



Lincoln Memorial University - Duncan School of Law

From the Selected Works of Akram Faizer

Winter December, 2017

Toward a Health Care Compromise (DICTA December 2017).pdf

Akram Faizer



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DICTA

TOWARD A HEALTH CARE COMPROMISE?



Photo Ops

Barristers Annual Charity Golf Tournament – October 30

On October 30th, 25 teams participated in the Barristers Annual Charity Golf Tournament at Holston Hills Country Club. Due to the generous support of participants and sponsors, over \$6,000 has been raised for the Barristers' charitable activities of the Hunger & Poverty Relief Committee. The Barristers Athletics Committee would like to thank all of the golfers and our sponsors for their support.

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DICTA

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publication of the
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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.

Alternative Dispute Resolution Section

The ADR Section has monthly CLE programs planned through the end of the year. If you have program topic or speaker suggestions, please contact the ADR Section Chairs **Kim Burnette** (546-7000) or **Dana Holloway** (643-8720).

Bankruptcy Law Section

The Bankruptcy Section will meet quarterly. To have your name added to the section list, please contact the KBA office at 522-6522. If you have program topic or speaker suggestions, please contact the Section Chairs **Tom Dickenson** (292-2307) or **Greg Logue** (215-1000). The next clinic is scheduled for Saturday, February 3, 2018 from 9:30 a.m. to 12:00 p.m. at the Knox County Public Defender's Community Law Office. If you would like to volunteer for next clinic, please sign up by clicking on February 3 on the event calendar at www.knoxbar.org.

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 get involved, 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. To have your name added to the section list, please contact the KBA office at 522-6522. If you would like further information on the Criminal Justice Section, please contact Section Chairs **Joshua Headrick** (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. For more information about the section, please contact Section Chairs **LeAnn Mynatt** (549-7000) or **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. To have your name added to the section list, please contact the KBA office at 522-6522. For more information about the section, please contact Chairs **Jo Ann Lehberger** (539-3515) or **Steve Sharp** (971-4040).

Government & Public Service Section

The Government & Public Service 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 further information on the section, please contact **Leah McClanahan** (545-4260) or **Ron Mills** (215-2050).

Juvenile Court & Child Justice Section

Members of the KBA are invited to join the KBA's Juvenile Court & Child Justice Section, formerly the Unmet Legal Needs of Children Committee. For information about the Section, please contact Section Chairs **Mike Stanuszek** (696-1032) or **Justin Pruitt** (215-6440).

Senior Section

The KBA Senior Section will meet next on Wednesday, December 13, 2017 at Calhouns on the River. The program title is "Who woke the bear: the rise of Vladimir Putin and the new Russian empire" and will feature **Natalie Manaeva Rice, PhD**, a research consultant for the Institute for Nuclear Security at the University of Tennessee. The luncheon will be held from 11:30 a.m. to 1:00 p.m. The price includes an entree, vegetable, salad and beverage. Please indicate your choice of Crab Cakes or Lemon Chicken. Register online by clicking December 13 in the Event Calendar at www.knoxbar.org. If you have suggestions for speakers, please contact Chair **Wayne Kline** at 292-2307.

Solo Practitioners & Small Firms Section

The goal of the Solo & 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. To have your name added to the section list, please contact the KBA office at 522-6522. For more information about the section, please contact Chairs **Heather Anderson** (546-8030) or **Tripp White** (712-0963).

Event Calendar

December

- 5 Law Office Tech Committee Meeting
- 6 Barristers Elections & Annual Holiday Party
- 7 Bankruptcy Section CLE
- 8 KBA Annual Meeting & Elections
- 11 ADR Section CLE
- 12 Professionalism Committee Meeting
- 13 Veterans Legal Advice Clinic
- 13 Senior Section Luncheon
- 14 Judicial Committee Meeting
- 14 Lunch & Learn
- 18 Diversity in the Profession Committee
- 18-22 Video Replay CLE programs
- 27-29 Video Replay CLE programs

January

- 2 Law Office Tech Committee Meeting
- 9 Professionalism Committee Meeting
- 10 Veterans Legal Advice Clinic
- 10 Barristers Meeting
- 11 Lunch & Learn
- 11 Judicial Committee Meeting
- 15 Diversity in the Profession Committee
- 17 Criminal Justice Section CLE
- 17 Board of Governors Meeting
- 17 Juvenile Court GAL CLE
- 25 Volunteer Breakfast
- 30 CLE Committee Meeting

Mark Your Calendar

**KBA
Annual Meeting
& Elections
Friday,
December 8, 2017**

By: **Amanda M. Busby**
Anderson Busby PLLC



TIME FLIES!

It seems like just a few weeks ago summer was coming to an end and my children were on their way back to West High School. Hard to believe they are all now old enough to drive themselves to West – the street in front of my house looks like a parking lot (yikes, how time flies!). Now it's the holidays and the New Year (2018) is upon us. I don't know about you, but as I get older, I am coming to realize that I have this same feeling year after year – Time Flies and you better: prioritize what is important in your life and in your career, taking into account what makes you happy; focus on accomplishing those priorities; and thank the people that have helped you along the way. As the contract lawyer in me says: "Time is of the essence!!" The start of a New Year is always a good time to make that list of priorities.

One of the items that has been on my priority list for many years and that will continue to be on that list for the rest of my practice career is service to the bar. Being a member of the KBA is important to me and my professional development, and honestly, it makes me happy. Given the investment of both money and time that I have made to many endeavors throughout my law career, I cannot think of two investments that have shown a greater return on investment than: (1) the investment in my JD/MBA degree earned at the UT College of Law; and (2) my investment in service to the Knoxville Bar Association.

Service on KBA committees and sections has given me an opportunity to interact with attorneys and judges that I would never have encountered in my practice areas of business transactional law, health law, probate and estate planning. I have been able to introduce myself to them, tell them what type of law I practice, they have gotten to know me better as a person and as a lawyer, and I likewise have gotten to know more about them. As an example, my service on the KBA CLE Committee has given me the chance to contact and interact with lawyers and judges, asking them to participate as speakers in CLE programs. Lawyers that I have met through bar service are in a variety of practice areas and many of the judges I have encountered in KBA activities preside over courts here and in surrounding counties that I may never have entered or only infrequently enter. I truly believe that the foundation to a successful law practice is having sustainable and healthy relationships with other local practitioners and members of the judiciary. The KBA gives you the opportunity to build those sustainable and healthy relationships with other lawyers and judges, which can have a very positive impact on your practice. For me, KBA activities have even resulted in my meeting life-long friends.

As I look back on 2017, I am proud of what the KBA has accomplished this year. I know that I, personally, have certainly gotten more out of my membership in the KBA than I have put in and this year, even with my increased duties, is no exception. Just to name a few things that we have accomplished this year: learned together (CLE events); laughed together (Lawyerpalooza; Fireflies in the Smokies); cried together (Memorial Services); welcomed new attorneys into our profession and courts (Tennessee Supreme Court New Lawyers Swearing In Ceremonies and U.S. District Court Admissions Ceremonies); helped those in need of legal and other assistance in our community (LAET events, including the Faith and Justice Alliance Legal Clinics; Veterans Legal Advice Clinics, Expungements Clinics, Open Service Projects); learned more about each other as lawyers and as people (Diversity Committee Events; Functions Committee Events; Barristers Events);

and helped one another as we face challenges in our personal life and in our profession (Lawyers Concerned for Lawyers). We have accomplished these things collectively, as a profession that cares about this community, each other, and the legal profession as a whole.

Thank you for the opportunity to serve as President of the Knoxville Bar Association in 2017. Thank you to the KBA staff and to my law partner, Adrienne Anderson, who being a former KBA President herself, knows the value of bar service. And, thanks to each of you for your continued commitment of service to this bar association, to each other, and to the people of this community in need of legal services. So many of our KBA members are active in committees and sections of the KBA. Like my message at the annual meeting last December, if you are not currently an active member of a KBA committee or section, I encourage you to become more involved next year. To those of you who are currently serving as a committee or section member or as a chair or co-chair, I am thankful for your service to the KBA and want to encourage you to continue to reach out to attorneys, both seasoned attorneys and newly admitted attorneys, that you believe would benefit from becoming more involved in the KBA. The KBA has over twenty-five (25) different committees and sections. There is something here for everyone.

The KBA is even planning to launch a New Lawyers Section in January for attorneys in their first three years of practice. The section will allow attorneys to connect with other attorneys who may not be in the same practice area, but who are new to the legal field and facing similar experiences. This new Section will include educational opportunities, networking events, community service projects, and an e-community listserv. If you are a newly admitted attorney, I hope you will join us at a KBA event soon. If newly admitted attorneys have just joined your firm, I hope that you will encourage them to get involved in the KBA, including in the New Lawyers Section, and I hope that you will take the time to invite them to attend and go with them to a KBA event to introduce them to other members of our bar.

The practice of law is really all about relationships. Time Flies—so, I hope you will take the time to participate in KBA activities in 2018, and I wish you a Happy New Year!





AROUND THE COMMUNITY

By: Paul Wehmeier
Arnett, Draper & Hagood

SERVING THE PROFESSION BY SERVING THE COMMUNITY: A THANK-YOU NOTE TO OUR VOLUNTEERS.

When I sat down to write this article it dawned on me that I had now served as a co-chair of the Barristers' Volunteer Breakfast Committee for four years and been privileged to partner with so many members of the Knoxville Bar Association and their families.

The Volunteer Breakfast Committee is responsible for overseeing and organizing the Barristers' efforts to purchase groceries, prepare, and serve breakfast at the Volunteer Ministry Center to less privileged individuals in the Knoxville area. The breakfast is served on the fourth Thursday of every month except November (when a longstanding volunteer from another organization prepares and serves the breakfast).

In 2015, my co-chair¹ and I embarked on a new method of obtaining sponsorships for the breakfast. After reaching out to law firms and legal organizations, we were able to obtain sponsorship dollars (\$150.00 per month) for the large majority of the months the Barristers' are responsible for serving, and these sponsorship dollars took significant pressure off of the Barristers annual budget. In addition, local law firms and legal organizations began to provide volunteers to prepare and serve the breakfast.

These efforts have continued to grow, and 2017 was another successful year. We specifically want to thank the following firms and legal organizations for their support in 2017:

1. Arnett, Draper & Hagood, LLP, January's sponsor;
2. London Amburn, February's sponsor;
3. Tarp, Cox, Fleishman & Leville, PLLC, March's sponsor;
4. Butler, Vines & Babb, April and May's sponsor;
5. Woolf, McClane, Bright, Allen & Carpenter, July's sponsor;
6. Professor Dwight Aarons, August's sponsor;
7. East Tennessee Lawyers' Association for Women, September's sponsor;
8. Paine Bickers, LLP, October's sponsor; and
9. Rachel Hurt and Family, December's sponsor.

In addition to the financial support these firms, groups and individuals provided, they also provided the manpower necessary to deliver the breakfast to thirty to forty folks in need.

By doing these non-legal tasks, we make our profession visible and "alive" to a community that may only understand our "job" through the lens of Law and Order, Suits, or Perry Mason reruns. In doing so we uphold the noble traditions of the profession and are blessed by the time spent serving others.

The Volunteer Breakfast Committee recognizes that you have many opportunities to meet the needs in this community. We also recognize that your time is pulled in many directions. But, as the holidays come and go in 2017, we respectfully ask you to consider this non-legal, yet practical way to reach your neighbors in need. If you are interested in participating in 2018, please contact Matt Knable or myself.

We look forward to working with members of the Bar in the coming year.

¹ In 2014-2015 Allan Moore, Esq. served as co-chair of the Volunteer Breakfast Committee. In 2016 Kati Sanford Goodner, Esq. served as co-chair of the Committee, and many thanks to Matt Knable, Esq. who served as my co-chair in 2017.



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

GOLF, GARDENING & GROCERIES

Almost every weekday morning, I see a flash of a bow tie at the corner of my office door. Usually, there is a “Good morning, neighbor” or something similar as the bow tie heads for a cup of coffee and hits the ground running. The office next to mine stays busy – phone calls, client meetings, more phone calls, KBA committee meetings, KBA Board of Governors meetings, KBA events, Knoxville Estate Planning Council Meetings, and Wednesday night choir practice.

Then, there are the “pop-ins.” Our Firm is a collaborative one, which means the office next to mine gets its share of intra-office visitors with a story to be told, a question to be asked, a legal problem that needs another brain, or a document that needs an extra pair of eyes. I suspect the pop-ins can make it a challenge to get the billable work done. After all, documents don’t draft themselves. But, no matter how much work has to be done, the door of the office next to mine always stands open. That is the best way I know to describe **Keith Burroughs**: the door is always open.

Keith was born and raised in East Knox County. He has lived in two zip codes his entire life – both in Knox County. His grandparents and parents were from Knox County. He earned his Bachelor’s, Master’s, and J.D. from the University of Tennessee.

Knox County is where Keith and his wife Fran (who also has deep Knox County roots) raised their three children, Christina, Casey, and Caroline. The kids have grown up, and the Burroughs family has grown, adding two sons-in-law – Bradford and Nick – and now three grandchildren. Keith still farms the family property. I would be jealous if the vegetables he grows weren’t so incredibly delicious.

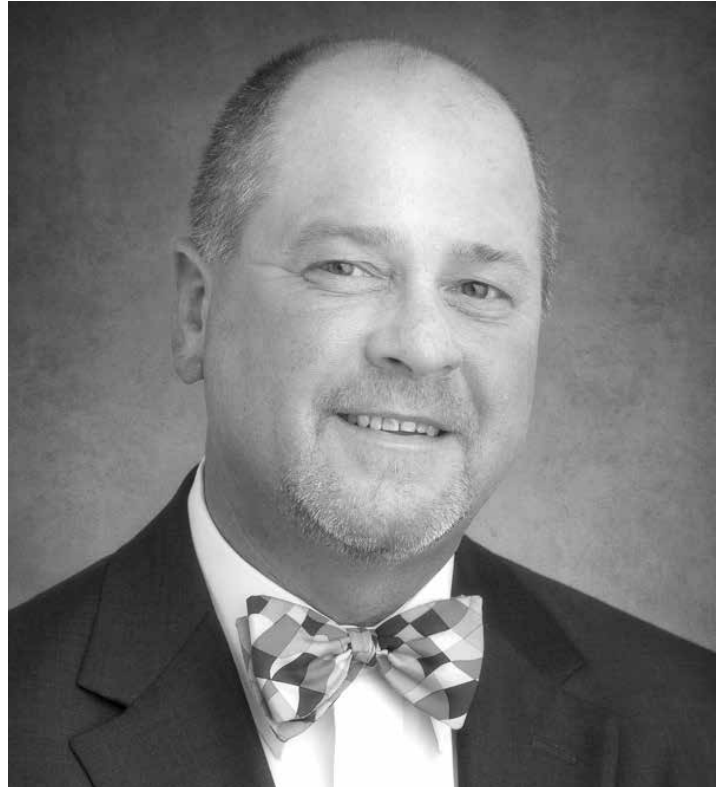
Knoxville is home, and home is where Keith’s heart is. He has spent years making the Knox County community better. He has served on and chaired the Boards of many of Knox County’s hard-working non-profits: East Tennessee Foundation, the Knoxville chapter of the American Red Cross, the Helen Ross McNabb Foundation, the Wesley House Community Center, and St. Mary’s Hospital Foundation. He and his family have been active members of the Fountain City United Methodist Church for over 30 years, where Keith has served in various leadership roles. Keith has left his mark on Knox County.

