

KENTUCKY BAR ASSOCIATION



Bench & Bar

Volume 75 Number 3

May 2011



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- PROPOSED AMENDMENTS TO THE SUPREME COURT RULES
- ANNUAL CONVENTION SPECIAL EVENTS

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NO SMALL ACHIEVEMENT: STAYING IN MOTION

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Bruce K. Davis

A MOTION TO SUPPRESS HUNGER

For the past several years, the Annual Convention Committee has selected a community service project that highlights the charitable work of various non-profit organizations. This year, God's Pantry Food Bank has been selected by the committee. With warehouses in Winchester, Lexington and Prestonsburg, God's Pantry serves 50 counties in Central and Eastern Kentucky by working with 320 member agencies which operate food pantries, senior citizen centers, soup kitchens, shelters and other emergency food outlets.

In a service area which covers more than 16,000 square miles, more than 310,000 people live at or below the poverty level. During this fiscal year, God's Pantry is on track to deliver over 21 million pounds of food that will be distributed to more than 211,000 people. Based on the number of people receiving food in the service area, approximately one out of every seven people living in the 50-county area will benefit from God's Pantry.

There are four food banks located in Kentucky and a total of seven serving Kentuckians. In addition to God's Pantry Food Bank, the others are:

- Dare To Care Food Bank in Louisville serving eight counties;
- Feeding America Kentucky's Heartland in Elizabethtown serving 35 counties;
- Freestore Food Bank in Cincinnati whose service area includes nine Kentucky counties;
- Tri-State Food Bank in Evansville, Ind., whose service area includes seven Kentucky counties;
- Huntington Area Food Bank in West Virginia, whose service area includes three Kentucky counties.
- Purchase Area in Mayfield, whose service area includes eight counties.

I trust that your plans for June will include attending the Kentucky Bar Association Annual Convention, June 15-17, in Lexington and that you will visit the God's Pantry Food Bank exhibit booth to learn more about programs that combat hunger in Kentucky. ☺

ANOTHER KBA YEAR CLOSES

The Annual Convention also marks the end of another fiscal year in the history of the Kentucky Bar Association. It has been a great privilege to have had the opportunity to serve as KBA President. The KBA has a great staff headquartered at the Kentucky Bar Center in Frankfort working alongside hundreds of volunteer lawyers and judges from all across Kentucky to carry out the Bar's programs. We are very fortunate to have a dedicated and thoughtful Board of Governors that next fiscal year will be guided by the outstanding leadership of Maggie Keane of Louisville as President beginning July 1 and Doug Myers of Hopkinsville who will become President-Elect. I hope to see YOU at the June 15-17 Annual Convention in Lexington.

Terms Expire on the KBA Board of Governors

On June 30 of each year, terms expire for seven of the fourteen Bar Governors on the KBA Board of Governors. SCR 3.080 provides that notice of the expiration of the terms of the Bar Governors shall be carried in the *Bench & Bar*. SCR 3.080 also provides that a Board member may serve three consecutive two-year terms. Requirements for being nominated to run for the Board of Governors are contained in Section 4 of the KBA By-Laws and the requirements include filing a written petition signed by not less than

twenty (20) KBA members in good standing who are residents of the candidate's Supreme Court District. Board policy provides that "No member of the Board of Governors or Inquiry Commission, nor their respective firms, shall represent an attorney in a disciplinary matter." Any such petition must be received by the KBA Executive Director at the Kentucky Bar Center in Frankfort prior to close of business on the last business day in October. The current terms of the following Board members will expire on June 30, 2012:

- 1st District**
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- 2nd District**
James D. Harris Jr. • Bowling Green
- 3rd District**
M. Gail Wilson • Jamestown
- 4th District**
Douglas C. Ballantine • Louisville
- 5th District**
Anita M. Britton • Lexington
- 6th District**
David V. Kramer • Crestview Hills
- 7th District**
Bobby Rowe • Prestonsburg

KENTUCKY BAR ASSOCIATION 2011 CONVENTION



PURSUING JUSTICE IN THE 21ST CENTURY

CONVENTION EVENTS

WEDNESDAY, JUNE 15

CONVENTION KICK-OFF EVENT

5:15-7:15 PM

The Big Blue Martini

Hilton Lexington/Downtown
Complimentary with Registration
Pre-registration Required
Sponsor | Frost Brown Todd LLC



THURSDAY, JUNE 16

MEMORIAL SERVICE

10:30-11:30 AM

First Presbyterian Church
171 Market Street
Lexington, Ky.

THURSDAY, JUNE 16

YOUNG LAWYERS SECTION LUNCHEON

12:00-1:30 PM

Hyatt Regency Hotel

Lexington, Ky.
\$25 per person

YOUNG LAWYERS SECTION RECEPTION

5:15-6:30 PM

BlueFire Bar & Grill

Hyatt Regency Lexington
Complimentary with Registration
Pre-registration recommended

BENCH AND BAR RECEPTION

5:30-6:30 PM

Bluegrass Ballroom Foyer

Lexington Convention Center
Complimentary with Registration
Pre-registration Required

THURSDAY, JUNE 16

KBA ANNUAL BANQUET

6:30 PM

Bluegrass Ballroom

Lexington Convention Center
\$50 per person
Pre-registration Required

FRIDAY, JUNE 17

KBA MEMBERSHIP AWARDS LUNCHEON

12:00-1:00 PM

Hyatt Regency Hotel

Lexington, Ky.
\$25 per person



Lend a Heart, Lend a Hand

Continuing its tradition of service to our host city,
the 2011 Annual Convention Planning Committee has selected

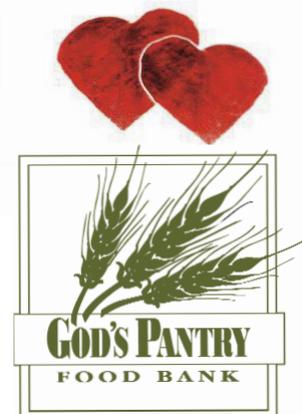
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YOUNG LAWYERS SECTION

KENTUCKY BAR ASSOCIATION

By Nathan Billings,
Chair, KBA Young Lawyers Section

Take Time to Think

“The real problem is not whether machines think, but whether men do.”
– Burrhus Frederic Skinner

Several months ago, I was given a copy of “The Ten Commandments for Business Failure” by Don Keogh, former President of the Coca-Cola Company. Chapter Six, titled, “Commandment Six - Don’t Take Time To Think” struck me as incredibly powerful.

As I read through this chapter, I was reminded of how often we fail to “take time to think,” in both our legal practices and leadership positions. In our frantic pace, too often we are left with little margin between practicing law and fully engaging in leadership in our organizations. We find it easier to fill our time with activities that make us appear “busy,” running between hearings and depositions, attending meetings, answering client phone calls and emails, and drafting documents, rather than those that add value, such as critical thinking. Unfortunately, it is certainly easier to bill a client for the former than the latter.

As a result, we attend a critical board or planning meeting, having failed to spend the necessary time to review and consider important pending issues or planning for the future. This extends to our practice as well. We rush to get a pleading filed, or to send discovery out, without spending time to think about a case, how we want it to develop, what our client’s true goals are, etc. We become automatons going through the “motions.”

The problem is not *whether* we will miss something important, but the

opportunity costs incurred *when* we are unable to process and think through the critical issues at stake. As attorneys, we are trained to identify issues and propose solutions, and commonly, the real issues, the ones that require significant attention to resolve, are rarely those easily spotted on the surface. As a result, successful identification and maneuvering through these opportunities requires an intentional mental engagement. And that requires two things: time and thought. So, how can we do this? Clearly not exhaustive, the following ideas propose several solutions.

First, schedule a regular appointment, no more than 30 minutes monthly, with other key leaders in your practice group, firm or organization that has one purpose – to focus on that group’s purpose. Use this time to go over your current strategic plan, and candidly assess progress toward its goals. Identify up to three tactics that need to be accomplished in the next 90 days to move you toward those goals, and who is responsible for each.

Second, when you have an important upcoming meeting, calendar a 30 minute appointment with yourself at least two days in advance to prepare for it. *Treat that appointment as if it were with your most important client.* Do not let anything, save a life or death situation, interfere with the

appointment. During that time, abandon the comfort of your desk (and the risk of interruptions like client calls, emails, etc.). Review the upcoming agenda (hopefully an “upside down” agenda!) and the minutes from the last meeting. Bullet point the two-three most important issues that need addressed during the meeting, and next to each, clearly write out the purpose of that item and the optimum result. Then, during the meeting, use this as a guide and a check to keep discussion focused on the important things.

Third, immediately upon returning from a critical meeting, invest five minutes to reflect on what occurred and to take care of any follow up. Return to your notes from your personal “planning” session. Review each of the issues you identified, and consider whether they were accomplished. If not, consider how you can address that issue. Otherwise, as we all know, those issues are likely to fall to the wayside, lost to yet another busy schedule. Also, you can use this time for follow up to absent members, and to set personal reminders for yourself.

Fourth, set written projects (important letters, briefs, meeting minutes, brochures, strategic plans, etc.) aside for at least 24 hours before finalizing them. Use this time to think about whether the project adequately conveys what you

YLS SEEKS VOLUNTEERS FOR “U@18” PROGRAM

During late April and the month of May, attorney volunteers will make one-hour presentations in high school classrooms across the Commonwealth, providing students timely, relevant information on reaching the age of majority in Kentucky. Topics covered include employment law, marriage and divorce, buying and driving a vehicle, money and credit, formation and enforcement

of contracts, crime and punishment, voting and jury service.

An easy to use lesson plan is provided for the volunteer presenters in order to enhance the classroom experience for student participants. One hour of CLE credit is available for attorney presenters. For more information, contact Mary Ann Miranda at (859) 333-2613 or mary_a_miranda@kyed.uscourts.gov.

intend to accomplish. If you are not clear about the intended result, either the project (i) was not necessary to begin with, or (ii) needs significant, additional work to mold it into productive form. Ask someone marginally distanced from the project what they think it is intended to accomplish. If they cannot clearly articulate the purposes intended, you should probably invest additional time to develop and craft its scope, format and content.

Fifth, as alluded to above, maintain a daily task list. Undoubtedly, like me,

you have an overall task list that, if you tried to think about everything on it, you might simply give up. However, by isolating key tasks that (i) can be accomplished quickly (such as sending a short letter or email) or (ii) that need immediate attention (such as a brief due next week), you can organize your time to focus on those items. Spending five minutes at the start or end of each day can help you accomplish this. This will free up additional time to think about a project before “putting pen to paper” or calling the other side.

By failing to take adequate time to think, we rob ourselves of our number one asset – our minds. Our ability to apply reason and logic, to spot issues and propose solutions, is really the crux of our strengths and value as attorneys and as leaders in organizations outside of our firms. Obviously, there are a multitude of opportunities to “create” time for you to think, and a few are presented here. If you have additional suggestions, please email them to me at nbillings@blfky.com. ☎

KBA LEASE WILL ALLOW CONSTRUCTION OF PUBLIC AMPHITHEATRE BEHIND KENTUCKY BAR CENTER IN FRANKFORT

The Kentucky Bar Center Board of Trustees has entered into a lease with the City of Frankfort that will allow the construction of a public amphitheatre on the river side of the floodwall near the western boundary of the Kentucky Bar Association’s (KBA) headquarters in Frankfort.

The amphitheatre will be named after its benefactor, the late Ward Oates of Frankfort, a former state highway commissioner under Gov. A.B. “Happy” Chandler who died in 2009 at the age of 103.

The amphitheatre is a cooperative effort among the City of Frankfort and its Parks & Recreation Department; the Frankfort/Franklin County Tourist & Convention Commission and its Kentucky Riverfront Development Committee; and the KBA. The 20-year lease, with an additional 20-year extension, will be at the rate of \$1 a year and will also allow use of the bar center parking lot for special events.

“All of those participating in the planning and implementation of the amphitheatre are deeply grateful to the Kentucky Bar Association for the generous lease arrangement to make this project a reality,” said Joy Jeffries, executive director of the Tourist and Convention Commission.

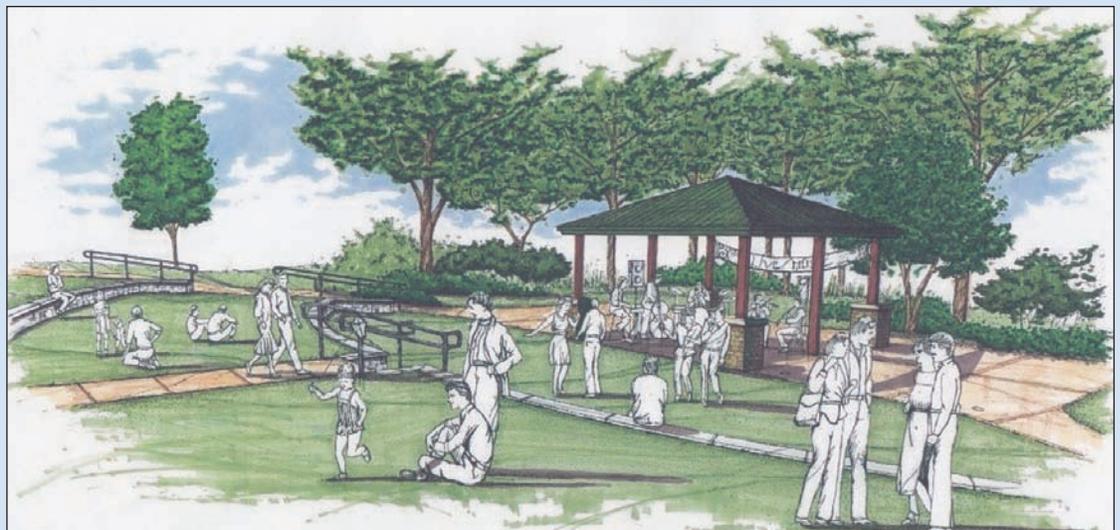
The amphitheatre will seat about 300 people on grass mounds with stone dividers, Jeffries said, with a stage located near the waterfront. The stage will have extensions on both sides and a back stage that can be removed

when not in use. The permanent stage will be covered with a slate canopy, and a handicap ramp will be located along one side.

“Lighting is also in the plan, not only for performances, but also to ensure public safety,” Jeffries said. “The electrical and sound booth will be at the back of the space, closest to the flood wall, and everything about the amphitheatre will be built to withstand a flood.”

The programming for the amphitheatre will be primarily for drama performances, such as those presented by the Kentucky Historical Society at the Thomas D. Clark Center for Kentucky History, as well as the Kentucky Arts Council’s Chautauqua series featuring well-known Kentuckians.

The inaugural event for the amphitheatre will be the “Battle of the Bands” concert, Sunday, September 4, which will be held in conjunction with the “Cornets and Cannons” Civil War Sesquicentennial Music Festival scheduled for September 1-4 at various sites in Frankfort. For more information on the event, visit www.cornetsandcannons.com.



**The Board of Governors of the Kentucky Bar Association
extends its congratulations to our colleague**

**Wm. T. (Bill) Robinson III
of Frost Brown Todd LLC**

**in anticipation of the upcoming
Passing of the Gavel Ceremony
marking the beginning of his tenure as the
President of the American Bar Association**



**The Passing of the Gavel Ceremony will take place the afternoon of Monday,
August 8, 2011, during the ABA House of Delegates Meeting at the
Metro Toronto Convention Centre
Toronto, Ontario, Canada**

(An exact time for the ceremony will be announced in the coming weeks.)

**We know Bill will serve with devotion and exemplary leadership and the
Board offers him best wishes for an outstanding year as ABA President.**



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Ensuring the Health Care Worker Can Perform the Essential Functions of Their Position in the Increasingly Restricted Legal Environment Governing Hiring and Disability Accommodation

By Ronald L. Lester

Attorneys representing employees and institutions need to familiarize themselves intimately with the Americans with Disabilities Act (“ADA”), Family Medical Leave Act (“FMLA”) and state Worker’s Compensation laws and regulations to help deliver effective health care to our communities. An aging population and growing obesity is making the work of health care workers more difficult and more demanding. While work-related injuries are decreasing for most categories of U. S. employees, work-related incidents for health care workers remain flat or, according to some studies and research, may be starting to surpass two of the most hazardous industries, agriculture and construction.¹ The risk of work related injury or illness for the health care worker stems from the inherent risks of performing patient care services, i. e., needle sticks, back injuries, latex allergies, assaults and stress.² In addition, demographic and economic pressures are also creating increased risk of injury or illness. Because of the risks, the necessity to select, monitor and maintain a quality work force requires an active and knowledgeable screening and risk management process.

The Physical Demands Facing Healthcare Employers and Employees

More than many other career fields, the physical and mental abilities of health care workers are critical to the delivery of quality patient care. The

aging of the U. S. population as well as increased longevity may be the most significant demographic affecting the present and future of health care workers.³ An aging population places higher burdens on the health care system as the elderly have a higher per capita use of health care services.⁴ In direct relation to the aging of the patient base, is rising acuity rates among the elderly indicating need for more intensive health care services as well as a decrease in the ability of patients to do tasks for themselves, again, driving up acuity levels and the necessity of assistance from healthcare workers to perform the daily tasks of living.⁵

Couple this dynamic with the dramatic demographic trend toward obesity and the need for compassionate and physically strong individuals becomes manifest. During the past two decades, studies show that the percentage of the U. S. population described as obese has increased from fifteen percent (15%) to twenty-seven (27%).⁶ Kentucky has a rate in excess of thirty percent (30%).⁷ Obesity has a two-fold impact on the patient population. Obesity is a major risk factor for a number of diseases, including cardiovascular disease, cancer, diabetes and degenerative joint disease which increase the demand for health care.⁸ Obese patients also present a greater challenge as a result of their weight and inability to ambulate and care for themselves without assistance from health care workers when hospitalized or receiving healthcare services. Notably patients in excess of 300 lbs. can exceed the capacity of standard lift

equipment and need even more health services.⁹

The impact of these trends is also present among health care workers themselves and impacts their own ability to safely and effectively deliver care. In fact, studies show that obese workers suffer more frequent and more costly work-related injuries.¹⁰

Other trends impacting the risk to health care workers include alcohol and drug abuse of patients, increased violence in hospital settings¹¹, increased stress with its resulting illnesses and immunological disorders¹², musculoskeletal disorders,¹³ falls,¹⁴ and even allergies to latex-free materials.¹⁵ Unlike other industries which have successfully reduced the risk of employee injury with automation and technology, health care remains and will remain a labor intensive endeavor. Patients will always need human assistance in ambulation and daily activities and no machine has yet been invented to obtain body samples or provide injections. Similarly, psychiatric and emergency room patients will continue to attack care givers. The goal is therefore to eliminate avoidable risks by ensuring that all employees are physically and mentally able to perform the essential functions of their position.¹⁶

Dealing with Risks and Needs as Part of the Hiring and Management Process Requires Effective and Legally Permissive Policies and an Understanding of the Essential Functions and Risks of Each Job

Effective employee screening requires the use of various tools, including criminal and background investigations, drug and alcohol testing, post offer physical examinations, independent medical evaluations and coordinated return to work programs. Using these tools, however, requires an understanding of the limits put on each by the requirements of the ADA. Moreover, an employer must continue to exercise screening and oversight tools throughout each employee’s career. The ADA, FMLA and workers compensation rules restrict the ability of an employer to gather, glean and utilize

information about candidates and employees during employment. Successfully navigating this area requires good policies and practices.

Developing and Utilizing Written Policies

Attorneys representing employers and employees in the health care industry need to understand what is permissible in employee and candidate screening. Beyond having an adequate physical ability evaluation program, an employer must also develop and follow comprehensive policies and procedures outlining the (1) hiring process, (2) expectations of employee conduct and performance, and (3) grounds for discipline and/or termination. Another useful and necessary tool is the job description. Every position should have an appropriate accurate job description containing: (1) the physical and mental requirements of the specific position, (2) the educational requirements, and (3) a detailed listing of the essential and non-essential functions. Sample job descriptions suited specifically to health care are frequently available from other sources.¹⁷

Written policies and job descriptions can help protect from legal liability, but are also essential tools for identifying potential risk. Accurate identification of essential functions permits everyone to understand the job's requirements and demands. For the year 2008, the U.S. Department of Labor discovered that between mining, manufacturing, agriculture and health care workers, health care workers experienced a considerably higher number of recordable injury incidents. The study indicated that health care workers incurred an average of 1.7 days away from work. Health care workers were placed on some type of job accommodation as a result of a work related injury or illness an average of 1.3 days — second only to manufacturing with 1.5 days.¹⁸ The fact is not unnoticed by workers as indicated by a recent survey in which 8 in 10 workers ranked workplace safety as their most important job issue.¹⁹ Obviously hiring unqualified individuals drives up the risks and creates a foundation for future liability.

Identifying Risk Using Criminal Records

There are regulations and statutes that specifically preclude health care entities participating in Medicare/Medicaid from hiring individuals listed on certain exclusion lists and registries (i. e., abuse).²⁰ As a consequence, health care employers have a regulatory duty, over and above the normal risk management requirements, to perform background and criminal checks on employment candidates. Undoubtedly background and criminal screens reveal a great deal of information regarding a potential candidate, but under other federal and state laws the ability of an employer to use the information in making employment decisions is also limited.²¹

The Dangers of Civil and Administrative Records Revealing Injuries or Infirmities

Information related to prior litigation, including personal injury and prior workers compensation claims can easily be obtained by searches in state and fed-

eral courts as well as agencies responsible for workers compensation programs. Despite employer interest in obtaining information regarding the litigation history of a potential candidate, obtaining such information or basing employment decisions on the information can be illegally discriminatory.²² Under the terms of the ADA, use of such information may be prohibited if the litigation history of a job candidate involves an injury or alleged physical or mental limitation that satisfies the ADA definition of a disability.

Decisions based upon injury or health information contained in a litigation report can easily lead to a successful charge of illegal discrimination under the second and third categories of "disability" under the ADA.²³ When this type of information is possessed it opens the employer up to a claim that employment was refused because of the record of disability or because the employer regarded the candidate as disabled.²⁴ Consequently, the best practice is to refrain from obtain-



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ing or utilizing such information when making employment decisions. In the event an employer does obtain such information through general background investigations, the information should be discarded. If unable to discard, the employer must be able to document that all employment decisions were based on criteria other than the prior litigation in order to overcome a prima facie ADA case.

When considering what information may be relied upon it is necessary to check and double check at each level of law. For example, while Kentucky law specifically provides that it is illegal to retaliate against an "employee" for filing workers compensation claims²⁵, nothing under state law precludes an employer from basing an employment decision on a prior workers compensation claim, so long as the prior claim does not relate to or involve the diagnosis of coal workers pneumoconiosis.²⁶ Yet, under the Family Medical Leave Act, it is unlawful for an employer to "discharge or in any manner discriminate against any **individual** for opposing any practice made unlawful" making no distinction between employee and individual as the Kentucky legislature did.²⁷ Only by cross checking for prohibitions can an employer successfully navigate this area.

Permissible Use of Drug and Alcohol Testing in the Health Care Worker Context

The ADA does not preclude an employer from asking an applicant and/or employee about current use of illegal drugs, but they are prohibited from asking about past addiction and treatment. In the health care context, the importance of this information is manifest by the close proximity to controlled substances in which many health care workers do their jobs. Fortunately, an employer may effectively and legally determine current use through a drug and alcohol screening. Though the ADA affords no protection for current use of alcohol and/or illegal drugs²⁸, an employer may not make any inquiry regarding use of a prescription medication, prior to making a bona fide

conditional job offer²⁹, or base any initial employment decision on the use of prescribed medications by an individual classified as disabled under the ADA.³⁰ Prescription medications can only be the subject of inquiry after an actual offer of employment is made and then only in the framework of ensuring the employee can perform the essential functions of the anticipated position. For many positions in the health care context, prescription medications may impact the potential of the employee to render care or operate safely and, therefore, the proper balance between protected status and the essential functions of the job must be carefully weighed.

Physical Testing Is Essential to Risk Management in the Health Care Arena

Employers are also permitted to implement a system of physical testing corresponding to the physical requirements of a particular position. Like drug and alcohol screening, the testing must be applied in a consistent method to all applicants in a specific job class. No part of the physical testing may include inquiries regarding medical history or disabilities. The focus of the testing must be strictly limited to whether the individual can perform the physical requirements of the position's essential functions, e.g., lift 50 lbs., walk up stairs, etc. Testing must aim to identify abilities rather than disabilities. If the applicant is unable to meet the physical demands of the position, an employer is not required to continue further consideration of that applicant. Physical testing is permissible pre-offer as it only gauges a current ability to perform specific tasks rather than delve into the medical history of the applicant.

Practical and Legal Issue in Post-offer Disability Evaluations

After an applicant is extended a conditional employment offer, but before the applicant begins working, an employer may finally make disability-related inquiries.³¹ While it would appear this would be an easy task for health care employers, in some situations, it may be more productive to utilize external vendors. Some medical practitioners sometimes have great diffi-

culty separating treatment from evaluation. Further in smaller communities, few practitioners want to be labeled as a "company doctor." As noted above, health care workers are exposed to substantial demands and risk. Health care workers need to possess (1) the physical ability to lift and assist patients in daily activities; (2) the mental capacity to deal with difficult, and even abusive patients; and (3) the cognitive abilities to interact with and assess patients appropriately. As a consequence, the post offer examination for a potential health care worker must be extensive and thorough.

Practitioners must make it clear through discussion and documentation that no patient care relationship is created during the evaluation. A post-offer physical examination should include at a minimum a complete medical history and physical examination performed by a health practitioner, e.g., physician, nurse practitioner or physician's assistant. The practitioner should also develop a number of processes to verify the actual identity and exact physical health of the applicant. The practitioner is permitted to make inquiries and discuss frankly with the applicant issues raised by the medical history as well as issues noted in the physical examination. The practitioner should have access to the drug and alcohol screening as well as the physical testing and job description. With appropriate patient information releases, the practitioner can raise any concerns or prescription medications with the applicant's treating physicians. At this point, the applicant may be queried regarding the use of prescription medications and whether the use of such medication is consistent with the job demands of the anticipated position.

Other Useful Diagnostics

In addition to a physical examination, the employer may also rely on other types of examinations and diagnostics. One such type of examination with increasing use is the functional or work capacity evaluation (FCE), a systematic method of measuring an individual's ability to perform meaningful tasks on a safe and dependable basis.³² The evalu-

ator will utilize the anticipated job description to generate job simulation. Through tasks and observation a report will be prepared outlining work tolerance and physical limitations of the applicant. The need for an FCE is usually triggered by prior injuries or diseases of the applicant that have the potential to decrease the ability of an applicant to perform the essential functions of a specific position.

After all medical examinations and inquiries are completed, the employer will then determine whether the applicant can perform the essential functions of the position or poses a direct threat based on the job description of the position and the information gleaned from the medical evaluations. While inquiries may exceed the scope of job relatedness and/or business necessity, information obtained during a post-offer physical examination³³ may be used to withdraw an offer of employment only if the reason for doing so was job related and consistent with business necessity, e.g., the use of prescription medications impairs the applicant's cognitive abilities to properly assess and interact with a patient.

Accommodation of an Applicant

However, even though an employer may determine an applicant is unable to perform those duties, the process does not end at that point. The applicant has the right to request an accommodation under the terms of the ADA. An employer is required to engage the applicant in an interactive process to discuss accommodation options. A position does not have to be created for the employee, nor is the employer required to displace another employee to make room for the employee with the disability. If the requested accommodation is unduly burdensome, the employer has no obligation to acquiesce. In the event of an employee's use of a prescription medication, it could be reasonable to permit the employee to work through an orientation period or permit the employee to use the medication with an altered dosage or another type of medication that does not decrease cognitive abilities or further impair the employee.

Monitoring During Active Employment

The continued monitoring of the health and well-being of the health care worker does not end upon hiring. In fact, the real work begins. Once employed, the health care worker is exposed to the risks outlined above from the work site as well as the health risks of the general public. At some point, employee behavior may trigger the need to ensure that the employee continues to possess the ability to perform the essential functions of their position or even that they do not pose a direct threat to others. The basic tools to accomplish that task requires the use of reasonable suspicion and/or post incident drug and alcohol screenings³⁴, and regular follow up on workers compensation injuries or illnesses or the need for family medical leave. The ADA will still limit an employer to inquiries that are job related and consistent with business necessity.

Unless an employer has a random drug testing policy, employers fre-

quently rely on testing when there is reasonable suspicion or a policy for post incident testing. Both types of testing are subject to the provisions of the ADA as well as the non-retaliation provisions related to workers compensation because most employee incidents result in a report to the state under worker injury reporting requirements.³⁵ If as a consequence of testing or an injury, it is determined that the employee needs leave as the result of a serious medical condition, the provisions of the FMLA may further limit an employer's prerogatives to disqualify or terminate an employee for absences³⁶ or violation of safety protocols.³⁷

Physical and mental evaluations can also be necessitated if the employee is involved in a patient incident or exhibits abnormal behavior. The results of these evaluations can be the basis for an interactive process and potential accommodation under the ADA, a temporary need for leave under FMLA or even permanent disqualification from the position.



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Need for Comprehensive Return to Work Programs

Extended absences due to work related illnesses and injuries as well as non-work related illnesses and injuries require a comprehensive return to work program, including detailed work capacity forms, temporary modified duty programs,³⁸ work hardening or conditioning, functional capacity evaluations and independent medical evaluations. In addition, employer absenteeism programs resulting in employee discipline must be modified to remain compliant with both the ADA and FMLA.

The first step to returning employees to active employment after an extended illness or injury is the completion by the treating physician of a work capacity evaluation outlining the specific abilities and/or inabilities of the employee to lift, stand, walk, etc. Unfortunately, most treating physicians permit an employee to indicate to the physician whether he/she can return to active employment. Many employees concerned with maintaining benefits and earnings may attempt to return too quickly after an illness or injury. Treating physicians frequently act more as an advocate for the employee rather than an objective evaluator. As a consequence, the employer and the employee may become involved in an adversarial dispute over the return to work.

The employer may with appropriate releases correspond with the treating physician and outline concerns the employer may have regarding the abili-

ties of the employee. If this dialogue does not satisfy the concerns of the employer, the employer may utilize the services of a third physician, usually specializing in physical medicine, orthopedic medicine, psychiatry or occupational medicine, as these specialties engage in the overall abilities of a patient rather than a specific condition. In the event the evaluator indicates an inability to perform the essential functions of a position or that the condition poses a direct threat, then the same evaluations used in hiring will need to be repeated. Except now there must be an interactive process to consider possible accommodation or disqualification, either on a temporary or permanent basis dependent upon the anticipated duration of the limitation.

New Rules and Legal Developments Involving Leave

Two recent developments are adding another element of complexity to this process. The first is an interpretation by the EEOC of the ADA, FMLA and the new amendments to the ADA that may require an employer to provide more leave to an employee after an extended illness even though FMLA has been exhausted.³⁹ The position of the EEOC indicates that an employer should provide further leave after an extended absence even though the employee has exhausted FMLA.⁴⁰ This extended leave is not permanent but the EEOC has not yet defined the duration. Basically applying the ADA in response to the perceived employer practice of ter-

minating employees upon the exhaustion of FMLA or other employer leave, the EEOC has determined that such automatic termination violates the ADA as those employees may be entitled to additional leave as a reasonable accommodation. At a minimum, it would appear that an employer would be required to engage in an interactive process at the cessation of any FMLA leave related to the serious health condition of the employee or at the cessation of employer provided leave related to an injury or illness of an employee that is arguably a disability. The real focus of the EEOC appears to have been the automatic termination of the employees. Unfortunately, the impact may be far reaching and create greater complexity. FMLA is a guarantee of continued employment based on a number of criteria not all related to the health of the employee. A serious health condition under the FMLA does not necessarily correspond to a disability under the ADA warranting an accommodation. It is also unclear as to whether the continued leave must be under the same terms as the previous leave, e.g., continued seniority and service credit, leave accruals as well as payments of insurance premiums. Termination of an employee triggers several changes in status, severance of seniority and service credit, leave accruals and constitutes a COBRA event triggering the payment of a total health premium rather than a discounted premium resulting from active employment.

Another complicating factor arises from the recent opinion by the Sixth Circuit in *Branham v. Gannett Satellite Information Network, Inc.* rendered on Sept. 2, 2010.⁴¹ This case highlights and adds to the current complexity employers face with the contours of their absenteeism policies and the FMLA. Gannett fired Branham after she failed to return to work upon being released by her treating physician. After termination, Branham provided the employer a differing opinion from another practitioner, in what appears to be "doctor shopping."⁴² The court in overturning summary judgment for the employer found:

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- 1) that the differing opinions created a factual dispute as to whether Branham suffered from a serious health condition precluding summary judgment; and
- 2) that since Gannett had not formally required FMLA certification from Branham, Branham had the right to complete the certification with another provider to request FMLA within fifteen days of submitting the excuse returning her to work.

The case opens the door for an employee to find any practitioner to support their need for FMLA even though their own treating physician determines they do not need further leave.⁴³ Under this case, it is conceivable that if an employee misses a number of days while making sporadic telephone calls to the supervisor about a health condition with vague statements that he will find another provider to support the absences, then the employer must ignore its own policies regarding notice of absences as well as excused absences until the employee either (1) completes the FMLA certification of a serious health condition which arguably the employer can deny and possibly terminate the employee based on the prior report of the treating physician; or (2) fails to complete the certification and is then terminated in any event.

