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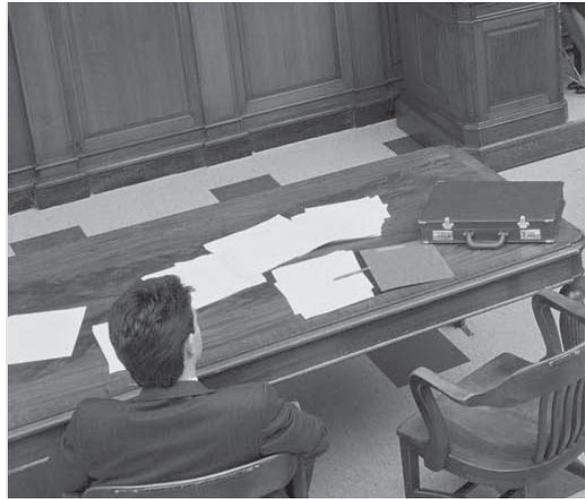
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Welcome Jim Deckard



Robert C. Ewald

If you have not heard already, in January the Kentucky Bar Association Board of Governors extended an offer to Jim Deckard to become the Execu-

tive Director of the KBA. Jim accepted our offer and undertakes a substantial task, inheriting the reins from Bruce Davis who has directed our programs for twenty-four years.

One of my first acts as KBA President last July was to appoint a search committee to begin the process of finding a successor to Bruce. He gave us substantial notice of his retirement, so we could carefully find the best person for the job.

I take this opportunity to explain the process involved in making this selection. A search committee of twelve individuals was appointed that included current members of the Board, two past presidents, several attorneys who are active in the KBA but are not Board members, and Chief Justice Lambert as a representative of the Supreme Court.

Contrary to some misinformed reporting in the press, Chief Justice Lambert did not force himself on the committee. In fact, he did not even request to be on the committee. I felt it was appropriate for a representative of the Supreme Court to serve on the search committee and asked Chief Justice Lambert if he would serve.

The search committee advertised nationally and received twenty-nine applications. There were a number of outstanding applicants, including

individuals who had directed bar associations in other states. The narrowing process consisted of meetings over seven different days. We owe a debt of gratitude to those dedicated members who came from as far away as Ashland and Paducah to attend the meetings on so many occasions.

The committee was asked by the Board of Governors to submit a list of three recommended candidates for the job. After background checks and contacts with references of all the applicants, we interviewed seven of the applicants. Secret ballots were taken, and a list of three candidates was submitted to the Board of Governors.

The Board of Governors had a very difficult decision, given the fine qualifications of the three individuals proposed by the search committee. Again, after very careful consideration, Jim Deckard was selected as the unanimous choice, and Jim accepted our offer.

Jim has a degree in Business Administration from Western Kentucky University and earned his J.D. degree in 1994 from the Cecil C. Humphreys School of Law at the University of Memphis, where he was a member of the *Law Review*. After graduation, Jim served as a law clerk to Chief Justice Lambert before entering into private practice in Nashville. From 1998 to 2005,

he served as Chief of Staff and Counsel in the office of Chief Justice Lambert. He then took the job as General Counsel in the Office of the Governor in 2005.

Jim's background with the Supreme Court, in private practice, and in the Governor's office after the indictments were handed up, speak worlds for his qualifications for the job of KBA Executive Director. In a pressure packed, emotional situation, as General Counsel to the Governor, Jim earned respect from the participants on both sides of the controversy as being an able and honorable representative of his client. His skills as an attorney and

an administrator will serve him and the KBA well in the coming years.

Jim grew up in rural Kentucky and was the first in his family to go to college. His first contact with the legal profession was when he mowed the lawn for a member of the bar in Tompkinsville. Through his talks with that lawyer, Jim became interested in law at an early age. That interest

led him to be a courthouse watcher, where he became intensely interested in local trials, and ultimately he joined our profession.

Jim lives in Frankfort with his wife, Mandy, and two children, Levy, age 4, and Henry, age 2. We are fortunate to have someone of Jim's character and experience guiding our organization. ■



Jim Deckard

WHAT DOES IT MEAN TO RETALIATE?

The Supreme Court Broadens the Scope of Retaliation Claims under Title VII

By Cynthia Blevins Doll

At the close of its 2005-2006 term, the U.S. Supreme Court issued an opinion that will alter the legal landscape for employers facing claims of retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* Introducing a standard of proof that in most circuits will be new and unfamiliar, the Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), chose a less exacting test that may result in more retaliation claims going to a jury.

Title VII bars employers from discriminating against employees with respect to the terms and conditions of employment.¹ Courts have uniformly held that this general provision of Title VII prohibiting discrimination in employment requires an employee to prove that he or she suffered an adverse employment action in order to prevail. Adverse employment actions would include, for example, hiring, firing, demotion, promotion and changes in pay. A separate section of the Act prohibits retaliation.² That section states only that “[i]t shall be an unlawful employment practice for an employer to discriminate against [an employee] because he has opposed a practice made unlawful by this subchapter” or because he filed a charge or participated in an investigation.³

Before *White*, the federal courts of appeal were divided about what an employee must show to succeed on a claim of retaliation. Three divergent views had emerged. One approach concluded that courts should read the dis-

crimination provision and the anti-retaliation section congruently. Those courts, including the Third, Fourth and Sixth Circuits, held that the alleged retaliatory action must “result in an adverse effect on the terms, conditions or benefits of employment.”⁴ The Supreme Court’s *White* case originated in the Sixth Circuit, and both the District Court and the Court of Appeals in *White* applied a variant of this test that requires a “materially adverse employment action.”

A more restrictive standard had developed in the Fifth and Eighth Circuits. Those courts adhered to an “ultimate decision” standard, which held that only acts such as “hiring, granting leave, discharging, promoting and compensation” will support a retaliation claim.⁵

The last and least restrictive approach was one followed in the Seventh and District of Columbia Circuits. Those courts required the plaintiff to show only that the “‘employer’s challenged action would have been material to a reasonable employee,’ which . . . means that it would likely have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”⁶ No ultimate employment action was necessary, according to this view. The Supreme Court in *White* rejected the two more demanding proof standards and adopted the Seventh Circuit’s more liberal test.

The *White* case emerged in the context of a woman working in a traditionally male environment. Sheila White was the only female employee in the Maintenance of Way department of Burlington Northern’s Tennessee train yard. White’s title

was “track laborer,” a job that entailed cleaning the right-of-way. The track laborer position required strenuous physical labor in the hot sun. Soon after White began that job, a forklift operator left, and White took over the responsibility of operating the forklift. Although her title still was track laborer, driving the forklift became White’s primary responsibility.

A few months after starting with Burlington, White complained to company officials that her supervisor had repeatedly declared that women should not be working in the Maintenance of Way department. After an investigation, Burlington suspended the supervisor for ten days and directed him to attend a sexual harassment training session. At the same time, however, a different manager removed White’s forklift operating responsibilities because her male coworkers had complained that a “‘more senior man’” should have that job.⁷ White filed a complaint of discrimination and retaliation with the EEOC.

A few days later, White and her immediate supervisor exchanged words over who should ride in a truck with a foreman. The supervisor reported to upper management that White had been insubordinate. As a result, the company suspended her without pay. White and her union filed a grievance, which went to a hearing. The hearing officer (a Burlington Northern manager) concluded that White had *not* been insubordinate and awarded her full back pay for the 37 days she was suspended. White filed another retaliation charge and later sued Burlington in federal court.

Cynthia Blevins Doll

is co-chair of the Labor & Employment Practice Group at Wyatt, Tarrant & Combs and works in the firm's Louisville office. She concentrates her practice in the areas of employment discrimination and employment-related torts, asbestos litigation and general commercial litigation. Before joining the firm in 1993, Ms. Doll was a law clerk to the Hon. Alan E. Norris, U.S. Court of Appeals for the Sixth Circuit. She received her B.A., *summa cum laude*, in 1988 from Bellarmine College and earned her J.D., *summa cum laude*, and graduated valedictorian in 1992 from the University of Louisville, where she was editor-in-chief of the University of Louisville's law review, the *Journal of Family Law*.



After a trial, a jury found against White on her sex discrimination claim but sided with her on her claim of retaliation. The jury concluded that Burlington's actions in (1) changing her job responsibilities and (2) suspending her without pay were retaliatory. The jury awarded her \$46,750 in damages, along with costs and attorney's fees. Burlington Northern moved to alter or amend the judgment, arguing that none of the actions taken against White were materially adverse, but the trial court overruled the motion.⁸

On appeal to the Sixth Circuit, a divided panel reversed the judgment for White. The panel first explained that under Sixth Circuit precedent, a plaintiff must identify a "materially adverse change in the terms and conditions of his employment" to state a claim for retaliation.⁹ A materially adverse change includes termination, demotion or materially diminished responsibilities, title or benefits. But to support a retaliation claim, an action "must be more disruptive than a mere inconvenience, or an alteration of job responsibilities."¹⁰

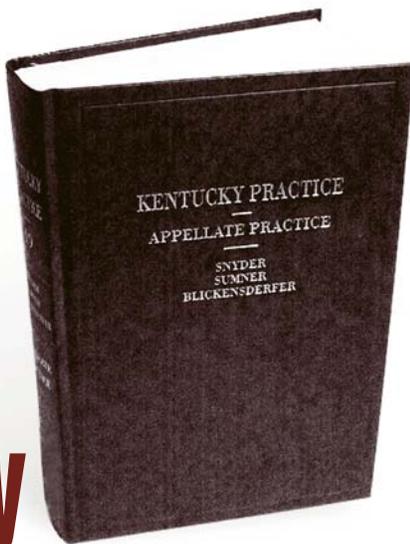
According to the panel, a reassignment

such as White's that did not also involve a change in salary or work hours does not meet the "materially adverse" standard. Because the physical track laborer tasks were part of her job anyway, the panel concluded reassigning those duties to her was not sufficient to support a claim of retaliation. As to the suspension, the panel pointed out that White was made whole by the award of full back pay, including overtime pay and benefits. Under existing Sixth Circuit precedent, a suspension with pay did not amount to a materially adverse employment action. Accordingly, the Sixth Circuit panel reversed the judgment for White.¹¹ Judge Clay filed a dissent in which he took issue with the panel's conclusion that the two actions were not materially adverse under existing Sixth Circuit case law.

White moved for *en banc* review before the full Sixth Circuit, which the court granted.¹² Before the *en banc* court, White mounted a full-fledged attack on the Sixth Circuit's "materially adverse employment action" test. The Equal Employment Opportunity Commission supported White's position in an *amicus*

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brief. The EEOC and White argued that the right standard was the one the EEOC had advocated in its guidelines. A plaintiff states a retaliation claim, the EEOC guidelines state, if she shows "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party" from engaging in protected activity.¹³

But the *en banc* Sixth Circuit was not persuaded. The materially adverse employment action test developed to screen out claims based on "trivial employment actions," the court explained. What is more, the standard "has the benefit of applying equally" to all Title VII claims, not just retaliation claims.¹⁴ Thus, the Sixth Circuit rejected the challenge to its standard for judging retaliation claims.

The *en banc* court did not, however, agree with the way the panel applied the materially adverse employment action test to the actions White complained about. A suspension without pay can support a retaliation claim even if the employee later receives a back pay award, the court concluded. "Taking away an employee's paycheck for over a month is not trivial." Furthermore, removing White's forklift duties was materially adverse because the track laborer duties were by all accounts "more arduous and dirtier" and the forklift position required more qualifications. Therefore, the court reinstated the judgment for White.¹⁵ In a concurring opinion, five judges would have agreed with the EEOC that the standard to apply is one that looks to what actions would dissuade a reasonable employee from exercising his or rights under the Act.¹⁶

The Supreme Court accepted review. In an opinion by Justice Breyer, the Court acknowledged that competing formulations had developed to describe what kind of actions will support a retaliation claim, and the Court set about to clear up the confusion. The Solicitor General had filed a brief supporting Burlington's position that the Sixth Circuit had it right by requiring an employee to prove that the retaliatory action had a materially adverse effect on a term or condition of employment.¹⁷ They argued that the Court should read the anti-discrimination and the retaliation provision *in pari materia*

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to avoid inconsistent results.

But the Supreme Court had no trouble rejecting that argument. The language of the retaliation provision, the Court pointed out, differs from the general discrimination section in significant ways. The anti-discrimination provision refers to hiring, discharging and affecting an employee's "compensation, terms, conditions or privileges of employment."¹⁸ By contrast, the Act's retaliation section states only that an employer may not "discriminate against" an employee for exercising his or her rights under the Act.¹⁹ No limiting words appear in the retaliation section.

According to the Court, Congress meant for the differing terminology to have legal significance. The discrimination section "seeks to prevent injury to individuals based on who they are," while the retaliation section seeks to prevent harm to individuals "based on what they do."²⁰ An employer can effectively retaliate against an employee by taking actions that do not affect the employee's conditions of employment or that cause the

employee harm *outside* the workplace. As an example, the Court pointed to a case in which the FBI was found to have retaliated when it refused to investigate death threats a prisoner made against an agent and his wife.²¹ Another example the Court cited was a case in which an employer filed false criminal charges against an employee who complained about discrimination.²² To limit actionable retaliation to employment-related actions, the Court held, "would not deter the many forms that effective retaliation can take."²³ Therefore, the Court rejected the two approaches that would require an employee to prove an adverse employment action:

The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by

the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions."²⁴

But what level of harm must an employee prove? The Court recognized that it had to place some limits on the type of actions that will support a retaliation claim. According to the Court, the Seventh Circuit approach was the right one. A plaintiff must prove that "a reasonable employee would have found the challenged action materially adverse," which means that "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"²⁵

Here the Court took pains to point out that not every alleged retaliatory action will satisfy this standard. The action must be *materially* adverse because it is important to "separate significant from trivial harms." Title VII does not establish a "general civility code," the Court reiterated. "[P]etty slights, minor annoyances, and simple lack of good manners" will not suffice.²⁶

Furthermore, the Court underscored that the standard, which looks to a *reasonable* employee, is an objective one. An objective standard is "judicially administrable." It avoids the uncertainty, the Court believed, that arises when courts have to "determine a plaintiff's subjective feelings."²⁷ In the next breath, however, the Court expressed a willingness to consider subjective factors. Noting that the significance of an act of retaliation will "depend upon the particular circumstances," the Court offered as an example a "young mother with school age children." To many workers, a schedule change may not be significant, but to this young mother it "may matter enormously." Accordingly, courts must look to an employee's individual circumstances to decide whether the alleged retaliatory action was materially adverse. As the Court put it: "Context matters."²⁸

Applying the new test to White's case, the Court had little trouble upholding the judgment for White. Although not every change in job duties will be actionable, here there was no dispute that the forklift duties were both less onerous and more prestigious. Furthermore, even though White eventually was made whole through

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back pay, the 37-day suspension was materially adverse. White and her family had to live for 37 days without income while facing uncertainty about when or even *whether* she would return to work. Thus, the jury properly held that the suspension supported a claim of retaliation.

All nine justices agreed with the judgment, but Justice Alito, in a concurrence, took issue with the Court's new standard. Alito would have adopted the Sixth Circuit's approach, which required an employee to show an adverse employment action. To Alito, the majority's new standard had "no grounding in the statutory language" and would lead to practical problems.²⁹

In addition, Alito pointed out that the objective test was not so objective after all because the majority would require a court to take into account at least some individual characteristics of the plaintiff. A test that requires an adverse employment action is the only standard that is truly objective, Alito contended, and it "permits insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees who are subject to real retaliation."³⁰ Finally, Alito added that the Court's new test, which asks whether an act "well might have dissuaded" an employee from making a charge establishes a causation standard that is "loose and unfamiliar."³¹

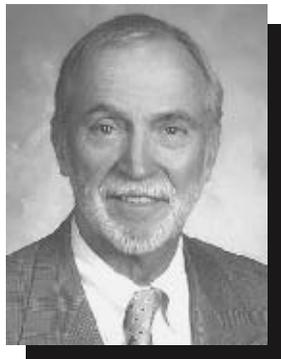
With the Court's decision, a new day has dawned for employees and their counsel pursuing retaliation claims, and it is likely that more of those cases will go to the jury. Employers and their counsel, on the other hand, will face a new set of hurdles in defending these claims. Were the actions alleged "materially adverse?" Were they enough to "dissuade a reasonable employee?" Or were they just "trivial annoyances?" Will the typical complaints of "snubbing" by co-workers after an employee files a complaint of discrimination now have more traction? What actions outside the workplace will support a retaliation claim, and what will not? Lawyers will be left to argue and courts will be left to decide these and a host of other new issues in the wake of the Court's landmark decision reshaping the law of retaliation. ■

ENDNOTES

- 42 U.S.C. § 2000e-2(a).
- Id.* § 2000e-3(a).
- Id.* (emphasis added).
- White*, 126 S. Ct. at 2410 (quoting *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001)).
- Id.* (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)).
- Id.* at 2410-11 (quoting *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)).
- Id.* at 2409.
- Id.* at 2410.
- White v. Burlington Northern & Santa Fe Railway Co.*, 310 F.3d 443, 450 (6th Cir. 2002).
- Id.* (quoting *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996)).
- Id.* at 455.
- White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789 (6th Cir. 2004) (*en banc*).
- Id.* at 798.
- Id.* at 799.
- Id.* at 802.
- Id.* at 809.
- White*, 126 S. Ct. at 2411.
- Id.* at 2411-12 (quoting 42 U.S.C. § 2000e-2(a)).
- Id.*
- Id.* at 2412.
- Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006).
- Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996).
- White*, 126 S. Ct. at 2412.
- Id.* at 2414.
- Id.* at 2415 (quoting *Rochon*, 438 F.3d at 1219).
- Id.*
- Id.*
- Id.*
- Id.* at 2418, 2420 (Alito, J., concurring).
- Id.* at 2419 (Alito, J., concurring).
- Id.* at 2421 (Alito, J., concurring).

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THE NLRA *and Non-Unionized Employers*

By Ronald Meisburg

One of the most often misunderstood aspects of federal labor law is that the National Labor Relations Act (NLRA) has important implications for employers even in situations in which there is no union on the scene. Section 7 of the NLRA states that employees – regardless of whether they are represented by a labor union – have a right “to engage in other concerted activities for the purpose of . . . mutual aid or protection . . .” Many employers and employees are unaware of this, and are quite surprised when they learn that the Act provides protections for such activities. The following discussion addresses several often raised questions regarding the applicability of the NLRA in the non-unionized workplace setting.