For Keith, a career in the law was always on the list. For that, we can thank his father, **Wallace F. Burroughs**. Mr. Burroughs enlisted in the Army right after Pearl Harbor and was honorably discharged with a medical discharge. After that, he enrolled in the John R. Neal School of Law and, of course, he stayed close to home.

Mr. Burroughs practiced in Knox County until 1985, and he was quite the trial lawyer. But, when Mr. Burroughs had a hearing out of the county, he took young Keith along. That did it for Keith. Law school was calling, but not without a rocky start. The first day of law school happened to be the day after Keith took his last exam to complete his Masters’ Degree in Accounting. That means Keith missed orientation, which means he missed the opening announcements.

Keith’s first class was Contracts with Joe Cook. His first clue that there was a reading assignment was about 2 minutes before class started when someone mentioned it. If you happened to have Contracts with Joe Cook, you know that having a last name that starts with a “B” is not an advantage on the first day.

Notwithstanding, Keith did manage to graduate and got to work making the legal community better. He completed the Leadership Knoxville program. He served on numerous KBA committees and has been the Co-Chair of the Judicial Committee, the Law Office Management & Technology Committee, and the Continuing Legal Education Committee. He has served on the KBA Board of Governors



and received the KBA President’s Award – twice (2009, 2014). In 2005, the TBA recognized his service to the practice of law in the State of Tennessee with the President’s Award for Dedicated and Exemplary Service to the Profession.

Keith’s leadership in the Bar and the Knox County community are impressive. But the best part about practicing with Keith is that he loves what he does, and he loves the clients he serves. Keith’s practice mainly focuses on probate, estates, and helping people plan for the future. Sometimes, planning means getting your personal affairs in order. Sometimes, it means getting your business in order. Each situation is a puzzle, and Keith is the kind of puzzlemaster who sticks with you until you can see how the pieces will come together.

When I asked Keith what he loved about being a lawyer, he didn’t hesitate: helping clients have peace of mind. He understands that clients have a lot of worries, and his role is to help them develop a plan to address those worries. He does this with civility, relatability, and a knack for finding the practical solutions to very complicated problems.

Keith is the kind of guy who makes sausage balls for his Sunday School class – every Sunday – and cooks for his thirty-plus extended family just so they can all get together. He loves golf, but wasn’t put out when a certain non-golfer who described the game as “that way of playing golf where you split up into teams and it has something to do with eggs.” He rides a tractor, blanches corn, and grows the best Romaine lettuce.

There is a reason why the office next door to mine is always busy. It is rare to find someone who appreciates the simple things – golf, gardening, and groceries – can handle the complicated things, and leaves the door open just in case you need to pop in to talk about any of the above. Our Firm is fortunate to have Keith as a shareholder, and we are proud to introduce him to the Knoxville Bar Association as our next President. 2018 is going to be a great year for that bow tie.



OUTSIDE MY OFFICE WINDOW

By: Robert E. Pryor, Jr.
Pryor, Priest & Harber
robertpryorjr.blogspot.com

THE BENCH

I've never been here by myself. When I've frequented this beautiful park, it has generally been hand in hand with a child or a beautiful woman, but never on my own. Near the water, just next to the playground, you'll find a bench. Parents sit there and watch their children at play. Young people in love sit and talk about their future after walking along the path by the lake. Children get their photo taken there. When a tornado recently visited the hallowed park, it uprooted trees, destroyed structures, and ripped apart playground equipment. After the storm did its worst, the bench remained. I knew that in order to find the words for this piece, I needed to visit here. It's been a while. I am immediately confronted by the bitter-sweet memory of the day in 2001 when I had my photo taken here with Shelby and Andy. It was a day to celebrate their mother and the dedication of the bench in her honor. I've always enjoyed visiting the bench and hearing of others who have seen or used it. I'm proud to see my children's little handprints preserved in concrete on the ground just in front of the bench. I place my hands on the prints and close my eyes, trying to remember when their hands were so little. They are now 21 and 18. I look up to the bench and the marker that reads "In Memory of Cheryl W. Pryor - A Mother Who Loved This Park," and I delight in the fact so many see her name and hope they read it aloud, letting the sound of it carry into the air.

I was drawn here because of my trip to the great Pacific Northwest this past weekend. There's a Presbyterian church in Clarkston, Washington, a million miles from here. This past Sunday I sat in a pew near the back, bundled in winter clothes and listened to the pastor's



sermon. I shared the lord's supper with seventy-five congregants which included my wife, Nancy, and my baby girl. It is Shelby's church, her family so far from home. When the young pastor and his wife asked her to babysit months ago, they picked the right girl. Shelby is the conscientious and caring child I hoped she would be when Cheryl told me she was pregnant on a beautiful October day in 1995. She is my fair-haired servant of the Lord who follows her heart and his teachings. She'll be the subject of my closing argument and personal plea to Saint Peter. I'm counting on her...heavily. She became a youth leader in the church and the young pastor and his wife graciously asked her to watch their children one day. Shelby has become a regular in their home.

We broke bread Sunday night with Pastor Dave Webster and his wife, Dawn, while their three children, Jeremiah, Jackson and Mary,

ran through the house, the sound of running bare feet dominating the air. We spoke of Seahawks football, the terrible state of my football program and, of course, my Shelby. I thanked them for inviting her into their church, for inviting her into their home and for watching after her while she was so far from her father. We talked about the unbelievable coincidence that their first church out of seminary was Concord Presbyterian, a beautiful church down by the lake. We talked about Knoxville and people we both knew, including the KBA's own, Chris McCarty. We talked about the unbelievable coincidence that my daughter would find them and their church so many miles from home. It is a small world. And then, we talked about the bench.

Dave and Dawn often frequented this park - the Cove - during their brief time in Knoxville. They know the park. They know the bench. In their scrapbooks, tucked on a shelf in Clarkston, Washington, so far from Knoxville, my daughter stumbled across the photos of Jeremiah and Jackson Webster taken in the sacred place we often frequented when she was a child. In the photos, two little happy faces smile while they sit on a bench dedicated to Shelby's mother. Sometimes "It's a small world," doesn't cut it. Sometimes we have to wonder what magic is at work in our world just beyond the conscious, patiently waiting to reveal itself. How much is there to be seen yet escapes our sight?

I love this park.



By: **Kathy D. Aslinger**
Kennerly, Montgomery & Finley
Kristi Paczkowski

Executive Director, City of Knoxville Pension Board



GOVERNMENTAL PLAN QDROS: NOT YOUR TYPICAL RETIREMENT PLAN DIVISION

Family law practitioners are very familiar with using a Qualified Domestic Relations Order, or “QDRO,” to divide 401(k) and other retirement plan benefits. A QDRO is a domestic relations order issued by a court that creates or recognizes the existence of an “alternate payee’s” right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan. The “alternate payee” is typically a plan participant’s former spouse, but could be a child or other dependent.

Although the Internal Revenue Code (“Code”) and the Employee Retirement Income Security Act (“ERISA”) require plans sponsored by private employers to recognize and divide retirement plan benefits pursuant to a QDRO, governmental plans are exempt from the requirements of ERISA and from some of the Code requirements, including most requirements related to QDROs.¹ Thus, governmental plans are only required to recognize QDROs to the extent required by state law.

Prior to July 1, 2015, Tennessee law effectively prohibited a Tennessee governmental plan from complying with a domestic relations order except in very limited circumstances related to child support or alimony. That all changed in July of 2015 with a change in Tennessee Code Annotated § 26-2-105, which now requires all Tennessee governmental plans to recognize QDROs.

This law change did not, however, subject governmental plans to the same ERISA and Code requirements as private plans. Rather, governmental plans have significantly more leeway in restricting the types of QDROs they will recognize and determining how and when benefits will be paid. Because of that leeway, different governmental employers may have very different rules. These tips may help you navigate this complicated area.

1. Make sure you understand the type of retirement plan you are trying to divide.

While most private employers have 401(k) or other types of defined contribution retirement plans, many governments still sponsor traditional pension, or defined benefit, plans. Benefits under a defined benefit plan are determined based upon a formula that usually considers things such as average compensation and years of service. The formula determines how much money a participant will receive each month after the participant reaches normal retirement age and retires. Although some defined benefit plans may allow the actuarial value of this monthly benefit to be paid to a participant in a single lump sum, most pension benefits are paid as a monthly annuity until the participant’s death. Depending on the plan and any annuity election made by a participant, a survivor annuity may be payable beginning on the participant’s death for the remaining life of a surviving beneficiary.

If you are trying to divide a governmental defined contribution plan, you may have the same flexibility as you would in a private plan to value the plan account as of a particular date, assign a percentage of those assets to the alternate payee, and direct the plan to pay the alternate payee’s share as soon as possible. Dividing a defined benefit plan, on the other hand, can be much more challenging due to restrictions on distribution timing and options and the valuation of the benefit.

2. Ask for a copy of the plan’s QDRO rules or procedures.

By now, most governmental employers have adopted QDRO rules and procedures governing the QDRO process. Those rules and procedures may have extremely valuable information on what types of QDROs are permissible under the Plan and the distribution options available to an alternate payee.

For example, the rules for the Tennessee Consolidate Retirement System only permit a “shared interest” QDRO.² A shared interest QDRO assigns to the alternate payee a percentage or dollar amount of the benefit payable to the participant, to be paid to the alternate payee at such time as paid to the participant. If the participant dies and no further benefit is payable, then benefits to the alternate payee would stop as well.

Other governmental plans, such as the City of Knoxville Employees’ Pension System, have adopted rules permitting separate interest QDROs so long as the participant has not yet retired.³ A separate interest QDRO assigns a portion of a participant’s benefit to the alternate payee as his or her separate interest, and the actuarially adjusted benefit (i.e., based on the age of the alternate payee) will be paid to the alternate payee at the time and in the manner elected by the alternate payee. The alternate payee’s benefit is not impacted by the participant’s separate choices or death.

3. If a sample QDRO is available, use it.

The plan may either require or encourage the use of a particular QDRO form. Even if a particular form is not required, you may find it easier to comply with the various rules and requirements governing a plan if you use the form suggested, and it will reduce the likelihood that changes will need to be made before the plan administrator will approve it. If the QDRO procedures permit it, also consider asking the plan administrator to review the draft QDRO before you submit it to the court.

4. Be prepared for a fee, particularly for separate interest QDROs.

Although not all plans assess a fee for the review and processing of a QDRO, many do. The amount of the fee may seem shocking to those more accustomed to 401(k) QDRO fees, but they are designed to cover the additional cost necessary for the plan’s actuary to calculate the benefit and for legal review.

5. Don’t be afraid to ask for help.

Pension plans are confusing, and the differences between plans and QDRO procedures make them even more so. When you have questions, reach out to the plan sponsor or pension board staff. In most circumstances, they are happy to walk you through the process, as it benefits both you and them to follow the rules on the first try.

¹ See ERISA § 4(b)(1); Code § 414(p)(9).

² See Tenn. Comp. R. & Regs. § 1700-03-03-.09.

³ See <http://cokpension.org/wp-content/uploads/2017/06/1.-QDRO-Procedure.pdf>.



By: Joe Jarret

University of Tennessee, Department of Political Science

Lutie A. Lytle: Tennessee's First African American Woman Lawyer



Were you to read a modern story about a strong, intelligent, African American woman who graduated from law school, professionally practiced her craft, and ultimately taught law at her alma mater, you may not give it a second thought. Learning that Lutie A. Lytle accomplished such feats and more a scant 30 years after the end of the Civil War and as such, slavery in America, and you just may just decide you're about to read the story of an exceptional lawyer.

Lutie A. Lytle was born in Murfreesboro, Tennessee in 1875¹ to parents John R. and Mary Ann "Mollie" Lytle, both former slaves. The Lytle family, which also included three other siblings and her grandmother, migrated to Kansas in 1882 shortly after the Exoduster Movement,² which took over six thousand Southern African Americans to the state. Lutie and her siblings attended local schools, including Topeka High School, during which time Lutie worked for one of the several African American newspapers in the city. When she turned 21, Lutie Lytle moved to Chattanooga, Tennessee, where she became a school teacher and saved part of her earnings to help finance her law school tuition at Central Tennessee College in Nashville.³ "I conceived the idea of studying law in a printing office where I worked for years as a compositor,"⁴ Lutie said during an 1897 interview. "I read the newspaper exchanges a great deal and became impressed with the knowledge of the fact that my own people especially were the victims of legal ignorance. I resolved to fathom its depths and penetrate its mysteries and intricacies in hopes of being a benefit to my people."⁵ In that same interview, the reporter noted, "There were a number of young men studying beside her,

but she held her own with them all. Though she studied hard, she did not shut herself out from the enjoyment of the society of her fellow students. She was a member of the college glee club, and at the numerous musical entertainments given by the students she was invariably relied upon to accompany on the piano."⁶

Lytle completed her studies at Central Tennessee College and in September 1897, after successfully passing an oral Bar exam, was admitted to practice law in the Criminal Court in Memphis, Tennessee. At the time, Lytle was reportedly the first African American woman licensed to practice law in Tennessee, and only the third in the United States. She likewise was among the first African American women to earn a law degree.⁷ After practicing criminal defense law in Tennessee for a short time, Lytle soon returned to Topeka, where she became the first African American woman admitted to the Kansas State bar. "In connection with my law practice I intend to give occasional lectures, but not in any sense for personal benefit," Lytle said. "I shall talk to my own people and make a sincere and earnest effort to improve their condition as citizens. I believe in efficacy of reason to bring about the best results."⁸

During her time in Kansas, Lytle became involved in the Interstate Literary Association with members from Kansas City, Missouri and Kansas communities. She was a sought after speaker who was frequently invited to lecture for women's groups and local colleges on criminal, domestic, and constitutional law. As to her many lectures, Lytle said, "I am of the mind that our beloved constitution plays the primary role in achieving justice for all. I like constitutional law because the anchor of my race is grounded on the constitution. It is the certificate of our liberty and our equality before the law. Our citizenship is based on it, and hence I love it."⁹

In 1898, Lytle announced that she would become a part of the faculty of her alma mater, Central Tennessee University, during which time several of her student went on to practice law in Knox County. Although newspaper accounts which claimed that she was the only female law instructor in the world at that time may have been apocryphal, there is no question that her status as an African American woman on a 19th Century law school faculty was exceedingly rare. After her tenure with Central Tennessee, Lytle moved to Brooklyn, New York with her husband Alfred C. Cowan, who was also a lawyer. The couple often attended the annual convention of what was formally known as "The Negro Bar Association" and is now known as the National Bar Association, the professional organization for African American attorneys.¹⁰ Lytle was the first black woman to become a member of the Association and she and her husband were the first married couple to participate as attorneys in the organization. After her husband's death in 1917, she took over his practice and remained active until 1950, which is the unconfirmed date of her death. As a biographical subject, Lutie A. Lytle encourages and teaches us to break barriers against seemingly insurmountable odds. Said one Kansas reporter, "Miss Lytle didn't leave any children behind, but she did leave of legacy of hard work, determination, and justice for all."¹¹

¹ The exact date of Ms. Lytle's birth remains in dispute.

