why educators cannot protect all of their students, and under this regulation there will be no excuses for failing to do so."

Meanwhile, criticism of the new regulations has been plentiful. Critics argue that under the new regulations, universities will be "held less accountable for the actions of its students or faculty, cases may drag out as schools will not be held to the previous 60-day maximum to adjudicate cases, and victims of sexual violence may have to relive their trauma during cross-examination." The general consensus of criticism states that the new regulations make it more difficult to hold perpetrators of sexual harassment responsible for their actions, as the new reporting process has become more arduous under the regulations.

As colleges and universities are required to comply with the new regulations by August 14, 2020, Title IX coordinators throughout the country scramble to analyze the entire 2,033 pages of the regulation document, attend digital webinars and trainings and prepare their campuses for the new procedures in the upcoming semester. Meanwhile, collegiate sexual assault prevention advocates await to see if the new regulations will truly have a negative effect on sexual harassment reporting.

While the new regulations contain many changes, this article will analyze three of the largest and most controversial modifications to the Title IX legislation: (1) which university officials must report acts of sexual harassment, (2) requiring schools to dismiss any complaints of sexual misconduct that occur outside of campus-controlled buildings and/or educational activities and (3) requiring colleges to allow live cross-examination by a "representative" of each party's choosing. This article will look at the criticism as well as the support of each of these regulations. Lastly, this article will state steps that institutions and students must take in August as the new regulations take effect.

From Mandatory Reporters to Officials with Authority

106.44 (a) General response to sexual harassment. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

Most universities make use of mandatory reporters; a system where the majority of university officials are required to report incidents of sexual misconduct to the Title IX office as they are made aware of them. While colleges may have adapted mandatory reporter policies to provide greater transparency in regards to the sexual assault statistics on their campus as well as their institutions' accountability towards victims, some critics worry that such policies might have a negative effect on reporting. Essentially, critics of mandatory reporting policies stress that students may be hesitant to do come forward, knowing that doing so will result in an official report being filed, without their permission. The Department seemingly agrees with this position stating:

> "The Department believes that respecting a complainant's autonomy is an important, desirable goal and that allowing complainants to discuss or disclose a sexual harassment experience with employees of postsecondary institutions without such confidential conversations automatically triggering the involvement of the recipient's Title IX office, will give complainants in postsecondary institutions greater control and autonomy over the reporting process."

As such, rather than utilizing mandatory reporters (or "responsible employees" as they are termed in the regulations), the new regulations state that notice to the Title IX coordinator or any other official with authority conveys actual knowledge to the institution. The regulations allow universities and colleges to decide which of their staff and faculty must report sexual harassment to the institution's Title IX coordinator. It should be noted that institutions still may use a broad set of employees to report, including all employees if they wish. However, for the "actual knowledge" standard to be met, the person reporting must be one designated as an official with authority.

Critics of this regulation point out that often, institutions discourage sexual harassment reports as the alleged perpetrators are often prominent members of campus communities such as athletes and fraternity members, among others. It is argued that by failing to make employees mandatory reporters, schools will be able to continue to ignore certain cases of sexual harassment, leading to fewer complaints and ultimately less justice for victims.

Commentators also point out that this regulation requires victims to bear the responsibility of locating the correct administrator to report to, thus making it more difficult for victims to know how to properly report instances of harassment.

Title IX Jurisdiction

106.45(b)(3)(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would:

- *Not constitute sexual harassment as defined in § 106.30 even if proved,*
- *Did not occur in the recipient's education program or activity, or*
- *Did not occur against a person in the United States,*

then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipients code of conduct.

...Title IX coordinators throughout the country scramble to analyze the entire 2,033 pages of the regulation document, attend digital webinars and trainings and prepare their campuses for the new procedures in the upcoming semester.

Per the final regulations, Title IX complaints that happen off-campus or not as part of a school program or activity must be dismissed. In addition, Title IX complaints that happen outside of the United States must also be dismissed. Supporters of this regulation state that it imposes reasonable limits on the school's responsibility as well as addressing the unrealistic expectations of the school regulating student behavior in off-campus locations such as private apartments, houses and bars.

Opponents of this regulation are quick to point out that under this section, sexual assaults, harassment, intimate partner violence, and stalking that happen during study abroad or in off-campus housing, are not covered under Title IX. As 84.4 percent of students are living off campus and rates of assault are approximately five times higher in study abroad programs, opponents argue that this regulation change is nonsensical.

A 2013 study, based on 218 female undergraduate students at a single institution, highlighted the frequency of sexual misconduct in study abroad programs. The study showed 60 of the respondents (27.5 percent) reported at least one experience of unwanted touching while abroad, 13 (6 percent) reported an attempted sexual assault (anal, oral or vaginal), and 10 (4.6 percent) reported rape. Other statistics show that only 8 percent of sexual assaults take place on school property. Sexual assault prevention advocates worry that with such a low amount of incidents transpiring on campus, this new regulation allows for institutions to largely ignore the majority of sexual assault incidents that occur.

The Department responds that despite this regulation change, institutions retain the flexibility to employ supportive measures in response to allegations of conduct that does not fall under Title IX's purview, as well as to investigate such conduct under the institution's own code of conduct at the school's discretion. The Department claims it does not intend to dictate how an institution responds with respect to conduct that does not meet the conditions specified in § 106.44(a).

