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## **Crisis Communications: What Every Lawyer Should Know**



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**DICTA**

DICTA is the official publication of the Knoxville Bar Association

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

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

The ADR Section will resume monthly CLE programs in February. If you have program topic or speaker suggestions, please contact the ADR Section Chairs **Kim Burnette** (kburnette@adhknox.com) or **Dana Holloway** (dholloway@hollowaymediation.com).

## Bankruptcy Law Section

The new Bankruptcy Section will plan to meet quarterly in 2015. 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 **Cindy Lawson** (938-0733).

## 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 further information on the Corporate Counsel Section, 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 Corporate Counsel 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** (hjackson@wimberlylawson.com), **Mark Travis** (mtravis@travisadr.com) and **Tim Roberto** (troberto@brownandroberto.com).

## Environmental Law

The Environmental Law Section meets regularly and presents speakers on topics relevant to both practitioners of environmental law and lawyers with an interest in the area. 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** (lmynatt@bakerdonelson.com) or **Jimmy Wright** (jwright@bvblaw.com).

## Family Law

The Family Law Section has speakers on family law topics and 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 **Elaine Burke** (tbpc@bellsouth.net) or **Niki Price** (nprice@bwmattorneys.com).

## Government & Public Service

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 **Daniel Sanders** (215-2327).

## Senior Lawyers

The Senior Section will meet quarterly in 2015. The next luncheon will be held at 11:30 a.m. on March 11th at Chesapeake's Restaurant. The featured speaker will be Georgiana Vines, former news editor of the Knoxville News Sentinel. More information is available on page 24 or online in the Event Calendar. If you have suggestions for speakers, please contact Chair **Wayne Kline** at 292-2307.

## Solo Practitioners & Small Firm

The goal of the Solo & Small Firm Section is to provide and encourage networking opportunities and CLE. To have your name added to the section list, please contact the KBA office at 522-6522. Please join other members of the Section on the first Wednesday of each month at the LunchBox at noon. For more information about the section, please contact Chairs **Jeff Whitt** (524-8106) or **Tripp White** (712-0963).

# Event Calendar

## March

- 2 Barristers Diversity Committee
- 2 ADR Section CLE
- 3 Law Office Tech Committee
- 4 Fee Dispute Committee
- 4 Solo Small Firm Section
- 4 Functions Committee
- 5 Lunch & Learn
- 6 Community Law School
- 7 Community Law School
- 9 Minority Opportunities Committee
- 10 Professionalism Committee
- 11 Senior Section
- 11 In Chambers CLE
- 11 Barristers Monthly Meeting
- 12 Judicial Committee
- 13 Legislative Breakfast
- 13 Investiture – Hon. Bauknight
- 14 Open Service Project
- 16 Barristers Access to Justice Comm
- 17 Family Law Section
- 18 KBA Board of Governors
- 24 CLE Committee Meeting
- 25 Juvenile Court CLE
- 26 Barristers Volunteer Breakfast
- 26 Access to Justice Committee
- 27 Unmet Legal Needs of Children Committee
- 27 Workers Comp CLE
- 31 Trivia Night

## April

- 1 Fee Dispute Committee
- 1 Solo Small Firm Section
- 6 ADR Section CLE
- 8 Barristers Executive Committee
- 9 Lunch & Learn
- 9 Judicial Committee
- 14 Professionalism Committee
- 16 Law Practice Today Expo
- 17 Law Practice Today Expo
- 20 Barristers Access to Justice Comm
- 20 Minority Opportunities Committee
- 21 Family Law Section
- 22 KBA Board of Governors
- 23 Barristers Volunteer Breakfast
- 23 Access to Justice Committee
- 24 Unmet Legal Needs of Children Committee

By: Tasha C. Blakney  
*Eldridge & Blakney, P.C.*



## FIFTY YEARS AND COUNTING

I have observed two noteworthy history-making events in the early part of 2015, and, though those events actually spanned a difference of five decades, and though I was only truly a witness to one, the connection between those two events was meaningful to me.

On March 25, 1965, Martin Luther King, Jr. ended a march that had begun in Selma, Alabama, and which culminated in a powerful speech that reverberated through the streets of Alabama and, further, well into the hearts and minds of Americans across the nation and across the generations to come. That speech, along with the march itself, was chronicled in the recent Academy Award Nominated film *Selma*.

In the weeks leading up to the Oscars, I always make a mad dash to the cinema to watch as many best picture nominees as possible. I anticipated that I would find *Selma* to be a moving tribute, as well as an excellent film, but I wasn't prepared for just how moving it would be. It prompted me to search for the full text of Dr. King's speech from that March day 50 years ago.

Then, only days after having watched the film and having read the language of that powerful speech myself, I watched President Obama give his State of the Union address. Though President Obama's speech came 50 years later, I was struck by the similar themes of the messages.

Consider this powerful passage from Dr. King's 1965 speech: We must come to see that the end we seek is a society at peace with itself, a society that can live with its conscience. And that will be a day not of the white man, not of the black man. That will be the day of man as man.

That aspiration rings true today as well, as signified by President Obama's address to the nation in January of 2015:

So I know the good, and optimistic, and big-hearted generosity of the American people who, every day, live the idea that we are our brother's keeper, and our sister's keeper.

I want future generations to know that we are a people who see our differences as a great gift, that we are a people who value the dignity and worth of every citizen: man and woman, young and old, black and white, Latino and Asian, immigrant and Native American, gay and straight, Americans with mental illness or physical disability. Everybody matters.

I want them to grow up in a country that shows the world what we still know to be true: that we are still more than a collection of red states and blue states; that we are the United States of America.

Had I not just seen the film only days before, I might not have recognized the similar themes in these important speeches. Perhaps more importantly, I might not have had the opportunity to proudly reflect on how far we've come as a nation, while also remaining mindful of the work we still need to do.

As similar as these speeches are, there is one thing that is dramatically different. Obama gave his address as the President of the United States of America. He is, arguably, the most powerful man on this planet. Agree or disagree with his politics, it is remarkable to reflect on the notion that he has twice been elected as the leader of this great and powerful nation only 50 years after another man of color stood on the steps and delivered a powerful message in an American city that would not have permitted him to even cast a vote.

As a nation, we have had some difficult days recently, particularly in the arena of race relations. Those challenges are fueled by tragic events involving law enforcement as well as hate crimes that prompted protests, outrage, and prevalent Twitter hashtags declaring that black lives and Muslim lives matter. Indeed, all of those lives do matter, as Dr. King told us 50 years ago and as President Obama reminded us much more recently.

It's hard to celebrate the progress we've made in the face of tragedy. But, I think we should also allow ourselves to acknowledge that 50 years is a relatively short period in that long "arc of the moral universe" which Dr. King taught us would ultimately point toward justice.

Even before his great speech in Alabama in 1965, Dr. King's most famous address outlined his dream for America. His aspirations were the culmination of two centuries of American progress and hard fought battles for rights for the poor and the disenfranchised. It was and remains a wonderful dream, and it's one we share as Americans.

As I thought about the similarities between the Alabama speech and the Obama address, I thought about the contested civil rights issues we still consider today, including the recent developments concerning same-sex marriage rights which recently took a turn right back into the state of Alabama, with that state and the federal government once again at odds. Closer to home, we see religious groups in our state face obstacles in their desire to worship in communities that do not welcome them.

Thankfully, the pervasive political and social climate Dr. King and his brethren faced has changed, and the hearts and minds of Americans have also changed. If nothing else, my own daughters and their friends teach me every day what we have already overcome and that Dr. King's vision of America largely remains our common, shared vision.

Have we reached the promised land? Perhaps not. But, we are a lot closer to it today than we were just fifty short years ago.



## OPEN SERVICE

**By: Katrina Atchley Arbogast**  
*Lewis, Thomason, King, Krieg & Waldrop, P.C.*

# EAST TENNESSEE KIDNEY FOUNDATION

The KBA Open Service Event for March will benefit the East Tennessee Kidney Foundation.

The mission of the East Tennessee Kidney Foundation is to provide patient services and support to East Tennesseans affected by kidney disease. ETKF currently serves 15 counties and 200 low-income patients per month, all local East Tennesseans. They operate solely on donations, monetary and in-kind, and the care and support of our amazing community.

I am committed to the ETKF and its mission, and I think you should be too. To understand my devotion and love for this non-profit, you need to know a little about my close connection to the history and cause of the organization.

This history of the creation of ETKF is similar to many other local non-profits. When national funding and support departs, East Tennesseans dig-in, network, and find a way to take care of their own. I am proud to have been a part of the original board that reacted to the National Kidney Foundation's January 2009 closure of the Knoxville office, by pulling together and forming this new organization. Because of our quick efforts, most of our local kidney patients kept receiving some type of services, primarily transportation to and from life-saving dialysis treatments, which would have disappeared without our efforts.

Also, both KBA President Tasha Blakney and I have a personal connection to the mission of ETKF. My mother was diagnosed with polycystic kidney disease, a cystic genetic disorder, as a child in 1947. My grandfather died of the disease in 1954 because dialysis was not yet available in East Tennessee, and he did not have the resources to travel to Nashville for treatment. Luckily for my mother, aunt and uncle who all inherited the disease, dialysis was available in Knoxville when the disease starting seriously affecting their kidneys in the 1990s. All were treated with dialysis, with my mother receiving dialysis treatment for over 14 years before her death in 2007. My aunt is still currently on dialysis and my uncle was a successful kidney transplant recipient in 2002. Tasha, at the young age of 16, lost one of her kidneys and now functions solely off the support of her remaining organ.

In honor of my mother and her courageous life-long battle against kidney disease, I rally friends, co-workers, and just about any person I can grab off the street in tennis shoes to join my annual Lucky Kidney Race team, Team Atchley Arbogast. Beginning in 2012 and every year since, I have formed the largest individual team (65+ people last year) competing in the annual run and taken the top individual fundraising spot raising approximately \$7,000.00 for the organization. I try to make my Momma proud and help those in a similar situation to her.

So fellow KBA Members, here's my challenge to you. In the month of March, there are three ways KBA members can participate in the Open Service Project and help me serve this valuable community organization and honor the fight of my mother and our current local kidney patients: volunteering, running, walking, and/or donating.

- **VOLUNTEER:** ETKF needs volunteers to help staff their annual fundraiser run—the 4th annual Lucky Kidney Run, 6K & 2K Walk on Saturday, March 14th, 2015, starting at Krutch Park downtown. Volunteers must report at 7:00 a.m. Please email [karbogast@lewisthomason.com](mailto:karbogast@lewisthomason.com), if interested in volunteering.

- **RUN/WALK:** Join team my race team, Atchley Arbogast! To sign-up, go to <https://www.raceit.com/Register/groups/jointeam.aspx?event=30792> or email [karbogast@lewisthomason.com](mailto:karbogast@lewisthomason.com).

- **DONATE.** A blanket drive will be held from March 2-13, 2015, to warm and comfort local dialysis patients during treatments. New, lap size blankets are preferred. Donation containers for your convenient drop-off will be located at the Knox County City County Building, KBA Office, Lewis Thomason (One Centre Square), U.S. District Court and Baker Donelson.

Thank you for your support of the East Tennessee Kidney Foundation.



By: J. Scott Griswold

*Hodges Doughty & Carson*

## PRESTON HAWKINS



I heard the name "Preston Hawkins" several times before I ever met him. First, when I was on the Moot Court Board at the University of Tennessee College of Law, Professor Penny White bragged about how Preston and his teammates won the Dean Jerome Prince Evidence Moot Court competition. Next, Muecke Barker, then Chief Justice of the Tennessee Supreme, told me about Preston being a member of the University of Tennessee at Chattanooga's men's basketball team that, as a fourteen-seed, advanced to the Sweet Sixteen of the NCAA tournament. So, it was nice when I finally got to meet him, in person, at Justice Barker's retirement party in the fall of 2008, and put a face with a name.

Preston grew up in Powell, Tennessee, and, after graduating from high school, enrolled at UTC to pursue a degree in Political Science and play basketball. During 1996-97 season, the Mocs, led by future NBA first round selection Johnny Taylor, defeated Tubby Smith's Georgia Bulldogs and the Fightin' Illini of the University of Illinois. While the clock eventually struck midnight against the Providence Friars, it was an experience that Preston will always carry with him. Having been to a few basketball games over the years, I can easily envision the energy and excitement that must have emanated from being around such a special group of players.

After college, Preston enrolled in law school at UT. He focused on courses in criminal law and was a member of the evidence moot court team, which won the national competition during his second year and was runner-up in his third year. Preston returned to Chattanooga to begin his legal career as a law clerk to Justice Barker. After completing his term, Preston joined the Chattanooga law firm of Luther Anderson as an associate attorney.

Preston's first day of private practice was spent in the courtroom where he successfully defended a driver involved in a car wreck. One of Preston's partners offered him the case while Preston was moving into his office the Friday before the Monday trial. Preston devoted his weekend to meeting with his witness and preparing for his first foray into the adversarial system. His hard work and diligence paid off with a defense judgment.

While

Chattanooga has its charms, Knoxville is Preston's home. He returned and eventually began practicing with Lewis Thomason.

Preston focuses on

construction litigation and is mentored by Loy Waldrop. Preston represents contractors and design professionals in state and federal court and in various alternative dispute resolution forums.

Some of Preston's friends must have believed Jane Austen when she opened *Pride and Prejudice* with "It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife." In 2008, Preston was set up on a blind date with his future wife, Molly. They dated for a few years and then married in May 2011. Their son, Jameson, followed a few short years later. It is through their son that I came to work with Preston. My daughter and Preston's son attend the same daycare in North Knoxville. The program is going through a change in ownership, and Preston serves on the Board of Directors for the new nonprofit, Little Oaks Academy. I serve as its lawyer and have worked with Preston and the other Directors closely in the hopes of creating an exceptional early childhood development program in North Knoxville. Preston and I are very proud of this endeavor and hope it becomes part of our legacy to the community.

I am proud to know Preston and work with him on a venture that will hopefully impact the lives of young people positively for decades to come. It is nice to be able to put a face with a name. It is also nice to know someone who has nailed a hole-in-one on the golf course and started another round with a double eagle when it comes time to form a team for Little Oak Academy's golf tournament on Saturday, June 6th, at Three Ridges Golf Course.

