

KENTUCKY BAR ASSOCIATION



Bench & Bar

Volume 75 Number 2

March 2011

KENTUCKY BAR ASSOCIATION 2011 CONVENTION



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LOUISVILLE BAR'S PROGRAM TEACHES STUDENTS ABOUT LAW, COURTS

Editor's Note: At the invitation of KBA President Bruce K. Davis, this issue's "President's Page" is authored by D. Scott Furkin, executive director of the Louisville Bar Association (LBA), who discusses the LBA "Law Day in School" program for middle school students in Jefferson County Public Schools. In the September 2010 issue of the Bench & Bar, Mr. Davis encouraged readers to share their stories of quality volunteer programs aimed at increasing civic education in Kentucky schools. We thank Mr. Furkin for providing information regarding this successful effort.

By D. Scott Furkin

In the September 2010 issue of *Bench & Bar*, KBA President Bruce K. Davis lamented that civic education has all but disappeared from most public school curricula. Indeed, courses in government, political science and citizenship have taken a back seat to those in English, math and science as teachers struggle to boost students' scores on standardized proficiency tests that are the barometer of modern educational success.

As a result, an entire generation of U.S. citizens is coming of age without even a basic understanding that our state and federal governments are divided into three coequal branches, each with separate and independent powers and areas of responsibility. Sadly, an increasing number of Kentuckians fail to grasp the important role the judicial

branch plays in administering justice and safeguarding our liberties. Many know little more about lawyers and judges than the unrealistic depictions presented in television shows and commercials.

To help fill this critical knowledge gap, for more than a decade the Louisville Bar Association has conducted "Law Day in School" in which volunteer attorneys teach middle school students about the court system, the legal profession and the Bill of Rights, among other topics. To date, LBA members have visited more than 500 classrooms in the Jefferson County Public Schools. Three dozen additional visits will take place during the current school year.

Spearheaded by an attorney who is a former teacher, "Law Day in School" is a program of the LBA's Public Service Committee. Curriculum materials were developed by a professional legal

educator and are periodically reviewed to make sure they are accurate and timely. They include lesson plans designed to give students an appreciation for the rule of law, individual rights and the protections afforded to all citizens by the U.S. Constitution. Students are also challenged to take seriously their responsibilities as future voters, jurors, litigants or perhaps even lawyers.

Teachers have consistently praised the quality of the instruction which incorporates handouts, video clips and interactive exercises into attorney-led presentations. One teacher wrote that "(t)his has been a great jumping-off point that has continued into wonderful class discussions and other learning activities." As a leader of several classes, I can personally attest to the students' enthusiastic response.

The LBA is proud to contribute to the civic education of students in Jefferson County. We are happy to share our curriculum materials with attorneys wishing to institute the "Law Day in School" program in other Kentucky counties. ☺

The Louisville Bar Association's "Law Day in School" program offers curriculum materials and lesson plans geared to middle school students on the following topics:

How Courts Work – Educates students about the functions of state and federal courts and the role of judges in the justice system

What Lawyers Do – Educates students about the role of lawyers in the justice system and what it takes to become a lawyer

Students and the Bill of Rights – Educates students about the U.S. Constitution and application of the Bill of Rights to their daily lives

For more information, contact Cindy Robinson, LBA Public Service Director, at (502) 583-5314 or crobenson@loubar.org.

D. Scott Furkin, a 1982 graduate of the University of Louisville Louis D. Brandeis School of Law, is an attorney and executive director of the Louisville Bar Association.



PLAN NOW ON ATTENDING THE 2011 KBA ANNUAL CONVENTION!

KENTUCKY BAR ASSOCIATION 2011 CONVENTION



PURSuing JUSTICE
IN THE 21ST CENTURY

Mark your calendars to join the Kentucky Bar Association for its 2011 Annual Convention at the Lexington Convention Center, Wednesday, June 15, through Friday, June 17! With a convention theme of "Pursuing Justice in the 21st Century," we'll take a look back at legal issues of relevance during the first decade of the new millennium, and a look ahead to new, emerging topics through a wide variety of CLE programming of interest to practitioners across the Commonwealth.

Under the direction of KBA
Convention Planning Committee Chair



Ronald Cotton and Jennifer Thompson

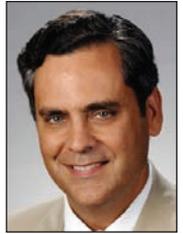
Mindy Barfield and CLE Program Committee Chair Anne Chesnut, three excellent featured speakers have been secured for the 2011 convention. The KBA is excited to announce that Jennifer Thompson and Ronald Cotton, two of the authors from The New York Times Best Seller *Picking Cotton: Our Memoir of Justice and Redemption*, will share their inspiring story on the convention's opening day.

According to the book's website, "... Jennifer and Ronald offer an unprecedented first-person glimpse into what happens when the system fails both the victim and the accused. Paced like the most riveting of thrillers and packed with page-turning twists and turns, this unforgettable book challenges our ideas of memory and judgment while demonstrating the profound nature of human grace and the healing power of forgiveness." For more information on the authors and their publication, visit www.pickingcottonbook.com.

On Thursday, June 16, the KBA Convention will feature Jonathan Turley, a nationally recognized legal scholar whose articles appear regularly in publications such as The New York Times, The Washington Post, USA Today, and The Wall Street Journal. Turley also appears often on all of the major television networks, including such shows as "Meet The Press," "ABC This Week," "Face The Nation," and "Fox Sunday." He is also a frequent witness before the U.S. House of Representatives and Senate on

constitutional and statutory issues as well as tort reform litigation.

Professor Turley has served as counsel in some of the most notable cases in the last two decades, representing whistleblowers, military personnel, and a wide range of other clients. He has also served as counsel in a variety of national security cases, as well as a consultant on homeland security and constitutional issues.



Jonathan Turley

On Friday, the convention's closing day, the KBA is pleased to present Erin Brockovich, a consumer advocate whose work to uncover the poisoning of the water supply in a small California town became the subject of the 2000 film "Erin Brockovich" starring Julia Roberts.

While organizing papers as a file clerk in a California law firm, Brockovich discovered medical records that led to an investigation of Pacific Gas & Electric, a utility accused of leaking toxic Chromium 6 into the groundwater. In 1997, as a result of a lawsuit spear-headed by Brockovich and the late attorney Ed Masry on behalf of more than 600 Hinkley, Calif., residents, the utility giant paid a \$333 million settlement. The lawsuit was dramatized in the 2000 film "Erin Brockovich," which earned Julia Roberts an Academy Award as Best Actress for her portrayal of Brockovich.



Erin Brockovich

Since that time, Brockovich has used her notoriety to spread positive messages of personal empowerment and to encourage others to stand up and make a difference. As president of Brockovich Research & Consulting, she is currently involved in numerous environmental projects worldwide.

Please make plans now to attend the 2011 KBA Annual Convention for what promises to be an extraordinary and educational convention. Registration information will be available in early April at the KBA website, www.kybar.org.



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YOUNG LAWYERS SECTION

KENTUCKY BAR ASSOCIATION

By Nathan Billings,
Chair, KBA Young Lawyers Section

Delegation -

“We accomplish all that we do through delegation – either to time or to other people.” – Steven Covey

Partner: Jim, I know it is 3 p.m. Friday afternoon, but I need a memo on the discoverability of an attorney’s communications with an expert in the *Smith* case.

Associate: Sir, I have not done any work on that case before. Is that the medical malpractice case?

Partner: No. You know, the *Smith* case is the one about construction defect in the slab. Oh, and I need it by 9 a.m. on Monday. You can find the file on Mary’s desk. I think the other side’s motion is in it. Thanks. [Partner leaves]

[Monday morning meeting, after Partner reviews the memo]

Partner: I wanted a brief on this issue! And, why does it not refer to the actual communications between our expert and the client? They were in the file – didn’t you read them? Oh, and I talked to the other side on Friday evening, and we don’t have to file this until Wednesday – when can you get me a new draft?

Many of us have been on the receiving end of a “delegation” like this in the past. A partner, senior attorney, committee chair, or manager assigns a project to us with little explanation of the context of the assignment, exactly what is expected, what the actual objective or goal is,

and in what format the finished product should be.

Unfortunately, as leaders, we far too often assign projects the same way. In the daily machinations of practicing a case or in our community involvement, we forget that we acquire a vast amount of knowledge about matters, and that others in our organizations do not possess the same amount of information. As a result, we ineffectively “delegate” tasks to others. The costs for such poor delegation include: low morale, burnout, unacceptable work product, duplicative work and rework, misallocation of personal and personnel resources, frustration, anxiety, increased client bills, lower profitability, damage to firm/organization image, and damage to firm/organizational health.

Although defined in a variety of ways, at its core, delegation is the practice of turning over work-related tasks and/or authority to employees or subordinates, and it is one of the hardest skills for a leader to master. Reasons for poor delegation include: “not enough time,” lack of trust in subordinates, unwillingness to surrender control or authority to others, inability to recognize the value or necessity of delegation, poor communication skills, or lack of understanding how to effectively

delegate. This article addresses this some of these barriers.

Despite situations like the one described above, effective delegation can be learned. In order to effectively delegate, you must have an objective grasp of your own abilities, responsibilities and communication skills, and what can and cannot be delegated to others.

We all know that our daily tasks accumulate quickly. It is critical that we prioritize those tasks that we must do and those that can be delegated to others. Thus, the first step to effective delegation is spending time daily to prioritize our tasks. Creating two lists can be incredibly useful: a running list for all tasks, and a second for tasks that must get done that day. Spend five minutes of your day (either the first or last five minutes at the office) updating your lists. (I prefer the end of the day, so that when I come in the office the next day, my focus for the day is already established.) Your “daily” task list should identify 5-10 items in order of importance. Anything that must be accomplished that day should be at the top. As you draft your lists, candidly ask yourself: “Is this something that I *must* do, or can someone else adequately accomplish some or all of this task?”

As you complete items, mark them off. Rarely, however, do we complete

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.

everything on our “daily” list. As lawyers with unwavering faith in our own abilities, we frequently believe that “we” are the only person who can “properly” complete a task. Consequently, if, over a period of several days, a task remains on your “daily” list, you should reassess whether someone else can perform that task. You will often find that while it appeared you “had” to complete the task initially, the process of triaging other projects provides further clarity that someone else can adequately perform it. Then, identify who can “adequately accomplish some or all of the task.” Thus, by this point, you have: (1) created daily and overall tasks lists, (2) prioritized your own tasks, (3) identified a task to be delegated, and (4) identified the individual(s) to whom you are going to delegate.

Next, (5) schedule adequate time to assign and discuss the task with the individual. Because of other pressing matters, there may be an inclination to sell this step short. Think about how much time will be required, and schedule it with the individual. There is an inverse proportion between the time invested in delegation of a task at the frontend and the overall time it takes to accomplish the task. In other words, a few extra minutes at the outset leads to exponential gains overall.

Before meeting with the individual, you will need to (6) clearly define the task and identify what must be achieved. If you are unable to clearly

articulate the task and its objective to yourself, how can a subordinate be reasonably expected to understand what he or she is being asked to do? One framework for defining and delegating tasks is the SMART criteria:

The task must be SPECIFIC: Like legal writing, be clear and concise. While we are (or should be) very clear in our communications with clients, other counsel and the courts, we often fail to use the same communication skills in our firms and organizations. To this end, a specific task has a much greater chance of being accomplished to your desire than a general task. Answering the “W” questions (who, what, when, where, which, and why) can help clarify the task. In the example above, the partner asked for a general task (a memo), when, in reality, he wanted something specific (a brief to file in response to another party’s motion).

The task must be MEASUREABLE: You must establish concrete criteria for measuring progress. By measuring progress, you ensure the individuals stay on track, meet deadlines, etc. Answer questions such as: How long? What issues? How will I know when it is accomplished?

The task must be ATTAINABLE: If it is going to take four months to plan a charity event, don’t start four weeks before the planned date. Similarly, if reviewing documents as part of discovery should take a week, don’t wait until you only have two days left to review them to delegate the task. (Obviously, the

attainability of a task depends highly on *your* objective assessment of tasks on your list, as noted above.)

The task must be REALISTIC: Related to a task’s attainability, a task must represent an objective toward which the employee is both *able* and *willing* to work. Sure, an associate *could* stay all weekend to work on that memo, but is it realistic to expect that? While something may be “attainable,” it does not mean it’s realistic to expect its accomplishment within the parameters given. A task is probably realistic if the employee truly *believes* that it can be accomplished.

The task must be TIME-ORIENTED: Finally, all tasks must have a time component. Without a time frame, there is no sense of urgency.

A key aspect of leadership is delegation. Unless you learn to learn to delegate effectively, your firms and organizations will be inefficient and demoralized. Thankfully, delegation is a skill that can be learned. By (1) creating daily and overall tasks lists, (2) prioritizing your own tasks, (3) identifying those tasks that can be delegated, (4) identifying the individual(s) to whom you are going to delegate, (5) scheduling adequate time to assign and discuss the task with the individual, and (6) clearly defining the task, identifying what must be achieved, and communicating the task to others, you will enhance your own leadership skills, and better serve your clients, your firm and your community. ☺

Call for Nominations for 2010-2011 YLS Awards

Each year the Young Lawyers Section (YLS) of the Kentucky Bar Association recognizes certain individuals for various awards. In addition to the annual Outstanding Young Lawyer Award and the Nathaniel R. Harper Award, for 2010-2011, YLS has added two (2) new awards: the Service to Young Lawyers Award and the Young Lawyer Service to Community Award. A description of each award and a call for nominations for each follows:

1. Outstanding Young Lawyer Award

Annually, the YLS selects an

Outstanding Young Lawyer for his/her civic activities, legal accomplishments and community involvement. Who is considered a Young Lawyer? Any Kentucky lawyer who is 40 years of age or under or any Kentucky lawyer who has practiced law 10 years or less regardless of age.

If you know of a young lawyer who exemplifies these outstanding character traits and activities who you would like to nominate, please submit a brief cover letter (no more than one page, single-spaced) and a completed application

discussing why the nominee is deserving of the Outstanding Young Lawyer Award. The nominating letters should include an overview of factors such as, but not limited to, civic activities, legal accomplishments and community involvement. Nomination forms can be found at www.kbayls.com.

Enclosure letters and completed applications can be mailed together and **must be received no later than Friday, April 1, 2011**. They can be mailed to Rebekkah Rechter, YLS Chair-Elect, at 700 West Jefferson Street, Suite 1000,

Louisville, Kentucky 40202, or emailed as an attachment to RebekkahRechter@kycourts.net. On April 4, YLS will forward all completed applications to the panel of judges who will select the 2011 Outstanding Young Lawyer (OYL) Award.

The OYL Award will be presented during the YLS Annual Luncheon scheduled for Thursday, June 16, during the KBA Annual Convention planned for June 15-17 in Lexington. If you have any questions, please contact Rebekkah Rechter at RebekkahRechter@kycourts.net or (502) 235-0137.

2. Nathaniel R. Harper Award

The Nathaniel R. Harper Award is a trailblazer award that seeks to recognize those individuals or entities who have demonstrated a commitment to changing the face of the bar in Kentucky by promoting full and equal participation in the legal profession through the encouragement and inclusion of women, minorities, persons with disabilities, members of the lesbian, gay, bisexual and transgendered community and/or other underrepresented groups.

The Award is named after Nathaniel R. Harper, one of the first two African Americans to be admitted to practice law in Kentucky. Because African Americans were excluded from law schools in the Commonwealth at the time of Harper's admission, he established the Harper Law School in his law office, where he trained and helped produce several African American lawyers. It is Harper's pioneering spirit and sense of responsibility to pave the way for others that the award seeks to honor. Nomination forms can be found at www.kbayls.com.

Completed applications **must be received no later than Friday, April 1, 2011**, and can be mailed to Adrienne Godfrey Thakur, Chair of YLS Diversity Committee, Henry Watz Gardner & Sellars, PLLC, 401 W. Main Street, Suite 314, Lexington, KY 40507, or sent as an email attachment to agthakur@hwgsg.com. On April 4, YLS will forward all completed applications to the Diversity Committee who will select the recipient(s).

The Nathaniel A. Harper Award will

be presented during the KBA Membership Luncheon on Friday, June 17, during the KBA Annual Convention in Lexington, June 15-17. If you have any questions, please contact Adrienne Godfrey Thakur at agthakur@hwgsg.com or (859) 253-1320.

3. Service to Young Lawyers Award

New for 2010-2011, the Service to Young Lawyers Award will be presented to a lawyer, non-lawyer, or organization for exceptional contributions to the professional and personal advancement and mentorship of young lawyers. This award seeks to recognize those senior lawyers, organizations, and others who consistently work to promote, mentor, and advance young lawyers.

If you know of a lawyer, non-lawyer, or organization who has made exceptional contributions to the professional and personal advancement and mentorship of young lawyers, please submit a nomination letter (no more than three pages, single-spaced) discussing why the nominee is deserving of the Service to Young Lawyers Award.

Nomination letters **must be received no later than Friday, April 1, 2011**, and can be mailed to Nathan Billings, YLS Chair, Billings Law Firm, PLLC, 219 North Upper Street, Suite 200, Lexington, KY 40507, or sent as an email attachment to nbillings@blfky.com. This award recipient will then be selected by the YLS Executive Committee during its quarterly meeting in April 2011.

The Service to Young Lawyer Award will be presented during the YLS Annual Luncheon scheduled for Thursday, June 16, during the KBA Annual Convention planned for June 15-17 in Lexington. If you have any questions, please contact Nathan Billings at nbillings@blfky.com or (859) 225-5240.

4. Young Lawyer Service to Community Award

Also new for 2010-2011, the Young Lawyer Service to Community Award will be presented to a Young Lawyers Section member(s) for exemplary service to his or her community through volunteerism, service to non-profit organizations, and/or pro bono legal representation. Preference will be given to individual(s) whose

service is(are) varied, longstanding, and/or fills a unique niche. When a candidate has engaged in pro bono representation, consideration will be given to both the amount of time the lawyer has contributed and the complexity of the representations completed.

If you know of a young lawyer who has engaged in exemplary service to his or her community, please submit a nomination letter (no more than three pages, single-spaced) discussing why the nominee is deserving of the Young Lawyer Service to Community Award. Please include a description of at least the following:

All Civic Activities, including the name, business address, and business telephone for all civic organizations in which the candidate has been a member while a Kentucky Young Lawyer; any specific offices or leadership positions the candidate has held within the organization; all the projects, programs, or activities organized or chaired for each of the organizations listed above (including dates); and the nominee's most significant contribution in the area of civic activity;

All Community Activities, including what leadership positions or projects the candidate has participated in his or her community; and

Pro Bono representation, including a description of the amount of time the lawyer has contributed and the complexity of the representations completed.

Nomination letters **must be received no later than Friday, April 1, 2011**, and can be mailed to Nathan Billings, YLS Chair, Billings Law Firm, PLLC, 219 North Upper Street, Suite 200, Lexington, KY 40507, or sent as an email attachment to nbillings@blfky.com. On April 4, YLS will forward all completed applications to the panel of judges who will select the recipient(s).

The Young Lawyer Service to Community Award will be presented during the YLS Annual Luncheon scheduled for Thursday, June 16, during the KBA Annual Convention planned for June 15-17 in Lexington. If you have any questions, please contact Nathan Billings at nbillings@blfky.com or (859) 225-5240.

Why Statutes of Limitations Are Not Applicable in Kentucky Arbitrations



By Charles C. Mihalek
and Steven M. McCauley

Introduction

There has been a proliferation of arbitration in the United States in the past 20 years. This rapid increase was caused by a sudden change in the law which took place in 1987.¹ This was not a legislative change but a judicial one. Most of this increase occurred primarily in the *consumer vs. industry* segment. The industries which favor mandatory pre-dispute arbitration include the securities industry, residential construction industry, credit card industry, internet software industry, and cable television industry, among many others. Some of these industries, like the securities industry, have established their own arbitration forums, and as such they maintain and administer the rules governing the resolution of disputes, as well as the recruitment, training and compensation of arbitrators.²

Arbitration started out in this country, and in the various industries mentioned above, as an expeditious alternative to court for businesses and gentlemen of similar sophistication and bargaining power to resolve disputes in private.³ There is a certain gentility to individuals not filing suit in open court, but rather filing a claim before a private forum using privately developed rules to achieve a full, unappealable and final resolution. What is even better, these individuals and businesses are not required to use licensed attorneys. The arbitrators thus do not have to be

licensed attorneys or judges; only businessmen or women.

Since arbitration does not create jurisprudence or precedent and its results are not reasoned, the consumer has no idea what to expect or why he received a particular arbitration result. And due to the nebulous mixture of facts, law, argument, common sense and numbers involved in arbitration, the respondents often successfully defend on the grounds that the claim is time-barred because of an “applicable” statute of limitations. This article will examine the viability of statute of limitations defenses in arbitration.

Statutes of Limitations Are Only Applicable to “Actions” in Kentucky

The statute in Kentucky prescribing the maximum time periods during which certain actions can be brought or rights can be enforced is codified under KRS 413 *et seq.* KRS 413.250 (setting out when an action commences) provides in part that an action “shall be deemed to commence on the date of the first summons or process issued in good faith from a court having jurisdiction of the cause of action.” Kentucky Rules of Civil Procedure CR 3.01 additionally states that a civil action “is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.” Accordingly, the “action” contemplated by the statutes of limitations involves judicial proceedings.⁴

Furthermore, Black’s Law Dictionary defines “action” to include:

A civil or criminal judicial proceeding... ‘An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.’⁵

By contrast, an arbitration is not an “action” as it is not a proceeding in a *court of justice*, nor does it involve the filing of a complaint in a *court*. Black’s Law Dictionary defines “arbitration” as “a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”⁶ The device of arbitration has been specifically recognized by the Kentucky Constitution since 1799.⁷ Kentucky, as well as a majority of other states, has adopted the Uniform Arbitration Act, codified as KRS 417.045 *et seq.*, which requires arbitration of any controversy arising between parties to a written arbitration agreement or an arbitration provision in a written contract.⁸ Kentucky law generally favors the enforcement of arbitration agreements.⁹

Statutes of limitations as set out under KRS Chapter 413 *et seq.*, by the statute’s own terms, clearly apply only to an “action,” which is a “judicial proceeding.” An arbitration is neither an “action” nor a “judicial proceeding,” but a non-judicial, out-of-court proceeding which makes an action or judicial proceeding unnecessary.

While “court” may generally be understood to be limited to tribunals of the judicial branch of government, KRS Chapter 413.270(2) (setting out the application of limitations to administrative agencies) expands the definition of “court,”¹⁰ providing in part:

- 1) If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court had no jurisdiction of the action, the plain-

tiff or his representative may, within 90 days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

- 2) As used in this section, “court” means all courts, commissions and boards which are judicial or *quasi-judicial* tribunals authorized by the constitution or statutes of the Commonwealth of Kentucky or of the United States of America. (emphasis added)¹¹

The court in *Commonwealth, Natural Resources and Environmental Protection Cabinet v. Kentucky Ins. Guaranty Association* addressed this expanded definition in the context of administrative hearings and distinguished the quasi-judicial powers of the Cabinet, explaining that the Cabinet’s hearing officers are quasi-judicial because they make findings of fact which are binding upon appeal to the circuit and appellate courts unless not supported by substantial evidence, and are granted authority by statute to impose fines, revoke permits and order the forfeiture of performance bonds.¹² Arbitrators, by contrast, are not granted such quasi-judicial powers, nor can arbitration proceedings be construed as “courts, commissions or boards which are judicial or quasi-judicial tribunals.” Arbitration is a private, voluntary proceeding for the resolution of disputes. Furthermore, it is a *substitute* for a judicial proceeding in court. Even applying the expanded definition of “court” as defined by KRS 413.270(2), an arbitration proceeding is not a proceeding in court, but rather a voluntary out-of-court proceeding held for the sole purpose of resolving a commercial contractual dispute by commercial experts chosen by the adverse parties.

As an arbitration proceeding is not an “action,” and as Kentucky statutes, civil procedure and case law clearly indicate that statutes of limitations only apply to an “action,” it therefore fol-

lows that statutes of limitations do not apply to arbitrations in Kentucky. Arbitrators misapply Kentucky law when they take statutes of limitations into consideration in determining their binding decision.

Although unable to locate a Kentucky arbitration award or decision which dismissed a claim because of statutes of limitations considerations, and which was subsequently vacated by a reviewing Kentucky court, we believe that such vacatur is a logical extension of prevailing Kentucky precedent.