Live Hearings and Cross Examination

Section 106.45(b)(6)(i) Postsecondary institution recipients must provide live hearing with cross-examination.

Section 106.45(b)(6)(i) of the regulations, addresses the use of live disciplinary hearings in cases of sexual harassment. While a number of institutions already make use of student conduct hearing boards to adjudicate violations of student policy, section 106.45(b)(6)(i) makes live hearings mandatory. Live hearings often resemble judicial hearings with both complainant and respondent having the ability to issue statements, bring forth evidence, call and question witnesses, cross examine the opposite party and witnesses, and issue closing statements. Hearing board members are permitted to ask follow up questions of all parties and ultimately determine if the respondent is responsible or non-responsible for the charged violation.

Commentators have opined that requiring live hearings with cross-examination is the most important addition to ensure the regulations provide a fair process for all students involved. Supporters point out that cross-examination is "an essential pillar of fair process," necessary for resolving factual disputes in cases and is in line with Supreme Court cases interpreting due process of the law.

Critics state that the new regulation allows for survivors to be cross-examined by their rapists' parents, friends, fraternity brothers or sorority sisters, thus greatly increasing the risk of re-traumatization. Meanwhile, others point to possible inequities in student representation. Title IX experts worry about unequal access to representation, pointing out the "huge asymmetry between male responding parties who can afford lawyers and female reporting parties who can't." Experts also anticipate the creation of a powerful incentive not to report for victims facing high paid lawyers and knowing they can't afford good legal advice of their own.

Moving Forward

Due process supporters and survivor advocates find themselves on rivaling sides of the new regulations. Regardless of where

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administrators may stand however, the regulations take effect on August 14, 2020 and as such, colleges, universities, students and parents all must prepare themselves for these changes in the coming semester.

Institutions must be intentionally transparent with who they have designated as an official with authority. Students must be furnished with the names, locations and contact information of each official with authority that they are permitted to report incidents of sexual harassment to. Title IX coordinators should also make efforts to show their faces and be known to the student body. Coordinators that participate in or appear at high visibility university events such as guest lectures, welcome week events, homecoming activities and sporting events, will become familiar faces with the student body. This familiarity will hopefully encourage students to seek these administrators out to make direct Title IX complaints.

Coordinators should also consider carving out time to appear in freshman first year seminar courses. These appearances should serve as an introduction to the coordinator themselves, as well as a description of their role in the Title IX process and the location of their office on campus. Furthermore, freshman seminar classes that use campus scavenger hunts as a class activity, should include the Title IX office as a "must visit location."

Although students are considered adults when they arrive on campus, parents continue to play integral roles in their children's post-secondary support system. Reaching out to the parents of incoming freshmen with an introduction and description of the college's Title IX procedure, allows parents to be a critical resource for their children in the midst of crisis. Local high schools that host college nights or college preparation events targeted at parents, should consider inviting local Title IX coordinators to participate in question and answer sessions with the parents of senior students.

While educating students and parents on the identity and role the Title IX coordinator and officials with authority is an important first step, faculty and staff members must also be educated on the university's reporting process as well. As the purpose of this new regulation is to empower and encourage more students to come forward with incidents of sexual harassment, faculty and staff must be properly equipped to support students who do so.

Faculty and staff must be knowledgeable about the entire reporting process, from initial report to appeals, as students may rely on them as guides to reporting. Faculty and staff must also be knowledgeable about the numerous resources for students, including those issued by the institution and those offered by community partners. Lastly, if increasing the number of students that come forward is a priority, then it must be made clear that students can approach non-authorized officials in confidence. Students must know that this confidence is key to them ultimately having the final say in whether to trigger the investigative process or not.

In regards to the geographical jurisdiction restrictions the new regulations create, now is the time for universities to review and update their student conduct codes to address sexual violations that no longer fall under the Title IX category. The Department makes it clear that institutions should still provide supportive measures and investigate issues of assault and harassment, regardless if they fall under Title IX or not. As such, institutions still may use other provisions in their codes of conduct to address these complaints. Colleges should use this time to update student conduct codes to include overarching harassment and discrimination policies that address all incidents uniformly. Institutions with policies such as these will still be able to regulate off-campus violations, including those that happen in study abroad programs.

Campuses that intend to utilize uniform harassment and discrimination policies, must be deliberate in making it known to the campus community that off-campus incidents of harassment and discrimination will still be investigated and adjudicated. This regulation has been one of the most misinterpreted additions to the legislation, with many believing that colleges simply will no longer investigate off-campus incidents of sexual harassment. These misinterpretations could potentially lead to lower reporting numbers, with students failing to report off-campus sexual harassment incidents under the belief that they will not be investigated. Universities must be clear that this is not the case and must also be intentional in explaining the sections of the student code these incidents will now fall under.

Finally, to combat potential inequities in student representation at conduct hearings, institutions should consider providing advocates to students at their request. Suitable advocates include attorneys, law professors, members of legal clinics and upper level law students. All members of a university's advocate pool, must be properly trained. Organizations including the National Association of College and University Attorneys (NACUA) and the Association of Title IX Administrators (ATIXA), regularly offer trainings on Title IX and collegiate sexual harassment. Institutions should review which training sessions will best educate and prepare advocates for conduct hearings.

Title IX coordinators and hearing board leaders should also develop training materials which outline how conduct hearings are held at the university. Advocates need to enter all hearings prepared and must be familiar with the school's hearing process in the same manner an attorney would be familiar with a court's judicial hearing process.

