

KENTUCKY BAR ASSOCIATION



# Bench & Bar

Volume 72 Number 4

July 2008



*KBA President Barbara Dahlenburg Bonar  
John, Katie, Alex and Ian  
in Covington's Devou Park*

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Cover photo and photo above  
by Deogracias Lerma.

Come join us October 23-25, 2008 for our Fall Getaway in beautiful French Lick, Indiana at the historic West Baden Springs Hotel. Register now for a relaxing fall weekend! See page 6 of this issue for registration information or register online at [www.kybar.org](http://www.kybar.org). — Barbara D. Bonar, KBA President

# Kentucky Bar Association Annual Convention 2008

Chief Justice Joseph E. Lambert  
Administering the Oath  
to the 2008-2009  
Kentucky Bar Association  
Board of Governors.



2008-2009 KBA President Barbara Dahlenburg Bonar accepting gavel from 2007-2008 KBA President Jane Winkler Dyche.

Left to right: 7th Supreme Court District Bar Governor Bobby Rowe, 3rd Supreme Court District Bar Governor Daniel J. Venters, 2nd Supreme Court District Bar Governor James D. Harris, Jr., 1st Supreme Court District Bar Governor Jonathan Freed, Young Lawyers' Section Chair Scott D. Laufenberg, Vice President Bruce K. Davis, President-Elect Charles E. English, Jr., 4th Supreme Court District Bar Governor Douglas C. Ballantine, 5th Supreme Court District Bar Governor Anita M. Britton, 6th Supreme Court District Bar Governor David V. Kramer and President Barbara Dahlenburg Bonar.



KBA President Barbara Dahlenburg Bonar giving inaugural address.

KBA President Barbara Dahlenburg Bonar with her husband, John Bonar, and her father, Charles Dahlenburg.



Barbara Dahlenburg Bonar

## *Casting shadows in the new Millennium*

**Character is like a tree and reputation like its shadow. The shadow is what we think of it; the tree is the real thing.** — Abraham Lincoln, 16th U.S. president (1809-1865) celebrating 200 years in February, 2009.

You won't glean it from the news these days, but one of the most pressing issues on the collective minds of attorneys is the apparently declining reputation of our profession, and the results from our recent Kentucky Bar member survey seem to confirm it. So, if we care so deeply about our image, why is it we can't come up with a sure method to improve it?

Each of us chose this profession because we think it is an honorable one, right? We exit law school proud to be attorneys and generally keep that belief throughout our careers. More importantly, although the professional road we travel is often harsh and fraught with pitfalls, most of us remain true to our oath, devoted to our clients and, above all, honorable in our professionalism.

So why is our image so tainted? Is it because people just generally dread encounters with the legal system and resent our making money off of their misfortunes? Maybe we should blame word-smithing lawyer politicians, the complexity of our times, or the sensationalism of a few bad lawyers and modern-day media? Well, yes we should. That still doesn't get us any closer to solving our image problem, though.

Besides, the persecution of our profession is as old as the ages. Shakespeare's "First thing.... let's kill all the lawyers" has been a favorite expression of attorney hate-mongers – for a long while, one would assume. (And there's now a blog

dedicated to this very proposal, if you can believe it.) How unfair, we say. Especially given that the real intent of the tyrant from Henry VIII was to eliminate the guardians of the law so as to create chaos and run amok. But doesn't that tell us something right there? Even where old Will had scripted our profession the grandest of compliments, our critics managed to turn it against us for posterity.

So let's first accept that our reputation is a two-edged sword. Being warriors for the rule of law and noncomplacent to tyranny is what elevates our profession. Yet our valiant and often misunderstood warfare is what also brings our image right back down.

History certainly supports such a public relations conundrum. Take the American Revolutionists. Thomas Paine knew all too well that fighting British tyranny would undoubtedly "raise a formidable outcry of disbelief" among colonists. His solution? Publish *Common Sense* anonymously and urge protectors of law to lead the charge. "If the impulses of conscience were clear, uniform, and irresistibly obeyed," he pled, "man would need no other lawgiver." We took the bait, and promptly laid the groundwork for our country's birth.

Attorneys have been expected to show the same courage and tenacity in most of America's greatest reforms. In the abolition of slavery, the civil rights movement, and, most recently, reforms in our financial, business and govern-

ment genres, we have been urged to take the lead, and we wittingly have complied. And history shows that we have consistently taken on these battles *in spite* of the known social setbacks. We inherited the wind, remember?

So, can we as a profession pursue justice *without fear* of social condemnation, and then ask to be socially coddled? Sometimes. But it doesn't always work out that way. Courage seems to defy popularity. Thomas More's unwavering passion for the rule of law was exactly what got him beheaded. And let's not forget Abraham, Martin, John, Bobby and a few others. Famous for their respective agendas of social justice, they were also publicly condemned by their enemies, and, oh yes, ultimately assassinated to take their seats of honor. Even fictional Atticus Finch, the exemplar for a reputable attorney, lived with constant public disparagement, merely for standing up for justice.

Taking on unpopular battles in the name of justice will just not always win us friends. And as long as greed and corruption continue in our world, so must our role to fight them, even when popularity wanes. As the warfare becomes more complicated, the enemies smarter, and attacks on us and society more fervent, we just have to be satisfied that our victories are no less consequential to social reform than in history. The public may misunderstand us, but our saving grace is the might-

ness of our profession's legacy.

Is it possible then, to still improve our image? According to Abe, it is. We start back at the basics by building individual character, one lawyer at a time. If we establish the core values of our profession, and ensure our young lawyers are brought forward in that character mold, the shadow of our reputation will begin to solidify and grow.

The humanist Johann Goethe wrote the perfect formula for establishing

character in our lawyers and, ultimately, our bar. "The easiest way to judge one's character," he noted, "is by how he treats those who can do nothing for him." On that simple premise, we know there is character aplenty among Kentucky lawyers and judges. It is there among the thousands of strong-minded lawyers quietly serving their clients, and the hundreds of judges resolute in making sound decisions – every day – and without expectation of fame, fortune, or,

yes, even popularity.

This year, in the name of Lincoln, let's honor and emulate our good lawyers and judges, and educate other disciplines as to the rule of law we follow. This will plant more seeds of character in our young lawyers and insure our profession's healthy future. One by one, but together, we will cast a long and beautiful shadow.

I welcome your comments at [bdbonar@kybar.org](mailto:bdbonar@kybar.org).



*Past  
Presidents  
of the  
Kentucky  
Bar  
Association*

Left to right: Herbert D. Sledd, Ben L. Kessinger, Jr., Charles E. English, Sr., David L. Yewell, John G. Prather, Jr., Marcia Milby Ridings, Stephen D. Wolnitzek, Donald L. Stepner, Norman E. Harned, Robert L. Elliott and Robert C. Ewald.

## *2008 Award Recognitions*



### **President's Special Service Award**

KBA President Jane Winkler Dyche presented the President's Special Service Award to Norman E. Harned (above).

### **Bruce K. Davis Bar Service Award**

Asa "Pete" Gullett (below) accepted the Bruce K. Davis Bar Service Award from KBA President Jane Winkler Dyche.



### **Donated Legal Services Award**

Frank C. Medaris, Jr. (above) accepted the Donated Legal Services Award from KBA President Jane Winkler Dyche.

# Framing Our Future

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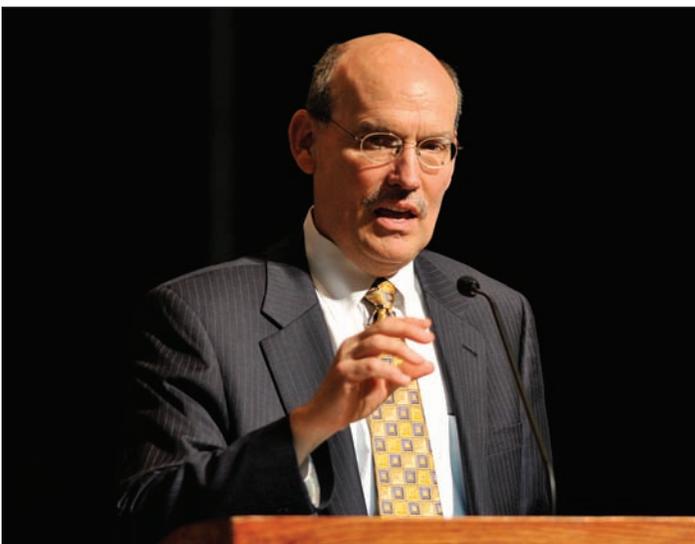
## Outstanding Judge

*KBA President Jane Winkler Dyche presented the Outstanding Judge Award in memory of and to the family of Justice William E. McNulty, Jr. of Louisville.*



## Outstanding Lawyer

*Margaret E. Keane, of Louisville, accepted the Outstanding Lawyer Award from KBA President Jane Winkler Dyche.*



## Chief Justice's Special Service Award

*Erwin W. Lewis, of Frankfort, accepted the Chief Justice's Special Service Award from Chief Justice Joseph E. Lambert.*



## Justice Thomas B. Spain Award

*CLE Chair Olu A. Stevens presented the Justice Thomas B. Spain Award to Professor William H. Fortune of Lexington.*

**KENTUCKY BAR ASSOCIATION  
2008 FALL GETAWAY  
WEST BADEN SPRINGS RESORT HOTEL, FRENCH LICK, INDIANA**

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Check in time is 4:00 p.m. Check out time is 11:00 a.m. **All reservations must be received by the Kentucky Bar Association, 514 West Main St., Frankfort, KY 40601 no later than September 19, 2008.** A 72 hour notice prior to check in is required on all cancellations.

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KENTUCKY BAR ASSOCIATION

# 2008 *Fall Getaway*

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October 23-25, 2008 for our Fall Getaway in beautiful French Lick, Indiana at the historic West Baden Springs Hotel. This magnificent structure boasts luxury suites, fine dining, and exciting casino nightlife! Join your friends and colleagues for Continuing Legal Education courses that will be offered on site Friday and Saturday mornings. Register now and bring your entire family for what promises to be a relaxing and beautiful fall weekend at this Midwestern landmark. We look forward to seeing you at West Baden Springs in October!

Barbara D. Bonar, KBA President

# 2008 Outstanding Young Lawyer Award



Ryan Reed, Jackie Wright, LaToi Mayo & Mark Burton.



LaToi D. Mayo, the 2008 Outstanding Young Lawyer.



2008-2009 YLS Chair Scott D. Laufenberg (right) presented plaque to 2007-2008 YLS Chair Ryan C. Reed (left).



Ryan C. Reed (left), 2007-2008 YLS Chair, congratulated Scott D. Laufenberg (right), 2008-2009 YLS Chair.



Law school students Katherine Holm and Travis Mayo accepted awards from Ryan Reed.



Sean Carter, author and self-described humorist at law, was the guest speaker at the Young Lawyers' Section Luncheon.



By Scott D. Laufenberg  
Chair, KBA Young Lawyers Section

There is an ongoing debate across this country whether young lawyer sections should call themselves “new lawyer” or “young lawyer.” While it may make for an interesting debate for bar leaders, the question for the average young lawyer is: what will you do for me?

If you attended the 2008 KBA Annual Convention, you saw examples of how the Young Lawyers Section serves its members. At the suggestion of the Section, the KBA agreed to conduct the spring New Lawyers Program in conjunction with the annual convention. As in the past, new admittees attended one day of programming specific to them. The major change, however, was their ability to attend the Young Lawyers Conference on Thursday, June 19, with other convention attendees. The Young Lawyers Conference consisted of programming designed by the Section to be relevant to lawyers just beginning their practice and for more advanced practitioners. On behalf of the Section, I want to express my appreciation to the KBA CLE office for making this idea a reality.

During the convention, KBA President Barbara Bonar and I announced a joint project between the KBA and this Section called Brief Insights. This program is modeled after a highly successful program created by the Texas Young Lawyer Association. The pre-

mise of the program is simple: ten-minute video clips on topics ranging from ethics and trial advocacy skills to law practice management are available on the web for free twenty-four hours a day. Besides the clips shown at the convention, the KBA and the Section will be recruiting additional presenters and placing those clips on a website located at [www.briefinsights.com](http://www.briefinsights.com).

But there is more to the Section than just serving its members; it serves our communities too. In response to the events of September 11, 2001, a South Carolina young lawyer was inspired to make a difference by addressing a stark reality – many of the first responders who died that day did not have a will. Since that time, he and another young lawyer have created the Wills for Heroes Foundation, Inc. ([www.willsforheroes.org](http://www.willsforheroes.org)), and they partnered with the American Bar Association Young Lawyers Division to promote a program called Wills for Heroes across the country. Through this program, first responders receive a basic will, a living will, and durable power of attorney. During the 2008-09 bar year, the KBA Young Lawyers Section will be implementing Wills for Heroes in September.

Besides Wills for Heroes, the KBA Young Lawyers Section will be implementing its U@18 program across the Commonwealth. The program is

designed to teach high school seniors about responsibilities of becoming adults. The program materials include a book and sample lesson plans for high school teachers.

At the Section luncheon at the 2008 KBA Annual Convention, the Section presented its annual Outstanding Young Lawyers Award to LaToi D. Mayo, who practices with Wyatt, Tarrant & Combs, LLP in Lexington. The Section also presented \$500 bar study scholarships to recent law school graduates J. Clark Baird of the University of Kentucky College of Law, Katherine M. Dittmeier Holm of the University of Louisville Brandeis School of Law, and Steven Travis Mayo of the Salmon P. Chase College of Law. Congratulations to LaToi and the three bar scholarship recipients.

In recent months, the Section has unveiled its new slogan and logo on its website, [www.kbayls.com](http://www.kbayls.com). If you have not visited the website in a while, I encourage you to check it out. It is a work in progress, but in upcoming months the Section will be adding additional content to its website, and I encourage you to contact me with any ideas.

As part of the restructuring of the Section, there are nine committees on which members may serve. If you are interested in volunteering and making a difference in the profession and in your communities, please review the committee list on the Section’s website at [http://www.kybar.org/documents/inside\\_kba/sections/yls/yls\\_committee\\_list.pdf](http://www.kybar.org/documents/inside_kba/sections/yls/yls_committee_list.pdf) and contact me at [slaufenberg@kscvlaw.com](mailto:slaufenberg@kscvlaw.com) or (270) 782-8160. Whether you consider yourself a young or new lawyer, I hope you find the KBA Young Lawyers Section a home to you in your beginning years of practice. ■

For additional information about the KBA Young Lawyers Section, visit <http://www.kbayls.com> or contact Scott Laufenberg at [slaufenberg@kscvlaw.com](mailto:slaufenberg@kscvlaw.com) or (270) 782-8160.



### 2008-09 YLS EXECUTIVE COMMITTEE

- Chair:** Scott D. Laufenberg, Bowling Green  
**Chair-Elect:** Jennifer L. Howard, Lexington  
**Vice-Chair:** J. Nathan Billings, Lexington  
**Secretary/Treasurer:** Clint Quarles, Frankfort  
**Immediate Past Chair:** Ryan C. Reed, Bowling Green (ex-officio)

### District Representatives

- First:** Michael O. Walker, Paducah  
**Second:** Jennifer L. Brinkley, Bowling Green  
**Third:** Tighe A. Estes, London  
**Fourth:** Patrick Shane O'Bryan, Louisville  
**Fifth:** Justin M. Schaefer, Lexington  
**Sixth:** Jacqueline S. Wright, Maysville  
**Seventh:** Randall L. Saunders, Huntington, WV

### At-Large Representatives

- |                                 |                                    |
|---------------------------------|------------------------------------|
| Roula Allouch, Covington        | Rebekkah Bravo Rechter, Louisville |
| Lauren R. Brooke, Lexington     | Stephanie Renner, Lexington        |
| Robert M. Croft, Jr., Lexington | Jesse Robbins, Frankfort           |
| Sara R. Elrod, Cincinnati       | David A. Trevey, Lexington         |
| Walter Hawkins, Bowling Green   | Christina L. Vessels, Lexington    |
| Robert L. Raper, Covington      | Timothy A. West, Lexington         |

### Local Bar Association Representatives

- Bowling Green-Warren County:** Matthew M. McGill, Bowling Green  
**Fayette County:** Adrien Spencer McKiness, Lexington  
**Louisville:** Erica A. Lee, Louisville  
**Northern Kentucky:** Stacy Hege Tapke, Covington

### SBA Representatives

- University of Kentucky College of Law:** TBA (ex-officio)  
**University of Louisville School of Law:** TBA (ex-officio)  
**NKU Salmon P. Chase College of Law:** TBA (ex-officio)

## Terms Expire on the KBA Board of Governors

On June 30 of each year, the terms expire of seven of the fourteen Bar Governors on the KBA Board of Governors. SCR 3.080 provides that notice of the expiration of the terms of the Bar Governors shall be carried in the *Bench & Bar*. SCR 3.080 also provides that a Board member may serve three consecutive two-year terms. Requirements for being nominated to run for the Board of Governors are contained in Section 4 of the KBA By-Laws. The requirements include filing a written petition signed by not less than twenty (20) KBA members in good standing who are residents of the candidate's Supreme Court District. Board policy provides that: "No member of the Board of Governors or Inquiry Commission, nor their respective firms, shall represent an attorney in a disciplinary matter." Any such petition must be received by the KBA Executive Director at the Kentucky Bar Center in Frankfort prior to close of business on the last business day in October. The current terms of the following Board members will expire on June 30, 2009:

- |                 |                                      |
|-----------------|--------------------------------------|
| 1 <sup>st</sup> | W. Douglas Myers<br>Hopkinsville     |
| 2 <sup>nd</sup> | R. Michael Sullivan<br>Owensboro     |
| 3 <sup>rd</sup> | Richard W. Hay<br>Somerset           |
| 4 <sup>th</sup> | Douglass C.E. Farnsley<br>Louisville |
| 5 <sup>th</sup> | Fred E. Fugazzi, Jr.<br>Lexington    |
| 6 <sup>th</sup> | Thomas L. Rouse<br>Ft. Wright        |
| 7 <sup>th</sup> | William H. Wilhoit<br>Grayson        |

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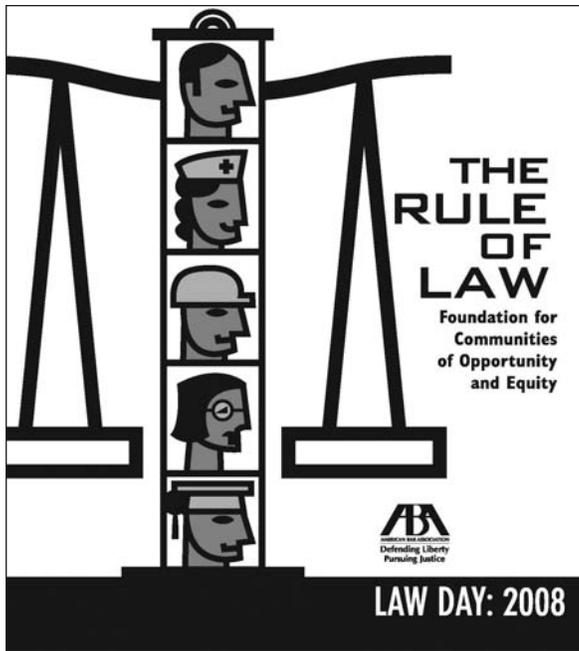
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# Law Day Awards



**G**ailen W. Bridges, Jr., the 2008 KBA Law Day Chair, recognized outstanding Law Day programs from bar associations across Kentucky at the Membership Awards Luncheon that was held during the 2008 KBA Annual Convention in Lexington. Mr. Bridges presented awards to the winners of this year's KBA Law Day Competition which was centered on "The Rule of Law: Foundation for Communities of Opportunity and Equity."

► The Northern Kentucky Bar Association and the Bowling Green-Warren County Bar Association were co-recipients of the Large Bar Award. Cathy Stavros, Northern Kentucky Bar Association President, and Matt Cook, Bowling Green-Warren County Bar Association Treasurer, accepted the awards. In Northern Kentucky, nineteen judges and attorneys spoke to students in ten area schools about the 50<sup>th</sup> anniversary of Law Day, the law in general, and the Law Day theme, "The Rule of Law: Foundation for Communities of Opportunity and Equity." In Bowling Green, over 150 judges, attorneys, teachers, children and parents attended the 2008 Law Day Ceremony and reflected upon the meaning of the rule of law, its role in society, and how it is essential in sustaining a free society. Kentucky Supreme Court Justice

Lisabeth Hughes Abramson was the guest speaker for the Law Day Ceremony.

► The Medium Bar Award was presented to the Madison County Bar Association. Nora Shepherd, past president of the Madison County Bar Association, accepted the award. Law Day activities conducted in Madison County included a Kentucky Bar Foundation Speaker Project, a Law Day Motion Hour Ceremony, a Law Day Banquet, and an annual Law Day Essay Contest. Kentucky Supreme Court Justice Mary C. Noble was the guest speaker at the Law Day Banquet and Family

Court Judge Jean Chenault Logue presented a *pro bono* award to Melinda Murphy. Circuit Judge Julia Hylton Adams also presented savings bond certificates to the essay contest winners at the Law Day Motion Hour.

