

KENTUCKY BAR ASSOCIATION



Bench & Bar

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C O N T E N T S

LEGAL MALPRACTICE

5 Lawyer Regulation and the Movement Toward A Unified Bar in Kentucky

By Jane H. Herrick

11 Legal Malpractice in Kentucky

By Del O'Roark & Pete Gullett

19 Legal Malpractice Primer

By O. Daniel Wolff

Departments

3 President's Page *By Robert C. Ewald*

24 Hot Topic Partnership and Limited Partnership Acts - Part I

By Dean Allan W. Vestal & Thomas E. Rutledge

29 Book Review *By Sheryl G. Snyder*

30 Effective Legal Writing *By Barbara McFarland*

33 Shop Talk *By Michael Losavio*

35 Proposed Amended Regulations of the Attorneys' Advertising Commission

37 Notice of Proposed Revision to LR 40.1 of the Joint Local Rules of the Federal District Courts in Kentucky

38 CLE

43 Kentucky Bar News

46 Who, What, When & Where

Cover photo by James Archambeault

Robert C. Ewald

I suspect few KBA members are aware that two dollars of your dues each year go to the Donated Legal Services Fund, a fund established and held separately for use solely to encourage and assist attorneys in participating in pro bono projects and the representation of those in need of counsel and unable to afford a lawyer.



Robert C. Ewald

On the annual form containing your dues statement is a line seeking information about the hours spent on pro bono matters. Last year 2,411 lawyers submitted information in that space. However, I find it hard to believe that last year only 2,411 of us spent time and effort on matters for which we never expected payment. Rather, I believe the great majority of us donated our services to worthy causes and merely failed to record the time spent. We gave our time because we found it the right thing to do and not because we were seeking recognition. Indeed, I believe most of us endorse the importance of pro bono participation and will do so given the appropriate opportunity.

Most of us are aware that various legal services programs exist in Kentucky, including four regional programs funded partially by federal government money through the Legal Services Corporation. Despite the existence of these and other organized programs, only 20 percent of the individuals who qualify for assistance in civil legal matters are being served. In other words, more than 80 per cent of eligible Kentuckians in need of legal assistance never get the help needed.

The situations in which the poor are left unrepresented involved the most pressing of human problems. One in six cases involves domestic violence. Oth-

ers involve tenants seeking decent living conditions, consumers fighting fraud or extortion, families seeing healthcare or public assistance, employees and others fighting discrimination, and parents fighting for adequate education for their children.

Over the years, the two dollars that have gone to the Donated Legal Services Fund has built up to

a substantial amount. At the same time, a need to develop statewide coordination to raise awareness of the crucial need for volunteer lawyers to assist low income individuals with civil legal problems became increasingly obvious. Recognizing a unique opportunity to establish a method to provide the opportunity for lawyers to participate in pro bono activity, a grant of \$200,000 was made by the Board of Governors to help fund a three year project aimed at creating such a statewide program.

As a result, the Kentucky Volunteer Lawyers Program (KVLP) was established in association with the Kentucky Access to Justice Foundation and the four regional legal assistance programs. Tamra Gormley, a Versailles attorney, was selected to direct the program. In recent meetings with the KVLP staff, I have been enormously impressed with their dedication, energy and ingenious ideas for various projects to give every attorney in Kentucky the opportunity to serve and participate in a variety of pro bono projects.

With the goal of improving access to the judicial system for low income Kentuckians with civil legal needs, the Kentucky Volunteer Lawyers Program will:

- Develop a statewide recruitment campaign;
- Identify and implement strategies to increase legal services to this underserved population through pro bono advocacy;
- Enhance training opportunities and materials for volunteer lawyers;
- Assist in programs in obtaining additional financial resources to support pro bono activities in the regional and local programs; and
- Create recognition activities for participating law firms and attorneys.

KVLP has identified a campaign theme, "Change the World in 50 Hours," recognizing the goal adopted in 1990 by the Kentucky Supreme Court in SCR 3.130(6.1) and by the American Bar Association that every attorney should participate in 50 hours of pro bono activities each year. A partnership has already been established with the KBA Young Lawyers section to develop statewide training programs for domestic relations practice as a pro bono recruitment tool. In addition, an upcoming issue of the *Bench & Bar* will be devoted to pro bono activities.

The KBA, with the support and approval of the Kentucky Supreme Court, has for many years recognized the importance of pro bono participation by every Kentucky lawyer. One of the goals of the Kentucky Volunteer Lawyers Program is to make your involvement as easy as possible. Over the next few months, you will receive more information about this program and the opportunities to become involved. I urge you to do so. We need your cooperation to implement the Kentucky Volunteer Lawyers Program and make it work. ■



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Prior to the 1934 State Bar Act,¹ two methods existed in Kentucky to proceed against an attorney's license. In the first, a circuit court issued a rule against an attorney to show cause why he should not be disbarred for alleged unethical conduct.² The rule was issued in the name of the Commonwealth, upon information from the Commonwealth's Attorney; in the name of a client; or *sua sponte* by the court itself.³ The other method was a statutory action against an attorney accused of wrongfully withholding client funds after a demand. If found guilty, the attorney was suspended from practice for one year and until the money was remitted to the client.⁴ Thus, attorney discipline was subject to local judges, local efforts, and local standards.

Early state bar leaders realized the need for improved lawyer regulation as a result of their own frustrated attempts to raise practice standards. As a result, a small voluntary group of lawyers interested in limited legal reforms evolved into a professional, well-organized association that actively campaigned for statutory bar integration.

Fits and Starts: 1871 and 1882-1884

The first attempt to form a lawyers' organization occurred in 1871, when an unknown number of lawyers met in Louisville sometime between June and December. The gathering's purpose was to promote changing the law to overturn the holding in a recent case,⁵ *Bowlin v. Commonwealth*,⁶ which held a black man incompetent to testify against a white. The effort was successful: at the next legislative session, the General Assembly amended the law.⁷ The means by which the legislature was influenced are not mentioned in the meeting records.

Ten years passed before another statewide organizational attempt. In April 1882, another group of attorneys gathered in Louisville. The group elected officers, set dues, and created a committee to draft a constitution and by-laws,⁸ which were adopted at the first annual meeting, June 22-23, 1882, also in Louisville.⁹ These documents formed the first attempt at self-government of an organized bar in Kentucky. The organization called itself

Lawyer Regulation and the Movement Toward A Unified Bar in Kentucky

"The Kentucky Bar Association," its object "to advance the science of jurisprudence, promote the administration of justice, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the Kentucky Bar."¹⁰ Committees "On Grievances" and on "Legal Education and Bar Admissions" were formed.¹¹ Papers were presented,¹² and the meeting concluded with a banquet at the Galt House.¹³

The organization met in the succeeding two years¹⁴ but by 1884 interest had waned. The 1884 records counted 232 association members, but "only 84 had paid their dues[.]"¹⁵ At the 1884 meeting, a site was selected for the 1885 annual meeting. That meeting never took place, and the association "was unfortunately allowed to die."¹⁶

Revival

In January 1900, Louisville lawyers organized the Louisville Bar Association,¹⁷ and in February 1901, the Kenton County bar was formed.¹⁸ By summer 1901, these two groups started communicating about forming a state organization.¹⁹ An organizational meeting was held on November 19, 1901, in Louisville,²⁰ where the Louisville Bar Association president confidently greeted attendees but acknowledged earlier failures: "[We] have called this meeting in the hope that a useful and permanent State association may be established. We have not forgotten the wrecks of the past."²¹

The group drafted a constitution and by-laws, largely based on the 1882 documents. This new organization, perhaps attempting to distinguish itself from the early 1880s group, named itself the "Kentucky State Bar Association."²² The new

Association's goals were taken almost verbatim from the 1882 constitution.²³ Reflecting the group's interest in legal reform, the constitution created a "Committee on Law Reform."²⁴ A main concern at the meeting was how new lawyers were admitted to the bar.²⁵ As a result, the Association's constitution created a "Committee on Legal Education and Admissions to the Bar" and a "Committee on Grievances." The latter was required to "receive the complaints... in matters affecting the interests of the legal profession, the practice of the law and the administration of justice and report the same to the Association with such recommendations as it may deem advisable."²⁶

By the next year, the Association was already grappling with lawyer regulation issues.²⁷ Having no power to broadly regulate the profession, the Association approved an amendment providing that an Association member could be "reprimanded, suspended or expelled" for misconduct.²⁸ However, the Committee on Grievances presented a report aspiring to focus its efforts "mainly at disorders outside of this organization, which this organization was designed to reform or suppress."²⁹ Therefore, the Committee proposed adopting a "Code of Legal Ethics" to reflect the trend in other jurisdictions.³⁰

The issue of a Code of Ethics was referred to the Committee on Law Reform for a report at the next meeting.³¹ The Association also approved draft legislation revising the method by which attorneys were admitted to practice law. The proposal invested the Court of Appeals with power to appoint a five-member "Board of Law Examiners." The examiners would be empowered to test applicants in writing

on seventeen subjects.³²

In 1903,³³ the Association adopted an ethics code without objection.³⁴ The Chair of the Grievance Committee, arguing in favor of the code, reported that a “Code of Legal Ethics” was not novel. He noted the Code was based on codes of other states, and primarily upon an influential mid-nineteenth century essay by Judge George Sharswood of Pennsylvania.³⁵ The Code contained fifty-five provisions, filled with “oughts” and “shoulds.”³⁶

Over the next several years, the Association busied itself with legal reform efforts, and enjoyed some quick success. By the 1904 meeting, the Association had successfully promoted reform regarding publication of the opinions of the Court of Appeals and the subpoenaing of witnesses by judges.³⁷

Beginning in 1904, the Association repeatedly attempted to have a law enacted tightening admissions procedures and standards. In March 1902, the legislature adopted a statute on admission to practice, but that law omitted a board of examiners, a provision sought by the Association. The statute retained the old system of testing by a circuit judge.³⁸ The 1904 legislature considered an admissions reform bill based upon the bar’s proposals, but it died in committee.³⁹ Over the course of the next fourteen years, the Association made

various attempts to get an admissions bill passed.⁴⁰ The General Assembly finally passed an admissions reform law in 1918.⁴¹

During these early years, the Association struggled with how to implement higher professional standards. It realized as early as 1902 that it lacked power to discipline non-members. Only the courts could disbar or suspend. Despite obvious jurisdictional limitations, the Association continued to take action in attempts to raise the professional standards of the entire bar. In 1905, the constitution was amended upon suggestion of the Grievance Committee to create an “Investigating Committee.”⁴² This committee’s duty was to investigate violations of the Code of Ethics and file charges and prosecute the charges before the Grievance Committee.⁴³

The Investigating Committee was the first body in Kentucky with the specific role of determining if an ethical complaint had sufficient merit to warrant a formal hearing. The Committee realized its limitations: “[W]e have adopted a Code of Ethics, but, unless some means are devised for bringing offenders before the bar of the Association, the code will practically become a ‘dead letter.’”⁴⁴

In 1908, the Association changed the name of the Grievance Committee to the “Trial Committee.”⁴⁵ The Investigating Committee rejected the roles of investigator, grand jury, and prosecutor.⁴⁶ However, the Investigating Committee wanted more power, and sought to expand its investigative authority and the Trial Committee’s review authority to include non-members.⁴⁷

This expansion of scrutiny was opposed; it prompted one judge to remark: “It is bad enough for a local bar association to practically become a conspiracy for the enforcement of the criminal laws. We have sworn Commonwealth’s attorneys whose duty it is to prosecute offenses of this sort.”⁴⁸ The Investigating Committee Chair responded that limiting the Committee’s oversight to only members “so limits the power of the Committee on Investigation that it can not adequately perform its function.”⁴⁹ The Association approved the Committee’s recommended expansion of authority over the objections.⁵⁰

Seeking Authority

By 1912, the Association had investigated a non-member for solicitation. However, solicitation was legal and the Investigating Committee could take no enforcement action.⁵¹ The Investigating Committee realized that “members of the bar, not belonging to this Association, are amenable to no rules of conduct, except as may be in direct violation of the law.”⁵² The Committee put the best face on its disciplinary impotence, concluding that “the investigation of [the non-member’s] conduct has taught him a wholesome lesson.”⁵³

The Investigating Committee therefore recommended the Association “take prompt and vigorous steps to secure the passage of a law regulating the disbarment of attorneys for dishonorable and unprofessional conduct.” The report was approved,⁵⁴ but the Investigating and Trial Committees’ subsequent yearly reports provide little information about efforts to secure bar-wide application of an ethics code.

Over a decade passed before the first hint of momentum toward a unified bar in Kentucky. At the 1925 annual meeting, the Chair of the Committee on Legal Education and Admission proposed an integrated bar.⁵⁵ The fiscal benefit of a unified bar became apparent after the Treasurer’s report. The Association had spent more money in the past year than it had collected.⁵⁶ Of the Association’s 718 members, only 435 had paid dues.⁵⁷ A discussion on Association management and how to increase membership ensued. Early in the discussion, a judge said:

[T]he State Bar Association is not the power that it ought to be in the State of Kentucky. There are thirty-five hundred lawyers in Kentucky—active lawyers. There are 718 who are members of the [Association]. Of that membership, four hundred and some odd pay dues, and of that membership less than a hundred attend the meetings of the Association. That has been true a long time. That being true, does it not suggest... that there must be something inherently wrong with our plan of organization or methods of operation and management [?]⁵⁸

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Association secretary J. Verser Conner addressed this concern. He noted that Kentucky's situation was not "peculiar" and that the only states to have solved this problem had statutes creating a unified or integrated bar.⁵⁹ Another judge approved this approach, advocating the Association be "chartered" by the General Assembly.⁶⁰ After additional discussion, the group created a committee to examine the "advisability of seeking to make this a self-governing bar."⁶¹

Sentiment for Change and Legislative Failures

By 1926, the Association's interest had increased in an integrated bar bill. A keynote speaker at the annual convention was Henry Upson Sims of the Alabama Bar Association, later president of the American Bar Association.⁶²

Alabama implemented an integrated bar in 1923, and Mr. Sims reported that Alabama's act was based upon a model act drafted by the American Judicature Society.⁶³ Mr. Sims endorsed Kentucky's progress toward a similar goal: "[I]f you do not resort to organization of the bar in Kentucky to solve the problems of the bar, you will eventually adopt some violent expedient of reducing the number of lawyers, like knocking every third lawyer in the head."⁶⁴

By the 1926 annual meeting, the "Committee to Devise Means for Improving and Extending the Work of the Association"⁶⁵ had drafted a proposed bar integration act, based upon Alabama's law.⁶⁶ The proposed bill was not presented to the legislature because the draft had not been adequately studied by the membership.⁶⁷ The report was accepted by the Association, with the Committee directed to continue its study of the issue.⁶⁸

At the 1927 meeting, the Committee presented another draft bill. The chair explained that the "[f]our fundamental principles underl[yin]g all legislation of this character" were:

The right to practice law is neither a natural nor common law nor a constitutional right.

An attorney at law is an officer of the Court, wherein he practices, subject to the control of the Court, and is, also, a quasi officer of the State wherein he is

admitted to practice.

The Legislature may prescribe qualifications and may make regulations for the admission of persons to practice law and for their conduct as attorneys at law after being so admitted.

The Courts have inherent power to regulate the conduct of attorneys at law which can not be taken from them and may exercise such power so far as may be necessary to the proper performance of their

the Committees' powerlessness.

Unlike in prior years, the 1931 Investigation Committee's report provided more detail than usual, but it also exposed a serious problem with the disciplinary system. The Committee had received a complaint about an attorney who had failed to remit less than \$100.00 to a client. This Association non-member ignored the Committee's letters, and the Committee referred the matter to the local Commonwealth's Attorney. However, the respondent attorney was that Commonwealth's Attorney. The report observed that "local

"[I]f you do not resort to organization of the bar in Kentucky to solve the problems of the bar, you will eventually adopt some violent expedient of reducing the number of lawyers, like knocking every third lawyer in the head."⁶⁴

functions[.]⁶⁹

The Association created another committee to promote enactment of the bill by the Legislature.⁷⁰ This bill died in the 1928 legislature.⁷¹ The main objection was also its main objective: mandatory membership in the association for all Kentucky lawyers. At the 1928 Annual Meeting, the Association authorized the Committee to continue its work toward passage of a bill.⁷²

In 1930, versions of the bill passed the House and Senate, but upon submission of the House version to the Senate, an allegation arose "that a majority of the lawyers of the State were not in favor of the bill." The allegation was denied, but the damage had been done. The Senate tabled the bill and did not reconsider it.⁷³ The measure was presented to the legislature again in 1932 and met defeat in the Senate after passage in the House. An attorney led the opposition to the bill.⁷⁴

The records of the Trial and Investigation Committees during this period reveal little movement on ethical issues. Correspondence resolved many complaints informally;⁷⁵ others were not considered for lack of verification.⁷⁶ These short and uninformative reports are indicative of

conditions furnish no other means of giving the matter attention" and it was "rather humiliating to the Association to have to acknowledge itself unable to take any effective action."⁷⁷

The Association's efforts to pass a bar integration bill were followed outside the organization. As early as 1929, the Louisville *Courier-Journal* supported a unified bar. The newspaper observed that opposition to the bill would "likely arise from within the unprofessional element of the profession," and it was "too much to expect to arouse public support for the effort."⁷⁸ The *Courier* understood the difficulty in disciplining or disbarring a lawyer:

[W]hen a lawyer is disbarred he is proven guilty [by] the same degree of certainty required to convict any person of a crime. That may curb the grosser offenses, but it doesn't elevate standards of conduct.

An elective judiciary cannot be depended upon to exact scrupulous regard for the niceties of professional ethics from lawyers who hook in their practice with local politics and the underworld...The

object is not summarily to reduce the number of lawyers, but to put an end to practices which militate against justice.⁷⁹

Reporting the 1930 bill's defeat, the newspaper criticized the profession's ongoing inability to self-regulate:

There is no bar as an entity which can command the support of lawyers...[T]here are more lawyers than can earn a legitimate livelihood by ethical methods...Practical standards consequently are whatever one can get away with...Standards of the bar as a whole can be elevated... only by the best influences within the bar itself, and this cannot be accomplished through moral persuasion or example. The bar must be empowered to establish and enforce its own standards of professional conduct upon the derelict.⁸⁰

After the bill's 1932 defeat, the newspaper noted that lawyers again killed the bill. Once more disparaging the high standard of proof required to discipline, the newspaper observed that proceedings were before an elected judge "in a district in which the accused more often than not is a better politician than he is a lawyer."⁸¹ The newspaper strongly endorsed a unified bar: "Nothing but the bar...can correct the evil; and nothing but an organized bar...can improve the system of justice[.] The bar should be given the power[.]"⁸²

Unification: The Beginning of Modern Lawyer Regulation in Kentucky

In 1934, the General Assembly passed a "skeleton" form of a bar integration bill. The law delegated regulatory power over the bar to the Court of Appeals, along with specific rule-making authority.⁸³ By June 1934, the Court had approved rules outlining bar governance by a Board of Governors and a disciplinary system.⁸⁴ The *Courier-Journal* lauded the result: "That the bar...will aid the court in establishing those standards can be taken for granted. The destiny of the Kentucky bar at last is in the hands of the lawyers."⁸⁴

A legal challenge quickly developed. An attorney subjected to disciplinary proceedings in the new system argued that

the legislature unconstitutionally delegated its power to the Court. The Court rejected the argument, confirming its *inherent* power to discipline:

To [declare the system unconstitutional] would result in an absolute denial of any inherent power whatever in courts to prescribe and adopt any method of procedure in conducting inquiries of the nature here involved in order to discover whether...any of the parts of its machinery has become in anywise contaminated. Therefore, if the Legislature should for any cause fail to do so, the court would be paralyzed and helpless to remedy its threatened destruction.⁸⁶

Legacy

The 1934 bar integration act marked a new era of lawyer discipline in Kentucky. For the first time, all Kentucky lawyers became subject to a specified code of conduct, and answerable directly to the highest court in the Commonwealth. No longer was discipline dependent upon courts choosing to take action against attorneys, based upon whatever information was presented by a local group of attorneys or a Commonwealth's Attorney.

