

BAR**briefs**

Louisville Bar Association

May 2020



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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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We know the COVID-19 pandemic is having a financial impact, and we're taking action to ease the burden on CLE programming. Now through June 30, 2020, all CLE programs will be 45% off for LBA members! That is only \$25 per credit hour!

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While the Bar Center remains closed until further notice, LBA staff remain accessible by phone and email (visit www.loubar.org, click on About Us, and select Meet the Staff). For the latest information about LBA programs and events, watch for our weekly eBrief or visit www.loubar.org.

Inspired by the Greatest Two Minutes in Sports

In 2015, my wife, Julia, and I were fortunate enough to have walk-around passes to the Kentucky Derby. While we had been to the Derby many times before, this was the first time either of us had ever actually seen the race in person. Sure, we experienced the race from the infield and paddock while in college and for several years thereafter, but in 2015 we got to both experience and see the race.

The day was perfect and was only made better when, about an hour before the race, we were invited by a couple (previously unknown to us) into a third-floor clubhouse box directly on the finish line for the duration of the Derby Day festivities. It was incredible! Suffice it to say, Julia and I are unlikely to ever experience the Derby like that again, especially since that race was won by American Pharoah, a horse that went on to win the Triple Crown. In summary, we witnessed greatness on that early Saturday in May, greatness in American Pharoah, greatness in strangers welcoming strangers into their box, greatness in all that is the Kentucky Derby—a race that is emblematic of our community coming together, supporting a two-week celebration of all things Louisville.

While it remains to be seen how the Kentucky Derby will be run this year—currently scheduled for September 5, 2020—we should not let its absence this spring cause us to lose sight of the importance of achieving greatness in supporting one another, the LBA and our community at large. This support

can manifest itself in many ways. For example, the way in which the LBA staff has transitioned to working remotely, focused on providing valuable content and updates to the LBA's membership, is truly inspiring.

In addition, the way that the LBA is partnering with the Center for Nonprofit Excellence to provide guidance on COVID-19 related legal issues free of charge makes me proud to be a lawyer. And, I was further reminded of the good the greater LBA membership provides when learning an LBA member helped establish a food pantry through Empathy in Action—occurring May 2 at 10 a.m. at 1314 Bardstown Road, while other members are making donations to various charities, including the Red Cross, The Jewish Community Center, The Community Foundation's One Louisville: COVID-19 Response Fund and University of Louisville's Louis and Louise W. Weisser Bornwasser Student Emergency Fund.

There is no doubt that COVID-19 impacts all of us both professionally

and personally; however, it is important to bear witness to all the good that is happening around us. Moments can seem long and dark, but when you stop and pay attention, you cannot help but be inspired by the light of those around us. Therefore, I challenge you to give back to our community in whatever way you can this month.



As attorneys, we make up a substantial portion of Louisville's leadership dynamic; therefore, it is incumbent that we use our time, talent and treasure to provide for those who are less fortunate or who are focused on keeping us safe. Whether you donate blood or plasma to the Red Cross, help those you love, or make a contribution to your favorite charity, I ask that you add to the patchwork of greatness happening every moment throughout Louisville. While we cannot enjoy the Kentucky Derby this spring, let's make sure we don't lose sight of the race's ability to bring our community together.

Therefore, please do whatever you can to give back this month and send a selfie or a photo of your efforts to skurkin@loubar.org—not for self-promotion, but rather to help us all stay connected—something we all need during these challenging times. Next month, we will

include these photos in this publication to highlight the incredible impact the LBA's membership is making in our community.

Finally, in closing, I ask that you also take a moment to sincerely thank those currently serving in the frontlines of our community's response to COVID-19. The doctors, nurses, firefighters, police and other essential workers in our community are true and inspiring examples of greatness! Expressing your appreciation of their extraordinary dedication will only take a minute and will make a lasting impact.

Sincerely,

Peter H. Wayne IV
LBA President

While it remains to be seen how the Kentucky Derby will be run this year—currently scheduled for September 5, 2020—we should not let its absence this spring cause us to lose sight of the importance of achieving greatness in supporting one another, the LBA and our community at large.

We Are All In This Together

The Justice System Response to the COVID-19 Crisis

Chief Judge Angela McCormick Bisig

It is hard for me to believe I'm writing this article. I sincerely hope all of you are surviving as well as possible and adapting to this unique virus challenge. It is human nature to resist change... but we are stepping up to handle our ever-changing community landscape. We can overcome this adversity—I'm confident in our legal community. My judicial colleagues and I are all thinking of the struggles you and your families are dealing with both professionally and personally. A virus doesn't care if we work for plaintiff or defense. It doesn't notice if we prosecute, structure corporate deals, transact real estate, handle divorces or probate estates—everyone is adjusting our work routines considering the threat presented by COVID-19. We all are committed to serving our role as well as possible under the circumstances.

In a bit of irony, my prior *Bar Briefs* articles involved profiles of my circuit court colleagues as we all sat around a "virtual legal dinner table." I asked my term mates to tell us about their best and worst experiences in their life as a judge. As I write, we are under a declaration of a state of emergency by our Governor and under an order of court "slow-down" mandated by our Kentucky Supreme

Court. Businesses are closed and citizens are encouraged to stay home. To follow suit, we will suspend our dining together at the legal dinner table this month.

I want to say first and foremost that we are all in this together. All of us, by keeping our part of the legal wheel moving slowly forward, will make sure we live in a community governed by ongoing justice and the rule of law. As you know by now, the courts are officially under a slow-down. We are handling in-custody criminal matters by telephone or video conference. Our Commonwealth Attorney and Public Defender (and the judges) have worked together to release some individuals charged with crimes to lessen the possible risks to our jail population.

In civil cases, while most hearings are delayed, we are reviewing motions and writing orders. Some issues we can address by teleconference, and others we are giving dates as soon it is possible to hold in-person hearings. Exigent matters such as emergency protective orders, domestic violence intake, and child removal issues are still being handled by our family court. In-custody arraignments on new charges and individuals with bench warrants outstanding are still being handled by our circuit and district judges. We have

established an "on call" schedule to address issues such as an individual's failure to quarantine. The justice system is here. Our laws are being enforced.

I want the members of the Bar and community to know how compassionate, responsible, thoughtful and urgent the response to COVID-19 has been across the justice system. The state-wide court leadership from Chief Justice John Minton and Deputy Chief Justice Lisa Hughes has been strong. From day one of the declaration of a pandemic, myriad legal issues inundated each of our partners. I have watched them working literally non-stop to meet and address each one. Justices Minton and Hughes have directly and personally been working incredibly hard to give us guidance and leadership. I've been on the phone with members of the AOC at all hours of the day and night. Each term (circuit, family and district) held multiple emergency meetings to establish protocols and add their collective wisdom to the issues facing our work.

Our justice partners such as the Clerk's Office, corrections, sheriffs, LMPD, and our metro maintenance crews have all been creative, available, responsive and willing to work together to find solutions. I want to thank Tom Wine, Leo Smith, David Nicholson, Mike O'Connell, Ingrid Geiser, Dwayne Clark, Steve Durham, Steve Conrad, John Aubrey, Carla Kreitman, Angela Bilewicz, Kelsey Doren, Laurie Dudgeon, Kim Hosea and Scott Furkin all for their efforts during the past 3 weeks. I have been blown away by the spirit of responsibility, innovation and tenacity with which everyone has approached this community-wide emergency.

This article will not reach each of your hands until a month from now. Much as my colleagues and I wish we were given a crystal ball with our black robe and gavel, I do not know as I write today how this situation will continue to unfold. What I do know is that we have a group of leaders who will work hard to ensure we can move forward. We are aware of the potential for the influx of issues when we reopen and are working now to do what

we can to lessen the impact of delays on our citizens. If we start back at the first of June, we will do all we can to help each of you get back on track with your legal issues.


In closing, I would like to attempt a bit of optimism. Supreme Court Justice Sonia Sotomayor once said, "I have never had to face anything that could overwhelm the native optimism and stubborn perseverance I was blessed with." At the risk of being Pollyanna, I invite each of you to consider for a moment in these days that can feel like a dark cloud of isolation and worry, if there is any silver lining for you in this experience?

Whether it is something small, such as learning how to use Skype or Zoom, or something huge, perhaps a new realization that the human race is all interconnected, is there something to be gained or learned from this experience? Have you adapted your legal practice in a way that may be helpful in the future? Have you spent more time with young or even adult children? Have you seriously considered you probably never washed your hands quite enough before this crisis? (The last question my husband and I just posed to each other this morning).

Perhaps part of our basic humanity that helps us to cope with pain is the adaptability to learn from negative situations. While in no way lessening the financial and social hardships this virus lock-down is causing so many of us, if we can try to see the small benefit that comes from this, it may help as we struggle with the bad. It is my hope that next month's article will allow us all to return to the legal dinner table together. I thank the members of the legal community for their patience, support, perseverance and chutzpah. As we say to each other when we leave pre-court morning coffee—do justice.



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



The Louis D. Brandeis School of Law at the University of Louisville and the university's Equine Industry Program, located in the College of Business, seeks a visiting faculty member in equine law and regulation.

Email Law Dean Colin Crawford at colin.crawford@louisville.edu for job details and application instructions.

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7 Steps to Lead Your Business in a Crisis

Mark McNulty

Let's face it, none of us have ever been through a crisis like the COVID-19 pandemic. There is no playbook, no "Pandemic for Dummies" books to read. While there have been other crises in our lifetimes, this one is different because it's not just a financial crisis, it is a direct threat to our physical well-being as well.

As a business owner or leader, your team (and your family and community) needs you to guide them through the survival process. Here are my Top 7 Steps you need to take to help them, to lead them. I'm focused on your business here, and I'm sure you will be able to see how these apply outside the office as well.

- 1. First, don't panic.** Your team is feeling Fear, Uncertainty and Doubt (FUD), and the last thing they need to see or feel is that you are acting/leading based on FUD. Stay calm and cool, collect your thoughts, set your priorities and respond thoughtfully while avoiding emotional reactions. Be positive; find the wins every hour of every day.
- 2. Communicate, communicate, communicate.** You need to be communicating regularly with your team, your customers, your suppliers and your community. Make sure everyone knows what you are doing to protect them and their needs. You should be communicating with your team multiple times per day. Establish new patterns of morning huddles and frequent check-ins with your team—use technology to facilitate this and to maintain safe distancing. Keep in touch with clients regularly, let them know what you are doing, what you are planning to do next, and educate them on why it is safe to continue doing business with you. Help remove their FUD.
- 3. Don't argue with the facts.** We all have our opinions about what is going on, whose fault it is, and what others should be doing about it. What we shouldn't do is get caught up in debating the facts of the situation. Instead, accept them and begin adapting to them.
Fact: We are in the midst of a world-wide pandemic.
Fact: People will be living their lives from home—shopping, entertaining, working.
Fact: Distribution methods will change.
Fact: Supply chains will be disrupted and change.
- 4. Save your resources.** Now is the time to deepen your understanding of your

financials. Eliminate all discretionary expenses (not investments like Sales and Marketing) and activities which do not contribute to cashflow. Use your credit, (extend it ASAP) and conserve your cash. Re-negotiate loan payments, leases and other debt payments.

