

# Lincoln Memorial University - Duncan School of Law

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From the Selected Works of Akram Faizer

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Winter February, 2020

## Diversity and Inclusion Piece (DICTA 2020).pdf

Akram Faizer



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# DICTA

**DAMAGES CAP ISSUE  
NOW IN THE HANDS  
OF THE TENNESSEE  
SUPREME COURT**





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**KNOXVILLE BAR ASSOCIATION**

## **rooftop party**

**February 25, 2020 | 5:30-7 p.m.**

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The Embassy Suites Knoxville Downtown has invited KBA Members to enjoy a complimentary beverage from an assortment of local craft brews, wines, and hand-crafted cocktails while taking in views of Downtown Knoxville and the Great Smoky Mountains. Afterwards Embassy Suites Knoxville Downtown will provide 10% off on tabs and will offer complimentary appetizers.

**Register online by clicking February 25 in the  
event calendar at [www.knoxbar.org](http://www.knoxbar.org).**

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**Knoxville Bar Association**  
505 Main Street  
Suite 50  
Knoxville, TN 37902  
865-522-6522  
Fax: 865-523-5662  
[www.knoxbar.org](http://www.knoxbar.org)



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**DICTA**

DICTA is the official  
publication of the  
Knoxville Bar  
Association

DICTA is published monthly (except July) by the Knoxville Bar Association. It is designed to offer information of value to members of the local bar association. The news and features should illustrate the issues affecting the bar and its members. The opinions expressed do not necessarily represent those of the Knoxville Bar Association.

All articles submitted for publication in DICTA must be submitted in writing and in electronic format (via e-mail attachment). Exceptions to this policy must be cleared by KBA Executive Director Marsha Watson (522-6522).

DICTA subscriptions are available for \$25 per year (11 issues) for non-KBA members.

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## Section Notices

There is no additional charge for membership in any section, but in order to participate, your membership in the KBA must be current. To have your name added to the section list, please contact the KBA office at 522-6522.

### Alternative Dispute Resolution Section

The ADR Section plans regular CLE throughout the year. Join the ADR Section for the upcoming CLE program "New Year's Resolution: Walk a Mile in the Moccasins of the Lawyer's Client" on February 3 featuring Cecilia Petersen. If you have a program topic or speaker suggestions, please contact the ADR Section Chair Betsy Meadows (540-8777) or Daryl Fansler (546-8030).

### Bankruptcy Law Section

The Bankruptcy Section plans regular CLE programs and Pro Bono Debt Relief Clinics throughout the year. The next Pro Bono Debt Relief Clinic will be held on February 8 and volunteer registration is available at [www.knoxbar.org](http://www.knoxbar.org). If you have a program topic or speaker suggestions, please contact the Bankruptcy Section Chairs Tom Dickenson (292-2307) or Greg Logue (215-1000).

### Corporate Counsel

The Corporate Counsel Section provides attorneys employed by a corporation or who limit their practice to direct representation of corporations with an opportunity to meet regularly and exchange ideas on issues of common concern. If you would like to know how you can get involved or have suggestions for CLE topics, please contact Section Chairs Marcia Kilby (362-1391) and David Headrick (599-0148).

### Criminal Justice

The KBA Criminal Justice Section represents all attorneys and judges who participate in the criminal justice system in Knox County. The section plans regular CLE throughout the year. If you would like to know how you can get involved or have suggestions for CLE topics, please contact Section Chairs Joshua Hedrick (524-8106) and Sarah Keith (215-2515).

### Employment Law

The Employment Law Section is intended for management and plaintiffs' counsel, in addition to in-house and government attorneys. If you would like further information on the Employment Law Section or have suggestions for upcoming CLE programs, please contact the Employment Law Section co-chairs Howard Jackson (546-1000), Tim Roberto (691-2777) or Mark C. Travis (252-9123).

### Environmental Law

The Environmental Law Section provides a forum for lawyers from a variety of backgrounds, including government, corporate in-house, and private firm counsel. If you would like to know how you can get involved or have suggestions for CLE topics, please contact Section Chairs Catherine Anglin (525-0880) and Jimmy Wright (637-3531).

### Family Law Section

The Family Law Section has speakers on family law topics or provides the opportunity to discuss issues relevant to family law practice. If you would like to know how you can get involved or have suggestions for CLE topics, please contact Section Chairs Jo Ann Lehberger (539-3515) or Steve Sharp (971-4040).

### Government & Public Service Lawyers Section

The Government & Public Service Lawyers Section is open to all lawyers employed by any governmental entity, state, federal, or local, including judicial clerks and attorneys with legal service agencies. If you would like to know how you can get involved or have suggestions for CLE topics, please contact Hon. Suzanne Bauknight (545-4284) or Ron Mills (215-2050).

### Juvenile Court & Child Justice Section

The Juvenile Court & Child Justice Section has speakers on juvenile law topics or provides the opportunity to discuss issues relevant to juvenile law practice. If you would like to know how you can get involved or have suggestions for CLE topics, please contact Section Chairs Mike Stanuszek (696-1032) or Justin Pruitt (215-6440).

### New Lawyers Section

The New Lawyers Section is for attorneys within their first three years of practice, and any member licensed since 2018 will automatically be opted-in to the section. The inaugural event for 2020 will be held on January 30 at Club LeConte. Register by clicking January 30 on the event calendar at [www.knoxbar.org](http://www.knoxbar.org). The Section will co-sponsor the KBA's Rooftop Party on February 25th from 5:30-7:00 p.m. at the Embassy Suites Knoxville Downtown and you may register in the Event Calendar at [knoxbar.org](http://knoxbar.org) by clicking February 25. If you would like to get involved in planning Section activities, please contact Section Chairs Courtney Walker (292-2307) or Chuck Sharrett (637-0203).

### Solo Practitioners & Small Firms Section

The goal of the Solo Practitioner & Small Firm Section is to provide and encourage networking opportunities and offer high quality CLE programs featuring topics that will help solo/small firm attorneys enhance and improve their practices and assist them with law office management challenges. If you have a program topic or speaker suggestions, please contact Section Chairs Tripp White (712-0963), Mary Miller (934-4000) or Tim Grandchamp (524-1873).

## Event Calendar

### February

- 3 ADR Section CLE
- 4 Law Office Tech Committee Meeting
- 8 Pro Bono Debt Relief Clinic
- 11 Professionalism Committee Meeting
- 12 Veterans Legal Advice Clinic
- 12 Diversity in the Profession Committee Meeting
- 12 Barristers Monthly Meeting
- 13 Lunch & Learn
- 13 Judicial Committee
- 19 Board of Governors Meeting
- 21 High School Mock Trial Competition
- 22 High School Mock Trial Competition
- 23 High School Mock Trial Competition
- 25 Rooftop Party
- 28 Memory Skills CLE

### March

- 2 ADR Section CLE
- 3 Law Office Tech Committee Meeting
- 10 Professionalism Committee Meeting
- 11 Veterans Legal Advice Clinic
- 11 Diversity Committee Meeting
- 11 Barristers Meeting
- 12 Lunch & Learn
- 12 Judicial Committee
- 25 Board of Governors Meeting
- 26 Barristers March Madness Social Hour
- 31 CLE Committee Meeting

## Mark Your Calendar

## Law Practice Today Expo April 2 & 3



By: Hanson R. Tipton

Watson, Roach, Batson &amp; Lauderback, P.L.C.



# WHATCHOO TALKIN' 'BOUT, HANSON?

One of my favorite television shows growing up was *Diff'rent Strokes*, starring Gary Coleman and Todd Bridges as Arnold and Willis Jackson, two African-American kids from Harlem who are adopted by a rich white widower on Park Avenue. The show served as a vehicle for the comedic force of nature that was 1980s Gary Coleman and also introduced many of us to the concept of "a very special episode," teaching '80s kids like me about heavy topics like racism, drug abuse, and child predators. But one of my favorite things about *Diff'rent Strokes* to this day is the theme song.

*Now the world don't move,  
To the beat of just one drum,  
What might be right for you,  
May not be right for some...*

I have told friends over the years that if I had to choose a TV theme song that best encapsulated my view of the world (and there are a lot of tempting choices – this might be a good column idea for Jason Long,) I would definitely go with the "live and let live" philosophy of the *Diff'rent Strokes* theme. Fun fact: the *Diff'rent Strokes* theme was written and performed by the late Alan Thicke, who you may remember as Dr. Jason Seaver from *Growing Pains*. Thicke was a prolific musician in addition to his acting career, and his credits also include the theme song to *Facts of Life*, which was a spin-off from *Diff'rent Strokes*.

I was reminded of the *Diff'rent Strokes* theme song when I was writing my remarks for the Annual Meeting in December. Those of you who attended may recall that as I urged KBA members to get involved and stay involved in KBA activities, I said that the types of bar service I enjoy may not be the same things that you enjoy but that the KBA is stronger when more members take ownership of it and participate. I challenged attendees to bring someone to a KBA event this year, bring someone to a committee meeting, or better yet, bring someone to the Annual Meeting next year.

*It takes Diff'rent Strokes to move the world.  
Everybody's got a special kind of story;  
Everybody finds a way to shine.*

2020 will offer many ways to shine in the KBA – opportunities to get involved in your bar in many ways. If you have never served on a KBA committee or section, I encourage you to look at the list in your KBA Attorneys' Directory (or at <https://www.knoxbar.org/index.cfm?pg=KBACcommitteesandSections>) and pick an area that interests you or is relevant to your practice. Many of our committees meet monthly for an hour or less, so the time commitment can be whatever you decide to devote to it.

On the page facing this one you will see the Section Notices & Event Calendar, listing many other opportunities to get involved in the coming months. Throughout the year, there are numerous ways to shine

through pro bono service at various clinics conducted by or affiliated with the KBA. You can always find information about these clinics on our website at <https://www.knoxbar.org/index.cfm?pg=Upcoming-Legal-Clinics>. And of course, *pro bono* ways to shine are available year-round through Legal Aid of East Tennessee and you can always find more information about LAET just inside the back cover of *DICTA*.

On our bar calendar I am particularly looking forward to the High School Mock Trial Competition later this month and the always-excellent Law Practice Today Expo in April. Later this spring, I hope you will join us for the annual Law Day Luncheon on May 1st, celebrating the centennial anniversary of the 19th Amendment granting women the right to vote. May 8th is the KBA Memorial Service, which I have found to be one of the most meaningful and fulfilling events of the bar year. And if you know how to swing a hammer be sure to join us for the 2020 KBA Habitat for Humanity build later this spring. Mark your calendar on May 16th for Blitz Day.

By the time you read this column, the KBA Board of Governors and Committee and Section chairs will have gotten together for the 2020 Bar Leaders Event with Dean Melanie Wilson and Dean Gary Wade to discuss communicating with and working with the next generation of lawyers. As I get older and my teenager gets older, I am reminded daily of our generational differences, and I am mindful of the KBA's need to

pay attention to how we engage and communicate with new lawyers. I look forward to working with the KBA Barristers and the New Lawyer Section this year to discuss ways to get more young lawyers involved in our bar. If you happen to think of other ways we can reach out to Knoxville lawyers – young or not so young – and get them involved, please let me know. The more members we have, and the more involved our members are in the work we do, the stronger your bar will be.

*They'll have theirs, you'll have yours, and I'll have mine,  
And together we'll be fine!*

I am honored to have the opportunity to write this column every month and share what is on my mind. I can't promise that every month will be as inspiring as the *Diff'rent Strokes* theme song, but we will see.

**“2020**  
will offer many ways  
to shine in the KBA”

**By: Lisa J. Hall***Hodges, Doughty & Carson*

# THE STORY OF POUR JOHN DOE, A FORMERLY PINK PURSE, AND A VERY, VERY, VERY RICH COUNTRY CLUB: TRAGEDY IN NEW JERSEY

In Demarest, New Jersey, there is a “full-service, family-focused Club” offering, in addition to golf, pools, a playground, a (half) basketball court, several “gracious” dining options, according to their website. This is the Alpine Country Club, where they “take pride in providing our members and their guests a memorable experience in an environment that encourages family and long-lasting friendships.” For a \$65,000 initiation fee and \$19,000 in dues each year, you can join this club started in 1928 by a group of civil leaders called “The Forty Millionaires.”

Most likely in the mood for some “gracious dining,” New Jersey real estate agent Maryana Beyder, her husband, and her \$30,000 pink Hermès Kelly handbag (a 30th birthday present from her husband) went out to dinner at the Alpine Country Club on September 7, 2018 and never suspected what would happen next. According to Beyder’s attorney, Alexandra Errico, the waiter “proceeded to pour red wine and didn’t stop. Poured it all over her. Poured it all over her husband. And poured it all over a very expensive Hermès bag.”

**SIDE NOTE:** I was not there, but is that really how that happened? I can only draw from my own experience as a server at the ever gracious Oak Ridge Applebee’s in the early 1990s, and one time I did accidentally pour some Coke from a pitcher down a person’s back (which they did not even seem to notice). I have possibly spilled various liquids in varying amounts at other times in my life, but it only happens in a few different ways. You can drop a glass, you can pour too much into a glass and then it spills over, you can knock a glass over, or you can try to pour a drink from one glass to another and sometimes the drink doesn’t cooperate. But how did it come to pass that this waiter at this fine establishment poured red wine all over Ms. Beyder, then all over Mr. Beyder, and then all over a pink handbag? Perhaps the waiter was a Waiter Scorned and that was his revenge, knowing that the discontinued, rare, pink, irreplaceable handbag was Ms. Beyder’s pride and joy.

After unsuccessful attempts to resolve the issue with the country club or its insurance company, Beyder filed a lawsuit, including a claim for “negligent hiring” of the waiter, John Doe. (I feel like I have heard of him). In response, the country club has questioned the authenticity and value of the handbag, which is an atrocious display of discrimination against the 1%. Errico stated, “They couldn’t comprehend that a bag could be that much. They kind of discriminated against her that she actually owned that type of bag...It’s sort of like a rich person problem.” **SIDE NOTE:** Maryana Beyder has a Facebook page that is fairly well locked down, but you are able to see the various pages she has “liked.”

These pages include Oreo, The Other 98%, Jimmy Choo, Christian Louboutin, both Khloe and Kourtney Kardashian, and, obviously, becoming minimalist.

The country club has also filed a cross claim against its own employee, John “Butterfingers” Doe. This cross claim has drawn disgust and contempt from the plaintiff: “It has absolutely nothing to do with the waiter, we were not trying to collect any money from the waiter,” said Errico. “There was never any intention of my client to go after

this person at all. The only intention was to have the employer take responsibility.” Errico maintained they were going after the “very, very, very rich country club.” This is a surprising distinction, given that the plaintiff also sued John Doe. The very, very, very, rich country club, perhaps recalling its claims to graciousness on its website, later amended its pleadings that no longer target John Doe.

To explain the facts of the case, Errico also said “She didn’t wear it apple picking. She wore it to a very expensive country club where she was a member.” She added, “If you bring your car to a country club and it gets scratched up, you expect the club to pay for it.”

At this point in the story, if you can recover from the shock and sadness of it all, you may have these kinds of questions:

- If you have a \$30,000 handbag, how are you ever comfortable carrying it?
- On the other hand, what is the point of owning an extremely valuable handbag if not to carry it and flaunt it?
- If your choice is to carry the handbag, why wouldn’t you be mindful of ordering things at your country club like red wine?
- If you own a \$30,000 handbag that is not easy to replace, why not insure it?
- If you don’t need insurance for your \$30,000 handbag, why expend the time and resources to file a lawsuit about it?