What employees are covered by the NLRA?

Generally, the NLRA covers private sector employees who are not supervisors, managers or confidential employees, as well as employees of the United States Postal Service. Certain employers whose operations do not sufficiently impact interstate commerce (as defined by applicable rules and case law) are exempt from coverage under the Act, but the vast majority of private sector employers are covered under current standards.

What are some of the types of employee activities that are protected under the NLRA?

It is generally understood that Section 7 of the NLRA protects the rights of employees to “self-organization, to form, join or assist labor organizations [i.e., unions], . . . and to refrain from any and all such activities.” As noted above, how-

ever, there is sometimes less awareness that Section 7 also protects the right of employees to engage in “other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*” (emphasis added). These other activities for “mutual aid or protection” are usually referred to as “protected concerted activities.”

“Protected” activity is usually defined as employee activity seeking to improve their wages, hours and/or other terms and conditions of employment for the purposes of mutual aid or protection. An activity is “concerted” if it involves two or more employees, or an individual employee if that individual is acting on behalf of other employees. Thus, for example, when two or more employees ask for a wage increase, or complain about a safety issue, they fall within Section 7’s umbrella, because they are engaged in protected concerted activity under the NLRA, and cannot be disciplined for such lawful efforts.

Protected concerted activity is not limited to events that involve actual confrontations with an employer. For example, simple conversations between and among employees about subjects like wages, hours and working conditions are protected and employees cannot be disciplined for such conversations. Thus, when one employee approaches another during non-work time to talk about working conditions, both the speaker and listener are engaged in protected activity.

Why should counsel representing a non-unionized employer be concerned about the applicability of the NLRA?

The applicability of the protections afforded employees under the NLRA can be of critical importance for counsel providing advice to a non-unionized employer. The fact that the client does not have a

unionized workforce does not lessen the importance of the attention that counsel must pay to the NLRA. Indeed, most NLRB cases involve employers whose workers are not represented by a union.

Events often unfold very quickly when a union initiates an organizing campaign or when, unexpectedly, employees engage in what may be protected concerted activity. Thus, it is imperative that counsel for a non-unionized employer be familiar with current developments regarding what is happening in labor law and at the NLRB, and must educate clients as to what constitutes protected concerted activity by employees, and what can and cannot be lawfully done, if and when employees engage in protected concerted activities.

Does the NLRA provide protection to non-unionized employees who go on strike?

Suppose employees at an unorganized plant show up for work one morning and find that the heating system is not operating. They decide to protest the company’s failure to provide heat, and do so by walking out. What action can the employer take?

Clearly the employees cannot be disciplined. They are engaged in protected concerted activity – protected because it involves “mutual aid and protection.” Their action is concerted because more than two employees are involved. In this case, the protected concerted activity is a strike and such strikes are protected regardless of whether they involve a union.

Like any lawful economic strikers, the employees cannot be fired, but they may be temporarily or permanently replaced. However, the employer may not refuse to take them back if they offer to return to work before the employer actually hires

replacements.¹ These are not novel principles of law recently developed by the Board. They are as old as the Act itself and have been affirmed by the Board and courts – including the Supreme Court in *Washington Aluminum*².

What are some currently pending issues that may have bearing on the NLRA's applicability in a non-union workplace?

On January 3, 2007, the National Labor Relations Board announced that it will hear oral argument in a case called *Register Guard*.³ *Register Guard* presents the issue of whether an employer can prohibit its employees from utilizing the employer's e-mail system for any non-business purpose. The *Register Guard* case happens to arise in the context of an employer whose employees are represented by a union, but the issue raised in the

case is equally applicable in a non-unionized setting. The decision in *Register Guard* will almost certainly have applicability to all employers coming within the jurisdiction of the NLRB, regardless of whether they are organized or whether there is a union campaign seeking to organize the employees.

Stated simply, the issue is whether e-mail has become so endemic to workplace communication and socializing that restrictions on its use for other than business reasons during non-working time is an unlawful interference with the Section 7 employee right to engage in protected concerted activity.

E-mail is, of course, a relatively new workplace phenomenon. But the concept of protected concerted activity is not. It has been protected by Section 7 since the passage of the NLRA in 1935. Congress recognized then that the workplace would change in the years to come and it charged the NLRB with the responsibility of applying the law in that changed environment. Thus, *Register Guard* is just the latest example of the Board considering how 1935 terms should apply in today's workplace.

Recently, we have seen possible protected concerted activity issues arising in events relating to immigration reform. A few months ago, there were nationwide demonstrations protesting immigration policy with reports that many employees failed to report to or left work to attend immigration protest rallies. Were these employees engaged in protected activity for which they cannot be disciplined? We have had some unfair labor practice charges filed regarding the discipline of employees who left work in such circumstances, and we are considering this issue now. The General Counsel is responsible for the investigation of these cases and for deciding whether to prosecute such disciplinary actions as unfair labor practices. These cases present interesting and difficult protected concerted activity issues.

On one side, the argument may be made that the conduct involved in such cases is too disconnected or attenuated from any kind of primary dispute with the employees' employers to be considered protected activity. Our system of labor relations is very different than in Europe, where general strikes – such as the recent

strikes in France over legislative changes in employment rules – are the norm.

If participation in these immigration rallies is considered to be protected activity, where should the line be drawn as to when employees may leave work without their employer's approval and be immune to any kind of discipline? Would we want to say that employees have a Section 7 right to leave work to participate in a rally for a political candidate who happens to be viewed as supporting policies and laws favored by the employees? How do we distinguish the immigration rally situation from that one?

On the other hand, there are arguments, and indeed some case law, that would support finding participation in these immigration rallies to be protected activity.

In *Kaiser Engineers*,⁴ the Board held that employees were engaged in protected activity when they wrote letters to Congress opposing the easing of immigration restrictions on the hiring of foreign engineers. The Ninth Circuit affirmed the Board's decision, noting that the engineers had "a legitimate concern in national immigration policy insofar as it might affect their job security."

And, in *Eastex*,⁵ the Supreme Court held that employees were engaged in protected activity, for which they could not be disciplined, where they leafleted in support of proposed increases in the minimum wage. The court decided that the employees were seeking to protect their interests as employees, and that they were entitled to do so through channels outside the immediate employer/employee relationship and regardless of whether their own employer had the right or power to affect the situation.

These and other cases defining the "mutual aid and protection" clause will have to be addressed in deciding whether participation in these kinds of immigration rallies is protected by Section 7. But regardless of the outcome, such questions present NLRA issues for both unionized and non-unionized employers.

What other types of workplace rules may violate the NLRA?

Statutory protections of the right to organize, to discuss unionization, or for that matter even to talk about wages,

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hours and other terms and conditions of employment (or to refrain from engaging in any such conduct) can have important implications bearing upon the legality of maintaining employer workplace rules. This is true even when the employer has not yet enforced the rule, because of the chilling effect that the mere maintenance of the rule may have.

For example, it is not unusual for employers to maintain work rules concerning what employees can and cannot do, and can and cannot say, while they are at work. Referred to generally as “no solicitation rules,” such policies are in place in many non-unionized facilities and are frequently the basis upon which an employer with an unorganized workforce is found to have violated the NLRA.

Generally, an employer can restrict employee talk and activity while employees are supposed to be working. But restrictions on what employees can and cannot do or say during breaks or lunch or in the parking lot are often the subject matter of an NLRB case. Although it is beyond the scope of this article to provide an exhaustive legal opinion about no solicitation rules, this is an area in which non-unionized employers often find themselves enmeshed in an NLRB case because a manager failed to consult with counsel about a rule and was not alert to the implications of maintaining an overly broad rule. And, sometimes, this can occur because counsel was not alert to the law while reviewing an employee handbook.⁶

No solicitation rules are not the only kinds of workplace rules that can have NLRA implications for non-unionized employers. For example, recent Board cases have set standards for “confidentiality” rules – rules that employers put in place to keep employees from talking about what they learn at the workplace.

A recent example will help to clarify this point. In a case decided by the Board in 2005, the Board was confronted with a General Counsel complaint allegation that the following “rule” in its “partner” (employee) handbook was illegal:

We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new

business efforts, customers, accounting and financial matters.

The General Counsel alleged that this rule improperly restricted employees in their Section 7 rights and the Board agreed. They found that:

the rule’s unqualified prohibition of the release of “any information” regarding “its partners” could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union.⁷

Another issue regarding workplace rules that has currency today involves alternative dispute resolution. The issue arises when an employer imposes a rule under which any workplace disputes must go to binding arbitration. The employer’s desire is, understandably, to keep cases out of the courts and thus avoid prolonged and expensive litigation, and awards that are outrageously high because of an overly sympathetic jury.

Can an employer lawfully maintain such a rule? Can employees be forced to sign such an agreement as a condition of employment? The short answer is that there is no NLRB decision on the subject, but that unfair labor practice complaints have been issued against employers whose rule is so broad that it would preclude — or at least appear to preclude — employees from filing unfair labor practice charges with the Board based upon the belief that employees could not do so because of the rule.

Where the rule required arbitration but made clear that employees could go to the Board if they desired to do so, we have not prosecuted. Again, because there is not yet a definitive Board case on this subject, it remains to be seen whether the Board will agree when it finally has the opportunity to rule on one of these cases. Clearly, however, counsel should be alert to this possibility.

What are “neutrality” and “card check” agreements about? What is the status of issues regarding these matters?

Some of the most critical and controversial issues presently pending before the

Board involve neutrality and card check agreements. Non-unionized employers may find themselves confronted with union demands that the employer sign an agreement committing itself to be neutral in the event the union begins an organizing drive, and that the employer also agree to a card check procedure in lieu of an NLRB election. In their efforts to obtain the agreement of employers to these procedures, unions sometimes conduct corporate campaigns, picketing, bannering, handbilling or other publicity efforts.

In considering these types of cases, it must be remembered that any employer, whether unionized or not, who reaches agreement with a union as to workplace rules must be alert to NLRA implications regarding such rules. The underlying premise of Section 7 of the Act is employee free choice and Section 7 protects the right of employees to refrain from union activity, just as it protects the right to engage in such activity. As a consequence, employers and unions are precluded from entering into agreements that, for example, include rules that limit the right of employees to refrain from or oppose union activities.⁸

The Board has a number of cases pending before it presenting neutrality and card check issues in various fact situations. It is, for example, considering whether an agreement based on a card check will be a bar to efforts by anti-union employees to obtain a secret ballot decertification election.⁹ In other words, is the right to a secret ballot election so embedded in the Act itself, that the right cannot be waived by an employer’s agreement to a card check procedure?

One related issue now before the Board is the question of the lawfulness of agreements entered into between employers and unions regarding workforces that have not yet been organized, where such an agreement sets out certain understandings by the employer and the union regarding what provisions will be included in any future agreement that may be negotiated if the union is successful in a card check campaign.¹⁰ For example, the parties might agree in their neutrality/card check agreement that if the union signs up a majority of employees, health benefits will not be affected and/or that the union will not strike.

Arguably, entering into agreements that set terms and conditions of employment for currently unorganized employees, in contemplation of an election or card check, could amount to a violation of Section 8(a)(2) of the Act. The theory is that this might be tantamount to the unlawful recognition of a union that does not have the support of a majority of the employees.¹¹ And, even if such agreements are conditioned on the union ultimately winning an election or obtaining union authorization cards from a majority of those employees, the boost that the pre-recognition bargaining could give the union in its later organizing campaign may be unlawful.

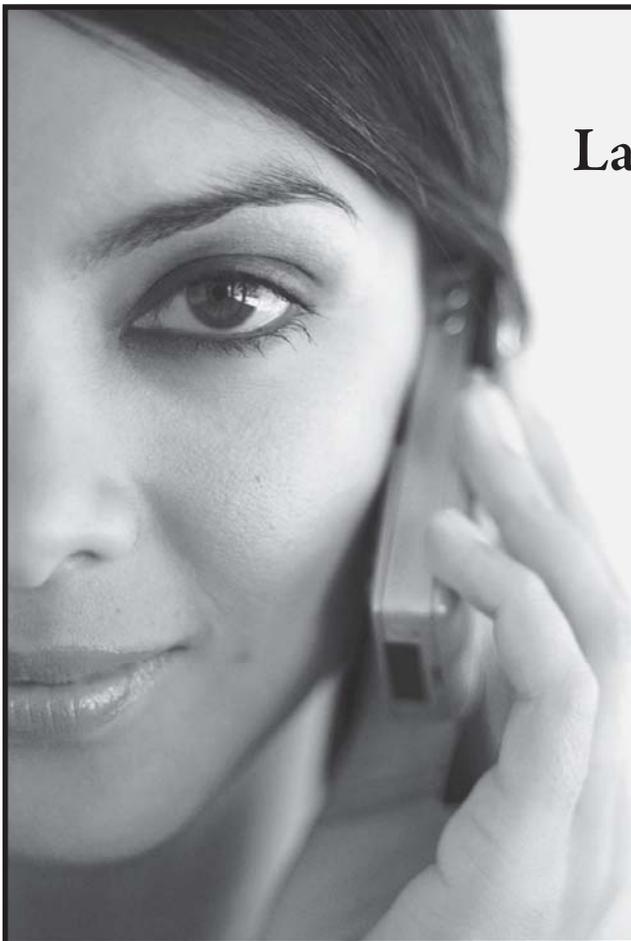
These are tough issues, as they present important questions regarding the rights and methods available to employees to choose whether to be represented by a union, and whether employers and unions have a right to enter into some types of understandings as part of a neutrality agreement. Again, these are all issues that are of concern to non-unionized employers.

Conclusion

The subjects I have touched upon are but a sample of the various issues arising under the NLRA that are relevant to non-unionized workplaces. All employers and employees need to be alert to these potential issues, and the labor management bar must remain informed regarding developments in these areas in order to provide effective counsel and advice to their clients. ■

ENDNOTES

1. The myriad of complex issues regarding the reinstatement rights of economic and unfair labor practice strikers are covered in a broad body of Board and court precedent. These issues are beyond the scope of this article.
2. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).
3. *The Guard Publishing Co., d/b/a The Register Guard*, 36-CA-8743-1, *et al.* (pending before the Board on exceptions; oral argument scheduled for March 27, 2007).
4. 213 NLRB 752 (1974).
5. 437 U.S. 556 (1978).
6. For a very recent example regarding the maintenance of unlawful handbook rules limiting employees' rights regarding fraternization, solicitation and registering of complaints, *see Guardsmark LLC v. NLRB*, ___ F.3d ___, 2007 WL 283455 (D.C. Cir. February 2, 2007).
7. *Cintas Corp.*, 344 NLRB No. 118 (2005). See also *Lutheran Heritage Village – Livonia*, 343 NLRB No. 75 (2004).
8. See, e.g., *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974).
9. *Dana Corp.*, 8-RD-1976, and *Metal-dyne Corp.*, 6-RD-1518.
10. *Dana Corp.*, 7-CA-46965 and 7-CB-14083.
11. See, e.g., *Majestic Weaving Co.*, 147 NLRB 859 (1964), *enf. denied* on procedural grounds, 355 F. 2d 854 (2d Cir. 1966).



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SEXUAL HARASSMENT *and the Teenage Worker*

What Employers Need to Do What the EEOC is Doing

By *Kenneth W. Brown*

Paula is 16 and it's her first job. Everything has been going well except for Frank, her 19 year old supervisor. He constantly rubs up against her, claiming that there's not enough room to go around. He makes explicit sexual comments to her and the other girls. He keeps asking her out even though she has repeatedly said no. At the end of last night's shift he told her to retrieve supplies from the back room. He followed her and closed the door. He then grabbed her chest from behind and told her to "go along with it or else." She broke free, left the room and clocked out. Paula's mad, frightened and embarrassed and doesn't know what to do. She's far from alone.

Many employers rely on teenage workers to help during the busy summer months and the holiday season.¹ Many, if not most, teenagers work in the food service industry where turnover is high and where they may be managed by another teenager or a young adult. Teens are also heavily employed in the retail businesses that occupy shopping malls.² Many studies show that early employment opportunities can play an important role in enhancing confidence, fostering responsibility and promoting positive future job opportunities for young adults.³ Positive results, however, depend upon positive first work experiences. Regardless of the circumstances, teenagers at work present important challenges for all businesses.

Teenagers are often unaware that they have the same rights in the workplace as adults or full time workers. Further, because they often value these work experiences as the first step to increased independence, many teens do not want to risk their employment by complaining about unfair or discriminatory treatment.

For these reasons they can be particularly susceptible to workplace sexual harassment. Consequently, employers need to be vigilant in educating young workers about company policies, procedures and expectations. Moreover, attorneys representing these employers must be vigilant in communicating the potential ramifications for failing to prevent or properly respond to sexual harassment incidents.

THE NUMBERS

The Department of Labor estimates that the U.S. workforce includes an estimated three to four million teenage employees, with a higher number of teenagers working during the summer months.⁴ Overall, 80-90 % of teenagers work at some point during high school.⁵ The majority of teenagers work at food (31 % of males and 33 % of females) or retail establishments (29 % of males and 31 % of females).⁶ In one study, a sample of 712 high school students, 35 % of the 332 students who worked part-time reported experiencing sexual harassment.⁷ Girls reported harassment at a higher rate, 63%, than boys, 37%, and harassment by supervisors accounted for 19 % of the reports while co-worker harassment accounted for 61% of the reports.⁸

These findings are reflected in the data the EEOC maintains on charge filings. In 2005 and 2006, charges of sexual harassment comprise 9.6 % of the charges filed with the EEOC nationally. Kentucky, Indiana, Michigan and the Western half of Ohio form the EEOC's Indianapolis District. In 2005, 1181 charges or 8.1 % of the charges received by the Indianapolis District contained an allegation of sexual harassment. As of July 2006, 802 charges or 7.3 % of the charges received by the District alleged sexual harassment. Sorting the EEOC charge data by Stan-

dard Industrial Codes (SIC),⁹ reveals that 20.8 % of the charges filed against the food industry in 2005 and 2006 included allegations of sexual harassment.