- 5. Be prepared to make the tough decisions.** One of your primary functions as a business owner/leader is to ensure that your business survives the crisis. You must do everything you can to make sure your business is still there when the crisis wanes. This will likely mean workforce reductions, which is very hard, but is another fact to deal with. Employment contracts when business contracts. Do it with compassion, but do it quickly and decisively, this is both a short-term and long-term business survival decision.
- 6. Evaluate both your supply chain and your distribution methods.** They have surely changed short-term, and possibly for the medium term as well. Find alternatives, consider new ways to buy and sell that meet your needs and the new buying patterns/methods of your customer base. Identify the weak links, the gaps, the opportunities and make the changes necessary.
- 7. Last but not least – put your personal care either first or high on the list.** Your team (family, community) need you to be healthy and to stay healthy to lead them through the duration of the crisis, and then to lead them some more as we come out of the crisis. This means eating well, staying hydrated, getting enough sleep. Find support groups (other business owners maybe) so you can maintain your mental health and sanity. If you aren't 100 percent, you can't be there for your team when they need you.

We are in unprecedented times, and that calls for leadership. Your teams are living in FUD (fear, uncertainty, and doubt) and they need you more than ever. Be the positive influence, look for small wins, help them through their days.

Mark McNulty is president and master coach for ActionCOACH Bluegrass. For the last 16 years he has been dedicated to helping other entrepreneurs achieve their dreams. ■



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EQUINE INDUSTRY TRENDS AND THE CORONAVIRUS IMPACT

Here in Louisville, the approach of spring is synonymous with preparations for the Kentucky Derby. A month ago, I anticipated that this column would be celebrating the approach of that treasured event that for so much of the world is Louisville's calling card.

Of course, this year, few if any events are proceeding as usual. The Derby is no exception. For the first time since 1945, the Derby will not be held on the second Saturday in May. In March, Churchill Downs officials announced the race will be held on September 5.

Of course, we all understand that postponement was the right decision. In this and so many other ways, I am proud of the thoughtful and far-sighted way that most Kentuckians have responded to this crisis. I am sure many of you feel this way as well. In the medium- and longer-term, at the same time, we are surely all concerned about the economic effects this will have.

Consider, for example, the role of the Thoroughbred industry in the Commonwealth. According to the Kentucky Thoroughbred Association, the equine industry as a whole is responsible for more than 60,000 jobs across the state, generating \$6.5 billion in annual cumulative direct, indirect and induced economic activity.



Bob Heleringer

The 2019 Kentucky Derby and Oaks had an estimated economic impact of \$356 million, and the Thoroughbred industry is responsible for \$115 million in annual tax revenue for Kentucky.

As a result, I know that I speak for many of us when I say that I hope the industry is able to bounce back quickly after the current crisis passes.

"It's a very unusual situation, as it is for everyone in the sports world," says Bob Heleringer, 1976 Louisville Law graduate, former state legislator and horse racing and equine law expert. He is the author of

Equine Regulatory Law, first published in 2012. He is working on the second edition now.

"[The delay] has kind of messed everyone up," Heleringer said. "Everyone in the racing industry likes routine, especially trainers."

Trainers had been working with horses to get them to their peak performance by early May. Now, they will have four more months to train. For some horses, this delay could cause them to miss their peak performance window. But for others, the extra time could give them a competitive edge, Heleringer said.

I asked if the delay will cause some horses to age out of eligibility to compete in the Derby. He explained that in racing, horses increase their age every January 1, so the horses will be considered the same age in September that they are in May.

But delays and closures due to the coronavirus pandemic do cause bigger worries for the horse racing industry. When we spoke in early April, only two or three racetracks in the country were continuing to run races. The economic impact of these closures is massive, Heleringer said, adding that some tracks have also limited horses coming in from other states.

"We're going to have huge financial repercussions if horses aren't allowed to earn purse money," he said. "The longer it goes on, the more devastating it is economically, like a lot of industries."

In 1945, the Derby was postponed until June because the federal government closed racetracks to preserve labor and materials for World War II.

But that ban was set to end on V-E (Victory in Europe) Day, giving racing officials an end date. Now, Heleringer said, no one can accurately predict when the pandemic will end.

"All they were looking for was the green light from the government (in 1945). This is a health crisis, and no one knows," he said. "In some ways, this is worse — the not knowing."

Our conversation turned from the current crisis to larger legal issues in equine law.

Heleringer pointed to the Horseracing Integrity Act, introduced in Congress in March 2019 by Rep. Paul Tonko of New York and co-sponsored in the House of Representatives by Rep. Andy Barr of Kentucky's Sixth District.

The bill proposes the establishment of a federal, independent authority charged with "developing and administering an anti-doping and medication control program for (1) Thoroughbred, Quarter, and Standardbred horses that participate in horse races; and (2) the personnel engaged in the care, training, or racing of such horses." As this column went to press, the bill remained in subcommittee.

As it stands now, the racing industry operates on a "patchwork system" of 38 state regulatory commissions, each with different rules and regulations, Heleringer explained.

"It's been something that the sport has tried to address for decades," he said. If that were to pass, there would be a system that would function like the Olympics. Everyone would know what the rules are. You wouldn't have a different standard in Kentucky and New York."

In January, the U.S. House of Representatives' Committee on Energy and Commerce's Subcommittee on Consumer Protection and Commerce held a hearing on the bill.

As we wrapped up our conversation, Heleringer stressed how important he believes it is for the Commonwealth's law schools to offer courses in equine law. I couldn't agree more. Since I arrived at Louisville Law just two years ago I have explored ways to develop offerings in "signature" areas special to our location - like equine law.

I am pleased to report that, with the support of the Equine Industry Program located in the University of Louisville's College of Business, and its Director, Sean Beirne, we hope to be doing that again in the next academic year. Once the pandemic has subsided and we all return to more normal times, this promises to be an innovation that promises to enrich the School of Law's curriculum even more — in ways that serve the Commonwealth and one of its key industries and traditions.



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.

Legal Aid Society's COVID-19 Response

Julia Leist

Our community faces an unprecedented challenge. Thousands of Kentuckians have been infected with the novel coronavirus, and thousands more have been directly affected by the economic aftershock. According to the U.S. Department of Labor, 113,149 Kentuckians filed for unemployment in the week ending March 28, 2020 (up from 2,785 claims from the week ending March 14, 2020), and the numbers continue to grow daily. These figures signal a rapid shift in the needs of our community and the number of people who depend on Legal Aid's services.

Since 1921, your Legal Aid Society has fought on the front lines of justice. From the Great Depression to the Great Recession, we have responded to ensure our services match the needs of our community. While the COVID-19 pandemic is ever-changing and there is still great uncertainty surrounding its impact, Legal Aid continues to serve those most in need. We are here to help in the immediacy of the crisis and will be an essential part of our community's recovery.

COVID-19 Response and Resources

In March, as businesses began to close and Kentuckians began to lose their jobs, Legal Aid launched a resource page on our new website: www.yourlegalaid.org/covid19responseandresources. This page is regularly updated with important legal information to help individuals should they have questions regarding unemployment insurance, stimulus payments, housing and family law issues. Additionally, Legal Aid has created a helpful Frequently Asked Questions page at www.yourlegalaid.org/unemployment-faqs about Unemployment Insurance to guide the community through new rules and regulations.

Volunteer Opportunities from Home

Volunteer attorneys from the private bar are more important than ever as more Kentuckians need legal help with their homes, incomes and families. Below are two unique ways

you can volunteer to assist in Legal Aid's COVID-19 response.

Volunteer with the Domestic Violence Advocacy Program

Legal Aid's Domestic Violence Advocacy Program provides representation to individuals seeking protective orders. Statistics suggests that with self-isolation comes an increase in domestic violence. We are in need of volunteer attorneys to provide legal advice to survivors. Practicing social distancing, we are NOT asking volunteers to go to court. This "advice only" approach usually involves a one-time phone conversation with a client than can last from 10 to 60 minutes.

Interested volunteers should e-mail Beth Robinson-Kinney, Senior Attorney of Legal Aid's Personal Safety Unit, at brobinsokinney@laslou.org. Beth will provide you with the training and tools you need to make sure those experiencing domestic violence during this pandemic know their rights and are able to pursue them.

Volunteer from the comfort of your home through KYJustice Online

KYJustice Online is a web-portal that connects Kentuckians from throughout the Commonwealth to volunteer attorneys to help with civil legal issues. Kentuckians in need of legal assistance who meet our income guidelines submit a legal question through our secure online portal. Legal Aid pairs that client with a volunteer to virtually provide an answer. Lawyers provide information and basic legal advice on a pro bono basis without any expectation of long-term representation.

To learn more about KYJustice Online, visit <http://kyjustice.org/pro-bono-portal> or contact Tracey Leo Taylor, Managing Attorney of Volunteer Services and Community Engagement at Legal Aid, ttaylor@laslou.org.

Julia Leist is the Director of Development and Communications at the Legal Aid Society. ■

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Making the Case for Wellness

Michael Kahn, JD, LPC

One early morning as I was driving to my job at the New Jersey Attorney General's Office, I found myself pounding the steering wheel. At home, I had already hit the snooze button countless times so the "pounding the wheel" portion of my morning was the final "wake up call" that I needed to do something different.

For many of you, your signs of stress and unhappiness aren't as dramatic, but are no less impactful. You realize at some level that you need to change something about your work and how you approach self-care. Some of you listen; but many more ignore the message.

Fortunately, the legal community, often resistant to change, is beginning to seriously acknowledge the importance of wellness. An increasing number of jurisdictions in the U.S. and Canada have a wellness/mental health/substance abuse CLE requirement or at least allow wellness programs to satisfy CLE hours. This is important not only on the human level, but also for more practical reasons.

Christopher Newbold, Executive VP of ALPS says, "If lawyers are not taking care of themselves, they generally are more likely to commit malpractice, and our experience in claims handling supports that" (Christine Simmons, *New York Law Journal at Law.com*, November 28, 2018). Looking at systemic changes is outside the purview of this article; but law firms must get on board as well. Newbold says that "[w]e're creating cultures in law firms that are misaligned with the values of taking care of one another."