As for me, I am still trying to imagine how John Doe managed to pour red wine “all over” Ms. Beyder, “all over” Mr. Beyder, and “all over” that bag. I also wonder how much the bottle of wine cost and how much wine went to waste in pouring it all over people instead of drinking it. I also wonder if the person upon whose back I accidentally poured Coke actually realized it but was just a gracious person graciously dining at Gracious Applebee’s.



By: **Melissa B. Carrasco***Egerton, McAfee, Armistead & Davis, P.C.*

# ALLISON S. JACKSON, BARRISTERS PRESIDENT

To the untrained eye, most beaches in the Caribbean look the same. White sand, blue ocean, umbrellas, beach chairs, and bathing suits are standard fare. But, this particular beach in Turks and Caicos was a bit different. There was a thief on this beach – or at least in the parking area next to it – and he thought he had found the perfect target. It probably only took him 30 seconds to break into the rental jeep, steal her clothes and her mother-in-law and father-in-law's wallets, passports, and other belongings. But, it only took him five seconds to learn that he had messed with the wrong female. This one wasn't going to take robbery lying down.

She was smart. She was fearless. She was persistent. Instead of yelling for the police or deciding right then and there that the vacation was ruined, she and her family went hunting for their belongings. They went after the thief, found most of their belongings in the bushes nearby, and went back to vacationing – after filing a police report, of course. Knowing her, she probably didn't even break a sweat the entire time and most likely made friends with the island police chief in the process.

That last part is just speculation, but it wouldn't surprise me. That is precisely why I like working with the 2020 Barristers president, Allison Jackson and why I know you will enjoy getting to know her as well.

Allison may be the new Barristers president, but she isn't new to leadership in the legal profession. 2019 was a very busy year for her. Allison served as the Barristers Vice-President and on the KBA Board of Governors. She was nominated to the Tennessee Bar Association Leadership Law (TBALL) program, and she spent 2019 travelling throughout the state of Tennessee to attend monthly meetings with other TBALL participants.

In 2019, Allison also served as Co-Chair of Membership for the East Tennessee Lawyers' Association for Women (ETLAW), and she was recently elected President-Elect for 2020. Allison also served and continues to serve on the Board of Directors of the Tennessee Lawyers' Association for Women (TLAW) as the ETLAW representative.

All of this is impressive . . . and the normal stuff you can find with a Google. Here is what you may not know. Allison was born in Memphis, Tennessee, and moved to Pickwick Lake when she was starting third grade. I did not ask, and we should not speculate as to whether this was because the Germantown educational system simply had enough.

As a high school sophomore, she moved to Columbia, about forty-five minutes south of Nashville. I am not supposed to tell you that Columbia is the self-proclaimed Mule Capital of the World, but I am allowed to tell you that Columbia was voted one of the top ten best small towns by Southern Living magazine. That upbringing shows. Allison brings both small-town practicality and big-city sophistication to her legal practice.

She is smart, fearless, and persistent, and I have rarely seen her break a sweat even when she and I are working 18-hour days on one of our cases. She is a tough litigator and an excellent employment attorney. Quite frankly, when I am picking a litigation team, I want someone who will chase down the problem with me and find the solution, even if it means hunting in the bushes for a while. I know our clients appreciate it, and I am certain that she will bring that same kind of practicality, sophistication, and tenacity to her year as Barristers president.

This year, Allison's goal for the Barristers is to open the doors wider and make Barristers feel more inclusive. There are missing faces at the Barristers meetings because Barristers is not just for law students and attorneys who just passed the Bar exam.

Anyone who is 36 years of age or younger is eligible to join the Barristers. If you graduated from high school when you were 18 and went

straight to college, you probably graduated from undergrad when you were 22. If you went straight to law school (and passed the Bar the first time. . . no judgment here), you probably started practicing law when you were 25.

That means you have 11 years to be a part of the Barristers – a special part of the Knoxville Bar Association designed to help you integrate into the Knoxville Bar, build relationships with other attorneys, grow your practice, serve the community, and take on leadership roles, with the added benefit of plenty of fun. Starting year 12 of your practice with the relationships and leadership experience you get while participating

in Barristers is invaluable.

Plus, anyone who has been practicing law for 5 years or less is also eligible to join Barristers. For people like me, who started law school later in life, the Barristers provides the same support system and experience for 5 years after graduation, even if you are over the age of 36.

So, if you are 36 or younger or have been practicing less than 5 years, you should be a part of the Barristers. This goes for attorneys in private practice and attorneys who work in other capacities: in-house counsel, judicial law clerks, public sector attorneys, attorneys working non-legal professions, and any other type of attorney you can think of. If you meet the eligibility requirements, you should be a part of Barristers.

At the end of the day, Barristers is about development – developing relationships, developing your law practice, developing leadership skills, and developing those around you. Because Barristers is open to such a diverse group of people, Barristers brings together new attorneys and those who have been in practice for years to provide that kind of informal mentoring that has always been foundational to the practice of law.

Lawyers need to be around good lawyers in order to become good lawyers. Barristers is designed to achieve that, so make sure the Barristers-eligible attorneys in your workplace are participating this year. That is Allison's goal for Barristers this year, and knowing her, she will exceed it.







## HELLO... MY NAME IS

**By: Jennifer Franklyn**

*Leitner Williams Dooley Napolitan*

# WILL BEASLEY



This month's q-and-a features KBA member **Will Beasley**, an Associate Attorney at Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. in the Advocacy Department. Will graduated from the University of Tennessee College of Law in May 2019, and before that, he graduated with a B.A. in English from Abilene Christian University. Will is a Chattanooga native, but after learning more about him, I am glad he calls Knoxville home, and I am sure you will agree.

### Before you decided to go to law school, where did you work?

I was an admissions counselor for four years before law school. I loved getting to work for Abilene Christian University (ACU) and had an awesome experience working with students who were interested in attending ACU.

### Tell me about your spouse.

My wife, Bree, grew up in Arlington, TX, and we met at Abilene Christian University. After we graduated, we stayed in Abilene and got married in 2013. We both love to travel, cook, and ski. Bree is currently the Associate Director of Student Financial Services at ACU.

### Why did you decide to stay in Knoxville?

Bree and I love Knoxville. We came to Knoxville for law school and have loved living here and getting involved in the community.

### What's one of your favorite memories from law school?

Over the summer, while we were all studying for the bar exam, Bree and I started hosting classmates for a study break on Tuesday nights. I think we were all just glad to have something on the schedule besides lectures and practice tests. Looking back on it now, this is one of my favorite memories from our time in Knoxville.

### What is your favorite travel destination?

We love the mountains. Our last trip was to Asheville and our next trip is to Colorado.

### Describe your hero.

I've been lucky to know all four of my grandparents. They are my heroes. Each of them is still making an impact on their communities in one way or another. At 87 and 88, my dad's parents are still operating a small farm in Fayetteville, TN – where they have lived since the late-1950s. My mom's parents, who both recently celebrated their 91st birthdays, are avid gardeners. They're known in their Austin neighborhood for leaving sacks of vegetables on the neighbors' front porches. It is really special to see them taking care of their family, friends, neighbors, and communities.

### Have you traveled to another country?

During my last semester of college, I lived in Montevideo, Uruguay, where I studied Spanish. While I was in South America, I also spent time in Paraguay, Brazil, Argentina, and Chile. Bree and I have also traveled to the England, Ireland, and Scotland.

### Where do you volunteer your time?

The UT Law Alumni Advisory Board and my church, Hardin Valley Church of Christ.

### What's your binge-watching guilty pleasure?

The Marvelous Mrs. Maisel.

### What is the best thing that has happened to you this year?

Finding out that I passed the bar was by far the best thing that happened this year.





# WHAT IS TLAP AND HOW DOES IT WORK?

Most legal professionals in Tennessee are, hopefully, aware of the Tennessee Lawyers Assistance Program (TLAP), which was created in 1999 by Tennessee Supreme Court Rule 33. Over the last 20 years, TLAP has helped hundreds of lawyers, judges and law students. The purpose of TLAP is three-fold: 1) to protect the interest of clients, litigants and the general public from harm caused by impaired lawyers or judges; 2) to assist impaired members of the legal profession to begin and continue recovery; and (3) to educate the bench and bar to the causes of and remedies for impairments affecting members of the legal profession.<sup>1</sup>

## The Need for Lawyer Assistance Programs

Multiple studies beginning as early as 1990 have stressed the need to implement lawyer assistance programs to assist impaired attorneys.<sup>2</sup> The latest study conducted by the Hazelden/Betty Ford Foundation and the ABA Commission on Lawyer Assistance Programs (CoLAP), demonstrates that a significant number of attorneys are adversely affected by the stress and pressure involved in law practice.<sup>3</sup> The 2016 study includes startling numbers of lawyers struggling to cope with the effects of stress:

1. more than 20% are problematic drinkers;
2. almost 20% have anxiety disorders;
3. 28% are suffering from active clinical depression; and
4. almost 12% have had thoughts of taking their own lives.

Lawyers also face other stress-related challenges, including sleep deprivation, work-life conflict, and job dissatisfaction.

The 2016 study also concludes that the rates of alcohol abuse, depression, anxiety and suicidal thoughts are even higher for attorneys during their first 10 years of practicing.

## The Advantage and Benefit of Having a Lawyer Assistance Program

Few of us know exactly what is happening in a colleague or friend's life that causes a person to try to relieve the stress of law practice in unhealthy ways. Sometimes all we see are little bits and pieces or clues about unhealthy behavior that may be impairing their ability to practice law. The advantage of having TLAP is the ability to pick up the phone and report your concerns about your colleague. TLAP acts as a clearinghouse for all of the information about a lawyer/judge/law student by others who are concerned about him or her. TLAP then reaches out to the affected lawyer/judge/law student to offer services and assistance to help get that person on the road to recovery and a return to practicing law without impairment.

## How TLAP Can Help

TLAP offers a wide range of services, including: Consultation, Assessment, Referrals, Interventions, Monitoring, Support Groups, Presentations, and Social Events.

TLAP's services are:

1. **FREE** - there is no charge for TLAP's services.
2. **ANONYMOUS** - If you make a call to express concern about a friend or colleague, you do not have to give your name. If TLAP reaches out to that person to offer services or assistance, the name of the referring person is not used without that person's permission.
3. **CONFIDENTIAL** - Confidentiality of any information received is provided by both Supreme Court rule<sup>4</sup> and by statute<sup>5</sup>. Again, that information cannot be disclosed unless the referring person grants express permission. By way of example, TLAP might suggest that a formal intervention be done with the referred attorney and might ask if the referring attorney would be willing to be a part of the intervention team. If the referring attorney agrees to participate in the intervention then the referred attorney would obviously become aware of the referring attorney's involvement.

## How the Process Works

The process is very simple. If you see a friend or colleague who begins acting differently - call TLAP. There are many early warning signs that someone may be having difficulty coping with stress. Difficulty sleeping or sleeping too much; not returning phone calls to clients or adversary counsel; not showing

up for court; showing up for court/work with bloodshot eyes, alcohol on breath; avoiding contact with friends, just to name a few.

If you are having difficulty yourself coping with the stresses of your practice - call TLAP. Prolonged periods of feeling down; dreading going to work; needing a drink/drugs to get started in the morning or at the end of every day; repeatedly dreading or failing to return client or adversary counsel phone calls, are signs that TLAP can help you.

When you make the call to TLAP, you will be greeted with a listening, caring ear from a trained member of the TLAP staff. TLAP has clinicians on staff who can offer support and assistance and make appropriate treatment referrals.

## The Reason to Call TLAP

TLAP provides the legal profession with a means of helping fellow lawyers, judges or law students without getting them in trouble. A prompt call to TLAP can also help the legal profession by getting help for an impaired lawyer before damage is done to clients. Calling TLAP can save careers and lives. So, if in doubt, call TLAP at 877-424-TLAP (877-424-8527).

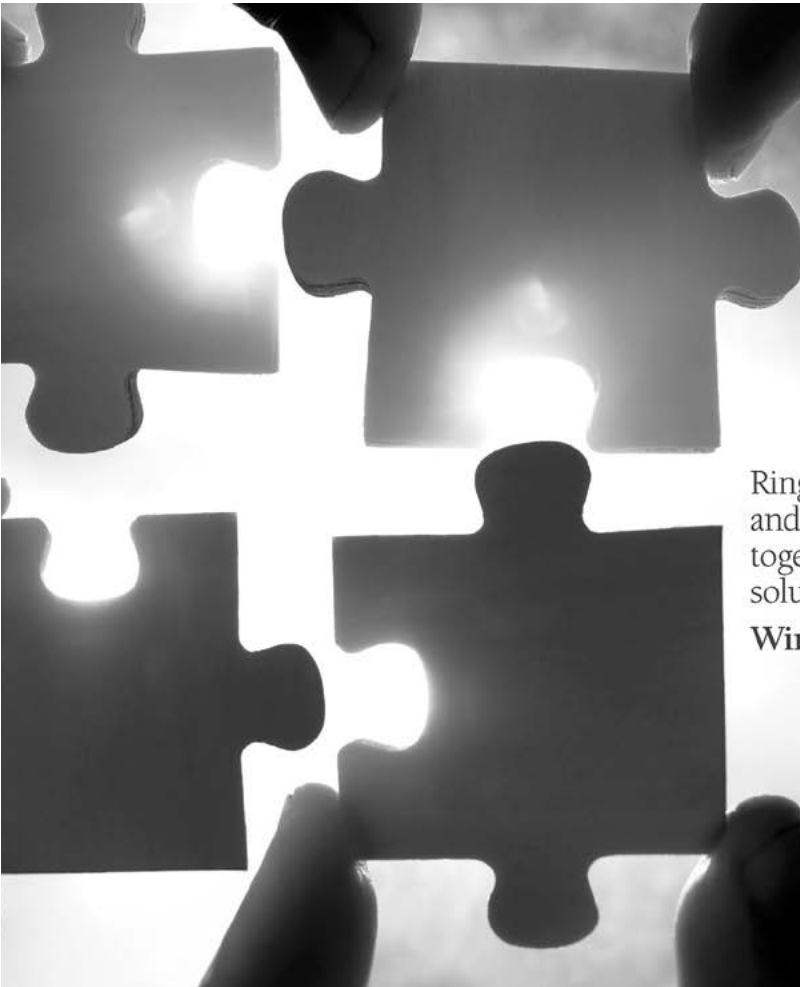
<sup>1</sup> TN Sup Ct R. 33.01.

<sup>2</sup> Occupations and the Prevalence of Major Depressive Disorder, Eaton WW, et al., J. Occup. Med., 1990.

<sup>3</sup> The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, Krill, Patrick R., JD, LL.M.; Johnson, Ryan, MA; Albert, Linda, MSSW, J. of Addiction Med.; Jan/Feb 2016, Vol 10, Issue 1, pp 46-52.

<sup>4</sup> TN Sup Ct R. 33.10.

<sup>5</sup> TCA Sec. 23-4-101.



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By: **Mary Elizabeth Maddox**  
*Frantz, McConnell & Seymour, LLP*



# LET IT SNOW!

As the days are shorter and the air colder (with the exceptions of a balmy East Tennessee Christmas), all of us long for excitement. And what better excitement than for Todd Howell to say the word snow in his forecast (sponsored by Kroger of course)? All of East Tennessee goes to the store and buys bread and milk. Occasionally we even see a flake or two. The inevitable 5 a.m. call from the school system (and the text and the email and the home phone call and the voicemail, lest you miss something) lets us know that we finally are having a SNOW DAY.

As is often the case in this area, snow means different things to different people. What one considers a blizzard another considers a normal day of work. These events along with other inclement weather can cause issues for employers and employees. So, what should you know about whether to plod along as a normal day at the office or whether to close your practice and give in to the excitement?