**... told me about Preston being a member of the University of Tennessee at Chattanooga's men's basketball team that, as a fourteen-seed, advanced to the Sweet Sixteen of the NCAA tournament.**



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**By: Esther Roberts Bell**  
*Global Intellectual Property Asset Management, PLLC*

# NEW INTERNET TOP-LEVEL DOMAIN NAME .BANK TO LAUNCH THIS SUMMER

Internet Corporation for Assigned Names and Numbers (ICANN) is rapidly moving forward with the launch of a new generic top-level domain name (gTLD), “.bank.” This gTLD will feature enhanced security protocols concomitant with the banking industry and will be available only to qualifying financial institutions. Banks who wish to obtain a .bank domain name must meet the following minimum criteria in order to qualify for purchasing a .bank domain:

1. Registered United States Trademark(s);
2. Proof/verification of the bank’s charter;
3. Site authentication of email protocols; and
4. Appropriate encryption protocols.

A 30-day sunrise period for pre-purchase is scheduled to begin in mid-May of this year. After the sunrise period closes, general purchase by qualified financial institutions will begin. ICANN has authorized one oversight organization for the United States, a D.C. company, *fTLD Registry Services, LLC* (fTLD). fTLD will then affiliate 10-15 registrar organizations to assist with the actual sales of .bank domain names. fTLD will set wholesale pricing for .bank domain names; the fTLD-affiliated registrars will set retail pricing for .bank domain names.

In related matters, ICANN is expected to launch another gTLD, “.insurance” later in 2015. It is anticipated that similar security protocols and qualifications will be required in order to obtain .insurance domains.

## Photo Ops



Former TBA President Bill Haltom spoke to KBA bar leaders, Barristers Officers and Committee Chairs and 2014 new admittees on Thursday, January 29, 2015, at the Square Room.





By: **Garrett P. Swartwood**  
*Long, Ragsdale & Waters, P.C.*

## TECHNOLOGY IN THE COURTROOM (PART II)

In law school, I was introduced to the idea of “substance over form”: that the substance of some matter is more important than its form. In practice, I have learned that form is pretty important too. The manner in which evidence or argument is presented can bear significantly on its persuasive effect. Courtroom technology can improve the presentation of a case and increase the chances of success. Modern jurors, in particular, have grown accustomed to electronic displays from computers, smart phones, televisions and the internet. They expect to see such technology used in the courtroom.

Last month, this column introduced the new visual and audio system available to attorneys in Division III of the Knox County Circuit Court. This article will explain the features of the new system in more detail. Judge Deborah Stevens prepared a primer explaining the new technology, from which this article borrows heavily. Counsel may connect to the system with a computer or even a cell phone and display documents, photographs and video. As summarized from Judge Stevens’ primer:

The system provides multiple types of input at multiple positions in the courtroom. Digital and analog ports are available at both counsel tables and immediately in front of the bench. A document camera is also available in the courtroom. Virtually any computing device – laptop computers, tablets, cameras and smart phones – can connect to the system through an HDMI or a VGA cable. It is even possible to connect wirelessly with a password using a system called NovoConnect©. Once connected, attorneys can upload

photographs, documents, videos and presentations on several screens in the courtroom.

The system includes a large screen across the courtroom from the jury box, and smaller screens at the witness stand and the judge’s bench. The judge determines which screens are activated in order to control the publishing of evidence to the jury. For instance, an image can be displayed only at the witness stand and the judge’s bench for authentication. Once authenticated, the judge can display the image on the large screen for the jury to view. The judge’s control panel also allows for multiple images to be displayed at one time. An attorney, for example, can show a video deposition of a medical doctor and display a document the doctor is referencing at the same time on the same screen.

The monitors at the witness stand and the judge’s bench also have a touchscreen annotation feature. A witness can highlight information or draw upon a display, creating an interactive experience for the jury. The marked image can then be printed in the courtroom to maintain the record.

Judge Stevens invites all attorneys to practice using the system prior to trial. Practice times may be scheduled with Judge Stevens’ assistant. The Division III courtroom, when available, may be used for trials of cases in other divisions of the Circuit Court. If there is sufficient demand, the technology will later be installed in the Division I and II courtrooms.

### KNOX COUNTY JUDICIAL MAGISTRATE FACT SHEET

**Qualifications** – Licensed attorney residing in Knox County, Tennessee

**Salary** - \$82,193.38

**Term** – Anticipated term to begin April 11, 2015

**Duties** – Include, but are not necessarily limited to, issuance of arrest warrants, search warrants and mittimus. The judicial magistrates also issue forfeiture warrants and conduct jail arraignments by means of video. The judicial magistrates have the duty of determining whether or not probable cause exist to issue an arrest warrant when a crime is alleged to have been committed.

**Contact Person** – Please send resume’ by noon, Friday, March 6, 2015 at the address below.

Donna Corbitt  
 Judicial Court Administrator  
 Room M-70, City-County Building  
 P.O. Box 2404  
 Knoxville, TN 37901  
 (865) 215-2370 FAX (865) 215-2403

## DICTA EDITORS’ NOTE

DICTA is a monthly publication of the Knoxville Bar Association. DICTA is offered to all members of the Knoxville Bar Association as one of the many benefits of membership. This issue represents one of our “super circulation issues” and is sent not only to all members of the Knoxville Bar Association but to all lawyers licensed to practice law in Knox County and all of its contiguous counties, Blount, Loudon, Anderson, Union, and Sevier. DICTA is an important publication to the Knoxville Bar Association and provides news regarding members and events of the Knoxville Bar Association as well as information on upcoming CLE seminars and news and notices from the Knoxville Bar Association president, the Barristers, and Knoxville Bar Association’s twenty different committees and eight different sections. If you are interested in becoming a member of the Knoxville Bar Association, please contact KBA Executive Director **Marsha Wilson** at 505 Main Avenue, Suite 50, P.O. Box 2027, Knoxville, Tennessee 37901-2027, (865) 522-6522 or access our award-winning website at [www.knoxbar.org](http://www.knoxbar.org).

**SUPER  
 CIRCULATION  
 ISSUE**



## LAWYER KIDS

By: Lisa J. Hall

*Hodges, Doughty & Carson, PLLC*

# KIDS ARE FUNNY

Kids are funny, and the funniest kids are typically our own, right? While not all of our kids will grow up to be lawyers, sometimes their insight on basic justice is much more distilled than that of the general population. While Harper Lee and her unpublished second novel have been in the news in recent days, the epigraph in *To Kill a Mockingbird*, attributed to English essayist Charles Lamb, is very appropriate here: “Lawyers, I suppose, were children once.” How do our future lawyers (and accountants, artists, businessmen and Rockettes, etc.) inform our world views, make us better lawyers, and best of all, entertain us?

**They bring new light to familiar terms.** We asked a few KBA members’ children to define a few terms we use every day:

- **Judge** Holly Davis, age 9, unbiased daughter of Judge Kristi Davis, sums it up: “Judges make the world a better place.” Shelby Yeager, age 4, daughter of Kandi Yeager, only knows one judge, and that is the “choir judge” at church.
- **Law** Shelby says that “law” means that you **have** to stop at the traffic light. Holly says laws are rules to keep people safe.

**They demonstrate legitimate alibis.** A few years ago, John Winters’ son, Finn, (then age 5) used a marker to draw on the couch. John asked Finn why he did that, and he said that his brain told him to do it. John told him that was not much of an excuse, and he needed to come up with a better explanation. The matter was dropped shortly thereafter, until Finn and his brother, Owen, (then age 4) did something else that resulted in an early bedtime. As Finn was brushing his teeth, John asked him again why he used the marker to draw on the couch. Owen immediately offered to Finn, “Don’t tell him that brain story; it didn’t work last time.”

Meredith Weaver has only caught her daughter, Mary Reagan, age 5, lying one time. She ate a whole box of Girl Scout cookies and tried to tell Meredith she only had two. She then threw up everywhere about ten minutes later.

**They have grand aspirations.** Tonya Willis’ son, Colin, age 9, would like to be a judge and the President when he grows up. He fully intends to enact a law providing that shots are unconstitutional. Jenny Rogers’ daughter, Hallie, recently completed an assignment about Martin Luther King, Jr.. She explained that Martin Luther King, Jr.’s dream was “to have freedom and for white people and black people to agree.” By contrast, Hallie’s dream was “to sit on a cloud and to drink out of a coconut.”

**They understand what we, as lawyers, do.** A few years ago, Will Carver went to speak to his son’s pre-K class. Will began with, “Who knows what lawyers do?” Will’s son, Drew, then age 4, piped up, “play golf!” When asked what she does for work, Meredith Weaver’s daughter Helen, age 2, says she “gets suckers,” because Helen always gets a sucker when she visits her mom. Mary Reagan says that Meredith “talks on the phone and writes letters in high heels.”

Fellow KBA members, this is your opportunity to showcase your own children’s wisdom and/or humor. If you have any “Lawyer Kids” stories, please send them to me at [LHall@hdclaw.com](mailto:LHall@hdclaw.com). I would be glad to incorporate them into the next column, in between talking on the phone and writing letters in my slippers.

**W**hile Harper Lee and her unpublished second novel have been in the news in recent days, the epigraph in *To Kill a Mockingbird*, attributed to English essayist Charles Lamb, is very appropriate here: “Lawyers, I suppose, were children once.”



By: **Erin Williams**  
London & Amburn



# FINDING AND RETAINING EXPERT WITNESSES

Most lawyers will find need to retain an expert witness during their legal career. Included in this article is a check list for retaining experts.

## Step One – Initial Contact

Contact experts by phone or email. The best way to make contact with an expert, especially those you have not worked with before, is by phone. Of course, it is always easier to retain someone with whom you have a connection even if that connection is a referral from another attorney and/or your client. However, given the proliferation of technology, it is an accepted practice to simply email experts about their willingness to review the case. If you do send an email, be sure to include the type of case that you are handling and who you represent. Be very careful with the language you use in this initial email because communications between an attorney and an expert are not privileged and the email will likely be an exhibit at the expert's deposition or at trial.

## Step Two – Request Information from the Expert

- Request an expert CV.
- Request an expert fee schedule.
- Determine up front how many hours it will take for the expert to complete the initial review. It is always the best practice to get the expert to sign off on an initial retention form designating the anticipated hours for the review. If later, you receive an exorbitant bill, you will be able to contest any fees that you and your client did not agree to pay. More than once, our firm has received bills in excess of \$20,000. Having a signed document in the file listing the agreed amount of hours assisted in negotiating a reasonable fee.

## Step Three – Conduct Your Own Investigation of the Potential Expert

Before retaining any expert, perform your own investigation of that expert. It is imperative that you at least search the internet for your expert's name. There are several expert witness services that are available for you to check how many times an expert has testified. Additionally, you should contact all licensing boards to ensure that your expert has a license and the appropriate credentials.

## Step Four – Required Forms and Information

- Obtain a completed W-9 which must be signed and returned in order for the expert to be paid.
- Request an address to send records with tracking and signature required for confirmation.
- If you are sending medical records or any documentation containing healthcare information, you will need to include a business associate agreement. A business associate agreement is a document required by HIPAA. HIPAA applies to law firms. The business associate agreement must establish permitted uses and disclosures of the health information by the expert, provide that the expert will not further disclose the information other than is required by law, and require that the business associate implement

appropriate safeguards to prevent unauthorized use of the healthcare information. Any improper disclosure, including breaches, are addressed by HIPAA. The procedures for how to deal with a breach are beyond the scope of this practice tip.

## Step Five – Sending Records

- Use a cover letter.
- Send records via tracking with signature required (FedEx or USPS: Mark a box to require signature for Express or Priority Mail or certified (green card).)
- Send healthcare records on encrypted discs.
- Keep an internal log of the records you have sent to an expert. As the case progresses, you will receive additional depositions and documents. Without a log identifying what you initially sent, you will have no idea what the expert has and has not reviewed. Keeping good records of the information that was sent to the expert can help you avoid an embarrassing call to your expert. Additionally, you can ensure your expert is properly prepared for his deposition.

## Step Six – Closing the Case

- Request a final bill.
- Ask the expert to destroy or return all items for secure destruction.
- Update your log to indicate whether the records were returned or destroyed.
- Suggested language: *This case has now been dismissed. We are going to proceed with closing our file within the next two weeks and ask that you please submit any unpaid or outstanding invoices by (date) so that they may be paid prior to closing the file. If we do not hear from you we will assume you have been paid in full for this matter.*

*You may either securely destroy the medical records or other documents we sent you for review in compliance with HIPAA standards and in accordance with the Business Associate Agreement, or you may return them to us for destruction. If we do not hear from you, we will assume you elected to securely destroy the documents in accordance with HIPAA protocols.*

### Who is Responsible for Evidence Preservation? YOU ARE ... as well as your client!

Law firms need well-informed **responsible** clients!  
The "duty to preserve" accrues even before litigation.  
Make sure your clients are well educated and compliant  
with document preservation plans and data maps.  
Or, they will pose a serious **risk for your firm.**

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**By: Sydney A. Beckman***Professor of Law**LMU-Duncan School of Law*

## “IS IT LIVE OR IS IT MEMOREX?” – A LOOK AT AUTHENTICATION IN THE DIGITAL AGE

Attorney: “Can you identify this document?”

Witness: “I know it has my name on it – but I did not write that email!”

Attorney (thinking to herself): “Sure you didn’t.”

Judge (thinking to himself): “Here we go again.”

The use of email and social media for communication has become a way of life. The days when people interacted with each other face-to-face, and wrote letters to each other, are rapidly waning. These days, people communicate with short text messages and comments, pictures, and other information posted on Facebook and blogs. Social media platforms such as Twitter and Facebook and communication tools such as email and Skype<sup>1</sup> have become the norm for many people as a conduit for communication.

The growth of these platforms and tools has been, in part, due to the proliferation of smartphone usage which, in recent years, has “grown dramatically.”<sup>2</sup> With the increase in forms of digital communication, evidence derived from these sources is playing an increasingly larger role in litigation.<sup>3</sup> For purposes of this article, these forms of communication shall be referred to as “electronic evidence.”