The recent National Task Force on Lawyer Well-Being report (*The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, lawyerwellbeing.net) concluded that "lawyer well-being issues can no longer be ignored" due to "an elevated risk for mental health and substance abuse disorders." In addition, the report says that many lawyers are not "thriving" and are experiencing "a 'profound ambivalence' about their work."

Having "made the case" for wellness, the remainder of this article offers interventions for improved well-being.

Challenge Automatic Negative Thoughts

Billable hours, financial strains and life events are well known stressors. Add to that common attorney personality traits and you have a toxic cocktail impacting well-being. These traits include perfectionism, pessimism, intolerance for weakness/hypercriticism and unrealistic standards of achievement and can lead to negative thoughts ("I'm a failure," "I always [or shouldn't] make mistakes," "My life s**ks") which impact mood and behavior.

Also called self-talk, these negative thoughts often go unchallenged. The thoughts sometimes have grains of truth but are warped versions of reality. Some common categories of negative self-talk are below (from David Burns, *Feeling Good Handbook* 1989, 1999) and John Grohol, *PsychCentral.com*). Consider whether you fall into some of these traps, as many of us do.

- **Filtering:** Magnify the negative details of a situation while filtering out all positive aspects.

- **Polarized Thinking:** Also called "all or nothing" thinking. You are either perfect or a complete failure.
- **Overgeneralization:** Arrive at a general conclusion based on a single incident or piece of evidence. You see a single, unpleasant event as part of a never-ending pattern of defeat.
- **Catastrophizing:** Expect disaster to strike, no matter what. You use "what if" questions to imagine the absolute worst occurring.
- **Shoulds:** Ironclad rules about how every person (including yourself) should behave. You feel angry when others break the rules and guilty or ashamed when you violate your own rules.
- **Emotional Reasoning:** Whatever a person is feeling is believed to be true automatically and unconditionally. If you feel stupid and boring, then you conclude you are stupid and boring.

Since these thoughts often go unchallenged, a common intervention is to dispute the negative self-talk with questions such as: *What is the evidence for this thought or belief? Am I confusing a thinking habit with a fact? Is this thought a habit I learned from my parents? Would I speak with a close family member or friend with the toxic language I use on myself?*

The next step is to replace the old thought with a more realistic one. Here is a more detailed example (from *Stress Management for Lawyers, How to Increase Personal & Professional Satisfaction in the Law*, Amiram Elwork, Ph.D. Vorkell Group 2007):

Self-Talk: "I am going to totally blow this trial!"

Disputing questions:

- How do I know this will happen before the trial even starts?
- How many times have I actually blown a trial before?
- How many times have I said that before, but it never happened?
- What is a possible truth? I need to prepare a little more because I think my opening statement could be better...

Once a real problem has been validated, ask:

- How can I fix this?
- What can I do about it right now?
- Is there someone who can assist me?
- How can I solve [prevent] this problem in the future?

Other Ways to Improve Well-Being

Focus on things you can control. Victor Frankl, MD, a Nazi concentration camp survivor and the author of *Man's Search for Meaning* said, "Everything can be taken from [an individual] but one thing: the last of the human freedoms—to choose one's attitude in any given set of circumstances, to choose one's own way." To put Dr. Frankl's statement another way, you often can't control what happens to you, but you can choose your response. There are countless things in your practice that you have little control over (i.e. your clients, evidence, opposing counsel, judges, juries, the law, etc.). The overall lesson

I take from Dr. Frankl is to focus on things that *you can control or at least manage*: your thoughts, actions, words and your attitude.

Take yourself lightly and your work seriously. Accept all parts of yourself even the flawed parts. This is not to say that self-improvement is not a worthy goal but be realistic about perfection. We can experience moments of perfection, so it is seductive, but not sustainable.

Three gratitudes. For 21 consecutive days take two minutes to think of three new things you are grateful for and then write them down. Each day you need to identify *three entirely new things* so you will have 63 at the end of the 21 days. They can be big things like your health and family and "smaller" things, such as a sunny day (an important one for me since I live in the Northwest), a good piece of pizza or having a friendly conversation with a stranger. As lawyers, we are trained to look for potential problems, which is helpful on the job, but can also impact well-being. This exercise helps you train the brain to look for positive things in your life rather than scanning for what's wrong.

Generosity. Richard Davidson, PhD from The Center for Healthy Minds says, "The best way to activate positive-emotion circuits in the brain is through generosity ...[T]here are systematic changes in the brain that are associated with generosity." Consider concrete ways that you can be generous to people and animals. For me, it is regularly volunteering at an animal shelter.

Go outside. To me, this is a no-brainer. If you need proof, one study (Bratman et al., *Nature Experience Reduces Rumination and Subgenual Prefrontal Cortex Activation*, Proceedings of the National Academy of Sciences of the United States of America) concluded that walking in nature reduced participants' rumination on negative aspects of their lives, as evidenced by self-report and a change in brain activity.

Notice exceptions to the problem (or learning from the past and the present). When Atlanta Braves first baseman Freddie Freeman is in a batting slump, it is probably helpful for him to review recordings of his swing when he is hitting well and identify what he is doing differently. Your slump looks different, but the same lesson applies. If you are unhappy with your job or feeling stressed, ask yourself: When in the **past** have I enjoyed this or any job? Been more relaxed? Engaged in better self-care? Also focus on the **present**: Pay attention to when things are going well with your job and well-being. In either case, whether it is past or present exceptions to the problem, note what's different and how you made it happen. Basically, you are going to school on yourself.

Talk with someone. Discussing concerns with someone is often helpful even if the other person says little. Leverage available resources such as colleagues, mentors, LAP counselors, friends, spouse/ partner or a religious advisor. This suggestion should not be discounted. Getting something off your chest can be incredibly helpful whether you are simply "venting" or problem solving.

Micro self-care. Micro self-care is defined as

quick, self-replenishing practices throughout the day, every day, that are simple, free and doable. In other words, don't wait for your next vacation. Incorporate small habits into your day and throughout the week. You can start the day with a grounding tool (i.e. listening to music in the car on the way to work), practice an energizing tool after lunch (i.e. walking outside) and implement something relaxing at the end of the day to transition out of work (i.e. on the way home sit at a local lake for 10 minutes). During a workshop, one lawyer said that to avoid bringing work issues home he would imagine putting them in a duffle bag and tossing them by the side of the train tracks he crossed on the way home. He would "pick up the duffle bag" in the morning on the way back to work.

Strategy for Keeping Your Commitments

At the end of one of our CLE programs a lawyer participant said, "This is all well and good, and I am pretty pumped up now, but I have been trying to do these kinds of things for years and yet I always seem to drift back into my old ways. How is any of this really going to make a lasting difference?" Fair point! Here are suggestions for keeping your commitment to improved well-being:

- Pick one key desired change.
- Make sure the goal is SMART (Specific, Measurable, Attainable, Relevant and Time Bound). Ex.: I will listen to classical music during my commute to work for three of the five days (you can eventually increase the days, but it is important for you to experience success first).
- Write down the goal.
- Tell someone you trust.
- Ask that person to follow up with you.

So, to avoid the "drift back into **your** old ways," write down one thing you can commit to NOW to improve your well-being AND identify who are you going to tell.

Michael Kahn is co-founder of ReelTime Creative Learning Experiences (www.reeltimecle.com), as well as a therapist and personal coach. He was a Deputy Attorney General with the NJ Attorney General's office for six years before leaving the law in 1991 and becoming Assistant Director of Career Services at Tulane Law School. ■



Did You Know?

ReelTime CLE currently has 4 programs available in the LBA's CLE OnDemand library!

~ Illumination of Bias

~ Nobody Told Me There'd Be Days Like These!

~ Passing the Torch...While Its Still Got Heat!

~ The Accidental Lawyer: Terms of Engagement

Check them out at
www.loubar.org/online-cle/



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How to Be a Successful and Persuasive Communicator While Working Remotely

Juliet Huck

As social distancing becomes the new normal throughout the U.S. and the world, professionals across industries are making drastic and immediate changes to their work and presentation styles. With the quick shift to working from home, business leaders, lawyers and sales and marketing teams are navigating new terrain—figuring out how to effectively communicate in a way that will achieve a desired outcome while working remotely. There's nothing quite like the energy and connection that a face-to-face interaction can create, but we have to try to work with what we've got. With that being said, just because we're in a period of social distancing doesn't mean that work and persuasion come to a halt.

Remote work was a rising trend before the COVID-19 pandemic, with regular work-at-home growing 173 percent since 2005. With so many additional businesses moving to a work-at-home structure for the time being, it's safe to assume that broader long-term adoption will become even more prevalent over the coming years. It's a good idea for professionals to start learning now how to connect remotely to stay ahead of the curve. Here are a few tools and tactics that will help you become a successful and persuasive communicator via a remote connection.

Stick to the Basics

Even through a remote connection, the basics of persuasion apply. It's vital that you do your homework and learn about the decision maker. Just because you aren't meeting face-to-face doesn't mean that you can skip the groundwork you would regularly complete. What are your target's demographics? Do they have any special interests? You'll need to establish an even stronger bond to persuade via remote means, so flex your research talents and learn about your target.

You should also continue to find their needs and pain points. Learning this information will help you demonstrate to your decision maker that you understand their goals, even if you can't see them in person. Establishing a strong sense of understanding will help you build trust and allow you to position yourself as an advisor. This trust will be critical for remote persuasion.

Leverage Technology

Although working from home can create another level of separation from your target, technology has progressed leaps and bounds when it comes to interpersonal communication. Tools such as Zoom and Skype for Business allow your audience to see your face. You should leverage your entire technology suite to help you persuade remotely.

Visuals must lead your decision maker to your desired conclusion. Create polished presentations to either show via conference call or e-mail ahead of your meeting. While you might not regularly do this when meeting face-to-face, you may consider

incorporating a video presentation as well. Video can be a terrific way to establish an emotional connection with your decision maker, providing for a unique story telling opportunity complete with visual and musical cues. Nearly 90 percent of professionals indicated that a strong narrative was critical in maintaining their attention. Engagement with your story is more important than ever, as you'll be competing with additional distractions including family and pets.

Practice and Develop a Style

Personal energy exchange is very difficult via a computer screen. You must determine who you are as a presenter in this new medium. How can you be more dynamic through remote connection? Before jumping on a conference call, practice on your computer by recording yourself and playing it back to see how you present on camera. Think this is taking it too far? Consider the first time you had to leave a professional voicemail and were put on the spot to communicate your needs in a brief message. It took time to sharpen those skills and you're probably a pro now! The same is true for online presentations. It might take a few rounds to get comfortable, but at this point in your career there's no time to fumble. "Practice makes perfect!"

