



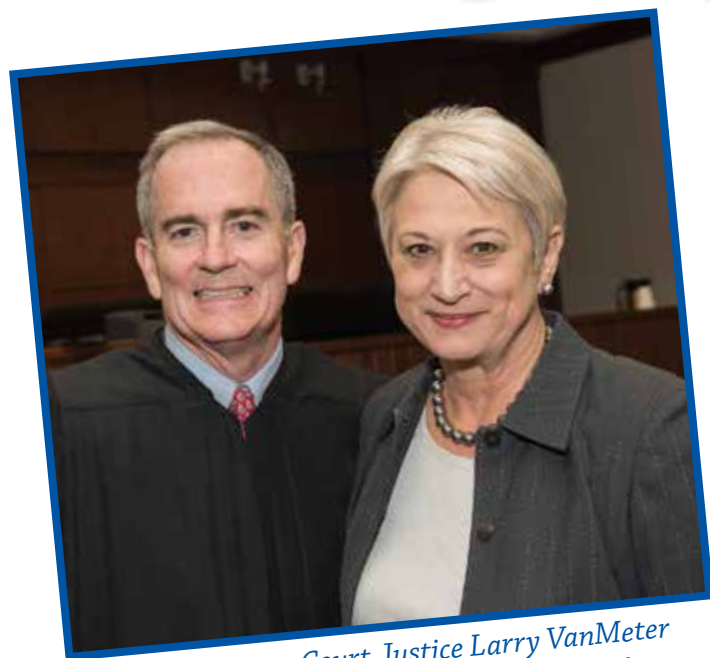
2017, Issue 1

# BarNews

## PASSING

of  
the

GAVELS



New Supreme Court Justice Larry VanMeter  
with his predecessor, Justice Mary Noble.

**Noble story, page 10.**

**VanMeter story, page 12.**



Judge Thomas Clark retires  
after 25 years on the Circuit bench.

**Clark story, page 14.**

# BarNews

A publication of the Fayette County Bar Association

## Bar News Article Submission Guidelines

Unsolicited manuscripts are accepted on subjects of interest to the legal profession. Manuscripts should be submitted in MS Word or WordPerfect in electronic form either on disk to the attention of Dana Arnold, FCBA, 219 N. Upper Street, Lexington, KY 40507 or as an attachment emailed to [info@fcba.com](mailto:info@fcba.com). Articles should not exceed 6 typewritten double-spaced pages. For complete set of submission guidelines visit [www.fcba.com](http://www.fcba.com) or contact the FCBA office at (859) 225-9897.

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## President's Message: *Kif Skidmore*



Kif Skidmore

### Food for thought ... and a recipe too.

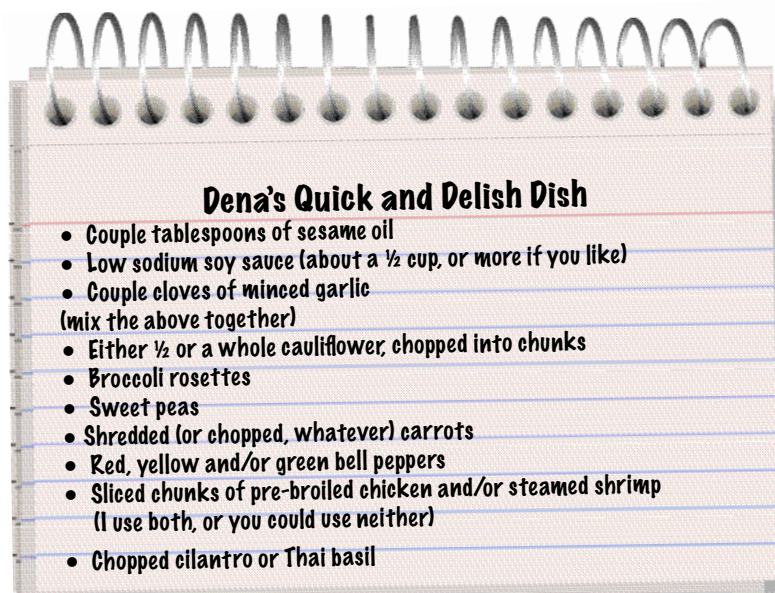
It's being in a profession inherently connected to conflict, albeit usually civil conflict. It's an upbringing in a family that literally reflects a microcosm of our richly colorful diverse society. It's being the parent of a wide-eyed little boy who still believes in Santa Claus and the basic goodness of the human heart. All of these things, and the events of the last year, have left me yearning for a space where voices that unite are finally louder than voices that divide. To this end, Mike and I are going to host a series of Sunday

Dinners in 2017 during which people from vastly disparate viewpoints and backgrounds break bread together. Sometimes we will tackle an issue facing our community, and sometimes we will just break bread. In the words of a good friend, who pointed out that at the core, we all desire "to be productive, to have a roof over our heads, a sense of belonging." If you would like to join us for Sunday Dinner sometime this year, please reach out to me. We might have to step out of our comfort zones for a couple of hours, and we might emerge finding a much wider zone in which we are comfortable. You can find me on facebook, or you can email me at my personal email, [kifskidmore@gmail.com](mailto:kifskidmore@gmail.com).



*First Cousins, Lesedi and Luke*

Now for the recipe. I can't claim this one, it was the inspiration of a girlfriend and with her permission I'm passing it on. A daily struggle for moms, dads and PPNK's (professional people no kids) involves finding healthy and fast evening meal solutions. This one involves minimal pre-prep. You can cook your protein and chop veggies on the weekend. You play around with the ingredients to suit your taste. It makes for a pretty good leftover too.