Much like direct electronic communication such as email, postings on social networking sites such as Facebook can contain relevant information including the “relationship of the parties, [the] declarant’s state of mind, or information regarding a person’s whereabouts.”<sup>4</sup> The increase in electronic evidence derived from social media has often been met with skepticism based on concerns that such evidence could be readily altered.<sup>5</sup> Courts, unfamiliar with the technology, may struggle with the application of authentication requirements. Although the changes in forms of communication have changed – rapidly – over the last decade or two, the rules of evidence have not been revised to reflect these advancements. Therefore, courts must make determinations of admissibility within the existing framework.<sup>6</sup>

### Tennessee Rule of Evidence 901

Tennessee Rule of Evidence 901 governs authentication. The rule provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.”<sup>7</sup> Seemingly a simple rule, the authentication of evidence derived from social media or email can create a myriad of problems. Although there is no Tennessee case directly on point, there are federal cases which provide some guidance.<sup>8</sup>

In *Lorraine v. Markel American Insurance Company*, the court noted the following:

“A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be.... This is not a particularly high barrier to overcome. [t]he question for the court under Rule 901 is whether the proponent of the evidence has offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is....’ The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.”<sup>9</sup>

“Ironically, however, counsel often fail to meet even this

minimal showing ... which underscores the need to pay careful attention to this requirement.”<sup>10</sup>

The rationale behind the need for authentication is contained in the language of Tennessee’s rule: proof that the evidence in question is what “its proponent claims” it to be.<sup>11</sup> As discussed in Weinstein’s *Federal Evidence*, “[i]n general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues.”<sup>12</sup> Although Tennessee courts have not directly addressed the question of the authentication of electronic evidence such as Facebook posts and email, their guidance as to other evidence is directive.

In *State v. Mickens*, the Tennessee Court of Criminal Appeals noted that courts have discretion in authenticating evidence that will not be disturbed “absent clear mistake.”<sup>13</sup> Tennessee courts have rarely overturned rulings on authentication unless the error was tied to questions of chain of custody. In *State v. Cannon*, the Tennessee Supreme Court discussed the authentication of pantyhose in a criminal case.<sup>14</sup> The Court held that it is “well-established that as a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence...”<sup>15</sup> Unlike traditional forms of evidence – such as pantyhose and the like – the challenge with electronic evidence is that electronic data can be easily manipulated and ultimately offered into evidence in a form that is different from that of the original.<sup>16</sup>

### Concerns with Electronic Evidence

The primary concerns with the authentication of electronic evidence are two-fold: first, the proper identification of the declarant and second, whether or not the evidence offered accurately reflects what was posted online.<sup>17</sup> Although various methods have been employed by courts to authenticate this kind of evidence, the two most common are through “the testimony of a witness with personal knowledge and distinctive characteristics of the communication.”<sup>18</sup>

Rule 901(b)(1) permits testimony from a witness with personal knowledge.<sup>19</sup> The author of the evidence can readily testify as to its authentication. The more prevalent problem arises when the person alleged to have created the electronic evidence denies making it. Often the allegation is that someone else accessed his or her email or “hacked” their social media account, creating the electronic message without his or her knowledge or consent.

### Methods of Authentication of Electronic Data

There is no concrete method to authenticate electronic communication. For purposes of authentication, “the fact that an email was sent from a particular email address will often be insufficient....”<sup>20</sup> A single email that has been denied as authentic by the alleged declarant can be difficult to authenticate. A chain of emails, however, is much easier to authenticate as more circumstantial evidence of the authenticity may be contained within the chain. Be aware, however, that given the low threshold for authentication, a court may admit an email and let the fact finder determine the weight it should be given.

For website or blog postings, a number of facts can assist in the authentication, such as: whether there are other captured copies of the evidence; whether other witnesses viewed the evidence; whether the

*(Continued on Page 13)*



By: **Latisha J. Stubblefield**

*Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*

**Oh Portlandia.** Portland, Oregon is a hipster’s haven and a foodie’s dream, always striving to take peculiar to an entirely new level. Last year, Matthew Thomas Mglej, 25, arrived outside the Mark O. Hatfield Federal Courthouse in Portland fully dressed in a suit, with his service animal and several props in tow. One particular prop was a sign quoting Thomas Jefferson, “The boisterous sea of liberty is never without a wave.” Seeking to make a wave of his own, Mglej proceeded to disrobe, completely, and began playing his violin outside the courthouse. Mglej also allegedly meditated and quoted individuals such as the ever-quotable former Iranian President Mahmoud Ahmadinejad. Like I said, peculiar. When law enforcement arrived, Mglej was given the option to put his clothes back on or be arrested. Naturally, Mglej chose the latter. Because even in Portland, it is against the law to be in public with *all* of your wobbly (or even toned) bits on display for all to see. Specifically, the city code provides it is illegal “for any person to expose his or her genitalia while in a public place or place visible from a public place, if the public place is open or available to persons of the opposite sex.” Mglej was charged with indecent exposure. Forging the path for all other nude violinists, Mglej has now filed a civil rights suit claiming, in part, that the city ordinance prohibiting nudity in public places violates his First Amendment rights. You know, your first amendment right to play a violin in the buff just outside a federal courthouse. I’m sure that’s exactly what James Madison had in mind when he inked the Bill of Rights. Much has also been made about the fact that Portland is famous for its World Naked Bike Ride, where some 8,000 participants ride through the city in their birthday suits each June. During this race, the police do not enforce the nudity code as long as the participants stick to the designated route. While some may argue about the potential constitutional import of this selective enforcement of the nudity code, I think it makes perfect logical and logistical sense. While police officers would probably, first and foremost, prefer their arrestees to be fully-clothed, I’m going to go out on a limb and say that if they had to pick their poison between chasing down a sweaty nude bicyclist or a seated, likely perspiration-free, nude violinist, the violinist is going to get arrested every time. The nude bicyclist is likely reaping enough punishment and regret from their choice to ride a bike while “naked as a jaybird.” Remind me to not visit Portland in June. (And to never Google synonyms for “naked” again).

**Ew. Just ew.** In January, the Hawaii appellate court upheld the misdemeanor harassment conviction of attorney Lawrence McCreery of (can-I-buy-a-vowel) Kauai, Hawaii. Though McCreery argued that there was no “specific finding” that he acted with an intent to harass, annoy, or alarm, the appellate court found the evidence to be sufficient and a “specific finding” to be unnecessary. What did 64-year-old McCreery do, you may wonder. Well, reportedly, a 26-year-old female client was in McCreery’s office in July 2011 to pick up some papers in her child custody case. She alleges that McCreery touched her hand and told her, “You look so good, ... too bad you’re married.” The client tried to kindly laugh off the remark, but testified that McCreery then hugged her and ... licked the back of her ear. Ew. Though McCreery maintains his innocence and insists the client initiated the hug, the court found otherwise. While I’ve never laid eyes on McCreery, in my mind he looks an awful lot like Champ Kind from Anchorman. Consider this a public service announcement: don’t lick your client’s ears. “The more you know.” (insert shooting star)

**“IS IT LIVE OR IS IT MEMOREX?” – A LOOK AT AUTHENTICATION IN THE DIGITAL AGE** (Continued from Page 12)

evidence still exists on the website (and can be verified); whether the webmaster might have an archival copy that may be compared with the one offered; and whether others have published the information (such as Facebook reposting by others).

Instant messages and chat room conversations pose even greater challenges than those of email messages. It has been suggested that information from a hard drive, proof that the alleged declarant used a particular screen name and proof that the times were arranged (when applicable) can verify the use of a particular screen name and/or chat room, and therefore may help authenticate the evidence.<sup>21</sup>

**Conclusion**

The many forms of electronic evidence create a myriad of challenges for authentication. Unless the rules change to encompass these new forms (which is unlikely), or the courts address the various methodologies, there is no definitive way to authenticate electronic evidence. Therefore, one should muster all applicable facts which support, or oppose, the authentication when preparing for a trial. Review the various treatises and foreign state decisions for ideas as to appropriate supporting facts and methodologies (i.e., using Meta data) to obtain those facts or to argue against those facts.

367, 368 (2012).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Although the article referred to makes reference to the Federal Rules of Evidence, the relevant Tennessee rules are identical to their Federal counterparts. *Id.*

<sup>7</sup> TENN. R. EVID. 901(a).

<sup>8</sup> In December of 2011, the Federal Rules of Evidence were rewritten pursuant to a mandate to rewrite them in simpler language which would not make any substantive changes. This became known as the “restyling project.” Before the restyling project, Federal Rule 901(a) and Tennessee Rule 901(a) were virtually identical. The only distinction (which was not a substantive one) was that the Tennessee Rule includes the words “...by the trier of fact...” that are not included in the language of the former Federal Rule.

<sup>9</sup> *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542 (2007) (quoting *United States v. Safavian*, 425 F. Supp.2d 38 (2006)).

<sup>10</sup> *Id.*

<sup>11</sup> TENN. R. EVID. 901(a).

<sup>12</sup> Jack B. Weinstein & Margaret A. Berger, WEINSTEIN’S FEDERAL EVIDENCE § 901.02[3], at 901–13 to 901–14 (Joseph M. McLaughlin ed., 2d ed. 2003).

<sup>13</sup> *State v. Mickens*, 123 S.W.3d 355, 376 (Tenn. Crim. App. 2003).

<sup>14</sup> The thrust of the court’s opinion addressed concerns over chain of custody of the evidence. However, a discussion of authentication and Rule 901 was intertwined in the court’s opinion. *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008).

<sup>15</sup> *Id.* at 296.

<sup>16</sup> Democko, *supra* note 3, at 382.

<sup>17</sup> Steven Goode, *The Admissibility of Electronic Evidence*, 29 Rev. Litig. 1, 16-17 (2009).

<sup>18</sup> Democko, *supra* note 3, at 382.

<sup>19</sup> TENN. R. EVID. 901(b)(1).

<sup>20</sup> Democko, *supra* note 3, at 384 (citing *Massachusetts v. Purdy*, 945 N.E.2d 372, 381 (Mass. 2011)).

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

<sup>22</sup> *Id.* at 386.

<sup>1</sup> Memorex, Twitter, Facebook and Skype are registered trademarks of their respective holders.

<sup>2</sup> <http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/>, (last visited Feb. 4, 2015).

<sup>3</sup> Democko, Breanne M., *Social Media and the Rules on Authentication*, 43 U. TOL. L. REV.



## BEFORE THE BAR

**By: Sally A. Goade**  
*Judicial Law Clerk*  
*Tennessee Court of Appeals*

# STEEL-TOED BOOTS TO HEELS: CATHERINE ANGLIN IS STEPPING FORWARD

When she received her acceptance letter from UT Law in the spring of 2006, Catherine W. Anglin was working in a “man camp” in Louisiana, overseeing a \$20 million post-Hurricane Katrina levee rebuilding project as the site’s Quality Control Manager. She worked about eighty hours a week during that project, and after beginning law school a few months later, she continued to work twenty hours a week as an environmental scientist for her longtime employer, Shaw Environmental (now CB&I in Knoxville). By the second summer of law school, Catherine was taking leave to clerk for law firms, and in 2009, law license in hand, she became a full-time associate with Paine Bickers, LLP.

Catherine’s story is the first we are highlighting in a new DICTA series this year: “Before the Bar,” in which we will explore the previous careers of some KBA members with unique “first lives.” Catherine began a thirteen-year career as an environmental scientist after earning her bachelor’s degree in 1996 from Georgia Tech. The photographs included here show her collecting soil samples in Texas (circa 1999) and investigating soil and groundwater contamination in Puerto Rico (circa 2006). In keeping with the dictates of the Superfund Act (“CERCLA”), Catherine conducted searches for Potentially Responsible Parties (“PRPs”), owners and operators liable for contamination at National Priority List (“NPL”) hazardous waste sites in the 1990s. She then worked under contract to the U.S. Army Corps of Engineers and the Air Force Center for Environmental Excellence to plan, conduct, and report results from soil and groundwater contamination investigations in Louisiana, Ohio, Tennessee, Texas, West Virginia, and Puerto Rico.

Second-career lawyers become accustomed to fielding the ubiquitous question, “Why did you switch?” When I asked the question of Catherine, she noted that by the time she applied to law school, existing hazardous waste sites had been identified and were in the process of being cleaned up. While the idea that clean-up could actually be accomplished is good news for all of us, it meant that for a scientist with Catherine’s background, retooling was a sensible idea. When she asked an advisor about possible master’s degrees, the advisor suggested law school, prompting Catherine to take the LSAT. Several years later and just before her LSAT score was set to expire, Catherine mailed her UT Law application the day she boarded a plane for that man camp in Louisiana.



Far from viewing her environmental science career as over, Catherine emphasizes that she now feels especially blessed to have enjoyed two careers that have built on each other. As a lawyer, she loves the complicated cases, those that require the close analysis of scientific data that a lawyer without her background might find daunting. She

**N**ow her work days are spent in air conditioned buildings rather than the 102-degree heat of Texas or the snowy cold of West Virginia.

also appreciates her role as something of an interpreter, taking care not to become so engrossed in data that she loses her audience (clients, colleagues, and ultimately, judges) as she explains the data’s meaning.

Catherine’s background helps her to evaluate plaintiffs’ cases before her firm agrees to represent them, recognizing, for instance, that sometimes plaintiffs may be convinced that their environment has been contaminated by particular toxins when the science does

not support their theory. It can be great fun for Catherine, and I imagine a bit intimidating to the opposition, to cross-examine the occasional expert witness whose scientific credentials mirror her own. Catherine also can’t help marveling that now her work days are spent in air conditioned buildings rather than the 102° heat of Texas or the snowy cold of West Virginia. In other words, it can be mighty cold inside steel-toed boots.

When asked what skill sets have transferred well between careers, Catherine laughed and said that although she originally thought she was entering a major with the least amount of English courses possible, the skill she has used most in both careers is writing. In law school, Catherine was a member of the Tennessee Law Review, and legal writing has taught her to move from presenting and analyzing data to persuading readers with her analysis of that data.



I also wondered which career had been the most demanding on Catherine’s time, but the answer is not a simple one. As Catherine notes, “some changes are irrelevant to the career.” First, there are the ways in which technology, especially smart phones, have made all of us more accessible outside of work hours. The most important addition, though, is Caroline, Catherine’s four-year-old daughter. Catherine was married to her husband Brian, an engineer, when that acceptance letter came from UT Law. Brian, initially hesitant to make the investment in law school, particularly as the sacrifice of Catherine’s temporarily reduced work hours and intense study hours hit home, has been her greatest encourager.

Financially, the career move from scientist to lawyer was a lateral one, but in experience and potential for growth, Catherine will tell you that becoming a lawyer was well worth the investment and sacrifice. She is quick to point out that attorneys are fortunate in that they can retool without returning to graduate school simply because a law degree is so versatile.