In 1974, voters approved a constitutional amendment creating the Supreme Court of Kentucky and investing it with exclusive constitutional authority over lawyer regulation.⁸⁷ This authority has been delegated to the Kentucky Bar Association as the Court's sole agency for lawyer discipline.⁸⁸ Lawyer regulation in Kentucky had been transformed from scattered circuit court proceedings into a constitutionally-recognized power vested completely in the Supreme Court.

The Kentucky legal professional owes its legacy of self-regulation to those farsighted attorneys of almost a century ago who led the movement toward an integrated bar. ■

ENDNOTES

1. Chapter 8, § 101-1, Carroll's Kentucky Statutes Annotated (Baldwin's 1936 Revision).
2. For an early example, see *Rice v. Commonwealth*, 57 Ky. 472 (472 B.

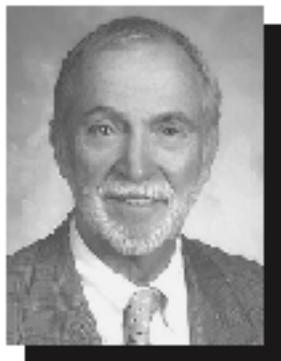
Monroe 376) (1857). This case may be the oldest published "lawyer discipline" case in Kentucky. In this case, a lawyer was found guilty of altering a document and was disbarred.

3. See, e.g., *Duffin v. Commonwealth*, 208 Ky. 452, 271 S.W. 555 (1925); *Denny v. Commonwealth*, 175 Ky. 357, 194 S.W. 330 (1917); *In re McDonald*, 157 Ky. 92, 162 S.W. 566 (1914).
4. See, e.g., *Bonner v. Goodloe*, 205 Ky. 555, 266 S.W. 62 (1924); *Duffin v. Commonwealth*, 208 Ky. 452, 271 S.W. 555 (1925); *Denny v. Commonwealth*, 175 Ky. 357, 194 S.W. 330 (1917).
5. *Constitution, By-Laws, Roll of Members and Proceedings of the Kentucky State Bar Association at Its Organizational Meeting Held in Louisville, Kentucky, November the Nineteenth, Nineteen Hundred and One, Together with a Resume of the History of the First State Bar Association, 1881-1884; and Facts Leading up to the Formation of the Present Kentucky State Bar Association, prepared by Edward J. McDermott at the Request of the Association*, 5-6 (June 1910) (hereafter, "McDermott").
6. 2 Bush 5 (1867).
7. 1871 Ky. Acts, Ch. 139, § 7; McDermott at 7: "Thus was removed another unreasonable barrier that helped to keep some light from the courts, though the courts need all the light they can get. Other barriers, maintained on plausible but unsound reasoning, still remain." The means, if any, by which the legislature was lobbied or influenced are not mentioned.
8. *Report of the First Annual Meeting of the Kentucky Bar Association held at Louisville, Kentucky, June 22 and 23, 1882* (Louisville, 1882), 2-4.
9. *Ibid.*, 18.
10. *Ibid.*, 99.
11. *Ibid.*, 99.
12. *Ibid.*, 18; 33; 46; 53; 68; 74; 93.
13. These lawyers knew how to have a good time. According to the Treasurer's Account, the group spent \$40.00 on cigars (\$10.00 for cigars

- at the banquet alone). The menu items sounded delectable: broiled blue fish, fillet of beef aux champignons, lamb chops, lobster salad, and wines. *Ibid.*, 95, 98.
14. McDermott at 15; 27.
 15. *Ibid.*, 27.
 16. Crab Orchard Springs in eastern Lincoln County was to have been the site of the 1885 meeting. McDermott at 27-28.
 17. *Ibid.*, 28.
 18. *Ibid.*
 19. *Ibid.*, 29.
 20. *Ibid.*, 30.
 21. *Ibid.*, 37.
 22. *Ibid.*, 96.
 23. "This Association is formed to advance the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to uphold integrity, honor and courtesy in the legal profession, to encourage thorough liberal legal education and cordial intercourse among members of the bar." *Ibid.*
 24. Mr. McDermott stated: "The Legislature is about to meet. Whatever we want must be presented at once; and surely we ought to be able to do something to elevate the bar and to help the bench and to benefit the people. The main business of the State is to preserve order and to administer justice; and yet that function of our government is not performed as it should be. If we do our duty we can surely bring about long-needed reforms and with the thanks of the public, while giving power and dignity to our calling." *Ibid.*, 39.
 25. *Ibid.*, 38.
 26. *Ibid.*, 99. The proceedings were to be confidential.
 27. The official report of this meeting called it the "First Annual Meeting of the Kentucky State Bar Association." *Proceedings of the First Annual Meeting of the Kentucky State Bar Association* (Louisville, 1902).
 28. *Ibid.*, 159. The amendment created a subsection (2) to Article X: "Any member of the Association may be reprimanded, suspended or expelled for misconduct in his relations to this Association or in his profession, on conviction thereof in such manner as may be prescribed by the by-laws...The disbarment of any member shall, *ipso facto*, work his expulsion from the Association. Reinstatement to practice shall not reinstate to membership, unless by a vote of the Association upon recommendation of the Committee on Membership." *Ibid.*, 236.
 29. *Ibid.*, 99.
 30. *Ibid.*, 95-96.
 31. *Ibid.*, 160-161.
 32. *Ibid.*, 36-37.
 33. *Proceedings of the Second Annual Meeting of the Kentucky State Bar Association Held at Owensboro, Kentucky, July 2 and 3, 1903* (Louisville, 1903).
 34. *Ibid.*, 48.
 35. *Ibid.*, 25-26. *See generally* Sharswood, *An Essay on Professional Ethics* (1854).
 36. 1903 *Proceedings*, 35-47.
 37. *Proceedings of the Third Annual Meeting of the Kentucky State Bar Association held at Louisville, Kentucky, June 23-24, 1904* (Louisville, 1904), 12-13.
 38. 1902 Ky. Acts, Ch. 17, §§ 1-9.
 39. *Ibid.*, 23; 27.
 40. *Ibid.*, 27-29; *see generally Proceedings of the Seventh Annual Meeting of the Kentucky State Bar Association held at Louisville, Kentucky, July 8 and 9, 1908* (Louisville, 1908); *Proceedings of the Ninth Annual Meeting of the Kentucky State Bar Association held at Middlesboro, Kentucky, July 12, 13, 14* (Caron Press, 1910), 169-171; *Proceedings of the Fourteenth Annual Meeting of the Kentucky State Bar Association held at Frankfort, Kentucky, July 8 and 9, 1915* (Louisville, 1915), 180.
 41. 1918 Ky. Acts, Ch. 131, §§ 1-12.
 42. *Proceedings of the Fourth Annual Meeting of the Kentucky State Bar Association held at Covington, Kentucky, June 22 and 23, 1905* (Louisville, 1905), 25; 27; 180.
 43. *Ibid.*, 170.
 44. *Ibid.*, 25.
 45. 1908 *Proceedings*, 83.
 46. *Ibid.*
 47. *Ibid.*, 83-86. The Trial Committee's

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- authority was to “determine [if] an offense worthy of prosecution has been committed, [and] they may order the Committee on Investigation to institute and carry on legal proceedings against any person practicing law or engaged in any way in the administration of the law who may be charged with misconduct, whether the offender be a member of the Association or not.” The Investigating Committee’s authority was stated as follows: “It shall be the duty of the Committee on Investigation to investigate all infractions and breaches of the Code of Ethics of the Association by members thereof and any and all charges of misconduct or of illegal acts against any person practicing law or engaged in the administration of law in Kentucky, which may be presented to any member of the committee, or may come to his knowledge from direct information or otherwise, and all complaints which may be made in matters respecting the interest of the legal profession, the practice of law, and the administration of justice.” *Ibid.*, 84-85.
48. *Ibid.*, 87 (comment of Judge Seymour).
 49. *Ibid.*, 89.
 50. *Ibid.*, 91.
 51. *Proceedings of the Eleventh Annual Meeting of the Kentucky State Bar Association held at Louisville, Kentucky, on July 10 and 11, 1912* (Henderson, Kentucky, 1912), 205.
 52. *Ibid.*, 206.
 53. *Ibid.*
 54. *Ibid.*, 207.
 55. *Proceedings of the Twenty-Fourth Annual Meeting of the Kentucky State Bar Association held at Bowling Green, Kentucky, July 1 and 2, 1925* (Louisville, 1925), 111-112.
 56. *Ibid.*, 142.
 57. *Ibid.*
 58. *Ibid.*, 144 (comments of Judge M.M. Logan).
 59. *Ibid.*, 148.
 60. *Ibid.*, 154.
 61. *Ibid.*, 155.
 62. *American Bar Association 2001-2002 Leadership Directory* (Chicago, 2001), 355.
 63. *Proceedings of the Twenty-Fifth Annual Meeting of the Kentucky State Bar Association held at Frankfort, Kentucky, April 8 and 9, 1926* (Louisville, 1926), 97. The act as described contained elements still found in Kentucky’s rules on lawyer regulation. For example, Mr. Sims stated that the Alabama Bar was governed by twenty-one elected council members, one from each circuit. Under SCR 3.080, lawyers from each of Kentucky’s seven Supreme Court districts elect two members of the Board of Governors.
 64. *Ibid.*, 101.
 65. Harry B. Mackoy of Covington chaired this group. *Ibid.*, 263.
 66. *Ibid.*, 264.
 67. *Ibid.*, 276-277.
 68. *Ibid.*, 278-279.
 69. *Proceedings of the Twenty-Sixth Annual Meeting of the Kentucky State Bar Association held at Louisville, Kentucky April 6 and 7, 1927* (Louisville, 1927), 22.
 70. *Ibid.*, 147-148.
 71. The bill was not brought to the floor of the House for a vote. *Proceedings of the Twenty-Seventh Annual Meeting of the Kentucky State Bar Association held at Lexington, Kentucky, April 5 and 6, 1928* (Louisville, 1928), 26.
 72. *Ibid.*, 32. The legislature did not meet in 1929, so the Committee directed its efforts to building support for the bill. The Committee’s report recommended that local support in each appellate district be organized prior to the January 1930 legislative session. The report was adopted. *Proceedings of the Twenty-Eighth Annual Meeting of the Kentucky State Bar Association, held at Frankfort, Kentucky, April 4 and 5, 1929* (Louisville, 1929), 39.
 73. *Proceedings of the Twenty-Ninth Annual Meeting of the Kentucky State Bar Association, held at Paducah, Kentucky, April 10 and 11, 1930* (Louisville, 1930), 17-18.
 74. *Proceedings of the Thirty-First Annual Meeting of the Kentucky State Bar Association, held at Louisville, Kentucky, April 7 and 8, 1932* (Lexington, 1932) 60.
 75. *See, e.g.*, 1926 Proceedings, 164; 1929 Proceedings, 32.
 76. *See, e.g.*, 1929 Proceedings, 32.
 77. *Ibid.*, 250. This example is particularly egregious because perhaps the only meaningful way to discipline the attorney, through criminal prosecution, was unavailable.
 78. “The Bar Intends to Act,” *Louisville Courier-Journal*, August 15, 1929, Section 1, p. 6, column 2.
 79. *Ibid.*
 80. “The Practice of Law,” *Louisville Courier-Journal*, January 24, 1931, Section 1, p. 6, column 2.
 81. “The Bar Must Help Itself,” *Louisville Courier-Journal*, April 9, 1932, Section 1, p.6, columns 2-3.
 82. *Ibid.*
 83. *Proceedings of the Thirty-Third Annual Meeting of the Kentucky State Bar Association held at Lexington, Kentucky, July 5 and 6, 1934* (Lexington, 1934), 53.
 84. *Ibid.*, 53-54; “Rules for Bar Given by Court of Appeals,” *Louisville Courier-Journal*, June 27, 1934, Section 1, page 12, column 5.
 85. “The State Bar,” *Louisville Courier-Journal*, June 29, 1934, Section 1, p. 6, column 1. The bar realized it was a new age, too. In 1935, the record of the annual meeting was described as “Proceedings of the First Annual Meeting of the Kentucky State Bar Association.” *Proceedings of the First Annual Meeting of the Kentucky State Bar Association* (1935).
 86. *Commonwealth ex rel. Ward v. Harrington*, 266 Ky. 41, 98 S.W.2d 53, 58 (1936). This conclusion echoed the court’s rationale in *Rice v. Commonwealth*, 57 Ky. 472, 472 Monroe 376 (1857), perhaps the earliest reported “lawyer discipline” case in Kentucky. In that matter, the lawyer, disbarred by the circuit court, appealed to the Court of Appeals. The Court upheld the court’s power to regulate: “All courts have the power to control and regulate, to a certain extent the conduct of their officers, and to inflict on them for the official misconduct such punishment as the law prescribes.”
 87. 1974 Ky. Acts, Ch. 84, §1.
 88. SCR 3.025.

What do we know about it?

Background

The first thing we know about legal malpractice in Kentucky is that historically there is not much of a track record available to examine. This is true in part because it was not until about 1970 that legal malpractice claims became a significant daily consideration in the practice of law in the United States. Beginning in the early '70s, malpractice claims against lawyers exploded changing the practice environment forever. Malpractice insurance became a necessary and often expensive cost of doing business. Risk management became an essential part of managing a law firm to minimize this growing hazard of practicing law. Legal malpractice was suddenly the elephant in the room that could ruin professional relationships and destroy firms.

Adding to the fog of what was going on with legal malpractice in the nation and in Kentucky in those days is the policy of most commercial insurers to treat claims experience as proprietary information. This is a legitimate practice, but made it virtually impossible to tell what the magnitude of legal malpractice was in a given state. The anomaly in analyzing legal malpractice for the purpose of preventing claims is that the great majority of claims are resolved by insurance companies – not the courts. The best information on what is going on in legal malpractice and how to prevent it is generally not available to the public. In Kentucky we could not tell in the '70s and '80s whether the ever increasing insurance premiums for Kentucky lawyers were because of bad experience in Kentucky or whether, as suspected, Kentucky lawyers were subsidizing the payment of malpractice claims against lawyers in other states – and the companies then insuring Kentucky lawyers would not help answering this question when asked by the KBA.

In response to this dilemma in the 1980s lawyers in a number of state bars sponsored the formation of bar-related insurance companies to provide malpractice insurance and risk management education exclusively for their state. The KBA joined in this movement in the mid-'80s resulting in the formation of Lawyers Mutual Insurance Company of Kentucky which opened for business in November 1987. Its purpose is to provide a competitive insurance market for Kentucky lawyers based on Kentucky malpractice experience and use this experience to foster claims prevention by assisting Kentucky lawyers in developing risk management programs.

At the national level the ABA in an effort to come to grips with the problem of increasing legal malpractice claims published its first study of national legal malpractice claims statistics in 1985. It published further studies in 1995, 1999, and in April 2005 issued "Profile of Legal Malpractice Claims 2000-2003" that recapitulates the results of all studies through 2003. The more recent studies are based primarily on input from bar-related insurance companies with a few commercial insurers participat-

Legal Malpractice in Kentucky

ing. Lawyers Mutual was an active participant in these studies.

This article compares selected statistics from the ABA's "Profile of Legal Malpractice Claims 2000-2003" (hereinafter ABA 2003) with Lawyers Mutual's claims statistics to enable Kentucky lawyers to see where the major malpractice risks are both nationally and locally. The limitations on these statistics are that the ABA study methodology has evolved over the years as has Lawyers Mutual's statistics collection procedures making comparisons among the studies imperfect. It is also significant that the information in recent ABA studies is based heavily on bar-related insurance company experience. These insurers primarily insure small firms (2-5) and solo practitioners.

While these and other factors diminish the overall usefulness of the ABA studies, they remain valuable in developing a national profile of malpractice trends that is a valid benchmark from which to compare Kentucky's claims experience.¹ The idea is to use the available statistics as indications of where the risks are and allow lawyers to focus risk management programs on those risks most applicable to their practice.

The studies and claims statistics cited in this article do not identify good and bad lawyers or areas of practice. They show only where the claims are occurring. These studies do not include demographic data such as the number of lawyers practicing in an area of law or the amount of overall lawyer time spent in an area of law or practice activity. Most important to remember is that overall Kentucky lawyers provide a high quality service to the clients they represent. This article necessarily centers on alleged errors by the small percentage of Kentucky lawyers who through neglect or bad luck are exposed to a claim of malpractice in a given year.

Included in the article along with the statistics are observations on trends from the limited, but growing, amount of knowledge we have on legal malpractice in Kentucky. Finally, the article offers a recently developed *Risk Management Analysis* checklist that is recommended for use in evaluating errors occurring in your practice for the purpose of identifying the causes of errors and the corrective actions required to prevent recurrence.

What the Statistics Show

The statistics displayed in this article are a helpful guide in identifying hazards relevant to the practice of law in Kentucky. We have selected the following framework for analyzing malpractice claims for this purpose:

Table 1: Percentage of Claims by Area of Law

	1990-95	1990-95	1996-99	1996-99	2000-03	2000-2006	All Years
	ABA %	KY %	ABA %	KY %	ABA %	KY %	KY %
Collection & Bankruptcy	7.91	7.89	8	12.17	7.92	11.5	11.21
Corp./Business Org. & Transactions	19.53	5.78	12.19	2.22	9.55	3.35	3.69
Criminal Law	3.82	4.56	4.15	4.63	4.19	2.26	3.56
Estate, Trust & Probate	7.59	6.49	8.67	9.26	8.63	8.42	8.13
Family Law	9.13	8.59	10.13	5.66	9.58	6.06	6.65
Labor Law	1.41	1.22	2.22	3.6	1.55	2.53	2.65
Personal Injury-Plaintiff	21.65	18.42	24.6	20.41	19.96	25.81	22.95
Personal Injury-Defense	3.27	2.28	4.1	3.43	9.96	1.99	2.43
Real estate	14.35	14.38	16.97	15.78	16.46	24	20.21
Workers' Compensation	3.3	7.54	1.86	8.74	2.27	5.34	6.73

- Area of Law
- Type of Activity
- Type of Alleged Error
 - Administrative Errors
 - Substantive Errors
 - Client Relations
 - Intentional Wrongs

These categories organize claims statistics from differing perspectives, but have a vectoring effect that pinpoints where the serious problems are. What follows are tables for each category comparing ABA 2003 statistics with those of Lawyers Mutual's. Significant trends and observations are noted in the accompanying commentary for each table.

Area of Law Claims

Table 1: Percentage of Claims by Area of Law lists the ten leading areas of law warranting malpractice analysis from a Kentucky perspective. The key considerations from Table 1 include:

- ABA 2003 noted that Personal Injury-Plaintiff in the 2000-03 study (hereinafter 2003 study) remained the area of practice with the highest claims rate responsible for

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approximately 20% of all claims. Kentucky had an even higher claims rate in the period 2000-06 of almost 26%. The nature of Personal Injury-Plaintiff practice with numerous deadlines to meet and the high risk of clients with unrealistic expectations accounts for many of the claims. The inescapable facts are that if your practice includes Personal Injury-Plaintiff matters, an aggressive risk management program is absolutely necessary for self-preservation.

- ABA 2003 showed that in the 2003 study Real Estate was again the second highest in percentage of claims. Kentucky experience in the period 2000-06 also shows Real Estate as the second highest. The primary cause for real estate claims is prosaic and remains the same as it has been for many years – error in public records search. This seemingly routine work requires careful attention to detail and close supervision because errors are expensive and for the most part indefensible.
- Collection and Bankruptcy is an area of law where Kentucky malpractice claims in the last several years are trending significantly higher than national experience. With a new and complex bankruptcy law governing an already technical area of practice it is essential that bankruptcy representations be undertaken only if you know what you are doing. Practicing “a little bankruptcy law” is a form of malpractice Russian roulette.
- ABA 2003 showed Personal Injury-Defense with an increase in claims to nearly 10% in the 2003 study. It moved to third highest in claims for an area of law. Kentucky statistics show a much better picture for Kentucky defense counsel with a percentage of claims consistently lower than the national average over all studies. For the latest period it was a remarkable 8% lower than the national average. Defense practice has historically been low risk, but it is clear that the dynamics of defense representation is changing. Clients of defense counsel are no longer quietly acquiescing in adverse results and are much quicker to claim. We are on notice in Kentucky that the risks of Personal Injury-Defense practice are much greater than in the past and that risk management is as essential to the defense

lawyer as it is to the plaintiff lawyer.