So here's the thing – cauliflower is the carb substitute. This is a guilt-free stir fry. You drop the chunks of cauliflower in a food processor, pour a mixture of the sesame oil, soy sauce and garlic over top of it, and pulse it into fine (but not too fine) bits. Then heat some oil (coconut or sesame or peanut) in a pan, toss in the cauliflower, then veggies and mix it together real good. Turn the heat down to medium and cover and let cook for 2-4 minutes. You can let it simmer on extra low until you are ready to eat. I toss the basil or cilantro in right before serving. I know, a recipe is a weird thing to include in a bar association message. But most of you know more than I do about the law, and this is a little practical thing I can offer that might make one of your workday evenings a little easier and tastier.

### ***What's next...***

Be looking for the member survey in late February or early March. Also, Law Day is right around the corner. Please join us on Monday, May 1 at the Hilton from 11:30 a.m. to 1:00 p.m. Please take time from your busy schedule to consider which members of our legal community are deserving of a Law Day award.

# Road to Renovation: Historic Old Courthouse



Foster Ockerman, Jr.

The road which leads to the renovation of our Historic Old Courthouse, Fayette County's fifth, begins, not surprisingly, in court.

In the early 1990's, then Mayor Scotty Baesler and the government had been acquiring land in what were called the Ben Snyder (for the department store) and GTE

blocks along the north east side of Limestone. Millions of dollars were advanced by the Commonwealth of Kentucky through the support of Gov. Wallace Wilkinson to fund acquisition. The end result was to be a large, downtown arts complex.

Then Baesler ran for governor against Brereton Jones, who defeated him in the Democratic primary and ultimately was elected. As no construction had begun and much time had passed, Jones demanded the state's money back. The Urban County, land rich and cash poor, could not repay and the Commonwealth sued the Urban County in Franklin Circuit Court.

At the same time, the state Administrative Office of the Courts was trying to figure out what to do about the Fayette County courts. The divisions of the Circuit Court had swollen to fill the courthouse and other offices, such as the County Clerk's Offices and the appeals branch, were being pushed out into other buildings. The District Courts were surviving in the

former city hall, a building not particularly well suited to the conversion from city offices to courts. The choices were renovate the old courthouses, possibly including a new wing on Cheapside, or build new. Neither was to be cheap.

Baesler was elected to Congress and left the scene, succeeded by Pam Miller. Jones went out of office to be followed by Paul Patton. Patton and Miller did not desire to continue the litigation and sought a way to settle the case.

Someone had the creative idea of solving all the problems with a game of musical chairs: the city owned property would become the site of new court buildings along Limestone and the city would retake possession of the old courthouse. As the original intent of the whole Ben Snyder project was to benefit arts and culture, the local government committed to spend sums to restore the Lyric Theater, convert some of the buildings into a Downtown Arts Center, and spend up to one million dollars to renovate the Old Courthouse for use by the Lexington History Museum.

Almost immediately, another vocal group arose – those seeking to relocate and expand the UK Art Museum downtown – and argued for using the courthouse. The two sides, art and history, clashed in several public meetings. Finally, former Gov. Ned Breathitt brokered an agreement to share the Old Courthouse. Approximately \$200,000 was spent to

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## 100% Club 2016-2017

This year the FCBA has instituted the 100% Club, to designate those firms who have made a commitment to have every member join our association. It is not too late to have your firm become a member of the 100% club. Call or email our office to make sure your firm is recognized. The following firms have joined thus far and shown their commitment to improve our profession by supporting the Fayette County Bar Association.

**Bingham Greenbaum Doll, LLP**  
**Dinsmore & Shohl, LLP**  
**Fowler Bell, PLLC**  
**Frost Brown Todd, LLC**  
**Gess, Mattingly & Atchison, PSC**  
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**Ward, Hocker & Thornton, PLLC**  
**Wyatt, Tarrant & Combs, LLP**





# Road to Renovation, continued

hire an internationally known museum architect who, in the end, proposed three alternative plans, the most ambitious to dig up the front and west/Cheapside grounds and build a below ground art museum while the History Museum would occupy the building. As an interim step, the remaining \$800,000 was spent to minimally fit up the first three floors of the Old Courthouse. The History Museum would occupy the second and third floors while, over time, Public Safety, Pharmacy and African American museums shared the ground floor.

Attention then turned to how to raise the millions needed for the grand plan. It was viewed that trying to solicit charitable donations to the government would not work; UK's development system was seen as too byzantine, and the History Museum was simply brand new (initiated by Mayor Miller, who asked attorneys Steve Amato and Foster Ockerman, Jr. to start the nonprofit organization) to have credibility for that large a drive. The Courthouse Square Foundation, Inc., with a board named in part by the Museum and in part by UK and the Mayor, was created for fund raising purposes.

Then the tragic 9/11 attack occurred and the world of fund raising changed. Monies simply dried up for local projects like museums of any kind. The University art community retreated to campus, the History Museum moved into the old Courthouse, and there matters stood.

Except for the Courthouse Square Foundation. The Museum named its board members, but the UK members withdrew and no new government members were named. Frank Mattone, chair, Kathy Stein and Steve Amato formed the board and named Foster Ockerman, Jr., as President. The Foundation began a slow, steady drumbeat for restoring the Old Courthouse. Annual meetings were held. Ockerman wrote several op ed pieces for the newspaper and met with city officials advocating the need to restore the building before it fell apart. In the last years of the History Museum's occupancy, the HVAC system failed (window AC units and floor heaters substituted) and several leaks in the roof allowed water to penetrate.

When Mayor Jim Grey took office, he recognized the cultural, artistic and architectural significance of the building. He named Dianne Carroll, then serving on the Bluegrass Trust board, Mary Quinn Ramer of VisitLEX, and vice mayor Linda Gorton to the Foundation board

and asked Downtown Development Corporation's Jeff Fugate to help staff the board. Fugate had prior experience with restoring large old buildings and, in particular, the use of historic renovation tax credits.

After several months of study and consultation with experts, the current public/private partnership plan was devised. Driving the program to a fast start and, more importantly, early conclusion was that the tax credit program to be used, which would provide roughly one-third of the funds, expires June 30, 2017 – a true “use it or lose it” situation. Construction is reported to be on schedule to complete the qualifying portions of the project in time and to finish some time in 2018.