We do not know how many of those charges were filed by young workers because, with the exception of charges filed under the Age Discrimination in Employment Act (ADEA), the EEOC does not maintain charge data by the age of the charging party. However, by analyzing the EEOC's litigation activity we can draw some conclusions regarding the prevalence of sexual harassment claims against teenagers. The EEOC started tracking the lawsuits it files on behalf of young workers in 2001. Since then, we have filed approximately 105 lawsuits on behalf of young workers. Of those lawsuits, the vast majority, 86 of 105 or 82%, involve claims of sexual harassment.¹⁰

WHAT THE CASES TELL US

Although the majority of the EEOC's cases alleging sexual harassment of teenagers involve food establishments, no workplace setting is immune. The EEOC has filed lawsuits against food establishments, retail stores, manufacturing facilities, professional firms, and entertainment companies, such as movie theaters and video rental stores. In most of the cases, the alleged victims are females; however, the EEOC has also filed on behalf of male victims of harassment. For example, the Indianapolis District Office sued Taco Bell claiming that a teenage male worker was sexually harassed by his female boss. *EEOC v. Taco Bell Corp.*, No. 1:05-CV-0998 (S.D. Indianapolis, IN 462. Feb.16, 2006)(consent decree approved). And in Philadelphia, the EEOC filed suit against Babies "R" Us, a large toy retailer, alleging that a male teen worker was sexually

harassed by other male employees. *EEOC v. Babies "R" Us, Inc.*, No. 02-CV-989 (D. NJ. Jan. 2003) (consent decree approved).

Examples of other cases the EEOC has recently filed include:

- A case against an International House of Pancakes (IHOP) franchise in Racine, Wisconsin involving allegations that an assistant manager subjected female employees, including teenagers, to lewd sexual comments, physical groping, and propositions for sex. The suit alleges that the IHOP franchise ignored early complaints of sexual harassment and that the employee who filed the charge of discrimination was fired after she complained about the harassment. *EEOC v. Management Hospitality of Racine, Inc. d/b/d International House of Pancakes*, No. 06-C-0715 (E.D. Wis. filed June 26, 2006).
- A restaurant whose owner and managers subjected a 19 year old employee to verbal and physical harassment at a golf outing. Specifically, the owner of the golf course and a manager of the restaurant demanded that the young female worker bare her breasts and when she refused they tried to forcibly remove her clothes. When the employee later complained to other managers the owner of the restaurant responded by saying that sometimes the manager involved in the incident got out of hand when drinking. No action was taken against the manager. The employee then resigned. *EEOC v. Mark and Greg's, Inc. d/b/a North Park Lounge Club House*, No. 06-00769 (W.D. Penn.

filed June 12, 2006).

- A case against a Sonic Drive-In franchise alleging that female employees, including two teenagers working for the first time, were subjected to sexual harassment. The harassment included improper touching, comments and requests for sexual favors by the night manager. *EEOC v. Mena SDI, d/b/a Sonic Drive-In*, No. 06-2058 (W.D. Ark. filed May 12, 2006).

The EEOC's litigation on behalf of young workers has achieved substantial results. Many of those cases involved allegations of sexual harassment or retaliation. Examples of recent settlements of EEOC cases include:

- Applebee's in Santa Fe, New Mexico settled a case which alleged harassment and retaliation against seven female employees including teens as young as 16 at the time. Applebee's agreed to pay \$310,000 to the victims and institute nationwide policies designed to prevent sex discrimination including sexual harassment or its employees. Applebee's also agreed to a nationwide injunction against sex discrimination. *EEOC v. Restaurant Concepts II, LLC, d/b/a Applebee's Neighborhood Grill and Bar*, No. CIV-04-709 (D. NM filed Oct. 26, 2005)(consent decree entered).
- Carmike Cinemas in North Carolina agreed to pay \$765,000 to a group of 14 teenage male employees who alleged sexual harassment by their male supervisor. The consent decree also required the company to provide: annual sexual harassment training; employees with a revised sum-

mary of its harassment policy; and post an employee notice about the lawsuit and the federal anti-discrimination laws. *EEOC v. Carmike Cinemas, Inc.*, No. 5:04-cv-673 (E.D.N.C. Sept 26, 2005)(consent decrees approved).

- Bob Evans Farms, Inc. agreed to pay \$250,000 to eight female employees, including three teenagers. The suit alleged that they were sexually harassed by the general manager. The consent decree required the posting of anti-discrimination notice and the recording and reporting of complaints of sexual harassment during the term of the decree. In addition, Bob Evans was enjoined from engaging in any practice in violation of Title VII. *EEOC v. Bob Evans Farms, Inc.*, No. 4:04-cv-00622 (E.D. Mo. Jan 19, 2005)(consent decree entered).
- In *EEOC v. Midamerica Hotels Corp.*, No. 4:03-cv-00107 (E.D. Mo. Dec. 8, 2004)(consent decree entered), a Burger King franchise in St. Louis agreed to pay \$400,000 to resolve allegations that seven former female employees, including teenagers, were subjected to sexual harassment by a male manager. The suit alleged that the defendant disregarded complaints of groping, sexual comments and demands for sex. The consent decree also contain injunc-

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tive relief requiring the defendant to provide training to its managers, revise and distribute its sexual harassment policy and post information on the reporting of complaints of sexual harassment.

WHAT EMPLOYERS SHOULD DO

In all of these cases, the employers likely could have limited their liability by better educating staff about responsible workplace conduct, increasing awareness about corporate commitment to a harassment-free work environment, and responding promptly and appropriately to complaints. Employers should be counseled to do everything possible to ensure that a teen's introduction to the working world is a positive one. The food service industry in particular should pay close attention to how younger workers are treated. Every employer, however, has to be aware of its responsibilities to prevent and respond to sexual harassment:

Awareness and Training

- Remember that awareness is the key to prevention. Educate staff about their rights and responsibilities in the workplace. Know your audience, and educate employees in a way that speaks to their sensibilities. Training employees in language that they can relate to, and in terms that they can identify with, can help foster understanding and awareness of workplace rights.
- Provide early training on anti-harassment laws and your company's sexual harassment policies. For industries with a high turnover rate, it is particularly important that new employees receive training at the outset. Make sure that employees are aware of their workplace rights and responsibilities.

Handling Claims

- Establish a strong corporate policy for handling complaints. Companies can limit their liability by implementing an effective grievance system, and by taking immediate and appropriate actions when an employee complains of sexual harassment. Make sure a company's complaint process provides alternate avenues of reporting, and ensure that employees know how

to contact each person who can help solve a workplace dispute.

Posting and Publishing

- Post company policies on discrimination and complaint processing in locations that are visible to employees, such as by the employee time clock. Include a short description of company policies with each employee's first paycheck and conspicuously publish new or edited policies and procedures.

WHAT THE EEOC IS DOING

On September 21, 2004, the EEOC announced the implementation of its "Youth@Work" initiative, an unprecedented national outreach and education campaign designed to prevent discrimination against teenage workers.¹³ The Youth@Work initiative has three main goals, all focused on helping young people become productive adults:

- Empowering youth to understand workplace rights and responsibilities;
- Partnering with employers to promote fair and inclusive workplaces; and
- Building alliances with parents and educators.

The three main components of EEOC's Youth@Work initiative are: a youth web site at youth.eeoc.gov, dedicated to educating young workers about their equal employment opportunity rights and responsibilities; a series of national out-

reach events by EEOC Commissioners and field office staff for high school students, youth organizations, and small businesses who employ young workers; and partnerships with business leaders, human resource groups, and industry trade associations. Since the inception of the Youth@Work initiative, the Indianapolis District has conducted over thirty outreach events at high schools, churches, youth clubs and other venues throughout our jurisdiction.

An important component of the Youth@Work initiative is developing partnerships with business leaders, human resource groups, industry trade associations and other who employ or work with young workers. In furtherance of this goal, the EEOC has signed national partnerships with the National Restaurant Association and National Retail Federation, which together employ more than 50 % of the workers between ages 16-19. The EEOC is also working with the National Education Association to jointly develop, produce and distribute a video and discussion guide about the workplace rights and responsibilities of teenage workers.

CONCLUSION

Paula's story is unfortunately too common. Sexual harassment of teenagers is pervasive, expensive and preventable. It is a huge problem and every employer of young people should pay attention to the risk of failing to address this issue in its

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workplace. It can be as simple as: having good sexual harassment policies and procedures; training managers and employees on their rights and responsibilities; investigating charges of harassment; and taking appropriate action. While this is good advice for any employer, it is crucial to the employers of teenagers. The EEOC is ready and eager to help. The Youth@Work program can provide training and partnership opportunities to employers who want to partner with the EEOC to provide safe and productive work environments for the most vulnerable workers. ■

ENDNOTES

1. U.S. Dep't of Labor, *Report on the Youth Labor Force*, 30 (Nov. 2000), at <http://www.bls.gov/opub/rylf/rylhome.htm>.
2. *Id.*
3. Duncan Chaplin, Jane Hannaway, *High School Employment: Meaningful Connections for At-Risk Youth*, Urban Institute, at <http://www.urban.org/url.cfm?ID=406506>; Barling, J., Rogers, K., & Kelloway, E., *Some*

Effects of Teenagers' Part-Time Employment: The Quantity and Quality of Work Makes the Difference, *Journal of Organizational Behavior*(1995), 16, 143-154; see also Fineran, S., *Adolescents at Work: Gender Issues and Sexual Harassment*, Violence Against Women, Vol. 8, No. 8, 953-967 (2002), at <http://vaw.sagepub.com>.

4. *Id.* at 30 <http://www.bls.gov/opub/rylf/rylhome.htm>.
5. National Research Council and Institute of Medicine, Committee On The Health and Safety, Implications Of Child Labor, *Protecting Youth At Work: Health, Safety And Development Of Working Adolescents In The United States*, National Academy Press., 1998.
6. U.S. Dep't of Labor, *Report on the Youth Labor Force*, 36-7 (Nov. 2000), at <http://www.bls.gov/opub/rylf/rylhome.htm>.
7. Fineran, S., *Adolescents at Work: Gender Issues and Sexual Harassment*, Violence Against Women, Vol. 8, No. 8, 953-967 (2002), at

<http://vaw.sagepub.com>.

8. *Id.*
9. See, Occupational Safety & Health Administration (OSHA) website, which maintains a SIC Manual at http://www.osha.gov/pls/imis/sic_manual.html.
10. Although this paper focuses on incidents of sexual harassment, which is the most prevalent form of discrimination against teenagers, it is important to note that teenagers are subjected to all forms of discrimination. Second on the list are claims of retaliation, where the young worker claims that he or she was fired or otherwise punished by the employer for reporting suspected discrimination. Since 1992, the number of retaliation charges filed with EEOC by all workers has doubled, increasing to 22,278 from 11,096. In 2005, almost 30% of the charges filed with the Commission included a claim of retaliation.
11. Information about the initiative can be found on EEOC's web site at www.eeoc.gov.

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Recent Developments in the Free Speech Rights of Public Employees

By Jeremy S. Rogers

The free speech rights of public employees are a hot topic in the local news. A political blogger filed suit against the Kentucky Governor and other state officials after state employees were prevented from using state computers to access his internet blog. A Louisville teacher was temporarily relieved of teaching duty after burning two American flags as part of a classroom demonstration to students examining free speech. Meanwhile, without much local attention, the U.S. Supreme Court redefined the protection afforded by the First Amendment to public employees in favor of the rights of the government as employer to exercise control over its employees' speech.

In *Garcetti v. Ceballos*,¹ the U.S. Supreme Court revisited the long standing balancing test for determining the limits of free speech for public employees established in *Pickering v. Board of Education*.² Although the full effect of the 5-4 decision in *Garcetti* is not yet clear, some scholars believe that decision has the potential to alter the First Amendment landscape considerably.³

Private Employees' Free Speech Rights

Because the First Amendment prohibits only *government* restriction of speech, it has virtually no application in the private sector. That is, the First Amendment does not prevent non-government employers from restricting their employees' speech or from disciplining their employees because of their speech. Other laws, however, give private employees some free speech protection as

against their employers. Title VII of the Civil Rights Act of 1964,⁴ for example, prohibits discrimination on the basis of religious activity, which can include forms of speech. Likewise, there are various whistleblower statutes protecting certain kinds of private employee speech.⁵

Public Employees' Free Speech Rights

While the government as employer has considerably more power to regulate the speech of its employees than the government as sovereign has to regulate the speech of its citizens, the First Amendment nonetheless places the public employer at a significant disadvantage to private employers when it comes to controlling what its employees can or cannot say. The Court in *Pickering* attempted to arrive at a balance between the government employer's interest in promoting the efficiency of the public service it necessarily performs through its employees with the interests of the employee citizen in commenting on matters of public concern.

Pickering and its Progeny

Marvin Pickering was an Illinois public school teacher. He was dismissed from his position by the Board of Education for sending a letter to a local newspaper that was critical of the way in which the Board and the district superintendent of schools had handled proposals to raise new tax revenue for the schools. After a full hearing, the Board dismissed Pickering, finding that his letter to the editor was detrimental to the efficient operation and administration of the schools of the district.⁶

The U.S. Supreme Court held that the

First Amendment protected Pickering from the School Board's retaliation because his letter was on a matter of public concern and because there had been no showing that it had disrupted the workplace.⁷ Thus, the "*Pickering doctrine*" was born.

The balancing test set out in *Pickering* recognizes a qualified First Amendment right for public employees. A public employee has the right, as a citizen, to comment on matters of public concern unless his or her employer can demonstrate that the speech would interfere with or disrupt the government's activities and can persuade the court that the potential workplace disruption outweighs the value of the employee's speech.⁸

The Supreme Court elaborated on the balancing test in *Givhan v. Western Line Consolidated School District*.⁹ *Givhan* involved a challenge to the firing of a teacher who had complained to her principal about racially discriminatory practices in the school. The school district contended that the speech had no First Amendment protection because the teacher had not made her comments publicly, for example in a newspaper, but instead, had done so privately. The Court disagreed, stating "[n]either the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."¹⁰

In 1983, the Supreme Court made clear that the *Givhan* protection for private speech was not to be expanded beyond its facts. In *Connick v. Myers*,¹¹ a case involving the dismissal of an assis-

tant prosecutor who, in an effort to resist being transferred, sent around the office a survey asking whether other employees had confidence in various superiors in the office, the Court focused on what constituted speech on a matter of “public concern.” The Court concluded that First Amendment protection for public employees encompassed speech on “any matter of political, social, or other concern to the community.” Yet, the Court held that *Connick’s* speech was a matter of personal interest, not public concern. “When a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision allegedly in reaction to the employee’s behavior.”¹²

The Court approached the outer bounds of the public concern inquiry in *Rankin v. McPherson*,¹³ which involved the dismissal of a county constable’s office worker. In response to news reports of the attempted assassination of President Ronald Reagan, the office worker said to a fellow employee, “[i]f they go for him again, I hope they get him.” Relying on *Connick’s* definition, the Court in *Rankin* held the employee could not be fired because the statement was on a matter of public concern. Also important to the Court was the fact that there was very little evidence that the statement caused any

actual disruption in the workplace.

On the other side of the scales, the case of *Waters v. Churchill*¹⁴ assisted the government employer in meeting its burden in the *Pickering* balance test. That case involved a nurse who was fired after making derogatory comments to a co-worker about her hospital department. The Court suggested that, even where there is little evidence of actual disruption, public employers can take action with regard to employee speech upon a legitimate showing of *potential* disruption in the workplace.¹⁵

Together, *Pickering* and its progeny provide First Amendment protection for the broadly construed category of speech on matters of public concern, whether or not the speech occurred in the workplace. Only speech about matters of purely personal interest is unprotected. Restrictions on speech about a matter of public concern are permissible if the government employer can demonstrate it took action against the employee out of a legitimate concern for actual or anticipated disruption and the court concluded that, on balance, that concern outweighed the value of the speech.

Garcetti: A Significant Limit to the Pickering Doctrine?

In *Garcetti*, the Supreme Court issued a 5-4 decision, the primary holding of which was that most, if not all, speech made in a public employee’s official capacity is entitled to no First Amendment protection at all.¹⁶ Richard Ceballos was an attorney in the office of Los Angeles County District Attorney Gil Garcetti. A defense attorney complained to Ceballos about a search warrant affidavit. After investigating the matter, Ceballos concluded that the affidavit contained serious misstatements by a police officer. Ceballos did not announce it to the public or write a letter to the editor, but instead brought the alleged wrongdoing to the attention of his supervisors in a memo. Those supervisors disagreed with his concerns and, according to Ceballos, subjected him to a series of retaliatory employment actions.

Ceballos filed a federal lawsuit alleging violations of his First Amendment rights. The U.S. District Court granted summary judgment to the defendant Dis-

trict Attorney, concluding that Ceballos’s memorandum did not constitute speech on a matter of “public concern” because Ceballos had prepared it pursuant to his employment duties, not in his capacity as a citizen.¹⁷ Citing the *Givhan* decision, the Ninth Circuit reversed, holding that speech about police misconduct was inherently a matter of public concern and was unlike the purely personal speech at issue in cases like *Connick*.¹⁸

The Supreme Court then reversed the Ninth Circuit, with the opinion focusing on the meaning of the single word “citizen.”¹⁹ As Justice Kennedy noted in the majority opinion, the Court long ago had adopted the formulation that First Amendment protections encompassed speech by a public employee “as a citizen upon matters of public concern.”²⁰

Thus, the majority viewed the issue presented by *Garcetti* as whether there is First Amendment protection for a public employee’s speech taken in the course of his or her duties. The fact that the content of the speech touches upon an issue of public concern was not material. In fact, when a public employee speaks as part of his or her duties, there is almost always an argument that such speech touches upon a matter of public concern.

Chief Justice Roberts and Justices Scalia, Thomas and Alito joined Kennedy to form the five-justice majority. According to the majority, the requirement that speech be in the employee’s capacity as a “citizen” means the employee must not be speaking pursuant to his or her official duties. “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²¹ Because it was part of Ceballos’ duties as an assistant district attorney to write memos like the one he had written, Ceballos was not speaking as a “citizen” when he brought concerns about the police misconduct to his supervisor’s attention.²²

What Will Be the Effect of Garcetti?