Be Memorable

Would you do a face-to-face meeting and not follow up? Absolutely not! You would always follow up with your decision maker and you need to continue that with a remote connection. Think about ways you can stand out in the crowd. How about an old school, handwritten thank you note sent to their home? During a time when personal connection is minimized, it might be an opportunity to brighten your customer's day and build trust. Just make sure you send to the correct address. If they're also working from home, a note to the office will get lost in the shuffle.

Persuade from a Distance

While many professionals are used to persuading through face-to-face interactions, the current climate calls for a new tactic. Just because you can't meet in person with your decision makers doesn't mean that you can't still do your job. Learning to effectively persuade via remote connection is possible, and by following the basic principles of persuasion, leveraging your technology suite, setting time to practice and developing ways to be memorable, you still have a strong chance at leading your decision maker to the desired outcome. While remote persuasion may take a bit more effort and preparation, you can get the results you seek if you take the time and keep these guidelines in mind.

Juliet Huck is the author of *The Equation of Persuasion* and founder of the *Academy of Persuasion e-learning series*. ■





*Reservations
Required*

RSVP for CLE WEBINARS

A reservation is required in advance of all CLE Webinars. Registrants will receive a confirmation e-mail the day before the event which will contain a link to join the meeting via Ring Central, as well as attachments of the handout material, the CLE activity code, and instruction on how to file with the KBA and Indiana Supreme Court (PDF files).

LBA ETHICS WEBINAR

Annual Spring Ethics Program: 2020 Developments in Professional Responsibility

Thursday, May 7

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

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

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

Time: 11 a.m. – 1 p.m. — Program
Place: Online
Price: \$50 LBA Members | \$45 Sustaining Members | \$15 Paralegal Members
 \$15 for qualifying YLS Members | \$25 Solo/Small Practice Section Members
 \$25 Government/Non-Profit Members | \$180 Non-members
Credits: 2.0 CLE Ethics Hours — Approved by KBA and Indiana

LBA ONE-HOUR WEBINAR

Retirement and Succession Planning for Solos and Small Firms

Wednesday, May 13

In a 2011 poll, 473 percent of law firm leaders cite their respective law firms' preparedness to deal with retirement/succession of Baby Boomers as an area of most concern. Lawyers generally excel at issue analysis and discussion, but law firms are seldom structured for fast implementation of new ideas. Despite the generally high recognition of the need for succession planning, many law firms have been reluctant, or lax, in developing adequate succession plans. This program will provide you with strategies to build your succession plan, successfully transition clients, and keep your standard of living throughout retirement. Also covered will be retirement plan options for solos and small firms.

Speaker: **Jeb Jarell**, Ameriprise Financial

Time: Noon – 1 p.m. — Program
Place: Online
Price: \$25 LBA Members | \$22.50 Sustaining Members | \$15 Paralegal Members
 \$15 for qualifying YLS Members | \$25 Government/Non-Profit Members
 \$25 Solo/Small Practice Section Members | \$80 Non-members
Credits: 1.0 CLE Hour — Pending with KBA and Indiana

LBA SOLO & SMALL PRACTICE SECTION WEBINAR

Systems Thinking for Your Practice

Friday, May 8

When attorneys are flying solo or working as part of smaller practices, they can find themselves dedicating more time to performing the housekeeping tasks of the firm instead of practicing law or spending quality time with their clients. The lack of effective systems can also cut into attorneys' ability to take time off work and thus affect their mental and emotional well-being.

This webinar will cover the business concept of creating systems tailored to each practice to let the legal practitioner devote quality time to the practice of law, instead of being an administrator or manager constantly putting out fires. The methodology used is based on the best-selling book *The E-Myth Revisited* by Michael Gerber, along with other prevalent tools and techniques currently used by business consultants. By having systems in place that are self-sufficient, a business can dedicate more time to revenue-creating pursuits such as lead generation/conversion and throughput.

Speaker: **Carlos Hernandez Ocampo**, Emergence Law, PLLC

Time: Noon – 1 p.m. — Program
Place: Online
Price: \$25 LBA Members | \$22.50 Sustaining Members | \$15 Paralegal Members
 \$15 for qualifying YLS Members | \$25 Government/Non-Profit Members
 \$25 Solo/Small Practice Section Members | \$80 Non-members
Credits: 1.0 CLE Hour — Approved by KBA and Indiana

LBA FAMILY LAW ETHICS WEBINAR

Collaborative Practice: The Alternate Dispute Resolution of the Decade

Wednesday, May 27

Learn the dynamics and features of the only established, non-adversarial civil ADR. Understand the paradigm shift of collaborative practice, which can reduce the trauma of divorce and help transition family members to their post-decree lives.

Speaker: **Bonnie M. Brown**, Attorney at Law

Time: 11 a.m. – 1 p.m. — Program
Place: Online
Price: \$50 LBA Members | \$45 Sustaining Members | \$15 Paralegal Members
 \$15 for qualifying YLS Members | \$25 Solo/Small Practice Section Members
 \$25 Government/Non-Profit Members | \$160 Non-members
Credits: 2.0 CLE Ethics Hours — Approved by KBA and Pending with Indiana

CLE Cancellation Policy: All cancellations must be received by the LBA 24 hours in advance to receive a credit or refund. "No shows" or cancellations received the day of the program will require full payment. Substitutions will be allowed. Please Note: The cancellation policies for certain programs, e.g. the AAML/LBA Family Law Seminar, KY Commercial Real Estate Conference, MESA CLEs, etc., are different. Please visit our CLE Calendar at www.loubar.org for details.

Join lawyers from across the country and enjoy the witty one-liners, clever pictures and video clips, intriguing poll questions and hilarious anecdotes that have made his “lawpsided” programs popular with attorneys in more than 40 states.

Live Ethics Webinars

**Legal Ethics Is No Laughing Matter:
What Lawyer Jokes Say About Our Ethical Foibles**
5-5-2020 | 1:00 pm | 1.0 CLE Ethics Credit - pending

**The Passion of the Barrister:
An Ethical Lawyer is a Happy Lawyer**
5-7-2020 | Noon | 1.0 CLE Ethics Credit - pending

**From Competence to Excellence: The Ethical
Imperative for Excellent Client Service**
5-12-2020 | 1:00 pm | 1.0 CLE Ethics Credit - pending

The 2020 Ethy Awards
5-16-2020 | 10:00 am
2.0 CLE Ethics Credits - pending

**It’s Not the Fruit, It’s the Root: Getting to the
Bottom of Our Ethical Ills**
5-19-2020 | Noon
1.0 CLE Ethics Credit - pending

**If You Can’t Say Something Nice,
Shut Up!: The Ethical Imperative
for Civility**
5-20-2020 | 1:00 pm
1.0 CLE Ethics Credit - pending

**Ethical Jeopardy:
A CLE Game Show**
5-27-2020 | Noon
1.0 CLE Ethics Credit - pending

**The Truth, The Whole Truth and Nothing
But the Truth: The Ethical Imperative for
Honesty in Law Practice**
5-28-2020 | 1:00 pm
1.0 CLE Ethics Credit - pending



**View program descriptions
online at www.LouBar.org.**

BAR STATUS	PRICE
LBA Member	\$55.00
LBA Sustaining Member	\$50.00
LBA Paralegal Member	\$25.00
Non-member	\$125.00

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 for the link to register and the cancellation policy.

LBA NATIONAL SPEAKER WEBINAR

**The Stones CLE: Music Copyright Law with Ethics based on
The Rolling Stones Career (feat. The Top 10 Music Copyright
Cases of All-Time)**

Friday, May 29

The program covers the basics of music copyright law. The course goes over the fundamentals before you can fully understand the revenue sources and exclusive rights you get with a song. Attendees will learn why it is important bands have operating agreements and what should be in those. Attendees will learn what a copyright is, including how to establish and register a copyright for your music. You will learn all the copyrights in a song, and all the intellectual property can generate. Lastly, we will discuss joint authorship and works-made-for-hire, all following the career and discography of The Rolling Stones. The ethics portion of the presentation focuses on the unique issues faced when representing an organization as a client when it is a rock band.

Speaker: **Jim Jesse**, Rock N Roll Law

Time: 1 p.m. – 4:15 p.m. — Program
Place: Online
Price: \$75 LBA Members | \$67.50 Sustaining Members | \$25 Paralegal Members | \$25 for qualifying YLS Members | \$25 Government/Non-Profit Members | \$25 Solo/Small Firm Section Members | \$240 Non-members
Credits: 3.0 (including 1.0 Ethics) CLE Hours — Pending with KBA and Indiana

LBA ETHICS BROWN BAG

Annual Ethics Program

Tuesday, June 2

Mark your calendar for our annual ethics program with Peter Ostermiller. More information coming soon!

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

Speaker: **Peter L. Ostermiller**, Attorney at Law

Time: 10:45 a.m. — Registration; 11 a.m. – 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: \$50 LBA Members | \$45 Sustaining Members | \$15 Paralegal Members | \$15 for qualifying YLS Members | \$25 Solo/Small Practice Section Members | \$25 Government/Non-Profit Members | \$180 Non-members
Credits: 2.0 CLE Ethics Hours — Pending with KBA and Indiana

LBA NATIONAL SPEAKER DAY LONG WEBINAR

**More Effective Writing Makes More Effective Lawyers:
Useful Strategies, Crucial Details, and Lots of Practical Tips**

Wednesday, June 3

Knowing the law is essential—but so is being able to communicate about it. Join writing coach and former attorney Rick Horowitz for a lively and practical webinar that will reintroduce you to your legal-writing toolbox, including a few tools you didn’t know were in there.

This class explores the fundamentals (and the critical details) of creating clear, well-organized, persuasive legal documents. Briefs, memos, client letters, even daily correspondence benefit from your deeper understanding of what goes into successful writing, so we’ll examine good and not-so-good writing to see what worked, what didn’t, and why:

- What should you include, and what can you leave out?
- What’s the most effective structure for this document, and this audience?
- Should you use an outline? Are there better options?
- What has to happen between “first draft” and “Send”?
- How can you steer clear of those grammar and usage potholes that undermine your credibility?
- How do you survive the in-house editing process?
- And do you really need all that “legalese”? (There’s a reason people tell lawyer jokes...)

Check out Horowitz’s webinar on Wednesday, June 3, for this full-day workshop. You’ll come away with new skills, new strategies, and new confidence. Sign up now—and spread the word!

More details on this CLE program can be found on the LBA website: www.loubar.org.