With the potential negative impact on health care reimbursement created by the Affordable Care Act, continued state budget shortfalls related to Medicaid funding, the decreasing private health insurance market from high unemployment levels, combined with the legal and regulatory framework outlined above, the health care employer faces increasing demands and pressures to provide patient care in a more cost efficient manner, in a more customer oriented manner as well as ensure its employees are able to perform their positions. The key is hiring only those employees best suited for health care careers and who are able to meet the increasing physical and mental demands. Yet that simple solution is

complex in practice and requires great and continuing attention to the evolution of the law and regulations relating to hiring and firing. ^①

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20. 42 U.S. § 1128.
21. Credit records and criminal history
22. This was an introductory paragraph outlining the concerns raised by ADA “regarded as” restrictions.
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24. Note that this is a simplistic interpretation of both categories of “disability” as defined by the ADA. However, the purpose of this article is to note areas of concern rather than provide an in-depth analysis of ADA or FMLA to any particular situation.
25. KRS 342.197 (1) Note that in regards to a diagnosis of pneumoconiosis, the statute is not limited to “employee.”
26. *Nelson Steel Corporation v. McDaniel*, Ky., 898 S.W.2d 66 (1995).
27. *Branham v. Gannett Satellite Information Network, Inc.*, No. 09-6149 FindLaw for Legal Professionals, (U.S.C.A., 6th Circuit, 2010, citing FMLA § 2615(a)(2) and *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 224 (6th Cir, 2004).
28. Note, however, that a candidate with a history of drug and/or alcohol addiction would be provided protection under the three categories of disability.
29. Discussed, *infra*.
30. Note the distinction made by the ADA between the taking of prescription medications arguably not protected and a disability resulting in the need to take prescriptions which affords protection.
31. Differentiate between pre-offer where no disability related inquiries are permissible and post-employment where the disability inquiries are only permitted if job-related and consistent with business necessity.
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34. Dependent upon policies of employer.
35. KRS 342.038 See, *Overnight Transportation Company v. Gaddis*, Ky., 793 S.W.2d 129(1990).
36. Note Kentucky workers compensation does not provide the injured or ill worker a guaranteed leave such as afforded by FMLA or as an accommodation under the ADA.
37. The report of the incident should not be the first time an employer notes a violation of a safety protocol. An employer should maintain excellent documentation of education and distribution of safety policies as well as incidents of discipline of other employees or prior discipline of the impacted employee. Without such evidence an employer may be subject to the retaliation provisions of KRS 142.197 if the employer determines discipline or disqualification from the work related injury or illness.
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40. Employers with union employees tend to provide guarantee of employment after extended illnesses or absences related to injuries.
41. *Supra*.
42. An extremely difficult problem in health care as workers and practitioners work in close proximity and develop close relationships.
43. This brings into question the ability of an employer to determine which provider is most reliable.



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A Medicare Secondary Payer Act Section 111 Reporting Primer for Attorneys and Health Care Providers



By Lynn Rikhoff Kolokowsky and
Mattea Carver Van Zee

The Medicare Secondary Payer Act ("MSP") provides that Medicare shall not make payments for any item or service if that payment has been made or can reasonably be expected to be made under a workers' compensation, automobile, liability, self-insured or no-fault insurance plan.¹ Unlike the basic subrogation right of an insurer, Medicare has a direct right of action to recover payment from any statutorily responsible entity or person, including attorneys, insurers, employers, health care providers and defendants.² Consequently, Medicare's right of action adds an additional layer of risk for persons working in this arena. In 2007, the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), amended the MSP to require additional reporting. While the MMSEA Section 111 reporting requirements are new territory for some insurers, attorneys, and health care providers, they still carry severe potential penalties. While insurers are the primary reporting entities, attorneys and health care providers must also understand that all claims or payments involving Medicare beneficiaries must be promptly reported and payments made to Medicare within the agency's specified timeframes.

The MSP reporting requirements under the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) are scheduled to be fully implemented following the first quarter of 2011 for no-fault insurance and work-

ers' compensation and in the first quarter of 2012 for liability insurance and self-insurance.³ Within the first quarter of each applicable year, all pre-registered Responsible Reporting Entities (RRE) must have supplied their first Claim Input File (CIF)⁴ regarding any payment obligations to Medicare claimants retroactive to Oct. 1, 2010, and retroactive to Jan. 1, 2010, for any ongoing responsibilities.⁵ In the case of liability insurance and self-insurance, the reporting obligations are for obligations occurring on and after Oct. 1, 2011.⁶ Despite the legislation's obvious applicability to liability insurance, no fault insurance, and workers' compensation plans, other entities and individuals are not free from liability for failure to report or to render reimbursement to Medicare. Any party that receives or makes a primary payment⁷ may be subject to recovery by CMS (Centers for Medicare & Medicaid Services) if the agency determines that the payment should have been issued to CMS for reimbursement.⁸ As such, it is of vital financial importance that attorneys and health care providers understand their role in the reporting requirements.

Implications for the Attorney and Health Care Providers

In the past reporting was the responsibility of insurers and workers' compensation plans, but the new reporting requirements will affect even the ordinary practices of attorneys and health care providers when settling claims or attempting to limit future liability.

A. Issues for Attorney

1. Settlements Procedures and Practice

Attorneys can be held liable for failures to reimburse Medicare so they now have a vested interest in insuring that payments are reported. Attorneys should institute a process that establishes contact with Medicare before reaching the settlement stage. The benefit is that attorneys will learn if Medicare has a standing lien against any settlement and will then be able to better pursue an adequate settlement agreement. By necessity, Medicare must be included before the settlement to ensure the best outcome for both beneficiary and counsel because Medicare's right to recover is absolute.

CMS has a right of action to recover payments from any entity that has received primary payments on behalf of the Medicare claimant.⁹ Once payment is received by counsel on behalf of a client, the CMS reimbursement must be made within 60 days.¹⁰ If a party has already reimbursed the beneficiary or any other party (as with a liability insurance settlement, no-fault insurance payment, or workers' compensation payment), it still does not diminish CMS's right of recovery against the primary payer.¹¹ If the primary payer makes payments to another entity but is aware, or has reason to be aware, that Medicare also made conditional primary payments for the claim, then the primary payer will remain exposed to liability for a potentially second payment to CMS for reimbursement.¹²

Even if someone else is responsible for reporting the settlement to Medicare, an attorney must still ensure that the settlement was in fact reported to CMS and that payment was submitted to CMS within the established time frame. Otherwise, if the attorney receives a payment on behalf of a beneficiary, without the Medicare obligations being fulfilled, he will be at jeopardy for failure to reimburse and could have to repay CMS out of his own funds.

2. Workers' Compensation Procedures

In claims where work-related illnesses or injuries have occurred,

workers' compensation plans are considered primary payers for purposes of Medicare reimbursement.¹³ In order to qualify for Medicare coverage of expenses, a worker must first apply for all available workers' compensation benefits before any supplier or provider may bill Medicare. For those instances where workers' compensation coverage may be at issue and payment is unlikely to be issued promptly, a provider, physician, or supplier may bill Medicare for conditional payment.¹⁴ If Medicare has made conditional payments on behalf of a claimant, Medicare has a right to recovery from any future settlement, judgment, award, or other payment.¹⁵

3. Representing Multiple Defendants

Many claims will involve more than one named defendant. In these instances, every Responsible Reporting Entity ("RRE") remains individually responsible for reporting.¹⁶ When one defendant is designated to make the payment on behalf of all defendants, all RREs must still report the entire Total Payment Obligation to Claimant ("TPOC") amount. Where defendants are named jointly and severally liable, each entity must report the entire TPOC amount and not just the proportion assigned to that entity.¹⁷ Even if one party makes the payment, that fact will not absolve the reporting responsibilities of the other individual entities.

B. Issues for Health Care Providers

A common health care provider practice is to sometimes provide services at a reduced or negative cost to lessen the probability of liability claims against the entity. While this is an effective practice of risk management, these offers of goodwill may unknowingly create reporting obligations to CMS. Because the reporting requirements include liability self-insurance, those providers will also become RREs where such measures are taken to lessen the risk carried by the entity.¹⁸ Providers should register with CMS as soon as possible to ensure that the framework is in place to allow reporting when the need arises. Additionally, providers must educate all parts of their organizations with the knowledge that such goodwill discounts made

without proper reporting may result in financial sanctions for the provider.

1. Write-Offs and Reduction in Charges

When a provider reduces its charges or writes-off a charge for services to a Medicare beneficiary, the provider is already expected to inform Medicare of the reduced amounts or write-offs when submitting a claim for payment. The claim for payment must reflect the "unreduced permissible" charges and the amounts that have been reduced as a measure of risk management. In these cases, Medicare ensures that their interests are protected by requiring that the discounts be reported and reflected in the billing statement.¹⁹ As long as this procedure is followed the provider should be in compliance.²⁰ However, if an entity reduces the charges or writes off a portion of the services, and there is a reasonable expectation that the claimant has or will seek medical treatment as a result of the incident, the entity must report the reduction or write-off. However, complicating matters further is the fact that risk management tools are also subject to limiting thresholds. If the total amount of the reduction or write-off is less than the threshold at that given time, the reporting requirement will not arise.²¹

2. Giving Property of Value

Reporting may also be required when a provider provides property of value to the Medicare beneficiary other than a reduction in charges or a write-off of services. If at the time there is evidence or a reasonable expectation that the beneficiary has or will seek medical treatment because of the risk management incident, the provider must report the value of the property given to the claimant. Again, if the property value does not exceed the existing threshold, the entity will be free from reporting.²²

Sanctions for Failure to Comply A. Fines for Failure to Properly Report

Failure to properly report carries a fine of \$1,000 per claimant per day of noncompliance.²³ For large reporters, RREs, any unreported or improperly reported claim beyond the deadline window will result in this fine per claimant.

For smaller reporters that have registered for the Direct Data Entry option, failure to report within 45 days of the settlement, award, judgment, payment, or assumption of ongoing medical expenses, will result in the fine for that claimant per each day of non-reporting.

B. Liability for Failure to Reimburse Medicare

Steeper penalties may occur when a party has failed to reimburse Medicare within the 60-day period. When Medicare is a secondary payer, the agency retains the right to bring suit for recovery of payment from the party responsible for making the payment.²⁴ These provisions have not changed with the implementation of the Section 111 Reporting Requirements. As before, where a primary payer has failed to provide reimbursement, Medicare may recover double the amount owed it.²⁵

It must be reiterated that for any party who receives payment on behalf of the beneficiary, that party must consider the plausible implications if payment is not issued to CMS within the allotted timeframe. CMS is no stranger to recovering what the agency believes rightfully belongs to it. In the case of *United States v. Harris*,²⁶ Harris represented a Medicare beneficiary in a defective product case and reached a settlement. Harris was notified by CMS of the applicable amount due for repayment. Harris nor the beneficiary paid the designated amount and also failed to file an appeal. CMS sought the settlement payment, interest on the payment, and CMS's attorney's costs and fees.²⁷ The district court found Harris personally liable for the reimbursement owed to CMS.²⁸ The take away from *Harris*, is that if the amount owed is in dispute, then the administrative appeals process must be initiated or the attorney will be held liable for failure to render unto CMS what is theirs. Thus failure to act will result in severe penalties against the attorney and his practice.²⁹

Responsible Reporting Entity Compliance

A. When an RRE Must Register

For those entities not already submitting claims to CMS, registration may be

delayed until the need to report arises. In this instance, the RRE must allow a full calendar quarter for registration to allow for the necessary testing to ensure that no issues arise with electronic data interchange.³⁰ There is a testing stage where the RRE must complete testing cycles to the satisfaction of the assigned Coordination of Benefits Contractor (COBC). After the initial testing, the RRE must produce a quarterly CIF within their specified submission timeframe.³¹

B. What is Reportable

CMS requires reporting after a settlement, judgment, award, or other payment (Total Payment Obligation to Claimant) to the Medicare claimant and/or after an ongoing responsibility for medicals is assumed. In the case of a TPOC, reporting is required regardless of a liability determination or whether the claim has been partially or fully resolved. As long as the claimant was or is a continuing Medicare beneficiary and the medicals claimed are released as an effect of the TPOC, the payment must be reported.³² Notice of a pending action to CMS will not satisfy reporting requirements once the claim is resolved and the payment obligation is determined.³³ When reporting, a RRE must supply the full amount of the TPOC without differentiating between separate obligations of ongoing responsibility for medicals.³⁴ Additionally, there is no differentiation between what is non-medical v. medical in the TPOC amount.³⁵ CMS requires reporting of the full TPOC amount to make its own determinations. Where there may be multiple TPOCs for the same claimant within the same claim, each TPOC amount will be reported separately but the combined amounts will determine if the claim meets the reporting threshold.³⁶

CMS has requested that one-time payments to a provider or a physician for a defense's independent medical evaluation not be reported; payments of this kind will therefore not trigger reporting requirements for the RRE.³⁷ Additionally, where a liability insurance award is for a "property damage only" claim where either medicals have not been claimed or where the medicals are

not released, reporting requirements will not be triggered.³⁸

In the case of Ongoing Responsibility for Medicals (ORM), reporting will be triggered when the RRE has determined or has been required to assume the responsibility for future medicals.³⁹ When reporting ORM, the dollar amount is not required. CMS will only require that the RRE submit information that ORM exists and a termination date if applicable. CMS will not assume that future medicals will be paid indefinitely if the RRE is unable to select a termination date.⁴⁰ ORM is required without consideration of whether or not there has been a TPOC amount on the same claim; both are to be reported and considered separately.⁴¹

When considering what to report, RREs may take into account the reporting thresholds that will be in place until Dec. 31, 2014. For no-fault insurance claims, there will be no minimum reporting threshold because all TPOC amounts or assumptions of ORM under no-fault plans must be reported.⁴² For any other form of applicable plan, the minimum threshold will decrease as the system ages. For TPOC amounts reported up to Jan. 1, 2013, amounts less than \$5,000 do not require reporting. After this date and up to Dec. 31, 2013, amounts less than \$2,000 are not

required to be reported. From Jan. 1, 2014 to Dec. 13, 2014, the minimum threshold will be \$600.00. From Jan. 1, 2015, and onward, there will be no minimum threshold and all amounts must be reported.⁴³

C. Who May Register

The role of the attorney is a precarious one in regards to reporting settlements, judgments, and awards. Entities offering applicable plans are the only ones who may register as a RRE and are solely responsible for fulfilling reporting requirements.⁴⁴ For purposes of the new reporting requirements, reporting entities include insurance companies and the self-insured. While an attorney may not register as the RRE for their client nor fulfill the reporting requirements, the attorney still must ensure that proper reporting has occurred because of the language in the regulations. The regulations grant a "right of action to recover payments from any entity, including a beneficiary, provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment."⁴⁵ As the first quarter reporting nears its end, attorneys must ensure that their institutional clients have implemented procedures to fulfill their reporting requirements.

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Additionally, one should be aware of the possible reporting traps for corporations. In assuring that corporations are ready to begin reporting, it should be verified that the proper entity has filed for status as a RRE. While an entity may register for itself or a direct subsidiary, the entity may not register for a sibling within the corporate structure.⁴⁶ As a rule of thumb, an entity may register for another entity only if the second entity lies directly below within the corporate structure.⁴⁷

Health care providers may face an entirely different scenario. Because covered liability insurance plans also includes self-insurance for purposes of this legislation, providers may be required to register as a RRE to report cases of write-offs, reduction in charges, and/or cases of providing property of value to a Medicare beneficiary. As with any other corporate structure, the provider may register for itself, as a parent entity, or for any direct subsidiary.⁴⁸ However there is a silver lining for enti-

ties that may be considered as “small reporters.” As of October 1, 2010, entities that expect to report fewer than 500 claims per calendar year may register for Direct Data Entry (DDE).⁴⁹ For those entities already registered, registration may be converted over to the new system and be ready for operation by July 1, 2011.⁵⁰ Retroactive reporting of no-fault insurance and worker’s compensation TPOC amount from October 1, 2010 onward and ORM reports for liability insurance, self-insurance, no-fault insurance, and workers’ compensation from January 1, 2010 onward must be completed by March 31, 2011.⁵¹

Under this abbreviated option, reporting entities will not be able to utilize the query function as with the full-scale reporting mechanism.⁵² Additionally, the retroactive reporting numbers for the first calendar quarter and all “no beneficiary march” results will count towards the first year total.⁵³ However, if the entity does not have an

expectation of reporting more than 500 claims per year, the DDE option allows the RRE to bypass the testing process required for larger reporters. Further, there is no assigned submission window and claim information can be entered one report at a time instead of filing a Claim Input File with all claims for that respective timeframe.⁵⁴ This option only requires that all TPOC information and/or ORM assumption or termination be reported within 45 days after the obligation is established or terminated.⁵⁵

Conclusion

By investing themselves into the reporting and payment obligations of their clients, attorneys will have taken precautions to adequately protect themselves against personal reimbursement to CMS. By ensuring that timely reporting has been reported following a settlement, award, judgment, or other payment, the attorney can ensure understanding of what Medicare will require in the way of reimbursement. By understanding their own reporting entity status, health care providers may prevent repercussions from failing to report routine behavior occurring in the course of risk management. In these instances a measure of precaution may save face and financial losses. 

ENDNOTES

1. See 42 U.S.C. § 1395y (2008).
2. 42 U.S.C. § 1395y(b)(2)(B) (2008).
3. See 42 U.S.C. § 1395y(b)(8) (2008); Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. No. 110-173, 121 Stat. 2497, § 111 (2007) (codified as amended in scattered section of 42 U.S.C. § 1395y); CTR. FOR MEDICARE & MEDICAID SERV., OFFICE OF FIN. MGMT./FIN. SERV. GROUP, ALERT I. REVISED IMPLEMENTATION TIMELINE FOR TPOC LIABILITY INSURANCE (INCLUDING SELF-INSURANCE) SETTLEMENTS, JUDGMENTS, AWARDS OR OTHER PAYMENTS AND II. EXTENSION OF CURRENT DOLLAR THRESHOLDS FOR LIABILITY INSURANCE (INCLUDING SELF-INSURANCE) AND

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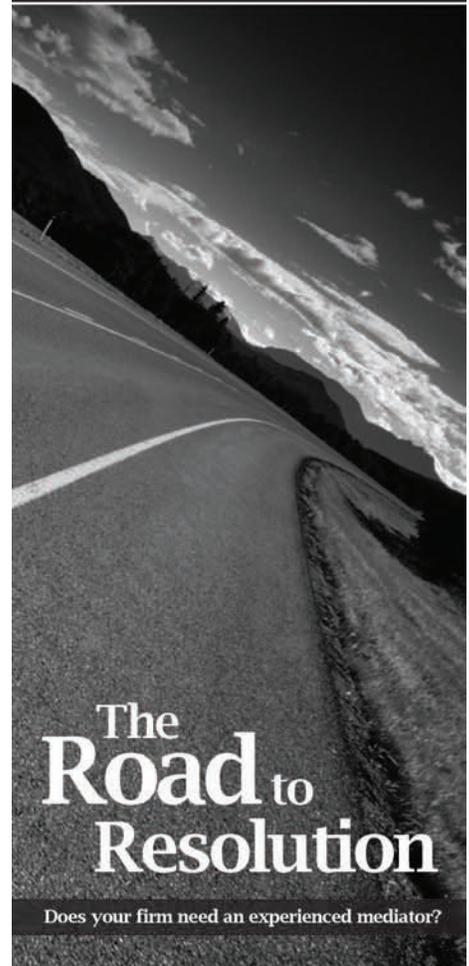
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- WORKERS' COMPENSATION, Nov. 9, 2010, 1, <https://www.cms.gov/MandatoryInsRep/Downloads/RevTimelineTPOC110910.pdf> (last visited Jan. 5, 2011).
4. Claim Input File is the data set transmitted from RRE to the COBC that is used to report applicable insurance information where the injured party is a Medicare beneficiary. CTR. FOR MEDICARE & MEDICAID SERV., MMSEA SECTION 111 MEDICARE SECONDARY PAYER MANDATORY REPORTING: LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKER'S COMPENSATION USER GUIDE VERSION 3.1, 19, July 12, 2010, <http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf> (last visited Mar. 31, 2010).
 5. Ongoing responsibility for medicals refers to the RRE's responsibility to pay, on an ongoing basis, for the injured party's medical expenses associated with the claim as typically seen in no-fault and workers' compensation claims. CTR. FOR MEDICARE & MEDICAID SERV., MMSEA SECTION 111 MEDICARE SECONDARY PAYER MANDATORY REPORTING: LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKER'S COMPENSATION USER GUIDE VERSION 3.1, 9, July 12, 2010, <http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf> (last visited Mar. 31, 2010).
 6. CTR. FOR MEDICARE & MEDICAID SERV., OFFICE OF FIN. MGMT./FIN. SERV. GROUP, ALERT I. REVISED IMPLEMENTATION TIMELINE FOR TPOC LIABILITY INSURANCE (INCLUDING SELF-INSURANCE) SETTLEMENTS, JUDGMENTS, AWARDS OR OTHER PAYMENTS AND II. EXTENSION OF CURRENT DOLLAR THRESHOLDS FOR LIABILITY INSURANCE (INCLUDING SELF-INSURANCE) AND WORKERS' COMPENSATION, Nov. 9, 2010, 1, <https://www.cms.gov/MandatoryIn->
- sRep/Downloads/RevTimelineTPOC110910.pdf (last visited Jan. 5, 2011).
7. A primary payment is when another entity has the responsibility for paying before Medicare. CTR. FOR MEDICARE & MEDICAID SERV., MMSEA SECTION 111 MEDICARE SECONDARY PAYER MANDATORY REPORTING: LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKER'S COMPENSATION USER GUIDE VERSION 3.1, 14, July 12, 2010, <http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf> (last visited Mar. 31, 2010).
 8. 42 C.F.R. § 411.24(g) (2006).
 9. 42 C.F.R. § 411.24(g) (2006).
 10. 42 C.F.R. § 411.24(h) (2006).
 11. 42 C.F.R. § 411.24(i)(1) (2006).
 12. 42 C.F.R. § 411.24(i)(2) (2006).
 13. CMS, *supra* note 4, at 16.
 14. *Id.* See 42 C.F.R. § 411.21 (2006) (To be regarded as a prompt payment, payment must be made "within 120 days after receipt of the claim.").
 15. CMS, *supra* note 4, at 16.
 16. *Id.* at 25.
 17. *Id.*
 18. *Id.* at 98.
 19. *Id.*
 20. *Id.*
 21. *Id.*
 22. CMS, *supra* note 4, at 98.
 23. 42 U.S.C. § 1395y(b)(8)(e)(i) (2008).
 24. 42 U.S.C. § 1395y(b)(2)(B)(iii) (2008).
 25. 42 U.S.C. § 1395y(b)(3)(A) (2008).
 26. *United States v. Harris*, No. 5:08CV102, 2009 WL 891931, at *1 (N.D.W.Va. 2009).
 27. *Id.*
 28. *Id.* at *5.
 29. See also *Cox v. Shalala*, 112 F.3d 151, 154 (4th Cir. 1997); *United States v. Sosnowski*, 822 F. Supp. 570 (W.D. Wis. 1993); *United States v. Weinberg*, No. 01-CV-0679, 2002 WL 32356399 (E.D. Pa. 2002); *Hadden v. United States*, No. 1:08-CV-10, 2009 WL



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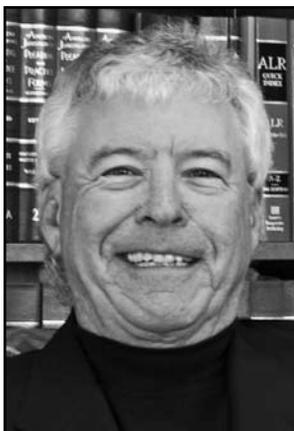
- 2423114 (W.D. Ky. 2009); *Tomlinson v. Landers*, No. 3:07-cv-1180-J-TEM, 2009 WL 1117399 (M.D. Fla. 2009).
30. CTR. FOR MEDICARE & MEDICAID SERV., OFFICE OF FIN. MGMT./FIN. SERV. GROUP, NGHP: RRE COMPLIANCE: ALERT FOR LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKERS' COMPENSATION, Feb. 24, 2010, 2, <http://www.cms.gov/MandatoryInsRep/Downloads/NGHPComplianceAlert022410.pdf> (last visited Mar. 31, 2011).
 31. CMS, *supra* note 4, at 18.
 32. *Id.* at 94.
 33. *Id.* at 93.
 34. *Id.* at 95.
 35. *Id.*
 36. *Id.* at 97.
 37. CMS, *supra* note 4, at 94.
 38. *Id.* at 95.
 39. *Id.* at 84.
 40. *Id.*
 41. *Id.*
 42. *Id.* at 59.
 43. CTR. FOR MEDICARE & MEDICAID SERV., OFFICE OF FIN. MGMT./FIN. SERV. GROUP, ALERT I. REVISED IMPLEMENTATION TIMELINE FOR TPOC LIABILITY INSURANCE (INCLUDING SELF-INSURANCE) SETTLEMENTS, JUDGMENTS, AWARDS OR OTHER PAYMENTS AND II. EXTENSION OF CURRENT DOLLAR THRESHOLDS FOR LIABILITY INSURANCE (INCLUDING SELF-INSURANCE) AND WORKERS' COMPENSATION, Nov. 9, 2010, 2, <https://www.cms.gov/MandatoryInsRep/Downloads/RevTimelineTPOC110910.pdf> (last visited Jan. 5, 2011).
 44. *Id.* at 21.
 45. 42 C.F.R. § 411.24(g) (2006) (emphasis added).
 46. CMS, *supra* note 4, at 21.
 47. *Id.* at 22.
 48. *Id.* at 21.
 49. CTR. FOR MEDICARE & MEDICAID SERV., OFFICE OF FIN. MGMT./FIN. SERV. GROUP, REVISED ALERT NEW DIRECT DATA ENTRY (DDE) OPTION FOR LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKERS' COMPENSATION, Dec. 21, 2010, 1, <https://www.cms.gov/MandatoryInsRep/Downloads/RevDDEAlert110510.pdf> (last visited Jan. 5, 2011).
 50. *Id.* at 2. CTR. FOR MEDICARE & MEDICAID SERV., OFFICE OF FIN. MGMT./FIN. SERV. GROUP, REVISED ALERT NEW DIRECT DATA ENTRY (DDE) OPTION FOR LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKERS' COMPENSATION, Feb. 14, 2011, 1, <https://www.cms.gov/MandatoryInsRep/Downloads/RevImplementationDDDNHGP.pdf> (last visited Mar. 31, 2011).
 51. CTR. FOR MEDICARE & MEDICAID SERV., OFFICE OF FIN. MGMT./FIN. SERV. GROUP, ALERT: REVISED IMPLEMENTATION DATE OF DIRECT DATA ENTRY (DDE) OPTION FOR LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKERS' COMPENSATION, Dec. 21, 2010, 2, <https://www.cms.gov/MandatoryInsRep/Downloads/DDEIImplementation122110.pdf> (last visited Jan. 5, 2011).
 52. CMS allows RREs to submit a query to the COBC to determine Medicare status of the injured party prior to submitting claim information for reporting. This allows the RRE to determine whether a claim must be reported. CTR. FOR MEDICARE & MEDICAID SERV., MMSEA SECTION 111 MEDICARE SECONDARY PAYER MANDATORY REPORTING: LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKER'S COMPENSATION USER GUIDE VERSION 3.1, 19, JULY 12, 2010, <http://www.cms.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3.1.pdf> (last visited Mar. 31, 2010).
 53. *Id.* at 3.
 54. *Id.* at 2.
 55. *Id.*



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Do Appellate Court Decisions Affect Health Care Costs?

By Gerald R. Toner and Brent T. Asseff

While the General Assembly is the acknowledged source of most governmental health initiatives, the pronouncements of Kentucky's appellate courts [hereinafter "the courts"] have a definite impact on medicine and its practice. Whether the court's decision is to alter common law or resist its alteration, expand causes of action or restrict them, lengthen the span of a case's life or shorten it, the consequences of appellate decisions have a ripple effect upon physicians, hospitals, nursing homes, drug and product manufacturers, malpractice insurers and – of course – patients. Precise calculation of this ripple effect is impossible. Certainly it is beyond the resources and expertise of these authors to set forth empirical data. The best we can offer are observations, based upon a review of cases from the past five years, on predictable consequences as devoid as possible of an advocate's bias.

I. Loss of Chance Doctrine

One recent, obvious example is *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008), in which the Supreme Court declined to follow the Court of Appeals in adopting a "loss of chance" approach to certain cases. The "loss of chance" doctrine allows plaintiffs to recover damages even when their probability of achieving a favorable medical outcome was less than 50% before the defendant allegedly rendered negligent treatment. The Supreme Court rejected an expansion

of tort parameters from current case law (wherein it must be proven "within a reasonable medical probability" that medical negligence has caused injury) to those cases where there simply exists a "loss of chance." Writing for the majority, Justice Cunningham wrote:

... even as we write this opinion, our society is wallowing near the water line with the burdensome and astronomical economic costs of universal health care and medical services. Rising malpractice insurance premiums for physicians are undoubtedly a part of that financial burden

We are troubled by the potential financial burden that might be spread upon the shoulders of millions of people if we adopt this new concept of lost or diminished chance of recovery A whole new and expensive industry of experts could conceivably be marched through our courts, providing evidence for juries that an MRI misread on Monday, but accurately discerned on Friday, perhaps gives rise to an infinitesimal loss of chance to recover. Yet, under this doctrine, even a small percentage of the value of a human life could generate substantial recovery and place burdensome costs on health care providers. This additional financial load would be passed along to every man, woman, and child in this Commonwealth. (p. 9-10)

While this was a "public policy" response to statements made by the

Court of Appeals, which had recognized a need for "lost or diminished chance of recovery," some of Justice Cunningham's colleagues took issue with his comments.

Though Justice Cunningham was joined in his opinion by Justice Scott and Special Justice James D. Harris, Jr., two other members of the majority,¹ in a separate, concurring opinion stated:

Though artfully written, I believe the majority has strayed from its role with speculation about economic, technological, and social circumstances. Moreover, I believe the majority has too greatly circumscribed the role of this Court in the development of tort law. I reject the view in *Smith v. Parrott* that changes in tort law are exclusively for the legislature.

Without comment further on the crux of the Court's disagreement, it is probably fair to state that the entire Supreme Court, including the dissent, implicitly recognizes that its pronouncements do affect health care and the delivery of medical services. When those pronouncements arguably expand the rights and monetary recovery of patients or their families (as in the case of *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997), discussed below), the effect is fairly obvious. Collateral parties previously unable to recover monetary damages are thereafter able to bring a claim. More subtle, however, are the costs, expenses, and general effect that appellate court opinions have on the delivery of health care in general, spread across the entire population of the Commonwealth.

II. EMTALA Claims

Just as the Supreme Court rejected "loss of chance" in *Kemper*, it declined expansion of recovery pursuant to claims brought under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd. EMTALA is sometimes referred to as an "anti-dumping" statute because its intent is to prevent hospitals

from refusing treatment to, or referring to other hospitals, patients who lack insurance or cannot pay for their treatment. EMTALA contains three main provisions:

- 1) A screening requirement to ensure that hospitals “determine whether or not an emergency medical condition . . . exists.” § 1395dd(a);
- 2) A stabilization or transfer requirement to ensure that hospitals provide treatment within their capabilities to patients with emergency medical conditions, or to transfer patients to appropriate facilities when the hospital is incapable of rendering necessary treatment. §1395dd(b); and
- 3) A creation of a private cause of action directly against hospitals for violation of the duties created by the statute. § 1395dd(d)(2).

If a hospital screens a patient and determines that he or she does not have

an emergency medical condition, EMTALA does not apply.

The Supreme Court recently addressed EMTALA claims in *Martin v. Ohio County Hospital Corp.*, 295 S.W.3d 104 (Ky. 2009). A patient was injured in an automobile accident and taken to the hospital with indications of blunt abdominal trauma. The hospital screened the patient and determined that she had an emergency medical condition. Hospital nurses and the attending physician rendered treatment to the patient for over four hours before transferring her to another hospital. The patient died en route to the hospital.

The plaintiff brought an EMTALA claim against the hospital based on the hospital personnel’s alleged negligence in treating the patient. In essence, the plaintiff alleged that the hospital failed to satisfy the stabilization or transfer requirement. The plaintiff also brought a negligence claim against the physician, which the physician settled prior to trial. The jury rendered a verdict against the hospital on the EMTALA claim. The hospital appealed and argued that it was entitled to a directed verdict.

The Supreme Court held that, even if a hospital is negligent in attempting to stabilize a patient, it complies with the statute’s requirements by its mere attempt to stabilize the patient. Although there was a question of whether the treatment the patient received was within the appropriate standard of care, the Court held that this question is not covered by EMTALA.

III. Loss of Spousal Consortium

While the Court has been reluctant to create new causes of action, it has recently expanded the right of recovery under existing causes of action. The prime example, coincidentally enough, is *Martin*.