# 2016 FCBA Holi





# Day Party



# Lawyers at Lunch

To sign up for Lawyers at Lunch, where you're randomly matched with a colleague, email [info@fcba.com](mailto:info@fcba.com). You go to lunch on us, make a new friend and write a brief report of your discussion. A selfie, or more precisely, an us-ie, is also required.

## Matt Boyd and Janet Luo



L: Janet Luo and R: Matt Boyd

**Matt's Take on Janet:** *I had the pleasure of having lunch with Janet Luo at Dudley's on Short. I have to say our lunch was filled with a lot of laughter and many mutual opinions and observations about the practice of criminal law. Many may find that peculiar considering Janet is an Assistant County Attorney who handles criminal prosecutions and I do a great deal of criminal defense work. However we both had the shared experience of being former public defenders so that probably helped. One thing we both believed when we were in law school (although I went many years before her) was that we didn't want to do criminal law upon becoming lawyers. But as life often works, that is exactly where we find ourselves and we both enjoy our work although we are on different sides of the table.*

*I learned that Janet was born in Philadelphia and lived throughout the Northeast until her family moved to Lexington when she was in 6th grade. Much to her chagrin, she found out that unlike her previous school where 6th was the last grade of elementary school and those in it where "the elders who were owed much respect"; in Lexington she began at "the bottom of the heap" because she was already in middle school. However she persevered and overcame this disappointment.*

*When she graduated college from The University Of Virginia in 2010 she took a year off and worked as an insurance adjuster. The thrill of that job, or lack thereof, led her to pursue a law degree. She decided to attend the University Of Minnesota College Of Law and graduated in 2014. When she headed up to Minnesota she had one thought in mind, "I want to be anywhere but Kentucky." However, her mind was changed when her significant other went to law school at Northern Kentucky University. That was enough to bring her back to the Bluegrass state. For the record, she loves Lexington, as do I. She spent about a year as a Public Defender in the Columbia Field office before she joined Larry Robert's team at the County Attorney's Office.*

*Janet is an intelligent, kind, funny, caring and gregarious lady. I found her easy to talk to and very enjoyable company during our lunch meeting. I look forward to seeing and working with her when I see her in District Court.*

**Janet's Take on Matt:** *A defense attorney and a prosecutor walk into a bar. Just kidding! We went to Dudley's. Matt is a born and bred Kentuckian, having grown up in LaRue and Hardin Counties. His grandfather was a World War II vet who owned the largest dairy farm in Kentucky. In fact the farm was so large that during the Cold War, Russians came and studied their farm processes. In addition to dairy farming, Matt's family's farm also grows 7500 acres of corn and soybean. So when you're drinking bourbon you're probably also sampling corn from Boyd Farms!*

*In high school he joined the speech and debate team and found instant success. He won seven state championships and was once ranked eighth in the country. Despite all of his glory on the stage, Matt didn't have the easiest childhood growing up and he's had to overcome a lot of adversity. He was raised by a single mom who worked factory jobs most of his childhood. But through hard work and determination, his mom obtained her RN in the same year that Matt graduated law school. His drive to become a lawyer stems from his childhood experiences. When Matt isn't in the courtroom he's playing golf with his son Eli or at the pool with his daughter Katie.*

***If you are interested in participating in Lawyers at Lunch  
please contact our office by email at [info@fcba.com](mailto:info@fcba.com).***





Nominations: In preparation for our Annual Law Day Celebration the FCBA would like your assistance with award nominations.

After reviewing the award descriptions, please nominate a deserving candidate and submit information to:

FCBA - Award Nomination  
219 N. Upper St.  
Lexington, KY 40507  
E-mail: [info@fcba.com](mailto:info@fcba.com)

Please include the following:

- Letter of nomination explaining your desire to nominate this person and why;
- Any supporting documentation you wish to include.

Nomination deadline is **Friday, March 17, 2017**. If you have any questions, please contact our office at 225-9897.

### Henry T. Duncan Award

In 1960, the Henry T. Duncan award was created to honor a member of the association who had made an outstanding contribution to the community. This award is presented to an attorney whose integrity, leadership and professional conduct serves to exemplify the high ethical and professional standards that benefit the community.

### Citizen Lawyer Award

This award honors one member of the Fayette County Bar Association who has:

- practiced at least 10 years in Fayette County;
- is involved in governmental, civic, charitable or community activities;
- and has demonstrated a sincere desire to maintain and improve the administration of justice, the quality of legal practice and the quality of life for all residents of Fayette County.

### Outstanding Young Lawyer Award

This award honors one member of the Fayette County Bar Association who has:

- practiced in Fayette County less than 10 years;
- admirably fulfilled the duties owed by an attorney to the Court, clients and the community the attorney serves;
- and shown dedication to the justice system through their involvement and enhancement of community life.

# Mary C. Noble: Celebrating 25 Years on the Bench



*Speakers at Justice Noble's retirement reception in Frankfort included: Chief Justice John D. Minton, Jr.; John Tilley, Justice Cabinet Secretary and retired Judge Sheila Isaac.*

In 25 years on the bench, Deputy Chief Justice Mary C. Noble has had a profound impact on many aspects of the Kentucky court system, with her most notable work occurring in the areas of Drug Court, family law and juvenile law.

"Deputy Chief Justice Noble is an extraordinary person and an exceptional jurist," said Chief Justice John D. Minton Jr., who has been her colleague on the Supreme Court for a decade.

## **From Classroom to Courtroom**

Deputy Chief Justice Noble grew up in Breathitt County, Ky., and began her career in 1971 as an English teacher at Montgomery Central High School in Clarksville, Tenn. After earning a master's degree in 1975, she was a guidance counselor at Columbia Military Academy and later a psychology instructor at Columbia (Tenn.) State Community College.