Catherine does note that her work as a lawyer is more difficult to leave behind at the end of the day. Little Caroline, accustomed to seeing her mom working at home on a computer, may not always be sure exactly what Mommy does. Caroline announced one day that she wanted to be an engineer like her dad because then she would know how to fix things. Catherine responded: “It’s nice you know what Daddy does. What do I do?” Then came the all-too-true reply: “Laundry.”

**About this column:** Each month this column will profile a different second-career lawyer who had another “life” prior to becoming a lawyer. If you have an idea for a future column, please contact Sally Goade at [sally.goade@tncourts.gov](mailto:sally.goade@tncourts.gov)

By: Rockforde D. King

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

## Heather Ferguson



Troy, Tennessee. If you head fifteen miles north, you are in Kentucky. If you head twenty-five miles to the west (and you are a very good swimmer), you can cross the Mississippi into Missouri. With a population of just over 1,300 residents, Troy may not have more than one stoplight, but, it is the town that gave one of Knoxville's rising new attorneys her roots.

Heather Grossner Ferguson is an associate with the law firm of Egerton, McAfee, Armistead, and Davis, P.C. and has been practicing with the Firm since 2013. She practices in the areas of commercial business transactions and health law. But, for Heather, the practice of law is not just a career; it is about being part of a community and making a difference in that community. That part goes back to her roots.

Heather's father, Fred, and mother, Linda, are registered nurses. Her older sister, Natalie, is a first grade teacher at their childhood elementary school. Through these professions, Heather's family still serves the Troy community throughout the work-week and their church families on the weekends. Heather's younger sister, Liesel, lives in Starkville, MS, and is working on her dual DVM-PhD in epidemiology through Mississippi State, performing the research that may help identify treatments and cures to the diseases that plague the animals we love.

As the middle child, Heather was the peace-maker for disputes between her siblings. This role as a peace-maker carried over into her love for animals when she found her first dog, a Dalmatian named "Lucky," and then Dior, a stray dog she picked up during college. When the occasional shoe, textbook or phone charger would disappear, Heather would use her peace-maker talents to calm their owners' tempers and mediate mercy for those (alleged) four-legged offenders. Heather finds these skills are still useful, especially in General Sessions Court.

Heather graduated from Obion County Central High School, and she and her best friends, Jackie Ervin Smith, Kelsey Sigman Wilmore and Kelsey Arnold, headed off to the University of Tennessee at Martin where Heather studied finance and accounting. UT Martin gave Heather the opportunity to join Chi Omega and play intramural sports, grant wishes through the Make-A-Wish Foundation, and eventually serve as President of Chi Omega. But, more importantly, it introduced her to Dr. Paula H. Moore, an accounting professor who was also a practicing attorney. Heather's original plan was to graduate with 150 hours to be able to sit for the CPA exam, and she graduated *summa cum laude* with a B.S. in Business Administration with a double major in Accounting and Finance. However, fortunately for the legal profession, she elected to take the LSAT rather than sit for the CPA exam. The rest, as they say, is history.

Heather attended the University of Tennessee College of Law, where she was a research assistant for Professor Amy Hess. Heather also served as a Research Editor of the *Tennessee Law Review*, as an Acquisitions Editor of *Transactions: Tennessee Journal of Business Law*, and as a Student Ambassador for the College of Law. She earned her J.D. in 2013, graduating *summa cum laude* with a concentration in business transactions. Heather was the recipient of the 2013 Concentration in Business Transactions Award.

But, for Heather, like the rest of her family, career and service go hand-in-hand. Heather is active in the legal community and is currently a member of the American Health Lawyers Association, Tennessee Bar Association, Knoxville Bar Association, Tennessee Lawyers' Association for Women ("TLAW") and East Tennessee Lawyers Association for Women ("ETLAW"), which she serves as Treasurer. Heather is the Chair of the TLAW Technology Committee and represents TLAW as an invited guest on the Diversity Committee of the Young Lawyers Division of the TBA. Heather is also Secretary of the Board of Directors of the University of Tennessee Alumni Association Network for the Knoxville Region.

However, the role she enjoys the most is serving as Chair of the Hunger and Poverty Relief Committee of the KBA Barristers. Through this Committee, she has helped the KBA and the Barristers reach out to many people in our community by collecting donations of professional clothing, coats, school supplies, and canned food. The Committee has partnered with Angel Tree and Mobile Meals to make sure children have a good Christmas and the home-bound get a good meal. The Committee has worked tirelessly to ensure that Knoxville's legal community makes a positive impact on the larger community.

What drives Heather is her faith, which has been a part of her life since she was a child. As a child, Heather was taught to purge herself of low aspirations and lift herself to high resolve. Her passion for service is grounded in Ephesians 2:10: "For we are his workmanship, created in Christ Jesus for good works, which God afore prepared that we should walk in them." Heather's Sunday mornings are shared with her Lord at Grace Baptist Church, and Sunday afternoons are devoted to her husband Justin, family and two Miniature Schnauzers, Marco and Pippi.

Heather has made the most of the eighteen months since she began practicing law. In those short eighteen months, she has shown the leadership and passion for services that have allowed her to make a positive impact on the Knoxville Bar and the Knoxville community. Now, you know more than just her name.

**About this column:** The goal of this column is to introduce a new lawyer to the KBA membership. If you have comments about this column or ideas for a future column, please contact **Casey Carrigan** at [cspitzer@utk.edu](mailto:cspitzer@utk.edu).

# CRISIS COMMUNICATIONS: WHAT EVERY LAWYER SHOULD KNOW



Your client has just called to tell you that an incident has occurred which has placed it in crisis mode. Litigation has already been filed or is highly likely. And the media machine is already churning.

You are pretty sure “no comment” is no longer an effective response (if it ever was) in today’s 24/7 news cycle. But you also know that the Rules of Professional Conduct place limits on what a lawyer can and cannot say to the media.<sup>1</sup> You also know that whatever response you provide must not disclose any client confidences or otherwise waive the attorney-client privilege.<sup>2</sup> So how do you balance these concerns and also make sure you act in the best interest of your client?

We offer seven “musts” that clients, legal teams and public relations teams should consider in effective crisis preparation and response:

## Seven “Musts” of Crisis Communications:

**1. Get the team in place -- now.** A great deal can be accomplished proactively if clients themselves will commit to form and develop their legal and public relations teams cohesively – and preferably, in advance of when a crisis situation might arise. Teams including both legal and public relations professionals (as well as other client / C-suite management leaders) who already have at least a working knowledge and relationship with one another will function far more seamlessly and effectively than teams who are flung together sight-unseen in the chaos of an unfolding crisis. Even better, it’s ideal for this team to have pre-developed for the client likely crisis scenarios and strategic response protocols via an actual crisis management plan. Attorneys and law firms can serve a vital function by counseling their clients to develop multi-disciplinary team relationships (particularly those operating in crisis-prone industries or sectors and who do not have senior public relations counsel in-house or

a respected agency of record), inclusive of public relations experts whom the legal team themselves know and whose work they trust. Attorneys without a good network in the public relations arena can consult the Public Relations Society of America ([www.prsa.org](http://www.prsa.org)) for a list of practitioners/agencies in their local area or who specialize nationally in the particular industry of the client or a specific practice area (such as crisis management).

**2. Develop working parameters to manage legal realities relative to their impact on crisis communications flow, both internally and externally.**

Attorneys should clearly identify and communicate to the client management team the likely overarching legal concerns and risk management issues that should remain in focus throughout a crisis – particularly specific to how these issues impact what information can be communicated at any given point in time. The public relations members of the team will need to understand what types of legal caution must be exercised in order to craft the most appropriate messaging for official corporate statements, news releases and/or CEO talking points.

**3. Know this: wholesale non-communication is rarely a sound strategy.**

Today’s media structure does not tolerate deafening silences or information vacuums in any form or for any duration. Thirty years ago, when news cycles were defined largely within traditional printed press and go-to-air deadlines and the pace of incremental news flow was far more generous, as it were, legal advice leaning toward the “let’s wait this out and say nothing for now” school of thought held more legitimacy (although from a public relations standpoint, it was never ideal or advised). We don’t live in a traditional-media-driven world anymore. News cycles are now fluid, 24/7 and timed

by the nanosecond via social media. Reporters with significant clout are no longer comprised largely of trained journalists whose editorial supervisors urge compliance with the Society of Professional Journalists Code of Ethics. Rather, a “reporter” can be anyone on Planet Earth with a mobile device and an opinion. Clients who give the silent treatment nearly always unwittingly imply messages far more powerful and damning, such as “We don’t know what’s going on or what we’re doing”; “We completely screwed up and are just praying this mess will go away”; and/or “We really only care about money and nothing about the well-being or feelings of people who have been impacted.” Communication voids are always filled by someone, and rarely by third parties whom the client has any desire to have speaking on their behalf.

**4. Operate from the basis that the initial three hours from the moment a crisis strikes can very well be “make-or-break.”**

Is the notion of responding via public communication to a crisis within this kind of time window extremely demanding, onerous and unreasonable? Absolutely – and in every respect; not just a legal one. Crises are by their very nature demanding, onerous and unreasonable – that’s why they are called crises. Point #3 on this list is the reality of our world, and it speaks to the rationale behind the critical importance of Points #1 and 2. From a tactical standpoint, taking multiple days to write, revise and approve media statements (or go through a dozen iterations of this process for a single statement) renders the client utterly defenseless to the impact of the media freight train, which always leaves the station with or without you. If the crisis is one in which major catastrophic damage is incurred (real or potential injuries, deaths, property damage, etc.), the initial three-hour window sets the stage for all manner of media coverage and public



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perception that follows. Clients must be prepared with the strongest legal and communications mindset, framework and tools to respond with their proactive “A” Game that places the client in the driver’s seat of how the crisis is initially covered across media formats and perceived by all stakeholders. The quality of the client’s combined legal and public relations counsel will inherently reflect the sophistication and efficacy of this effort.

**5. Help the client demonstrate the three C’s of initial crisis response: Care, Competency and Consistency.**

These three character traits will rarely work against the client later in a courtroom, and in the initial minutes, hours and days of a crisis situation, keeping these client values and behaviors visible and at the fore of communication strategy may be the most critical objective the team can accomplish. Speaking to the press, to employees or via social media in a crisis situation does not have to place the client at inherent legal risk, particularly if messaging focuses on showing care and concern to those impacted in the crisis. The communication should be direct, with a solid level of management competency in acknowledging that an incident in some form has occurred and consistency in both saying and demonstrating through visible action that fully responsive measures are being taken to investigate and address the matter at hand. These messages may have to be repeated ad nauseam over the timeline in which a larger, cogent legal, operational and communications strategy can be developed behind closed doors – and if so, then that’s fine.

**6. Prep spokespersons with no more than three key messages during each press conference, news release or other media communication.**

A true crisis will likely call upon the entity’s top executive / CEO to serve as spokesperson – although there can be a range of situational factors that require another individual to serve in this role, particularly via live press conferences. Most importantly, the spokesperson should ideally have some past media experience and/or media training, as well as an overall presence both visually and verbally that conveys authority, control and credibility.

He or she should receive and thoroughly review carefully worded, concise talking points encapsulating no more than three key themes (see Point #5 on this list for suggested focal points), which are previewed, stated, and then recapped in talking points, prior to a media interview or press briefing. Spokespersons should avoid trying to memorize talking points; instead, have their own intellectual ownership in the messages and be versatile in stating them within required parameters. Intensive Q&A mock interview prep in advance of any media interface is essential (with questions asked in an aggressive manner mirroring what he or she will likely encounter later). Spokespersons should avoid media conversations in an uncontrolled environment and absolutely abstain from any “off the record” conversations.

**7. Actively monitor and measure impact of all media coverage – whether traditional news media or social media.**

Staying abreast to-the-minute of what’s being stated in the

news and in social media in particular (which news outlets themselves monitor for leads, tips and insider information, largely regardless of the source) provides critical guidance to the full executive team on how the crisis is evolving. Media monitoring will shed light on how both legal and communications strategies must also evolve to meet unfolding issues and new information pertaining to the crisis at hand, and, in all likelihood, counter any misinformation.

Following these “musts” will enable your client to exercise some control over the message, and while nothing may prevent a media “feeding frenzy” of sorts, these actions can help your client maintain a proactive, credible posture that serves it well in the court of public opinion and in the court of law.

<sup>1</sup> See Rule of Professional Conduct 3.6

<sup>2</sup> Rule of Professional Conduct 1.6



## barrister bullets

### JOIN US FOR THE MARCH MEETING

Everyone is invited to the Barristers' monthly meetings held on the second Wednesday of every month at 5:00 p.m. at the Bistro by the Bijou (807 South Gay Street). The next meeting will be held on **March 11, 2015**. There are many opportunities to get involved, so please contact Barristers President **Taylor Williams** at [taw@painetar.com](mailto:taw@painetar.com) for more information. Check out the Barristers on Facebook at [www.facebook.com/knoxvillebarristers](http://www.facebook.com/knoxvillebarristers).

**OPEN SERVICE PROJECT** - The Barristers are supporting President **Tasha Blakney's** signature project for the year, which involves monthly service projects in the community. In March, lawyers will support the East Tennessee Kidney Foundation by donating blankets, volunteering at the group's annual fundraiser, or running/walking the Lucky Kidney Run on March 14. Contact Open Service Project co-chairs **Troy Weston** at [tweston@eblaw.us](mailto:tweston@eblaw.us) and **Jamie Ballinger-Holden** at [jballinger@bakerdonelson.com](mailto:jballinger@bakerdonelson.com) for details on any of these activities.

**ACCESS TO JUSTICE** - The Committee meeting will be held on March 16, 2015 at 5:15pm at the KBA office. If you are interested in serving on this committee or have ideas for the committee, please contact **Charity Miles Williams** at [cmiles@laet.org](mailto:cmiles@laet.org).

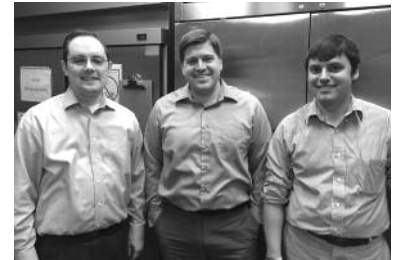
**DIVERSITY** - The Diversity Committee is meeting at Noon on March 2, 2015 for lunch in Market Square (Restaurant TBD) to discuss and plan for upcoming projects. Please contact **Amanda Morse** at [amanda.morse@knoxcounty.org](mailto:amanda.morse@knoxcounty.org) or **Zack Gardner** at [zgardner@kmfpc.com](mailto:zgardner@kmfpc.com) to join us. All are welcome!