In *Martin*, the Court for the first time recognized a spouse’s right, in wrongful death cases, to recover damages for post-death loss of consortium. Prior to *Martin*, a wrongful death

plaintiff could only recover consortium damages for the period of time between his or her spouse’s injury and death. In cases of instantaneous death, a plaintiff could recover nothing for spousal consortium.

The genesis for *Martin* is *Guiler*, *supra*. Prior to the Court’s decision in *Guiler*, a parent could recover for the lost consortium of a deceased child under Kentucky Revised Statutes §411.135, but a child could not recover for the lost consortium of a deceased parent. The Court in *Guiler* found that “[t]he claim of loss of parental consortium is a reciprocal of the claim of the parents for loss of a child’s consortium.” Moreover, the Court determined that it ran counter to public policy to recognize a parent’s right of recovery without granting the same right to children.

Kentucky Revised Statutes § 411.145, which allows damages whenever a spouse is wrongfully incapacitated by a third party to the extent that the marital relationship has been harmed, is silent as to whether damages terminate or continue at death. Although Kentucky courts had previously interpreted the statute to terminate damages at death, the Court in *Martin* determined that “[i]t defies common sense to put a value on such losses while a spouse is lying incapacitated, but to say the loss is worthless after death.”

Moreover, the Court relied upon the compensatory nature of KRS § 411.145 in deciding to extend damages beyond death.

[S]ince the statute is intended to be compensatory, full compensation cannot be had if the damages claimed are required to terminate at death. Indeed, in many cases death is so sudden or follows so quickly after the injury that to cut loss of consortium damages off at death is to essentially deny the cause of action to the spouse altogether.

As such, if a lesson is to be learned from the Court’s recent decisions, it’s that the Court is concerned about the societal effects of increasing the frequency and duration of lawsuits. On



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the flip side, the Court is equally concerned with allowing maximum recovery to those with viable causes of action. Whereas one approach cuts down on the expense of litigation for the legal system as a whole, the other approach potentially increases the expense for those found liable under the system.

IV. Restoring Jury Review

There are times when the Court's ruling has a broad effect on health care costs and delivery of patient care and compensation absent a dramatic expansion or maintenance of rights *per se*. The mere clarification of lines of responsibility can have a major impact on health care and its costs, especially when the factual setting is repeated time and again. Thus, the Supreme Court's decision to revisit physician and hospital liability in the instance of a retained object should impact countless cases throughout the Commonwealth for years to come. *Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009).

In *Branham*, the Supreme Court overruled *Laws v. Harter*, 534 S.W.2d 449 (Ky. 1975), and its imposition of strict liability or *negligence per se*, upon a surgeon whose patient is found to have a retained object such as a sponge, pad, needle or other "sharp" utilized during surgery. In essence, the Supreme Court recognized the principle of *res ipsa loquitur* as a rule of evidence requiring both physician and hospital to prove why they should not be held responsible for the retained object. The Court's decision was in line with an earlier Court of Appeals' opinion, *Chalothorn v. Meade*, 15 S.W.3d 391 (Ky. App. 1999), which seemed consistent with opinions issued prior to *Laws* recognizing that the "retained object" case assured recovery against one entity or the other, but did not mandate strict liability upon either.

How then does this decision impact overall health care and its cost to patients? At first blush, it would seem to have the deleterious effect of requiring an innocent, clearly "wronged" patient sitting by the sidelines while physician and hospital wage an expensive and time consuming finger-pointing battle.

The reality should be far different.

While *Branham* did not absolve the physician from responsibility for counting surgical sharps, it removed the possibility of absolute liability. Thus, hospital "in-house" counsel and risk managers will often be presented with a fairly straightforward scenario where (1) object counts were required by hospital Policy and Procedures, and (2) an object was presumably left somewhere in the body. While "gray" areas are bound to arise, such as an object's non-inclusion in a "counts policy" (arguably the situation in *Branham*) or an emergency surgery precluding an object's count, the "garden variety" situation will merely require proof of the retained object and damages.

The physician, his or her malpractice carrier, and the participation of defense counsel and experts should be all but eliminated, thus saving considerable expense. Frankly, if plaintiffs' counsel remain reasonable in their assessment of their client's damages, hospital counsel may also avoid the expense of

experts and outside counsel. Certainly, physicians and hospital personnel will be spared the anguish and stress of litigation while patients will avoid the similar anguish and stress of litigation and waiting for what is often a relatively modest recovery. Thus, reducing a previously contested area of medical malpractice recovery to a fairly straightforward claim for damages should have the effect of prompter recovery and money saved by all parties in the process itself. If *Branham* hopefully has the effect of facilitating recovery by plaintiffs where it is a foregone conclusion, defendants in malpractice cases are similarly interested in mechanisms by which to terminate cases with little or no merit.

V. Terminating Litigation Short of Trial

The termination of a malpractice case short of jury trial or settlement is obviously a matter of concern for health care providers. Given our Commonwealth's decision not to adopt some of the so-called "tort reform" practices of other

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states, the appellate courts' observations on the management and termination of a case, particularly by summary judgment, becomes extremely significant. Every year, there are a substantial number of medical malpractice cases filed in which, as discovery proceeds, plaintiff's counsel simply does not obtain an expert as required in the vast majority of Kentucky medical malpractice cases. Sometimes the decision is purposeful, and sometimes it is not. Court-ordered deadlines come and go, and when experts are not named, the defense ordinarily proceeds with a motion for summary judgment.

While declining to "loosen" the standard for summary judgment adopted in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), in favor of a test more closely aligned with the federal courts, the Supreme Court in *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010), again addressed the dismissal of plaintiff's case for lack of an expert. A number of questions were presented by the Court, including several practical ones. When is the appropriate time to move for summary judgment? What are the appropriate means, if any, to dispose of a case in which counsel has not produced expert testimony and appears to have no intent to do so? Should the task of dismissing such a case be made more difficult by other means?

The Court ultimately decided that when the plaintiff names no expert on or before the disclosure deadline passes, and when the plaintiff concedes that an expert is required after the defense files a summary judgment motion, it is

appropriate under the facts set forth in *Blankenship* to grant summary judgment. The majority opinion was careful to point out that (1) if the need for expert testimony was truly in question, or (2) it appeared that CR 56 was being used as a sanction as per CR 37.02, then termination of the litigation **would not be appropriate**.

The Court avoided any discussion of the effects of summary judgment on the health care system as a whole. As noted elsewhere in this article, the cost of litigation is ultimately spread amongst the entire patient population. When a given piece of litigation lacks merit sufficient to justify an expert witness, it can either end at a point in time where relatively little expense or emotional investment has been made by any of the parties, or it can end a year or two later, at trial. At that point, far more money would have been spent, and the litigants will be no closer to resolution. The analogy, quite simply, is to a terminal, brain-dead patient on life support; the question is not whether, but when, to pull the plug.

VI. The Necessity and Expense of Expert Witnesses

While terminating a case via summary judgment limits litigation expense, the use of medical experts significantly drives up the cost of medical malpractice litigation. The role of medical experts has been well delineated. As previously noted, the general rule is that an expert is essential to the plaintiff in first, proving a breach of the standard of care, and second, that the breach caused the plaintiff's damages.

Baptist Healthcare Systems, Inc. v. Miller, 177 S.W.3d 676 (Ky. 2005).

That some cases do not require expert testimony is merely a recognition that while ordinarily the gravamen of a case is technical in nature, there are instances in which lay knowledge and understanding are all that is required. To this extent *Blankenship* endorsed the earlier conclusion of non-meritorious litigation.

Behind this seemingly simple and straightforward "rule of law" is the incredibly complex series of steps that leads to an expert's testimony at trial. Driving each of these steps is a cash investment that often exceeds either lawyer fees or plaintiff's recovery. While hourly fees for experts vary, it is not unusual for physicians to charge an average of \$500 per hour for an initial review and trial opinion and another, higher "flat fee" for depositions and trial. In a fairly complex case, by the end of trial, costs per expert can run over \$25,000. Assuming the use of three experts with varying expertise on each "side," the practitioner may soon com-



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product liability, and first party insurance liability. He has tried over 25 cases to a verdict in the past 10 years. Toner received an undergraduate degree from Harvard College and a J.D. from Vanderbilt University Law School. He is an author of four books of short fiction whose work has also appeared in *The Saturday Evening Post* and *Redbook*, among other national publications. Toner spearheaded the Kentucky Bar Association's Oral History Project, culminating in the publication of *Kentucky Lawyers Speak*, co-edited with Professor Les Abramson of the University of Louisville Louis D. Brandeis School of Law.

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mit to collective expert fees of \$75,000 or more. Further, assuming that malpractice cases often involve more than two parties, the collective expense of experts alone can easily exceed \$200,000. Added to these initial fees are the collateral expenses of air travel, food, hotel accommodations, and the legal fees incurred in traveling to and from out-of-state depositions.

Obviously, someone pays for these expenses. When a recovery is obtained, plaintiffs pay for these costs. When no recovery is obtained, plaintiff's counsel typically absorbs this expense. On the defense side of the equation, insurers and corporate entities bear the expense initially, then pass these costs along to physicians and patients.

The irony of this system is that jurors often report after a verdict that while one expert was or was not more credible than another, as a general proposition they "discount" experts completely – often because they are so handsomely compensated – and decide the case on other facts. Obviously, if the expense of admittedly necessary expert testimony could be contained, the cost savings would be tremendous.

VII. Prospects for Legislative Reform

Clearly it would be for the General Assembly to embark upon a "mini-" reform plan that addressed the expense of experts without imposing upon the rights of litigants recognized in the Kentucky Constitution. These rights,

embodied in §§ 15, 54, and 241 of the Kentucky Constitution, are known collectively as "jural rights." See *Ludwig v. Johnson*, 49 S.W.2d 347 (Ky. 1932); *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998).

The jural rights doctrine establishes a limitation upon the power of the General Assembly to limit common law rights to recover for personal injury or death. Although not necessarily conceived as a package, these sections work in tandem to preserve those jural rights which had become well established prior to the adoption of the Constitution. Section 54 perhaps most succinctly embodies the jural rights doctrine by specifically providing that the General Assembly "shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

Any attempt by the General Assembly to reform the judicial process of determining medical liability therefore must be tailored carefully so as not to run afoul of the jural rights doctrine. A reform effort that imposes a cap on damages, such as Indiana's Medical Malpractice Act, IC § 34-18-et seq., is therefore a non-starter in Kentucky.

These authors could envision, however, a system that borrows components of legislation from other states to improve the efficiency and cost-effectiveness of medical negligence

litigation while simultaneously protecting the constitutional rights of Kentucky litigants. Given the political realities of the past 15 years, it would require a broad consensus of advocates for plaintiffs and defendants (who would thus embody a broad consensus of various political views) to present such a plan to the General Assembly.

One such example could be a hybrid of the Indiana panel system in which, following a "reasonable cause" review by a consulting expert and initial discovery at the trial court, cases would go on a brief hiatus during which a panel of Kentucky physicians would review the case as experts. Once the panelists rendered an opinion, cases would thereafter proceed to mediation and jury trial. Participation on the panel would become a requirement of practicing medicine in Kentucky, and compensation for panelists would be borne by a carefully constructed fund.

Moreover, plaintiffs and defendants alike could consult with the panelists and call upon them to testify as experts at trial. Depending on the strength of the panel's opinion and the conviction of individual panelists, a party that obtains a favorable opinion from the review panel may be able to forego outside experts altogether. Parties that forego outside experts would save great expense while at the same time lend a stronger air of impartiality to their case.



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practice, legal malpractice, and automobile negligence. He received an undergraduate degree from the University of Notre Dame, a graduate degree from University College Dublin in Ireland, and a J.D. from the University of Louisville Louis D. Brandeis School of Law.

An additional article "When Good Healthcare Workers Go Bad - Protecting Patient Rights In the Face of Employee Performance Problems" by Paul Alley and Lee P. Geiger has been placed on the KBA website under **Hot Topics**.



Look for this logo at www.kybar.org to find these items.

All parties would still be free, however, to retain the services of outside experts. It could also be the case that parties, when given the opportunity, will always choose to retain outside experts even after receiving a favorable opinion from the review panel. The experiences in Indiana by the authors' firm certainly bear this out.

One argument against implementing a medical review panel process in Kentucky, however, is the impression – real or perceived – that Kentucky physicians are reluctant to sit in judgment of their peers. The belief is that panels consisting exclusively of Kentucky physicians would, regardless of the strength of the plaintiff's claim, be more inclined to find in favor of the defendant. Given the fact that panelists would be perceived by juries as impartial local physicians, this would effectively place plaintiffs in an inferior position heading into mediation and trial.

Another concept that would require legislative initiative but would presum-

ably “pass” appellate review is the idea of a “neonatal fund” in birth injury cases. Such cases are in many respects the most consistently tragic subcategory of medical malpractice actions. Care of a birth injured child depletes, and sometimes impoverishes, parents and siblings – both financially and emotionally. The effect on medical providers is equally dire. Obstetricians, neonatologists, anesthesiologists, and a host of other medical specialists face life-long liability with no realistic statute of limitations.

Those who have dedicated their lives to the newborn – like the parents of the brain injured newborn – are often emotionally scarred by the experience of discovery and trial. Having spent years in training, many skilled obstetricians abandon obstetrics for a practice limited to gynecology long before their skills have diminished. Though the majority of birth injury cases that are tried before a jury result in a defense verdict, the experience is devastating upon all parties.

Given the cost of such cases – typically in the hundreds of thousands of dollars – a “neonatal fund” financed both publicly and, primarily, privately is probably worthy of a study by a governor-appointed joint commission comprised of those actually involved in such cases. In order to comport with the jural rights discussed above, such an option would have to be voluntary on the part of parents. Its nature would be “no fault” and would require a careful screening process with defined parameters and a graduated allowance based on the degree of injury and scrutiny of collateral sources for monetary support.

Again, the fine points of such a recommendation are beyond the scope of this brief article or the authority and charge of these authors. It is mentioned only to underscore the need for all segments of the Commonwealth populace to address the concerns explicitly raised by Justice Cunningham in *Kemper*, and implicitly by other members of the courts in the appellate decisions of the past several years. Suffice it to say that while decisions of the appellate courts seem to recognize both the ultimate health care costs of “expert witnesses” and the need not to expand litigation or the use of experts in litigation, the court cannot “legislate” significant aspects of medical malpractice litigation in an effort to ease the financial burden on all of the Commonwealth's citizens.

What is ultimately important is to understand that the decisions of our appellate courts impact how health care is delivered in the Commonwealth, and at what cost. While our appellate justices may disagree about whether the perceived impact of decisions should influence court opinions, they appear to agree that their opinions do have an impact. This realization should be beneficial to plaintiff and defense advocates alike, all of whom share an interest in ensuring that litigants are able to achieve justice in an efficient and cost-effective manner. [®]

ENDNOTE

1. Justices Abramson and Lambert

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JUDICIAL ETHICS OPINION

JUDICIAL ETHICS OPINION JE-121

March 29, 2011

The Committee has received inquiries whether a judge's staff attorney or law clerk could be appointed to the additional position of trial commissioner, if:

- (A) the two positions are kept "separate," that is, time spent in each position would be separately accounted for, and
- (B) the staff attorney/law clerk did not work on anything he or she had worked on as trial commissioner, and *vice versa*.

The Committee believes that the answer to the posed question is "no," and while the inquiring judges were content with private opinion letters, a majority of the Committee believes that a formal opinion on the subject is warranted.

There are several reasons for this decision. First, a judge is required by Canon 3A to give first place to his or her judicial duties and as the position of staff attorney or law clerk is full-time, the trial commissioner would not be able to comply with this ethical requirement. Second, there is an appearance of impropriety. The dual employment would create concerns in the minds of the public about the relationship between the Judge and the Trial Commissioner. The Committee did not believe that the appearance problem could be solved by having the trial commissioner recuse from any project he or she had worked on as staff attorney or law clerk, or *vice versa*.

An additional element of the inquiry was whether the appointment could be made if the staff attorney or law clerk for Judge A were appointed as the trial commissioner for Judge B. The Committee does not believe that this scenario would alter the situation.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Sincerely,

Arnold Taylor, Chairman
The Ethics Committee of the Kentucky Judiciary

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.

ADVISORY ETHICS OPINION

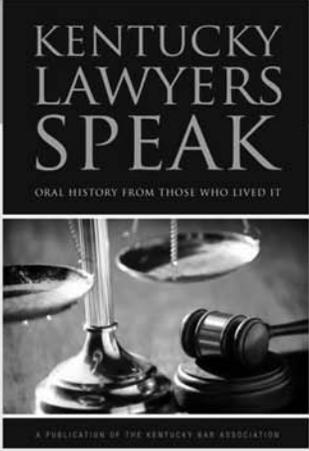
ETHICS OPINION KBA E-431 (WITHDRAWAL OF KBA E-324)

January 15, 2011

Ethics Opinion KBA E-324 has been withdrawn because SCR 3.130(1.17), effective July 15, 2009, permits a lawyer to sell or purchase a law practice if certain prescribed conditions are met.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. Note that the Rule provides: "Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney's written request, provided that the written request clearly, fairly, accurately and completely states such attorney's contemplated professional act."



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The Perils of Hyperbole

by Diane B. Kraft
University of Kentucky College of Law

Think about some of the most quoted lines from movies, books and history. “Go ahead, make my day.” “Reader, I married him.” “Houston, we have a problem.” These lines are powerful because they’re understatements. Dirty Harry could have said, “Go ahead, you rotten scumbag, shoot that hostage so I can blow your brains out.” Jane Eyre could have said, “Reader, I joyfully entered into wedded bliss with the love of my life.” But the writers opted for understatement, and their work was more powerful for it.

Many authors of books on legal writing advise law students not to exaggerate when writing fact statements and arguments in briefs. In their excellent book, *Making Your Case: The Art of Persuading Judges*, Antonin Scalia and Bryan Garner urge advocates to “err...on the side of understatement, and flee hyperbole.”¹ “Authors of legal writing texts warn law students that “[c]ourts are much more likely to be persuaded by a brief that presents forceful arguments” than by “overblown rhetoric,”² and that “[e]xaggeration destroys credibility.”³

Yet some lawyers continue to exaggerate to make their points, perhaps thinking it is expected of them as zealot advocates. Often, they do so at their peril. Consider the California attorney who described the opposing party as “immoral, unethical, oppressive, and/or unscrupulous.” The court was not impressed, noting that “[c]olorful language, which is not in short supply in the...brief, is not a substitute for facts or evidence.”⁴

An annoyed U.S. District Court judge in Colorado included the following footnote in an order denying the plaintiffs’

motion for class certification: “At various points in their briefing, Plaintiffs resort to rhetorical and inflammatory language to describe Quiznos’ sales practices, e.g., ‘charade,’ ‘dupe,’ calling Quiznos personnel ‘hucksters,’ etc. These discretions from legal civility do not help Plaintiffs’ case and the Court encourages counsel to pause a moment before resorting to the computer thesaurus tool when writing their briefs.”⁵

Sometimes a court is so irked by hyperbolic language that it threatens to hit the offending lawyer where it hurts – the pocketbook: “Further filings consistent with the parties’ previous tone, to include the use of such adjectives as ‘ludicrous,’ ‘eye-rolling,’ and the like, will be treated as a violation of this Order and will subject the responsible attorney to the imposition of sanctions.”⁶

If the facts or arguments are on your side, you don’t need to exaggerate them to win. If they’re not, you’re not going to fool anyone by trying to hide bad facts or a weak argument with exaggerated claims about your client’s or the opposing party’s case. Writers use hyperbole thinking it will bolster their arguments, but it often has the opposite effect of signaling to the reader that the facts or arguments are so weak, the writer can’t rely on them alone to win. The converse is also true – facts and arguments devoid of hyperbole suggest a writer who is confident that the facts speak for themselves and that his arguments are solid.

But you don’t need to call the opposing party’s argument “ludicrous” to be guilty of hyperbole. Even a word as simple as “clearly” or “very” can have the unintended effect of prompting the

reader to wonder, “If it’s so *clear*, why are you and your opponent in court?” or “Is a *very* large semi truck really any bigger than a large semi truck...and are there any small semi trucks?” As the author of a popular first-year legal writing text observes, such words are so overused that they are “virtually meaningless.... So many writers (lawyers and judges alike) have used those labels in place of well-reasoned legal analysis that some readers see these intensifiers as signaling a weak analysis.”⁷

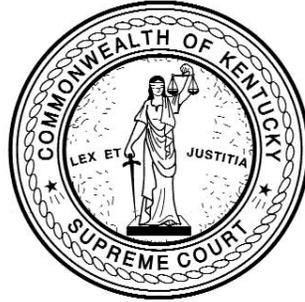
Given the overwhelming view among legal writing professionals that hyperbole is unhelpful at best, why do lawyers use it? Perhaps we are so used to hearing politicians and pundits exaggerate that we sometimes forget the power of a simple fact or valid argument. But we shouldn’t, if our goal is to make the strongest argument we can and win our client’s case. A good legal writer will resist the temptation to rely on hyperbole to do the work of a well-crafted fact statement or argument.

So the next time you’re tempted to write a fact statement or argument that’s long on exaggeration and short on subtle persuasion, pause and remember that the judge reading your brief will likely see right through the fog of hyperbole and perhaps question the strength of your case as a result. When she does, you have a problem. ☹

REFERENCES

1. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 14 (2008).
2. John C. Dernbach et al., *A Practical Guide to Legal Writing & Legal Method* 342 (4th ed. 2010).
3. Kristen Konrad Robbins-Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* 205 (2009).
4. *Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th 36 (2009).
5. *Bonanno v. Quizno’s Franchise Co.*, 2009 WL 1068744 (D. Colo. 2009).
6. *Texas Taco Cabana L.P. v. Taco Cabana of New Mexico, Inc.*, 2004 WL 2106527 (W.D. Tex. 2004).
7. Linda Edwards, *Legal Writing Process, Analysis, and Organization* 229 (5th ed. 2010).

Supreme Court of Kentucky



PROPOSED AMENDMENTS TO THE SUPREME COURT RULES OF PROCEDURE

The following Proposed Rules Amendments will be considered in an open session beginning at 8:30 a.m. on Wednesday, June 15, 2011. The hearing will be conducted in the Bluegrass Ballroom at the Lexington Convention Center in Lexington.

PROPOSED AMENDMENTS TO THE RULES OF THE SUPREME COURT

I. SCR 2.014 Legal education

The proposed amendments to subsection (c) and new subsection (d) of section (2) of SCR 2.014 are:

(2)(c) In evaluating the education received the Board of Bar Examiners shall consider, but not be limited to, such factors as the admission of the applicant to the bar of another state or the District of Columbia, the similarity of the curriculum taken to that offered in law schools approved by the American Bar Association or by the Association of American Law Schools, and that the schools at which the applicant's legal education was received has been examined and approved by other state bar associations examining the legal qualifications of non-ABA law school graduates.

(d) The attorney meets all other requirements contained in the Rules of the Supreme Court of Kentucky pertaining to Admission of Persons to Practice Law.

II. SCR 2.022 Application for admission by examination

The proposed amendments to section (2) of SCR 2.022 are:

(2) **ATTORNEY APPLICANT:** An attorney applicant who is admitted in another jurisdiction must file a complete Application for Admission by Examination form along with a fee of seven hundred seventy five dollars (\$775.00) [\$675.00] (cashier's or certified check or money order). The filing deadline is October 1 for the February Bar examination and February 1 for the July Bar examination.

III. SCR 2.080 Bar examinations

The proposed amendments to subsections (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o) of section (1) and section (4) of SCR 2.080 are:

(1) The Board of Bar Examiners shall examine such applicants as are certified to it as provided in Rule 2.040. The examination shall cover a period of two days and may cover the following subjects:

- (a) [Administrative Law and Administrative Procedure
- (b) Conflict of Laws]
- [c] [C]contracts
- [b[d]] [C]constitutional [L]law
- [c[e]] [B]business [E]entities (corporations, partnerships and/or others)
- [d[f]] [C]criminal [L]law and [P]procedure
- [e[g]] [C]civil [P]procedure
- [f[h]] [D]domestic [R]relations
- [g[i]] [P]property (real and/or personal)
- [j] Federal Taxation]
- [h[k]] [T]torts
- [i[l]] [U]uniform [C]commercial [C]code (sales, secured transactions and/or negotiable instruments)
- [j[m]] [E]estates (wills and/or trusts)
- [k[n]] [E]evidence

[o) Such other subjects as the Board may select from among questions proposed by the National Conference of Bar Examiners.]

Prior to or at the time of the examination, each applicant shall certify that he or she has successfully completed a course of study in law school in the subject of ethics, and that if admitted to practice, the applicant will adhere to the Code of Ethics prescribed by the Supreme Court. The Character and Fitness Committee of the Kentucky Office of Bar Admissions may, in exceptional cases, waive the requirement that an applicant have successfully completed a course of study in law school in the subject of ethics.

(4) An applicant must pass both the essay and Multistate (MBE) portions of the examination at the same sitting. A general average of 75% or higher on the essay portion of the examination shall be deemed a passing score on the essay portion of the examination. A scaled score of 132 or higher on the Multistate (MBE) portion of the examination shall be deemed a passing score on the Multistate portion of the examination. After failing to pass five (5) Kentucky Bar Examinations, an applicant shall not be permitted to sit for the Kentucky Bar Examination. [An applicant who has failed only one portion of the exam must only reapply to sit for the failed portion; however, a passing score on one portion of the exam may only be used for a period of three years to exempt the applicant from taking that portion of the examination.] An applicant who has taken the Multistate (MBE) examination in another jurisdiction and passed that examination, within three years of the date of the Kentucky examination may transfer a score of 132 or higher and need only sit for the essay portion of the examination. [In situations where the applicant has first passed the Kentucky essay portion of the examination, subsequently has taken the Multistate (MBE) examination in another jurisdiction, and wishes to be admitted by transferring in a score of 132 or higher that applicant must first file an update form for a character and fitness re-certification as prescribed in SCR 2.062.]

IV. SCR 2.110 Admission without examination

The proposed amendments to section (2) and new section (4) of SCR 2.110 are:

(2) An attorney applying for admission under this Rule shall file with the Kentucky Office of Bar Admissions, on the form provided for application for admission, such information as shall be requested thereon accompanied by a fee of fifteen hundred dollars (\$1500.00) [twelve hundred dollars (\$1200)], no part of which shall be refunded. An applicant shall file with the Character and Fitness Committee such other affidavits, certificates, documents and materials as shall be required to satisfy the Committee of the applicant's good moral character and fitness to be a member of the bar of this state. With respect to character and fitness, the Character and Fitness Committee shall process such applications pursuant to Rule 2.040.

(4) Notwithstanding the requirements stated above, if the applicant has practiced five of the last seven years preceding the application in a jurisdiction that permits the admission without examination of attorneys from this Commonwealth, the Character & Fitness Committee may, in its discretion, approve admission without examination under the same provisions that allow admission of Kentucky attorneys.

V. SCR 2.111 Limited certificate of admission to practice law

The proposed amendments to subsection (a) of section (1) and section (2) are:

(1) Every attorney not a member of the Bar of this Commonwealth who performs legal services in this Commonwealth solely for his/her employer, its parent, subsidiary, or affiliated entities, shall file with the Kentucky Office of Bar Admissions on a form provided, an application for limited certificate of admission to practice law in this Commonwealth. Such application shall be reviewed by the Character and Fitness Committee. If approved, a limited certificate of admission to

practice law shall be granted, and shall be effective as of the date such application is approved, provided that the following [pre]requisites are satisfied.

(a) The applicant must be admitted to practice in the highest court of another state or the District of Columbia, and be a member in good standing at the Bar of such court, or in such state [at the time of filing such application].

(2) Such applicant shall pay to the Kentucky Office of Bar Admissions, at the time of submission of such application a fee of fifteen hundred dollars (\$1500.00) [one thousand dollars (\$1,000)] and shall make payment of the current annual dues or fees to the Kentucky Bar Association, as authorized under SCR 3.040.

VI. SCR 2.300 Reinstatement of persons to practice law Scope and Purpose of Reinstatement Guidelines.

The proposed amendments to sub-sections (b), (c), (d), (e) and (f) of section (1) of SCR 2.300 are:

(1) Initial Reinstatement Application Process:

(b) Any applicant for reinstatement who is a member of the bar in any other jurisdiction must provide with the application a statement from the disciplinary authority of each such jurisdiction indicating whether any complaint or charge has been filed against the applicant, its disposition, and any discipline imposed in that jurisdiction. In the event the discipline was reciprocal discipline based on a Kentucky disciplinary order, such shall be disclosed.

(c) Any applicant who is permanently disbarred in another jurisdiction is not eligible to apply for reinstatement in Kentucky.

(d) Upon receipt of a complete application for reinstatement and payment of necessary fees by an applicant who has been suspended more than one hundred eighty (180) days (and in some cases where the suspension has been less than one hundred eighty (180) days the Kentucky Bar Association will refer the application to the Kentucky Office of Bar Admissions, Character and Fitness Committee for investigation, for a hearing, if necessary, and for a formal recommendation regarding the disposition of the application in accordance with SCR 3.500, SCR 3.505, and SCR 3.510.

(e) Upon receipt of a Reinstatement Application from the Kentucky Bar Association, the Kentucky Office of Bar Admissions, Character and Fitness Committee will immediately send the applicant an Application for Admission to the Bar. The applicant must complete that form and return it to the Character and Fitness Committee with documentation specified in instructions accompanying the application.

(f) The submission of an incomplete application or the failure of an applicant to submit necessary documentation and/or fees will delay the Character and Fitness Committee's ability to render a timely recommendation. Failure of an applicant to submit the application for admission to the Bar within thirty (30) days or failure of an applicant to perfect an application within thirty (30) days of the date a notice of deficiency is sent to the applicant by the Committee may result in an unfavorable recommendation.

VII. SCR 3.030 Membership, practice by nonmembers and classes of membership

The proposed amendments to section (2) of SCR 3.030 are:

(2) A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if that attorney subjects himself or herself to the jurisdiction and rules [of the court governing professional conduct] Supreme Court of Kentucky, pays a one time per case fee of two hundred seventy dollars (\$270.00)

[100.00] to the Kentucky Bar Association and engages a member of the association as co-counsel, whose presence shall be necessary at all trials, and at any other proceedings before the court unless excused by the court, administrative and adjudicative hearings, arbitrations, and at other times when required by the court. No motion for permission to practice in any state court in this jurisdiction shall be granted without submission to the admitting court of a certification from the Kentucky Bar Association of receipt of this fee.

VIII. SCR 3.040 Dues: date of payment and amount

The proposed amendments to sections (1), (2) and new section (4) of SCR 3.040 are:

(1) On or before July 1 of each year every member of the [a] Association, including every justice or judge of the Kentucky Court of Justice and United States judge in or who is appointed from or maintains a residence in Kentucky, except board-designated honorary members, shall be assessed [pay to the treasurer as] dues for the ensuing twelve months. [beginning September 1, such sums as may] Dues shall be fixed by the Supreme Court on recommendation of the [b]board. Dues shall be paid to the treasurer on or before September 1 of each year. [; provided, however, that any member of the bar may be relieved of the payment of dues by reason of undue hardship arising from disability, sickness, age or financial condition. A governor from the district in which the attorney lives may recommend in writing to the president that such relief be granted, giving his reasons therefor. Thereupon the president shall have the authority to notify the treasurer by written order that the attorney is relieved of the payment of dues, and the president shall file with the registrar both the recommendation of the governor and his own order.]

(2) Any member of the association shall be relieved of the payment of dues for any fiscal year in which [he] the member serves actively for a period of not less than six months in the armed services of the United States of America, other than as a career member of the armed forces.

(4) Any member of the bar may apply in writing to be relieved of the payment of dues by reason of undue hardship arising from disability, sickness or financial condition. A governor from the district in which the attorney lives may recommend in writing to the president that such relief be granted, giving the reasons therefor. Thereupon the president shall have the authority to notify the treasurer by written order that the attorney is relieved of the payment of dues, and the president shall file the order with the registrar along with the recommendation of the governor.

IX. SCR 3.050 Collection of dues; suspension for non-payment

The proposed amendments to SCR 3.050 are:

In the event dues are not paid on or before September 1, then an additional late payment fee of fifty dollars shall be assessed. On or before September 15 of each year, the Treasurer shall notify a member in writing of his or her delinquency and late fee. [and an additional late payment fee of fifty dollars shall be assessed.] On or before October 15 of each year, the Treasurer shall in writing certify to the [Court]Board the names of all members who remain delinquent. The [Clerk]Board shall cause to be sent to the member a notice of delinquency by certified mail, return receipt requested, at the member's bar roster address. [docket the matter and the Court shall issue to such members a rule requiring each to show cause why he or she should not be suspended from the practice of law. The member shall file a response with the Clerk within twenty (20) days of the date of the entry of the show cause order, and shall serve a copy on the Director, in addition to making the required payment of the delinquent dues and the late payment fee paid to the Association. The Association shall be permitted to file a reply within ten (10) days after the filing of a response by a member. Unless good cause is shown by the return date of the rule or within such additional time as maybe allowed by the Court, an order shall be entered suspending respondent from the practice of law.] Such notice shall require the member to show cause within thirty (30) days from the

date of the mailing why the member's law license should not be suspended for failure to pay dues and the late fee. In addition such notice shall inform the member that if such dues and late fee, as well as costs in the amount of fifty (\$50.00), are not paid within thirty (30) days, or unless good cause is shown within thirty (30) days that a suspension should not occur, the lawyer will be stricken from the membership roster as an active member of the KBA and the member will be suspended from the practice of law. At the conclusion of the thirty (30) days, unless the dues, late fees and additional costs payment have been received, or unless good cause has been shown as to why the member should not be suspended, the Board of Governors will vote to suspend any such member from the practice of law. A[n] [attested] copy of the suspension notice [order] shall be sent [delivered] by the Director [Clerk] to the member, the Clerk of the Supreme Court of Kentucky, the Director of Membership, [the Director,] and the Circuit Clerk of the member's [residential] roster address district for recording and indexing. The suspended member may apply for [reinstatement] restoration to membership under the provisions of SCR 3.500. A member may appeal to the Supreme Court of Kentucky from such suspension within thirty (30) days of the date the suspension is recorded in the membership records. Such appeal shall include a filing fee of one hundred fifty dollars (\$150.00), and an affidavit showing good cause why the suspension should be revoked.