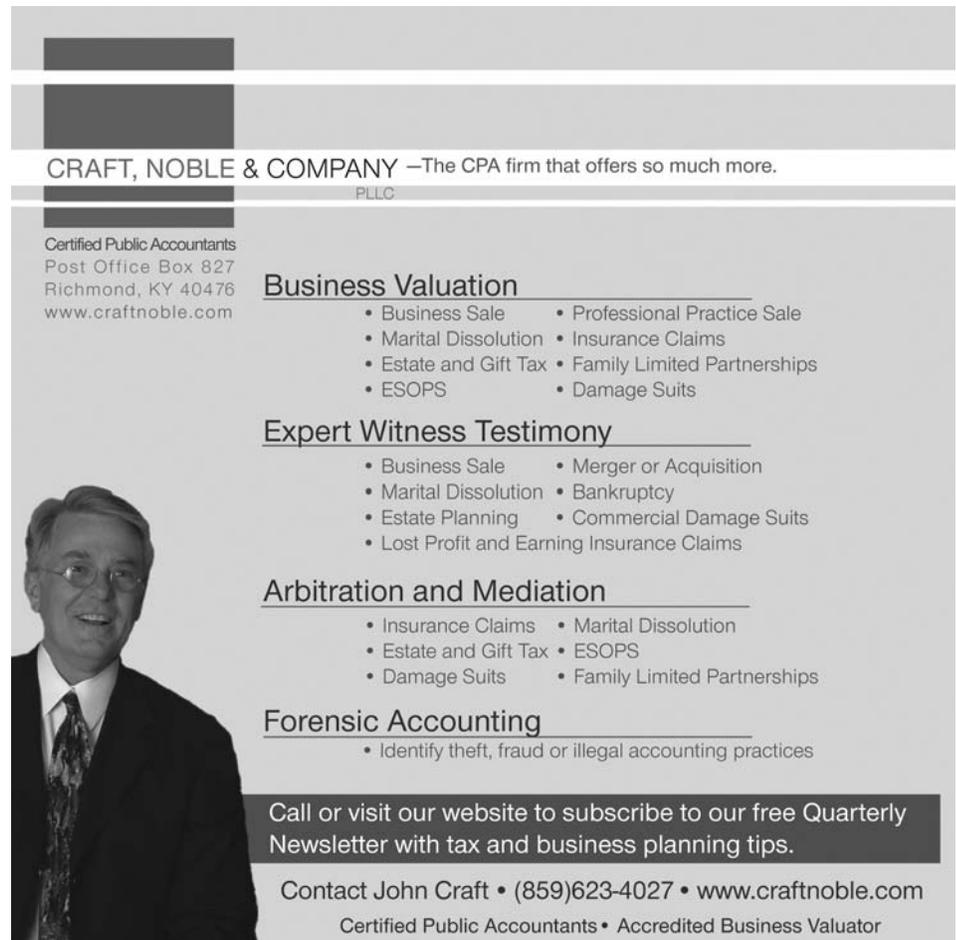
Other Jurisdictions and the Applicability of Statutes of Limitation to Arbitrations

Most states have held that an arbitration proceeding is not an “action” and that, as a result, limitations on “actions” do not apply to arbitration.¹³ Many, including Kentucky, have civil codes that define “action” in a way that clearly does not include arbitration proceedings, and the correlative statutes of limitations specifically limit the time

within which “actions” may be brought, leaving private contractual dispute resolutions out of the picture.

The issue of the inapplicability of statutes of limitations to arbitrations is addressed thoroughly in *NCR Corp. v. CBS Liquor Control*, in which an arbitrator’s refusal to apply a statute of limitations was found not to be manifest disregard of the law.¹⁴ During the arbitration underlying that case, NCR Corp. argued that the claims against it were barred by a number of statutes of limitations. The arbitrator refused to apply those statutes of limitation and awarded damages to CBS Liquor Control. NCR Corp. then petitioned to vacate the award, claiming that the arbitrator’s refusal to apply the statute of limitations was manifest disregard of the law. The U.S. District Court disagreed, stating that “the effect of a statute of limitations is to bar an action at law, not arbitration.”¹⁵

The District Court went on to point out that, if NCR had allowed the claims against it to remain in court, rather than



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forcing them into arbitration, it might well have defended successfully on statute of limitations grounds. The *NCR* court recognized the critical difference between statutes of limitations that extinguish claims, on the one hand, and those which place time limits on the filing of actions, stating:

If the statutes of limitations on which *NCR* relies were the sort that purport to extinguish claims, rather than limit actions in court, they might be relevant, but they do not purport to be statutes of that sort. Rather, on their face they limit the bringing of actions.¹⁶

The statutes of limitation in *NCR* were limitations on actions in court rather than on the underlying claims, and were thus not an applicable defense in an arbitration proceeding. The *NCR* court furthermore went on to hold:

There is no doubt that *NCR* and *Acme* could have lawfully incorporated into the 1982 Agreement either an express limitation on claims or incorporated a statute of limitations by reference, but they did not do so.¹⁷

In Massachusetts the court in *Carpenter v. Pomerantz* held the statute of limitations on actions for breach of contract to be inapplicable to demands for arbitration.¹⁸ The court pointed out that the statute limited the time for commencement of actions and stated that “[a]s used in statutes of limitation, the word ‘action’ has been consistently construed to pertain to court proceedings.”¹⁹

In Texas, the fact that state statutes of limitations do not apply to arbitration proceedings is demonstrated in the use of the word “suit.” For example, the statute providing for the four-year limitations period reads, “[a] person must

bring *suit* on the following actions not later than four years after the day the cause of action accrues...”²⁰ Under Texas law, bringing *suit* and initiating arbitration have been viewed as separate and distinct concepts for 150 years. The Texas Supreme Court stated in 1855:

The words *court* and *suit* have a distinct meaning, and suggest a very different idea from arbitrators and arbitration. These words have been understood and construed in the connection in which they are used to mean either the District Court or that of a justice of the peace, as the case may be.²¹

It is commonly accepted black-letter law that “suit” connotes “any proceeding by a party or parties against another in a *court of law*.”²² Arbitration does not take place within the state’s established judicial system, nor do traditional rules of civil procedure apply to arbitration proceedings.

In California, the statute of limitations reads slightly differently, and rather than using the word “suit,” provides that “[t]he periods prescribed for the commencement of *actions*... are as follows.”²³ “Actions,” as defined under the California C.C.P. are “an ordinary proceeding in a *court of justice*...”²⁴ Clearly, the California statute of limitations, like Texas and Kentucky’s statutes of limitations, only governs the administration of justice by the courts, and the statutes are, by their own terms, inapplicable to arbitration.²⁵

The Connecticut court in *Skidmore, Owings & Merrill v. Connecticut General Life Ins. Co.* concluded that the plaintiff was not entitled to a judgment declaring that a six-year statute of limitations relating to a breach of contract barred the defendant from proceeding with arbitration of a dispute arising under a contract between the parties, even though the contract contained an arbitration clause, and held that the demand for arbitration by the defendant was not the bringing of an action within the bar of any statute of limitations.²⁶ Noting that most statutes of limitations in their essential features were enacted long

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before the present methods of pleading and practice were adopted, and that such limitation periods were designed to apply to the various actions known to the common law, the court pointed out that arbitration is not a common-law action, but rather an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of seeking relief in the established tribunals of justice.²⁷

The court in *Lewiston Firefighters Association v. City of Lewiston* held that arbitration is not an action at law, and thus that the six-year statute of limitations was not an automatic bar to a claim for back-pay by a firefighters' association under the terms of a collective bargaining agreement containing arbitration procedures.²⁸

Affirming a decree dismissing the city's bill in equity for injunctive relief restraining arbitration proceedings that concerned claims by a construction company against the city, the court in *Worcester v. Park Construction Co.* held that even though the contract between the parties provided for arbitration, the statute of limitations had no application where the demand for arbitration was seasonably made by the construction company under the terms of the contract.²⁹

The court in *Har-Mar v. Thorsen & Thorshov* reversed a judgment for the plaintiff which sought to enjoin an arbitration proceeding regarding a fee dispute demanded by the defendant under a contract between the parties providing for arbitration of disputes at the choice of either party. The *Har-Mar* court held that in view of the special nature of arbitration proceedings and the statutory and common-law meaning of the term "action," the six-year statute of limitations was not intended to bar arbitration of the defendant's fee dispute solely because such claim would be barred if asserted in an action in court.³⁰ Noting that by statute the term "action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity, and any other proceedings in which rights are to be determined, and also noting that few Minnesota cases which have attempted a common-law definition of the term

"action" have restricted it to the prosecution in a court of justice of some demand or assertion of right of one person against another, the court stated that it thus appeared that the six-year statute of limitations, both by statutory definition and by common law, was intended to be confined to judicial proceedings.³¹ Rejecting the plaintiff's argument that arbitration should be held to be an action subject to the six-year statute of limitations by implication, since prior to legislative enactment of the Uniform Arbitration Act in 1957 no controversy could be arbitrated unless specific performance of the arbitration agreement could be judicially compelled, the court pointed out that such an argument was contradictory to the historic objective, purpose and intent of the Uniform Act, which was to encourage voluntary, speedy, inexpensive, private and final out-of-court arbitration of commercial contractual disputes by commercial experts.³²

In *Cameron v. Griffith*, the defendants argued that their contract for corporate stock was governed by the four-year statute of limitations provided for in G.S. 25-2-725 and the arbitration was not authorized since the claim was barred by that statute.³³ The North Carolina Court of Appeals held that the question as to whether the four-year statute of limitations was applicable was irrelevant and chose not to make a determination on such, holding instead:

[F]or by its terms the limitations period stated in G.S. 25-2-725 applies only to an "action," which is a "judicial proceeding," G.S.25-1-201(1); and an arbitration is neither an "action" nor a "judicial proceeding," but a non-judicial, out-of-court proceeding which makes an action or judicial proceeding unnecessary.³⁴

In *Broom et. al. v. Morgan Stanley Dean Witter, Inc. et. al.*,³⁵ the Washington Supreme Court vacated an arbitration award because the FINRA (formerly known as the NASD) Arbitration Panel had applied "an erroneous rule of law or mistaken application

thereof."³⁶ The court stated that "in the absence of a clear statement to the contrary by the Washington Legislature, we thus read the statutory language and our own precedent to conclude that arbitration is not an 'action' subject to state statutes of limitations in these circumstances."³⁷

Even a FINRA Arbitration Panel in California concluded that statutes of limitations are inapplicable to FINRA arbitration proceedings, stating as much in the Arbitration Award they rendered.³⁸

The survey of cases provided above is a small sampling of a large body of case law.³⁹ There are numerous other cases through a wide range of jurisdictions which have likewise held that statutes of limitations are inapplicable to arbitrations because arbitrations are not *actions*.⁴⁰ Arbitrators, whether in Kentucky or one of these other jurisdictions, must follow established legal precedent and hold statutes of limitations inapplicable in the forum of arbitration.

Conclusion

Kentucky, like the majority of jurisdictions, has interpreted its statutes, civil procedures and case law to determine that statutes of limitations are only applicable to "actions" which are judicial or quasi-judicial proceedings. As an arbitration is a voluntary and private out-of-court proceeding, which serves as a *substitute* for judicial proceedings, it therefore falls outside the scope and reach of statutes of limitations that would otherwise be applicable if the parties had chosen to resolve their dispute in court. Unless otherwise specified by the agreement entered into by the parties, or by express statutory language which defines an "action" to include arbitration, the only applicable limitations period in a securities arbitration is the six-year eligibility rule set forth in FINRA Rules 12206(a) and 13206(a) and NYSE Rule 603, both of which are generally incorporated by reference into broker-dealer customer agreements with arbitration clauses. Arbitrators who take statutes of limitations into consideration when rendering their decision are misapplying the established legal precedent that statutes of limitations are inapplicable to arbitrations. Ⓢ

The authors would like to acknowledge the assistance of Nathan Paul Isaac in the research and preparation of this article.

ENDNOTES

1. The landmark case of *Shearson / American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), established arbitration as the vehicle for securities investors and brokerage customers to arbitrate their statutory fraud claims and other disputes with the brokerage industry pursuant to pre-dispute arbitration agreements. Before that case, arbitration was for the most part confined to member to member disputes within a particular industry or trade organization. In 1974, the U.S. Supreme Court decided *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974), holding that parties could agree to arbitrate federal securities claims in international arbitration. Since 1987, the U.S. Supreme Court has decided a line of cases reinforcing and expanding the use of arbitration. Most recently, on June 21, 2010 the U.S. Supreme Court held that an employer could cause an employee to arbitrate a race discrimination and retaliation case based on the employment agreement the employee signed when hired. *Rent-a-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).
2. Some of these arbitration forums include the Financial Industry Regulatory Authority (FINRA, formerly known as the National Association of Securities Dealers, or the NASD), the New York Stock Exchange (NYSE), the American Arbitration Association (AAA), the National Arbitration Forum (NAF), the National Labor Relations Board (NLRB), and the Chicago International Dispute Resolution Association (CIDRA), among many others.
3. Under English law, the first law on arbitration was the Arbitration Act of 1697. The Jay Treaty of 1794 between Britain and the United

States sent unresolved issues regarding debts and boundaries to arbitration.

4. *Metts v. City of Frankfort, Ky.* App., 665 S.W.2d 318 (1984); see also, *Whittaker v. Smith, Ky.*, 998 S.W.2d 476 (1999).
5. *Black's Law Dictionary* 32 (9th Ed. 2009) (citation omitted) (emphasis added).
6. *Black's Law Dictionary* 119 (9th Ed. 2009) (citation omitted). Earlier editions of Black's Law Dictionary also defined "arbitration as "an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation."
7. See *Fite & Warmath Construction Co. v. MYS Corp., Ky.*, 559 S.W.2d 729 (1977). The Kentucky Constitution at section 250 provides: "It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose the summary mode of adjustment."
8. *Id.* at 734.
9. *Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. 1984).
10. *Commonwealth, Natural Resources and Environmental Protection Cabinet v. Kentucky Ins. Guaranty Association, Ky. App.*, 972 S.W.2d 276 (1997).
11. *Id.* at 280.
12. *Id.* at 279.
13. See *Skidmore, Owings & Merrill v. Connecticut General*, 197 A.2d 83 (Conn. 1963) (an arbitration is not the bringing of an action within the meaning of that phrase as used in the statute of limitations); *Har-Mar v. Thorsen & Thorshov*, 218 N.W.2d 751 (Minn. 1974) (based on the special nature of arbitration proceedings and both the statutory and common-law meaning of the term "action," we feel compelled to hold that the statute of limitations was not intended to bar arbitration

of the claimant's claim solely because such claim would be barred if asserted in an action in court); *Lewiston Firefighters Association v. City of Lewiston*, 354 A.2d 154 (Me. 1976) (arbitration is not an action at law, and the statute is not, therefore, an automatic bar to the Firefighters' recovery); *Son Shipping v. Defosse & Tanghe*, 199 F.2d 687 (2nd Cir. 1952) (arbitration is not within the term "suit" as used in the statute of limitations, and is instead the performance of a contract providing for the resolution of controversy without suit); *SCM Corp. v. Fisher Park Lane*, 358 N.E.2d 1024 (1973) (arbitrators have the power to fash-



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ion remedies appropriate to resolving the dispute before them, including reformation of a contract, often applying principles more liberal than judicial equity, their function as arbitrators being to “find a just solution” to the controversy between the parties); *Associated Teachers of Huntington v. Board of Education*, 33 N.Y.2d 229 (1973) (absent a provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence... their duty is to reach a just result regardless of technicalities); *Town of Haverstraw v. Rockland Patrolman’s Benevolent Association*, 481 N.E.2d 248, 491 N.Y.S.2d 616 (1985) (arbitrator may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be); *Raisler Corp. v. NYC Housing Authority*, 32 N.Y.2d 274 (1973) (absent provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence); *NCR Corp. v. CBS Liquor Control dba Acme Cash*



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- Register*, 847 F.Supp. 168 (S.D. Ohio 1993) (the effect of a statute of limitations is to bar an action at law, not arbitration); and *Carpenter v. Pomerantz*, 634 N.E.2d 587 (Mass.App. 1994) (as used in the statutes of limitations, the word “action” is consistently construed to pertain to court proceedings, not arbitration); and *Miele v. Prudential*, 656 So.2d 460 (Fla. 1995) (arbitration is not considered a “civil action”).
14. *NCR Corp. v. CBS Liquor Control dba Acme Cash Register*, 847 F.Supp. 168, 172 (S.D. Ohio 1993).
 15. *Id.* at 172 (emphasis added).
 16. *Ibid.*
 17. *Ibid.*
 18. 634 N.E.2d 587, 590 (Mass.App. 1994).
 19. *Id.* at 590.
 20. Tex. Civ. Prac. & Rem. Code Ann. § 16.004
 21. *Yarborough v. Leggett*, 1855 WL 4956 (Tex. 1855).
 22. *Black’s Law Dictionary* 1572 (9th Ed. 2009) (citation omitted).
 23. Cal. C.C.P. § 335 (emphasis added).
 24. Cal. C.C.P. § 22 (emphasis added).
 25. Several states have statutes of limitations provisions similar to California’s, including Kentucky, which provide limits on “actions.” For a comprehensive list of cases in which courts have ruled that arbitration proceedings did not constitute “actions,” and thus statutes of limitations were not applicable, see, Statute of Limitations as a Bar to Arbitration Under Agreement, 94 A.L.R.3d 533 (2004).
 26. 25 Conn. Supp. 76, 197 A.2d 83 (1963).
 27. *Id.* at 85.
 28. 354 A.2d 154 (Me. 1976).
 29. 361 Mass. 879, 281 N.E.2d 600 (1972). For other Massachusetts decisions which have consistently construed the word “action” to pertain only to court proceedings, see also *Boston v. Turner*, 201 Mass. 190, 196, 87 N.E. 634 (1909); *Pigeon’s Case*, 216 Mass. 51, 56-57, 102 N.E. 932 (1913); *Ginzberg v. Wyman*, 272 Mass. 499, 501, 172 N.E. 614 (1930); and *Lynch v. Springfield Safe Deposit & Trust Co.*, 300 Mass. 14, 16, 13 N.E.2d 611 (1938).
 30. 218 N.W.2d 751, 754 – 756 (Minn. 1974).
 31. *Id.* at 755.
 32. *Id.* at 754.
 33. 370 S.E.2d 704 (1988).
 34. *Id.* at 704 – 705.
 35. Case No. 06-2-32543-5SEA (unpublished).
 36. RCW 7.04A.230.
 37. See Case No. 82311-1 (July 22, 2010).
 38. See *Angle et. al. v. ING Financial Advisors et. al.*, 2006 WL 1725915 (FINRA).
 39. See *Statute of Limitations as a Bar to Arbitration Under Agreement*, 94 A.L.R.3d 533, 534 (2004).
 40. *Id.* at 533 – 534.

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Why Kentucky's Statutes of Limitations Should Apply to Claims Raised in Arbitration

By Janet P. Jakubowicz and
J. Curtis McCubbin

Why Kentucky's statutes of limitations should apply to claims raised in arbitration¹

Any defense lawyer who frequently arbitrates claims before FINRA,² the American Arbitration Association or a similar forum, has likely had occasion to file a motion to dismiss claims that are on the very face of the Statement of Claim time barred by the applicable statutes of limitations. Indeed, as young lawyers, we are trained that every cause of action has a specific statute of limitations within which it must be brought or it will be lost forever. Despite this axiomatic principle, the plaintiffs' bar has been able to persuade some courts (and some arbitration panels) that statutes of limitations governing the timeliness of claims do not apply in arbitrations.

This article will present the arguments being advanced by the plaintiffs' bar; the rejection of such arguments by the substantial majority of state and federal courts; and why Kentucky courts should follow those jurisdictions which hold that the arbitrators, not the courts, have the exclusive authority to assess the timeliness of a plaintiff's claims.

A. Where parties have agreed to a broad arbitration provision, the defense of statute of limitations is generally available

As a general rule, if parties have agreed to a broad arbitration provision

which is otherwise silent as to the issue of statute of limitations defenses, the applicability of such a defense is for the arbitrators to decide.³ Those attempting to avoid application of a statute of limitations in arbitration attempt to draw a distinction between arbitrations and "actions" in court. An oft-cited case by the plaintiffs' bar addressing this issue is *Har-Mar, Inc. v. Thorsen & Thorshor, Inc.*⁴ In *Har-Mar*, the Minnesota Supreme Court stated, "[b]ased upon the special nature of arbitration proceedings and both the statutory and common-law meaning of the term 'action,' we feel compelled to hold that Section 541.05(1) [the six year statute of limitations] was not intended to bar arbitration of Thorsen's fee dispute solely because such claim would be barred if asserted in an action in court."⁵

However, numerous other state and federal courts have rejected this hyper-technical analysis which would completely prohibit the application of statutes of limitations in arbitration proceedings. In *Nielsen v. Barnett*,⁶ for example, the Michigan Supreme Court was asked to determine whether an arbitration panel had erred by denying the plaintiffs' claim because it was barred by the two year statute of limitations governing malpractice actions. The plaintiffs argued that, because the "statute defining the period of limitations for a malpractice action only applies to court actions,"⁷ the arbitration panel erred in dismissing the plaintiffs' claims as untimely.⁸

In squarely rejecting this argument,

the *Nielsen* Court first noted that an arbitration is a creature of contract.⁹ The authority of arbitrators is conferred by the arbitration agreement itself and arbitrators are bound to act within those terms.¹⁰ The Court observed that because the arbitration clause was written in broad and comprehensive language and included "any claims or disputes" arising from or related to the contract, the arbitrators were empowered with the authority to determine whether or not the plaintiffs' claims were stale.¹¹ Moreover, the fact that the arbitration agreement was silent on the issue of whether the arbitrators had authority to make a determination of timeliness was not fatal because it came within the arbitrator's broad grant of authority:

Just as the arbitrators were authorized to determine whether the defendants owed a duty to the plaintiffs, whether the defendants breached the standard of care, whether any breach of the standard of care was a proximate cause of the plaintiffs' injury, and the amount, if any, of the plaintiffs' damages, we believe that the broad grant of authority also empowered the arbitrators to determine whether, in the first instance, the plaintiffs' claim was stale.¹²

The Court next looked at whether the statute of limitations applied by the arbitrators was consistent with the parties' reasonable expectations when they agreed to arbitrate any claims or disputes. According to the *Nielsen* Court, "the application of the malpractice statute of limitations to the plaintiffs' claim was certainly within the contemplation of the parties to the arbitration agreement. It was certainly not beyond the reasonable expectation of the parties that the arbitration panel would judge the timeliness of the plaintiffs' claim consistent with the Legislature's determination of the appropriate period of limitation for a malpractice claim."¹³

The *Nielsen* Court determined that the policy reasons behind statutes of limitations — to prevent stale claims and provide finality to litigation — were equally relevant both to actions filed in court and to claims pursued in binding arbitration.¹⁴ Thus, the Court rejected any *per se* rule that arbitrators have no authority to interpret or apply statutes of limitations, and reinstated the circuit court order denying the plaintiffs' motion to vacate the arbitration award.¹⁵

The sound reasoning applied by the *Nielsen* Court applies with equal force to Kentucky arbitrations. Arbitration is not intended to enlarge or re-write existing laws,¹⁶ but rather to provide an efficient, less costly alternative forum for resulting disputes under existing laws. Parties do not forgo substantive rights by agreeing to arbitrate their disputes.¹⁷ However, if a statute of limitations defense no longer applies, then a substantive right is being given up and the parties may not even realize it. It would be inconsistent and unfair for a party to invoke the protections of Kentucky's state laws, while at the same time seeking to avoid the limitations periods contained in those same statutes. Indeed, plaintiffs frequently seek attorneys' fees and damages under statutes which only apply to "lawsuits" or "actions," yet argue that arbitrations are not "suits" or "actions" so as to avoid the application of statutes of limitations.¹⁸ In securities arbitration, Plaintiffs commonly bring breach of fiduciary duty, state securities statutory violations, breach of contract, and negligence claims that fall under state statutes or common law. It is reasonable to assume that parties have an expectation that an arbitrator will determine the timeliness of the asserted claims consistent with the applicable state and federal statutes of limitations.¹⁹ Indeed, a contrary position would lead to the absurd results of parties being able to flood arbitration panels with stale, untimely claims many years after the fact.²⁰

To take this argument to its logical conclusion, how can arbitration panels apply any type of statute that only applies to "lawsuits" or "actions?" If this

is the threshold, then arbitrators will only be allowed to consider "rules" or "regulations" propagated by their governing bodies. Obviously, this outcome was not intended by the arbitration legislation and the spirit of the arbitration process. Statutes of limitations thus protect parties from having to deal with disputes (whether in court or arbitration) in which the search for truth has been seriously impaired by plaintiffs who have slept on their rights and evidence may have been lost or witnesses' memories faded.

Moreover, there can be little doubt that an arbitration is a quasi-judicial forum.²¹ The fact that the arbitrator is appointed by agreement to act as arbitrator and is empowered to determine the rights, duties and obligations of the parties, enforce sanctions, and render a binding decision which is enforceable against one of them, clearly demonstrates that the arbitration is quasi-judicial in nature.²²

B. Kentucky should follow the majority of courts which have recognized the applicability of statutes of limitations in arbitration

An overwhelming majority of courts from across the country have both

expressly or implicitly recognized the applicability of federal and state statutes of limitations in arbitration proceedings. For example, in *Merrill Lynch, Pierce, Fenner & Smith v. Jarros*,²³ the appellants challenged the arbitrators' denial of their motion to dismiss on statutes of limitations grounds. Although the Sixth Circuit refused to vacate the arbitrators' decision, it did not do so on the ground that arbitration actions are exempt from statutes of limitations bars. To the contrary, the Sixth Circuit implicitly recognized that statutes of limitations do apply to arbitrations: "Because *Jarros* did not institute arbitration proceedings until much longer than one year. . . [after discovery of the facts underlying his claim], it appears his federal securities claims were not timely brought. . . Even accepting this argument as true, there was a period of two years and two months during which any claim that arose would not have been time-barred. It is likely that at least one state law claim arose during this period and therefore would not be time-barred. A single timely state law claim would support the arbitration award in its entirety."²⁴



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This same result was reached by Judge David L. Bunning from the United States District Court for the Eastern District of Kentucky in *First Family Financial Services, Inc. v. Mollet*.²⁵ In that case, Judge Bunning was confronted with an arbitrator's award which the losing parties sought to vacate, in part, because the arbitrator had failed to apply the applicable statutes of limitations and bar the claim. Although the Court ultimately refused to vacate the award, the *Mollett* Court noted that because the arbitrator was "presented with conflicting theories concerning how the statute of limitations should be interpreted," it could not be said that he manifestly disregarded the law.²⁶

Obviously, if there were a clearly defined legal principle that statutes of limitations do not apply to arbitrations, it would have been unnecessary for the Courts in *Jarros* and *Mollett* to analyze whether the limitations had run on all of the claims being asserted in the underlying arbitrations. The reasoning of the *Jarros* and *Mollett* Courts is therefore consistent with cases from other jurisdictions which have expressly held that state and federal statutes of limitations apply to arbitration proceedings.²⁷

Conclusion

Contrary to the handful of out of state courts which have held that statutes of limitations do not apply in arbitrations, these authors believe that the more reasoned approach is for Kentucky to follow the majority of jurisdictions which permit arbitrators to apply statutes of limitations where the parties have otherwise agreed to a broad arbitration provision.²⁸ Such a position would be consistent with Kentucky's public policy against the prosecution of stale and outdated claims in litigation.²⁹ It would also be in line with the expectations of the parties that the arbitral award for which they bargained will truly be final and immune from intrusive review by the courts.