**HUNGER AND POVERTY RELIEF** - The Hunger and Poverty Relief Committee is recruiting people who want to make a difference in our community to serve on this committee. The Committee is also looking for law firms to volunteer with Second Harvest in the Firms for Food initiative. Lastly, please look for more information to follow regarding the Professional Clothing Drive, which will take place April 6-20. For more information or if you have any questions, please reach out to **Heather Ferguson** at [hferguson@emlaw.com](mailto:hferguson@emlaw.com) or 546-0500.

**LAW SCHOOL MENTOR** - The Mock Interview Program at UT College of Law was held February 2-6. Committee chair, **Caitlyn Elam** ([celam@lewis Thomason.com](mailto:celam@lewis Thomason.com)) would like to thank all that volunteered for this hugely successful event.

**MOCK TRIAL COMMITTEE** - The annual high school mock trial competition was held on Saturday, February 14, 2015, and Saturday, February 28, 2015, at the City-County Building. After another successful event, Committee chair, **Kathryn Ellis** ([kellis@laet.org](mailto:kellis@laet.org)), would like to thank all the law students, attorneys, judges, and paralegals who gave their time and efforts to this great community event!

**VOLUNTEER BREAKFAST** - The Volunteer Breakfast Committee would like to thank **William Bennett**, **Nathan Goodner**, and **Eric Luttrell** for volunteering at the January Breakfast. Volunteers are ALWAYS needed to serve breakfast at the Volunteer Ministry Center on the fourth Thursday of the month, the next breakfast being March 26th at 6:15 a.m. Contact **Alan Moore** at [mamoore@ftb.com](mailto:mamoore@ftb.com) or **Paul Wehmeier** at [pwehmeier@adhknox.com](mailto:pwehmeier@adhknox.com) to get involved.



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## CES REPORT

Once again, we made our annual trek to Las Vegas for the Consumer Electronics Show (January 5–9). On the morning of January 6, with our hearts all aflutter, we hopped on a Southwest Airlines jet to view the latest offerings in gadget “geekdom.” We hurried off the plane, grabbed a bite to eat, and headed straight to the Las Vegas Convention Center to fill ourselves with visions of tech toys.

Upon arrival, however, we almost immediately turned into “tech curmudgeons.” It seemed that we had seen everything before: 4K TVs—seen that; Internet of Things—been there, done that; flying drones—already saw it; wireless speakers of every kind—Bill has most of them. At the end of our first day, we were unimpressed.

Phil got a bright idea and decided to study the online materials for the Show. He discovered that the Innovation Awards (and apparently most of the innovative devices) were on display at the Sands Expo, and not at the main Las Vegas Convention Center. We decided to walk to that venue from our hotel, rather than taking the monorail. The “short walk” turned out to be about two miles, but it was well worth it. This is the stuff we came to see! Here are a few examples.

There was the ZUtA Pocket Printer, a small device about the size of a wedding ring jewelry box. It is a little robot that runs on the paper and deposits the ink on the page. The printer is so small that you can put it in your pocket, yet you can print on any size of paper.

Another gadget with a wow factor was the Dash Headphones by Bragi. These are completely wireless headphones. They are two buds that simply stick in your ears. You can play music through them from your Smartphone, or you can listen to them by themselves. Together they hold about 1,000 songs and, by the way, they can audibly coach you while you are exercising, track your movements, and capture biometric data.

We also loved Netatmo. Netatmo is a small, cylindrical camera that sits in your home and detects a person’s face inside the home, and then informs you of who has come into your house. It has night vision and recording capabilities, and it can recognize you and the members of your family. Speaking of cameras, we were also intrigued by Ricoh’s new Theta camera which uses a pair of fish-eye lenses to capture 360-degree spherical images.

And those are just the beginning.

After our “curmudgeon-ness” had subsided after viewing all the innovative products at the Sands, we became wide-eyed geeks again. Here are the things we recognized at CES and a sample of the products we liked in each category:

### 1. Drones.

There were so many drones that they had their own section at the Convention Center. Today’s drones can not only be used for photo and videos, but also for surveying, package delivery, law enforcement, and gathering weather data and traffic information. While Parrot continues to be a leader in this genre, we really liked the Ghost drone make by the EHang, Inc. You can use it right out of the box, equip it with a GoPro cam, and control it with an app on your smartphone.

### 2. PCs are here to stay.

In recent years, electronic manufacturers have tried to take our laptops and desktops away from our warm, live fingers. They wanted us to start using tablets and Smartphones. Apparently, they have realized

the folly in this strategy. Laptops and desktop PCs were everywhere. The trend, as always, is toward lighter devices with more powerful performance and longer battery life. We really loved several of the computers in the Lenovo line such as the X1 and the Lavie Z ultrabook which weighs in at an impressive 1.72 pounds. We also drooled over the new Samsung ATIV Book 9, a highly portable and almost weightless computer that does not need a cooling fan because its processor is based on Intel’s new Broadwell-Y power-efficient design. Consequently, it is very quiet.

### 3. Connected and Automated Vehicles.

We saw the BMW that drove itself to CES. We saw the electronics packages in Volkswagen, Lexis, Toyota, and Mercedes Benz. But perhaps the coolest and most impressive display was the Audi section. Audi is perfecting technology that is not fully driverless, but merely assists drivers. For example, the car will warn you when you are distracted. It will also warn you when there is a pedestrian ahead and brake for you if you do not brake quickly enough. The car will warn you when another car is about to encroach into your lane of traffic. We were really impressed.

### 4. Wearables.

We saw every type of wearable you can imagine. Almost every device could tell time, track your GPS coordinates, and measure your bodily attributes, such as skin temperature and heart rate. There were even devices that had voice and facial recognition. Our favorite wearable, Motorola’s Scout5000, was a smartcollar you can put on your dog to track and train your dog and a mini GoPro camera so that you can see the world from your dog’s perspective.

### 5. Smart Home Products.

Almost every major company at CES had “connected home” products. There were products that connected all of your appliances to the Internet, products that connected your lights and your music systems into one network that could be controlled over the Internet and, of course, many, many devices, such as the Nest Thermostat that would allow you to control the temperature in your home. Perhaps our favorite Smart Home system is the Home Automation System that acts as a much more user friendly version of the Crestron products. The system allows you to separately control lighting, temperature, music, etc. and establish “themes” for each room, such as a party atmosphere, a wake-up atmosphere, a bedtime atmosphere, a romantic atmosphere, etc.

### 6. Higher and Higher Definition Television.

All of the television manufacturers had the new 4K (supposedly 10x sharper and more detailed than standard hi-definition televisions) models available in almost every size—up to screens as large as nine or ten feet. And these video screens were not just for entertainment. There were also screens for surgeons, design artists, architects, etc. And, even though Bill is a major critic of the curved television screens, we found ourselves drawn to the curved computer monitors that appeared to make a more attractive and viewable work space. Samsung made some of our favorite curved computer screens.

*(Continued on Page 20)*



## WORD PLAY

By: Peter D. Van de Vate  
Law Office of Peter D. Van de Vate

### “Berserk”

“Berserk” made its way into the common English language around 1851. It means violently angry or mad. It appeared in Scott’s *The Pirate* in 1822, as *berserker*, incorrectly adopted from the Scandinavian *berserkr*. The Norse *Berserkr* were ferocious warriors noted for their frenzied and furious fighting. In Old Icelandic, *berserkr* probably meant “bear shirt.”

Legend has it that the Berserkr warriors ingested the *Amarita muscaria* (fly agaric) mushroom to feed their frenzy in battle.

## CES REPORT (Continued from Page 19)

### 7. 3D Printing.

There appeared to be over 100 manufacturers of 3D printers displaying their wares at CES. It appears this sector is about to break into the mainstream. One of our favorites was the XYZ 3D Food Printer made by XYZ Printing that uses food ingredients to produce and decorate uncooked cookies or cakes. You can design your decorations for food items, determine their size and the ingredients that they will be made out of, and, *viola*, you have a perfectly decorated cake (or even pizza pie). XYZ Printing also makes one of the most affordable traditional 3D printers with its Da Vinci model.

### 8. Internet of Things or Internet of Everything.

Every tech company involved in networking at the Consumer Electronics Show proclaimed 2015 as the year of Internet of Everything, a world when every device, and virtually every inanimate object, will be interconnected to a vast computer network. This will be a world where there is no privacy and that everything that occurs any way can actually be reviewed and established by viewing a log of network activity. The volume of digital data in this new world of Internet of Everything will generate a bazillion terabytes of data and make all the networking and computer hard drive and computer storage device manufacturers rich beyond their wildest dreams. Let’s hope this does not happen.

### 9. Robots.

There were robots of every kind at the Consumer Electronic Show. There were robots to take care of your elderly parents; robots to clean your house; robots to provide security in your home; and even robots to shine your shoes. The most interesting (and eerie) robot was what Bill calls a “cyborg” that poses as a cheesy lounge singer. The cyborg, a very attractive Asian-looking woman, sang the Louis Armstrong song, “What a Wonderful World” while being accompanied by a live pianist. The cyborg had very real looking facial expressions and was able to stay in tune and in time with the piano accompaniment. It really looked like a scene from the movie, *I, Robot*, when everyone had gathered around to see the cyborg’s performance. Bill became scared and ran away because he was afraid that the cyborg would suddenly turn evil and attack the crowd with either a knife or an automatic weapon. It didn’t happen.

With our gadget appetites fully satisfied and our little tech bellies bloated, we boarded our Southwest return flight a few days later and came home. During that entire flight, Bill planned his next trip to Vegas for the 2015 AVN Expo on January 21–24.

## Address Changes

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

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**COURT UPDATE:**  
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**CIRCUIT COURT DIVISION III**  
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765 Justice Center Drive  
Dandridge, TN 37864  
Ph: (865) 453-8385 FAX: (865) 453-9380

**CIRCUIT COURT DIVISION IV**  
(Also Serves as Criminal Court Judge)  
**Hon. O. Duane Sloane**  
Admin. Asst.: Lisa Bryant  
P. O. Box 858, Dandridge, TN  
37725-0858  
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Ph: (865) 397-8733 FAX: (865) 397-1587

**FIRM UPDATE:**  
Address updated for all of the attorneys with **Leitner, Williams, Dooley & Napolitan, PLLC**. All other contact information remains the same. New address is:  
900 South Gay Street, Suite 1800  
Knoxville, TN 37902

## New! Member Updates available online and in the weekly email

Each month, the KBA uses DICTA to alert you to changes in member contact information since the Attorneys’ Directory was published. Although you can access updates anytime using the online members-only attorney search function, we know that many of you also want to be notified of just those changes since the latest print version was released.

When contact information changes are made, we’ll include a link to those updates in the Friday “News You Can Use” e-mails. You can access a running list of all of the changes at <http://www.knoxbar.org/images/directory-updates-since-published.pdf>.

By: Cathy Shuck

*Of Counsel, Wimberly Lawson Wright Daves & Jones, PLLC*

## Affordable Care Act Reporting Requirement Applies to All Covered Employers in 2015

As of February 3rd, the U.S. House of Representatives has voted 67 times to repeal, defund, or change the Patient Protection and Affordable Care Act ("ACA").<sup>1</sup> Republicans have finally unveiled a proposed alternative to the ACA.<sup>2</sup> And on March 4th, the U.S. Supreme Court will hear arguments in *King v. Burwell*<sup>3</sup> as to whether the subsidies received by millions of policyholders in federally-run health care exchanges run afoul of the ACA's plain language.

Unfortunately, none of these news-grabbing developments is likely to relieve employers from one of the ACA's most burdensome requirements in 2015: reporting on offers of insurance coverage pursuant to Section 6056 of the ACA.<sup>4</sup> Section 6056 requires employers to submit detailed information to the IRS and to employees at the end of the 2015 tax year, showing who was offered coverage and when.

Section 6056 reporting takes effect in 2015 for all employers covered by the ACA's employer mandate.<sup>5</sup>

### Who is Covered?

Recall that the ACA's employer mandate applies to all employers with at least 50 full time equivalent employees (FTEs). The IRS granted transition relief from the mandate for 2015 for employers with 50-99 FTEs; employers with 100 or more FTEs must comply with the mandate this year. However, there is *no relief* for smaller employers from the Section 6056 reporting requirement.<sup>6</sup> In other words, even if an employer is relieved from the mandate in 2015, the employer will still have to comply with the Section 6056 reporting requirements.

### What is Required?

Section 6056 requires employers to file an informational return for each full-time employee<sup>7</sup> showing, on a month-by-month basis, whether the employee received an offer of health insurance coverage. Additionally, if the employer is self-insured, the employer must provide information about the insurance coverage and whether any dependents were covered.<sup>8</sup>

### How is the Information Reported?

The IRS has developed forms, naturally. Covered employers will file a Form 1095-C for each full-time employee, and will submit the forms under a Form 1094-C transmittal, similar to W-2 reporting.

### When is it Due?

Employees must receive their copy of the form by January 31 of each year for the prior year. Information must be submitted to the IRS by February 28, or by March 31 if the employer submits the information electronically.<sup>9</sup> In other words, 2015 forms will be due to employees by

January 31, 2016<sup>10</sup> and to the IRS by February 28, 2016 (or March 31, 2016 if filing electronically). The IRS considered and rejected requests to make the deadlines flexible for employers with non-calendar-year benefit plans, because the information is required for tax filing and enforcement.<sup>11</sup>

### Where Can I Get More Information?

The IRS also has a FAQ page on Section 6056.<sup>12</sup> The forms and instructions (some of which are still in draft form) are also available on the IRS's website and are probably the best way to get a handle on what information is required.

### Conclusion

All employers with 50 or more full-time equivalent employees should be tracking information and making plans to prepare and file under Section 6056 now, if they have not already. It will be much easier to collect the information throughout the year than to go back and re-create it later.

<sup>1</sup> See H.R. 596, introduced by B. Byrne (R-Ala.) Jan. 28, 2015.

<sup>2</sup> See joint press release Jan. 27, 2015 from Senators Burr (R-N.C.), Coburn (R-Okla.) and Hatch (R-Utah) announcing the "Patient Choice, Affordability, Responsibility, and Empowerment (CARE) Act," available at <http://www.finance.senate.gov/newsroom/ranking/release/?id=5cebe1e1-963f-4a4d-b613-0bd5aa0f2e3a> (Feb. 9, 2015).

<sup>3</sup> Docket No. 14-114.