Advocates should also have basic training on performing an adequate cross examination. While some advocates may choose to only ask predetermined questions, most experienced trial attorneys will agree that the most beneficial cross examinations are those that respond directly to statements made by witnesses in real time. Institutions should consider hiring local trial attorneys to help train their advocate pool in the art of cross examination, while institutions with law schools may be able to offer the same training through mock trial teachers and coaches.

Lastly, institutions must create a vetting process to ensure that non-biased volunteers are being selected for the advocate pool. Providing a student with an advocate is a service that must be fairly extended to the complainant and the respondent, equally. Advocates must be made aware that they could be called to represent either side of the case and must be able to do so in a non-biased manner to avoid any claims of ineffective representation. Just as an attorney must zealously represent her client, so too must the university issued advocate.

The fall semester of 2020 will be one of the most unique semesters in recent times. Institutions already have a tall order in returning students to the class room as the COVID-19 pandemic continues. Some have questioned the appropriateness in the timing of releasing these regulations, given the uncertainty that universities face in the near future. Others remain hopeful that a change in administration after the 2020 presidential election will render these new regulations moot. Whatever the case may be, these regulations go into effect in the fall and institutions must not only prepare themselves, but also prepare their students for change.

James Wilkerson received his J.D. from the University of Louisville in 2018. He currently serves as the Director of Staff Equity & Diversity and the Deputy Title IX coordinator at Indiana University Southeast. He is also the founder and CEO of Greek Law Inc; a 501 (c)3 nonprofit organization, dedicated to educating students on consent, collegiate sexual assault prevention and social sexual responsibility. ■

Share your thoughts

We're listening

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Legal Resources for a Continuing Pandemic

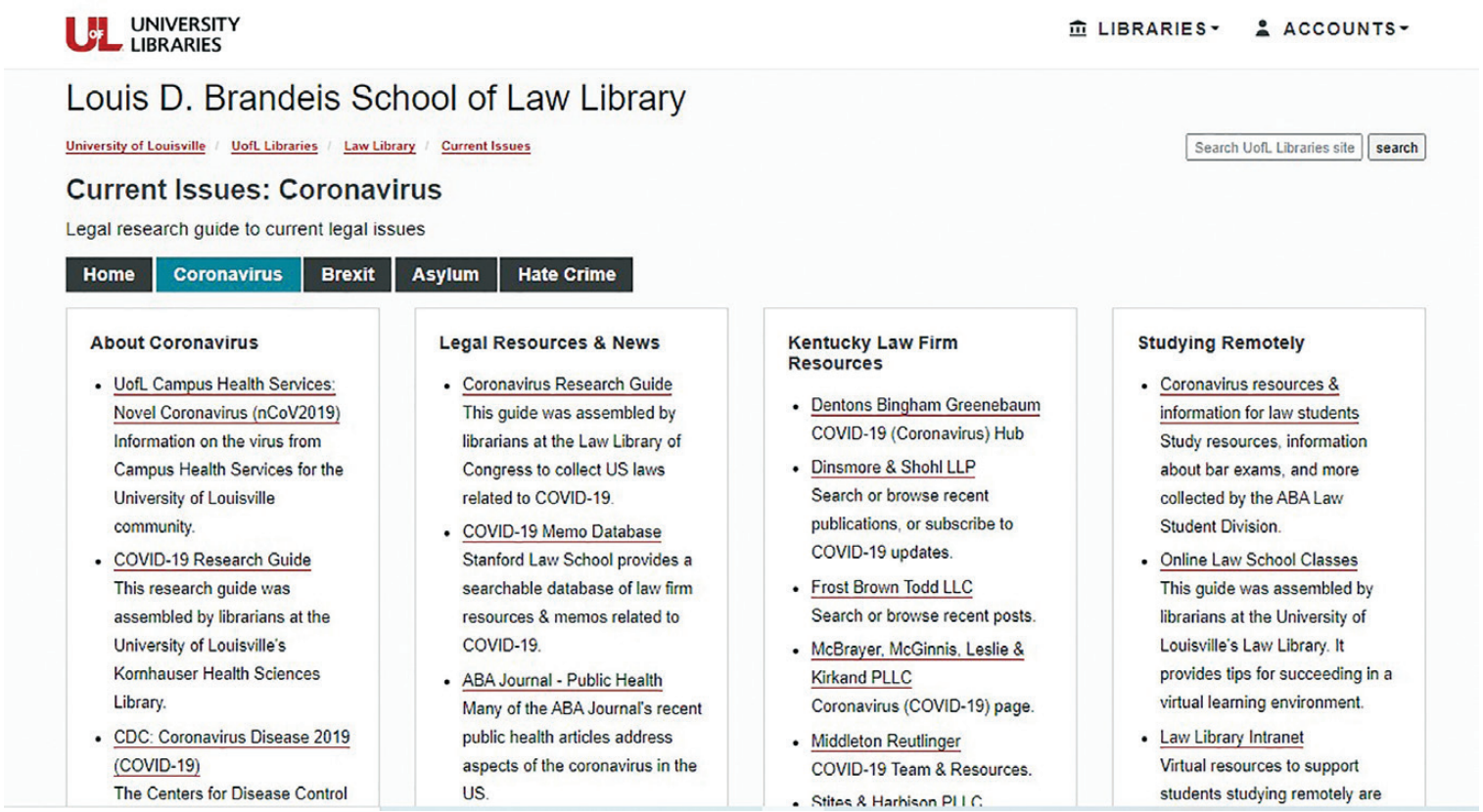
Kurt Metzmeier

Since the beginning of the crisis involving the novel coronavirus, or COVID-19, we have been bombarded with e-mails from the courts, the institutions in which we work and from our closest to our obscurest vendors. Because the situation has been so fluid, these e-mails are often sent daily to include new changes and new procedures for those practicing in the courts of Kentucky.