Type of Activity

Table 2: Percentage of Claims by Type of Activity focuses on the legal process in which a lawyer was engaged when the error occurred. The key considerations from Table 2 include:

- Preparation, Filing, Transmittal of Documents is a broad category that applies to documents that are not part of a pleading or related to a contested matter. It includes contracts, leases, deeds, formal applications, wills, and trust. It does not include tax returns or title opinions. ABA 2003 shows this category as the highest ranked for type of activity claims in the 2003 study. Kentucky statistics have been consistently better over all studies than the ABA statistics. We flag it here nonetheless because it is clearly a troublesome area for many lawyers and we can do better. Risk management that includes tight control over document flow, detailed mail procedures, and docketing of all time sensitive and important documents is essential to avoid claims.
- Commencement of Action/Proceeding is a category that focuses on the formal activities in starting a contested proceeding including filing a government claim. It is an area where Kentucky has been consistently higher in claims that the ABA studies show. A combination of failing to know or ascertain a deadline, to calendar a deadline, to calendar a deadline accurately, and to react to a calendar alert accounts for most of the claims. Every practice should have an automated docketing system that alerts the responsible lawyer, her secretary, and a central control person in the firm to deadlines (solo practitioners use your computer as the central calendar control).
- It is not surprising that the percentage of claims in the activity Title Opinion is high in Kentucky given our high rate of real estate claims. What is alarming is that our Title Opinion percentage is more than twice the percentage ABA 2003 shows in the 2003 study. This is a risk that is screaming for attention. The percentages tell it all.
- Appeal Activities is another category where Kentucky's percentage of claims have been consistently higher than the ABA percentages. We attribute this primarily to missed deadlines and again encourage emphasis on using state of the art docketing systems.

Table 2: Percentage Claims by Type of Activity

	1990-95 ABA %	1991-95 KY %	1996-99 ABA %	1996-99 KY %	2000-03 ABA %	2000-2006 KY %	All Years KY %
Preparation, Filing, Transmittal of Documents	16.21	12.27	25.24	13.37	23.08	13.13	13
Pre-Trial, Pre-Hearing	12.62	10.69	8.18	10.29	19.47	14.67	12.59
Commencement of Action/Proceeding	28.62	29.1	15.66	29.33	15.59	24.54	26.87
Advice	12.41	12.27	6.79	9.26	15.07	7.69	9.16
Settlement/Negotiation	11.44	18.21	6.38	13.37	8.2	7.15	11.35
Trial or Hearing	7.1	6.73	5.1	6.51	5.07	3.8	5.2
Title Opinion	0.95	13.06	13.01	9.09	4.03	10.5	10.72
Investigation other than Litigation	1.86	1.38	16.26	2.57	2.19	0.63	1.32
Appeal Activities	2.75	8.11	1.11	6.34	2.15	4.71	5.93
Ex Parte Proceeding	1.43	1.38	0.39	0	1.72	2.08	1.36
Post Trial or Hearing	2.62	3.96	1.08	3.08	1.72	5.52	4.51
Written Opinion other than Title	0.65	1.18	0.22	0.34	0.77	0.72	0.72
Tax Reporting	0.77	1.78	0.2	1.2	0.58	1.35	1.41
Referral/Recommendation	0.57	0.39	0.38	0.17	0.36	0.09	0.18

Alleged Error Claims

Administrative Errors: Table 3: Percentage of Claims by Type of Error – Administrative Errors concerns getting the work done on time. Of significance is:

- Getting the work done on time administrative errors account for 24.98% of all Kentucky claims in 2000-06. This contrast marginally favorably with the 28.36% ABA 2003 shows in the 2003 study, but leaves a lot of room for improvement
- The Kentucky percentages for the categories Failure to Calendar Properly and Failure to React to Calendar show again that this is a major weakness in office administration and risk management for too many Kentucky lawyers.

Substantive Errors: Table 4: Percentage of Claims by Type of Error – Substantive Errors concerns lawyer competence. The key considerations from Table 4 include:

Del O'Roark is the Loss Prevention Consultant for Lawyers Mutual Insurance Company of Kentucky.



Table 3: Percentage of Claims by Type of Error — Administrative Errors

	1990-95	1991-95	1996-99	1996-99	2000-03	2000-2006	All Years
	ABA %	KY %	ABA %	KY %	ABA %	KY %	KY %
Procrastination	8.68	5.94	4.95	5.31	9.43	6.79	6.2
Failure to Calendar Properly	6.75	8.71	7.03	7.71	5.19	9.69	8.94
Failure to React to Calendar	6.35	2.77	1.27	3.25	4.35	4.8	3.92
Clerical Error	2.14	4.35	1.25	4.45	4.74	2.08	3.23
Failure file Document No Deadline	2.69	0.39	1.54	0	4.28	1.08	0.63
Lost File,							

Table 4: Percentage of Claims by Type of Error — Substantive Errors

	1990-95	1991-95	1996-99	1996-99	2000-03	2000-2006	All Years
	ABA %	KY %	ABA %	KY %	ABA %	KY %	KY %
Failure to Know/Apply Law	11.05	29.3	21.9	27.1	10.98	17.84	23.03
Inadequate Discovery Investigation	10.24	9.5	6.13	7.89	10.37	7.33	7.98
Planning Error Procedure Choice	10.87	4.75	3.21	3.43	7.72	11.14	7.61
Failure to Know/Ascertain Deadline	6.97	7.32	15.24	6.17	7.09	6.25	6.47
Conflict of Interest	3.79	4.55	5.12	3.43	6.28	2.8	3.37
Error in Public Record Search	1.24	10.69	2.65	5.83	2.54	8.96	8.53
Failure Understand/Anticipate Tax	1.96	0.99	1.57	0.85	1.26	1.26	1.09
Error Math Calc.	0.44	0.59	0.48	0.34	1.04	0.18	0.31

- Failure to Know/Apply Law is a category that Kentucky has improved in over the years, but a claims percentage of 17.84% for 2000-06 is a significantly higher percentage than the ABA statistics show in the 2003 study. This can be the result of taking on more work than can be competently managed, relying too much on inexperienced assis-

tance, or accepting matters outside a firm's practice area. If there is not time to gain the competence to practice a matter, representation should be declined.

- The higher 2000-06 percentage of Kentucky claims in the category Error in Public Record Search reinforces what is already evident from the statistics for the Area of Law category Real Estate and Type of Activity category Title Opinion. Far too many errors are made in title searches virtually all of which could be avoided with careful attention to detail and close supervision and review by the responsible lawyer.

- The category Planning Error – Procedure Choice concerns cases when the lawyer knows the law and facts but allegedly makes an error in judgment. The Kentucky 2000 – 06 percentages show a serious increase in claims for this category. Judgmental immunity for such claims as a defense in Kentucky was reviewed in *Equitania Ins. Co. v. Slone and Garrett PSC*, (Ky., No.2003-SC-1003-DG, 2/2/06) and is recommended reading. Kentucky lawyers can expect more claims for simply getting a bad result even when fully competent and informed on a case.

- The category Conflict of Interest shows Kentucky trending below the ABA studies' percentages of conflict claims. What is significant is that the ABA studies show a national upward trend in claims alleging a conflict of interest. We too are seeing more claims that, in addition to alleging negligence, add allegations of a conflict of interest or fiduciary breach. In ABA 2003 the comment is made:

“We continue to see an increase in claims alleging a conflict of interest by a lawyer or firm. Claims involving conflicts of interest increased slightly to 6.2% of all claims during the survey. Few of these claims appear to have involved intake problems. Instead, some industry observations are that the vast majority of significant malpractice claims include a claim of conflict of interest. The conflict may not have given rise to the

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Table 5: Percentage of Claims Reports by Type of Error — Client Relations

	1990-95	1991-95	1996-99	1996-99	2000-03	2000-2006	All Years
	ABA %	KY %	ABA %	KY %	ABA %	KY %	KY %
Failure to Follow Client's Instructions	5.06	3.36	3.93	4.45	6.72	7.15	5.56
Failure to Obtain Client Consent/ Inform Client	9.77	8.11	11.89	5.14	5.75	3.07	4.79
Improper Withdraw of Representation	2.14	4.55	2.93	3.08	2.1	1.9	2.82

Table 6: Percentage of Claims by Type of Error — Intentional Wrongs

	1990-95	1991-95	1996-99	1996-99	2000-03	2000-2006	All Years
	ABA %	KY %	ABA %	KY %	ABA %	KY %	KY %
Malicious Prosecution							
Abuse of Process	3.7	11.48	4.09	7.03	3.59	2.62	5.83
Fraud	3.19	3.16	2.11	2.57	3.35	3.8	3.33
Libel or Slander	1.11	2.17	1.18	1.37	1.59	1.08	1.41
Violation of Civil Rights	1.29	0.39	1.15	0.17	1.26	0.09	0.18

claim, but colors it and makes it more difficult to defend.”

Everyone knows to screen for conflicts before accepting a matter, but many lawyers fail to periodically check for conflicts that may have arisen during a representation. Make sure your risk management program calls for periodic review of all matters for new circumstances that could create a conflict of interest.

Client Relations and Intentional Wrongs: Table 5: Percentage of Claims by Type of Error – Client Relations; and Table 6: Percentage of Claims by Type of Error – Intentional Wrongs show Kentucky claims percentages for 2000-06 overall in line with the ABA percentages in the 2003 study.

Risk Management Analysis

Accompanying this article is a *Risk Management Analysis* checklist that is printed in a way to facilitate copying. It is from materials developed for the Hinshaw & Culbertson 2006 Legal Malpractice & Risk Management Conference, and is reprinted with permission. We consider it one of the best checklists of its kind. It is a valuable instrument for evaluating and correcting errors that occur in a firm. It should be used to analyze all questions of malpractice that arise in a practice – not just the situations that rise to the level of an actual allegation of malpractice. This analysis should permit immediate correction of a malpractice risk within a firm. By using the *Risk Management Analysis* checklist for all incidents of potential malpractice and retaining them in

a permanent file, systemic weaknesses in firm operations can be identified over time, recurring errors come to light, and risk management programs can be developed responsive to a firm's unique situation. Risk management is not a “one size fits all” process. Every firm is different and requires a tailored risk management plan. The *Risk Management Analysis* checklist is the instrument that gives a firm the means to identify its special risk management needs.

Conclusion

Space precludes going into detail on other important malpractice information. For example, ABA 2003 finds in the 2003 study that most claims concern firms with less than five lawyers

(65.45%), but that claims concerning firms of 40 or more lawyers were up 10.79% to 14.89%. This is an important indicator of the continuing trend of increasing and more expensive malpractice claims because larger firms typically have sophisticated risk management programs and tight internal controls. It is also an unfortunate fact that the trend is for claims to take longer to resolve. This means a dark cloud can hang over a lawyer and his firm for a protracted period of time – an unhappy way to practice law. We hope this article serves to help you avoid this stress by providing you some of the information needed to effectively risk manage your practice. We urge you to use the *Risk Management Analysis* checklist to facilitate this effort and achieve a claims-free practice. ■

ENDNOTE

1. Kentucky statistics are based on all reports received by Lawyers Mutual of potential claims (incidents), claims, and suits.

The Risk Management Analysis Checklist begins on page 16.

C. CLEVELAND GAMBILL

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RISK MANAGEMENT ANALYSIS

I. CLIENT INTAKE

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. Incomplete information on firm's client intake form <input type="checkbox"/> 2. No independent review of client intake decisions <input type="checkbox"/> 3. Inadequate independent review of client intake decisions <input type="checkbox"/> 4. No engagement letter sent <input type="checkbox"/> 5. Inadequate engagement letter sent <input type="checkbox"/> <ol style="list-style-type: none"> a. Failure to use form engagement letter <input type="checkbox"/> b. Inadequate definition of clients/non-clients <input type="checkbox"/> c. Inadequate description of scope of service <input type="checkbox"/> d. Inadequate limitation of scope of service <input type="checkbox"/> e. Failure to include conflicts disclosure language <input type="checkbox"/> f. Inadequate conflict disclosure language <input type="checkbox"/> g. Failure to obtain any/adequate waiver or consent <input type="checkbox"/> h. Failure to obtain client's timely countersignature <input type="checkbox"/> 6. Failure to send any/adequate non-engagement letter <input type="checkbox"/> 7. Failure to identify after-arising conflict of interest <input type="checkbox"/> 8. Failure to send closing letter <input type="checkbox"/> | <ol style="list-style-type: none"> i. Misrepresentation <input type="checkbox"/> j. Inadequate Preparation <input type="checkbox"/> k. Ineffective Negotiation <input type="checkbox"/> l. Failure to understand/anticipate tax <input type="checkbox"/> m. Error in formal opinion (including audit response) letter <input type="checkbox"/> n. Error in public record search <input type="checkbox"/> o. Error in mathematical calculation <input type="checkbox"/> <ol style="list-style-type: none"> 2. Causes of Substantive Error <ol style="list-style-type: none"> a. Attorney suffering from impairment (alcohol, drugs, other addiction or psychiatric problem) <input type="checkbox"/> b. Attorney practicing out of normal area of expertise <input type="checkbox"/> c. Attorney handling file/matter alone <input type="checkbox"/> <ol style="list-style-type: none"> (i) No other attorney in firm with knowledge of practice area <input type="checkbox"/> (ii) Inadequate or no review or oversight of file by second attorney <input type="checkbox"/> d. Paralegal handling matter alone – inadequate or no review or oversight of file by an attorney <input type="checkbox"/> e. Inadequate or no practice group management <input type="checkbox"/> |
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II. TIME RECORDING, FEES, BILLING AND COLLECTIONS

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. Fee dispute with client <input type="checkbox"/> <ol style="list-style-type: none"> a. Firm threatened suit for fees <input type="checkbox"/> b. Firm initiated suit for fees <input type="checkbox"/> c. Firm counterclaimed for fees <input type="checkbox"/> 2. Improper timekeeping/time recording <input type="checkbox"/> <ol style="list-style-type: none"> a. Timekeepers entered time seven or more days after date work performed <input type="checkbox"/> b. Substantive (more than editorial) changes in description of work made subsequent to original time entry <input type="checkbox"/> c. Substantive (other than to conform matching entries of multiple timekeepers) changes made in amount of time spent on task after date of original entry <input type="checkbox"/> d. Impossible (e.g., 25 hour day) time entries recorded <input type="checkbox"/> e. Identity of person performing task changed after original time entry <input type="checkbox"/> f. Inadequate or inaccurate description of work performed <input type="checkbox"/> 3. Improper withdrawal of representation for failure to pay <input type="checkbox"/> | <ol style="list-style-type: none"> B. Client Relations <ol style="list-style-type: none"> 1. Categories of Failure <ol style="list-style-type: none"> a. Failure to follow client's instruction <input type="checkbox"/> b. Failure to obtain client consent <input type="checkbox"/> c. Failure to inform client <input type="checkbox"/> d. Improper withdrawal other than for failure to pay <input type="checkbox"/> 2. Causes of Failure <ol style="list-style-type: none"> a. Attorney practicing out of normal area of expertise <input type="checkbox"/> b. Attorney handling file/matter alone <input type="checkbox"/> <ol style="list-style-type: none"> (i) No other attorney in firm with knowledge of practice area <input type="checkbox"/> (ii) No review or oversight of file by second attorney <input type="checkbox"/> c. Inadequate practice group management <input type="checkbox"/> C. Intentional Wrongs <ol style="list-style-type: none"> 1. Categories of Failure <ol style="list-style-type: none"> a. Malicious prosecution/abuse of process <input type="checkbox"/> b. Fraud <input type="checkbox"/> c. Defamation <input type="checkbox"/> d. Violation of civil rights <input type="checkbox"/> 2. Causes of Failure <ol style="list-style-type: none"> a. Attorney handling file/matter alone <input type="checkbox"/> <ol style="list-style-type: none"> (i) Failed to make adequate investigation <input type="checkbox"/> (ii) Ignored information making client's claims suspect <input type="checkbox"/> b. No review or oversight of file by second attorney prior to commencement of litigation <input type="checkbox"/> c. Inadequate review or oversight of file by second attorney prior to commencement of litigation <ol style="list-style-type: none"> (i) Failed to make adequate investigation <input type="checkbox"/> (ii) Ignored information making client's claims suspect <input type="checkbox"/> |
|--|--|

III. SUBSTANTIVE ERRORS – INADEQUATE OVERSIGHT OF PARTNERS, PROFESSIONALS AND MATTERS IN PROGRESS

A. Substantive Errors

1. **Categories of Substantive Error**
 - a. Failure to know/properly apply law
 - b. Improper Advice
 - c. Inadequate discovery/investigation/due diligence
 - d. Improper strategic/procedural choice
 - e. Unethical Conduct
 - f. Failure to Advise
 - g. Improper Drafting
 - h. Defective Research

d. Inadequate practice group management

(ii) Inadequate or no review or oversight of file by second attorney

d. Paralegal handling matter alone – inadequate or no review or oversight of file by an attorney

e. Inadequate or no practice group management

f. Inadequate or inappropriate document or file retention/destruction policy

g. Failure to follow document retention/destruction policy

IV. CASE MANAGEMENT AND THE PROTECTION OF CLIENT CONFIDENCES

A. Failure to Protect Client Confidences

1. Client confidences inadequately protected

(i) Disclosure during discovery process

(ii) Disclosure resulting from inadequate protection of electronic communication (e.g., instant messaging, e-mail, fax, telephone or voicemail)

2. Nonexistent or inadequate firm policies and procedures for protection of client confidences

3. Nonexistent or inadequate training of law firm personnel regarding protection of client confidences

B. Missed Deadlines

1. Categories of Failure

a. Failure to know/ascertain correct deadline

b. Failure to calendar properly

c. Failure to react to calendar

2. Causes of Failure

a. Attorney maintaining personal calendar (no central or practice group software available for deadline calculation and/or entry)

b. Paralegal/staff maintaining attorney's personal calendar (no central or practice group software available for deadline calculation and/or entry)

c. Deadline missed by attorney maintaining personal calendar (attorney not using available central or practice group software for deadline calculation and/or entry)

d. Deadline missed by paralegal/staff maintaining attorney's personal calendar (attorney not using available central or practice group software for deadline calculation and/or entry)

e. No independent checking of deadline calculation and/or entry and/or timely completion of task by an attorney responsible for calendar/docket control

C. Other Administrative Errors

1. Categories of Failure

a. Failure to file document (no deadline)

b. Lost file, document or other item of evidence or client asset

c. Loss or Destruction of Valuable Client Property (e.g., Wills, Bonds Original Documents, Necessary Evidence)

2. Causes of Failure

a. Attorney suffering from impairment (alcohol, drugs, other addiction or psychiatric problem)

b. Attorney practicing out of normal area of expertise

c. Attorney handling file/matter alone
(i) No other attorney in firm with knowledge of practice area

V. HANDLING PROBLEMS, POTENTIAL AND ACTUAL CLAIMS

1. Failure to give notice to insurer

a. Inadequate or no defined internal reporting policy

2. No designated general counsel, risk management or claims partner

3. Failure to manage impaired lawyer

a. Inadequate or no human resource or employment manual or policies

4. Failure to manage dealings with the media

a. Inadequate or no policy for responding to media inquiries

VI. DISASTER RESPONSE/BUSINESS RECOVERY PLANNING

1. Inadequate or no disaster recovery plan

a. Failure to secure adequate data backup

b. Failure to secure adequate backup premises

c. Failure to secure adequate backup equipment

d. Inadequate or no off-site data backup

e. Inadequate training of personnel

2. Failure to follow disaster recovery plan

3. Loss of key personnel

VII. FINANCIAL CONTROLS AND MANAGING ESCROW

ACCOUNTS/CLIENT FUNDS

1. Categories of Failure

a. Theft, embezzlement or diversion of firm funds

b. Theft of client funds

2. Causes of Failure

a. Inadequate human resource management procedures

b. Inadequate audit or review of finances

c. Inadequate review of purchasing procedures

d. Inadequate oversight of client accounts

VIII. LAW FIRM MANAGEMENT

1. Inadequate or no partnership/shareholder agreement

a. Compensation structure encourages solo practice mentality – discourages centralized management

2. Inadequate resources allocated to firm management

3. Inadequate time spent on firm management

4. Inadequate supervision of satellite office

5. Inadequate oversight of firm finances

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All Kentucky attorneys should be concerned with legal malpractice. In hopes of lessening one's prospect of confronting a legal malpractice claim, this primer is provided.