² The mass movement of African Americans from states along the Mississippi River and into Kansas in 1879 is commonly referred to as the Kansas Fever Exoduster Movement. It was the first general migration of African Americans following the Civil War and Reconstruction. <http://rileycountyhistoricalmuseum.weebly.com/exoduster-movement-1879.html>

³ Central Tennessee College operated from 1870 to 1900 under John Braden, a Union army chaplain and was created to educate former slaves dubbed freedmen and freedwomen. In 1900, the name of the school was changed to Walden University, in honor of Bishop John Morgan Walden, formerly a freedmen's missionary.

⁴ A "compositor" was someone who arranged words, pictures etc. on a page before they are printed.

⁵ (Dodge City, Kan.) Globe-Republican, October 5, 1899, 2.

⁶ *Id.*

⁷ Smith Jr, J. C. (1999). *Emancipation: The Making of the Black Lawyer, 1844-1944*. University of Pennsylvania Press.

⁸ (Dodge City, Kan.) Globe-Republican, October 5, 1899, 3.

⁹ *Id.* at 4.

¹⁰ The "Negro Bar Association" later called the National Bar Association was founded after some of the National Bar Association founders were denied membership in the American Bar Association. (Note: In 1911, William Henry Lewis became the first black lawyer admitted to The American Bar Association.) <https://www.nationalbar.org/NBA/History.aspx>.

¹¹ Henderson, T. N. Y. (2016). *I Shall Talk to My Own People: The Intersectional Life and Times of Lutie A. Lytle*. *Iowa L. Rev.*, 102, 1983.

By: Esther L. Roberts

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TAM'S IMPACT ON UNITED STATES TRADEMARK LAW: *MATAL V. TAM*

The Slants is the name of a modern band comprised of four Asian/Asian Pacific Islander American musicians, Simon Tam, Ken Shima, Joe X. Jiang, and Yuya Matsuda.² Simon Tam, who also goes by the name Simon Young³, is the bassist for The Slants and founder of the band.⁴

Tam submitted an application for registration for the name, 'The Slants' to the United States Patent and Trademark Office (USPTO) on November 14, 2011.⁵ The USPTO denied registration for the mark, based upon 15 U.S.C. § 1052(a), which provides that no trademark may be registered if it "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; . . ."⁶ The USPTO viewed the term, "slants" as disparaging to Asian/Asian Pacific Islander Americans.

Tam appealed the USPTO decision through administrative appeals, lost, and then filed suit in federal court.⁷ The Federal Circuit first upheld the USPTO decision; however, upon a review en banc, ultimately ruled in Tam's favor – finding the disparagement clause to be unconstitutional under the Free Speech Clause of the First Amendment.⁸ The USPTO appealed, and the Supreme Court granted certiorari.⁹ The case was argued January 18, 2017 and decided June 19, 2017.¹⁰

The Supreme Court upheld the Federal Circuit's finding of unconstitutionality of the disparagement clause¹¹ unequivocally: "The disparagement clause violates the First Amendment's Free Speech Clause."¹² Justice Alito, writing for the court with respect to Parts I, II, and III-A of the opinion, gave little credence to the Government's argument that a trademark, once registered by the USPTO, becomes government speech. "It is thus farfetched to suggest that the content of a registered mark is government speech, especially given the fact that if trademarks become government speech when they are registered, the Federal Government is babbling prodigiously and incoherently."¹³

The Court dismissed the disparagement clause: "It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."¹⁴

The unresolved issue the Court will almost certainly have to address at some point in the future is: how must trademark applicants distinguish between speech that "expresses ideas that offend," and "hate speech." Hate speech can be defined as, "speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, disability, or other traits."¹⁵

Based upon the holdings in *Tam*, it is possible USPTO application 74300713 for the mark, "WASHINGTON REDSKINS" as filed by Pro-Football, Inc. may now issue. Under pre-*Tam* jurisprudence, "redskins" was considered disparaging to many Native Americans and Indigenous/First Peoples.¹⁶

One fact is, arguably, a critical difference between *Tam* and the "WASHINGTON REDSKINS" application. Tam is Asian American and he specifically chose to name his band, "The Slants" in an effort to "reclaim" the term and "drain its denigrating force" on Asian people.¹⁷

Tam explains on his website, "when I started this band, it was about creating a bold portrayal of Asian American culture. . . . [As] we continued writing music about our experiences, we realized that activism would be integrated into our art as well. I'm proud . . . that we could humanize important issues around identity and speech in new and nuanced ways."¹⁸

One might compare Tam's choice of language to African American musicians, playwrights, and other creative artists who use certain terms to describe themselves while justifiably taking offense when non-African Americans use such terms.¹⁹

The owner of the Washington Redskins is non-Native American, thus one might argue this fact distinguishes the "WASHINGTON REDSKINS" application from the holding in *Tam*. The Court, however, noted that the disparagement clause "applies to marks that disparage, not just 'persons,' but also 'institutions' and beliefs."²⁰

This reaffirmation of the scope of the disparagement clause, combined with the Court's definitive statement, "[s]peech may not be banned on the ground that it expresses ideas that offend," leads one to consider it may be a new day with regard to trademark registration of terms once considered offensive or disparaging. Future trademark jurisprudence must clarify whether a line still exists between newly registrable, protected "free speech" and "hate speech," and, if so, where the line is to be drawn.

¹ The author expresses her thanks to her long-time legal research assistant, Ms. Sarah Smith, for her assistance with this article.

² *Id.* Tyler Chen, original drummer of "The Slants," retired from the band in 2016. See <https://www.youtube.com/watch?v=TX5L1Jl3tXU>

³ <https://www.facebook.com/theslants/videos/1647744560301/>

⁴ *Id.*

⁵ See United States Patent and Trademark Office application serial number 85472044.

⁶ <http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4806:7rlv0i.2.3>

⁷ https://www.uspto.gov/sites/default/files/trademarks/law/Trademark_Statutes.pdf 528 U.S. ____ (2017), No. 15-1293, Slip. Op. at ____; Syllabus, p. 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* The ruling, 8-0, reflects the fact that Justice Neil M. Gorsuch did not participate in the opinion because he was not yet on the Supreme Court as of the date of oral argument of this case.

¹¹ *Id.*

¹² 528 U.S. ____ (2017), Syllabus, p. 2.

¹³ *Id.*

¹⁴ 528 U.S. ____ (2017), pp. 1-2.

¹⁵ https://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate.html

¹⁶ See *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 367 U.S.App.D.C. 276, 75 U.S.P.Q.2d 1525 and *Blackhorse v. Pro-Football, Inc.*, (TTAB Cancellation No. 92046185)

¹⁷ See www.theslants.com.

¹⁸ http://www.theslants.com/statement_on_recent_sotus_ruling/ (visited Nov. 17, 2017).

¹⁹ *Id.*

²⁰ 528 U.S. ____ (2017), p. 10.



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By: **Cathy Shuck**
East Tennessee Children's Hospital



A REFRESHER COURSE ON TRAINING TIME

The holidays are here, which means the CLE deadline is right around the corner, causing attorneys to disappear for hours at a time to attend educational events. Non-attorney staff in your office may also need to attend end-of-year training or have professional society events to attend. When accounting for training and other educational time, do you go the Santa route and consider it all compensable work time? Or are you more of a Scrooge who hates to pay anyone for non-productive time?

Fortunately you don't have to decide whether to be a saint or a miser, because the Fair Labor Standards Act (FLSA) provides a handy four-factor test to help you determine whether to pay employees for the time they spend at seminars, classes, and the like. The FLSA states that for non-exempt employees, training and other educational time is compensable unless all four of the following factors are met:

1. The training is outside normal work hours; and
2. Attendance is voluntary; and
3. The training is not directly related to the employee's job; and
4. The employee performs no other work while attending the training.¹

Each factor is considered below in turn.

1. Outside Normal Work Hours

The first factor is fairly straightforward. If the employee normally works 8:00-5:00 Monday to Friday and attends a seminar starting at 6:00, or on a Saturday, the time is outside normal work hours. Similarly, watching webinars at home after hours or during lunch breaks would be outside normal work hours.

The federal Department of Labor's ("DOL") regulations do note that an employee cannot on his own initiative sign up for an after-hours class related to his job and require you to pay him for it. The regulations state that such "independent training" is not hours worked for the employer "even if the courses are related to his job."²

2. Attendance is Voluntary

In order for training or education to be non-compensable, attendance must be truly voluntary. As the DOL's regulations explain, attendance "is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance."³ In other words, if the employee feels pressured or otherwise obligated to attend, the session is not voluntary.

3. Not Directly Related to the Employee's Job

This factor can be hard to satisfy, unless the employee is taking time away from work to complete a knitting class or a screenwriting class or something not *directly* related to the employee's current job. The DOL

regulations explain that training is "directly related" to an employee's job "if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill."⁴ The regulations do note that training that is intended to help the employee to move to another job within an organization is not "directly related" to the employee's job. For example, if your office manager takes a course in QuickBooks, then it is probably directly related to her job. But if she takes a computer programming course and she is not currently responsible for I.T., then it may not be directly related to her job.

4. No Other Work Performed

Finally, the employee must be relieved of all duties while doing the training in order for it to be non-compensable. So if in the example above, the office manager watches an online webinar on programming but works on office billing while doing so, the time is compensable.

Putting it All Together

The question of whether to pay for training time most often comes up when the training is held after-hours or on a Saturday. Remember that if the employer offers the training, unless it is truly voluntary *and* is not directly related to the employee's job, the employee must be paid for the time.

Other Considerations

The holidays also bring professional society luncheons, parties, and the like. In general, employers should treat professional society meetings the same as educational events if the employee is expected to attend such events.

Note that the considerations discussed above apply to employees who are non-exempt from the FLSA. Exempt employees, such as attorneys, are entitled to their regular pay on any day that they perform any work for the employer.⁵

Now you know how to handle those pesky questions about paying for training time. Unfortunately, this article has not been certified for any CLE credit.

¹ 29 C.F.R. § 785.27.

² 29 C.F.R. § 785.30.

³ 29 C.F.R. § 785.28.

⁴ 29 C.F.R. § 785.29.

⁵ For a detailed discussion of exempt employee timekeeping, see the *Management Counsel* column in the October 2015 issue of DICTA.

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.



By: Patrick Slaughter
LaFevor & Slaughter

TASK MANAGEMENT AND BILLING REMOTELY

Over the past several months we discussed issues that our firm encountered while developing our ability to work remotely. In our last article, we will discuss how to get things done, making sure they got done, and most (importantly) getting paid.

Every lawyer I know is busy. One of the biggest problems most lawyers face is how to stay on top of all the things that we need to accomplish in any given case. We need to be able to identify what tasks need to be done, develop a plan on how to accomplish those tasks and projects, and then make sure that we get those things done.

I would first recommend that you get a copy of "Getting Things Done" by David Allen. You've probably heard of it, or might have already read it. If not, this book could very well change your life. It did mine. This book is required reading for every new hire in our firm. The book talks about a methodology for getting things out of your head and into a system that makes sure that you know what you need to accomplish and a way to make sure it gets done. Another benefit of the book is that most of the productivity software out there is based on the same methodology.

We realized that we needed a system to make sure that we were getting everything done to stay on top of the cases we have. While most all practice management software provides task management capability, we wanted something that was a little more developed specifically for task management. This software allows us to create a project file for each client matter. Then we can create all the tasks that must be accomplished in that matter. We can tag each task that is created by different categories that we create, which allows us to group similar tasks.

The first program that I would suggest is Omnifocus. Omnifocus has been around a while and is set up to allow you to put the "Getting Things Done" methodology to work. There is a video tutorial that is available from David Sparks at <https://www.macsparky.com/omnifocus> that will get you up to speed in no time. Omnifocus is probably the easiest program to get started with and for 99% of folks it is all you will ever need. The biggest downside to the program was that it did not let us share projects with other team members. That was a deal breaker for our firm. So, we moved on to Nozbe.

Nozbe is a cloud based subscription software. While I don't like paying for it year after year, it is really good at what it does. It is also cheap. The biggest advantage to the software is that it allows you to invite other team members to projects so you can share tasks. This capability allows you to assign tasks to other folks and then find out when those tasks have been completed. Nozbe also makes it very easy to set up matter templates.

Using matter templates makes coming up with all the things that need to get done in a particular case almost automatic. Most of our cases are essentially the same seven or eight types of cases that we repeat over and over with different clients and a different set of facts. When you create a client template you are basically just listing all the different tasks you have to complete in that case from beginning to end. When a client comes in with that type of case, the software automatically populates a list of tasks to complete the matter. You can then assign those tasks to different team members and add deadlines for task completions. Nozbe also allows you to attach files to tasks so that forms will automatically be

available for the person assigned to draft that document. All in all, client templates systematize the process of handling cases. They are easy to set up, save you tons of time, and insure that you do not forget something.

Next is billing. You need to be able to bill when you are working remotely. For us the billing solution is found in our practice management software. We use Rocket Matter, but there are many other programs out there. Most programs have very similar billing capabilities.

We like to make sure that we get paid. We send clients bills every single month on the last day of the month. With Rocket Matter, I go through each user's billing activity to make sure the billing is appropriate and fix any typos. Then I click a button and all the bills are processed. Each client gets an email with their monthly invoice attached that describes all the work we did on their case. Their invoice also tells the client how much money is in their trust account and how much money they owe us that month. Rocket Matter will automatically adjust all of the account ledgers so everything stays up to date. If a client owes us money or needs to replenish their trust account, there is a link in the email they can click to pay their invoices. Once they pay their invoice, their payment is automatically credited to their account and deposited in either the firm's operating or trust account. We still have to transfer money from the actual bank accounts, but Rocket Matter takes care of the rest.

Transitioning from a paper driven office to a paperless, mobile enabled office might seem overwhelming but you probably have most of the equipment required. Spend some time thinking about your practice. Do you want to spend more time out of the office? Do you want to lower overhead and increase your happiness? Are you willing to take some ribbing about how much you go to Disney World? If so, start considering your options and implement them one at a time until you feel comfortable with each step. Soon, you'll be drafting briefs on the beach.



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



CULTURE OF THANKSGIVING

One of my most prized possessions is a copy of *The Bible Reader*, a monthly periodical published in Richmond, Virginia in the 1800's. Mine is the December 1896 issue, Volume VII, No. 1. My copy travelled from Hixburg, Virginia, a tiny community named after my great-great grandfather who operated the county store which served his part of Appomattox County, Virginia. My great-grandmother, Florence Augusta Hix, brought this paper with her when she and her new husband, Wilson Mack Erwin, Sr., moved to Rowan County, North Carolina.