► Judge Earl-Ray Neal and Clark County Bar Association President William Elkins accepted the Small Bar Award for the Clark County Bar Association. A series of events were held in Clark County to commemorate Law Day 2008. Circuit Judge William T. Jennings approved a proclamation commemorating the 50th anniversary of Law Day and focusing on this year's theme, "The Rule of Law: Foundation for Communities of Opportunity and Equity." Local attorneys spoke to elementary school students about the rule of law. Clark County middle school students participated in an art contest and high school students had the opportunity to participate in an essay contest and a mock trial. Members of the bench and the bar also held a local law forum for the community. ■



*Matthew Cook accepted the Large Bar Award for the Bowling Green-Warren County Bar Association from Gailen W. Bridges, Jr.*



*Catherine Stavros accepted the Large Bar Award for the Northern Kentucky Bar Association from Gailen W. Bridges, Jr.*



*Nora Shepherd accepted the Medium Bar Award for the Madison County Bar Association from KBA Law Day Chair Gailen W. Bridges, Jr.*



*Judge Earl-Ray Neal and William Elkins accepted the Small Bar Award for the Clark County Bar Association from Gailen W. Bridges, Jr.*

## 2008 Convention CLE

### 2008 Rules Hearing Considers Ethics Rules Changes

On June 18, 2008, the Kentucky Supreme Court held a three-hour long Rules Hearing on significant changes to the Kentucky Rules of Professional Conduct (KRPC), stemming from the work of the "Ethics 2000" Committee. The Rules Hearing was chaired by now-Chief Justice John Minton, Jr.

The changes to the KRPC were originally presented at the Rules hearing at the 2007 Annual Convention in Louisville in 2007. However, it was realized that more time was needed for study of the proposals. Chief Justice Minton noted that the Court "made an effort to put this out before the members of the Bar for discussion." The changes were presented to the membership at all locations of the Kentucky Law Update in 2007 by Professor William Fortune.

The Court is taking comments on the changes through the end of July 2008. All comments should be in writing and addressed to Susan Clary, Clerk of the Supreme Court.

### Noted Author and Commentator Jeffrey Toobin Addresses Convention

Jeffrey Toobin, author and legal affairs commentator on CNN, addressed the 2008 Annual Convention on June 19, 2008. Discussing his recent book,



Jeffrey Toobin addressed the KBA Convention.



Newly-elected Chief Justice John Minton chaired part of the Rules Hearing at the Annual Convention.

*The Nine*, Mr. Toobin said that the U.S. Supreme Court is "at an important moment in its history." He reviewed the Court's work over the last forty years, and remarked on retired Justice Sandra Day O'Connor's impact on the Court during her tenure. Toobin called Justice O'Connor "a toweringly important figure in American history." Toobin also noted that for the first time in the Court's history, all nine justices are former federal appellate court judges. He said that the Court has "greatly missed" a "non-judge" justice, such as a governor, senator, or president.

### William Korman presents the Email that Roared: Ethics in an Age of Electronic Communication

At this year's KBA Annual Convention, William Korman presented *The Email that Roared: Ethics in an Age of Electronic Communication*, providing attendees with a very informative overview of ethical dilemmas surrounding the use of electronic technology.

Mr. Korman practices in the area of state and federal criminal defense, and is the founding partner of Korman & Associates, LLC, located in Boston, MA. He received his B.S. from Syracuse University in 1992, and his J.D. from Boston University School of Law in 1995. Mr. Korman is a member of numerous organizations including the National Association of Criminal Defense Lawyers, and the New Hamp-

shire, Massachusetts, and Boston Bar Associations. In addition, he has received a number of awards throughout his career, including having been named Lawyers' Weekly "Up and Coming Attorney" in 2001, and Massachusetts' "Rising Star" in 2005, 2006, and 2007.

Mr. Korman's presentation, *The Email that Roared*, focused on the increased and widespread use of electronic communication in the day-to-day practice of attorneys. Such pervasive use of email can result in a breach of ethical responsibilities by an attorney through disclosure of confidential information. While such email responsibility will vary from jurisdiction to jurisdiction in regards to electronic communication, Mr. Korman identified several issues to be cautious of, including sending electronic communications to unintended recipients, and the communication of invisible data. He also discussed several precautions that can be taken and tools that can be used to ensure the confidentiality of your client and their case. Such precautions and tools include manually addressing emails as opposed to using pre-programmed addressing and group addresses; removing metadata, or invisible data from documents; minimizing the use of electronic communication for confidential matters; and keeping a tighter control on the information received by third party contractors and consultants. ■

# Lost in the shuffle?

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## A Collection of Epigrams — Some Mantras for Legal Writing

Adrienne Noble Nacev, Visiting Assistant Professor of Legal Writing, NKU Chase College of Law

Legal writing is founded on the internal voice of reason that is inherent in humans. That voice is honed through experience and schooling, starting long before a student enters a law school's portals to begin a life in the law and continuing through all stages in the life of a lawyer. This article posits a Collection of Epigrams that provides guidance to that internal voice.

Early in the process of becoming a lawyer, the student is introduced to enduring analytical and organizational constructs that inform understanding of the law and how to write about it. Students learn about the basic organizational principle of IRAC or Issue, Rule, Application and Conclusion. That is a good beginning, but it is only a beginning. IRAC structure does not provide guidance on how to identify the issue, or derive the rule, or apply the rule to support the conclusion reached. Nor does it recognize the need to address counter arguments in order to logically justify the conclusion.

CRAC is the amusingly pronounced persuasive form of IRAC: Conclusion, Rule, Application and Conclusion. It too is only a beginning because it does not encompass the analytical foundations that support its conclusions.

CREAC is an improved, though still imperfect, acronym: Conclusion, Rule, Explanation, Application, and Conclusion. It incorporates the need to explain the rule so it can be applied to support the conclusion. However, the logical requirements for that explanation and persuasive conclusion are still not there.

The Collection of Epigrams below addresses some of the steps in the

process of formulating and writing about rule explanations and applications that may not be apparent in the standard acronyms. These are mnemonic devices to scroll through the mind in the process of deriving and expressing the solutions to legal problems. Some are familiar, some are traditional expressions that may appear in a new context, and perhaps some are new.

1. Tell the readers what you are going to tell them, tell them and then tell them what you told them — This is the basic outline of a piece of legal writing. It is basically the roadmap and issue, the rule explanation and application and the conclusion. It is analogous to the sonata form in music: exposition, development and recapitulation.

2. Saying something is so, does not make it so — This is a reminder of the need to support statements with both logic and authority.

3. Don't be conclusory — This is an admonition to make sure that the writer has laid the foundation for the conclusions reached (and it is a word that spell check rejects even though it does express the point well.)

4. Substantiate your assertions — This is a variation on the theme that the just application of law is based on analysis of authority, including its underlying logic.

5. To everything there is a purpose<sup>1</sup> — That is, be sure to include all the necessary logical and analytical components in your memo or brief.

6. Don't proposition/cite — Conclusory legal propositions, followed by cites, do not work because the explanations and applications are missing. The same goes for string cites.

7. Analyze, don't personalize — That is, do not say, "I believe," rather analyze the law and the facts so that the logic speaks for itself.

8. Do not tell your readers what they "must" decide — Rather, appeal to the readers' sense of logic and justice.

9. Remember to edit — That is, read, reread, put aside and reread.

10. Brevity is the soul of wit<sup>2</sup> — Say all you need to say as completely as possible, as briefly as possible — No one wants to read more than they need to.

11. And room to grow.... — This Collection of Epigrams is not finite, and more epigrams will reveal themselves in the process of thinking about legal reasoning and legal writing. ■

### ENDNOTES

1. See Ecclesiastes 3:1 (King James Version).
2. William Shakespeare, *Hamlet*, Act 2, scene 2, 90.

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# Reservations for 50: A Closer Look at the Tenth Amendment's Powers Reserved to the States

By John J. Balenovich

This article addresses the Court's application of the Tenth Amendment as a constitutional restraint on Congressional power. The Tenth Amendment, based on the principle that the Constitution's authority rests on the consent of the people, not individually as an entire nation, but as to the "individual states...they respectively belong,"<sup>1</sup> reads:

THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY, OR TO THE PEOPLE.<sup>2</sup>

The Tenth Amendment operates as an exception – a limit on the general rule that the federal government may enact laws necessary and proper to effectuate one of the federal government's enumerated powers. The Tenth Amendment preserves the rule of limited federal government by reserving powers to the states. This reservation has been construed by the Court to delineate what the national government *may not* demand of the states because the action intrudes upon state sovereignty.

The Court's treatment of this express limitation on the national government has been anything but consistent, leading to confusion surrounding the scope and extent of the Tenth Amendment's constraint on Congress. But confusion should not be taken to mean insignificance. The final amendment in the Bill of Rights maintains its importance and viability in our modern system of government. Today, the Tenth Amendment retains its stature as a viable constitutional restraint on Congressional power.

The Tenth Amendment, while a part

of the "living" Constitution, has witnessed its own evolution in response to the changing needs of the country. An explanation of the Tenth Amendment in the proper historical context sheds valuable light on its meaning and importance in the constitutional scheme. The Tenth Amendment is the guardian of the federal structure in the Constitution.<sup>3</sup> American federalism is the vertical division of power between the federal government and the states based on the principle of dual sovereignty.

## A Sword or a Shield?

The major impetus for the Framers including the amendment stemmed from concerns raised during the Constitutional Convention about the appropriation of power between the two concurrent sovereigns – the national and state governments.<sup>4</sup> Intending to strike a proper balance and fearful the national government would abuse its power under the Supremacy clause<sup>5</sup>, the Framers inserted paper protections into the structure of the Constitution itself to prevent Congressional legislative encroachment into the realms of purely state control.<sup>6</sup>

Not convinced a mandate to refrain from legislating in excess of its constitutional power was strong enough to guard against the threat of Congressional tyranny; the Tenth Amendment was passed to prevent national government intrusion on state sovereignty. But, as we will see, the Supreme Court has not always embraced the Tenth Amendment as viable constitutional restraint.

## A Lion or a Lamb?

The United States is wholly "a creature of the Constitution."<sup>7</sup> The most basic constitutional limitation on Congress is restricting it to its enumerated powers in Article I.<sup>8</sup> Because Congress can legislate only by exercising one of its enumerated powers, a law passed

that is not expressly or impliedly derived from an enumerated power is, by definition, unconstitutional.<sup>9</sup> Further, the fact that the Constitution is a document of "limited and enumerated powers," logically necessitates "that what is not conferred [to Congress], is withheld, and belongs to the state authorities."<sup>10</sup>

Historically, the Court's key focus on the issue has been whether the Tenth Amendment is a "judicially enforceable limit" on Congressional power.<sup>11</sup> In other words, can the Court declare a federal law unconstitutional because the law violates the Tenth Amendment?<sup>12</sup>

The Court has employed two approaches to address the meaning and scope of the Tenth Amendment. One approach, the *reminder approach*, views the Tenth Amendment as a reminder that Congress may only legislate if it has the constitutional authority to do so.<sup>13</sup> Under this approach, the Tenth Amendment is not a separate restraint on Congressional power; therefore a federal law could not violate the Constitution on Tenth Amendment grounds.<sup>14</sup>

The second approach applies the Tenth Amendment as a constitutional protection of state sovereignty.<sup>15</sup> Under this approach, the Supreme Court has used the Tenth Amendment as a "key protection of states' rights and federalism."<sup>16</sup> The Tenth Amendment, being a viable restraint on Congressional power, confirms the "Federal Government is subject to limits that...reserve power to the States."<sup>17</sup> Thus, the Tenth Amendment forces the Court to determine whether Congressional action was permissible or did the Federal action offend state sovereignty protected by the Tenth Amendment.<sup>18</sup>

The second approach is more in line with the intent of the Framers.<sup>19</sup> As Alexander Hamilton explained in The Federalist No. 33, Congressional action is allowed if executed properly under

Article I. However, when a federal law violates state sovereignty, then that law is “merely [an] ac[t] of usurpation” which “deserve[s] to be treated as such.”<sup>20</sup>

### Early Treatment of the Tenth Amendment

Tenth Amendment jurisprudence has gone through four phases since its adoption into the Constitution in 1789. During the Nineteenth Century, based on Chief Justice John Marshall’s opinions in *McCulloch v. Maryland*<sup>21</sup> and *Gibbons v. Ogden*,<sup>22</sup> the Court treated the Tenth Amendment as a reminder to Congress that it must have constitutional authority to legislate, not a restraint on Congressional power.<sup>23</sup> These cases involved testing the limits of one of Congress’s enumerated powers under the Supremacy Clause and the Commerce Clause, respectively.

In both cases, Marshall, a staunch nationalist, expanded national power and limited state sovereignty.<sup>24</sup> This was no surprise; Marshall consistently “constructed” the Constitution as authorizing the broad Congressional powers he believed were necessary to ensure the national government was effective when executing national initiatives.<sup>25</sup>

Marshall’s approach was abandoned in 1918, when the Court handed down its opinion in *Hammer v. Dagenhart* (The Child Labor Case).<sup>26</sup> Brought before the Court during the *Lochner* era, the decision in *Hammer* fundamentally changed Tenth Amendment jurisprudence by explicitly recognizing “zones of state control.”<sup>27</sup> The Court reasoned that Congress was prohibited by the Tenth Amendment from legislating activities in those zones.<sup>28</sup> The *Hammer* Court ruled Congressional authority over a federal matter could not destroy the innate power always reserved by the states over the same issue.<sup>29</sup> The Court used the Tenth Amendment as a formidable limit on federal power until the early 1930s.<sup>30</sup>

By the end of the decade, the Court had an influx of progressive Justices who were less concerned with adhering to the text of the Constitution than reaching what they believed was the right result. Again, a perceived strong

need for big national government to address big national problems led to a serious shift in the Court’s approach on many constitutional issues. In 1937, in *West Coast Hotel Co. v. Parrish*,<sup>31</sup> the Court upheld the federal minimum wage law and effectively ended the *Lochner* era. The Court reverted back to viewing the Tenth Amendment as merely a reminder of Congressional limits. This swing in the pendulum was confirmed in 1941 in *United States v. Darby*,<sup>33</sup> where the Court squarely addressed the issue of whether the Tenth Amendment<sup>34</sup> was an actual restraint on Congressional authority. The Court held it was not.

Between 1937 and 1992, Tenth Amendment issues were raised in several cases before the Court; however the Court only struck down one federal law as violative of the Tenth Amendment. In 1976, Justice William Rehnquist’s opinion for the Court in *National League of Cities v. Usery*, briefly revived the Tenth Amendment as a viable constitutional restraint when he articulated the *government functions test* that prohibited Congress from regulating “traditional ... functions” of state governments.<sup>35</sup> The problem for the Court was determining which state functions deserved Constitutional protection.

Over the next ten years the Court consistently rejected Tenth Amendment-based claims similar to those raised in *National League of Cities*. In 1985, the Court expressly overruled the government functions test in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>36</sup> The *Garcia* Court explained the government functions test was not sound, unworkable in practice, and led to inconsistent results.<sup>37</sup> The Court ultimately concluded that protection of state sovereignty is best left to the political process, and in so doing, the Court “washed its hands” of the Tenth Amendment leaving it for dead.<sup>38</sup>

### Modern Tenth Amendment Jurisprudence

In the 1990s, the Court resurrected the Tenth Amendment by using it to limit Congress’s authority to require state governments to effectuate federal regulatory laws by prohibiting Congress

from commandeering state legislatures and state officials.<sup>39</sup> The Supreme Court’s reversal of opinion can largely be attributed to Chief Justice Rehnquist. The Rehnquist Court, citing “first principles,”<sup>40</sup> took the country on a “federalism revival” that expressly overruled *Garcia* and revitalized the Tenth Amendment.<sup>41</sup>

The three cases that establish current Tenth Amendment jurisprudence are *New York v. United States*, *Printz v. United States*, and *Reno v. Condon*. In *New York*, the State challenged the federal 1985 Low Level Radioactive Waste Policy Amendments Act. The Court’s analysis focused on the Act’s incentives, specifically the “take title” provision, that obligated states to accept ownership of any undisposed of waste within their borders and held states liable for any direct or indirect damages caused by the waste as a consequence of ownership.<sup>42</sup> The Court found the Act’s “take title” provision unconstitutional because it forced state governments to make a Hobbsian choice; either accept ownership of the waste or regulate “according to the instructions of Congress.”<sup>43</sup>

The Court was unequivocal: Congress is prohibited from commandeering state legislatures, or the state legislative process, by compelling states to enact and enforce federal laws.<sup>44</sup> The Court laid down a bright-line rule: it will never sanction an explicit federal command to states to affirmatively act.<sup>45</sup>

Simply put, the Court concluded that Congress is not empowered to commandeer state legislatures by requiring state governments to “promulgate and enforce [federal] laws and regulations” and the Tenth Amendment expressly forbids such action.<sup>46</sup> This misuse of Congressional power, the Court reasoned, would destroy the federal system and undermine government accountability because Congress would make the political decisions, but the states would take the “political heat” and be held responsible for a decision they did not make.<sup>47</sup>

In *Printz v. United States*, the Court extended the anti-commandeering principle to encompass federal laws requiring action by state executive officers. The case involved a Tenth Amendment challenge to the Brady

Handgun Violence Prevention Act. Specifically, the Court found the Brady Act's requirement that each state's chief law enforcement officer establish a national background check system violated the Tenth Amendment because it "pressed into federal service" state executive officers for federal regulatory purposes.<sup>48</sup> The Court ruled the Federal Government could not issue directives (1) requiring state officials to address a particular problem, nor (2) command State officials or political subdivisions to administer federal programs.<sup>49</sup> The Court restated that it would not allow Congressional attempts to circumvent the Tenth Amendment by "conscripting" state officers instead of passing laws directing state governments.<sup>50</sup>

Shortly after the decision in *Printz*, the Court reigned in the scope of the Tenth Amendment in *Reno v. Condon*. The case involved a challenge by the state of South Carolina to a provision of the Drivers Privacy Protection Act of 1994 (DPPA) that restricted the disclosure and sale of personal information kept in DMV records.<sup>51</sup> The state's law was in direct conflict with the federal law because it allowed any person to access DMV records by filling out a formal request, so long as they swore the information would not be used for telephone solicitation.<sup>52</sup> The state argued the DPPA was unconstitutional because it "thrust[ed]" upon the state government the day-to-day responsibility of administering a complex federal program.<sup>53</sup>

The Court ruled the DPPA provision did not violate the Tenth Amendment because it did not *require affirmative action by the state* and instead prohibited state conduct, which is a permissible use of Congressional power.<sup>54</sup> In other words, Congress prohibiting state conduct does not violate the Tenth Amendment because Congress does not force a state to pass laws, regulate their own citizens, or require state officials to assist in the enforcement of federal regulatory programs.<sup>55</sup>

In summary, it is clear the Court will strike down a federal law that commands state legislatures or state executive officials for federal regulatory purposes. The Court has held that federal laws

which compel states or state executive officers to affirmatively act are unconstitutional as violative of the Tenth Amendment. However, Congress may pass laws that prohibit state conduct so long as the law does not influence the manner in which states regulate their own citizens.

### Future of the Tenth Amendment

Reverberations of the Rehnquist Court's "federalism revival" will continue to echo as these decisions have spawned hundreds of lower court decisions delineating issues of federalism.<sup>56</sup> With Chief Justice Rehnquist and Justice O'Connor no longer on the bench, how the Tenth Amendment will be shaped by the Roberts Court remains to be seen. To date, the Roberts Court has not directly addressed the scope of the Tenth Amendment or any of the fundamental "constitutional federalism issues that formed the heart of the Rehnquist Court's Federalism Revolution."<sup>57</sup> But it has dealt with cases that raised federalism issues.