Moreover, while there has been a lot of press coverage of legal matters arising out of the shutdowns ordered by states under the guidance of the CDC and the presidential task force overseeing the coronavirus response, the issues discussed aren't those that affect the average lawyer in their day-to-day activities of practicing the law. Constitutional questions over the scope of the police powers of the state during an epidemic and whether they impede the freedom of religion are certainly interesting—but they are not the kind of cases that come across the desk of most Louisville lawyers.

With no ready course of treatment and even the most optimistic predictions of a vaccine not arriving to ordinary citizens until next year, lawyers will be practicing during a pandemic for a long time. Undoubtedly, they will be dealing with related commercial and personal legal issues that will continue to impact their clients. At best, we will be living with COVID-19 well into the start of 2021, but the legal ramifications will be felt for years, maybe decades. After all, we don't yet have a vaccine but if you squint you can almost see the "have you been injured because of the coronavirus vaccine" ads in the future.

This article will attempt to bring together resources in one place that lawyers can use for matters concerning the coronavirus well into the future. I'll begin by providing a roundup of resources lawyers can use regarding courts and legal practice to stay updated on these matters without burning out reading and digesting daily e-mails. Next, I will introduce some materials the University of Louisville Law Library has collected, some of which have been created by both local law firms and law firms around the country to inform clients and other lawyers about practical commercial and litigation issues raised in this crisis.



COVID-19 Resources for Practice in Kentucky Courts

One of the immediate responses to the realization that the coronavirus was present in the Commonwealth of Kentucky was swift action to close the state courts to prevent the virus from spreading through contact in crowded court houses. In early March, the Kentucky Supreme Court issued its first order to close courts. It was followed by several similar orders which now can be found at on the courts' website at Supreme Court of Kentucky, Rules & Procedures, *https://kycourts.gov/courts/supreme/Pages/rulesprocedures.aspx*. Another webpage, COVID-19 and the Courts, *https://kycourts.gov/Pages/Coronavirus.aspx*, summarizes the actions.

The U.S. District Courts for the Western District of Kentucky also created a webpage for court closings and procedural changes in response to the COVID-19 pandemic: *https://www.kywd.uscourts.gov/coronavirus-disease-covid-19*.

Other institutions like the Louisville Bar Association have disseminated information in its weekly e-mails and its extremely useful, COVID-19 Updates page *https://www.loubar.org/News%20Publications/COVID.aspx*, which collects all the orders of the state and the local courts.

UofL Law Library Coronavirus Library Guide

Halfway through the University of Louisville's spring break in early March, the administration, alarmed by reports of the spread of the coronavirus, made the dramatic step of taking instruction entirely online starting immediately. Faculty scrambled to turn live courses into online courses and to assist them the UofL Law Library created a coronavirus library guide: *https://library.louisville.edu/law/current_issues/coronavirus*.

As the dramatic developments found their way into instruction, electronic resources librarian Erin Gow began adding legal resources related to the novel coronavirus. I, like many UofL faculty, incorporated the pandemic into my class and as I encountered resources, I passed them to her, helping to build a robust coronavirus library guide to online resources research and instruction. The guide is focused on publicly available collections and is an excellent resource for the Louisville bar.

The guide begins with a summary of resources from both government and academic epidemiological and government agencies. There are links to the coronavirus clearinghouse websites of the CDC, the Commonwealth of Kentucky, UofL, and the World Health Organization (WHO). There is also access to an excellent research guide on medical and scientific materials on nCoV2019 that was assembled by medical librarians at the University of Louisville's Kornhauser Health Sciences library.

Next, under Legal Resources & News, there are several websites devoted to the legal issues raised by the virus. There are links to legal news sites including *The ABA Journal* and Law 360, a free coronavirus segment of the LexisNexis-owned news source. There are also research guides created by the Law Library of Congress to collect US laws related to COVID-19 and to provide updates on legal issues caused by the pandemic around the world.

One of the more interesting sources referenced is Stanford Law School's searchable database of national law firm memos and other resources related to COVID-19. When I discovered it, I began to collect similar information from state and local law firms. This material is the focus of the Kentucky Law Firm Resources segment of the guide. Memos, news articles, guidance to clients and other posts from the special COVID-19 pages of such firms as Dentons Bingham Greenebaum, Dinsmore & Shohl, Frost Brown Todd, Middleton Reutlinger, Stites & Harbison, Stoll Keenon Ogden, and Wyatt Tarrant & Combs are represented. Our website urges that any state law firms with similar coronavirus resources that we have omitted to contact the library so we can add them.

The last column of the guide is devoted to resources for law faculty teaching and law school students learning in the continuing environment of a deadly pandemic that continues to spread and will continue to impact legal education for months if not into 2021.