<sup>4</sup> See P.L. 111-148 (Mar. 23, 2010) § 6056, codified (helpfully) at 26 U.S.C. § 6056.

<sup>5</sup> The employer mandate requires all employers with 50 or more full-time equivalent employees (FTEs) to offer qualifying coverage to their full-time employees or pay a penalty. 26 U.S.C. § 4980H. Employers with 50-99 FTEs are exempt from the mandate until 2016. See 79 Fed. Reg. 8574 (Feb. 12, 2014).

<sup>6</sup> See 79 Fed. Reg. 13242-43 (Mar. 10, 2014) (noting that even though employers with 50-99 FTEs received relief from the mandate for 2015, those employers "will still report under section 6056 for 2015").

<sup>7</sup> Recall that under the ACA, "full time" is 30 hours per week.

<sup>8</sup> This is pursuant to a companion provision, Section 6055. 26 U.S.C. § 6055.

<sup>9</sup> 79 Fed. Reg. 13238-39 (Mar. 10, 2014); note that employers filing at least 250 returns must file electronically. *Id.* at 13239.

<sup>10</sup> Actually by February 1, 2016, as January 31 is a Sunday. 79 Fed. Reg. 13238 (Mar. 10, 2014).

<sup>11</sup> See 79 Fed. Reg. 13238-39 (Mar. 10, 2015).

<sup>12</sup> <http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Reporting-of-Offer-of-Health-Insurance-Coverage-by-Employers-Section-6056> (Feb. 10, 2015).

**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: Joe Jarret  
*UT Graduate School of Public Policy*

## SAM HOUSTON: TENNESSEE GOVERNOR, AVENGER OF THE ALAMO, ATTORNEY AT LAW

To his beloved Cherokee, he was *Colonneb* “the Raven.” To Texans, his rallying cry “Remember the Alamo!” assured them statehood. But to many Tennesseans, he was merely their attorney. He was Sam Houston, 7th Governor of Tennessee, member of Congress, and veteran of the Creek War. As you may recall from your Tennessee history studies, the Creek War began as a conflict within the Native American Creek Confederation, but various United States militia quickly joined in the fight. The outbreak of hostilities caused Sam Houston, Davy Crockett and other notables to take up arms against the Creek, British traders and the Spanish government, all whom provided supplies to the Red Stick (tribe) majority due to their shared interest in preventing the expansion of United States territory.<sup>1</sup> On or about May, 1812, Houston spent approximately (historians can’t seem to agree) six months in Maryville where he started a private school, and where it is reported that he taught students from ages 6 years to sixty. Although the school was reported to be successful, it appears its brief run under Houston’s leadership was due to the fact that, once he paid off a \$300 debt, other things tickled his fancy, namely, the law.<sup>2</sup>

When Sam Houston wasn’t teaching, taking up arms, serving as the state’s chief executive or representing Tennessee in Congress, he was doing battle in court, representing clients and prosecuting cases as a member of the Bar. In 1818, still recovering from wounds received in battle, Houston read law in Nashville for six months in the office of Judge James Trimble. Judge Trimble, who was acquainted with Houston’s Virginia relatives, outlined an 18th month course of reading for the young Army veteran, thereby becoming his precept (from the Latin *praecipere*, to command or mentor). Reading for the law and legal apprenticeships were the predominate ways people became attorneys in Houston’s time. Years later, Abraham Lincoln would read for the law and become a lawyer under an Illinois law enacted in 1833. This law stated that to be a lawyer someone had to read for the law and “obtain a certificate procured from the court of an Illinois county certifying to the applicant’s good moral character.”<sup>3</sup> Interestingly, another future Governor of Tennessee, Aaron V. Brown, likewise studied law with Judge Trimble, ultimately becoming the law partner of future president James K. Polk.<sup>4</sup>

To the astonishment of Judge Trimble, Houston completed the regimen in six months, and immediately thereafter, “passed an examination for admission to the bar.”<sup>5</sup> Upon being admitted to the Bar, Houston opened a law practice in Lebanon, Tennessee, where he rented office space from the town’s postmaster, Issac Gallady, for the princely sum of \$1.00 per month. According to one historian, Houston never forgot Gallady’s kindness which was also manifested itself in the form of credit for law office postage and the provision of a suit of clothes. It is said that Mr. Gallady provided the young lawyer with the ability to “dress fit to kill in his bell-crowned beaver (hat), plum-colored coat, tight breeches and waistcoat.”<sup>6</sup> Although Houston spent most of his formative time as an attorney practicing in Lebanon, he also took cases in Nashville where it is said “he rode often, frequently stopping off on the way to visit General Jackson at the Hermitage.”<sup>7</sup> On several of his visits to the Hermitage, Houston spent time with Joseph McMinn, Tennessee’s 5th Governor and veteran of the Revolutionary War. McMinn, obviously impressed with the young lawyer and fellow veteran, appointed Houston to serve as adjutant-general of the state militia, and in so doing, promoted him to the rank of colonel.<sup>8</sup>

As if Houston wasn’t busy enough, he turned to politics and, in late 1818, was elected attorney general (prosecuting attorney) of the District of Nashville. Houston took up residence in Nashville, and served in his new post for three years before returning to the private practice of law in Nashville.<sup>9</sup> His return to private practice was announced in the *Nashville Whig* newspaper<sup>10</sup> in 1821, which read “Sam Houston attorney at Law. Having removed to an office second below A. Kinglesy’s, Esq. on Market Street, can be found at all times where he ought to be.”<sup>11</sup> By all accounts, Houston’s practice was a successful one, as reported by historian Marquis James who noted that Houston made “a local reputation as a trial lawyer” who was “able to reap the larger rewards of private practice,” so much so, it appears, that he was able to timely settle his debts with a Nashville bank.<sup>12</sup>

Soon, the restless Houston left the practice of law to serve in Congress, as Governor of Tennessee, “President” of Texas, and after Texas joined the Union, as a U.S. Senator until 1860. He died in Texas in 1863, at the age of 70. Many people through the ages have had many things to say about this soldier, lawyer and leader, but perhaps it’s best we end with Houston’s own words: “I would give no thought of what the world might say of me, if I could only transmit to posterity the reputation of an honest man.”

<sup>1</sup> Michael D. Green, *The Politics of Indian Removal: Creek Government and Society in Crisis*, Lincoln, Nebraska: University of Nebraska Press, 1985, pp. 38-39, accessed 11 September 2011

<sup>2</sup> Friend, Llerena. *Sam Houston, the Great Designer*. University of Texas Press, 1954 at 6.

<sup>3</sup> Duff, John, A. *Lincoln: Prairie Lawyer* (New York, Bramhall House, 1960), Note: Today, California is among a handful of states that formally provide this alternative. Under the provisions of the State Bar’s Law Office Study Program (LOSP), would-be attorneys train and study under the guidance of a practicing attorney or judge for four years before being permitted to sit for the bar exam.

<sup>4</sup> Lester, Connie, “Aaron V. Brown,” *Tennessee Encyclopedia of History and Culture*, 2009.

<sup>5</sup> James, M. (1988). *The Raven: A Biography of Sam Houston*. The Bobbs-Merrill Company at 47

<sup>6</sup> *Id.* at 48

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Braider, Donald, *Solitary Star: A Biography of Sam Houston* (New York: Putnam, 1974).

<sup>10</sup> *The Nashville Whig* newspaper was founded by brothers and journeyman printers Moses and Joseph Norvel to provide news each week to the 1,200-person settlement along the bluffs of the Cumberland River in 1812. It survives today in the persona of *The Tennessean*. Archives, the Gannett Company, 2014.

<sup>11</sup> “Historical News & Notices,” *Tennessee Historical Quarterly*, V (1946), 286.

<sup>12</sup> James, M. (1988). *The Raven: A Biography of Sam Houston*. The Bobbs-Merrill Company at 50.

By: Jason H. Long

*Lowe, Yeager & Brown*

## THE GREATEST LAWYER WHO NEVER WAS

Next month will mark the eleven-year anniversary of my father's death. That is probably the most somber first line I have ever written in this column (way to set the reader up for some comedy, Jason). My dad, James H. Long, Jr., died after a relatively brief bout with lung cancer on March 18, 2004. The event forever changed and colored my perception of St. Patrick's Day, formerly one of my favorite holidays. Dad was at peace when he died. He was surrounded by family and knew he was loved. That is all he ever asked for.

Not surprisingly, I can state with all sincerity that no one had a bigger impact on my development than my father. That is how it should be. He is also the one person in my life I consider a hero and whose every action I would happily emulate if I could. That, too, is how it should be. I spent a lifetime trying to make him proud, and I know that I succeeded with my choice of career. My dad thought the law was a high calling, and he had immense respect for those who practiced it well. Dad felt that lawyers, in many ways, were architects of society. Don't get me wrong, he would tell a good lawyer joke as quick as the next guy. He never let the opportunity slip by to give me a good razzing about my chosen profession. Still, he confided in me more than once that he wished he had become a lawyer. Economics made that a near impossibility. Instead, he spent his life selling newspapers, as the Circulation Director for the *News Sentinel* and the *Journal*. As I think back on it now, I believe dad would have been a giant in the bar. I know he possessed all of the basic tools necessary to be a lawyer. Space prohibits listing everything he taught me (that would require a multi-volume series), but here are a few highlights:

**Have confidence in yourself.** Lawyers must project authority when events around them are in turmoil. No one ever displayed more confidence than Jim Long. Whether it was openly mocking Cas Walker at a public speaking event (bad idea in retrospect) or wearing his Hee Haw Overalls to a black tie affair, dad was unafraid. It came naturally to him. He was 6'6" and used his size and quick humor to dominate any room he was in. I never knew a better public speaker. He could speak with absolute authority on matters he had no knowledge of, and he could convince you he was right by the strength of his passion and confidence.

**Be willing to adapt.** My dad was a child of the 40s and 50s. I imagine he had friends who were gay, but none of them talked about it. It was a world he never had to deal with, except to make an offhand joke now and again which, sadly, his generation considered harmless. Flash forward to 1993, and two gay men moved in across the street from my parents in the sheltered bastion of Holston Hills. These men were open about their relationship and raised more than a few eyebrows in the community. It was not surprising, therefore, that some of the neighbors looked for opportunities to make them feel unwelcome. Apparently one of the men ran a photography studio out of the home, and an unknown neighbor complained that running the business was a violation of zoning laws. I could not have been more proud of my father when, at age 58 (which I considered old back then), he took up their cause and went before the MPC to plead on their behalf. In putting himself out there, in front of many of his friends and colleagues, dad showed a compassion and ability to adapt to new circumstances that I believe is essential for any good lawyer.

**Pick your battles wisely.** My dad served in the army during the Korean War. He was an MP stationed in Frankfurt, Germany (just before Elvis got there) and always bragged that no Koreans invaded Germany during his tour of duty. He spent most of his free time at local bars in town. He told the story of the night he was deep in his cups when a little guy walked into the bar and shouted "I'll kick the a\*\* of the biggest man here!" My dad, fortified by liquid courage, stood up and said "Let's see what you can do." At this point in the story, my dad looked at me and said, "Son, if the smallest guy in the bar says he can whip the biggest man there, you better believe it. That little guy put me in the infirmary for a week." The lesson to pick your battles wisely is a good reminder for any attorney.

**Have a sense of humor.** Dad was gregarious to say the least. He could be bitingly sarcastic, almost to the point of being caustic. In other people, that can often be a turn off. Still, people gravitated to my dad because he was really funny, and he was always looking for the opportunity to make people laugh. He could laugh at anything or anyone, including himself. One week before he died, he was in hospice care, and I went to see him after work. He was pumped up on morphine and not really aware of his surroundings most of the time, although he did have moments of great lucidity. I walked in the room that night, and he immediately tore into me. He was mad because he had been watching the NCAA tournament the day before and saw that I, apparently playing for Indiana in his mind, continued to take low percentage half court hook shots. While he was impressed that I made most of them, he felt like he taught me better than that. At one point, he paused in the story and said, "You don't play for Indiana do you?" When I told him "no," he proceeded to go on a fifteen-minute comedy set about the effects of morphine and cancer in general (who tells jokes about cancer?). That night, he would have put Robin Williams to shame. He had me laughing so hard I cried (in happiness). That was the last time I heard my father tell a joke, but I was awfully glad that he could still do it. Lawyers who don't have a sense of humor about the absurdity of their practice, the process, or their clients, will not survive long.

Anyway, I appreciate the lessons my dad taught me. I think I learned more about being a lawyer from that newspaper man than from any professor I had in law school . . . except maybe Joe Cook, there's a man who knows his contracts.

**I**n putting himself out there, in front of many of his friends and colleagues, dad showed a compassion and ability to adapt to new circumstances that I believe is essential for any good lawyer.



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EASTERN DISTRICT OF TENNESSEE

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By: Paula Schaefer

Professor of Law  
University of Tennessee College of Law

## PROSECUTORS, POWERPOINT, AND CLOSING ARGUMENT

Though it is often dismissed as sleep-inducing and ineffective, PowerPoint can be a powerful tool in a courtroom. In closing argument, an attorney can use PowerPoint to display admitted exhibits while arguing the inferences the jury can draw from that evidence. Combining the visual aid with oral presentation can help the jury remember the message during its deliberations.

Prosecutors risk reversal when they abuse the tool, though. The Washington Supreme Court recently reversed the conviction of Odies Delandus Walker based on a prosecutor's improper PowerPoint content. In that case, the prosecutor displayed over 100 slides to the jury that included the title: "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER." In some slides, the prosecutor added new text to photos that had been admitted as exhibits. In one instance, the words "MONEY IS MORE IMPORTANT THAN HUMAN LIFE" were superimposed on a photo of money seized in the case. (The phrase was not testimony from any witness). The defendant's mug shot was displayed with the caption, "WE ARE GOING TO BEAT THIS." *State v. Walker*, 2015 WL 276363, at \*3, \_\_\_ P.3d \_\_\_ (2015).

Even though defense counsel in *Walker* did not object to any of these slides (and additional problematic slides not discussed here), the Washington Supreme Court determined that reversal was appropriate. The court explained that the applicable standard is "whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether the prejudice could have been cured with a timely objection." *Id.* at \*4-5. The court noted that the misconduct in the case included presenting altered versions of exhibits, presenting "derogatory depictions of the defendant," and stating a personal opinion about the defendant's guilt (in violation of RPC 3.4 which prohibits a lawyer stating a personal opinion on the guilt or innocence of the accused). The court found that the prejudicial impact – obfuscation of the complex factual issue in the case – could not have been overcome by a timely objection and instruction to the jury to ignore the improper PowerPoint slides. *Id.* at \*6.