X. SCR 3.130 (1.8) Comment 13: Conflict of interest: current clients; specific rules

Comment 13: Aggregate Settlements

The proposed amendments to comment (13) of SCR 3.130 (1.8) are:

(13) Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The Rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, [including what the other clients will receive or pay if the settlement or plea offer is accepted] as described herein.

A non-certified, non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent. The resolution of claims in a non-class aggregate settlement is interdependent if the defendant's acceptance of the settlement is contingent upon the acceptance by a specified number or percentage of the claimants or specified dollar amount of claims; or the value of each claim is not based solely on individual case-by-case facts and negotiations. In such situations potential conflicts of interest stemming from interdependency exist, thus posing a risk of unfairness to individual claimants.

When the terms of an aggregate settlement do not determine individual amounts to be distributed to each client, detailed disclosures are required. For example, if a lump sum is offered in an aggregate settlement and the claimants' attorney is involved in dividing the settlement sum, that attorney must disclose to each client the number of his or her clients participating, specifics of each client's claim relevant to the settlement, and the method of dividing the lump sum. In addition, the attorney must disclose the total attorney fees and costs to be paid, payments to be made other than to clients, to their attorneys and for costs, the method by which the costs are to be apportioned among the clients and ultimately the amount each client receives.

By contrast, if the terms of the aggregate settlement establish the method of calculating and distributing payments to each claimant,

based upon the individual claim for liability and/or damages, the disclosures to each client represented by the same attorney do not need to be as detailed. In that instance, each client should be generally informed of the terms of the aggregate settlement offer, how such terms apply specifically to such client, the fact that the attorney represents multiple clients in the settlement and, if applicable, any contingency in the settlement requiring a percentage of claimants to accept the settlement. The claimants' attorney must also disclose fees and costs to each client (including how costs are apportioned among the joint clients) but attorney fees may be stated as a percentage of the total recovery as opposed to a specific dollar amount.

XI. SCR 3.130(1.19-1.23) RULES FOR CLIENT TRUST ACCOUNT RECORDS

The proposed new rule SCR 3.130(1.19) is:

SCR 3.130(1.19) Recordkeeping generally

A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these Rules and required by SCR 3.130(1.15), and shall retain the following records for a period of five years after termination of the representation:

(a) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(b) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(c) copies of retainer and compensation agreements with clients SCR 3.130(1.5);

(d) copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(e) copies of bills for legal fees and expenses rendered to clients;

(f) copies of records showing disbursements on behalf of clients;

(g) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(h) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

(i) copies of monthly trial balances and quarterly reconciliations of the client trust accounts maintained by the lawyer; and

(j) copies of those portions of client files that are reasonably related to client trust account transactions.

Supreme Court Commentary

(1) SCR 3.130(1.19) enumerates the basic financial records that a lawyer must maintain with regard to all trust accounts of a law firm. These include the standard books of account, and the supporting records that are necessary to safeguard and account for the receipt and disbursement of client or third person funds as required by SCR 3.130(1.15) or its equivalent. Consistent with SCR 3.130(1.15), this Rule proposes that lawyers maintain client trust account records for a period of five years after termination of each particular legal engagement or

representation. Although these Rules address the accepted use of a client trust account by a lawyer when holding client or third person funds, some jurisdictions may permit a lawyer to deposit certain advance fees for legal services into the lawyer's business or operating account. In those situations, the lawyer should still be guided by the standards contained in these Rules.

(2) SCR 3.130(1.19)(g) requires that the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks be maintained for a period of five years after termination of each legal engagement or representation. The "Check Clearing for the 21st Century Act" or "Check 21 Act", codified at 12 U.S.C. §5001 *et. seq.*, recognizes "substitute checks" as the legal equivalent of an original check. A "substitute check" is defined at 12 U.S.C. §5002(16) as "paper reproduction of the original check that contains an image of the front and back of the original check; bears a magnetic ink character recognition ("MICR") line containing all the information appearing on the MICR line of the original check; conforms with generally applicable industry standards for substitute checks; and is suitable for automated processing in the same manner as the original check. Banks, as defined in 12 U.S.C. §5002(2), are not required to return to customers the original canceled checks. Most banks now provide electronic images of checks to customers who have access to their accounts on internet-based websites. It is the lawyer's responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall be readily available for printing upon request or shall be printed and maintained for the requisite number of years.

(3) The ACH (Automated Clearing House) Network is an electronic funds transfer or payment system that primarily provides for the inter-bank clearing of electronic payments between originating and receiving participating financial institutions. ACH transactions are payment instructions to either debit or credit a deposit account. ACH payments are used in a variety of payment environments including bill payments, business-to-business payments, and government payments (e.g. tax refunds.). In addition to the primary use of ACH transactions, retailers and third parties use the ACH system for other types of transactions including electronic check conversion (ECC). ECC is the process of transmitting MICR information from the bottom of a check, converting check payments to ACH transactions depending upon the authorization given by the account holder at the point-of-purchase. In this type of transaction, the lawyer should be careful to comply with the requirements of 1.19(h).

(4) There are five types of check conversions where a lawyer should be careful to comply with the requirements of SCR 3.130(1.19)(h). First, in a "point-of-purchase conversion," a paper check is converted into a debit at the point of purchase and the paper check is returned to the issuer. Second, in a "back-office conversion," a paper check is presented at the point of purchase and is later converted into a debit and the paper check is destroyed. Third, in an "account-receivable conversion," a paper check is converted into a debit and the paper check is destroyed. Fourth, in a "telephone-initiated debit" or "check-by-phone" conversion, bank account information is provided via the telephone and the information is converted to a debit. Fifth, in a "web-initiated debit," an electronic payment is initiated through a secure web environment. Rule 1.19(h) applies to each of the type of electronic funds transfers described. All electronic funds transfers shall be recorded and a lawyer should not re-use a check number which has been previously used in an electronic transfer transaction.

(5) The potential of these records to serve as safeguards is realized only if the procedures set forth in SCR 3.130(1.19)(i) are regularly performed. The trial balance is the sum of balances of each client's ledger card (or the electronic equivalent). Its value lies in comparing it on a monthly basis to a control balance. The control balance starts with the previous month's balance, then adds receipts from the Trust Receipts Journal and subtracts disbursements from the Trust Dis-

bursements Journal. Once the total matches the trial balance, the reconciliation readily follows by adding amounts of any outstanding checks and subtracting any deposits not credited by the bank at month's end. This balance should agree with the bank statement. Quarterly reconciliation is recommended only as a minimum requirement; monthly reconciliation is the preferred practice given the difficulty of identifying an error (whether by the lawyer or the bank) among three months' transactions.

(6) In some situations, documentation in addition to that listed in paragraphs (a) through (i) of SCR 3.130(1.19) is necessary for a complete understanding of a trust account transaction. The type of document that a lawyer must retain under paragraph (j) because it is "reasonably related" to a client trust transaction will vary depending on the nature of the transaction and the significance of the document in shedding light on the transaction. Examples of documents that typically must be retained under this paragraph include correspondence between the client and lawyer relating to a disagreement over fees or costs or the distribution of proceeds, settlement agreements contemplating payment of funds, settlement statements issued to the client, documentation relating to sharing litigation costs and attorney fees for subrogated claims, agreements for division of fees between lawyers, guarantees of payment to third parties out of proceeds recovered on behalf of a client, and copies of bills, receipts or correspondence related to any payments to third parties on behalf of a client (whether made from the client's funds or from the lawyer's funds advanced for the benefit of the client).

XII. SCR 3.130(1.20) Client trust account safeguards

The proposed new rule SCR 3.130(1.20) is:

With respect to client trust accounts required by SCR 3.130(1.15):

(a) only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account;

(b) receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and

(c) withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.

Supreme Court Commentary

(1) 3.130(1.20) enumerates minimal accounting controls for client trust accounts. It also enunciates the requirement that only a lawyer admitted to the practice of law in the jurisdiction or a person who is under the direct supervision of the lawyer shall be the authorized signatory or authorize electronic transfers from a client trust account. While it is permissible to grant limited nonlawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See, SCR 3.130(5.1) and (5.3).

(2) Authorized electronic transfers shall be limited to (1) money required for payment to a client or third person on behalf of a client; (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation; or (3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or (4) money transferred from one client trust account to another client trust account.

(3) The requirements in paragraph (b) that receipts shall be deposited intact mean that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, a practice commonly known as a split deposit.

XIII. SCR 3.130(1.21) Availability of records

The proposed new rule SCR 3.130(1.21) is:

Records required by SCR 3.130(1.19) may be maintained by electronic, photographic, or other media provided that they otherwise comply with these Rules and that printed copies can be produced. These records shall be readily accessible to the lawyer.

Supreme Court Commentary

(1) SCR 3.130(1.21) allows the use of alternative media for the maintenance of client trust account records if printed copies of necessary reports can be produced. If trust records are computerized, a system of regular and frequent (preferably daily) backup procedures is essential. If a lawyer uses third-party electronic or internet based file storage, the lawyer must make reasonable efforts to ensure that the company has in place, or will establish reasonable procedures to protect the confidentiality of client information. See, ABA Formal Ethics Opinion 398 (1995). Records required by SCR 3.130(1.19) shall be readily accessible and shall be readily available to be produced upon request by the client or third person who has an interest as provided in SCR 3.130(1.15), or by the official request of a disciplinary authority, including but not limited to, a subpoena duces tecum. Personally identifying information in records produced upon request by the client or third person or by disciplinary authority shall remain confidential and shall be disclosed only in a manner to ensure client confidentiality as otherwise required by law or court rule.

(2) SCR 3.395 provides for the preservation of a lawyer's client trust account records in the event that the lawyer is suspended, disbarred, disappears, or dies.

XIV. SCR 3.130(1.22) Dissolution of law firm

The proposed new rule SCR 3.130(1.22) is:

Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust account records specified in SCR 3.130(1.19).

Supreme Court Commentary

(1) SCR 3.130(1.22) and SCR 3.130(1.23) provide for the preservation of a lawyer's client trust account records in the event of dissolution or sale of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with SCR 3.130(1.0)(c),(g), and (h).

XV. SCR 3.130(1.23) Sale of law practice

The proposed new rule SCR 3.130(1.23) is:

Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of records specified in SCR 3.130(1.19).

XVI. SCR 3.130(5.4) Professional independence of a lawyer

The proposed new sections (e), (f), (g), (h) and (i) of SCR 3.130 (5.4) are:

(e) A lawyer shall not accept a referral from a non-lawyer who has provided financial assistance or a non-recourse loan to the potential client in exchange for an agreement that said financial assistance or non-recourse loan shall be reimbursed from any future settlement or judgment obtained as a result of client's personal injury claim.

(f) A lawyer shall not accept a referral from a non-lawyer who intends or expects to receive from the lawyer, directly or indirectly, some form of financial gain or remuneration in exchange for the referral.

(g) a lawyer shall not make a referral to a third party non-lawyer who has or will provide financial assistance, services, or a non-recourse loan to the client in exchange for an assignment against the proceeds of any future settlement or judgment as a result of the client's personal injury claim.

(h) a lawyer shall not make a referral to a third party non-lawyer or participate in an arrangement with non-lawyer third parties, who have or will provide financial assistance, services, or a non-recourse loan to the client in exchange for an assignment against the proceeds of any future settlement or judgment obtained as a result of the client's personal injury claim.

(i) a lawyer shall not make a referral to a non-lawyer where there is a financial interest or benefit to the lawyer or non-lawyer for the referral.

XVII. SCR 3.130(5.5) Unauthorized practice of law; multijurisdictional practice of law

The proposed amendments to subsection (1) of section (c) of SCR 3.130 (5.5) are:

(c)(1) comply with SCR 3.030(2), or they do not require compliance with SCR 3.030(2) [but are legal services before an administrative tribunal] due to federal statute, rule or regulation; or

XVIII. SCR 3.130(5.7) Employment of disbarred or suspended lawyers

The proposed new rule SCR 3.130(5.7) is:

(a) A lawyer shall not employ, nor accept services related to the practice of law from, a person the lawyer knows or reasonably should know is disbarred or suspended from the practice of law for more than one hundred eighty (180) days in any jurisdiction, or is suspended from the practice of law pursuant to SCR 3.165 or 3.166 or comparable interim suspension rule.

(b) A lawyer may employ persons who are suspended from the practice of law in any jurisdiction for one hundred eighty (180) days or less, for failure to pay Association dues as required by SCR 3.050, or for failure to comply with continuing legal education requirements as required by SCR 3.661, to perform certain limited services during the period of suspension. None of these limited services may be performed for the benefit of any clients or former clients of the suspended lawyer or the law firm or associates with whom the suspended lawyer was associated at any time on or after the date of the acts which resulted in the suspension. The limited services that may be performed by such persons are:

(1) Clerical, copying, word processing or editing work of others;

(2) Administrative, distributing and/or coordinating work, maintaining client files, and/or scheduling events/appearances;

(3) Information technology support, maintaining computer systems, data organization, data entry, software support, and data retrieval;

(4) Legal research to be reviewed by a lawyer, but not including the drafting/preparation of pleadings, briefs, memoranda or other similar documents;

(5) Review and preparation of summaries of deposition transcripts and/or medical and business records;

(6) Title searches; and

(7) Functions which are permitted by federal law

(c) In all employment permitted by paragraph (b), a suspended lawyer is prohibited from any interaction with the public from which it might reasonably appear that the suspended lawyer is a lawyer in good standing. This prohibition applies to communication with any clients of the employing lawyer and communication with any lawyers other than the employing lawyer. Further, a suspended lawyer shall not receive, disburse, or otherwise handle any client or trust account funds; nor appear on behalf of the employing lawyer or client at any deposition, hearing, meeting, or conference, wherever held. The suspended lawyer may be present on behalf of the employing lawyer or client only in such portions of a courthouse, justice center, or court of justice as are required for the limited purpose of performing title searches.

(d) When a lawyer employs a suspended lawyer, as authorized in paragraph (b), the employing lawyer, within fourteen (14) days shall notify in writing the Association's Bar Counsel of that fact. The notification shall state that the employing lawyer accepts responsibility for the services to be performed by the suspended lawyer, and that all of the suspended lawyer's services will be limited to those services permitted by paragraph (b). Upon termination of such employment, the employing lawyer shall notify Bar Counsel in writing within fourteen (14) days of such termination.

(e) For the purposes of this Rule, the term "employ" means (1) engaging a person to perform services as an employee or independent contractor, or (2) as a volunteer, or accepting any service from a person regardless of whether any compensation is paid to such person.

XIX. SCR 3.130(7.03) Attorneys' Advertising Commission

The proposed amendments to sections (4), (5), (6), (7), (8) and (9) of SCR 3.130 (7.03) are:

(4) The Board shall appoint a Chair from among the Commission members. The term shall be one (1) year; however, the Chair may serve more than one (1) term.

(5) The Commission shall be provided with sufficient administrative assistance from the Director as from time to time may be required.

(6) The Commission shall have general responsibilities for the implementation of this Rule. In discharging its responsibilities the Commission shall have authority to:

(a) Issue and promulgate regulations and such forms as may be necessary, subject to prior approval by the Board. Each member of the Association shall be given at least sixty (60) days advance notice of any proposed regulations and an opportunity to comment thereon. Notice may be given by publication in the journal of the Kentucky Bar Association.

(b) Report to the Board at its last meeting preceding the Annual Convention of the Association, and otherwise as required, on the status of advertising with such recommendations or forms as advisable.

(c) Delegate to an employee of the KBA designated by the Director of the Kentucky Bar Association the authority to review advertisements on its behalf.

(d) Review advertisements, issue advisory opinions concerning the compliance of an advertisement with the Advertising Rules and Advertising Regulations, conduct such proceedings or investigations as it deems necessary, or delegate this authority to a Commission member or a hearing officer who shall proceed in the name of the Commission.

(e) Seek out violations of the Advertising Rules and the Advertising Regulations, resolve the violations under Rule 7.06(4), or refer violations to the Inquiry Commission. Referral to the Inquiry Commission may be by any panel or by a majority of a quorum of the entire Commission.

(7) The Commission shall prepare a budget for the succeeding year and shall submit same to the Board of Governors for inclusion with the budget of the Association.

(8) The Commission shall act upon advertisements, or issue advisory opinions in panels of three (3) persons. A quorum to act upon an advertisement shall consist of not fewer than two (2) members of a panel. A quorum to do business in meetings of the entire Commission shall consist of not fewer than five of its members in attendance.

(9) Nothing in these rules shall be construed as creating any cause of action for any party or right of suit against any member of the Commission. The Kentucky Bar Association, the Board of Governors, the Attorneys' Advertising Commission, the Executive Director of the Association, the Office of Bar Counsel, all of their officers, members, employees or agents shall be immune from civil liability for all acts in the course of their official duties in regulating lawyer advertising.

XX. SCR 3.130(7.05) Filing of advertisements

The proposed amendments to subsection (b) of section (1), section (2) and new section (4) of SCR 3.130(7.05) are:

(1)(b) If the advertisement contains only those items listed in SCR 3.130(7.05)(1)(a), or in AAC Regulation 2, the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement, or electronically transmit the advertisement via facsimile or email in PDF (Portable Document Format) to the Attorneys' Advertising Commission address attorneyadvertising@kybar.org. If the advertisement is to be published by broadcast media, including radio or television, a fair and accurate representation of the advertisement plus three (3) copies of a typed transcript of the words spoken shall be submitted. Any such advertisement is exempt from a fee for submission. Submission under this subsection shall occur no later than the publication of the advertisement.

(2) If the advertisement does not qualify under SCR 3.130(7.05)(1) for submission without a fee, the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement. If the advertisement is to be published by broadcast media, including radio or television, a fair and accurate representation of the advertisement plus three (3) copies of a typed transcript of the words spoken shall be submitted. Website advertisements that do not qualify for submission without a fee must be submitted in electronic format on a data disc in PDF (Portable Document Format), or other such data storage media as the Commission may designate by regulation. Three (3) copies of the data disc should be mailed or delivered to the Commission, c/o the Director of the Kentucky Bar Association. A filing fee of seventy five-dollars (\$75.00) for each advertisement filed under this subsection shall accompany each submission. Submission under this subsection shall occur no later than the publication of the advertisement. An additional administrative fee of one hundred dollars \$100.00 may be imposed for late submissions. Additionally, advertisements of more than 100 pages, or longer than 10 minutes of video or audio, will require a supplemental fee of one hundred dollars \$100.00. The same fees are required if an advisory opinion has been sought under SCR 3.130(7.06)(1).

(4) The lawyer shall retain a copy or recording of all advertisements utilized by the lawyer, as well as a record of when and where it was used, for two (2) years after its last dissemination. Electronic retention is permitted if in PDF format, or such other formats as the Commission may designate by regulation. In the event of the pendency of any disciplinary action before the Inquiry Commission, Board of Governors or Court, the lawyer shall continue to retain a copy until the termination of that proceeding.

XXI. SCR 3.130(7.09) Direct contact with potential clients

The proposed amendments to subsections (a) and (b) and new subsection (c) of section (1) of SCR 3.130(7.09) are:

(1) No lawyer shall directly or through another person, by in person,

live telephone, or real-time electronic means, initiate contact or solicit professional employment from a potential client unless:

(a) the lawyer has an immediate family relationship with the potential client; [or]

(b) the lawyer has a current attorney-client relationship with the potential client[.]; or

(c) the lawyer is advocating a public interest issue and is not significantly motivated by the lawyer's pecuniary gain.

This Rule shall not prohibit response to inquiries initiated by persons who may become potential clients at the time of any other incidental contact not designed or intended by the lawyer to solicit employment.

XXII. SCR 3.130(8.1) Bar admission and disciplinary matters

The proposed amendments to section (b) of SCR 3.130(8.1) are:

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority [, except that]. Information that is the subject matter of a confidentiality order or agreement shall be disclosed, however the lawyer may take appropriate steps to obtain a protective order under SCR 3.150. T[t]his Rule does not require disclosure of information otherwise protected by Rule 1.6.

XXIII. SCR 3.130(8.3) Reporting professional misconduct

The proposed amendments to section (f) of SCR 3.130(8.3) are:

(f) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify [the Director] Bar Counsel of such event.

XXIV. SCR 3.150 Access to disciplinary information

The proposed amendments to section (1), subsection (b) of section (2) and subsection (a) of section (5) of SCR 3.130(8.3) are:

(1) Confidentiality. In a discipline matter, prior to [a rendition of a finding of a violation of these Rules by the Trial Commissioner or the Board and the recommendation of the imposition of a public sanction,] the issuance and service of a charge, the proceeding is confidential; thereafter all records related to the disciplinary matter, except the work product of Bar Counsel or the Inquiry Commission or the Board of Governors, shall be available to the public, unless there is a protective order issued for specific testimony, documents or records.

(2)(b) After considering the protection of the public, the interests of the Bar, and the interest of the Respondent in maintaining the confidentiality of the proceeding prior to [a finding of a violation of the Rules,] the issuance and service of a charge, the pendency, subject matter and status may also be disclosed by Bar Counsel at the discretion of the Chair of the Inquiry Commission, or of the Chair's lawyer member designee, if:

i. The proceeding is based upon an allegation that the Respondent has been charged with a crime arising from the same nexus of facts; or

ii. The proceeding is based upon a finding by a court in a civil matter that an attorney has committed conduct that may constitute a violation of the Rules of Professional Conduct.

(5) Public Proceedings. Upon [a finding by the Trial Commissioner or the Board that an attorney has committed a violation of these rules meriting public discipline,] the issuance and service of a charge, or

upon the filing of a petition for reinstatement, the record of the Disciplinary Clerk, and any further proceedings before the Inquiry Commission, the Trial Commissioner, the Board or Court, shall be public except for:

(a) deliberations of the Inquiry Commission, the Trial Commissioner, Board of Governors, or the Court; or

(b) information with respect to which a protective order has been issued.

XXV. SCR 3.165 Temporary suspension by the Supreme Court

The proposed amendments to subsection (d) and new subsection (e) of section (1), new section (5), and sections (6), (7) and (8) of SCR 3.165 are:

(1)(d) It appears that probable cause exists to believe that an attorney is mentally disabled or is addicted to intoxicants or drugs and probable cause exists to believe he/she does not have the physical or mental fitness to continue to practice law. If the attorney denies that he/she is mentally disabled or denies that he/she is addicted to intoxicants or drugs, the Court may order the attorney to submit to a physical or mental examination by a physician or other health care professional appointed by the Court. The examining health care professional shall file with the Clerk of the Court a detailed written report setting out the findings of the health care professional, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations by any health care professional of the same condition. The Clerk of the Court shall furnish a copy of the examining health care professional's entire report to the attorney and to Bar Counsel. The Court may order the attorney to produce to the Court and Bar Counsel any relevant medical, psychiatric, psychological or other health care or treatment records, including alcohol or drug abuse patient records, evidencing prior or ongoing treatment for mental disability or addiction to drugs or to execute appropriate releases which would comply with applicable federal and state law in order to permit the treating health care professional to release those records to the Court and Bar Counsel. Any such order and the resulting records regarding the treatment shall be confidential and sealed in the record; or,.

(e) An attorney has failed to cooperate with a disciplinary investigation. Such failure to cooperate may include but is not limited to the following: an attorney's failure to submit a written response to a complaint containing allegations of misconduct that has been filed by the Disciplinary Clerk and transmitted under SCR 3.160(1); failure to respond to any lawful demand for information made by the Office of Bar Counsel or Inquiry Commission in connection with any investigation or prosecution of any disciplinary matter; failure to respond or file as good faith objection to a subpoena issued pursuant to either SCR 3.180 or SCR 3.330; or unexcused failure to appear at any hearing before the Trial Commissioner on a Charge issued under SCR 3.190.

(5) In the event the lawyer is suspended only under the provisions of (1)(e) above, the suspension shall be terminated upon the filing of a joint notice of compliance by the Respondent and the Inquiry Commission, and payment by the Respondent of associated costs. Such a notice will be filed only after the Respondent has corrected the failure to respond or to appear that led to the suspension, and if there is no objection by the Inquiry Commission. A lawyer suspended under the provision of (1)(e) may also proceed to request relief under (4) above.

(6) Within twenty (20) days from the date of the entry of the order of temporary suspension, the attorney shall notify all clients in writing of his/her inability to continue to represent them and shall furnish copies of all such letters of notice to the Director.

(7) Upon the issuance of an order of temporary suspension, the attorney affected shall immediately, to the extent reasonably possible, cancel and cease any advertising activities in which the attorney is engaged, and remove the attorney's name from any firm with which the attorney is associated.

(8) Failure to comply with this rule shall subject the Respondent to a charge of contempt of court.

XXVI. SCR 3.166(2) Automatic suspension after conviction of a felony

The proposed amendments to section (2) of SCR 3.166 are:

(2) The attorney prosecuting the case to a plea of guilty, conviction by judge or jury or entry of judgment, whichever occurs first, shall immediately notify [the Director of the Kentucky Bar Association] Bar Counsel and the Clerk of the Supreme Court that such plea, finding or entry of judgment has been made.

XXVII. SCR 3.180 Investigations and trials to be prompt; subpoena power

The proposed amendments to section (3) and new section (4) of SCR 3.180 are:

(3) Upon application of Bar Counsel to the Inquiry Commission and after a hearing of which Respondent is given at least five (5) days' notice, for good cause shown the Inquiry Commission may authorize the Director or the Disciplinary Clerk to issue a subpoena to a Respondent, or any other person or legal entity, to produce to Bar Counsel any evidence deemed by the Inquiry Commission to be material to the investigation of a complaint and to testify regarding such production. Such an application may be made in connection with complaints against more than one Respondent if the complaints are based on the same or a related set of facts. The person or entity so subpoenaed will not divulge, except to his/her own attorney, that such a subpoena has been served nor what evidence is sought or obtained. The Respondent may be present at the time the evidence or material is examined or obtained by Bar Counsel and will be furnished copies of all documents obtained, unless obtained from the Respondent.

(4) Upon application of the Inquiry Commission, the Supreme Court may issue such orders as it deems appropriate to compel compliance with a subpoena issued in accordance with this Rule, including the imposition of sanctions for non-compliance.

XXVIII. SCR 3.181 Assistance to other lawyer disciplinary jurisdictions

New rule proposal SCR 3.181 is:

(1) Upon receipt by the Director of a subpoena certified to be duly issued under the rules or laws of another lawyer disciplinary jurisdiction, or by a clients' security fund of any jurisdiction, the Inquiry Commission may authorize the Director or Disciplinary Clerk to issue a subpoena directing a person domiciled or found within the Commonwealth of Kentucky to give testimony and/or produce documents or other things for use in the other lawyer disciplinary or clients' security fund proceedings as directed in the subpoena of the other jurisdiction.

(2) The testimony or production shall be only in the county wherein the person resides or is employed, or as otherwise fixed by the Inquiry Commission for good cause shown, and shall be taken as provided in CR 28.01.

(3) Any attack on the validity of a subpoena issued by another jurisdiction may be heard and determined by the disciplinary authority of the other state in accordance with the law of the issuing jurisdiction.

(4) In addition to the relief available under the law of the requesting disciplinary jurisdiction or clients' security fund, upon motion made by a party or by the person from whom appearance or production is sought, and for good cause shown, the Inquiry Commission may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (a) that the testimony or production not be had; (b) that it may be had only on specified terms and conditions, including a designation of the time or place; (c) that it may be had only by a method other than that selected by the party seeking testimony or production; (d)

that certain matters not be inquired into, or that the scope of the subpoena be limited to certain matters; (e) that the testimony be taken with no one present except persons designated by the Inquiry Commission; (f) that testimony may be sealed to be opened only by order of the original issuing jurisdiction; (g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the original issuing jurisdiction.

XXIX. SCR 3.185 Informal admonition procedure

The proposed amendments to SCR 3.185 are:

After a complaint against an attorney for unprofessional conduct is investigated and a response filed, the Inquiry Commission may direct a private admonition with or without conditions, to the attorney if the acts or course of conduct complained of are shown not to warrant a greater degree of discipline. The attorney so admonished may, within twenty (20) days from the date of the admonition, [answer] reject such admonition and request that [the private admonition be treated as if] a charge be issued and filed [had been filed against the attorney] as is provided by Rule 3.190; whereupon, the issues shall be processed under the applicable rules. The Inquiry Commission may also issue a warning or a conditional dismissal letter including, but not limited to, conditions such as referral to KYLAP, or attendance at a remedial ethics program or related classes as directed by the Office of Bar Counsel.

XXX. SCR 3.225 Appointment of Trial Commission

The proposed amendments to SCR 3.225 are:

The Chief Justice shall appoint, subject to the approval of the Supreme Court, from among the membership of the Bar Association, a Trial Commission and shall designate a chair from the Commission. Members of the Trial Commission shall be lawyers licensed in the Commonwealth who possess the qualifications of a Circuit Judge. To the extent practicable, the Chief Justice shall, with the consent of the Court, appoint Trial Commissioners from each appellate district. Such Trial Commissioners shall be authorized to serve terms of two (2) years.

XXXI. SCR 3.260 Joinder and consolidation

The proposed new sections (3) and (4) of SCR 3.260 are:

(3) Charges against two or more attorneys may be consolidated by order of the Inquiry Commission for limited purposes including, but not limited to, preservation of testimony, out of state depositions, or document production pursuant to subpoena.

(4) Any party may file a Motion with the Inquiry Commission to deconsolidate separate charges against any attorney as provided in subsection (1), or to deconsolidate charges against two or more attorneys as provided in subsection (2) or (3). However, the filing of such Motions shall not delay the evidentiary hearing or the Board's consideration of the case.

XXXII. SCR 3.360 Trial Commissioner to file report with Disciplinary Clerk

The proposed new section (6) of SCR 3.360 is:

(6) Upon the finality of the report of the Trial Commissioner, the Disciplinary Clerk shall certify the record of the prior proceedings and send notice of certification to the parties.

XXXIII. SCR 3.365 Notice of appeal

The proposed amendments to section (2) of SCR 3.365 are:

(2) The notice of appeal shall specify by name, the Appellant, and the [order] report appealed from.

XXXIV. SCR 3.370 Procedure before the Board and the Court

The proposed amendments to SCR 3.370 are:

(1) [Upon receipt of the report of the Trial Commissioner, the Disciplinary Clerk shall certify the record of the prior proceedings and send notice of certification to the parties. The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to and in the conduct of the proceedings, as well as the expenses associated with the Trial Commissioner's hearing, shall be filed with the Disciplinary Clerk.]

[(2)] Thirty (30) days after the [record is certified] filing of the notice of appeal, the Appellant shall file a brief supporting his/her position on the merits of the case. Fifteen (15) days thereafter, the Appellee shall file his/her brief. No reply brief shall be permitted.

(2) Upon motion by the parties or upon the Board's own motion, oral arguments may be scheduled before the Board.

(3) Within sixty (60) days of completion of briefing by the parties, the Board shall consider and act upon the entire record. Only the President, the President Elect, the Vice President, the fourteen (14) duly-elected members of the Board from their respective Supreme Court Districts, and four (4) adult citizens of the Commonwealth who are not lawyers appointed by the Chief Justice as hereinafter described, shall be eligible to be present, participate in and vote on any disciplinary case. Any member, including a non-lawyer member, who has participated in any phase of a disciplinary case submitted to the Board under this rule, or who has been challenged on grounds sufficient to disqualify a Circuit Judge shall be disqualified. If disqualification or absence results in lack of a quorum the Chief Justice shall appoint a member or members (or, if applicable, non-lawyer participants) sufficient to provide a quorum to consider and act on the cases. Any challenge to a member's qualifications shall be determined by the Chief Justice in accordance with KRS 26A.015, et seq.

(4) Eleven (11) of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

(5) (a) The Board, after deliberation, and consideration of oral argument, if any, shall decide, by a roll call vote: [.]

(1.) [whether the decision of] To accept the Trial Commissioner's Report as to the [finding of a violation and degree of discipline imposed is supported by substantial evidence or is] guilt, innocence, and the discipline imposed, by concluding that the Trial Commissioner's report is supported by substantial evidence and is not clearly erroneous as a matter of law, or, [.]