After earning her law degree in just two and a half years, she began practicing law in 1982 with Bryan and Fogle in Mt. Sterling, Ky., where she focused on school law and insurance defense. In 1983, she began a general litigation practice in Lexington, Ky., and continued to represent school boards and handle civil plaintiff's cases and criminal defense. She obtained several large plaintiff's settlements and notable criminal defense verdicts.

She gained experience with the court system as a domestic relations commissioner for Fayette Circuit Court from 1989 until her election as a circuit judge for Fayette County in 1991.

## **One of Few Women on Circuit Bench**

At the time of her swearing-in, she was only the fifth woman in Kentucky to become a circuit judge and was one of only three female circuit judges in office. While on the circuit bench, she served two terms, from 1998 to 2002, as chief

regional circuit judge for the Bluegrass Region. She was also the first woman to serve as chief judge of Fayette Circuit Court.

From 2000-2002, she was instrumental in overseeing the design and construction of the new Robert F. Stephens Circuit and District courthouses in Lexington as part of her responsibilities as chief circuit judge.

## **Kentucky Drug Court Pioneer**

While on the circuit bench, Deputy Chief Justice Noble saw the need to help drug abusers who came before her court and she was instrumental in founding Kentucky Drug Court, one of her most important contributions to the commonwealth.

She was concerned that the legal system was focused on incarcerating users instead of providing treatment options. She believed the courts could find a better way to handle defendants with drug problems who were not involved in dealing drugs.

In 1995, she single-handedly went before the Kentucky General Assembly to request Drug Court funding and convinced the legislature to include \$300,000 for a Lexington-Fayette County Drug Court in the state budget. Instead of keeping the amount solely for Fayette County, she allowed the Administrative Office of the Courts to create a statewide Drug Court department. The AOC used the state funding as leverage and matching funds for a wide array of Drug Court grants. Barely 10 years later, state and federal funding for Kentucky Drug Court exceeded \$14.8 million.

Deputy Chief Justice Noble established a Drug Court program in Fayette County in 1996 and volunteered as a Drug Court judge from 1996 to 2006. Her experience during the country's early Drug Court movement made her a sought-after speaker. She traveled throughout Kentucky and the nation to speak at Drug Court graduations, state trainings and panels tackling Drug Court issues.

She also contributed on the national level by serving as president of the National Association of Drug Court Professionals' Congress of State Drug Courts and on the board of the NADCP. As president of the NADCP Congress, she spent much of her time communicating with judges across the country about how Drug Court works, how to establish a program and how to get community support.

On each trip to Washington, D.C., she scheduled meetings with Kentucky's senators and representatives to encourage them to allocate more funding for Kentucky Drug Court.

Her efforts were recognized in 2004 when the NADCP inducted her into the Stanley M. Goldstein Drug Court Hall of Fame, which honors those who have made preeminent contributions to the Drug Court field.



# Mary C. Noble, continued

The AOC adopted the Fayette Drug Court program as the model for Kentucky. Deputy Chief Justice Noble's vision was for every county and every judge who wanted a Drug Court to have one. Today that vision is a reality as there are Drug Court programs in 113 of the 120 counties. All Kentuckians are indebted to Deputy Chief Justice Noble for being a trailblazer in the Drug Court movement.

## ***Serving Kentucky's Highest Court***

In 2006, she was elected to the Supreme Court of Kentucky from the Fifth Appellate District, which comprises Anderson, Bourbon, Boyle, Clark, Fayette, Franklin, Jessamine, Madison, Mercer, Scott and Woodford counties. She was re-elected to the Supreme Court unopposed in 2008. Chief Justice Minton appointed her deputy chief justice in 2010. Deputy Chief Justice Noble became the first woman to preside in a Supreme Court oral argument after the chief justice was recused from a case in 2011.

## ***Family Court Rules of Procedure and Practice***

Her tireless endeavors on behalf of family law are remarkable and worthy of recognition. Her work began in 2008 when Chief Justice Minton approached her about the need for uniform, statewide rules of procedure and practice for Family Court.

Although Kentucky had a unified court system, the courts had yet to achieve uniformity in the local practice of family law. It was going to require a great deal of patience and persistence to implement standardized procedures across 120 county and jurisdictional lines. Deputy Chief Justice Noble's strong leadership and diplomacy, and her exceptional ability to manage projects and motivate people made her the ideal candidate to take on this monumental task.

Her oversight of the Family Law initiative included reviewing local rules, creating and adopting statewide forms, and collecting data on performance measures in child welfare cases. Refusing to leave any voice unheard, she included every conceivable stakeholder for feedback and open debate. She proved especially adept at engaging the judiciary while also listening to other partners who sometimes had competing views.

Since being adopted in 2011, the Family Court Rules of Procedure and Practice have been well received by judges and attorneys for providing consistency to the practice of family law in Kentucky.

## ***Champion for Juvenile Justice Reform***

Deputy Chief Justice Noble again proved to be an effective leader as a member of the Task Force on the Unified Juvenile Code, which brought together representatives from the three branches of government and a variety of agencies to make sweeping reforms to Kentucky's outdated juvenile justice laws.

Justice Noble worked tirelessly with other members of the Task Force to develop recommendations that would be incorporated into Senate Bill 200, which passed in 2014. SB 200 was progressive legislation that provides alternatives to incarceration by enhancing the treatment and services available to troubled youth.

## ***Juvenile Court Rules of Procedure and Practice***

With juvenile justice reform in place, the court system needed a set of Juvenile Court Rules that would be consistent with the mandate to promote treatment instead of detention. Given Deputy Chief Justice Noble's success with the Family Court Rules, Chief Justice Minton asked her to lead the initiative to develop statewide Juvenile Court Rules of Procedure and Practice.

She convened a JCRPP Advisory Committee comprised of judges, court personnel, attorneys and representatives from agencies involved in juvenile justice reform. After many months of intense work under tight deadlines, Kentucky's Juvenile Court Rules of Procedure and Practice were adopted in 2016.