The *Walker* case is not unusual. *The Marshall Project* has identified ten recent cases in which a prosecutor's improper PowerPoint was the basis of a reversed conviction and additional cases in which PowerPoint misconduct was discussed but ultimately not the basis of conviction reversal. *PowerPoint Justice: When prosecutors slide around the law*, THE MARSHALL PROJECT, Dec. 23, 2014, <https://www.themarshallproject.org/2014/12/23/powerpoint-justice>.

In 2013, the Tennessee Court of Criminal Appeals considered a prosecutor's PowerPoint statements in *State v. Adcock*, 2013 WL 6187700, at \*13-17 (Tenn. Crim. App. 2013). In closing argument, the prosecutor argued that the jury should believe the victim while displaying a PowerPoint slide that stated, "If [the victim] is not telling the truth, she's put on one heck of a performance – effectively fooling police and prosecutors with the sophistication of a CIA field operative. . . ." Defense counsel objected that the PowerPoint statement improperly indicated "the prosecutors believe [the victim's] story. . . ." *Id.* at \*13-14. The Tennessee Court of Criminal Appeals found that the statements amounted to improper vouching for the credibility of the victim. *Id.* at \*17. The court ultimately determined that the vouching did not have a prejudicial impact on the verdict, "especially in light of the trial court's initial curative instruction and general instructions that arguments of counsel were not evidence." *Id.*

What can prosecutors learn from these cases? One lesson is that PowerPoint content that is close to the line may lead to a mistrial or reversal. A Missouri appellate court recently admonished prosecutors, "It defies logic why even an overzealous prosecutor would tempt the grant of a mistrial during closing argument [by displaying the defendant's booking photo with the word "GUILTY" written across it]. . . . Such egregious conduct on the part of the prosecutor is unwarranted and cannot be condoned by any court." *State v. Walter*, 2014 WL 4967913, at \*17, \_\_\_ S.W.3d \_\_\_ (Mo. Ct. App. 2014).

But what is close to the line? Any PowerPoint slide that includes words that may be construed as the prosecutor's personal opinion regarding "the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused" are prohibited. Tennessee RPC 3.3(e)(3). See also *State v. Thornton*, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999). In short, anything that cannot be spoken by the prosecutor cannot be included in a PowerPoint. Relatedly, the addition of words to exhibits (like a defendant's booking photo) is problematic not only when the words express the opinion of the prosecutor, but also when those words may be understood as inflaming the jury's passions and prejudices. *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998). PowerPoint slides that oversimplify or otherwise misstate the law are also improper. *State v. Rivera*, 99 A.3d 847, 864-65 (N.J. Super. Ct. App. Div. 2014) (prosecutor oversimplified self-defense law in PowerPoint to the point that it was misleading). In short, prosecutors should be guided by the principle that the objective "is not [to] win a case, but that justice shall be done. It is as much the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

There are lessons in these cases for criminal defense attorneys, too. First, defense attorneys must be prepared for the prosecution's use of PowerPoint. The impact of this technology cannot be ignored or avoided by waiving closing argument. See, e.g., *Leach v. State*, 2010 WL 2244113, at \*33 (Tenn. Crim. App. 2010) (defense attorney decided to waive closing argument to avoid "powerful emotional images" he anticipated in prosecutor's PowerPoint). Second, defense counsel should not hesitate to object to improper PowerPoint slides. The objection gives the trial court an opportunity to correct the matter, and ultimately, the objection gives counsel a much stronger argument on appeal than that available under plain error review. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (describing plain error review). Finally, defense attorneys should request the opportunity to review the prosecution's PowerPoint prior to it being displayed to the jury. It can be impossible to undo the harm of an improper slide once the jury sees it. And it can be difficult for defense counsel to simultaneously listen to the oral presentation and evaluate the propriety of the information displayed in a PowerPoint. See, e.g., *Walter*, 2014 WL 4976913, at \*16 (defense counsel explains after closing argument that he did not object to PowerPoint images because he was "watching the prosecutor and not the screen"). See also *Walker*, 2015 WL 276363, at \*6 ("Given the serious need to curb abuses of such visual presentations, we encourage trial court judges to intervene and to preview such slides before they are shown to a jury.").

If both prosecutors and criminal defense lawyers are vigilant, they can avoid the problems courts are increasingly seeing in this area.



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By: Stephen Ross Johnson  
Ritchie Dillard Davies & Johnson, PC



## FORGIVING JUSTICE: PRETRIAL AND JUDICIAL DIVERSION

### I. Introduction

Justice is a process and not a particular result. The prosecutor must not measure success just by obtaining convictions or longer, harsher prison sentences. Within the system of justice, for certain qualified persons, the law allows for the normal criminal process to be deferred, either through judicial diversion or pretrial diversion. While similar, these provisions have sharp differences. This article will not attempt to go through all of the provisions of pretrial and judicial diversion, but it is helpful to understand the practical aspects of both statutes.

### II. Pretrial Diversion

“The self-evident purpose of pre-trial diversion is to spare appropriately selected first offenders the stigma, embarrassment and expense of trial and the collateral consequences of a criminal conviction.” *Stanton v. State*, 395 S.W.3d 676, 686 (Tenn. 2013) (quoting *Pace v. State*, 566 S.W.2d 861, 868 (Tenn. 1978) (internal quotation marks omitted)). “The result contemplated is the restoration of successful divertees to useful and productive citizenship.” *State v. McKim*, 215 S.W.3d 781, 792 (Tenn. 2007) (quoting *Pace v. State*, 566 S.W.2d at 868 (internal quotation marks omitted)). “This is a legitimate and praiseworthy objective and one that has now become the public policy of the State.” *Id.*

Pretrial diversion allows deferral of prosecution for persons who have no prior convictions of any Class A or B misdemeanor or any felony, have not been granted diversion before, and who are *not charged* with any felony, driving under the influence, sexual offense, or matter allegedly committed by a public official in that person’s official capacity. See T.C.A. § 40-15-105. A certificate of eligibility must be obtained from the Tennessee Bureau of Investigation. *Id.* Most misdemeanor offenses, such as simple assault, drug possession, or theft, are therefore eligible for pretrial diversion. The pretrial diversion process allows the accused to make application to the district attorney general for deferral of prosecution for up to two years and, if granted, a memorandum of understanding is filed with the court. See T.C.A. § 40-15-105(b). The agreement may allow conditions to be placed on the defendant during the deferral period, and at any time diversion may be terminated upon application and notice to the court. See T.C.A. § 40-15-105(d). If the prosecutor attempts to terminate the diversion, the defendant has the right to require the court to determine if the termination is arbitrary, capricious, or an abuse of discretion by the prosecutor. See T.C.A. § 40-15-105(d). Upon completion of the period of suspension, the case shall be dismissed and the defendant may have the record of the alleged offense expunged. See T.C.A. §§ 40-15-105(e) and 40-32-101.

If the prosecutor denies the application for pretrial diversion, the defendant has the right to petition the court for a writ of certiorari for an abuse of prosecutorial discretion. See T.C.A. § 40-15-105(b)(3); Tenn. R. Crim. P. 38(a). The court can enter a writ requiring the district

attorney general to place the defendant on pretrial diversion. *Id.* If the trial court denies the petition for writ of certiorari, the defendant may take interlocutory appeal. See Tenn. R. Crim. P. 38(b); Tenn. R. App. P. 9, 10.

Pretrial diversion, therefore, has two powerful tools. First, it *does not* require the entry of a guilty plea. This is important for collateral consequences to the criminal case, such as a civil action related to the same underlying facts, or whether other jurisdictions will consider the pretrial diversion as a conviction. For example, under federal immigration laws, even deferral of prosecution and dismissal is considered a prior conviction if it involves a guilty plea, see 8 U.S.C. § 1101(a)(48)(A), making pretrial diversion an attractive alternative to judicial diversion. Second, the prosecutor’s denial of pretrial diversion is subject to review by the trial and appellate courts, which can stop the normal process of criminal prosecution in its tracks while the courts determine the legality of the denial.

### III. Judicial Diversion

Unlike pretrial diversion, judicial diversion requires the entry of a guilty or no contest plea, or a finding of guilt following trial. See T.C.A. § 40-35-313. The same general eligibility requirements of pretrial diversion apply to judicial diversion, except one may seek judicial diversion for a much broader class of offenses, such as *most* Class C, D, and E felonies and misdemeanors, other than sexual offenses. See T.C.A. § 40-35-313(a)(1)(B)(i). Unlike pretrial diversion, the discretion to grant judicial diversion rests with the court, not the prosecutor. See T.C.A. § 40-35-313(a). A defendant placed on judicial diversion who completes his or her term of probation successfully may receive dismissal and expungement. See T.C.A. § 40-35-313(b)). If a defendant placed on judicial diversion violates the terms of probation, the state may seek revocation. See *Alder v. State*, 108 S.W.3d 263, 266 (Tenn. Crim. App. 2002). Note that if the defendant’s probation is revoked, the terms of any plea agreement *do not* survive the revocation of judicial diversion. See *State v. Voto*, No. E2013-02652-CCA-R3-CD, Slip Opinion at p. 6 (Tenn. Crim. App., Knoxville, Nov. 24, 2014) (citing *State v. Judkins*, 185 S.W.3d 422, 425 (Tenn. Crim. App. 2005)).

### IV. Conclusion

Diversion is the Tennessee criminal justice system’s way of forgiving certain first time offenders, recognizing the lifetime stigma and consequences that follow formal conviction for a crime. Understanding the differences, both in procedure and substance, between pretrial and judicial diversion is essential to enabling justice to be forgiving.



By: **Melissa B. Carrasco**

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

## GENERATIONAL GENERALIZATIONS

**Pop Quiz.** Which one of these best describes your approach to work?

### Option A

You are a quick decision-maker. You know what you want and how to get it. You are willing to take risks to achieve what you want. You do not define success by job titles or position, but you want regular feedback from your peers and superiors. You expect people to recognize you for your work. You are independent, and if you do work with others, you prefer that each person have a defined role and specific tasks. You do not want to be overly managed. You see work as an opportunity to reach personal goals, and you like to learn new skills. You want a flexible schedule and the ability to telecommute so you can pursue activities outside of work. You believe your career should improve your life, and you have no problem changing jobs to improve the quality of your life. You believe you should not have to work long hours in order to succeed at work and that working long hours is a sign of inefficiency. You prefer a telephone call to sending a letter. You value change. You want your work to have an impact.

### Option B

You are achievement-oriented. You welcome challenging projects. You like stability, but you do not mind challenging the status quo as long as you are the one challenging it. You like to take time to think through issues and consider all possibilities. You do not like feeling rushed. You believe in sacrificing to get to where you want to be in your career, and you think everyone should “pay their dues” at work. You like deadlines, and you expect people to meet the deadlines. You do not like working remotely. You have little patience for people who do not spend as many hours at the office as you do. You prefer in-person meetings, and you communicate well by letter because it allows more time to deliberate. You are motivated by position and prestige; you enjoy the perks that come with it. You like public recognition, whether it is for you or the organization you helped to build. You want your work to have long-lasting results.

### Option C

You believe you can do “it,” no matter what “it” is. You have an opinion, and you do not mind expressing it. You like to work, but work is not your life. You like options, and you are slow to commit if it means you have to rule out other options. You value creativity and independent thinking. You have a hard time being told to do something unless you understand why it should be done. You need information . . . lots of information. You like innovation and think more technology is better. You believe your career should be fulfilling. You want enriching experiences that are related to your work. You think work should have some element of fun. You prefer to work with others, and you expect immediate feedback on your work. Frequent communication is important to you, but you would rather send an e-mail—even if it is to the person three feet away. You value individuality, and you want to do

things your way. You are very comfortable with change. You prefer to work on a lot of things at one time rather than focus on one thing for a period of time. You value relationships. You want a flexible schedule and can work from anywhere. You want your work to make a difference. You dislike generalizations and are annoyed with this article already.<sup>1</sup>

Whether your birth year makes you a Generation X-er<sup>2</sup> (Option A), Baby Boomer<sup>3</sup> (Option B) or Millennial<sup>4</sup> (Option C), the truth is, your perspective of work enters the office with you every day. The same goes for every coworker, every client, every opposing counsel, and every person on the other side of the courtroom . . . and the bench.

If your workplace consists of more people than you, you probably work with at least one person whose perspective of work is different than yours. Whether or not this can be attributed to generational differences, as a practical matter, these divergent perspectives affect the workplace. Different attitudes, values, interests, and methods of communication can make it difficult for individuals of different generations to work together. Managing someone from a different generation can be a challenge. Taking guidance can be challenging as well.

The solution is not to withdraw from other generations. There is much each generation can learn from the others. Rather than assuming one’s own generation has it the hardest or does it the best way or insisting that others adapt to the way you communicate, it might be more efficient to learn what the other generation values, how that generation communicates, and what motivates that generation. Maybe that millennial is “paying her dues,” just working from her home early in the morning and late at night instead of in the office. Maybe you should walk across the hall to your colleague’s office instead of sending him an e-mail. Maybe you call your Gen. X opposing counsel before you send the tersely-worded letter. Maybe instead of doing what just comes naturally, you take a minute to think about the best way to reach your goals, even if the best way is something different.

**D**ifferent attitudes, values, interests, and methods of communication can make it difficult for individuals of different generations to work together.

<sup>1</sup> See Abhishek Agarwal, *Characteristics of Baby Boomers-The Good and the Bad Involved* (Nov. 6, 2008), <http://ezinearticles.com/?Characteristics-of-Baby-Boomers---The-Good-And-The-Bad-Involved&id=1657103> (last visited Jan. 31, 2015); Stephanie Armour, *Generation Y: They’ve Arrived at Work with a New Attitude*, USA Today (Nov. 6, 2005), [http://usatoday30.usatoday.com/money/workplace/2005-11-06-gen-y\\_x.htm](http://usatoday30.usatoday.com/money/workplace/2005-11-06-gen-y_x.htm) (last visited Jan. 31, 2015); Sally Kane, *Baby Boomers*, <http://legalcareers.about.com/od/practicetips/a/Babyboomers.htm> (last visited Jan. 31, 2015); Tim Shaver, *Understanding Generation X and Y Employees*, available at <http://casagrandepress.com/sample/understanding-generation-x-and-y-employees.pdf>.