However, until this issue has been

definitely resolved by our Kentucky courts, parties should consider specifying in their arbitration contracts which statutes of limitations will govern their future disputes or specify a time limit to bring certain claims so far as to eliminate the risk of having to defend against claims that one would ordinarily believe are time barred. Ⓢ

ENDNOTES

1. The authors would like to acknowledge the assistance of Jessica T. Sorrels, Esq. for her work in connection with this article.
2. In 2007, the National Association of Securities Dealers, Inc. merged with the New York Stock Exchange. The merged entity is known as the Financial Industry Regulatory Authority ("FINRA"). FINRA is the regulatory body which administers arbitration claims between broker dealers and customers in the securities industry. Arbitration is the primary dispute resolution mechanism in the securities industry today.
3. See, e.g., *ON Equity Sales Co. v. Pals*, 528 F.3d 564 (8th Cir. 2008); *Liberte Capital Group, LLC v. Capwill*, 148 Fed. Appx. 413 (6th Cir. 2005) (unpublished); *MONY Sec. Corp. v. Bornstein*, 390 F.3d 1340 (11th Cir. 2004); *Wash. Square Sec., Inc. v. Aune*, 385 F.3d 432 (4th Cir. 2004); *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.* 266 F.3d 645 (7th Cir. 2001); *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906 (6th Cir. 2000).
4. 218 N.W.2d 751 (Minn. 1974).
5. For examples of other courts that have concluded that arbitrations are not "actions" in the context of issues related to statutes of limitations, see, e.g., *Skidmore, Owens & Merrill v. Connecticut General Life Insurance Co.*, 197 A.2d 83, 87 (Conn. Super. 1963) (concluding that "[a]rbitration is not a common-law action, and the institution of arbitration proceedings is not the

bringing of an action under any of our statutes of limitation."); *Lewiston Firefighters Association v. City of Lewiston*, 354 A.2d 154, 167 (Maine 1976) (holding that "[a]rbitration is not an action at law and the statute is not, therefore, an automatic bar to the [Firefighters'] recovery."); *Broom v. Morgan Stanley DW Inc.*, 236 P.3d 182, 244 (Wash. 2008) (holding that an arbitration is not an "action" subject to the state of Washington's statutes of limitations.

6. 485 N.W.2d 666 (Mich. 1992).
7. *Id.* at 668.
8. The parties' arbitration agreement was governed by the Malpractice Arbitration Act, M.C.L. § 600.5805(1); M.S.A. § 27A.5805(1) which provides: A person shall not bring or maintain an *action* to recover damages for injuries to persons or property unless, after the claim first accrue to the plaintiff . . . , the *action* is commenced within the periods of time prescribed by this section. (emphasis added).



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The statute further provides that: “[t]he period of limitations is two years for an *action* charging malpractice.” M.C.L. § 600.5805(4); M.S.A. § 27A.5805(4) (emphasis added).

9. *Id.* at 669.
10. *Id.*
11. *Id.* at 670. This principle is consistent with the general proposition that arbitration awards should be upheld so long as they do not disregard the plain provisions of the contract. *See General Telephone Company of Ohio v. Communications Workers*, 648 F.2d 452 (6th Cir. 1981). *See also Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, 312 F.2d 299 (2nd Cir. 1963).
12. *Id.*
13. *Id.*
14. *Id.* at 669
15. *Id.* at 671.
16. In 1984, Kentucky adopted the Uniform Arbitration Act, KRS §417.045, *et seq.*, which governs arbitrations in Kentucky. If the arbitration agreement at issue involves interstate commerce (such



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as securities industry disputes), the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* also applies.

17. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).
18. For example, under the Federal Securities Law, attorneys’ fees are recoverable for violations of 10b-5 to any person “who may sue at law or in equity in any *court* of competent jurisdiction.” 15 U.S.C. § 78r (emphasis added). Plaintiffs in securities arbitrations frequently make claims for their attorneys’ fees pursuant to this and other similar statutory provisions that reference only courts, and not arbitration proceedings.
19. It is a well established policy in Kentucky that statutes of limitations are statutes of repose and were enacted “to fix *in every* case, a definite limit” of time for bringing actions or proceedings for relief. *Hoffert v. Miller*, 9 Ky L. Rptr. 732, 86 Ky 572, 6 S.W. 447 (Ky. 1888). There is no logical reason to believe that the Legislature intended to exempt arbitrations from that policy.
20. In securities industry arbitrations, FINRA Rule 12206 contains an eligibility provision which provides, in part, that no claim can be submitted to arbitration if six years have elapsed “from the occurrence or event giving rise to the claim.” In contrast, the AAA Commercial Arbitration Rules impose no specific outside time limits within which claims must be filed.
21. The format and substance of a FINRA arbitration proceeding, for example, is clearly judicial in nature. Such proceedings provide for a statement of claim and answer to be filed, written discovery to be conducted pursuant to established guidelines, motion practice, subpoenas, opening statements, followed by direct and cross examinations, expert witnesses, closing statements, deliberations by the arbitrations and issuance of a written award. FINRA Code of Arbitration, § 13000, *et seq.*
22. Kentucky courts have not yet had occasion to address the issue of whether an arbitration is a quasi-judicial proceeding. However, courts from other jurisdictions have so held. *See, e.g., Cahn v. International Ladies’ Garment Union*, 203 F. Supp. 191 (E.D. Pa. 1962) (holding that if “one is appointed by agreement of parties to act as arbi-

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trator, and is empowered to resolve dispute between them, he is, in so acting, performing a ‘quasi-judicial’ function . . .); *International Association of Firefighters v. City of Everett*, 146 Wash. 2d 29, 42 P.3d 1265 (Wash. 2002) (holding that arbitrations may be judicial in nature, depending on the circumstances); *Boyd v. Davis*, 897 P.2d 1239 (Wash. 1995) (quoting *N. State Constr. Co. v. Banchemo*, 386 P.2d 625 (1963)) (*per curiam*) (concluding that “[a]rbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts.”) In addition, at least one Kentucky federal court, *Warren v. Tacher*, 114 F. Supp. 2d 600, 602-03 (W.D. Ky. 2000), has recognized the authority of FINRA arbitrators to decide prehearing dismissals for failure to state a claim (as a court would do) so long as the dismissal is not fundamentally unfair.

23. 70 F.3d 418, 421 (6th Cir. 1995).

24. *Id.* at 421-22

25. 2006 WL 695258 (E.D. Ky. 2006).

26. *Id.* at *8.

27. For examples of other courts which have concluded that statutes of limitations apply to arbitration proceedings, see *O’Neel v. National Assoc. of Securities Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982) (holding that the validity of time-barred defenses to enforcement of arbitration agreements is generally determined by the arbitrator, not the court); *United Rubber, Cork, Linoleum & Plastic Workers of America v. Pirelli Armstrong Tire, Corp.*, 104 F.3d 181 (8th Cir. 1997)(same); *National Iranian Oil Co. v. Mapco Int’l Co.*, 983 F.2d 485, 491 (3d Cir. 1992) (holding that the arbitrator determines the timeliness of the underlying claim); *Durham County v. Richards & Assoc., Inc.*, 742 F.2d 811, 815 (4th Cir. 1984) (concluding that claims of untimeliness are for the arbitrator); *Berkley v. Merrill Lynch*, 2008

WL 755875 (S.D. Ohio 2008) (implicitly recognizing that the timeliness of claims is determined by the arbitrators); *Max Mark Color & Chemical Co. Employees’ Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 255 (S.D.N.Y. 1999) (holding that arbitration panel acted appropriately in granting a motion to dismiss based, in part, on ERISA’s three year statute of limitations); *Dean Witter, Reynolds, Inc. v. McCoy*, 853 F. Supp. 1023, 1034 (E.D. Tenn. 1994) (“[t]he NASD arbitrators are required to follow and apply the same substantive law and the applicable statute of limitations as the courts”); *Davis v. Skarnulis*, 827 F. Supp. 1305, 1308 (E.D. Mich. 1993) (holding that statute of limitations defenses apply in arbitration); *Prudential Securities, Inc. v. LaPlant*, 829 F. Supp. 1239, 1243 (D. Kan. 1993) (“[I]t is well-settled that the determination of all time-barred defenses, including the statute of limitations, is to be made by the arbitrator, not the courts.”) In addition, the FINRA Code of Arbitration Procedure specifically allows for dismissal based on time-barred claims. See FINRA Rule 12206 (“This Rule shall not extend *applicable statutes of limitations*. . .”) (emphasis added).

28. At least three states (New York, Delaware and Georgia) have passed statutes expressly providing that parties may assert the applicable statutes of limitations as a bar to an arbitration. See, e.g., NY CPLR §7502(b); 10 Del. C. §5702(b); Official Code of Georgia § 9-9-5.

29. See also *National Iranian Oil Co. v. MAPCO International, Co.*, 983 F.2d 485, 491 (3d Cir. 1992) (concluding that while the Federal Arbitration Act reflects a strong federal policy favoring arbitration, Congress, by declining to provide for a specific limitations period, did not intend to grant parties the perpetual right to enforce arbitration agreements).



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The Scope of the Power of Courts to Enforce Agreements to Arbitrate in Kentucky



By Walter L. Sales

The Federal Arbitration Act (hereinafter the FAA) provides that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²

Kentucky's Uniform Arbitration Act (KUAA) has a similar provision:

A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract. This chapter does not apply to:

- (1) Arbitration agreements between employers and employees or between their respective representatives; and
- (2) Insurance contracts. Nothing in this subsection shall be deemed to invalidate or render unenforceable contractual arbitration provisions between two (2) or more insurers, including reinsurers.³

The KUAA is a uniform statute which has been adopted by most of the states.

Federal and State Substantive Developments

The Kentucky Supreme Court has opined that the relevant provisions of the FAA and KUAA, cited above, are virtually identical, *Louisville Peterbilt, Inc. v. Cox*⁴. When a state statute is modeled on a federal one, typically, as to the substantive provisions of the statutes, Kentucky courts have been directed to adopt U.S. Supreme Court or Sixth Circuit law interpreting the federal statute when there is a lack of precedent in Kentucky.⁵ In *Peterbilt*, the Kentucky Supreme Court adopted the U.S. Supreme Court's basic guide on interpreting the FAA as the way to interpret the KUAA, "any doubts concerning the scope of arbitrable issues is to be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."⁶ In *Peterbilt*, the Court held that even as to allegations that the contract containing the agreement to arbitrate was procured by fraud that question was reserved for the arbitrator.⁷ The identical savings provisions in the FAA and KUAA which exempt from enforcement those agreements which "save upon such grounds as exist at law for the revocation of any contract," do not apply to fraud in the inducement to enter the contract, but only as to fraud in the inducement to agree into the arbitration provision itself.⁸

To determine whether and to what extent parties entered into an agreement which requires arbitration, courts will obviously apply the law of the state

where the contract was made or which governs the interpretation of the agreement, both to efforts to compel arbitration under the KUAA and to efforts to compel arbitration under the FAA.⁹ In *Stutler*,¹⁰ the Court held that while an agreement to arbitrate is valid as a matter of federal law, state law will generally govern issues concerning the validity of the contract and defenses, including fraud, duress, and unconscionability.¹¹ Accordingly, the Court held that a district court erred in applying federal common law rather than state law as to contract defenses.

The FAA and the KUAA appear to be for the most part harmonious. For example, Kentucky excludes employment agreements from those arbitration agreements which may be enforced under the KUAA. The FAA has a similar, but not identical provision in 9 USC §1 which exempts from its coverage, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In *Gilmer v. Interstate/Johnson Lane Corporation*,¹² the U. S. Supreme Court held that an employment agreement to arbitrate all disputes, including statutory ones arising under the Federal Age Discrimination in Employment Act, was arbitrable because the agreement to arbitrate was embedded in a registration agreement between the employee and the New York Stock Exchange, and hence was not technically an employment agreement at all. Later, citing *Gilmer*, the Kentucky Court of Appeals held that the very same registration agreement between an employee and the New York Stock Exchange also justified the enforcement of an agreement to arbitrate claims of sexual harassment, retaliation, and equal pay violations asserted by a registered broker against her employer.¹³ But, the Court held that allegations of rape and battery against a co-worker which formed the basis for her statutory claims of sexual harassment were not subject to the agreement to arbitrate because those acts, if true, are "independent of the employment relationship."¹⁴ Recognizing that the

result left the parties to litigate some claims in court and to arbitrate others, the Court of Appeals, again citing *Cone*, observed “that it is the FAA and the contract which requires the piecemeal resolution.”¹⁵

A question left unanswered by the court in *Gilmer* was whether an agreement to arbitrate contained in a traditional employment agreement could be enforced under the FAA since the agreement in *Gilmer* was one between a brokerage’s employee and the New York Stock Exchange. That question was answered 10 years later in *Circuit City Stores, Inc. v. Adams*,¹⁶ where the Court held that the exemption from coverage of the FAA contained in 9 U.S.C. §1 for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” was limited to workers directly involved in transportation. The Supreme Court did not equate the use of the words “in foreign or interstate commerce” in 9 U.S.C. §1 as co-extensive with the power of Congress under the Commerce Clause of the U.S. Constitution.¹⁷

The limited exemption for contracts of employment of transportation workers is not found in the KUAA which exempts all employment contracts from its ambit.¹⁸ But, the Kentucky Court of Appeals recently held, on remand from the Kentucky Supreme Court, that a contract of employment which included an arbitration provision could be enforced in Kentucky despite the exemption.¹⁹ There, an employment agreement contained a provision requiring arbitration of disputes. Ultimately, an arbitrator’s award provided relief for both the employer and the employee, and the award was confirmed by the Circuit Court. The Court of Appeals affirmed confirmation of part of the award and reversed part. The Kentucky Supreme Court granted a motion for discretionary review, vacated the decision of the Court of Appeals, and remanded to the Court of Appeals to reconsider whether the exclusion in KRS §417.050 for arbitration agreements between employers and employees applied. On remand, the Court of Appeals held that KRS

§417.050 excludes employment agreements from its coverage, but that does not limit Kentucky courts from enforcing these provisions. The Court of Appeals held that the statutory exclusion does not pre-empt ordinary contract principles from applying, but only limits the use of the procedural rules set forth in the KUAA from applying to employment agreements. The Court also noted that both parties had relied upon various provisions of the KUAA throughout the proceedings, though the Court of Appeals did not characterize that reliance as a waiver or a post-dispute agreement to arbitrate. Nor did the Court of Appeals mention the FAA as a basis for its holding, though the FAA probably would have applied. At the time of the writing of this article no further motion for discretionary review has been filed.

An interesting outgrowth from *Jacob v. Dripchak* and *Circuit City v. Adams* is the possibility that employers and employees in the transportation industry in Kentucky may seek to enforce agreements to arbitrate under ordinary contract principles, eschewing both the FAA and the KUAA because both exclude such contracts from their coverage.

That agreements to arbitrate require the consent of the parties may seem obvious, but the application can sometimes take interesting twists. For example, the Kentucky Court of Appeals in *Olshan Foundation v. Otto*,²⁰ held that an action by homeowners for breach of warranty contained in a contract with the home builder was required to be arbitrated despite the fact that the homeowner was not a signatory to the contract. The homeowners by seeking to enforce warranties contained in the agreements between the previous homeowners and the contractor were held to be estopped from denying the arbitral choice of dispute resolution contained in the contracts at issue when they sought other benefits of those agreements.²¹ The receipt of a direct benefit from the contract by the non-signatory operated as an acceptance of all of the terms. The Court quoted with approval the standards set forth by the Court of Appeals in *Thomson-CSF v. American Arbitration Association*: “Five theories for

binding non-signatories to arbitration agreements have been recognized: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel.”²²

The estoppel theory and the decision of the Court in *Thomson-CSF v. American Arbitration Association* was adopted by the Kentucky Supreme Court in *North Fork Collieries, LLC v. Hall*,²³ when it held that third party beneficiaries of a contract containing an arbitral dispute resolution mechanism were bound by that agreement even if other rights of other parties under related agreements were not subject to arbitration. The Court noted that the parties could have specifically opted for a provision to stay arbitration while others not subject to arbitration can litigate their sides of the dispute, but in the absence of such an agreement related litigation should be stayed to allow for arbitration.²⁴

But in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*,²⁵ the Court held that an agreement to arbitrate a class action dispute would not be inferred from an otherwise enforceable agreement to arbitrate because while an arbitrator may adopt procedures necessary to give effect to the intent of the parties, it simply cannot be inferred from the fact of an agreement to arbitrate a bilateral dispute that there is an agreement to arbitrate a complex class action. The Court relied heavily upon the fact that there could be thousands of class members asserting many disputes, and that the award of the arbitrator adjusts the rights of the actual parties to the agreement but perhaps hundreds or thousands of non-parties as well.

Procedural Developments.

Under both federal and state arbitration laws appeals may be taken from interlocutory orders denying a motion to compel arbitration or to stay litigation in favor of arbitration, or confirming, modifying, or vacating awards of arbitrators.²⁶ By the same provisions, however, appeals may not be taken from interlocutory orders compelling or directing arbitration or refusing to enjoin arbitration.

The choice available to a party seek-

ing to compel arbitration is frequently not “either/or” as in FAA or KUA. Rights asserted under the FAA must be asserted in state and federal courts as defenses, and both federal and state courts are obliged to honor the federal preference for arbitration, but they remain free to apply state contract law to this federal preference.²⁷

There is no jurisdictional component to the FAA. It creates no independent cause of action. The same is true with the KUA except for the jurisdictional limitations of KRS 417.200 which were the subject of an interesting case at the Kentucky Supreme Court. In *Ally Cat, LLC v. Chauvin*,²⁸ Ally Cat purchased a condominium, out of which it intended to operate a medical practice. There was no arbitration agreement between Ally Cat and the seller. Later the Homeowners Association and the sole member of Ally Cat signed a homeowners’ warranty containing an agreement to arbitrate, and referencing the KUA. Ally Cat later asked the seller to repair leaks in the roof which were not performed to its satisfaction and then sued the seller for breach of the sale contract, fraud, and negligence. Ally Cat did not seek relief under the warranty. The Circuit Court, on motion of the defendant, compelled arbitration and the Court of Appeals denied Ally Cat’s motion for interlocutory relief. Ally Cat then filed a petition for writ of prohibition because as acknowledged by the Supreme Court, “an order compelling arbitration under a valid arbitration agreement is, ordinarily, not appealable.”²⁹ Ally Cat argued that because of KRS 417.200 the circuit court lacked jurisdiction in the first instance, thereby making relief via extraordinary writ appropriate.³⁰ KRS 417.200, the statute governing jurisdiction, states in salient part, “[t]he making of an agreement described in KRS 417.050 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter...” The Kentucky Supreme Court, citing with approval *Tru Green Corp. v. Sampson*,³¹ and *Artrip v. Samons Construction, Inc.*,³² held that when an agreement to arbitrate does not explicitly state that the arbitration is to be conducted in Kentucky, then the circuit

court lacks jurisdiction to compel arbitration even, when as here, the agreement to arbitrate references the KUA.³³ The Court specifically withheld making the same judgment when the case before it was on a motion to enforce an arbitration award, where the arbitration did not occur in Kentucky.³⁴

Additionally, because the seller was not a signatory to the homeowners warranty containing the arbitration provision and because Ally Cat was likewise not a party (Ally Cat’s sole member signed it in her own name) the Court went on to hold that the agreement to arbitrate otherwise failed to meet the requirements of KRS 417.050. Moreover, because the warranty was limited only so long as the unit was used for a residence, the Court concluded it did not apply as the unit was used for business.³⁵

Two cases which discuss appellate procedures are worth noting. In *Kindred Hospitals Limited Partnership v. Lutrell*,³⁶ administratrix of an estate sued a nursing home for negligence and

wrongful death of her mother, and nursing home unsuccessfully sought to compel arbitration under the KUA in circuit court. Appellant sought relief in the Court of Appeals under CR 65.07 by filing a motion for intermediate relief which was denied by the Court of Appeals as not being authorized by KRS 417.220. A similar motion was filed in the Kentucky Supreme Court under CR 65.09. The Supreme Court reviewed the appellate provision of the KUA which provides that “the appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action,” and noting the vagueness of the statute rejected the requirement that a notice of appeal (set forth in CR 73) must be filed under KRS 417.220(2). Rather, the Court concluded that KRS 417.220(2) authorized both modes of appellate redress from an order refusing to compel arbitration. Either CR 65 or CR 73 could be used.³⁷ When using CR 65, however, a high burden must be met in order to obtain relief – if irreparable injury is lacking

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relief may be denied. On the other hand, party can invoke the court's appellate jurisdiction pursuant to the normal processes of CR 73 which of course are lengthier and without a stay could result in an appellate decision that comes too late. Finally, the Court held that while KRS 417.220 allows for two separate appellate paths, an appellant may use only one.³⁸

Just last year, the Court, while accepting that there are two separate appellate paths for parties to appeal from orders denying arbitration, seemingly loosened the strictures of using CR 65.07 or CR 65.09 in *North Fork Collieries, LLC. V. Hall*.³⁹ There the Court held that, when faced with a motion to compel arbitration, the court's job is to determine if in fact an agreement to arbitrate was reached and whether said agreement applies to the instant dispute. When it does, reference to arbitration is required.⁴⁰ The Court then seemed to back away from its observations in *Kindred Hospitals*⁴¹ that the risk of proceeding under CR 65 car-

ries with it the possibility of not being able to prove a right to extraordinary relief, observing that when the party seeking to compel arbitration asserts that its bargained for right of an arbitral forum will be denied if arbitration is not compelled then it has met its burden under *Kodak Mining Corporation v. Carrs Fork Corporation*.⁴² The court then rationalized its prior holdings in *Kindred Hospitals* and *Oakwood Mobile Homes v. Sprowls*⁴³ by noting that in those cases the equitable claim asserted by the party seeking arbitration relied on the cost and delay of litigation rather than being deprived of its contractual bargain to an arbitral forum.

If the Court's explanation of the differences between *North Fork Collieries* on the one hand and *Kindred Hospitals* and *Oakwood* on the other holds true in future cases, it will place a premium on parties seeking to compel arbitration to make it clear that their equitable injury is to the benefit of their bargain, and not to the cost and delay associated with losing that bargain.

Finally, another recent development is found in the Kentucky Supreme Court's decision in *Ernst & Young, LLP v. Clark*,⁴⁴ petition for writ of certiorari denied.⁴⁵ There, a financially distressed workers compensation self-insurance fund was placed into rehabilitation under Kentucky's Insurers Rehabilitation and Liquidation Laws ("IRLL").⁴⁶ Under the IRLI the Commissioner of the Kentucky Department of Insurance serves as the rehabilitator. The rehabilitator and members of the fund sued the former auditor of the fund alleging accounting malpractice which caused or substantially caused the near financial collapse of the fund. The Kentucky Supreme Court held that the agreement to arbitrate between the fund and its auditors was binding on the members of the fund because they assented to the agreements as a condition of their application to join the fund.⁴⁷ However, the Court refused to compel arbitration of the rehabilitator's claims because the McCarron Ferguson Act⁴⁸ "establishes a doctrine of reverse pre-emption that expressly exempts from federal preemption state statutes enacted to regulate insurance, leaving the regulation of insurance to the individual state."⁴⁹ Relying on *Humana Inc. v. Forsythe*⁵⁰ and *Stephens v. American Int'l Ins. Co.*,⁵¹ the Court held that the FAA did not regulate the business of insurance, that the IRLI was intended to regulate the business of insurance, and that because the FAA would "invalidate, impair, or supersede" Kentucky's IRLI, it was subject to reverse pre-emption.

Conclusion

The evolution of the law of arbitration is now in a second, maturing phase. The first phase was establishing in state and federal jurisprudence the concept of a preference for the enforcement of private agreements to settle disputes through arbitration, rather than through judicial litigation. In that first phase appellate courts generously enforced arbitration agreements. In the current second phase, the limits to what the courts will enforce are being set as lawyers and their clients are less inclined to litigate what has already been established. Now, the litigation tests the nuances. For those lawyers

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engaged in litigating and drafting arbitration agreements the challenge is now much greater; *i.e.*, to master the nuances of the limitations that arise in the maturity phase of the development of the law of arbitration. ①

ENDNOTES

1. The scope of this article covers the development of the law of arbitration in Kentucky. The principal sources for the evolution of the law in Kentucky are the Federal Arbitration Act, 9 USC§ 1, et seq., and the Uniform Arbitration Act, KRS §417.045, et seq. The article does not address developments in the law under collective bargaining agreements between employers and labor unions in the private sector, which are subject to the federal common law as it has developed under Section 301 of the Labor Management Relations Act, 29 USC §185. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).
2. 9 USC §2.
3. KRS § 417.050.
4. 132 S.W.3d 850, 854 (Ky. 2004).
5. *Harker v. Federal Land Bank*, 679 S.W. 2d 226, 229 (Ky. 1984).
6. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) (hereinafter referred to as “Cone”).
7. 132 S.W.3d 850, 855 (Ky. 2004).
8. *Id.* at 854. The Kentucky Supreme Court adopted the U. S. Supreme Court’s holding in *Prima Paint Corporation v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967).
9. *Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W. 3d 193(Ky. 2002). See also *Seawright v. American General Finance Services, Inc.*, 507 F.3d 967, 972 (6th Cir. 2007); *Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343, 345 (6th Cir. 2006).
10. 448 F.3d 343 at 345.
11. *Id.* See also *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) quoted by the Court of Appeals for the proposition that that federal law requires the enforcement of agreements to arbitrate unless the savings clause requires otherwise.