Deputy Chief Justice Noble's career as a judge has been defined by her willingness to take risks and find innovative solutions to problems facing the courts. Her strong commitment to public service and the law has left a legacy benefiting all Kentuckians.



*A lively tribute to Justice Noble was held during the FCBA's Holiday Party. Those speaking were Chief Circuit Judge Pamela Goodwine, Elizabeth Thompson and Noble's successor, Justice Larry VanMeter.*

# VanMeter on VanMeter

Our fearless leader, Judge Sheila Isaac (ret.), asked me to compose something original for this issue of the Fayette County Bar News, to go along with the pictures of my December swearing in. “Nothing too long, you know, 300-400 words.” No problem.

Problem! What to write? My biography is readily available on the Kentucky Court of Justice website (<http://courts.ky.gov/courts/supreme/Pages/vanmeter.aspx>), plus snippets were published over the course of the last year, especially in the three or so weeks leading up to November 8: Vanderbilt undergrad; U.K. Law; Stoll, Keenon & Park—transactional work; Fayette District Court; Fayette Circuit Court; Kentucky Court of Appeals; now Kentucky Supreme Court; third Justice to have served at all four levels of Kentucky’s unified court system; and first Clark Countian since 1812 on Kentucky’s highest court (Justice James Clarke, 1810-12). Actually, I found out a month or so ago that I was slightly mistaken on that fact. Judge Jean Logue let me know that Justice James Simpson (1847-60), although born in Ireland, was a resident of Clark County. Oh, well. 157 years is still quite a drought! Plus, who wants to write about him- or herself in a publication going out to friends and colleagues?!

So maybe just brief comment on my 2016. I traveled countless times to all eleven counties of the Fifth Appellate District: Anderson, Bourbon, Boyle, Clark, Fayette, Franklin, Jessamine, Madison, Mercer, Scott, and Woodford. Who knows where Dixville is? Millville? Little Rock? Pilot View? Oxford? In order: Mercer, Woodford, Bourbon, Clark and Scott. I said many times that the “worst” thing that could happen to me over the course of 2016 was that I could spend a lot of time in eleven counties meeting a lot of great folks. And, of course, that was the BEST thing that happened to me. I am very proud to serve as their, and your, representative on Kentucky’s highest court!

Finally, a public shout-out to my friends, Justice Mary Noble and Judge Glenn Acree. Justice Noble served in a judicial capacity for almost 30 years and her accomplishments are well known. As oft stated, “Job well done, good and faithful servant.” And for Judge Acree, putting one’s name on the ballot can be a daunting undertaking because you’re putting yourself out there, and you don’t really know how it’s going to turn out. Judge A put his name on the ballot, and we both ran positive campaigns. When we presented together as Court of Appeals colleagues for the last time at the KBA’s Law Update in December, we mentioned that, and received a rousing round of applause. If only all elections could be so conducted!



*Justice VanMeter’s family at his swearing-in ceremony.*



*Bill Lear of Stoll Keenon Ogden gave remarks.*



*Justice VanMeter was robed by his children.*



*Lucy Ferguson holds the family bibles as Chief Justice John Minton administers the oath to Justice VanMeter.*





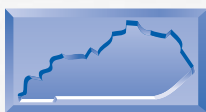
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# Fayette Circuit Chief Judge Thomas Clark Retires

The FCBA held a retirement reception for Judge Tom Clark in December at the Bodley-Bullock house. It was a packed house as attorneys, judges and court staff came to wish him well as he steps down after serving 27 years on the bench. He officially retired in late November but has volunteered to stay on until his successor is appointed. There is great respect for Judge Clark among the members of the bar. In our recent Judicial Bar Poll, 94% of those responding rated him as excellent or good, the highest rating of the Circuit Judges. He has the best qualities of a trial judge in that he is humble, easy-going, even-tempered and has a great sense of humor. Judge Clark may be hanging up his robe, but he intends to keep working in private practice which may include a mediation practice.

Judge Clark obtained his undergraduate and law degrees from the University of Kentucky. He played football for UK and was twice voted outstanding offensive lineman. After obtaining his undergraduate degree in 1973, he put himself through law school at NKU by teaching middle school at Crawford Junior and commuting to northern Kentucky. After passing the bar, Judge Clark's first job was representing indigent defendants at Legal Aid in Lexington. Two years later he went into private practice. In 1989, he was elected district judge and in 1997 became a Fayette Circuit Court Judge.

During an interview with Judge Clark for a recent *Lexington Herald-Leader* article, he stated: "I've always tried to be fair. I've always tried to be fairly even-tempered, and to treat everybody with respect, whether it's a criminal going off to prison or litigants. I think the attorneys appreciate that."

Judge Clark has certainly succeeded in his efforts and we commend him for not just a job done well, but for a job done exceptionally well.





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# The Real Impact of *Hollaway v. Direct General Ins. Co.*

In our last issue, Austin Mehr wrote an article regarding the recent Supreme Court case of *Hollaway v. Direct General*. This month, Jamie Dittert gives her take on what the opinion means.



Jamie W. Dittert

The Kentucky Supreme Court clarified the standards for extra-contractual liability, a.k.a. “bad faith,” claim against an insurer under Kentucky law in *Hollaway v. Direct Gen. Ins. Co.*, 497 S.W.3d 733 (Ky. 2016). This seminal opinion establishes the following: (1) both liability and causation must be clearly established before an insurer

has a duty to settle a claim; (2) settlements of underlying claims do not establish liability and are not admissions of fault; and (3) a plaintiff cannot succeed on a bad faith claim without proof of malevolent intent on the part of the insurer.

*Hollaway* began with a low-impact motor vehicle collision. There were conflicting versions of how the accident occurred, and the claimant/plaintiff (Samantha Hollaway) had pre-existing injuries. Direct General settled Hollaway’s property damage claim for \$463.62, but the parties reached an impasse over Hollaway’s bodily injury claim. Hollaway demanded \$125,000 (or policy limits, \$25,000), and Direct General offered \$5,000, citing the liability and causation disputes. Hollaway refused to change her demand, and Direct General did not bid against itself. Over two years later, after the matter was in litigation, Direct General settled Hollaway’s bodily injury claim for \$22,500.