A legal malpractice action is a negligence case – a duty, a duty breached, the breach causing damages – but there are twists unique to such an action.

A legal negligence claim consists of three elements:

1. An attorney-client relationship;
2. The attorney's breach of the duty owed to the client to exercise the ordinary care and skill of a reasonably competent attorney acting in the same or similar circumstances; and
3. The attorney's breach of duty was a proximate cause of the client's loss.¹

The following is a basic discussion of state law pertaining to the components of a legal malpractice claim.

The Attorney-Client Relationship

The Attorney

The first component of the attorney-client relationship is the attorney, who is an attorney that may be liable for malpractice. The relationship of attorney-client is a contractual one, created either expressly or impliedly by the conduct of the parties.²

Obviously the attorney who expressly contracts with a client or the attorney who actually handles the client's matter is an attorney in the attorney-client relationship.

A unique twist is the defendant attorney may not be the attorney who attended to the client's matter. The liability of an attorney can be created vicariously.

Examples of an attorney being held vicariously accountable for another attorney's malfeasance are numerous. One example is a legal partnership. If one attorney within the partnership acts negligently, all the attorneys in the partnership will be exposed to liability. In essence, all the partners become the attorney in the attorney-client relationship.³

The author is unaware of any Kentucky case which addresses the malpractice liability of individual members of a

professional corporation of attorneys – a limited liability partnership, a professional service corporation, a limited liability company. The courts addressing the issue have generally held the offending lawyer liable and the professional entity liable to the extent of the entity's assets.

In Kentucky, the question of the liability of a member of a limited liability entity is largely answered in Supreme Court Rule (SCR) 3.024.⁴ Under this Rule a lawyer may practice in a registered limited liability partnership, a professional service corporation or a limited liability corporation so long as there is maintained by the entity adequate professional liability insurance coverage to cover acts, errors or omissions of its partners, shareholders or owners. The Rule defines what is adequate liability insurance. The Rule provides each co-owner of a limited liability entity

shall remain jointly and severally liable for acts, errors and omissions not covered by insurance. Under this Rule a co-owner remains personally liable for the negligent acts committed by an individual under his or her direct supervisor.⁵

Participants in a *de facto* partnership (typically a group of individual attorneys who physically practice together), who did not deal with the client, may be considered an attorney in the attorney-client relationship. The test for the existence of a *de facto* partnership is whether the client reasonably believed the representation had been provided by the entity rather than by a sole attorney.⁶

Another example of an attorney being vicariously liable occurs through non-lawyer employees of a law firm, which includes secretaries, law clerks and paralegals. When a paralegal undertakes tasks

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requiring legal skills and does so negligently, the standard applicable to an attorney will apply to the paralegal and the supervising attorney.⁷

An attorney who delegates or refers a matter to an incompetent attorney may become liable for malpractice of the incompetent attorney. The referring attorney becomes a defendant with the attorney who negligently did the work.⁸

The negligent actions of an attorney who has retained local counsel may expose the local counsel to liability and vice versa. The test for the liability of the local counsel is largely based upon the understanding of the attorneys which is often documented in an engagement letter. In the absence of an engagement letter, there are factors to be considered in determining liability of local counsel. Is the relationship a joint venture where the attorneys share profits and losses? To what extent did the local counsel actually participate in the development and strategy of the case?⁹

The negligent doings of an 'of counsel' attorney may cause a law firm to be exposed to liability. A key factor in determining the liability of an 'of counsel' attorney is how the firm's stationery represents the status of the 'of counsel' attorney. Is his name separated from the other firm members? Is the attorney noted as a specialist? A further determinative factor is whether the 'of counsel' attorney acted on his or her own behalf; if so, there should not be liability to the firm. An 'of

counsel' attorney should not be vicariously liable for the firm's negligence.¹⁰

A retired attorney may be liable for the allegedly negligent acts done by him while a member of his former firm. This is true if the retired attorney is the attorney who committed the firm to take on the client's matter or if the retired attorney worked on the matter while a member of the firm.¹¹

The estate of a deceased attorney may become vicariously liable for a deceased attorney's negligence provided, during the deceased attorney's life, he/she dealt with the underlying matter or brought the client to the firm.¹²

The Client

The other component of the attorney-client relationship is the client. The question being who qualifies as a client in the attorney-client relationship?

Who is a client is largely determined by the reasonable perception of the person contending to be a client. Some of the client's perceptions are accurate, some are less so. One may be a client either expressly or impliedly.

An obvious client is the person or entity who expressly retained or contracted with the attorney to provide legal services.

Irrespective of a lack of privity, Kentucky law allows one to be considered a client if that person is intended to be benefited by the lawyer's performance.¹³ Examples being the intended beneficiaries of an estate trust wherein the suing client is the benefactor rather than the testator of the trust,¹⁴ likewise, the intended heirs under a will are intended beneficiaries though they had no contact with the offending attorney.¹⁵ Another example is the attorney who performs a property title exam for a specific client, often a financial institution, but others, besides the direct client, reasonably rely upon the attorney's input.¹⁶ If a client files bankruptcy with a malpractice claim pending, the bankruptcy trustee may become the client.¹⁷

Attorney-Client Relationship

The last component of the first element of a legal malpractice claim is whether there is a relationship between the attorney and the client. Kentucky courts work to preserve the traditional attorney-client relationship.¹⁸

Whether there is an attorney-client relationship is primarily determined by ascertaining if the attorney has created a duty owed to the client. The question of whether there is a duty owed is a question of law for the court, but due to factual disputes this issue can become a question of fact for the jury.¹⁹

The relationship of attorney-client is contractual, either expressed or implied by the conduct of the parties. The relationship is one of principal and agent, but because of the attorney's quasi-judicial status as an officer of the court, the attorney has a higher duty than an ordinary agent owes the principal; the attorney-client relationship is fiduciary in nature.²⁰

An appropriate inquiry in determining if there is a relationship is whether the attorney undertook to perform any service thus creating a duty owed. Another utilized test is whether the potential client reasonably relied on the attorney's actions or representations.²¹

The creation of the relationship does not require the payment of a fee and the relationship can arise from a brief formal or informal consultation with a prospective client.²²

Kentucky law contains an example of a determination that there is not an attorney-client relationship.²³ Therein an excess insurance carrier attempted to sue the insured's defense counsel. The Court of Appeals denied such noting the attorney's duty was owed to the insured rather than to the excess carrier, thus there was not an attorney-client relationship. The Court stated:

"To hold otherwise would in our judgment acknowledge a direct duty owed by the insured's attorney to the excess insurer and would be tantamount to saying that the insurance defense attorneys do not owe their duty of loyalty and zealous representation to the insured client alone."

The Court went on to define the excess carrier as an incidental beneficiary rather than an intended beneficiary and thus precluded substituting clients.

Standard of Care

The next element of an attorney malpractice action is whether the attorney breached a duty to exercise the ordinary

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care and skill of a reasonably competent attorney acting in the same or similar circumstances.

The question of whether the attorney's conduct meets the standard of care is a question for the jury.²⁴ Unless the alleged error is obvious (a missed statute of limitations) there must be expert attorney testimony to define the standard of care and to point out how the attorney's actions deviated from that standard.²⁵ The expert witness may not be the judge who sat or ruled in the underlying matter.²⁶

The duty of the defendant attorney consists of two parts:

1. whether the attorney gave to the matters submitted to him such care and attention as is ordinarily given to similar affairs by members of the profession and
2. whether the attorney possesses, to an ordinary extent, the technical knowledge commonly possessed by those in the profession dealing with such matters.²⁷

More simply stated, the standard of care consists of two elements – care and skill.

Examples of the care component of the standard of care exist when an attorney fails to timely act thus causing injury to the client. Examples of a lack of skill exist when the attorney, without a sufficient degree of legal knowledge, acts ineptly.

Situations which have been deemed to constitute an attorney's departure from a standard of care include an attorney's failure to discuss a non-compete provision with a client who is buying control of a closely held corporation,²⁸ an attorney's failure to have the client in a bankruptcy proceeding not list an asset,²⁹ allowing a statute of limitations to run thus extinguishing a client's personal injury cause of action.³⁰ In each of these situations the attorney failed to meet the standard of care and skill required of attorneys practicing such matters.

Proximate Cause

If it is determined the allegedly offending attorney was negligent by breaching the standard of care, then the last element of a legal malpractice claim is whether the attorney's negligence was a proximate cause of the client's damages.³¹

To prove that the negligence of the attorney caused claimant harm, claimant

must show he/she would have fared better in the underlying matter but for the attorney's negligence.³² As to proximate cause the attorney's negligence need not be the sole cause of the client's loss, it needs merely to be a substantial factor in causing the client's loss.³³

Causation is often determined by utilization of the trial-within-a-trial technique. The objective of the trial-within-a-trial methodology is to establish causation and, in some situations, to determine damages.³⁴ A legal malpractice case is often referred to as the suit within a suit. This technique is utilized to prove the negligence of the attorney caused the plaintiff harm. The plaintiff must show he/she would have fared better in the underlying claim 'but for' the attorney's negligence.³⁵

An example of the trial-within-a-trial is when the legal malpractice action involves an underlying medical malpractice action, the legal malpractice claimant must prove what the result in the underlying medical malpractice case should have been. Causation is established if there exists a difference between what should

have been and what the result was and that difference would not have occurred but for the attorney's negligence.

In handling a trial-within-a-trial situation, it seems logical to bifurcate the trials so the jury does not confuse the issues. To this author's knowledge, bifurcation has not been utilized in state court but has recently been utilized in federal court. This technique saves time for if the client does not prevail in the underlying case, then the attorney's supposed error would be harmless.³⁶

To demonstrate proximate cause in a criminal proceeding, the client must be exonerated from the conviction through post-conviction relief. This requirement is the equivalent of showing in a civil action what claimant should have received but for the attorney's malfeasance.³⁷ Without exoneration it cannot be said the attorney's actions were the proximate cause of the loss; unless the client obtains exoneration, then his/her criminal activities are presumed to be the proximate cause of the client's loss.

To obtain post-conviction relief by criminal clients a CR 11.42 ineffective

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assistance of counsel motion is usually utilized. Such motions may succeed if the attorney affirmatively advised the client wrongly.³⁸ If such an ineffective assistance of counsel motion is successful, a legal malpractice claim usually follows. If a client is able to prevail in an 11.42 motion, the client should be able to prevail in a legal malpractice claim.³⁹

Damages

Palmore's instructions define what a claimant must prove to be deemed to have sustained injury, the claimant must prove a "loss."⁴⁰

A malpractice action cannot be successful unless it can be shown that the client sustained a loss or was deprived of something to which the client was otherwise entitled.⁴¹ A loss can be the loss of a right, a remedy, an interest or the imposition of a liability.⁴² A "loss" may be the loss of a cause of action, the failure to receive an unencumbered title to real property, loss of an opportunity to accept a plea with a lesser punishment, loss of pursuing a safety violation in a workers' compensation claim, loss of entering into

a disadvantageous settlement, etc.

Typically it is relatively simple to demonstrate a loss. The difficulty lies in fixing the monetary value of that loss.

The measure of damages is the difference between what the claimant's pecuniary position is and what it should have been had the attorney not erred. The value of the loss is measured at the time of the attorney's error.⁴³

Although damages cannot be calculated precisely, depending on the circumstances, damages may be estimated or resolved with the trial-within-a-trial technique.⁴⁴

The value of the loss cannot be speculative. Kentucky case law illustrates when one's damages are too speculative to be allowed.⁴⁵ A Kentucky attorney committed malpractice when he let the Kentucky statute of limitations expire on a personal injury cause of action. Subsequently the clients retained another attorney who was aware claimants had a two-year statute of limitations if the action was filed in the federal court of southern Indiana which claimant did. The Indiana suit concluded with a \$60,000.00 settlement. After settle-

ment the claimants sued the Kentucky lawyer for malpractice based upon the missed statute; claimants contended they would have received more than \$60,000.00 if the case had been tried by a Kentucky jury. The Kentucky matter was tried and the jury awarded the client \$90,854.62 in compensatory damages and \$15,000.00 in punitive damages.

The verdict was appealed. On appeal it was held claimants' Kentucky damages were too speculative to be allowed. The appellate court characterized the Kentucky recovery as being "a matter of conjecture and speculation." The court explained there was no way of knowing what an Indiana jury would have done if the Indiana case had been tried to a jury, the Indiana jury could have awarded more or less damages so therefore the Kentucky jury award was too speculative.

Includable within malpractice damages is interest on the amount lost and any fee paid to the negligent attorney.⁴⁶ KRS 411.182. As with other Kentucky tort actions one may not recover the attorney fee due claimant's malpractice attorney.

It is unclear whether a Kentucky client's legal malpractice recovery should be reduced by the attorneys' fees the client would originally have had to pay for competent performance in the underlying matter. The majority view is that such fees are not deducted from damages.⁴⁷

In a Kentucky legal malpractice action, punitive damages are allowed provided the underlying wrongful act constitutes an act of fraud, lying, concealment or breach of fiduciary duty.⁴⁸

Apportionment of fault should apply to a legal negligence action pursuant to KRS 411.182. Utilization of apportionment was suggested prior to enactment of the apportioned statute.⁴⁹

Statutory Provisions

Kentucky does have a statutory provision providing a legal malpractice cause of action. KRS 411.165 limits the bringing of the action to the client who actually employed the attorney. There does not appear to be any room for an intended beneficiary to proceed under this statutory cause of action. Statutes of this nature are seldom relied upon to pursue a legal malpractice action rather

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reliance is placed upon the common law cause of action.⁵⁰

The risk of legal malpractice can be minimized. By relating these key elements, it is hoped that Kentucky attorneys will be able to avoid the distraction and potential bad result of a legal malpractice claim. ■

ENDNOTES

1. *Marrs v. Kelly*, 95 S.W.3d 856 (S.Ct. Ky. 2003)
2. *Daugherty v. Runner*, 581 S.W.2d 12 (CA Ky. 1979)
3. KRS 362.220 – Nature of Partner’s Liability
4. SCR 3.024 – Requirements of Practicing Law in Limited Liability Entities
5. *Id.*
6. Smith & Mallen Legal Malpractice, 5th Ed. Sec. 5.3. This text is considered authoritative on the subject of legal malpractice. See *Marrs*, 95 S.W.3d 856, fns 10 and 17.
7. Smith & Mallen, *supra*, Sec. 5.8
8. Smith & Mallen, *supra*, Sec. 5.9
9. Smith & Mallen, *supra*, Sec. 5.7, 5.9
10. Smith & Mallen, *supra*, Sec. 5.7
11. Smith & Mallen, *supra*, Sec. 5.9
12. Smith & Mallen, *supra*, Sec. 5.1, 5.2
13. *Siegle v. Jasper*, 867 S.W.2d 476 (CA Ky. 1993)
14. Smith & Mallen, *supra*, Sec. 7.8
15. *O’Bryan v. Love*, 2004 Ky.App. LEXIS 105, No. 2002-CA-002601MR, discusses liability to identifiable beneficiaries of an estate’s planners and will drafters; 53 KLS 9, p. 30 (S.Ct. Ky. 2006) (reversed on other grounds)
16. *Siegle*, 867 S.W.2d 476, note 13
17. *Kirk v. Watts*, 62 S.W.3d 37; 2001 Ky. App. LEXIS 592 (CA Ky. 2001).
18. *American Continental Insurance Co. v. Webber & Rose*, 997 S.W.2d 12 (CA Ky. 1998)
19. Smith & Mallen, *supra*, Sec. 7.8
20. *American Continental Insurance Co.*, 997 S.W.2d, note 18
21. Smith & Mallen, *supra*, Sec. 8.2
22. *American Continental Insurance Co.*, 997 S.W.2d, note 18
23. *Id.* at 18
24. *Daugherty*, 581 S.W.2d 12, note 2
25. *Stephens v. Denison*, 150 S.W.3d 80 (CA Ky. 2004)
26. *Bierman v. Klapheke*, 967 S.W.2d 16 (S.Ct. Ky. 1998)
27. *Daugherty*, 581 S.W.2d 12, note 2
28. *Holt v. Concrete Materials Corp.*, 1990 Ky. App. LEXIS 20, No. 88-CA-2322-MR
29. *Kirk*, 62 S.W.3d 37, note 14
30. *Mitchell v. Transamerica Insurance Co.*, 551 S.W.2d 587 (CA Ky. 1977)
31. Smith & Mallen, *supra*, Sec. 8.5
32. *Marrs*, 95 S.W.3d 860
33. *Daugherty*, 581 S.W.2d 12; Smith & Mallen, *supra*, Sec. 8.5
34. Smith & Mallen, *supra*, Sec. 33.9
35. *Marrs*, 95 S.W.3d 856
36. Professional Liability Reporter, Vol. 31, Number 9, p. 400 (Sept. 2006); *McMurtry v. Wiseman*, 2006 WL 237006 (W.D. Ky. Aug. 2006).
37. *Stephens*, 150 S.W.3d 80
38. *Padilla v. Comm. of Ky.*, No. 2004-CA-001981 (CA Ky. 2006)
39. See The Risk Manager, Lawyers Mutual Insurance Co. of Ky., Summer 2005 Newsletter, Vol. 16, Issue 3.
40. Palmore, Kentucky Instructions To Juries, §21.01 (4th Ed. 1989)
41. *Mitchell*, 551 S.W.2d at 586
42. Smith & Mallen, *supra*, Sec. 20.1
43. Smith & Mallen, *supra*, Sec. 19.4
44. Smith & Mallen, *supra*, Sec. 19.3
45. *Mitchell*, 551 S.W.2d 587
46. *Id.* at note 41; KRS 411.165
47. Smith & Mallen, *supra*, Sec. 20.18
48. *Bierman*, 967 S.W.2d 16, note 26
49. KRS 411.182; *Wimsatt v. Hayden Oil Co.*, 441 S.W.2d 908 (CA Ky. 1967)
50. Smith & Mallen, *supra*, Sec. 9.2

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Part 1

Kentucky's New Partnership and Limited Partnership Acts

An Introduction

By Dean Allan W. Vestal & Thomas E. Rutledge

The 2006 Kentucky General Assembly adopted new partnership and limited partnership acts. These new acts, each based upon a uniform act, significantly modernize their respective area of law as contrasted with the prior law. In Part 1 of this two-part article, the Kentucky Revised Uniform Partnership Act is discussed. Part 2 of the article, addressing the new Kentucky Uniform Limited Partnership Act, will appear in the next issue of the Bench & Bar. The article in its entirety is available on the Kentucky Bar Association's website at www.kybar.org.

The following Frequently Asked Questions (FAQs) are not intended to be a complete exegesis of the new laws. Rather, they serve to address what are likely to be first questions that will occur to the practitioner upon the first reading of the statutes.

The Kentucky Revised Uniform Partnership Act Frequently Asked Questions (FAQ)

Q. Upon what is the former partnership law based?

A. Kentucky's former general partnership law (set forth in KRS ch. 362 at §§ 362.150 through 362.360) was based on the Uniform Partnership Act (1914) ("UPA"), and was adopted by Kentucky in 1954 ("KyUPA"). But for amendments made in 1994 to address the election of a general partnership to be a limited liability partnership (KRS §§ 362.555 through 362.605), KyUPA was minimally revised since its adoption.

Q. Why is the New Uniform Act called "RUPA"?

A. The technically correct name for the new uniform act is the "Uniform Partnership Act (1997)." Through most of its drafting and consideration by the National Conference of Commissions of Uniform State Laws ("NCCUSL"), it was referred to as the Revised Uniform Partnership Act. In 1994, the "Revised" was dropped. Nonetheless, "RUPA" has become firmly fixed as the colloquial name of the act, and "RUPA" is in fact used in NCCUSL's prefatory note to the act. The official name of the Kentucky adoption is the "Kentucky Revised Uniform Partnership Act (2006)".¹ This distinguishes it from the official name of KyUPA, being the "Uniform Partnership Act."²

Q. How was RUPA drafted, and by whom?

A. RUPA was a project of NCCUSL, undertaken in response to a call for a revision of UPA set forth in *Should the Uniform Partnership Act Be Revised?*, a 1986 report of the UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association.³ Members of the American Bar Association Committee on Partnerships and Unincorporated Business Organizations reviewed and advised on the draft act throughout its development.