12. 500 U.S. 20 (1991).
13. *Hill v. J.J.B. Hilliard, W.L. Lyons, Inc.*, 945 S.W. 2d 948 (Ky. App. 1996).
14. *Id.* at 952.
15. *Id.*
16. 532 U.S. 102 (2001).
17. *Id.* at 115-116.
18. See KRS §417.050.
19. *Jacob v. Dripchak, et al.*, ___ S.W. 3d___, No. 2008-CA-001157 -MR (January 21, 2011).
20. 276 S.W. 3d 827 (Ky. App. 2009).
21. *Id.* at 831.
22. 64 F.3d 773, 776 (2d Cir. 1995). See also the Court’s reliance on *Javitch v. First Union Securities, Inc.*, 315 F.3d 619 (6th Cir. 2003).
23. 322 S.W.2d 98, 106 (2010).
24. See the Court’s reliance on *Volt Information Services, Inc. v. Stanford University*, 489 U.S. 468 (1989); *Rodriguez v. American Technologies, Inc.*, 136 Cal.App.4th 1110, 39 Cal.Rptr.3d 437 (2006).
25. ___ U.S. ___, 130 S.Ct. 1758 (2010).
26. 9 U.S.C. §16; KRS §417.220.
27. *Seawright v. American General Finance Services, Inc.*, 507 F.3d 967, 972 (6th Cir. 2007); *Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343, 345 (6th Cir. 2006); *Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W. 3d 193(Ky. 2002). See also *Kruse v. AFLAC International, Inc.*, 458 F. Supp. 2d 375 (E.D. Ky., 2006)(“Generally, state law principles that govern the formation of contracts will apply...In deciding whether the parties agreed to arbitrate a dispute, the court examines the applicable state contract law[citation omitted]. However, the federal policy favoring arbitration is taken into consideration even in applying ordinary state law.”) *Id.* at 382.
28. 274 S.W. 3d 451 (Ky. 2009).
29. *Id.* at 454.
30. See the Court’s reliance on *Hoskins v. Maricle*, 150 S.W. 3d 1, 10 (Ky. 2004) (“a writ of prohibition may be granted ‘upon a showing that ... the lower court is proceeding or is about to proceed outside of its jurisdiction and

there is no remedy through an application to an intermediate court.”)

31. 802 S.W.2d 951, 952 (Ky. App. 1991).
32. 54 S.W.3d 169, 171 (Ky. App. 2001)
33. *Id.* at 455.
34. *Id.* at 456.
35. *Id.*
36. 190 S.W. 3d 916 (Ky.2006).
37. *Id.* at 920.
38. *Id.* at 921. Though the Supreme Court disagreed with the rationale used by the Court of Appeals it ultimately affirmed the Court of Appeals decision to deny arbitration because the appellant failed to show extraordinary cause as required by CR 65.09. *Id.* at 922.
39. 322 S.W. 3d 98 (Ky. 2010).
40. *Id.* at 102.
41. 190 S.W.3d 916 (Ky. 2006).
42. 669 S.Wd. 2d 917 (Ky. 1984).
43. 82 S.W.3d 193 (Ky. 2002).
44. 323 S.W.3d 682 (Ky. 2010).
45. _____U.S. _____(Feb, 2011).
46. KRS Ch. 304.33.
47. *Ernst & Young, supra* at 694-5.
48. 15 U.S.C. §1011. *et seq.*
49. *Id.* at 688.
50. 525 U.S. 299 (1999).
51. 66 F.3d 41, 43 (2d Cir. 1995)(interpreting Kentucky law)



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Is a Broad Arbitration Clause Still Effective After *Granite Rock*?

By Richard H.C. Clay
and Stephen J. Mattingly

Bringing up arbitration at a cocktail party is more likely to provoke yawns than excitement, even when one is in the company of fellow members of the bar. But as most every litigator is aware, arbitration issues have become nearly ubiquitous in litigating everything from commercial breach-of-contract disputes to employment-discrimination claims. In many cases, whether claims are subject to an arbitration agreement may be a “make or break” issue – one that can determine whether a lawsuit is worth bringing, whether or when a defendant should settle a case, or whether a particular defendant or cause of action should be included in a complaint.

The scope of an arbitration clause – *i.e.*, what claims fall within the language of the provision – frequently is the lynchpin issue in determining whether a party’s claims are subject to mandatory arbitration. Those who undisputedly entered into an agreement to arbitrate have little hope of resisting arbitration unless they can argue successfully that their claims fall outside the scope of the particular arbitration agreement. Traditionally, however, those arguing that their claims are outside the scope of a valid and enforceable arbitration clause have faced an uphill battle with a limited likelihood of success. Courts have consistently held that the Federal Arbitration Act (or an equivalent state law, if the FAA does not apply¹) mani-

fest a presumption in favor of arbitration and that this presumption requires the scope of an arbitration clause to be broadly construed.² A recent United States Supreme Court case, *Granite Rock v. International Brotherhood of Teamsters*,³ may at first blush call into question the continuing strength of this pro-arbitration presumption. A closer look at the case and a subsequent federal court of appeals opinion, however, reveals that the presumption in favor of arbitration is still intact.

Granite Rock v. International Brotherhood of Teamsters

Granite Rock is one of several cases decided by the United States Supreme Court in the last year that has the potential to affect practitioners facing any number of arbitration-related issues. In *Granite Rock*, which was decided in June 2010, the Court endeavored to clarify the proper framework for determining when particular disputes are subject to arbitration. While essentially synthesizing prior Supreme Court precedent, the *Granite Rock* Court did stake out some new ground by elucidating several broad principles concerning the interpretation and enforceability of arbitration provisions. First, the Court made it clear that the presumption in favor of arbitration has no applicability to the question of whether a contract containing an arbitration clause was ever formed in the first place. Because arbitration is “strictly a matter of consent,” a court is required to address a party’s argument that no agreement containing an arbitra-

tion provision was ever reached. Subsequent federal appellate decisions have confirmed this interpretation of *Granite Rock*.⁴ Thus, *Granite Rock* establishes that the resolution of disputed questions as to whether such an agreement was reached is not subject to determination by an arbitrator, and instead is a matter to be determined by a court.

However, *Granite Rock* maintains that the presumption in favor of arbitration remains applicable to determinations about the scope of a validly formed arbitration clause. To be sure, the Court appeared to downplay somewhat the strength and importance of the pro-arbitration presumption. It stated that it was “wrong to suggest that the presumption of arbitrability we sometimes apply takes courts outside our settled framework for deciding arbitrability.”⁵ It stated that the Court had never held that the pro-arbitration policy overrides the principle that arbitration is strictly a matter of consent, and that courts may not “use policy considerations as a substitute for party agreement.”⁶ Additionally, the Court noted that any pro-arbitration presumption is simply derived from the conclusion that a broadly worded arbitration clause reflects that the parties intended to arbitrate grievances between them.

Nonetheless, the Court ultimately appeared to endorse the continuing viability of this presumption whenever it is determined that the parties have agreed to an arbitration clause and that the clause is ambiguous as to whether it covers a particular dispute: “We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.”⁷

But the Court’s interpretation of the particular arbitration provision at issue

– which required arbitration of any claims “arising under” the parties’ agreement – does somewhat call into question the way the pro-arbitration presumption has been applied by lower federal courts. The Supreme Court held that the parties’ dispute about *when* the agreement containing the arbitration clause was ratified was not itself arbitrable because it could not be said that a dispute about when an agreement came into existence “arises under” that agreement.⁸ The Court mentioned that the “arising under” language was “relatively narrow,” and it rejected the Ninth Circuit’s reasoning that the clause was “susceptible of an interpretation” which would require the dispute to be arbitrated.⁹

Pre-*Granite Rock* law on the pro-arbitration presumption

Thus, in the wake of *Granite Rock*, one might reasonably ask whether the Court’s decision will alter the long line of cases holding that a broad arbitration clause leads to a presumption that the parties agreed to arbitrate any disputes not clearly excluded from the terms of the agreement.

One such typical pre-*Granite Rock* case is *Kruse v. AFLAC International*, where the United States District Court for the Eastern District of Kentucky compelled the plaintiff, Kruse, to arbitrate her claims against AFLAC and other defendants.¹⁰ (In full disclosure, one of the authors was counsel to AFLAC in that case.) Kruse – a former regional sales coordinator for AFLAC – alleged breach of contract, violations of state and federal statutes, and a litany of common law claims, including promissory estoppel, conversion, fraud, defamation, and tortious interference. Kruse argued, among other things, that her claims other than the breach of contract claim fell outside of the scope of the arbitration agreement she had signed. That agreement required Kruse and AFLAC to arbitrate “[a]ny dispute arising under this Agreement to the maximum extent allowed by applicable law.” The court disagreed with Kruse and held that her claims were within the scope of this agreement. “The test to determine if a claim falls within the



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scope of an arbitration clause is to determine if the factual allegations ‘touch matters’ governed by the parties’ Agreement, not what claims the Agreement specifically mentions as plaintiff contends.” The court relied in part on prior Sixth Circuit cases holding that, where the parties agreed to arbitrate disputes “arising out of” the parties’ contract, any claim between them should be arbitrated unless there is “clear intent to exclude a particular claim.”¹¹

Because all of Kruse’s claims touched on her business relationship with AFLAC, and the agreement did not manifest any intent to exclude any of her claims from arbitration, the court found all of Kruse’s claims to be arbitrable. The court specifically rejected Kruse’s argument that claims were not arbitrable unless their subject matter was specifically made arbitrable by the contract. Although Kruse argued that the clause did not “govern disputes beyond violation of specific terms of the Agreement,” the district court did not agree. Rather, it found that all of



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Kruse’s claims were covered by the arbitration clause because the factual allegations supporting the claims pertained to Kruse’s contract with AFLAC in some way.

A post-*Granite Rock* decision

A review of a recent Sixth Circuit opinion suggests that, even after *Granite Rock*, decisions like *Kruse* will continue to be the norm whenever it is clear that the parties agreed to a broad arbitration provision. This opinion suggests that the judiciary does not believe *Granite Rock* altered the general rule that a broad arbitration provision is presumed to encompass any substantive disputes between the parties that are not expressly excluded from arbitration by their agreement.

In *Teamsters Local Union No. 89 v. Kroger*, 617 F.3d 899 (6th Cir. 2010), a case decided two months after *Granite Rock*, the Sixth Circuit reiterated its prior holdings to the effect that “where the agreement contains an arbitration clause, the court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”¹² (internal citations omitted) The Sixth Circuit panel in *Kroger* stated that the presumption in favor of arbitration is “particularly applicable” in cases involving broad arbitration clauses and that in such a case, “only an express provision excluding a particular grievance from arbitration or ‘the most forceful evidence of a purpose to exclude the claim from arbitration’” can prevent a dispute from being arbitrated.¹³ The court found that the arbitration provision before it – which required arbitration of “any grievance[,] dispute[,] or complaint over the interpretation or application of the contents of this Agreement” – was the type of broad arbitration clause that would trigger such a presumption. In so doing, the court cited to prior cases holding that agreements requiring arbitration of claims “arising under” and “related to” an agreement were broad

arbitration agreements. It therefore rejected Kroger’s argument that arbitration was inappropriate because the subcontracting dispute at issue was outside of the scope of the parties’ arbitration clause. The court held that because the parties’ arbitration agreement was “susceptible to an interpretation” that would provide for arbitration of the dispute, the presumption in favor of arbitration controlled.¹⁴

The *Kroger* court did not reference or cite to *Granite Rock*, and it thus appeared to believe that *Granite Rock* did not require the Sixth Circuit to revisit its general rules that a broad arbitration clause triggers a presumption of arbitrability and that when parties have agreed to such a provision, a dispute between them is arbitrable absent clear evidence that the parties intended the particular dispute to be non-arbitrable. As described above, this “susceptible to an interpretation” standard was at least obliquely called into question by *Granite Rock*, but the Sixth Circuit in *Kroger* did not appear to believe that *Granite Rock* would require this standard to be revisited. Additionally, the Sixth Circuit cited favorably to prior holdings that “arising under” language was broad – even though the *Granite Rock* Court termed such language “relatively narrow.”

A federal district court in Missouri recently reached a similar result while citing to *Granite Rock*. In *Utility Workers Union v. Missouri-American Water*



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Co.,¹⁵ the district court upheld an arbitrator's determination that the parties' broadly phrased agreement to arbitrate encompassed a dispute over wage amount. The court observed that *Granite Rock* "clarified the framework regarding the application of 'the federal policy favoring arbitration.'"¹⁶ Nevertheless, the Court favorably quoted prior decisions for the proposition that a broad arbitration clause triggers a presumption that a dispute between the parties is arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."¹⁷ Like the Sixth Circuit in *Kroger*, the district court did not appear to believe that *Granite Rock* altered the application of the presumption in favor of arbitrability in any significant way.

Ramifications

What does this mean for the interpretation of the scope of arbitration provisions after *Granite Rock*? In *Granite Rock*, the Supreme Court appeared expressly to hold that a presumption in favor of arbitration applies only when "a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand."¹⁸ The *Granite Rock* decision emphasized that the Supreme Court "has never held that the presumption [in favor of arbitration] overrides the principle that a court may submit to arbitration 'only those disputes . . . the parties have agreed to submit . . .'"¹⁹ *Kroger* provides a clear indication that courts do not appear to believe that *Granite Rock*'s clarification of the law requires alteration of the rule that certain broadly phrased arbitration provisions trigger a presumption in favor of arbitrability.

Thus, provisions requiring arbitration of any dispute "arising out of" or "relating to" a contract that governs the relationship between parties will likely generally continue to be construed to encompass most any claim between the parties that "touches on" matters in the contract. Even though a party may be compelled to arbitrate "only those disputes" that the party has agreed to

arbitrate, this does not mean that the arbitration agreement needs to enumerate particular types of disputes to make such disputes arbitrable. The holdings in cases such as *Kruse* – where the court held that arbitration is appropriate if the factual allegations underlying a claim "touch matters" governed by the agreement – therefore appear to remain sound even in light of *Granite Rock*.

Because *Granite Rock* is little over half-a-year old, it may be that future lower court decisions will begin to read the decision more broadly. But for now, it appears that prior decisions on the scope of a broad arbitration clause remain good law. ☺

ENDNOTES

1. See, e.g., KRS 417.045 *et seq.* (the Kentucky Uniform Arbitration Act)
2. See, e.g., *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 450 (6th Cir. 2005).
3. 130 S. Ct. 2847 (2010).
4. See, e.g., *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741-42 (7th Cir. 2010) (holding that *Granite Rock* "eliminated all doubt" about whether a court is required to decide questions of whether an agreement to arbitrate was reached in the first place).
5. *Id.* at 2859.
6. *Id.*
7. *Id.* at 2859-60.
8. *Id.* at 2862.
9. *Id.*
10. 458 F. Supp. 2d 375 (E.D. Ky. 2006).
11. *Id.* at 387 (citing *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155, 160 (6th Cir. 1983)).
12. *Id.* at 904.
13. *Id.* at 905.
14. *Id.* at 909-11.
15. 2010 U.S. Dist. LEXIS 111752; 189 L.R.R.M. 2718 (E.D.Mo. Oct. 22, 2010).
16. *Id.* at *34.
17. *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).
18. *Granite Rock*, 130 S. Ct. at 2858-59.
19. *Id.* at 2851.



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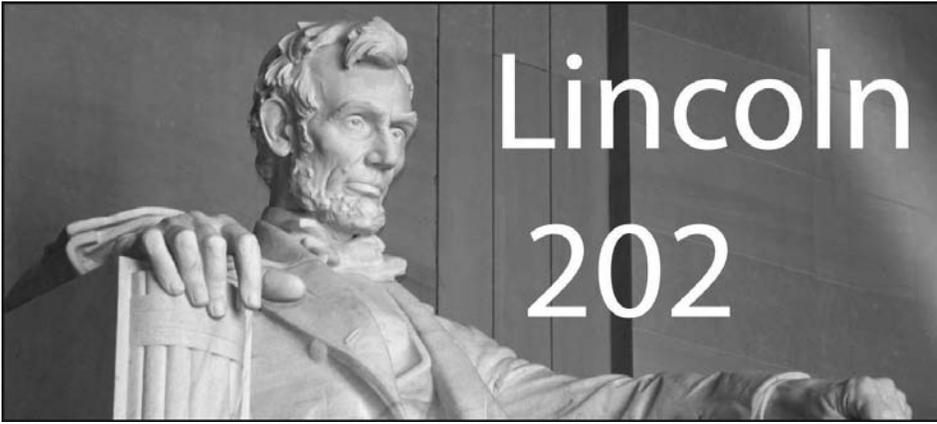
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By Donald K. Kazee

Two years ago, our Commonwealth observed the bicentennial of the birth of her estranged son, Abraham Lincoln. On March 4th of this year, we marked the 150th anniversary of his inauguration as the 16th president. On this second occasion, we may reflect that the most fundamental legal writings are neither court opinions nor the briefs that inform them, nor the statutes and constitutions upon which they in turn are based, but are rather the conversations between candidate and constituent negotiating the contract of democracy. Lincoln was master of that medium as candidate and president. But the pen that yet appeals to our better angels to give our last full measure of devotion served an apprenticeship. That apprenticeship teaches lessons which bear on all forms of legal writing.

Two letters announcing his candidacy for the Illinois legislature in 1832¹ and in 1836² offer contrasts in writing style and effectiveness. In 1832, Lincoln introduced himself with earnest erudition:

Fellow-Citizens: Having become a candidate for the honorable office of one of your representatives in the next General Assembly of this state, in accordance with an established custom, and the principles of true republicanism, it becomes my duty to make known to you—the people whom I propose to represent—my sentiments with regard to local affairs.

Time and experience have verified to

a demonstration, the public utility of internal improvements. . . .

There follow 10 tedious paragraphs on the day's issues: "internal improvements" (we would call them infrastructure), public finance, usury, education, and estray laws, as well as on the candidate's own youth and inexperience. He gives the detailed merits of each side in turn, as if to appeal to the holder of every opinion. His own stance is a matter of suspense until the merits are weighed, yet his choices are perplexing. Railroads are too expensive, so dredging the river is preferable, though that cost is yet unknown. As for limiting usury,

A law for this purpose, I am of the opinion, may be made, without materially injuring any class of people. In cases of extreme necessity, there could always be means found to cheat the law, while in all other cases it would have its intended effect. I would not favor the passage of a law upon this subject, which might be very easily evaded. Let it be such that the labor and difficulty of evading it, could only be justified in cases of greatest necessity.

Oscar Wilde might have written it for Lady Bracknell.

At length Lincoln closes, adamant for diffidence:

I was born and have ever remained in the most humble walks of life. I have no wealthy or popular relations to commend me. My case is thrown exclusively upon the independent voters

of this county, and if elected, they will have conferred a favor upon me, for which I shall be unremitting in my labors to compensate. But if the good people in their wisdom shall see fit to keep me in the background, I have been far too familiar with disappointments to be very much chagrined.

He sounds like Woody Allen, Charlie Brown, or maybe Eeyore. Of course he lost. None need expect clarity of vision or a sense of the practical from a 23-year-old novice, but the next four years' experience would transform his writing. In 1834, Lincoln did win election to the General Assembly and began studying law. His colleagues in the legislature turned to the freshman to draft committee reports and to articulate Whig policies.³ Politics milled away his studied fugues, so that his letter announcing his 1836 candidacy was a model of directness:

In your paper of last Sunday, I see a communication over the signature of "Many Voters," in which the candidates who are announced in the Journal, are called upon to "show their hands." Agreed. Here's mine!

This candidate needs no "established custom" to justify "my duty to make known to you . . . my sentiments with regard to local affairs." The people have called for a show of hands and Lincoln wastes no words to offer his.

I go for all sharing the privileges of government who assist in bearing its burthens. Consequently, I go for admitting all whites to the right of suffrage, who pay taxes or bear arms (by no means excluding females).

Lincoln begs no one's participial pardon to speak: "I go for . . ." What he goes for first are not six serpentine paragraphs on dredging the Sangamon, as in 1832. He goes for broad democracy, saving the Sangamon for later.

Lincoln was running as a Whig in a heavily Democratic state, depending for support upon Democratic friends. The hallmark of Jacksonian Democracy was

the expansion of suffrage beyond the elites by removing property requirements for white men to vote.⁴ For many Whigs, especially elites and Easterners, white manhood suffrage invited the barbarians within the gates.⁵ By contrast, the Northwest was so egalitarian that there was even debate on opening the vote to non-naturalized Irish laborers as a way to attract settlers.⁶ A part of both debates was the injustice of calling men to militia service without granting them the right to vote.⁷

Lincoln finesses the divisiveness of labels by adopting an expansive view of suffrage in terms nearly everyone could support. In two sentences, he declares a fundamental equation of privilege with burden and specifies those burdens which earn the bearer a vote. He thus affirms the elimination of the property qualifications which Illinoisans had come westward to escape.⁸ He offers a voice to the foreigner as well. He allows that even women might earn the franchise.⁹

Lincoln's equation of privileges with burdens marks the means by which 18th century privileges and immunities held by the propertied became 21st century rights held by all. As Whigs followed Democrats to embrace a broader democracy, earning a stake in the democracy by taxes or arms brought into the fold hardscrabble whites like Lincoln, city dwellers without real property, aliens, and, in principle, women.¹⁰ Lincoln's equation is significant not for the race restriction that strikes today's reader, but for being as expansive as it was. By operation of a fundamental principle, previously foreclosed classes could earn that stake in democracy.

Lincoln articulates that principle without mentioning either Whigs or Democrats, or property or citizenship. Yet all are encompassed within an appeal to the universal, without naming any category, save race. African-American suffrage simply was not on the horizon in 1836.¹¹ Decades later, when a stake for African-Americans was Lincoln's purpose at Gettysburg, he again spoke in the universal. There was no North, no South, no conqueror, no slave. There were only the honored dead

and the free and equal living.

Having embraced the best of Jacksonian Democracy, Lincoln takes one sentence to spurn the worst:

If elected, I shall consider the whole people of Sangamon my constituents, as well those that oppose, as those that support me.

Jacksonian Democracy had been built on the victor taking the spoils. Lincoln is no victor if he alienates the Democrats. Lincoln's Democracy includes "the whole people," regardless of whom they supported. He will bear malice toward none as the servant for all. What are the duties of the people's servant?

While acting as their representative, I shall be governed by their will, on all subjects upon which I have the means of knowing what their will is; and upon all others, I shall do what my own judgment teaches me will best advance their interests. Whether elected or not, I go for distributing the proceeds of the sales of public lands to the several states, to enable our state, in common with others, to dig canals and construct rail roads, without borrowing money and paying interest on it.

To listen and to exercise judgment is the pledge of representative government. If Lincoln is elected, he will have heard the people to "go for" internal improvements financed by the sale of federal lands. The federal undertaking of internal improvements was, in fact, the Whigs' signature issue in opposition to President Jackson, who had famously vetoed the Maysville Road project in Kentucky.¹² From the Nullification Crisis to the Second Bank of the United States, debate in the 1830s focused on what the Constitution denied one sovereign or another the power to accomplish. But in Lincoln's letter, the Constitution permits each sovereign to work in its own sphere, yet in tandem to finance the people's progress without resorting to debt. Finding a way for the sovereigns to work in tandem, and the money to finance it, would be the great task of his presidency.

Finally,

If alive on the first Monday of November, I shall vote for Hugh L. White for president.

With message accomplished, Lincoln delivers a punch line worthy of Stephen Colbert. First, he signals a joke with the utmost somber piety: "If



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alive”¹³ Then he pledges to vote for the Senator playing Lucifer to Jackson’s God. White was an erstwhile Tennessee Democrat who had succeeded to Andrew Jackson’s Senate seat. He did Jackson’s bidding in the Senate until the Tennessee legislature nominated White for president in 1835, an office that Jackson held in gift for Martin Van Buren. Cast into outer darkness, White was named by the Whigs as one of three regional candidates in an effort to total more electoral votes than Van Buren. Imagine Hillary versus Al Gore in 2000; Scooter Libby versus Dick Cheney in 2008. White did not even run in Illinois,¹⁴ but that made Lincoln’s barb the more outrageous. Without mentioning party labels, Lincoln skewers Jackson and makes even Democrats laugh.

These two apprentice letters may serve our own apprenticeships as lawyers:

First, less is more.

Second, there is more to less than meets the eye, and ultimately it meets the mind. Each sentence speaks in a context calling upon the reader to supply meaning that he may more readily accept in his own voice than in the writer’s.

Third, the whole is more than the sum of its parts. We have examined the 1836 letter sentence by sentence. Now read the italicized text of that letter aloud. There is a structure pendant upon the call of the people. The electors having earned their franchise are owed a duty by the elected to listen to the whole people and to “dare to do our duty as we understand it.”¹⁵ In only

seven sentences, Lincoln offers a contract of democracy between voters and their servants, plus a policy for progress based on a practical reading of the Constitution. He tells us plainly what he is for. He satirizes what he is against with a zinger.

Fourth, the divisive and inflammatory can be given a more thoughtful reception by appeal to fundamental principles rather than surface flash points.

I go for all sharing the privileges of government who assist in bearing its burthens. Consequently, I go for admitting all whites to the right of suffrage, who pay taxes or bear arms (by no means excluding females).