Hollaway also asserted bad faith claims against Direct General, arguing that Direct General admitted its insured was at fault by making offers on her property damage and bodily injury claims and then failed to offer a fair settlement amount for that liability under the Kentucky Unfair Claims Settlement Practices Act. After discovery, the trial court granted summary judgment in favor of Direct General, and Hollaway appealed. The Court of Appeals sustained the summary judgment based on (1) evidentiary problems with Hollaway’s records, and (2) irreconcilable accounts of the accident.

The Supreme Court affirmed the Court of Appeals but rejected the restrictive approach used by the intermediate court. The *Hollaway* court revisited the “tall burden” a plaintiff must show in order to assert a viable bad faith claim: “(1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer

must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. Proof of this third element requires evidence that the insurer’s conduct was outrageous, or because of his reckless indifference to the rights of others.” Instead of limiting its analysis to liability for the accident, the *Hollaway* court recognized two operative disputes: liability for the accident; and the extent of injuries caused by the accident. Accordingly, *Hollaway* could not, as a matter of law, clearly establish Direct General’s “absolute duty to pay her claim.”

Second, the *Hollaway* court held that Direct General’s early settlement of the property damage claim, initial notes referring to its insured as “at fault,” and initial bodily injury claim offer were not evidence that Direct General’s insured was liable for the accident or that Direct General admitted liability. Rather, it found that an insurer’s change in its position as new information is acquired is not tantamount to a bad faith failure to settle as “a rule disallowing an insurer to evolve its position as the investigation unfolds cuts against our goal of speedy, fair, and transparent investigation.”

Finally, the court found that Hollaway had not offered any proof of the “malevolent intent” required to sustain a bad faith action under Kentucky law. The court did not abandon and, instead, reinforced the requirement that a bad faith plaintiff prove “outrageous” conduct or “reckless indifference to the rights of others.” It noted that the use of the term “evil” invokes sinister implications in casual conversation, as opposed to the legal concepts of outrage and deliberate indifference. Accordingly, instead of looking for proof of “evil motive,” the court examined whether Hollaway presented “any proof of intentional misconduct” beyond her own speculation that Direct General “never intended to negotiate with her fairly.” Her inability to do so was an alternate ground for summary judgment.

*Hollaway v. Direct Gen. Ins. Co.*, clarified the import of causation disputes, settlements of underlying claims, and the “malevolent intent” required to sustain a bad faith claim under Kentucky law.



# Nominees chosen to fill the 8th division Fayette Circuit Seat vacated by Judge Thomas Clark



*Carl N. Frazier*



*Megan Lake Thornton*



*Thomas Lee Travis*

On January 4, 2017, the Judicial Nominating Commission, led by Chief Justice of Kentucky John D. Minton Jr., announced nominees to fill the Fayette Circuit Court judgeship in the 8th division, now vacant due to the retirement of Judge Thomas Clark. The three nominees for the judgeship were chosen by the Commission from over 20 applications. They are attorneys Carl N. Frazier, District Judge Megan Lake Thornton and Thomas Lee Travis. Each earned their juris doctor from the University of Kentucky College of Law.

Frazier has been in private law practice since 2007 and serves as an attorney with the firm of Stoll Keenon

Ogden. Judge Thornton has served as a Fayette County District Court judge since 1997 and as chief regional district judge since 2003. Travis has been in private law practice for 29 years and serves as an attorney with the firm of Ward, Hocker & Thornton.

The Kentucky Constitution requires that three names be submitted to the governor. The governor has 60 days to appoint a replacement and his office makes the announcement.

*As we went to press, the governor had not yet made the appointment.*

## New Attorney Swearing In 2017

On October 31 2017, Fayette Circuit Chief Judge Tom Clark presided over the swearing-in of Fayette County's newest attorneys. This ceremony has gone on for decades and may be the only local presentation of new bar members in the state. In addition to the Chief Judge, Judges Philpot, Brislin, Ishmael, Masterton, Stein, Scorsone and Bunnell sat en banc to hear the motions of sponsoring attorneys who presented the new attorneys to the court. Deputy Chief Justice Mary Noble administered the constitutional oath of office to the

new attorneys who had been formally sworn in at the Kentucky Supreme Court. Judge Pamela Goodwine then presented the words of wisdom and encouragement to the new attorneys.

FCBA President Elect Kif Skidmore spoke on behalf of the FCBA to welcome the new attorneys to the Fayette County Bar. Following the program, the FCBA hosted a reception for the Court and all the attorneys attending.





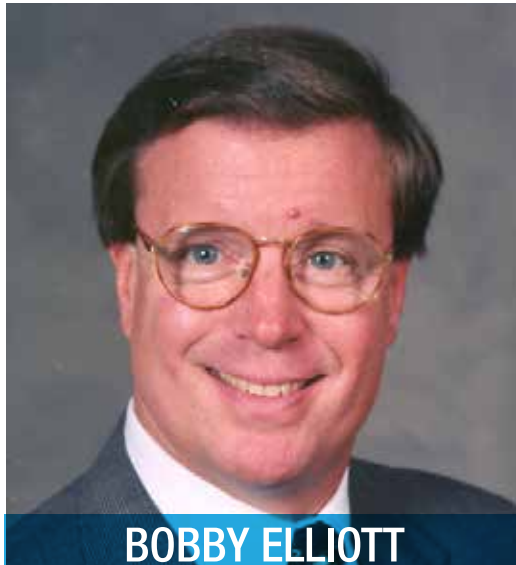
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# Kentucky SSM Rulemaking Update



Carolyn M. Brown

As previously reported in the “Dinsmore Air Quality Letter”, the Environmental Protection Agency found in June of last year that the State Implementation Plans (SIPs) of 36 states were substantially inadequate due to their regulatory treatment of excess

emissions associated with startups, shutdowns and malfunctions at regulated facilities. The agency issued a SIP Call to each of those states to correct the deficiencies. For Kentucky, the SIP Call was directed at Section 1 of 401 KAR 50:055. Kentucky submitted its formal response to EPA on November 17, 2016, meeting its November 22, 2016 deadline. A copy is available on the DAQ website.