After a number of drafts, the Uniform Partnership Act (1994) was finalized and approved that year by both NCCUSL and the ABA. However, shortly thereafter, the decision was made to reopen the act to address limited liability partnerships. With the LLP amendments,⁴ the Uniform Partnership Act (1997) was completed.⁵

NCCUSL maintains a website at <http://www.nccusl.org> from which all of the uniform acts can be accessed and downloaded. The copy of RUPA available at the NCCUSL website also contains the prefatory note and the reporter's comments.

A listing of other states that have adopted RUPA also can be found on the NCCUSL website.

Q. What was the effective date of the new partnership law, and what is its effect on partnerships formed before then?

A. The effective date of KyRUPA was July 12, 2006. As of that date, all newly-formed partnerships are formed under and governed by KyRUPA.⁶ KyRUPA will not govern partnerships formed prior to July 12, 2006 unless the partnership makes an affirmative election to be so governed.⁷

The election by a KyUPA partnership to be governed by KyRUPA will be by a vote of the partners sufficient to amend the current partnership agreement.⁸ Filing a statement of partnership authority or a statement of qualification is an affirmative election to be governed by KyRUPA.⁹

Q. Must partnerships file organizational documents with the Secretary of State?

A. RUPA does not mandate any filings for partnerships. However, a partnership cannot elect limited liability partnership ("LLP") status without a filing with the Secretary of State. Certain "statements" may be filed on a voluntary basis.

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Q. What is the relationship of a LLP to a general partnership?

A. Every LLP is a general partnership, and is the same partnership both before and after the election to be an LLP.¹⁰

Q. What are the statements that a partnership may file with the Secretary of State?

A. RUPA provides for various voluntary filings to facilitate notice of authority to act on behalf of a partnership as well as record certain transactions. Those filings, the relevant KyRUPA sections, and the purpose of each filing are as follows:

Statement of	KRS § 362.1-	Purpose
Partnership Authority	303	Filed to record existence of partnership, identify partners and state which partners have authority to transfer partnership real property
Denial	304	Filed to deny one is a partner or another fact in a statement of partnership authority
Dissociation	704	Filed to record the dissociation of a partner
Dissolution	805	Filed to record that a partnership has dissolved and is winding up its business
Merger	907	Filed to record a merger
Qualification	1001	Qualification of a partnership as a limited liability partnership
Amendment to Qualification	1001	Amendment of the registration as a limited liability partnership
Foreign Qualification	1102	Qualification of a foreign limited liability partnership to transact business in Kentucky

Forms are available from the Secretary of State's office. KyRUPA does not mandate the use of certain forms. However, the Secretary of State has the discretion to make the use of certain forms mandatory.¹¹

Q. Is a partnership required to have a registered office and agent for service of process?

A. A general partnership that has filed a statement of qualification (thereby electing to be an LLP) must maintain a registered office and agent for service of process.¹² A foreign LLP that has qualified to transact business is likewise required to maintain a registered office and agent.¹³ Partnerships that have not elected to be an LLP do not have a registered office/agent.

Q. What is the hierarchy of the statements?

A. There is no hierarchy of the statements in the manner of corporate/LLC filings, which begin with the articles and subsequent filings modify that initial filing. Rather, RUPA statements should be thought of as similar to filings under the Uniform Commercial Code. The RUPA statements regimen is voluntary, and while the various statements are effective for their respective purposes, it is possible for transactions/events to take place without any statement having been filed.

Q. Must statements be filed with the county clerk?

A. There is no requirement that statements be filed with the county clerk. However, such filings are permitted, and a statement of partnership authority will not, with respect to real estate transfers, have its full effect without a county level filing.¹⁴

Q. Must partnerships file an annual report?

A. General partnerships that file a statement of qualification (thereby electing to be an LLP) are required to file an annual report.¹⁵ Foreign LLPs that file a statement of foreign qualification also are required to file an annual report.¹⁶ If a general partnership has not made one of these filings, it is not required to file an annual report.

Q. What is the consequence of not filing an annual report?

A. A domestic LLP that fails to file an annual report will have its statement of qualification administratively dissolved.¹⁷ The administrative dissolution of the statement of qualification may be cured, and the cure relates back to the date of dissolution.¹⁸ A foreign LLP that fails to file its annual report will have its statement of foreign qualification revoked.¹⁹ The revocation of a statement of foreign qualification cannot be cured - a new statement must be filed.

Q. Who is an agent of the partnership and the partners, and who can sign statements on behalf of the partnership?

A. Each partner is an agent for the partnership in its ordinary course of business.²⁰ As KyRUPA adopts an entity treatment for partnerships,²¹ partners are not agents for other partners. Statements filed on behalf of the partnership must be signed by two partners, while statements filed on behalf of a partner need be signed only by that partner.²²

Q. Has the rule of partner liability been altered?

A. Assuming the partnership has not filed a statement of qualification and elected to be an LLP, partners are jointly and severally liable for the debts and obligations of the partnership.²³ The rule that a person admitted to a previously existing partnership is not personally liable for pre-admission partnership obligations is preserved.²⁴

Q. What changes have been made to the limited liability partnership (LLP)?

A. Under the 1994 amendments to KyUPA, LLPs were authorized, and general partners are afforded a “partial shield” from personal liability. That partial shield protects a partner from personal liability from claims involving negligence, malpractice, wrongful acts or misconduct, but not from contract-based claims.²⁵ Under KyRUPA, general partners in an LLP are afforded a complete shield from liability - the protection is not dependent upon whether the claim arises in tort or in contract.²⁶ Of course, this liability protection relates only to vicarious liability as a partner, and does not protect a partner from personal liability for their own actions.²⁷

Note that the broader liability protection afforded a KyRUPA LLP is available to partnerships formed prior to July 12, 2006 only after the partnership elects to be governed by KyRUPA. The LLP electing to be governed by KyRUPA needs to notify its existing customers and creditors of that election in order to have the immediate benefit of the broader liability shield.²⁸

Q. How has KyRUPA impacted partnership names?

A. The name of a partnership filing a Statement of Qualification or of Foreign Qualification must be distinguishable.²⁹ Distinguishability is not a prerequisite to filing other statements. The statute sets forth certain terms that may not be used in the name of a general partnership, as well as the required endings for a domestic or foreign LLP.³⁰

Q. May partnerships merge under KyRUPA?

A. Partnerships mergers are expressly provided for under KyRUPA.³¹

Q. May partnerships convert under RUPA?

A. KyRUPA permits a partnership to convert into a limited partnership.³² The existing mechanism for the conversion of a general partnership into an LLC remains in place.³³

Q. Does KyRUPA define fiduciary duties among the partners?

A. In this area KyRUPA is not uniform to RUPA,³⁴ adopts a non-exclusive statutory description of the fiduciary obligations of the partners,³⁵ and also addresses non-fiduciary obligations such as good faith and fair dealing. The KyRUPA formula for the duty of care is non-uniform and is unique to Kentucky.³⁶ These provisions are complex and go to the core of the partnership and the relations among the partners, and as such must be carefully studied by all practitioners who would counsel clients as to the formation, operation, and/or dissolution of partnerships.

Q. Is a KyRUPA partnership treated as an aggregate or an entity?

A. KyRUPA adopts an entity, as contrasted with an aggregate, treatment for all partnerships.³⁷

Q. What freedom exists to customize the relationship amongst the partners in the partnership agreement?

A. KyRUPA sets forth comprehensive default rules that subject to certain safeguards and limitations³⁸ may be modified

by the partners.³⁹ This is a marked clarification as contrasted with the prior law.⁴⁰

Q. May a foreign partnership qualify to transact business in Kentucky?

A. A foreign partnership that is an LLP in its jurisdiction of organization may qualify to transact business in Kentucky by filing a statement of foreign qualification.⁴¹ A foreign partnership that is not an LLP is not required to qualify to transact business, and there is no mechanism for it to do so.

Q. How are filing procedures with the Secretary of State addressed?

A. Filing procedures with the Secretary of State are based upon practices already in place with respect to corporations and limited liability companies. For example, the provisions addressing requirements for documents to be filed,⁴² effective time and date,⁴³ and appeal of a refusal to file⁴⁴ are all closely patterned on the corresponding provisions under the Business Corporation and Limited Liability Company Acts.

Q. Has the assumed name statute been revised to address KyRUPA?

A. The assumed name statute⁴⁵ has been revised⁴⁶ to:

- (i) provide that the “real name” of a partnership that is not an LLP and that has filed a statement of partnership authority is the name set forth on that statement;⁴⁷
- (ii) clarify that if a partnership is not an LLP and has not filed a statement of partnership authority, its “real name” is a name that includes the name of each of the general partners;⁴⁸ and
- (iii) provide that the “real name” of an LLP is the name set forth on its statement of qualification or the LLP registration filed under KRS § 362.555.⁴⁹

Q. Must a partnership identify all of its partners if adopting an assumed name?

A. Under current law, a partnership, as such, is not obligated to make a public filing identifying all of the partners. How-

ever, if the partnership is to do business under an assumed name, it must name all of the partners in the application for certificate of assumed name.⁵⁰ Under KyRUPA and the revised assumed name statute, the same rule will apply unless the partnership files a statement of partnership authority or a statement of qualification. If the partnership files either of those statements, the name on the statement becomes the “real name” of the partnership for assumed name purposes.⁵¹ ■

Part II of this article will appear in the March 2007 issue of Bench & Bar.

ENDNOTES

1. KRS § 362.1-1202.
2. KRS § 362.150.
3. 43 BUS. LAW. 121 (November, 1987).
4. See generally Carter G. Bishop, *The Limited Liability Partnership Amendments to the Uniform Partnership Act (1994)*, 53 BUS. LAW. 101 (1997).
5. For commentary generally on RUPA, see generally ROBERT W. HILLMAN,

ALLAN W. VESTAL AND DONALD J. WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT (Thomson-West, 2006).

6. KRS § 362.1-1204(1)(a).
7. KRS §§ 362.1-1204(1)(b); 362.1-1204(2).
8. KRS § 362.1-1204(2).
9. KRS § 362.1-1204(2).
10. KRS § 362.1-201(2). Accord KRS §§ 362.155(7); 362.175(1).
11. KRS § 362.1-105(11). Accord KRS §§ 271B.1-210(2); 275.050(2).
12. KRS § 362.1-117.
13. KRS §§ 362.1-117; 362.1-1102(1)(c).
14. KRS § 362.1-303(4)(B).
15. KRS § 362.1-121(1).
16. KRS § 362.1-121(1).
17. KRS § 362.1-122. As such, the partnership, while no longer a limited liability partnership, remains a valid partnership that may carry on the full range of business activities, and it is not constrained to only those appropriate to dissolution and winding up. Contrast KRS §§ 271B.14-210(3); 275.300(2) (administratively dis-

solved corporation or LLC restricted to activities appropriate for its winding up and dissolution).

18. KRS §§ 362.1-122(5), 362.1-122(6). Accord KRS §§ 271B.14-220(3); 275.295(3)(e).
19. KRS § 362.1-123. Accord KRS §§ 271B.15-310; 275.440; 275.449.
20. KRS § 362.1-301(1). Accord KRS § 362.190(1).
21. KRS § 362.1-201(1).
22. KRS § 362.1-105(3).
23. KRS § 362.1-306(1). Contrast KRS § 362.220(1) (joint and several liability for claims arising in tort, joint liability for other claims).
24. KRS § 362.1-306(2). Accord KRS § 362.230.
25. KRS § 362.220(2). See also Rutledge & Hester, *Practical Guide to Limited Liability Partnerships, 5 STATE LIMITED LIABILITY COMPANY AND PARTNERSHIP LAWS* (Arthur J. Jacobson, Scott E. Ludwig, Elizabeth S. Miller and Thomas E. Rutledge, eds. (Aspen 2006)).
26. KRS § 362.1-306(3).
27. KRS § 362.1-306(4).

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John Hays has been mediating cases for over 10 years and has extensive experience with mediating construction, employment, commercial, and personal injury disputes. He has served as a mediator for cases from all parts of the Commonwealth and several surrounding states. Mr. Hays is currently on the Board of Directors for the Mediation Center of Kentucky and is a past president of the Mediation Association of Kentucky. He is a mediator and arbitrator for AAA and is on the CPR panel of distinguished neutrals for Kentucky.



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28. KRS § 362.1-1204(2). KyUPA partnerships that have elected LLP status by registering under KRS § 362.555 may continue to do so, and KyUPA partnerships may elect LLP status with a KRS § 362.555 filing even after July 12, 2006.
29. KRS § 362.1-114(1). *Accord* KRS § 362.565(2). *See also* KRS § 362.1-116.
30. KRS § 362.1-114(2).
31. KRS §§ 362.1-905 through 362.1-908. Prior law allowed a partnership to convert into a limited liability company (*see* KRS § 275.370), but not to merge into another partnership or other business entity.
32. KRS § 362.1-902.
33. KRS § 275.370.
34. *Contrast* RUPA § 404.
35. KRS § 362.1-404(1) (“The fiduciary duties ... include ...”) (*emphasis added*).
36. KRS § 362.1-404(3). *See also* J. William Callison, “*The Law Does Not Perfectly Comprehend...*”; *The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations*, 94 KY. L. J. 451 (2005-06).
37. KRS § 362.1-201(1).
38. KRS § 362.1-103(2).
39. KRS § 362.1-103.
40. For example, UPA § 18 (KRS § 362.235) expressly states that the rights and duties of the partners in relation to the partnership “shall be determined, subject to any agreement between them.” In contrast, UPA § 20 (KRS § 362.245), regarding the obligation to provide information, is silent regarding the ability to modify the obligation by agreement. *In re Estate of Bennett*, 205 N.Y.S.2d 50 (1960), involved a permissible modification of the rule of UPA § 25(b) (KRS § 362.270(2)) despite the fact that the provision did not expressly provide for its modification. *Labovitz v. Dolan*, 545 N.E.2d 304, 310 (Ill. App. 1989) involved a court not accepting the ability, in the context of a general partnership, to modify the fiduciary obligations among the partners.
41. KRS § 362.1-1102. Foreign LLPs also may qualify in Kentucky under KRS § 362.585.
42. KRS § 362.1-108. *Accord* KRS §§ 271B.1-200; 275.045
43. KRS § 362.1-110. *Accord* KRS §§ 271B.1-230; 275.060.
44. KRS § 362.1-112. *Accord* KRS §§ 271B.1-260; 275.075
45. KRS § 365.015.
46. *See generally* Maryellen B. Allen and Thomas E. Rutledge, *The 2006 Amendments to the Assumed Name Statute: The Ongoing Task of Modernization and Clarification*, 70 BENCH & BAR 62 (May, 2006).
47. KRS § 365.015(1)(b)2.
48. KRS § 365.015(1)(b)1.
49. KRS § 365.015(1)(b)3.
50. KRS § 365.015(1)(b)1.
51. KRS §§ 365.015(1)(b)2, 365.015(1)(b)3.

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BOOK REVIEW

Business and Commercial Litigation in Federal Courts

By Sheryl G. Snyder

Any lawyer who has participated in a book writing project with a bar association group must stand in awe of Robert L. Haig's accomplishment. With the recent publication of the Second Edition of *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* (Thomson/West 2006), Mr. Haig, a litigator at Kelley Drye & Warren, and his 199 co-authors have produced a definitive treatise for business litigators. In nine volumes, with 96 chapters, 16 new and 80 updated, the Section of Litigation of the ABA has given practitioners a thorough treatise that is at once scholarly and chock full of practical tips.

Each chapter is written by one of the premier law firms in the country, together with 17 federal District and Circuit Judges, giving practical advice that will be useful to young lawyers conducting research as well as experienced lawyers counseling clients and strategizing litigation.

Each chapter begins with research references to the applicable West key numbers, the A.L.R. annotations, treatises and a bibliography of law review articles, a significant timesaver for the researcher.

Most chapters include a section that contains checklists, forms, jury instructions and similar practice aids. In that sense, the treatise is a compendium of the past efforts files of litigators from some world class law firms.

The heart of each chapter is an in depth analysis of that chapter's topic, with extensively footnoted authorities. The topics range from basic procedural issues such as jurisdiction and venue, to customary practice issues such as discovery, experts, jury selection and evidence, to areas of substantive law such as antitrust, securities, director and officer liability, patent, trademark and copyright, franchising and products liability. As one who has retained the habit from law school of reading an overview before delving into the cases, these mini-treatises are very useful tools.

I perused a few in which I had recent experience, such as fraudulent joinder, enforcing venue selection and arbitration clauses, class certification, torts of competition, electronic discovery and appeals. I found each chapter to be thoroughly researched, cogently analyzed, succinct but comprehensive, and clearly written. Each chapter includes a section on strategies and objectives, and excellent practice pointers.

For example, the chapter on federal appellate practice, written by Stephen R. Kaye and his colleagues at Proskauer Rose, contains all the nuts-and-bolts, and rules and procedures, for practicing in the federal appellate courts. But it also contains a section entitled "The strategy of the appeal: formulating an appellate game plan," in which the authors correctly instruct that an appeal requires a strategy just as much as initial litigation strategy and trial strategy. The authors opine that "[t]he appellate brief is, of course, the primary vehicle for executing counsel's strategic game plan." They observe that, while the appellate advocate occasionally wins the case with a stellar oral argument, "there is considerable truth to the view that cases are most often won in the briefs but can sometimes be lost in oral argument." There follows a very good section on brief writing and a section on delivering a persuasive oral argument, which properly focuses upon preparation for answering questions from the bench.

The chapter devoted to that latest "hot topic," discovering electronic information, is authored by Jonathan M. Redgrave of Jones Day, the Editor-in-Chief of the "Sedona Principles," and Judge Shira A. Scheindlin of the Southern District of New York, author of the *Zubulake* opinions. This chapter understandably emphasizes the client's duty to preserve electronic information, and the corollary importance of counseling clients to create records and information policies that contemplate electronic discovery, including effective litigation hold procedures.

Searchable databases, which simultaneously facilitate the search for responsive electronic documents while containing the scope of the search to a reasonable key word vocabulary, should be considered by sophisticated corporate clients. The authors encourage an early meeting of counsel at which "mutuality of interests can help foster creative and beneficial agreements regarding the scope of electronic discovery . . . [such as] agreements among the parties that inadvertent productions of privileged documents will not effect a waiver of privilege, agreement on the use of a common search strategy for electronic documents, agreements on key word terms to be used, agreements on the use of neutral vendors or discovery experts to assist the process and agreements regarding the form of production." And, as litigants are still ruefully learning every day, "files or data deleted by the user from computer hard drives and disks still exist in complete or residual form until fully overwritten and may be reconstructed in some instances." There follows an excellent overview of cost-shifting for discovery of deleted data and reasonable standards for preserving back-up tapes. This chapter is a thorough introduction to the topic and a good summary of the present state of the art.

A separate index includes tables of the jury instructions, forms, laws and rules, and cases cited in the treatise. The nine volume set, with a CD-ROM containing the forms and jury instructions, costs \$960. All royalties go to the ABA Section of Litigation. ■



Sheryl G. Snyder is a member of Frost Brown Todd LLC in Louisville. He has litigated business disputes in several U.S. District Courts and has argued in six U.S. Courts of Appeals. Mr. Snyder served as KBA President in 1989-90.

Expletives: Usurpers of Space and Emphasis

By Barbara McFarland

Now that I have your attention, let me first admit that I refer not to expletives as in “[expletive deleted]” but as in the “it [verb]” and “there [verb]” constructions that run rampant in much legal writing.

Most of us probably already edit out the obvious ones, the “it is important to point out that” start to a sentence, or the “it is unlikely that a court will find” in a conclusion. These catch our eye on a second draft and fall victim to the delete key.¹ Some authors, however, are seemingly unaware how inert their writing becomes when they use these constructions:

It is obvious that the final judgment rule is not working as intended. The root of the malfunction lies in the tension between the twin goals of judicial efficiency and fairness. **It is** difficult in most cases to reconcile the two. Courts and legislatures have often been unwilling

to work hardship on a particular litigant in order to comply with the dictates of the final judgment rule. The result has been that the goal of efficient judicial administration has often given way to the competing goal of justice to a particular litigant. **It is** doubtful that these compromises have, in fact, furthered either goal.²

As the title of this article suggests, the main problem with such constructions is that they usurp the position of the true subject and verb of the sentence. Each sentence that begins with the word “it” in the subject slot has a true subject that is either relegated to a position of little emphasis or omitted from the sentence entirely. Possible revisions of these sentences would result in the following passage:

The final judgment rule is obviously not working as intended. The root of the malfunction lies

in the tension between the twin goals of judicial efficiency and fairness, which are difficult to reconcile in most cases. . . .These compromises have doubtfully furthered either goal, in fact.³

The second “it is” construction was paired with a verb in passive voice - “to reconcile” - and had no stated subject, so it was relegated to a dependent clause.⁴ The first and third of the constructions have been replaced with the true subject and verb of the sentence.