Earning the privilege by bearing the burden applied well enough to the landless or to the foreigners who shared the load of building and defending Illinois, but the principle transcended the issues of 1836. As Lincoln grew toward his role as Emancipator, he constantly revisited the principle of earning one’s rights by bearing the burden. While it is indisputable that he held the contemporaneous racial assumptions that we find repugnant today, they are repugnant today only because he held to the equation of privilege and burden despite the near universality of those racial views among whites:

I agree with Judge Douglas that he [the negro] is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without leave of anybody else, which his own

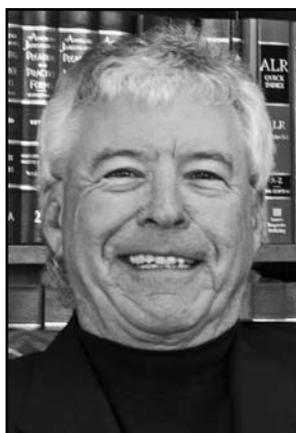
*hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man.*¹⁶

When African American hands turned to defending the Union following the Emancipation Proclamation, most famously at Fort Wagner, Lincoln understood what privilege had been earned:

*It will then have been proved that among free men, there can be no successful appeal from the ballot to the bullet; and that they who take such appeal are sure to lose their case, and pay the cost. And then, there will be some black men who can remember that, with silent tongue and clenched teeth, and steady eye, and well-poised bayonet, they have helped mankind to this great consummation; while, I fear, there will be some white ones, unable to forget that, with malignant heart, and deceitful speech, they have strove to hinder it.*¹⁷

Having borne the burden of battle in 1863, African Americans had, in Lincoln’s eyes, earned privileges that only a new contract of democracy could secure. At Gettysburg, he invoked the fundamentals to propose that new contract for *a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal*. Just as the apprentice had appealed to the fundamentals to remove distinctions among whites in 1836, the master used those fundamentals in 1863 to reach beyond the day’s racial assumptions toward a government of, by, and for the people, the undifferentiated people, the one people, the “whole people.” Lincoln lived to shepherd the Thirteenth Amendment through Congress as the first chapter in the new contract of democracy, thereby earning his own emancipation and that of his nation as well.

Fifth and finally, the finale is very final. What do you want the reader to repeat as the book is closed? Compare Lincoln’s apology for breathing in 1832 with the howling Whig one-liner in 1836. Yet we may here profit not only



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from the works of the apprentice, but from that of the master, pleading for peace on March 4, 1861:

*I am loth to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearth-stone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.*¹⁸

At the close of Inauguration Day in 1861, none could have foreseen the countless patriot graves awaiting, nor how this president's words would in time write upon every heart and hearthstone. The 1836 letter is among the most important documents in all of American politics and law. It is a first draft for Gettysburg. It not only gives us an example of spare, strong style, it teaches a lesson in how a writer can convey a message larger than the text itself. It reveals the "principles of true republicanism" by which a fledgling legislator became the Lincoln that belongs to the ages. ①

ENDNOTES

1. "To the People of Sangamo County," March 9, 1832. *Lincoln: Selected Speeches and Writings* 3-7 (Don Fehrenbacher, ed., Vintage Books 1992).
2. "To the Editor of the Sangamo Journal," June 13, 1836. *Lincoln: Selected Speeches and Writings* 7-8 (Don Fehrenbacher, ed., Vintage Books 1992).
3. David Herbert Donald, *Lincoln* 54 (Simon and Schuster 1995); Fred Kaplan, *Lincoln: The Biography of a Writer* 60-61 (HarperCollins 2008).
4. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 41 (Rev. ed. Basic Books 2009).
5. As the *New York Journal of Commerce* had declared: "By throwing open the polls to every man that walks, we have placed the power in the hands of those who have neither property, talents, nor influence in other circumstances, and who require in their public officers no higher qualifications than they possess themselves. It would be a disgrace to the city and to republicanism if a ticket so utterly unworthy as theirs should succeed. . . . We cannot believe that we are so soon reduced to the condition of the Romans, when the popular voice was raised against every honorable distinction; a voice which finally prevailed, to the utter extinction of the Republic." *New York Journal of Commerce*, November 7, 1829, reprinted in *5 A Documentary History of the American Industrial Society* 154-155 (John R. Commons, et al., eds., Cleveland, Arthur H. Clark Co. 1910-1911).
6. The Illinois Supreme Court affirmed the non-citizen's right to vote in 1840, as the 1818 constitution and related statutes referred to "inhabitants." *Spragins v. Houghton*, 3 Ill. 377, 408 (1840) (argued for the Irish by Stephen Douglas). The 1848 Illinois Constitutional Convention imposed a citizenship requirement, rejecting a strong effort to guarantee that right to non-citizens in the new constitution. Keyssar 27, 32.
7. Keyssar 30-32.
8. While property qualifications had been commonplace in the East, neither the Illinois constitutions of 1818 or 1848 imposed any property or tax qualification on voting, although municipalities could. Keyssar 24-26.
9. David Herbert Donald considers the parenthetical a throw-away joke. Donald 59. Yet Whigs had to grapple with the consequences for tax-paying women if the franchise was a right that could be earned. Keyssar 36-37. A joke in the foundation paragraph of this tautly structured letter is wholly out of place; Lincoln saves his humor for the end. Rather, he explicitly recognizes that a qualification not based on gender has applicability to women as well as men. Fidelity to principle could transcend conventional categories.
10. Keyssar 28-37.
11. Donald 59; Keyssar 44-47.
12. In the Illinois legislature just concluded, Lincoln had cast the swing vote to finance badly needed railroads and river transportation with state bonds, despite his prior reservations on public debt. As events would prove, the Panic of 1837 would shatter Illinois' massive public debt and Lincoln would be subject to his share of the blame. Donald 59, 61.
13. From our own perspective, any Illinoisan pledging to vote only if alive deserves to be called Honest Abe.
14. William Henry Harrison was the Whig candidate in Illinois in 1836, but Martin Van Buren carried Illinois and the election.
15. Cooper Union Address, February 27, 1859. *Lincoln: Selected Speeches and Writings* 251 (Don Fehrenbacher, ed., Vintage Books 1992).
16. First Debate, Ottawa, Illinois, August 21, 1858. *Lincoln: Selected Speeches and Writings* 153 (Don Fehrenbacher, ed., Vintage Books 1992).
17. Letter to James C. Conkling, August 26, 1863. *Lincoln: Selected Speeches and Writings* 393 (Don Fehrenbacher, ed., Vintage Books 1992).
18. First Inaugural Address, March 4, 1861. *Lincoln: Selected Speeches and Writings* 284 (Don Fehrenbacher, ed., Vintage Books 1992).

Donald K. Kazee is a graduate of the Georgetown University Law Center and is a member of the Kentucky and District of Columbia Bar Associations. He has taught at Northern Kentucky University Salmon P. Chase College of Law since 1989. During the Lincoln Bicentennial, he taught Lincoln's Constitution at Chase College of Law.

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

HON. TAMRA GORMLEY, FAMILY COURT JUDGE

14TH JUDICIAL CIRCUIT

By agreement of the Commission and Judge Gormley:

1. Counts 1, 2, 3, 4, and 6 (and any claims and charges brought or which could have been brought relating thereto) are dismissed with prejudice.
2. As to Count V, Judge Gormley acknowledges the following:
 - a) After the Court of Appeals entered its Opinion, the Woodford County Attorney filed a motion to have a Special Judge appointed to have the matter transferred to Rowan County for child support purposes.
 - b) Judge Gormley heard the matter on 3/11/10 and stated that she would take the motion under advisement.
 - c) Judge Gormley did not rule on the motion until August 3, 2010, when she asked for the appointment of a Special Judge. Judge Gormley acknowledges that these facts, without further explanation, constitute a failure to comply with the Judicial Canons.
3. As to Count V, the Commission imposes and Judge Gormley accepts a ten day suspension without pay. This suspension shall run concurrently with the prior suspension of Judge Gormley now pending on appeal before the Kentucky Supreme Court. This suspension shall be served even if the Supreme Court reverses the previous suspension.

Agreed to this 12th day of January, 2011

Hon. Tamra Gormley

Stephen D. Wolnitzek, Chair

Judicial Conduct Commission

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

ALLAN RAY BERTRAM, CIRCUIT JUDGE
ELEVENTH JUDICIAL CIRCUIT, DIVISION II

ORDER OF PUBLIC REPRIMAND

Allan Ray Bertram is Circuit Judge for Kentucky's Eleventh Judicial Circuit composed of Taylor, Marion, Washington, and Green Counties. Judge Bertram has waived formal proof and has agreed to accept the disposition made in this order.

After receiving complaints and conducting an investigation, the Commission determined that Judge Bertram failed to render timely decisions in a number of cases.

The Kentucky Code of Judicial Conduct, SCR 4.300, Canon 3B(8), provides: "A judge shall dispose of all judicial matters promptly, efficiently and fairly." The Commentary points out that Canon 3B(8) requires judges to be "expeditious in determining matters under submission."

There was a pattern of delay in cases under submission in all four counties of Judge Bertram's circuit. In these matters, Judge Bertram violated 3B(8) of the Code of Judicial Conduct by failing to dispose of judicial matters promptly and efficiently.

In making the determinations in this order, the Commission duly considered that Judge Bertram had no prior infraction and that he met with the Commission and discussed his docket in an attempt to address the delays, he changed his practices as recommended, and addressed the cases in question. The Commission will continue to monitor Judge Bertram's court as to the status of his case docket.

IT IS HEREBY ORDERED that for the foregoing violations Judge Allan Ray Bertram is hereby publicly reprimanded.

DATE: January 14, 2011

STEPHEN D. WOLNITZEK, CHAIR

AGREED TO :

ALLAN RAY BERTRAM

THANK YOU TO MR. DEL O'ROARK

Dulaney L. "Del" O'Roark, Jr., has advised the *Bench & Bar* that as part of "taking the next step toward retirement" he has contributed



the last of 59 articles on the subject of professional responsibility over the past 20 years.

O'Roark was the first employee and first chief operating officer of Lawyers

Mutual, the KBA-sponsored professional malpractice carrier.

O'Roark served as the chair of the KBA's Ethics 2000 Committee responsible for recommending to the Board of Governors numerous changes to the 1990 Kentucky Rules of Professional Conduct. These recommendations led to the implementation of the 2009 Revised Kentucky Rules of Professional Conduct.

He has lectured in the KBA's New Lawyers Program, addressed countless district bar meetings, and has taught professional responsibility at both the University of Kentucky College of Law and the University of Louisville's Brandeis School of Law.

O'Roark has made a lifetime study of what can go wrong for lawyers. He said in conversations about his retirement that a "huge majority, more than 90 percent – almost all – lawyers are as ethical as they can be. The percentage of lawyers with ethical problems is miniscule."

In his articles for the *Bench & Bar* and in his quarterly newsletters for Lawyers Mutual, O'Roark, has kept Kentucky lawyers reliably informed of trends in the three components of his specialty: professional responsibility, malpractice, and risk management.

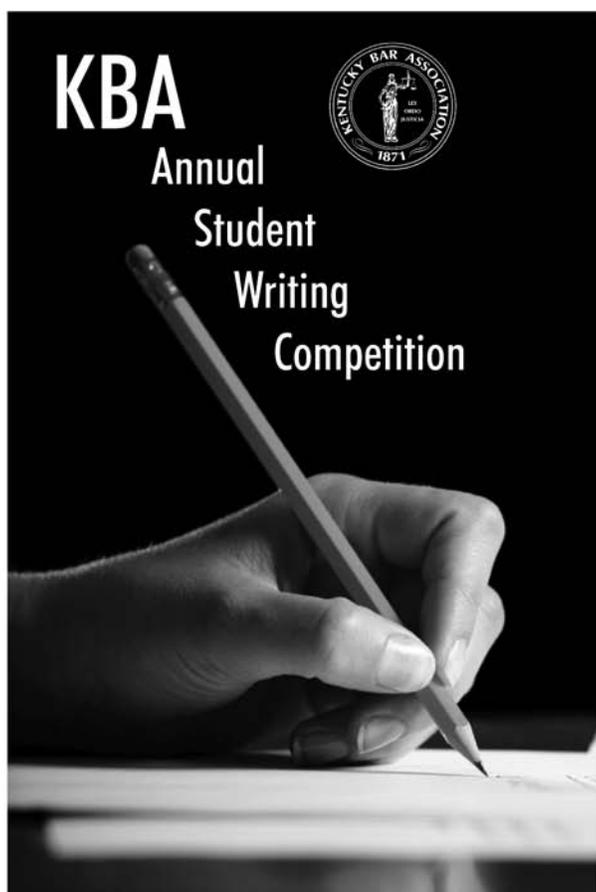
In his articles, work-a-day Kentucky practitioner readers have found insights on ethical issues not readily obtained

elsewhere, a dedicated advocate for the ethical practice of law, an ally of ethical practitioners and, finally, a teacher.

He says he gathered his curriculum by working with policy-makers at Lawyers Mutual, by attending national conferences on the subject, by what he learned from preparing and giving his lectures at law schools, and with direct exchanges with Kentucky lawyers.

Like his father, O'Roark had a career as an officer in the U.S. Army. He retired as Brigadier General in 1989. He is married to Jane O'Roark, the couple has three children and five grandchildren, and reside in eastern Jefferson County.

In retirement, O'Roark plans to consult with Lawyers Mutual on a part-time basis, continue bar service as a member of the KBA Member Services Committee and the newly established Paralegal Committee, while indulging his passions for reading and gardening. ☺



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*.

THANK YOU

to the Kentucky Bar Foundation Directors and the Kentucky IOLTA Fund Trustees
for the dedication and time devoted to ensure the continuing success of both programs.

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Michael Losavio

Socializing Media – The Adoption of Social Media By Professionals

“Social Media” are more and more a part of professional and personal life. Some jump in while others wait to see what happens to those that jump in.” It is a recurring story with all technologies. Yet we must consider the velocity, scope and scale of these changes. In less than a generation we’ve gone from a world-wide network on your desk to one in your palm.

These technologies have a special impact due to the creation, exchange and use of data, information and knowledge. Using the Twitter system for short statement instant messaging and notice, you can be informationally linked to someone or something as if right next to you.

Whether you want this or not is another matter.

The impact of social media goes even further. This expanded information exchange affects relationships across many domains. All kinds of relationships. While some social media may focus on narrow matters, the hugely successful ones open up to the wide range of human interests, needs and aspirations. Just like successful societies. It’s not about socializing but about building a society.

Jumping In

Casual play with these media technologies may be a good way to test them and see what benefit, if any, they offer. We all recall innovative systems that seemed so promising yet just never made it in the marketplace of ideas and services. While Facebook is a growing, important player in the social media space, its predecessor, MySpace, is shrinking. An informed guess about the future of a technology helps reduce the odds you’ll put your time and money into an also-ran.

But a cautious, planned approach is advised for professionals stepping into this arena.

First and foremost, there are ethical, legal and reputational risks in jumping in the social media sea of information. Participation means putting information out in the world with your name on it for all the world to see. The curious privacy and intimacy of a computer interface has tricked many into saying things carelessly with harsh consequences. Thought and publication are almost simultaneous and nearly permanent, cached and stored all over the Internet.

So a reputation can be damaged in seconds. Especially for those with successful and popular media, as the *faux pas* is heard by so many people instantly.

Informational tort issues also crop up, like defamation, invasion of privacy and false light. For a professional, the business aspects of information publication may raise risks of misleading or deceptive trade practices or other forms of misrepresentation or, in some cases, malpractice/professional liability exposure.

For professions with effective and enforced codes of professional ethics, this can be very risky. Most ethics codes developed well before these new, amazing media made everyone a First Amendment publisher, so how they apply may be an open question. This is especially tricky for lawyers, where 50 different bar associations may choose to interpret the rules many different ways, whether they relate to client relations, candor or “advertising.”

Kentucky has been an innovator in this regard. The professional rules expressly permit lawyers to participate in weblogs without that being considered “advertising.” The lawyer must still com-

ply with the general rules, such as those on truthfulness. The Kentucky judicial ethics authorities permit a judge to have a Facebook page and “friend” people without that by itself raising questions of bias; other states differ on this.

This debate is a vitally important one. In the electronic marketplace of ideas, is it really a good idea to limit the participation of those professionals trained in reasoned analysis of important issues? Just as the participation of lawyers, judges and other professionals in civic groups enriches the civic effectiveness of those organizations, that same participatory discourse can help with the online conversation. Too many online discussions veer into hyperbole, malice and the bizarre; a lawyer’s careful comments could help avoid that.

Testing the Waters

Adopting social media is much like a strategic planning session for business or litigation, where you weigh the benefits against the risks, including compliance with legal and ethical strictures. One key factor to keep in mind is that social media are *not* only about business but all the forms of relationships folks might have.

First, you need to list why you would want to participate in a social media environment, the standard goals-and-objectives exercise. What can the easy and quick exchange of information do for you? That might be of help with:

- 1) professional and practice excellence;
- 2) business development;
- 3) professional and community relationships;
- 4) friends; and,
- 5) family.

This is a non-exclusive starter list, but it is certainly broader than the “business development” mantra that’s used to promote social media for professionals. Business is very, very, very important, but it’s not all about business. And often isn’t. Nicole Black, in her piece “Five Things Lawyers Should Know About Social Media,”¹¹ notes “people want to hire people, not a business” and that the mix of social and professional make for happier clients and happier lawyering. And happier lawyering is a good thing.

Second, start thinking about due diligence and risk analysis, the ethical-legal-reputational chestnut that may get roasted in the pursuit of these goals. But not too hard, yet.

Third, research the tools that are available that may assist with these goals. There is a wide range of systems for social information exchange and some are better suited for a particular goal than others. For example, for professional and practice development the JDSupra site (Give Content. Get Noticed., at www.jdsupra.com) let’s members upload and share legal documents of all types, from employment law to civil procedure. Legal update features are available.

JDSupra highlights an important aspect of professional life that sometimes gets lost in the maelstrom of work; lawyers helping lawyers helps us and everyone else.

Other sites may offer other features

that support these goals. LinkedIn (www.linkedin.com) is a social media site expressly for business networking. Samantha Collier’s *Social Media for Lawyers* blog, www.socialmediaforlawfirms.com, succinctly lists tips for optimizing one’s LinkedIn profile, the variety of LinkedIn applications that may benefit an attorney in many areas and image improvement for one’s Facebook through use of a “landing page” for first time visitors.

Lastly check what others are doing and then try it yourself. Social media are useful for getting others opinions on everything, including social media. It’s like a mini-jury deciding on the merits. What others say can guide you.

And then you try it yourself.

Carefully. With a list of the rules of professional responsibility, for all the pertinent regulatory authorities, next to you. Especially the “Advertising” rules, as “Your Name” next to “Lawyer” or other professional designation may fall under those rules, regardless of how attenuated it may seem to you.

Many of these services can be used in a passive manner whereby you receive information but don’t have to submit such. This can reduce the risk of a misstep while testing the benefits. But even their lawyers must be careful; in some circumstances even the receipt of information may run afoul of ethics rules, like where that access to information is acquired through deceit. And,

again, if you are listed by your name and profession, check to see there are no conflicts over advertising restrictions.

You might then try these services out on a purely personal basis to avoid the ethics/law entanglements. But remember that the ethics rules follow you everywhere. Florida, apparently, is now including social media site reviews of bar candidates as part of the character and fitness examination.

But to get the most out of social media requires full participation. Tyson Snow, the Social Media Lawyer, (www.thesocialmedialawyer.wordpress.com) says that the issue needs to be considered in a different and not purely commercial light:

“Maybe the question needs to change from: ‘What has social media done for me today?’ to ‘What have I done for social media today?’ If you make valuable contributions to the medium, the medium will reward you in spades.”

As in not what your country has done for you but what you have done for your country. Or society. Or community. Or family.

The potential for many good things. ☺

ENDNOTE

1. <http://nylawblog.typepad.com/suigeneris/2009/06/five-things-lawyers-should-know-about-social-media.html>. Last visited Feb. 14, 2011

Mark your calendar

June 15-17, 2011

KBA Annual Convention

Lexington

SUPREME COURT OF KENTUCKY ADOPTS UNIFORM RULES FOR FAMILY LAW CASES STATEWIDE

For the first time, the Supreme Court of Kentucky has adopted uniform rules for family law cases statewide, Chief Justice of Kentucky John D. Minton, Jr., and Deputy Chief Justice Mary C. Noble announced at a news conference held January 13 at the state Capitol.

The Family Court Rules of Procedure and Practice apply to all family law cases, which are handled by Family Court judges in 71 Kentucky counties and by circuit and district judges in the 49 other counties without a Family Court. Family law cases include such matters as divorce, termination of parental rights, domestic violence, child support, juvenile status offenses, adoption, and dependency, neglect or abuse.

The rules became effective Jan. 1, 2011, and will have a significant impact on the practice of family law in Kentucky.

Previously there were no statewide rules specifically for family law cases. Judges followed the Supreme Court Civil Rules and created local family law rules for their jurisdiction. The new rules are based on best practices in domestic and child welfare cases in Kentucky courts. They provide a uniform set of rules for judges, attorneys and parties to follow statewide to help ensure safety, permanency and well-being for children and families.

“These rules will change the way family law is practiced in Kentucky,” Chief Justice Minton said. “The many Kentucky citizens involved in family law proceedings – some of the most sensitive and difficult cases to come before our courts – will benefit from the dedication and vision of Justice Noble and all those who assisted with drafting these rules.”

Justice Noble headed the initiative to develop and recommend uniform rules as chair of the Supreme Court Civil Rules Committee. The Family Court Rules are a section of the civil rules.

“These rules represent the ongoing efforts of the Court of Justice to imple-

ment the Family Court amendment to our Constitution, which established our Family Courts,” Justice Noble said. “As time passes, we grow closer to having a true statewide Family Court system. This is a developmental project we are mindful of and determined to achieve.”

The new family law rules were developed with input from stakeholders, including Supreme Court justices, Court of Appeals judges, Family Court judges, circuit and district judges, domestic relations commissioners, circuit court clerks, family law attorneys, the Cabinet for Health and Family Services and community partners, including children’s advocacy groups.

The process began in May 2009, when the Supreme Court and the Administrative Office of the Courts jointly hosted a Civil Rules Conference to gather information from judges and domestic relations commissioners to assist with drafting the rules. The conference focused on identifying the best practices in rules for family law cases and developing these rules as the standard for all Kentucky courts. Approximately 80 justices, judges and domestic relations commissioners participated in the discussions. They covered the areas of divorce and property; domestic violence; paternity; status offenders (juveniles who commit non-criminal acts such as running away from home); dependency, neglect or abuse; adoption and termination of parental rights; and child custody, visitation and child support.

As a result of the conferences, six multidisciplinary subcommittees were



Justice Mary C. Noble and Chief Justice John D. Minton, Jr., discuss the new Family Court Rules during a recent press conference held in the chambers of the Supreme Court of Kentucky in the state Capitol.

formed to provide input and recommendations for drafting the new rules. The subcommittees were chaired by judges and included representation from the courts, social services, attorneys and other family law professionals.

The recommendations for the proposed rules was presented to the Supreme Court in April 2010 and published in the Kentucky Bar Association magazine, *Bench & Bar*, in May. All attorneys licensed to practice in Kentucky receive the magazine. Attorneys had the opportunity to provide input on the proposed rules at a hearing during the KBA Convention in June.

Domestic and child welfare cases are handled by Family Court judges in the 71 Kentucky counties with a Family Court. In the 49 other counties, the cases are handled by circuit and district judges.

The proposed rules and feedback from the KBA Convention were presented to the Supreme Court in October 2010. The court voted in November to adopt the rules. A complete listing of the rules was published in the November 2010, issue of the *Bench & Bar*. 

Information provided by Public Information Specialist Jamie Ball of the Administrative Office of the Courts.

ATTENTION:
**Amendment and Deletion to the Regulations of the
Attorneys' Advertising Commission, pursuant to SCR 3.130(7.03)(5)(a)**

As approved by the KBA Board of Governors January 14, 2011

Publisher's Note:

Supreme Court Rule (SCR) 3.130 contains the Kentucky Rules of Professional Conduct which include rules on lawyer advertising. SCR 3.130(7.03) establishes an Attorneys' Advertising Commission (the "Commission") which has general responsibilities for implementing the lawyer advertising rules. In discharging its responsibilities, the Commission is given authority to issue and promulgate regulations subject to prior approval by the Board of Governors. When proposed regulations are issued, members of the Kentucky Bar Association are entitled to at least sixty (60) days advance notice and an opportunity to comment. The Commission, with approval of the Board of Governors, has promulgated an amendment to Regulation 2. It has also approved deletion of Regulation 3 because it has been superseded by amendments to the requirements of SCR 3.103(7.25). The Board of Governors approved these changes for publication on July 30, 2010. The amendment and deletion to the Regulations were published for comment in the September 2010 issue of the *Bench & Bar*. No comments were received. On January 14, 2011 the Board of Governors gave final approval for the changes to be implemented as originally published.

The following changes to the Regulations will be effective April 15, 2011.

The full Regulations of the Commission may be viewed at www.kybar.org, along with Frequently Asked Questions.

AAC Regulation No. 2:

PERMISSIBLE CONTENT OF ADVERTISEMENTS SUBMITTED WITHOUT A FEE

Pursuant to SCR 3.130-7.05(1)(a)(26) the Commission may specify additional information that may be contained in advertisements that are permitted to be submitted without a fee. The following additional information may be included in any of these advertisements: ...

11. The website address of a lawyer or law firm's website advertisement, if the website has been submitted as required by SCR 3.130(7.05); ...

Note: The only change is to subsection 11. The remaining portions of this Regulation were not amended. They may be viewed at www.kybar.org.

AAC Regulation No. 3:

COMMUNICATIONS THAT REQUIRE THE DISCLAIMER "THIS IS AN ADVERTISEMENT"

Deleted



By Amber Potter
 NKU Chase College of Law
 Communications Coordinator

Chase Alumni Receive Awards

Congressman Steven J. Chabot '78 received the NKU Alumni Association's Outstanding Chase Alumnus Award and Jonathan P.



Congressman
 Steven J. Chabot

Wright '06 received the Outstanding Young Alumnus Award at the university's annual Alumni Awards Banquet held January 28.