And this is a good reminder that for everything from a summary eviction proceeding or a foreclosure, to major corporate litigation will continue to be impacted by this virus for the foreseeable future. Personal injury and mass torts law, banking and real estate development, the law of hospitals, pharmaceutical and medical devices law—it is hard to see an area of law that won't be impacted by the effects of the pandemic for years to come.

Louisville lawyers will be researching this topic for a long time. I hope this article and the UofL Law Library Coronavirus guide will remain a helpful starting place.

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

Celebrating the 19th Amendment

Jennifer Kleier and Delores "Dee" Pregliasco

Join us in celebrating the 100th anniversary of the 19th Amendment to the U.S. Constitution, commonly known as the Suffrage Amendment. The amendment guaranteed women the right to vote, stating "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."

The road to passage was an arduous one that took over 70 years and the work of thousands of people. It included protests, riots, boycotts, jail sentences and hunger strikes, disagreement and fracture amongst leadership and confrontations over race. Despite passage stalling during World War I, Congress finally passed the 19th Amendment in 1919. Tennessee became the last state to ratify the amendment and it was officially codified on August 26, 1920, now celebrated as Women's Equality Day. That same year the National League of Women Voters was formed to educate women and the public about the new amendment. The Louisville League of Women Voters also came into existence in November of 1920.

In future issues of *Bar Briefs* look for articles discussing various aspects of the battle for the 19th Amendment and current voting rights issues. Other resources are the websites of The National League of Women Voters, The National Women's History Alliance, and the Kentucky and Louisville Leagues of Women Voters. A video which is worth the time to watch is Martha Wheelock's video of Inez Milholland, the iconic suffragist on the white horse featured in the various suffrage parades.

There are two wonderful exhibits celebrating a woman's right to vote: The Frazier History Museum's exhibition *What is a Vote Worth: Suffrage Then and Now* can be seen in person or online; and *BallotBox* — a voting rights art exhibition for Louisville Metro Hall, curated by Skylar Smith in partnership with the Metro Government Office for Women, Louisville Visual Art, the Frazier History Museum and the Louisville League of Women Voters.

If you are looking for some good books to read check out *The Woman's Hour* by Elaine Weiss (a recent Filson Historical Society speaker), *Mr. President, How Long Must We Wait* by Tina Cassidy (scheduled to speak, probably virtually at Louisville's Women's Equality Day Celebration on August 22) and *The Untold Story of Women of Color in the League of Women Voters* by Dr. Carolyn Jefferson-Jenkins, first African-American President off the National League of Women Voters (scheduled speaker for the Louisville League's 100th Anniversary Celebration on November 12).

Some additional resources on the current state of voting rights and voting issues our country continues to face are: *Vote for US, How to Take Back Our Elections and Change the Future of Voting* by Professor Joshua A. Douglas of the University of Kentucky College of Law and *One Person, No Vote, How Voter Suppression Is Destroying Our Democracy*, by Carol Anderson.

Jennifer Kleier is a partner at Karem & Kleier Law and chair of the LBA's Gender Equity Committee. Dee Pregliasco is retired from Pregliasco Straw-Boone, Doheny Banks & Mudd; she is a practicing mediator and an adjunct professor at the Brandeis School of Law. ■

Live Webinars with Sean Carter

Yakety Yak! Do Call Back!: The Ethical Need for Prompt Client Communication

7-15-2020 | 1:00 pm |
1.0 CLE Ethics Credit - pending

While it is important to comply with every obligation of the ethics canon, the obligation to promptly communicate with the client may be the most important. Lawyers who flaunt this rule leave their clients with no choice but to contact the state bar in a desperate attempt to seek answers to their questions. And, of course, by that point, the disciplinary authorities will have a long list of questions of their own. In this insightful webinar, legal humorist Sean Carter will provide lawyers with practical tips for how to meet the increasingly difficult of burden of talking, emailing and texting to each client's content.

Technical Fouls: Even Minor Ethics Violations Can Have Major Consequences

7-22-2020 | 1:00 pm
1.0 CLE Ethics Credit - pending

When it comes to ethics violations, there is no such thing as a minor or "technical" foul. All ethics violations are serious matters, evidencing a breach of the trust that has been placed in the lawyer. As a result, lawyers must avoid falling into the mindset that a particular violation is "no big deal." To make this case, Sean Carter will chronicle a number of recent ethics cases in which lawyers were surprised to discover that even minor ethics violations can have major consequences.

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

7-29-2020| 1:00 pm
1.0 CLE Ethics Credit - pending

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

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Due to the partnership with Mesa CLE, the LBA will NOT be accepting registrations for these webinars. Please visit the LBA website's CLE calendar, www.loubar.org, for the link to register and the cancellation policy.

Having our Collaborative Say, the Kentucky Way

Bonnie M. Brown

Collaborative divorce is recognized internationally as a type of alternative dispute resolution in which the parties contract to avoid court, try to settle in good faith, and must change counsel if either resort to court. Recent research in the UK and USA confirms that, no matter where a collaborative case is successfully concluded, the parties and attorneys generally report a more satisfactory experience than with traditional adversarial litigation. As the public increasingly requests this type of alternative dispute resolution, attorneys had best be prepared to meet this demand with competent, skillful collaborative legal services.

Every case may not be suited for collaborative resolution. When exercising our judgment to recommend it or not, some of us "recovering litigators" must guard against being unduly influenced by our old comfort zones. We have all heard (and, ourselves, said): "Let's 'just' do this cooperatively. It's easier and practically the same thing." Well, it *is* easier—for attorneys who have done litigation for years. However, it may not be best for the clients. It is certainly not practically the same thing.