A second problem with the overuse of expletives is that they make writing wordier than it needs to be, which is never a good result in legal writing. Thirteen words in the original version of the first sentence have been reduced to ten; ten words in the second sentence containing the “it is” construction have been reduced to an eight-word clause; and, twelve words in the final sentence of the paragraph have been cut to nine. Not a substantial reduction in words, to be sure, but a worthwhile one in terms of clarity and concision.

The third negative effect of such constructions is their needless profusion of forms of the verb “to be,” which make writing flaccid. No action takes place; rather, everything is simply in a state of being. However, most legal writing describes events and actions. Use active verbs, placed in the verb slot of each sentence, to make your writing active and interesting.

Having completed the examination of the easy example,⁵ I will turn to my greater concern, the more subtle expletives that slip past all but the most vigilant of editors or form such an integral part of a writer’s style that they go completely unchallenged, as in the following passage.

The point of the question is not to second-guess a defen-



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dant's actual decision; if **it is** reasonably probable that he would have gone to trial absent the error, **it is** no matter that the choice may have been foolish. The point, rather, is to enquire whether the omitted warning would have made the difference required by the standard of reasonable probability; **it is** hard to see here how the warning could have had an effect on Dominguez's assessment of his strategic position. And even if **there were** reason to think the warning from the bench could have mattered, **there was** the plea agreement, read to Dominguez in his native Spanish, which specifically warned that he could not withdraw his plea if the court refused to accept the Government's recommendations.⁶

Clearly, if your writing is rife with expletives, you are in good company. If, however, you see the benefit to removing such constructions, or at least to reducing

their numbers, the cure is a relatively simple one. Use your word processor's locate or find function on something you have written recently to look for the words "it" and "there."

Does every "it" have an antecedent, a noun to which the "it" refers?⁷ If not, try to reword the sentence; what is the true subject that should be placed into the subject slot of the sentence or clause and what verb would best express the action being described? In looking at your uses of the word "there," each should refer to a place to which you are referring back;⁸ if one does not, reword the sentence asking yourself those same questions.

Your writing will be clearer, more active, and less wordy, if you eliminate or reduce your use of expletives. At first, the editing will take a bit of time, but as you become accustomed to the task, you will find you simply delete the expletive before it even reaches the page. ■

ENDNOTES

1. Devoted readers of this column should have learned to edit these out last January, as they were Tip #5 in Susan Kosse's *Common Writing*

Problems, 70 Kentucky Bench & Bar 23, 24 (Jan. 2006). As many students seem to adopt these constructions immediately after starting law school, and carry the habit into practice, an expansion of the topic seemed warranted.

2. Robert Martineau, *Cases and Materials on Appellate Practice and Procedure* 202 (West 1987). Professor Martineau is a former colleague who asked me to edit a chapter in a later text; when informed of the tendency to use expletives, he was quick to edit

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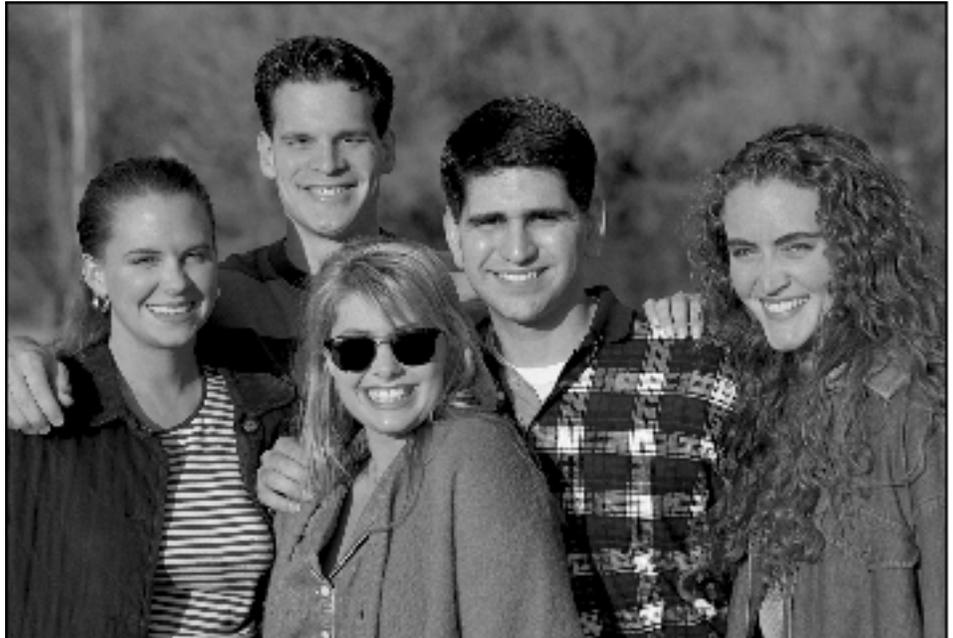
them out of his writing.

3. The revision of the third sentence is neither clear nor satisfying. The true rewrite would probably begin with “I doubt,” because the author was expressing an opinion in this sentence. In such sentences, if your opinion is appropriate, state it as such: “I doubt that such compromises have, in fact, furthered either goal.” If not, rephrase the sentence: “In fact, these compromises have furthered neither goal.”
4. This is referred to as a “truncated” passive and may be the subject of a future column.
5. Although the sample used only one of the two most common expletives, the “there is” forms are just as common and just as easily excised:
 - there is no evidence to support plaintiff’s claim that = no evidence supports plaintiff’s claim
 - there is no reason for the court to refuse = the court should
 - there are four elements to the plaintiff’s claim = plaintiff must prove four elements to prevail on the claim
 - there is a shift in the burden to the defendant = the burden shifts to the defendant
6. *U.S. v. Dominguez Benitez*, 542 U.S. 74, 85 (2004)(Souter, J.).
7. In the following example, the “it” refers to the contract: “Your signa-

ture on the contract means that you accept every term and provision it contains.” “Contract” is the antecedent for the pronoun.

8. “Defendant’s testimony regarding his

presence at the Holiday Inn clarified that he was only **there** at the behest of his friend and co-defendant.” “Holiday Inn” is the antecedent for the word “there.”



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PowerPoint, Power Cords, Power Windows, etc.

By Michael Losavio

Power corrupts, right?
What about PowerPoint?

Simple, affordable media tools have made high-quality, high-tech presentations available from the lawyer's desk top. As easy as power windows!



Michael Losavio

Microsoft's PowerPoint shuttered the media production offices of many major companies and let even low-level staff do glitzy electronic slide shows. Digital production software helps with animation and management of digital video. Desktop digital editing suites let you edit and add all manner of audio and visual features to your production.

Courts accommodate the use of such technologies. The U.S. District Court in Louisville has a fully wired courtroom with monitors for each juror, counsel and the judge. Counsel use a central island workstation to pipe the information to those monitors. Court staffers Vanessa Carroll and Ross Anderson work directly with counsel to familiarize, train and practice with the system prior to trial.

Does this better tell our client's story?

Or is it that, as Edward Tufte put it, "Power Corrupts. PowerPoint Corrupts Absolutely." His 2003 *Wired* article¹ argued these technologies ruined rhetoric rather than helped it, noting "... the PowerPoint style routinely disrupts, dominates, and trivializes content" as with Peter Norvig's *The Gettysburg Address Powerpoint*, <http://norvig.com/Gettysburg/>, which took great American oration² into the Microsoft world.

But don't clients expect some sizzle in our advocacy? Haven't lawyers put just as many jurors to sleep without these

technologies?

The debate over these new presentation technologies in legal practice is heated. Some feel they are wastes of time while others glorify the power of these media. For some it's a mixed bag of benefits and detriments that must be tuned to the facts of a case.

Heather Watkins, legal assistant to lawyer Thomas Clay, promotes their extensive and successful use of visual media technologies, including a mobile set of terminals for jury viewing. Yet as one lawyer has noted, it takes only one technical glitch to destroy the flow of your case and your credibility with the judge and jury. For want of a power cord, the battle may be lost.

As to presentation, some lawyers cynically see proof of Tufte's premise in badly overdone PowerPoints at trial by eager lawyers who wanted to be first in their courthouse to use it. See, e.g., Rick Friedman's "Pondering PowerPoint: Not In My Trial Toolbox," 29 AK Bar Rag 11, Autumn, 2005.

Others effectively use PowerPoint and other visual technologies, such as document cameras, e.g., ELMO, to tell the story and keep the jurors' attention.

In the middle are those who use PowerPoint and other concept organization software to prepare and guide their

trial and pre-trial presentations. Jay Lambert, a capital litigator for the Louisville Public Defender's Office, uses CaseMap and TimeMap to build their case with concise, succinct style and then prepare exhibits and examples for the jury. These technologies are "the wave of the future," but a lawyer must strike a balance between effective use and being overwhelmed by the available features. He recommends checking out www.trialmax.com for a free trial version of one such technology.

Paranoid that I am, I have used PowerPoint to prepare opening statements. I then copied to non-electrified poster board. The outline structure of PowerPoint helped organize my thoughts for a more straight-forward pitch for the jury.

Several Kentucky law firms use PowerPoint to prepare and pitch their settlement packages to opposing counsel and claims adjusters, finding the combination of oral and visual presentation very effective. In at least one case, the presentation was given to the adjuster to, in turn, secure approval for greater settlement authority.

I think this boils down to the right use of the right tool at the right time. But the temptation to overkill is just so great. Lawyer Stephen Groo, a consultant on trial presentation technologies, writes

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there is "...unfortunately, a tendency to overeat."³ For Groo, these technologies are just part of litigator's toolkit and, when used appropriately, are immensely powerful. When too many features, bells and whistles are thrown together, the story gets lost along with the case.

California attorney R. Rex Parris spent around \$60,000 on presentation consultants and focus groups to build a PowerPoint program for his client's personal injury case. The product they developed went "beyond bullet points" to a sequence of pictures and single-word slides. Parris focused on those key words throughout his case and then used the one-word slides with pictures in PowerPoint to link his entire case together. The jury returned a \$15.7 million verdict in contrast to the \$1 million settlement offer made at trial.⁴

Parris' experience details that it's the story that matters. He sought counsel on how best to tell that story without muddling it in the glitz to his client's benefit.

We practice our written and oral skills.

If we plan to use these new technologies for advocacy, we will need to practice them, too. It will take special effort, as most of us don't do slideshows or movies every day, but it's a needed effort.

Absent that, we may need to hire consultants or keep a look-out of new law grads with proven tech expertise. The risk is that we may not know what precisely we need.

Our obligation for competency extends to the competent use of PowerPoint, movie makers or whatever we choose. That includes having a back-up plan for tech failure. And it may be best to just use the professionally designed templates that come with PowerPoint or are available on-line to develop a presentation, instead of just winging it.

Otherwise, it may be best to stand in front of the mirror. There we can try to match Lincoln with the tried and true power of the human voice and the human condition.

PowerPoint and Microsoft are the trademarks or registered trademarks of

Microsoft Corporation. CaseMap and TimeMap are the trademarks or registered trademarks of their holder. ■

ENDNOTES

1. <http://www.wired.com/wired/archive/11.09/ppt2.html>, last visited December 3, 2006.
2. Abraham Lincoln, *Gettysburg Address*, <http://www.americanrhetoric.com/speeches/gettysburgaddress.htm>.
3. Stephen W. Groo, "Every Picture Should Tell A Story," The Metropolitan Corporate Counsel, December, 2005 Northeast Edition.
4. Nora Lockwood Tooher, "Consultants key to \$15 million verdict," St. Louis Daily Record/St. Louis Countian, July 22, 2006.

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KYBench_Bar06

Proposed Amended Regulations of the Attorneys' Advertising Commission, pursuant to SCR 3.130-7.03(5)(a)

As approved by the
KBA Board of Governors
November 17, 2006

Publisher's Note:

Supreme Court Rule SCR 3.130 contains the Kentucky Rules of Professional Conduct (KRPC) which include rules on lawyer advertising. KRPC 7.03 establishes an Attorneys' Advertising Commission (Commission) which has general responsibilities for implementing the lawyer advertising rules. In discharging its responsibilities, the Commission is given the 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 at least sixty (60) days advance notice and an opportunity to comment. The Commission has promulgated the following amendments to the enumerated regulations based on amendments to the Supreme Court Rules which were effective January 1, 2006. The Board of Governors approved these amended regulations on November 17, 2006, subject to review and consideration of comments from the membership. Members wishing to comment on these proposed regulations must do so in writing. Written comments must be sent no later than April 1, 2007, to the Attorneys' Advertising Commission, c/o KBA Executive Director, 514 West Main Street, Frankfort, KY 40601-1812.

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:

1. Participation by the lawyer in community groups or clubs and nonprof-

- it charitable organizations or groups, either as a member or officer;
2. Previous employment positions, including governmental and non-governmental employment;
3. Enlargements of business cards that are not themselves advertisements under SCR 3.130-7.02(1)(a), but if the advertisement includes reference to a website, the website is considered a separate advertisement;
4. Listings of immediate family, such as spouses, children and parents
5. Information identifying the offices of the firm in several jurisdictions or cities within or without the Commonwealth of Kentucky;
6. The length of time any particular law firm of lawyer has been in practice;
7. The types of information listed in SCR 3.130-7.05(1)(a)(6-13) may include both past and present participation or status, if the advertisement discloses, when necessary, that the lawyer is no longer a participant or no longer holds that status;
8. A photograph of the lawyer with no accompanying scene in the background of the photograph;
9. Words such as "congratulations" or "good luck," when used in program advertisements for charitable or education functions;
10. The designation of a law firm as "A debt relief agency" as required by the Bankruptcy Abuse Prevention and Consumer Protection Act, [11 USC § 528(b)(1)(a)(b)].
11. Such variations on the items contained herein and in SCR 3.130-7.05(1)(a)(1-25) that are minor or technical in nature and may be reviewed and approved by the designee of the Commission named herein.

AAC Regulation No. 3: COMMUNICATIONS THAT REQUIRE THE DISCLAIMER "THIS IS AN ADVERTISEMENT"

SCR 3.130-7.09(3) requires that certain types of advertisements contain the

disclaimer "THIS IS AN ADVERTISEMENT." In addition, SCR 3.130-7.25 authorizes the Commission to require the disclaimer "THIS IS AN ADVERTISEMENT." This Regulation No. 3 clarifies the relationship between SCR 3.130-7.09(3) and SCR 3.130-7.25.

1. SCR 3.130-7.09(3) does not apply to every written, recorded or electronic communication from a lawyer, including emails. Rather, it applies only to any such communication that solicits "professional employment from a prospective client known or reasonably believed to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship." The term "particular matter" includes any identifiable type or category of legal matter as well as any

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specific case of that consumer. An advertisement that is within the scope of SCR 3.130-7.09(3) must include the disclaimer "THIS IS AN ADVERTISEMENT."

2. Even if an advertisement does not constitute a solicitation of professional employment within the scope of SCR 3.130-7.09, the Commission may require the disclaimer "THIS IS AN ADVERTISEMENT." pursuant to SCR 3.130-7.25, if the Commission concludes that the advertisement may not be perceived by the consumer as a quest for clients because of its format, manner of presentation or medium.

**AAC Regulation No. 4:
DELEGATION OF**

ADMINISTRATIVE TASKS

Supreme Court Rule 3.130-7.03 provides that the Commission may delegate to an employee of the KBA the authority to review advertisements submitted under SCR 3.130-7.05(2). The Commission hereby delegates this function to the advertising paralegal, with the supervision of the Office of Bar Counsel and the Director, to review such submissions in the limited circumstances as follows:

1. The Commission has determined the advertisement to be noncompliant and the lawyer is making a resubmission to bring the advertisement into compliance.
2. If a submission is determined to have been made without the proper fee then the KBA would be authorized, through its designee, to inform the attorney that the submission does not qualify without a fee, or that the amount of the fee is incorrect, and should be submitted under SCR 3.130-7.05(2) with the proper fee to the Commission;
3. Advertisements submitted for review which, on their face, comply with the rules and regulations of this Commission and contain no issues requiring the individual attention of the Commission;
4. If its designee determines a question exists concerning compliance with these regulations or the Supreme Court rules that require the Commis-

sion's review, the advertisement may be submitted to the Commission by the designee.

**AAC Regulation No. 5:
TIME PERIOD FOR REVIEW
WITH ADVISORY OPINION
FOR BROADCAST MEDIA**

1. SCR 3.130-7.06(1) allows the Commission a period of thirty days to consider an advertisement submitted for an Advisory Opinion. The thirty-day period runs from the date of submission of the advertisement, transcript and fees. If a transcript is presented without three copies of the video or audio tape, the Commission will attempt to review and respond to the submission within thirty days, but the thirty day period set forth in SCR 3.130(7.06) will not begin to run and an Advisory Opinion will not be provided regarding the advertisement

until three copies of the video, digital image or audiotape advertisement are provided for review.

2. If the Commission approves a transcript subject to a review of the video or digital media, the thirty-day time period set forth in SCR 3.130-7.06(1) will commence upon the Commission's receipt of the three copies of the video or digital media.

**AAC Regulation No. 6:
REQUEST FOR HEARING; INFORMAL RESOLUTION PROCEDURE**
Deleted

**AAC Regulation No. 7:
HEARING PROCEDURE**
Deleted

**AAC Regulation No. 8:
TIME FOR FILING APPEAL**
Deleted

NOTICE OF PROPOSED REVISION

TO LR 40.1

OF THE JOINT LOCAL RULES

OF THE FEDERAL DISTRICT COURTS IN KENTUCKY

NOTICE is hereby given that the Joint Local Rules Commission has forwarded to the Judges of the United States District Courts for the Eastern and Western Districts of Kentucky a revised LR 40.1 of the Joint Local Rules of Civil Practice for the federal courts in Kentucky. The Judges of the United States District Courts in Kentucky will be considering the following proposed Joint General Order for adoption after publication of this Notice in the Kentucky Bench & Bar. On or before March 31, 2007, the bar and public are invited to submit comments and/or suggestions, in writing, with respect to the proposed revision of the Joint Local Rules to either of the United States District Court Clerk's Offices or to Douglas L. McSwain, Chair of the Joint Local Rules Commission, at the law firm of Sturgill, Turner, Barker & Moloney, PLLC, 155 E. Main St., Lexington, KY 40507.

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

JOINT GENERAL ORDER NO. ____-E.D.Ky.

JOINT GENERAL ORDER NO. ____-W.D.Ky.

* * * * *

Pursuant to LR 83.14 of the Joint Local Rules of the Eastern and Western Districts of Kentucky, and pursuant to the authority granted by Rule 83, F.R.Civ.P., and upon recommendation of the Joint Local Rules Commission, the Judges of the Eastern and Western Districts hereby ORDER that the following amendments be made to the Joint Local Rules:

1. A new subsection (b) is created to LR 40.1 to read as follows:

(b) Reassignment of Cases; Motion to Reassign Related Cases.

A case may be reassigned to another judge within the district upon the Court's own motion, in the interests of justice, for reasons stated in an order of reassignment. A party may file a motion to reassign a case if it is related to another case pending in the district. Cases may be considered related if they meet the requirements of F.R.Civ.P. 42(a), or if a substantial savings of judicial time and resources would result if they were handled by the same judge. The Court will determine a motion to reassign on the basis of whether reassignment is in the interests of justice.

2. Current subsection (b) to LR 40.1 is re-lettered to (c);
3. The new LR 40.1 shall read as follows:

**LR 40.1 ASSIGNMENT OF CASES AMONG JUDGES
AND CALENDARING**

(a) Assignment of Cases Among Judges. Cases are assigned among the various judges within a district in a manner established by the Court's general order. Unless otherwise ordered, cases are calendared for trial or other appropriate proceedings by the assigned judge.