Congressman Chabot served as U.S. Representative for

Ohio's First Congressional District for 14 years, having been first elected in 1994. After running successfully in 2010 to reclaim his seat, he was sworn in as congressman again on January 5. Chabot serves on the Committee on the Judiciary, the Committee on Small Business, and the Committee on Foreign Affairs where he serves as chair of the Subcommittee on the Middle East and South Asia. He is one of Congress's leading advocates for fiscal responsibility and is an outspoken defender of individual privacy rights. Prior to his first election to Congress, Chabot served on Cincinnati City Council and the Hamilton County Commission for four years on each body.

Wright was named by Secretary of Commerce Gary Locke as a legislative assistant with the U.S. Department of Commerce's Office of Legislative Affairs. He previously served as the Obama campaign's Florida deputy political director during the 2008 general election and was the cam-



Jonathan P.
 Wright

campaign's Kentucky political director during the primaries. A Kentucky

native, Wright was unable to accept his award in person because he was in India advancing the Secretary of Commerce's then upcoming High-Tech Trade Mission.

Chase Welcomes New Faculty Member

David Singleton, executive director of the Ohio Justice and Policy Center (OJPC) in Cincinnati, will join the Chase faculty as a tenure-track assistant professor of law in the fall 2011. He will also retain his position as the



Professor David
 Singleton

OJPC's executive director.

Singleton received his J.D., *cum laude*, from Harvard Law School in 1991 and his A.B. in Economics and Public Policy Studies from Duke University in 1987.

Upon graduation from law school, he received a Skadden Fellowship to work at the Legal Action Center for the Homeless in New York City, where he practiced for three years. He then worked as a public defender for seven years, first in Harlem and then in the District of Columbia. After moving to Cincinnati, Singleton practiced at Thompson Hine before joining OJPC as its executive director in July 2002.

Singleton has been a visiting assistant professor at Chase since 2007. He has garnered numerous awards and recognition

through his work with the OJPC, a non-partisan, nonprofit, public interest law office, including his selection by Harvard Law School as a Wasserstein Fellow – which recognizes exemplary lawyers who have distinguished

themselves in public interest work – for the 2006-07 academic year.

As a member of the Chase faculty, Singleton will teach complex problem solving; facts, storytelling & persuasion; and contemporary issues in criminal justice. He will continue to oversee Chase's Constitutional Litigation Clinic, which allows third- and fourth-year students to handle OJPC cases in federal and state court with supervision and guidance.

Chase Team Finishes as National Arbitration Competition Runner-up

NKU Chase College of Law's Arbitration Team finished in second place at the American Bar Association's National Arbitration Competition held January 21-22 in Chicago, Ill. The team earned the right to compete in the national competition by winning a regional competition in November.

Alyse Bender, Jessica Biddle, Jonathan Davis, and MyLinda Sims defeated teams from Stetson University College of Law, Chapman University School of Law, and Fordham University School of Law. In the final round, the Chase team lost a split decision to Georgia State University College of Law. The team was coached by Professor Richard Bales, director of Chase's Center for Excellence in Advocacy, with assistance from Professor Ljubomir Nacev, David Bender '79, Rebecca Cull '08, and Marielle Peck '10. 



ABA National Arbitration Competition Runners-up



University of Kentucky College of Law Students to provide Income Tax Preparation Assistance.

By Amanda DeBord, Director of Communications, UK College of Law

A group of students from the University of Kentucky College of Law and the UK Gatton College of Business and Economics is preparing for income tax season, not by getting their own paperwork in order, but by undergoing a series of online training programs to ready themselves for the hundreds of individuals who will take advantage of the University of Kentucky Volunteer Income Tax Assistance (VITA) Program.

About 45 students, led by UK Assistant Professor of Law Jennifer Bird-Pollan, began preparing income tax returns on February 21, in the basement of the University of Kentucky Law Building. Last year, the program's students prepared returns for over 650 low-income households, and generated over one-fifth of the total returns filed through the Central Kentucky Economic Empowerment Project (CKEEP), earning them the Collegiate Challenge trophy for most returns prepared by a volunteer tax program in Kentucky. Based on CKEEP's estimates, UK students saved Lexington-area taxpayers approximately \$137,000.

The cost of tax preparation is a barrier to many in the community who are either unable to prepare their own taxes, or unaware of the various credits for which they may be eligible. Tax preparation through the VITA program is free for households that make \$49,000 or less per year.

This program is also a valuable opportunity for the volunteers according to Professor Bird-Pollan. While the students know a lot of tax law, for many, this experience will mark the first chance they will get to apply the skills they've learned in their courses.

The students receive no course credit or payment for volunteering, and have

to pass three levels of certification tests, including a foreign student certification to prepare them for the many international students that they will assist. Former VITA volunteers will be on site to supervise and answer any questions that may arise. ①

For more information, or to schedule an appointment, visit www.law.uky.edu.



University of Louisville School of Law

Reforming the Kentucky Bar Exam for the Benefit of Legal Education and the Practice of Law

Note: The following memorandum has been sent to the Justices of the Supreme Court of Kentucky, the Kentucky Board of Bar Examiners, the Kentucky Office of Bar Admissions, and the deans of the University of Kentucky College of Law and Northern Kentucky University's Chase School of Law. At a meeting hosted by the Supreme Court on Jan. 14, 2011, these parties discussed the following proposal by the University of Louisville's law faculty.

Kentucky Supreme Court Rule 2.080(1) prescribes the subjects that may be tested on the Kentucky bar exam. It has been the subject of discussion among the Justices of the Supreme Court, the Board of Bar Examiners, the Office of Bar Admissions, Kentucky's three law schools, and individual members of our bar. The faculty of the University of Louisville Louis D. Brandeis School of Law has adopted a resolution advocating the amendment of SCR 2.080(1) in an effort to reduce the number of subjects tested on the bar exam.

Supreme Court Rule 2.080(1) has a profound and not altogether positive impact on legal education. In practice a significant number of law students design their curriculum primarily by relying on the content of the bar exam. The University of Louisville's law faculty believes that an amendment of SCR 2.080(1) would improve legal education and the practice of law in the

Commonwealth of Kentucky. By reducing the scope of subjects tested on the Kentucky bar exam, this proposed amendment would enable our state's law schools to structure their programs of instruction and to advise their students in ways that are more responsive to their needs and to those of their future clients, their future employers, and the legal profession as a whole.

The complexity of contemporary legal practice has rendered untenable the traditional presumption that all lawyers need to demonstrate competence across the full spectrum of legal subjects. Many lawyers today practice in specialized settings. Lawyers specializing in areas such as labor and employment law, immigration law, international law, intellectual property, and environmental law realistically need to have their initial exposure to their chosen fields of expertise during law school, not after graduation.

Established types of practice, such as tax or transactional work, have evolved so as to demand deep course sequences that span the entirety of the second and third years of legal education. The traditional bar exam has failed to anticipate entire types of practice, such as alternative dispute resolution and governmental relations. Experienced lawyers in all settings are calling upon law schools to prepare their graduates through enhanced teaching of concrete legal research, writing and speaking skills, client relations, and law practice management. Legal education now emphasizes, as never before, not only specialized courses but also skills-based training, experiential learning, and live-client clinics. These types of instruction benefit all law school graduates, most of all those who begin their careers working for themselves or for small firms. In today's legal environment, subject-matter specialization coupled with

■ In Memoriam

Mary June Pound Burns	Louisville
Louis Cohen	Louisville
Larry Wayne Gilliam	London
Challen P. McCoy	Bardstown
Robert Pride Moore	Madisonville
Raymond Overstreet	Liberty
Larry L. Saunders	Louisville

KENTUCKY BAR NEWS

practical legal skills has far greater impact than exposure to an arbitrary list of discrete subject areas.

In deciding which individual subjects to propose for removal from SCR 2.080(1), the law faculty of the University of Louisville consulted national trends among bar examiners for appropriate guidance. The independent, collective judgment of bar examiners nationwide suggests that less frequently tested subjects are the most appropriate candidates for removal from Kentucky's bar exam.

In its current form, SCR 2.080(1) reads in relevant part:

SCR 2.080: Bar examinations

(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) Contracts
- (d) Constitutional Law
- (e) Business Entities (corporations, partnerships and/or others)
- (f) Criminal Law and Procedure
- (g) Civil Procedure
- (h) Domestic Relations
- (i) Property (real and/or personal)
- (j) Federal Taxation
- (k) Torts
- (l) Uniform Commercial Code (sales, secured transactions and/or negotiable instruments)
- (m) Estates (wills and/or trusts)
- (n) Evidence
- (o) Such other subjects as the Board

may select from among questions proposed by the National Conference of Bar Examiners.

Of the subjects identified in SCR 2.080(1), all but three are tested by at least 38 jurisdictions among the 50 states and the District of Columbia. (*Source*: National Conference of Bar Examiners, March 31, 2007, survey; *see also* BarBri Digest 2011: Bar Exam Information.) Three subjects listed in SCR 2.080(1) are fairly described as subjects that are infrequently encountered on the bar examinations nationwide:

Administrative law is tested in **15 jurisdictions**: Colorado, Connecticut, Illinois, Indiana, Kentucky, Minnesota, Mississippi, Missouri, New Mexico, Oklahoma, Oregon, Utah, Vermont, Washington, Wyoming.

Conflicts of law is tested in **31 jurisdictions**: Alabama, Arkansas, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia.

Taxation is tested in **15 jurisdictions**: Illinois, Indiana, Kentucky, Maine, Minnesota, Mississippi, Montana, New Mexico, North Carolina, Oregon, Pennsylvania, Texas, Vermont, Virginia, Wisconsin. Oklahoma tests estate and gift tax; Utah notifies its test-takers that it may examine the tax aspects of estate planning. Among jurisdictions testing taxation, two (Montana,

Texas) explicitly identify both income tax and estate and gift tax as subjects to be tested. Therefore, by the broadest possible definition of "taxation," 17 jurisdictions include tax-related subjects on their bar exams.

Because relatively few jurisdictions test administrative law, conflicts of law, and taxation, we propose the elimination of these subjects from SCR 2.080(1). The following proposal would remove administrative law and administrative procedure, conflict of laws, and federal taxation from the scope of SCR 2.080(1). In addition, by striking the final subsection of SCR 2.080(1), this proposal would eliminate any potential inconsistencies arising from reliance on questions (1) that are proposed by the National Conference of Bar Examiners and (2) that cover topics not listed in an amended version of SCR 2.080(1).

Our proposal consists of the following language:

SCR 2.080(1) is amended:

- by striking subsections (a), (b), (j), and (o)
- by reordering the remaining subsections (c) through (n) so that they run sequentially from (a) through (k).

As amended, SCR 2.080(1) would read in relevant part:

SCR 2.080: Bar examinations

(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) Contracts
- (b) Constitutional Law
- (c) Business Entities (corporations, partnerships and/or others)
- (d) Criminal Law and Procedure
- (e) Civil Procedure
- (f) Domestic Relations
- (g) Property (real and/or personal)
- (h) Torts
- (i) Uniform Commercial Code (sales, secured transactions and/or negotiable instruments)
- (j) Estates (wills and/or trusts)
- (k) Evidence.

Alexander Hamilton Historical Society to Present Symposium

The Alexander Hamilton Historical Society will present the symposium, "Federalism, the Power of the States and Adherence to the Constitution," from 10:30 a.m.-12:30 p.m. on April 16 at the Chao Auditorium at the Ekstrom Library, University of Louisville. The event, which is free and open to the public, will feature the following speakers and presentations: Hon. Michael O. McDonald (retired), Kentucky Court of Appeals, "Changing the Constitution Through the 'Necessary and Proper' Clause;" Dr. Aaron D. Hoffman, Associate Professor of Political Science, Bellarmine University, "Federalism and the Commerce Clause;" Dr. Jasmine Farrier, Associate Professor of Political Science, University of Louisville, "State Politics and the 14th Amendment;" and Dr. Charles Ziegler, University Scholar, Political Science Department, University of Louisville, "U.S. Federalism and Elected Representation."

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING NOVEMBER 19, 2010

The Board of Governors met on Friday, Nov. 19, 2010. 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. Jaggars; *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* – B. Rowe, W. Wilhoit.

In Executive Session, the Board considered three (3) discipline default cases. Malcolm Bryant of Owensboro, Steve Langford of Louisville and Roger Rolfes of Covington, 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, Diversity in the Profession Committee, Kentucky Lawyer Assistance Program, Rules Committee and Office of Bar Counsel.
- Approved the Family and Medical Leave Act Policy to be incorporated into the Employee Handbook.
- Chief Bar Counsel Linda Gosnell provided a report on the issue of the ongoing compliance with *Keller v. State Bar of California*.
- Approved the 2011 Holiday Schedule for the KBA Staff.
- 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. Ballots will be mailed by December 15 to those members in good standing in the 7th Supreme Court District to

be returned to the Clerk of the Supreme Court by Jan. 15, 2011.

- Mr. Meyers reported on orders received from the Supreme Court 1) order appointing Matthew P. Cook of Bowling Green to the CLE Commission to fill an unexpired term; 2) Order approving Amendments to Section 4, Section 5 and Section 11 of the By-Laws of the Kentucky Bar Association; 3) Order approving the amended and restated By-Laws for the Health Law Section of the Kentucky Bar Association; 4) Order approving the amended and restated By-Laws for the Young Lawyers Section of the Kentucky Bar Association; 5) Order approving the amendments to the By-Laws of the Kentucky Bar Association with the deletion Section 16 – Law Student Division; 6) Order approving the employment of auditors for the Kentucky Bar Association and the Kentucky Bar Foundation/IOLTA Fund; and 7) Order appointing Hon. William J. Wehr for a three-year term on the Kentucky Bar Center Board of Trustees.
- Director of Accounting/Membership Nicole Key presented the financial and investment report.
- Young Lawyers Section Chair Nathan Billings reported that the section is doing extremely well and membership numbers will exceed last year. The section will be releasing an E-Newsletter scheduled to come out in December. Mr. Billings reported that the Lawyers as Leaders project is going well and that a second session will be held in early 2011 in partnership with KYLAP.
- President Davis reported that the Order from Chief Justice Minton creating the new Access to Justice Commission provides that the President of the KBA has the authority to appoint a member from the Board of Governors. President Davis reported that he has asked President-Elect Margaret E. Keane of Louisville to serve in this capacity.
- Approved the appointment of Bar Governor Anita Britton of Lexington to serve on the Kentucky Child Support Guidelines Review Commission.
- Accepted the Fiscal Year June 30,

2010 Audit Report prepared and presented by Rudler & Associates, Inc.

- Approved continuing the policy of providing comp registration for active members of the judiciary to attend the KBA’s 2011 Annual Convention.
- Approved the reappointment of Bar Governors Anita Britton of Lexington and Jonathan Freed of Paducah to the Audit Committee as well as the reappointment of Audit Committee Chair James Dressman of Crestview Hills each to a second three-year term expiring on Dec. 31, 2013.
- Approved the reappointment of George E. Long II of Benton to the Bar Center Board of Trustees for another three year term ending on Dec. 31, 2013.
- Approved the appointment of Mark Whitlow and Kelly Shoening to the Joint Local Federal Rules Commission for the Eastern District of Kentucky for a four year term ending on Dec. 31, 2014.
- Approved the reappointment of Arnold Taylor of Covington to the Judicial Ethics Committee to a second four year term ending on Nov. 30, 2014.
- Heard a presentation from Del O’Roark, Jr.; President of the Kentucky Paralegal Association Vicki Howard; Past President of the Louisville Association of Paralegals Dana Martin; and Professor/Attorney Dick Williams, Director of Paralegal Studies at Sullivan University, requesting the Board to re-establish the KBA Paralegal Committee. Following discussion, the Board approved establishment of a Paralegal Committee with the committee’s first task to report back to the Board on its perceived role and proposed guidelines.

To KBA Members

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

**May 20-21, 2011
June 14, 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.



LAW DAY 2011

The Legacy of John Adams, From Boston to Guantanamo

LAW DAY 2011 PLANNING GUIDES COMING SOON

Presidents of local bar associations across the Commonwealth should be on the lookout this month for their Law Day 2011 Celebration planning guides. This year's theme — *The Legacy of John Adams from Boston to Guantanamo* — provides the legal community with an opportunity to assess and celebrate the legacy of John Adams, explore the historical and contemporary role of lawyers in defending the rights of the accused, and renew our understanding of and appreciation for the fundamental principle of the rule of law.

Law Day 2011 falls on Sunday, May 1. For more information on Law Day, visit www.lawday.org or contact Shannon Roberts in the KBA Communications Department at (502) 564-3795, ext. 224.

Legally Insane by Jim Herrick



"Your Honor, I've heard of spin, but I didn't realize counsel would be placing us in a centrifuge today."

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN AND WESTERN DISTRICTS OF KENTUCKY**

IN RE: MANDATORY ELECTRONIC FILING OF SEALED DOCUMENTS

NOTICE OF MANDATORY ELECTRONIC FILING OF SEALED DOCUMENTS

Pursuant to Joint General Order 11-01, the United States District Courts for the Eastern and Western Districts of Kentucky give notice that effective March 15, 2011, sealed documents filed with the court must be filed using the Electronic Case Filing System (ECF System).

The Courts' Joint General Order and other information relating to CM/ECF are posted on the Courts' websites. The Courts' websites are located at www.kyed.uscourts.gov and www.kywd.uscourts.gov. If you have any questions, please call the ECF Help Desk.

Eastern District of Kentucky
(866) 485-6349

Leslie G. Whitmer, Clerk
Eastern District of Kentucky

Western District of Kentucky
(866) 822-8305

Vanessa L. Armstrong, Clerk
Western District of Kentucky

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WHO, WHAT, WHEN & WHERE

ON THE MOVE

Stoll Keenon Ogden PLLC is pleased to announce that attorneys **Travis Crump** and **Emily Pagorski** are now members of the firm. Crump and Pagorski work in the firm's Louisville office. Crump practices in the area of business litigation with particular emphasis on tort, environmental and contractual disputes. He is a graduate of Transylvania University and earned his law degree in 2003 from Vanderbilt University Law School. Pagorski practices in the area of business litigation and debtor-creditor relations. She is a graduate of the University of Georgia and earned her law degree in 2004 from Vanderbilt University Law School.

Cory D. Thompson is pleased to announce the formation of the Thompson Law Office. The firm's office is located at 3805 Edwards Rd, Suite 550, Cincinnati, OH, 45208. The focus of the firm is on general civil litigation, personal injury, insurance cover-

age, and criminal defense. Thompson earned a B.A. with Honors in Political Science and his J.D. from the University of Cincinnati in 2004. He is licensed in Kentucky and Ohio. Mr. Thompson can be reached at 513-236-7338 and cory@thomp-law.com. More information is available at www.thomp-law.com.

Greenebaum Doll & McDonald PLLC is pleased to announce that **Christopher W. D. Jones** and **Patrick J. Welsh** have been named co-chairs of the firm's Mergers & Acquisitions (M&A) Team. Greenebaum's M&A Team has been in existence for over 50 years and handles every aspect of a deal, including real estate, environmental, tax, ERISA, licensure and intellectual property issues. Jones practices in the areas of mergers and acquisitions, healthcare, securities, private equity, financial institutions, and international transactions. Jones is also involved with general corporate and contractual issues, U.S. public company reporting

requirements, executive compensation and corporate governance. Jones received his bachelor's degree from Vanderbilt University and his law degree from the University of Louisville Louis D. Brandeis School of Law. Welsh practices in the areas of mergers and acquisitions, contractual issues, real estate and other business related topics. He represents several manufacturing companies and distributors, advising them on issues related to product distribution. He routinely advises clients on the formation and organization of business entities. Additionally, a considerable portion of Welsh's practice involves franchise law matters. Welsh received his bachelor's degree from Bellarmine College and his law degree from University of Louisville Louis D. Brandeis School of Law.

Vanessa L. Armstrong has been appointed Clerk of Court for the

United States District Court for the Western District of Kentucky. She succeeds Jeffrey A. Apperson, who served as Clerk of Court for 16 years. Armstrong formerly served as the chief deputy clerk for the Western District of Kentucky. There she has also served as a pro se staff attorney and clerked for the Honorable Thomas B. Russell and the Honorable John G. Heyburn II. For the Commonwealth of Kentucky, she held the positions of legal counsel to the Governor's Office of Child Abuse and Domestic Violence Services and assistant attorney general. Following law school, Armstrong worked as a law guardian for the Juvenile Rights Division of The Legal Aid Society in New York City before moving to Kentucky in 1994. The Administrative Office of the U.S. Courts recently appointed Armstrong to the Court Interpreters' Advisory Group, sought her participation on a court management review team, and named her to a committee for judicial policy review. She has also served as a circuit representative to the Federal Court Clerks' Association where she currently chairs its education committee. She is a member of the Kentucky Bar Association. Armstrong received her B.A. *summa cum laude* from Berea College in 1988 and her J.D. from Columbia Law School in 1992.

Stoll Keenon Ogden PLLC is pleased to announce the opening of the firm's fifth office location – this one in Morganfield, Ky. SKO would also like to welcome attorney **Sidney H. "Buz" Hulette**, who is Of Counsel with the firm and will be managing the Morganfield office. Hulette will practice primarily in the areas of general litigation, creditor's rights, real estate, probate, mineral law and tax planning. **Craig Dilger** from the firm's Louisville office and **Lauren McElroy** and **John Henderson** from the firm's Henderson office will also be practicing from the firm's new location as needed. This expansion is part of the firm's effort to better serve its clients by growing its presence in Western Kentucky.



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Perry M. Bentley,
Lexington, KY

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WHO, WHAT, WHEN & WHERE

Paul J. Dyar has joined the law firm of **Tilford Dobbins Alexander, PLLC**. Dyar earned his B.A. in History from Bellarmine University in 1988 and his J.D. from the University of Kentucky College of Law in 1992. Dyar also received his LL.M., Taxation in 1993 from the University of Florida. His practice includes taxation, tax exempt organizations, business law, wills and trust and estates.

Frost Brown Todd is pleased to announce the appointment of four new members to the firm. **Cory J. Skolnick** represents clients in a wide array of complex civil litigation at federal and state levels as well as before various alternative dispute resolution forums. Several of his matters have involved parallel civil litigation, criminal investigations, and administrative actions. In addition to his more traditional litigation practice, he advises clients regularly on administrative and regulatory issues and conducts internal corporate investigations. **Geoffrey M. White** is in the Real Estate Practice Group and is licensed in Kentucky and Ohio with an AV® Preeminent™ Peer Review rating by Martindale-Hubbell. White's practice is focused on representing lenders, loan servicers, owners, investors, developers and managers in the workout, servicing, financing, purchase, sale, development and management of commercial real estate properties. He is a member of the Board of Directors and the President of the Young Professionals Association of Louisville, a member of the Board of Directors of Greater Louisville Inc. (GLI), the Leadership Louisville Center, the Louisville Energy Alliance, and is a founding member of the Governing Directors of The Crossing Generations Society. **Jason C. Williams** concentrates his practice in corporate law with an emphasis in franchise law and mergers and acquisitions of public and private companies. He has substantial experience in the organization and representation of purchasing cooperatives for national restaurant chains. Williams serves as the head of the Frost Brown Todd's franchise and distribution service team and is a member of the recruiting committee. Williams remains actively involved in the Louisville community and

serves on the Board of Directors of Family and Children First. Williams graduated from the University of Kentucky College of Law in 2003 and Yale University in 2000 where he majored in economics. He is married to Jefferson County District Court Judge Erica Lee Williams. **Martin B. Tucker** concentrates his practice primarily in all aspects of bankruptcy and restructuring law and creditor's rights law. His experience includes the representation of banking institutions, commercial landlords, business entities and individuals regarding complex workouts, out-of-court restructurings, commercial and consumer bankruptcy cases and foreclosures, general business litigation and contract disputes. He represents and has represented numerous companies and individuals as debtors in complex commercial Chapter 11 and Chapter 7 bankruptcy cases and complex out-of-court restructurings and workouts. These cases have included the representation of restaurant owners, franchisees, commercial property owners and similar interests. His practice also includes representation of clients in commercial transactions, business formation and general corporate practice.



Daniel A. Hunt

Daniel A. Hunt has joined the law firm **Ziegler & Schneider, P.S.C.**, as an associate. Hunt obtained his law degree, graduating *summa cum laude* from Northern Kentucky University Salmon P. Chase College of Law, and his bachelor of arts degree from the University of Louisville. While at Chase, Hunt served as an associate editor of the *Law Review* and completed an externship with Judge William O. Bertelsman. Hunt has been admitted to practice in both Kentucky and Ohio. His practice will include general corporate matters, insurance defense, litigation, and municipal law.

Stoll Keenon Ogden PLLC is pleased to announce that attorney **Eileen M. O'Brien** is the new chair of the firm's Family Law practice group. O'Brien has

been with the firm since 1981. She has been actively involved in firm leadership throughout her career with the firm, helping to plan the annual Women in Business seminar each fall. She is also actively engaged in the community, serving on the Editorial Board for *Kentucky Bench & Bar* since 2000. She is a volunteer counselor for the Kentucky Lawyers Assistance Program and is active with the Fayette County Pro Bono Board. She presently serves as the vice-president of the Kentucky Bar Foundation Board. O'Brien also serves as the president of the Board of the Chrysalis House and the Carnegie Center for Literacy and Learning.



David Treacy

Dinsmore & Shohl is pleased to announce that **David Treacy**, an attorney in the firm's Lexington office, has been appointed a partner. David concentrates his practice on complex corporate and commercial litigation in the state and federal trial and appellate courts as well as before state administrative agencies. He currently is a member of the firm's Professional Development Committee and its Mentoring Program. In addition, David currently serves on the Board of Directors for the Central Kentucky Youth Orchestras and the Bell Court Neighborhood Association, and is an officer of the Notre Dame Club of Central Kentucky. He earned his J.D. from Seton Hall Law School and his B.A. from the University of Notre Dame.