(2.) [The Board, in its discretion, may] To conduct a [review] de novo review, in its discretion. In that event it shall make findings as to the guilt or innocence on each Count, and the appropriate discipline to be imposed, and take separate votes as to each. If the Board votes to take a de novo review of the case, said review shall be confined to the evidence presented and the record of the case. The Board may consider the admissibility of evidence as well as the appropriate weight of it. The Board shall state, in its written report required by subsection (8) the difference between its findings and recommendations and the report of the Trial Commissioner.

(b) In the event of a case submitted under SCR 3.210, the Board shall decide, by a roll call vote, guilt or innocence on each Count and on the appropriate discipline to be imposed, if any, make findings of fact in the event of a disputed fact, and make conclusions of law. Failure to Answer may be deemed an admission of the facts stated in the charge.

(c) Each roll [of the evidence presented to the Trial Commissioner. Both the findings and any disciplinary action must be] call vote made under (6)(a) or (b) shall be agreed upon by eleven (11) or

three-fourths (3/4) of the members of the Board present and voting on the proceedings, whichever is less. [The result of each of the two (2) votes shall be recorded in the Board's minutes and in a written decision of the Board setting forth the reasons therefore as stated in paragraph seven (7) of this rule. The President shall sign and file with the Disciplinary Clerk an order setting forth the action and decision of the Board. The Disciplinary Clerk shall mail copies of such order and decision, together with a copy of the Trial Commissioner's report, to the Respondent and his/her counsel, and to each member of the Inquiry Commission, shall place ten (10) copies in the file, and file the entire record of the case with the Court. The]

(d) At any time during deliberations the Board by a vote of a majority of the Board present and voting, may remand the case to the Inquiry Commission for reconsideration of the form of the charge, remand the case to the Trial Commissioner for clarification of the Trial Commissioner's report, or for an evidentiary hearing on points specified in the order of remand. The Board may order the parties to file additional briefs on specific issues.

(6) The Board shall issue a written decision within [thirty (30)] forty five (45) days of voting on the cases. The Disciplinary Clerk shall mail copies of such report to the Respondent and his counsel, if any, and to each member of the Inquiry Commission. The Disciplinary Clerk shall place ten (10) copies of the report in the record and file the entire record of the case with the Court, unless the Board has taken actions under subsection (6)(d), in which case the matter will proceed in accordance with the Board's direction. [The Board shall, in its decision, state wherein it differs with the findings of fact and law of the Trial Commissioner and will state the degree of discipline, if any is imposed.]

(7) Bar Counsel or the Respondent may file with the Court a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Disciplinary Clerk, stating reasons for review, accompanied by a brief supporting his/her position on the merits of the case. The opposing party may file a brief within thirty (30) days thereafter. Before the notice for review can be filed, the Respondent shall furnish a bond with surety acceptable to the Disciplinary Clerk, conditioned that if the principal in the bond be disciplined by the Court, he/she will promptly pay all costs incurred in the proceeding, including those certified under [Rule 3.370] SCR 3.450. If Respondent files a response *in forma pauperis*, no bond shall be required.

(8) The Court may, within ninety (90) days of the filing with the Court of the Trial Commissioner's report as provided by 3.360(4), or of the Board's decision, notify Bar Counsel and Respondent that it will review the decision. If the Court so acts, Bar Counsel and Respondent may each file briefs within thirty (30) days, with no right to file reply briefs unless by order of the Court, whereupon the case shall stand submitted. Thereafter, the Court shall enter such orders or opinion as it deems appropriate on the entire record.

(9) If no notice of review is filed by either one of the parties, or the Court under paragraph nine (9) of this rule, the Court shall enter an order adopting the decision of the Board or the Trial Commissioner, whichever the case may be, relating to all matters.

(10) When the Respondent is proceeded against by warning order, the notice in paragraph three (3) and paragraph nine (9) of this rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order.

(11) In each case to be presented to the Trial Commissioner, there shall be supplied with the Disciplinary Clerk's file a sealed envelope containing a statement of the Respondent's years of membership in the Association, all orders of unprofessional conduct, and all withdrawals from the association and reasons therefor. The envelope will be opened only if the Trial Commissioner makes a finding of a violation and may be considered in deciding what discipline to impose. Such statement will become part of the record of the case and be transmitted with the rest of the file to the Disciplinary Clerk, Board and/or Supreme Court. Before submission of a

case to the Trial Commissioner or the Board a copy of said statement shall be sent to the Respondent, who may review documents relative to it at the Bar Center, and may comment to the Trial Commissioner or the Board upon the statement and point out errors contained in it.

XXXV. SCR 3.390 Notice to client of suspension or disbarment

The proposed amendments to SCR 3.390 are:

(a) In all cases where a lawyer has been suspended from the practice of law, except a suspension under SCR 3.165 or 3.166, the suspension shall take effect beginning on the tenth (10th) day following the order of suspension. In such cases the suspended lawyer shall take all reasonable steps to insure that the clients will be protected. After issuance of the order the suspended lawyer may not accept new clients or collect unearned fees. In addition, the lawyer shall comply with the provisions of SCR 3.130-7.50(5).

(b) [There shall be contained in every] In the event of an opinion or order, imposing disbarment or a suspension of more than sixty (60) days, [a direction] and any suspension under SCR 3.050 and SCR 3.669(4), [that] such suspended or disbarred attorney must notify all Courts in which [he/she] the lawyer has matters pending, and all clients [for whom he/she is actively involved in litigation and similar legal matters.] of [his/her] the suspended lawyer's inability to continue to represent them and of the necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly placed in the United States mail within ten (10) days of the date of entry of the order of suspension or disbarment [becomes effective], and such suspended or disbarred attorney shall simultaneously provide a copy of all such letters to the [Director of the Association] Office of Bar Counsel. Upon the issuance of said opinion or order the attorney affected shall immediately, to the extent possible, cancel and cease any advertising activities in which the attorney is engaged.

(c) Failure to comply with this rule shall subject the Respondent to a charge of contempt of Court or disciplinary action. Failure to comply with this rule shall prohibit the respondent from applying for reinstatement.

XXXVI. SCR 3.450 Recovery of Costs

The proposed amendments to SCR 3.450 are:

In all cases to be submitted to the Court, the entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to and in the conduct of the proceedings, as well as any expenses associated with the Trial Commissioner's hearing, shall be forwarded to the Court by the Disciplinary Clerk.

Every final order of the Board or the Court which adjudges the Respondent guilty of unprofessional conduct shall provide for the recovery of all costs, including those certified by the Disciplinary Clerk [under SCR 3.370]. Immediately upon the effective date of the order the Clerk shall furnish a cost bill to the Respondent[, and i] If the bill is not satisfied within ten (10) days thereafter, the Clerk shall [issue one or more executions thereon, directed to the sheriffs of the counties in which the Respondent and the sureties on his bond reside. So much of the costs collected by the Clerk as represent those incurred by the Board shall be promptly refunded to] notify the Director of the Association.

XXXVII. SCR 3.500 Restoration to membership

The proposed amendments to subsections (a), (b) and (c) of section (1), sections (2), (3), (4) (5), (6) and (7) of SCR 3.500 are:

(1) No former member who has withdrawn under Rule 3.480, or who has been suspended for failure to pay dues as provided by Rule 3.050, or who has failed to pay dues for such period of time as to warrant suspension under that Rule, or who has been suspended for failure to comply with the continuing legal education requirements as provided by Rule 3.661, and such status has prevailed for less than a period of

five (5) years can be restored to membership unless the former member, applies for restoration by completing forms provided by the Director, to include a certification from the KBA's Office of Bar Counsel that there is no pending disciplinary matter, tendering a fee of three hundred fifty dollars (\$[250.00] 350.00), and payment of dues for the current year and all back years, unless he/she has been in withdrawal status by order of the Court. In cases where a suspension or withdrawal has prevailed for five (5) years or less and the restoration application is referred to the Character and Fitness Committee, a fee of two hundred fifty dollars (\$250.00) shall be made payable to the Kentucky Office of Bar Admissions.

Upon receipt of such application and payments, the Director shall refer the application to the Continuing Legal Education Commission for certification under Rule 3.675 within thirty (30) days of the referral. The Continuing Legal Education Commission shall make its certification which shall be added to the record in the restoration proceeding. The Director shall in turn advise each member of the Board and furnish them all pertinent information available.

(a) The Board shall, within thirty (30) days of review of the information, [make its recommendation to the Court for approval of an entry of an order] issue an order restoring the Applicant; or

[b] R[eferring the matter to the Committee for proceedings under Rule 2.040 and SCR 2.011. The Committee's recommendation shall be made to the Board for its action [and recommendation to the Court].

[c] (b) As to any Applicants, including those who have been suspended for failure to pay dues or failure to meet continuing legal education requirements, the mere submission of the application for restoration and tendering the required fee shall not automatically restore the privilege of practicing law, and such suspension or withdrawal shall remain in force pending entry of the order of the [Court] Board or of the Court restoring the Applicant.

(2) No former member who has withdrawn or has been suspended for failure to pay dues or has been suspended for failure to meet continuing legal education requirements, and such status has prevailed for five (5) or more years, can be restored to membership unless the former member applies, for restoration by completing forms provided by the Director, which shall include a certification from the KBA's Office of Bar Counsel that there is no pending disciplinary matter, and tendering payment of seven hundred fifty dollars (\$750.00)[500.00]. If the former member has been suspended for nonpayment of bar dues or CLE non-compliance he/she shall also tender payment for current dues and all back dues. The application shall then be referred to the Committee for proceedings under Rule 2.040 and SCR [2.100] 2.110 and to the Continuing Legal Education Commission for certification under Rule 3.675. An additional fee of five hundred dollars (\$500.00) shall be made payable to the Kentucky Office of Bar Admissions. The Committee shall make its recommendation to the Board.

(3) If the Committee recommends approval of the application and the Board concurs, and the status of the suspension has prevailed for five (5) or more years, then the application shall be referred to the Board of Bar Examiners, which Board shall administer a written examination which shall cover the subject of ethics and five (5) of the subjects listed in SCR 2.080(1). A general average of 75% or higher shall be deemed a passing score on the written examination. The fees required by Rules 2.022 and 2.023 shall be paid prior to taking the examination. Or, as an alternative, upon referral from the Board of Governors, if the applicant has practiced in a reciprocal jurisdiction after withdrawal pursuant to SCR 3.480 and meets all requirements of SCR 2.110, the applicant may elect to have the Character & Fitness Committee consider an application for admission without examination under SCR 2.110. The fees required by Rule 2.110 shall be paid prior to the processing of the application.

If an applicant takes and passes an examination or is approved for admission without examination, such fact shall be certified to [the Court

and] the Director, together with a recommendation that the Applicant be readmitted to membership. Upon this certification, the Director shall [forward the file to the Court to consider whether] forward the application to the President to enter an order to restore the Applicant. If the Applicant fails to pass an examination, the Board of Bar Examiners shall certify the fact of failure to the [Court and the] Director. Upon certification that Applicant failed to pass, the Director shall [forward the file to the Court for entry of] enter an order denying the Applicant for restoration. The applicant may appeal to the court within thirty (30) days. Such appeal will be accompanied by a filing fee of one hundred fifty dollars (\$150.00).

The provision of Rules 2.015 and 2.080, or if applicable, 2.110, shall apply where not inconsistent.

(4) If the Committee recommends disapproval of the application referred to in paragraph (2) after its hearing, then the application shall be referred to the Board for review. The Applicant and the KBA may file briefs and an oral argument may be held at the request of either party. If, after such consideration, the Board concurs in disapproval of the application, it shall enter an order denying restoration. [its findings and recommendation shall be filed with the Clerk, and t] The Applicant and the Committee shall be notified of this decision by the Director. The Applicant shall be sent notice by certified mail, return receipt requested, at his/her bar roster address. For a period of twenty (20) days after the [Clerk] Director shall have mailed said notice, the Applicant may petition the Court for a review of the action of the Board. Such appeal will be accompanied by a filing fee of one hundred fifty dollars (\$150.00). Should the Board or the Court reverse the disapproval recommendation of the Committee, then the file shall be referred to the Board of Bar Examiners for procedure under paragraph (3).

(5) All costs incurred in excess of the filing fee shall be paid by the Applicant. [A c] Cash [or corporate surety] bond in the amount of two thousand five hundred dollars (\$2500.00) to secure costs to be incurred shall be posted with the Office of Bar Admissions upon the filing of [the] an application under subsection (2), or referral to Character and Fitness under subsection (1).

(6) The burden of proof is on the Applicant to establish his/her present qualifications to practice law in Kentucky.

(7) If the Committee [and] or Board recommend approval of restoration on conditions, as provided in SCR 2.042, [or approval with such additional conditions as the Board may recommend,] the [Court] Board may include such conditions in any order of restoration.

XXXVIII.SCR 3.510 (1) Reinstatement in case of disciplinary suspension

The proposed amendments to section (1) of SCR 3.510 are:

(1) No former member of the Association who has been suspended for a disciplinary case for more than one hundred eighty (180) days shall resume practice until he/she is reinstated by order of the Court. Application for reinstatement shall be on forms provided by the Director and Continuing Legal Education Commission, filed with the Director, and shall be accompanied by a filing fee of one thousand dollars (\$1,000.00) [250.00] which shall be made payable to the Kentucky Bar Association. An additional filing fee of one thousand two hundred fifty dollars (\$1250.00) shall be made payable to the Kentucky Office of Bar Admissions. The Director shall not accept an application for filing unless all costs incurred in the suspension proceeding have been paid by the former member, the Office of Bar Counsel has certified to the Applicant that there is no pending disciplinary file, and the costs in the reinstatement proceeding (whether costs of the Association or of the Character and Fitness Committee or of the Kentucky Office of Bar Admissions) have been secured by the posting of a cash or corporate surety bond of two thousand five hundred dollars (\$2500.00). Any additional costs will be paid by Applicant. The Director shall refer the application to the Continuing Legal Education Commission within ten (10) days of receipt for certification under Rule 3.675. The Continuing Legal

Education Commission shall make its certification within twenty (20) days of the referral which shall be added to the record in the reinstatement proceedings.

XXXIX.SCR 3.600 Continuing Legal Education Definitions

The proposed amendments to SCR 3.600 are:

As used in SCR 3.610-3.690, the following definitions shall apply unless the context clearly requires a different meaning:

“Approved activity” is a continuing legal education activity that has been approved for credit by the CLE Commission.

“Attorney Identification Number” is the five (5) digit number assigned to each member of the Association upon admission.

“Award” is the Continuing Legal Education Award.

“Commission” is the [c]Continuing [l]Legal [e]Education [c]Commission.

“Continuing legal education,” or “CLE,” is any legal educational activity or program which is designed to maintain or improve the professional competency of the practicing attorneys and is accredited by the Commission.

“Credit” is a unit for measuring continuing legal education activity.

“Educational year” is the reporting period for mandatory continuing legal education and runs from July 1st each year through June 30th of the successive year.

“Ethics, professional responsibility and professionalism” is the category by which “ethics credits” shall be earned and includes, but is not limited to programs or seminars or designated portions thereof with instruction focusing on the Rules of Professional Conduct independently or as they relate to law firm management, malpractice avoidance, attorneys fees, legal ethics, and the duties of attorneys to the judicial system, the public, clients and other attorneys.

“In-house activity” is an activity sponsored by a single law firm, single corporate law department, or single governmental office for lawyers who are members or employees of the firm, department or office.

“Legal writing” is a publication which contributes to the legal competency of the applicant, [or] other attorneys or judges and is approved by the Commission. Writing for which the author is paid shall not be approved.

“Non-compliance” means not meeting continuing legal education requirements set forth in Rule 3.661 and Rule 3.652 and includes both lack of certification and lack of completion of activities prior to established time requirements.

“Technological transmission” is a CLE activity delivery method other than live seminars and includes video tape, DVD, audio tape, [live broadcast transmission, satellite simulcast, teleconference, video conference,] CD-ROM, [data conference,] computer on-line services, or other appropriate technology as approved by the Commission.

XL. SCR 3.620 Selection and tenure of the commission, filling vacancies on the commission

The proposed amendments to SCR 3.620 are:

The Court shall appoint all members of the [c]Commission from a list consisting of three times the number to be appointed submitted to the [c]Court by the [b]Board. A chairman shall be designated by the [c]Court for such time as the [c]Court may direct [at the pleasure of

the court]. Of the members first appointed, three shall be appointed for one year, two for two years and two for three years. Thereafter, appointments shall be made for a three-year term. Members may be reappointed but no member shall serve more than two successive three-year terms. Each member shall serve until a successor is appointed and qualified. Vacancies occurring through death, disability, inability or disqualification to serve or by resignation shall be filled for the vacant term in the same manner as initial appointments are made by the [c]Court. [The] [m]Members of the [c]Commission shall serve without compensation but shall be paid their reasonable and necessary expenses incurred in the performance of their duties. The [a]Association shall have the responsibility of funding the [c]Commission and any necessary staff who shall be employees of the [a]Association.

XLI. SCR 3.630 Commission member's qualifications

The proposed amendments to SCR 3.630 are:

Each [c]Commission member must be a citizen of the United States, licensed to practice law in the courts of this Commonwealth and have been a resident in the appellate district from which nominated for two years [next] immediately preceding [his] the appointment.

XLII. SCR 3.635 Commission quorum

The proposed amendments to SCR 3.635 are:

[A quorum to do business in meeting of the Commission shall require the attendance of not less than four members of the Commission.] A quorum consisting of at least four (4) Commission members is required for conducting the business of the Commission.

XLIII. SCR 3.640 Commission staff

The proposed amendments to SCR 3.640 are:

The Commission shall be provided with a Director for Continuing Legal Education and sufficient administrative and secretarial assistants as are from time to time required. Selection and qualifications of the Director for Continuing Legal Education shall be determined by the Board except that the person selected shall be an attorney licensed to practice law in the [C]courts of this Commonwealth. The Director for Continuing Legal Education shall be responsible to the Commission for the proper administration of the rules applying to the Commission and any regulations issued by the Commission.

XLIV. SCR 3.650 Commission duties

The proposed amendments to sections (2), (6) and (7) of SCR 3.650 are:

(2) Conduct, sponsor, or otherwise provide high quality continuing legal education, specifically including, but not limited to, one (1) twelve and one-half (12.5) credit seminar[s] in each Supreme Court District each year.

(6) Promulgate rules and regulations for the administration of the [M]andatory [C]continuing [L]legal [E]education program subject to approval of the Board and the Court.

(7) Report annually, on or before September 15, and as otherwise required, to the Board and the Court on the status of continuing legal education in the Commonwealth. Such report[s] shall include recommended changes to these rules and regulations and their implementation.

XLV. SCR 3.651 [District bar programs] Kentucky Law Update Seminars in Each Appellate District

The proposed amendments to sections (1), (2) and (3) of SCR 3.651 are:

(1) Each educational year, the Commission shall conduct a twelve and one-half (12.5) credit continuing legal education seminar in each Supreme Court District. Subjects taught at each seminar shall include the latest Kentucky Supreme Court and Court of Appeals decisions, procedural rule changes, Federal Court decisions, legal ethics, professional responsibility and professionalism, Kentucky statutory changes and other subjects relating to improvements in basic legal skills. Each program shall include a minimum of two (2.0) credits for subjects specifically addressing legal ethics, professional responsibility and professionalism.

(2) Registration for the [district bar education programs] Kentucky Law Update seminars shall be free to all members in good standing of the Association. [Non-members may be charged an amount set to cover the cost of program materials.]

(3) Members may attend [district bar education programs] Kentucky Law Update seminars in any location. [Attendance at more than one seminar will not result in duplicate credits earned. The maximum credit which may be earned for the district bar meeting seminar is twelve and one-half (12.5) credits. If separate track programs are offered and attended separately, additional credits may be granted by the Commission] The maximum credit that may be earned for attending any one (1) Kentucky Law Update seminar is twelve (12.5) credits. However, if different tracks of programs are attended at different locations, additional credit may be approved by the Commission. Pursuant to Rule 3.664 (1) duplicate credits shall not be earned by attending the same program at a different location.

XLVI. SCR 3.652 New Lawyer [Skills] Program

The proposed amendments to SCR 3.652 are:

(1) At least once each educational year, the Commission shall provide or cause to be provided a New Lawyer [Skills] Program of not less than twelve and one-half (12.5) credits. The Commission may in its discretion, accredit a New Lawyer [Skills] Program proposed by other CLE providers.

(2) Continuing legal education credits for the New Lawyer [Skills] Program shall be awarded in a number consistent with the award of credits for other continuing legal education programs.

(3) The New Lawyer [Skills] Program shall include at least two (2) hours of ethics, a course on law practice management and other subjects determined appropriate by the Commission.

(4) The Commission or other provider accredited under SCR 3.652(1) may charge a reasonable registration fee approved by the [Supreme] Court [of Kentucky] for the New Lawyer [Skills] Program.

(5) Within twelve (12) months following the date of admission as set forth on the certificate of admission, each person admitted to membership to the [Kentucky Bar] Association shall complete the New Lawyer [Skills] Program.

(6) Each individual attending the New Lawyer [Skills] Program shall certify to the Director the completion of the Program on the attendance certificate provided for that purpose. Such certification shall be submitted to the Director upon completion of the program and in no case shall the certification be submitted later than thirty (30) days after completion of the program. Continuing legal education credits awarded for the program shall be applied to the educational year in which the program is attended, and if applied to a year in which the individual so attending is otherwise exempt from CLE requirements under SCR 3.666(1)(b), then said credits shall carry forward in accordance with SCR 3.661([4] 5) and ([5] 6).

(7) Members required to complete the New Lawyer [Skills] Program pursuant to paragraph (5) of this Rule may, upon application to and approval by the Commission, be exempted from the requirement if the member is admitted to practice in another jurisdiction for a minimum of

five (5) years, and will certify such prior admission to the Commission, or if the member has attended a mandatory new lawyer training program of at least twelve and one-half (12.5) credits, including two (2) ethics credits, offered by the state bar association of another jurisdiction and approved by the [d]Director.

(8) The time for completion and certification set forth in paragraphs (5) and (6) of th[e]is Rule may, upon written application to and approval by the Commission or its designee, be extended. Written applications for an extension under this paragraph must be received by the Commission no later than thirty (30) days after the member's deadline to complete the Program as set forth in paragraph (5) of this Rule. All applications must be signed by the member [and notarized]. The Commission may approve extensions for completing the Program under the following circumstances:

(a) Where the member demonstrates hardship or other good cause clearly warranting relief. Requests for relief under this subsection must set forth all circumstances upon which the request is based, including supporting documentation. In these circumstances, the member shall complete the requirement set forth in paragraphs (5) and (6) as soon as reasonably practicable as determined by the Commission or its designee; or

(b) Where the member fails to demonstrate hardship or other good cause clearly warranting relief. In this circumstance], the member must pay a fee of two hundred fifty dollars (\$250.00) and complete the requirement set forth in paragraphs (5) and (6) at the next regularly scheduled New Lawyer [Skills] Program.

(9) Failure to complete and certify attendance for the New Lawyer [Skills] Program pursuant to paragraphs (5), (6), or (8) of this Rule shall be grounds for suspension from the practice of law in the Commonwealth or other sanctions as deemed appropriate by the Court. Ninety (90) days prior to the end of the twelve (12) month period all individuals not certifying completion of the New Lawyer [Skills] Program pursuant to paragraphs (5), (6) or (8) shall be notified in writing that the program must be completed before the end of the twelve (12) month period, indicating the date. Names of all individuals not submitting certification of completion of the New Lawyer [Skills] Program within the twelve (12) month period or not being granted an extension of time, pursuant to paragraph (8) of this Rule, shall be submitted to the Court by the Director, certifying the member's failure to comply with the New Lawyer [Skills] Program requirement. The Clerk shall docket the matter and the Court shall issue each such member a rule returnable within twenty (20) days thereafter to show cause why the member should not be suspended from the practice of law or otherwise sanctioned as deemed appropriate by the Court. The Commission shall be permitted to file a reply within ten (10) days following the filing of a response by a member. Unless good cause [be] is shown by the return date of the rule, or within such additional time as may be allowed by the Court, an Order shall be entered suspending respondent from the practice of law or imposing such other sanctions as may be deemed appropriate by the Court. An attested copy of the Order shall forthwith be delivered by the Clerk to the member, the Director, and in the case of suspension, to the Circuit Clerk of the district wherein the member resides for recording and indexing as required by Rule 3.480.

XLVII. SCR 3.661 Continuing legal education requirements: compliance and certification

The proposed amendments to sections (2), (3), (4), (5), (6) (7) and (8) of SCR 3.661 are:

(2) Certification of completion of approved CLE activities must be received by the Director no[t] later than August 10th immediately following the educational year in which the activity is completed. Certification shall be submitted to the Director by the sponsor of the accredited activity or by individual attorneys. Sponsors submitting certifications to the Director shall comply with all requirements set forth in SCR 3.665(6).

(3) Programs or seminars or designated portions thereof devoted to legal ethics, [or] professional responsibility or professionalism include but are not limited to programs or seminars, or designated portions thereof, with instruction focusing on the Rules of Professional Conduct independently or as they relate to [and/or the Rules of Professional Conduct as they are directly related to] law firm management, malpractice avoidance, attorneys fees, legal ethics, and the duties of attorneys to the judicial system, the public, clients and other attorneys.

(4) Integration of legal ethics, [or] professional responsibility or professionalism issues into substantive law topics is encouraged, but shall not count toward the two (2) credit minimum annual requirement.

(5) A member who accumulates an excess over the twelve and one-half (12.5) credit requirement may carry forward the excess credits into the two successive educational years for the purpose of satisfying the minimum requirement for those years. Carry-forward [is] credits are limited to a total of twenty-five (25) credits. All excess credits above a total of twenty-five (25) credits will remain on the member's records but may not be carried forward.

(6) Carry-forward credits shall be allowed to satisfy the two (2) credit annual requirement for continuing legal education addressing the topics of legal ethics, professional responsibility and professionalism, and may be carried forward into the two years [next] immediately succeeding the year in which the hours were earned. Carry-forward credits for ethics, professional responsibility and professionalism [is] are limited to a total of four (4) credits.

(7) Certification may be submitted by sponsors or by individuals on approved Association forms, [or] uniform certificates, or any other format adopted by the Commission.

(8) Compliance and certification requirements concerning the New Lawyer [Skills] Program are set forth at SCR 3.652(5) and (6).

XLVIII. SCR 3.662 Qualifying continuing legal education activity [and] standards and credit limits

The proposed amendments to subsections (b), (j), (k) and (l) of section (1), subsections (b), (c), and (h) of section (2), and subsections (a), (b), (c), (d) and (e) of sections (3) of SCR 3.662 are:

(1)(b) The activity deals primarily with substantive legal issues directly related to the practice of law, or practice management and includes consideration of any related issues of ethics, [or] professional responsibility, or professionalism.

(j) The activity may be presented live or by technological transmission as defined in Rule 3.600 [, including: video tape, audio tape, live broadcast transmission, satellite simulcast, teleconference, video conference, CD-ROM, data conference, computer on-line services, or other appropriate technology as approved by the Commission]. If presented by technological transmission [as set forth above], the transmission [, tape, or other technologically-transmitted activity] must be produced from an activity submitted and approved by the Commission pursuant to SCR 3.665. [Activities presented by technological transmission shall be accredited for the educational year during which they are produced to guarantee timeliness of content.] Activities including audio components must have high quality audio reproductions so that listeners may easily hear the content of the activity. Activities including video components must have high quality video reproductions so that observers may easily view the content of the activity. If activities are presented by technological transmission and an attorney facilitator [must be] is available for purposes of answering questions and leading discussions, that activity is considered a live seminar. [Activities presented by technological transmission to individuals without group participation or the participation of a qualified attorney facilitator will require independent verification of credits.]

(k) In cases of in-house activity, as defined in SCR [3.010] 3.600, such activities may be approved if all standards set forth herein for

accreditation are met. A maximum of six (6.0) credits per educational year earned at in-house activities may be applied to meet the annual twelve and one-half (12.5) credit requirement. [and if t]The following additional requirements [are] must also be met for accreditation of in-house activities:.]

(i) Applications for approval must be submitted at least thirty (30) days in advance; applications submitted less than thirty (30) days in advance or after the fact will not be approved.]

(j) At least half the instruction hours must be provided by qualified persons having no continuing relationship or employment with the sponsoring firm, department or agency. For technologically transmitted activities, the activities must meet all standards for qualifying continuing legal education activities as set forth in SCR 3.662 and must be included as part of the application as set forth at SCR 3.662(1)(k)(i)].

(ii) Members of the Court, [or] the Commission or a Commission designee may attend or participate in any such program to observe compliance without payment of registration or other fees.

(l) In cases of law school classes attended by members, the member may receive continuing legal education credit provided the following requirements are met[.]:

(i) The member registers for the class with the law school.

(ii) The member completes the course as required by the terms of registration, for credit or by audit.

(iii) Credit is calculated pursuant to Rule 3.663.

(2) The following categories of activities shall not qualify as a continuing legal education activity[.]:

[(b) In-house activity which has not been accredited at least thirty (30) days in advance.]

[(c) b] In-house activities for which less than half the instruction is provided by qualified persons outside the firm, department or agency, and for which members of the Court, the Commission or Commission designee are prohibited from observing for compliance without charge of fees.

(c) Seminars or meetings sponsored by law firms or other organizations which are determined by the Commission to be in the nature of client development.

(h) Any activity completed prior to admission to practice in Kentucky except the program required pursuant to SCR 3.661([9] 8) and 3.652(5).

(3)(a) Teaching or participating as a panel member or seminar leader in an approved activity. No credit may be earned for teaching or participating as a panel member or seminar leader for activities that do not meet standards set forth in Rule 3.662. A maximum of twelve and one-half (12.5) credits earned under this Rule per educational year may be applied to meet the annual minimum requirement.

(b) Researching, writing or editing material to be presented at an approved activity. No credit may be earned for researching, writing, or editing materials for activities that do not meet the standards set forth in Rule 3.662. A maximum of twelve and one-half (12.5) credits earned under this Rule per educational year may be applied to meet the annual minimum requirement.

(c) Publication of legal writing. A legal writing is a publication which contributes to the legal competency of the applicant, [or] other attorneys or judges and is approved by the Commission. Writing for which the author is paid shall not be approved. A maximum of six (6.0)

credits earned under this Rule per educational year may be applied to meet the annual minimum requirement.

(d) [Law-related education and p]Public speaking. Upon application, by teaching or participating as a panel member, mock trial coach or seminar leader for law-related [education activities or for] public service speeches to civic organizations or school groups. A maximum of two (2.0) credits earned under this Rule per educational year may be applied to meet the annual minimum requirement. Speaking for which the member is paid shall not be approved. Written copies of presentations must accompany such applications; provided, however, that, where appropriate, a narrative summary of the material presented may be sufficient.

(e) Seminars designed for non-lawyer professionals which in, case-by-case situations, will benefit the lawyer by allowing clients improved services in unique areas of practice. Credits earned for this category of seminar or activity shall not count toward the twelve and one-half (12.5) credit annual minimum requirement but may count toward continuing legal education award credits as determined by the Commission.

XLIX. SCR 3.663 Calculation and reporting of continuing legal education credits: formulas and limits

The proposed amendments to section (1), subsections (a) and (b) of section (3), sections (5) and (9) of SCR 3.663 are:

(1) Members completing or participating in the course of study of an approved activity will be granted one (1) credit for each sixty (60) minutes of actual instructional time. Instructional time shall not include introductory remarks, breaks, or business meetings held in conjunction with a continuing legal education activity. For activities involving technologically transmitted programming, actual instructional time may be deemed inappropriate for assigning credit hours. In such circumstances credits claimed will be limited by the total assigned by the Commission. The Commission's assignment of credit hours for such activities will include consideration of the sponsor's estimates of average completion time, volume of material, opportunities for interaction, duration of program and other factors as deemed appropriate. No additional credit is given for completing or participating in duplicate activities at different times or locations. Duplicate completion of or participation in any course of study of any accredited activity shall not result in duplicate continuing legal education credits awarded. Continuing legal education credit shall be claimed on forms provided by the Association, or any uniform certificate adopted by the Association, and shall be forwarded to the Director.

(3) Members may be granted preparation credit as follows:

(a) One (1) credit for each two (2) hours spent in preparation for teaching or participating as a panel member or seminar leader in an approved activity, up to a maximum of twelve and one-half (12.5) credits per educational year.

(b) One (1) credit for each two (2) hours spent researching, writing or editing material presented by another member at an approved continuing legal education activity, up to a maximum of twelve and one-half (12.5) credits per educational year.

(5) Members may earn credits for publication of legal writing up to a maximum of six (6.0) credits per year. One (1) credit is granted for each two (2) hours of actual preparation time including research, writing, and editing. [A maximum of six (6.0) credits may be applied to meet the minimum requirement set forth in Rule 3.661.] Any excess credits will be applied toward the award established in Rule 3.680. The Commission may grant up to twenty (20) credit hours for published legal writing toward the award, but may only grant up to six (6.0) credits to meet the annual minimum requirement. Applications for continuing legal education credit for a published legal writing shall be made on forms provided by the Association and shall be accompanied by a copy of the published legal writing for which credit is sought. Said application shall be forwarded to the Director.