By all accounts, my great-grandmother was quite the reader, but all of the people who might know why she saved this particular copy have long passed on. My mother found it in a trunk in the family homestead – a log cabin that did not have indoor plumbing until the 1950's – after my grandmother passed away.

This issue includes a very interesting story about General T.J. "Stonewall" Jackson and his orders to a young Captain to guard a warehouse full of liquor and prevent anyone from entering the warehouse until relieved of duty by the General himself. It includes a story about a recent discovery of papyri containing fragments of Homer and Demosthenes found in Egypt.

It also has your usual advertisements for things like *Rudy's Pile Suppository*, guaranteed to cure "Piles and Constipation" and *David's Sarsaparilla* which apparently cured Mr. George Allen of Goshen, VA of his "scrofulous sores and most distressing enlargement of the glands of the neck." There is also *Dr. Klines Great Nerve Restorer*, guaranteed to permanently cure fits and prevent insanity. That one warns readers to "Beware of imitating frauds."

But, my favorite part of this paper is an article called, "The Practical Side of Thanksgiving." It is a reprint of an article originally written by Rev. Edward L. Pell, a Methodist clergyman, for *The New York Observer* on November 19, 1896. The article begins:

Yesterday, a young man stopped me on the street to ask the time of day. As he turned slowly away, I had time to notice that, while he was conscious of having received what he wanted, there was not the faintest indication that he recognized it as a favor. As for thanks, he had no tongue for it, and as for thankfulness, he evidently had not heart for it. He was so poor – this well-dressed beggar of the streets – that he could not even pay his debts of gratitude.

Man is a debt-paying animal. He may be unable to pay his money debts – not for want of manhood, but for want of money – but so long as he remains a man, he cannot suspend the payment of his debts of gratitude, because gratitude is of the essence of manhood, and he has wherewith to pay. And the very life of his manhood depends upon his paying. An unacknowledged debt stifles the soul . . . If thankfulness is a part of manhood, then thanksgiving must be an important means in the culture of manhood.

The article continues, but the overarching idea is that, every day, we incur a lot of debt. Fortunately, this is the kind of debt that each of us has the

ability to pay because gratitude is one of those qualities that makes us human.

In fact, Rev. Pell later argues that a person without gratitude is lacking in one of the most basic characteristics that distinguishes humans from animals. Humans have the ability to recognize when someone has done something nice for them and to pay the debt with a simple, "Thank you" if they choose to do so.

As this Thankworthy column ends, it is time to pay the piper. After all, "an unacknowledged debt stifles the soul," and no one wants to live with a stifled soul. There are just so many people on my thankworthy list for 2017:

- James and Louis – the security guards who have a greeting every morning and make sure I am safe when I have to work late;
- My law partner who literally dropped everything he was doing to come back to the office just to make sure I didn't actually jump off the balcony when I found out I only had fifteen minutes to file something;
- My colleagues who have graced my desk with bars of chocolate or servings of blackberry cobbler to make the work easier or who have stopped by to tell me an interesting story and thereby remind me that I am truly fortunate to practice law with people I like;
- My former law school classmate who disrupted her day to let me use her firm's binding machine so I could re-bind an appellate brief after the printer had closed for the day;
- My legal assistant who did not quit after week 2, and all of the other legal assistants who have jumped in to help get stuff finished and out the door time after time;
- The co-counsel who value collaboration above competition, and have been willing to tell me if I was having a bad idea – before I actually did it;
- The opposing counsel who help to make me a better practitioner as surely as iron sharpens iron;
- The court staff who stamped my pleadings at 4:29 p.m. on a Friday; and
- The clients who have given me the honor of being a part of the situations they face.

This year, the thankworthy list is quite long. It should be. If thankfulness is a part of what it means to be human, then thanksgiving must be an important part the culture we cultivate.



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TOWARD A HEALTH CARE COMPROMISE?

The Senate's recent failure to repeal the Patient Protection and Affordable Care Act of 2010 ("ACA"), also known as Obamacare, means that the most ambitious social welfare legislation enacted since the Great Society Era remains in place. However, President Trump's recent executive order on health care¹ and repeated demands for the ACA's repeal has created instability in the health-care sector and concern that a compromise is unworkable. Health care, which consumes one-sixth of national output, is as polarizing and important a subject as civil rights was in the 1950s and 1960s. The appointment of a bipartisan commission to propose solutions now, as then, would be a solution.

U.S. Health Care before the ACA – Rising Costs and Insufficient Coverage

Unlike other developed nations that enacted universal health care after World War II, the U.S. maintained a system of private insurance for health-care delivery. The postwar consensus brokered among government, private employers, medical providers and organized labor dates back to the Roosevelt administration's wage and price control regimen, which conflicted with union demands for increased compensation. The government disallowed employers from awarding pay increases, but countenanced the provision of health plans as a non-taxable employee benefit that employers could expense. Under these plans, coverage was guaranteed and premiums for the sick couldn't be raised – irresistible incentives. Employer-provided health care, however, inevitably led to labor market inflexibility because covered employees tended to forego employment alternatives or entrepreneurship to remain insured.

The government's involvement substantially increased when President Johnson signed Medicare and Medicaid into law in the Great Society Era.² Costs for both programs have grown dramatically and unsustainably.³

Accordingly, the glaring defects in the U.S. health-care picture before the ACA were cost and relative inaccessibility – interrelated problems, because the fee-for-service medicine and high physician compensation raised

treatment costs and drove up premiums, which resulted in more uninsured, e.g. more than 60 million people, or 18.2% of the population, were uninsured even though the U.S. spent more than one-sixth of GDP on health.⁴

The pre-ACA healthcare system was advantageous in terms of research and provision of high quality care to those with coverage. However, it was costly, and systematically denied coverage to sick patients without employer-provided coverage, which was becoming increasingly elusive. Enter the ACA.

Divergent Views on the ACA

The most politically polarizing piece of social welfare legislation enacted since the Great Society Era, the ACA was passed by reconciliation at the height of the financial crisis, and was designed to expand access to coverage, control costs and improve health-care delivery.⁵ It ambitiously sought to provide universal health care access, in part by expanding Medicaid, requiring an essential benefits package for ACA-approved policies⁶, creating subsidized health-care exchanges and charging an individual mandate penalty to those who remained uninsured.⁷

The ACA barely survived judicial review in *National Federation of Independent Business v. Sebelius*⁸ and *King v. Burwell*.⁹ Many "red states," including Tennessee, refused to expand Medicaid under the ACA's terms.¹⁰ Congress repeatedly tried to withdraw federal subsidies designed to stabilize the individual insurance marketplaces,¹¹ and the Republican Congress also repeatedly tried (unsuccessfully) to effectuate its repeal.¹² Recently, President Trump issued an executive order to unilaterally undermine the ACA's insurance marketplaces by promoting the use of cut-rate association health plans that would undermine insurance marketplaces in two ways. First, it deprives them of their youngest and healthiest patients. Second, it exempts purchasers of such policies from their current obligation to make share responsibility payments to the IRS because association health plans lack the minimum benefits package required of ACA-approved policies.¹³

Divergent Perspectives

To its supporters, the ACA is an audacious piece of social welfare legislation that, to paraphrase Theodore Parker, bends the arc of history towards justice. Among the benefits: fewer uninsured, a lower rate of health-care inflation and lower economic stress felt by newly insured families.

To its opponents, the ACA is a coercive use of federal legislative power to undermine state and individual autonomy and create a nationwide right to health care that illegitimately adumbrates a European social democracy. Indeed some insurers have left individual marketplaces, resulting in a dramatic rise in premiums in those markets. Moreover, the ACA is inordinately complex, with hidden taxes, regulatory compliance costs, and unforeseen problems borne of the fact that many state governments did not expand Medicaid.

Perhaps the ACA's greatest flaw is its attempt to fundamentally reform health care on a partisan basis. After all, the health sector is too large, important and personal to most Americans. Indeed, even the ACA's most ardent supporters would agree that it is flawed, e.g. the ACA failed to deal with the most important problem facing U.S. health care, namely its unsustainable cost and administrative burdens. This is because the ACA's drafters abjured direct taxes¹⁴, failed to alter fee-for-service medicine and instead relied on a complex regulatory framework to socialize costs. The ACA's opponents, however, are wrong to claim it is a complete failure. It has dramatically reduced the number of uninsured and improved the breadth and quality of health plans. Indeed, unanticipated and partisan opposition has hampered its implementation. For example, based on *NFIB v. Sebelius*, 18 "red" states have refused to expand Medicaid and this has led individuals who would otherwise choose Medicaid, to enter the federal exchanges. Because these individuals are higher risk, insurers have either dramatically increased premiums or exited the marketplaces altogether. This requires HHS stabilization subsidies that are highly unpopular with both Congress and the public.

By: **Mohamed Akram Faizer**
Professor of Law, LMU Duncan School of Law



In reality, much of the bemoaned increase in health care premiums and deductibles is not a reflection of ACA-induced health care inflation, but the fact that HHS no longer approves of association-type health plans that lack coverage for such basics as pre-existing conditions, mental health, pregnancy and emergency care.

Where Next?

Lack of bipartisan support is surely one strike against the ACA. But further complicating its repeal is the fact that a growing number of Americans support the ACA's benefits package and the closing of the pre-existing condition loophole, but disapprove of the shared responsibility payment and the high cost and deductibles for ACA-approved health plans. The policy's most popular and unpopular components, then, are intertwined. The only way to tackle these complexities is to undertake bipartisan reform for purposes of national cohesion, not unlike the civil rights challenges we faced in previous generations when broad consensus was needed to end a Senate filibuster and enact the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968. As President Eisenhower did in convening the bipartisan Civil Rights Commission under the University of Notre Dame's President, Father Theodore Hesburgh, C.S.C., the current president should convene a bipartisan commission on the future of health care. Their findings would be more acceptable to Congress and the American people and facilitate a bipartisan compromise. Such a commission may recommend a government entitlement to basic health care for all. The composition of benefits, however, would have to exclude coverage for anything but the most essential emergency and preventive care on a non-fee-for-service basis to contain costs. This entitlement, though, could be supplemented by private plans without government subsidy or expenditure. Although this will make private insurance less affordable to many, the existence of a public entitlement will legitimize and facilitate a needed deregulation of health plans to incentivize competition, transparency and cost containment. It would also prevent against a complete government takeover of health care and ensure that needed private sector capital is available to fund health research and development. The president ran and won office

as an anti-establishment candidate with a focus on improving living standards. Included in this was a promise of health care reform and ACA repeal. To date, he has avoided bipartisanship on the issue. He should change course in his first term's remaining thousand days.

¹ See Exec. No. 13765, (titled "Promoting Healthcare Choice and Competition Across the United States," dated October 12, 2017).

² See Title XVIII and Title XIX of the Social Security Act, which created both Medicare and Medicaid.

³ To illustrate, Medicare's share of the budget has grown from 3% in 1970 to 15% today and Medicaid's share of the federal budget has grown from 1.4 percent in 1970 to approximately 10 percent today. For state governments that run the programs, the fiscal burden has grown from 9.5 percent of state budgets as of 1990 to approximately 20 percent today. This is largely based on the overall increase in health care costs, an uptick in the indigent population and the increasing reliance of seniors on Medicaid-funded assisted living.

⁴ See Kevin Drum, *Chart of the Day: Health Care Spending as a Percentage of GDP*, Mother Jones (June 5, 2017) <http://www.motherjones.com/kevin-drum/2017/06/chart-day-health-care-spending-percentage-gdp/> (last visited November 9, 2017) (demonstrating that the U.S. spends 18% of its income on health care while other developed countries spend between 7 and 11%).

⁵ 42 U.S.C. § 18091(2)(c) (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

⁶ ACA approved policies cannot deny coverage for pre-existing conditions or increase premiums based on age or health status. They must also include coverage for emergency care, mental health treatment, contraception, drug treatment and coverage for adult children under age 26.

⁷ Under the ACA, individuals above a certain income threshold who remain uninsured must make a shared responsibility payment of no less than \$695 to the IRS on an annual basis.

⁸ 132 S. Ct. 2566 (2012) (the Supreme Court concluded the Individual Mandate was disallowed under the Commerce Clause, but permitted under the Spending Clause. It also concluded the ACA's Medicaid expansion violated the Tenth Amendment by coercing state governments, by allowing non-consenting states to reject the ACA's Medicaid expansion, but allow for subsidies to be provided to consenting states under the ACA's terms).

⁹ Concluding that the IRS Rule, which granted tax subsidies to insurance policies purchased on federal as opposed to state health exchanges, is legal.

¹⁰ Eighteen states have refused to expand Medicaid according to the ACA's terms, which has resulted in approximately 3.3 million individuals being denied Medicaid coverage.

¹¹ Under the ACA, the federal government can stabilize the individual insurance marketplaces by providing subsidies to protect private insurers whose viability would otherwise be jeopardized by insuring high risk patients. Congress has acted to close this provision to disallow such funding, which has resulted in many insurers leaving the individual marketplaces. Recently, a bipartisan compromise has been reached by Senators Lamar Alexander (R-TN) and Patti Murray (D-WA) to legislatively approve these subsidies that is currently being considered by Congress.

¹² See Lee Fang, *GOP Lawmakers Now Admit Obamacare Repeal Votes were a Sham*, The Intercept (March 31, 2017), <https://theintercept.com/2017/03/31/Congress-voted-more-than-50-times-to-repeal-the-aca-during-president-obamas-last-six-years-in-office-at-the-time-of-this-writing-the-full-house-voted-twice-to-repeal-the-aca-under-president-trump-one-of-which-succeeded-while-the-senate-has-failed-in-its-three-attempts-to-muster-50-votes-to-do-the-same/>.

¹³ See supra. President Trump's Executive Order on "Promoting Healthcare Choice and Competition Across the United States," dated October 12, 2017 has the effect of undermining the ACA by allowing for cut rate, minimum coverage association health plans that charge punitive rates to older and sicker insureds to be accepted by HHS and the IRS for purposes of avoiding the ACA's shared responsibility payment.

¹⁴ The ACA is, however, partly funded by increasing the Medicare tax by 0.9% for individuals earning above \$200,000 and \$250,000 for married taxpayers.





WELL READ

By: **Tracy S. Chain**
LRIS Administrator

THE BALLAD OF FRANKIE SILVER

BY SHARYN MCCRUMB (1998)

About 25 years ago, I was privileged to take a class at UT called “Appalachian Literature,” taught by the late Wilma Dykeman. Ms. Dykeman had selected one book from each of five states: West Virginia, Virginia, North Carolina, Tennessee, and Kentucky, and through those books the class explored what it means to be Appalachian. Aside from the obvious delight of being able to actually – gasp – sit in the same room with the celebrated writer, I was, by the end of the course, absolutely hooked on the subject.