Speaker: **Rick Horowitz**, Prime Prose, LLC

Time: 9 a.m. – 4:30 p.m. — Program
Place: Online
Price: \$150 LBA Members | \$135 Sustaining Members | \$75 Paralegal Members | \$75 for qualifying YLS Members | \$75 Government/Non-Profit Members | \$75 Solo/Small Firm Section Members | \$480 Non-member
Credits: 6.0 CLE Hours — Approved by KBA and Indiana



Healthy at Home

We are working to ensure all in-person CLE programs will be also available via an online platform!

MARK YOUR CALENDAR!

11th Annual Lively M. Wilson Memorial Lecture Series on Ethics, Professionalism and Civility

Tuesday, June 16

Mark your calendars for the 11th Annual Session of the Lively M. Wilson Memorial Series on Professionalism (formerly known as the Louis D. Brandeis Inn of Court Annual Ethics Program).

Speakers and topics to be announced.

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

This CLE is a partnership with the Louis D. Brandeis Inn of Court, the Louisville Bar Association and Stites & Harbison, PLLC

Time: 10:45 a.m. — Registration; 11 a.m. — 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: \$50 LBA Members | \$45 Sustaining Members | \$15 Paralegal Members | \$15 for qualifying YLS Members
\$25 Solo/Small Practice Section Members | \$25 Government/Non-Profit Members | \$180 Non-member
Add on: \$15 printed handouts (electronic is included with registration fee)
Lunch is included with advanced registration
Credits: 2.0 Ethics CLE Hours — Pending with KBA and Indiana

FAMILY LAW DAY LONG

Annual Nuts & Bolts of Family Law

Friday, June 19

This annual primer on litigating the domestic relations case from A to Z is always a popular program. The program is a valuable update for those attorneys currently practicing family law and for those who might practice in this area in the future. Speakers will review the forms and procedures needed to take a case from client interview to entry of a decree and give tips on how to keep the case simple and keep it moving quickly to a resolution.

Up to **10** LBA members can attend this seminar **FREE** of charge by agreeing to represent **TWO** Legal Aid clients, pro bono, in their domestic relations matters. Please call the LBA CLE Department at (502) 583-5314 for details.

Agenda and speakers available online at www.loubar.org.

Time: 8:45 a.m. — Registration; 9 a.m. — 4:15 p.m. — Program
Place: LBA, 600 W. Main Street
Price: \$150 LBA Members | \$135 Sustaining Members | \$25 Paralegal Members | \$25 for qualifying YLS Members
\$25 Government/Non-Profit Members | \$25 Solo/Small Firm Section Members | \$480 Non-members
Credits: Pending with KBA and Indiana

LOUISVILLE BAR ASSOCIATION IN PARTNERSHIP AMERICAN CONSTITUTIONAL SOCIETY

Annual U.S. Supreme Court Review

Tuesday, June 30

The American Constitution Society and the LBA's Appellate Law Section invite you to their seventh annual U.S. Supreme Court Review CLE program. The seminar will address the key cases before the U.S. Supreme Court during October Term 2019. The court will recap key opinions from the previous year, discuss any new or continuing trends at the court, and preview the upcoming term.

Speakers: **Michael P. Abate**, Kaplan Johnson Abate & Bird and more, TBA.

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

Time: 10:45 a.m. — Registration; 11 a.m. — 1 p.m. — Program
Place: LBA, 600 W. Main Street
Price: \$50 LBA Members | \$45 Sustaining Members | \$15 Paralegal Members | \$15 for qualifying YLS Members
\$25 Solo/Small Practice Section Members | \$25 Government/Non-Profit Members | \$180 Non-members
Add On: \$15 printed handouts (electronic is included with registration fee)
Lunch is included with advanced registration
Credits: 2.0 CLE Hours — Approved by KBA and Indiana

3 Strategies for Negotiating in a Crisis

Marty Latz

Our tax accountant offered to extend his payment terms to us as he knew our business—which relies in part on in person training—would take a short-term cash flow hit during the stay-at-home part of our current coronavirus crisis.

I declined his generous offer. But the offer represented a smart strategy by a sophisticated business negotiator to take into account the fairly unique circumstances presented by our current society-wide crisis.

What are these circumstances and how should you negotiate differently during them?

Everyone knows we face an immediate threat to our physical and economic health today, a classic crisis involving an unusual “time of intense difficulty, trouble or danger” (Oxford Dictionary). This crisis, like others, causes many in society to view others’ actions in different ways.

That includes how they behave in negotiations. In fact, we even have price gouging laws prohibiting certain negotiation behavior during crises and states of emergency. And we view individuals attempting to unfairly benefit from a crisis as immoral (just search the internet for “price gouging”).

So how should you negotiate differently in a crisis like this one?

1 Focus on the long-term business and human relationship

Use this time to strengthen your human and business relationships with your current and potential business partners, colleagues, vendors, counterparts and even competitors. The “we are all in this together” feeling and the fact that we cannot effectively fight this crisis without collaborating will create a special bond.

Building strong and long-lasting connections during this time is the right thing to do, good for everyone, and smart negotiating. How can you do this?

- Don't hold your counterparts to the absolute letter of your agreements if they request a favor. They may be hurting from the crisis, and you will gain more long-term relationship-wise by commiserating and empathizing than by enforcing every “i” and “t” in the contract.
- Take the initiative and contact your partners and vendors to see if they're alright. Don't have an ulterior motive or purpose other than checking in.
- Avoid certain hard-nosed and aggressive strategies and tactics that might be appropriate in other times. For instance, don't take advantage of your increased leverage and your counterpart's desperation if it derives from a crisis. This is why laws exist against price gouging.

2 Exhibit creativity and flexibility

A client recently called me and indicated that their procurement department was reluctant to pay our initial fee, even though we have a signed agreement requiring it. They felt our contract was ambiguous regarding the use of that fee if we reschedule our training due to the pandemic.

After brainstorming about different ways to satisfy their procurement department's interests, we decided upon an addendum that they felt would accomplish our goals.

Our mutual creativity and flexibility were crucial to re-negotiating this deal. Would it have been necessary in normal times? No. But we are not living—or negotiating—in normal times.

3 Offer special discounts and help to strengthen your goodwill and loyalty

We recently developed a new remotely delivered training program on *Practical Ways to Fight Gender Bias and Sexism in Negotiations*. We are marketing it with a special discount to our clients.

We also recently offered to waive the student use fee for our package add on to our partner's negotiation teaching software.

Why? Because offering to help out your counterparts during a crisis: a) is the right thing to do, b) will not cost too much; and c) parties especially appreciate offers of help during crises and will remember it for years to come.

You will also feel better for doing so—and that can be invaluable during a crisis.

Martin E. Latz is founder of Latz Negotiation Institute, a national negotiation training and consulting firm based in Phoenix and author of “Gain the Edge! Negotiating to Get What You Want.” ■



Getting Socially Undistant with Business Court

Judge Charles L. Cunningham Jr.

It seems like a long time ago, but on January 1 the Court of Justice, through the Jefferson Circuit Court, kicked off an effort to improve how business disputes are handled in Kentucky. Certain types of business cases (more on that later) are now being handled somewhat differently. Since this edition of *Bar Briefs* is focused on business litigation, it seems an ideal time to provide an update (or a primer, as the case may be) on the Business Court Docket. Let's begin with some background.

Trial court judges have to be conversant in all manners of litigation, disputes and proceedings. For the most part we are generalists. But some things get handled in a special way on a special docket. A good example is how we handle foreclosure cases. A lot of those cases get filed every month and resolving them requires someone to spend a lot of time confirming that all of the "ts" have been crossed and "is" have been dotted. If I had to do it, there'd be little time left for anything else.

So, we have that work done by a Master Commissioner. And in Jefferson County, our wonderful Master Commissioner, Carole Schneider, has several dedicated deputies who keep that process moving efficiently and accurately. The Master Commissioner operates using a special set of rules and procedures (see, e.g., JRP 501, *et seq.*) developed over time as we honed our tools to a professional grade.

For some years now, Justice Lisabeth Hughes has been trying to get Kentucky a nice set of chisels to use in carving enduring statues from the formless blocks of granite that are most business disputes. Over time, two to three dozen other states have experimented with such efforts. Kentucky has gotten in the game after a lot of work by Justice Hughes and a number of local litigators who worked on the details over many months. We now have a sharp set of rules, and a process they established, that will be used in business cases in Jefferson Circuit Court. We believe we have taken the best lessons learned in other states, as well as details forged in the federal furnace, to craft a very workable plan.

I would not be surprised if a thought occurs to you non-business litigators to the effect of, "why bother?" Are we going to set up a Car Crash Docket and an Unpaid Credit Card Docket, too? No, but there is a method to our madness.

First, business cases tend to be needy children; they often flourish with a relatively higher level of judicial parenting. Indeed, in my experience, in this town, many business disputes are, at their core, a family dispute. Second, our "customers" want it. Litigators may not tell me directly what their clients think of my court (thank goodness) but they tell me indirectly with their forum selection. And lately, they've been talking some trash about me because a lot of cases which could be filed here are filed in federal court or in arbitration. Third, this is how courts get better—by trying new things, learning from others' experiences and always seeking to improve.

So, here are the basics. I and Chief Circuit Judge Angela Bisig are the judges currently assigned to the docket. We continue to handle our normal allotment of other cases; we are just adding these cases to our load. When working on them, we are utilizing a set of rules adopted by the Kentucky Supreme Court and codified as BCR. Here is some language adapted from an orientation order I send out at the beginning of each case to help you understand the process:

The following information is provided to help litigants and counsel understand the process utilized in Business Court (a pilot project of the Kentucky Court of Justice) and how that process is expected to promote justice, reduce costs and expedite resolutions in such cases. The cases assigned to this docket will be litigated using a special set of rules adopted by the Kentucky Supreme Court (KSC) in November of 2019, and

which overlay the Kentucky Rules of Civil Procedure (CR 1, *et seq.*) and the Jefferson Rules of Practice (JRP 101, *et seq.*).

You should familiarize yourself with these rules which are designated BCR 1, *et seq.* They may be found at a webpage created for the project and hosted by the Administrative Office of the Courts. Its web address is: <https://kycourts.gov/courtprograms/business-court/Pages/default.aspx>. Generally, pursuant to BCR 5.2, substantive rulings issued in cases on this docket will also be posted on this Business Court web page. While these previous rulings do not serve as binding precedent, they can inform litigants regarding historical rulings on particular issues at the trial level.

The experience of Business Courts in other states strongly suggests that timely and systematic attention to the case aids the parties in achieving a positive outcome.