(9) The Commission shall grant a maximum of two (2.0) credits to meet the annual minimum requirement for public speaking credit[s] earned pursuant to SCR 3.662(3)(d).

L. SCR 3.665 Procedure for accreditation of continuing legal education activities and obligations of sponsors

The proposed amendments to sections (4) and subsections (d) and (e) of sections (6) of SCR 3.665 are:

(4) Activity sponsors which apply for accreditation and receive approval prior to the activity may announce in advertising materials, "This activity has been approved by the Kentucky Bar Association Continuing Legal Education Commission for a maximum of XX.XX credits, including XX.XX ethics credits." Sponsors [which] who have made application for accreditation of activities [which] that have not yet been approved may announce in advertising materials, "Application for approval of this activity for a maximum of XX.XX credits, including XX.XX ethics credits, is PENDING before the Kentucky Bar Association Continuing Legal Education Commission." Sponsors may not advertise accreditation if accreditation has not been granted by the Commission and notice of such accreditation received by the sponsor.

(6)(d) Provide to each Kentucky attorney completing an approved activity an Association approved credit reporting [card] form and activity code. Credit reporting [cards] forms and activity numbers shall be made available to sponsors upon request from the Association for use at approved activities.

(e) Collect credit reporting [cards] forms from Kentucky attorneys and submit to the Commission all [cards] forms received within thirty (30) days of completion of the program. Failure to submit completed credit reporting [cards] forms within thirty (30) days of the activity shall be accompanied by a late filing fee from the sponsor of ten dollars (\$10.00) per [card] form or certificate. Submit all attendance [cards] forms or certificates for activities held during the month of June no [t] later than July 10th, immediately following the end of the educational year on June 30th. For programs held during June this provision of the rule supersedes the thirty (30) day submission provided above. Failure to submit [cards] forms or certificates pursuant to this schedule will result in the sponsor's obligation to pay a late filing fee of ten dollars (\$10.00) per [card] form or certificate.

LI. SCR 3.666 Exemptions and removal of exemptions

The proposed amendments to subsection (b) of section (1) and subsections (b) and (c) of sections (2) of SCR 3.666 are:

(1)(b) Members who have not completed one full educational year of Association membership on or before the June 30 of their initial admission to membership provided, however, such persons shall be subject to the provisions of [SCR 3.661(9) and] 3.652[(5)].

(2)(b) Members who practice law within the Commonwealth, but demonstrate that meeting the requirements of Rule 3.661 would work an undue hardship by reason of [age,] disability, sickness, [financial condition,] or other clearly mitigating circumstances.

(c) Members required to complete the New Lawyer [Skills] [p]Program following procedures set forth in SCR 3.652(7).

LII. SCR 3.667 Extension of time requirements

The proposed amendments to sections (1) and (2) of SCR 3.667 are:

(1) The time requirements associated with completion of continuing legal education and certification thereof, as set forth in Rule 3.661(1) and (8), may be extended by the Commission in case of hardship or other good cause clearly warranting relief. Requests for time extensions for completion of activities or certification thereof shall be made to the Commission in writing. All requests for time extension must be received

by the Commission no later than the September 10th following the end of the educational year for which the time extension is sought. Requests must set forth all circumstances upon which the request is based, including supporting documentation. Applications for time extensions for completion of the New Lawyer [Skills] Program may be submitted pursuant to SCR 3.652(8).

(2) A member who fails to complete the requirements of Rule 3.661 for any educational year, and who cannot show hardship or other good cause clearly warranting relief, may submit a plan for making up his or her delinquency, provided that the Commission has not approved such a plan for the member for either of the two preceding educational years. The plan must be received by the Commission no later than the September 10th immediately following the end of the educational year for which the time extension is sought. The plan will be approved only if the member pays a filing fee of two hundred fifty dollars (\$250.00) and the plan lists activities which would provide, by the September 10th immediately following the end of the educational year, the credit hours needed to make up the deficiency. Such plan shall be deemed accepted by the Commission unless within fifteen (15) days after receipt of the compliance plan and filing fee, the Commission notifies the applicant to the contrary.

LIII. SCR 3.668 Non-compliance, definition

The proposed amendments to sections (1) and (2) of SCR 3.668 are:

(1) Delinquency of Certification. Any certification of [C]continuing [L]legal [E]education activity for an educational year (July 1-June 30) which is submitted after the August 10th immediately following the close of that educational year, shall be deemed past due and in non-compliance. All past due reports shall be accompanied by a late filing fee of fifty dollars (\$50.00) per certificate or report to cover the administrative costs of recording credits to the prior year. All past due reports for completion of an activity in the immediately preceding educational year must be received by the Commission with the late fee of fifty dollars (\$50.00) per certificate or report no later than the close of the current educational year (June 30). Past due reports shall be accepted only until the end of the educational year (June 30) immediately following the year during which the activity is completed. This deadline (June 30) will not apply in instances where the member or former member is in the process of removing an exemption per SCR 3.666(6) or attempting certification per SCR 3.675, but the late fee of fifty dollars (\$50.00) per certificate or report shall be applied if the report is received after the August 10th reporting deadline described above.

(2) Delinquency of Credits. Failure to acquire a minimum of twelve and one-half (12.5) credits to meet the minimum continuing legal education requirements of Rule 3.661 and associated certification requirements shall be grounds for suspension by the Court from the practice of law.

LIV. SCR 3.669 Non-compliance: procedure and sanctions

The proposed amendments to SCR 3.669 are:

(1) As soon as practicable after August 20th of each year, the [Director] Commission shall notify a member in writing of existing delinquencies of record. The writing may consist of a computer generated form setting forth said delinquency. If any statement incorrectly reflects the continuing legal education status of the member it shall be the duty of the member to promptly notify the [Director] of any claimed discrepancy in the education statement.

(2) If, by the [10th] first day of [August] November immediately following, a member has [not] neither certified [that he or she completed] completion by the June 30th immediately prior, or the minimum continuing legal education requirements set forth in Rule 3.661, nor applied for and satisfied the conditions of an extension under Rule 3.667 or exemption under Rule 3.666, the [Director] Commission shall [, forthwith,] certify the name of that member to the [Court] Board.

(3) [The Clerk shall docket the matter and the Court shall issue to such member a rule returnable twenty (20) days thereafter to show cause why he or she should not be suspended from the practice of law or otherwise sanctioned by the Court. The response shall be in writing to the Supreme Court, filed with the Clerk, with a copy to the Commission, in care of the Director, and shall be accompanied by a fee, payable to the Kentucky Bar Association, in an amount to be set forth in the Court's Order. The Commission shall be permitted to file a reply within ten (10) days following the filing of a response by the member.] The Board shall cause to be sent to the member a notice of delinquency by certified mail, return receipt requested, at the member's bar roster address. Such notice shall require the attorney to show cause within thirty (30) days from the date of the mailing why the attorney's license should not be suspended for failure to meet the mandatory minimum CLE requirements of SCR 3.661. Such response shall be in writing, sent to the attention of the Director for CLE, and shall be accompanied by costs in the amount of fifty dollars (\$50.00) payable to the Kentucky Bar Association.

(4) Unless good cause [be] is shown by the return date of the rule, or within such additional time as may be allowed by the [Court] Board, [an Order shall be entered] the lawyer will be stricken from the membership roster as an active member of the KBA and will be suspended from the practice of law [suspending respondent from the practice of law] or [imposing such other sanctions] will be otherwise sanctioned as [may be] deemed appropriate by the [Court] Board. A[n attested] copy of the suspension notice [Order] shall [forthwith] be delivered by the [Clerk] Director to the member, the Clerk of the Kentucky Supreme Court, the Director of Membership, and[, in the case of suspension,] to the Circuit Clerk of the district wherein the member resides for recording and indexing as required by Rule 3.480.

(5) A [The suspended] member suspended under this Rule may apply for restoration to membership under the provisions of Rule 3.500.

(6) A member may appeal to the Kentucky Supreme Court from such suspension order within twenty (20) days of the effective date of the suspension. Such appeal shall include a filing fee of one hundred fifty dollars (\$150.00), and an affidavit showing good cause why the suspension should be set aside. [Sanctions for failure to meet the requirements of SCR 3.661(9) and SCR 3.652(5) are set forth at SCR 3.652(9).]

LV. SCR 3.670 Appeal of Commission actions

The proposed new section (5) to SCR 3.670 is:

(5) Commission certification of non-compliance filed with the Supreme Court pursuant to SCR 3.652 (9) or SCR 3.669 may not be appealed under Sections (3) and (4) of this Rule.

LVI. SCR 3.675 Continuing legal education requirements for restoration or reinstatement to membership: procedures

The proposed amendments to section (2) of SCR 3.675 are:

(2) The application or affidavit of compliance submitted for restoration or reinstatement shall include certification from the Director for CLE of completion of continuing legal education activities as required by these Rules, or otherwise specified by the Commission or Court. Applicants or affiants shall request said certification from the Director for C[ontinuing] L[egal] E[ducation] in writing and shall submit with said written request a fee of fifty dollars \$50.00 to cover the expense of the record search and certification. Applications or affidavits of compliance submitted for restoration or reinstatement which do not include the required certification of continuing legal education credits, including verification of fee payment for the certification, shall be considered incomplete and shall not be processed.

LVII. SCR 3.680 Continuing Legal Education Award

The proposed amendments to sections (2), (3), (4), (5), (6), (7) and (8) of SCR 3.680 are:

(2) [When a member has completed the credits required by the Rule for the award, he or she may, during July or August of the educational year, apply for the award by filing an application form with the Commission which shall be provided by the Association.] The Commission shall notify the member and issue the award.

[(3)] At the next meeting of the Commission following the filing of the application it shall be approved or denied by the Commission. The Director shall notify the member of the Commission's determination.]

[(4)] Approved [A]awards are valid for one year, beginning on the first day of July of the year of application award notification.

[(5)] The validity of an [A]award may be renewed for an additional year [for each educational year,] following the initial [A]awards date, in which the member who holds the [A]award completes a minimum of twenty (20) approved credit.

[(6)] Failure to earn twenty (20) credits in any educational year following the initial [A]award date shall disqualify the member from further renewals of that [A]award. The member may only become eligible for another [A]award by earning sixty-two and one-half (62.5) approved credit hours in a period separate and distinct from the period for which a prior [A]award was issued.

[(7)] Application for renewal of a Continuing Legal Education Award shall be made by members following the same procedure required for initial award application pursuant to this Rule.]

[(8)] Each member who holds a valid, unexpired [A]award shall receive a 25% discount from the normal registration fee for the Kentucky Bar Association Annual Convention.

LVIII. SCR 3.910 Kentucky Lawyer Assistance Program (KYLAP)

The proposed new section (8) to SCR 3.910 is:

(8) KYLAP may, with the approval of the Board, establish such non-profit tax exempt Foundations as are necessary for the purpose of carrying out its mission. This may include establishment of a Foundation to obtain donations in order to furnish financial assistance, in the form of loans, to enable members of the legal community to obtain treatment for their impairment. The Board will appoint the Directors of any such Foundation.

LIX. SCR 4.300 CANON 4 C. (3) A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

The proposed amendments to subsection (3) to section (C.) to Canon 4 of SCR 4.300 are:

C. Governmental, Civic or Charitable Activities.

(3) A judge may serve as an officer, director, trustee, regent or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, including governing boards of public universities, subject to the following limitations and the other requirements of this Code. Service on governing boards of public universities shall not constitute governmental service under subsection (2) above.

LX. SCR 4.310(2) and (4) Judicial ethics committee and opinions

The proposed amendments to sections (2) and (4) of SCR 4.310 are:

(2) Opinions as to the propriety of any act or conduct and the construction or application of any canon shall be provided by the committee upon request from any justice, judge, trial commissioner or by any

judicial candidate. Any other Supreme Court Rule or Rule of Civil or Criminal Procedure notwithstanding, communications between the questioner and the Judicial Ethics Committee and its members shall be confidential. If the committee finds the question of limited significance, it shall provide an informal opinion to the questioner. If, however, it finds the question of sufficient general interest and importance, it shall render a formal opinion, in which event it shall cause the opinion to be published in complete or synopsis form, without specific identification of the questioner. Likewise, the committee may issue formal opinions on its own motion under such circumstances as it finds appropriate.

(4) Any person affected by a formal opinion of the ethics committee may obtain a review thereof by the Supreme Court by filing with the clerk of that court within thirty (30) days after the end of the month in which it was published a motion for review stating the grounds upon which the movant is dissatisfied with the opinion. The motion shall be accompanied by a copy of the opinion or synopsis as published and shall be served upon the ethics committee and, if the movant is someone other than the party who initiated the request for the opinion, upon the initiating justice, judge or commissioner. The filing fee for docketing such motion shall be as provided by Civil Rule 76.42(1) for original actions in the Supreme Court. The ethics committee may file a response to the motion for review within thirty (30) days after its receipt of the motion. Notwithstanding the provisions of this subsection of the rule, the Supreme Court on its own initiative may review a judicial ethics opinion at any time.

LXI. SCR 7.030 Nomination and election – regular elections

The proposed amendments to section (2), subsections (a), (b) and (c) of section (3), sections (4) and (6) of SCR 7.030 are:

(2) On or before June 1 of the years in which regular elections are to be held under this rule the board shall by majority vote nominate candidates for election to the various commissions as specified in paragraph (c) of this rule. The board shall immediately certify the names of its nominees to the director. On or before July 1 the director shall [mail] publish by appropriate means to the members specified in paragraph (c) of this rule a list or lists of the candidates so nominated.

(3) (a) For the commission for the Supreme Court and the Court of Appeals the board shall nominate one (1) qualified member from each appellate district. The director shall [mail] publish by appropriate means a list of the candidates so nominated to each member residing in the Commonwealth of Kentucky.

(b) For the commissions for each judicial circuit the board shall nominate two (2) qualified members. To the extent practicable, in multi-county circuits the board shall nominate candidates from different counties in the circuit. The director shall [mail] publish by appropriate means a list of the candidates so nominated to each member residing in the circuit.

(c) Lists of the board's nominees for election to the various commissions may be combined as one list and may be included in one [mailing] publication of names.

(4) Any other qualified member may file a written petition for candidacy for the commission for the Supreme Court and the Court of Appeals, signed by himself and not less than ten (10) other members residing in the Commonwealth of Kentucky, or may file a written petition for candidacy for the commission for a judicial circuit, signed by himself and not less than two (2) other members residing in the circuit. In his petition the member shall state that he does not hold any other public office or any office in a political party or organization. All such petitions shall be filed with the director on or before August 15 of the year in which the regular election for members of the commissions is to be held. The director shall acknowledge receipt of each candidate's petition by return mail. All petitions shall be considered public records and shall be available for inspection at reasonable hours. On or before September 1 the director shall [mail] publish by appropriate means to the members specified in paragraph (c) of this rule a list or lists of the candidates, including those nominated by the board and those nominated by petition.

(6) Ballots shall be prepared by the director. The [Ballots for the] various commissions shall be on separate [sheets of paper] ballots but may be included in one mailing. The ballot for each commission shall include the names of the candidates, listed in alphabetical order, and the addresses at which they reside. There shall be printed on each ballot in boldface type the words "This ballot must be received by the director on or before the first Tuesday following the first Monday in November" and the words, "You must vote for two and two only or your ballot will not be counted."

LXII. SCR 7.040 Nomination and election – special elections

The proposed amendments to sections (1) and (2) of SCR 7.040 are:

(1) On or before ten (10) days after receipt of the notice to the director (hereinafter referred to as "Director's notice") of the need for a special election, to fill an unexpired term resulting from a vacancy in the bar representation on any commission, the board shall nominate the bar representative[s] for each vacancy in the same manner as provided in Rule 7.030(2) and (3).

(2) On or before twenty (20) days after the director's notice, the director shall cause to be [mailed] published by appropriate means to each member residing in the circuit or jurisdiction concerned a list of candidates nominated by the board.

BUSINESS LAW SECTION

KBA Business Law Section Annual Meeting Announcement

The Annual Meeting of the KBA's Business Law Section is scheduled to be held at 5:20-6:20 p.m. on June 16, 2011, during the KBA's annual convention.

At the Annual Meeting, the members will consider proposed amendments to the bylaws, the text of which is set forth in full below.

For more information on the purpose of these amendments and to obtain a proxy to vote at the Annual Meeting, please contact Jennifer Raisor, Section Chair-Elect, at jraisor@wyattfirm.com.

PROPOSED AMENDMENTS 3/2/11

AMENDMENTS TO THE BY-LAWS OF THE KENTUCKY BAR ASSOCIATION SECTION ON CORPORATE BANKING AND BUSINESS LAW

The following amendments to the by-laws (the "By-Laws") of the Kentucky Bar Association (the "Association") Section on Corporate Banking and Business Law (the "Section") were duly adopted by two-thirds (2/3) vote of the members of the Section in attendance and voting at the meeting of the Section held during the annual meeting of the Association on June 16, 2011 pursuant to Article VII of the By-Laws:

Section 1.1 of the By-Laws is hereby replaced in its entirety with the following:

1.1 The name of the organization shall be the Business Law Section (the Section).

Section 5.1 of the By-Laws is hereby replaced in its entirety with the following:

5.1 An annual meeting of the Section shall be held during the annual meeting of the Association or as scheduled by the Section prior to the end of the current fiscal year ending June 30th. Unless the Section determines otherwise in any year, the annual meeting shall be scheduled during either the (i) the Biennial Business Associations Law Institute or (ii) Biennial Securities Law Conference, as the case may be, each conducted by the University of Kentucky Office of Continuing Legal Education, or any successor program thereto.

Article VII of the By-Laws is hereby replaced in its entirety with the following:

AMENDMENTS

These By-Laws may be amended at any meeting of the Section by two-thirds (2/3) vote of the members of the Section in attendance and voting, provided that notice of the substance of the proposed amendments shall be distributed to each member of the Section by means of both (i) an e-mail message to the e-mail address the member has furnished to the Section and (i) a notice posted on the Section's website.

I hereby certify that I am the duly elected and qualified Chair of the Section and that on this ____ day of June, 2011, the foregoing amendments to the By-Laws were duly adopted by the members of the Section.

Laura A. D'Angelo, Chair

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JULY 2011 KENTUCKY BAR APPLICANTS

Following is a list of applicants who have applied to take the July 26 & 27, 2011, Kentucky Bar Examination. If anyone has knowledge pertinent to determining the character and fitness of any of the applicants to become a member of the Kentucky Bar, please provide that information to:

Kentucky Office of Bar Admissions
 1510 Newtown Pike, Suite 156
 Lexington, KY 40511-1255
 Phone: (859) 246-2381
 Fax: (859) 246-2385
 E-mail: info@kyoba.org

NOTE: This list is current as of April 5, 2011. Any applications filed after this date will not be included in this list.

SHELTON LAWRENCE ABRAMSON	AUBREY MARIE CARMAN	STEPHANIE REGINA FOX
JEANNINE CLAIRE ABUKHATER	MICHAEL ERB CARR JR	DENNY MARLOWE FOX
JENNIFER LEIGH ADAMS	DANIEL THOMAS CARTER	EMILY HELEN FUNK
ADAM JUDE AHNE	DAVID T CECIL	ANTHONY GEORGE GALASSO
DAVID GORDON AMES	MATTHEW TYLER CHEEKS	BYRON LINWOOD GARY
PAULA DENISE ANDERSON	NATHANIEL VICKERS CHITTICK	MATTHEW NEVILLE GEORGE
CONSTANCE BARR ARCHER	GAYLA MAE CISELL	JONATHAN MATTHEW GIFFORD
DOUGLAS EDWARD ASHER II	JACOB CHESLEY CLARK	LAUREN LEIGH GILBERT
RANIA ABDULLA ATTUM	WILLIAM THOMAS CLAUSON	WILLIAM LUKE GILBERT
OLUWASEYE AWONIYI	EMMETT DANIEL CLIFFORD	JOHN STEPHEN GILLIAM
REBECCA MARIE BABARSKY	MATTHEW COLEMAN COCANOUGH	MELANIE ANNE GOFF
JENNIFER LYNN BAKER	NICHOLAS PAUL COLEMAN	BRIAN WILLIAM GOHMANN
JUDSON ROLSTON BAKER	TIA JENAY COMBS	NATHANIEL HAMPTON GOINS
AMANDA LEIGH BAKER	KATELYN ELISABETH CONROY	JUSTIN PARKER GOOCH
CASEY DOUGLAS BAKER	JACKSON CHARLES COOPER	WHITNEY MORGAN GOOCH
CHRISTOPHER NICHOLAS BALLANTINE	ELIZABETH ANNE COOPER	RYAN TAYLOR GOODE
KATHERINE ANN BARNES	BRIDGET AILEEN CORAZ	TYLER WAYNE GOSSETT
BENJAMIN SEQUOYAH BASIL	ROSALIND CORDINI	MICHAEL JEFFREY GRAY
ANNE CAROLINE BASS	JENNA MICHON CORUM	AUSTIN TYGREET GREEN
KRISTOPHER GERALD BATES	BRYCE LEE COTTON	ZACHARY TAYLOR GREER
LIUDMILA BATISTA	SARA RENEE COWLES	ROSA RAMSEY GROVES
MEGAN LEE BAYER	JENNIFER LYNN COX	MELISSA CLAIRE HABERER
RANDY LEE BAYERS	JESSICA LYNNE CRAVEN	BENJAMIN WILLIAM HAGER
JOSHUA WILLIAM BEAM	MATTHEW FRANCIS XAVIER CRAVEN	BARTLEY KEMBLE HAGERMAN
KORI LEIGH BECK	JACOB WAYNE CROUSE	JEFFREY P HALL
JEFFREY WILLIAM BENEDICT	JAMES EARL FRANCIS CROUSHORN	KAREEM SHAHIR HAMDIAH
ELIZABETH GRACE BENJAMIN	NICOLE RENE CRUMP	GUY PADRAIC HAMILTON-SMITH
BRIAN MICHAEL BENNETT	NATHANAEL SAGE CUTLER	JOSEPH BARON HAMMONS
AARON JOSEPH BENTLEY	JOSEPH RHYS DAGES	COURTNEY MICHELLE HAMPTON
JONATHAN CHRISTOPHER BIALOSKY	RYAN THOMAS DANE	DANIEL EDWARD HANCOCK
JESSICA SALLY JEAN BIDDLE	NEAL EDWARD DARNEL	MEGAN RAE HANDSHOE
JOSEPH ALEXANDER BILBY	BRANDON DEE DAULTON	AUTUMN LEIGH HARBISON
WILLIAM TYLER BIRDWHISTELL	CHRISTOPHER DANE DAVIS	ALEX JAMES HARGROVE
LINDSAY ERIN BISHOP	JONATHAN BARKLEY DAVIS	SUNNI ROSE HARRIS
PHILLIP DAVID BLAIR	KATHRYN CAIN DAVIS	KAREN ELAINE HARTLAGE
JAMES GARLAND BLAND JR	JASON RYAN DELGADO	ALLISON DIANE HARTLEY
LAURA ELIZABETH BLASER	RACHEL MICHELLE DEVOTO	CHARLES CHRISTOPHER HASELWOOD II
MEREDITH ARVIN BOOTH	SCOTT DANIEL DILLEY	PANKHURI HATFIELD
SABRINA DAWN BOWLING	ALLISON RYAN DIXON	JESSICA LYN HAURYLKO
ADAM TAYLOR BOWLING	SEAN ELLIOTT DONALDSON	SARA ANNE HAWKINS
EMILY CAROLYN BOYLE	JILLIAN MAE DOVE	MARY CATHERINE HEAD
DENNA DAWN BROCKMAN	ELIZABETH ANN DUNCAN	DEVIN MCKINNEY HENDRICKS
AMI LEIGH BROOKS	MATTHEW JAMES DUNNINGTON	JOHN MAURICE HENDRICKS
EMILY HELEN BROOKS	AARON MICHAEL DYKE	BRYAN JUSTIN HENLEY
ADAM BAILEY BUCKMAN	BRANDY NICOLE EDEN	JOSHUA DAVID HERSHBERGER
KATHERINE ANN BUMGARNER	JESSICA ERIN EDGELL	TARA NICOLE HESTER
KYLE GARRETT BUMGARNER	BRANDON ONEAL EDWARDS	JOSHUA DANIEL HICKS
JOHN MICHAEL BUNDY	CHRISTOPHER SHEA EGAN	MICHAEL KEITH HIENEMAN
ANDREA MARIE BURKHOLDER	DANIEL B ELLIOTT	CASEY LEIGH HINKLE
SCOTT ELLIS BURROUGHS	JEREMY VERNON ENLOW	PAUL RITCHIE HOBBS
JESSICA DRAKE BURTON	COBIE DANE MCKINLEY EVANS	CHRISTOPHER JAMES HOERTER
SCARLETTE RENEE BURTON	AMY LYNN EVERSOLE	ASHLEY RENEE HOOKER
KEVIN MICHAEL BUSH	MICHELLE KATHRYN EVISTON	ZACHARY ADAM HORN
SARAH FRANCES CABLE	ALEXANDER LEE EWING	JOHN WILLIAM HORNE
JESSE MATTHEW CALL	NATASHA CAMENISCH FARMER	CARA CECILIA HOULEHAN
DAVID MICHAEL CAMERON	SUSAN MICHELLE FARRA	ELISABETH MEGAN HOWARD
SARAH ELIZABETH CAMERON	CHARLES S FINLEY	JOSHUA CABLE HOWARD
DANIEL JAY CAMERON	THOMAS LUKE FLEMING	MEGAN MARIE HUBBARD
ASPEN CAROLINE CARLISLE	CHANTELL CHEREE FOLEY	KATHERINE LANIER HUDDLESTON

EMILIE DENISE HUNT	JOSHUA GILLESPIE MILLER	KRISTEN SUE SIMPSON
JOSHUA ROSS HURLEY	SARAH MICHELE MILLS	MyLINDA KAY SIMS
ALAN B HURST	ANDREW EVAN MIZE	WILLIAM RUSSELL SIPES
SARAH ASHLEY HUYCK	WHITNEY LYNN MOBLEY	SETH CALEB SLONE
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ROOZBEH JAHED	IARA QUADROS MONTORO	AFRICA R SMITH
LAUREN ELIZABETH JANSEN	SANDRA MOON	GABRIEL PATTON SMITH
BRIAN MICHAEL JASPER	HOLDEN FIFE MOORE	DANNY RAY SMITH
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NICOLE MARIE KERSTING	SARAH BETH PAYNE-JARBOE	WILLIS SPURGIN TAYLOR
NICHOLAS TYLER KING	KYLE THOMAS PENCE	BILLY JOSEPH TAYLOR
DORA LASHAE KITTINGER	COURTNEY LAMONT PHELPS	NICHOLAS SEAN THOMAS
STEPHEN ANTHONY KLAUSING JR	MEG ELLEN PHILLIPS	DARYA DANIELLE THOMPSON
JOEL DAVID KOERNER	DAMIAN GRANT PICKERING	LARRIN CORTNEY THOMPSON
ALEXANDER JOSEPH KUEBBING	TONI LYN PISANESCHI	TIMOTHY DAVID THOMPSON
CHRISTINE ELAINE KUGELE	RYAN THOMAS POLCZYNSKI	GREGORY BENARD THOMPSON
MATTHEW FRANKLIN KUHN	CATHERINE ANN POOLE	SARAH MICHELLE TOLLIVER
MICHAEL THOMAS KUNJOO	RICKY LYNN POPE	SALVADOR ALEXANDER TORRES
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BRANDON THOMAS LALLY	ANDREW MILAM POWELL	AUDREY LAYNE TRIGG
ASHLEY TAYLOR SMITH LANT	MARTIN KEITH POYNTER	LAUREL WHITNEY TRUE
EMILY SUSANNE LARISH	AARON AUSTIN PRICE	AMY LEA TURNER
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CAROLYN REECE LAWRENCE	SARAH ELIZABETH RAINEY	HALEY JO VALLANCE
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KATIE LYNN LAX	RACHEL ELIZABETH RATLIFF	EMMA REBECCA VAUGHAN-CHERUBIN
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JESSICA LEIGH ANN MILLER	THOMAS BOURKE SIMMS JR	

Salmon P. Chase College of Law

By Amber Potter
NKU Chase College of Law
Communications Coordinator

Mecklenborg Serves as Distinguished Practitioner in Residence

Daniel P. Mecklenborg, Chase class of 1981, served as the Transactional Law Practice Center's Distinguished



Daniel P.
Mecklenborg

Practitioner in Residence March 16-17. The Distinguished Practitioner in Residence program provides an opportunity for accomplished practitioners to share their experiences and insights about the real-

ities of transactional law practice with the college of law community. During his visit, Mecklenborg participated in lectures, regularly scheduled classes, special workshops, and small group discussions with students, faculty, and alumni.

Mecklenborg is senior vice president, human resources, chief legal officer, and secretary of Ingram Barge Company, in Nashville, Tenn. Ingram is the largest barge transportation company in the country. He joined Ingram in 1996 and is responsible for the company's Legal and Claims; Human Resources; and Safety, Training, and Environmental departments; and the company's Governmental Relations and Sustainability functions. Prior to joining Ingram, he served as associate general counsel of The Ohio River Company, a Cincinnati-based barge transportation company.

In 2003, Mecklenborg completed a four-year term as a member and then chairman of the Inland Waterways Users Board. He currently serves as immediate past chairman of Waterways Council, Inc. and as a member of the Board of the Tennessee Infrastructure Alliance, through which he is active in working to maintain and

modernize the nation's inland navigation system and other facets of our transportation infrastructure. In 2010, Mecklenborg was named a trustee of the Great Rivers Partnership, which works to promote the sustainable development of great rivers on four continents.

NKU Chase's Moot Court Team Finishes as National Champions, Runners-up

Chase students Christopher Allesee and Lawrence Hilton won the Robert F. Wagner National Labor and Employment Law Moot Court Competition held March 16-20 in New York City. Allesee received the Best Final-Round Oralist award, and the team also received the award for the third-best brief. The team was coached by Professor Lawrence Rosenthal, associate dean for academics.

The Wagner Competition is the nation's largest student-run moot court competition, and it is the premier national competition dedicated exclusively to the areas of labor and employment law. Chase defeated the Charlotte School of Law, Mississippi College, University of Arkansas, University of South Dakota, University of Toledo, University of Washington, and University of Wisconsin.

Also, two Chase teams competed at the National Moot Court Competition in Child Welfare and Adoption Law March 18-19 in Columbus, Ohio. Colby Cowherd, Greg Ingalsbe, and Elizabeth



Chase's Moot Court Team wins national championship.

Sprowl took second place, defeating Loyola University Chicago, University of Cincinnati, University of Michigan, and University of San Diego. This team was also coached by Professor Rosenthal.

At the same competition, Joanna Berding, Elizabeth Favret, and Rachael O'Hearen advanced to the quarterfinals and won the Best Brief award. The team was coached by Professor Emily Janoski-Haehlen, assistant director for research & online services, and Professor Donna Spears, assistant director for research & instructional technology.

Chase National Trial Team Finishes as Regional Champions



Chase's National Trial Team wins regional championship.

Chase's National Trial Team won the National Trial Competition Regionals held February 17-19 at the University of Louisville Louis D. Brandeis School of Law. The competition was sponsored by the Texas Young Lawyers Association and the American College of Trial Lawyers.

Lawrence Hilton and Danielle Reesor were undefeated in five rounds finishing in first place. They advanced to compete in the national competition April 6-10 in Houston, Texas, against the top 25 teams in the nation.

The team was coached by Professor Kathleen Johnson. Special thanks go to local practitioners and alumni who also helped to prepare the team: William Gustavson '78, Judge Steven Jaeger '78, Ronald Johnson, Jr., Michael Lyon '75, Tifanie McMillan, Robert Sanders, Richard Smith-Monahan, and Meagan Lorenzen Tate '10. ☺



University of
Louisville
School of Law

UK Law Trial Teams Succeed this Spring

Two University of Kentucky College of Law trial teams advanced to national-level competitions in March.

For the fifth consecutive year, the University of Kentucky National Trial Competition Team, composed of third-year students Adam Bowling and Joshua Hicks, won the Seventh Circuit regional round of the American College of Trial Lawyers National Trial Competition, sponsored by the Texas Young Lawyer's Association. The victory would not have been possible without coach Allison Connelly, and teammates Maggie Gigandet and Guy Hamilton-Smith, who tied for eighth place in the competition, and helped Bowling and Hicks to prepare. This is the fifth year in a row that a UK Law team has won the regional competition. They will go on to compete at the National Trial Competition, April 6-10 in Houston.

In addition, the UK Black Law Students Association (BLSA), comprised of Kristy Avery, Chris Henderson, Kirby Smith and Nicole Tarrence, came in third place in the National Black Law Students Association Midwest regional round of the Thurgood Marshall Mock Trial Competition, held in March. They were coached by 2008 UK Law grad Jackie Alexander. Their placement allowed them to compete in the national finals at the 43rd annual NBLSA National Convention, March 9-13, in Houston.