Two recent cases, *Waters v. Wachovia Bank, N.A.* and *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, indirectly shed light on both Chief Justices Roberts's and Justice Alito's stance on federalism. In *Waters*, the Court faced a preemption issue involving the National

Banking Act.<sup>58</sup> Alito joined the majority recognizing a zone of federal activity that is free from undue interference by state regulations.<sup>59</sup> Further, the majority held the Court may properly overturn state laws that unduly hamper federally preempted national banking regulations.<sup>60</sup> The dissent, in which Roberts joined, expressed concern about how the majority's decision impacts the federal-state balance of power.<sup>61</sup> The dissent pointed to the Tenth Amendment, and explained that it serves to remind the Court that its decisions impact sovereigns.<sup>62</sup> The dissent concluded the dual sovereignty enjoyed by the states and federal governments is the reason for the well established "presumption against preemption."<sup>63</sup>

The second case, *United Haulers*, involved a state law that required waste haulers to bring their waste to a state-created public benefit corporation.<sup>64</sup> The constitutional question was whether the dormant Commerce Clause precluded state and local governments from favoring (i.e. showing preference to) government-owned corporations over private competitors.<sup>65</sup> Roberts, writing for the majority, strongly argued for judicial restraint on the expansion of the dormant Commerce Clause.<sup>66</sup> Despite making comments at his nomination hearing emphasizing stronger Congressional power, Roberts' opinion



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strengthened states' rights by holding that state enterprises should not be treated with as much skepticism as private businesses and therefore may properly be favored or preferred.<sup>67</sup> Finding otherwise, he maintained, would lead to unbounded interference with local and state government by the Courts.<sup>68</sup>

Conversely, Alito, a champion of federalism on the Third Circuit Court of Appeals, argued in the dissent that both public and private corporations should be treated equally under the dormant Commerce Clause.<sup>69</sup> Alito argued the Court should not shirk its obligation to overturn disruptions in the market, even if the disruption involves state regulation within her police power of a traditional government function.<sup>70</sup> More surprising, Alito harkened back to *Garcia* to remind the majority that the traditional state functions analysis has been found unsound in principle and unworkable in practice.<sup>71</sup> Alito's embrace of *Garcia* along with his disregard of states' rights throughout his dissent is a far cry from Justice O'Connor, whom Alito replaced, and leaves room to question the future of the Tenth Amendment.<sup>72</sup>

## Conclusion

Of the various structural elements the Framers built into the constitution – checks and balances, separation of powers, judicial review, and federalism – the latter has been the only doctrine not unconditionally embraced by the Court.<sup>73</sup> The Court's hesitation to impose the limits expressed in the Tenth



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Amendment is, in a word, ironic.

The irony is that federalism “was *the unique contribution* of the Framers to political science and political theory.”<sup>74</sup> Federalism, in other words, is the defining characteristic of American government as expressed in the written Constitution. Yet, for the better part of the past forty-five years, federalism has taken a “back seat to an extensive period of judicial activism” that has reduced the Tenth Amendment's importance in constitutional law.<sup>75</sup>

Even if the Tenth Amendment remains a weak limit on federal power, it nevertheless serves an important role in the modern state/federal dichotomy. If nothing else, the Tenth Amendment is testament to the propriety and necessity of state regulators to continue to devise innovative responses to today's challenges. The Court's recent federalism decisions implicating the Tenth Amendment have placed the powers reserved to the states back into the constitutional law spotlight. So as it was at the beginning, states' rights versus federal power continues to be the great American question. ■

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44. *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

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51. *Reno v. Condon*, 528 U.S. 141, 146 (2000).
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59. *Id.*
60. *See Id.* at 1566-72.
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71. *United Haulers Ass'n, Inc.*, 127 S.Ct. at 1810.
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# Board and Commission Appointments: Executive Power — With Limits

By Bill Lear & David Fleenor

Recent controversies concerning the governing boards of the Commonwealth's public universities<sup>1</sup> and the leadership of the Council on Postsecondary Education,<sup>2</sup> bring into focus the overall importance of boards and commissions in the structure of state government. These controversies also highlight a continuing tension between the Governor's authority to make appointments to those boards and the General Assembly's desire to limit that power. The stakes are not insignificant. The nearly 500 boards and commissions in the Commonwealth regulate and define nearly every aspect of our lives. Professions as diverse as medicine and barbering have their own governing boards. The worker's compensation system, public utilities, election finance, and executive branch ethics, each have a specialized board that governs it or adjudicates disputes or both. These boards and commissions are diverse in function but similar in that they are typically attached to the executive branch of government and are controlled by appointees as opposed to elected officials. Those appointees are primarily selected by Kentucky's Governor. The power of the Governor to make appointments to these boards is a constitutional prerogative of the Commonwealth's "Chief Magistrate,"<sup>3</sup> a prerogative that is not unfettered and which is limited in varying degrees by legislation enacted by the Legislative Branch and interpreted by the Judicial Branch. This article will examine the constitutional basis of the Governor's appointment power, the practical aspects of the use of that power, and the attempts by the General Assembly to limit that power.<sup>4</sup>

## CONSTITUTIONAL PROVISIONS AFFECTING THE GOVERNOR'S APPOINTMENT POWER

At first blush it would appear that the Governor's power to make appointments to the Commonwealth's Boards and Commission is contained within Section 76 of the Constitution, which states:

He shall have the power, except as otherwise provided in this Constitution, to fill vacancies by granting commissions, which shall expire when such vacancies shall have been filled accordingly to the provisions of this Constitution.<sup>5</sup>

Courts in Kentucky have inconsistently applied this Section to the Governor's

appointment power for Boards and Commissions. Most cases have held that Section 76 applies only to constitutionally created offices. Typical of these are *Poyntz v. Shackelford*<sup>6</sup> and *Rouse v. Johnson*.<sup>7</sup> In these two cases the Kentucky Court of Appeals held that Section 76 had no applicability to legislatively created positions. The plain language of Section 76 supports that view. At least one case in the Kentucky Supreme Court subsequent to *Poyntz* and *Rouse*, however, has referenced Section 76 as the basis of the Governor's power to appoint members to university boards.<sup>8</sup> Reliance upon Section 76 was not critical to the result in that case. The Court referenced that section only to show that it con-

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tained no prohibition that would have prevented Governor Wallace Wilkinson from appointing himself. The same holding could be reached by reference to other sections of the Constitution that have been used as a basis for the Governor's appointment power.

This is not to suggest that Section 76 does not provide the Governor with an extremely important appointment power. That section clearly applies to vacancies in constitutionally created offices. This includes judges in all of the Commonwealth's courts, county judge executives, and Commonwealth Attorneys to name a few. These gubernatorial appointments are temporary; however, lasting only until the next scheduled election. The procedures for these appointments are also laid out in express terms within the body of the Kentucky Constitution. *See* Section 152 of the Kentucky Constitution. Gubernatorial appointments to Constitutional offices have thus not been the subject of the same volume of litigation as board and commission appointments.

More to the point with respect to board and commission appointments is Section 93 of the Kentucky Constitution which states in pertinent part:

Inferior State officers and members of boards and commissions, not specifically provided for in this Constitution may be appointed or elected, in such manner as may be prescribed by law, which may include a requirement of consent by the Senate, for a term not exceeding four years, and until their successors are appointed or elected and qualified.<sup>9</sup> (Emphasis supplied.)

Significantly, the phrase "boards and commissions" and the provision for consent by the Senate were both added by a Constitutional Amendment ratified by popular vote in 1992. The phrase "in such manner as may be prescribed by law" would seem to give the legislature fairly broad latitude in limiting the appointment power, until it is paired with the "consent by the Senate" language. Under this approach, the "in such manner as may be proscribed by law" language only allows the General

Assembly to determine whether a position will be elected or appointed, and not the manner of appointment. As will be discussed in more detail below, the Supreme Court has at times taken the position that the separation of powers doctrine limits the ability of the General Assembly to only this "advise and consent" roll. At other times the Court has allowed a more expansive oversight role.

Yet another section of Kentucky's Constitution has an impact on the Governor's appointment power. Section 23 of the Kentucky Constitution says nothing about boards and appears aimed only at preventing Kentucky from conferring titles of nobility. Notwithstanding the lack of express references to appointment power, Section 23 has been used as a basis for the creation of certain board and commission offices and is so referenced in the underlying legislation. Specifically, that Section of the Constitution is used when the General Assembly has created board offices with a term in excess of four year limit contained in Section 93.<sup>10</sup>

The seminal case of *LRC v. Brown*,<sup>11</sup> a 1982 Kentucky Supreme Court case, took a different approach in defining the Governor's appointment powers, ignoring Sections 76, 93 and 23. This case has been called by legal commentators the Kentucky *Marbury v. Madison*.<sup>12</sup> The approach taken by the Court in *Brown* viewed the Governor's appointment power as implicit in the doctrine of separation of powers contained in Sections 27 and 28 of the Kentucky Constitution. Section 27 divides the powers of the government into three (3) distinct departments. Section 28 states:

No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

As Kentucky's Separation of Powers provision is particularly strong, the holding of *Brown* would seem to indicate that the Governor's appointment power can only be limited by the advise and consent function of the Senate added in the 1992 Amendment to Section 93. Despite the language of *Brown*,

Courts have not always taken that hard line approach.

## GENERAL STATUTORY PROVISIONS

Procedures for the Governor's appointments are outlined within Chapters 11 and 12 of the Kentucky Revised Statutes. Specifically, KRS § 11.160 delineates the process for General Assembly confirmation of appointments. It provides that a board appointment may be subject to confirmation by the Senate or by the Senate and the House of Representatives depending upon the specific enabling legislation. The appointee requiring confirmation is allowed to serve prior to his confirmation.<sup>13</sup> However, if not confirmed, the appointment expires at the end of the General Assembly session that declined to confirm the appointee. The Governor may not reappoint that person to the same position for a period of two (2) years.<sup>14</sup> As noted before, the provisions of Section 93 concerning Senate confirmation would at least arguably appear to be at odds with a statutory provision requiring Senate and House confirmation. That issue has yet to be resolved by a court.

KRS § 12.070 contains requirements for minority representation on Boards and Commissions. It also contains a provision that allows the Governor to reject a list and require that other lists be submitted in those instances where he is required to select from a list. A recent decision by the Kentucky Court of Appeals has made it clear that the Governor's power to reject a list is not limited solely to the instance of achieving minority representation.<sup>15</sup> There was a dissent to that decision and it is not an absurd position to view this statute as only applying to issues affecting minority representation.

## ILLUSTRATIVE BOARDS

Contained within the numerous Boards and Commissions which regulate affairs in the Commonwealth of Kentucky are several distinct approaches to appointment of board members. In some instances the Governor's appointment power is completely unfettered. He may appoint whomever he chooses and that appointment is not

subject to any confirmation process. In some instances the Governor must select from a list of potential nominees submitted by another entity, but his nominee is not subject to confirmation. At the other end of the spectrum, there are Boards in which the Governor must pick from a list and the choice is subject to confirmation by one or more of the houses within the General Assembly. These approaches are best explained by reference to specific boards.

The Executive Branch Ethics Commission consists of five members, all appointed by the Governor.<sup>16</sup> Each serves a four year term. Even a one term Governor will over time have the opportunity to appoint a majority of the EBEC. The EBEC has significant power: the ability to issue subpoenas, levy fines of up to \$5,000.00, and issue recommendations that state employees have their employment terminated. The only constraint on the Governor's appointment power is that an appointee be a registered voter. Currently, no confirmation process is in place.

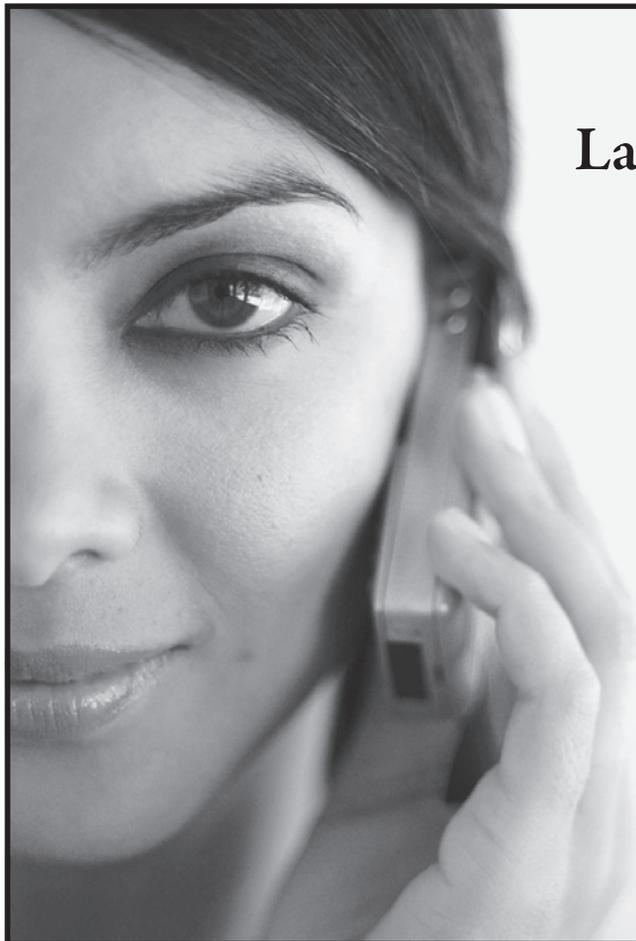
The Worker's Compensation Board

consists of three members with staggered four year terms. The Governor makes his choice from a list submitted by a nominating commission.<sup>17</sup> The members of the nominating commission are in turn also appointed by the Governor, subject to certain qualifications. Members of the Board are subject to Senate Confirmation.<sup>18</sup> Members of the nominating commission are not.

University Boards, a subject of recent litigation, are a hybrid form of appointment. The Governor is required to pick from a list submitted by the Post Secondary Education Nominating Committee.<sup>19</sup> Contained within the statute that set up the university boards are requirements that the composition of the boards must be balanced both politically and try to achieve full representation of the sexes as well as minority representation.<sup>20</sup> The nominating committee that submits the list to the Governor itself must reflect representation of the sexes, minority representation and voter registration in its membership.<sup>21</sup> Finally, the members of the Nominating Committee must be

confirmed by both houses of the General Assembly. Members of the University Boards are not subject to General Assembly confirmation.

As a final note on university boards, these appointments are for a term of six (6) years. This would seem squarely at odds with the requirement contained within Section 93 of the Constitution that a Board appointment not last longer than four (4) years. Kentucky's highest court passed on its last opportunity to determine this issue.<sup>22</sup> The current statutory schemes however, indicate that these appointments are made pursuant to Section 23 of the Constitution. Section 23 states that appointments shall only be for a term of years with no reference to a specific number of years. This provision was first seen in the Constitution of 1792 and in fact is part of the Kentucky Bill of Rights. Viewed in the context of the years immediately after the Revolutionary War, this section appears aimed more at preventing titles of nobility. Nevertheless, it has been used as an expedient to achieve six (6) year appointments, and its applicability



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has not been challenged.<sup>23</sup>

Another appointment method is reflected in the State Board of Medical Licensure. Of the fifteen members, eleven are appointed by the Governor. The other four are *ex officio* members. Eight of the eleven members appointed by the Governor are to be selected from lists provided the Kentucky Medical Association and the Kentucky Osteopath Association. Three appointments are completely within the discretion of the Governor, subject to the qualification that they represent a consumer health advocacy. None of the fifteen members of this board are subject to confirmation.

## CASES

The concept of requiring the Governor to pick from a list supplied by another entity would seem to be an improper delegation of the Governor's authority. The constitutionality of this delegation of authority was first addressed in *Elrod v. Willis*.<sup>24</sup> That case concluded that requiring the Governor to make his appointment to the Disabled



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Ex-Servicemen's Board from a list supplied by the American Legion was constitutional. The Court held that this procedure did not violate separation of powers as it "... merely sets in motion the machinery by which its purpose will be effected."<sup>25</sup> The Governor still made the appointment.

The issue of whether the Governor may be required to pick from a list seemed to have been answered in the negative in 1984 by the Supreme Court *LRC v. Brown*. The post-*Brown* argument would be that requiring the Governor to select from a list submitted by another entity would usurp a power reserved exclusively for the Governor. However, in the 1991 case of *Kentucky Association of Realtors v. Musselman*<sup>26</sup> the Supreme Court decided that lists were still an acceptable procedure, albeit with a strong dissent from part of the Court. The *Musselman* case involved the practice of appointments to the Real Estate Commission being made from a list submitted by Kentucky Association of Realtors. The Court distinguished *Brown* on the basis that the entity providing the list was not the LRC or the General Assembly. Since the Governor still had the ability to pick from the list, and implicitly since the Governor had the ability to reject the list in its entirety and require a subsequent list, the Court held that this passed Constitutional scrutiny, if only barely.

The *Wilkinson* case involved the appointment to the University of Kentucky Board of Trustees of Wallace Wilkinson and merits another look.<sup>27</sup> While the case stands for the proposition that a Governor can appoint himself, that occurrence triggered a complete revision of the statutes concerning university boards. Under the modern provisions of KRS Chapters 164, the Governor may make an appointment to a University Board only from names on list submitted by the Postsecondary Education Nominating Commission. That Commission must adhere to strict requirements in formality, as to the list composition, and the appointments to the Commission require confirmation by both houses of the General Assembly.

*Kraus v. The Kentucky State Senate*<sup>28</sup>

directly addressed the issue of whether a statute could require confirmation of the gubernatorial appointment by one body of the General Assembly, in that instance the Senate. At issue was a rejected Worker's Compensation Administrative Law Judge who had been denied confirmation by the Senate. The Court ultimately held that the State Senate has an inherent power to advise and consent on Executive Branch appointments. This case was decided prior to the Amendment to Section 93 which made the Senate's advise and consent power express. Again the case contained a strong dissent which questioned whether the advise and consent function of the Senate had been removed by the Constitution of 1892. An express advise and consent provision had been considered in the Constitutional Convention of 1890-91. That provision was ultimately rejected. The dissent viewed this as a constraint on the Governor's executive power and a violation of the separation of power provisions of Section 27 and 28 of the Kentucky Constitution.

In a slightly different context, *Prater v. Commonwealth*<sup>29</sup> examined separation of powers from the view point of separation between the Executive and Judiciary divisions. That case held unconstitutional a judicial pre-release program as it impermissibly conferred the Executive Power of Pardon and Clemency upon the Judiciary.

Finally, in *Galloway v. Fletcher*,<sup>30</sup> the most recent case to deal with the Governor's appointment power, the Court of Appeals held that the Governor had the right to reject the list for reasons other than achieving minority representation.

## CONCLUSION

Boards and Commissions constitute a powerful and far reaching element of the Executive Branch of Government. In the Commonwealth of Kentucky there are nearly five hundred (500) of these Boards and Commissions which regulate or adjudicate many aspects of our daily life. The power to fill these appointments is an important element of the Governor's overall power and allows that official to effect government well beyond his term of office. Recent

controversy and litigation concerning the Governor's appointment power is nothing new and will likely not be resolved in the near future. ■

#### ENDNOTES

1. *Comm. Ex rel. Conway v. Beshear*, Franklin Court, Civil Action No. 07-CI-1456. The action was originally filed by then Attorney General Greg Stumbo against then Governor Ernie Fletcher challenging whether appointments to the university boards reflected voter registration as required by statute. The newly elected Governor and Attorney General agreed to dismiss the case.
2. "Cowgill Resigns Post" Lexington Herald Leader April 30, 2008. The Council on Postsecondary Education, composed of gubernatorial appointees had initially selected Brad Cowgill as the Council's president over the Governor's objections. Mr. Cowgill voluntarily resigned to defuse the controversy.
3. Section 69 of the Kentucky Constitution provides that "The supreme executive power of the Commonwealth shall be vested in the Chief Magistrate, who shall be styled the 'Governor of the Commonwealth of Kentucky.'" 4. The issues raised in this article are uniquely issues of Kentucky law. References to the "Constitution" are references to the Kentucky Constitution in its current form. References to decisions of the "Supreme Court" refer to the Kentucky Supreme Court.
5. Kentucky Constitution, Section 76.
6. *Poyntz v. Shackelford*, 54 S.W. 855 (Ky. 1900). "It cannot, of necessity, have any application to vacancies in office for the filling of which no provision is made in the constitution; for, as to such offices, there would be no period at which the commissions granted by the governor would expire." *Id* at 857-8.
7. *Rouse v. Johnson*, 78 S.W. 2d 145 (Ky. 1930). This case dealt with the constitutionality of a statute that took the appointment power for the State Highway Commission away from the Governor and lodged it with an appointing board. The appointing board consisted of the Governor, Lieutenant Governor and Attorney General. Ultimately, the Court avoided deciding the constitutionality question.
8. *Comm. ex rel. Cowan v. Wilkinson*, 828 S.W. 2d 610 (Ky. 1992). The Court discussed the Governor's appointment authority solely by reference to Section 76.
9. Kentucky Constitution, Section 93.
10. Section 23 of the Kentucky Constitution states: "The General Assembly shall not grant any title of nobility or hereditary distinction, nor create any office the appointment of which shall be for a longer time than a term of years." KRS Chapter 165 references this section as creating university board terms of six years, directly contrary to the Section 93 limit of four years.
11. *LRC v. Brown*, 664 S.W. 2d 907 (Ky. 1984).
12. See Snyder and Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of LRC v. Brown*, 73 Ky L.J. 165 (1984-85).
13. KRS §§ 11.160(1)(f) and 11.160(2)(h).
14. KRS § 11.160(1)(h) and 11.160(2)(i).
15. *Galloway v. Fletcher*, 241 S.W. 3d (Ky. App. 2007). In that case the Governor rejected a list of three potential appointees to the Murray State University Board. The Governor ultimately made the appointment from a subsequent list submitted to him by the Post Secondary Education Nominating Committee. The disappointed nominees from the first list brought suit.
16. KRS § 11.060
17. KRS § 342.213
18. *Id.*
19. KRS § 164.005(5)(a)
20. KRS §§ 164.131, 164.321 and 164.821.
21. KRS § 164.005
22. *Jones v. Forgy*, 750 S.W. 2d 434 (Ky. 1988). The court declined to decide the case as the terms of the trustees at issue had expired, thus rendering the issue moot.
23. The General Assembly has been inconsistent in its approach to the length of term of state university board member. Until 1988, KRS Chapter 164 provided for six year terms. In 1988, the statutes were amended to shorten that period to four years. In 1992, the term was again lengthened to six years, and the reference to Section 23 was added.
24. *Elrod v. Willis*, 203 S.W. 2d 18 (Ky. 1947)
25. *Id* at 228.
26. *Kentucky Association of Realtors v. Musselman*, 817 S.W. 2d 213 (Ky. 1991).
27. *Comm. ex rel. Cowan v. Wilkinson*, 828 S.W. 2d 610 (Ky. 1992).
28. *Kraus v. The Kentucky State Senate*, 872 S.W. 2d 433 (Ky. 1994).
29. *Prater v. Commonwealth*, 82 S.W. 3d 898 (Ky. 2002).
30. *Galloway v. Fletcher*, 241 S.W. 3d (Ky. App.2007).