As with many employment considerations under the Fair Labor Standards Act ("FLSA"), inclement weather policies often hinge on the type of employee that is being addressed. The law basically recognizes two types of employees- exempt and non-exempt. Non-exempt employees are those who are entitled to overtime pay. Most employees covered by the FLSA are non-exempt. Exempt employees are often referred to as "salaried" employees while non-exempt employees are often referred to as "hourly." (This article is not intended to provide in-depth information about the classifications.) The Department of Labor views absences for inclement weather when an office is open as being for "personal reasons." These absences are not classified as sickness or accident related. There is no law that requires a Tennessee employer to excuse an inclement weather absence (unless there is a situation involving an employee who is the parent or guardian of a disabled person whose facility closes or who cannot be transported).

## Exempt Employees

What is a private employer to do when inclement weather strikes? If an office is closed due to inclement weather, the FLSA prohibits an employer from deducting pay to an exempt employee if that employee stands ready, willing and able to work and if they actually perform any work during that workweek.<sup>1</sup> Therefore, an exempt employee does not have to be paid if an office is closed for an entire workweek but only if that employee does no work at all- even if from home.

If an office is not closed for business but an exempt employee does not work due to the weather, an employer is able to deduct pay for full-day absences as being deemed "personal reasons" by the Department of Labor. These deductions are only allowed for full day absences, not those which are partial.

The FLSA does not require an employer to provide vacation time. However, if there is a benefit plan available, an employer can reduce accrued leave during the employee's absence without affecting the salary and, if that employee does not have any accrued benefits existing or left in the account, the employer must still pay that employee's salary while the office is closed. Generally, exempt employees are more likely to be

paid for a full day of work without being required to use PTO or to make up the missed time.<sup>2</sup>

## Non-Exempt Employees

If an employer closes its office due to inclement weather, the organization can decide whether to pay a non-exempt employee when the office is closed due to weather. The FLSA requires that employees be paid only for the hours they work, not more or less. The FLSA presents minimum requirements and employers are always allowed to be generous above those minimum standards. In general, non-exempt employees are more likely to be paid only for hours worked.

## Office Policies

PTO policies become very important to addressing how an exempt employee is treated in the event of weather-related closings. If an office is closed for an entire week due to snow or other weather, an employer may require exempt staff to take vacation or debit their leave bank account if one is available. If the closure is for less than a workweek, the employer must pay its exempt employees their full weekly salaries but may still require those employees to take deductions from their PTO accounts. If no time remains, a negative account balance can be incurred because the weekly salary still must be paid.

Employers can consider PTO policies that provide for a fixed number of inclement weather days or that provide for PTO time to be taken so that employees can still be paid. Many employers consider absences for both exempt and non-exempt employees excused if they are due to inclement weather, especially if the weather is deemed severe or unsafe. Other employers consider the excuses on a case-by-case basis. The voluntary versus non-voluntary nature of the absence should be considered. Furthermore, all employees should be treated in the same fashion in these decisions. The bottom line is to have a clear and defined policy on inclement weather days including how employees are notified of the status- preferably not by Todd Howell.

<sup>1</sup> 29 C.F.R. § 541.602(a)

<sup>2</sup> DOL Opinion Letter FLSA2005-41



**About this column: "The cobbler's children have no shoes." This old expression refers to the fact that a busy cobbler will be so busy making shoes for his customers that he has no time to make some for his own children. This syndrome can also apply to lawyers who are so busy providing good service to their clients that they neglect management issues in their own offices. The goal of this column is to provide timely information on management issues. If you have an idea for a future column, please contact Cathy Shuck at 541-8835.**



## AROUND THE BAR

By: M. Akram Faizer

*Professor of Law*

# DIVERSITY AND INCLUSION

According to Carol Dweck, acclaimed psychologist and exponent of the “growth mindset,” our tendency to classify individuals based on fixed and determinate criterion has negative consequences for individual, organizational and cultural growth.<sup>1</sup> A ‘fixed mindset’ also helps explain the legal profession’s relative homogeneity, according to San Diego-based attorney and nationally prominent diversity and inclusion expert, Janice Brown, who spoke at the KBA’s annual diversity event on October 3, 2019.

The KBA’s Diversity in the Profession Committee, chaired by Amanda Morse and myself, with detailed involvement by both KBA President Wynne Caffey-Knight and Executive Director Marsha Watson, held several meetings prior to this event to both promote diversity, inclusion and cultural competence and further develop the “Buddy Match” program, first initiated in 2013 to pair local attorneys with law students for mentoring purposes. The “Buddy Match” program has been especially helpful to women and minority students who disproportionately lack mentoring. This year, 96 students participated from both area law schools, together with 55 mentors from 34 local law firms, government entities, not-for-profit organizations and courts. On average, two students were assigned to each mentor, and 35 of 36 students who gave feedback said they would recommend the program to other students.

An ice-breaker exercise demonstrated how unexpectedly diversity can manifest itself: one Jewish attendee said she’s regularly assumed to be Christian; one woman said her priority is caring for a disabled parent. Against that personal backdrop, Brown delivered a coruscating presentation highlighting the need to recognize and repair implicit biases and fixed negative mindsets that she says are prevalent among lawyers. Understanding and inviting diversity forces us to creatively solve problems, and in turn, increases productivity and retention, according to Brown. The problem for the legal profession is its atypical homogeneity, with men accounting for 65% of the country’s 1.3 million lawyers of whom 88% are white. Big Law, Brown said, tends to be even whiter and more masculine than even Fortune 500 companies, despite efforts to counter that trend.

The socio-economic and cultural legacy of discrimination is part of the problem: fully one-third of Ivy League students are either “legacy” admissions or from top one percent households as measured by wealth.<sup>2</sup> But lawyers’ mindsets are also at issue, and a previously unexplored reason for the legal profession’s monographic power structure, says Brown. One study she cited found lawyers have low resilience and are in the 90th percentile for skepticism. While capable of spotting issues with a critical eye, lawyers altogether lack the grit to deal with unanticipated setbacks. This, she said, is a concomitant of legal training, which is backward looking and focuses on avoidance of failure and risk aversion. This undermines lawyers’ ability to see the potentiality of new endeavors, including those that have pronounced upsides, such as the benefits of increased diversity and inclusion in hiring, retention and promotion. Although Millennials may see diversity as a means to facilitate innovation, while Gen Xers and Boomers see its benefits in terms of ‘fairness’, Brown stressed that realization of diversity and inclusion is precluded by lawyers’ paradigmatic fixed mindset.

Societal self-preservation, according to Brown, necessitates action on diversity. White men from wealthy backgrounds are a shrinking demographic and inclusion of historically marginalized groups is an absolute necessity. Brown laid out ten demographic trends that, if not acknowledged by organizations, will herald their failure:

- 1) racial and ethnic minorities will soon constitute the country’s majority;
- 2) Asia is the biggest source of new immigrants;
- 3) the electorate is becoming less white consistent with demographic shifts;

- 4) Millennials are a growing segment of the electorate;
- 5) Women’s roles in the labor force and leadership positions are growing;
- 6) the family structure is changing;
- 7) the middle class is shrinking;
- 8) the proportion of those who identify with a defined religious sect is decreasing such that;
- 9) the country’s religious make-up will dramatically change, and
- 10) the population is aging such that the labor force participation is decreasing.

Brown said that a manifestation of this problem is the housing affordability crisis in the country’s major metropolitan areas, including San Diego, where she chairs the Economic Development Corporation. San Diego’s largely non-white and socio-economically vulnerable workforce cannot afford the housing stock, undermining the area’s economic potential because the high cost of housing prevents San Diegans from investing in themselves. San Diego’s problem is increasingly paradigmatic. Brown cited the Brookings Institution President, former U.S. Army General John R. Allen, who has identified the country’s lack of progress towards diversity and inclusion as a major national security threat.

Brown then moved to unconscious or implicit bias as an additional threat to diversity and inclusion. To mitigate the problem, Brown said organizations must take a top-down approach, creating behavioral standards and holding leaders accountable for results, training people at all levels about unconscious bias and creating employee networks.

Attorney participants awarded Janice Brown an overall grade of 92.18% or 955 out of a total of 1036 points, while law students graded her at 95.13%, or 723 out of a total of 760 points

For some concrete actions, Brown recommended that both practitioners and law students take the Harvard University Implicit Bias Test, on an anonymous basis, for self-reflection purposes. Brown stressed that because implicit bias is a concomitant cultural hegemony, members of non-dominant groups tend to equally suffer from unconscious bias. The Test, which can be taken in about 10 minutes free of charge, enables takers to identify biases to potentially increase organizational diversity by empowering its advocates. Both law schools will be encouraging their student bodies to complete it. Brown recommended books by Verna Myers, including “Moving Diversity Forward: How to go from Well-Meaning to Well-Doing” and “What if I Say the Wrong Thing? 25 Habits for Culturally Effective People.” Brown also recommended organizations conduct a workshop to solicit three ideas to enhance diversity, followed by an anonymous vote to implement the best proposal.

The February 13, 2020, KBA Lunch & Learn, in which one hour of dual CLE will be provided, features Ron Harris, Blue Cross Blue Shield’s director of diversity, who will speak about the importance of cultivating a corporate culture that prioritizes diversity and inclusion consistent with the company’s corporate strategy and values. Harris, who reports directly to the CEO, provides strategic leadership and counsel for diversity initiatives within BCBS, including diversity awareness training, recruitment, cultural competency training and employee development, as well as community outreach. Harris frequently serves as a nationwide expert speaker on diversity and inclusion, addressing issues that include generational diversity, disability awareness, stereotyping, effective cross-cultural communication, religion in the workplace and the business case for diversity. Registration can be completed via [www.knoxbar.org](http://www.knoxbar.org)’s event calendar.

<sup>1</sup> <https://www.ft.com/content/fd3e920e-0f7d-11ea-a7e6-62bf4f9e548a>

<sup>2</sup> For the obvious reason that these are metrics that facilitate access to other professions, businesses and endeavors that are more heterogeneous than law.

By: Alex B. Long

*Williford Gragg Distinguished Professor of Law  
University of Tennessee College of Law*

# TOP LEGAL ETHICS STORIES IN 2019: TENNESSEE AND BEYOND

As the New Year begins, now is as good a time as any to look back on some of the more interesting, important, and weird legal ethics stories of the past year, both at home and on a national level:

(1) Prosecutorial ethics: The biggest ethics brouhaha in Tennessee in 2019 was unquestionably the battle over a prosecutor's ethical obligation to disclose exculpatory material. In a 2017 ethics opinion, the Board of Professional Responsibility opined that a prosecutor's ethical duty to disclose information favorable to the defense under TRPC Rule 3.8(d) is broader than the constitutional standard outlined by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963). The decision upset many prosecutors and even prompted the Tennessee District Attorneys General Conference to petition the Tennessee Supreme Court to stay the opinion. In August, the court vacated the BPR's opinion and declined to rule that a prosecutor's ethical obligations with respect to disclosure are broader than under *Brady*. That didn't end the dispute, however. Not long after, Chief U.S. District Judge Pamela Reeves informed federal prosecutors that the Tennessee Supreme Court's decision was not binding on federal district courts and that U.S. Attorneys appearing in federal court are still expected to "disclose exculpatory and mitigating material to a criminal defendant in the manner described in the referenced ethics opinion, and certainly before any guilty plea."<sup>1</sup>

(2) Bias at BigLaw: Several large law firms, including Jones Day, Morrison Forester, LeClair Ryan, DLA Piper, and Baker McKenzie, faced potential liability stemming from alleged gender bias and sexual harassment. While the primary concerns for these firms were probably financial and reputational, it's worth remembering that many states have rules of professional conduct that specifically prohibit bias and harassment, including in the workplace. (Tennessee isn't one of those states.)

(3) ABA ethics opinion regarding fee division: In ABA Formal Opinion 487, the ABA provided guidance concerning the rules regarding fee divisions in contingency fee matters when the initial lawyer is replaced by a successor lawyer.

(4) Raccoon drowning as professional misconduct: In May, the Florida Bar opened an investigation into the actions of lawyer Thomas Cope, who posted a video of himself trying to get a stowaway raccoon off of his boat. "So long, sucker," said Cope, as the raccoon fell overboard some 20 miles out to sea. The Florida Fish and Wildlife Conservation Commission launched its own investigation into the matter but declined to file criminal animal cruelty charges based on jurisdictional issues. In December, Cope was ordered to complete a professionalism workshop in order to avoid professional discipline.

(5) Tennessee ethics opinion on settlement agreements in product liability cases: In April, the BPR issued Formal Ethics Opinion 2019-F-167, which opined that is improper for an attorney to propose or accept a provision in a settlement agreement in a products liability case that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney's representation of other clients.

(6) ABA ethics opinions on judicial ethics: The ABA issued two opinions on judicial ethics. In the first, the ABA discussed the ethical issues involved when a judge is called upon to perform a same-sex

marriage. ABA Formal Op. 485 (2019). In the second, the ABA provided guidance as to when a judge's social or close personal relationships necessitate recusal. ABA Formal Op. 488.

(7) Lawyer disbarred for submitting "grossly exaggerated" fee request: The Tennessee Supreme Court disbarred a Knoxville lawyer in July for submitting a "grossly exaggerated" fee itemization as part of a discovery dispute in federal court. According to the opinion, the lawyer falsely claimed the work done by a paralegal as his own, submitted a written declaration along with the itemization falsely claiming that he had kept contemporaneous records of his time, and also requested "grossly exaggerated and unreasonable" attorney's fees of more than \$103,000 for work beyond the scope of the federal district court's order. See *BPR v. Justice*, 577 S.W.3d 908 (Tenn. 2019).

(8) "This profession does not need you." So said U.S. District Judge Otis Wright II of the Central District of California to lawyer Christopher Hook at a hearing concerning Hooks' behavior during settlement talks with an opposing party's lawyers. According to the other lawyers, Hooks "bombarded" them with them over 100 emails, many of which contained language unprintable here in Dicta. (However, because we here at Dicta know you that you'd like to know what he said, here's a representative [yet redacted] sample: "---- crooks. Eat a bowl of ----." "Hey ---- for brains. Allstate owes my client a lot money ... Pay up ----." "Peter when you are done ---- -- your copy boy tell Allstate the demand is now 305 million." "Tell Allstate I am going to water board each one of their trolls that show up for depo tomorrow without any mercy whatsoever." "Don't make me come down there and beat it out of you you ---- thief.") Prior to the hearing before the judge, Hook also decided it was a good idea to appear on comedian Adam Carolla's podcast to discuss the matter and argued that his speech on behalf of his client was protected by the First Amendment.

(9) ABA ethics opinion on ethical obligations when lawyers change firms: In December, the ABA issued Formal Opinion 489, which discussed the ethical obligations of lawyers and law firm management where a lawyer plans to leave the firm. The opinion clarifies that firms can impose reasonable notice requirements on the part of a departing attorney but cannot restrict a lawyer's ability to represent a client competently during such notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period.

(10) Indiana judges gone wild: Three Indiana judges were suspended in November for conduct that was not "merely embarrassing on a personal level" but that "discredited the entire Indiana judiciary." While attending a professional development conference for members of the judiciary, the judges became intoxicated, tried to enter a closed strip club around 3 a.m., and then wandered over to a nearby White Castle restaurant. There, the judges got into a verbal altercation with the driver and passenger of a car, which ultimately resulted in (1) one of the judges being filmed giving the middle finger to the car, (2) a physical fight taking place, and (3) the other two judges being shot. (Both judges survived.)

<sup>1</sup> <http://nafusa.org/2019/08/update-on-tennessee-ethics-battle/>

If you have an idea for Schooled in Ethics column, please contact Cathy Shuck at 541-8835.