The experience of Business Courts in other states strongly suggests that timely and systematic attention to the case aids the parties in achieving a positive outcome. To this end, the KSC has codified four steps which are to occur early in the litigation:

- 1. Case Management Meeting (CMM).** Pursuant BCR 4.2, the parties shall participate in a CMM no later than 45 days following perfection of service on all defendants. Counsel for the parties shall jointly contact the court *before* conclusion of the CMM to schedule a case management conference. Leave to extend the time by which the CMM must be held will neither be liberally granted nor considered in the absence of unavoidable good cause. BCR 4.2 sets out a detailed itemization of areas to be considered, when appropriate, at the CMM. As codified by the KSC in BCR 4.1: "All parties shall communicate in good faith and attempt to agree to an appropriate and thorough case management plan, including review of novel and creative approaches that may assist the efficient and just resolution of the case."
- 2. Case Management Report (CMR).** Pursuant to BCR 4.3, the parties shall jointly file a CMR within 15 days of the CMM. Plaintiff's counsel shall circulate an initial draft, incorporate the views of other counsel, and finalize and file the report. A template for the CMR is located at Appendix 1 to the BCRs.
- 3. Case Management Conference (CMC).** Pursuant to BCR 4.4, the court will hold a CMC within 60 days after the CMM. While substantive motions will not usually be heard at the CMC as per BCR 4.4, the conference is expected to be an important opportunity for the court and counsel to confer about, to conceive, and to craft, the path forward. Therefore, counsel and a knowledgeable representative for each party must attend the CMC unless the court expressly permits an exception.
- 4. Case Management Order (CMO).** Pursuant to BCR 4.5, the court will then enter a CMO setting out the plan for the litigation developed during the CMM and CMC.

The parties shall conduct motion practice in accordance with

the provisions of BCR 5.3 and 5.4. Currently, the project does not envision a separate Business Court motion hour. Thus, litigants may avail themselves of the regular motion hour. The court envisions having routine conferences with counsel going forward and these may provide an additional opportunity to be heard on pending issues. Suitable consultation with, and notice to, opposing counsel should occur in advance of any such motion being made.

While case-specific decisions regarding the scope and timing of discovery necessarily must await the CMM and CMC, some general guidelines are provided in this section to assist counsel in forging a workable plan: a) an appropriate sequencing of discovery will be imposed—no benefit will be derived from racing to be "first;" b) the court will follow the Court of Justice's foundational tenet of a liberal view as to discoverability; c) another basic discovery tenet followed in this case will be that of proportionality; d) some discovery must be achieved in a stepwise fashion; and e) protective / confidentiality orders will only be entered upon a showing of good cause and of appropriate specificity. BCR 5.7.

This court is proud to be a trial court and considers a jury trial to be the 'highest and truest' form of dispute resolution. Nonetheless, it directs the litigants and counsel to remain receptive to alternative methods of resolving their differences if such a method could provide a comparable result in a more efficient manner.

The court has found it useful in past cases to utilize court-appointed experts in business cases when the cost can be justified. Examples could include: a person assigned to manage a business while the principals resolve disagreements on how things should work going forward; a discovery referee, especially for electronically stored information; or an accountant to appraise the value of assets. The process for doing so is set out in BCR 5.1.

The court welcomes the opportunity to conduct business face-to-face but recognizes that doing so can pose a burden in some circumstances. Pursuant to BCR 5.5, telephonic conferences can be utilized when counsel or the court conclude it would be appropriate to do so. Similarly, pursuant to BCR 5.6, the use of e-mail for communication is encouraged.

Keep in mind that this is a pilot project. That means we are learning as we go and invite constructive criticism and recommendations. Here's an example of an early issue we addressed—if discovery is filed with an initiating complaint, the deadline for responding will be addressed in the CMO. CR 36.01(2), for example, would not control.

So, what types of cases go to business court? That is the issue the drafters of the rules struggled with the most. BCR 2.1 lists eligible disputes, BCR 2.2 lists excluded disputes. Space does not permit me to even attempt a summary here. Broadly stated, we are not trying to capture consumer cases so much as we are looking for inter- and intra-company disputes. After much consideration, no minimum amount in controversy was imposed. I encourage you to read the rules on this aspect of business court particularly. Cases get assigned either because the plaintiff designated it as such, a defendant moved to place it there or the assigned judge did so. BCR 3 covers all of that. Be aware that even a perfect business docket case won't be assigned if it was filed in 2019 or before (but nothing keeps y'all from holding a CMM anyway).

Thank you for your time and for your interest in business court. It is appreciated.

Judge Charles L. Cunningham Jr. presides in Division 4 of Jefferson Circuit Court. ■



Ransomware the Latest Cyber Threat Targeting Law Firms

Jock Wols

Not a week goes by without a headline in the press related to some form of cyber security incident. Typically, these relate to breaches at Fortune 500 companies with a narrative around millions of records being compromised. However, small businesses and municipalities have recently generated attention by falling victim to ransomware attacks. This includes at least five law firms who have been impacted by the Maze ransomware strain.

Why the Legal Profession?

The legal profession is an attractive target by hackers for a couple of reasons. Not only is the information and data of a particularly sensitive and confidential nature, lawyers are engaged in and privy to a variety of financial transactions. Law firms are a lucrative target for the bad actors as they have valuable information and data and often constrained resources for IT security. This puts firms at significant risk.

What are the Key Threats?

- The typical cybersecurity incident is associated with a **data breach** resulting in a loss of your internal or client data. The incident leads to a variety of costs incurred including, but not limited to, credit monitoring, data restoration, forensics and public relations. Furthermore, third party liability exists for the failure by an attorney to maintain confidentiality and safeguard client information. This is specified in the ABA Model Rules of Professional Conduct.
- **Cybercrime or wire transfer fraud** poses a significant risk for law firms. The standard playbook the bad actors follow is to compromise a system or attorney's e-mail account, monitor activity and intercept communication at the opportune time. Often false bank account instructions are provided to the client that appear to legitimately come from the attorney.
- A threat that is increasingly impacting businesses is **cyber extortion or ransomware**. The bad actors deploy malware to disable a business's system, usually through phishing attacks, in exchange for a ransom. While ransomware attacks don't discriminate against industry, the hackers behind the Maze ransomware strain deployed a strategic approach with law firms a high priority target.
- Cybersecurity incidents can also lead to a severe operational impact for a business, preventing you from servicing your clients. This leads to lost income and profits which jeopardize the future of the business. As a result, a firm impacted by a cybersecurity incident may suffer a **business interruption loss**.

Maze Ransomware

While several businesses in various industry groups fell victim to the Maze ransomware, the number of small law firms impacted appears particularly concentrated. Two firms fell victim at the end of 2019, followed by three more in January. The fact the three January victims were all South Dakota based firms suggests a targeted attack on law firms in a specific region. The sizes of the five firms ranged from a two-attorney practice to a 27-attorney firm.

Even more concerning is the aggressive nature of the hacker group. The ransom demands ranged from \$1m to \$2m, which is incredibly high not only for a small business but also from a historical perspective. Furthermore, sample information was deployed to publicly accessible websites to evidence the credibility of the threat. In the past, ransomware hacker groups were predominantly focused on disabling access to the system rather than stealing data.

What Can You Do?

It starts with **general awareness**. Openly communicate the risks cyber threats pose to the firm to all employees. Each employee represents an opportunity for a point of entry by the bad actors into your system. Ensure basic risk management tips are followed:

- Exercise caution when receiving communication from an unknown source. Review the e-mail address and particularly the domain name for authenticity.
- Think twice before you click an attachment. Malicious e-mail attachments can deploy the malware immediately.
- Uncharacteristic communication errors, such as spelling, from trusted sources are to be treated with suspicion, particularly if it relates to sensitive information. It could mean their e-mail has been compromised.
- Be suspicious about urgent requests or instructions that require you to click a link or attachment or transfer funds.
- Always verbally verify communication related to transfer of funds.
- Always use 2 Factor Authentication (2FA) for any remote access solutions.

Enable your employees and fellow attorneys to make the right decisions through ongoing **education**. Many cyber security related courses even qualify for continuing legal education credits.

Take IT security seriously. An IT consultant can help draw up **best practices** to elevate your risk management through cyber security tools, software and processes.

Lastly, **cyber liability insurance** protects you from first- and third-party claims as a result of a cybersecurity incident. However, be aware not all cyber solutions are created equal. Coverage in the form of an endorsement is basic at best, but even standalone policies can be inadequate if not updated within the last few years. Request your insurance agent prioritize coverage.

Jock Wols is the founder of RiskDesk. He holds a Bachelor of Science degree in Business from Washington and Lee University and an MBA from New York University. ■



DRIVE UP FOOD PANTRY

SATURDAY, MAY 2
10 AM – WHILE SUPPLIES LAST
1314 BARDSTOWN RD.

Empathy in Action is hosting a food pantry on Saturday, May 2, 2020 at 10 a.m. (until supplies last) at 1314 Bardstown Rd. The food pantry will take place in the back of the building, accessible by an alley off Rosewood Ave.

Monetary donations are tax deductible and can be made to Empathy in Action via their charity link on PayPal.

Food donations can be dropped off at the food pantry site on May 2, 2020 between 8:30-9:30 a.m. Pickup can also be arranged by contacting empathyinactionlouisville@gmail.com.

Bar Exam News

February Bar Exam Results Released

The Kentucky Office of Bar Admissions released the results of the February bar examination on April 3. Of the 181 applicants tested, 101 passed for an overall passage rate of approximately 56 percent. Of those taking the exam for the first time, 72.5 percent passed.

Passage rates for applicants from the state's three public law schools were as follows: University of Kentucky Rosenberg College of Law, 66 percent; University of Louisville Brandeis School of Law, 53 percent; and Northern Kentucky University Chase College of Law, 40 percent.

Formal swearing-in ceremonies for successful applicants scheduled for May 4 in Frankfort were cancelled due to the ongoing COVID-19 public health emergency. ■

July Bar Exam Subject to COVID-19 Restrictions

The next Kentucky bar examination—scheduled for July 28-29—is contingent on the status of the COVID-19 pandemic. In an April 15 news release, the Kentucky Supreme Court confirmed that administration of the exam will depend on state and federal restrictions regarding COVID-19 and the ability of the National Conference of Bar Examiners to supply test materials and grade exams.

“At a time when many third-year law students are anxious about their future employment, the Supreme Court is committed to administering a July exam to avoid delays in licensing for new attorneys,” Chief Justice John D. Minton Jr. said. “We will take every precaution to ensure the exam is administered in a manner that complies with public health recommendations to protect the safety of all examinees.”

If the exam cannot be administered in July, it will be rescheduled for September according to the release. ■

Supreme Court Seeks Feedback on Uniform Bar Exam

The Kentucky Supreme Court is soliciting comments from lawyers regarding proposed adoption of the Uniform Bar Examination (UBE) as the official test for admission to the Kentucky bar. In 2015, a commission created to evaluate Kentucky's bar admissions process recommended against adopting the UBE in part because only 14 other states had adopted it at that time. However, since then 20 additional states and the District of Columbia have adopted the UBE and four more states are now considering adopting it.