Kentucky had reportedly evaluated a number of options to address the SIP Call, including no action. However, Kentucky ultimately chose to resolve the SIP Call by removing Section 1(1) and (4) of 401 KAR 50:055 from the SIP. Section 1(1) provides as follows: “Emissions which, due to shut down or malfunctions, temporarily exceed the standard set forth by the cabinet shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) of this section are made.” Subsection (4) addresses the demonstration the source must make in order for the Director of the Division for Air Quality to find that the source should be relieved from compliance with the standards. The source must show that (a) the malfunction or shutdown and ensuing start-up did not result from failure to operate and maintain properly the equipment; (b) all reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards; (c) all reasonable steps were taken to minimize the emissions and their effect on air quality; (d) the excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and (e) the malfunction or shutdown and ensuing start-up was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown. The regulation also requires the Director to notify the source of his determination 60 days after the submittal.

public hearing on the proposed approach was held on September 14, 2016. EPA Region 4 had an opportunity to review and comment on Kentucky’s proposed approach and had no comments. Therefore, it is anticipated that this proposed resolution of the SIP Call will be approved. However, the change to the SIP is not effective until EPA formally approves the revision. The timing of EPA approval is uncertain, particularly due the change in administrations. It is not unusual for EPA to take months (or years) to act on proposed SIP revisions.

Even after an approval of the SIP revision, it is important to remember that Section 1(1) and (4) are still in effect as a matter of state law. Although the acceptance of a source demonstration under Section 1(4) by the DAQ Director will not bar federal enforcement or a citizen suit under the Clean Air Act, the granting of a request for relief would preclude state enforcement. The state’s determination should also merit consideration in the event EPA or a third party pursues an action over the same event.

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**Hilton Downtown**

*More information coming soon.*





### **Delcotto Law Group PLLC**

**Heather Purnell**, a paralegal with DelCotto Law Group PLLC, is the recipient of the 2016 Donald E. Eppler Commitment Award, presented by the Greater Lexington Paralegal Association (GLPA). Each year, the Donald E. Eppler Commitment Award is given to a paralegal who has demonstrated a great love, enthusiasm and commitment for the GLPA and the paralegal profession.

### **Dinsmore & Shohl**

**Jeffrey A. Kaplan, Jr.** joins the Lexington office and will practice out of the Labor and Employment Department. While serving as a summer associate for Dinsmore, Kaplan drafted pleadings and completed research assignments on litigation, torts and corporate law. He earned his J.D. from the University of Kentucky College of Law.

**Travers B. Manley** joins the Lexington office and will practice out of the Litigation Department. Manley interned for the Honorable Karen K. Caldwell, Chief Judge of the United States District Court for Eastern District of Kentucky, researching legal issues and drafting memoranda. He also was a summer associate with Dinsmore in 2015. Manley earned his J.D. from the University of Kentucky College of Law.

**Bardia Sanjabi** joins the Lexington office and will practice out of the Litigation Department and focus his practice on tort litigation. Sanjabi was a summer associate at Wyatt Tarrant & Combs, LLP and also interned at the Law Offices of Karen Wonsetler, PA in Orlando Florida. Sanjabi earned his J.D. from the University of Kentucky College of Law.

**Anna Claire Skinner** joins the Lexington firm. Skinner will practice out of the Litigation Department and will focus on environmental law. Prior to joining Dinsmore, Skinner practiced with Jones Day in Atlanta, where she assisted clients on environmental issues, including compliance with the Clean Air Act and other federal and state regulations. Skinner has also helped protect clients against environmental enforcement initiatives directed at electric utilities. Skinner earned her J.D. from the Vanderbilt University Law School, where she was a member of the Order of the Coif. She received her B.A. from Washington and Lee University, graduating cum laude.

### **Dinsmore & Shohl LLP**

Dinsmore & Shohl LLP is pleased to announce two Lexington attorneys have been named partner.

**Drew B. Millar** and **John M. Spires** were elected to partnership effective January 1, 2017.

**Drew B. Millar** is member of the Labor and Employment Department, Drew's practice focuses on the representation of both public and private employers in issues related to the workplace. He has significant experience in handling wage and hour matters. Drew has represented a wide variety of clients in cases brought by the U.S. Department of Labor, as well as a number of state labor boards. Outside of wage and hour disputes, Drew also has extensive experience with defending cases and administrative complaints involving Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, and other state and federal employment statutes and regulations. He has also represented several clients in proceedings under the National Labor Relations Act including assisting with collective bargaining, dealing with strikes, and defending against unfair labor practice charges. Drew earned his J.D. from the University of Kentucky College of Law.

**John M. Spires** is a member of the Bankruptcy and Restructuring Group, John has experience representing both creditors and debtors in complex bankruptcy cases and workouts outside of the bankruptcy system, and he has litigated a number of contested matters arising in bankruptcy cases. He has also successfully defended clients on claims ranging from demands for the return of alleged preferential and fraudulent transfers to claims for breach of the automatic stay. In addition to his bankruptcy practice, John also has extensive experience in the commercial litigation context. He has specifically represented clients in cases involving claims for breach of contract, breach of fiduciary duty, violation of the Fair Debt Collection Practices Act, and other business-related issues. John has practiced before Kentucky's federal and state trial courts, the Kentucky Court of Appeals, the Kentucky Supreme Court, and United States Bankruptcy Courts in multiple states. John earned his J.D. from the University of Kentucky College of Law.