Some commentators have decried the *Garcetti* decision as a monumental limitation on existing First Amendment protections for public employees.²³ Although

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the Court did not overrule *Givhan*, there remains a serious question whether that decision still protects a public employee from retaliation for reporting misconduct in the workplace. Ironically, there now appears to be less protection for reporting misconduct if reporting misconduct happens to be in the employee's job description, as was the case with Mr. Ceballos. If *Givhan* had been decided under *Garcetti*, a court would ask whether the teacher was reporting racial bias in her workplace as a concerned citizen or as a teacher who was subject to perceived racial inequality. In that case, it's unclear how the line would be drawn.

By exempting from First Amendment protection public employees' speech made "pursuant to their official duties," the Supreme Court may have opened the door to the argument that much, if not all, speech that occurs in one's government workplace is speech pursuant to official duties and is therefore not protected. Likewise, there is a real question of how much speech will fall under the rule of *Garcetti* when such speech is taken by public employees outside the government office but still pertains in some way to the job of the public employee. This is an especially salient question for many public employees whose jobs entail routinely speaking to members of the public.

Consider the February 2007 ruling by the Sixth Circuit in *Ibarra v. Lexington-Fayette Urban County Gov't*.²⁴ The plaintiff in that case was terminated from his employment by the city as "Coordinator of Immigrant Services" allegedly in retaliation for speaking out about his various concerns over mistreatment of the local Hispanic community. He went to the mayor, the local commissioner of social services, city council members, and finally to the *Lexington Herald-Leader*. The court dismissed his First Amendment claim, holding that his speech was unprotected because his job duties included "advocating for the Hispanic community."²⁵

On the other hand, *Garcetti* potentially creates more problems than it alleviates for government employers. In effect, for public employees who fear retaliation for reporting misconduct, the *Garcetti* rule creates an incentive to report such misconduct in the first instance outside the government chain of command, for

example, to the media. To avoid any argument that reporting misconduct was taken as part of one's official duties (and is therefore unprotected by the First Amendment), employees should proceed directly to the local newspaper or some other outside organization. Consider that, instead of writing a memorandum to his supervisors about the perceived police misconduct, Ceballos could have written a letter to the editor about it, in which case he would be entitled to maintain his First Amendment claim under *Garcetti* because, as the Ninth Circuit held, police misconduct is inherently a matter of public concern.

Take, for example, the recent decision in *Barber v. Louisville & Jefferson County MSD*.²⁶ In that case, the plaintiff, a city employee, alleged that she had informed her superior on several occasions of perceived misconduct by other city officials. Her supervisor refused to act and even took disciplinary action against her, so she sent a letter to the state Attorney General's office concerning the alleged misconduct. The letter found its way back to her supervisor, who then allegedly had her fired because of it. The court ruled that her internal grievances to her supervisor were unprotected speech within her job responsibilities, but that her letter to the Attorney General was protected speech in her capacity as a citizen.²⁷

What effect the decision in *Garcetti* will ultimately have on public employees' free speech rights will have to be born out in the lower courts. Likewise, only time will tell whether public employees who wish to report alleged misconduct will take advantage of *Garcetti's* apparent doctrinal ironies by going public instead of attempting to report up the chain of command within the system.

A Different Rule for Teachers

A quick review of the reported decisions from the Supreme Court applying the *Pickering* doctrine show the Court has not again addressed a case arising in the public school context. Justice Stevens, who authored the dissenting opinion in *Garcetti*, emphasized the importance of maintaining First Amendment protections of academic freedom in public schools, where teachers necessari-

ly speak and write pursuant to official duties. This is of particular importance in the college and university setting. Responding to this criticism, the majority in *Garcetti* was careful to point out that, in the future, it may be necessary to carve out a special exception for "speech related to scholarship or teaching."²⁸

As recognized by Justice Kennedy and the *Garcetti* majority, some justices have called for a different rule for public school teachers.²⁹ The standard *Pickering* test, they argue, makes no sense in the classroom.³⁰ A good example might be the recent Sixth Circuit decision in *Evans-Marshall v. Board of Education*,³¹ an Ohio case that may have turned out differently if it were decided after *Garcetti*.

In that case, a high school English teacher's employment contract was terminated after several parents attended school board meetings to express concerns about the teacher's classroom discussion on the books *Siddhartha*, *To Kill a Mockingbird*, and *Fahrenheit 451* as well as a film adaptation of *Romeo and Juliet*. While a teacher typically has no First Amendment right to override the school's curriculum decisions (i.e. in teaching, the teacher speaks for school and not for himself), the Sixth Circuit held that the teacher's classroom discussions of these three well-respected and school-approved novels and film adaptation was her individual "speech" for the purposes of the First Amendment and that the themes of these works addressed matters of public concern.³²

Conclusion

While *Garcetti* may have limited the First Amendment protections enjoyed by public employees, the framework established by *Pickering* remains the law and still provides robust protection against government restrictions on public employees' speech. Important issues about the First Amendment rights of public employees remain unresolved, however, in ways that were indirectly brought to our attention in recent Kentucky headlines. In the case of the flag-burning teacher, for example, the Court has never addressed the extent to which the *Pickering* protections apply in the academic speech setting. Nor has the Court determined whether *Pickering* applies in the

same way to a public employee's right to hear or read information (as distinguished from the right to speak) as is at issue in the case of the blog-blocking software.

Perhaps most glaring, the Court has never spelled out with any precision how courts are to calculate the value of employee speech on a matter of public concern when employing the *Pickering* balancing test. ■

ENDNOTES

1. 126 S.Ct. 1951 (2006).
2. 391 U.S. 563 (1968).
3. See, e.g., *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, Secunda, Paul M., 40 U.C. Davis L. Rev. 85, 104 (2006).
4. See 42 U.S.C. § 2000e-2.
5. E.g., 31 U.S.C. Sec. 3730(h) (False Claims Act whistleblower statute); 29 U.S.C. § 623(d) (ADEA whistleblower statute); 42 U.S.C. §12203(a) (ADA whistleblower statute); KRS

- 61.102 (Kentucky public employee whistleblower statute).
6. 391 U.S. at 564.
7. *Id.* at 570.
8. *Id.* at 574-75.
9. 439 U.S. 410 (1979).
10. *Id.* at 415-16.
11. 461 U.S. 138 (1983).
12. *Id.* at 147.
13. 483 U.S. 378 (1987).
14. 511 U.S. 661 (1994).
15. 511 U.S. at 680.
16. See *Id.*
17. *Id.* at 1956.
18. *Id.*
19. E.g., *id.* at 1960.
20. *Id.* at 1956.
21. *Id.* at 1960.
22. *Id.*
23. See, e.g. Joseph E. Hardgrave, *If You Work for the Government, Then Shut Your Mouth: Garcetti v. Ceballos and the Future of Public Employee Speech*, Berkely Electronic Press (2006); Stephen M. Kohn, *What Price Free Speech?: Whistleblowers and the Garcetti v. Ceballos Decision*

- (2006).
24. 2007 U.S. App. LEXIS 4895 (6th Cir. 2007) (unpublished).
25. *Id.* at 11-12.
26. 2006 U.S. Dist. LEXIS 92065 (W.D.Ky. 2006).
27. *Id.* at 11-12.
28. 126 S. Ct. 1951,1962.
29. *Id.* at 1969 (Souter, J. dissenting) ("I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities.")
30. See *id.*.
31. 428 F. 3d 223 (6th Cir. 2005).
32. *Id.* at 230-31.



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Part 2

Kentucky's New Partnership and Limited Partnership Acts

An Introduction

By Dean Allan W. Vestal & Thomas E. Rutledge

In the January 2007 issue of the *Bench & Bar*, Part 1 of this article discussed the Kentucky Revised Uniform Partnership Act. Part 2 of the article addresses the new Kentucky Uniform Limited Partnership Act. The article in its entirety is available on the Kentucky Bar Association's website at www.kybar.org.

As in Part 1, the following Frequently Asked Questions (FAQs) are not intended to be a complete exegesis of the new law. 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 limited partnership law based?

A. Kentucky's former Limited Partnership Act (set forth in KRS ch. 362 at §§ 362.401 through 362.527; "KyRULPA") was based upon the Revised Uniform Limited Partnership Act (1976) with the 1985 Amendments thereto ("RULPA"). Furthermore, under the principal of "linkage," to the extent KyRULPA did not address a particular issue, reference was made to the Uniform Partnership Act ("UPA").¹ In effect, the UPA was the "gap filler" for RULPA.

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

A. The technical name of the uniform act upon which this statute is based is the Uniform Limited Partnership Act (2001).² It is the successor to the Revised Uniform Limited Partnership Act (1976) with 1985 Amendments. The Uniform Limited Partnership Act (1976) is commonly referred to as ULPA. With the 1985 Amendments, the combined law was referred to as the Revised Uniform Limited Partnership Act, or RULPA. The uniform act approved in 2001, a significant re-write of limited partnership law as contrasted with a mere revision/supplementation, was through the drafting process commonly referred to as ReRULPA, the "Revision" of RULPA, but the official acronym is "ULPA."

Q. What other states have adopted ULPA?

A. ULPA was approved by NCCUSL in the summer of 2001. In 2003, ULPA was adopted in Hawaii. In 2004, it was adopted in Illinois, Iowa, and Minnesota, and 2005 saw it adopted in Florida and North Dakota. It was adopted in 2006 in California, Idaho, Kentucky, and Maine, with Maine being the only state, other than Kentucky, to have adopted RUPA and ULPA simultaneously.

Q. Where can I get a complete copy of ULPA?

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

Q. Why was ULPA drafted?

A. Following the extensive efforts involved in drafting RUPA, NCCUSL determined that a similar effort should be undertaken with respect to RULPA.³ In undertaking this effort, NCCUSL was mindful of the need to address de-linkage from RUPA,⁴ provide additional flexibility with respect to the structure of limited partnerships, and better coordinate its provisions with the anticipated use of limited partnerships in a choice

of entity environment that now includes the limited liability company and limited liability partnership. At the same time, the revision was intended to address the evolution of the limited liability limited partnership ("LLLP").

Q. How was ULPA drafted, and by whom?

A. ULPA was drafted by a NCCUSL committee working in concert with the American Bar Association Committee on Partnerships and Unincorporated Business Organizations, the same mechanism used for the drafting of RUPA.

Q. What is the effective date of the new limited partnership law?

A. The effective date of KyULPA is July 12, 2006. As of that date, all newly-formed limited partnerships are formed under and governed by KyULPA.⁵

Q. Is KyULPA applicable to limited partnerships existing prior to the effective date?

A. Limited partnerships organized prior to July 12, 2006 remain governed by their existing organic statutes,

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whether that be KyRULPA or its predecessor laws.⁶ Limited partnerships formed under prior law may elect to be governed by KyULPA.⁷

Q. Does the limited partnership have a role to play in the menu of available entities?

A. Since their arrival on the choice-of-entity scene, the limited liability company and the limited liability partnership have been applied to address situations for which, prior to their development, the limited partnership would have been used. The prefatory note to ULPA addresses this question:

The new Act has been drafted for a world in which limited liability partnerships and limited liability companies can meet many of the needs formerly met by limited partnerships. This Act therefore targets two types of enterprises that seem largely beyond the scope of LLPs and LLCs: (i) sophisticated, manager-entrenched commercial deals whose participants commit for the long term, and (ii) estate planning arrangements (family limited partnerships). This Act accordingly assumes that, more often than not, people utilizing it will want:

- strong centralized management, strongly entrenched, and
- passive investors with little control over or right to exit the entity.

The Act's rules, and particularly its default rules, have been designed to reflect these assumptions.⁸

Q. What has changed in the procedure for forming a limited partnership?

A. The procedure for forming a limited partnership under KyULPA is essentially identical to that for forming a KyRULPA limited partnership. A certificate of limited partnership meeting the statutory requirements is filed with the Secretary of State, and the limited partnership is formed.⁹

Q. Is a form KyULPA certificate of limited partnership available?

A. The Secretary of State's office has a form certificate of limited partnership that complies with KyULPA.

Q. Has KyULPA impacted limited partnership names?

A. KyULPA continues the rules that the name of a limited partnership identify the business as a limited partnership (e.g., "LP;" "Limited") and must be distinguishable upon the records of the Kentucky Secretary of State.¹⁰

Q. Must limited partnerships now file an annual report?

A. Limited partnerships governed by and foreign limited partnerships qualified to transact business under KyULPA are required to file annual reports with the Secretary of State.¹¹

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

A. A domestic limited partnership that fails in its obligation to file an annual report will have its certificate of limited partnership administratively dissolved.¹² The administrative dissolution of the certificate of limited partnership may be cured, and the cure will relate back to the date of the administrative dissolution.¹³ A foreign limited partnership that fails to file its annual report will have its certificate of authority revoked.¹⁴ The revocation of a certificate of authority cannot be cured - a new application for certificate of authority must be filed.

Q. Has the rule of general partner liability been revised?

A. The rule of general partner liability for partnership obligations has not been materially altered from prior law.¹⁵ A person admitted as a general partner is not personally liable on obligations of the limited partnership incurred prior to admission.¹⁶ If LLLP status is elected, the general partners will enjoy limited liability.¹⁷

Q. What is a limited liability limited partnership ("LLLP")?

A. A limited liability limited partnership ("LLLP") is a limited partnership that has made an election to afford its general partners limited liability from the debts and obligations of the partnership.¹⁸ The election to be an LLLP is made in the certificate of limited partnership, or, in the alternative, in an amendment to the certificate.¹⁹ Thereafter, subject to a notice period for pre-existing limited partnerships,²⁰ the general partners enjoy limited liability. There are special rules for the name of LLLP.²¹ An LLLP is for all purposes a limited partnership.²²

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

A. Foreign limited partnerships are obligated to qualify to transact business if they are in fact "transacting business." The foreign limited partnership must file an application for a certificate of authority²³ and thereafter file an annual report.²⁴ If the annual report is not filed, the certificate of authority will be revoked.²⁵ If a foreign qualification is cancelled, that cancellation is not subject to cure; the foreign limited partnership will need to apply for a new certificate of authority, effective from its issuance, and that new certificate does not relate back to the cancellation of the earlier certificate. This is that same treatment currently afforded foreign corporations and LLCs.

Q. What constitutes "transacting business" that would require qualification?

A. KyULPA contains a "laundry list" of activities that do not constitute transacting business.²⁶ As this list is nearly identical²⁷ to the lists in the Business Corporation²⁸ and Limited Liability Company acts,²⁹ reference to guidance issued under those laws often will be applicable when making qualification determinations for foreign partnerships. Note, however, the provision addressing income producing property;³⁰ this language does not appear in the corporation or LLC acts.

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

A. The filing procedures for limited partnerships by KyULPA are based upon those already in place for limited partnerships, updated to adopt some of the concepts and procedures used in the Limited Liability Company and Business Corporation acts.

Q. Who can sign documents on behalf of a limited partnership?

A. As a general rule, all filings on behalf of the limited partnership must be signed by at least one general partner, and in other instances by all of the general partners.³¹ There are other situations in which a mid-point will apply. KyULPA contains specific provisions on who must sign specific documents.

Q. Do filings made with the Secretary of State also have to be made with the County Clerk?

A. Filings by a limited partnership with the Secretary of State need to be filed as well with the county clerk for the county in which the partnership maintains its registered office.³² However, the failure to make the county level filing will not diminish its effectiveness.³³

Q. Are there required forms?

A. The Secretary of State has the authority to make the use of certain forms mandatory, and may provide other forms, but may not make their use mandatory.³⁴

Q. How does KyRUPA relate to limited partnerships formed under KyULPA?

A. Under KyUPA and KyRULPA, the general partnership law acted as a “gap filler” where the limited partnership law did not address a particular issue.³⁵ This reliance by limited partnership law on general partnership law is referred to as “linkage.” Under RUPA/ULPA, linkage has been abandoned, and the partnership and limited partnership laws are free-standing acts which do not reference one another.³⁶

Q. Does KyULPA define the fiduciary duties among the partners?

A. KyULPA adopts a non-exclusive (and as contrasted with ULPA a non-uniform) statutory description of the fiduciary obligations of the general partners as including duties of care and duty of loyalty, and these individual duties are themselves carefully described.³⁷ The KyULPA formula for the duty of care is non-uniform and is unique to Kentucky.³⁸ KyULPA provides that limited partners, as such, do not have a fiduciary duty to the limited partnership or the other partners.³⁹ 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 limited partnerships.

Q. May a limited partnership be used to organize a professional practice?

A. KyULPA specifically excludes

the formation of a professional limited partnership.⁴⁰

Q. What is the duration of a KyULPA limited partnership?

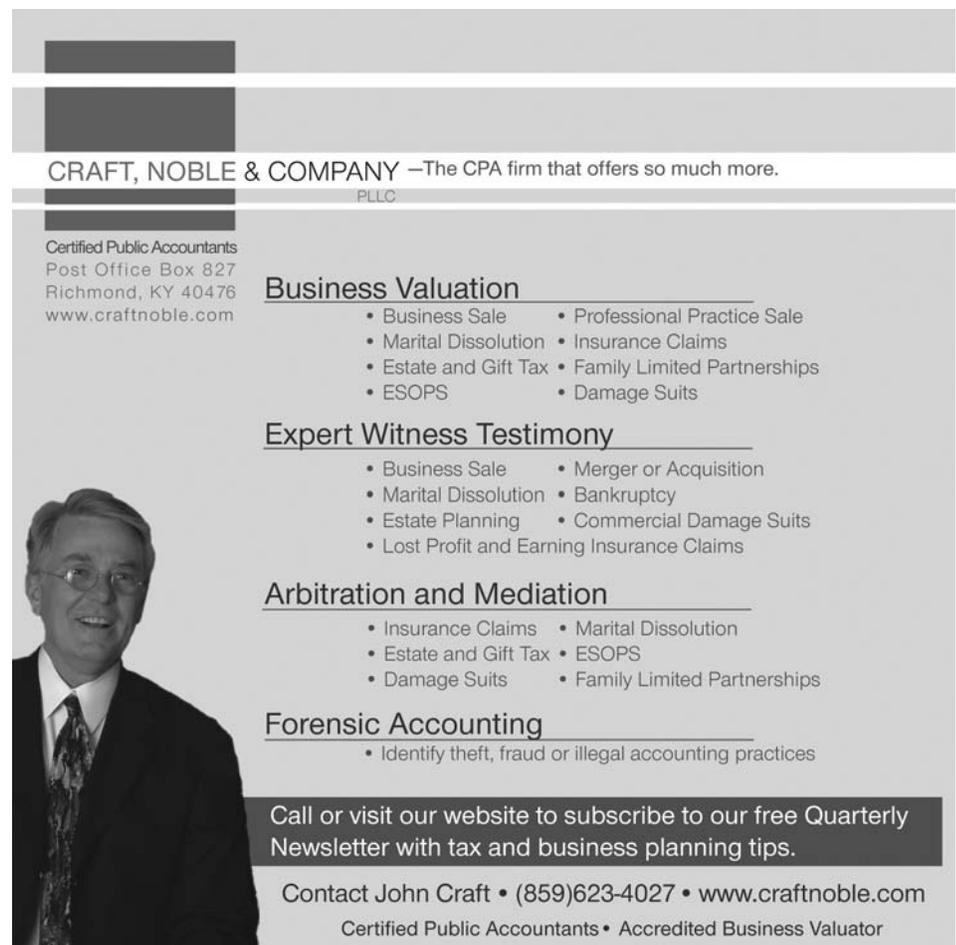
A. A KyULPA limited partnership has perpetual duration.⁴¹ A shorter duration may be specified in the certificate of limited partnership.