(b) Reassignment of Cases; Motion to Reassign Related Cases. A case may be reassigned to another judge within the district upon the Court's own motion, in the interests of justice, for reasons stated in an order of reassignment. A party may file a motion to reassign a case if it is related to another case pending in the district. Cases may be considered related if they meet the requirements of F.R.Civ.P. 42(a), or if a substantial savings of judicial time and resources would result if they were handled by the same judge. The Court will determine a motion to reassign on the basis of whether reassignment is in the interests of justice.

(c) Judge Not Available. If it appears that any matter demands immediate attention and the judge to whom the case has been assigned is not or will not be available, the Clerk—upon request—must determine if another judge is available who will consent to hear the matter.

Copies of this Order shall be affixed to every copy of the Courts' Official Rules Book distributed by the Clerks' Office. Upon the next printing of the Rules Book, all changes in Joint Local Rules as set out in this Order shall be included in the new Rules Book. Copies of this Order shall be made available to the various publishing companies that publish the Joint Local Rules of the Eastern and Western Districts of Kentucky and to the public upon request. The changes noted in this Order shall take effect upon entry of this Order.

IT IS SO ORDERED:

Hon. Joseph M. Hood, Chief Judge
U.S. District Court
Eastern District of Kentucky

Hon. John G. Heyburn, Chief Judge
U.S. District Court
Western District of Kentucky

Hon. Jennifer B. Coffman, Judge
Hon. Thomas B. Russell, Judge
Hon. David L. Bunning, Judge

Hon. Charles L. Simpson, III, Judge
Hon. Danny C. Reeves, Judge
Hon. Gregory F. Van Tatenhove, Judge

Hon. Karen K. Caldwell, Judge
Hon. Joseph H. McKinley, Jr., Judge

Following is a list of **TENTATIVE** upcoming CLE programs. REMEMBER circumstances may arise which result in program changes or cancellations. **You must contact the listed program sponsor** if you have questions regarding specific CLE programs and/or registration. ETHICS credits are included in many of these programs. Some programs may not yet be accredited for CLE credits— please check with the program sponsor or the KBA CLE office for details.

JANUARY

- 23 Strategic Planning for Contingent Fee Law Practices**
Kentucky Academy of Trial Attorneys
- 24 Healthcare & Insurance CLE**
Fayette County Bar Association
- 24 Environmental Law**
Cincinnati Bar Association
- 25-26 New Lawyer Training**
Cincinnati Bar Association
- 30 Mastering PowerPoint - Objectifying the Plaintiff's Case to Overcome Jury Bias**
Kentucky Academy of Trial Attorneys

- 6 Mediation Do's and Don'ts that Every Plaintiff Attorney Should Know**
Kentucky Academy of Trial Attorneys
- 7 Guardian Ad Litem Training Seminar**
Administrative Office of the Courts
- 8 Insurance Coverage Pertinent to Construction Projects**
Kentucky Bar Association - Construction & Public Contract Law Sections
- 8 Electronic Service of Pleadings and Discovery**
Kentucky Academy of Trial Attorneys
- 9 Advanced Estate Planning Institute**
Cincinnati Bar Association
- 14 Women Lawyers Association Lunch Meeting**
Fayette County Bar Association

FEBRUARY

- 1-2 11th Biennial Business Associations Law Institute**
UK CLE

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

AOC Juvenile Services
Lyn Lee Guarnieri • (502) 573-2350

Louisville Bar Association
Lisa Maddox • (502) 569-1361

KYLAP
Anna Columbia • (502) 564-3795

Kentucky Academy of Trial Attorneys (KATA)
Ellen Sykes • (502) 339-8890

Chase College of Law
Jennifer Baker • (859) 572-1461

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

AOC Mediation & Family Court Services
Malissa Carman-Goode • (502) 573-2350

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

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

Northern Kentucky Bar Association
Christine Sevendik • (859) 781-1300

Fayette County Bar Association
Mary Carr • (859) 225-9897

Cincinnati Bar Association
Dimity Orlet • (513) 381-8213

Mediation Center of Kentucky
Tami Bowen • (859) 246-2664

Access to Justice Foundation
Nan Frazer Hanley • (859) 255-9913

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| <p>14 Advertising Law from a Litigation Perspective
<i>Cincinnati Bar Association</i></p> <p>15 Handling Economic Damages in Injury and Wrongful Death Cases
<i>Kentucky Academy of Trial Attorneys</i></p> <p>20 Recent Developments in Class Action Litigation
<i>Kentucky Academy of Trial Attorneys</i></p> <p>21 Labor & Employment Law CLE
<i>Fayette County Bar Association</i></p> <p>21 Workers' Compensation
<i>Cincinnati Bar Association</i></p> <p>21 Domestic Relations Practice Section Meeting
<i>Fayette County Bar Association</i></p> <p>22 The ABC's of Tax Law
<i>Cincinnati Bar Association</i></p> | <p>22 Pre-Suit Discovery, Investigation and Mediation
<i>Kentucky Academy of Trial Attorneys</i></p> <p>28 ERISA Update, After the Sereboff Decision
<i>Kentucky Academy of Trial Attorneys</i></p> <p style="text-align: center;">MARCH</p> <p>1 Environmental Law
<i>Cincinnati Bar Association</i></p> <p>2 Tort & Insurance Practice
<i>Cincinnati Bar Association</i></p> <p>6 Current Perspectives in Medical Causation
<i>Kentucky Academy of Trial Attorneys</i></p> <p>6 FCBA & Kentucky Chapter Federal Bar CLE
<i>Fayette County Bar Association</i></p> | <p>7 Healthcare Law
<i>Cincinnati Bar Association</i></p> <p>7 Guardian Ad Litem Training Seminar
<i>Administrative Office of the Courts</i></p> <p>8 Expert Testimony in Civil Cases - The Future of Daubert & Frye
<i>Kentucky Academy of Trial Attorneys</i></p> <p>9 Domestic Relations Institute
<i>Cincinnati Bar Association</i></p> <p>14 Municipal / Local Government Law
<i>Cincinnati Bar Association</i></p> <p>14 Theming Your Case and Closing to Optimize Damages - Toxic Torts
<i>Administrative Office of the Courts</i></p> <p>16 Construction Law
<i>Cincinnati Bar Association</i></p> |
|--|--|---|

2007 Guardian ad Litem Training Seminars

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June 7, 2007

Danville Conference Center, Danville

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FOUNDATION**

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Those
Helping
Others*



CASA Program for Bullitt County, Inc.

Shepherdsville

The CASA (Court Appointed Special Advocates) Program for Bullitt County is a non-profit organization that recruits, trains and supports volunteers to advocate for children who are in the court system due to parental abuse and neglect. Oftentimes both social workers and Guardians Ad Litem are assigned to numerous cases, and are unable to devote full attention to each individual case to know fully what is happening in the life of the child. This is where the CASA volunteer fills the void. Through their independent interviews and direct observations, the CASA volunteer is able to make a thorough assessment of the child's situation and in turn make recommendations to the judge on what is in the best interest of the child.



CASA volunteers gather information from caseworkers, Guardians Ad Litem, mental health professionals, agencies providing in-home services to the family, teachers, counselors, foster families, relative placements, other family members and, most importantly, the child. It is through this collaborative effort that CASA volunteers are able to form a better understanding of the life circumstances of each child and his or her family. The CASA volunteer prepares a court report for the judge. The main focus is to advocate for the safety of the child and for the child to be placed in a safe, permanent environment as quickly as possible where the child can thrive. The CASA volunteer monitors the case throughout its duration to ensure the safety and well being of the child.

The CASA Program for Bullitt County received grant funding in the amount of \$5,000 in June of 2006 from the Kentucky Bar Foundation and, as a result, this program trained nine new CASA volunteers during October and November. The new CASA volunteer training consists of educational speakers from various professions that relate to the work of a CASA volunteer and the court system. Since the CASA volunteer interacts with all parties involved in the case, as part of the training the volunteer is educated on the roles of all the diverse parties they will be working with. Currently there are 17 volunteers with cases serving 39 children. It is anticipated that the nine new CASA volunteers will be appointed to cases over the next few months. The Kentucky Bar Foundation grant was also the funding source for in-service training for the 17 current CASA volunteers.

The Kentucky Bar Foundation's support is helping to make a difference in the lives of those served by the CASA Program for Bullitt County.

Family Nurturing Center

Florence

The Kentucky Bar Foundation awarded a grant of \$10,000 to the Family Nurturing Center in Florence to support its VISITS program, which provides supervised visitation services to children and families in the Northern Kentucky region.



school performance. They may be more likely to struggle with drug and alcohol abuse, teen pregnancy and juvenile delinquency. The majority of families are referred by local court systems and attorneys. Reasons for referral include but are not limited to: divorce or separation decrees where there is a concern about a parent's ability to provide for the safety and well-being of a child; allegations of abuse and neglect; assistance with reunification after a prolonged absence of a non-custodial parent; recommendations from a custody evaluator; and active substance abuse or severe mental illness on the part of the non-custodial parent. While the vast majority of adults served are parents, the program has facilitated court ordered visitation with grandparents or other non-custodial relatives.

The VISITS program enhances the image of the legal system and helps to build trust in the system. If the court orders that visitation be supervised, but has no resources to offer, frustration with the courts and "the system" in general builds. Clients feel that they are in a "no-win" situation if they are mandated to a program that lacks the resources to help them. Clients are left with the choice of either violating a court order or not having access to their children.

The program promotes the administration of justice by supporting the rights of children to have safe relationships with both parents and by supporting the rights of non-custodial parents to have access to their children. Without this program, a child's physical and emotional well-being is jeopardized. The program, therefore, provides a critical resource to the courts and the legal profession.

Without the support of the Kentucky Bar Foundation, the availability of supervised visitation services would be compromised for hundreds of Northern Kentucky's most vulnerable families. ■

The Family Nurturing Center is a not-for-profit organization dedicated to ending the cycle of child abuse. It was the first non-profit organization in Northern Kentucky to provide supervised visitation services, when the organization received a federal access and visitation grant in 1998. Increases in funding from the state allowed the program to grow significantly in 2004, making it the largest program of its kind in the area. This was then jeopardized when changes in funding threatened to close this much needed program. Support from the Kentucky Bar Foundation, along with the help of the Robert M. Butler Memorial Foundation and The Spaulding Foundation, has allowed the Family Nurturing Center to continue to provide this vital resource in the Northern Kentucky region.

Supervised visitation and access services are designed to promote children's rights to a healthy relationship with one or more parents. The program provides a safe environment under the supervision of qualified staff and volunteers for visiting with non-residential parents. The philosophy of the VISITS program is that children have a right and a need to healthy relationships with both parents. Sometimes abuse, mental illness, unexplained absences, hostile divorces, and substance abuse lead to great difficulty in building healthy bonds. Studies show that children who are missing key relationships with parents often suffer in the areas of self-esteem and

Yes! I wish to invest in my Bar Foundation as a Fellow.

- Enclosed is my check for \$1,250 representing full payment of my Life Fellow Membership.
- Enclosed is my check for \$300 and I pledge to pay \$300 annually for the next four years, for a total contribution of \$1,500.

Name: _____

Address: _____

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Questions? Call the Foundation at 800-874-6582 or 502-564-3795.

Kentucky Bar Foundation, 514 W. Main Street, Frankfort, KY 40601-1883

Note: KBF is an IRC Section 501(c)(3) organization.

Contributions are tax-deductible to the full extent of the law.

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January 9	Estate Planning in Prenuptial Agreements
January 11	Quarterly Estate and Gift Planning Update
January 16	Choice of Entity for Small & Medium Size Business, Part 1
January 17	Choice of Entity for Small & Medium Size Business, Part 2
January 23	UCC Issues in Real Estate Transactions
January 30	Corporate Governance for Family Businesses
February 6	Your Largest Asset: An Estate Planning Guide to Your Personal Residence
February 13	Uses of Life Insurance in Business Planning
February 20	ADR in Estate Planning Disputes
February 22	Choice of Entity for Nonprofits
February 27	Ethical Issues in ADR

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Salmon P. Chase College of Law

Looking Back: the Legacy of the Dred Scott Decision

The *Northern Kentucky Law Review* will host its spring symposium, "Looking Back: the Legacy of the *Dred Scott* Decision," on Friday morning, March 2, 2007. No case that the Supreme Court of the United States has ever decided has had a greater effect on American law, history, society, and race relations than its 1856 decision in *Dred Scott v. Sandford*. This decision, denying citizenship to African-Americans and overruling the exclusion of slavery from

the free territories, was a major cause of the Civil War, and its consequences did not end there. The symposium will look back at the legacy of this important case over the time that has passed up to the present day along legal, historical, political, and social dimensions. It is being co-hosted with the National Underground Railroad Freedom Center in Cincinnati and will be held at the Freedom Center's Harriet Tubman Theater.

Five panelists will be featured, including Dr. Roberta Alexander, former professor and director of the Prelaw Program at the University of Dayton; Professor Mark Graber of the University of Maryland School of Law; the Honorable Nathaniel Jones, former judge, United States Court of Appeals

for the Sixth Circuit; Chase adjunct professor David Singleton, executive director of the Ohio Justice and Policy Center; and Chase professor John Valauri, symposium advisor. Each panelist will focus on a different aspect of the *Dred Scott* decision.

Judge Jones will discuss the case in general, and historical and contemporary implications. Dr. Alexander will discuss historical implications on politics at the time of the decision, and Singleton will discuss the contemporary problems with the Cincinnati school system. Professors Graber and Valauri will focus on constitutional interpretations.

Faith C. Isenath is the spring symposium editor for the *Northern Kentucky Law Review*. She can be reached at isenathf1@nku.edu.

Northern Kentucky Bar Foundation

The Northern Kentucky Bar Foundation (NKBF) has generously offered six scholarships to various law students from Salmon P. Chase College of Law, the University of Kentucky College of Law and the University of Louisville Louis D. Brandeis School of Law. The scholarship programs the NKBF offers annually are the Judge Judy West Scholarship, the A.J. Jolly Scholarship and the Minority Bar Exam Scholarship. The Judge Judy West Scholarship was established in 1991 to honor the late Judge Judy M. West, an outstanding jurist and individual, and the first woman appellate judge in the Commonwealth of Kentucky. This fund provides a \$1000 award to a female law student from Salmon P. Chase College of Law entering her last year of school. Special consideration is given to a non-traditional or returning student. The recipient must be a Kentucky resident who has demonstrated high academic achievement and who, in the judgment of the Women Lawyers Section of the Northern Kentucky Bar Association, best exemplifies the characteristics and attributes of Judge Judy M. West. The A.J. Jolly scholarship awards \$500 to a first-year law student from Salmon P. Chase

College of Law, the University of Kentucky College of Law and the University of Louisville Louis D. Brandeis School of Law. The recipients must have graduated from a Northern Kentucky High School (Boone, Kenton, Campbell, Pendleton, Grant, Gallatin, Carroll or Owen County) and possess the highest GPA of all applicants. The Minority Bar Exam Scholarship is endowed to assist a final-year minority law student with his or her bar exam expenses, which may be applied toward any/all bar exam related expenses, including pre-test training and/or additional expenses incurred while preparing to take the bar exam. This award increased to \$1000 this year. The 2006 recipients for each scholarship were as follows: Virginia Riggs from Chase College of Law (Judge Judy West Scholarship), Christopher Cole from Chase College of Law (A.J. Jolly Scholarship), Joshua Hitch from UK College of Law (A.J. Jolly Scholarship), Clair Parsons from U of L Brandeis School of Law and Kenyatte Mickels from Chase College of Law (Minority Bar Exam Scholarship). For more information about the scholarship programs, please contact Christine Sevindik at christine@nkybar.com.

In Memoriam

Stuart E. Alexander, Jr.	Louisville
Foster J. Collis	Lexington
Leon M. Eichenholz	Sebastopol, CA
Anne Marie Mielech	Southgate
Lora Salee Morris	Louisville
Jane Frances Murray	Hazard
Alfred C. Oliver	Prospect
Peggy Butler Sturgill	Lexington
Mark Bradley Terry	Irvine
Henry Triplett	Louisville
Marlin M. Volz	Davenport, IA
John E. Wise	Louisville

Small Firm Practice Section Undergoes Facelift

After being dormant for several years, the Small Firm Practice Section now has a new lease on life. L. W. Myers has become Interim Chair and Andrew Friedman has become Vice Chairman.

Pending approval by the Board of Governors, the Section has adopted By-laws changing its name to the **Small Firm Practice and Management Section**. The Section provides a forum for the exchange of ideas among solo and small firm practitioners in Kentucky; informs its members about current relevant issues concerning solo and small firm practice and management; and helps solo and small firm practitioners with their practice and office management. The new By-laws also provide:

- The term of office for the officers of the Section will be increased from one year to two years to provide continuity.
- A departing officer will be replaced by a vote of the Members.
- The title of "Vice Chairman" will also be the "Secretary."
- Meetings will be held two times per year.

- Members may attend Section meetings via telephone.

The Section has established committees consisting of the following persons:
CLE Events Committee

Tom Blackburn, Chairman
Sandy Varellas
Jim Thompson

Publications/Newsletter/ListServ Committee

Melissa McQueen, Chairman
Jim Thompson
John Arnett

Client Relations Committee

Steve Bolton, Chairman
Jim Thompson

As with most Sections of the KBA, membership is open to all KBA members. For more information or to join:

Contact **Lori Alvey**
(502) 564-3795 ext. 253
(lalvey@kybar.org)

L. W. Myers
(859) 492-9945
(larryw@insightbb.com).

Kentucky Sheriff's Association

Colonel John Aubrey, President-Elect

As a result of an amendment to KRS 64.090(2) by the 2006 General Assembly, the Sheriff's Fee for executing and returning civil process will be forty dollars (\$40.00), effective January 1, 2007.

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 St., Frankfort,
KY 40601*

*There is a \$10 fee per
photograph appearing with
announcements.*

*Paid professional announce-
ments 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 February 1st.*

Before You Move...

Over 14,000 attorneys are licensed to practice in the state of Kentucky. It is vitally important that you keep the Kentucky Bar Association (KBA) informed of your correct mailing address. Pursuant to rule SCR 3.175, all KBA members must maintain a current address at which he or she may be communicated, as well as a physical address if your mailing address is a Post Office address. If you move, you must notify the Executive Director of the KBA **within 30 days**. All roster changes must be in writing and must include your 5-digit KBA member identification number. There are several ways to do this for your convenience.

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

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

FAX the Address Change/Update Form obtained from our website or other written notification to:

Executive Director/Membership Department
(502) 564-3225

MAIL the Address Change/Update Form obtained from our website or other written notification to:

Kentucky Bar Association
Executive Director
514 W. Main St.
Frankfort, KY 40601-1883

* 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.

BOARD OF GOVERNORS

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING SEPTEMBER 15, 2006

The Board of Governors met on Friday, September 15, 2006. Officers and Bar Governors in attendance were *President R. Ewald, President-Elect J. Dyche, Vice President B. Bonar, Immediate Past President D. Sloan, Young Lawyers Section Chair A. Schaeffer, Bar Governors 1st District M. Whitlow, D. Myers; 2nd District – C. Moore, J. Harris, Jr., 3rd District – R. Madden, M. McGhee, 4th District – M. O'Connell, J. White; 5th District – D. McSwain; F. Fugazzi, Jr., 6th District – M. Grubbs, T. Rouse and 7th District – J. Rosenberg, W. Wilhoit*

In Executive Session, the Board considered six (6) discipline cases, involving two lawyers, two (2) default discipline cases and two (2) reinstatement cases. Robert Coleman of Paducah, Steve Langford of Louisville and Mickey McCoy of Inez, 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:

To KBA Members
Do you have a matter to discuss
with the KBA's Board of
Governors?
Board meetings are
scheduled on
March 23-24, 2007
May 18-19, 2007
To schedule a time on the
Board's agenda
at one of these meetings,
please contact
Bruce Davis or
Melissa Blackwell
at (502) 564-3795.

Heard status reports from the Client Assistance Program (CAP), Kentucky Lawyer Assistance Program (KYLAP), Office of Bar Counsel and Rules Committee.