John Selent

Dinsmore & Shohl is pleased to announce that **John Selent** has been named the managing partner for Dinsmore & Shohl's Louisville offices. Selent will oversee nearly 60 attorneys and the integration of the firm's two local offices following the firm's merger with Woodward, Hobson & Fulton in 2009. He assumes

WHO, WHAT, WHEN & WHERE



Jon Fleischaker

the position from **Jon Fleischaker**, who served as the managing partner for the firm's Louisville office since 1997. Selent is a member of the firm's Board of Directors and focuses his practice primarily

on administrative law and commercial litigation, with a special emphasis on telecommunications and public utility law. Selent earned his J.D. from the University of Notre Dame Law School and his B.A. from Bellarmine College.

Stites & Harbison, PLLC, announced today that two attorneys have been elected to membership in the law firm. The new members are: **Jamie L. Cox** and **Mandy Wilson Decker** from the Louisville office. Two Associates were also promoted to counsel: **Demetrius O. Holloway** and **Jamie K. Neal**, both



Jamie L. Cox

from the Louisville office. Cox is a member of the firm's Real Estate & Banking Service Group. She is also the co-chair of the firm's Sustainability and Emerging Technologies Practice Group. She concentrates on commercial

real estate development and leasing, commercial lending and corporate-related real estate issues. Cox is a LEED Accredited Professional. Decker is a life sciences patent attorney and a member



Mandy W. Decker

of the firm's Intellectual Property & Technology Service Group. Her practice focuses on patent-related aspects of intellectual property, including counseling clients on the creation, management, enforcement, and practice of intellectual property rights. Contributing to her practice is a scientific background in chemistry and experience with academic and commercial research in the areas of biochemistry, biotechnology and pharmaceutical sciences. Holloway is a member of the



Demetrius O. Holloway

Employment Law Service Group and has both first and second chair trial experience. He represents employers in the defense of a variety of state and federal civil suits including Title VII,



Jamie K. Neal

ADA, ADEA, FMLA, FLSA and common-law tort claims related to employment. He also has extensive experience in litigating non-competition and other restrictive covenant cases in both federal and state court. He

also represents clients in the defense of civil suits involving personal injury,

product liability, breach of contract and common law tort claims. Neal is a member of the firm's Torts & Insurance Practice Service Group and the Appellate Advocacy Team. She focuses on appellate practice and on defending product liability and professional malpractice claims. She has handled litigation on a variety of business liability issues, including intellectual property claims, premises liability actions and contract disputes.



Auric D. Steele

Seiller Waterman is pleased to announce that **Auric D. Steele** has become an associate with the firm. Steele received his J.D. from the University of Louisville Louis D. Brandeis School of

Law and is licensed to practice law in Georgia, Kentucky and California. His practice includes litigation, intellectual property and entertainment law.



Ben Carter

Ben Carter has opened a law office in Louisville. **Ben Carter Law** (www.bencarterlaw.com) focuses primarily on defending homeowners facing foreclosure, consumer law, and

debtors' rights litigation. Prior to opening Ben Carter Law, PLLC, Ben served as a housing attorney at Legal Aid Society in Louisville, a public defender in the island-nation of Palau, and a law clerk for the Honorable Thomas Wingate of the Franklin Circuit Court. He is a 2001 graduate of Davidson College and a 2006 graduate of the University of Kentucky College of Law. Contact him at 502-303-4062 or ben@bencarterlaw.com.

Anita M. Britton, Crystal L. Osborne, and Amy C. Johnson have announced the opening of their new Lexington law firm, **Britton Osborne Johnson PLLC**. They will concentrate their practice in the areas of family law, employment law, securities arbitration and general litigation.



Anita M. Britton



Crystal L. Osborne



Amy C. Johnson

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WHO, WHAT, WHEN & WHERE



Oran S.
McFarlan, III

Yunker & Park PLC, of Lexington, is pleased to announce that **Oran S. McFarlan, III**, has become a member of the firm. McFarlan received his J.D. from Wake Forest, and graduated *summa cum laude* from the

University of Kentucky with a B.A. in History. His areas of practice include civil litigation, consumer protection and entrepreneurial law.



Christopher W.
Goode

Bubalo Rotman PLC announced the election of **Christopher W. Goode** as a partner. He will split his time between the Louisville and Lexington offices where he practices in the areas of personal injury and products

liability litigation. Goode currently serves as chair of the Lexington-Fayette Urban County Government Ethics Commission. He will begin his term as president of the Fayette County Bar Association in May 2011. Goode earned his undergraduate degree from Northern Illinois University and his J.D. from DePaul University. He is a member of the Kentucky, Louisville and Fayette County Bar Associations, American Association for Justice (AAJ), and the Kentucky Justice Association. Goode is also a member of The Million Dollar Advocates Forum. Goode is a founding fellow of the Fayette County Bar Foundation and a past President of the Young Lawyers Section of the Fayette County Bar Association. In 2005, Goode received the Fayette County Outstanding Young Lawyer award.

Dinsmore & Shohl is pleased to announce that **Lee Rosenthal**, an attorney in the firm's Lexington office, has been appointed a partner. Rosenthal joined the firm in 2009 through the firm's merger with Woodward, Hobson & Fulton LLP, which Lee practiced with



Lee Rosenthal

since 2002. His practice involves litigation in the areas of product liability, transportation law, commercial litigation, insurance coverage and bad faith, and general liability. He has published multiple articles, in several publications, on a wide variety of evidentiary, liability, and damages issues. Rosenthal earned his J.D. from the University of Kentucky College of Law and his B.A. from the University of Richmond.



Marcia L. Pearson

Gwin Steinmetz & Baird PLLC is pleased to announce that **Marcia L. Pearson** and **Michael F. Sutton** have become members in the firm. Both Pearson and Sutton have been with GSB since its inception in 2007. Pearson is a 2003 graduate of the University of North Carolina School of Law. Her concentration is in the area of nursing home litigation as well as



Michael F. Sutton

employment law. Sutton is a 2004 graduate of Indiana University School of Law. He concentrates his practice in nursing home litigation, healthcare law and intellectual property law.

Escum L. "Trey" Moore, III and **Jennifer Howard Moore** are pleased to announce the opening of their firm, **Moore & Moore, PLLC**. Trey's practice focuses on civil litigation, especially personal injury and medical malpractice cases for plaintiffs. Jennifer's primary areas of practice are organization and representation of small businesses and family law. Prior to establishing the firm, Trey was a founding partner of Savage, Elliott, Houlihan, Moore, Mullins & Skidmore, LLP, and Moore, Mullins & Erdmann, LLP. He has extensive experience litigating



Escum L. "Trey"
Moore, III

plaintiff's personal injury and medical malpractice cases. Trey received his B.A. from Centre College in 1999 and earned his J.D. from the University of Kentucky College of Law in 2002. He is a member of the

Lawyers Mutual Insurance Company of Kentucky Board of Directors and serves as editor-in-chief of the Kentucky Justice Association *Advocate* magazine. Jennifer previously served as a judicial law clerk to the Honorable Karl S. Forester of the U.S. District Court for the Eastern District of Kentucky and to the Honorable Jennifer B. Coffman of the U.S. District Court for the Eastern and Western Districts of Kentucky. She also practiced with Wyatt, Tarrant & Combs, LLP in the firm's corporate and equine groups where her practice emphasized entity formation, loan transactions and general contract law.



Jennifer H. Moore

Jennifer earned a B.A. from Centre College in 2000 and graduated with honors from the University of Kentucky College of Law in 2003. Jennifer served as chair of the KBA Young Lawyers

Section from 2009-2010 (including serving on the KBA Board of Governors) and has been a longtime member of its Executive Committee. She currently serves as an adjunct instructor of legal writing at the University of Kentucky College of Law. **Moore & Moore, PLLC**, is located at Richmond Square, Suite 22B, 141 Prosperous Place in Lexington. Trey and Jennifer can be reached by email (treym@moorepllc.com or jennifer@moorepllc.com) or by phone 859.368.8900.

Burr & Forman LLP announce that the Self-Insurance Institute of America, Inc. (SIIA) has named Nashville-based Counsel **Julie McPeak** special counsel for the organization with specific

WHO, WHAT, WHEN & WHERE

responsibilities to represent SIIA on regulatory matters considered by the National Association of Insurance Commissioners (NAIC). With her new role, McPeak joins several of her firm colleagues in national leadership roles in the insurance industry. McPeak has over 12 years of legal and administrative experience in state government and most recently served as the executive director of the Kentucky Office of Insurance (KOI). Prior to her appointment as executive director, she spent nine years as an attorney for KOI, the last five as general counsel. McPeak also served as general counsel to the Kentucky Personnel Cabinet. McPeak is a member of the Tennessee, Kentucky, Nashville, and Franklin County Bar Associations. She is an active member of the American Bar Association, Tort and Insurance Practice section, where she serves as Vice-Chair of the Insurance Regulation Committee and a member of the Federal Involvement in Insurance Regulatory Modernization Task Force. McPeak was also a member of the National Association of Insurance Commissioners, having served on its Executive Committee, serving as Southeastern Zone Secretary/Treasurer and Chair of the Life Insurance and Annuities Committee. She is a past Board member of the National Insurance Producer Registry. McPeak received her J.D. from the University of Louisville Louis D. Brandeis School of Law in 1994, and her BBA in 1990 from the University of Kentucky.

IN THE NEWS

Wyatt, Tarrant & Combs, LLP has been recognized as one of the “Best Places to Work in Kentucky” in the large companies’ category for 2011. This marks the fifth consecutive year Wyatt has earned this honor. Sponsored by the Kentucky Society for Human Resource Management and the Kentucky Chamber of Commerce, this award is based on a two-part assessment.

Thomas E. Rutledge, a member of Stoll Keenon Ogden PLLC, has co-
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authored with **Allan W. Vestal**, dean and professor of Law at Drake University School of Law, a book entitled “Rutledge and Vestal on Kentucky Partnerships and Limited Partnerships.” This book was published by the University of Kentucky College of Law Office of Continuing Legal Education.

Thomas L. Rouse, an attorney in sole practice in Erlanger, was elected to a second consecutive four-year term as mayor of Erlanger, a city of more than 17,000 residents in Kenton County across the Ohio River from Cincinnati. He was also selected as vice-chair of the Kenton County Mayors’ group, an organization of mayors and government officials that meets monthly to consider and discuss issues affecting Northern Kentucky local government. Rouse was also elected to the position of vice president of the Kentucky Bar Association. His term begins on July 1, 2011, at the expiration of his sixth year as a member of the KBA Board of Governors. He may be contacted at Tom@thomasrouselaw.com or trouse@ci.erlanger.ky.us.

Greenebaum Doll & McDonald PLLC is pleased to announce that **James W. Herr** has been selected to serve on the Board of Directors for the Legal Aid Society that serves Jefferson County, Ky., and the 14 surrounding counties. Herr is a member of the firm’s Litigation and Dispute Resolution Group. His practice includes commercial litigation, class action defense and appeals. Herr received his bachelor’s degree from the University of Kentucky and his law degree from the University of Louisville Louis D. Brandeis School of Law.



Greg Ehrhard

Leadership Louisville has announced that Stites & Harbison attorney **Greg Ehrhard** is one of 44 community leaders selected for membership in the 2011 Bingham Fellows class. The topic for Bingham Fellows this year is “Shaping Louisville for the 21st

Century.” Their task is to create a long-range infrastructure plan to meet Louisville’s economic and environmental needs. Greg Ehrhard is a member of the firm practicing in the Real Estate & Banking Service Group. He advises clients in many areas of commercial real estate law, including zoning/land use, leasing, lending and condominium development.

For the seventh year in a row, **Stites & Harbison** was named one of the “Best Places to Work” in Kentucky. The official rankings will be announced at an awards dinner on April 20, 2011, at the Lexington Convention Center in downtown Lexington. “Best Places to Work in Kentucky” is hosted by the Kentucky Society for Human Resource Management in conjunction with The Kentucky Chamber of Commerce. Also, the Louisville Bar Association has awarded Stites & Harbison the Paul G. Tobin Pro Bono Service Award. The award, normally given to an individual, was presented to the firm for providing pro bono legal services to victims of domestic violence at court hearings that decide whether temporary emergency protective orders should be turned into permanent protective orders. The program was originally conducted in conjunction with The Center for Women and Families and is now coordinated through the Legal Aid Society as part of the Domestic Violence Advocacy Program and has been expanded nationwide to other communities.



Don Graeter

Bank Investment Consultant magazine has named Central Bank’s **Don Graeter** to its annual ranking of “Top 50” consultants with a ranking of #6 in the nation. Graeter partners with his sons, Drew and Spencer Graeter, at the bank’s Waterfront Plaza location. Graeter, a former tax attorney, cited the team’s extensive experience and an early commitment to providing comprehensive financial advice as central to its success.

WHO, WHAT, WHEN & WHERE



Bob Hoffer

Bob Hoffer, partner at Dressman Benzinger LaVelle, was recently awarded the Outstanding Community Service Bonitatem Award from the Covington Latin School. Hoffer is a 1972 alumnus of the school. Embodying the school motto *Bonitatem et Disciplinam et Scientiam Doce Me* (teach me goodness, discipline and wisdom), Hoffer was presented the award for his work in the community, including the Diocesan Catholic Children's Home (DCCH). Hoffer was also named president-elect for the Kentucky Defense Counsel (KDC). The Kentucky Defense Counsel is focused on increasing the quality of legal services its members render to their clients and improving the administration of justice in the courts. Hoffer has been a member of the KDC since 2004. Hoffer heads DBL's employment law division which represents employers of all sizes including some of the largest throughout the Kentucky and Greater Cincinnati area.



Joshua D. Farley

Recently, **Joshua D. Farley** appeared before the Supreme Court of the United States, arguing on behalf of the Commonwealth of Kentucky in *Kentucky v. King*. Appearing before the Court at age 29 makes Farley one of the youngest individuals to ever appear before the Supreme Court.



James A. Dressman III

James A. Dressman III, partner at Dressman Benzinger LaVelle, was recently reappointed chairman to the Kentucky Bar Association's (KBA) Audit Committee. Dressman was reappointed to serve on the committee through 2013. Dressman and this committee will be responsible for appointing independ-

ent auditors and working with them and internal staff to ensure sound accounting practices and financial reporting for the KBA. 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.



Gregory E. Mayes



Michael F. Tighe

Middleton Reutlinger attorneys **Gregory E. Mayes** and **Michael F. Tighe** were recognized by the Kentucky Alliance Against Racist & Political Repression for negotiating a settlement with Metro Louisville government on behalf of the Coalition for the Homeless and Wayside Christian Mission, which resulted in new zoning and licensing ordinances for homeless shelters.



Richard M. Hopgood

Wyatt, Tarrant & Combs, LLP, announce that the Lexington-Fayette Urban County Airport Board appointed **Richard M. Hopgood**, partner at the law firm of Wyatt Tarrant & Combs, LLP, to serve as chair. He has served on the Airport Board since 2008. Hopgood is a member of the firm's Real Estate & Construction Service Team. He concentrates his practice in representing retailers, developers, landlords and tenants in commercial real estate with an emphasis on retail and office developments. He also has extensive experience in oil and gas acquisition, financing and development.

Dinsmore & Shohl is pleased to announce that **Kenyon Meyer**, a partner in Dinsmore & Shohl's Louisville office, was recently elected to serve on the firm's Board of Directors. Dinsmore & Shohl's Board is com-



Kenyon Meyer

prised of 14 partners from across the firm. Meyer is a partner in the firm's Litigation Department and represents businesses in all types of litigation. His extensive litigation experience includes commercial disputes in state and federal courts, wrongful discharge litigation, and trade secrets and restrictive covenant issues on behalf of employees and employers. He also represents employers and employees in white collar criminal matters, both in the investigation stage and in litigation. Meyer earned his J.D. from the University of Louisville Louis D. Brandeis School of Law and his B.A. from the University of Notre Dame.



Michael A. Galasso

Michael A. Galasso of Robbins, Kelly, Patterson & Tucker, has been certified as a member of The Million Dollar Advocates Forum. The Million Dollar Advocates Forum is recognized as one of the most prestigious groups of trial lawyers in the United States. Membership is limited to attorneys who have won million and multi-million dollar verdicts, awards and settlements. The organization was founded in 1993 and there are approximately 4000 members located throughout the country. Fewer than 1% of U.S. lawyers are members. Members must have acted as principal counsel in at least one case in which their client has received a verdict, award or settlement in the amount of one million dollars or more. Galasso is a 2000 graduate of the Salmon P. Chase College of Law at Northern Kentucky University. He has been associated with Robbins, Kelly, Patterson & Tucker since 1999 and became a shareholder in 2006. He practices in the area of civil litigation with a focus on commercial, consumer, bankruptcy, personal injury, employment law, and creditor's rights.

WHO, WHAT, WHEN & WHERE

Clifford H. Ashburner, chair of Wyatt's Sustainability Group, has been re-elected Chairman of the Kentucky chapter of the United States Green Building Council (USGBC). As chair, Ashburner will lead the chapter as it educates the community on green-building issues and promotes policies that encourage green building. The Kentucky chapter has over 250 members, ranging from architects and designers to construction companies and developers. Ashburner was the first attorney to be certified a LEED Accredited Professional in Kentucky, and also heads the newly-formed Conservation and Energy Efficiency committee at Greater Louisville, Inc. He is a published author and frequent speaker on sustainability issues. Ashburner was also a member of the 2010 Bingham Fellows and served as a primary author of the group's white paper, "Greening Louisville's Built Environment."

KBA Ethics Committee Chair **Linda S. Ewald** recently received the Judge Benjamin F. Shobe Civility and Professionalism Award presented jointly by the Louisville Bar Association and the Louis D. Brandeis American Inn of Court. The award is presented to an attorney who displays sterling character and unquestioned integrity and consistently adheres to the highest standards of civility, honesty and courtesy in his/her personal and professional life. Professor Ewald has been a member of the University of Louisville Brandeis School of Law faculty for over 30 years. She is the author of several significant articles on professional responsibility, and was a leading member of the KBA Ethics 2000 Committee which revised the Kentucky Rules of Professional Conduct. She also spearheaded the reorganization of the KBA "Ethics Hotline," which provides advice and guidance to attorneys in need of immediate assistance with ethical questions or quandaries. Additionally, Professor Ewald was a founder of the "Partners in Professionalism" program which helps third year law students make the transition in law practice with an understanding of the importance of ethics, professionalism and civility.

RELOCATION



Edward J. Brockman, Jr.

Edward J. Brockman, Jr., is pleased to announce that he has moved his principal law office to 161 East Joe B. Hall Avenue in Shepherdsville. His telephone number has changed to (502) 955-5501 and his e-mail address is

EJBROCKMAN@hotmail.com.

Brockman has been in general civil practice for 41 years and will continue his practice in Jefferson and surrounding counties.

Linda R. Magruder of Magruder Law is proud to announce the relocation of her office to 12211 Old Shelbyville Road, Suite D, Louisville, KY 40243-1591. Her new telephone number is (502) 690-6611 and new fax number is (502) 690-6747. Linda will continue her work in protecting plaintiffs against subrogation and reimbursement claims made by Medicare, Medicaid and ERISA disability and medical benefits plans.

Have an item for WHO, WHAT, WHEN & WHERE?

The Bench & Bar welcomes brief announcements about member placements, promotions, relocations and honors. Notices are printed at no cost and must be submitted in writing to: Managing Editor, Kentucky Bench & Bar, 514 West Main Street, Frankfort, KY 40601 or by email to sroberts@kybar.org. Digital photos must be a minimum of 300 dpi and two (2) inches tall from top of head to shoulders. There is a \$10 fee per photograph appearing with announcements. Paid professional announcements are also available. Please make checks payable to the Kentucky Bar Association. The deadline for announcements appearing in the next edition of Who, What, When & Where is April 1st.

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.
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* 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.

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Congratulations!

To the following members who reported 50 or more Pro Bono hours on their 2010-2011 Annual Dues Statement.



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R Randolph Behnken	Dennis Clay Burke

Stella Belinda House	Ryland F. Mahathey	Jaime Lynne Patterson	James Richard Scott	Michael D. Triplett
Douglas C. Howard	Don H. Major	John Judson Patterson	Lindsey Scott	C. Christopher Trower
Jay Bruce Howd	Brett Edward Mangum	John E. Pence	Tasha Kay Scott	Philip J. Truax
Thomas M. Howe	Samuel Manly	Robert John Penta	Thomas Arthur Scott Jr.	Agnes Sipple Trujillo
Bradley R. Hoyt	Michelle E. Mapes	Charlie M. Perkins	Jeffrey B. Segal	Emanuel Cohen Turner
Carroll Hubbard Jr.	David Dwight Marshall	Jason Kelly Petrie	M. Thurman Senn	Johnnie Lloyd Turner
Lee Huddleston	Stephen L. Marshall	Kirk M. Pfefferman	Mary E. Sergeant	Robert Steven Ukeiley
Lisa D. Hughes	Eleanor F. Martin	Robert David Pinson	Stephen K. Sesser	Melissa S. Van Wert
Sidney H. Hulette	James Richard Martin II	Michael M. Pitman	Suzanne Lee Shaffar	Susan Jeanne Van Zant
Derek D. Humfleet	Jennifer McVay Martin	Stephen Howard Poindexter	Saeid Shafizadeh	Richard Allen Vance
John Earl Hunt	Evaristo M. M. Martinez	Andrea Lynn Poniacki	Michael Gary Shaikun	John Jay Vandertoll
William Jay Hunter Jr.	Frank Mascagni III	Brenda Popplewell	Valerie Anne Shannon	James J. Varellas Jr.
Joseph Thomas Ireland	Marsha Dianne Mason	Jack Chester Porter	Wavie Clinton Sharp	Sandra M. Varellas
Justin Lee Jablonski	Ronald D. Mather	Richard C. Porter Jr.	Mary Angela Shaughnessy	Bradley K. Vaughn
Andrea Marie Janovic	Charles C. Mattingly III	Stephen T. Porter	Crystal M. Shepard	Jason C. Vaughn
August Thomas Janszen	Joseph Hubert Mattingly III	Clifford Keith Powell	Ashlea Lashea Shepherd	Nicholas C. A. Vaughn
Elizabeth M. Jenkins	Robert Denton Mattingly	Scott Emerson Powell	Mary Margaret Sherman	Rebecca Cox Venter
Donn Randall Jewell	Sharon A. Mattingly	Nicola Ai Ling Prall	Karen Lee Shinkle	Justin D. Verst
Harold M. Johns	Frederick M. Mayer	John G. Prather Jr.	Thomas Paten Shreve	Harold Louis Vick
Alicia Carol Johnson	Thomas A. McAdam III	Nicole M. Prebeck	Katherine N. Sierveld	David B. Vickery
Graddy W. Johnson	Anne W. McAfee	Zachary David Prendergast	Larry D. Simon	Stephen Deems Vidmer
Kevin Wayne Johnson	Bruce Lane McClure	Haley Anne Prevatt	Thomas Bruce Simpson Jr.	Paul F. Vissman
Lira Ann Johnson	George David McClure Jr.	E Austin Price	Bruce W. Singleton	Charles Curtis Walden
Lon M. Johnson Jr.	Allen Keith McCormick	Kimberly S. H. Price	Diana L. Skaggs	Charles Aaron Walker
Robert H. Johnston III	James Paul McCrocklin	William E. Quisenberry Jr.	Robin Renee Slater	Richard Adolph Walker
Brandon C. Jones	Micki Woodward McDaniel	Marco Mike Rajkovich Jr.	Michael R. Slaughter	Catherine I. Wallace
Saunders Paul Jones IV	Kevin Michael McGuire	Phillis Hegmon Rambsy	Roxann R. Smalley	Matthew Robb Walter
Judith K. Jones-Toleman	Katherine E. McKune	Daniel Parker Randolph	Mark Anthony Smedal	Dana Geneen Walton-Macaulay
David Barry Jorjani	Brendan Joseph McLeod	William C. O. Reaves	Eurie Hayes Smith III	John Lockwood Warner Jr.
Edwin F. Kagin Jr.	William F. McMurry	Ryan James Reed	H. Bradley Smith	William T. Warner
Cathy Kahnle	Melissa D. McQueen	C. Michael Reynolds	Harold R. Smith	Louis Irwin Waterman
Taylor Kain	Mark Stephen Medlin	Elizabeth Dawn Reynolds	James David Smith	Alvin D. Wax
David M. Kaplan	David S. Mejia	Frederick W. Rhyhart	James Stephen Smith	Harry Patrick Weber
Martin Z. Kasdan Jr.	James Albert Metry	Robert Edward Rich	Jonathan Logan Smith	Katharine C. Weber
Margaret E. Keane	Gregory Scott Metzger	Charles E. Ricketts Jr.	Linda Andrea Smith	Thomas Marion Weddle Jr.
Lori Jayne Keen	Keith D. Meyer	Donald Jerome Ridings Jr.	Mark Thomas Smith	Kevin Patrick Weis
Dennis James Keenan III	Karen Diane Meyers	Ronald Lee Rigg	Mitzie V. Smith	Robert J. Welch Jr.
William Leslie Keene Jr.	James C. Milam	Nicholas W. Riggs	John E. Spainhour Jr.	C. Michael Weldon
Benjamin Todd Keller	Adam Clayton Miller	Virginia Maria Riggs-Horton	Lloyd Emory Spear	Charles S. West
John Warren Keller	Brendon D. Miller	Billy N. Riley	D. Nathaniel Spencer	Gail Webb West
Laurie Goetz Kemp	Amy Marie Miller-Mitchell	Johanna Doreen Rippey	Charles S. Spiegel	Steven L. West
Katherine Kay Kendall	Mark Daron Mitchell	John Todd Rippy	Robert Joseph Stanz	Whitney H. Westerfield
James Venus Kerley	Kent David Mitchner	James O. Risch	Mark Joseph Stanziano	Jennifer T. Westermeyer
Thomas R. Kerr	Theresa Marie Mohan	Michael D. Risley	John Warren Stapleton	Paul Lewellin Whalen
Valerie S. Kershaw	Edward C. Monahan	Stephanie Dawn Ritchie	Auric D. Steele	Thomas Edward Wheeler II
Joshua Ryan Kidd	Patrick John Monohan	Mary Kelly Rives	Kathy Stein	Stanley W. Whetzel Jr.
James Albert Kidney	James H. Moore III	Theodore M. Robbins	E. Douglas Stephan	Larry Whitaker
Lanna Martin Kilgore	Patrick Joseph Moran	Nancy Oliver Roberts	Andrew Martin Stephens	John Andrew White
Phillip Lynn Kimbel	Kevan Morgan	Ronald Gerald Robey	Kenneth S. Stepp	Scott White
John W. Kirk	W Randall Morris	Cory Scott Robins	Melissa Ann Stevens	John Bell Whitesell
Robert M. Kirtley	Nina Louise Moseley	Phyllis L. Robinson	David Stuart Stevenson	Jerry W. Wicker
Christopher J. Klein	William C. Mosey	Timmy G. Robinson Jr.	John F. Stewart	Mary Jo Wicker
Bruce Lee Kleinschmidt	Teri Lynn Mosier	Benjamin D. Rogers	William Kash Stiltz Jr.	Mark Kindred Wickersham
Brian J. Klopfenstein	William Lowell Mundy	Earl Rogers III	Brent Michael Stinnett	Diana Carter Wiedel
John Mark Kressenberg	Linda Strite Murnane	Suzanne Romano	Matthew Atwood Stinnett	Christopher D. Wiest
Rand E. Kruger	Aaron Michael Murphy	John H. Rompf Jr.	Thomas K. Stone	Dennis Keith Wilcutt II
John F. Lackey	Melinda Ann Murphy	Camille D. Rorer	Melanie Lee Straw-Boone	Leanna Puckett Wilkerson
Ashley Nicole Laferty	Terri Renee Mussetter	John M. Rosenberg	David C. W. Stuart	Russell Lynn Wilkey
David James Lampe	Joseph James Neely	Martha Alice Rosenberg	Flora Stuart	Howard Douglas Willen
Susan Turner Landis	Kerry Lee Neff	Peter Allen Roush	Natalie T. Stuart	Thomas Brandt Willenborg
Timothy Daniel Lange	William D. Nesmith	Neil Prakash Roy	David Shawn Sullivan	Arthur Lee Williams
Edward Charles Lanter	Frank Lewis Newbauer	Michael K. Ruberg	Maureen Ann Sullivan	Cordell Hull Williams Jr.
Kevin Paul Laumas	Peter Canavan Newberry	David Brian Rubinstein	Nicholas D. Summe	John Paul Wilson
Theodore Lavit H.	Samuel Ryan Newcomb	Raymond F. Runyon	David Brandeis Tachau	Melissa Ann Wilson
Nancy Ann Lawson	Robert Brand Newman	Wendellyph Knox Rush	Anthony B. Tagavi	William R. Wilson
Stephen Samuel Lazarus	Thomas A. Noe III	Ronald Joseph Russell	Alex F. Talbott	Meagan Ruth Winters
Patricia C. Le Meur	Dennis Leo Nordhoff II	Harry J. Rust	John Lewis Tate	Mark Donald Wintersheimer
Pamela S Ledgewood	Christopher S. Nordloh	Jamie Lynne Rust	Jeffrey Dale Tatterson	Mark Alan Wohlander
Jason Landow Lee	Dennis L. Null	Perry Thomas Ryan	David Allen Taylor	Kay L. Wolf
Mary A. Lepper	Victoria D. Oakley	Brian Keith Saksefski	Edwin Evans Taylor	David Duane Wolfe
Michelle C. Lerach	Daniel Brian O'Brien	Timothy Jay Salansky	Kembra Sexton Taylor	Mark H. Woloshin
Marc H. Levy	George R. O'Bryan	Jeffery Lynn Sallee	Leonard W. Taylor III	Dax Ryan Womack
Matthew Asher Levy	Paul Connor O'Bryan	Jonathan Todd Salomon	Lescal Joseph Taylor	Zack N. Womack
Bobbi Jo Lewis	Lynne Marie O'Connor	Arthur R. Samuel	Michael A. Taylor	Bobby G. Wombles
Floyd Allen Lewis	Stephen M. O'Connor	Jeffrey M. Sanders	Roderick A. Tejada	John W. Woodbridge
Johnie Delbert Lewis Jr.	Margaret O'Donnell	Stephen Craig Sanders	John O. Terry	Jerry Lee Wright
Phillip Lewis	Lisa Jean Oeltgen	Antony Lee Saragas	T Rankin Terry Jr.	Charles David Yates
Bruce Wayne Lominac	James Floyd Ogden	Sharon H. Satterly	Donald Anthony Thomas	Frank Yates Jr.
John M. Longmeyer	Steven J. Olshewsky	Steven C. Schletker	Linda Bernice Thomas	Shelli D. D. Yoakum
Philip Michael Longmeyer	Patrick Edward O'Neill	Benjamin Schmidt	Patricia Ann Thomas	Larry H. York
Franklin W. Losey	Rebecca Jean O'Neill	John Anthony Schmidt	Charles Lee Thomason	Michael M. York
Marc Allen Lovell	K. Osi Onyekwuluje	John Hilary Schmidt	David T. Thompson	Mary James Young
Jeffrey Todd Loy	Victoria Combs Owen	Thomas David Schneid	Gregory Irvin Thompson	Shane Alan Young
Deborah Lydon	Annie L. Owens	Larisa I. Schneider	Kenneth R. Thompson II	Franklin S. Yudkin
James David Lyon	Ross Collins Owens III	Jennifer Lynn Scholl	Steven O. Thornton	Bruce A. Yungman
James William Lyon Jr.	Stephen Palmer	W. Fletcher Schrock	Margaret F Timmel	Russell Bruce Zaino
Michael W. Lyons	Timothy Alan Parker	David M. Schuler Jr.	Arlette Cooper Tinsley	
Thomas C. Lyons	D. Steven Parks	Lee A. Schulz	Karen Tosh	
Mark Thomas Macdonald	Djenita M. Pasic	Paul Roman Schurman	Todd Kirby Trautwein	
Richard C. Macke	William Lewis Patrick	Ryan A. Schwartz	David Clifton Travis	