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# Civil Resolution of Ecclesiastical Disputes

By Paul E. Salamanca

In our world of extraordinary religious plurality, schisms within denominations occur with great frequency, often bringing with them the fascinating legal problem of who keeps the bricks, mortar, records and savings of the institution. The problem can arise in virtually any denomination, from the most hierarchical to the most congregational. Here in Kentucky, for example, we have recently seen people in the Episcopalian tradition coming close to litigation after the consecration of V. Gene Robinson, an openly gay man, as Bishop of the Diocese of New Hampshire.<sup>1</sup> On first impression, one might think that cases arising in this area involve only the laws of property, contracts, trusts and estates, but in fact such cases strongly implicate the First Amendment as well.<sup>2</sup> First, lack of access to adequate, familiar facilities can affect free exercise, as can the exigencies of litigation itself, particularly discovery. Second, civil courts are understandably wary of being called upon to construe ecclesiastical terms, given the risk of establishment posed by such construction. In light of these concerns, a handful of somewhat specialized approaches to resolving ecclesiastical disputes over bricks and mortar have developed. The purpose of this essay is to describe three of the most historically prominent of these approaches, with specific reference to prevailing rules in Kentucky.

## The Doctrine of Implied Trust

Until fairly recently, one of the most common methods of resolving such disputes, at least with regard to hierarchical denominations, was to apply the doctrine of implied trust. Under this doctrine, a grant of property to a local church was deemed to be “for the benefit of the general church

[meaning the church’s hierarchy] on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local [church].”<sup>3</sup> This doctrine reflected the fairly simple assumption that, when people gather together on a local basis, raise money, build a church, and affiliate themselves with a larger institution, they do so on the implied understanding that the latter will continue to espouse the basic theological doctrine that it holds forth at the time of affiliation. Courts maintained a similar doctrine for churches adopting a congregational polity.<sup>4</sup>

Needless to say, there are flaws in this theory. First, it depends on a supposition of the exact nature of the original grantors’ intent. Although many donors may be particular about doctrine, others may not. Others, in fact, might wish to facilitate theological innovation by worshipers to follow. A second, related problem arises from conflicting rights. That is, whose rights should control – those of the donors, who may be long deceased, or those of worshipers who prefer the innovation at issue, and who may be many in number? One might answer that a condition attached to a gratuitous grant should be respected out of deference to the rights of property, but of course the doctrine does not require the condition to be explicit. This tension is obviously most acute when the condition *is* explicit, that is, when the original donor does make his or her grant subject to an express religious use.<sup>5</sup>

But the formal demise of the doctrine of implied trust did not in fact arise from any of the foregoing concerns. Instead, it arose from the anxiety courts felt with distinguishing one theological concept from another. To illustrate, consider a grant to the hypothetical “First Church of Reincarnation,” subject to a condition

that its clergy continue to espouse reincarnation as a theological concept. Assume that, well after the demise of the donor, a new minister took to the pulpit of the church and began to describe reincarnation as merely a metaphor for the fact that each day is a new day, wherein we can be new and better people. People of common sense might be able to formulate a reasonable opinion about whether the new minister’s theology is consistent with the intentions of the donor, but courts understandably are wary of the entanglement that might arise from making these kinds of determinations in a legally binding way. Thus, in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church*, the Supreme Court of the United States held that the doctrine of implied trust could not be applied in a manner consistent with the First Amendment to the federal Constitution.<sup>6</sup> As the Court noted in *Hull*, the “departure-from-doctrine element” of the theory “requires the civil court to determine matters at the very core of a religion – the interpretation of particular church doctrines and the importance of those doctrines to the religion.” “Plainly,” it went on to say, “the First Amendment forbids civil courts from playing such a role.”<sup>7</sup> Ironically, this rationale would appear to apply just as forcefully to *express* trusts in favor of religious uses as to implied ones.

As of today, there are two approaches to resolving ecclesiastical disputes that have been held to comport with the First Amendment. The one with the longer historical pedigree is the so-called “rule of deference,” which actually arose from a dispute here in Kentucky. The other is the so-called “rule of neutral principles.” As we will see, the courts of the Commonwealth have not definitively embraced either of these rules to the exclusion of the other.

## The Rule of Deference

The rule of deference is uniquely suited to a hierarchical church, although it has some application to a congregational polity as well. Under this rule, courts avoid enmeshing themselves in theological disputes by deferring to the highest authority within a particular religious structure as that structure presents itself to the civil world. As the Supreme Court of the United States explained in *Watson v. Jones*, the case in which it first applied the doctrine, when a dispute within a denomination has “been decided by the highest of [the ecclesiastical] judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.”<sup>8</sup>

*Watson v. Jones* arose from a dispute within the Third or Walnut Street Presbyterian Church in Louisville in the aftermath of the Civil War. During the war, the church’s national body, the General Assembly, had supported the

Union and opposed slavery.<sup>9</sup> In the bitter ecclesiastical disputes that followed the war, it became apparent that a majority of the congregation had also opposed slavery. A majority of the local Session, however, had defended slavery, the Session being the primary governing body of the local institution.<sup>10</sup> A dispute thus ensued as to whether the majority of the Session or a majority of the congregation, which itself aligned with the General Assembly, were the “true” representatives of the local church. The case originated in federal court on account of diversity, some of the congregants being from Indiana.<sup>11</sup> The Court, adhering at that time to the doctrine of *Swift v. Tyson*,<sup>12</sup> which permitted it to create federal common law, applied the rule of deference to resolve the case.

This rule has the obvious virtues of upholding the prerogatives of religious tribunals, of preserving lines of authority set up by a religious society, and of protecting civil courts from the potential hazards of resolving theological dis-

putes. As two prominent commentators noted in a general article on the subject, the approach of *Watson v. Jones* “posed few difficulties”:

*Once civil courts found implied consent on the part of a local church to be bound to a general church organization, the crucial determination then became the characterization of the church polity as either congregational or hierarchical. When a church’s organizational structure was ascertained to be hierarchical, the action or judgment of the highest church tribunal was conclusive on the civil court.*<sup>13</sup>

On the other hand, the rule of deference obviously prefers hierarchy and order to the wishes of dissenting members of such a society, who of course can be many in number, and who may have been much more responsible for building the local institution than the larger church. As noted above, however, there are rights on both sides of such disputes.

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## The Rule of Neutral Principles

The other constitutional option is for courts to resort to so-called “neutral principles of law.” Under this approach, courts apply the same principles of law to a dispute arising from a denominational schism as they would to a dispute arising from the fragmentation of a non-religious voluntary association. The Supreme Court of the United States give its first fulsome approval to this approach in *Jones v. Wolf*, another case involving the Presbyterian Church.<sup>14</sup> In this case, the Supreme Court of Georgia had held in favor of the local congregation, applying neutral principles, and the Court upheld its decision to do so. Although the Court did not describe neutral principles as mandated by the First Amendment, it nevertheless saw them as permissible, and perhaps even preferred.<sup>15</sup>

An obvious advantage of applying neutral principles is that it saves courts from having to choose between an ecclesiastical hierarchy (if there is one) and a dissenting congregation, unless the denomination has ordered its affairs in accordance with civil law to require preference of one over the other. As the Court maintained in *Jones v. Wolf*, the rule of neutral principles is both “secular” and “flexible” in its operation. “Through appropriate reversionary clauses and trust provisions,” wrote Jus-

tice Blackmun in his opinion for the majority, “religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy.”<sup>16</sup>

This approach is also not without its detractions, however. First, by emphasizing lawyerly examination of a church’s papers and records, the rule of neutral principles will inevitably compel religious organizations to become lawyerly in conducting their affairs. This can be a source of difficulty. Although many religious organizations are well-endowed with attorneys or funds with which to engage attorneys, others are not. Second, and as a related matter, ecclesiastical documents are not necessarily written with an eye toward civil litigation, nor perhaps should they be. When this occurs, courts will lack “neutral” language upon which to rely.<sup>17</sup> Finally, as applied to grants executed in the past, strict adherence to neutral principles will not properly discern the original intent of the grantor if that individual simply assumed that his or her donation would remain with the larger ecclesiastical body. Nevertheless, the rule of neutral principles is consistent with familiar notions of private ordering. That is, if someone wants a donation to a local

church in fact to adhere to the larger hierarchy, he or she can say so in the instrument of trust or conveyance.

## Civil Resolution of Ecclesiastical Disputes in Kentucky

Over the last seventy years, Kentucky has seen both “deference” and “neutral principles” applied in its courts, often in the same case.<sup>18</sup> In *Clay v. Crawford*, for example, the Commonwealth’s highest Court held in favor of the faction of a local church in the African Methodist Episcopal tradition that had remained loyal to the larger church, which took the form of an Annual Conference under the direction of a Bishop and a General Conference.<sup>19</sup> To a substantial extent, the Court justified its decision in terms of deference, citing *Watson v. Jones*. “In an adjudication of rights,” the Court wrote, “the criterion is identity, not of individuals, but of organization. The question is which of the rival factions is the true representative and successor or continuation of that local society as it existed prior to the division. The answer is to be found by ascertaining which of them adheres to or is sanctioned by the governing or central body.”<sup>20</sup> But the Court went on to examine the various instruments by which the church had acquired its property, concluding that the grants were subject to a trust in favor of the larger church.<sup>21</sup> In doing this, the Court’s analysis sounded in neutral principles.<sup>22</sup>

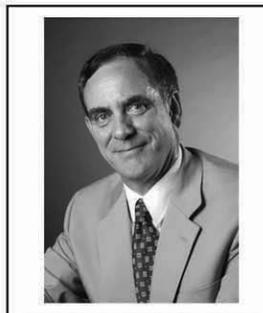
In *Pelphry v. Cochran*, by contrast, the Court appeared to adopt a pure version of the rule of deference.<sup>23</sup> This case involved a doctrinal schism within a church in the Baptist tradition, which generally contemplates a congregational polity. The majority of the congregation and the association with which the majority sought to affiliate adhered to one belief regarding the eligibility of people who have been divorced and remarried to become members, and the minority adhered to another.<sup>24</sup> Pretermittting the issue of the church’s exact polity, the Court adopted a position that sounds in deference, noting with approval that “the trial court merely recognized as church doctrine that which had been so declared by the church authorities vested with the power to declare it – either the association if the church was a part of its

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hierarchy or a majority of the congregation if it was not.”<sup>25</sup> The Court did not appear to rely on any evidence that would sound in neutral principles, stating only that “[t]he property in question was conveyed to the church in 1925.”<sup>26</sup>

Against this backdrop, the highest Court of Kentucky’s most recent decisions in this area, *Bjorkman v. Protestant Episcopal Church in the United States of America* and *Cumberland Presbytery of the Synod of the Mid-West of the Cumberland Presbyterian Church v. Branstetter*, can be discussed.<sup>27</sup> To one degree or another, both *Bjorkman* and *Branstetter* involved a blend of deference and neutral principles.

*Bjorkman* involved a schism within the Episcopal denomination. Specifically, an entire church within that denomination, without dissent, sought to dissociate itself from the larger structure, and litigation ensued as to whether the larger church or the local institution lay proper claim to the bricks and mortar.<sup>28</sup> This was a case where neutral principles and deference might well have yielded different results. The Episcopalian Church has a hierarchical polity, with judicatory powers lying in its senior officials. On the other hand, the instruments by which a church takes and holds its property may appear to vest title

in the local institution.

Citing *Jones v. Wolf*, the Court applied neutral principles and held in favor of the local church. “[T]his nation’s highest Court,” noted then-Justice Lambert for the majority, “has held this approach to be constitutional, preferable, and broadly applicable as a method of resolving church property disputes.” Therefore, he continued, “this Court is clearly empowered to adopt the neutral-principles approach if we so choose.” On the other hand, the Court noted, the justices were “reluctant . . . to overrule longstanding precedent.”<sup>29</sup> The Court found an apparent escape from this dilemma, however, in the fact that none of its precedents had involved a local church that, without dissent, had sought to dissociate from a denominational hierarchy.<sup>30</sup> In reaching this conclusion, the Court noted the harshness and rigidity of the rule of deference, at least from the point of view of a dissenting local faction. Although the Court acknowledged that neutral principles might not be a “panacea,” it nevertheless saw it as preferable to deference because, under the latter, “in every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization.”<sup>31</sup> It then proceeded to examine the documents at issue in the case, concluding that, as a matter of neutral principles, the bricks and mortar lay in the local church.<sup>32</sup>

The Court’s observation in *Bjorkman* that deference (almost) invariably yields a victory to the ecclesiastical hierarchy is not only true, but essentially a restatement of the rule itself. That is, the rule by definition gives almost categorical preference to the decision of the church’s highest judicatory body. But this had been no less true when *Clay v. Crawford* and *Pelphry v. Cochran* were decided than when *Bjorkman* was decided. For the Court, however, the salient difference between the earlier cases and present case lay in the fact that in *Bjorkman* the free exercise of the entire local congregation was at stake. Although this was true, the Court’s analysis is still vulnerable to the modest criticism that it failed to take every actor’s rights into account. That is, although there were no dissenting members of the local church whose free exercise would suffer were the building to follow the schismatics, the officials of the diocese, other worshippers of the diocese, and the local church’s prior donors might also have had legitimate interests, sounding in free exercise or in rights of property, to have the local institution remain in the hierarchical fold. In other words, to distinguish a schism involving an entire congregation from one involving a mere faction puts strong and perhaps too much emphasis on the rights of the current local congregation.<sup>33</sup>

*Cumberland Presbytery of the Synod*



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of the Mid-West of the Cumberland Presbyterian Church v. *Branstetter* involved a schism within a local church in the Presbyterian tradition, with the minority of the congregation adhering to the larger church and the majority seeking to break away.<sup>34</sup> In the course of describing the facts, the Court, per Justice Spain, was careful to emphasize the “connectional or hierarchical” nature of the Presbyterian polity, as well as the various steps that judicatory bodies higher than the local church had taken.<sup>35</sup> It then went into a

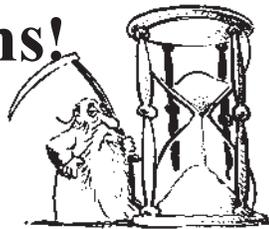
lengthy discussion of *Watson v. Jones*, which had also involved the Presbyterian Church, noting the rule from that case and quoting from it quite substantially. Next, it took up *Clay v. Crawford*, which it described as “a scholarly opinion” and “[o]ne of the leading Kentucky cases applying the compulsory deference rule.”<sup>36</sup> In light of this predicate, the Court had little difficulty holding in favor of the minority of the local institution that had remained faithful to the larger ecclesiastical hierarchy. “Applica-

tion of the ‘compulsory deference rule’ to the . . . dispute before us,” wrote Justice Spain, “leads to the inescapable conclusion that the minority faction[,] which ‘adheres to’ and ‘is sanctioned by’ the central body, . . . must prevail.”<sup>37</sup>

At this point, the Court took up neutral principles, discussing *Jones v. Wolf* and the demise of the doctrine of implied trust that had given rise to that approach. After a brief review of that case, the *Branstetter* Court noted that neutral principles does not yield a “foreordained” result (presumably in favor of a majority of the local congregation),<sup>38</sup> but instead requires analysis of those principles, as they exist in the jurisdiction, as well as analysis of the documents in question. The Court then went on to observe that the larger church in the case before it had amended its Constitution in 1984, before the dispute had arisen, to provide that “all property held by or for a particular church . . . is held in trust nevertheless for the use and benefit of the [general church].”<sup>39</sup> In other words, wrote Justice Spain, the general church had amended its organic document in response to *Jones v. Wolf*. The Court then proceeded to distinguish *Bjorkman*, noting first that the earlier case had involved a unanimous local congregation seeking to break away, and second that *Bjorkman* had not involved a denomination that had revised its organic documents to make the results under deference and neutral principles the same.<sup>40</sup>

As the foregoing discussion suggests, much of the analysis in *Branstetter* sounded in the rule of deference, with substantial positive references to both *Watson v. Jones* and *Clay v. Crawford*. Nevertheless, the Court did not overrule *Bjorkman*, instead distinguishing it as a case involving a unanimous local departure. In addition, the Court was careful in *Branstetter* to emphasize that both neutral principles and deference would yield a decision in favor of the hierarchy in that case. Thus, *Branstetter* does not appear to stand firmly for either rule, and further litigation may be necessary to establish whether neutral principles will govern in all such cases in Kentucky, or only where the facts of *Bjorkman* arise again. ■

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ENDNOTES

1. See Frank E. Lockwood, *Now Anglican, both are acquiring buildings*, LEXINGTON HERALD-LEADER (Dec. 16, 2006) (describing parishes that withdrew from the Episcopal Diocese of Lexington and affiliated themselves with the Anglican Church of Uganda.)
2. The First Amendment provides in part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I.
3. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 443 (1969).
4. See, e.g., *Parker v. Harper*, 295 Ky. 686, 175 S.W.2d 361, 363 (1943). Other decisions by the highest Court of Kentucky sounding in the area of implied trusts for religious purposes include *Mullins v. Elswick*, 438 S.W.2d 496, 497 (Ky. 1969), *Fleming v. Rife*, 328 S.W.2d 151, 152 (Ky. 1959), and *Bunnell v. Creacy*, 266 S.W.2d 98, 99 (Ky. 1954).
5. The Southwest Reporters contain quite a few decisions by the highest Court of Kentucky sounding in the area of express trusts for religious purposes. See, e.g., *Cantrell v. Anderson*, 390 S.W.2d 176, 177 (Ky. 1965); *Luttrell v. Potts*, 257 S.W.2d 542, 543 (Ky. 1953); *Hall v. Deskins*, 252 S.W.2d 417, 419 (Ky. 1952); *Black v. Tackett*, 237 S.W.2d 855, 855-56 (Ky. 1951); *Martin v. Kentucky Christian Conference*, 255 Ky. 322, 73 S.W.2d 849, 851 (1934). Cf. *Rife v. Fleming*, 339 S.W.2d 650, 652-53 (Ky. 1960) (express language deemed to be overcome by contemporaneous understandings and continuous practice). As noted below, the enforceability of such trusts is doubtful because of constitutional concerns.
6. See *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969).
7. *Id.* See also *Pelphrey v. Cochran*, 454 S.W.2d 675, 678 (Ky. 1970) (noting that the courts of Kentucky may not determine whether individuals have “departed from the fundamental doctrine” of a particular faith without violating *Hull*).
8. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872). As this doctrine developed, courts did acknowledge some exceptions to it at the margins, for instance in cases involving allegations of “fraud, collusion, or arbitrariness.” Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religious Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1303 (1980).
9. See *Watson*, 80 U.S. at 690-91.
10. See *id.* at 693.
11. See *id.* at 694.
12. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).
13. Adams & Hanlon, *supra* note 8, at 1301 (footnote omitted).
14. *Jones v. Wolf*, 443 U.S. 595 (1979).
15. See *id.* at 602-04.
16. *Id.* at 603.
17. Indeed, the Court in *Jones v. Wolf* was careful to note that, where documents allocate property according to “religious concepts” that are themselves in dispute, a court should defer to the resolution of that issue by the “authoritative ecclesiastical body.” *Id.* at 604.
18. In *Pelphrey v. Cochran*, 454 S.W.2d 675, 678 (Ky. 1970), the Court appeared to recognize that the decision of the Supreme Court of the United States in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), precludes use of the doctrine of implied trust.
19. *Clay v. Crawford*, 298 Ky. 654, 183 S.W.2d 797, 804 (1944).
20. *Id.* at 800.
21. See *id.* at 803-04.
22. In *Nolynn Association of Separate Baptists in Christ v. Oak Grove Separate Baptist Church*, 457 S.W.2d 633, 634 (Ky. 1970), the Court recognized the abstract validity of the rule of deference, but went on to hold in favor of the local church on two grounds. First, the Court saw “substantial evidence” that the denomination in fact main-  
tained a congregational polity. The Court also construed various documents of the local church as confirming this arrangement.
23. *Pelphrey v. Cochran*, 454 S.W.2d 675, 678-79 (Ky. 1970).
24. See *id.* at 676-77, 678.
25. *Id.* at 678-79.
26. *Id.* at 677.
27. Another recent decision in this broad area is *Music v. United Methodist Church*, 864 S.W.2d 286 (Ky. 1993). Because this case was actually about employment, with specific reference to a minister, it may reasonably be seen as falling in a different category. As the Court noted in *Music*, the doctrine of neutral principles originated in the realm of disputes over ecclesiastical property, where its likelihood of interference with religious liberty is considered slight. See *id.* at 288.
28. See *Bjorkman v. Protestant Episcopal Church in the United States of America*, 759 S.W.2d 583, 584 (Ky. 1988).
29. *Id.* at 585.
30. See *id.* at 585-86.
31. *Id.* at 586.
32. See *id.* at 586-87. Writing in dissent, Chief Justice Stephens, joined by Justice Leibson, argued that the larger church should have prevailed in the case under either neutral principles or deference, because the hierarchy had organized its affairs to ordain that result. See *id.* at 587 (Stephens, C.J., dissenting).
33. See generally John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L., ETHICS & PUB. POL’Y 567, 586 (1990) (“[T]he rule of neutral principles serves the goal of individual freedom; the rule of deference, the goal of group freedom.”).
34. See *Cumberland Presbytery of the Synod of the Mid-West of the Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 417-18 (Ky. 1992).
35. See *id.* at 418.
36. *Id.* at 419.
37. *Id.* at 420.
38. *Id.* at 421.
39. *Id.* at 421-22 (emphasis removed).
40. See *id.* at 422.