## PASSING BY

By: Julia Hale

*Lewis, Thomason, King, Krieg & Waldrop*

# IN LOVE WITH WILD LOVE BAKEHOUSE

Every month, I will be reviewing eateries and attractions that are off the beaten path. These are the hidden gems of East Tennessee.

There are any number of coffee shops to choose from, with both local and national brands that elected to set up shop in our beautiful city. But, of all the options available to choose from, one stands out amongst the rest as a result of the high quality espresso and the made from scratch baked goods they have to offer.



Wild Love Bakehouse, commonly referred to as just Wild Love, is located in the heart of North Knoxville on Central Avenue. It was born out of a need for the owners of our beloved Old City Java to expand the space in which they produced all of their delectable baked goods. Their menu changes depending upon what local ingredients are available, though they have some staples that remain constant regardless of the season.

I elected to order a simple croissant, as I usually do when I frequent Wild Love. One bite, and I am immediately transported to Paris, France, where I imagine this croissant could give its Parisian counterpart a run for its money. Flaky on the outside, yet soft and buttery on the inside, it will melt on your tongue as you think to yourself, "I should have ordered two."

While the classic croissant is always on the menu, today they also have available some more substantial variations of that option. One includes prosciutto & gruyere baked into the layers of the buttery pastry. Or, if you would prefer a sandwich, you could select between the baked brie and fig jam or ham, white cheddar cheese, and stoneground mustard bechamel to be sandwiched between two slices of their croissant. They, of course, also have options for those with a sweet tooth, such as morning buns, cookies and brownies.

In terms of beverages, they have the standard options one would expect at a coffee shop including the various combinations of espresso and steamed milk (from a double shot of espresso to a latte), simple

coffee (iced or hot), as well as loose leaf tea. Their espresso stands apart from other coffee shops in town, in that it lacks the strong acidic bite I have come to expect from a poorly prepared double shot of espresso. And, if you come during the summer, they have an off the menu option that you absolutely must try: an affogato. Wild Love prepares theirs with Cruze Farm ice cream, another local favorite establishment here in Knoxville.

But Wild Love is more than just a bake house. It is a place to meet with study partners or sit alone in the corner while working on your computer or reading a book. When you take a break from work, you can walk over to the glass wall and peer into the kitchen where often times you will see Wild Love's bakers working their magic to prepare the aforementioned baked goods.

Thank you to Professor Ben Barton, for recommending this hidden gem while I was in law school. If you have a recommendation for where I should go for next month's Passing By column, send me an e-mail at [jhale@lewisthomason.com](mailto:jhale@lewisthomason.com).

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By: Philip S. Ashley

Associate Professor of Law  
Lincoln Memorial Univ. School of Law

# THE IRRATIONAL RIPENESS DOCTRINE FOR FIFTH AMENDMENT TAKINGS HAS BEEN REFORMED

In 1985, the U.S. Supreme Court decided *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.<sup>1</sup> The decision adopted a bizarre ripeness requirement that, thereafter, so distorted the jurisprudence of Fifth Amendment<sup>2</sup> takings that it eventually deprived some landowners of the opportunity to litigate their takings claims in any court. Recently, however, in *Knick v. Township of Scott*, the Court has corrected its error.<sup>3</sup>

*Williamson* held that takings litigants must meet a two-part ripeness test before they can litigate their takings claim in federal court. The test required that the property owner have secured a “final decision” and, where a state or local government is the taker the property owner must seek just compensation in state court and be denied.<sup>4</sup> This established the principle that takings litigants who seek to assert a federal constitutional right must first litigate in the state courts, perhaps all the way to the state supreme court. This is because the Supreme Court then believed that “[T]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensations.”<sup>5</sup>

The *Williamson* court viewed state litigation merely as a preliminary step before the takings cause of action could be heard in federal district court. So, while the state litigation would be time consuming and expensive, it ultimately would not deprive the litigant from the protection of the federal courts.

Responding to withering academic criticism of *Williamson*, the court in 1992 tried to expand the right to litigate in federal court that *Williamson* had so severely narrowed. It announced that the state litigation exhaustion requirement was no longer jurisdictional but only prudential, thus encouraging lower federal courts to not dismiss takings claims where doing so would work a hardship. However, despite the Court’s intention to open the federal courts to at least some takings claims, several courts of appeal simply ignored the shift to prudential status and continued to view the *Williamson* exhaustion requirement as jurisdictional, which always lead to dismissal of the case.

Eventually, resort to federal district court became a total impossibility with the Supreme Court’s 2005 decision in *San Remo Hotel v. County of San Francisco*.<sup>6</sup> There the Ninth Circuit Court of Appeals held that a property owner who litigated in state court and lost could not re-litigate that claim in federal district court because under the doctrine of issue preclusion a plaintiff only gets one chance to litigate the same issue against the same party when that claim goes to a final judgment on the merits. Res judicata then precludes a party who has litigated federal claims in state court, or who could have litigated them, from re-litigating those claims in federal district court. The Supreme Court affirmed *San Remo* holding that federal courts must treat the state decision as preclusive under the full faith and credit statute<sup>7</sup> and because allowing the cause of action to be relitigated in federal district court would “transform the district court into an appellate tribunal for state proceedings.”<sup>8</sup> The combined effect of *Williamson* and *San Remo* was to permanently deprive a litigant asserting a federal constitutional takings cause of action from ever being allowed to litigate that federal safeguard in federal court unless the Supreme Court took it on a writ of cert.

The final development that made the continued use of *Williamson* ripeness intolerable was the use of a procedural technique that sometimes

foreclosed the plaintiff from even being able to litigate in state court. Under this disingenuous strategy, once the plaintiff had filed their lawsuit in state court as required, the state taker would remove the case to federal district court under federal question jurisdiction. Almost always the district court judge, despite the now prudential nature of *Williamson* ripeness, would dismiss the case. What was so devastating to the plaintiff’s case was that many district court judges would dismiss but without remand to the state court. This absurd result left the plaintiff with no forum in which to litigate their claim, allowing the state to win even if the taking was unconstitutional.

In the years following *San Remo*, Justice Thomas most forcefully made this case for overturning *Williamson* and, as the make-up of the court shifted, was eventually able to persuade a majority to agree with him. In 2019, in *Knick v. Township of Scott*, the court reaffirmed that ripeness still requires the necessity of “final decision” but overturned the *Williamson* state litigation requirement.<sup>9</sup>

The Court’s prior precedents on when just compensation must be paid by the state taker are contradictory and confusing. In *Knick*, the Court held that just compensation must be paid ahead of or contemporaneously with the taking and if it isn’t, the plaintiff may file suit for just compensation in federal or state court.

Regarding the choice of forum, many plaintiffs will continue to choose state court, depending on state precedents, because many states have a broader view of what is compensable than federal cases. For example, Tennessee has extended its compensation rules to fixtures.<sup>10</sup> But, if the plaintiff chooses to go directly to federal court, the litigant may have a choice. Where the takings damages are alleged to be in excess of \$10,000, then under the Tucker Act,<sup>11</sup> the United States Court of Federal Claims has exclusive jurisdiction, but where damages are \$10,000 or less, the federal district courts have concurrent jurisdiction with the Court of Claims. Where this choice exists, a deciding factor may be that a jury trial is available in district court but not in the Court of Claims.

<sup>1</sup> *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985).  
<sup>2</sup> The Fifth Amendment takings clause provides “... nor shall private property be taken for public use without just compensation.”

<sup>3</sup> *Knick v. TWP. of Scott*, 138 S. Ct. 1262 (2019).

<sup>4</sup> There are three exceptions: 1) where the federal government is the taker, 2) where a facial challenge is brought, and 3) where the taking is not for a public use.

<sup>5</sup> *Williamson* at 473 U.S. at 194.

<sup>6</sup> *San Remo Hotel v. County of San Francisco*, 545 U.S. 323.

<sup>7</sup> 28 U.S.C. §1738.

<sup>8</sup> *Palomar Mobilehome Park Ass’n., v. City of San Marcos*, 989 F.2d 362, 366 (9th Cir. 1993).

<sup>9</sup> For an excellent treatment of the final decision requirement see *Elvis Presley Enterprises, LLC v. City of Memphis*, 2019 U.S. Dist. LEXIS 136373 (W.D. Tenn., August 13, 2019).

<sup>10</sup> *Phillips v. Montgomery County*, 442 S.W. 3d 233 (Tenn. 2014).

<sup>11</sup> 28 U.S.C §1491(a)(1) (2019).

# DAMAGES CAP ISSUE NOW IN THE HANDS OF THE TENNESSEE SUPREME COURT

In 2011, the Tennessee legislature passed the Tennessee Civil Justice Act, codified as Tenn. Code Ann. § 29-39-102.<sup>1</sup> In relevant part, the Act capped the non-economic damages that could be awarded in civil cases to \$750,000, regardless of the amount the jury awards.<sup>2</sup> Insurance companies and pro-business lobbyists promoted it as a way to bring businesses to Tennessee and to give said businesses a sense of “predictability and clarity” by avoiding “runaway verdicts” in negligence cases.<sup>3</sup>

Attorneys John Vail and Edmund Schmidt, III claim, however, “the difference between the kind of adjudication to which plaintiffs are entitled [through both the United States and Tennessee Constitutions] and the kind of adjudication they get with caps is analogous to the difference between custom-tailored clothing and off-the-rack clothing, and in this case nothing is available in large or extra-large.”<sup>4</sup> Vail and Schmidt represent Jodi McClay in *McClay v. Airport Management Services, LLC*, the federal court case that has brought the damages cap issue to the legal forefront in our state.

## The McClay Case

In *McClay*, the plaintiff, a resident of California, stopped at a Hudson News shop in Nashville during her air travels in 2016. When she retrieved a drink and closed the cooler door, a long, heavy board that had been leaned against the bottom of the cooler fell and crushed her ankle.<sup>5</sup> She was immediately treated in Nashville and continued treatment and physical therapy upon her return to California. When her pain did not subside, she sought further treatment and was diagnosed with Complex Regional Pain Syndrome. The case went to trial in federal court in Nashville, and ultimately the jury awarded Ms. McClay \$444,500 for future medical expenses and \$930,000 for pain, suffering, and loss of enjoyment of life.<sup>6</sup>

While the economic damages award could stand, the federal court judge knew the non-economic damages award exceeded the statutory damages cap. He sought the assistance of the Tennessee Supreme Court, who agreed to take up the question. They heard oral arguments on the issue in September of last year. Specifically, the Court accepted three certified questions from the federal district court.<sup>7</sup>

1. Does the damages cap violate a plaintiff’s right to a trial by jury under the Tennessee Constitution?
2. Does the damages cap violate Tennessee’s constitutional doctrine of separation of powers between the legislative and judicial branches?

## The Plaintiff’s Arguments

Vail and Schmidt’s arguments to the Tennessee Supreme Court

mirror other high courts’ reasoning for striking down damage caps within their own states. Most importantly, the drafters of the Tennessee Constitution took the enumerated rights of their citizenry very seriously, declaring that such rights “shall never be violated on any pretense whatsoever.”<sup>8</sup> Additionally, the Court has protected these rights, stating the “General Assembly has no constitutional power to enact rules that infringe upon the protections of the Declaration of Rights.”<sup>9</sup>

In other words, the right to a trial by jury, the full remedy afforded to persons who have been wronged, includes more than the right to appear at the courthouse and have your case heard by twelve of your peers. The jury is the judge of damages. The amount of damages in a case at law is a fact to be determined by the jury,<sup>10</sup> and there has been no variation in the methods juries used to exercise this function since the

Constitution was adopted.<sup>11</sup> Further, the damages cap affects a very small percentage of the litigation in our state; those that juries have found to be the most meritorious; and the cap certainly does not make the jury awards any more objective.<sup>12</sup> Instead, the caps “merely substitute the subjective judgment of the legislature for that of the jury”<sup>13</sup> - effectively taking the jury’s specifically-considered and custom-tailored award and giving the legislature the right to present a plaintiff they don’t know with a generic, ill-fitting amount of money for a harm that it knows nothing about.

Not only does the damages cap take away the right to a trial by jury, and replace the jury’s decision with that of the legislature, the jurors generally never find out this cap will be applied to the case they just decided. Said one juror in a case whose award was later adjusted to the damages cap,

This law is an insult to the people of Tennessee who dutifully serve as jurors. It is just plain wrong to assemble jurors in a case, tell them what they need to do, they do it in good faith, believing they are doing the right thing, only to learn later their votes didn’t matter and their votes don’t count. . . . Why doesn’t the Legislature trust us to vote when fulfilling jury duty? Our vote counts when we step into the voting booth. Obviously our vote does not count when we step into the jury box.<sup>14</sup>

For demographic context, three states that border Tennessee (Arkansas, Kentucky, and North Carolina) do not have caps on non-economic awards. Three bordering states (Alabama, Missouri, and Georgia) have had this type of legislation struck down by the courts.<sup>15</sup> These same states, in their findings, distinguished legislative damages caps from judicial remittitur, governmental tort liability actions, and workers’ compensation when promoting the inviolate right to trial by jury. Because the sovereign was originally immune, a jury has never





By: Sarah M. Booher  
OEB Law, PLLC



had a right to hear and decide claims against the state. With workers' compensation cases, an employee voluntarily waives the right to a trial by jury by accepting the employment. However, the jury has always had the right to hear and decide tort cases in our respective states. Of the others, Mississippi has a medical malpractice damage cap which was struck down by a trial court and challenged, but the issue has not yet made it to the high court.<sup>16</sup> A Virginia medical malpractice cap was upheld in 1989 and 1999.<sup>17</sup>

### The Defendant's Arguments

Arguments made by Defendant's attorneys also mirror the reasoning set forth by courts in states where damages caps were upheld. States like Ohio and Idaho upheld their damages cap (noticeably lower than Tennessee's), with the Idaho Supreme Court stating "the jury is still allowed to act as the fact finder in personal injury cases. The statute simply limits the legal consequences of the jury's finding."<sup>18</sup> Oregon also upheld the legislative caps, finding, "Nothing in the [constitutional right to a jury trial], its history, or our cases interpreting it suggests that the framers intended such sweeping consequences in guaranteeing the right to have a jury rather than a judge decide claims and defenses commonly heard at common law."<sup>19</sup>

Nebraska also asserts that the jury is still the fact finder for a civil case, but that the remedy is a question of law, not facts. It is the judge's duty to apply the law to the facts as found by the jury.<sup>20</sup> Oregon supports the position that damage caps are as much a limitation on common law recovery as are foreseeability and proximate cause.<sup>21</sup> It is just another mechanism for setting parameters around liability and exposure.

Attorneys for the defendant further cite other situations where the legislature has codified or modified the recovery available in other civil cases. For example, those defendants determined to have breached a contract in Tennessee are liable in treble the amount of damages resulting from the breach.<sup>22</sup> Likewise, when someone negligently cuts the timber on the property of another, the damages are statutorily determined to be the amount double that of the current market value of the timber.<sup>23</sup>



Despite numerous efforts to the contrary, these remedy codifications and other constraints like statutes of limitations and repose imposed by the legislature have not been stuck down or invalidated by the Court.<sup>24</sup> Similarly, while there is a separation of powers within the three branches of government, the branches are at some points interdependent. One such interdependency is that it is within the legislature's purview to abrogate common law (such as alienation of affection or criminal conversation).<sup>25</sup> Therefore, it follows that it may codify the damage caps without violating the separation of powers doctrine.

While our Supreme Court has yet to render its decision, the Sixth Circuit Court of Appeals has already struck down a Tennessee cap on punitive damages. There, a jury's punitive damage award of \$3 million was upheld when a life insurance company attempted to prevent paying out on two children's 2013 life insurance claim after their father died.<sup>26</sup> Perhaps no one will be more interested in the pending outcome of the *McClay* decision than the relief clean-up workers in the TVA coal ash spill case. They were cleared last November to seek damages in their case against contractor Jacobs Engineering.<sup>27</sup>

<sup>1</sup> 2011 Tenn. Laws Pub Ch. 510 (H.B. 2008).