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

A. The default rules of KyULPA, subject to certain safeguards and limitations,⁴² may be modified in the agreement of limited partnership.⁴³ A non-uniform statute of frauds has been added for partnership agreements.⁴⁴

Q. Has the assumed name statute been revised to address KyULPA?⁴⁵

A. For purposes of the assumed name statute, the “real name” of a limited partnership remains its name as set forth on its certificate of limited partnership.⁴⁶



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ENDNOTES

1. KRS § 362.523. *See also* KRS § 362.447.
2. For commentary generally on ULPA, see Daniel S. Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act*, 37 SUFFOLK U. L. REV. 583 (2004).
3. *See also* Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195 (Summer 1995).
4. In drafting RUPA, the drafting committee expressly ignored the consequences should it be linked to and used as a gap filler for limited partnerships.
5. KRS § 362.2-1205(1)(a).
6. KRS § 362.2-1205(1)(a). *See also* KRS §§ 362.521(1); 362.525.
7. KRS § 362.2-1205(1)(b).
8. Uniform Limited Partnership Act (2001), Prefatory Note, 6A ULA 2.
9. KRS § 362.2-201. *See also* KRS § 362.2-120.
10. KRS §§ 362.2-108(2), 362.2-108(3); 362.2-108(4). *Contrast* KRS § 362.403(1).
11. KRS § 362.2-210.
12. KRS § 362.2-809. *Accord* KRS §§ 271B.14-200(1); 275.295(1)(a).
13. KRS § 362.2-810. *Accord* KRS §§ 271B.14-220; 275.295(3)(c).
14. KRS § 362.2-906. *Accord* KRS §§ 271B.15-300(1); 275.440(1).
15. KRS § 362.2-404(1). *Accord* KRS § 362.220.
16. KRS § 362.2-404(2). *Accord* KRS § 362.230.
17. KRS § 362.2-404(3).
18. KRS § 362.2-404(3).
19. KRS §§ 362.2-201(2); 362.2-1205(1)(b).
20. KRS § 362.2-1205(3).
21. KRS § 362.2-108(3).
22. KRS § 362.2-104(1).
23. KRS § 362.2-902.
24. KRS § 362.2-210.
25. KRS §§ 362.2-906(1), 362.2-907.
26. KRS § 362.2-903.
27. The list of activities that do not constitute transacting business does not include "owning, without more, real or personal property." *Contrast* KRS §§ 271B.15-010(2)(i), 275.385(2)(i).
28. KRS § 271B.15-010(2).
29. KRS § 275.385.
30. KRS § 362.2-903(2).
31. KRS § 362.2-204. *Contrast* KRS § 362.421.
32. KRS § 362.2-121(10).
33. KRS § 362.2-121(10). *Accord* KRS §§ 271B.1-230(3), 275.060(3).
34. KRS § 362.2-119. *Accord* KRS §§ 271B.1-210, 275.050.
35. KRS § 362.523.
36. *See generally* Elizabeth S. Miller, *Linkage and Delinkage: A Funny Thing Happened to Limited Partnerships When the Revised Uniform Partnership Act Came Along*, 37 SUFFOLK U. L. REV. 891 (2004).
37. KRS § 362.2-408.
38. KRS § 362.2-408(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).
39. KRS § 362.2-305(1).
40. KRS § 362.2-104(2).
41. KRS § 362.2-104(3). *Contrast* KRS § 362.415(1)(e) (requiring that the certificate of limited partnership set forth "the latest date upon which the limited partnership is to dissolve.")
42. KRS § 362.2-110(2).
43. KRS § 362.2-110(2).
44. KRS § 362.2-110(3). *Accord* KRS § 275.015(14).
45. *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).
46. KRS § 365.015(1)(b)4.

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Metadata Part III

Basic File System Metadata in Electronic Discovery and Digital Forensics

By Michael Losavio

Metadata is the “data about data” of documents, like the “FILED” date stamped by a clerk on a pleading that tells its filing date. Metadata sits between the essential information about a document, like its case number, and the actual content of the document.



Michael Losavio

The metadata that accompanies electronic documents is also “stamped” on them, but by both automatic and human action.

Like the “FILED” information, metadata can tell useful things about an electronic document if there is a dispute as to who knew what when.

This may be important given how easily changeable electronic documents are, with seemingly few artifacts of those changes.

The most basic metadata about electronic documents is that stamped by the

particular file system of the computer that manipulates it. By computer I mean any electronic data processing device, from your desktop computer to your Personal Digital Assistant to your cell phone. By electronic document I include your PDA address list, your cell phone’s pictures, your iPod’s video and any other electronic data or file.

Basic Information

The file system will generally “timestamp” an electronic document with temporal metadata that includes the times of:

- Creation
- Last modification
- Last access

These basic data are often called “MAC” times.

Different file systems timestamp differently and may give more or less information. The file system FAT 32 used by

MS-DOS and Windows shows when the file was created or modified/changed by time, to the second, and date as set by the computer’s clock. The time of last access, such as simply viewing a file but not changing it, is recorded only as to date.

The New Technology File System (NTFS) used in advanced Windows products records all three of these timestamps to the second, but also includes entries for when the metadata itself was last changed and attribution for that file. These metadata are kept as an entry in a Master File Table.

The files systems used by Linux and Unix operating systems record modified, accessed, metadata change and deletion times in “inodes.” “Ownership” of a file is also recorded, keyed to the password used to access the system and that file. Note these file systems may not normally keep the creation (birth-time) timestamp for a file.

The electronic metadata can help reconstruct a course of events. That

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reconstruction may refute a claim of recent fabrication or indicate one. This is increasingly important as more and more transactions take place only through electronic documents like e-mail.

Misinformation

Though valuable, the information in metadata must be reviewed critically. Metadata is *nonessential* file system information, meaning it's not needed for the file system to work properly. Metadata could be incorrect but the file system could still retrieve, modify and store usable files. In contrast, if the filename or addresses of file data in the storage medium were corrupted, the file system might not retrieve it.

If metadata is used to reconstruct a sequence of events or make inferences, the possibility of both intentional and unintentional misinformation must be considered. Given the diverse possibilities for this in each different file system, additional research, and possibly expert advice, may be needed if the metadata is disputed.

One example of this can be seen in the FAT/Windows environment, where the operation of the file system itself produces seemingly impossible metadata. This is in contrast to moving a physical document from one folder to another. In the virtual

world of Windows files and folders, "moving" a file from one folder to another changes the filename/directory structure.

This "creates" a new file even though the content of the e-document has not changed. The metadata then shows a creation time after a document change time. This is an unintentional inconsistency in the metadata, but one from which inferences of fabrication or spoliation might be made.

Other misinformation may be created if analysis is conducted on "deleted" files using digital forensic techniques.

"Deleted" data can be a rich source of information. Metadata and content are stored separately with a pointer from the metadata to the related content. When "deleted," their information remains in unallocated storage until overwritten.

But it is possible for the content to be overwritten before the metadata. If this new content is then "deleted" before the older metadata is overwritten, an examiner could recover the "deleted" metadata that points to the newer "deleted" content even though they are unrelated. This could give the appearance of age and access to the content that is false. It is further evidence of the importance of having a competent digital forensic examiner in such matters.

Spoliation

And, alas, there is the weakness in folks' hearts that leads to the fabrication, fraudulent modification or destruction of the metadata for electronic documents.

Metadata entries can be fabricated at the application and system level in a variety of ways. Resetting system clocks and manipulating files with an application program like e-mail or a word processor is simple. It's simplest for FAT file systems as they have simple structures, but manipulation can occur with more sophisticated file systems.

For Linux/Unix/Mac OS systems, the *touch* utility can be used to reset the modified and accessed times in the metadata. A short manual for manipulating timestamps using *touch* is available online from the Huntsville Macintosh Users Group at

<http://www.hmug.org/man/1/touch.php> .

For the hardcore, the *febooti fileTweak* utility can be used for such metadata manipulations on a wide variety of files. (<http://www.febooti.com/products/filetweak/>)

Use of any of these techniques may have a legitimate purpose, but their use, like that of a wipe utility, will raise questions.

Cross-correlation with other system data may reveal these fabrications, but it does mean more work and more expertise. The more complex file systems record other data which an examiner may access and use to detect spoliation. Some of these systems keep journals of file changes that may indicate fraud. Some keep secondary records of the metadata in other file structures that can reveal inconsistencies.

We will examine fabrication and authentication issues further. The point here is that if a dispute over key metadata erupts, advice from an expert in the particular file system at issue is needed. As with all things digital and forensic, each day brings new challenges.

If you have any comments or questions, please e-mail me at Michael.losavio@louisville.edu .

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Hidden Data in Your Documents

By Helane Davis, Director and Assistant Professor of Law, University of Kentucky Law Library

You have finished the important document, it states your position or argument, and with a click, it's off to the court, your opponent, or elsewhere out in the world. But did you know that you may have just provided an unintentional inside look into how that document was

created, by whom, when, and in how many versions?

That is the risk of hidden data in word processed documents.

Chances are that in creating these documents you

have used the very elements that might put you at risk. Document properties sections allow us to add reference terms, check revision dates, and note document authors. Built-in editing and comment tracking functions allow multiple readers to comment on and correct a draft. What you might not be aware of is the extent to which this information – often called metadata, or data *about* data – can travel with your document, even when you turn off editing functions, delete unused comments, or save what outwardly appears to be a *clean* document.

What's Saved As Metadata

Contrary to popular opinion, metadata is

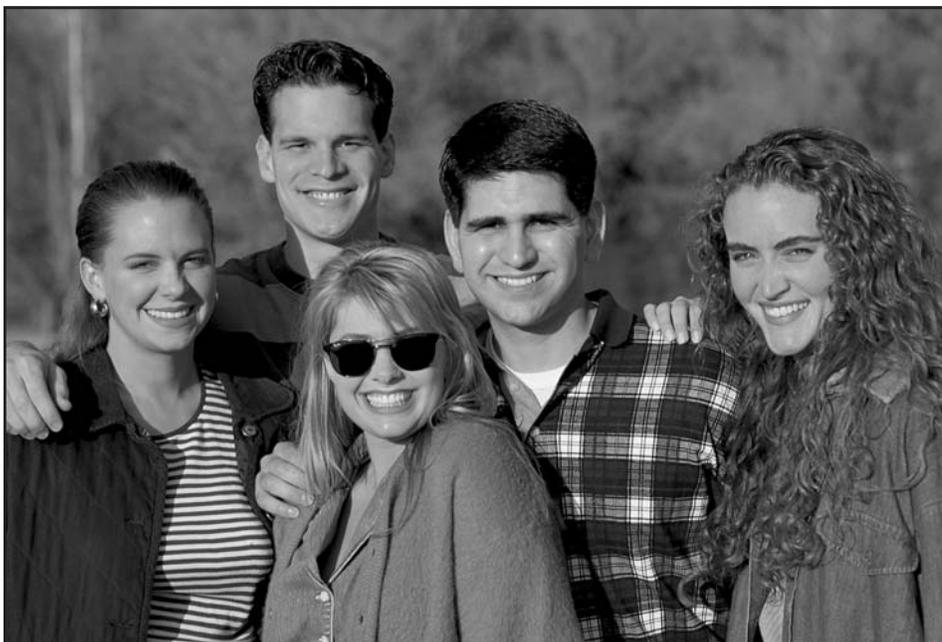
not just a problem with one particular word processing program. While Microsoft Word™ has received a lot of attention in this area, it's not the only application that stores metadata. It is true, however, that stored metadata varies depending upon the program you are using.

If you are using Corel WordPerfect™ (and WordPerfect was once the preferred program by lawyers – some would argue it still is), then your metadata includes all the information saved in document properties or file summary, including: creation date, last saved date, author typist, length (by characters, paragraphs, and lines), revision date, descriptive title, and terms. In addition to document properties, WordPerfect tracks the undo/redo history that records and stores edits made to your document. If saved with the document, this history could potentially provide a step-by-step guide to past wording, descriptions, and amounts. WordPerfect also has a 'review' function that allows multiple reviewers to comment on a document. Those comments are identified by user, and this information – both the comments and who made them – is also saved.

If you are using Word, then your metadata includes similar document properties information, including: creation date, last accessed date, last modified date, user, file name, document size, descriptive terms, the applicable document template, total editing time, and versions. Users also have the option of customizing additional functions, including who the document was forwarded to, a document number, client, document destination, status, owner, and disposition. Word's 'track changes' feature, when engaged, tracks every change in a document, including additions, deletions and comments. Every change is identified by user. What is most significant about 'track changes' is that it can be turned on or off, but that alone does not delete these changes. Word users



Helane Davis



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often turn the track changes feature off, forgetting that with one click it can be re-engaged, making every edit and change viewable once again.

Why You Should Care

Imagine extensive comments from a firm partner questioning how damages were calculated in a civil matter. Would you want the opponent receiving your settlement offer to have access to this set of deliberations? Or, imagine a letter template created by one attorney and used by another where the final document carries the name of the first attorney. If the letter purports to come from someone else in your office, this discrepancy, although easily explained, is potentially embarrassing. Two simple examples, but with each it's easy to understand why this type of information should never travel with your documents.

What You Can Do

If you are using WordPerfect X3, from the menu go to **File** and choose **Save Without Metadata**. A dialog box will open that allows you to choose exactly

which metadata you want to remove, from comment information to the routing slip affiliated with the document. If you are using an older version of WordPerfect, you will have to approximate this function with several steps. First, go to **File**, and choose **Properties**. Delete any information you don't want saved. Then, under **File** choose **Document** and systematically delete sensitive information from any or all of the subcategories. This is where you remove redlining, delete reviewer information, and delete routing slip information. It is also a good idea to display any 'hidden text' and delete anything sensitive or embarrassing. To see this text, choose **View** and **Hidden Text**. Depending upon your version of WordPerfect, you may have to experiment to identify all the locations where metadata is stored, but if that's the case, the task will be worth the few extra minutes.

If you are using Word (2003 or XP), Microsoft has created a Remove Hidden Data tool to help you easily remove the metadata that Word routinely saves. This tool is free and can be downloaded from

the Microsoft website¹. Once you've installed the tool, you can access it via **File** on the menu bar. If you're using an older version of Word, you may have to follow a similar process as the one above and locate all the places where Word stores data about your document and its users. Whether you use the Remove Hidden Data tool or not, it's a good idea to familiarize yourself with the type of hidden data stored in your documents. Also, in addition to this tool, it is recommended that users always do two things. First, if you use track changes, make sure you either accept or reject all changes before distributing your document. This will purge the markup that indicates comments, deletions and additions. Once the document is saved and closed, individual edits cannot be displayed. Buttons to accept or reject any change or all changes at once are available on the Track Changes toolbar. If you are not sure how to access this toolbar, choose **View** on the menu bar, then **Toolbars**, then **Reviewing**. Second, there are two security options that you should consider. From the menu bar, go to **Tools**, then **Options**.

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John W. Hays
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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Click on the **Security** tab and make sure the following options are checked in the 'privacy' section: "Remove personal information from file properties on save" and "Warn before printing, saving or sending a file that contains tracked changes or comments."

If you are a Word user and would like to learn more about ways to protect yourself, see "Check for hidden text, comments, and revisions before sending a legal document" at the Microsoft website.² If you are a WordPerfect user and would like a detailed breakdown on X3's new metadata function, see "Saving WordPerfect Files Without Metadata" at the Corel website.³

Additional Considerations

When considering this issue, don't think small. Remember to check your spreadsheets⁴ for formulas that might disclose proprietary calculations and your word processed documents for embedded objects. Both of these areas can raise concern. Also, other digital formats, such as JPEGs, can carry metadata.

A related issue, redaction, has also gained attention. With word processed documents, redaction appears to be very easy. Symbols or changes in color can obliterate text. However, that type of alteration only looks permanent and is usually easily reversed. If you are worried about redaction in Word files, check the Microsoft Download Center for a separate redaction tool.

Finally, it was only a matter of time before bar associations started weighing in on whether lawyers *should* mine metadata for proprietary information. The Florida Bar did just that in early 2006, stating unequivocally that such a practice is unethical.⁵

ENDNOTES

1. Access the Microsoft Download Center at [http://www.microsoft.com/downloads/Search.aspx?](http://www.microsoft.com/downloads/Search.aspx?displaylang=en) and search 'remove hidden data.'
2. Available at [http://office.microsoft.com/en-](http://office.microsoft.com/en-us/word/HA010777371033.aspx?pid=CL100636481033)
3. Available at <http://www.corel.com/servlet/Satellite?pagename=Corel3/Section/Display&sid=1047024315119&gid=1047024331836&cid=1144159894033>. Corel has also provided instruction on how to achieve the same result in WordPerfect 12. That paper is available at http://www.corel.com/content/pdf/wpo12/Minimizing_Metadata_In_WordPerfect12.pdf.
4. The Microsoft Hidden Data Tool is designed to remove metadata from not only Word but also from Excel™ and PowerPoint™ files.
5. See "What's In Your Document?" available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/0/c3f75b4e10e94f78852570e50051b23e?OpenDocument>.