Co-operative practice is qualitatively different from collaborative practice, not "just the same thing without having to lose your attorney." Co-operative is not "collaborative light," but is a type of negotiation—within the context of the adversarial system. Some may be confused because of surface similarities such as:

- Sharing experts/resources
- Exchanging releases/informal discovery
- Respectful approach

Co-operative practice has less brutality than hard ball litigation, and fewer of its disadvantages, but, at the same time, may not produce as speedy a settlement. Co-operative practice has none of the benefits (or constraints) of a strictly collaborative case, in which all cards are on the table—face up—from the outset.

Specifically, the differences are summarized and explained below, with reference to Kentucky Bar Association Ethics Opinion, KBA-E425, (hereafter "Opinion") which can be accessed at *https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)_/kba_e-425.pdf*

Collaborative vs. Co-Operative

The following table sets out the main differences, other than mandatory withdrawal, if there is no settlement:

	Big C (collaborative participation agreement signed)	**Little C (co-operative)**
Goals	Client's goals are best interest of family	Client's goals may be best interests of client only
Disclosure	Attorney may require client to disclose or terminate case	Attorney requires client to co-operate if opposing counsel asks the "right question"
Errors	Attorney must tell other (not opposing) party if he/she made a mistake	Attorney may take advantage of opposing party's mistake or omission
Strategizing	Attorney must tell other (not opposing) party if he/she made a mistake	Attorneys may still jockey for position/case posture for client only

Client's Goals

In qualifiedly approving the practice of collaborative law in Kentucky, the Opinion recognizes that the client determines the objectives of representation, which can be family peace, children's well-being and economic stability of all family members. When the client instructs his or her attorney to pursue these goals, the collaborative method of resolving the marital dispute is consistent with the lawyer's obligations.

In co-operative practice, the client's goal may still be his or her separate interests only. Of course, most litigants contend that they are pursuing the best interests of the family or at least the best interests of the children; when it comes down to the actual structure of a resolution that may not be the case. That is when the mental health professionals or coaches can be of great value and keep the client focused on healing instead of revenge.

Nevertheless, it is often these directives to pursue family peace and health that drive the paradigm shift and supply the fundamental difference between collaborative and co-operative cases. The "carrot" of well-being for all rather than the "stick" of an expensive change of counsel is the real foundation for the significant benefits of a collaborative case.

Disclosure

As the Opinion explains, though the formal discovery process is eliminated, the contract requires full and timely disclosure of all material information and actions in good faith. If an attorney knows his client is not disclosing, that attorney may withdraw and often must withdraw. While not addressed in the Opinion, nothing would inherently prohibit exchange of releases as well. In co-operative cases, it is still the responsibility of the person without the information to "ask the right question." Again, the difference is fundamental. Placing the burden on the party with the information to disclose rather than waiting to be asked reflects the driving force of the collaborative resolution for family peace and economic stability.

For example, a business may have prepaid estimated taxes and/or an expectancy in a new project that would not be clearly expressed on the company books or in a business valuation relying thereon. If the attorney for the party not involved in the business (hypothetically, the wife) does not specifically ask about ongoing contract negotiations and/or potential tax refunds for the business, the attorney for the business owner (hypothetically, the husband) must affirmatively disclose in the collaborative case. Such affirmative disclosure would not be required in a co-operative case and might even constitute malpractice.

Why is it in the husband's best interests to affirmatively disclose? Remember, the goal is family peace and economic stability. The wife could eventually find out after the case is over. There are a thousand ways to get even—999 of them involving the children. The "savings" from the discovery gamesmanship can be wiped out by the attorney's fees expended in opposing motions to alter parenting schedules and by children's permanent memories of ruined holidays.

Errors

Similarly, in a collaborative case, one must advise and not take advantage of the other party's mistake. The above reasoning applies. Moreover, knowing that two attorneys and/or a financial neutral will be checking the math, ensuring inclusion of all assets and debts, and confirming the legal consequences of certain language or omissions of certain language, facilitates both the perception and reality of a team effort with both parties' working toward the common goal of the amicable, just, and healthy resolution.

Strategizing

In the collaborative case, both attorneys are most likely to work together to identify financial and tax structures which generate economies that inure to the benefit of the whole family. It is also more likely that the entire family will be looking at parenting schedules and decision-making models that are best for the children without worrying about whether that "means" the children may become more bonded to the other parent or about losing touch with the children. Such results are still possible with co-operative cases, but less likely and certainly not mandated. If a co-operative settlement results in one party's enhanced economic stability and the other party's economic vulnerability; that can be an acceptable and sometimes preferred outcome for the advantaged client. The same result would constitute a failure under a collaborative resolution.

Thus, the features of collaborative and cooperative cases are fundamentally distinct and, to a great extent, opposite. Co-operative is "litigation light," and not "collaborative light." When collaborative divorce is truly not appropriate for a certain case, a co-operative case may be the best alternative. However, when the client's goals are compatible with ethical use of a collaborative case, it is incumbent on us to offer this option to the client.