<sup>2</sup> Jamie Satterfield, *High Court Weighs Damages Cap Law*, Knoxville News Sentinel, Sept. 6, 2019.

<sup>3</sup> *Id.*

<sup>4</sup> Plaintiff's/Petitioner's Brief at 13, *McClay v. Airport Management Services, LLC*, No. M2019-00511-SC-R23-CV (Tenn. Apr. 10, 2019).

<sup>5</sup> Satterfield, *supra* note ii.

<sup>6</sup> Pet'r's Br. xi.

<sup>7</sup> *Id.* at ix. The Court was also asked to decide if the cap violates the Tennessee Constitution by disproportionately discriminating against women. McClay's attorneys argue that non-economic damage caps have been found to disproportionately affect women because they specifically compensate the kinds of injuries that are not measured in markets. For example, in gynecological torts, non-economic damages comprise, on average, eighty-three percent of amounts awarded. However, counsel for the defense argues the law is neutral on its face and fulfills the law's purpose to create predictability and clarity, thereby requiring no heightened scrutiny.

<sup>8</sup> Tenn. Const. Art. XI, § 16.

<sup>9</sup> *State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001).

<sup>10</sup> *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 353 (6th Cir. 2018)(petition for rehearing denied Mar. 28, 2019).

<sup>11</sup> Pet'r's Br. 3.

<sup>12</sup> *Id.* at 3, 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.* at 9, note 4.

<sup>16</sup> *Tanner v. Eagle Oil & Gas Co.*, 2012 WL 7748580 (Miss. Cir., 2012).

<sup>17</sup> *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 96, 376 S.E.2d 525, 529 (1989).

<sup>18</sup> Brief of Defendant/Respondent Airport Management Services, LLC at , *McClay v. Airport Management Services, LLC*, No. M2019-00511-SC-R23-CV (Tenn. Apr. 29, 2019).

<sup>19</sup> Resp't's Br. at 26.

<sup>20</sup> *Id.* at 33.

<sup>21</sup> *Id.* at 34.

<sup>22</sup> Tenn. Code Ann. § 47-50-109.

<sup>23</sup> Tenn. Code Ann. § 43-28-312.

<sup>24</sup> Resp't's Br. at 40-41.

<sup>25</sup> Resp't's Br. at 46, 49.

<sup>26</sup> Jamie Satterfield, *Knox Parents Urge Tennessee's Attorney General to Fight for Cap on Damages*, Knoxville News Sentinel, Apr. 26, 2019.

<sup>27</sup> Satterfield, *supra* note ii.



By: Sarah M. Booher  
OEB Law, PLLC

# ME, MYSELF, AND I: LEARNING TOGETHER

This month we are talking about the proper uses of *me*, *myself*, and *I*. They are often a humdinger for us all, present company perhaps worst of all.

## *I and Me*

If my mother were to say, “You are the best thing that’s ever happened to your dad and I,” would it be as grammatically correct as it is factually correct? Unfortunately, no.

Often, the confusion comes when another person is involved in the sentence. Thus, the easiest way to figure out whether a sentence should use *I* or *me* is to remove that person from the equation and to figure out what is correct with fewer moving pieces. In other words, my mother should bring me a cake on my birthday, look me dead in the eye (after practicing it in her head), and say, “You are the best thing that’s ever happened to me. I think your dad would agree.”



Let’s extrapolate that just a little bit then. It wouldn’t be correct to say, “They plan to bring Mike and I our small Diet Cokes and Butterfinger Blasts together.” Why? Because in addition to our obvious caloric confusion, we generally don’t say, “They plan to bring I my small Diet Coke and Butterfinger Blast together.” In that sentence, when I take Mike away and keep all the food for myself, it

clearly should be brought to *me*. So when you let your friends back into your dessert plans, be sure it’s *me* and not *I*.

Another example: “You gave Amy and I just what we needed; that air fryer is perfect for feigning our enthusiasm for our New Year’s resolution.” I’ll admit that is rolls off the tongue quite nicely. Regrettably, it is wrong. Remove Amy and it just wouldn’t be right to say, “You gave I just what I needed.” Instead, one would more reasonably say, “You gave me just what I needed.”

But don’t get fooled into thinking that *I* is never proper. You certainly wouldn’t want to say, “The kids wanted to hear the 90s country karaoke that Trina and me prepared,” because it was *I* who prepared, not *me*. Trina just picked the song.

With a little bit of practice and some patience with yourself as you do some mental talking ahead of talking to others, *me* and *I* can be navigated pretty easily and quickly.

## *Myself*

I will honest with you, though. It isn’t those words that get me – it’s *myself*. I have struggled with *myself* for years on a variety of levels. Let’s work it out together.

Reflexive pronouns are words ending in *-self* or *-selves* that are used when the subject and the object of a sentence are

the same (e.g., I believe in myself). They can act as either objects or indirect objects. The nine English reflexive pronouns are *myself*, *yourself*, *himself*, *herself*, *oneself*, *itself*, *ourselves*, *yourselves*, and *themselves*.<sup>1</sup> Reflexive pronouns reflect back on the sentence subject.

It’s like looking in a mirror. The being looking in the mirror is the subject and that which is reflected back is the reflexive pronoun.



Whew! The reflexive personal pronoun *myself* is complicated for sure, but just remember to use *myself* as the object of a sentence and/or as an intensive pronoun to give your sentence intensity. In other words, *myself* is never used as a subject pronoun. This is the rule, but what in the world does that mean in practice? Let’s try a couple.

“I (subject) see (verb) myself (reflexive objective pronoun) eating a big chocolate cookie.” You’d never write “Myself ate a big chocolate cookie.” You can also use *myself* to direct the action expressed by the verb back to the subject. “I found myself the only one in favor of the move.”

*Myself* also serves as an intensive pronoun. Intensive pronouns are reflexive pronouns used to emphasize the subject or antecedent in a sentence, often in the sense of “and not someone else.” You can tell when a word ending in *-self* or *-selves* is being used as an intensive pronoun because the sentence it is part of will not change in meaning significantly if you remove it<sup>2</sup> (whereas reflexive pronouns are required for the sentence to make sense).

Use *myself* as an intensive pronoun to highlight a noun or pronoun already expressed. “I will contact her myself.” “I will contact her” has the same meaning but adding *myself* adds intensity. Likewise, if Baby Yoda himself won the internet’s heart, you understand the sentence without *himself* there, but you also understand that the noble Mandalorian is not currently a viral meme sensation (and please don’t flood my inbox with debates over whether it’s actually Yoda or just one of his species).

And with that all sorted, gentle readers, I think I’ll make myself a hot tea and head to bed.

*Correction: Grammar Grinch would like to take this opportunity to highlight the importance of proper pacing and good editing while apologizing for two errors in the “Christmas in Quotation Marks” issue. She meant to say catty (not caddy) and rapport (not report) in her last article.*

<sup>1</sup> Catherine Traffis, *What is A Reflexive Pronoun?*, GRAMMARLY BLOG, available at <https://www.grammarly.com/blog/reflexive-pronouns/>.

<sup>2</sup> GRAMMARLY BLOG, *What is an Intensive Pronoun?* Available at <https://www.grammarly.com/blog/intensive-pronouns/>.

By: Melissa B. Carrasco

*Egerton, McAfee, Armistead & Davis, P.C.*

# THE LAST IMPRESSION

There is an empty office on the fourteenth floor of the Riverview Tower. It has been one month since there was any furniture in that office. From the doorway, you can see three, undecorated, off-white walls with a few nail holes here and there. The fourth wall is a wall of floor-to-ceiling windows that overlook the Tennessee River.

The carpet is a standard, dark gray, and the only indication that the office wasn't always empty is the three red lights sitting in the sill of the last, floor-to-ceiling window. The lights are on a standard, Shortel office telephone. The screen reads, "W. McClamroch 506." The three red lights indicate that the phone is set to "In a Meeting-DND."

That has been the setting since May 5, 2018. Apparently, it has been a really long meeting. Actually, this is rather ironic because the former occupant of this office was a bit of a paradox in this area. On the one hand, Rocky was a self-proclaimed detester of long meetings. "Why can't people just say what they mean and then stop talking so we can get done?" he would wonder, loudly and often. On the other hand, he was famous for being able to extend a meeting with just one more thought. . . or story.

He was the guy in your ninth-grade Algebra class who popped his hand up every time the teacher asked, "does anyone have any questions?" Then everyone had to stay an extra ten minutes to listen to the question, the answer, and the follow-up question.

Rocky thought out loud. If he was thinking it, you knew it because he told you . . . and then he would tell you again . . . and then he would tell someone else that he had told you what he told you. This is how Rocky worked through problems – whether it was a legal problem, or an interpersonal problem, or the problem of people not using the document management system properly, or the problem with healthcare in America.

Rocky thought out loud. But, where a legal issue was concerned, if you had the patience to walk with him through all of these thoughts, the result usually was a solution that wove together legal nuances like an elegant, sturdy tapestry.

Those three red lights say a lot, but if you look more closely, you will see something else. There, in the dark, gray carpet, you can see marks. You can see four circles, where the table used to sit. That table was the place where business deals were planned, legal strategies vetted, and families discussed. He was so very proud of his wife and kids, but he also didn't mind hearing how proud you were of your own family.

You can see the rectangle of the large desk where Rocky would sit, hidden by a tower of monitors. A few feet away, are the four, small circles where a chair used to sit. This is where shareholders and associates alike would sit while Rocky thought through whatever issue they wanted to discuss. . . and whatever topic Rocky wanted to add.

Usually, the conversation would start with, "I just want to run something by you, do you have a minute?" Then, Rocky would stop whatever he was doing, and you would go sit in the chair. Before you

knew it, you had been in that chair for an hour and had talked about everything except for the original question. Then, you would get back to the original question and leave with a solution – or homework – because Rocky was also famous for thinking of things that you hadn't thought about before and letting you know that you would be a complete moron if you didn't figure out this other thing before doing what you thought you were going to do.

That is the impression that I will always have of Rocky McClamroch. Rocky took the time to figure things out and respected the expertise of others. Degrees, CVs, and bios didn't matter to Rocky. You had to prove that you knew what you were doing and why you were doing it. But, once you did that, he respected you and your expertise.

If he had the expertise in an area, he never let me leave until I understood the issue, and all of the details of the issue, and why the issue mattered, and whether the issue mattered a lot or a little. It was also reciprocal. If I was the person with the expertise in a particular area, then he wouldn't leave until he understood the issue, and all of the details of the issue, and why the issue mattered, and whether the issue mattered a lot or a little.

During the Middle Ages there were things called badges of nobility or "impresa." These were emblems, sewn onto clothing, impressed into leather, or painted onto wood and stone. It was a distinctive mark which signified belonging – to a particular family, order, tradition, or political party.<sup>1</sup> The impresa and the traditions and values they represented were passed down from generation to generation as a sign of nobility. Noble people make a lasting impression.

It has been nineteen months since Rocky died in a bicycle accident. The meetings may be shorter (sometimes), but there is still a sense that something, someone, is missing. At some point, the impressions in the carpet of his office will fade. Carpet has a short memory. New furniture and a new occupant will move into that office. Even so, the impression which Rocky made will last, not in the carpet but in the people who knew him, like a badge of nobility in the oddest places.

At some point before your first job interview or some important meeting, someone likely reminded you that you never get a second chance to make a first impression. That is true, but the converse is also true: you never get a second chance to make a last impression. We rarely know what day may be our last, which makes the last impression more important than the first.

“**Y**ou never  
get a  
second  
chance to make a last  
impression.”

<sup>1</sup> See Three Gold Bees Sabine du Bourbonnais, *Heraldic Badges*, available at <https://threegoldbees.com/collegia-notes/heraldic-badges/>.



## barrister bullets

### MONTHLY MEETING

Everyone is invited to attend the Barristers' monthly meetings, which are held on the second Wednesday of every month at the Bistro by the Bijou (807 South Gay Street). Social time begins at 5:00 p.m., and the meeting begins promptly at 5:15 p.m. The first meeting of the year will be held on February 12, 2020. There are many opportunities to get involved, so please contact Barristers President, **Allison Jackson** (ajackson@emlaw.com) or Vice President, **Amanda Tonkin** (amanda.tonkin@ssa.gov) for more information.

### CLE

The CLE Committee will be meeting in early 2020 to begin planning informative and entertaining CLEs for the upcoming year. Please feel free to submit any ideas you may have to **Caitlyn Elam** (CElam@LewisThomason.com) or **Jared Garceau** (JGarceau@LewisThomason.com).

### CONSTITUTION DAY & SCHOOL OUTREACH

The Constitution and School Outreach Committee is now accepting nominations for the Law & Liberty Award. The deadline to submit a nomination is April 10. The recipient should be visible to the legal profession and local bar association. The recipient should strive to foster and to maintain good relationships between the legal profession and the community, work to advance the understanding of the law and legal processes in the non-legal community, set an example of good citizenship, give time for volunteer work, both within the legal profession and otherwise, evidence high professional standards in his or her occupation, express concern for the safeguard of personal, political, civil, and religious liberties and should be someone whose work is not normally recognized. Nominees do not have to be attorneys to qualify for the Law and Liberty Award. Consider those individuals in your firm, in local civic and religious organizations, or in the community who have worked to improve our legal system and protect our civil liberties. Please contact **Zack Walden** (zwalden@eblaw.us) or **Mikel Towe** (mtowe@lewis-thomason.com) with nominations or if you have any questions.

### MOCK TRIAL

The KBA Mock Trial Competition will take place from February 21st through 23rd, 2020. A final schedule and volunteer information will be coming soon, but please contact **Erica Green** (egreen@kramer-rayson.com) or **Jimmy Snodgrass** (jimmy\_snodgrass@tned.uscourts.gov) with any questions!

### VETERANS LEGAL CLINIC

The Veterans' Legal Advice Clinic is a joint project of the Knoxville Barristers, the Young Lawyers Division of the Knoxville Bar Association (KBA), KBA/Barristers Access to Justice Committees, Legal Aid of East Tennessee, Knox County Public Defender's Community Law Office, the University of Tennessee College of Law, and the local VA office. This is a general advice and referral clinic which will require attorney volunteers for its operation, and it is anticipated to serve between 20 and 30 veterans in the community each month with a wide variety of legal issues, including family law, landlord/tenant, bankruptcy, criminal defense, consumer protection, contract disputes, child support, and personal injury, among other issues. We need volunteers for the next two clinics on February 12 and March 11 from 12:00 p.m. to 2:00 p.m. at the Knox County Public Defender's Community Law Office at 1101 Liberty Street, Knoxville TN 37912. Register by clicking on February 12 or March 11 in the Event Calendar at [www.knoxbar.org](http://www.knoxbar.org).

### VOLUNTEER BREAKFAST

The Volunteer Breakfast is a recurring event on the 4th Thursday of each month at 6:15 a.m. The Barristers Volunteer Breakfast Committee always needs volunteers to serve food or sponsor. The cost is \$150 for sponsoring, and we need 4-5 volunteers. If you are unable to fund the breakfast, the Barristers will subsidize the cost of the breakfast. We meet at 6:15 a.m. and serve breakfast to approximately 30-40 individuals, generally leaving the site around 7:30 a.m. It's a great way to serve the community! The committee is in need of a sponsor and 4-5 volunteers for the March 26, 2020 breakfast. Please contact **Matt Knable** (knablelaw@gmail.com) or **Mitchell Panter** (mpanter@LewisThomason.com) to volunteer or for more information.