Both competitions were established in order to help future lawyers develop courtroom skills and to expose the students to the nature of trial practice. Everyone at UK Law is so proud of our mock trial teams. "[They] have achieved an incredible level of success, but the real success story is what these advocates do with their talent and skill when they graduate," Connelly said. "They are changing lives, one case at a time." ©

Snap the Whip

We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

— Oliver Wendell Holmes, Jr.,
The Path of the Law,
10 Harv. L. Rev. 457, 478 (1897)

Oliver Wendell Holmes exhorted the lawyers of his time to "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." I propose, in a roundabout way, to trace Holmes's path through the law as a guide to the way that the University of Louisville and its friends must travel.

The University of Louisville's capital campaign (described at <http://chartingourcourse.org>) challenges the university, its graduates, and its friends to "chart our course" by raising \$750 million in private support by 2013. To state this sum, or the Law School's more modest share of that goal (roughly \$22.5 million), scarcely does justice to the campaign or the institution that it serves. Nor does it suffice to outline the Law School's needs. Those needs, to be sure, are pressing. The Law School needs a building whose visual grandeur and steely practicality befit its goal of training the finest lawyers, entrepreneurs, and public servants our society deserves. Its faculty, as accomplished as it is distinguished, aspires to master the law and all the allied disciplines that inform it. In a society that is at once diverse and economically unstable, access to legal education hinges as never before on scholarship support.

All of these aspirations — physical integrity, academic distinction, educational access — reflect a larger ambition, a singular mission binding all of us who believe in the power of law to rebuild society and transform lives for good. Every lawyer's journey of a lifetime begins with a thousand days, the three-year window of opportunity in which legal education can shape the ethos of the entire profession.

Holmes extolled the "remoter and more general aspects of the law" as sources of "universal interest" and as "food" for "intellect[s] great enough to win" all prizes, material and otherwise, offered by a life in the law. Translation: Connect what you do in law with everything else that matters to you. Connect law with all your passions, wherever they may lie.

Let me to the marriage of true minds admit the unity of portraiture and poetry. Pictures are putatively worth a thousand words, and the very best works of visual art often inspire poets to respond. Jean-François Millet's *L'homme à la houe*, for instance, inspired Edwin Markham's "Man with the Hoe," and W.H. Auden wrote "Le Musée des Beaux Arts" as an extended answer to Pieter Brueghel, *De Val van Icarus*. Look above, for you will see something amazing, such as the swing of Pleiades or even boy falling out of the sky.

My mind has always linked Winslow Homer's 1872 depiction of American childhood, *Snap the Whip*, with "Lucinda Matlock," one of the most powerful voices in Edgar Lee Masters, *Spoon River Anthology* (1916). For most lawyers, law school caps an active youth, the transition from "dances at Chandlerville" and "snap-out at Winchester" to the serious work of a lifetime. In the poem that bears her name, Lucinda Matlock surveys all that passes from her youth to her death and delivers one final lecture from her grave.

The game that Lucinda Matlock called "snap-out" was the same game that Winslow Homer called "snap the whip" in his iconic painting. "Snap the whip" represents the application of centrifugal force to children's arms. Its thrill consists of being propelled into orbit,



Winslow Homer's "Snap the Whip" image provided by Wikimedia, http://commons.wikimedia.org/wiki/File:Snap_the_Whip_1872_Winslow_Homer.jpg

like Icarus in his fleeting moment of liberation. For our purposes, it depicts what legal education needs to accomplish at this moment of historic transition.

For much of American history, legal education was an overwhelmingly professional exercise. Typically an aspiring lawyer became apprentice to an experienced lawyer, who in time might bequeath, sell, or otherwise transfer the practice to the former apprentice. From the mid-twentieth century onward, law schools progressively transformed the experience of legal education according to a vision that Holmes and *The Path of the Law* would have found quite compelling. Holmes accurately predicted that the lawyer of the future would become a student "of statistics and [a] master of economics."

I enthusiastically embrace the interdisciplinary approach to contemporary legal education, and I take great pride in the way my colleagues at the University of Louisville have woven the full extent of human learning in to their teaching, their scholarship, and their service. Ours is a program of legal education informed by statistics, economics, and all other branches of the humanities, social sciences, and natural sciences.

At the same time, however, we must acknowledge a trap that unfolded as universities absorbed a system of legal education formerly dominated by practicing lawyers. As law schools drifted further from the professional roots of legal education, they became more prone to believe that they should focus, perhaps even exclusively, on teaching their stu-

dents to "think like lawyers." This of course is a caricature of legal education, and a terribly destructive one at that. Law schools should do more, much more, to prepare their students for the demands of contemporary practice. Law does not thrive on theory or doctrine alone, but on every value given voice in the broader world of markets and morals. Where and how will coming generations of lawyers learn to hone their craft and serve their clients?

To answer this question, we must flee the orbit of the myth of law as a strictly intellectual enterprise. We need something to help us achieve escape velocity. We need, metaphorically speaking, to snap the whip.

Law serves real people with real problems, and at its best law delivers solutions that work. Poetry reinforces what we know too well from life. Lucinda and Davis Matlock "were married and lived together for seventy years, / Enjoying, working, raising the twelve children, / Eight of whom [they] lost / Ere [Lucinda] had reached the age of sixty." The work of the University of Louisville is Socratic method and the time-honored march through the rule against perpetuities, but it is so much more. It is the 8,000-10,000 hours that our students perform every year on behalf of our society's neediest, through our public service program and the University of Louisville Law Clinic. It is the capstone experience of publishing a note in the *University of Louisville Law Review* or representing UofL in an intercollegiate moot court competition. It is working hand in hand with a faculty mentor as a research associate or serving on the Student Bar Association.

The thread that connects all of these experiences is learning by doing. Nothing reinforces the learning process as powerfully and as permanently as personal experience. *Tell me and I will forget*, said the wise one. *Show me and I might remember*. *Involve me, and I shall understand*. In her own domain, Lucinda Matlock understood:

I spun, I wove, I kept the house, I nursed the sick,
I made the garden, and for holiday
Rambled over the fields where
sang the larks,
And by Spoon River gathering
many a shell,
And many a flower and medicinal
weed —
Shouting to the wooded hills,
singing to the green valleys.

Relative to a purely classroom-based model of legal education, learning by doing does suffer from one admitted drawback. It is expensive. The economics of higher education dictate as much. Lecture halls hold several dozen students at a time. In skills courses and any clinical setting, far fewer students command the instructor's attention. The labor cost per credit hour of instruction is greater in experiential learning. It is worth every penny. Private support opens the door to a far richer experience-based law school experience, one that takes lessons learned in the classroom and translates them to real-world settings with actual consequences.

Economic upheaval in the legal profession reinforces the case for learning by doing. In a mythical age that might have been and most certainly no longer exists and will never return, large law firms could afford to pay a premium salary to the choicest students — but only an elite sliver of every graduating class. Presumably these top graduates could secure their positions without regard to practical learning during law school because their firms' most reliable clients could subsidize on-the-job legal training. No depiction of the legal profession could be further from today's reality — or more odious to the vast majority of lawyers. Clients expect and deserve impeccable professionalism, clear communication, and seasoned judgment. To the "sorrow and weariness" of modern times, to the "[a]nger, discontent and drooping hopes" that dominate certain corners of the legal profession, I offer an answer inspired by Lucinda Matlock. Law is too strong for you — it takes law to love law. "Life is too strong for you — It takes life to love Life." ☺

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING JANUARY 14-15, 2011

The Board of Governors met on Friday and Saturday, Jan. 14-15, 2011. Officers and Bar Governors in attendance were, *President B. Davis; President-Elect M. Keane; Vice President D. Myers; Immediate Past President C. English, Jr., and Young Lawyers Section Chair N. Billings. Bar Governors 1st District – J. Freed, S. Jagers; Bar Governors 2nd District – R. Sullivan, J. Harris; 3rd District – R. Hay, G. Wilson; 4th District – D. Ballantine, D. Farnsley, 5th District – A. Britton, F. Fugazzi, Jr.; 6th District – D. Kramer, T. Rouse; and 7th District – W. Wilhoit.* Bar Governor absent: B. Rowe.

In Executive Session, the Board considered two (2) discipline cases, one (1) discipline default case and one (1) restoration case. Malcolm Bryant of Owensboro, Steve Langford of Louisville, Roger Rolfes of Covington and Dr. Robert Strode of Frankfort, non-lawyer members serving on the Board pursuant to SCR 3.375, participated in the deliberations.

In Regular Session, the Board of Governors conducted the following business:

- Heard a status report from the Board Policy Review Subcommittee, 2011-2012 Budget & Finance Committee, Kentucky Lawyer Assistance Program, Rules Committee and Office of Bar Counsel.
- Department of Public Advocacy Commission (DPA) Public Advocate Ed Monahan and DPA Commission Member Jerry Cox reviewed with the Board the organization of the DPA and presented their 2010 Annual Report ending on June 30, 2010.
- Young Lawyers Section Chair Nathan Billings reported that the YLS Executive Committee will be having their quarterly meeting on January 15. He also reported that Rebekkah Rechter, YLS Chair-Elect, will be attending the March Board meeting to familiarize herself with the process and the Board members. Mr. Billings reported that the section has a lot going on and if the Board had any questions to please contact him.
- Director of Accounting/Membership Nicole Key presented the financial and investment report.
- President-Elect Margaret E. Keane

reported that the Access to Justice Commission is scheduled to have its first meeting on January 28 at the Bar Center in Frankfort. There are 27 members on the Commission, including judiciary, Margaret E. Keane as KBA representative, and a variety of other representatives. She advised that the purpose of the Commission is to attempt to provide pro bono services in Kentucky for those individuals who cannot afford legal counsel.

- President Bruce K. Davis appointed a Task Force on Dues Structure Evaluation with Douglas Myers serving as Chair, and Ms. Keane, Mr. Rouse, Director for CLE Mary Beth Cutter, John Meyers, Nathan Billings and himself as Task Force Members.
- Executive Director John Meyers reported there would be a contested election in the 7th Supreme Court District for Bar Governor between Steve Burchett of Ashland and Earl “Mickey” McGuire of Prestonsburg. The Canvassing Board has been appointed and will be meeting on Jan. 20, 2011.
- Approved KBA mileage reimbursement increase to \$.41 effective Jan. 10, 2011.
- Mr. Meyers reported that the KBA is doing a feasibility study for a complete upgrade for their database which will allow the KBA to be on-line a lot more with the membership and accept credit card payments for dues. Mr. Meyers reported that the process is in the early stages and he will report back to the Board as the project progresses.
- President Davis reported that several of the officers and bar governors were planning to attend the Louisville Bar Association Bench & Bar Dinner scheduled for Thursday, Jan. 20, 2011.
- President Davis reported that the 2011 Annual Convention plans are on schedule. Mr. Davis reported that the following featured speakers have been confirmed: “Picking Cotton” presentation with Ronald Cotton and Jennifer Thompson on Wednesday; Jonathan Turley on Thursday and Erin Brockovich on Friday. Mr. Davis reported that the Board had been invited to attend the DPA Luncheon scheduled on Tuesday, June 14.
- President Davis reported that Bar Governor R. Michael Sullivan had been appointed to serve as Chair of the Paralegal Committee. Mr. Davis reported that he would like to have one member from each Supreme Court District. It was the consensus of the

Board that Del O’Roark should be appointed to serve on the Committee.

- President Davis reported that Charles E. Ricketts, Jr. of Louisville has been appointed to serve as Chair of the Unauthorized Practice of Law Committee. Mr. Davis reported that there is a need for one or two more members. Bar Governor M. Gail Wilson recommended the appointment of Thomas G. Simmons of Monticello.
- President Davis advised the Board that nominees for the IOLTA Board of Trustees from the 5th and 7th Supreme Court Districts will need to be submitted for consideration at the March Board meeting.
- Approved the appointment of Jonathan Shaw of Paintsville to the Kentucky Bar Foundation to fill the vacancy created by the resignation of Lois Kitts and complete the remainder of her term for six (6) months ending on June 30, 2011.
- President Davis advised the Board that three nominees for each of the 5th and 7th Supreme Court Districts for the CLE Commission will need to be submitted at the March Board meeting.
- Approved the recommendation of U.S. District Court Judge Jennifer Coffman as the recipient for the 2011 Distinguished Judge Award.
- Approved the recommendation of Leslie Whitmer, U.S. District Court Clerk for the Eastern District, as the recipient for the Bruce K. Davis Bar Center Award.
- Ethics Committee Chair Linda Ewald presented an Ethics Opinion regarding Third Party Litigation Financing. Following discussion, the draft opinion was referred back to the Ethics Committee for further consideration and being represented to the Board at the May Board meeting after further review by the Committee.
- Approved the recommendation of the Ethics Committee to withdraw Ethics Opinion E-324.

To KBA Members

Do you have a matter to discuss with the KBA’s Board of Governors? Board meetings are scheduled on

June 14, 2011
July 22-23, 2011

To schedule a time on the Board’s agenda at one of these meetings, please contact John Meyers or Melissa Blackwell at (502) 564-3795.

KENTUCKY BAR NEWS

KENTUCKY BAR ASSOCIATION WELCOMES EMPLOYEES

The KBA is pleased to welcome two employees to the Kentucky Bar Center in Frankfort.



Michele M. Pogrotsky

Michele M. Pogrotsky serves as director for the Accounting/Membership Department of the Kentucky Bar Association. She received her B.B.A. in Accounting from East Texas State University in 1990 and is a Certified Public Accountant. She is also a member of the Kentucky Society of Certified Public Accountants. Formerly, Pogrotsky served in this position at the KBA from 1998-2005. Most recently, she was

employed in local government and as a consultant for Kentucky's guardianship program.

Yvette Hourigan joins the staff as director of the Kentucky Lawyer Assistance Program. She is a graduate of Murray State



Yvette Hourigan

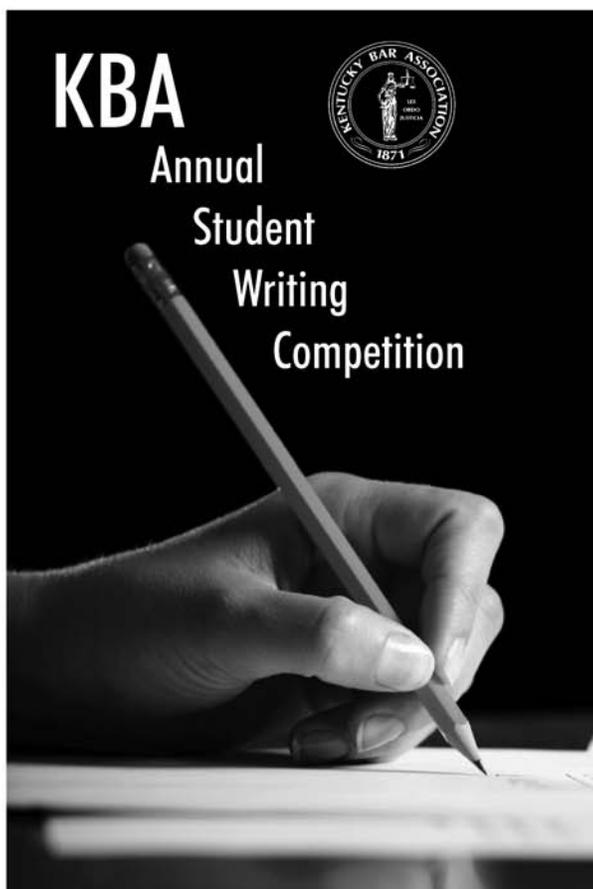
University and the University of Kentucky College of Law. Upon graduation, she was a law clerk for the Honorable Justice Joseph Lambert in the Kentucky Supreme Court. She began her legal career in Lexington, where she practiced primarily in automobile product liability defense. In 1998, she opened the Law Office of Yvette Hourigan, also in Lexington. Her practice has been focused primarily on plaintiff's personal injury work, including nursing home negligence, automobile wrecks, and other civil litigation. She has been sober, gratefully, since Jan. 1, 2003. 

Kentucky Office of Bar Admissions would like to hear from Louisville-area attorneys interested in serving as proctors to assist with the July 2011 KY Bar Exam. The exam will be held July 26 & 27, 2011, at the Crowne Plaza Hotel in Louisville, Ky. Interested attorneys should be licensed at least three years. Please call 859-246-2381, Ext. 226, for more information.

■ In Memoriam

Norbert J Bischoff	Florence
James Benjamin Brown	Florence
Robert Lee Gushee	Greenville
William B. M. Hingeley	Baltimore
Larry Lynn Johnson	Louisville
Marrs A. May	Pikeville
Robert Pride Moore	Madisonville
John Gerard Patten	Fort Thomas
Ronald Glen Polly	Whitesburg

**Mark your calendar • June 15-17, 2011 •
KBA Annual Convention • Lexington**



Call for Entries - Deadline June 1, 2011

The Kentucky Bar Association invites and encourages students currently enrolled at the University of Kentucky College of Law, the University of Louisville Louis D. Brandeis School of Law, and the Northern Kentucky University Salmon P. Chase College of Law to enter the KBA Annual Student Writing Competition. This competition offers these Kentucky legal scholars the opportunity to earn recognition and a cash award. First, second, and third place awards will be given. Entries must be received by June 1, 2011.

**1st Place - \$1,000 * 2nd Place - \$300
3rd Place - \$200**

Students may enter their previously unpublished articles. Articles entered should be of interest to Kentucky practitioners and follow the suggested guidelines and requirements found in the "General Format" section of the Bench & Bar Editorial Guidelines at www.kybar.org/103. For inquiries concerning the KBA Annual Student Writing Competition, contact Shannon H. Roberts at sroberts@kybar.org or call (502) 564-3795 ext. 224.

Submit entries with contact information to:

Shannon H. Roberts
Communications Department
Kentucky Bar Association
514 West Main Street
Frankfort, KY 40601-1812

*Also includes possible publication in the *Bench & Bar*.

Kentucky Bar Foundation Welcomes New Fellows

*Our deepest
appreciation goes to
these distinguished
members of the
Kentucky Bar for
their financial
support of the
Foundation's
charitable efforts.*



John N. Billings practices law in Lexington. A graduate of Centre College of Kentucky and the Regent University School of Law, he was admitted to the Kentucky Bar in 2000. Mr. Billings is also a member of the KBA Young Lawyers Section where he currently serves as Chair on the Executive Committee, and is an Ex-Officio member of the Kentucky Bar Foundation Board of Directors. He is a Life Fellow.

Dwight M. Burton practices law in Bowling Green. A graduate of the University of Kentucky and the University of Akron School of Law, he was admitted to the Kentucky Bar in 2006 and is also a member of the Tennessee Bar. Mr. Burton is a Life Fellow.

John Gregory Catron of Louisville currently serves as Vice President, Associate General Counsel & Chief Compliance Officer for Humana, Inc. A graduate of Brescia University and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 1987. Mr. Catron is a Life Fellow.

James L. Clarke practices law in Maysville with the law firm of Clarke & Clarke. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1969. Mr. Clarke is a Life Fellow.

Dawn Franklin Croft of Louisville currently serves as a corporate attorney for Yum! Brands, Inc. A graduate of Yale University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 2007 and is also a member of the Indiana Bar.

Bill Cunningham of Princeton currently serves as Justice of the Kentucky Supreme Court representing the 1st Supreme Court District. He served as Commonwealth's Attorney for the 56th Judicial District from 1976 to 1988. From 1991 to 2007 he served as Circuit Court Judge for the 56th Judicial Circuit. A graduate of Murray State University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1969. Justice Cunningham is a Life Fellow.

Steven D. Downey practices law in Bowling Green. A graduate of the University of Tennessee and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 1978. Mr. Downey is a Life Fellow.

Howard Downing practices law in Nicholasville. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1963. Mr. Downing is a Life Fellow.

Ben Duncan of Park Hills is a graduate of the University of Kentucky and the Salmon P. Chase College of Law, and was admitted to the Kentucky Bar in 1983. Mr. Duncan is a Life Fellow.

Katie Gilliam practices law in London with the law firm of Gilliam & Payne. A graduate of Lincoln Memorial University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1993.

Kathleen Harris of Lexington is a graduate of the University of Kentucky and the University of Kentucky College of Law, and was admitted to the Kentucky Bar in 1977. Ms. Harris is a Life Fellow.

David F. Latherow practices law in Ashland with the law firm of Williams, Hall & Latherow. A graduate of the University of Notre Dame and the Ohio Northern University Claude W. Pettit College of Law, he was admitted to the Kentucky Bar in 1995 and is also a member of the Ohio Bar.

Kristin N. Logan practices law in Louisville with the law firm of Landrum & Shouse. A graduate of the University of Kentucky and the University of Louisville Brandeis School of Law, she was admitted to the Kentucky Bar in 2001. Ms. Logan also currently serves as an At Large Representative of the KBA Young Lawyers Section.

Kurt W. Maier practices law in Bowling Green with the law firm of English, Lucas, Priest & Owsley. A graduate of Denison University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1979 and is also a member of the Tennessee Bar. Mr. Maier is a Life Fellow.

J. Duncan Pitchford practices law in Paducah with the law firm of Whitlow, Roberts, Houston & Straub. A graduate of Centre College of Kentucky and the Washington and Lee University School of Law, he was admitted to the Kentucky Bar in 2000. Mr. Pitchford is a Life Fellow.

Jerome Park Prather practices law in Lexington with the law firm of Garmer & Prather. A graduate of Vanderbilt University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 2006. Mr. Prather is a Life Fellow.

E. Frederick Straub, Jr. practices law in Paducah with the law firm of Whitlow, Roberts, Houston & Straub. A graduate of Centre College of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1980. Mr. Straub currently serves as a member of the Kentucky Bar Foundation Board of Directors.

Adrienne Godfrey Thakur practices law in Lexington with the law firm of Henry Watz Gardner & Sellars. A graduate of DePaul University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 2008. Ms. Thakur also currently serves as an At Large Representative of the KBA Young Lawyers Section.

W. Todd Walton II of Flemingsburg currently serves as District Judge for the Nineteenth Judicial District. A graduate of the University of Kentucky and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1983.

WHO, WHAT, WHEN & WHERE

ON THE MOVE



Carson Porter

Rimon Law Group, a growing law firm comprised of partner-level attorneys, announced its expansion to Washington, D.C., with the addition of its newest partner, **Carson Porter**.

Porter brings decades of experience in both business and law to the firm as well as a strong track record of success in non-profit entities. Porter joins the firm as partner in Rimon's Healthcare, Mergers and Acquisitions and Non-Profit Practice Groups. He argued and won the first case to be heard by the Medicare Provider Reimbursement Review Board and acted as the lead counsel on five Medicare appeals filed on behalf of the Kentucky Hospital Association and its member hospitals. Porter offers a rich background as both a lawyer and business leader. Porter has also been active in the non-profit world, having served as an officer and director of several national and regional organizations.



David L. Haney

The law firm of **O'Bryan, Brown & Toner, PLLC**, is pleased to announce that **David L. Haney** has joined their Louisville office as an associate attorney.

Haney graduated, *cum laude*, from

Transylvania University with a double major in Business Administration and Spanish Language & Literature. He received his J.D. from the University of Louisville Louis D. Brandeis School of Law, where he was executive editor of the *University of Louisville Law Review*. Haney is licensed to practice law in Kentucky and his primary area of practice will be insurance defense litigation with a special emphasis on medical malpractice defense, product liability, negligence and tort claims.

Steven D. Jaeger, Esq., is proud to announce the opening of **The Jaeger**

Firm, PLLC, a full service law firm located at 23 Erlanger Road, Erlanger, and on the web at www.thejaegerfirm.com. Steve can be contacted at (859) 342-4500 or by email at sdjaeger@thejaegerfirm.com. Steve is



Steven D. Jaeger

also pleased to announce that he was elected to his second consecutive term on Edgewood's City Council, located in Kenton County.

Steven R. Jaeger, Esq., is pleased to

provide mediation services to the Kentucky legal community. After retiring from more than 23 years of judicial service to the Commonwealth of Kentucky in September, 2010,



Steven R. Jaeger

Jaeger joined his son, Steve, as a partner of The Jaeger Firm, PLLC, where he is a general practitioner and trained mediator. He can be reached at (859) 342-4500 or by email at srjaeger@thejaegerfirm.com.



LaToi D. Mayo

Littler Mendelson, P.C., the nation's largest employment and labor law firm representing management, welcomed **LaToi D. Mayo** to the firm. Mayo is a shareholder in Littler's Lexington office.

Mayo is a former member of Wyatt Tarrant & Combs LLP's Labor & Employment Service Team. Her practice focuses on labor and employment, and immigration law. She is a member of the National Bar Association's John Rowe Chapter, was co-chair of the Continuing Legal Education Committee for the 2008 Kentucky Bar Association Convention, and is a former legal writing instructor at the University of Kentucky College of Law. Mayo is actively involved in her community. She is a member of the Lexington-Fayette Urban County Ethics Commission and

serves on the Legal Aid of the Bluegrass Board. She also volunteers her time to the Fayette County Bar Association Pro Bono Volunteer Program, the Lawyers Are Reading to Kids Program, and the University of Kentucky College of Law. Mayo was named the "Outstanding Young Lawyer" in Kentucky 2008 by the Kentucky Bar Association after having received the "Outstanding Young Lawyer Award" in 2006 from the Fayette County Bar Association. Mayo received her J.D. from the University of Kentucky College of Law and B.A., *cum laude*, from the University of Kentucky.

We are pleased to announce that the law firm of **Bach Hamilton LLP** has changed its name to **Bach, Hamilton & Armstrong LLP**. The firm's partners are **Sam Bach, Curt Hamilton & Jon Armstrong**. The firm continues to practice all areas of personal injury law, including auto accidents, trucking accidents, wrongful death, and workers compensation. Bach, Hamilton & Armstrong LLP is located at 110 North Main Street in Henderson.



Shelley D. Chatfield

Shelley D. Chatfield recently joined **English Lucas Priest & Owsley, LLP**, as an associate attorney. She practices mainly in the areas of education, product liability and employment law. She is a native of

Owensboro who recently relocated to the area from Chicago. Chatfield has a Bachelor of Arts degree from Washington University in St. Louis and a J.D. from the University of Kentucky College of Law, where she was the notes editor of the Law Journal.

The Zoppoth Law Firm is pleased to announce that **Gray Caudill** has joined the firm as an associate. Caudill received his B.A. in Language and Literature from the University of North Carolina at Asheville in 2001, and his J.D. from Northern Kentucky University Salmon P. Chase College of

WHO, WHAT, WHEN & WHERE

Law in 2006. Caudill will concentrate his practice at The Zoppoth Law Firm in the areas of Business and Commercial Litigation.



Brian D. Stempien

Travis & Herbert Attorneys are pleased to announce that **Brian D. Stempien** has become associated with the firm. Brian previously served as an officer and attack helicopter pilot in the United States Marine

Corps and is a graduate of the University of Louisville Louis D. Brandeis School of Law and Vanderbilt University. His areas of practice now include military law, insurance law, business law, and general civil litigation.



Joshua M. P. Cooper

Cooper & Cooper Law Offices is pleased to announce that **Joshua M. P. Cooper** has been appointed city attorney for West Point, Ky. Cooper also practices in the areas of commercial collections, estates, family law, and civil litigation.



Emily W. Newman

Reminger Co, LPA, is pleased to announce the addition of attorney **Emily Weaver Newman** to its Louisville office. Newman relocated her practice from Reminger's Toledo office, where she has

concentrated her career in defending clients with professional liability, employment practices liability, mortgage banking litigation, medical malpractice and nursing home negligence issues. A member of the American Bar Association, Kentucky Bar Association, Ohio State Bar Association, State Bar of Michigan, Toledo Bar Association and the Ohio Women's Bar Association, Newman has also served as an adjunct faculty member of the University of

Toledo College of Law, advising its Trial Advocacy Program and currently assists with the College of Law's Dean's Technology Council.

K. Lance Lucas and **Kenneth J. Dietz** are pleased to announce the formation of **Lucas & Dietz, PLLC**, with their primary office located at 1511 Cavalry Lane, Suite 201, Florence, KY 41042. **Christopher G. Newell** and **Lance O. Yeager** have joined the firm as associates and will practice in the firm's Louisville office located at 10503 Timberwood Circle, Suite 213, Louisville, KY 40223. The firm will concentrate its practice in the area of workers' compensation, insurance defense, business litigation and subrogation.



Lori H. Flanery

Lori Hudson Flanery was appointed secretary of the Kentucky Finance & Administration Cabinet by Gov. Steve Beshear on April 1, 2011. Since December 2007, she served as deputy secretary of Finance & Administration and interim chief information officer of the Commonwealth of Kentucky.



Thomas R. Coffey

Morgan & Pottinger is pleased to announce that **Thomas R. Coffey** has joined the firm as a senior associate. Coffey's practice will focus on commercial litigation, business disputes and criminal defense. Coffey brings

a wealth of litigation experience to Morgan & Pottinger. Most recently, he served as an assistant commonwealth attorney for Jefferson County. Prior to moving to Kentucky, he was an assistant district attorney for Montgomery County in Pennsylvania. In addition to his litigation experience, he has worked for two U.S. senators and was the Brain Injury Association of America's policy analyst. Coffey graduated in 2006 from Notre Dame Law School where he was named

to the school's moot court team. He earned a Bachelor of Arts degree from Providence College in 1995, as well as a Master of Theological Studies degree from Harvard Divinity School in 2000. Coffey is a member of the Louisville, Kentucky and Pennsylvania Bar Associations.

Middleton Reutlinger is pleased to announce that two attorneys have joined the firm. **G. David McClure, Jr., Ph.D., RAC** is a registered patent attorney who



G. David McClure, Jr.

advises clients developing and marketing products regulated under the US Federal Food, Drug, and Cosmetic Act. McClure provides counsel concerning regulatory and intellectual property strategy in addition to

representing clients before agencies such as the US Patent and Trademark Office and the Food and Drug Administration (FDA). He received his J.D. from the University of Kentucky College of Law, his Ph.D. in Biochemistry from the University of North Texas and B.A. from Harvard University. **Loren T. Prizant** practices primarily in the areas of labor & employment,



Loren T. Prizant

defending individual and class action employment matters, workers' compensation claims, unemployment claims and labor disputes in a variety of forums, including federal, state and administrative agencies and courts. Prizant also provides advice to employers on personnel policies and procedures, employee discipline, sexual harassment investigations and termination decisions. Prizant received his J.D. from the University of Louisville Louis D. Brandeis School of Law, *magna cum laude*, and B.A. from Boston University, *magna cum laude*.

The Louisville law firm of **Middleton Reutlinger** is pleased to announce the appointment of **John F. Salazar** to the firm's management committee. He is an

WHO, WHAT, WHEN & WHERE



John F. Salazar

equity director in the firm and chairs the Intellectual Property Practice Group. Salazar is a registered patent attorney concentrating his practice in the areas of patents, trademarks, copyrights and strategic portfolio

management. He received his law degree from the University of Louisville Louis D. Brandeis School of Law in 1994 and both a Master of Engineering and Bachelor of Engineering Science with a Minor in Business from the University of Louisville Speed Scientific School.



Aaron Esmailzadeh

Gwin Steinmetz & Baird is pleased to announce that **Aaron Esmailzadeh** has joined the firm as an associate.

Esmailzadeh obtained his J.D. from the University of Louisville Louis D. Brandeis School of

Law. He will concentrate his practice in the areas of insurance and transportation litigation.

Greenebaum Doll & McDonald PLLC is pleased to announce that **Jennifer J. Cave, James W. Herr, Christopher W. D. Jones, Jesse A. Mudd** and **V. Brandon McGrath** have been elected as members of the firm. Cave is based in the firm's Lexington office and is a member of the Environment, Energy & Natural Resources Practice Group. Cave received her bachelor's degree, *cum laude*, from the University of Kentucky and her law degree, *magna cum laude*, from Seattle University School of Law. Herr is based in the firm's Louisville office and is a member of the Litigation and Dispute Resolution Group. Herr received his bachelor's degree, *summa cum laude*, from the University of Kentucky and his law degree, *cum laude*, from the University of Louisville Louis D. Brandeis School of Law. Jones is based in the firm's Louisville office

and is a member of the Corporate and Commercial Group, and is the Mergers & Acquisitions Team Co-Chair. Jones received his bachelor's degree from Vanderbilt University and his law degree from the University of Louisville Louis D. Brandeis School of Law. Mudd is based in the firm's Louisville office and is a member of the Litigation & Dispute Resolution Practice Group. Mudd received his bachelor's degree from the University of Kentucky and his law degree, *magna cum laude*, from the University of Louisville Louis D. Brandeis School of Law. McGrath is based in the firm's Cincinnati office and is a member of the Litigation and Dispute Resolution Practice Group. McGrath received his bachelor's degree from the University of Kentucky and his law degree from the University of Cincinnati College of Law.



Gregory P. Parsons

Stites & Harbison, PLLC, recently announced that attorney **Gregory P. Parsons** is the new office executive member of the Lexington office. Parsons replaces attorney Kenneth R. Sagan, member of the firm, in

this role. Parsons is a member and former chair of the Construction Service Group. He is also a former member of the firm's management committee. His practice focuses on litigation, with a particular emphasis on representing clients in construction and business disputes. Parsons also drafts and reviews construction contracts and participates in alternative dispute resolution as an advocate and neutral. He has earned the status of LEED Green Associate. Parsons is a member of the American Bar Association's Forum on the Construction Industry and the CRP Institute for Dispute Resolution.