## Reforming Reform – Kentucky’s Campaign Finance Laws in Transition

By David S. Samford

There is no law more political in nature than a campaign finance law. While most laws regulate the behavior of all citizens, campaign finance laws specifically regulate the behavior of politicians. With little incentive to self-regulate, it comes as no surprise that the enactment of significant campaign finance legislation often closely follows the incidence of scandal. Watergate and BOPTROT precipitated the most recent Kentucky campaign finance laws, culminating in the Kentucky Public Financing Campaign Act of 1992 (the “Act”),<sup>1</sup> which significantly altered the ground rules for financing political campaigns in Kentucky and implicated several important First Amendment rights. The Act is administered by the Kentucky Registry of Election Finance (“Registry”).

There are two fundamental First Amendment rights implicated by campaign finance laws – the freedom of speech and the freedom of association. Both freedoms are essential to maintaining the marketplace of ideas that Justice Holmes so eloquently described as being “the theory of our constitution.”<sup>2</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976), remains the landmark United States Supreme Court decision construing the permissible intrusions upon the freedoms of speech and association in the context of financing political campaigns.

*Buckley* draws a crucial distinction between campaign contributions and campaign expenditures. Reasoning that a contribution is a symbolic form of expression but not a direct communication per se, *Buckley* essentially views a candidate as the contributor’s surrogate speaker. Contributions may reflect the intensity of a contributor’s support for a candidate, but not necessarily the basis for that support.<sup>3</sup> As a result, the

Supreme Court generally held that contribution limits are not a violation of the contributor’s freedom of speech because they only limit the ability to speak through another person.<sup>4</sup> The Court agreed that a governmental interest in preventing “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office” justified the contribution limits’ abridgment of the First Amendment, but rejected the notion that the government could constitutionally “mute the voices of affluent persons and groups in the election process” or place “a brake on the skyrocketing cost of political campaigns.”<sup>5</sup>

The freedom of speech is preserved through the contributor’s uninhibited right to speak on his own behalf through personal, independent expenditures. Limitations on expenditures are viewed less favorably because they limit “the ability of candidates, citizens, and associations to engage in protected political expression... .”<sup>6</sup>

*Buckley* also considers the potential for unconstitutional infringement upon the freedom of association resulting from mandatory disclosure obligations in campaign finance laws. *Buckley* confirms that the compelled disclosure of contributors may unconstitutionally infringe upon the contributor’s right of association.<sup>7</sup> “On this record,” however, the Court held that the government’s interest in requiring disclosure of the identity of those persons making expenditures “that expressly advocate a particular election result” was constitutionally tolerable.<sup>8</sup>

Thus, *Buckley* upheld the constitutionality of contribution limits and mandatory disclosure of the identity of campaign contributors but struck down several forms of expenditure limitations. Astutely perceiving the future of cam-

paign finance, the Court wrote: “The overall effect of the Act’s contributions ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression... .”<sup>9</sup> The advent of the perpetual fundraising campaign and the proliferation of so-called 527 Organizations, which are less transparent than candidate campaign committees, begs the question of whether contribution limits have in fact improved the public’s perception of the political process.

The Act — which was loosely modeled on the Federal Election Campaign Act construed in *Buckley* — blurred the line between contribution and expenditure limitations in many respects. It was quickly challenged.

In *Wilkinson v. Jones*, 876 F.Supp. 916 (W.D. Ky. 1995), the Court was asked to rule, in part, on the constitutionality of a \$100 campaign contribution limit on candidates not accepting public financing while those receiving public funds could raise \$500 from each contributor and then receive a two-for-one match. In response to a motion for injunctive relief, the Court found that former Governor Wallace Wilkinson, who indicated a willingness to self-fund another gubernatorial campaign, would likely prevail on his challenge that the “cap gap” was unconstitutional. The Court noted that contribution limits were generally permissible in light of *Buckley*, but that the Act was “palpably penal and thus not narrowly tailored to achieve the goal of thwarting *quid pro quo* corruption.”<sup>10</sup>

Next came *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6<sup>th</sup> Cir. 1997), which alleged, *inter alia*, that “contribution” and “permanent committee” were too broadly defined to survive First

Amendment scrutiny. The district court dismissed the action on the basis that “the Registry had never interpreted those definitions as broadly as plaintiffs’ asserted.”<sup>11</sup> Yet during the pendency of the appeal, the General Assembly amended KRS Chapter 121 to narrow the definition of “contribution” and “permanent committee.” The 1996 amendments to the Act also made the distinction between regulated “express advocacy” and unregulated “issue advocacy” more explicit and raised the contribution limit from \$500 to \$1000 per election – bringing it in line with federal law.<sup>12</sup> The appellate court ruled that most of Kentucky Right to Life’s constitutional challenges were rendered moot by the General Assembly, but affirmed the constitutionality of KRS 121.190(1), which required persons making independent expenditures to disclose their identity on a handbill or in an advertisement. The Court reasoned that the government’s interest in limiting political corruption is stronger than the right to “publish anonymously.”<sup>13</sup> The Court also sustained the \$1,500 per year aggregated contribution limit to permanent committees set forth in KRS 121.150(10), finding that it did not unconstitutionally restrict the freedoms of speech or association.

In *Gable v. Patton*, 142 F.3d 940 (6<sup>th</sup> Cir. 1998), the Court of Appeals affirmed the District Court ruling that a statutory prohibition on a non-publicly financed candidate’s contributions to his own account within the final twenty-

eight days of a campaign is in fact an expenditure limitation and therefore unconstitutional.<sup>14</sup> *Anderson v. Spears*, 356 F.3d 651 (6<sup>th</sup> Cir. 2004), later extended *Gable* to hold that the prohibition on contributions within the final twenty-eight days of a campaign was unconstitutional as applied to write-in candidates, regardless of the source of the contribution.<sup>15</sup> Quoting from *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334, 347 (1995), *Anderson* noted, “the fact that speech occurs during the heat of an election ‘only strengthens the protection afforded.’”<sup>16</sup>

*Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003), noted three constitutional infirmities relating to the definitions of “contribution” and “independent expenditure” as well as the scope of prohibited communications regarding potential independent expenditures.<sup>17</sup> The Kentucky Supreme Court also found that each of these constitutional infirmities was redressed in the course of the General Assembly’s 1996 legislative session.

The most recent in the line of cases construing the Act is *Anderson*, *supra*, where the Court of Appeals struck down the definition of “contribution” in KRS Chapter 121A – relating to public financing of gubernatorial campaigns – as it “infringes upon constitutionally protected speech.”<sup>18</sup> Likewise, both KRS 121A.080(6) and KRS

121A.150(16) were declared to be unconstitutional.<sup>19</sup> The former statute created a per se taking by requiring gubernatorial slates not participating in the public financing scheme to surrender any unused campaign funds to the state at the conclusion of a campaign. The latter statute imposed an absolute ban on fundraising after an election. On this point, the Court found the prohibition to be an impingement “on associational rights even where there is little risk of corruption following an election.”<sup>20</sup>

*Anderson* also struck down the \$50,000 limit on loans by a candidate to his own campaign as being an unconstitutional limitation on a candidate’s expenditures. Finally, the Court held that an absolute ban on cash contributions, for items such as T-shirts and buttons, “effectively forecloses speech by a large body of individuals who will be chilled from making a *de minimis* contribution.”<sup>21</sup> Following *Anderson*, KRS Chapter 121 and KRS Chapter 121A were beginning to resemble Swiss cheese.

A bill to expand public financing to include political parties passed the House with less than a majority in 2000, but was never considered in the Senate.<sup>22</sup> Kentucky’s experiment with public financing of political campaigns lasted only two gubernatorial election cycles and effectively ended in 2003



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when it was de-funded by the General Assembly.<sup>23</sup> KRS Chapter 121A was repealed in its entirety in 2005.<sup>24</sup>

In light of the piecemeal dismemberment of the Act, the Registry voted in 2003 to establish a bipartisan task force to evaluate the current campaign finance system from top to bottom and to make appropriate recommendations to the General Assembly. In a collaborative, year-long process involving all stakeholders, the Registry's Task Force made eighty-eight recommendations to improve Kentucky's existing campaign finance laws in late 2005. The recommendations generally were aimed at correcting the constitutional deficiencies noted by the Courts but still set forth in the statutes, simplifying the statutes (the reporting requirements statute alone is *eleven pages* long), easing the administrative burden on campaigns, and giving greater transparency to the political process.

In 2006, former State Representative Adrian Arnold, a Democrat, sponsored legislation that included most of the Task Force's recommendations.<sup>25</sup> The bill passed the House on a vote of 97-0, but was received in the Senate too late in the session for meaningful consideration. In 2007, State Senator Damon Thayer, a Republican, sponsored similar legislation to implement the Task Force's recommendations.<sup>26</sup> Senator Thayer's bill passed the Senate in three days on a final vote of 35-0. Although a House committee favorably reported the bill, it failed to win House approval. This year, Senator Thayer's bill again narrowly missed passing both chambers.<sup>27</sup> The bills introduced by Senator Thayer and former Representative Arnold reflect the spirit of bipartisanship which gave rise to the Registry Task Force's original recommendations. Although both chambers of the General Assembly have unanimously passed similar versions of the same legislation, there has not yet been a consensus between them that the bill should become law. But each year the legislation gets one step closer to final passage.

Currently, most violations of Kentucky's campaign finance laws are felonies. KRS 121.135 sets forth a procedure, however, by which participants in the political process – and those who

must sometimes advise them – may obtain helpful guidance from the Registry's general counsel in the form of an advisory opinion. Where such an opinion has been rendered, the requesting party may then claim reliance on that advisory opinion. Informal advice about particular points of Kentucky law is almost always available less formally with a simple phone call.

Establishing rules for financing elections is controversial, emotional and highly technical simply because campaign finance laws go to the heart of the democratic process and implicate fundamental constitutional rights. Ultimately, political speech and expression are the remedy, not the enemy. ■

#### ENDNOTES

1. "Campaign Finance Legislation in Kentucky: An Historical Overview" by Rosemary F. Center & Jennifer Black Hans, Kentucky Registry of Election Finance (2005).
2. *Abrams v. United States*, 250 U.S. 616, 630 (1919).
3. *Buckley*, p. 21.
4. *Id.*
5. *Id.*, p. 26.
6. *Id.*, p. 59.
7. *Id.*, p. 64.
8. *Id.*, pp. 64-80.
9. *Id.*, pp. 21-22.
10. *Wilkinson*, p. 929.
11. *Terry*, p. 642.
12. *Id.*, p. 643.
13. *Id.*, p. 646, 648.
14. *Gable*, p. 953.
15. *Anderson*, p. 675.
16. *Id.*
17. *Martin*, pp. 50-51.
18. *Anderson*, p. 667.
19. *Id.*, p. 669.
20. *Id.*, p. 671.
21. *Id.*, p. 672.
22. HB 750, 2000 Regular Session.
23. HB 269, 2003 Regular Session.
24. SB 112, 2005 Regular Session.
25. HB 670, 2006 Regular Session.
26. SB 159, 2007 Regular Session.
27. SB 8, 2008 Regular Session.

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**COMMONWEALTH OF KENTUCKY  
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

JUDGE JOHN P. CHAPPELL,  
27<sup>TH</sup> JUDICIAL DISTRICT, DIV. 02

**ORDER OF PUBLIC REPRIMAND**

(Pursuant to SCR 4.020(1)(b))

John P. Chappell filed for candidacy for the vacant position of district judge of Division Two of the Twenty-Seventh Judicial District on December 12, 2007. On January 19, 2008, he made a contribution of \$200 to a candidate running for public office. On January 28, 2008, he was appointed by the governor to fill the district judge vacancy. Judge Chappell agreed to accept without formal proof the disposition made in this Order.

The Commission determined, after an informal investigation, that Judge Chappell made a campaign contribution to a candidate for public office.

The above actions of Judge Chappell 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 Judge Chappell self-reported the violation and fully cooperated with the Commission in its consideration of this matter and agreed to the resolution adopted by the Commission.

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 violation, John P. Chappell should be and hereby is PUBLICLY REPRIMANDED.

This Order is issued this 23rd day of May, 2008.

STEPHEN D. WOLNITZEK, CHAIR  
JUDICIAL CONDUCT COMMISSION  
COMMONWEALTH OF KENTUCKY

AGREED TO:  
JOHN P. CHAPPELL  
JUDGE, 27<sup>TH</sup> JUDICIAL DISTRICT, DIV. 02

This is to certify that a true copy of this Order has been served on the judge by mail this 27th day of May, 2008.

JAMES D. LAWSON  
EXECUTIVE SECRETARY

# COMMONWEALTH OF KENTUCKY JUDICIAL CONDUCT COMMISSION

IN RE THE MATTER OF:

FRANK H. WAKEFIELD II, DISTRICT JUDGE  
49TH JUDICIAL DISTRICT

## ORDER OF SUSPENSION

Judge Frank H. Wakefield II is district judge for Kentucky's forty-ninth judicial district composed of Allen and Simpson Counties.

Judge Wakefield has waived formal proceedings and proof and has agreed to entry of this order by the Commission. The Commission notes at the outset, and has duly considered, that Judge Wakefield fully cooperated in the investigation which culminated in the disposition made in this order.

### PATTERNS OF IMPROPER PRACTICES

Judge Wakefield has engaged in patterns of practices in his court in violation of the Code of Judicial Conduct, SCR 4.300, in regard to the following matters:

#### Failure to Accord Fundamental Rights

Judge Wakefield frequently failed to follow orderly procedures to safeguard fundamental rights to counsel and notice and right to be heard; and interrogated individuals in open court without regard to their privilege against self-incrimination. In one instance Judge Wakefield interrogated a juvenile and obtained an admission of guilt on one of two charges after the juvenile had expressed an intention to plead not guilty to both charges; and appointed counsel only after the admission of guilt. By these practices Judge Wakefield violated the Code of Judicial Conduct, Canon 2A, providing that a "judge shall respect and comply with the law," Canon 3B(2) providing that a "judge shall be faithful to the law and maintain professional competence in it," and Canon 3B(8) requiring that a judge dispose of judicial matters fairly.

#### Lengthy and Rambling Discourses

On numerous instances during proceedings in his court, Judge Wakefield engaged in lengthy and rambling discourses on subjects unrelated to the business before his court. Judges often have occasion to make explanations or comments in conducting court and this is not inappropriate nor a violation of the Code. However the discourses of Judge Wakefield involved trivia unrelated to court business, and were so lengthy that conducting an arraignment and setting a court date in a single traffic or misdemeanor case sometimes consumed ten minutes or more. The business of all persons in Judge Wakefield's court was unnecessarily and unreasonably delayed by these discourses. The instances in question occurred as early as March 22, 2007, less than three weeks after the Commission issued a private admonition to Judge Wakefield for similar conduct. By these actions, Judge Wakefield violated Canon 3B(4) requiring that a judge be courteous to litigants and others with whom the judge deals in an official capacity, and Canon 3B(8) requiring that a judge dispose of judicial matters promptly, efficiently and fairly.

#### DemEANING and Belittling Individuals

Judge Wakefield often demeaned persons in his court by inappropriate critical comments. Instances include: Judge Wakefield demeaned a young defendant because his mother had posted his bond; in explaining his policy regarding employment of persons seeking appointment of a public defender, Judge Wakefield stated that a named individual seated in his court was a "knucklehead" and would not qualify as an employer; and Judge Wakefield pointed out an individual in the courtroom and stated that if he was there to see the court, he was guilty, and after the individual's unfavorable comment in response to the judge's question about an earlier case when the judge had represented him, Judge Wakefield stated that he should have gotten more jail time. By this conduct, Judge Wakefield violated Canon 3B(4) providing that a judge shall be dignified and courteous to those with whom he deals in an official capacity.

#### Imposing Unlawful Conditions or Requirements

Judge Wakefield engaged in practices of ordering that defendants be removed from homeschooling and attend public schools in cases unrelated to school, and of requiring a defendant to show contact with 120 potential employers in order to qualify for appointment of a public defender. A district judge is not vested with authority to regulate homeschooling. The requirement of 120 employment contacts has no legal basis and is punitive. By these practices Judge Wakefield violated Canon 2A providing that a "judge shall respect and comply with the law," Canon 3B(2) providing that a "judge shall be faithful to the law and maintain professional competence in it," and Canon 3B(8) requiring that a judge dispose of judicial matters fairly.

ACTIONS REGARDING FAMILY COURT JUDGE

Judge Wakefield also engaged in two instances of improper conduct related to the family court judge in his district. On July 3, 2007, Judge Wakefield became upset that his court was delayed because the county attorney was attending the family court's session in another courtroom. Judge Wakefield recessed his court to address the problem and commented openly that the public could remedy the situation by going to the polls in November (the family court judge was the incumbent candidate in that election). Judge Wakefield then entered the family court session, and after the judge announced a recess in order to recognize him, he confronted the family court judge in the presence of attorneys and court personnel as to why the county attorney was there and not in Judge Wakefield's court. By the comment regarding the election Judge Wakefield violated Canon 5A(1)(b) providing that a judge shall not "publicly endorse or oppose a candidate for public office." By confronting the family court judge in the presence of others about a matter which should have been addressed in private, Judge Wakefield violated Canon 3B(4) requiring that a judge be dignified and courteous to those with whom the judge deals in an official capacity.

SANCTION

In addition to the previous admonition to Judge Wakefield for lengthy discourses mentioned above, the Commission previously issued a private admonishment and a private reprimand to Judge Wakefield for not being dignified and courteous to persons in violation of Canon 3B(4).

The Commission concludes that for the foregoing conduct, Judge Wakefield should be, and hereby is, suspended from his duties as district judge without pay for a period of thirty (30) days commencing June 1, 2008 and concluding June 30, 2008.

The Commission will monitor Judge Wakefield's court to determine that the patterns of offending conduct are not repeated.

DATE: May 23, 2008

STEPHEN D. WOLNITZEK, CHAIR

AGREED TO:

CHARLES E. ENGLISH  
Counsel for Judge Wakefield

GEORGE F. RABE  
Counsel for the Commission

JUDGE FRANK H. WAKEFIELD II

**COMMONWEALTH OF KENTUCKY  
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

JUDGE FRED F. WHITE,  
34<sup>TH</sup> JUDICIAL DISTRICT, DIV. 02

**ORDER OF PUBLIC REPRIMAND**

(Pursuant to SCR 4.020(1)(b))

Fred F. White filed for candidacy for the vacant position of district judge of Division Two of the Thirty-Fourth Judicial District on December 12, 2007. On January 19, 2008, he made a contribution of \$200 to a candidate running for public office. On March 14, 2008, he was appointed by the governor to fill the district judge vacancy. Judge White agreed to accept without formal proof the disposition made in this Order.