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JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

FORMER JUDGE DANIEL J. ZALLA,
16TH JUDICIAL CIRCUIT, DIV. 2

**ORDER OF PUBLIC REPRIMAND
(Pursuant to SCR 4.020(1)(b))**

Daniel J. Zalla was a candidate for circuit judge of Division 2 of the Sixteenth Judicial Circuit in the general election held November 7, 2006. Mr. Zalla agreed to accept without formal proof the disposition made in this Order.

The Commission determined, after an informal investigation, that Mr. Zalla made campaign contributions to seven candidates for public office.

The above actions of Mr. Zalla violated the following Canon of the Code of Judicial Conduct, Supreme Court Rule 4.300:

Canon 5

**A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN
FROM INAPPROPRIATE POLITICAL ACTIVITY**

A. Political Conduct in General

(1) A judge or a candidate for election to judicial office shall not: (c)solicit funds for or pay an assessment or make a contribution to a political organization or candidate...

The Commission gave due consideration in making this disposition to the fact that Mr. Zalla fully cooperated with the Commission in its consideration of this matter and agreed to the resolution adopted by the Commission. Also, it should be noted that Mr. Zalla made all the contributions at issue prior to his filing to run for the office of circuit judge with the Secretary of State. However, the Code of Judicial Conduct states that a person becomes a candidate as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The Commission determined that Mr. Zalla established a campaign treasurer and made a contribution to the treasurer prior to making the campaign contributions to the other candidates for public office. The Commission further determined that Mr. Zalla attended campaign events in behalf of his own candidacy prior to making the majority of the contributions.

Upon consideration of his agreement to accept this disposition without formal proof, the Commission finds and it is hereby ORDERED and ADJUDGED that for the foregoing violations, Daniel J. Zalla should be and hereby is PUBLICLY REPRIMANDED.

Stephen D. Wolnitzek and Judge Wil Schroder disqualified from any consideration of the matter involving Mr. Zalla.

This Order is issued this 26th day of January, 2007.

**J. DAVID BOSWELL, CHAIR
JUDICIAL CONDUCT COMMISSION
COMMONWEALTH OF KENTUCKY**

This is to certify that a copy of this Order has been served on Mr. Zalla by mailing a copy to his counsel this 29th day of January, 2007.

**JAMES D. LAWSON
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<i>Kentucky Academy of Trial Attorneys</i></p> <p>21 Domestic Relations CLE
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Robert L. McClelland
John D. Meyers
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Justice John D. Minton Jr.
Patrick H. Molloy
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Jesse T. Mountjoy
Kris D. Mullins
W. Douglas Myers
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Michael V. Pearson
John G. Prather, Jr.
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William C. O. Reaves
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KBA Alternative Dispute Resolution Section
KBA Civil Litigation Section
KBA Criminal Law Section
KBA Elderlaw Committee
KBA Natural Resources Law Section
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Pulaski County Bar Association
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2006 CLE *Award Recipients*

Congratulations to the following members who have received the CLE award by obtaining a minimum of 62.5 CLE credit hours within a three year period, in accordance with SCR 3.680. The CLE Commission applauds these members for their efforts to improve the legal profession through continuing legal education. The below list and a list of renewal recipients may be accessed through the Kentucky Bar Association website at www.kybar.org.

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Ryan James Albrecht	Angela M. Capps	Robert F. Duncan	Chadwick B. Hammonds	Kimberly Ann Krall
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Lori Janelle Alvey	Christopher D. Carrier	Stefanie Lynn Durstock	Philip L. Hanrahan	Steven J. Kriegshaber
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David E. Arvin	Mary P. Cartwright	Robert Henson Eardley	Joseph Leon Hardesty	Joel Christian Lamp
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Shawn Allen Bailey	J. Kirk Clarke	Teressa L. Elliott	David Hare Harshaw III	Yolanda J. Layne
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 John Frederick Zink

2007 KENTUCKY LAW UPDATE

Dates and Locations

September 6-7 (Th/F)	Lexington Lexington Convention Center
September 18-19 (T/W)	London London Community Center
September 25-26 (T/W)	Covington Northern Kentucky Convention Center
October 4-5 (Th/F)	Ashland Ashland Plaza Hotel
October 25-26 (Th/F)	Prestonsburg Jenny Wiley State Resort Park
October 29-30 (M/T)	Bowling Green Holiday Inn & Sloan Convention Center
November 7-8 (W/Th)	Owensboro Executive Inn Rivermont
November 29-30 (Th/F)	Louisville Kentucky International Convention Center
December 4-5 (T/W)	Paducah JR's Executive Inn



April 4-5, 2007 • Covington Northern Kentucky Convention Center

If you were sworn in April 2006 and have not yet fulfilled your New Lawyers Program requirement, register now!
 Visit www.kybar.org • click "CLE" and choose "New Lawyer Program" from the menu.
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March 6	The Law of Religious Organizations Part 1
March 7	The Law of Religious Organizations Part 2
March 13	Successor Liability In Asset Acquisitions
March 20	Key Principles of Residential Real Estate Buy-Sell and Brokerage Agreements
March 22	Retaliation Claims Update
March 27	Ethics in Civil Litigation Part 1
March 28	Ethics in Civil Litigation Part 2
April 3	LLCs and Insolvency: Bankruptcy and Tax Aspects
April 10	Update for Attorneys Advising MDs, Part 1
April 11	Update for Attorneys Advising MDs, Part 2
April 17	Real Estate Workouts: Tax and Non-Tax Aspects

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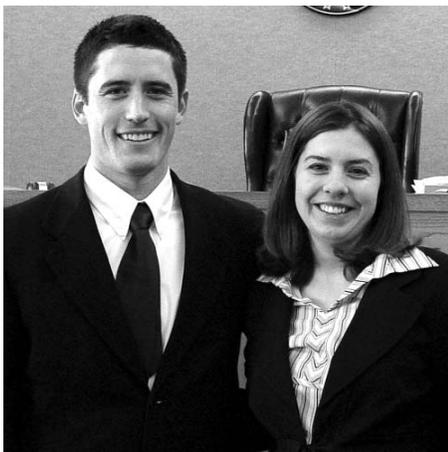
Note: Credits earned from listening to these prerecorded programs are technological credits; a maximum of six (6.0) CLE credits may be applied to your record for any given educational year pursuant to SCR 3.663(7).



Salmon P. Chase College of Law

Chase College of Law Trial Team Advances to National Competition

Northern Kentucky University Salmon P. Chase College of Law continued its tradition of providing high-quality education in trial advocacy skills as demonstrated by its most recent first-place finish in the Sixth Circuit Regionals of the National Trial Competition held February 9 through



Chase trial team members Kyle Murray and Kelly Gindele.

11 in Covington, Kentucky and Cincinnati, Ohio.

The Chase team of Kelly Gindele and Kyle Murray, and a team from the University of Kentucky College of Law, tied for first place in the regionals and earned the right to advance to the finals of the National Trial Competition in Houston, Texas in March. Chase team members also competing were Bryan Butler, Anne Bennett Cooke, Leslie Heagan, Carrie Masters, Dustin Riddle, and Larry Shelton. Professor Kathleen Gormley Hughes serves as faculty advisor to the Chase National Trial Team. Hughes and adjunct faculty Bob Sanders, Linda A. Smith, and Tifanie McMillan coach the team.

This year, Chase College of Law was the host school for the regionals during

which 26 teams from 13 law schools from Kentucky, Ohio, Michigan and West Virginia competed. Thirty six members of the American College of Trial Lawyers from Michigan, Ohio, Kentucky and Tennessee served as judges.

The National Trial Competition was established in 1975 and is an inter-law school trial competition sponsored by the American College of Trial Lawyers and the Texas Young Lawyers Association. Its purpose is to encourage and strengthen students' advocacy skills through quality competition and valuable interaction with members of the bench and bar. The program is designed to expose law students to the nature of trial practice and to supplement their education. Over 500 law students from across the country vie for the opportunity to compete in the national championship round in Texas. The Chase team is among only 26 teams in the nation to earn the right to compete in Texas.

Chase started its Trial Advocacy Program in 1999 and the team has achieved first or second place in numerous state, regional and national competitions since its inception. The program is supported by Reminger & Reminger, The Lawrence Firm, the American Board of Trial Advocates (ABOTA), the Kentucky Association of Justice, and the Kentucky District Judges Association. Adjunct faculty John Dunn and Emily Kirtley Hanna also coach competition teams.

UK University of Kentucky College of Law

Some Things Have Changed Over 40 Years; Some Haven't

Recently, I had occasion to describe what law school at UK was like forty years ago and what it is like today. You may find it an interesting comparison.

The class that entered in the fall of 1966 and graduated in 1969 – Biff Campbell's class to give you a reference – came to the present building. But it

had a very different experience than that of the current students.

Some of the changes are worrisome: in 1966 resident tuition was \$280 a year, non-residents were charged \$820. Resident tuition this year is \$12,144, non-resident tuition is \$22,544. Although we have raised scholarship resources unimaginable in 1966, concerns about affordability are always present.

Most of the changes, however, are clearly for the best. In 1966 we had 14 faculty members; today we have 31. In 1966 we taught 10 first year sections; today we teach 19 and would teach more if we had the classroom space to do it. In 1966 we taught 27 upper level classes and 8 seminars; today we teach 78 classes and 13 seminars. More than the numbers, compare the breadth of classes then and now: in 1966 we taught a single international law seminar; today we teach International Law, International Human Rights, International Taxation, International Trade Law, and International Environmental Law. In 1966 we didn't teach intellectual property law; today we teach Intellectual Property, Copyright Law, Internet Law, and Patent Law. In 1966 we taught a Medico-Legal Problems Seminar; today we teach Healthcare Organizations and Finance, Advanced Research Topics in Health Law, Bioethical Issues in the Law, and Medical Liability.

Indeed, today we teach the following classes, none of which were offered in 1966: Advanced Partnership Law; Advanced Torts; Advanced Research

In Memoriam

William Joseph Crowe	Louisville
Cecil Davenport	Leesburg, FL
C. Boyd Green	Shelbyville
Henry B. Mann	Louisville
William Jerry Parker	Bowling Green
Cecil C. Sanders	Lancaster
Richard D. Shapero	Louisville
Roy Vance, Jr.	Frankfort

Topics in Health Law; Alternative Dispute Resolution; Banking Law; Bioethical Issues in the Law; Business Planning; Capital Punishment; Children and the Law; Complex Civil Litigation; Conflict of Laws; Copyright Law; Criminal Trial Process; Education Law; Election Law; Estate Planning Skills; Federal Criminal Law; Healthcare Organizations and Finance; Immigration Law; Innocence Project; Intellectual Property; International Business Transactions; International Environmental Law; International Human Rights; International Taxation; International Trade Law; Internet Law; Land Use Planning; Law and Religion; Legal Accounting; Legislation; Litigation Skills; Medical Liability; Negotiations; Patent Law; Payment Systems; Products Liability; Race, Racism and the Criminal Law; Real Estate Transactions; Remedies; Scientific Evidence; State and Local Taxation; Statutory Civil Rights; Tax Policy; and Topics in Property.

Other changes confirm the rich expansion of what we do. In 1966, we had 80,000 volumes and equivalents in

the library. Today we have 465,187. We have a live-client clinic, which we didn't in 1966. Even the student organizations have changed. The SBA, KLJ and student fraternities still exist, but in addition we have: the Journal of Natural Resources and Environmental Law, the Moot Court Board, the Trial Advocacy Board, the Black Law Students Association, the Federalist Society, the American Constitution Society, the Student Public Interest Law Foundation, the Women's Law Caucus, the Christian Legal Society, the Environmental Law Society, the Equine Law Society, the Gay and Lesbian Law Caucus, the Health Law Society, the Intellectual Property Law Society, and the J. Reuben Clark Law Society.

The community has changed in positive ways. In 1966, Dorothy Salmon was the only female member of the faculty; today women comprise 40%. There were no African American faculty members in 1966; today we have four. Take a look at the graduation photographs from 1969 and you find two women and no African Americans. The class of 2009 is diverse: women are 44% and minority students

11% of that class.

Some important things don't change, however. The great teachers of 1966 – Matthews, Moreland, Oberst, Ham, Gilliam, and Whiteside – have their counterparts among the women and men of the current faculty. After all, three of the promising young professors of 1966 – Al Goldman, Bill Fortune and Bob Lawson – are still teaching. And the promising students of 1966 have their counterparts as well. I am confident that the class of 2009 will include legal academics like Biff Campbell and Paul Willis; public servants like Tom Handy and Ed Whitfield; notable practitioners like Ed Glasscock, Bill Baird, and Glen Bagby; judges like John Adams and Bill Cunningham; and community leaders like so many of the class of 1969. You see, some good things just don't change.

—Dean Allan W. Vestal



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BOARD OF GOVERNORS

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING NOVEMBER 17, 2006

The Board of Governors met on Friday, November 17, 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; *Bar Governors 2nd District* – 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* – T. Rouse and *7th District* – J. Rosenberg, W. Wilhoit. Bar Governors absent were: M. Grubbs and C. Moore.

In Executive Session, the Board considered one (1) discipline case, two (2) default discipline cases, one (1) reinstatement case and three (3) restoration cases. Steve Langford of Louisville non-lawyer member serving on the Board

pursuant to SCR 3.375 participated in the deliberations.

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

Heard status reports from the Client Assistance Program (CAP), Kentucky Lawyer Assistance Program (KYLAP), Investment Committee, 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.

Approved signing a two (2) year contract with Lexington Center Corporation and the Hyatt Regency for both 2008 and 2010 Annual Convention.

Approved a resolution to the Access to Justice Foundation for their work in promoting Pro Bono services.

Heard a presentation from representatives with the Kentucky Paralegal Association concerning funding for a paralegal certification program.

President Ewald reported that the Executive Director Search Committee has met twice and received 29 applications submitted for the position of KBA Executive Director. Individual interviews will be held on December 15 and 16 at the Kentucky Bar Center in Frankfort.

President Ewald reported that the ABA House of Delegates Committee on Credentials and Admissions approved the KBA’s application for an additional Delegate of the ABA House of Delegates thereby allowing the KBA to appoint four Delegates. The Board approved appointing Immediate Past President David B. Sloan of Covington as the fourth Delegate to the ABA House of Delegates.

Approved the appointments of Jane Winkler Dyche of London and G. David Sparks of Paducah to serve on the Joint Local Federal Rules Commission for respective four (4) year terms beginning on December 31, 2006 and expiring on December 31, 2010. Other Commission Members include: C. Dean Furman, Jim Cleveland, Michael T. Lee, Charles

Wisdom, Charles Middleton III and Barbara Edelman.

Approved the reappointment of Arnold Taylor of Covington to the Judicial Ethics Committee for a four (4) year term ending November 17, 2010.

President Ewald announced that there will be a retirement celebration for Bruce K. Davis on Friday, March 9, 2007.

Approved Larry W. Myers acting interim Chair of the KBA Small Firm Section until the next annual meeting of the section to be held during the 2007 KBA Annual Convention in Louisville.

Approved the 2007 Holiday Calendar for the KBA Staff.

Executive Director Bruce K. Davis reported that Barbara D. Bonar was unopposed and will become President-Elect of the Kentucky Bar Association on July 1, 2007. There will be a statewide election for the Office of Vice President between Charles E. “Buzz” English, Jr. of Bowling Green and Shelby C Kinkead, Jr. of Lexington. There were no contested elections for any of the seven Bar Governor seats on the Board of Governors. The following will begin their respective two (2) year terms beginning on July 1, 2007:

1st Supreme Court District – Douglas L. Myers, Hopkinsville
2nd Supreme Court District – R. Michael Sullivan, Owensboro
3rd Supreme Court District – Richard Hay, Somerset
4th Supreme Court District – Douglass Farnsley, Louisville
5th Supreme Court District – Fred E. Fugazzi, Jr., Lexington
6th Supreme Court District – Thomas L. Rouse, Covington
7th Supreme Court District – William H. Wilhoit, Grayson

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To KBA Members
Do you have a matter to discuss
with the KBA's Board of Governors?
Board meetings are scheduled on
May 18-19, 2007
June 19, 2007

To schedule a time on the
Board's agenda at one of these
meetings, please contact
James L. Deckard or
Melissa Blackwell
at (502) 564-3795.

Proposed By-Law Changes

The following are proposed changes to the Natural Resources Law Section By-Laws. The revisions will be voted on at the Section's annual meeting on June 20, 2007 in conjunction with KBA Annual Convention in Louisville.

NATURAL RESOURCES LAW SECTION
SECTION OF ENVIRONMENT, ENERGY AND RESOURCES

KENTUCKY BAR ASSOCIATION
BY-LAWS

NAME AND PURPOSE

Name.

The organization shall be known as the ~~Natural Resources Law Section,~~ **Section of Environment, Energy and Resources**, (Section), of the Kentucky Bar Association (KBA).

Purpose.

The purpose of this Section shall be as follows:

To promote the exchange of ideas within the KBA on matters of interest to lawyers who practice within the field of ~~natural resources~~, environmental quality, and energy **and natural resources**.

To provide through the KBA, programs and information relevant to **environmental, energy and** natural resources law practice.

To enhance the image and professional capability of the legal profession in **the field of environmental, energy and** natural resources law.

MEMBERSHIP AND VOTING

Membership.

Membership in the Section is open to all members of the KBA. A membership fee shall be assessed annually to those members of the KBA who wish to be members of the Section. An initial fee of \$10.00 per annum has been established, and any increase or decrease shall be subject to approval by a majority vote of the Section members present and voting at the Annual Meeting. Dues shall be due and payable with the KBA dues. Associate, non-voting membership may be permitted.

Voting.

Only dues paying members of the KBA and the Section shall be qualified

electors and eligible to vote and hold office in the Section. Unless otherwise provided in these Articles, any and all official action taken by the Section at the Annual Meeting shall be by a majority of those members present and voting.

OFFICERS, DIRECTORS, AND COMMITTEES

Officers.