A. J. Schaeffer, Chair of the Young Lawyers Section, reported that the section plans to partner with the Access to Justice Foundation to enhance pro bono efforts among young lawyers. The section continues its public service efforts with the "Wills for Heroes" program as well as its affiliation with the ABA.

Lori Dearfield with Kelley, Galloway & Company, P.S.C. presented the Fiscal Year June 30, 2006 Audit Report.

Bar Governor John Rosenberg presented the first report of the Kentucky Pro Bono Development Project. The Project's new theme is "Change the World in 50 hours – The Kentucky Volunteer Lawyer Program.

President Ewald reported that the Executive Director Search Committee met on September 14. The job

announcement was mailed to the KBA Membership on August 28, advertised in the *Bench & Bar* magazine as well as through a job announcements service of the ABA Division for Bar Services.

President Ewald reported that as of September 15, 2006 the Kentucky Bar Foundation has received more than \$100,000 as a result of the voluntary sustainer contribution on the KBA Annual Dues statement. The sustainer contribution total last year was just over \$28,000.

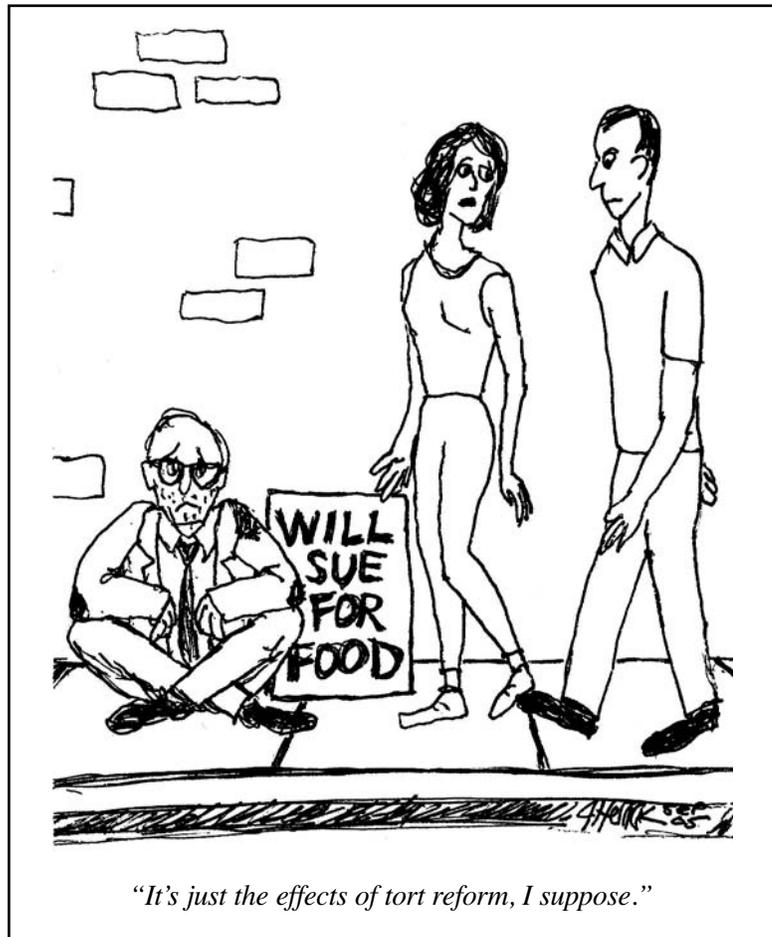
Approved a policy for the appointment of a Special Deputy Bar Counsel.

Mr. Davis reported there was a loss of \$15,062.87 for the 2006 Annual Convention in Covington.

Approved the total reserve/surplus carry forward for 22 sections in the amount of \$213,822.10.

A copy of the CLE Commission Annual Report that is filed with the Supreme Court was distributed to the Board of Governors.

Legally Insane by Jim Herrick



"It's just the effects of tort reform, I suppose."

WHO, WHAT, WHEN & WHERE

ON THE MOVE

Stoll Keenon Ogden PLLC is pleased to announce attorney **Olu A. Stevens** is now a member of the firm and that attorneys **Jeffrey A. Calabrese**, **Amy Olive Wheeler**, **Allison J. Donovan** and **Laura Katherine Tzanetos** are now practicing law with the firm. Stevens concentrates in the areas of domestic, tort and insurance litigation. Prior to his work at Stoll Keenon Ogden, he spent ten years as a solo practitioner and also served as a prosecutor with the Jefferson County Attorney's Office. He received his B.A. from Morehouse College and earned his J.D. from George Washington Law School. Calabrese concentrates his practice in labor and employment law and commercial litigation. Before joining the firm, he practiced law with Baker Donelson Bearman, Caldwell & Berkowitz, PC and clerked for the Hon. Karon O. Bowdre, U.S. District Judge for the Northern District of Alabama. Wheeler is a 2005 graduate of Vanderbilt University Law School and practices in the areas of commercial litigation and bankruptcy. Prior to joining the firm, she clerked for Associate Justice William S. Cooper at the Kentucky Supreme Court. Donovan is a 2006 graduate of the University of Kentucky College of Law



Olu A. Stevens



Jeffrey A. Calabrese



Amy O. Wheeler



Allison J. Donovan



Laura K. Tzanetos

and practices in the area of business entities and transactions. Tzanetos is also a 2006 graduate of the University of Kentucky College of Law and focuses her practice in the areas of corporate finance and lending, real estate finance and development, and business entities and transactions. In 2005, she earned her Masters in Diplomacy with a concentration in international law from the University of Kentucky.

Wyatt, Tarrant & Combs, LLP is pleased to announce that **Daniel E. Hitchcock** has joined the firm as counsel in the Lexington office and that **Carl Horneman** is rejoining the firm in the Louisville office.

Hitchcock is a member of the firm's Bankruptcy & Creditors' Rights Practice Group. He received his B.A. from the University of South Florida and earned his J.D. in 1996 from the University of Louisville Brandeis School of Law. Hitchcock is licensed to practice law in Kentucky and Florida. Horneman, former senior counsel, environmental law, for GE Consumer & Industrial, has joined the firm's Environmental Practice Group. Prior to the past fifteen years at GE, he was an attorney at Wyatt, a clerk for the chief judge of the United States Court of Appeals for the Sixth Circuit, and manager of the enforcement branch of the Kentucky Division of Waste Management.



Daniel E. Hitchcock



Carl Horneman

The Louisville law firm of **O'Bryan, Brown & Toner, PLLC** is pleased to announce that **Joshua W. Davis**, **Melissa F. Calabrese** and **Katherine K. Vesely** have joined the firm as associate attorneys. Davis received his B.A. from Centre College in 2001 and earned his J.D. from the University of Louisville Brandeis School of Law in 2004. He is

licensed to practice law in Kentucky and Indiana. His primary practice areas include insurance defense litigation cases involving matters of medical malpractice, negligence and tort claims, product liability, workers' compensation, and insurance coverage. Calabrese received her B.A. from the University of Louisville, *magna cum laude*, in 2000 and earned her J.D. from the University of Georgia at Athens in 2003. She is licensed to practice law in Kentucky and Alabama and will concentrate her practice in the area of insurance defense litigation, including matters of medical malpractice, negligence and tort claims, product liability, and insurance coverage. Vesely received her B.A., *magna cum laude*, from Mercer College in 1995 and earned her M.A. from Vanderbilt University in 1997. After serving with the Peace Corps in Poland from 1998-2000, she returned to the U.S. and earned her J.D., *cum laude*, from the University of Louisville Brandeis School of Law in 2006. Her primary practice area is insurance defense litigation with emphasis on medical malpractice, product liability, negligence and tort claims, and insurance coverage.

The Louisville law firm of **Diana L. Skaggs & Associates** is pleased to announce **Sarah Jost Nielsen** has joined the firm as an associate. Nielsen is a 2002 *cum laude* graduate of St. Louis University



Joshua W. Davis



Melissa F. Calabrese



Katherine K. Vesely



Sara J. Nielsen

WHO, WHAT, WHEN & WHERE

School of Law. The firm will continue to limit its practice to the areas of divorce and family law.

Greenebaum Doll & McDonald PLLC is pleased to announce that **Gary T. Banet**, **Kevin T. Duncan**, **Matthew A. Stinnett** and **Timothy J. Weatherholt** have

joined the firm. Banet and Weatherholt are practicing in the firm's Louisville office. Duncan is a resident in the firm's Louisville and Washington, D.C. offices. Stinnett is practicing in the firm's Lexington office.

Banet holds an undergraduate degree from Indiana University and is a graduate of the University of Louisville Brandeis School of Law. He has joined the firm's Estate Planning, Health and Insurance Practice Group. Duncan earned his B.M.C.S., M.E.E. and J.D. degrees from the University of Louisville. He is admitted to practice law in Kentucky,

Indiana and Virginia. Duncan has joined the firm's Intellectual Property Team and will lead the team's patent litigation area of practice. Stinnett received his undergraduate degree from Transylvania University and is a graduate of Salmon P. Chase College of Law. He has joined the firm's Litigation and Dispute Resolution Practice Group. Weatherholt received his undergraduate degree from Transylvania University and earned his law degree from Vanderbilt Law School. He has joined the firm's Labor and Employment Practice Group.



Gary T. Banet



Kevin T. Duncan



Matthew A. Stinnett



Timothy J. Weatherholt

Dinsmore & Shohl LLP has hired **Aaron R. Esmailzadeh** and **Alexander "Alec" J. Moeser**. Esmailzadeh received his B.A. from Brown University in 1999 and earned his J.D., *cum laude*, from the University of Louisville Brandeis School of Law in 2006. Moeser received his B.A. from Stanford University in 2001 and earned his J.D. from the University of Kentucky College of Law in 2005. Esmailzadeh and Moeser both practice at the Cincinnati office in the Litigation Department.



Aaron R. Esmailzadeh



Alexander J. Moeser

Woodward, Hobson & Fulton, LLP has announced that **Daniel P. Cherry** has joined the firm in its Louisville office. Cherry's primary areas of practice include litigation management, construction law, bankruptcy litigation, appellate practice and Uniform Commercial Code Articles 2, 3 and 4.



Daniel P. Cherry

The Louisville law firm of **Middleton Reutlinger** is pleased to announce that **Alexander Brackett** has been named a director. He graduated from the University of Delaware and received his M.B.A. from Xavier University. Brackett earned his J.D. from Salmon P. Chase College of Law. He is a registered patent attorney and is admitted to practice in Kentucky and Ohio. He practices in the firm's Intellectual Property Group, focusing on patent law and patent prosecution.



Alexander Brackett

Thompson Miller & Simpson is pleased to announce that **Cherene Fannin** has accepted an associate position with the firm in Louisville. Fannin, a 1995 graduate of Centre College, obtained a bachelor's degree in Health Science/Physician Assistant Studies from the University of Kentucky in 1999 and worked as a P.A. for three years. She graduated from the University of Dayton School of Law in 2006 and is licensed to practice law in Kentucky.



Cherene Fannin

The Frankfort law firm of **Hazelrigg & Cox** is pleased to announce that **J. Scott Mello** has joined the firm as a partner and **Sarah K. Mello** has joined the firm as an associate. Scott Mello, a 1968 graduate of the State University of New York, obtained his J.D. from the University of Louisville in 1999. He has twenty-two years experience with the Kentucky Natural Resources Cabinet and will continue to concentrate his practice in environmental law, domestic relations law, administrative law, and civil litigation. Sarah Mello, a 2001 graduate of the University of Kentucky, obtained her J.D. from the U.K. College of Law in 2006. She will concentrate her practice in contract law, administrative law, and domestic relations law.

Turner Keal & Dallas, PLLC is pleased to announce that **R. Allen Button** and **James M. Burd** have joined the firm as partners. Button's area of practice is in civil defense litigation in state and federal courts. He is a 1973 graduate of the University of Kentucky and a 1975 graduate of the U.K. College of Law. Burd practices in the area of insurance defense litigation involving medical malpractice, long-term care, automobile liability, employment and civil rights. He is a 1989 graduate of Auburn University and a 1992 graduate of the U.L. Brandeis School of Law.

W. Banks Hudson announces that his son, **Joshua J. Hudson**, has joined him

WHO, WHAT, WHEN & WHERE

in practice and the two have formed **Hudson & Hudson, PLLC**. The office will remain at 102 South Fourth Street in Danville on the second floor of the Kentucky Federal Savings Bank Building. The firm will engage in the general practice of law. Joshua Hudson received his B.A. from Wofford College in South Carolina in 2001 and earned his J.D. from Salmon P. Chase College of Law in 2006.

Commonwealth's Attorney, Karen M. Davis, is pleased to announce the addition of **Kathryn M. Thomas** as an Assistant

Commonwealth's Attorney for the 43rd Judicial District, which encompasses both Barren and Metcalfe Counties. Thomas received her B.A. from Western Kentucky University in 1999 and earned her J.D. from the University of Louisville Brandeis School of Law in 2003.



Kathryn M. Thomas

The Cincinnati law firm of **Wood & Lamping, LLP** is pleased to announce that **Elizabeth A. Horwitz** has joined its Business Practice Group. Horwitz has over twenty years of experience representing businesses of all types and sizes.

Weltman, Weinberg & Reis Co., LPA welcomes **Andrew J. Sonderman**, Of Counsel, to the Columbus office. Sonderman received his B.A., *summa cum laude*, from Kent State University in 1973 and earned his J.D. with highest honors in 1976 from the Ohio State University Moritz College of Law, Order of the Coif. He is licensed in the state courts of Kentucky and Ohio and has joined the firm's Litigation & Defense Department.

The Louisville law firm of **Theodore L. Mussler, Jr. & Associates** is pleased to announce that **David Bryce Barber** has joined the firm as an associate attorney. Barber received his M.A. from the University of Illinois and earned his J.D.

from the University of Louisville Brandeis School of Law. His primary areas of practice include personal injury, employment, and insurance law.



David B. Barber

The Bowling Green law firm of **Bell, Orr, Ayers & Moore, PSC** is pleased to announce the association of **T. Brian Lowder** with the firm. Lowder graduated from Western Kentucky University in 2003 and earned his J.D. from the University of Louisville Brandeis School of Law in 2006. He focuses his practice in banking, commercial and business litigation, corporate, criminal, and real estate.

Mark L. Miller announces that he is entering the private practice of law after retiring as the commissioner of the Kentucky State Police. Miller's practice is located in Louisville at 600 West Main Street in Suite 300. His telephone number is (502) 589-6190. He is also a Lieutenant Colonel in the U.S. Army Reserve, Judge Advocate General Corps.



Mark L. Miller

Adam Redden has joined **Eric C. Deters & Associates** in Independence as an associate. Redden is a graduate of the University of Louisville Brandeis School of Law and is licensed to practice law in Kentucky.

The Prospect law firm of **Turner Keal & Dallas, PLLC** is pleased to announce that **R. Allen Button** and **James M. Burd** have joined the firm as partners. Button graduated from the University of Kentucky in 1973 and earned his J.D. from the U.K. College of Law in 1975. His area of practice is in civil defense litigation in state and federal courts. Burd graduated from Auburn University in 1989 and earned his J.D. from the University of Louisville Brandeis School of Law in 1992. His

area of practice is in insurance defense litigation involving medical malpractice, long-term care, automobile liability, employment, and civil rights.

The **Zoppoth Law Firm** in Louisville is pleased to announce that **Christina M. Caravello** has joined the firm as an associate with Scott P. Zoppoth and Bryan M. Cassis. She graduated, *cum laude*, from the University of Kentucky and earned her J.D. from Salmon P. Chase College of Law in 2005. Caravello will concentrate her practice in the areas of commercial and business litigation.

IN THE NEWS

C.A. "Woody" Woodall, III was elected Circuit Judge of the 56th Judicial District (Caldwell, Livingston, Lyon and Trigg Counties) in an unopposed election November 7, 2006.

Wyatt, Tarrant & Combs, LLP is pleased to announce that **Kathie McDonald-McClure** has been elected to the board of directors of the Health Enterprises Network Louisville, a non-profit economic development network focused on the region's health-related business. McDonald-McClure is a member of the firm's Health Care Practice Group. She also advises clients in insurance coverage and risk management plans.

Greenebaum Doll & McDonald PLLC has announced that **Jeffrey A. McKenzie**, member-in-charge of the firm's Louisville office, has been named chairman and chief executive officer of the firm. McKenzie joined Greenebaum in



Jeffrey A. McKenzie

1986. In addition to his new role as chairman and CEO, he is the chair of the firm's Economic Development and Incentives Team, where he concentrates his practice in business law, economic development, corporate law, real estate development and finance, commercial lending, and construction.

WHO, WHAT, WHEN & WHERE

Major General **Richard L. Frymire** was enshrined in the Kentucky Aviation Hall of Fame in October of 2006. The Kentucky Aviation Hall of Fame is part of the Aviation Museum of Kentucky at Bluegrass Field in Lexington. General Frymire had a thirty-one year military career. He served as a Marine aviator, then after active duty joined the Air National Guard in 1956. After graduating from the University of Kentucky College of Law, he settled in Madisonville in 1959.



Richard L. Frymire

Assistant United States Attorney **Jo E. Lawless** received an award for superior performance in October 2006 from the Department of Justice at its 23rd annual Executive Office for United States Attorneys Director's Awards Ceremony. Attorney General Alberto R. Gonzales said, "The award recipients were honored for their extraordinary commitment to protecting our communities, promoting justice and preserving the civil liberties that make our country so great."

Woodward, Hobson & Fulton, LLP has announced that its managing partner, **Donna King Perry**, was recognized by the Business and Professional Women of River City as the 2006 *Woman of Achievement* at its annual banquet during National Business Women's Week in October of 2006.



Donna King Perry

Woodward, Hobson & Fulton, LLP has also announced that **Richard H.C. Clay**, a partner in its Louisville office, has been elected chair of the J.B. Speed Art Museum Board of



Richard H. C. Clay

Governors. A former Kentucky Bar Association President, Clay practices in the areas of complex litigation, pharmaceutical and medical device litigation, appellate practice and administrative law.

Frost Brown Todd members, **Greg E. Mitchell** and **Susan Grogan Faller**, were featured speakers in Beijing, China at MULTILAW's Annual Meeting hosted by Jun He Law Offices. Mitchell presented, "The Challenges for China as an Exporter – the U.S. Perspective," and Faller presented "Advertising in China."



Greg E. Mitchell



Susan G. Faller

The Kentucky Registry of Election Finance unanimously re-elected **John Rogers**, a Glasgow attorney, to serve a fifth consecutive term as chair, and unanimously re-elected **Craig C. Dilger**, a Louisville attorney, to serve a second consecutive term as vice-chair. They serve are serving a one-year term as officers that commenced October 27, 2006.

Philip C. Eschels, an attorney practicing in the Louisville office of Greenebaum Doll & McDonald, has been elected president of the Actors Theatre of Louisville Board of Directors. In addition, his article entitled "Effective Post-Trial Motion Practice in Employment Cases" was published in the *Practical Litigator*.

John S. Lueken, a member in Greenebaum Doll & McDonald's Louisville office, has been elected as a Fellow of the American College of Trust and Estate Counsel. Lueken's practice areas focus on estate and trust planning and administra-



John S. Lueken

tion, as well as charitable and family-owned business planning.

Stoll Keenon Ogden PLLC is pleased to announce that attorneys **Thomas E. Rutledge** and **Laura H. Pulliam** were both contributors to the "Model Limited Liability Company Membership Interest Redemption Agreement," which was published in the May 2006 issue of the *Business Lawyer*, the journal for the ABA Section of Business Law. Rutledge was also the co-chair of the drafting committee and the reporter for the agreement.



Thomas E. Rutledge



Laura H. Pulliam

RELOCATIONS

Bradley Pruitt has been appointed vice-president, legal at RehabCare Group, Inc., a national health care company providing rehabilitation program management services and operating free-standing rehabilitation hospitals and long-term acute care hospitals. Pruitt will be located in the corporate headquarters in St. Louis, Missouri.

Steven L. Snyder has accepted the position of counsel in GE – Aviation's Litigation and Preventive Law Department. Snyder is located at the GE – Aviation facility in Evendale, Ohio. His previous position was as a partner with Wyatt, Tarrant & Combs, LLP in Louisville, where he worked for thirteen years.



Steven L. Snyder

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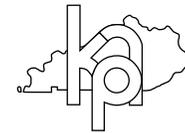
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