Jonathan Miller, outgoing secretary of finance and administration to Gov. Steve Beshear, made the move from state government to private practice, joining **Frost Brown Todd's** Lexington office as counsel. As secretary of

finance and administration, Miller chaired pension reform efforts, led the way on the administration's broadband expansion program, spear-headed the governor's e-transparency initiative, and launched a first-in-the-country Green Bank to fund public energy efficiency initiatives. Miller has more than 20 years of experience in the practice of law and government service and will join Frost Brown Todd's Government Services Practice Group.

The law firm of **Fulkerson & Kinkel, PLLC**, is pleased to announce that it has changed its name and is now known as **Fulkerson, Kinkel & Marrs, PLLC**. The firm's named members are **Calvin Fulkerson, Steve Kinkel** and **Melanie Marrs**. The firm continues to practice litigation defense focusing on professional liability defense. The firm's office is located at 239 North Broadway, Lexington. Fulkerson, Kinkel & Marrs, PLLC is also pleased to announce that **Todd D. Willard** has rejoined the firm and will once again be practicing in the area of insurance defense litigation.

IN THE NEWS

James A. Dressman III, Mark D. Guilfoyle and **Alan J. Hartman** partners in the law firm of Dressman Benzinger LaVelle PSC, were recognized by *Cincy Magazine* as three of the top lawyers in the tri-state area. Dressman heads the commercial law and banking practice at DBL. His practice includes banking law, commercial transactions, tax law, probate, estate planning and real estate.

Deeply committed to serving the community, **Dressman** is a member of the Freestore Foodbank Foundation and a prior board member and past president of Senior Services of Northern Kentucky. Dressman obtained a law degree from the University of



James A. Dressman III

Kentucky College of Law in 1977 and is a member of the Ohio State, Northern Kentucky, and Kentucky Bar

WHO, WHAT, WHEN & WHERE

Associations. He is the chair of the Kentucky Bar Association Audit Committee. **Guilfoyle** practices extensively in the area of administrative law, guiding clients through the bureaucracies and administrative processes of state and local governments in the Commonwealth of Kentucky. He chairs the firm's



Mark D. Guilfoyle

Administrative Law Section. Guilfoyle also represents health care providers in administrative matters, and he represents employers in employment and labor relations matters. He is chairman of the Board of Catholic Charities for the Diocese of Covington, and he also serves as secretary of the Serra Club of Northern Kentucky, a group devoted to promoting vocations to the Roman Catholic priesthood and religious life. Guilfoyle obtained a law degree with honors from George Washington University in 1983 and is a member of the Northern Kentucky and Kentucky Bar Associations. **Hartman** heads the



Alan J. Hartman

firm's Technology Law Practice Group. He is also partner-in-charge of the firm's downtown Cincinnati office. He practices business law with an emphasis on computer, Internet, information technology, and biotechnology law. Hartman is a member of the Ohio State, Kentucky, Cincinnati, and Northern Kentucky Bar Associations, the Christian Legal Society, and the International Technology Law Association. He obtained his law degree from Northern Kentucky University's Salmon P. Chase College of Law in 1978.



Taft A. McKinstry

Fowler Measle & Bell PLLC is pleased to announce that members **Taft A. McKinstry** and **Elizabeth S. Feamster** have been named to The Martindale-Hubbell®



Elizabeth S. Feamster

Bar Register of Preeminent Women Lawyers. Only those women lawyers that have achieved the AV peer rating and have been designated by their colleagues as preeminent in their field are included. McKinstry is the only lawyer designated in the field of bankruptcy for Lexington, Fayette County and Eastern Kentucky. Feamster is one of only two women designated in the field of medical malpractice for Lexington, Fayette County and Eastern Kentucky.

Greenebaum Doll & McDonald PLLC is pleased to announce that **Robert L. Brown**, a member in the firm's Louisville office, has been elected chair of the United States Department of Commerce, Kentucky District Export Council. Appointed by the U.S. Secretary of Commerce, the Kentucky District Export Council (KYDEC) is a volunteer organization drawn from industry whose knowledge of international business provides a unique source of professional advice to inform government officials about issues important to their success. They also help mentor other American firms to enable them to compete and win business in the international marketplace. Brown is a member of Greenebaum's Corporate and Commercial Practice Group and is the firm's International Team Chair and China Team Chair. He has worked closely with international companies as an investment banker and attorney, serving both in-house and as an outside advisor, and has passed all four parts of the CPA exam.



Richard Bales

Richard Bales, professor at Northern Kentucky University Salmon P. Chase College of Law and director of Chase's Center for Excellence in Advocacy, was named a 2011

Outstanding Educator by *Cincy* magazine. Bales teaches civil procedure, employment law, employment discrimination, ADR in the workplace, labor law, and arbitration law. He was also named NKU's Frank Sinton Milburn Outstanding Professor last year.



Todd V. McMurtry

Dressman Benzinger LaVelle PSC partner **Todd V. McMurtry** recently completed a course of study at the Harvard Mediation Institute. The course, offered at Harvard Law School, was instructed by some of the nation's top authors, leading mediators and Harvard Law professors. Participants learned how to mediate, the law governing mediation, mediation ethics, and other more practical matters such as how to host a mediation. McMurtry currently is a member of the Fort Wright Kentucky City Council. He has also held a number of volunteer board positions, including Board Chairman of Cardinal Hill Hospital of Northern Kentucky, Finance Chairman of the Kenton County Republican Party, and Board of Education for Covington Latin School. In his law practice, McMurtry handles complex litigation and mediation cases involving business disputes, land use, real estate, construction, and personal injury in Ohio and Kentucky courts.

Greenebaum Doll & McDonald PLLC is pleased to announce that **Jeffrey A. McKenzie** has been re-appointed to serve on the Board of Directors for Greater Louisville Inc. (GLI), the Metro Chamber of Commerce. McKenzie will serve a two-year term. McKenzie is a member of Greenebaum's Corporate and Commercial Practice Group, chair of the Economic Development and Incentives Team, co-chair of the Life Sciences Team and past chairman of the firm. McKenzie also serves on the boards of Leadership Louisville, Leadership Kentucky, The Fund For The Arts, University of Cincinnati College of Law, E.P. Tom Sawyer State

WHO, WHAT, WHEN & WHERE

Park, and many other community organizations. He received his bachelor's degree from Virginia Polytechnic Institute & State University and his law degree from University of Cincinnati College of Law.

Leadership Kentucky recently announced its 27th Class. Selected participants for the 2011 class are: **Mark Grundy**, member/attorney, Greenebaum Doll & McDonald, PLLC, Louisville. The class will travel across Kentucky this year for seven monthly sessions (May through November). Leadership Kentucky, created in 1984 as a non-profit educational organization, brings together a selected group of people that possess a broad variety of leadership abilities, career accomplishments, and volunteer activities to gain insight into complex issues facing the state.



Buckner Hinkle Jr.

During his summers back home from college in the late 1960s, **Buckner Hinkle Jr.** worked with road construction crews for his father's company, Hinkle Contracting Corporation, in Paris,

Ky. Recently, Hinkle, an attorney in Stites & Harbison's Lexington office, was awarded a lifetime achievement award from the largest trade group representing the construction industry in the state. Associated General Contractors of Kentucky presented the award during a February 25 ceremony at the Civic Center Ballroom in Lexington in honor of Hinkle's four decades of service. Hinkle was instrumental in formulating the Fairness in Construction Act, adopted by the Kentucky General Assembly in 2007. Hinkle's law practice is concentrated exclusively on construction and business litigation. He chairs Stites & Harbison's Construction Service Group and the Sustainability & Emerging Technologies Practice Group. Hinkle, 62, joined Stites & Harbison's predecessor firm – Harbison, Kessinger, Lisle & Bush – in 1974, and he became a partner of the firm in 1979.

Greenebaum Doll & McDonald PLLC is pleased to announce that **Peter L. Thurman, Jr.**, an associate in the firm's Louisville office, has been chosen as one of *Business First's* "2011 People to Watch" in the health care business in Greater Louisville. Thurman is a member of the firm's Health and Insurance Team and Employee Benefits Team. Thurman serves on the Board of Directors for the Neighborhood House and on the Development Committee for The Heuser Hearing Institute. He received his bachelor's degree, *summa cum laude*, from Denison University and his law degree, *magna cum laude*, from the University of Louisville Louis D. Brandeis School of Law.

Laura Day DelCotto of DelCotto Law Group PLLC has been selected as a member of the Leadership America Class of 2011. Leadership America was established in 1988 and is one of the longest running national women's leadership programs in the nation with over 1600 graduates. The 2011 Leadership Program runs from March through October, 2011, and focuses on the "Evolution of Leadership" confronting today's interconnected global society in the economic, environmental and social realms.

McBrayer, McGinnis, Leslie & Kirkland, PLLC, would like to announce that **W. Brent Rice**, partner in the firm's Lexington office, has been appointed by Mayor Jim Gray as Chairman to the Arena, Arts and Entertainment Task Force. Rice was appointed along with 40-plus others to the member task force to study the options for Rupp Arena, the convention space, the Lexington Center and the Lexington Opera House. Rice is a founding partner of the firm's Lexington office and has spent more than 20 years developing its telecommunications group into one of the largest practices of its kind in Kentucky. He is a native of Richmond and a graduate of the University of Kentucky and the University of Louisville Louis D. Brandeis School of Law. He practices in virtually every aspect of communications law, including regulatory, transactional, legislative and land use.

Tandy Patrick from Greenebaum Doll & McDonald PLLC has been elected to The American Saddlebred Horse Association Board of Directors.



Chauncey Curtz

Chauncey Curtz, managing partner of Dinsmore & Shohl's Lexington office, has been elected to serve on the Board of Directors for the Kentucky Coal Association. Curtz was elected to serve a one-year term as a board member representing the associate members of the association. Curtz is the Chair of the firm's Natural Resources Practice Group. His experience includes representing clients engaged in every aspect of the ownership, leasing, development, extraction and sale of coal, and mineral properties. Curtz earned his J.D. from the University of Wisconsin Law School and his B.A. from McGill University.



Barry Norfleet

Barry Norfleet has joined Farmers Bank & Capital Trust Company in Frankfort as senior vice-president, senior trust officer and legal counsel. Norfleet will head the Trust Department covering offices in Frankfort, Danville, Lawrenceburg and Harrodsburg. He is a graduate of the University of Kentucky with both an MBA and law degrees. Farmers Bank is a subsidiary of Farmers Capital Bank Corporation (NASDAQ: FFKT), which conducts banking operations in 23 communities and 36 locations in Kentucky.

Ferreri & Fogle, PLLC, is pleased to announce that equity member, **Sherri Brown**, has been selected by Gov. Steve Beshear to serve a four-year term on the Kentucky Workers' Compensation Nominating Commission. The Commission is charged with the responsibility of submitting names to the Governor for positions on the Kentucky Workers'

WHO, WHAT, WHEN & WHERE



Ward Ballerstedt

Compensation Board and for Administrative Law Judge positions. Also, **Ward Ballerstedt** was a recipient of the September 2010 Golden Gavel Award from Westfield

Insurance for successful trial in a Kentucky Workers' Compensation matter.



MacKenzie M. Walter

MacKenzie Mayes Walter, an attorney in Dinsmore & Shohl's Lexington office, was recently elected president of the Fayette County Bar Association's Women Lawyers' Association (WLA). She will serve a one-year term as

president of the WLA and will be responsible for day-to-day administration and long-term planning for all members. Walter is a member of the firm's Litigation Department and focuses her practice on general commercial and specialty litigation. She earned her J.D. from the University of Kentucky College of Law and her B.A. from Indiana University.

Stoll Keenon Ogden PLLC is pleased to announce that attorney **Gwen R. Pinson** has been selected to participate in the Leadership Kentucky Class of 2011. Pinson was one of 62 individuals selected statewide. Gwen R. Pinson is a member of the firm's Business Litigation Practice Group as well as the Mineral and Environmental Law Group. Pinson mentors incoming first-year law students enrolled in the Kentucky Legal Education Opportunity Program and coordinates a program pursuant to which members of the Fayette County Bar Women Lawyer's Association mentor members of the Women's Law Caucus at the UK College of Law.

The Louisville law firm of Hagan & Mullins is pleased to announce that **Charles Curtis Hagan, Jr.**, has completed all requirements for and will be awarded a Masters of Science in



Charles C. Hagan, Jr.

Management degree, *summa cum laude*, from New England College Henniker, N.H. on May 14, 2011. Hagan received his B.A. degree from the University of Louisville and his J.D. degree from the University of

Louisville Louis D. Brandeis School of Law. His emphasis for his M.S. degree was nonprofit leadership and his capstone thesis was "Curbing the Democracy Deficit: A New Paradigm for Civic Education, Literacy and Participation." His areas of practice include criminal defense, family law and personal injury law. He has practiced with Paul J. Mullins (J.D. University of Louisville Louis D. Brandeis School of Law, 1997) since 1998.

Greenebaum Doll & McDonald PLLC is pleased to announce that **James M. Francis** has been elected to serve as vice-chair of the Louisville Bar Association's (LBA) Intellectual Property Section. The LBA has 19 practice-focused sections, including the Intellectual Property Section. Francis is a registered patent attorney experienced at prosecuting biomedical, mechanical, and material science/chemical patent applications. He co-chairs Greenebaum's Life Sciences Team and focuses his practice on U.S. and interna-

tional patent applications, trademark prosecution, licensing, and intellectual property litigation. Francis received his bachelor's degree from Marshall University and his law degree from the University of Louisville Louis D. Brandeis School of Law.

RELOCATION



Alan R. Trenz

Trenz, Schoenfeld & Knabe Co., LPA, is pleased to announce the relocation of its main office to 10403 Harrison Ave., Suite 400, Harrison, OH 45030. The main phone number is 513-367-5656, and fax 513-621-2465.



Thomas R. Schoenfeld

Schoenfeld is licensed in Ohio and Kentucky and Trenz is licensed in Ohio, Kentucky and Indiana.

Dinsmore & Shohl recently consolidated its Louisville offices, relocating from PNC Plaza to the firm's existing space in the National City Tower. This move comes following the addition of 31 attorneys and 24 staff members to Dinsmore & Shohl's Louisville office in late 2009.

Before You Move...

Over 16,000 attorneys are licensed to practice in the state of Kentucky. It is vitally important that you keep the Kentucky Bar Association (KBA) informed of your correct mailing address. Pursuant to rule SCR 3.175, all KBA members must maintain a current address at which he or she may be communicated, as well as a physical address if your mailing address is a Post Office address. If you move, you must notify the Executive Director of the KBA **within 30 days**. All roster changes must be in writing and must include your 5-digit KBA member identification number. There are several ways to do this for your convenience.

VISIT our website at www.kybar.org to make **ONLINE** changes or to print an Address Change/Update Form

EMAIL the Executive Director via the Membership Department at kcobb@kybar.org

FAX the Address Change/Update Form obtained from our website or other written notification to: **Executive Director/Membership Department (502) 564-3225**

MAIL the Address Change/Update Form obtained from our website or other written notification to: **Kentucky Bar Association Executive Director 514 W. Main St. Frankfort, KY 40601-1812**

* Announcements sent to the *Bench & Bar's Who, What, When & Where* column or communication with other departments other than the Executive Director do not comply with the rule and do not constitute a formal roster change with the KBA.

CLEvents

The following is a list of TENTATIVE upcoming CLE programs. Circumstances may result in program changes or cancellations. **You must contact the listed program sponsor** if you have questions regarding specific CLE programs and/or registration.

MAY

17 Video Replay: Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association

17 Recent Developments in Professional Responsibility
Louisville Bar Association

18 Retirement Plans for Small Law Firms and Small Businesses
Louisville Bar Association

19 To Sue or Not to Sue: Helpful Hints in Collecting More of Your Receivables
Louisville Bar Association

19 Kentucky Collection Law Conference
UK CLE

20 Local Government
Cincinnati Bar Association

20 Handling Auto Cases in 2011: How the Landscape has Changed (Hebron)
Kentucky Justice Association

20 Obstrepidity: Is It Accurately Described as a Lawyer Problem? Is It Getting Worse? What's a Lawyer to Do?
Louisville Bar Association

23 Institutional Investment for Attorneys in the Context of the Kentucky Uniform Prudent Management of Institutional Funds Act (KRS Ch. 273)
Louisville Bar Association

24 Analyzing Financial Statements
Cincinnati Bar Association

25 Handling Auto Cases in 2011: How the Landscape has Changed (Louisville)
Kentucky Justice Association

25 Employment Law: Wage/Hour and Overtime
Cincinnati Bar Association

25 On Your Own but Not Alone: Efficient Legal Research
Cincinnati Bar Association

25 Reverse Mortgages: The Good, the Bad and the Ugly
Louisville Bar Association

26 Nuts & Bolts of Real Property
Cincinnati Bar Association

26 Verdict & Settlement Analyzer
Louisville Bar Association

JUNE

1 Hot Topics and Critical Issues Pertinent to Employers and Health Care Providers
Louisville Bar Association

1 Researching Circular 230: Standards of Professional Conduct, Ethics and Conflict of Interest
Louisville Bar Association

2 Trial Practice from the Judge's Perspective – What Works in the Courtroom
Cincinnati Bar Association

2 Potpourri of In-House Counsel Issues
Louisville Bar Association

2-3 15th Biennial Judge Joe Lee Bankruptcy Institute
UK CLE

3 The Lawyer-Writer: How Writing Can Help Your Law Practice, the Legal Profession & Your Mental Health
Cincinnati Bar Association

3 Contempt of Court: Two Lawyers & a Lynching that Forever Changed the Practice of Law
Cincinnati Bar Association

3 Missing High Value Cases? How to Recognize and Handle Claims Many Lawyers Overlook
Kentucky Justice Association

3 Lawyer Prerequisites for Ethical Client Care
Louisville Bar Association

6 Ethics on the Go! Writing Requirements of the 2009 Rules of Professional Conduct
Louisville Bar Association

7 New Lawyer Training: Client Funds & Law Office Management and Professionalism
Cincinnati Bar Association

7 Libel Litigation: America's Other Favorite Pastime
Cincinnati Bar Association

7 All Things Auto (Owensboro)
Kentucky Justice Association

8 Criminal Practice in Federal District Court
Cincinnati Bar Association

8 Complexities of the Food and Flora Puzzle: Sustainable Agriculture Law & Policy – Everything is Connected!
Louisville Bar Association

9 Ethics and Risk Management in a Web 2.0 World
Louisville Bar Association

9-10 Employee Benefits
Cincinnati Bar Association

10 Effectively and Ethically Market Your Legal Practice to Get the Cases You Want to Handle
Kentucky Justice Association

- 10 The DUI Jury: Cases You Better Know What to Expect from the Judge, Prosecutor and Jury
Louisville Bar Association
- 10 Cheap & Easy CLE Program
UK CLE
- 13 Ethics on the Go! Supervisory Professional Responsibilities
Louisville Bar Association
- 14 Video Replay: Discharge in Bankruptcy; Property Tax; Family Law Mediation
Cincinnati Bar Association
- 14 Powering Up Your Law Practice with Technology and Solutions
Kentucky Justice Association
- 15-17 Annual Convention
Kentucky Bar Association
- 16 All Things Auto (Paducah)
Kentucky Justice Association
- 16 Social Media - Ethical, Practice & Forensic Issues
Louisville Bar Association
- 17 Construction Law: Preparing for the Impending Upswing
Cincinnati Bar Association
- 20 Ethics on the Go! Returning Client Files
Louisville Bar Association
- 22 Ethics
Cincinnati Bar Association
- 23 How to Use an iPad in Your Law Practice
Kentucky Justice Association
- 23 Nuts & Bolts of Family Law
Louisville Bar Association
- 23-24 Video Replay
Kentucky Bar Association
- 24 Domestic Relations: Property Division & Support
Cincinnati Bar Association
- 24 Ethics & Bankruptcy
Louisville Bar Association
- 24 Becoming an Expert on Working with Experts
Kentucky Justice Association
- 27 Webinar Replay: Making the Phone Ring: How to Effectively and Ethically Market Your Legal Practice to Get the Cases You Want to Handle
Kentucky Justice Association
- 27 Ethics on the Go! And Here's the Top 10
Louisville Bar Association
- 28 Video Replay: Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association

2011 New Lawyers Program

"Within twelve (12) months following the date of admission as set forth on the certificate of admission, each person admitted to membership to the Kentucky Bar Association shall complete the New Lawyer Skills Program."

SCR 3.652 New Lawyer Skills Program

June 15-16, 2011

**Lexington Convention Center
in conjunction with the**

KENTUCKY BAR ASSOCIATION 2011 CONVENTION



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IN THE 21ST CENTURY**

Visit www.kybar.org/195 for more information



28 All Things Auto (Prestonsburg)
Kentucky Justice Association

28 Criminal Law Seminar
Northern Kentucky Bar Association

28 2nd Annual Lively M. Wilson
Memorial Lecture Series
Louisville Bar Association

29 Webinar Replay: Making the Phone
Ring: How to Effectively and
Ethically Market Your Legal
Practice to Get the Cases You Want
to Handle
Kentucky Justice Association

28-29 Annual Bench & Bar CLE
Fayette County Bar Association

29-30 Last Chance Video 2011
UK CLE

30 Medicaid and Medicare Winds are
Swirling Around the Trial Lawyer
Kentucky Justice Association

30 Bankruptcy Law Seminar
Northern Kentucky Bar Association

30 iPad for Lawyers
Louisville Bar Association

JULY

6 Ohio Civil Rights Commission –
Overview of Procedures and
Discussion of Public
Accommodations Law
Cincinnati Bar Association

19 Video Replay: Professionalism,
Ethics & Substance Abuse Instruction
Cincinnati Bar Association

20 Fair Debt Collection Practices Act:
Challenges for Attorneys in
Litigation
Cincinnati Bar Association

21-22 38th Annual Midwest-MidSouth
Estate Planning Institute
UK CLE

2010-11 Continuing Legal Education Commission



Dennis L. Null
First Supreme Court District

Matthew P. Cook
Second Supreme Court District

Julie Roberts Gillum
Third Supreme Court District

Janet Jakubowicz
Fourth Supreme Court District

Janis E. Clark
Fifth Supreme Court District

Shane C. Sidebottom
Sixth Supreme Court District

Kimberly Scott McCann, Chair
Seventh Supreme Court District

Justice Lisabeth Hughes Abramson
Supreme Court Liaison

Mary E. Cutter
Director for CLE

2011 KENTUCKY LAW UPDATE



September 1-2 (TH/F) COVINGTON
Northern Kentucky Convention Center

September 8-9 (TH/F) BOWLING GREEN
Holiday Inn & Sloan Convention Center

September 20-21 (T/W) OWENSBORO
RiverPark Center

September 27-28 (T/W) ASHLAND
Bellefonte Pavilion Theatre

October 4-5 (T/W) GILBERTSVILLE
Kentucky Dam Village State Resort Park

October 18-19 (T/W) PRESTONSBURG
Jenny Wiley State Resort Park

October 25-26 (T/W) LEXINGTON
Lexington Convention Center

November 2-3 (W/TH) LONDON
London Community Center

November 30-
December 1 (W/TH) LOUISVILLE
KY International
Convention Center

**Kentucky Bar Association
CLE Office**
(502) 564-3795

AOC Juvenile Services
(502) 573-2350

Louisville Bar Association
Lisa Maddox • (502) 583-5314

KYLAP
Ashley Beitz • (502) 564-3795

**Kentucky Justice Association
(formerly KATA)**
Amy Preher • (502) 339-8890

Chase College of Law
Amber Potter • (859) 572-5982

Kentucky Department of Public Advocacy
Jeff Sherr or Lisa Blevins
(502) 564-8006 ext. 236

AOC Mediation & Family Court Services
Melissa Carman-Goode
(502) 573-2350 ext. 2165

UK Office of CLE
Melinda Rawlings • (859) 257-2921

**Mediation Center of the
Institute for Violence Prevention**
Louis Siegel • (800) 676-8615

Northern Kentucky Bar Association
Julie L. Jones • (859) 781-4116

Children's Law Center
Joshua Crabtree • (859) 431-3313

Fayette County Bar Association
Mary Carr • (859) 225-9897

CompEd, Inc.
Allison Jennings • (502) 238-3378

Cincinnati Bar Association
Dimity Orlet • (513) 381-8213

Pike County Bar Association
Lee Jones • (606) 433-1167

Access to Justice Foundation
Nan Frazer Hanley • (859) 255-9913

State Government Bar Assoc
Amy Bensenhaver • (502) 696-5655

Administrative Office of the Courts
Melissa Carman-Goode
(502) 573-2350 ext. 2165

Don't Forget...



The deadline to **complete** your annual CLE requirement for the 2010-2011 educational year is **JUNE 30, 2011**.

You must have a total of 12.5 CLE credits including 2.0 Ethics credits to meet the annual requirement.

Check your CLE record online at www.kybar.org.



Note: The deadline to **report** your CLE credits is August 10, 2011 for the 2010-2011 educational year.

Get Your CLE Credits On-Line!

The KBA offers seminars on-line, eliminating the hassle and expense of travel.

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Online seminars are technological programs. A maximum of six (6.0) technological CLE credits may be applied to your record for any given educational year.



www.kybar.org

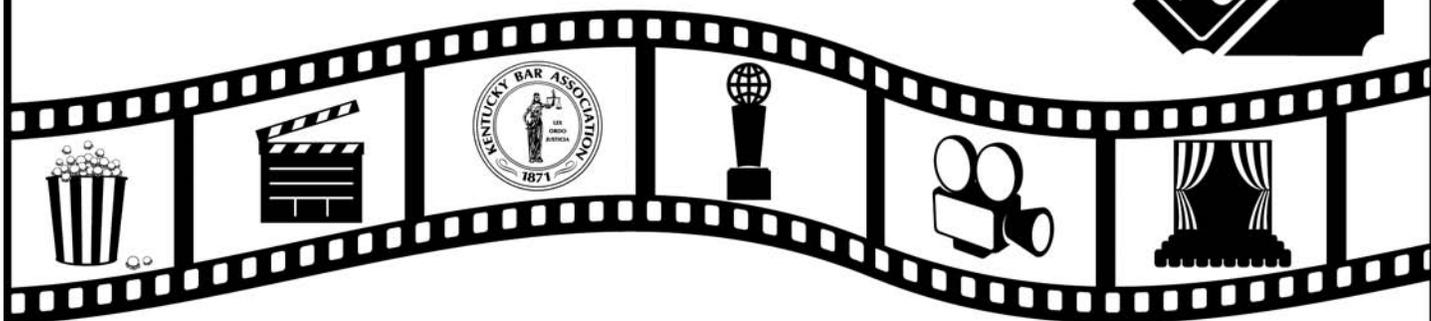
KBA Teleseminars



As the end of the educational year draws near, **don't miss the opportunity** to earn "live" CLE credits -- learning about timely topics through the KBA Teleseminar program! Every month the Kentucky Bar Association brings you a new series of Live Teleseminars, straight to your office or home phone.

To see a complete program listing, visit <http://ky.webcredenza.com>.

2011 KBA VIDEO REPLAY



EARN UP TO 6.75 "LIVE" CLE CREDITS INCLUDING UP TO 3.75 ETHICS CREDITS

DATES: THURSDAY, JUNE 23
OR
FRIDAY, JUNE 24

TIME: 8:00 A.M. - 4:30 P.M.

LOCATION: KENTUCKY BAR CENTER
FRANKFORT, KENTUCKY

- PRE-REGISTRATION IS REQUIRED
- VISIT WWW.KYBAR.ORG/341 FOR DETAILS AND REGISTRATION INFORMATION



SEATING IS LIMITED SO REGISTER TODAY TO GUARANTEE YOUR ATTENDANCE!

KBA DVD Program Catalog

Check out the latest video recordings available in the KBA DVD Catalog. The DVD packages contain sessions grouped into sets totaling 2.0 to 3.5 CLE credits (some including Ethics credits) and range in price from \$105 to \$175. These DVDs are a great way to get those remaining CLE credits needed before the end of the educational year.

Note: DVDs are technological programs. A maximum of six (6.0) technological CLE credits may be applied to your record for any given educational year.

Visit www.kybar.org/639 for details and ordering information.



Go Paperless

Join many other KBA members, and sign up today to have your CLE notifications sent to your e-mail address of record. In addition to saving countless trees, this action will help eliminate excess paper, create a convenient electronic record for your files, and save the association thousands of dollars allocated to mailing these notifications.



Just e-mail us a brief note at cle_reg@kybar.org indicating "I grant the KBA permission to e-mail my CLE notifications to me."

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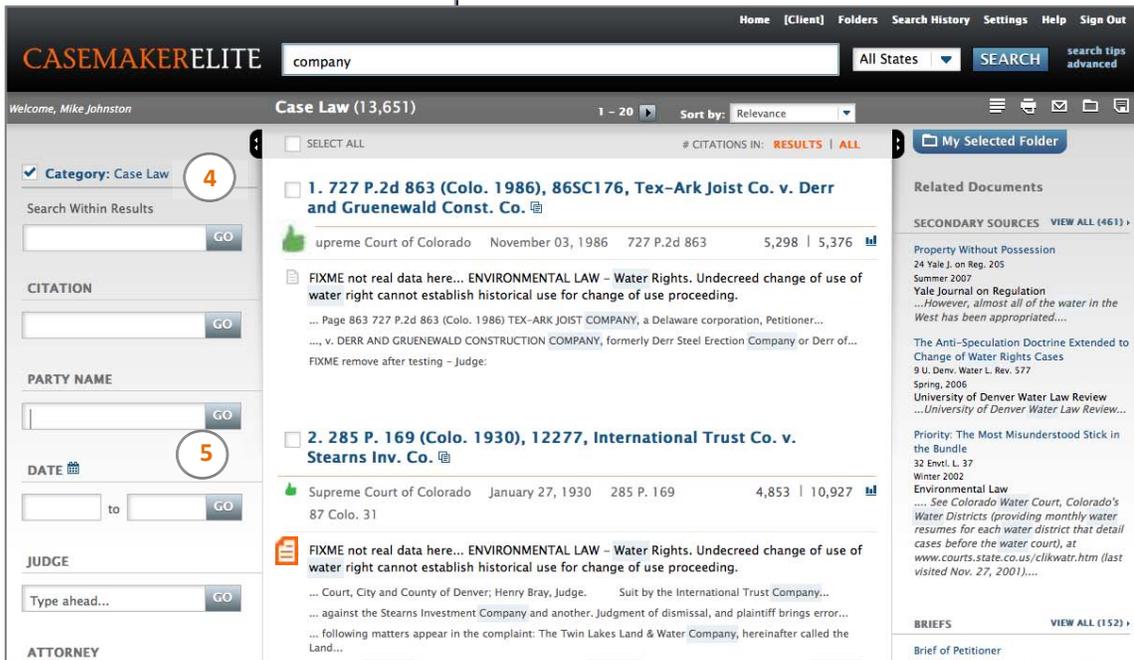
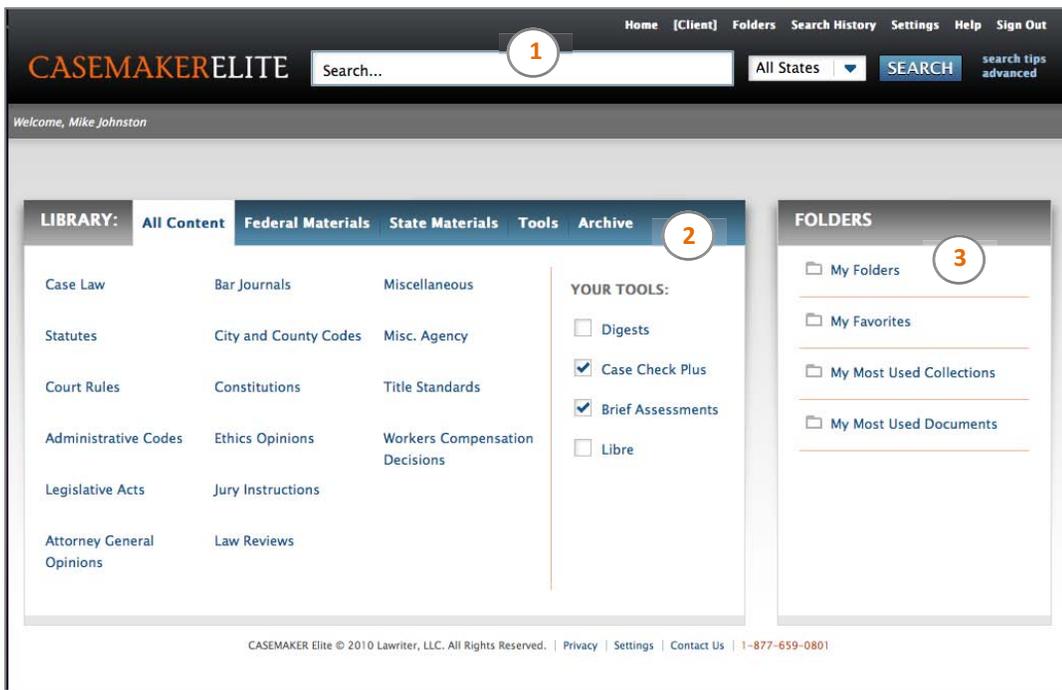
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