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By: Joe Jarret

Attorney At Law, University of Tennessee



# ALL ABOARD! THE LAW & FOLKLORE OF STEAMBOATING IN TENNESSEE

## The Taming of the Shoals

Until the beginning of the 19th century, Alabama's Muscle Shoals – a series of irregular rock formations that formed shallow and often turbulent pockets of rushing current – stood in the way of navigation and commerce on the Tennessee River (which begins at the confluence of the Holston and French Broad Rivers, just east of Knoxville). The shoals slowed the movement of goods to and from upstream farms and the travel of settlers to new farming lands to the west. Enter the steamboat. The workaday, 19<sup>th</sup> Century Tennessee steamboat was a small, three-hundred-ton, low-draft (drawing only two to three feet) stern-wheeled craft with few fancy trappings and an average life span of five years. Peak shipping time occurred during high water, when steamers carrying flour, pork, whiskey, tobacco, cotton, livestock, and passengers dotted the Mississippi, Tennessee, and Cumberland Rivers. Steamers on these waterways carried crews of twelve, including a captain, pilot, engineer, mate, and deck hands. The men varied in age according to their rank and occupation. The common hands included farm boys, city urchins, and an increasing number of Irish and German immigrants and freed slaves.<sup>1</sup>

## The Steamboat Comes to Knoxville

As steamboats began to appear on the Tennessee River, Knoxville's civic and business leaders wanted to get in on the action. As such, the people of the City of Knoxville constructed a wharf large enough to accommodate a steamboat, and offered a \$1,000 incentive for the first steamboat to dock there. It was Captain Trotter, from East Tennessee, piloting the *Atlas* who claimed the prize in 1828. Because this was a time before the invention of the steam whistle, a small cannon heralded the approach and departure of the boat. People on the boat's route flocked to the riverbank to cheer her on. Captain Bearden of Knoxville made the next venture piloting the aptly named steamboat *Knoxville*. Christened in 1831, the *Knoxville* ran intermittently between its namesake city and Decatur, Alabama, up until the beginning of the Civil War. With the increase of steamboat traffic commerce came subsidized river improvements, undertaken by the U.S. Army Corps of Engineers. Captain Henry Miller Shreve (the American inventor and steamboat captain who opened the Mississippi, Ohio, and Red rivers to steamboat navigation), developed a steam-powered snag-pulling apparatus, mounted to his steamer *Heliopolis*, that achieved fame on the Lower Mississippi as "Uncle Sam's Tooth-Puller." More than one ship's captain owed a debt of gratitude to Captain Shreve (for whom the city of Shreveport, Louisiana is named) for saving their ships from the treacherous shoals.<sup>2,3</sup>

With the advent of the steamboat, the once-silent Mississippi, Cumberland, and Tennessee Rivers echoed early with the sounds of the Industrial Revolution. On the Upper and Lower Cumberland and the Lower Mississippi business boomed, making towns like Knoxville and

Memphis a rollicking picture of steamers, bustling dockworkers, and a wide variety of merchandise.

## Enter the Tennessee Legislature

As steamboat trade and traffic became more commonplace, the Tennessee Legislature deemed it time to regulate such activities. Consequently, during the 1881 Legislative Session, the Legislature enacted Acts 1881, ch. 66 entitled "Actions against steamboat owners." Interestingly, the law read then, as it does today:

(a) All persons, resident and nonresident of this state, running and operating steamboats in any of the rivers in or bordering on this state as common carriers, may be sued in law or equity in any county where the boat or boats of such person lands, for any cause of action or suit growing

out of or connected with the business carried on or done by or in connection with the running and use of the boat or boats.

(b) Service of process on any captain or clerk of any boat of such person, whether it is the particular boat complained of or immediately connected with the transaction out of which the cause of suit or action originates or not, shall be sufficient to bring such person into court.<sup>4</sup>

## The Beginning of the End of an Era

After a major setback during the Panic of 1837,<sup>5</sup> the Tennessee steamboat trade stabilized, but never regained its

earlier profits and glamour. Ironically, as steamers supplanted flatboats and keelboats, railroads poised to cripple all these modes of river commerce. The rise of railroads and the Civil War closed most western river commercial traffic and marked a watershed for the Steamboat Age in Tennessee. Postbellum statistics show a gradual shift in almost every market, except coal, from river to rail transport. Nevertheless, steamboats did not immediately, or entirely, disappear. Steamers continued to serve the urban centers, as well as hundreds of smaller ports and landings. On the Upper Cumberland River, poor roads and the late arrival of the railroads perpetuated a vibrant market for steamers well into the opening decades of the twentieth century.<sup>6</sup> And so, alas, the steamboat paddled noisily into the sunset and the history books.



<sup>1</sup> <https://tennesseencyclopedia.net/entries/steamboating/>

<sup>2</sup> *Id.*

<sup>3</sup> "Henry Miller Shreve", A Dictionary of Louisiana Biography, Vol. II (1988), p. 741

<sup>4</sup> Acts 1881, ch. 66 is presently codified as Tenn. Code Ann. § 20-2-208, albeit the title remains the same.

<sup>5</sup> A financial crisis involving an unstable currency and financial system resulting in a lack of confidence in both government and the banks. According to historians, the Panic of 1837 had many causes, some related to the ill-judged policies of President Andrew Jackson's administration, some completely beyond the control of any president or any government.

<sup>6</sup> <https://www.tva.gov/About-TVA/Our-History/Built-for-the-People/A-Dam-for-the-People>





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By: Robbie Pryor

*Pryor, Priest & Harber**robertpryorjr.blogspot.com*

# RESOLUTIONS - A NEW YEAR

## Busking in Market Square

The enthusiasms and dreams of youth do not die. They take up residence in the unconscious mind waiting for a moment to materialize. The lawyer knows this more than anyone.

It was a warm day. I carried my guitar case to the living room of my downtown condo, placed it on the couch and reached for my Martin DR-15 acoustic. More beautiful than any piece of furniture I own, it is always on display. To keep it in a case would be like storing the Mona Lisa in a closet. It rarely travels for it is an embodiment of a dream that is mine and mine alone. I sat down and plucked a G-chord, making sure the sound was right. I can never pass this masterpiece without picking it up. The night before, I'd tuned the guitar and ran through my set list - 5 songs. Though it looks like it could play itself, in my hands it has suffered its share of insult and embarrassment. Gifting it to someone of my skill is akin to handing a Stradivarius to a rhesus monkey, but that is what my father did a few years back. It opened a portal to a dream of youth. It is the best gift I ever received. If tuned right and given time to warm up, I can surprise and fool the uneducated listener. I taught myself to play. Books, YouTube, charts, and internet guitar tabs have been my training ground. I know a grand total of approximately 7 chords. Knowing them is one thing. Moving effortlessly among them is quite another. If I could figure out how to play bar chords, it would change my world. However, on this warm day I moved with purpose as I prepared to carry the Martin to my "gig."

If my prowess with a guitar is average at best, my singing voice is three steps below. It is quite a shame considering my exceptional stage presence. As it turns out, it is the great irony of my life. The spotlight is in my DNA. I would love to submit a sample to 23andME. I have no doubt that my roots are in Vaudeville, but, unfortunately, somewhere along the way the genetics were contaminated. I lack that one element to make the recipe work - the ability to sing. The Creator gave me a voice fit for the shower and not an inch beyond.

Still, it was time. The guitar case holds the aroma of the C. F. Martin & Co. factory in Nazareth, Pennsylvania, complete with tones of craftsmanship and pine, creativity and optimism. It conjures hope and magic. I placed my guitar into the case, closed the top, and fixed the clasps into place, and walked out the door.

Jeans, torn at the knee, and an old t-shirt comprised my attire. I threw on an old baseball cap to complete the look. I'd grown a bit of a beard so that I was a bit unrecognizable. I walked down Gay Street, turned right on Wall and then made my way down the east side of the square, beyond Preservation Pub and Scruffy City, places where musicians - like me - played late into the night and early morning.

I situated myself on the bench near Cafe 4, a place where I'd met a girl nearly nineteen years earlier. That very same girl stood in the shadow of the trees, somewhat in disguise herself, nervously anticipating what she knew would be, without doubt, a disaster.

I lifted the instrument from its case, rolled the capo onto the third fret, and kicked the case to the side to catch the cash that would inevitably fall. I felt the crowd converge. The mumbles and sounds of the square - dogs barking, babies crying, people talking - faded as I reached for the plastic pick and rested the Martin on my knee. When I looked up they were staring at me in anticipation. I ran the pick across the strings, striking the first notes of Wagon Wheel (Old Crow Medicine Show version) and we were off to the races. Then, I woke up. This is the point where I always wake up.

We all need dreams, resolutions. I've rarely met a lawyer who believed he or she was born to be a "lawyer." In the back row of Circuit Court on motion day, with the murmur of technical and legal arguments in the air, our minds find somewhere to go. In the rhythms of a standard car wreck deposition or in the back row pew of a Sunday service, all of us slide off to another place from time-to-time and take note of things we wish we could do. We drift to where we possess the talents of others or meet with a different destiny. Sometimes we dust off the dreams of youth. The older we get, the more likely these dreams often fit into a drawer entitled "regrets." According to the studies, and more than any other professional, the lawyer is burdened by his/her decision and lifetime commitment to this profession. It's a hard way to make a living.

I'm a lawyer and proud to be, but a dream still pushes me around. It has evolved and is more modest than the one bolstered by the enthusiasms of youth. I'm not going to be a rockstar. I don't have to play the Bijou, The Tennessee Theatre or Thompson Boling Arena. I just want to play Market Square, on a bench beneath the shade on a mild summer day's sun, to feel the anticipation and anxiety, open a musical artery to bleed for the crowd. It might surprise that it isn't about the adoration of the crowd or need for attention. In fact, Nancy is likely the only one to get advance notice. She is, after all, the one who has had to endure the years of preparation for a 5-song set. I'm willing to subject the unfortunate public to my lack of talent for another, better, and beautiful reason - to steal from the Universe what I know was a moment not intended for me. I was not meant for the stage with a guitar in my hand. So, I will steal the moment and tell of it to friends and family who will doubt my veracity and sanity, but I will have it in 2020. Will you get yours?



**"The older we get,  
the more likely  
these dreams often  
fit into a drawer entitled  
"regrets."**



## BILL & PHIL'S GADGET OF THE MONTH

**By: Bill Ramsey**

*Neal & Harwell*

**By: Phil Hampton**

*Founder and CEO, LogicForce Consulting*

# WIRELESS EAR BUD MADNESS

We have been fans of Bluetooth wireless ear buds that will pair with our phones for some time; but it seems here lately that the wireless ear bud genre has skyrocketed in popularity. Probably the main driving force behind this frenzy is the fact that major phone vendors (mainly Apple, Samsung, and Google) have been dropping the 3.5mm headphone jack from their new phone models, so users have been forced to look for alternatives to the traditional wired headphones, including Bluetooth wireless ear buds. Secondly, the quality of some of these wireless ear buds has increased dramatically over the past couple of years. Now it is quite common to see folks with their wireless ear buds at the gym, on the sidewalk, at the airport, and even in the office. But there are so many options now with many manufacturers getting in on the action, that you might be confused as to which solution is the best bang for your buck. While we haven't tried every wireless ear bud on the market, between the two of us, we've tried out quite a few. Here are some of our favorites.



**Apple AirPods Pro:** This is Apple's replacement for the original AirPods earbuds. The AirPods Pro will outsell all of the other buds in this review, combined, because of the popularity of the Apple iPhone. They are expensive, but worth it. They will make you forget how you look with white things hanging out your ears. They fit great, and your iPhone's app will even tell you when you have picked the right tips and the perfect fit. They are vented to avoid the "stopped up" feeling when you have earbuds in your ear. They feature a new design, active noise cancellation and improved sound quality, and they're water- and sweat-resistant. They also have a "transparency mode" that allows you to hear outside sounds when you are riding your scooter. The sound quality is better than, or at least on par with, the sound quality of all the earbuds on the market.



**Bose SoundSport Free wireless headphones:** We love Bose sound and these small Bose speakers for your ears do not disappoint. While the price point for the SoundSport ear buds is at the top end of the scale at \$199.95; the quality of the sound from these ear buds is definitely at the top of the scale as well. In addition to sounding incredible, these ear buds have one of the best fits in terms of staying in place and not falling out. In addition they are sweat proof, meaning they are a terrific addition to take with you to the gym. You get about 5 hours of playing time on one charge; and the handy storage case also will re-charge the buds an additional 2 times. About the only thing we wish we could change about the Bose SoundSport ear buds is the actual size. They are just a little bit bulky in the ear, which is not really uncomfortable; but they are just really visibly noticeable when you have them on. We don't care so much as long as the sound is good. And the sound is really, really good.



**Samsung Galaxy Buds:** While Samsung's entry into the wireless ear bud market, the Galaxy Buds, can be paired with any smartphone via Bluetooth, the integration is really tight with Samsung's Galaxy phone lineup. The Galaxy Buds are priced below Apple's popular AirPods at \$149; but we really don't think you sacrifice much, if anything, in sound quality by going with Galaxy Buds. We like Galaxy Buds not just for the superior sound but for the great fit and cosmetic appeal. They fit very securely in your ear with customizable wingtips and eartips to get the perfect fit. Of all the earbuds we have tried, these are probably the most compact and least conspicuous pair when you have them in your ear. This can be important if you don't want to appear too geeky when working up a sweat at the gym. Just like the other ear buds we have tried, the battery life is great and the storage case doubles as a re-charging unit. If you have a Galaxy phone, you can actually re-charge your ear buds by placing them on the back of the phone. With the Galaxy Wearable app you can adjust how much ambient noise you wish to hear through the ear buds, which can be useful when walking or running in a city environment while listening to music.



**Amazon Echo Buds:** Amazon recently introduced a new option with its Echo Buds. These ear buds are probably most similar to the Galaxy Buds in terms of how they look and fit; but, they clearly are not in the same league with the other ear buds we have tried in terms of sound quality. They are priced a little lower at \$129; which is still a little pricey, in our view, for the sound quality that the Echo Buds offer. It's not that the sound quality is terrible; it's just that when you compare the Echo Buds with AirPods, Bose SoundSport, or Galaxy Buds, there is a noticeable drop-off in quality. Of course, the Echo Buds name suggests a tie-in with Amazon's popular Echo Alexa voice assistant technology. With the Echo Buds you have the always-on Alexa assistant listening for voice commands. So, if you are so inclined, you could be working out at the gym or navigating public transportation in a busy city and still be able ask Alexa to do things for you handsfree, like playing the next tune, or giving directions to a restaurant, or whatever. We guess this is a great feature. We just feel a little strange talking to Alexa while in a crowded space with these ear buds in our ears. If the sound quality were top-notch, we wouldn't have any problem with Alexa listening while we're ear budding. Until Alexa can match the sound we find on the other ear bud options, we'll just leave her at home.

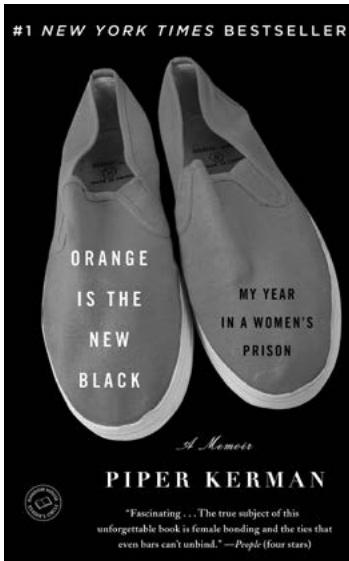


**Klipsch T10 True Wireless smart headphones, powered by Ear Micro:** If you really want to go "whole hog" and spend all your savings on a pair of earbuds, buy the Klipsch T10s. (They will come out later this year. They only cost \$649!) They will have their own built-in operating system with embedded "artificial intelligence." They will even respond to "advanced voice-control gestures," (whatever that means) "freeing a person's hands to seamlessly accomplish tasks on the go."