More information about the UBE, including its three component parts, can be found at www.loubar.org under Legal Community Headlines. Comments should be submitted by June 30, 2020 to the Office of the Chief Justice at UBecomments@kycourts.net. ■

The COVID-19 Crisis and Lessons from Kentucky's "Old Court-New Court Controversy"

Kurt X. Metzmeier

As measures by states to reduce the impact of the coronavirus on lives and in its impact on the economy become more unprecedented, it is inevitable that they are running into certain constitutional barriers to the power of government to restrict the activities of business. In Kentucky (and many other states), courts suspended evictions, which in Kentucky was followed by Governor Andy Beshear's Executive Order 2020-257 on March 25, 2020 extending this to the whole state. The measure was clearly designed to prevent the spread of the disease, but other emergency measures are more designed to buffer economic damage to businesses.

In New York, foreclosures and mortgage payments have been suspended for 90 days, although the payments will be eventually paid. Similar halts to foreclosures followed in Florida and California. On March 18, HUD and the Federal Housing Finance Agency, which oversees Fannie Mae and Freddie Mac, suspended foreclosures and evictions for "at least 60 days." In states without such acts, the closing of courts to non-essential business has had similar effect.

Congress and legislatures are now considering measures to let small businesses activate business interruption clauses in their insurance policies—even if those policies could be read to exclude the COVID-19 crisis. Indeed, in an interview with U.S. Speaker of the House Nancy Pelosi on April 3, CNBC's Jim Cramer appeared to call for suspending other commercial payments across the U.S.

All these measures implicate a rarely discussed—or breeched—provision of the U.S.

Constitution, the contract clause. Section 10 of Article 1 is unique because while the 1789 Constitution usually only limits federal powers, this section lists actions state governments are barred from doing. Clause 1 mandates that "no State" shall pass any "Law impairing the Obligation of Contracts."

One proposed measure to mitigate the economic damage of the novel coronavirus appears to directly implicate the ability of private parties to contract without government interference. States like New Jersey, Ohio, Massachusetts and New York are considering legislation to retroactively alter insurance contracts by nullifying clauses excluding pandemics from the business interruption clauses of existing policies.

Police Power and its Limits

The ability of governors to issue emergency orders derives from an ancient common law authority, the so-called "police powers" of state governments to regulate activities and enforce order for the public health, safety and general welfare of their residents. It is one of the most important powers reserved to the states by the Tenth Amendment to the U.S. Constitution. *United States v. Dewitt*, 76 U.S. 41, 45 (1869).

(M)asures during the COVID-19 crisis designed to protect lives strongly tilt the balance of equities towards the state's exercise of police powers. States protecting the economic welfare, however, must carefully balance those measures to not choose sides between parties to a commercial contract.

It was explained by America's most influential jurist, Massachusetts' Lemuel Shaw in *Commonwealth v. Alger*, 61 Mass. 53 (1851):

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the rights of the community." (Punctuation modernized).

Shaw goes on to say that "it is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." However, he clearly indicated, and other courts have followed, that the state's exercise of this power must be "reasonable."

Shaw references smallpox measures and indeed legal precedents are unanimous in upholding the exercise of the police power during public health and safety emergencies, which is perhaps the height of its potency. Kentucky adopted Shaw's opinion in *Sanders v. Commonwealth*, 117 Ky. 1, 5 (1903), quoting the same language quoted above, and they exercised it to protect the commonwealth from pestilences endemic to the state, including smallpox, yellow fever, influenza, and, with

urbanization, venereal diseases.

In *Hengehold v. City of Covington*, 57 S.W. 495 (1900), the Kentucky courts approved the removal of children to a "pest house" (a quaint term for an infectious disease hospital). In *Duncan v. City of Lexington*, 244 S.W. 60 (1922), a reputed prostitute was arrested and confined indefinitely for allegedly spreading syphilis. When a milliner in Kuttawa was accused of spreading smallpox through clothing sold in her store, the court denied her compensation for the destruction of the store's contents during its fumigation. *Allison v. Cash*, 245 S.W. 245 (1911).

Purely economic measures to prevent damage to the general welfare, especially during economic depressions, are a valid exercise of the police power and, indeed the issue in *Alger* involved a zoning regulation. But courts have found more limits than reasonability, including due process and the takings clause of the Eighth Amendment.

And, of course, the contract clause.

The Contract Clause and Kentucky's Court Controversy of the 1820s

Interestingly, this is not the first national crises where state legislatures have tried to relieve the harshest impact of unforeseen financial emergencies. In the late 1820s in Kentucky debt relief measures roiled the states politics, split the state's courts, and left the Commonwealth economically depressed for a decade.

As I describe in my 2016 book, *Writing the Legal Record: Law Reporters in Nineteenth-Century Kentucky*, when the international "global economy shaped by the Napoleonic Wars lurched into peace," gold—the standard of all banking—flowed back to the recovering victors. This created monetary dislocations in the American financial system that sparked the Panic of 1819. In Kentucky, the lack of hard currency—gold being very hard to transport to the frontier—meant that unregulated bank notes provided the liquidity necessary for growth.

What "passed for economic wisdom in that era" prompted the National Bank to call in debts from poorly capitalized local banks. This started a "chain reaction of collapsing private and state banks and legal proceedings against farmers to force them to pay back bank loans." Creditors began proceedings to foreclose on the property of debtors, leading to cries for debt relief. In August 1820, pro-relief candidates in Kentucky won control of the lower house of the General Assembly and began to devise methods to do this.

George M. Bibb, a former chief justice of the Court of Appeals and a brilliant legal scholar, was among the relief faction leaders. The pro-relief legislature "passed two radical laws that, working together, gave debtors comprehensive relief while largely extinguishing creditors' hopes that they would ever be paid." They first chartered the Bank of the Commonwealth

(Continued on next page)



JOIN YOUR NEIGHBORS.

Trying times can bring communities together. Now, more than ever, our neighbors need our help. We invite you make a gift to the One Louisville COVID-19 Response Fund. This fund is deploying financial support to those most impacted by the virus and its economic consequences. Join us by visiting www.cflouisville.org/one-louisville to learn more and make a gift.

(Continued from previous page)

which was empowered to print banknotes to act as legal tender in the state. Because the new bank was poorly capitalized, the value of its notes was questionable.

In December, the legislature passed the Replevin Act, which mandated a two-year moratorium before a creditor could execute on a debt, unless the creditor agreed to be paid in the dubious notes of the Bank of the Commonwealth. (Replevin was an early legal action to attach and execute on property used to secure a loan.)

Bibb and other drafters understood that the contract clauses in the U.S. and state constitutions would bar any explicit forgiveness of private debts. They “attempted to avoid that issue by focusing not on the debt obligation (which they admitted was constitutionally protected) but on the governmental procedures a creditor had to resort to in order to recover on that debt.” The argument had some merit, because the government not only opens the courthouse door to private creditors, it also creates statutory procedures to execute on debts in summary processes that are quicker and more efficient than in a normal contract case. (The same theory applies to evictions, the result of another summary proceeding.)

However, the relief-party had gone much farther. Given the “excessive length of the moratorium—two years is a lifetime in a financial crisis—and the fact that the commercial paper of the Bank of the Commonwealth was widely considered worthless,” creditors were right to argue that the laws were a legal maneuver to “wipe the debts from the books.”

That’s what the Court of Appeals ruled in the combined 1823 case of *Blair v. Williams* and *Lapsley v. Brashears* (4 Ky. 47), deciding by a 2–1 vote that the Replevin Act was an unconstitutional impairment of the right of contract. However, the relief faction still had some sting, and soon voted to abolish Kentucky’s Court of Appeals and create a new high court, with new judges. This led to almost two years of the state having two high courts, a situation that was only resolved when the “Old Court party” recaptured the legislature in 1826, sending the New Court to the dustbins of history.

The Great Depression and The General Welfare

Nonetheless, the idea that, in tough times, states could pause or slow its statutory or court procedures for summary proceedings to give debtors (or tenants) time to recover still has merit, so long as contract obligations are not extinguished. Indeed, modest moratoriums on the collection of debts were enacted by states during the Great Depression (and were even considered by some state legislatures in 2008 after the collapse of the subprime mortgage industry).

Indeed, in 1934 the Supreme Court decided a Depression era case involving a Minnesota law that “declared the existence of an emergency demanding an exercise of the police power for the protection of the public” by temporarily delaying the foreclosure and sale of defaulting mortgages. The court upheld the law, finding that the “contract clause must be construed in harmony with the reserved power of the State to safeguard the vital interests of her people,” and noting the depth of the economic emergency and provisional

nature of the restraint. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

Given the times, this case might be an outlier. Nonetheless, it is important to note that the “reserved power” the court referenced was the “police power” of states to protect the general welfare of its citizens.

Drawing Conclusions for the COVID-19 Crisis

So, what are the lessons of history for the COVID-19 crisis regarding the rights of states to enact emergency measures that directly or indirectly affect contracts?

The first is that while states retain the police power to protect the public health and welfare that is reserved to it by the Tenth Amendment, the precedents suggest that the police power is at its apex when protecting the public health. Yet *Blaisdell* also instructs that it can be employed judiciously to protect the financial welfare of its citizens. However, when any of these measures invade the private agreements inscribed in mortgage, leasing and insurance contracts, the contract clause is implicated.

In cases when private rights must be executed through public courts using court procedures, the state has the right to change, delay and suspend those proceedings for the safety of its officers and for the public health and general welfare.

All these interests and rights must be balanced. No constitutional right is absolute, and no public power can be exercised unreasonably or capriciously.

The major lesson of the relief controversy in Kentucky was that no measure to alter the legal procedures is reasonable if its practical effect is to extinguish one party’s commitments under a contract. In an economic crisis, suspending foreclosure for two years affectively bankrupts creditors while giving the debtors the benefits of the contract with none of the obligations.

The *Blaisdell* case indicated that the federal contract clause can be balanced against short halts to public executions of mortgage contracts so long as they are reasonable and protect the general welfare of the citizens.

Finally, it seems clear that measures during the COVID-19 crisis designed to protect lives strongly tilt the balance of equities towards the state’s exercise of police powers. States protecting the economic welfare, however, must carefully balance those measures to not choose sides between parties to a commercial contract. Any government actions that have the effect of both protecting the public health and the economic welfare may well survive any contract clause challenges in the courts.

It is the job of governors and legislatures to balance these interests and rights so that the public’s health and welfare is protected without unduly harming the contractual relations of its citizens.