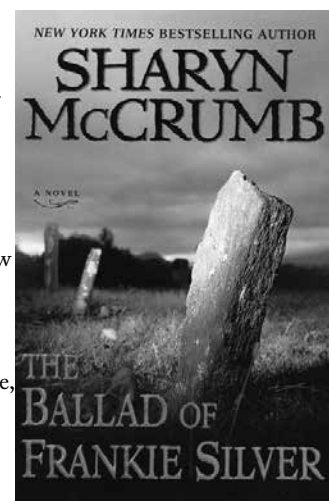
I discovered author Sharyn McCrumb on the Knox County Library website. Just how, I can’t remember, but the first book of hers I saw was “The Ballad of Tom Dooley,” which of course caught my eye since some of my earliest memories center around my father’s frequently played Kingston Trio album. After recovering from the emotional rollercoaster of reading that book, I was eager to find more McCrumb to consume, and found her earlier 1998 novel about Frankie Silver, the first woman hanged in the state of North Carolina, executed on July 12, 1833 in Morganton.

The technique the author chose to bring Frankie’s story to life involves the reader in not only the events of 1831-33 but of the life of Sheriff Spencer Arrowood in the fictional Wake County, TN (geographically equivalent to Unicoi County), who is recovering from a near-fatal gunshot wound and is confronted with the state’s invitation to the upcoming execution of a man whom he arrested decades before. Sheriff Arrowood, confined to his house, has plenty of time on his hands to reflect not only on that case, but the strange and haunting tale of Frankie Silver, first shared with him by his late mentor and predecessor

Sheriff Nelse Miller. It’s a compelling literary technique in this instance, as it draws the reader in, then thrusts her back in time only to yank her forward to the 1990s just about the time 1832 becomes a little more comfortable. The time and perspective shifts serve to highlight the similarities and differences between the cases of the doomed Frankie Silver and her fictional 20th century counterpart, Fate Harkyrder, whose scheduled execution was to be the first in Tennessee in decades.

I found the afterword of the book (no peeking!) as interesting as the novel itself, giving information about the author’s research into this tale, her choice of narrative, and her themes of the clashes between the very poor and the middle class, hill folk and flatlanders, and the origins of the tensions to this day that any pro bono attorney or public defender in Appalachia is acutely aware of. I was interested to learn that the book is required reading at several different law schools, and it was easy for me to see why.

If you’re looking for a book that will make you think about social justice, western North Carolina history, and experience the thrill of a mystery, I highly recommend this one.



LAWYERS ALMANAC

By: **Chris McCarty**
Chris McCarty, Lewis Thomason

GIVING BELATED THANKS

As we approach the heart of the holiday season, I hope everyone will, “Eat, drink and be merry.” This saying, of course, comes from the Bible: “Then I commended mirth, because a man hath no better thing under the sun, than to eat, and to drink, and to be merry.” Ecclesiastes 8:15.

I think it fair to say that “drink” was not referencing eggnog, at least not the kind you buy at Kroger. The Bible and other religious texts are full of people drinking and/or referencing alcohol. Yet it was members of the Temperance Movement, often with Bibles in hand, that pushed forward the concept of prohibition. Their efforts eventually caused the passage of the 18th Amendment, with its enabling legislation, the Volstead Act, prohibiting the sale/use of alcohol in America as of January 17, 1920.

But only Al Capone and other less than forthcoming members of society ended up benefiting from prohibition. By 1943, Congress was already proposing the repeal of prohibition. By December 5, 1933, in fact,

the 21st Amendment was ratified, bringing an official end to prohibition just over a decade after its passage.

Maybe Congress had the holiday season, and the Biblical text above, in mind when ratifying the 21st Amendment in December. What better time to celebrate the very fuel of heightened celebration?

So, I again say to one and all, eat, drink and be merry, and remain thankful for constitutional conventions.



barrister bullets

BARRISTERS ELECTIONS & HOLIDAY PARTY

Mark your calendar to attend the December 6 Knoxville Barristers meeting, elections and holiday party. We'll be electing Vice President, Secretary/Treasurer and two At-Large Executive Committee seats. Even if you can't stay for the whole party, make sure to drop in. If you intend to vote, please make certain to arrive before 5:15 p.m.

Nominees include:

Vice President: **Mikel Towe**, Lewis Thomason

Secretary/Treasurer: **Daniel Ellis**, Breeding & Henry, LLC

Members-at-Large:

- **Jeremy Goolsby**, London & Amburn, P.C.
- **Allison Jackson**, Egerton, McAfee, Armistead & Davis, P.C.
- **Amanda Tonkin**, TN Dept. of Human Services
- **Sarah Watson**, Law Office of Sarah Watson

Mitchell Panter, Paine | Bickers LLP, will become Barristers President at the end of the meeting. There is no need to RSVP - just stop by, have a drink on us, grab some refreshments, and help shape the future of our profession and community.

HUNGER AND POVERTY RELIEF

The Hunger and Poverty Relief Committee would like to thank everyone who participated in this year's canned food drive. Second Harvest Food Bank of East Tennessee will be able to provide thousands of meals to East Tennessee residents thanks to your generosity!

Throughout the month of December, the Committee will be adopting several angel tree children and providing Christmas gifts for them. If you are interested in shopping for a child in need, please contact **Courtney Houtp** (crhoutp@gmail.com) or **Meagan Davis Collver** (mdaviscollver@londonamburn.com).



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New Admittees Reception

On November 6th, the Knoxville Barristers hosted a reception for bar admittees who were sworn in by the Supreme Court earlier that day.





LEGALLY WEIRD

By: **Allison S. Jackson, Esq.**
Egerton, McAfee, Armistead & Davis, P.C.

Holiday Tips

It is the most wonderful time of the year again. The holiday season is finally upon us, and if your family is anything like mine, you have probably spent the better part of several weeks hemming and hawing over which delicious, buttery (read: calorie-laden) recipes might grace the holiday dinner table this year. Some of you may be lucky enough to travel to your holiday dinners, and if so, you should be attentive to the offerings at your intended destination to be sure that you are not running afoul of some obscure state or local law or custom. For your benefit, I have compiled a few helpful tips for those navigating the roadways or the airways this holiday season.

If you are visiting relatives and friends in Tennessee (and West Virginia, too), your yuletide celebration might not be complete without Cousin Eddie's roadkill cuisine, perhaps an elegant squirrel stew, which is perfectly legal (and hopefully delectable).¹ If your tender Tennessee Christmas includes fish-based fare, let's hope that Cousin Eddie put away his spear and lasso and caught dinner the old-fashioned way, or Santa may very well bring him a misdemeanor for Christmas in addition to that lump of coal.²

If you are venturing over to North Carolina for a Smoky Mountain getaway, be careful when sampling Aunt Bethany's green bean casserole because, unbeknownst to me, the black market for Granny's bacon grease is smoking hot these days, and a sizeable grease theft can result in felony charges!³ If you are traveling down South, you better leave your utensils at home if you plan a pit stop in Gainesville, Georgia. The self-declared "Chicken Capital of the World" prides itself upon its poultry, and since 1961, has allegedly made it unlawful to consume fried chicken using anything other than your fingers.⁴ (Just ask ninety-one-year-old Ginny Dietrick who was arrested on her birthday for eating her fried fowl with a fork in 2009.)⁵

If your adventures are going to take you a bit further, perhaps to the Northeast, your friends' and relatives' holiday tables likely will be topped with traditional recipes. For instance, Mainers know that tomatoes are not a welcome ingredient in New England clam chowder. In fact, State Representative Cleveland Sleeper planned to legislate the recipe in 1939 and proposed sentencing offenders with clam digging at high tide.⁶ He never filed his bill, but, rather, settled the issue with a high-profile chowder contest judged by then-Governor Lewis Barrows and Ruth Wakefield, the inventor of the Toll House chocolate chip cookie.⁷ Similarly, Vermonters know that the state pie – apple, of course – is served in "good faith" with a glass of cold milk (the state beverage), a slice of Vermont cheddar cheese weighing a minimum of half an ounce, or a large scoop of vanilla ice cream.⁸

For those of you who plan to visit the Midwest, your festivities may include a greased pig contest or a turkey scramble (read: game similar to Capture the Flag—only substitute said flag for an oily swine, chicken, or turkey). If you are in Minnesota and Cousin Clark recruits you for his team, think like Nancy Reagan and "Just Say No" because you could be placed on the Naughty List and charged with a petty misdemeanor offense.⁹

If your travels are going to be tropical this year (and I envy you if they are), then you may be pleased to learn that Honolulu County, Hawaii has renewed your right to "double-fist" your holiday libations. The Liquor Commission of the City and County of Honolulu recently repealed its drink stacking law, which previously precluded boozy patrons from ordering more than one cocktail at a time.¹⁰ Be careful not to overindulge! If you have a few too many and prank order pizza to your sister's house in Louisiana, you may end up paying a hefty fine or spending New Year's Eve in the slammer.¹¹

Wherever this holiday season takes you, I wish you and yours the happiest Christmas since Bing Crosby tap-danced with Danny Kaye and a healthy and prosperous New Year.

¹ Tenn. Code Ann. § 70-4-115(c); W. Va. Code § 20-2-4(e).

² Tenn. Code Ann. § 70-4-102(c), 104.

³ N.C. Gen. Stat. § 14-79.2; Mario Parker and Leslie Patton, *Crooks Are After the Grease From Your French Fries*, Bloomberg Markets (May 4, 2017, at 8:00 AM), <https://www.bloomberg.com/news/articles/2017-05-03/grease-heists-turn-gross-goo-to-gold-for-crooks-in-biofuel-rally>.

⁴ *Gainesville, GA*, The Newnan Times-Herald (Apr. 9, 2016, 7:22 PM), <http://times-herald.com/news/2016/04/gainesville-ga>; Jessica Jordan, *Visitor arrested for eating chicken with fork*, (Jul. 20, 2009, 11:27 PM), <https://www.gainesvilletimes.com/news/visitor-arrested-for-eating-chicken-with-fork/>.

⁵ Jessica Jordan, *Visitor arrested for eating chicken with fork*, (Jul. 20, 2009, 11:27 PM), <https://www.gainesvilletimes.com/news/visitor-arrested-for-eating-chicken-with-fork/>.

⁶ New England Historical Society, <http://www.newenglandhistoricalsociety.com/maines-great-clam-chowder-war-of-1939/> (last visited Nov. 10, 2017).

⁷ Lemelson-MIT, Ruth Wakefield Toll House Chocolate Chip Cookies, <https://lemelson.mit.edu/resources/ruth-wakefield> (last visited Nov. 10, 2017); New England Historical Society, *Maine's Great Clam Chowder War of 1939*, <http://www.newenglandhistoricalsociety.com/maines-great-clam-chowder-war-of-1939/> (last visited Nov. 10, 2017).

⁸ Vt. Stat. Ann. tit. 1, §§ 512, 513; H.B. 302, 1999-2000 Leg. Sess. (Vt. 1999).

⁹ Minn. Stat. §§ 343.36, 343.55.

¹⁰ City and County of Honolulu, Haw., Rules of the Liquor Comm'n., § 3-84-78.52 (repealed).

¹¹ La. Stat. Ann. § 68.6(D).

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By: Judy M. Cornett
UT College of Law



ETHICS LESSONS FROM THE HEADLINES

You may not represent the *New York Times*, but you can learn something from someone who does – or did. David Boies is perhaps most famous for representing Al Gore in the litigation following the 2000 Presidential election. Now, however, he is gaining publicity for his representation of media mogul Harvey Weinstein, which has given rise to at least two ethical dilemmas.

Boies undertook the representation of Weinstein when he also represented the *New York Times* in unrelated matters. Wishing to collect information about Weinstein's accusers, Boies signed a contract with a company called "Black Cube," which allegedly employs former Israeli spies. Boies sought this information primarily to persuade his other client, the *New York Times*, not to publish an upcoming article about Weinstein. Unfortunately, the Black Cube employees approached Weinstein's victims and prominent journalists using false identities and phony stories. Boies has said that he did not choose Black Cube, did not negotiate the contract, did not read it before signing it, and did not direct the activities of Black Cube under the contract. When the *New York Times* learned of Boies involvement with the Black Cube contract, it fired him, stating that his actions constituted a "grave betrayal of trust."¹

Boies' conduct raises two ethical issues. First, did his representation of both Weinstein and the *Times* constitute a conflict of interest? Boies has stated that there is no conflict in assisting another client in gaining truthful information to present to the *Times*. Pursuant to Tennessee's Rule of Professional Conduct 1.7,² a lawyer is prohibited from representing two parties whose interests are "directly adverse." A lawyer is also prohibited from representing a client if her representation may be "materially limited" by the interests of another client. In Boies' case, there was probably not a "directly adverse" conflict when he undertook the representation of Weinstein. However, when he signed the contract with Black Cube in an effort to persuade one client not to publish an article about another client, the interests of those two clients were becoming "directly adverse." What if the information gathered on behalf of one client had been presented to the other client, who then refused to do what the first client wanted it to? At that point, direct adversity would surely exist.

Boies argued that the *Times* had signed a waiver of future conflicts that covered his representation of Weinstein. Comment [22] to TRPC 1.7 provides guidance on waivers of future conflicts. The effectiveness of the waiver depends "upon the extent to which the client reasonably understands the material risks that the waiver entails." A waiver is more likely to be effective if the risks are described specifically, if the client is a sophisticated user of legal services, and if the client is independently represented in entering into the waiver. Without knowing more about the specifics of the conflicts waiver, it is difficult to know whether the waiver would pass muster under Tennessee's rules. But given the unusual circumstances of this case – one client attempting to persuade another client not to publish an article – it is unlikely that the waiver could have been specific enough to waive this conflict.

The second issue raised by Boies' conduct is his responsibility for the nefarious activities of Black Cube. Because this behavior "involv[ed] dishonesty, fraud, deceit, or misrepresentation," Rule 8.4(c) would prohibit Boies himself from engaging in it. But because Rule 8.4(a) also prohibits a lawyer from violating the Rules of Professional Conduct

"through the acts of another," the issue becomes whether Boies is responsible for Black Cube's actions. In determining whether a lawyer is responsible for the misconduct of an investigator, the Eighth Circuit used the standard in Rule 5.3 governing a lawyer's liability for the actions of a non-lawyer employee. Rule 5.3(c)(1) provides that a lawyer who "orders, or with knowledge of the specific conduct, ratifies" it is liable for the non-lawyer's conduct.³

In the Boies case, it seems clear that he did not "order" the specific wrongful conduct. The contract itself provided that Black Cube would obtain information "by legal means and in compliance with all applicable laws and regulations."⁴ The question whether he ratified the misconduct is closer, because he received reports generated by the Black Cube employees and forwarded those reports to Weinstein. Some commentators have suggested that Boies's liability could derive from Rule 5.3(c)(2), which imposes liability if the lawyer exercises "direct supervisory authority" over the non-lawyer and "knows of the non-lawyer's conduct at a time when the consequences can be avoided or mitigated but fails to take reasonable remedial action." However, it is unclear whether Boies exercised "direct supervisory authority" over Black Cube and equally unclear how or when Boies learned about Black Cube's tactics.