The Commission determined, after an informal investigation, that Judge White made a campaign contribution to a candidate for public office.

The above actions of Judge White 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 Judge White self-reported the violation and fully cooperated with the Commission in its consideration of this matter and agreed to the resolution adopted by the Commission.

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 violation, Fred F. White should be and hereby is PUBLICLY REPRIMANDED.

This Order is issued this 23<sup>rd</sup> day of June, 2008.

STEPHEN D. WOLNITZEK, CHAIR  
JUDICIAL CONDUCT COMMISSION  
COMMONWEALTH OF KENTUCKY

AGREED TO:  
FRED F. WHITE  
JUDGE, 34<sup>TH</sup> JUDICIAL DISTRICT, DIV 02

This is to certify that a true copy of this Order has been served on the judge by mail this 30<sup>th</sup> day of June, 2008.

JAMES D. LAWSON  
EXECUTIVE SECRETARY

# Supreme Court of Kentucky

## ORDER CORRECTING

2008-01

**IN RE: Amendments to CR 3.02, CR 3.03 and CR 76.42 of the Civil Rules Procedure**

**IT IS HEREBY ORDERED that, effective July 1, 2008, CR 3.02, CR 3.03 and CR 76.42 of the Civil Rules Procedure are hereby amended as follows:**

**A. CR 3.02(1) and (2) Circuit civil fees and costs**

Sections (1) and (2) of CR 3.02 shall read:

(1) The filing fees for a civil case in Circuit Court (including original actions of administrative agencies, special districts or boards) shall be paid to the circuit clerk at the time the case is filed and shall be \$115.00, except as provided below:

(a) There shall be no filing fees for proceedings for a writ of habeas corpus, proceedings under RCr 11.42, and mental health proceedings under KRS Chapters 202A, 202B and 387.

(b) Fees required by KRS 453.060 and KRS 27A.630 and any other required fees (e.g., court facility fee, library fee) shall be paid in addition to the fees required by this rule.

(2) Additional costs, payable to the circuit clerk at the time the service is requested, shall be charged in Circuit Court civil cases as follows:

|     |  |         |
|-----|--|---------|
| (a) | For a jury of six persons  | \$30.00 |
| (b) | For a jury of more than six  | \$60.00 |
| (c) | Filing a third party complaint   | \$30.00 |
| (d) | Preparing a certification, including Act of Congress                             | \$ 5.00 |
| (e) | Providing a copy of a document (per page)  | \$ .25  |
| (f) | Providing a copy of a video recording (per individual tape, disk or other media) | \$20.00 |

|     |  |  |
|-----|--|--|
| (g) | Providing a copy of an audio recording<br>(per individual tape, disk or other media) | \$10.00                                  |
| (h) | Issuing orders of attachment; executions,<br>writ of possession after judgment       | \$20.00                                  |
| (i) | Issuing garnishments   | \$10.00                                  |
| (j) | Publishing a notice  | As set by Newspaper                      |
| (k) | Certified mail fees  | As set by Postal Service                 |
| (l) | Original deposition, including appearance<br>fees and mileage                        | Assessed as Costs                        |
| (m) | Library fees   | As set by KRS 172.180<br>and KRS 453.060 |

**B. CR 3.03(1) and (3) District civil fees and costs**

Sections (1) and (3) of CR 3.03 shall read:

(1) The filing fee for a civil case in District Court shall be paid to the clerk at the time the case is filed and shall be \$55.00, except as provided below:

(a) Where the case or controversy does not exceed \$1500.00, exclusive of interests and costs (Small Claims), shall be \$20.00;

(b) Where the amount in controversy is \$500.00 or less and is not filed in small claims court, the fees shall be \$30.00;

(c) Where the case involves the probate of an estate, the fees shall be \$20.00;

(d) Where the case involves the appointment of guardians, conservators, and curators and is not related to a pending probate proceeding, the fees shall be \$20.00 for each application;

(e) Where the matter involves a name change for a natural person, the fees shall be \$20.00;

(f) Where the case involves a paternity determination under KRS Chapter 406, the fees shall be \$20.00;

(g) Where the case involves mental health proceedings under KRS Chapter 202A, 202B or 387, there shall be no fees except as provided in paragraph (d) of this subsection;

(h) Where the case involves a hearing for a student pursuant to KRS 159.051, there shall be no fees;

(i) Where the case involves filing forcible detainer actions, the fees shall be \$20.00; and

(j) Where the case involves filing a petition to marry under KRS 402.020, the fees shall be \$5.00.

(k) Fees required by KRS 453.060 and KRS 27A.630 and any other required fees (e.g., court facility fee, library fee) shall be paid in addition to the fee required by this rule.

(3) Additional costs, payable to the circuit clerk at the time the service is requested, shall be charged in District Court civil cases as follows:

|   |                                       |
|---|---------------------------------------|
| (a) For a jury of six persons including paternity cases                               | \$30.00                               |
| (b) Filing a third party complaint  | \$30.00                               |
| (c) Preparing a certification, including Act of Congress                              | \$ 5.00                               |
| (d) Providing a copy of a document (per page)   | \$ .25                                |
| (e) Providing a copy of a video recording (per individual tape, disk or other media)  | \$20.00                               |
| (f) Providing a copy of an audio recording (per individual tape, disk or other media) | \$10.00                               |
| (g) Issuing orders of attachment; executions, writ of possession after judgment       | \$20.00                               |
| (h) Issuing garnishments  | \$10.00                               |
| (i) Publishing a notice   | As set by Newspaper                   |
| (j) Certified mail fee  | As set by Postal Service              |
| (k) Original deposition, including appearance fees and mileage                        | Assessed as Costs                     |
| (l) Library fees  | As set by KRS 172.180 and KRS 453.060 |

### C. CR 76.42(2)(a) Costs

Sub-section (a) of section (2) of CR 76.42 shall read:

#### (2) Filing fees.

(a) Filing fees for docketing the following in the Court of Appeals or in the Supreme Court shall be:

|  |          |
|--|----------|
| (i) Appeal, cross appeal or certification of law   | \$150.00 |
| (ii) Appeals or cross appeals from Circuit Court, Family Division, to the Court of Appeals, from orders determining: | \$75.00  |

|        |   |          |
|--------|---|----------|
| (a)    | Paternity   |          |
| (b)    | Dependency, neglect or abuse  |          |
| (c)    | Domestic violence   |          |
| (d)    | Juvenile status offense   |          |
| (iii)  | Motion for transfer   | \$150.00 |
| (iv)   | Motion or cross-motion for discretionary review   | \$150.00 |
| (v)    | Petition for rehearing, modification or extension of opinion  | \$150.00 |
| (vi)   | Motion for leave to file amicus curiae brief  | \$150.00 |
| (vii)  | Motion for extension of time for certification of record, for intermediate relief, or for dismissal of an adversary party's appeal, if the filing fee has not been paid theretofore | \$150.00 |
| (viii) | Motion for relief under Rules 65.07 or 65.09  | \$150.00 |
| (ix)   | Original proceeding   | \$150.00 |
| (x)    | Motion for reconsideration of a final order or "Opinion and Order" under Rule 76.38   | \$150.00 |
| (xi)   | Petition or cross-petition for review of a decision by the Workers' Compensation Board  | \$150.00 |

ENTERED: MAY 22, 2008.

  
 CHIEF JUSTICE



Michael Losavio

## Opening Up Information with Voice Recognition Software

Open information management improves the easy movement of information from point A to point B. It improves efficiency, accuracy and availability, all key issues for good information business.

While this has produced great benefits, there is still the frontier where the information is first created that slows things down. How we first speak, write or otherwise express ourselves is the beginning of communication, wherever our expression ends. Though many techniques have improved that first rendition of our thoughts, we still rely on some slow ways of first rendering data in electronic form.

A common means is the keyboard. But common doesn't mean optimal. After these many years I am still not enamored of the keyboard, but it is familiar. It generates that first electronic iteration of my thoughts, banal as they may be. But it locks me to a keyboard and a machine I must still lug around, as small as they've become, with less spontaneity.

Spontaneity is dangerous in any legal writing but it may inspire the most wretched case. Handwritten notes or voice dictation still needs later transcription for other uses. Keyboarding into a word processor creates an open information document that can be manipulated and exchanged with great ease. Other document formats, like audio voicemails and video/image files (e.g., Acrobat .pdf, .jpeg and .mov files) are much more difficult to use other than through a particular application program. Tough choice.

### The Natural Way

So if we could speak and all could learn via that electronic document, open



expression would be easier. That's why voice-to-text translation has been one of the most sought-after computing technologies. It needs massive computing power to deal with all the variations and subtleties of our human tongue.

Dragon NaturallySpeaking is now in its 9<sup>th</sup> generation of striving towards that goal. There are several other similar systems available, but NaturallySpeaking still ranks at the top in third-party reviews. It has moved from a technology deserving of consideration to one that now, or in the near future, may become an essential part of legal technology.

### Why I'm Interested?

I'm lazy. NaturallySpeaking translates very, very accurately. And I speak faster than I write.

Reading some old trial transcripts shows that's not necessarily a good thing, but most of my communications aren't so immediate and unforgiving. I kept a log using Dragon NaturallySpeaking across a variety of modes to see what works best, using a decent, inexpensive laptop with Windows XP. First, I'm yet again amazed at the accuracy of the transcription. The accuracy is superior to anything I've seen before. Even past the initial gee-whiz phase it is impressive.

But think of our own high-level of oral communication and how we use context to correct for mispronunciations. Proof-reading is *very* important before you send out a voice-transcribed document, at least in your early phases of use. Crisp pronunciation is critical. Cold/allergies did effect transcription. Homonyms and near-homonyms, different words with the same or similar sounds, may be transcribed where you meant a different word.

NaturallySpeaking does an impressive job of context-analysis to transcribe the correct word even among several identically-sounding homonyms (e.g., write, right, rite) It initially scans the documents on the hard drive of the machine where it is installed to index and analyze how you use language in your letters, motions, briefs, pleadings and e-mails to better analyze the context of your dictation.

This and other recognition accuracy tools and features are very important. I tested NaturallySpeaking on two machines, one with my work available for scanning and one without, and initial recognition was better on the machine where my prior writing was scanned and analyzed.

NaturallySpeaking does a better job of transcribing when you speak in a continuous stream of words. Speaking in short phrases or word by word actually reduces the accuracy as it removes context from the translation engine's transcription. Again, crisp, concise and clear pronunciation is still very important. When using NaturallySpeaking for long form documents I found it important to proofread periodically.

## But There Is More to Legal Practice Than Briefs

NaturallySpeaking is a great help with mail and e-mail. Since much of e-mail needs only short, brief responses, the voice transcription response let me answer e-mail more quickly than manual typing. Again, proof-reading is still necessary, but that is always important in a quick-response medium like e-mail.

I also found it very helpful in doing more complete annotations to electronic documents, commenting on whatever point in an e-document needed further elaboration. Though for me these days that's student papers; the same could be used for transcripts, discovery responses or comments on motions/briefs being sent to a colleague. The ease of adding extensive comments also benefits from the reader's ability in context to understand a transcription mistake for what was intended.

Again, care is needed or things may come out mangled, like with a foreign language translation engine. One allergy-filled day when I was not careful with the crisp enunciation, strange things happened. Thus "how are you doing" came out as a phonetically-literal "Hauer U. Dooling?" Who? But quick remediation with tissues ended such problems and I breezed through the rest of the day's communiqués.

## And There's More Than Just Speaking Into a Microphone

The accuracy and power of NaturallySpeaking depended, in part, on my own discipline in using and training it on how I express myself. It continues to learn my patterns as I use it *if* I take a few seconds to "teach" it its mistakes with my style. This requires I learn and use the various tools and techniques NaturallySpeaking has to learn and fit itself to my needs. Unfortunately, I would often type corrections rather than using those teaching functions. I have started doing better with this, and this clearly improves recognition. Discipline! And one day I will read the manual...

### In Conclusion

I did initially find it odd to use voice transcription rather than typing. I have a rhythm with typing with which I am comfortable. Transcription is so much faster and non-tactile, I felt an unease and my thoughts felt out of sync. And I kept reaching to keyboard for corrections, which did not help improve NaturallySpeaking's performance.

But with a disciplined use of NaturallySpeaking, I was better able to do everything. And I only use a few of its features (again, discipline...). Several lawyers I know use it in place of any secretarial typing services. Given the

significant cost to power ratio, I expect NaturallySpeaking and other, equally-powerful voice recognition services to continue to expand into legal and judicial practice.

For example, video records are cost-effective, but on appeal have been time-consuming as the video may need to be reviewed in full in real time, a very slow process. Some courts rejected video records and required text transcripts. This has been helped by judges entering text comments during trial and at objection/motion moments. Those comments could now be done through the judge's oral restatement and ruling on such issues captured through voice recognition. There may be sufficient accuracy with comments of counsel and perhaps even, one day, for witnesses such that a text transcription accompanies the video of the testimony. This would also apply to video depositions, further reducing the cost of producing and reducing depositions in discovery.

It is clearly worth a look. You can find more information on Dragon NaturallySpeaking at <http://www.nuance.com/naturallyspeaking/>.

NaturallySpeaking was evaluated using a Windows XP/Intel chip laptop running at 1.9 Gigahertz with one Gigabyte of memory. ■

## Did A Broker's Big Promises Lead to Big Losses?

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# A Resolution Recognizing the Excessive Caseloads Being Handled by Kentucky Public Defenders in Light of the Recent Budget Cuts Require a Reduction in Services in Order to Achieve Ethical Caseload Levels

WHEREAS, Section Ten of the Kentucky Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel for persons charged with crimes;

WHEREAS, in *Gholson v. Commonwealth*, the Kentucky Court of Appeals stated that “common justice demands” that an attorney must be appointed when a person charged with a felony cannot afford to hire his own counsel;

WHEREAS, *Gideon v. Wainwright* and its progeny mandate that an individual whose liberty is threatened by either a felony or a misdemeanor charge and who cannot afford counsel cannot be held unless the state provides counsel to him or her;

WHEREAS, in *Bradshaw v. Ball*, the Kentucky Court of Appeals held that it was unconstitutional to force a lawyer to represent a person in a criminal case without compensation;

WHEREAS, it is the obligation of the Commonwealth of Kentucky to provide and adequately compensate a competent attorney to represent indigent persons charged with crimes;

WHEREAS, the Commonwealth of Kentucky has established the Department of Public Advocacy (DPA) as the state entity responsible for providing counsel to indigents accused of crimes;

WHEREAS, Kentucky public defenders have no control over the number of cases to which they are appointed since public defender caseloads result from court-ordered appointments rather than voluntary selection of new clients;

WHEREAS, overall caseloads for public defenders have gone up by 52% over the past seven years;

WHEREAS, DPA handled 148,518 cases in FY07;

WHEREAS, individual public defenders opened 436 cases each at the trial level in FY07;

WHEREAS, 436 cases is at least 40% above nationally recognized standards first adopted in by the National Advisory Commission of 1972;

WHEREAS, DPA is funded presently at \$40.1 million in FY08;

WHEREAS, DPA’s budget as enacted in House Bill 406 for FY09 has been cut to \$37.8 million in FY09;

WHEREAS, House Bill 406 as enacted results in the loss of funding for approximately 75 of DPA’s positions, including 50 trial level public defenders, in FY09;

WHEREAS, the loss of 75 positions will result in trial attorney caseloads of over 500 cases per lawyer in FY09 if no action is taken;

WHEREAS, caseloads of over 500 cases per lawyer are clearly excessive and cause the Board of Bar Governors to question whether public defenders in Kentucky could handle these caseload levels in a competent and ethical manner;

WHEREAS, excessive caseloads can have ethical ramifications that are of deep concern to the Kentucky Bar Association.

WHEREAS, American Bar Association Formal Opinion 06-441 has explicitly stated that public defenders have the same ethical responsibilities of diligence and competence as do other lawyers, that they do not have an exemption from ethical rules regarding excessive caseloads, that they have an ethical responsibility to provide competent representation, that they have an ethical obligation not to accept excessive caseloads when they cannot provide competent representation, and that their supervisors likewise have ethical responsibilities to ensure that those they supervise can provide ethical and competent assistance of counsel;

WHEREAS, ABA Opinion 06-441 also affirmed that national caseload standards are to be considered among other factors in determining whether caseloads are excessive;

WHEREAS, the National Advisory Commission set maximum standards for public defenders at no more than 150 felonies, no more than 200 juvenile cases, or no more than 400 misdemeanors;

WHEREAS, excessive caseloads affect the quality of representation being rendered by Kentucky public defenders, compromising the reliability of verdicts and even threatening the conviction of innocent persons;

WHEREAS, the Public Advocacy Commission, the 12 person oversight board of the DPA, was presented by the Public Advocate with a plan to reduce services to ensure an ethical caseload and the Public Advocacy Commission adopted a resolution in support of the plan on March 26, 2008.

WHEREAS, although the Public Advocate in a letter dated May 23, 2008 has informed the Court of Justice of its plan to cut services beginning July 1, 2008 in a way that would minimize impact on the liberty interests of most of DPA clients, this plan includes cost containment, including no longer providing funds for the defense of an estimated 5,000 conflict cases, and reducing services in a manner individualized for each office depending upon vacancy and caseload levels in addition to other office specific circumstances such as travel requirements and the practices of the local prosecutor. Among the services being reduced in the individual offices are cases involving involuntary commitments, status offenses, family court, Class B misdemeanors, some Class A misdemeanors, parole violations, and other similar cases;

WHEREAS, Pursuant to SCR 3.025 the mission and purpose of the Kentucky Bar Association is to use appropriate means to insure a continuing high standard of professional competence on the part of the members of the bar, and to bear a substantial and continuing responsibility for promoting the efficiency and improvement of the judicial system;

WHEREAS, the Kentucky Bar Association has a significant interest in the quality of representation being provided by Kentucky lawyers to indigents accused of crime.

**NOW, THEREFORE, BE IT RESOLVED by the Board of Governors of the Kentucky Bar Association:**

Section 1. That the Kentucky Bar Association rededicates itself to the principle of equal justice for all regardless of income.

Section 2. That the Kentucky Bar Association hereby calls upon the Governor and the General Assembly to provide parity of resources among the different components of the criminal justice system in order to achieve a system that is balanced, efficient, and fair.

Section 3. That the Kentucky Board of Bar Governors believes that the DPA's plan to reduce services in order to achieve ethical caseloads is both necessary and reasonable.

Section 4. That the Kentucky Board of Bar Governors encourages Kentucky policy makers, including the Executive and Legislative Branches, to fund the Department of Public Advocacy sufficiently to ensure that public defenders do not carry excessive caseloads.

Section 5. That the Kentucky Board of Bar Governors encourages the members of the Kentucky Bar Association to provide counsel in cases in which they are competent and where the Department of Public Advocacy cannot provide counsel for budgetary reasons.

Section 6. That copies of this resolution shall be printed and make available to the Governor and members of the Kentucky General Assembly.

**THIS 17th day of June 2008.**

KENTUCKY BAR ASSOCIATION

BY: JANE WINKLER DYCHE  
PRESIDENT

ATTEST:  
JAMES L. DECKARD  
EXECUTIVE DIRECTOR

# CLEvents

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

## JULY

- 24-26 35<sup>th</sup> Annual Midwest/Midsouth Estate Planning Institute  
*UK CLE*
- 31 Brown Bag CLE  
*Louisville Bar Association*

## AUGUST

- 6 Ancillary Rules in Collection Law: FDCPA, Ethics & Other Pitfalls for the Ordinary Attorney  
*Cincinnati Bar Association*

- 7-8 Midwest Regional Bankruptcy Seminar  
*Cincinnati Bar Association*
- 14 Appellate Law Brown Bag  
*Louisville Bar Association*
- 19 Video Replay: Corporate Law; White Collar Crime; and Trial Skills  
*Cincinnati Bar Association*
- 19 ADR/Mediation Brown Bag  
*Louisville Bar Association*
- 20 Tax Law/Issues  
*Cincinnati Bar Association*
- 27 Solo/Small Firm Brown Bag  
*Louisville Bar Association*
- 28 Video Replay: Professionalism, Ethics & Substance Abuse Instruction  
*Cincinnati Bar Association*
- 28 Health Law Brown Bag  
*Louisville Bar Association*
- 10 Triage for Mechanics Liens: Identifying Common Laws & Defects  
*Cincinnati Bar Association*
- 10 All Ohio Annual Institute on Intellectual Property (Covington)  
*Cincinnati Bar Association*
- 11 Probate & Estate Brown Bag  
*Louisville Bar Association*
- 11 All Ohio Annual Institute on Intellectual Property (Cleveland)  
*Cincinnati Bar Association*
- 12 28<sup>TH</sup> Annual Conference on Legal Issues for Financial Institutions  
*UK CLE*
- 17-18 Kentucky Law Update – Covington  
*Kentucky Bar Association*
- 22-23 Kentucky Law Update – Bowling Green  
*Kentucky Bar Association*

## SEPTEMBER

- 4-5 Annual Convention  
*Kentucky Justice Association*
- 4-5 Kentucky Law Update – Louisville  
*Kentucky Bar Association*
- 24 Securities Law; Private Placement & Funding a Small Business  
*Cincinnati Bar Association*
- 26 Labor & Employment Law  
*Cincinnati Bar Association*

### COUNSEL - CORPORATE GOVERNMENTAL AFFAIRS



#### JOB SUMMARY

The Counsel will develop and manage the governmental affairs function of the company, serve as a Kentucky legislative agent and as the corporate liaison with regulatory authorities, keep up with new legislative and regulatory developments on both the state and federal level, work with the company to develop proactive legislation/regulation benefiting the company, monitor and lobby legislation through the legislative process, and is responsible for the integration of new legislation/regulation into the organization. May lead and direct the work of others. A certain degree of creativity and latitude is required.