By: Elizabeth Ford  
Federal Public Defender's Office



# ORANGE IS THE NEW BLACK, A MEMOIR



In all honesty, I had no intention of liking anything about Orange Is the New Black, A Memoir by Piper Kerman, a Smith educated twenty-two year old who spent 15 months in the custody of the Bureau of Prisons (BOP) on a drug related charge. After all, I (unfortunately) know hundreds of people who have trudged through the federal criminal justice system and who have spent years in the custody of the BOP. What could Piper Kerman, a middle class woman with a relatively short sentence, tell me?

For the most part, I liked the book, and I agreed with ninety-five percent of what she had to say. Of course, the one exception is where she is highly critical of appointed counsel. There are many similarities between Piper Kerman and the indigent clients of the federal defender's office. Like many of our clients, Piper Kerman did not think that she would get caught. In fact, she had not had any contact with those in her conspiracy for many years when the Customs officers knocked at her door in 1998 to tell her that she had been indicted for her part in a drug crime. This was a crime which had occurred 5 years before. (For those of you wondering about things like statutes of limitations, the conspiracy continued long past the time that Piper withdrew.) The person who was arrested that day in 1998 bore little resemblance to the bored, spoiled new college graduate who followed her admitted drug dealing girlfriend around the world to places like Indonesia and the Netherlands. Like many girlfriends of drug dealers, she was for the most part just along for the ride to exotic places. However, she did enough favors for drug dealer Nora to exceed the standard for being merely present and moving to furthering the conspiracy so that she found herself facing a possible 10 year sentence. (I will be the first to admit that her retained lawyer did a magnificent job for her in successfully arguing that a sentence of 13 months was the appropriate sentence.)

At the time of her arrest, Piper was engaged to a man who had no idea about her sketchy past. When the story starts, she was even beginning to have success in the challenging advertising world in New York City. Because she agreed to cooperate, another 5 years passed before sentencing was set. During 5 years, she and her boyfriend did their best to carry on with their Manhattan lives, but the stress was paralyzing. When the sentencing day finally arrived, Piper actually felt relief, at least for a short period of time. She describes well what it must be like to have a sentence of unknown length hanging over one's head, and she also captures what the last 24 hours are like before one's report date.

Throughout the book, the author gives an accurate overview of federal sentencing law and federal criminal procedure. She cites statistics in a helpful way, making the point that the United States incarcerates so many, many of its citizens compared to other countries.

After she self surrenders, Piper learns to navigate the very strange world of the BOP. There are official rules, which she had researched before going to the camp at Danbury, and there were the arbitrary, ever changing rules enforced by some of the staff who seemed to delight in being cruel. She learns a new language and prison etiquette. Her creativity shows when she learns to make prison cheese cake. (See page 150 for the recipe. I have not tried it yet.) She also learns that she has a great deal in common with many of the people who were incarcerated with her. With only minor exceptions, she describes all of those around her as kind, generous people. She is able to tell their stories with humor and with empathy. If there is one complaint to be made, it is that a distance remains between her and the story that she tells throughout the entire book.

One of the main takeaways of the book is the failure of the system to provide services to inmates that will help them be successful when released. Preparation for how to find a job or how to find an apartment was non-existent or unrealistic. Piper Kerman recognizes that she was not the typical person released from prison. She had a boyfriend who was ready to marry her; she had a place to live; and she had a job waiting for her. The last section of the book is devoted to a list of resources to help people leaving prison. Without a doubt, helping people reenter society is critical to any former inmate's success, and Piper Kerman's story has continued in that she has spent a great deal of time post-prison lobbying for criminal justice reform. Here is where I put in a plug for supporting reentry programs such as the new one begun by U.S. Probation and Federal Defender Services. It would make Piper Kerman proud.

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By: Stewart Harris

Lincoln Memorial University  
Duncan School of Law

# THE ETHICALLY-CONSTRAINED PRESIDENT

As a lawyer, Abraham Lincoln faced many ethical conflicts, perhaps most notably in the Matson Slave Case, where he represented a slave owner trying to recover his runaway “property.” Lincoln resolved that conflict by losing the case, although not, as some claim, on purpose.

As president, Lincoln faced an even larger ethical dilemma, a conflict between his deeply-held personal beliefs and his oath of office. The Constitution of 1787, for all of its many strengths and its soaring rhetoric, was a profoundly immoral document. Our nation’s original sin was slavery, and our original Constitution did not merely allow it, but went to great lengths to protect it. If ever you have the chance to visit Montpelier, James Madison’s historic home, be sure to see the award-winning exhibit, “The Mere Distinction of Colour.” Part of that exhibit is a table-top display of the Constitution, surrounded by push-buttons. Press one of them, and a clause protecting slavery will light up. You’ll be shocked. You’re probably aware of the Fugitive Slave Clause and the Three-Fifths Clause. But did you know that another clause protected the international slave trade – perhaps the most monstrous part of a monstrous institution – for twenty years?

By 1861, the Constitution had been amended twelve times, but none of those amendments addressed slavery.

Lincoln struggled with the resulting dilemma. In 1864, he wrote: “I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel.”<sup>1</sup> He saw the hypocrisy of a nation that declared that all men are created equal even as it subjugated some men (and women) with the lash: “As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy.”<sup>2</sup>

On the other hand:

I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power.<sup>3</sup>

So Lincoln hated slavery. But he had sworn to uphold a constitution that protected slavery. What was he to do? The right thing? Or the constitutional thing?

Lincoln eventually decided to do . . . both. But it took him a while to get there.

Soon after the Civil War began, enslaved people began running toward the U.S. Army’s lines, and, they hoped, freedom. But Lincoln did not believe that he had the constitutional authority to free them without paying the compensation required by the Fifth Amendment. Nor did he believe he had the political power to do so, given that several loyal border

states – Missouri, Kentucky, Maryland, and Delaware – still allowed slavery.

Lincoln’s first and primary war aim was to preserve the nation. He famously wrote to newspaper editor Horace Greely:

If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do *not* believe it would help to save the Union.<sup>4</sup>

But as the war ground on, Lincoln came to realize that slaves were an asset to the rebellion, an asset he could seize, just as he could seize Confederate horses, or wagons, or guns. And he could employ those assets to save the nation:

I was, in my best judgment, driven to the alternative of either surrendering the Union, and with it, the Constitution, or of laying strong hand upon the colored element. I chose the latter. In choosing it, I hoped for greater gain than loss; but of this, I was not entirely confident. More than a year of trial now shows no loss by it . . . On the contrary, it shows a gain of quite a hundred and thirty thousand soldiers, seamen, and laborers. These are palpable facts, about which, as facts, there can be no cavilling. We have the men; and we could not have had them without the measure.<sup>5</sup>

Thus Lincoln reconciled his duty to the Constitution with his moral beliefs: He could free the slaves of the Confederacy because doing so was necessary to save the nation that he had sworn to “preserve, protect and defend.”<sup>6</sup>

At least as a wartime measure. To ensure that slavery was fully and finally abolished, Lincoln pushed Congress to pass the Thirteenth Amendment. Ultimately, to resolve a conflict between law and morality, Lincoln changed the law.

All of which has great personal meaning to me. Almost thirty-three years ago, my wife and I were married in the main hall of our alma mater, the University of Pennsylvania Law School. A bust of Lincoln gazed down upon us. Above Lincoln’s image was the University’s motto: “LEGES SINE MORIBUS VANAE.” In English: “Laws without morals are useless.”



<sup>1</sup> Letter to Albert Hodges, April 4, 1864, available online at <http://www.abrahamlincolnonline.org/lincoln/speeches/hodges.htm>.

<sup>2</sup> Undated scrap of paper, ca.1858, available at <https://quod.lib.umich.edu/lincoln/lincoln2/1:547?rgn=div1;view=fulltext>

<sup>3</sup> Letter to Albert Hodges, April 4, 1864, available online at <http://www.abrahamlincolnonline.org/lincoln/speeches/hodges.htm>.

<sup>4</sup> Letter to Horace Greely, August 22, 1862, available at <http://www.abrahamlincolnonline.org/lincoln/speeches/greeley.htm>

<sup>5</sup> Letter to Albert Hodges, April 4, 1864, available online at <http://www.abrahamlincolnonline.org/lincoln/speeches/hodges.htm>.

<sup>6</sup> U.S. Const. art II,



# GIFTS AND GRANOLA GOODNESS

Hugh and I are not gift-givers – not to each other, anyway. When we were younger, Hugh and I always tried to find unique and innovative gifts for each other. While I never managed to be terribly creative, he always did.

One year for my birthday, Hugh bought me a gift certificate for a stay in a haunted hotel because he knew that I enjoy a good ghost tour. What he did not realize was that my enjoyment of a ghost tour is learning about the history of whatever city we were in... not in the stories about ghosts themselves. I did use the gift certificate, but I cannot honestly tell you that I slept at all that night. Suffice it to say, I was happy to check out the next morning.

For Christmas that same year, he bought me a hot air balloon trip across Sonoma. He thought that a balloon trip would be a romantic way to see Northern California. While I enjoy watching hot air balloons in flight, I don't actually enjoy the open air flight itself. I. AM. DEATHLY. AFRAID. OF. HEIGHTS. I recall standing in the center of the basket, with a death grip onto the rail, eyes closed and praying that it would end. I may have kissed the ground when we landed. It was not exactly the romantic trip he had envisioned.

The year that we moved into our house, Hugh bought me a Miele vacuum cleaner for Christmas. His mother was actually appalled that he would buy me an appliance for a holiday and suggested that he refrain from giving gifts without a little input in the future.

As the years have evolved, we have gravitated toward joint purchases and "experiences" in lieu of gifts. This year, our wedding anniversary fell on Thanksgiving weekend. We had already planned to spend Thanksgiving in New York, so it was the perfect excuse to celebrate our anniversary. When we started making plans, we realized that my mom could stay with Trace at the hotel, meaning that we could go to dinner alone to celebrate. (This was the first time that happened in ten years. The last anniversary dinner we had without Trace was number 5 in Paris.)

After a lot of research and obtaining recommendations, Hugh scored a reservation at Eleven Madison Park, which is recognized as one of the best restaurants in the world. It did not disappoint. For over four hours, we enjoyed a nine-course dinner, which was capped off with a tour of the kitchen with the chef. Each dish was unique and perfectly prepared, and the staff was amazing. It was the dining experience of a lifetime. For a foodie like me, it was pure heaven.

As we were leaving, our server presented us with a menu showing our food selections so that we would remember the meal and a gift bag that contained two jars of their house-made granola. He told us that we could enjoy it for breakfast the next day. I had heard about the restaurant; however, I had not heard of the granola (which I now know to be a famous tradition).

The following morning, as we were getting ready for the Macy's Thanksgiving Day parade, Hugh opened the granola and started eating it straight out of the container. He knows I am not a granola eater, but he told me that I needed to try it. I did. Suffice it to say, we brought two empty jars home with us.

After the busy-ness of Christmas ended, Hugh and I made it our mission to find the Eleven Madison Park granola recipe. With a quick Google search, we found it. Since that time, our kitchen has become "granola central," with six to eight batches prepared each week. It has become "our thing." We have been making jars of it to give as gifts (thank you, A.C. Moore, for the great selection of clearance jars), and a fairly sizable amount gets consumed at our house. Since I cannot give each of you a jar, I thought I might share the recipe.

This one is quick... and it is easy to make. To prepare, preheat oven to 300°F. Line a baking sheet with parchment paper. In a medium bowl, mix together 2 ¾ cups of old fashioned rolled oats, 1 cup shelled pistachios (I use the pre-shelled salted and roasted one in the bulk area at Fresh Market because I am lazy like that), 1/3 cup raw pumpkin seeds, and 1 cup unsweetened coconut chips (not shredded coconut).

In a small saucepan (or in a microwave-safe container), combine ¾ cup light brown sugar, 1/3 cup extra virgin olive oil, and 1/3 cup maple syrup. Heat to medium and whisk occasionally until sugar is dissolved. Pour over oat mixture and fold until all of the dry ingredients are covered with the sugar-syrup mixture.

Spread oats along the prepared baking sheet. Bake until lightly golden, about 30-35 minutes. Remove from oven, cool, and place in a large bowl. Stir in one cup of dried cherries. Scoop into containers to eat or give away. Note: the dried cherries at Fresh Market tend to be sticky. I will put those on the parchment and "bake" them for about 7 minutes while the oven preheats. This tends to dry them out so that they don't stick to the granola.

It is easy – and oh-so-good! We enjoy it spooned into Greek yogurt or straight out of the container. While it does have some sugar, it is a good (and healthy) alternative to chips or other snacks. And even our middle schooler loves it.

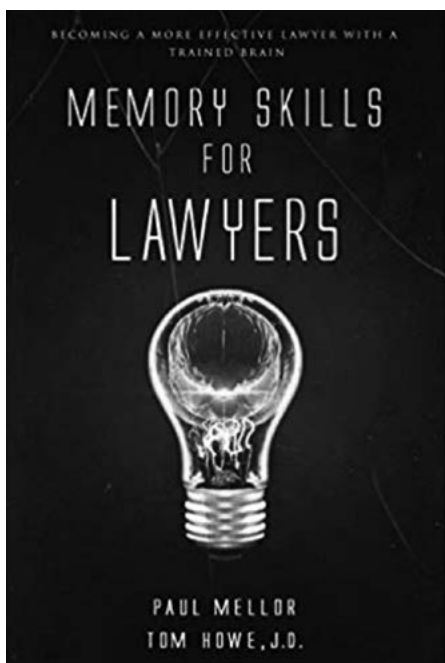




## CLE PREVIEW

By: Paul Mellor

# GOING TO COURT TO REMEMBER NAMES



### ABOUT THE AUTHOR

Paul Mellor is the author of eight books, including, *Memory Skills for Lawyers*. His interactive CLE programs have been delivered to Bar associations nationwide. He'll make his third appearance to the Knoxville Bar Association on Friday, February 28, 2020. Sign up today ... before you forget.

Register by clicking the date in the event calendar  
at [www.knoxbar.org](http://www.knoxbar.org).

A gentleman on the street recognizes you and shakes your hand for a job well done. He says, "Since the trial, Max is doing much better." You remember the case: it involved a broken fence, a loose dog, and a rambunctious boy. Unfortunately, you don't remember which one is Max. The puzzled look when you ask, "Is he still drinking out of the toilet?" tells you it wasn't the dog. Oops!

The ability to call a person by name shows that you care, you listen, and that you're interested. As one who teaches memory training to attorneys throughout America, I've learned the five keys in remembering names and how they can make you more powerful and more influential. But first, you must to go to COURT.

### C — Concentrate

To remember a name, it's vital to concentrate. As you make your approach, tell yourself to concentrate on the name. You know it's coming, so get ready for it. First the handshake, then we hear, "I'm Wendell Wriggleman." "Hi, Betty Bakerman." "Good evening, I'm Stan Jones." Too often, those names never arrive at our ears because we weren't concentrating on listening.

### O — Observe

When the name is given, observe the owner of that name. Look into the person's eyes when the name is announced. This simple gesture will be appreciated; it indicates his or her importance. And who doesn't want to feel important?

Train yourself on studying facial features. What's the first feature you observe?

### U — Understand

If you don't catch a name, ask her to repeat it right away. If the name is unusual, ask for its spelling or origin. She will be flattered, not offended, because you took the time to understand it. It will also tell you more about the person, her family, or where she's from.