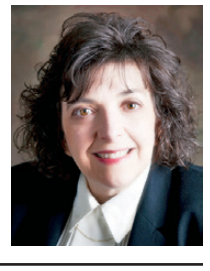
Informed consent

The client's informed consent in selecting collaborative divorce as the means to resolve their family's issues is the key to ethically practicing a collaborative case within the rules designed for the adversarial system, as explained in the Opinion. The client must understand that a collaborative divorce is very different from what is normally expected, imposing upon the lawyer a heightened obligation to communicate the special implications of the process. It is a form of limited representation recognized under Kentucky Rules, and the client must understand those limits.

It is also important to make an individualized assessment of whether a collaborative case is in each specific client's best interest. It is best for the collaborative agreement to expressly state that the parties' objective is family peace, that no information may be withheld and that counsel will withdraw if the client insists, that formal discovery is expressly waived, and that the right to seek an advantage from an error of the opposing party is likewise expressly waived.

Conclusion

The rapid and global growth of collaborative practice clearly indicates its beneficial properties. Some of us whose licenses were granted in the seventh or eighth decades of the prior century may be representing the now-adult children in their own divorces over whom we litigated in the earlier years of our practice. It is a blessing that we can offer them a healthier alternative than we were able to offer their parents.



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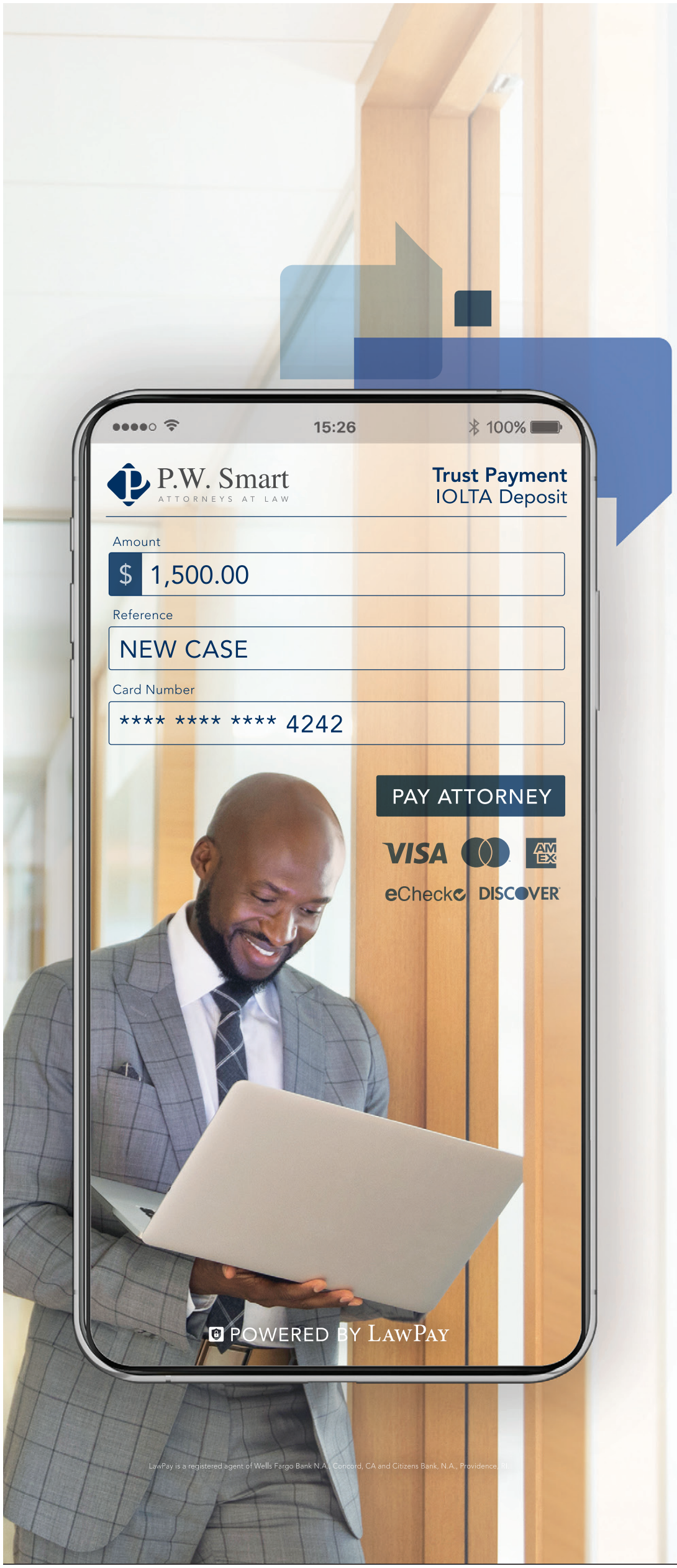
Bonnie Brown received her J.D. from University of Louisville in 1978 and has been in private practice concentrating in family law for over 40 years. ■



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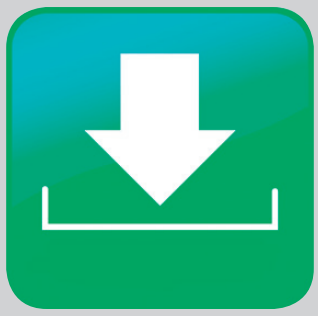

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Wyatt, Tarrant & Combs is pleased to announce that **Mary Elizabeth Anderson** was nominated for her first term as Assistant Secretary, Trusts and Estates Division of the Real Property Trust and Estate Section of the American Bar Association. Anderson is a member of Wyatt's Trusts, Estates & Personal Planning Service Team. She concentrates her practice in the areas of estate planning and trust administration including issues with estate, inheritance and gift taxes, trust modifications, business planning and probate.