<sup>2</sup> Generation X-ers were born between 1965 and 1977.

<sup>3</sup> Baby Boomers were born between 1946 and 1964.

<sup>4</sup> Millennials were born around 1981 or 1982 until some unknown year, which we assume social scientists will identify for us at some point in the future.

This "members only" column is published each month to share news and information among KBA members. Submissions should be limited to 50 words and will be edited for space and other considerations.

**KNOXVILLE BAR FOUNDATION GRANTS: APPLY BY MARCH 13**

The Knoxville Bar Foundation was established in 1992 to improve the administration of justice, to enhance the public's understanding of and confidence in the legal system, and to serve the legal profession. Last year the Board of Directors approved ten grant requests, totaling \$25,000. Apply for a 2015 grant by March 13. Please go to [www.knoxbar.org](http://www.knoxbar.org) to download an application. For further information, please contact **J. Michael Haynes**, Chairman, Knoxville Bar Foundation, P.O. Box 869, Knoxville, Tennessee 37901 or call him directly at (865) 292-2307 or e-mail to [mhaynes@hdclaw.com](mailto:mhaynes@hdclaw.com).

**AFFILIATED ORGANIZATION**

The Smoky Mountain Paralegal Association will hold its monthly meeting on Thursday, March 12, 2015, at 12:00 p.m. in the U.S. Attorney's Office, Knoxville, Tennessee. **Melanie Reid**, Esq., Assistant Law Professor, LMU Duncan School of Law will be presenting the topic of Homeland Security. The presentation will provide 1.0 hour program. A lunch buffet is available at the cost of \$12/person with reservations. Please contact **Kelley Myers**, ACP at [president@smparalegal.org](mailto:president@smparalegal.org) or (865) 974-0425 for additional information and/or lunch reservations. Additional information can be found at our website, [www.smparalegal.org](http://www.smparalegal.org).

**NEED GUIDANCE IN A SPECIFIC PRACTICE AREA?**

One of the best kept secrets of the Knoxville Bar Association is our Mentor for the Moment program. We want to let the secret out and make sure that our members use this wonderful resource. It's really simple to ask a question of our helpful volunteer mentors. Log in to the members' only section of [www.knoxbar.org](http://www.knoxbar.org) or check out the list in the KBA Attorneys' Directory and begin your search! Our easy-to-use website allows you to search by last name or by subject area experience.

**OFFICE SPACE AVAILABLE**

- A perfect office space available with signage on Peters Road. The office has just been renovated and ready for new occupants. Space offers room for two private offices and reception area and other area for a work station. The location is visible from Kingston Pike and would make a great office for an accountant, insurance agent, attorney or mortgage broker, engineering firm or anyone who would like high visibility. Offers a carport for your parking along with a paved parking lot. Carport also has a storage closet. Rent: \$900.00 per month. Contact **Karen Emmert** at 356-5049.
- Historic Post Office – space available – ready to be finished to tenant's tastes. Ideal for legal professionals. Contact **Jim Justice** at 865-521-7500 or 865-679-3207.
- Office space in beautiful Victorian style office building. Hardwood floors and fireplace with Italian marble. Use of reception area, conference room and full kitchen. Utilities, janitorial service, and high speed internet provided. Will consider month to month lease. Rent is \$450.00 per month, with damage deposit. Adjacent to I-75 at Merchants road exit. Ten minutes from courthouse. Perfect for attorney, accountants, or insurance representatives. Please contact **Jack Bowers** at 688-4060 for more information.



**NEW MEMBERS**

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

- Brenda G. Brooks**, Moore & Brooks
- Adam M. Bullock**, The Ratliff Firm
- T. Michael Craig-Grubbs**, Butler, Vines & Babb, P.L.L.C.
- Carl Dowdy**
- Gregory C. Eshbaugh**, Knox County District Attorney General's Office
- Jacob A. Feuer**, The Law Offices of James A.H. Bell, P.C.
- Felicia E. Fortune**, Young Williams Child Support Services
- Jeffrey H. Glaspie**, Bill Hotz & Associates, P.C.
- Linn M. Guerrero**, Loring Justice, PLLC
- Grae A. Hinds**
- Kyle Hixson**, Knox County District Attorney General's Office
- Ryann M. Jeffers**
- Lindsey E. Martin**, Paine | Bickers LLP
- L. Martin McDonald**, McDonald, Levy & Taylor
- Byron T. McQuain**, The Ratliff Firm
- Cynthia A. Mobley**, At Risk Intervention
- Brittany L. Nestor**
- Mindy L. Nower**, Tennessee Supreme Court
- Nathaniel R. Ogle**, Knox County District Attorney General's Office
- Derek S. Paul**, The Bosch Law Firm
- Preston D. Pierce**
- Keith A. Pope**, Keith Pope & Associates
- Haseeb N. Qureshi**
- Ellen J. Radice**, U.T. College of Law
- Benjamin C. Rhodes**
- Louis W. Ringger III**, Tennessee Supreme Court
- Rachel D. Russell**, Knox County District Attorney General's Office
- Bailey M. Schiermeyer**, Elder Law of East Tennessee
- J. Daniel Smith**, The Smith Law Firm
- Charles T. Stafford**
- Sarah J. Watson**, Sobieski, Messer & Associates, PLLC
- M. Jeffrey Whitt**, Whitt, Cooper, Trant & Hedrick

**Law Student Members:**

- Lora Cobble**
- Aaron M. Jett**
- Evan J. Tuck**
- Christina L. Wilford**

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- Mike and Laura Myers, The Myers Law Firm, PLLC

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**LRIS is a membership service of the Knoxville Bar Association.**

Download a LRIS Application at [www.knoxbar.org](http://www.knoxbar.org) OR contact LRIS Intake Specialist **Tracy Chain** at 865-522-6522 for more information.



By: Terry Woods
Project Director

The Exotic Allure of Saturday Bar

You've wondered what goes on at Saturday Bar, haven't you? There are so many questions you've been afraid to ask. We understand. Saturday Bar is mysterious. Most lawyers assume that it's a secret society, similar to Skull and Bones. You may have felt slighted because no one has thrown a hood over your head and dragged you down to the dungeon under the Legal Aid office for the clandestine initiation ceremony. Or perhaps you have heard the rumors of exclusivity, that it is an event reserved for the privileged elite.

What could motivate lawyers to get up early on Saturday morning and drive downtown to talk to poor people? Yes, we have coffee and doughnuts; but that can't be the only reason.

Here, for the 163rd time, exclusively for DICTA subscribers, we will reveal the ancient and sacred traditions of Saturday Bar.

- 1. There is no initiation ritual. There is a dungeon below the Legal Aid office, but that's where I sleep; so no one else goes there.
2. No ceremonial attire is worn. Some kind of attire is worn, but it should be casual and appropriate for whatever you have planned for the rest of your Saturday.
3. There is no rigorous application process. There is no application process at all. No interview. No qualifying exam. You're a lawyer. You're qualified. Just show up.

'But what happens when I get there?' you ask. When you arrive, you will be greeted by other selfless and dedicated lawyers and a committed team of law students. The students will already be conducting the initial client interviews. After that, a student will ask one of the lawyers to take over. 'Take over' is secret Saturday Bar code for 'talk to the client.'

'Who are these clients? Are they my clients? Are they going to show up at my office on Monday morning? What if they want me to handle an IPO?' I don't know anything about how to do an IPO! Calm down! First, they aren't going to ask you to do an IPO. Saturday Bar clients are low-income people who need advice about a variety of civil legal issues. At the last Saturday Bar, we saw (1) a woman who wanted to know how to get access to her late husband's bank account, (2) a man who wanted to sue his employer because the employer was mean to him, (3) a tenant whose landlord would not return her security deposit, (4) a woman who needed help filling out an application for insurance death benefits, (5) a man who wanted his criminal record expunged, (6) a grandmother who wanted to adopt the grandchildren who had lived with her since their birth, (7) a woman who wanted to become the conservator over her severely disabled adult son, (8) an uninsured man who had been sued over a traffic accident, (9) a man who had been sued for an unpaid credit card debt, (10) a 16-year-old who wanted to be emancipated because her father kicked her out of the house, and (11) a man who lost his job and wanted to reduce his child support obligation.

'I don't know anything about any of those problems!' After the client explains the problem to you, you will realize that you know a lot more than you think you do. I make that solemn commitment to you on the sanctity of The Oath of Saturday Bar Conviviality. Not that we take an oath. We don't.

Moreover, it doesn't really matter if you know anything about the legal issues the clients present. 'Is that because they are poor, and their problems aren't important?' No. And stop trying to disqualify yourself. The reason you don't have to be an expert in everything is that you won't be the only lawyer there. Someone will always know something about the client's problem. And, believe it or not, Legal Aid has a law library. And Westlaw.

'But just suppose, hypothetically, that no one can solve the client's problem at Saturday Bar? Then I'm the one on the hook, right?' No. Your relationship with the client ends at Saturday Bar (unless, of course, you want to offer the client additional help.).

'I'll bet the client would look for any excuse to sue me though, right?' I am not aware of anyone ever suing a Saturday Bar volunteer. But let's say you did get sued. Legal Aid provides you with \$1 million in professional liability coverage that is primary over any existing policy you have.

You don't have to worry about conflicts (see Tennessee Rule of Professional Conduct 6.5); and as an extra bonus, you will automatically get 0.6 hours of CLE credit every time you volunteer.

If you want to participate in Saturday Bar, email me at twoods@LAET.org or call 865-637-0484. We have a steady stream of clients who hope you will.

2015 Saturday Bar Schedule

Saturday Bar in Knoxville

Legal Aid of East Tennessee
502 S. Gay St., Suite 404
Knoxville, TN 37902
June 13 & 27
July 11 & 25
August 8 & 22
September 12 & 26
October 10 & 24
November 7
December 5

Saturday Bar in Maryville

Legal Aid of East Tennessee
307 Ellis Avenue
Maryville, TN 37804
March 21
April 25
May 30
June 20
July 25
August 22
September 26
October 24
November 7
December 5
Some sessions in Maryville will be at other locations. Call or email for more information.

Thank you to all of the lawyers who offered your time in the service of others, particularly those who accepted or consulted on new cases or participated in Saturday Bar, the OP Clinic, Detainer Court, mediation, or in any other way since publication of the last list in DICTA:

Table listing names of lawyers who participated in Saturday Bar, including Song Betzler, John E. Eldridge, Amy Morris Hess, Joseph J. Levitt, Dianna M. Russell, and others.

By: Jack H. (Nick) McCall



Q:

*Anna, tell us how you got involved with the Law Practice Today Expo, and your thoughts and observations on the changing nature of legal management and office technology.*

A:

**ANNA F. HINDS***Stone & Hinds, P.C.*

As a member of the KBA since 1967 (Stone & Hinds, P.C., is in the 100% Membership Club), and having become “of counsel” to the firm in 1998, I indicated as my first choice on Marsha’s sign-up sheet to serve on the newly-formed Law Office Technology & Management Committee. I did so, not because I am tech-savvy (which I clearly am not); rather, because I wanted to stay in touch with those who are, which brings me to the second part of your question.

Watching the changes in legal management and office technology over almost half a century has been amazing. For 30 years, the changes were gradual, incremental, and understandable. Since 1998, I have witnessed a technological sea change that reminds me of what I have read about the Industrial Revolution. Without resorting to the destruction of industrial machinery as did the Luddites of early industrial Britain, it is imperative that the individual’s right of privacy be protected amidst a burgeoning digital technological revolution.

Beginning with the evolution of office equipment, I recall the purchase of our first Xerox copier in 1973. Without a copy machine, secretaries turned out pleadings, contracts, briefs, and wills using electric typewriters, carbon paper, and multiple onion skin copies. In 1971, came the centralized magnetic tape selectric typewriter (MTST); in 1974, individual correcting selectric typewriters; in 1977, the centralized optical character recognition reader (OCR) with a daisy wheel printer, in 1988, the IBM System34, and in 1995, desktop computers. Now, the copier is so much more than a copier. It will copy in color, scan, and print in 3-D. The Health section of the Knoxville News Sentinel on the day of our interview featured a cardiovascular surgeon in Miami using 3-D printing technology to create a model of his patient’s heart to plan the child’s surgery.

Similarly, the devices for dictation and telecommunication progressed gradually and incrementally to become multi-purpose, leaving others, such as the telefacsimile machine practically obsolete. But it is the vanishing use of the telephone which is being replaced by e-mail and smart phones that I find counterintuitive and counterproductive. Perhaps staying connected around the clock helps lawyers work smarter. Today’s Barristers do lead a more balanced life than my career allowed. I possess, but rarely use, what the Supreme Court of the United States described as a “rudimentary flip phone,” noting further that what most people are carrying around is a mini, yet powerful, computer that happens to include a phone. The pitfalls and the advantages of such a tracking device are in the news, and in the courts, daily.

Inextricably linked to office technology is the legal administrator, without whom lawyers would have no time to practice law. Stone & Bozeman in 1967 was managed by the senior partners. Lawyers recorded their time (if at all) on the inside cover of their client’s manila file folder. I attended an ABA Law Office Management Section seminar in the mid-1970’s after which we switched to timekeeping slips that were 3-part self-carbons (glued together by blind workers) with a backup sheet on a peg board. With the hiring of a legal administrator in 1986, the necessary software for billing became the responsibility of the office manager. Shifting the duties of billing, preparation of financial reports, personnel, and staying current with changing technology to a non-lawyer was definitely a positive move.

The Knoxville Bar Association’s award-winning Law Practice Today Expo is celebrating its 10th anniversary on April 16 and 17 of this year, and I am proud to have been a participant since its inception. See you there!



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



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Earn up to 8 hours of CLE and attend the Expo's special event with an All-Expo Pass—only \$175 for KBA members. Customize your Expo experience by selecting the courses that will most benefit you and your firm. The CLE has been designed for attorneys and law office staff to offer inspiration, strategies and the tools necessary for law firms to increase their likelihood of success. If you pay for the All-Expo Pass, you will receive handouts for all 16 CLE courses. The Expo features national speakers and sessions with candid roundtable discussions about topics that really matter.

A FREE pass to the Exhibit Hall is available to anyone in the East Tennessee legal community. Staff appreciation hours will be held on Friday from 11:30 am – 1:30 pm with a box lunch compliments of the Trust Company. Business solutions and product demonstrations to help you manage your practice no matter the size. Attendees can win BIG due to the generosity of our sponsors and exhibitors!