### R — Repeat

When you get a name, give it back. When you hear, "Hi, I'm Steve," say, "Steve, nice to meet you." Repeat the name immediately. There may not be a big difference in saying, "Nice to see you, Jackie," vs. "Jackie, nice to see you." But there is when you have to rely on your memory. In the split second you begin with, "Nice to see you ..." you can easily forget the name. Take the pressure off your memory by saying the name first. Then repeat it in the conversation.

### T — Translate

Translate the name you hear into a word that is tangible. Practice by reading names in the newspaper or hearing them on television. For instance, translate "Beverly" to "beverage"; "Vivian" to "violin"; "Tracy" to "tracing"; "Tom" to "tomato"; and "David" to "DVD."

By making a link, it's easier to remember the name.

As attorneys having spent years of study, your success not only comes from knowing the rules of law and skillfully making your case, but also from understanding people, working on their behalf, and continuing to serve in a proud profession. In essence, it's all about people. The first step is remembering who they are.



*How to place an announcement: If you are a KBA member in good standing and you've moved, have property to rent, or received an award, we'd like to hear from you. Talks, speeches (unless they are of international stature), CLE promotions and political announcements are not accepted. Notices must be submitted in writing and limited to 100 words. They are printed at no cost to members and are subject to editing. Email your notice to Marsha Watson at [mwatson@knoxbar.org](mailto:mwatson@knoxbar.org).*

### **MERCHANT & GOULD PROMOTES ATTORNEY TO PARTNER**

**Ian G. McFarland** focuses on enforcement and litigation encompassing patent, copyright, trademark, false advertising, unfair competition and trade secret matters. He represents clients across a wide array of industries and technology fields in federal courts across the country and before the United States Patent and Trademark Office. He has served on several trial teams and has extensive experience working with foreign counsel and coordinating global brand enforcement campaigns.

### **MATTHEW DRAKE, ARIANE HOOKMAN, AND HAYDEN SHORT JOIN LEWIS THOMASON LAW FIRM**

**Matthew Drake** has obtained multiple defense verdicts on behalf of his clients following jury and bench trials and enjoyed success at the appellate level. **Ariane Hookman** graduated from the University of Tennessee College of Law and practices primarily with the construction practice group. **Hayden Short** graduated from the University of Tennessee College of Law and practices primarily with the auto/premises liability practice group.

### **PARALEGAL ASSOCIATION MEETING**

The Smoky Mountain Paralegal Association ("SMPA") will hold its monthly meeting on Thursday, February 13, 2020, at 12:00 p.m. at the Blount Mansion Visitors Center, Knoxville, Tennessee. Attorney **Hillary Dewhirst** will be discussing Adoption Law. A lunch buffet is available at the cost of \$12/person with reservations. Please contact **Karen Yearwood**, ACP, at [president@smparalegal.org](mailto:president@smparalegal.org) for additional information and/or lunch reservations. If you would be interested in speaking at a future SMPA meeting, please contact **Kati Wheatley**, ACP, First Vice President, at [firstvice@smparalegal.org](mailto:firstvice@smparalegal.org).

### **KALA SALARY SURVEY AVAILABLE**

The Knoxville Chapter of the Association of Legal Administrators (KALA) conducts a survey each year that includes general salary information and fringe benefits. If you would like to purchase a copy of the survey, please contact **Charlotte Welch** at [cwelch@opw.com](mailto:cwelch@opw.com). The cost of the survey is \$150.00

### **OFFICE SPACE AVAILABLE:**

- West Knoxville-Bearden Office Space - West Knoxville lawyer has office space for rent at 4008 Sutherland Avenue. The rent includes internet, ample parking and common area maintenance. Inquiries: [lesliehull@gmail.com](mailto:lesliehull@gmail.com).
- Office Space for Lease at 5344 N. Broadway, Knoxville. Across from Fountain City Park. Approximately 900 sq ft. Present floor plan accommodates four offices plus a conference room and a reception area. One Level. Offices on either side occupied by long-term law firms. Very Affordable Rate with a two (2) Year minimum lease required; great for satellite office. Qualified prospects call: (865) 805-1911.

## **Address Changes**

Please note the following changes in your KBA Attorneys' Directory and other office records:

**Oliver D. Adams**  
BPR #: 026164  
Long, Ragsdale & Waters, P.C.  
1111 N. Northshore Dr.,  
Suite S-700  
Knoxville, TN 37919-4097  
Ph: (865) 584-4040  
[OAdams@lrwlaw.com](mailto:OAdams@lrwlaw.com)

**Timothy C. Chambers**  
BPR #: 037490  
Chambers Law Firm, PC  
800 S. Gay St., Suite 700  
Knoxville, TN 37929-9703  
Ph: (865) 309-4015  
[timothyccchambers@outlook.com](mailto:timothyccchambers@outlook.com)

**Deanna A. Cooper**  
BPR #: 033222  
Lincoln Memorial University  
6965 Cumberland Gap Pkwy,  
Suite 203  
Harrogate, TN 37752-8245  
Ph: (423) 869-3611  
[deanna.cooper@lmunet.edu](mailto:deanna.cooper@lmunet.edu)

**Rachel E. Donsbach**  
BPR #: 032073  
550 W. Main St., Suite 600  
Knoxville, TN 37902-2567  
Ph: (865) 312-5044  
[rachel.donsbach@gmail.com](mailto:rachel.donsbach@gmail.com)

**Richard E. Graves**  
BPR #: 034258  
1600 Division St., Suite 700  
Nashville, TN 37203-2771  
Ph: (615) 252-3541  
[rgraves@bradley.com](mailto:rgraves@bradley.com)

**Marshall A. Jensen**  
BPR #: 036062  
Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, TN 37203  
Ph: (615) 736-5047  
[marshall.jensen@gmail.com](mailto:marshall.jensen@gmail.com)

**Christine L. Lord**  
BPR #: 024142  
11124 Kingston Pike,  
Suite 119-265  
Knoxville, TN 37934-2863  
Ph: (865) 748-8656  
[Christinelordjd@gmail.com](mailto:Christinelordjd@gmail.com)

**Joshua E. McFarland**  
BPR #: 037959  
Crane McFarland Law  
131 Lynnwood Drive,  
Suite 18112  
Knoxville, TN 37928-5042  
Ph: (865) 862-5428  
[cranemcfarland@gmail.com](mailto:cranemcfarland@gmail.com)

**Mary J. Newton**  
BPR #: 037605  
606 W. Main St, Suite 100  
Knoxville, TN 37902-2622  
Ph: (865) 224-6591  
[MJoyceNewton@gmail.com](mailto:MJoyceNewton@gmail.com)

**Chelsea B. Parrish**  
BPR #: 031028  
Home Federal Bank of  
Tennessee  
515 Market Street, Ste 500  
Knoxville, TN 37902-2145  
Ph: (865) 544-3853  
[chelsea.parrish@homefederaltn.com](mailto:chelsea.parrish@homefederaltn.com)

**Wendy G. Patrick**  
BPR #: 032298  
140 Court Avenue, Ste. E  
Sevierville, TN 37862-3587  
Ph: (865) 244-6000  
[wendy.patrick@outlook.com](mailto:wendy.patrick@outlook.com)

**Kelly D. Tanner**  
BPR #: 033577  
550 W. Main St., Suite 600  
Knoxville, TN 37902-2567  
Ph: (865) 200-8538  
[kellytanner1687@gmail.com](mailto:kellytanner1687@gmail.com)

**Katie E. Wise**  
BPR #: 033633  
Elder Law of East Tennessee  
PLLC  
P.O. Box 3804  
Knoxville, TN 37927-3804  
Ph: (865) 951-2410  
[katie@elderlawetn.com](mailto:katie@elderlawetn.com)



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## PRO BONO SPOTLIGHT

**By: Kathryn Ellis**

*Pro Bono Director*

*Legal Aid of East Tennessee*

*Serving the Legal Community in Assisting  
Low-Income Persons To Navigate the Justice System*

# 2020 LEGAL ADVICE CLINICS

**NOTE:** Calendar will be updated throughout the year – please check [www.knoxbar.org](http://www.knoxbar.org) for the most current updates.

## February

February 1 – Knox County Saturday Bar at LAET's Knoxville Office, 9 a.m. – 12 p.m.

February 8 – Pro Bono Debt Relief Clinic – 9:30 a.m. – 12 p.m., Knox County Public Defender's Community Law Office.

February 12 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

February 15 – Blount County Saturday Bar at LAET's Blount County Office, 9 a.m. – 12 p.m.

## March

March 7 – Knox County Saturday Bar at LAET's Knoxville Office, 9 a.m. – 12 p.m.

March 11 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

March 21 – Blount County Saturday Bar at LAET's Blount County Office, 9 a.m. – 12 p.m.

## April

April 4 – Faith and Justice Clinic at Faith Promise Church, 9 a.m. – 12 p.m.

April 8 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

April 18 – Blount County Saturday Bar at LAET's Blount County Office, 9 a.m. – 12 p.m.

## May

May 2 – Knox County Saturday Bar at LAET's Knoxville Office, 9 a.m. – 12 p.m.

May 9 – Pro Bono Debt Relief Clinic – 9:30 a.m. – 12 p.m., Knox County Public Defender's Community Law Office.

May 13 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

## June

June 6 – Knox County Saturday Bar at LAET's Knoxville Office, 9 a.m. – 12 p.m.

June 10 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

## July

TBD – Knox County Saturday Bar at LAET's Knoxville Office, 9 a.m. – 12 p.m.

July 8 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

## August

August 1 – Knox County Saturday Bar at LAET's Knoxville Office, 9 a.m. – 12 p.m.

August 8 – Pro Bono Debt Relief Clinic – 9:30 a.m. – 12 p.m., Knox County Public Defender's Community Law Office.

August 12 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

## September

September 12 – Knox County Saturday Bar at LAET's Knoxville Office, 9 a.m. – 12 p.m.

September 9 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

## October

October 14 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

## November

November 7 – Pro Bono Debt Relief Clinic – 9:30 a.m. – 12 p.m., Knox County Public Defender's Community Law Office.

November 11 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

## December

December 9 – Barristers' Access to Justice Veterans' Legal Clinic, at the Knox County Public Defender's Community Law Office, from 12 Noon- 2 p.m.

### **Want to Volunteer?**

Fill out our new Pro Bono Volunteer Survey:  
<https://www.surveymonkey.com/r/DCTWYFSt>

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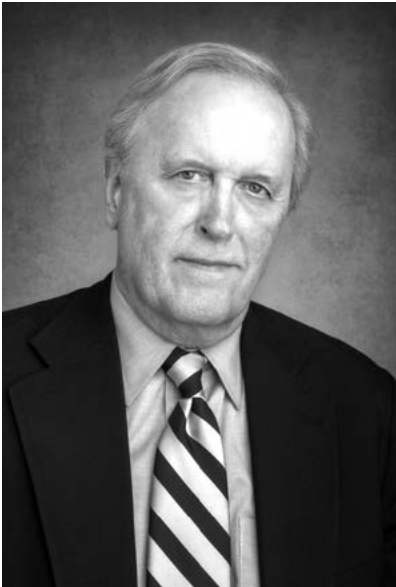
**e-mail: [kellis@laet.org](mailto:kellis@laet.org)**

**fax (865) 525-1162**



**Q:** *John, would you mind telling DICTA's readers about the "great elephant caper of 1978?"*

**A:** **JOHN K. KING  
LEWIS, THOMASON, KING, KRIEG &  
WALDROP, P.C.**



This happened during Lamar Alexander's 1978 gubernatorial campaign. Lamar had asked me to help him, so I was responsible for Lamar's campaign for Knox County and several of the surrounding counties. Lamar's opponent was Jake Butcher. The Butcher campaign was well financed and they were very active and organized – a tough opponent.

We learned that Jake had rented the Knoxville Coliseum for a big campaign event – they literally drove people to it in school buses – and two of my campaign volunteers, Janet Testerman

(the elder) and Micki Childress, who got dressed up in wigs and vintage clothes, went to spy on Jake's rally for us. (While we had some very energetic campaign workers, our women volunteers were really outstanding and energetic.) Janet and Micki came back and said, "Jake had a large and fired-up crowd! We've really got to do something big in Knox County."

So, the next night, a bunch of us gathered at a local watering hole to plan Lamar's big campaign event in Knoxville. We were thinking about what Janet and Micki had told us. One of our group said: "Here's something 'big': what if we get an elephant?" They began talking about getting an elephant, and dressing it in a huge red-and-black plaid shirt, Lamar's signature shirt. Everybody laughed; I said, "Let's keep thinking about this." It seemed like such a crazy idea, and where in the world were we going to get an elephant?

Then, at 2:00 a.m. the next morning, one of our most enthusiastic volunteers, a young woman named Molly Weaver (she is now Molly Pratt), called me at home. I was sound asleep; as I answered the phone, before even saying hello, she said: "Mr. King, what size elephant do you want?" I was just flabbergasted. I couldn't believe it. I said, "Well, I guess any size elephant ought to work." She said, "I found one, but it's not fully grown." She knew one of the people at the Knoxville Zoo, and he agreed to loan us a young elephant for our event, as long as he could accompany it. So, we rented the Coliseum and scheduled the event. (I know the Coliseum had no idea that we were planning to bring an elephant to our event.)

Well, we were off. Since Lamar was all about showing a spirit of bipartisanship, somebody asked, "Don't we need a donkey, too?" So, we also found a donkey.

The handler drove the elephant over from the zoo; since we couldn't get a plaid shirt big enough to fit an elephant, somebody found a red-and-black plaid table cloth or something like it that, which we draped over the back of the elephant. We also found a similar sheet or table cloth that we put on the donkey. We put the elephant and the donkey out in front of the Coliseum. I stood and watched as the handler helped kids get up and ride on the elephant's back – he'd turn around in a little circle, then stop – and families were posing for pictures with both animals. As the starting time for the event got closer, there was still quite a line of folks and kids waiting to see the elephant. So, I got the idea: *what if I bring the elephant on-stage and walk him from one side of the stage to the other?*

We had two high-school bands playing, one on each side of the stage, while the people filed in to take their seats; while that was going on, we got the elephant and the handler in through the back loading dock door of the Coliseum and up in the area on stage behind the curtains. Representative Duncan was the first speaker; he was supposed to introduce Representative Robin Beard, who in turn would introduce Howard Baker, who in turn would introduce Lamar. Politicians being politicians, they began to talk longer than scheduled; we had to get things back on-track so that Howard could timely introduce Lamar.

There was one problem with this particular elephant: nobody had told me that he was incontinent.

As Robin Beard was making his speech, the incontinent elephant did what incontinent elephants do – on the stage, behind the curtains, right while Robin was in mid-speech. There was a flurry of activity: people are grabbing mops, buckets, brooms, desperately trying to sweep the elephant's water off the back of the stage area. You've never seen or heard such a commotion, and the elephant is still standing there.

Robin, still speaking, heard all of this commotion going on behind him. He looked over his shoulder and asked, on-air, so to speak: "What the hell's going on back there?" I stuck my head out through the curtain and gave him the "keep-rolling" finger gesture. He gave me a look, but he kept going. Then, Robin finished up his speech, and Howard came up – I don't recall where he was seated, maybe in the audience – and he gave his speech and introduced Lamar without any "hiccups." Howard had no idea of what had just happened, nor did Lamar--at least, not until it was all over.

As for me, I got that elephant out the back door of the Coliseum and back to the Zoo. He'd already been incontinent, and I didn't want to think what else might happen next! We gave up on the idea of walking him across the stage.

**"The Last Word" column is coordinated by KBA Member Nick McCall. If you have an idea for a future column, please contact Nick at [nick.mccall@gmail.com](mailto:nick.mccall@gmail.com)**





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