Leadership Kentucky has selected **J. Brittany Cross Carlson** as a member of the 2020 program. Leadership Kentucky, created in 1984 as a non-profit educational organization, brings together a select group of people that possess a broad variety of leadership abilities, career accomplishments, and volunteer activities to gain insight into complex issues facing the state. Carlson is a partner of Stites & Harbison in the Torts & Insurance Practice Service Group. Her practice focuses on drug and medical device litigation, product liability, medical malpractice and personal injury. She defends multiple international medical device and product manufacturers in federal and state courts across the nation, and acts as Kentucky counsel for a national retailer, handling personal injury, contract and property-related litigation.

Wyatt, Tarrant & Combs is pleased to announce that **Michelle Browning Coughlin** has been appointed by the President of the American Bar Association to serve as one of the 12 members of the Commission on Women in the Profession. The Commission's mission is to "secure the full and equal participation of women in the ABA, the legal profession, and the Justice system." Coughlin is the founder of MothersEsquire, a national organization of more than 5,000 members that works to improve promotion and retention rates of women in the law, along with championing equal pay and transparency regarding compensation practices in the legal profession. Coughlin is also a well-regarded intellectual property and data privacy lawyer representing large and small companies in their trademark matters, as well as celebrity and sports figures in their trademark, copyright and licensing matters.

David Spalding has opened the firm, Spalding Law, PLLC. His office is located at 214 South Clay Street, Louisville, KY 40202 and he can be reached at (502) 483-6030. ■

More Black Lives Matter Signs Available

Due to the strong positive response about the LBA offering Black Lives Matter signs to members at no cost—100 signs gone within 4 days!—additional signs have been ordered and are available for pickup.

To request a sign (max 5 signs per member), please call 583-5314 or e-mail admin@loubar.org. Signs will be available for pickup at the Bar Center Monday-Friday during regular business hours.

Breonna's Law a Start, but Jefferson Circuit Court Should Change Warrant Process

Ted Shouse

The passage of Breonna's Law eliminates no-knock warrants. That's a step in the right direction, but it does not address the deeper, systemic problems involving the issue of how the police get search warrants.

The United States Constitution requires the police to obtain a search warrant to enter your home without your permission and look for something. To get a warrant, the police have to appear before a neutral judge and swear, under oath, to facts that would lead the judge to believe that a) probable cause exists that a crime has been committed and b) evidence of that crime is in your home. The judge is supposed to read the application and ask questions to determine if probable cause exists. That's what the law requires for a judge to sign a search warrant.

In 21 years as a criminal defense attorney in Jefferson County I've seen this procedure dozens of times. Here's what that looks like: The police officers, always in plain clothes, appear unannounced in a courtroom. They linger until there is a break in the court's business. When a break occurs, they approach the judge and white noise is turned on to make their conversation inaudible to anyone else in the courtroom. A casual conversation happens, and the warrant is invariably signed.

The judge is not randomly assigned; the police can pick whichever judge they want. Believe me, if I could pick the judge in my cases, I would. The conversation between the police and the judge is not recorded. Nor is there a record of how these conversations came to happen. Sometimes it appears a phone call has been made beforehand, but often it seems the officers appear unannounced.

Compare this procedure to how felony indictments are handled in Jefferson County. The case is presented to a grand jury. This presentation happens in secret but an audio recording is made. That grand jury tape is made available to the defense lawyer almost immediately. The indictment, a physical piece of paper laying out the charges, is presented to a judge in open court and the judge (or the clerk) spins a drum and draws out a ball at random. The number on the ball—between one and thirteen—determines which division of circuit court the case is assigned to. The judge is selected at random.

Grand jury proceedings are recorded so the defendant knows what evidence was presented against him or her. This transparency allows a defendant to address the specific allegations and ensures nothing improper has occurred. It was the existence of the grand jury tape that led directly to the charges being dismissed against Kenneth Walker, Breonna Taylor's boyfriend.

The *Courier Journal* reported that the judge who issued the no-knock warrant in Breonna Taylor's case signed it and four others in 12 minutes. I could not read five warrant applications in 12 minutes—much less ask questions about them and feel comfortable signing my name to each one. A recording of those 12 minutes could clear up any ambiguity about what happened.

Transparency needs to be the standard. Jefferson Circuit Court should change the warrant application process. Judges should be randomly assigned to hear warrant applications, as they are randomly assigned after indictments are returned. The judge's conversation regarding the warrant should be recorded. A copy of that recording should be made available to the defense lawyer as soon as possible.

Under the current system, no one knows what really goes on when the police get a warrant to search your home. It is past time for that to change.

This article first appeared in The Courier Journal on June 22, 2020. It is reprinted with permission from Ted Shouse.

Ted Shouse has been a criminal defense lawyer for 21 years. ■

Register to Vote in the General Election!

Election Day is fast approaching and the deadline to register to vote will be here before you know it. The last day to register to vote in Kentucky for the General Election is Monday, October 5. You can register at www.GoVoteKY.com. It takes less than five minutes!

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2020 AAML/LBA Family Law Seminar Cancelled

To ensure the safety of our speakers, participants, committee members and staff and to keep with the spirit of our seminar, the LBA and the KY Chapter of AAML made the difficult decision to cancel this year's seminar. Please mark your calendars for April 21-23, 2021 when we hope to see you all in person!