What lessons can we learn from David Boies' situation? First, do not undertake representation for one client that involves persuading an existing client to do or not do something, even if you represent the existing client in unrelated matters. The potential for direct adversity is just too great. Second, if you use a waiver of future conflicts, make sure it is as specific as possible about those potential future conflicts. Don't rely on the waiver if the eventual conflict is one that the client would be unlikely to foresee. Third, if you use an investigator, make sure you vet the investigator before hiring him or her, and make sure that you can adequately monitor, supervise, and control the investigator's activities. If you discover misconduct by the investigator, make sure you take steps to correct or mitigate its consequences. We can't all represent the *New York Times*, but we can try to make sure our clients never accuse us of a "grave betrayal of trust."

¹ Deborah Cassens Weiss, Did David Boies Push Ethical Boundaries in Dual Role with Weinstein and the New York Times?, ABA Journal (Nov. 8, 2017), available at http://www.abajournal.com/news/article/did_david_boies_push_ethical_boundaries_with_dual_role_for_weinstein_and_th/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email; see generally Ronan Farrow, Harvey Weinstein's Army of Spies, THE NEW YORKER (Nov. 6, 2017), available at <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies>.

² Boies' conduct is governed by New York's ethics rules, but for our purposes, we will examine how Boies' conduct would be evaluated under the Tennessee Rules of Professional Conduct.

³ *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003).

⁴ Farrow, *supra*.



By: **Lisa J. Hall**
Human Lawyer

NOT MY JOB, TOO!

Throughout this past year, I have spent some time researching future trends in the practice of law for this column on the Evolving Legal Marketplace. (Marsha asked me early on to think of a catchy title for the column, but clearly that did not happen). At any rate, in theory, if we are aware of the trends, we can stay on top of them and not get left behind. Future trends in the law typically seem to address concerns about efficiency and access to justice. Lawyers can be expensive and are not easy to afford for a very large portion of our population. As a human being who cares about other human beings, I acknowledge this legitimate concern, which deserves research and intentional effort to address. As a human being who has invested the time and money in education and experience to hone my skills as a trial lawyer, and support my family, I am concerned when I hear about robots replacing lawyers in areas like document review, legal research, and even dispute resolution. I have often consoled myself in the midst of this research, reminding myself that even as so many areas of the law have become administrative and streamlined, family law practice, including family mediation, is one area that cannot be delegated to an administrative process and robots. With all of the factors to be weighed by the judge, including credibility of the witnesses, and many issues necessarily being decided on a case-by-case basis, there is no way that family law will be taken out of the hands of the practitioner and replaced by computers. Then, I realized I may have been wrong.

In September, I attended the KBA seminar “Mediation, Arbitration and Negotiation, Oh My!: An Alternative Dispute Resolution Update and Review of Mediation Best Practices.” I needed Continuing Mediation credit (CME), and I thought I could learn something from Professor Benjamin Barton’s presentation on Online Dispute Resolution (“ODR”) for this column. He was very engaging and interesting, and then he began to describe a program called Rechtwijzer (I have seen this translated as both “Roadmap to Justice” and “signpost” – who can say?), which is an ODR platform being used in the Netherlands for divorce and separation. While the first uses of ODR were the kinds of claims that benefitted primarily from efficiency (eBay or other small consumer disputes or minor traffic tickets), Rechtwijzer’s values (empowerment instead of efficiency, interests instead of positions, and people instead of rules) are more suited for relational disputes like divorce or employment disputes. Professor Barton showed us some slides illustrating how Rechtwijzer works, and it appeared to be a very user-friendly and well-designed program.

Couples are first asked basic demographic questions and then questions about their preferences. The questions are designed to identify issues and encourage reflection and articulation of overall goals. The other party goes through the same process before learning about the first party’s ideas, which avoids some of the pitfalls of the traditional process (polarization and argument). The next phase is dialogue and negotiation, where the parties learn about which topics they have similar viewpoints and can begin resolving. The platform finds points of agreement and proposes solutions. It also includes a child support calculator and software for drafting agreements. Couples can use a professional mediator for an additional charge and if nothing else works, they can request a binding decision by an adjudicator. An adjudicator is only needed in about five percent of the cases.

Rechtwijzer is designed to avoid some of the risk factors particular to divorce by encouraging cooperation and stimulating the parties to

reflect on solutions that would work for both. The interface allows people to reflect on declines in household income, prompting them to come up with ideas to increase their joint income and manage costs, and this process limits legal costs. Emotional conflict is perhaps the biggest risk factor in a divorce. Rechtwijzer reframes conflicts as issues needing solutions, rather than providing options for adversarial positioning, claims or counterclaims. The arms-length cooperative interface allows parents additional channels for communication and aims to prevent communication breakdown. The platform also attempts to reduce uncertainty and tension by providing a step by step, issue by issue process, with help available at any time. There is always a clear process to move forward to an acceptable and fair outcome.

Despite the good intentions and design of Rechtwijzer, as well as the national and international acclaim, the program ultimately was not financially viable. The concept to follow will be Justice42 (“Justice for two”), which will take some of the team behind Rechtwijzer, and will strive to incorporate the lessons learned from Rechtwijzer into a new platform focusing on the Netherlands only (plans had been in place to bring Rechtwijzer or similar platforms to different countries). Laura Kistemaker, part of the former Rechtwijzer and now on the Justice42 team, remains optimistic about their prospects, “We hope to become the platform people will turn to in difficult times of separation. And we will work hard to offer them the structure, control and expertise help they need to make a good separation plan and finalise their divorce.”

Even when Rechtwijzer was being utilized, it was only being used for about 700 divorces per year, in contrast to the 65,000 divorces the Netherlands has every year. Further, Dutch lawyers were (understandably) initially wary of the online platform and feared a loss of business, but once it got started, many viewed Rechtwijzer as an efficient way to process simpler cases, leaving the more complex matters for the expertise of the lawyers.

For the foreseeable future in the Netherlands and the United States, the practice of law remains in the hands of licensed attorneys. We just need to keep our friends close and the robots closer.



By: Sarah M. Booher, Esq.
The Law Offices of Ogle, Elrod, & Baril



JEFFREY GLASPIE

“Should a young attorney find themselves in an appellate situation, I highly recommend they thoroughly review the Rules of Appellate Procedure and take very careful note of the various deadlines and requirements early in the process so that they don’t end up drinking five energy drinks the night before their briefs are due!”

An obvious caffeine junkie, Jeffrey Glaspie is a telecommunications technician turned “late in life lawyer” who knew he had no desire to practice criminal or family law. This Seymour native majored in Sociology and Political Science, graduating from East Tennessee State University in 2000. A member of the second class of LMU’s Duncan School of Law, he was still in school when he went to work for Bill Hotz and Associates five years ago, and he’s never left. “I started here prior to graduation and worked as a paralegal, law clerk, investigator, and was invited to work here as an attorney once I passed the bar. I officially began my practice on January 1, 2015.”

“Misconceptions abound regarding plaintiff’s attorneys, both young and old. When I told my father that I was going to be working at a personal injury firm, he told me that I couldn’t do it because I’m a terrible liar! As it turns out, I think that is one of my most valuable assets in my practice. The general public has this perception of the sleazy, slick-talking personal injury lawyer, wherein reality, integrity and honesty are the most important attributes an attorney can have when dealing with insurance companies, defense attorneys, the courts, and, most importantly, clients. Organizations like the KBA and TBA are important because you can draw upon those members for knowledge and referrals. Our local bar is made of some wonderful people who are both professional and welcoming. Moreover, they help build relationships that make finding common ground for good faith negotiations easier.

“I wouldn’t say the perception of the dishonest lawyer is true, but I would say that most litigants believe strongly that the facts of their cases are in their favor and that a zealous attorney who scrutinized those facts can leave an opposing litigant with that impression.”

“It’s difficult as a ‘young’ attorney to have the confidence in your abilities when you enter into litigation with other attorneys who have decades of experience. I do often feel behind the curve when working with other attorneys around my age who have much more experience than myself. Despite this, I simply rely upon my mentors when I wade into the deep waters and try to stay confident in my abilities. I have been extremely fortunate to work in a firm where I have mentors with years of litigation experience to lean on. Without that wealth of experience at my disposal, I could easily see myself being overwhelmed by the challenges a lawsuit poses.” With that said, “I always find that I learn more from my failures than my successes. I love to play poker, and it’s sort of card cliché, but you never forget your bad beats.

For Jeff, maintaining good personal relationships is vital to a law student and new lawyer’s tenacity. If he had to go back and give his younger, law school self some advice, it would be this: “It’s important to work hard and do the best you can, but it doesn’t mean anything if you don’t try and preserve your personal relationships. Law school, by design, is an all-encompassing venture, but it isn’t your entire life. Balancing your work and personal life is extremely important to your resiliency in both. Your personal life is what keeps you grounded. Don’t forget to cultivate those pre-existing relationships with family and friends. It’s easy to forget



their lives aren’t consumed with civil procedure and contracts!”

And so far, honesty and a devotion to fostering good relationships have served Jeff well. Just shy of three years as a practitioner, he has already been to the Court of Appeals twice, most recently in *Cindy Phillips, et al. v. Rural Metro of Tennessee, LP, et al*, an interlocutory appeal concerning healthcare liability actions. The decision was just recently published, but it’s been a long and ongoing journey for Jeff and his clients. “The client relationship has been a steady thing through this case. It took the court three or four months to issue its opinion and then the time it took for the Court of Appeals to decide if they would hear this appeal. It was a Rule 9 appeal, meaning it is discretionary because it does not deal with a final judgment. Then they waited until the opinion was issued and now we have to await the defense’s decision to seek approval to appeal to the Supreme Court or if we can resume the litigation in the trial court.”

“In my practice, I have found that most plaintiffs want their cases resolved without the anxiety of a trial. I suppose that is neither good nor bad. It’s just that clients want things resolved sooner rather than later. Regardless, some cases need to be tried.”



LIFE HACKS

By: **Angelia Nystrom**

University of Tennessee Institute of Agriculture

TALKING TURKEY: LIFE HACKS FOR THANKSGIVING

I am a huge fan of Thanksgiving. I love to cook, and I love to host our family and friends. A couple of years ago, though, I was a bit behind the 8-ball. I was busy at work and didn't quite get it together enough to shop and plan my menu until a couple of days before Thanksgiving. When I finally did make it to the grocery store, I quickly realized that my chances of finding a fresh turkey were about as high as my chances of winning the Power Ball.

Hugh suggested that I call Willy's Butcher Shop (which I love). Fortunately, Willy did have a couple of fresh turkeys. Unfortunately (for my wallet), they were heritage turkeys, which I learned are fairly rare (about 24,000 are sold each year) free-range turkeys that are naturally self-basting. It really was the best turkey that I have ever tasted... and, based on its price, it should have been. (As a side note, a couple of months later, I was visiting a farm with work and met Pete, a pet heritage turkey who thinks he is a dog. After meeting him, I will not be eating heritage turkey again).

Lesson learned: plan ahead. So that I'm not scrambling every year, I have come up with some "life hacks" to make Thanksgiving just a little bit easier.

1. **Set the table ahead a week before Thanksgiving.** A couple of years ago, we were hosting 22 friends and family members for Thanksgiving. When I started setting the tables, I realized that my brown tablecloth for the kitchen had not come back in the dry cleaning from two years earlier. I spent about 30 minutes looking for it... and then about 30 more trying to figure out what sort of table cloth I was going to do. Since then, I have started setting the table in advance. It lets me cross at least one thing off my to-do list on Thanksgiving Day.
2. **Let the salad bar be your sous chef.** This may be my favorite tip. I can shave hours off my prep time by picking up ingredients from the supermarket salad bar that are already cleaned and ready to go—think chopped onions, sliced bell pepper and celery, hard-boiled eggs and even crumbled bacon.
3. **Learn how to carve a turkey by practicing on cheap rotisserie chickens beforehand.** My carved turkeys have often looked like something out of a horror movie. With practice on rotisserie chickens, they now look much better.
4. **Use your cooler as a fridge.** In the lead-up to the big event, refrigerator real estate is precious. I clear out space-hogging bottles of ketchup, pickles, etc. and stow them in the garage in a cooler filled with ice packs. Another hack with the cooler: use it to brine the turkey overnight (but make sure to add plenty of ice).
5. **Use a corkscrew as a guest-deflector.** Ever heard the old adage about too many cooks in the kitchen? I have learned how to keep well-meaning family and friends out of the kitchen during the final flurry of cooking by coming up with a few tasks that they can do to help: opening the wine, filling water glasses (which are placed outside of the kitchen), hanging coats and herding children are all appreciated—and guarantee time to focus when I need it most.
6. **Let the kitchen cabinets serve as a cookbook stand.** I like to minimize clutter in the kitchen, eliminate flipping back and forth, and protect my laptop that I know (from experience) is going to get damaged in the cooking chaos by making copies of my favorite recipes that I will include in the feast. Then, on game day, I tape

them at eye level to the doors of my kitchen cabinets. They are easy to read and follow, and I can even arrange them in order of my cooking prep.

7. **Make dressing in a muffin pan for easier serving.** Bonus: you get lots of crispy edges.
8. **Use chicken broth as a turkey reviver.** Overcooked the bird? Before you place that platter of dried-out breast meat to the table, drizzle it with a little warm chicken broth. It will help moisten the meat and add flavor. This is also a good trick for perking up slices that have gone from room temperature to cold.
9. **Use a slow cooker as a mashed potato keeper.** The only thing worse than lumpy mashed potatoes on Thanksgiving is cold, gluey ones. I keep my spuds warm when every burner of my stovetop is in use by buttering my slow-cooker insert, adding a little heavy cream and then spooning in the potatoes. Set the temp to low and stir every hour or so to keep them smooth and silky.
10. **Use a measuring cup as a fat separator.** The secret to great gravy is skimmed—not greasy—pan drippings. If you are without a fat separator, pour your drippings into a large heatproof measuring cup and pop it into the freezer. As the drippings cool, the fat will rise to the top and solidify, making it easy to skim off with a spoon.
11. **If you want wine with dinner (or just want to chill and watch football with a cold beer), chill it quickly in the freezer.** Wrap it in a wet paper towel and place it in the freezer for 15 minutes to get it cold.
12. **When all else fails, go out to a restaurant.** Last year, we were heading out of town the week after Thanksgiving. To make things easier, we decided to spend Thanksgiving at Brazeiros. It was one of the easiest and most enjoyable Thanksgivings I have ever had. I didn't have to cook, and I didn't have to clean up.
13. **You can have leftovers without actually cooking.** While I enjoyed dinner at the Brazilian steakhouse, I was a little bummed that we wouldn't have any leftovers. Hugh came up with a solution. We picked up some prepared Thanksgiving foods from Butler and Bailey, some William-Sonoma cranberry relish, and a turkey breast. It was just enough for the three of us to enjoy for a couple of days.

May these "life hacks" help to remove some stress and give you extra time to enjoy friends, family and really good food. Happy Thanksgiving!



By: **Stewart Harris**
*Lincoln Memorial University
 Duncan School of Law*



RECONSTRUCTING TENNESSEE

Okay, so you've won the Civil War. You occupy the former seceded states. Now, what do you do with them?