The officers of the Section shall be the Chair, the Chair-Elect, and the Vice-Chair. They shall be elected at the annual meeting of the Section from and by the Section membership present and voting during the Annual Meeting of the KBA and shall qualify by acceptance. All officers must be active dues paying members of the KBA and the Section. A word importing the masculine gender only may extend and be applied to females as well as males.

Duties of Officers:

Chair. The Chair shall preside at all meetings of the Section and of the Executive Committee and shall perform such other duties assigned by the membership or by the Executive Committee. He shall prepare and file an annual

report in compliance with the requirements of the By-Laws of the KBA.

Chair-Elect. The Chair-Elect shall serve as administrative assistant to the Chair and shall perform the duties assigned by the membership, the Executive Committee or the Chair. He shall, during the tenure as Chair-Elect, endeavor to thoroughly familiarize himself with the duties of the Chair and the works of the Section and of the KBA.

Vice-Chair. The Vice-Chair shall serve as secretary of the Section and shall issue notice of all meetings of the Section and the Executive Committee and shall keep a record of the proceedings.

Term of Officers.

The officers shall serve for a term of one year beginning with the adjournment of the annual meeting of the membership at which they are elected and ending with the adjournment of the next annual meeting of the membership or thereafter until their successors shall have been duly elected and qualified. The member of the Section elected Chair-Elect at an annual meeting of the membership, shall, upon expiration of

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- Mediator for the Franklin Circuit Court, assisting in resolution of tort, contract, personnel and property disputes and the rehabilitation of AIK Comp

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- Harvard Law School Program on Negotiation (mediation)
- Harvard Law School Program on Negotiation (negotiations)
- Straus Institute for Dispute Resolution, Pepperdine School of Law
- University of Cincinnati College of Law Center for Practice in Negotiation and Problem Solving
- Administrative Office of the Courts
- United States Department of Justice

Other Experience:

- Recognized by the AOC as a Civil Mediator
- U.S. Attorney and Commissioner of Kentucky State Police



Mike Troop
Frankfort, KY
502-330-0856
mikewtroop@cs.com

his term as Chair-Elect, succeed to the office of Chair for a term of one year, beginning with the adjournment of the annual meeting of the membership of which he assumes the office and ending with the adjournment of the meeting of the membership thereafter, until his successor has assumed office.

The Executive Committee.

The Executive Committee shall be composed of the Chair, Chair-Elect, Vice-Chair, immediate past Chair, and four other members. The Chair shall appoint the four non-officer members of the Section to be members of the Executive Committee. In making such appointments, the Chair shall consider the qualifications, size and type of practice, and the diversity of geographical location of each person so appointed. The term of the appointed non-officer members shall be coextensive with the term of the Chair. The Executive Committee shall be responsible for liaison with all other section and committees of the KBA.

The Executive Committee, by two-thirds (2/3) vote, may exercise the power of the Section during any period the Section membership is not meeting, subject to such limitation as may be imposed by the Section membership.

Standing Committees.

The standing committees shall be as enumerated herein. They shall be advisory to the Chair and to the Executive Committee and shall have duties as directed by the Chair and as herein set out.

Nominating Committee.

The Nominating Committee for each subsequent year shall be appointed at least three months prior to the Annual Meeting of the Executive Committee. In making such appointments, the Chair shall consider the qualifications, size and type of practice, and the diversity of geographical location of each person so appointed. The Nominating Committee shall consist of at least three members (but not more than five members) of the Section and shall include at least ~~one~~ **one** past Chair of the Section, if he is available and willing to serve. In the first year of the Section, the Chair shall serve as a member of the Nominating Committee. The Nominating Committee shall receive and consider suggestions of

Legally Insane by Jim Herrick



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.

persons to serve as officers and Directors for the Section and shall report a slate of nominees to the section for election at the business meeting of the Section at the Annual Meeting of the KBA. The Nominating Committee may nominate more than one person for each office.

Natural Resources Committee

- Coal
- Forest Resources
- Oil and Gas
- Water Resources
- Alternative Energy Sources
- Oil Shale
- Hard Minerals

Environmental Quality Committee

- Air Quality
- Water Quality
- Solid and Hazardous Wastes

Energy Committee

- Energy Policy
- Electric Power
- Public Lands and Land Use

CLE Committee

- Programs
- Newsletter
- Teaching

Planning Committee

Membership Committee

- Regular
- Associate Memberships

Special Committees.

The Chair shall with the approval of the Executive Committee create such special committees as deemed necessary. Committee Chairs and Memberships.

The Chair shall, with approval of the Executive Committee, appoint the chair of each standing committee and each special committee. The Chair shall appoint the membership of each committee.

MEETINGS

Meetings.

An annual meeting of the Section shall be held during the KBA Annual Convention.

Special meetings of the Section may be called by the Chair, by two-thirds (2/3) vote of the Executive Committee, or by the Vice-Chair upon written request of not less than 25 members of the Section. The time, place, and purpose of the special meetings shall be announced at least 10 days in advance, either by publication in the Kentucky Bench and Bar or by notice to the membership via first class mail or via electronic mail. All special

meetings shall be held within the Commonwealth of Kentucky.

At all meetings, the members of the Section present (but not less than three) shall constitute a quorum for the purpose of transacting business. The latest edition of Roberts' Rules of Order shall govern the proceedings.

The Executive Committee shall meet not less than three times each year. The meetings of the Executive Committee shall be called by the Chair or upon written request of not less than four (4) members of the Executive Committee. The time and place of the meetings of the Executive Committee shall be announced at least ten (10) days in advance by notice via first class mail or via electronic mail to its members.

AMENDMENTS

Amendments.

These by-laws may be amended only at an Annual Meeting of the Section membership by two-thirds (2/3) vote of the members of the Section in attendance and voting, provided that notice of the substance of the proposed amendments shall either have been published with notice of the meeting in the Kentucky Bench and Bar or sent to all members of the Section with notice of the meeting via first class mail or electronic mail. Alternatively, these by-laws may be amended by two-thirds (2/3) vote of the members of the Section (but not less than 25 members) by electronic vote, provided that notice of the substance of the proposed amendments

shall have been delivered to members of the Section via first class mail or electronic mail at least thirty (30) days prior to the voting. The timing, security and manner of electronic voting shall be determined for each vote by the Executive Committee in consultation with the KBA Executive Director.

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WHO, WHAT, WHEN & WHERE

Wyatt, Tarrant & Combs, LLP names **Peter G. Marino** as new counsel to its Louisville office and names **Kristie Alfred, Robert J. Penta, Edith P. Silletto, Bradford C. Spencer, and Sara Veeneman** as new associates. Marino concentrates his practice in the area of health care law. He served as in-house counsel and worked in government affairs concentrating on managed care, insurance, and regulatory issues for Humana, Inc.

Marino received his B.A. from Centre College in 1988 and earned his J.D. from the University of Louisville School of Law in 1994. Alfred received her B.A., *summa cum laude*, from Western Kentucky University in 2003 and earned her J.D. from the University of Kentucky in 2006. Penta received his B.A. from Indiana University in 2003 and earned his J.D. from the Wake Forest University School of Law. Silletto received her B.A., *summa cum laude*, from the University of Kentucky in 2001 and earned her J.D., *magna cum laude*, from the University of Louisville Brandeis School of Law in May 2006. Spencer received his B.S., *summa cum laude*, with honors from the University of Kentucky and obtained his M.S. in 2001. He earned his J.D. in 2006 from the



Peter G. Marino



Kristie Alfred



Robert J. Penta



Edith P. Silletto



Bradford C. Spencer

University of Kentucky College of Law, Order of the Coif. Veeneman received her B.A., *magna cum laude*, from Transylvania University in 2002 and earned her J.D., *cum laude*, from the University of Kentucky College of Law in 2005.



Sara Veeneman

The Covington law firm of **Adams, Stepler, Woltermann & Dusing** is pleased to announce that **Jeffrey A. Stepler** and **W. Thomas Fisher** have been named partners effective January 2007. Stepler practices in the areas of commercial litigation, products and premises liability, insurance defense, personal injury and appellate law. He received his B.A. from Miami University in 1994 and earned his J.D. from the University of Kentucky College of Law in 1997. Fisher's practice covers a wide range of business and real estate transactions. He represents business clients ranging from start-up businesses to larger established businesses, counseling them on legal and business decisions, including capitalization and finance, taxation, mergers and acquisitions, employment and compensation. Fisher received his B.A. from the University of Louisville in 1996 and earned his J.D. from the Brandeis School of Law in 1999.

The Louisville law firm of **Sitlinger, McGlinch, Theiler & Karem** is pleased to announce that **David S. Mejia** has become Of Counsel with the firm. Mejia will continue to concentrate his practice in criminal defense, litigation, attorney discipline, trials and appeals in the federal and state courts. He is licensed in Kentucky and Illinois. Mejia also is active in lecturing, training and authoring articles and texts in the field of criminal practice.



David S. Mejia

The Paducah law firm of **Whitlow, Roberts, Houston & Straub, PLLC** is pleased to announce that **Joe H. Kimmel, III** and **J. Duncan Pitchford** have become partners in the firm. Kimmel earned his J.D. with honors and obtained his LL.M. from the University of Arkansas Law School. He has been with Whitlow, Roberts, Houston & Straub since 2001 and concentrates his practice in the areas of real estate transactions, elder law, agribusiness, estate planning, bankruptcy and collections. Pitchford earned his J.D., *magna cum laude*, from the Washington and Lee University School of Law. He has been with the firm since 2004 and concentrates his practice in the areas of litigation, health law, business law, and commercial real estate transactions.

C. Ellsworth (Worth) Mountjoy and **Susan Montalvo-Gesser** have joined the Owensboro law firm of **Sullivan, Mountjoy, Stainback & Miller PSC** as associates. Mountjoy, a Utica native, graduated *magna cum laude* from the University of the South at Sewanee. He earned his J.D. in 2006 from the University of Dayton School of Law.

Montalvo-Gesser graduated *magna cum laude* from Washington University in St. Louis. She earned her J.D., *magna cum laude*, from the University of Louisville Brandeis School of Law in 2005. Montalvo-Gesser organized Owensboro's first Latino & Immigration Law Clinic and served as a law clerk to Judge Joseph McKinley, Owensboro Division of the Western District of Kentucky, from 2005 to 2006. She will practice in the civil litigation section of the law firm and will concentrate in both family-based and employment-based immigration.



C. Ellsworth Mountjoy



Susan Montalvo-Gesser

WHO, WHAT, WHEN & WHERE

Stoll Keenon Ogden PLLC is pleased to announce that attorney **David J. Clement** is now a member of the firm and that attorneys **Adam M. Back** and **Stephen D. Milner, Jr.** are now practicing law with the firm. Clement, a registered patent attorney concentrates his practice in the area of intellectual property. He received his B.S. in aerospace engineering from the University of Virginia and his J.D. from the University of Louisville. He also received a Master of Strategic Studies degree from the U. S. Army War College. Prior to joining the firm, Clement spent six years in St. Louis as intellectual property counsel for the Boeing Company. He is a colonel in the U.S. Marine Corps Reserve. Back's practice will focus on bankruptcy matters, insolvency issues, and representation of secured and unsecured creditors in state and federal courts. He graduated from Eastern Kentucky University before earning his J.D. at the University of Kentucky College of Law. Milner is an associate in the firm's Labor, Employment and Employee Benefits Group. Prior to joining the firm, he worked as a law clerk for the Honorable John C. Roach, Associate Justice on the Kentucky Supreme Court. Milner received his B.A. from the University of Virginia and earned his J.D. at the University of Kentucky College of Law.



David J. Clement



Adam M. Back



Stephen D. Milner, Jr.

and **Brandi Lewis** are new associates. Pancake graduated from Marshall University with a B.A., received her M.S.W. from the University of Kentucky, and earned her J.D. from Salmon P. Chase College of Law. Pancake practices in the area of insurance defense in the firm's Louisville office. Little received his B.B.A., *summa cum laude*, from Pikeville College and earned his J.D., *magna cum laude*, from Chase College of Law. Little practices in the area of insurance defense in the firm's Lexington



Gregory L. Little



Ward Ballerstedt

office. Ballerstedt received his B.B.A. from the University of Kentucky in 2002 and earned his J.D. from the University of Louisville Brandeis School of Law in 2006. Ballerstedt practices in the area of insurance defense in the firm's Louisville office. Lewis received her B.A. from the University of Kentucky in 1999 and earned her J.D. from Salmon P. Chase College of Law in 2003. Lewis practices in the area of insurance defense in the firm's Lexington office. Prior to joining the firm, Lewis worked for the Fayette County Attorney's office as an assistant prosecutor and as a law clerk for Judge Rodrick Messer of the 27th Judicial Circuit.



Brandi Lewis

Ferreri & Fogle, PLLC is proud to announce that **Jane Ann Pancake** and **Gregory L. Little** have become shareholders in the firm and that **Ward Ballerstedt**



Jane Ann Pancake

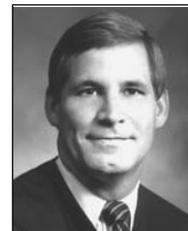
Retired Judges Mediation & Arbitration



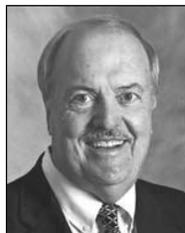
Judge Dan Schneider (Ret)



Judge Ken Corey (Ret)



Judge Tom Knopf (Ret)



Judge Stan Billingsley (Ret)



Judge Ray Corns (Ret)



Steve Ryan



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WHO, WHAT, WHEN & WHERE

Greenebaum Doll & McDonald PLLC has announced that **Richard S. Cleary** has been named member-in-charge of the firm's Louisville office and that **Stewart Douglas Hendrix** has joined the firm's Frankfort office as Of Counsel. Cleary, who joined Greenebaum following graduation from Georgetown University Law Center, succeeds Jeffrey A. McKenzie, who recently was named firm chairman and CEO. Cleary has served as chairman of the firm's Labor and Employment Practice Group since 1996. Hendrix will serve on the firm's state and local tax team and the government affairs team. Prior to joining the firm, he was a staff attorney at the Kentucky Department of Revenue and Public Service Commission. Hendrix received his undergraduate degree from Eastern Kentucky University and earned his J.D. from the Brandeis School of Law.



Richard S. Cleary



Stewart Douglas Hendrix

Boehl Stopher & Graves, LLP is pleased to announce that **Jeffrey W. Adamson, Andrew Pullen, Tanisha A. Hickerson, Elsabe Meyer** and **Robert Rives** have joined the firm and that **Tiara B. Silverblatt** has been made partner in the Louisville office. Adamson and Pullen are 2006 graduates of the Brandeis School of Law. Hickerson is a 2006 graduate of the University of Kentucky College of Law. Meyer is a 2003 graduate of DePaul University College of Law. Rives is a 2004 graduate of the University of Kentucky College of



Jeffrey W. Adamson



Andrew Pullen

Law. Silverblatt received her B.A. from Columbia University and earned her J.D. from Brooklyn Law School in 1996. Before joining the firm in 2001, she litigated cases for the NYC Law Department and two NYC law firms and then served as general counsel for Professional Computers, Inc. Silverblatt concentrates her practice in civil litigation defense with an emphasis on medical malpractice, professional liability and employment law. She is licensed to practice law in Kentucky, New York and New Jersey.

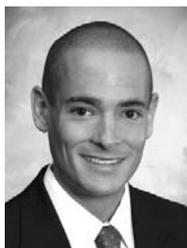
The Nashville law firm of **Boult, Cummings, Connors & Berry, PLC** has named **Andrew J. Murray** as a member of the firm. Prior to joining Boult Cummings, Murray in 2006, Murray practiced with Baker & Hostetler, LLP in Cleveland and Greenebaum Doll & McDonald PLLC in Louisville. His practice is focused primarily on health care law, with an emphasis on mergers and acquisitions, as well as operational and regulatory matters. He is a member of the Kentucky, Ohio, and Tennessee Bar Associations. Murray received his undergraduate degree from the Ohio State University and earned his law degree from the Moritz College of Law.



Tanisha A. Hickerson



Elsabe Meyer



Robert Rives



Tiara B. Silverblatt



Andrew J. Murray

Mark Jordan has been named managing partner of **Drew & Ward**. Jordan practices in the areas of estate planning, probate, taxation, insurance and business law and has 26 years experience serving in private legal practice and as in-house counsel. He is a member of the Kentucky Bar Association and the Cincinnati Estate Planning Council. A Cincinnati native, Jordan is a Phi Beta Kappa graduate of the School of Foreign Service at Georgetown University in Washington, D.C. and earned his J.D. from the University of Cincinnati College of Law. He is certified as a Fellow of the Life Management Institute (FLMI), a Chartered Financial Consultant (ChFC) and a Chartered Life Underwriter (CLU).

Smith, Greenberg & Deetsch, PLLC is pleased to announce that **Tim Napier** has joined the firm as a member and that the firm's name has changed to **Smith, Greenberg & Napier, PLLC**. A 1993 graduate of the University of Louisville, Napier will continue to concentrate his practice in the areas of business litigation and tort defense. He may be reached by telephone at (502) 426-1058. The members are also pleased to announce that **Dan Deetsch** will remain Of Counsel to the firm.



Tim Napier

Chad Perry and **Robert Miller** announce that **Heather Gearheart** joined their law firm located in Paintsville at 232 College Street in January 2007. Gearheart, a 1998 graduate of the University of Kentucky and a 2005 graduate of the Appalachian School of Law, has served as a staff attorney to Deputy Chief Justice Will T. Scott for the last year. She may be reached by telephone at (606) 789-5395.

Woodward, Hobson & Fulton, LLP announces that **James T. Blaine Lewis** has been named a partner in the firm. Lewis joined the firm's Louisville office

WHO, WHAT, WHEN & WHERE

in 1998 and concentrates his practice in the areas of product liability, FELA and railroad defense, trucking, professional liability and general tort litigation. He is admitted to practice before all state and federal courts in Kentucky.



James T. Blaine Lewis

The law firm of **Jones Dietz & Schrand, PLLC** is pleased to announce that **Robert L. Swisher** has joined the firm and practices in the Lexington office. He will be focusing his practice in the areas of workers' compensation and civil litigation as well as estate planning and probate. Swisher, a 1979 graduate of the University of Kentucky College of Law, has been admitted to practice before the U.S. District Court for the Eastern District of Kentucky and the U.S. Court of Appeals, Sixth Circuit.