# Names In the News, continued

## Jackson Kelly

Jackson Kelly PLLC is pleased to announce that the firm has elected two new members to its Executive Committee and elevated eight of the firm's attorneys to Member, all effective Jan. 1.

Firm Members **Marc D. Fine** and **M. Shane Harvey** will serve new three-year terms on the Executive Committee. They fill the expired Executive Committee terms of firm Members Timothy E. Huffman and Robert F. Duncan. Firm attorneys **Elizabeth A. Amandus, Charles A. Compton, Chacey R. Ford, Laurie K. Miller, Daniel R. Micheltmore, Matthew S. Tyree, Danielle M. Waltz** and **John S. Zakhem** have joined the ranks of firm Member.

## William C. Karutz

NOTICE is hereby given to all: I, **William C. (Bill) Karutz**, have retired from the private practice of law after 33 ½ years. I thank the Judges whom I have practiced before - for their many years of mentoring, counseling and above all, their patience. I thank all my colleagues I have met - for the trials, tribulations and joys of practice before you, against you and above all, with you. And most of all, I extend many thanks to all of my former clients - who entrusted me with their most serious ills and who have sustained me throughout these many years. What a blessing it has been.

## Littler

The Lexington office of Littler announced the addition of **Leila G. O'Carra** as Special Counsel to its attorney roster. She was previously an attorney at Wyatt, Tarrant & Combs LLP.

O'Carra focuses on a broad range of employment matters and has extensive experience in commercial litigation, discrimination and harassment, non-competes and higher education. She also counsels employers on day-to-day workplace issues, conducts education sessions and prepares employer policies and handbooks. She works with clients in numerous industries, with a considerable portion of her roster spanning higher education institutions. O'Carra is also active in various professional and community organizations, including service as Legislative Affairs Director of the Bluegrass Society for Human Resource Management and a founding fellow of the Fayette County Bar Foundation. She is also very involved in her local bar association and a member of the

Kentucky and American Bar Associations. Additionally, she was recognized in three recent editions of Kentucky Super Lawyers. O'Carra earned her J.D. from the University of Kentucky and her B.S. from Vanderbilt University.

## Mazanec, Raskin & Ryder

Mazanec, Raskin & Ryder (MRR) is proud to announce that partner **Casey C. Stansbury** is the newly appointed chair of the Defense Research Institute's (DRI) Governmental Liability Committee. Founded more than 50 years ago, DRI is the nation's leading organization of defense attorneys and in-house counsel. In addition to the Governmental Liability Committee, the group includes 29 substantive committees that focus on the development of the defense bar in a number of practice areas by enhancing their skills, effectiveness, and professionalism while improving the civil justice system.

## Stites & Harbison

**Robin E. McGuffin** joins the Torts & Insurance Practice Service Group. She graduated first in her class from Vanderbilt University Law School in 2015, earning the 2015 Founder's Medal for First Honors, and Order of the Coif. During law school, she was an Articles Editor for the Vanderbilt Law Review. McGuffin joined the firm after serving as a law clerk for the Honorable John M. Rogers, United States Court of Appeals for the Sixth Circuit. She previously participated in the firm's summer associate program in 2014. She is admitted to practice in Kentucky.

Stites & Harbison, PLLC attorneys honored by Benchmark Litigation 2017.

The Lexington based attorneys include:

**Daniel Danford**

**Anne Gorham**

**William Gorton III**

**Gregory Parsons**

**Ashley Ward**

Editors of the *ABA Journal* announced that Stites & Harbison, PLLC's blog, **Trademarkology**, has been selected to the 10th annual Blawg 100 as **one of the top 100 best blogs for a legal audience for 2016**. This is the third consecutive year that Trademarkology has made the list.

## Adam Smith - Construction Service Group

**Adam Smith's** litigation practice is focused on



## Names In the News, continued

representing owners, contractors and subcontractors in construction disputes. He has extensive experience in complex commercial litigation in federal and state trial and appellate courts, as well as in arbitration proceedings.

### Wyatt, Tarrant & Combs, LLP

**George Miller**, a Partner in the Lexington office of Wyatt, Tarrant & Combs, has authored a chapter on *Responsive Pleadings* in the latest edition of the *Kentucky Civil Practice before Trial Handbook* (4th ed. 2016) for the University of Kentucky Office of Continuing Legal Education. Mr. Miller has authored the chapter in all four editions of the book.

Wyatt, Tarrant & Combs, LLP is pleased to announce that **Sharon Gold** has been selected by Commerce Lexington for its Leadership Lexington Class of 2017.

Wyatt is pleased to announce that the Kentucky Chamber of Commerce once again relied upon Wyatt health care attorney **Margaret Levi** to update Kentucky employers by writing the third edition of her popular book, *The Impact of Health Care Reform on*

*Kentucky Employers*.

**W. Craig Robertson, III** has been named Partner in Charge of Wyatt's Lexington office, the firm's second largest office. Robertson follows Mark Burton, who served 12 years in the position and remains Chairman of the Firm's Executive Committee. In addition to his new position, Mr. Robertson will maintain his full time litigation practice. He is a member of the Firm's Litigation & Dispute Resolution Service Team. He concentrates his practice in the areas of commercial litigation, construction, equine, banking, intellectual property, professional malpractice, insurance and appellate law. Mr. Robertson earned his J.D. from the University of Kentucky, where he was named Order of the Coif, and his undergraduate degree, with high distinction, also from the University of Kentucky. He is a graduate of both the Leadership Lexington and Leadership Kentucky programs. Mr. Robertson has been honored with the Highest Professional AV Rating by *Martindale-Hubbell Law Directory* and recognized by *Woodward/White's The Best Lawyers in America*®, *Benchmark Litigation* and *Super Lawyers*®.



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## Calendar of Events

### **March 2017**

- 16 GAP Conference
- 17 Law Day Award Nominations Due

### **May 2017**

- 2 Annual Law Day Luncheon – Hilton Downtown Lexington
- 29 Memorial Day



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