#### QUALIFICATIONS

- Graduate of an accredited law school; Juris Doctor's Degree required
- A license to practice law in Kentucky; admitted to practice in both State and Federal courts of Kentucky.
- Ability to do research on all legal problems pertaining to insurance.
- Excellent communication skills – reading, writing and oral.
- Two years' experience in the practice of law in Kentucky is required; experience in a governmental agency or insurance company preferred.
- Experience as legislative agent in Kentucky preferred.

TO VIEW THE ENTIRE JOB DESCRIPTION AND TO APPLY, PLEASE GO TO WWW.KFBJOBS.COM, JOB #1469 - MAILED, FAXED OR E-MAILED RESUMES WILL NOT BE CONSIDERED.

## Before You Move...

Over 15,000 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](http://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](mailto:kcobb@kybar.org)

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

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

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

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

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

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

**KYLAP**  
Anna Columbia • (502) 564-3795

**Kentucky Justice Association  
(formerly KATA)**  
Ellen Sykes • (502) 339-8890

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

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

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

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

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

**Northern Kentucky Bar Association**  
Julie L. Jones • (859) 781-4116

**Children's Law Center**  
Joshua Crabtree • (859) 431-3313

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

**CompEd, Inc.**  
Allison Jennings • (502) 238-3378

**Cincinnati Bar Association**  
Dimitry Orlet • (513) 381-8213

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

**Administrative Office of the Courts**  
Malissa Carman-Goode  
(502) 573-2350, Ext. 2165

# 2008 KENTUCKY LAW UPDATE

## Dates and Locations

**September 4-5 (Th/F)** **Louisville**  
Kentucky International Convention Center

**September 17-18 (W/TH)** **Covington**  
Northern Kentucky Convention Center

**September 22-23 (M/T)** **Bowling Green**  
Holiday Inn & Sloan Convention Center

**October 6-7 (M/T)** **Ashland**  
Ashland Plaza Hotel

**October 20-21 (M/T)** **Prestonsburg**  
Jenny Wiley State Resort Park

**October 28-29 (T/W)** **Paducah**  
KY Dam Village State Resort Park

**November 6-7 (TH/F)** **Somerset**  
The Center for Rural Development

**November 13-14 (Th/F)** **Owensboro**  
RiverPark Center

**December 4-5 (TH/F)** **Lexington**  
Lexington Convention Center



## **FAMILY LAW MEDIATION** STATEWIDE

**Judge Paul W. Rosenblum [ret.]**  
OVER 23 YEARS OF JUDICIAL EXPERIENCE

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Circuit Court Judge, District Court Judge and  
Senior Status Judge of Kentucky Court of Appeals

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Prospect, Kentucky



By Dennis Honabach, Dean

## **Chase Inducts Five Students into National Order of Scribes**

Fred Rodell, a Yale Law School professor before most of us were born, wrote in 1939: "There are two things wrong with almost all legal writing. One is its style. The other is its content." At NKU Chase College of Law, we have long taken Professor Rodell's critique to heart. Recognizing that the ability to write well is one of the essential skills a lawyer must possess, NKU Chase is committed to developing one of the top writing programs in the country.

Great programs begin with great people. That is why Chase students hone their writing skills under the tutelage of full-time, tenure-track faculty members who hold degrees from topnotch law schools including NKU Chase, Georgetown, Howard, Michigan, and Vanderbilt. Additionally, as a condition of graduation, each Chase student satisfies two advanced writing requirements while working under the close supervision of Chase faculty.

Evidence that the program is successful is abundant. In recent years, Chase students have authored more than fifty-four law review articles, including no fewer than fourteen published in reviews outside of the *Northern Kentucky Law Review*. Chase students have recently earned numerous best brief awards in moot court competitions, including the 2008 Robert F. Wagner Labor & Employment Law Best Respondent Brief and the 2007 Robert F. Wagner Labor & Employment Law Best Brief awards and the 2008, 2007, and 2006 National Adoption and Child Welfare Law Moot Court Competition Best Brief awards.

In May, five Chase students were selected as members of the National Order of Scribes. The National Order of Scribes is a newly created student

honorary organization begun by Scribes - The American Society of Legal Writers, to recognize graduating law students who have exhibited exceptional legal writing skills. Scribes itself was founded in 1953 to honor legal writers and encourage a "clear, succinct, and forceful style in legal writing."

The new Chase members of the National Order of Scribes are Kim DeGraaf, Jamie Ireland, Katie Koch, Marci Palmieri, and Dustin Riddle. Ms. Degraff was selected for her article entitled, "Should the U.S. Restrict Imports of Chinese Archaeological Materials? An Analysis Under the Convention on Cultural Property Implementation Act," published in the *Art & Museum Law Journal*. Ms. Ireland was chosen for her article published in the *Northern Illinois Law Review*, "Title II of the Americans with Disabilities Act and its Prohibition of Employment Discrimination." Ms. Koch was inducted for her article, "Transgender Employment Discrimination," published in the *UCLA Women's Law Journal*. Ms. Palmieri wrote the briefs for Chase's 2008 and 2007 Robert F. Wagner Labor & Employment Law Moot Court Competition teams, both of which won Best Brief awards. Also, the 2007 brief placed second in the Scribes national Best Brief contest. Mr. Riddle was selected for his article, "Disability Claims for Alcohol-Related Misconduct," which was published in the *St. John's Law Review*.

While these accomplishments underscore the already high quality of the Chase writing program, Chase faculty and students continually strive for improvement. To paraphrase another of Professor Rodell's famous quotations, any law school serious about the quality of the writing abilities of its students cannot afford to be like "...the killy-loo bird of the sciences. The killy-loo, of course, was the bird that insisted on flying backward because it didn't care where it was going but was mightily interested in where it had been." At Chase, we keep our writing program moving forward!



By Heather N. Russell  
Communications Director

## **UK College of Law Names Interim Dean**

Louise Everett Graham has been named acting dean of the University of Kentucky College of Law for the next academic year. Graham is currently the Wendell H. Ford Professor of Law and has taught at the College since 1978. She will begin her new leadership role in August 2008.



Louise Everett  
Graham

Prior to becoming a law teacher, she served as a law clerk to Judge J. Homer Thornberry of the United States Court of Appeals for the Fifth Circuit. She received her undergraduate degree from the University of Texas and is a Coif graduate of its School of Law, where she served on the *Texas Law Review*. In 1989, she received the University of Kentucky Great Teacher Award.

Professor Graham has a particular interest in family law issues and has published the third edition of *Kentucky Domestic Relations Law*, a treatise on Kentucky family law. Her law review publications include articles in the *Wayne Law Review*, the *Kentucky Law Journal*, and the *Santa Clara Law Review*.

Graham published her article "Child Witness Policy: Law Interfacing with Social Science" in 65 *Law & Contemporary Problems* 209 in 2002 with Dorothy F. Marcil, Jean Montoya and David Ross.

Provost Kumble Subbaswamy praised Graham's long history of dedicated service to the College of Law and to UK. "She is well respected in the profession and community," he said.

Graham's appointment marks the first time in the College of Law's 100-year history that a woman has served as dean.

"I feel privileged to serve as the

Acting Dean for the College of Law. My only regret is that this work will take me out of the classroom, where I've taught so many wonderful students over the last 30 years," said Graham. "The strength of our faculty, the quality of our students and our strong network of alumni all position the school to move forward and meet the challenges of the future. Our hope is that continued engagement with the wider University community and the Commonwealth of Kentucky will bring positive outcomes to all our endeavors," said Dean Graham.



## University of Louisville School of Law

By Jim Chen, Dean and Professor of Law

### *Truth and Beauty: A Legal Translation*

Law schools owe their primary allegiance to those whose tuition dollars, taxes, and donations enable the entire project of legal education. We owe these students, taxpayers, and benefactors some measure of good faith.

Indeed, it is no exaggeration to state this proposition in ethical terms. Law schools, no less than the lawyers they train, owe the profession an obligation to behave ethically. Within the realm of law teaching and educational administration, that ethical duty requires faithful translation. Legal educators should strive to translate their knowledge about law into real-world applications and outcomes.

Law is an applied discipline, not a pure science. There are divisions of the ideal university that ponder quantum chromodynamics, universal grammar, and number theory. And then there are divisions that design new devices, teach Spanish to otherwise monolingual Anglophones, and develop new encryption algorithms. Law schools emphatically belong to the latter category.

As in the health sciences, the greatest challenge facing law schools lies in translating the work of law professors, as teachers and as scholars, into real-world results. Medical schools aspire to perfecting their programs for transla-

tional research. There is a legal equivalent of the medical profession's desire to deliver health care from bench to bedside. Law schools succeed to the extent that they train skilled social engineers. The term "social engineering" carries no pejorative connotation. It is the conscious, purposeful, and ultimately noble project of avoiding, resolving, and mitigating disputes and of designing institutions to accomplish goals beyond the reach of individuals. Social engineering is the work of lawyers and allied professionals trained in law.

Let me translate this admittedly florid and abstract thesis into a set of blunt, pragmatic statements about legal education. Law schools have a single mission: we train people to become lawyers or to leverage their legal training into gainful employment in business, government, philanthropy, or education. Our students represent our ultimate product; their accomplishments, our greatest pride.

Law students — who often arrive at school with more ambition and raw generalized intelligence than anything resembling a marketable skill — have every right to expect a material, measurable return on their investment. Although legal education at the University of Louisville (or, for that matter, either of our sister law schools in the Commonwealth of Kentucky) remains one of the profession's greatest bargains, many law students shoulder tuition in the neighborhood of \$40,000 per year and living expenses in communities that are costly precisely because they surround universities. Many law

students graduate with six-figure debt loads. This is to say nothing of debts from undergraduate education, family formation, the ordinary business of life.

American legal education today faces stiff challenges. A significant portion of each year's new crop of law school graduates will be fortunate to find employment, if at all, in the neighborhood of \$40,000 per year in salary. The convergence of high tuition rates and low first-year salaries is a sign that law schools need to deliver more on their promises. Mere job-hunting may not pose worries for students at the very best schools or for the very best students at most other schools, and unemployment certainly lies outside the experience of most law professors. But the vast majority of law students pay tuition and forgo at least three years of other opportunities in order to secure jobs that are more rewarding, in intellectual and financial terms, than those they might otherwise have held.

Employers often report that many law school graduates need three to five years of on-the-job training to become truly effective. In private practice, the turning point is profitability. Law schools must be able to guarantee that their newest graduates will represent leverage, not liabilities. At the University of Louisville, we strive to prepare our graduates to be ready for work in every conceivable placement setting, immediately upon graduation and bar exam passage, or at least as quickly as possible thereafter.

Today's legal academy often seems to wage war against itself. On one hand,

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# KENTUCKY BAR NEWS

genuine reform efforts stress improvements in teaching that are consciously designed to improve law school graduates' skills and marketability. Novel approaches to the first year, experiential learning, interdisciplinary education, and capstone courses represent merely some of the ideas that more enterprising schools have begun to explore and even to implement. The newly announced University of Louisville Law Clinic represents our Law School's most significant innovation in recent memory.

By the same token, many other law schools are prone to chasing the latest intellectual fads and pouring enormous amounts of money into collateral projects whose connection to the core mission of training lawyers and other legally sophisticated professionals is apparent, if at all, only to the proponents of those projects. Law schools often tout these maneuvers in glossy publications aimed not so much at graduates, donors, and prospective employers of our students, but at other law professors. The legal academy can, should, and does blame much of this imprudence on the *U.S. News and World Report* rankings. Legal educators as a

class, however, cannot afford to become divorced from the realities facing our students and from our duty to address those realities on their behalf. We must remember that law schools exist not as playgrounds for their faculties, but as training grounds for their students.

As matters stand, law schools have a very hard time accomplishing their core mission. The real cost of solid legal education is very substantial, and there are no obvious places to cut costs. Most law schools depend almost entirely on tuition or on some blend of tuition and precarious public support. It is not at all unusual for unrestricted giving to a law school to hover in the neighborhood of one percent of the overall budget. Donors can be persuaded to support a wide variety of causes, ranging from physical facilities and scholarships to programs such as moot courts and clinics. Most donors are law school graduates who had to work hard for relatively low pay before achieving the financial security that now enables them to be generous. They will support their alma maters, in some cases with extraordinary passion, precisely to the

extent they feel that they were able to translate their law school experiences into real-world success.

The message for legal educators is clear. Remaining true to the process by which law school graduates transform themselves for good – in both senses of that phrase – represents fidelity in translation.

## Bowling Green-Warren County Bar Association Presents Award

Murry A. Raines, a Bowling Green attorney, was presented the *Pro Bono Publico* Award at the 2008 Law Day ceremonies conducted by the Bowling Green-Warren County Bar Association. The award is presented each year by the Lawyers Care Volunteer Attorney Program to a member of the Bar who has made a significant contribution to the provision of donated legal services to low-income elderly or disabled individuals in the community. Mr. Raines received the award for his continued commitment to the mission of Lawyers Care and *pro bono* service.



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**SUMMARY OF MINUTES  
KBA BOARD OF GOVERNORS  
MEETING  
MARCH 14, 2008**

The Board of Governors met on Friday, March 14, 2008. Officers and Bar Governors in attendance were *President J. Dyche, President-Elect B. Bonar, Vice President C. English, Jr., Immediate Past President R. Ewald, Young Lawyers Section Chair R. Reed, Bar Governors 1<sup>st</sup> District - D. Myers, M. Whitlow; Bar Governors 2<sup>nd</sup> District - J. Harris, Jr., R. Sullivan; 3<sup>rd</sup> District - R. Hay, R. Madden; 4<sup>th</sup> District - D. Farnsley, M. O'Connell; 5<sup>th</sup> District - F. Fugazzi, Jr.; 6<sup>th</sup> District - T. Rouse and 7<sup>th</sup> District - J. Rosenberg.* Bar Governors absent were: M. Grubbs, D. McSwain and W. Wilhoit.

In Executive Session, the Board considered three (3) discipline default cases involving two attorneys and one (1) reinstatement case.

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

- Heard status reports from the 2008-2009 Budget Committee, Kentucky Lawyer Assistance Program (KYLAP), Long Range & Strategic Planning Committee and Office of Bar Counsel.
- President-Elect Bonar reported that a committee formed to consider a conference on the Rule of Law was held on Wednesday, March 12 with justices of the Supreme Court, judges of the Court of Appeals, deans/representatives from the three law schools and members of the Board of Governors in attendance. A final date and location is being considered as plans continue to be made for the conference.
- Young Lawyers Section Chair Ryan C. Reed reported that the "u@18" handbook was being printed for distribution. He advised that the Wills for Heroes clinics scheduled for March 8 had to be rescheduled to a later date due to delays in finalizing the software formatting necessary for documents used for the program.
- Bar Governor Thomas L. Rouse updated the Board on the status of legislation addressing notary public process in Kentucky. He stated the proposed legislation was being revised to omit the language the Board previously opposed and that the main concerns were now coming from other interested groups. Due to the various difficulties, the bill will most likely be addressed in a future session of the General Assembly.
- Executive Director James L. Deckard reported that the Bar Center Trustees met on February 15 to discuss the following items: landscaping around the perimeter of the Bar Center, exterior windows, basement repairs and renovations for office space and other various repairs around the Bar Center property.
- Approved the Law Day Awards totaling \$900 (3 @ \$300/each).
- Approved the Student Writing Competition Awards totaling \$1,500 (1<sup>st</sup> - \$1,000; 2<sup>nd</sup> - \$300; 3<sup>rd</sup> - \$200).
- Mr. Deckard reviewed the current list of Judicial Nominating Commission nominations. The Board will need to finalize a list that will nominate two lawyers to be on the ballot for each for the 57 circuits and 60 districts across the Commonwealth, as well as for the Commission for Kentucky's appellate courts, in accord with SCR 7.000 et seq.
- Approved the submission of three nominees to the Supreme Court of Kentucky for the appointment of one person from each District to the CLE Commission for three-year term ending on June 30, 2011: 5<sup>th</sup> Supreme Court District – Janis Clark, Lexington; Katherine Hornback, Lexington and Melinda Murphy, Richmond and 7<sup>th</sup> Supreme Court District – Kimberly Scott McCann, Ashland; Michael B. Fox, Olive Hill and David F. Latherow, Ashland.
- Approved the submission of nominees to the Supreme Court of Kentucky for appointment to the IOLTA Board of Trustees for three-year term ending on June 30, 2011: 5<sup>th</sup> Supreme Court District Laura DeAngelo, Lexington and 7<sup>th</sup> Supreme Court District Anita Johnson, Pikeville.
- President Dyche distributed an announcement regarding the 2008 Annual Convention for distribution by the Bar Governors in their respective districts to encourage membership participation in the annual convention.
- Approved the nominations for the 2008 Outstanding Awards: Outstanding Judge Award – In memory of and to the Family of Justice William E. McAnulty, Jr. of Louisville; Outstanding Lawyer Award – Margaret E. Keane of Louisville; Bruce K. Davis Bar Service Award – Asa "Pete" Gullett III of Louisville; and President's Special Service Award - Norman E. Harned of Bowling Green. President Dyche informed the Board that a recommendation on the Donated Legal Services Award would be made at an upcoming meeting of the Board.
- Approved the payment of expenses for Board members attending the Board of Governors meeting on June 17 and the convention itself on June 18-20 as follows: Lodging at the Hyatt Regency Lexington at a rate of \$120.00 single/double per night for a maximum of four (4) nights. Reimbursement for round trip mileage at the rate of forty-one cents (\$.41) per mile. Reimbursement for meal expenses incurred on Monday, June 16 and Tuesday, June 17 above and beyond group meal functions on those dates.

## To KBA Members

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

**September 12-13, 2008  
November 21-22, 2008**

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

# KENTUCKY BAR NEWS

## SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING MAY 16, 2008

The Board of Governors met on Friday, May 16, 2008. Officers and Bar Governors in attendance were *President* J. Dyche, *President-Elect* B. Bonar, *Immediate Past President* R. Ewald, *Young Lawyers Section Chair* R. Reed, *Bar Governors 1<sup>st</sup> District* - D. Myers, M. Whitlow; *2<sup>nd</sup> District* - J. Harris, Jr., R. Sullivan; *3<sup>rd</sup> District* - R. Hay, R. Madden; *4<sup>th</sup> District* - D. Farnsley, M. O'Connell; *5<sup>th</sup> District* - F. Fugazzi, Jr., D. McSwain; *6<sup>th</sup> District* - M. Grubbs, T. Rouse and *7<sup>th</sup> District* - J. Rosenberg, W. Wilhoit. Officer absent was: *Vice President* C. English, Jr.

In Executive Session, the Board considered two (2) discipline cases, four (4) discipline default cases, involving two attorneys, one (1) reinstatement case and one (1) restoration case.