L. Chad Elder is pleased to announce that he has joined the Louisville firm of **Valenti, Hanley & Robinson, PLLC** as Of Counsel. Elder's practice will focus on the area of professional licensure (medicine, dentistry, pharmacy, nursing, and real estate) defense. He will also practice in the areas of criminal defense and general civil litigation. Elder received his J.D. in 1995 from the University of Kentucky College of Law. He most recently served as litigation counsel for the Kentucky Board of Medical Licensure. From 1996-2002, he served as a Jefferson County Assistant Commonwealth Attorney.

The law firm of **McBrayer, McGinnis, Leslie & Kirkland, PLLC** is pleased to announce that **Jason P. Blandford** has become a member and that **Jason R. Bentley, Chad Butcher, Alissa Graf-Schad, Luke Morgan, Ashely W. Noel, Christopher A. Richardson** and **Benjamin L. Riddle** have become associated with the firm. Blandford received his undergraduate degree from Western Kentucky University and earned his J.D. from the

University of Kentucky. He concentrates his practice in the areas of litigation and employment law and works in Lexington. Bentley received his undergraduate degree from Centre College and earned his J.D. from Vermont Law School. He works in Frankfort and practices in the areas of government relations and energy law. Butcher received his undergraduate degree from Transylvania University and earned his J.D. from the University of Kentucky. His area of practice is corporate law. Graf-Schad received her undergraduate degree and earned her J.D. from the University of Louisville. She works in Louisville and concentrates her practice in real estate law. Morgan received his undergraduate degree from the University of Illinois, Champaign-Urbana and earned his J.D. from the University of Kentucky. He works in Lexington and concentrates his practice in the areas of criminal and administrative law. Noel received her undergraduate degree and earned her J.D. from the University of Kentucky. She also works in Lexington and concentrates her practice in litigation. Richardson received his undergraduate degree from Indiana University and earned his J.D. from the University of Dayton. He works in Louisville and concentrates his practice



Jason P. Blandford



Jason R. Bentley



Chad Butcher



Luke Morgan



Benjamin L. Riddle

in real estate law. Riddle received his undergraduate degree and earned his J.D. from Indiana University. He works in Lexington and concentrates his practice in insurance law and litigation.

The Richmond law firm of **Burnam, Thompson, Simons, Dunlap and Fore** is pleased to announce that **L. Brooke**

Bowman has joined the firm as an associate. Bowman is primarily involved in insurance defense, general civil litigation and family law. A native of Richmond, she received her B.A. from the University of Kentucky in 2003 and earned her J.D. from the U.K. College of Law in 2006.



L. Brooke Bowman

Tom Blankenship, Jeffrey G. Edwards and **Jason F. Darnall** are proud to announce the formation of the Benton law firm of **Blankenship, Edwards & Darnall**. A Jackson, Tennessee native, Blankenship earned his B.B.A. in accounting from Lambuth University in 1985 and obtained his J.D., with honors, from the University of Tennessee in 1988. Edwards, a Benton native, earned his B.S. from Murray State University in 1984 and obtained his J.D. from Chase College of Law in 1987. Darnall is from Benton. He earned his B.A. from the University of Kentucky in 1999 and obtained his J.D., *magna cum laude*, from Chase College of Law in 2003. Darnall was a staff attorney for former Kentucky Court of Appeals Judge Rick Johnson. Blankenship, Edwards & Darnall will be a general practice law firm.

Thomas M. Todd, formerly a partner in the firm of Walther, Roark, Gay & Todd, announces that he has opened a new law practice in Lexington located at 3010 Lexington Financial Center. Todd will con-



Thomas M. Todd

tinue to concentrate his practice in the areas of construction and real property claims, land use planning and development, and commercial transactions.

The Madisonville law firm of **Logan, Morton and Ratliff** is pleased to announce that **Caroline A. Mills** has joined the firm as an associate. Mills obtained a B.A. in journalism from the University of Kentucky in 1975 and earned her J.D. from Chase College of Law in 1978. She recently completed eight years of service as a prosecutor serving as assistant county attorney in Hopkins and Caldwell Counties. Mills' general practice will focus in real estate transactions, criminal defense, personal injury, and family and probate law.

Reminger & Reminger Co., LPA

is pleased to announce that **Shea W. Conley** has become a partner in the firm. Conley is a 1998 graduate of the University of Kentucky College of Law. He practices in the Lexington and Florence offices of the firm and concentrates his practice in commercial litigation, general casualty, products liability, construction law and employment litigation.



Shea W. Conley

Christopher A. Spedding

is pleased to announce the opening of his law office in Lexington located at 2560 Richmond Road in Suite 101 of the Farmer Building. Spedding will concentrate his practice in the areas of commercial/business law, equine law, and criminal defense. The office telephone number is (859) 255-0050.



Christopher A. Spedding

The Louisville law firm of **Schiller Osbourn Barnes & Maloney, PLLC** is pleased to announce that **Quang D. Nguyen** has become



Quang D. Nguyen

associated with the firm. Nguyen obtained his J.D. from the Brandeis School of Law and was admitted to practice law in Kentucky in 1998. He joins the firm as an associate and will concentrate his practice in insurance defense.

Michael Davidson and Lisa J. Oeltgen

have formed the law firm of **Davidson & Oeltgen, PLLC** located in Lexington at 139 West Short Street in Suite 100 of the Barrow Building. The firm will engage primarily in the practice of family law. **J. Vincent Riggs** has joined the firm as an associate. Riggs received his B.A. from the University of Kentucky and earned his J.D. from the Appalachian School of Law in 2006.



J. Vincent Riggs

Cory M. Erdmann is pleased to announce the opening of **Erdmann Law Office, PLLC** in Richmond. The law firm is located at 527 West Main Street in Suite 2 and may be reached by telephone at (859) 624-9555. Erdmann, a Richmond native, is a graduate of the University of Virginia and the University of Kentucky College of Law.

Conley Salyer is pleased to announce the opening of his law office at 444 East Main Street in Lexington. He will focus his practice in the representation of non-profit organizations and foundations. Salyer may be reached by telephone at (859) 281-1171. He earned his J.D. from Chase College of Law and obtained his LL.M. in taxation from the Marshall-Wythe School of Law at the College of William and Mary in 1991.

Ross T. Turner announces the opening of his practice in Louisville at 6500 Glenridge Park Place in Suite 12. Turner is a graduate of the University of Kentucky College of Law and a former law clerk to U.S. District Judge Joseph



Ross T. Turner

McKinley in Owensboro. He spent the last four years with a plaintiff's firm in Louisville and will continue to handle plaintiff's tort cases throughout the state. Turner may be reached by telephone at (502) 429-9303.

Givaudan is pleased to announce that

Jane Garfinkel has joined Givaudan as senior vice president and general counsel for the North American Flavours and Fragrances business. In this position, Garfinkel will be responsible for providing legal counsel to both divisions in North America. She joins Givaudan from Thompson Hine, where she was a partner and the head of the firm's Health Care Practice Group. Garfinkel earned her J.D. from the University of Michigan.



Jane Garfinkel

Darby and Gazak, PSC is pleased to announce that Daniel G. Brown has been promoted to partner and that **Robert J. Shilts** has joined the Louisville firm as an associate. Brown, who has been with the firm since 1999, will continue to practice in the areas of appellate and medical malpractice litigation. Shilts primarily practices in the area of professional liability defense with an emphasis on medical malpractice defense. He is a graduate of Bellarmine University, the University of Maryland at College Park, and the University of Maryland School of Law.

Dinsmore & Shohl LLP

announces that **Aaron R. Esmailzadeh** and **Alexander "Alec" J. Moeser** were hired as new associates of the firm. Esmailzadeh practices in the Louisville office, and Moeser practices in the Lexington office of the firm. Esmailzadeh received his B.A. from Brown University in 1999 and earned his J.D., *cum laude*, from the University of Louisville Brandeis School



Aaron R. Esmailzadeh

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. They both practice in the litigation department.



Alexander J. Moeser

Frost Brown Todd LLC is pleased to announce the appointment of **Bill Becker**, **Whitney Calvert**, **Matt Gunn** and **Adam Kegley** as new members of the firm. Becker practices in Louisville and has experience covering all areas of employment law, with a focus on wage and hour law, employment discrimination and harassment, and affirmative action. Calvert practices in the Lexington office and focuses on general corporate law, with special emphasis on matters relating to the coal industry. Gunn practices in the Louisville office and represents clients in a wide array of business immigration matters with particular emphasis on nonimmigrant and immigrant visas for degreed professionals, intracompany transferees, and Trade NAFTA professionals. Kegley practices in the Lexington office and focuses his practice primarily in the area of bankruptcy.



Bill Becker



Whitney Calvert



Matt Gunn



Adam Kegley

Weltman, Weinberg & Reis Co., LPA (WWR) is pleased to announce the election of a new partner, **John L. (Jack) Day, Jr.** He practices in the bankruptcy department of the Cincinnati office of the firm. Day received his B.A. from the

University of Kentucky in 1973 and earned his J.D. from Chase College of Law in 1981. He is licensed to practice law in Kentucky and Ohio.

IN THE NEWS

Chief Justice Joseph E. Lambert has named **Jason Nemes** as acting director of the Administrative Office of the Courts (AOC). Nemes, a Louisville native, holds a bachelor's degree from Western Kentucky University and a J.D. from the University of Louisville Brandeis School of Law, where he currently serves as an adjunct professor of constitutional law and appellate practice.



Jason Nemes

The Kentucky Court of Appeals has named **Judge Laurance B. VanMeter** to serve as chief judge pro tem for the court. The chief judge pro tem manages the administrative functions of the court when the chief judge is unavailable. Judge VanMeter was elected to the Court of Appeals in November 2003 and was re-elected in November 2006.



Judge Laurance B. VanMeter

Judge Joe Lee, long-time judge for the U.S. Bankruptcy Court for the Eastern District of Kentucky, was named the inaugural recipient of the 2006 Judge William L. Norton, Jr. Judicial Excellence Award. The award is given to a judge whose career embodies the same kind of continued dedication and outstanding contributions to the insolvency community as the award's namesake.



Judge Joe Lee

Teresa Isaac has been selected to receive the 2007 Najeeb Halaby Award for Public Service. The award will be presented to Isaac on April 25th at the

Kahlil Gibran Spirit of Humanity Awards Gala in Washington. Isaac was selected to receive this year's Halaby Award in recognition of her decades of service to the civic, political, and social welfare of her community and country.

The Kentucky Chapter of the American Academy of Matrimonial Lawyers (AAML) elected the following officers to serve two-year terms: **Diana L. Skaggs**, President; **Mitchell Charney**, President Elect; **Martha Rosenberg**, Vice President; **Melanie Straw-Boone**, Secretary; **William Tingley**, Treasurer; and **Sandra Mendez Dawahare**, Kentucky Delegate to the National Board of Governors.



Diana L. Skaggs



Mitchell Charney



Martha Rosenberg



William Tingley



Melanie Straw-Boone



Sandra Mendez Dawahare

Sylvia L. Lovely, NewCities Institute President and Kentucky League of Cities Executive Director and CEO, received the Vic Hellard, Jr. Award for Public Service in



Sylvia L. Lovely

recognition of her lifetime contribution to public service. The award was presented at the Long-Term Policy Research Center's annual conference in Frankfort. Given in recognition of service in the interest of Kentucky's future, the Hellard Award is presented in honor of Vic Hellard, Jr.'s long and distinguished career as director of the Legislative Research Commission.

David Kramer, a partner with Deters, Benzinger & LaVelle and a member of Crestview Hills City Council and chairman of the city's Economic Development & Zoning Committee since 2000, has been reappointed by the city council as Economic Development Committee Chairman. He has also been reappointed to the governing board of the Lakeside Park/Crestview Hills Police Authority.



David Kramer

David T. Royse, an attorney with the law firm of Stoll Keenon Ogden PLLC in Lexington, has recently been appointed to serve as a Special Justice on the Kentucky Supreme Court in two civil actions. Royse graduated from the University of Kentucky College of Law with honors in 1998. He focuses his practice on civil litigation.



David T. Royse

The law firm of Greenebaum Doll & McDonald PLLC announced that **Robert L. Brown**, a member in the firm's Louisville office, has been elected Kentucky World Trade Center President. He will also continue to serve as Kentucky World Trade Center Vice Chair.



Robert L. Brown

Nicholas W. Ferrigno, Jr., a member of Greenebaum Doll & McDonald

PLLC's Cincinnati and Covington offices, and an Eagle Scout, has been elected to the board of directors of the Dan Beard Council of the Boy Scouts of America.



Nicholas W. Ferrigno, Jr.

Mark D. Eblen has been awarded the 2006 Attorney of the Year for the Small Business/Self-Employed Division of the Office of Chief Counsel, Internal Revenue Service. The Division consists of approximately 450 attorneys, and the award is presented to an attorney who provides outstanding client service to the IRS. Eblen is a senior attorney in the Louisville office.

RELOCATIONS

David L. Helmers is pleased to announce the law office of **David L. Helmers & Associates PLLC** has moved. The firm, now located at 110 East Third Street in Lexington, will continue to represent individuals and families in the areas of product liability, personal injury, wrongful death, consumer claims and mass torts and may be reached by telephone at (859) 252-2927.

The law firm of **Robenalt & Robenalt** has relocated to 212 North Elizabeth Street in Suite 410 at Lima, Ohio. **John A. Robenalt** and the other attorneys at the firm may be reached by telephone at (419) 229-0054.

AT THE KBA

Jay R. Garrett has recently been promoted to KBA Chief Deputy Bar Counsel. Before his promotion, Garrett had served as KBA Deputy Bar Counsel/Disciplinary Intake Manager and as KBA Deputy Bar Counsel. He received his B.A. with high distinction from the University of Kentucky in 1986 and earned his J.D. from the University of Kentucky College of Law in 1989. From 1990 to 1991, he served as a law clerk for the Honorable Robert J. Jackson, Circuit Judge for the



Jay R. Garrett

13th Judicial Circuit. From 1991 to 1994, he practiced law with the firm of Moynahan, Bulleit, Kinkead and Irvin, where he was the resident associate attorney in the firm's Nicholasville office. Garrett was engaged in a general practice of law and concentrated in criminal defense, civil litigation, domestic relations, probate, and real estate. He also served as the first City of Nicholasville Ethics Committee Chairman in 1994.

"Misconduct, Mental State, and Mitigation: The Developing Role of Mental State, Condition, or Impairment in Kentucky Lawyer Discipline," by KBA Assistant CLE Director **Jane H. Herrick**, has been published by the *Appalachian Journal of Law* (Vol. 6, Issue 1, Winter 2006). From 1996 to 2004, Herrick served as a KBA Deputy Bar Counsel.

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:

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Employment

CORPORATE ATTORNEY – Frost Brown Todd LLC, one of the largest regional law firms in the Midwest and one of the 100 largest law firms in the United States, seeks an associate for its Lexington, Kentucky office. Successful candidate must have at least 2-4 years experience in general business and corporate transactions, specifically the area of Mergers and Acquisitions. Strong academic record necessary. Send resume, writing sample and law school transcript to Karen Laymance, 200 PNC Center, 201 E. Fifth Street, Cincinnati, Ohio 45202 or by email to klaymance@fbtlaw.com. *Frost Brown Todd LLC is an equal opportunity employer.*

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mitment to excellence and professionalism. We provide an excellent and supportive work environment, competitive salary and benefits package including medical, sick/vacation/holiday pay, and 401(k). Please mail resume, law school transcript, and references to Box 307, 514 West Main Street, Frankfort, KY 40601.

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LITIGATION ASSOCIATE - Seeking litigation associate with 2 - 4 years of experience. Candidate should have a broad range of experience in general litigation matters as well as a strong academic record and excellent research and writing skills. Preference will be given to candidates admitted to practice in Kentucky and Indiana. **COMMERCIAL REAL ESTATE PARALEGAL** - Seeking an experienced commercial real estate paralegal to assist with land development projects and multi state transactions. Qualified candidates must have excellent written and oral communication skills, and the ability to work autonomously and as part of a team. To be considered for the above positions, include your resume (in Microsoft Word format) in an e-mail to: tmccarthy@derbycitylaw.com.

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STAFF ATTORNEY: Commonwealth Credit Union, Kentucky's largest Credit Union, has a career opportunity for a Staff Attorney to manage and direct its collections litigation, corporate issues, and review vendor contracts. Candidate should have a minimum 3 years experience in collection litigation, debtor-creditor relations, contract law, general business and corporate law, labor and employment law, federal bankruptcy law and financial institutions (credit union preferred). KY law license is required. Interested candidates, please send resume, salary requirement and contact information to: Commonwealth Credit Union; Attn: Human Resources; P.O. Box 978; Frankfort, KY 40602-0978. Applications will be accepted until the position is filled. In addition to our positive, team approach to doing business, CCU offers a competitive salary and benefits package. Come and experience first hand what others are talking about! E.E.O. M/F/D/V

ESTATE PLANNING ATTORNEY: Rendigs, Fry, Kiely & Dennis, LLP is a medium size law firm with offices in downtown Cincinnati and Dayton, Ohio. We are seeking to add an advanced estate planning attorney or attorneys. Ideal candidates will have significant experience in estate planning, business and tax matters. An established client base is a plus, however, not a necessity. Candidates will support an estate planning and administration practice for an expanding department. Reply in confidence to: Michael P. Foley, Employment Committee, Hiring Partner; Rendigs, Fry, Kiely & Dennis, LLP; One West Fourth Street, Suite 900; Cincinnati, Ohio 45202; telephone (513) 381-9200; e-mail - mfoley@rendigs.com.

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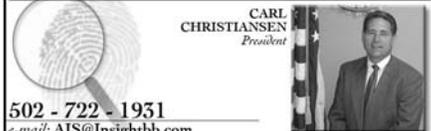
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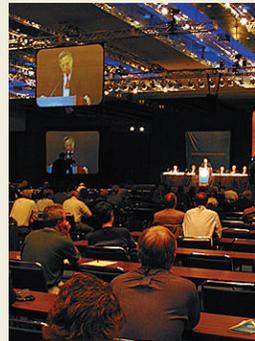
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