That, in a nutshell, was the issue that faced President Lincoln and the Republican-controlled Congress as U.S. troops occupied ever-increasing swaths of Confederate territory. The occupied South's economy was destroyed, its governments absent or nonfunctional. There were many opinions – some of them rather harsh -- on the proper treatment of the Southern states, but Lincoln wanted to “let 'em up easy.”

On the other hand, he didn't want to turn over Southern governance to unrepentant Confederates. He came up with something he called the “ten percent plan.” If ten percent of a given state's eligible voters in the 1860 election (the last one prior to the Secession Crisis) were now ready to affirm their loyalty and accept emancipation, the state would be on the path to redemption.

Lincoln came up with an amnesty oath in 1863:

I, ____ , do solemnly swear, in presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States, and the Union of the States thereunder; and that I will, in like manner, abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified or held void by Congress, or by the decision of the Supreme Court; and that I will, in like manner, abide by and faithfully support all proclamations of the President made during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by decision of the Supreme Court. So help me God.

But Lincoln's oath was not enough for Andrew Johnson, the military governor of Tennessee, one of the first states to be occupied. Johnson composed his own oath, which went significantly further, requiring affiants to “ardently desire suppression of the present insurrection and rebellion,” and to promise “that I will hereafter aid and assist all loyal people in the accomplishment of all these results.” This was too much for many Tennesseans, who referred to Johnson's formulation as the “damnesty oath.”

Even this more stringent oath did not long satisfy Johnson, who later imposed a requirement, just prior to the 1864 election, that voters “cordially oppose all armistices or negotiations for peace with rebels in arms.” This was a direct repudiation of a major part of the campaign platform of George B. McClellan, the Democratic nominee. Think about that: before a Tennessean could vote, he had to effectively reject one of the presidential candidates. Loyalty had morphed into conformity.

The morphing continued when a convention in early 1865 proposed a new state constitution. To vote in the subsequent ratification process, a Tennessean had to swear that he was an “enemy of the so-called Confederate States,” and that he did “sincerely rejoice in the triumph of the armies and navies of the United States and in the defeat and overthrow of the armies, navies, and all armed combinations in the interest of the so called Confederate States.”

While “rejoicing” sounds more appropriate to an old-time church service than to a voter registration certificate, such were the times, and

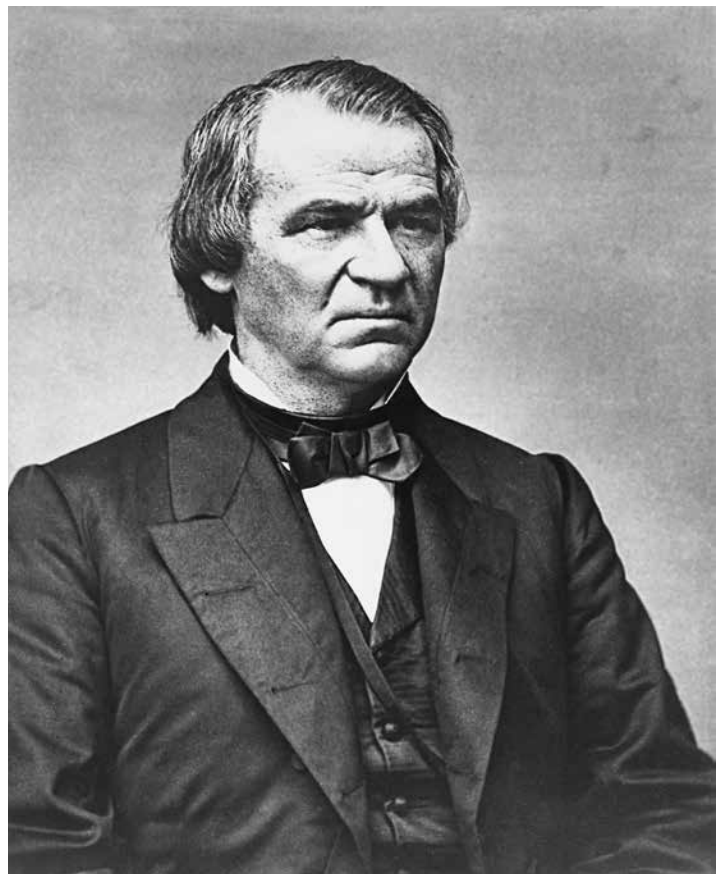
such was the need to ensure that, as Johnson insisted, “[t]reason must be made odious, [and] traitors must be punished and impoverished.”

All of this fascinating history was the subject of the 2017 McMurtry Lecture at Lincoln Memorial University's Duncan School of Law, an annual event which, this year, featured prominent attorney and historian Sam D. Elliott of Chattanooga. Sam describes it all much better than I can, and you can catch the gist of his presentation in a recent episode of my public radio show and podcast. Google “*Your Weekly Constitutional*,” and scroll down until you find the episode “Reconstructing Tennessee.”

As Sam notes, the process of readmitting Tennessee to the Union was rather “irregular,” but in the words of Andrew Johnson,

Now you cannot get back in the present chaos and disorder without some irregularity. . . . Talk of violating constitutional rules. Why how much law and constitution have you got now? In the absence of both, if you act irregularly, who dare say aught against it? Where is your law now? Lincoln may be charged with irregularity, but if he saves the Government by it who can find fault?

I guess that sometimes, when there is no law, you have to make up your own.





By: **Leslie L. Beale, JD**

Success Coach

Profusion Strategies

THE PROBLEM OF PERFECTION

Without a doubt, being a parent is the hardest thing I have ever done. Giving of myself when I am tired, or sick, or in desperate need of quiet is a daily challenge. The lessons I have learned from my boys are, however, the greatest gifts I have ever been given.

On our beach vacation last year, I was the student again as my youngest son taught me a valuable lesson about perfection. The beach where we vacation is great for kids with white sand, low surf, small crowds. It's a little lacking in the shell department, however. There are a few good ones discovered on each trip, but for the most part they are broken and bleached out by the time they make it to shore. Nonetheless, we hunt for shells each year.

On this particular day, I was standing in knee deep surf with my son and skimming the sand beneath for the perfect shell.

"Look at this one, Mom!"

"No, that one's broken."

"Ooh, this one's pretty."

"Yes, but look - it has a hole."

This went on for five minutes or so before I finally had enough sense to slow down and pay attention to what was happening. I was looking for the perfect shell, one that would excite and surprise my little explorer. I was getting more and more focused, and more and more frustrated with each failure. My son, however, was taking each shell (or piece of shell) as it came. He found something beautiful and exciting in each of them. He

didn't need the perfect shell - he was already excited and surprised, even in the midst of all the flawed shells at his feet.

How often, I wondered, do I react this way? How often do I miss the really, really good in my quest for the perfect? How often do I dismiss the beautiful things in my life because I have judged them somehow flawed? How many times do I fail to appreciate my success or the strengths of those around me because they are incomplete or not up to my standards? Maybe more importantly, what has all my demanding perfection gotten me?

I believe that's the problem with seeking perfection. On our quest to get there, we miss a lot and can even do real damage - to ourselves and those around us. We tell ourselves that all the striving, the pushing, the demanding is constructive, but nothing could be further from the truth. The unending quest for perfection keeps us trapped in a loop. It keeps us tense and stressed. It leads to frustration and a sense of never quite being enough.

So today, take time to notice the things in your life that are special. The things that you've missed or dismissed because they weren't perfect. The people you've sold short because they somehow didn't fit your mold. Celebrate a success of your own that you've never celebrated before because it wasn't big enough or important enough to matter. The best things in our life aren't always perfect, but if we pay attention we may just find we have more good than we realize.

KBA Open Service Project - December 15 Emerald Youth Foundation Christmas Store

Emerald Youth Foundation expects to serve more than 300 city children and their families through the Emerald Youth Christmas Store this holiday season. The store gives parents of children in their ministry the opportunity to purchase gifts at a deeply discounted rate.

This year the KBA will volunteer to assist shoppers. The store will be open December 15th from 3:30 p.m. (allows enough time for instructions and getting settled into position before store opens) to 8:00 p.m. (store actually closes at 7:00 p.m., so this includes at least an hour of assigned area cleanup afterwards). We need eight (8) volunteers for this worthy cause. Unfortunately, due to the popularity of this event, volunteers will be chosen "first come, first served."

Volunteer positions (with descriptions) available for KBA volunteers:

- Check-out
 - o Count each gift families would like to purchase to ensure limit per child is not exceeded. Also, locate pricing of gifts and tally final cost of all gifts per family. This allows a smooth process for cashiers. Clean up when store closes. Note: Customer service skills are a must as this can be a fast-paced, demanding position.
- Wrapping
 - o Be available to assist families with wrapping needs after they pay for their gifts. Clean up when store closes. Note: Kind personality preferred.
- Mrs. Claus' Sweet Shop
 - o As parents enter wrapping area, invite them to enjoy some Christmas refreshments. Refill food and drink areas as needed. Clean up when store closes. Note: "Sweet" and assertive personality is a must.

Please email jackie.myers@knoxcounty.org if you are willing to serve.

If you are not one of the lucky eight (8) to volunteer and miss out on the chance to assist shoppers, don't fret! We are also providing another opportunity to give back. We will be hosting a "VIRTUAL TOY DRIVE." You may purchase a gift or make a donation by using the provided link. <https://eychristmas.emeraldyouth.org/>

We, as members of KBA, are blessed this holiday season to have this generous opportunity to help those who are not as fortunate.



By: Jason H. Long
London Amburn



HELP WANTED

Seeking head football coach to return once proud program to its former glory. Applicants must have demonstrated ability to win football games at a high level. Eight and nine-win seasons considered a minimal requirement, although more will be expected in short order. Regular SEC championships will be expected, despite playing in the toughest conference in college football. Losses to Alabama, Florida and Georgia are occasionally expected, but under no circumstances shall be a regular occurrence. Losses to Vanderbilt and Kentucky shall be immediate grounds for Show Cause status for applicant to retain position.

Qualified applicants will be expected to have a history of recruiting top tier players to areas such as east Tennessee, despite pressures from competing schools to lure recruits with promises of ongoing national championships (Alabama), warmer weather (Florida, Georgia), strong academic programs (Vanderbilt) and exciting nightlife (LSU). Applicant can take solace in the fact that school can be sold on rich history of athletic success that occurred prior to any of the current recruits being born. Applicant will be expected to abide by NCAA rules regarding recruitment of players. Infractions will not be tolerated . . . if discovered.

Once recruits are on campus, applicant will need to demonstrate ability to manage their educational success (this requirement may be eased depending on skill of player recruited), impose discipline, and develop "leaders" within the team. Applicant is expected to do this with a group of 18 to 22-year-old boys, most of whom are away from home and experiencing independence for the first time in their lives and are now being praised as heroes in the community for their ability to play a game.

Position requires adept interaction with local and, if all goes well, national media outlets. Care should be given to cultivate relationships with media members to accentuate the positive and downplay the negative in the program in order to placate rabid and, at times, overly optimistic fan base. Caution to applicants who get on the bad side of local media, which has demonstrated significant leverage in swaying public opinion and placing pressure upon applicant's long-term employment status.

Applicant should either be a "Tennessee Man/Woman" or willing to become one. This will entail learning all verses of Rocky Top (sans the "wool," please God, for all that is good and holy, leave out the "wool!") and wearing orange without unnecessarily generating memes on the internet referring to "The Great Pumpkin." Must be comfortable around blue tick hounds. Applicants will not be considered unless they can honestly refer to this as their "dream job." University of Southern California personnel and Ed Ogeron need not apply.

Good communication skills a must. Top applicants will be able to inspire players, motivate donors, and keep positive national attention on the program. Applicant will need to develop publicity strategy that does not involve the use of the word "champions," does not make reference to World War II military engagements, and does not unjustly

impugn the recruiting efforts of opposing schools. All such strategies have proven ineffective in the past. In addition, please don't criticize the player's hygiene publicly, use a trash can as a motivational symbol, or tell players going elsewhere that they will end up "pumping gas for a living." Constant reference to General Neyland's maxims is acceptable and will be required.

Qualified applicant will be a good "X's & O's" person. Expected that applicant will recognize the need to utilize the best players on the field. Coach will recruit players that actually fit the system he or she is implementing. Expected that a qualified applicant will be able to find a way to score touchdowns from the one-yard line at least 50% of the time. Under no circumstances should applicant lose to Kentucky for the first time since 1984 when they are starting a converted wide receiver at quarterback.

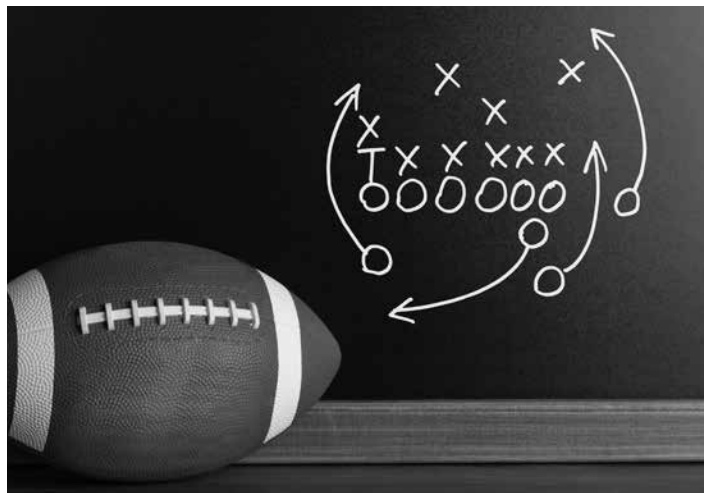
Applicant will need to demonstrate extreme patience when community "arm-chair quarterbacks" break down every decision made the Sunday after a Saturday game. Applicant advised to shut off personal

social media accounts and avoid reading the sports section or listening to any sports talk radio show caller who begins with the statement "Long time listener, first time caller . . ." for the duration of the season. Regardless, applicant and his/her family, will need to possess a thick outer-skin, content in the knowledge that salary will compensate for the general disdain expressed by several members of the community regardless of the state of the program. Applicant is advised that being a "good guy(girl)," getting players to stay out of trouble and graduate and generally being a respectable face of the administration is insufficient

to maintain job. Also, applicant cannot rely upon past successes, even where applicant has won multiple SEC championships, a national championship and maintained a top-ten program for the better part of a decade. A qualified applicant will not be willing to rest upon his or her laurels. Please refer to first paragraph.

As to benefits, salary expected to be commensurate with prevailing rate for duties described, with inflated buy-out clause in the event of termination. Applicant will almost assuredly be the highest paid state employee, reflecting priorities of the budgeting process. Football camps and shoe deals available to supplement income, so long as shoe deals are not used to facilitate recruiting. Speaking of coaches who may or may not have relied upon shoes companies to steer recruits, DO NOT, under any circumstances, lie to NCAA investigators once you are accused of wrongdoing. Applicant will be provided the best legal representation possible, but we cannot help you if you can't act with any more maturity than a five-year-old.

Applicants are directed to send resumes to John Currie. Please keep application process confidential to avoid media firestorm and speculation in the hiring process. If you must put name on application, please use approved pseudonyms Jon Gruden or Peyton Manning.