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. ■



Cancelled Events

Summer Law Institute Cancelled

The Summer Law Institute—a week-long residential “law camp” for high school students interested in legal careers—has been cancelled out of concern for the safety and well-being of participants, volunteers and staff. While we regret the inconvenience to those who have applied or may be in the process of applying, we felt this was the most prudent decision given the gravity of the ongoing public health crisis and uncertainty surrounding its duration.

Summer Internship Program Cancelled

Due to the uncertainty of the duration of the COVID-19 pandemic, the 2020 Summer Internship Program has been cancelled. The program, which is a partnership between the LBA and Central High School, allows students the opportunity to intern for local law firms and offices, gaining insight into the legal profession and the opportunity to interact with legal professionals, as well as valuable work experience. We hope you will consider hiring an intern or sponsoring a student to work in a government or public interest office when the program returns in 2021.

No Leadership Academy in 2020

The ongoing COVID-19 public health emergency has caused the LBA to cancel its planned Leadership Academy this year. Designed for attorneys practicing between 3-10 years, the Leadership Academy helps develop a corps of leaders for the bar and wider community. More than 200 attorneys have completed the Leadership Academy since its inception in 2006. Look for its return in 2021.



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Due to their continued growth, a multi-office national law firm is seeking **ATTORNEYS** for its Louisville and Lexington offices. The litigation department seeks individuals with experience in civil trial and/or insurance defense litigation.

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- General interest articles
- Essays or humor
- Book reviews
- Letters to the Editor
- Poems
- Quick Tips
- Comics

Contact Lauren Butz
lbutz@loubar.org

Office Space

Offices Available in Downtown Louisville:

An established law firm with offices in Lexington and Louisville currently has office space available for rent immediately. This office-share environment in our Louisville office includes 3-5 adjoining offices (each with fantastic views of downtown), building security, a secretarial workstation, access to conference rooms, lobby/receptionist and conveniently located kitchen/restrooms. Please call 859-514-7232 for additional information and/or to view the offices.

Downtown Private Office Space w/ PARKING For Lease:

730 W Market - Secure building w/parking \$825/mo incl utilities, phone, internet, assigned parking space, use of conf rooms. Receptionist on site, all attys on floor, 3-4 offices available. Call 502-396-1311 Kathy, PRG Commercial Property Advisors.

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1 large office approximately 16' x 16'
1 office approx. 8' x 10'
1 office approx. 8' x 10' - with adjoining Room that can be used for secretarial office Or storage/copy area
1 large open space with enough room for 3 - 4 desks for support staff
Access to conference rooms, copy, fax and postage machines and kitchen.
Free Parking. Rent one or all four - all on 3rd floor.
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Family Law's "New Normal"

A. Holland Houston

Where do we go from here? Now that all of the children are growing up? How do we spend our time? Knowing nobody gives us a damn.

By the time this went to print, and you read it, my hope was we would all be back to court trying to outwit each other as we are paid to do. Alas, my hopes were dashed faster than you can say "2021? I can't get a hearing on this until 2021?" when I received yet another court closure notice, this one through May 31, 2020.

The new normal is upon us, as if there ever were any normalcy to donning a suit in the morning and rushing to argue the most intimate and safe guarded details of people's lives—their kids and their money. Is the real difference now that we're doing it in our kitchens and living rooms with better coffee sans suits? Or is this a harbinger of technology replacing in person court appearances altogether?

Family law has been disrupted, to be sure. Both the process and the assumption that the nuclear family is the average family structure has eroded slowly over the last half century. A quick look at social trends according to the Pew Institute yields these nuggets:

- Approximately 1/3 of children in the U.S. live with an unmarried parent.
- More people aged 18-44 have lived with a significant other than have ever married.
- Marriage rates among 18-year-olds and older are between 48 percent (2020) and 53 percent (2019).

Additionally, according to the most recent statistics Pew cites about cohabitation and non-nuclear family structures, Americans' acceptance of gay marriage, single parenting and cohabitation is on the rise.

Dig a little deeper and it gets increasingly interesting (but not surprising for those of us who have been "home cooked" out in the counties with a "nontraditional" case) the openness of your attitude toward the new structures is in direct proportion to the area in which you live within a state. The more urban the area in which you live, for example, the more likely you are to be in a "non-traditional" relationship and thus, the more accepting of fluid roles and structures. Conversely, the more rural, well, we have a long way to go there.

COVID-19 or none, whether the law and the processes governing divorce, custody and parenting have evolved far enough to adequately meet the needs of the changing American family amid the next technological age remains to be seen.

To wit: When I began practicing family law in 1997, joint custody was a relatively new option for courts to input as a legitimate form of custody with the imprimatur of the Kentucky Supreme Court. The test was basically two pronged: 1) a parent had to be fit (not actually insane, not incarcerated long term and not a drug addict or alcoholic with little chance of sobriety, not a domestic violence perpetrator or a child abuser) and 2) joint custody had to be in the best interests of the child.

A singular statute, KRS 403.270, controlled custody determinations without more. A

different statute, KRS 403.320, controlled visitation. It would be at least a decade before we began talking about parenting time instead of visitation and another decade before the legislature would amend KRS 403.270 in 2018 to create a rebuttable equal time presumption for parents with additional factors to consider for custody determinations.

Inasmuch as Jefferson county is likely as urban as Kentucky gets, our family courts considered and input parenting schedules long before 2018 that deviated from what was the traditional every other weekend to one parent, with all other time to what was deemed the parent with "primary custody" at the turn of the 21st century. Whether we called it equal time, half time, shared parenting or referred to it only in numbers to define a certain schedule, i.e., 2-3, 3-4, 2-5 alternate, 2-2-5 with nesting or 2-2-5 with parents switching M,T and W,Th each week with the weekend to at-tach to W,Th, we made inroads to statutes that remained static because that's what met the children's best interests.

The legislature, in its wisdom, left the core of KRS 403.320 intact over the years with its directive to attorneys to prove serious endangerment to a child as a prerequisite to restrict parenting time according to what I have always referred to as time, place and manner restrictions. The statutory framework governing initial custody determinations and modifications of parenting time didn't evolve much over the years, while the caselaw filled in the gaps.

Along the way, to be sure, we could always count on the appellate courts to confound us with their magical maneuverings to make desired legal outcomes fit cases before them. The evolution of joint custody and parenting schedules to match parties' lives is grounded in caselaw, as was establishing rights of same sex parents with holdings pre *Obergefell v. Hodges*, 576 U.S. ___ (2015).

The Kentucky Supreme Court has taken on modifications of equal parenting now it seems in *Layman v. Bohanon, Jr.*, 2019SC-000364-DGE, rendered March 26, 2020. Mr. Bohanon, Jr. and Ms. Layman divorced in 2016, then parents of a four-year-old and seven-year-old. They agreed to joint custody and equal time. Mr. Bohanon, Jr.'s work schedule shifted and the parties modified their parenting agreement by changing from a week on and week off schedule, to days certain during each week to keep the equal time, but failed to memorialize it. Bohanon, Jr. moved to enter the new schedule they practiced for two years. Layman objected and moved for less than equal time. The Supreme Court held that equal parenting time can be modified pursuant to KRS 403.320(3) "if it is in the best interests of the child, but it can only order a 'less than reasonable' timesharing arrangement if the child's health is seriously endangered." In a 20-page opinion, Bohanon, Jr. lost his equal time motion because the Supreme Court held it was not error to find a modification to less than 50 percent parenting time is reasonable pursuant to KRS 403.320(3). "Under our caselaw, less than reasonable does not necessarily mean less than 50 percent

parenting time."

The applicable subparts of KRS 403.320 appear as follows: KRS 403.320. Visitation of minor child:

(1) A parent not granted custody of the child and not awarded shared parenting time under the presumption specified in KRS 403.270(2), 403.280(2), or 403.340(6) is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child...

(3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

While at the outset the case is meant to distinguish between the statutes governing custody and parenting time and how to establish and modify both, it adds a reasonableness standard to KRS 403.320(3) when parents have equal time to modify parenting time that doesn't exist in the sub-section.

The Supreme Court in *Layman v. Bohanon, Jr.* borrows from previous decisions to define the word "restrict" found in KRS 403.320(3)

to mean "to provide [either] parent with something less than reasonable visitation." In dicta, then, it tells us how much it loves the rebuttable presumption for equal time amendment to the custody statute, in my humble opinion.

There is no set formula for determining whether a modified timesharing is reasonable; rather it is a matter that must be decided based upon the unique circumstances of each case. Drury, 32 S.W.3d at 524. For example, it doesn't necessarily mean that a parent has less than reasonable timesharing just because he or she spends less time with the child than under the original timesharing arrangement. *French*, 581 S.W.3d at 50; see also *Kulas*, 898 898 S.W.2d 529.

One thing we can always count on is the tried and true "case by case" approach to family law. No matter how the world changes, people will still fall in love, break up, get pregnant and everything else that goes with it. I pulled this quote from Anne Morrow Lindbergh from *Womankind*, a magazine about western women in India, as I contemplated an ashram in my post COVID-19 future:

"Only in growth, reform, and Change, paradoxically enough, Is true security to be found."

#StayHealthy everybody. We have a lot of work to do!

A. Holland Houston is an Attorney at Law and vice-chair of the LBA's ADR/Mediation Section. ■



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derson has been appointed chair of the firm's Construction Service Group. Henderson is a member (partner) of Stites & Harbison in the Louisville office. His practice is devoted to representing contractors, owners, and design professionals in all aspects of the construction and design process, ranging from drafting and negotiating various types of contracts to resolving complex disputes through informal negotiation, mediation, arbitration, and litigation in state and federal courts throughout the country.

Morgan Pottinger McGarvey is pleased to announce that **Charlie Otten** has been promoted to senior associate. Otten supports several of the firm's practice areas, including banking and finance law, business law and litigation, employment and labor law, and real estate law. Otten serves on the Junior Achievement of Kentuckiana's Young Professionals board and executive committee. He also completed Louisville's Fund for the Arts NeXt Class in 2019. Otten received his J.D. from the University of Kentucky College of Law. ■

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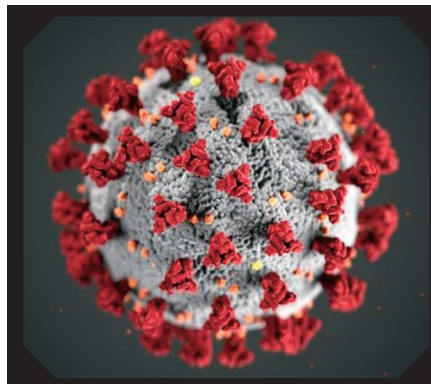
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