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.

MARCH

- 15 Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association
- 15 Appeals from Arbitration Orders
Louisville Bar Association
- 16 Foreclosure: Debt Readjustment
Cincinnati Bar Association
- 16 Kentucky Legislation & Tax Case Update
Louisville Bar Association
- 17 Family Court Half Day CLE
Louisville Bar Association
- 18 Corporate Law Brown Bag
Louisville Bar Association
- 22 Webinar: Deferred Fees and Structured Settlements
Kentucky Justice Association
- 22 Probate & Estate Law Brown Bag
Louisville Bar Association
- 24 Advocacy Series/Part One – Pre-Trial Practice
Cincinnati Bar Association
- 24 Social Security Brown Bag
Louisville Bar Association
- 25 True Success as an In-House Law Department: Proactive Workplace Harassment Prevention Program
Louisville Bar Association
- 29 Kentucky’s Corrections Crisis: Reforming the Commonwealth’s Sentencing Laws
State Government Bar Association

- 29 Webinar: Demonstrative Aids
Kentucky Justice Association

- 30 Healthcare Enterprise: A Primer on the Regulations Affecting the Business of Healthcare
Cincinnati Bar Association

APRIL

- 12 Video Replay: Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association
- 13 Releases
Kentucky Justice Association
- 13 Immigration Law for the General Practitioner
Cincinnati Bar Association
- 13 Environmental Law Brown Bag
Louisville Bar Association
- 14 Advocacy Series/Part Two – Trial Practice
Cincinnati Bar Association
- 15 Subrogation Workshop (Louisville)
Kentucky Justice Association
- 15 Domestic Relations Institute
Cincinnati Bar Association
- 15 Criminal Law Brown Bag
Louisville Bar Association
- 19 Real Estate Brown Bag
Louisville Bar Association
- 20 Health Law Brown Bag
Louisville Bar Association
- 21 Elder Law
Cincinnati Bar Association
- 27 Construction Law
Cincinnati Bar Association
- 28-29 AAML/LBA 14th Annual Family Law Seminar: Tackling the Tough Issues
Louisville Bar Association

- 29 Subrogation Workshop (Lexington)
Kentucky Justice Association

MAY

- 4-5 26th Annual National Conference on Equine Law
UK CLE
- 6 Social Security
Cincinnati Bar Association
- 10 Government & Public Sector Brown Bag
Louisville Bar Association
- 11 Probate Law
Cincinnati Bar Association
- 11 Taxation Law Half Day CLE
Louisville Bar Association
- 12 Volunteer Lawyers for the Poor Seminar
Cincinnati Bar Association
- 12 Social Security Half Day
Louisville Bar Association
- 13 Nursing Homes
Kentucky Justice Association
- 14-18 Trial College
Kentucky Justice Association
- 17 Video Replay: Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association
- 20 Local Government
Cincinnati Bar Association
- 20 Auto Seminar (Hebron)
Kentucky Justice Association
- 25 Auto Seminar (Louisville)
Kentucky Justice Association
- 25 Employment Law: Wage/Hour and Overtime
Cincinnati Bar Association
- 26 Basic Real Property
Cincinnati Bar Association

THE CLE COMMISSION: WHAT WE DO AND WHY WE DO IT

The Kentucky Bar Association Continuing Legal Education Commission is a hard-working group of volunteer KBA members consisting of seven attorneys, one from each appellate district in Kentucky. These members are appointed by the Kentucky Supreme Court and serve a three-year term. A member of the commission may be reappointed, but may not serve more than two successive three-year terms. The purpose of this commission is to administer and regulate all continuing legal education programs and activities for the members of the KBA. This includes ensuring that the members of the KBA complete high quality, timely CLE programming each year. From developing and implement-

ing rules and policies to ensure high standards in the accreditation of CLE programming, to developing and sponsoring quality programming, to regulating attorney compliance with the mandatory minimum CLE requirements, the CLE Commission is working toward the increased competency of the legal profession in Kentucky.

In carrying out its duties under the Kentucky Supreme Court Rules, the CLE Commission wears two distinct hats. First, as a program sponsor responsible for overseeing the development and performance of KBA-sponsored CLE programs, the commission operates as a service organization, finding timely, convenient and interesting programming at little to no additional expense to KBA members. In addition to planning, commission members often take an active role in executing programs by participating as speakers, moderators, and/or program coordinators. Second, as a regulatory body, the commission works tirelessly to educate members regarding their CLE requirements under the Rules and how to satisfy them. For those who fail to satisfy these requirements, the commission is responsible for certifying their names to the Kentucky Supreme Court and for providing the Court with relevant information in order to help ensure appropriate remedy.

Because of KBA member volunteers like those serving on the CLE commission, the continuing legal education of Kentucky attorneys continues to be in good hands . . . their own. If you should have questions or comments about continuing legal education, the members of the commission encourage you to contact your district representative. 



Go Paperless with Your CLE Records

Join many other KBA members, and sign up today to have your CLE records 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 this paper file each year.

Just e-mail us a brief note at cle_reg@kybar.org indicating "I grant the KBA permission to e-mail my CLE records to me."

To check your e-mail address on record with the KBA, look yourself up on the website using Lawyer Locator under the Membership Menu.

The e-mail address listed is the one used for your CLE records. If you want to change your e-mail address on record, fill out the online address form by clicking the box marked "Request for Address Change."

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



CONGRATULATIONS 2010 CLE AWARD RECIPIENTS

Congratulations to the following members who have received the 2010 CLE Award by obtaining a minimum of 62.5 CLE credit hours within a three year period, in accordance with SCR 3.680. The CLE Commission applauds these members for their efforts to improve the legal profession through continuing legal education.

Cesar Mark C. Achico	Lisa Marie Brookes-Hayse	April Lynn Davenport	Judith Boyers Gee	Clayton Reed Hume
Sara Jean Adair	Shannon Brooks-English	Brian John Davis	Alan J. George	Christopher E. Hutchison
Deborah S. Adams	Carolyn Dawn Brown	Timothy Edward Davis	Ann Elizabeth Georgehead	David Brandon Ison
John R. Adams	Brian Scott Brownfield	Patricia Ann Day	Richard A. Getty	Lindsey Lee Jaeger
John Lindsey Adams	Matthew James Browning	John L. Day, Jr.	Lee Jay Gilbert	Steven Douglas Jaeger
Angela Adams	Jennifer W. Bryan	Matthew Beatty DeMarcus	Jason Robert Gilbert	Cheryl Edwards James
Gary William Adkins	Sarah Kay Bryant	Jeffery Bryant Dean	Bruce J. Gilbert	Jamie T. Jameson
William L. Aldred, Jr.	Vicki Lynn Buba	Karey Lenee' Deardorff	Karen Hoskins Ginn	Brandon Neil Jewell
Dennis Charles Alerding	Melinda Brooke Buchanan	Cheri Riedel Decker	Robert William Goff	A. Thomas Johnson
Benjamin R. Allen, III	Steven Jared Buck	Larry Colby Deener	Brian David Goldwasser	Rickie A. Johnson
Paul Alley	Amy Catherine Burke	Laura Day DelCotto	Joe M. Goodman	Anita Parsons Johnson
Joseph Casey Allison	Kevin Crosby Burke	Mary Jo Delaney	Lori Nicole Goodwin	Barbara W. Jones
Daniel Michael Alvarez	Michael T. Burns	Peter G. Diakov	Henrietta D. Gores	Susan Beverly Jones
E. Kenly Ames	E. Andre' Busald	Craig C. Dilger	Michael D. Grabhorn	Jennifer A. Jones
Julie A. B. Anjo	Jennifer L. Bush	Rebecca B. Diloreto	Janet Marie Graham	Kyle David Kaiman
Joseph Richard Ansari	Victoria D. Buster	Ervin Dimeny	William Allen Gray	Alexis Kasacavage
Joseph V. Aprile, II	James Aaron Byrd	Shannon Marie Doan	Anthony B. Gray	Charles David Keen
Glen S. Bagby	Jeffrey August Calabrese	Allen McKee Dodd	Joan Deaton Grefer	Linda Marion Keeton
Neal Forrest Bailen	Robert Jeffrey Caldwell	John Carroll Dodson	Virginia Werle Gregg	Louis Kelly
Ashleigh Noel Bailey	Stephanie Lynn Caldwell	Anna Leisa Dominick	James Randall Grider, Jr.	Barbara Curtin Kenney
Carlos D. Bailey	John Harlan Callis, III	James J. Drake	John Gregory Grohmann	Joe Harvey Kimmel, III
Kathryn R. E. Baillie	Joe B. Campbell	Jacqueline S. Duncan	William R. Hagan	Shawna Virgin Kincer
John Joseph Balenovich	Rutheford B. Campbell, Jr.	Harold F. Dyche, II	Sharon Kaye Hager	David Dale King
Bryan C. Banks	Alton L. Cannon	Marci P. Eaton	Lisa Russell Hall	Edward Michael King
Travis Kent Barber	Allison N. Carroll	Garry L. Edmondson	Morgan Carol Hall	Lori A. Kinkead
Rodney David Barnes	Benjamin W. Carter	Glenda Mae Edwards	Martha Turner Hamann	Michael Keith Kirk
Douglas Wayne Barnett	John Keith Cartwright	Ashley Ruth Edwards	Joseph L. Hamilton	Jeremy Kirkham
David Michael Barron	Lance Casey	Darren Lee Embry	Seth Allen Hancock	Mark Joseph Kisor
Michael Austin Bass	Diana L. Cassidy	Charles E. English, Jr.	James E. Hargrove	Sarah Hay Knight
W. Ralph Beck	Mary Suzanne Cassidy	Tammy Meade Ensslin	Aaron Charldon Harper	Walter C. Koczot
Robert L. Bell, Sr.	Stephen E. Castlen	John Francis Estill	Michael J. Harrison	Jennifer L. Kovalcik
Tiffany Lynn Bell	Marianne S. Chevalier	Joshua Tyler Fain	Martha Blair Harrison	Sheilah G. Kurtz
Elizabeth A. Bellamy	Carole Douglas Christian	Douglass Farnsley	Jason Apollo Hart	Stephen C. Laber
J. David Bender	Robert K. Claycomb	Marjorie Ann Farris	Martin Lando Hatfield	Cicely Jaracz Lambert
Amye L. Bensenhaver	Robbie Owen Clements	Elizabeth S. Feamster	Foster L. Haunz	Dean A. Langdon
Perry Mack Bentley	Aimee K. Clymer-Hancock	James Owen Fenwick, III	Richard Wayne Hay	Stephanie D. Langguth
Joel T. Beres	Michael Coblenz	Erin Kelli Fields	Hidekazu Hayakawa	Holly Neikirk Lankster
Richard W. Bertelson, III	Jonathan Chase Cochran	Jill Marie Finch	Sarah Capps Hayes	Michael Lars Larson
Sarah Marie Best	Daryl Russell Coffey	Robert Patrick Flaherty	John Christian Helmuth	James Theodore Lawley
Tamela Ann Biggs	Thomas R. Coffey	Melanie Ann Foote	Christy Lee Hendricks	Jason Andrew Leasure
Clay Massey Bishop, Jr.	Tracy Lynn Cole	Paul Kevin Ford	James Michael Herrick	Jason Landow Lee
Erich Eugene Blackburn	William Lewis Collins	Matthew W. Forsythe	David Jack Herzig	James Russell Lesousky, Jr.
James Bradley Blakeman	Kieran John Comer	Jack Dwain Fowler	Vincent F. Heuser, Jr.	Richard Owen Lewis
Caleb Tyler Bland	Allison Inez Connelly	Cathy Weller Franck	Ramona Carole Hieneman	Leah Erin Link-Ulrich
Barbara D. Bonar	Edward Lyn Cooley	Carl Norman Frazier	Myles Lee Holbrook	Matthew Thomas Lockaby
Ruth Elizabeth Booher	Mary Anne Copeland	Tracey A. Frazier	Elaina Lell Holmes	Michael A. E. Loesevitz
David C. Booth	Joshua Bryan Crabtree	Steven Michael Frederick	Sherrill P. Hondorf	Jane Long
Paul Richard Boughman	James Robert Craig	Jonathan Freed	Stephen M. Hopta	Jason Hursel Long
William Andrew Bowker	Joseph N. Crenshaw	Tommy J. Fridy	Vicky Chandler Horn	Crystal Dawn Love
John C. Bowlin	Boyce Andrew Crocker	Luke Joseph Frutkin	Melissa Carol Howard	Eric Allen Ludwig
Edward Lee Bowling	Justin David Crocker	Roy Fugitt	Robbie Joseph Howard	David Eric Lycan
Melissa Jane Bowman	Richard A. Cullison	Steven Brent Fuller	Tammy E. Howard	James Vincent Magee, Jr.
James E. Boyd	Lori Fuller	John Paul Howard	John Paul Howard	Kurt William Maier
Gorman Bradley, Jr.	Mary Elizabeth Cutter	Catherine S. N. Fuller	Rachelle N. Howell	Cole Adams Maier
John W. Braun	Teresa Ann Daniel	Ashley Ryan Gaddis	Bradley R. Hoyt	Amanda G. Main
Laura B. Brent	Jason Franklin Darnall	Michael Alan Galasso	Barbara Ann Hughes	Amanda A. Major
Anita Mae Britton	Gene A. Dauer	Carol Marie Garrett	Leland Taylor Hulbert, Jr.	John Regis Maloney

Tommye Collett Mangus	Angela Hatton Mullins	Bruce Reynolds	Scott M. Smith	Ronald R. Van Stockum, Jr.
Reid Stephens Manley	Larry Wayne Myers	Jason Cosmo Reynolds	Gwendolyn L. Snodgrass	Santina O. Vanzant
Michael John Marsch	David Wayne Nagle, Jr.	Alexandria Ribeyre Leitao	Steven Lee Snyder	David Todd Varellas
Valerie May Marshall	Gail Chooljian Nall	Robert Edward Rich	Mark Steven Solomon	Maureen L. Veterano
James Richard Martin, II	E. Lorraine Neeley	James Milby Ridings	G. David Sparks	Eric Peter Von Wiegen
Sarah Jessica Martin	Leslie M. Newman	John Robert RoBards	Lloyd Emory Spear	Julie A. Wallace
Kevin Jay Martz	Spencer D. Noe	Jimmy Lee Roark	Timothy B. Spille	Penny R. Warren
Ronald Scott Masterson	Onita Nella Noffke	Theodore M. Robbins	Morgain Mary Sprague	Jody Christine Warren
Pamela R. May	Daniel Mark Nolan	Joe Lucas Roberts	Deborah Spring	Clint Evans Watson
Teresa D. Maynard	Eileen M. O'Brien	David Cooper Robertson	Debra Kaye Stamper	Whitney F. Watt
Wendell Kevin McBride	Lynne Marie O'Connor	William Taylor Robinson, III	D. Christian Staples, III	Trevor Wayne Webb
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Alyson Renee McDavitt	Mark Allen Ogle	John Caldwell Rogers	E. Douglas Stephan	Jack A. Wheat
Julie Marie McDonnell	Christopher B. Oglesby	Erica Michelle Roland	Michael Lee Stevens	John Russell Wheatley
Brandi Lynn McEldowney	John Kirk Ogrosky	Kenneth R. Root	Deborah C. Stevens	Randall L. Wheeler
Jason Scott McGee	Suleiman O. Oko-ogua	Martha Alice Rosenberg	John W. Stevenson	Charles S. Wible
Michael Scott McIntyre	Tomoyuki Otsuki	James Rottinghaus	John F. Stewart	Frank A. Wichmann, II
Carrie Insko McIntyre	Mark R. Overstreet	Thomas L. Rouse	Karen Liles Stewart	Russell Lynn Wilkey
Bernard L. McKay	Stephen Palmer	Thalethia B. Rountt	Mark Alan Stiebel	Kenneth Thomas
Kevin M. McNally	Melissa H.P. Palmer	Christopher C. Ruml	Alicia Ann Still	Williams, II
Julie Mix McPeak	Nicole Hou Wen Pang	Soha Tajoddin Saiyed	Mary Whitlock Stoddard	Wesley Kiser Williams
Douglas L. McSwain	C. Fred Partin	Edward Robert Sanders	David Michael Stout	Thomas L. Williamson
Christopher J. Mehling	David Patrick	George Benton Sanders, Jr.	E. Frederick Straub, Jr.	Willis Lee Wilson
Coty Meibeyer	John Judson Patterson	Crystal Lynn Saresky	Sarah B. E. Tankersley	William C. Wilson, III
Matthew Dean Meier	D. Patton Pelfrey	Donna Marie Sauer	John Lewis Tate	Sean Michael Wilson
Christopher A. Melton	Randall Pennington	Robert Schaefer	Barry Michael Taylor	Christopher A. Wilson
William Peery Melton	Brenna Lynn Penrose	Lori Ann Schlarman	Gregory L. Taylor	Steven Robert Wilson
Louis F. Mercado	David Gary Perdue	Thomas David Schneid	Richard S. Taylor	Robert Albert Winter, Jr.
Keith D. Meyer	David James Perlow	George Stephen	Lescal Joseph Taylor	James R. Wood
C. Terrell Miller	Michael Todd Pfeffer	Schuhmann	Daniel N. Thomas	Robert Woodruff
Mason L. Miller	Jeanne M. Picht	Steven Wayne Sebastian	Brian Neal Thomas	Frank C. Woodside, III
Daniel H. Miller, III	Gwendolyn R. Pinson	Marion D. Seitz	J. Hamilton Thompson	Jamhal Lashon Woolridge
Sucheta Mohanty	Janice Lee Platt	Thomas L. Self	Jennifer Lee Thompson	Joseph A. Worthington
Mary Kathleen Molloy	Laura C. Plumley	Gary John Sergeant	Melissa Thompson	Catherine S. N. Wright
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Edward S. Monohan, IV	John Randall Potter	Dennis William Shepherd	Landon Jackson Tingle	Blake Edward Wright
William Ladd Montague	Brian Stephen Powers	William Taylor Shier	Nathan Blaze Tomlin	Garnetta P. Wylie
Barry David Moore	Jeffrey Ray Prather	Jonathan Todd Shipp	Gerald R. Toner	Mitzi Denise Wyrick
Jessica Ann Moore	Finis R. Price, III	Paula Jo Shives	David Michael Tranum	Brandon Troy Yarbrough
E. Patrick Moores	Carl Eugene Pruitt, Jr.	Thomas Bruce Simpson, Jr.	James Thomas Traughber	Donald Craig York
John Hunt Morgan	Justin Henry Ramey	Logan Nicholas Sims	Sadhna True	Daniel Z. Zaluski
Kyle Mason Morris	James Brian Ratliff	Chad Michael Sizemore	Renae Mechelle Tuck	Deborah Jo Zimmerman
Bryan Darwin Morrow	Gregory Adam Redden	Sara Grinnell Smith	Amy L. Tufts Jervis	Michael Dean Zimmerman
Denise M. Motta	James Terrill Redwine	Linda Tally Smith	Patricia A. Van Houten	
Julia T. Mudd	Bradley Aaron Reisenfeld	Jenohn LeShea Smith	Eric Kent Van Santen	

**2011 Dates
KENTUCKY LAW UPDATE
Dates and Locations**

September 1-2 (TH/F) Northern Kentucky Convention Center	Covington	October 18-19 (T/W)	Prestonsburg Jenny Wiley State Resort Park
September 8-9 (TH/F) Holiday Inn & Sloan Convention Center	Bowling Green	October 25-26 (T/W)	Lexington Lexington Convention Center
September 20-21 (T/W)	Owensboro RiverPark Center	November 2-3 (W/TH)	London London Community Center
September 27-28 (T/W)	Ashland Bellefonte Pavilion Theatre	November 30-December 1 (W/TH)	Louisville Ky. International Convention Center
October 4-5 (T/W)	Gilbertsville Ky. Dam Village State Resort Park		



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