BILL & PHIL'S GADGET OF THE MONTH

By: Bill Ramsey

Neal & Harwell

Phil Hampton

Founder and CEO, LogicForce Consulting

FITBIT IONIC SMARTWATCH

We have been wearing activity tracking devices for some time now. We all have been involved in those one-on-one competitions with co-workers or family members to see who can log more steps on their tracking device for a day, week, or month. (Currently Phil has the Bill & Phil record with over 21,000 steps in one day at the Consumer Electronics Show exhibit hall in Vegas). We have heard of law firms issuing fitness tracking devices to all employees and initiating firm-wide activity competitions (in exchange perhaps for some discounts on health insurance). Whatever the motivation, however, tracking your daily activity with the devices and maintaining a historical record of your progress via a web-enable dashboard is popular with techies and non-techies alike.

Fitbit has been a leader in the tracking device market; and they have created an array of products from simple step-counting devices to more full-featured devices that increasingly blur the lines between activity trackers and smart watches. The FitBit Ionic is their latest release; and it definitely can be classified as a "smart watch," comparable to the Apple Watch, Samsung Gear, and other popular models. We have purchased a number of FitBit products through the years; and so when the Ionic was announced, we decided we had to give it a try, especially since it was the most advanced device yet from the folks at FitBit.

We definitely felt that FitBit had moved into the smart watch category with the Ionic when we saw the price. The Ionic set us back \$299, so we were expecting something that would do much more than say "Have a nice day" and tell us how many steps we had walked. The price point puts the Ionic on the same level as the Apple Watch, and so we expected similar features. We were very pleased. First of all, the watch face is large enough to be readable but not too heavy on your wrist. You can change out the wristband; and the band that came in the box is perfect for both casual wear and workouts. The second observation from the Ionic- once we turned it on - was the very bright colorful screen that showed up quite nicely even in bright sunlight.

Setup was a breeze as we downloaded the FitBit app on our phone and followed the step-by-step instructions. Unlike the Apple Watch, the Ionic will work both with iPhone and Android phones. But the Ionic does not have built-in LTE connectivity like the new Apple Watch 3. As a result, you must have the phone in close proximity to the watch to be able to get notifications and see and answer calls,

One of Ionic's key features, however, that was a selling point for us, was the ability to store music on the watch so you could stream music directly without having your phone nearby. The Ionic will let you download up to two Pandora stations for offline play and will also allow you to upload songs that you may have on your PC or phone directly to the watch. This feature allowed us to take a run along the Nashville greenway and play music from the Ionic without having to tote our phone along with us.

Of course, in order to hear the music streaming from the watch, you must have some sort of wireless headset to pair with the Ionic. FitBit has introduced its own wireless earbuds, called FitBit Flyer, selling for an extra \$129 that you can use with their new smart watch. We were really holding out to purchase Google's upcoming wireless earbuds, called Pixel Buds; but sadly, they were not out yet at the time we picked up the Ionic.

So, of course, we bought the FitBit Flyer earbuds as well. (We are sure we will buy the Pixel Buds later as well.) And those wireless earbuds worked great with our Ionic. We were able to listen to our favorite Pandora station on the wireless earbuds as we ran around the city with just our smart watch on our wrist (and without our phone).

FitBit is developing a number of apps you can download to use on the Ionic; but one that was pre-loaded for us was FitBit Pay. We tried it out and it worked great. Via the app you simply add one of the supported credit or debit cards to the FitBit wallet. You can then pay for a purchase at any payment station that accepts contactless payments by simply holding your watch face close to the payment device. We love this feature. We can go for a walk or run without taking our phone and listen to music, track our activity, and pay for a latte all by just using our new Ionic watch.

The Ionic still does everything one would expect from a regular activity tracker, including GPS-tracking, step counting, sleep tracking, multi-exercise tracking, and heart rate monitoring. All of the stats are synced to FitBit's personal dashboard on the web where you can monitor your own progress or share your info to compete/compare with friends.

We think \$300 is a pretty hefty price to pay for a smart watch, but we like the Ionic as a credible alternative to the Apple Watch 3, especially for those who want Apple Watch-like functionality but use an Android as their primary phone.



This "members only" column is published each month to share news and information among KBA members. Submissions should be limited to 75 words and will be edited for space and other considerations. Email submissions to mwatson@knoxbar.org by the 10th of each month.

SAVE THE DATE!

2018 Law Practice Today Expo
April 12-13, 2018

The KBA's Law Practice Today Expo is the premier opportunity for you to get exposed to dynamic CLE courses from local and national speakers so that you can fast-forward your law office management skills and make new connections. If you are interested in helping plan the Expo, join the Law Office Technology and Management Committee.

FIRE FORCES MOVE

Knoxville attorneys were impacted by a fire on November 14, 2017. The following attorneys have secured office space on the 14th floor of 625 Market Street: **Keith Stewart, John Dupree, Tyler Roper, Scott Saidak, John Boucher, Mark Orr, Chris Heagerty and Jim Scott.** Please update your contact information to reflect this alternate address.

OFFICE SPACE AVAILABLE:

- 2,870 sq ft 2nd floor office space with large reception area, 5 private offices, board room, two large work-rooms/offices, common rest rooms & kitchen/break room with one other tenant on the floor. Zoning C-3, Office Space Class B. Excellent high-visibility location with views of downtown Knoxville. Other tenants are a late-afternoon/evening youth music school downstairs (sound-isolated), and a single attorney. Ample parking and easy freeway access. An additional 1,500 sq ft of adjacent space is available if desired. Contact **Frank Graffeo** at 525-6806.
- Furnished office space available in West Knoxville. Convenient to I-40 and Downtown. Quiet atmosphere perfect for sole practitioner or mediator. Contact **Dana Holloway** at Holloway Law & Mediation Center. (865) 719-1644 or (865) 643-8725.
- Office Space for Lease at 5344 N. Broadway, Knoxville. Across from Fountain City Park. Approximately 2,000 sq ft. Present floor plan accommodates four offices plus a conference room and a reception area. Would consider dividing space. One Level. Offices on either side occupied by long-term law firms. 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:

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WELCOME NEW MEMBERS

THE KNOXVILLE BAR ASSOCIATION IS PLEASED TO WELCOME THE FOLLOWING NEW MEMBERS:

NEW ATTORNEYS

LaToya T. Carpenter
U.S. Attorney's Office

Vera Dygert

Jacob A. Feuer
The Law Offices of
James A.H. Bell, P.C.

Jessica L. Moe
ETHRA

Sheri L. Ridgeway
The Ridgeway Law Firm, Inc.

Shawn T. Ross
Vickers, Crisp & Russell, P.C.

Michael Semack
Lirio, LLC

NEW LAW STUDENT MEMBERS

Aaliyah I. Abdullah
Courteney M. Barnes-Anderson

Ashleigh R. Beer
Koi Bradley

Jeffrey W. Brink
Clint Coleman

Mariel S. Cooper
Kortney Corlew

Keema D. Fann
Lucas Fishman

George B. Gilliam
David W. Hamby

Andrew P. Harrison

Keyona Henry
Barton A. Hove

Donovan E. Justice
Evan A. Katz

Dr. Joseph A. Moore
Michelle C. Morales

Alejandra Palomo
Samiah S. Patton

Marteena A. Rodriguez
Brooke Spivey

Rachel K. Tierney
Nicole A. Williams



PRO BONO PROJECT

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*

Every year, Legal Aid of East Tennessee helps hundreds and hundreds of clients who cannot afford to hire an attorney. One such client was Joanie.

Joanie is a young, single mother with two small children. She was in an abusive relationship and had filed for an order of protection with help from Legal Aid of East Tennessee. She also suffered from Post-Traumatic Stress Syndrome associated with the abuse. While court proceedings were still pending, she began to worry that the abuse might escalate. She no longer felt safe in her home knowing that her abuser could return at any moment.

She asked her landlord to cancel her lease so she could move, but the landlord refused. She again contacted Legal Aid for help. Joanie's attorney contacted the landlord and explained housing law. With a new understanding of the law, the landlord agreed to cancel the lease. This allowed Joanie to keep her Section 8 voucher and move to a new home unknown to her abuser. Joanie and her children now live in a safe location, separated from the threat of abuse that she knew would return if she had not moved.

In order to help clients like Joanie, LAET depends on funding from a variety of sources, but also on the generosity of others in our community, like you, who contribute both time and money. Without your support, we would not be able to help clients like Joanie.

As the year is coming to a close, I would like to ask you to do three things.

First, keep donating your time through our Pro Bono Project. All of you have been an amazing resource for our clients through your work at legal advice clinics, as Pillar Law Firms, and through your willingness to assist LAET clients on a Pro Bono Basis.

Second, please consider making a donation to our 2017 Annual Campaign before the end of the year. Every dollar you donate to LAET enables us to provide services that help clients stay safe, maintain their housing, obtain benefits they are entitled to, and most importantly gain back their dignity. To donate to our annual campaign, you can go to https://app.etapestry.com/onlineforms/LegalAidOfTennessee/online_donations.html or send a donation to LAET at 607 W. Summit Hill Drive, Knoxville, Tennessee 37902.

Third, although Election Day has passed, you can also help us to get out the vote! Not for any political candidate, but for Legal Aid of East Tennessee. GivingTuesday.org is holding a competition right now that gives non-profits, like Legal Aid of East Tennessee, the opportunity to win up to \$10,000. If you could both vote at and share the following link (<https://goo.gl/6S6xbA>) to all of your colleagues, friends, and family, you could potentially help LAET to end the year on a high note with an award to help us help even more clients.

Again, thank you all for everything you do to help Legal Aid of East Tennessee. You remind us every day how lucky we are to be part of the Knoxville community and the Knoxville Bar

Mark Your Calendars:

- December 2 (9:00-12:00) – Faith & Justice Clinic (Ball Camp Baptist Church)
- December 13 (12:00-2:00) – Veterans Advice Clinic at the Public Defender's CLO

Forging Justice - October 20

The following is an excerpt from Tom Hale's introduction of Terry Woods into the Donald F. Paine Memorial Pro Bono Hall of Fame at the Forging Justice event on October 20:

Terry has spent a substantial part of her working life ensuring that the less fortunate among us got the legal services they needed. As important as that work is, I think she has done something even more important than that. Terry was recently quoted as follows:

"I think the reason I never had a problem asking someone to take a pro bono case is that I remembered how much fun I had in my own private practice doing pro bono work. I knew that a lawyer would get more out of doing pro bono work than he or she gave. I felt that I was giving the lawyer a gift, instead of asking for something."

By her interactions with the many many lawyers she has touched, Terry Woods has not only helped the less fortunate, but she has helped educate and create a community of lawyers "who put their money where their mouth is."

And for that, I submit that she has more than earned her place in the Donald F. Paine Memorial Hall of Fame.



The Pro Bono Project • Legal Aid of East Tennessee, Inc. • 607 W. Summit Hill Drive • Knoxville, TN 37902
phone (865) 637-0484 e-mail: kellis@laet.org fax (865) 525-1162

By: Jack H. (Nick) McCall



Q:
A:

Gary, you are a co-owner of a new restaurant, Landing House. How did you become involved in the restaurant business?

GARRY W. FERRARIS
Law Office of Garry Ferraris

Practicing law is my primary focus, a privilege and still exciting and challenging every day. But long before I began practicing law I was at my core a “foodie” before the term ever entered the lexicon. I have gardened and cooked at home since I was young, always with a view towards bringing the freshest herbs, vegetables and other ingredients to the table.

Perhaps I am genetically predisposed to a love of presenting good food and drink. My Italian great-grandparents owned a farm-to-table restaurant in Torino in the province of Piemonte. They raised the animals and grew the vegetables and grapes which ended up as table fare and wine in their restaurant.

I love both the courtroom and the kitchen. Regrettably, opportunities to be in the courtroom have dwindled. Most lawyers, it appears, have developed a resistance to trying cases anymore. As an alternative, I’ve felt compelled to spend far too much time in the home kitchen. Like the courtroom, performing in the kitchen requires a strategy, thorough planning, grace under pressure with the accompanying rush of adrenalin. Friends who dine at my table, and who don’t know how difficult the restaurant business can be, have encouraged me to start my own restaurant. As romantic as that might sound, I have resisted the temptation to think adequate home cooking translates to professional cooking.

Instead, to deliver me from any lingering temptation, Landing House magically appeared. LH has served as a halfway house for a recovering restaurateur wannabe. I am a less-than-perfectly-silent partner but without the considerable day-to-day responsibilities of running a busy restaurant.

I was attracted specifically to Landing House because of three quality partners I trust and the prospect of providing excellent and unique food in a niche near the South Knoxville waterfront on Sevier Avenue. Suttree Landing Park is practically in Landing House’s backyard. Our good neighbor across Sevier Avenue is Alliance Brewing. Our cozy, renovated building is the former site of the Civil Air Patrol.

Hao Land’s Cambodian family recipes are the inspiration for the restaurant’s menu. The centerpiece is kuy teav, a pho-like brothly noodle bowl. Then there is fresh knife-shaved noodles with braised pork, gai-lan, keum salad, spring and summer rolls, tofu skin, wings in a green garlic sauce, eggplant and tofu frites, char sui pork fried rice and more. The food is unlike anything else to be found in Knoxville, made with quality ingredients under the guidance of partners Hao and Zach Land who do most of the creative heavy lifting.

We have a fourth partner, Matt Pacetti, who knows his beer and is the main force behind Suttree’s High Gravity Tavern, in my humble opinion, the best beer-drinking establishment in Knoxville.

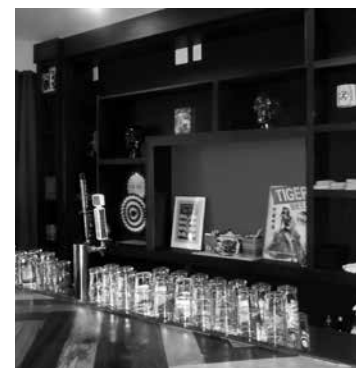


Clearly full-time law practice and full-time restaurant management are not compatible. I’ve arrived at the best possible compromise. I have the privilege of doing what I know and love – practice law – and I can leave the restaurant details to my able partners. We have a perfect deal: My partners don’t tell me how to run my law practice and I don’t tell them how to run Landing House.

If I feel the urge, in no time I can get to Landing House, which is almost in sight of my downtown office, to dabble, kibitz, prop an elbow on the edge of the bar with a plate of succulent, seared sous vide pork belly or otherwise make a pest of myself. Once in a while, in a moment of weakness, I’ll even do something useful, roll up my sleeves and give an assist in the kitchen. Have no fear, I’m not in the kitchen often enough to do any lasting harm.

I’m proud of the food Landing House is turning out; that we’ve filled a void in the developing South Knoxville eating scene; and that people who appreciate good food continue to grace our doors. I’ve found the restaurant business is not difficult at all...especially for a non-working dilettante.

Cross the river. Stop in. I’ll be the guy with his elbow on the corner of the bar, surveying the scene, seared pork belly fat running down his chin and decidedly not working up a sweat.



“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.



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