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

- Heard status reports from the Kentucky Lawyer Assistance Program (KYLAP), Office of Bar Counsel and Rules Committee.
- Young Lawyers Section Chair Ryan C. Reed distributed a copy of the YLS project "U@18" brochure and discussed curriculum materials that the YLS would use in high schools throughout Kentucky during the current and upcoming educational years. He advised that the young lawyer registration for the 2008 Annual Convention continues to be strong and that by instituting the Young Lawyers Conference as part of the annual convention it is anticipated the young lawyer registration may well exceed last year. Mr. Reed also reported that, for the first time, the New Lawyers Program will be in conjunction with the annual convention this year.
- President-Elect Bonar reported that an Order was received from the Supreme Court of Kentucky approving the KBA Annual Operating Fiscal Year Budget for July 1, 2008 – June 30, 2009 as

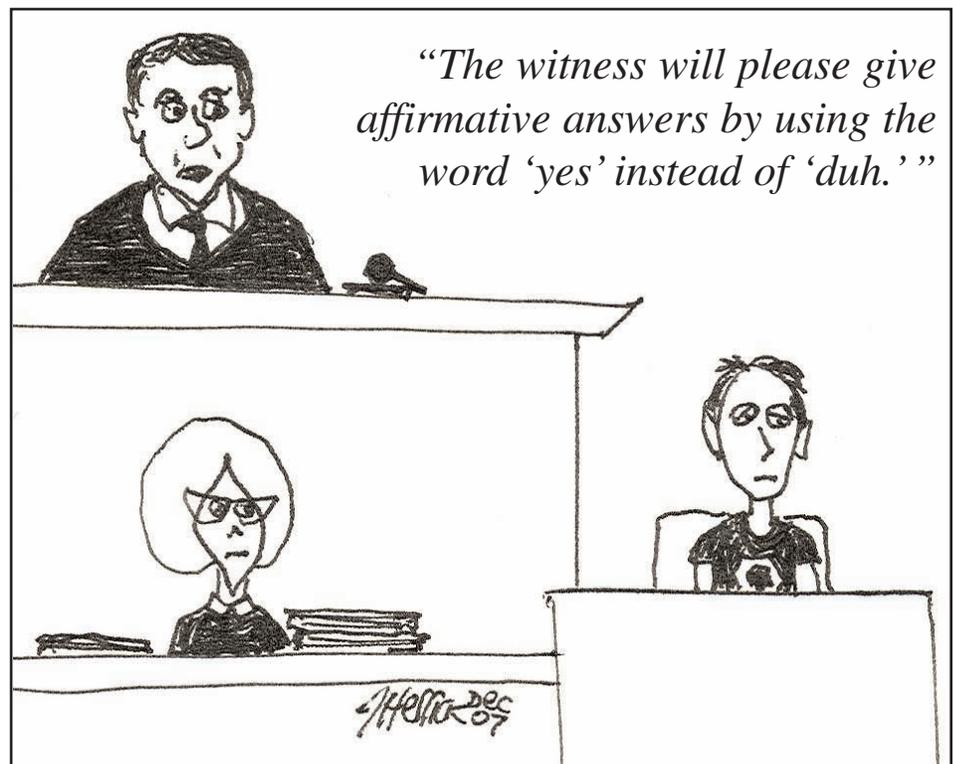
well as the employment of Anneken & Moser, P.S.C. of Covington, Kentucky to audit the accounts of the KBA and the Kentucky Bar Foundation/IOLTA Fund for the Fiscal Year ending June 30, 2008.

- President-Elect Bonar reported that the Rule of Law Conference Committee met again on May 15 and has set a date for the conference, February 6, 2009, in celebration of Lincoln's 200<sup>th</sup> birthday later that month.
- President-Elect Bonar reported that she was in the process of putting together the 2009 Annual Convention planning committees and asked for volunteers to participate. Plans are being made to have the 2009 Annual Convention the week of June 8-12 in Covington.
- President-Elect Bonar reported the KBA Fall Getaway is scheduled for October 23-25, 2008 in West Baden Springs and French Lick, Indiana. Registration fees will be \$129.00 and \$99.00 for Young Lawyers, with six (6) hours of CLE credit to be offered. 70 sleeping rooms have been reserved

at the West Baden Springs Hotel.

- Approved the amount of \$2.50 as a refund of dues to any member making a formal written objection to use Bar dues for activities not sanctioned by the Keller v. State Bar of California decision.
- Executive Director James L. Deckard reported on his receipt of Orders from the Supreme Court, entered May 14, 2008: Appointment of members to the CLE Commission for three (3) year terms ending on June 30, 2011: 5<sup>th</sup> Supreme Court District – new appointment of Janis Clark of Lexington; and 7<sup>th</sup> Supreme Court District – reappointment of Kimberly Scott McCann of Ashland. In addition, the Order cited the Court's appointment of Kimberly Scott McCann as Chair of the CLE Commission, to succeed Anita Britton, beginning July 1, 2008.
- Approved the appointment of David Latherow of Ashland to the Attorneys' Advertising Commission for a three (3) year term beginning on July 1, 2008 and ending on June 30, 2011.
- Approved appointments and reap-

## Legally Insane by Jim Herrick



pointments to the Kentucky Bar Foundation: 1<sup>st</sup> Supreme Court District appointment of Dianna Kay Douglas of Paducah for a three (3) year term ending on June 30, 2011; 3<sup>rd</sup> Supreme Court District appointment of Jane Adams Venters for a new three (3) year term ending on June 30, 2011; 4<sup>th</sup> Supreme Court District reappointments of Edward M. (“Ted”) King of Louisville and Frank P. Doheny of Louisville for respective three (3) year terms ending on June 30, 2011; 6<sup>th</sup> Supreme Court District appointment of Tasha Kay Scott of Florence for a new three (3) year term ending on June 30, 2011; and 7<sup>th</sup> Supreme Court District appointment

of Lois Anita Kitts of Pikeville and Catherine C. Hughes of Ashland for respective three (3) year terms ending on June 30, 2011.

- Approved the appointment of Bar Governor Thomas L. Rouse to the KYLAP Commission to fill the vacancy created with the expiration of Bar Governor Mike O’Connell’s Board term. Also approved the reappointment of Asa “Pete” Gullett III of Louisville to the KYLAP Commission for a second three (3) year term ending on June 30, 2011.
- President Dyche gave a report on the registration for the 2008 Annual Convention, along with contributions pledged and received.

## BAR NOTIFICATION

April 21, 2008 the legal community lost one of its most valued members. Judge Kathleen Voor Montano passed away after a brief illness. Judge Montano served as a Jefferson Circuit Court Judge for Division Ten. She had previously served as a District Court Judge, Family Court Judge and had served on Teen Court and Truancy Court. Her service before becoming a Judge herself included her position as Senior Staff Attorney for the Kentucky Court of Appeals.

Judge Montano’s commitment to public service did not stop at the bench. She was involved in numerous legal and community groups including the Board of Directors of Mercy Academy and Chair of the Metro Criminal Justice Commission.

The outpouring of sympathy from the legal community has been a tribute to Judge Montano’s time on the bench. Her absence from Jefferson Circuit Court is keenly felt by many. I wish to express appreciation for the sympathy, patience and decorum of the bar during this time of transition. I also wish to express my gratitude to Valerie Shannon, the Division 10 staff attorney who has assisted me in this difficult transition. Her legal ability, intellectual capacity and kindness have been greatly appreciated. At this point, I believe everything has been resolved of which we are aware. To aid in the resolution of any matters that may remain pending, all attorneys with issues currently under submission in Division Ten are requested to file the AOC-280 form to bring such matters to my attention. The cooperation and thoughtfulness of the bar has made it possible to continue the work of the division with little interruption after such a singularly tragic event.

Ann O’Malley Shake, Senior Judge

## Northern Kentucky Lawyers, Inc. Honored Lawyers for Service

The 2008 *Pro Bono* Awards Luncheon celebrated the 30<sup>th</sup> anniversary of *pro bono*



in Northern Kentucky in May at Summit Hills Country Club. The president of the Legal Services Corp., Helaine Barnett, spoke at the luncheon. The *Pro Bono* Attorney of the Year Award was presented to R. Kim

Vocke for dedication to the legal needs of families and children throughout Northern Kentucky for the past twenty-nine years. William Adkins was honored with the Nick

of Time Award for his quick response to requests for client assistance with domestic violence, cus-



tody, and eviction cases. Debbie Davis was awarded the Distinguished New Volunteer Award for her acceptance of family law, property and bankruptcy cases showing



concern for her clients before the courts. Stephen D. Wolnitzek, Thomas L. Rouse, Donald

J. Ruberg, and Thomas R. Kerr received 30 year service awards for providing volunteer civil legal services from 1978-2008. Mary Wallingford was the recipient of the *Pro Bono* Student Award, and Jeffery Sallee received the Bar Bri Award.

## ■ In Memoriam

|                           |                 |
|---------------------------|-----------------|
| Phillip E. Allen          | Louisville      |
| William T. Bishop III     | Lexington       |
| Carmol D. Cook            | Beaver Dam      |
| Albert C. Hawes, Jr.      | Covington       |
| Joseph E. Johnson III     | Bal Harbour, FL |
| John C. Klotter           | Louisville      |
| Bryan LeSieur             | Cape Coral, FL  |
| James Alexander Mackenzie | Frankfort       |
| Glenn E. Nippert          | Newport, RI     |
| Robert Doyle Preston      | Lexington       |
| Joseph D. Raine           | Louisville      |
| James D. Ruark            | Morganfield     |
| Edgar A. Smith            | Hopkinsville    |
| Kathleen Voor Montano     | Louisville      |

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# WHO, WHAT, WHEN & WHERE

## ON THE MOVE



Carla M. Venhoff



Kelly M. Gindele



Timothy H. Napier

The Crestview Hills law firm of **Deters, Benzinger & LaVelle, P.S.C.** is pleased to announce that **Carla M. Venhoff** has been named a partner in the firm and that **Kelly M. Gindele** has been appointed as a new associate. Venhoff practices in the firm's commercial, real property and construction groups. Gindele, based in the firm's downtown Cincinnati office, focuses her practice primarily in the areas of construction and real estate law and is admitted to practice law in Kentucky.

**Timothy H. Napier** and **Patrick W. Gault** are pleased to announce the opening of **Napier Gault, PLC** and that **Angela McNeal Hoyer** has joined the firm as a senior associate. The



Patrick W. Gault



Angela M. Hoyer



Gregory A. Redden

firm concentrates its practice in the defense of complex litigation, including claims of products liability, medical negligence, legal malpractice, personal injury, defamation and construction defects. The firm's office is located in Louisville at 455 South Fourth Street, Suite 1400, and the firm's phone number is (502) 855-3800.

**Richard Breen Law Offices, P.S.C.**, is pleased to announce that **Gregory Adam Redden** has joined the Louisville law firm as an associate. Redden will be concentrating his practice in the areas of personal injury, insurance bad faith, products liability, and nursing home neglect cases.

**Wyatt, Tarrant & Combs, LLP** has named **Elizabeth J. McKinney** and **Daniel K. Swanson** as new



Mark C. Hahn



Elizabeth J. McKinney



Daniel K. Swanson

partners in its Bowling Green office and is pleased to announce that **Mark C. Hahn** has joined the firm and practices in its Louisville office. McKinney concentrates her practice in the areas of corporate law, business planning, probate and estate planning and public finance. Swanson concentrates his practice in the areas of business mergers, sales and acquisitions; the negotiation and drafting of intellectual property licenses; manufacturer production agreements; property management arrangements; and real estate financing and development transactions. Hahn is admitted to practice law in Kentucky and New York and will concentrate his practice in federal and state taxation, including the taxation of transactions.

## COMMONWEALTH OF KENTUCKY FINANCE AND ADMINISTRATION CABINET

### Seeking Licensed Attorneys

The Finance and Administration Cabinet requires the services of qualified attorneys throughout the Commonwealth of Kentucky for the purpose of conducting title work and other real property related services on property to be acquired on behalf of the Commonwealth. Selection of attorneys approved to conduct the work will be based on professional qualifications, experience, and geographic working area as well as a general bidding process for each assignment.

Multiple attorneys are needed in every area of the Commonwealth, and bids will be solicited as necessary. If you would like to be considered for approval to perform work, please contact Patrick McGee, Attorney, or Wilda Caudill, Office of Legal Services, Finance and Administration Cabinet at (502) 564-6660 to receive a proposal package. Proposals, conforming to the terms and conditions of the proposal package, must be received no later than 2:00 pm on August 29, 2008.



# WHO, WHAT, WHEN & WHERE



*Amanda G. Simmons*

Kentucky. She focuses her practice in the areas of construction litigation and equine law.

**Amanda G. Simmons** has joined the law firm of **Shutts & Bowen, LLP**, an international law firm based in Orlando, Florida. Simmons, a 2003 graduate of the University of Kentucky College of Law, is licensed to practice in Florida and



*Eric J. Haner*

workers' compensation, social security disability, and probate matters, representing clients in Kentucky and Indiana. He may be reached at his new office phone number at (502) 562-0020.

**Eric J. Haner** announces the opening of the **Haner Law Office** located at 651 South Fourth Street in Louisville at Theater Square. He will continue to focus his practice in the area of plaintiff's personal injury law,

announce that **Robert R. Gillispie** has become a member of the Herndon, Virginia firm. Gillispie practices primarily within the areas of commercial transactions, government contracts and immigration. He is a member of the Kentucky, Virginia and District of Columbia Bar Associations.

**Welter Law Firm, P.C.** is pleased to



*Brady Dunnigan*

Dunnigan focuses his practice primarily in the areas of commercial real estate and lending.

**Brady Dunnigan**, a former partner with Frost Brown Todd, has joined **Dinsmore & Shohl LLP**. He will practice as a partner in the corporate department, working from the firm's Lexington office.

The **Kentucky Registry of Election Finance** has appointed **Emily Dennis**, a Frankfort attorney, as general counsel. She joins the Registry after having been employed for nearly six years by the Kentucky Justice & Public Safety Cabinet in its Office of Legal Services. Dennis graduated, *magna cum laude*, from Transylvania University and earned her J.D. from the University of Louisville School of Law in 1998.

**Greenebaum Doll & McDonald PLLC** is pleased to announce that **Mark T. Hayden**, a member in the firm's Cincinnati office, has been named member-in-charge of the firm's Greater Cincinnati offices, where he will oversee operations of the firm's Cincinnati and Covington offices and serve as a member of the firm's management committee. Greenebaum Doll & McDonald is also pleased to announce that **Henry C.T. "Tip" Richmond III**, a member in the firm's Lexington office, has been named to the firm's management committee and that **Benjamin J. Evans**, **Michael A. Grim**, **Mark A. Loyd**, **Ted R. Martin**, and **W. Edward Skees** have been elected as members of the firm. Richmond's practice consists primarily of advising on trust and estate matters, gift and estate tax planning, and closely-held business matters, including succession planning. Evans concentrates his practice in employee benefits law, including qualified retirement plans, employee welfare benefit plans, nonqualified deferred compensation arrangements, COBRA, and ERISA-related litigation. Grim is based in the firm's Louisville office and focuses his practice on state, local and federal taxation. Loyd is also based in the firm's Louisville office and concentrates his practice in the areas of state, local and federal taxation, tax controversy/litigation and governmental affairs. Martin is based in the firm's Lexington office and focuses his practice on administrative proceedings and commercial litigation. Skees is based in the firm's Louisville office and concentrates his practice on construction and commercial litigation, including contract, franchise, lender liability, product liability, and member/shareholder litigation. He practices in Kentucky and Indiana.



*Mark T. Hayden*



*Henry C.T. Richmond III*



*Benjamin J. Evans*



*Michael A. Grim*



*Mark A. Loyd*



*Ted R. Martin*



*W. Edward Skees*

The law firm of **Clark & Ward** is pleased to announce that **Justin L. Handshoe**, **Peter W. Whaley**, **David P. Kaiser**, **Barry N. Sullivan**, and **John L. Tackett** have joined the firm as associates in the Lexington office and that **Noelle J. Bailey** and **Taylor P. Sorrells** have joined the Louisville office.



*Justin L. Handshoe*



*Peter W. Whaley*



*David P. Kaiser*



*Barry N. Sullivan*



*John L. Tackett*



*Noelle J. Bailey*



*Taylor P. Sorrells*

**Jeffrey D. Hensley**, of the Hensley Law Office, PSC in Flatwoods, is pleased to announce his partnership with attorney **Christopher A. Dawson**. Dawson, who is licensed in Kentucky, Ohio, and West Virginia, has practiced in the area for nine years and with Hensley for the last two. The firm name has changed to **Hensley & Dawson, PSC** and will continue to be located at 1813 Argillite Road in Flatwoods.

## IN THE NEWS



*Judge Charles R.*

*Simpson III*

The Chief Justice of the United States, John G. Roberts, Jr., appointed **U.S. District Judge Charles R. Simpson III**, of Louisville, as chair of the federal judiciary's International Judicial Relations Committee, effective April 16, 2008. In that role, Judge Simpson will coordinate the federal judiciary's relationship with foreign judiciaries and with those agencies and organizations that are involved in the expansion of the Rule of Law and the administration of justice.



*James D.  
Harris, Jr.*



*Jefferey Yussman*

Wyatt, Tarrant & Combs, LLP is pleased to announce that Bowling Green attorney **James D. Harris, Jr.** was named to the executive council of the Association of Defense Trial Attorneys at the organization's annual meeting in Charleston, South Carolina and that Louisville attorney **Jefferey Yussman** has been selected as the newest member of the Special Needs Alliance. The firm is also pleased to announce that **Turney P. Berry**, a partner in the firm's Louisville office, has been elected as a member of the of the American College of Trust and Estate Counsel's Board of Regents; **George Seay**, a partner in the firm's Lexington office, has been named to the Kentuckians for Better Transportation Board; and **Joe Zaluski**, also a partner in the firm's Lexington office, has been elected to the Kentucky Coal Association Board of Directors.

NKU Salmon P. Chase College of Law is pleased to announce that **Professor**

## The Kentucky Bar Association's 2008 Outstanding Lawyer of the Year.



**Maggie Keane** is a Member of Greenebaum Doll & McDonald's Litigation and Dispute Resolution Practice Group.

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# WHO, WHAT, WHEN & WHERE



*Kathleen G. Johnson*

McBrayer, McGinnis, Leslie & Kirkland, PLLC is pleased to announce that attorney **Douglas T. Logsdon** was inducted as Fayette County Bar Association President on May 1, 2008. Logsdon will serve a one-year term. He has previously served as secretary, treasurer, and president-elect within the association.



*Amy C. Eason*

**Kathleen Gormley Johnson** has been selected for the Leadership Kentucky Class of 2008. Professor Johnson is the associate director of the Chase Center for Excellence in Advocacy. She focuses her teaching on civil and criminal litigation, and clinical skills courses and serves as the faculty advisor and coach of the Chase National Trial Advocacy Team.

Woodward, Hobson & Fulton, LLP is pleased to announce that **Amy C. Eason** and **Guy E. Hughes**, associates in the Lexington office, have been elected to the Fayette County Bar Association Board of Directors.



*Guy E. Hughes*

**Ellen Arvin Kennedy**, a member of the firm Fowler Measle & Bell PLLC, has been named as the 2008 Outstanding Young Lawyer by the Fayette County Bar Association.



*Ellen Arvin Kennedy*

**Philip J. Schworer** was inducted at the 116<sup>th</sup> president of the Cincinnati Bar Association. He became the first Kentucky resident to ever hold the title of Cincinnati Bar Association President. Schworer, a member of the environmental law department of Frost Brown Todd LLC, practices in the firm's Cincinnati office.



*Philip J. Schworer*

**Paige L. Ellerman**, an associate in the litigation department at Taft Stettinius & Hollister



*Paige L. Ellerman*

**Edward J. Buechel**, of Edgewood, has been elected a Fellow of The American College of Trust and Estate Counsel, a national professional organization. Buechel practices at the Florence law firm of Raines, Buechel, Conley & Dusing and concentrates his practice on estate planning and probate.



*Mark T. Hurst*

**Robert G. Schwemm** has been named the first Ashland Inc.–Spears Distinguished Research Professor for the University of Kentucky College of Law. His five-year term in the professorship began July 1, 2008. A committee comprised of Dean Steven L. Hoch of UK's College of Arts & Sciences, Chief Justice Joseph Lambert of the Kentucky Supreme Court, and Chief Judge Jennifer Coffman of the U.S. District Court for Eastern District of Kentucky selected Schwemm for the honor.

**Joseph L. Fink III**, professor, and **Ralph E. Bouvette**, Ph.D., associate professor, in the Department of Pharmacy Practice and Science at the University of Kentucky College of Pharmacy, have been elected to membership in the Kentucky Institute of Medicine and were inducted on May 15, 2008.

The American Academy of Matrimonial Lawyers' Kentucky Chapter is pleased to announce that **Bruce Petrie**, Boyle and Mercer Family Court Judge, is the 2008 recipient of its annual Family Court Judge of the Year Award and that **Stephen Kriegshaber** is the recipient of the annual Raising the Bar Award.

**Kenneth L. Wagner**, chief compliance officer for William Blair & Company, LLC

LLP in Cincinnati, will serve as the Cincinnati Bar Association's Young Lawyers Section (YLS) Chair. The YLS is open to every member of the Cincinnati Bar Association who is under age 36 or in his/her first five years of practice, regardless of age.

headquartered in Chicago, was recently elected a director of the National Society of Compliance Professionals. Wagner is a 1980 graduate of the University of Kentucky College of Law.

**Thomas E. Rutledge**, a member of Stoll Keenon Ogden PLLC, spoke on "Understanding Operating Agreements: If We Can Understand This So Can You" and "Inter-Entity Mergers: Comparing Texas, Delaware and META" at the ABA Section of Business spring meeting, which took place in Dallas, Texas.

## RELOCATIONS

The **Law Office of Adam Zeroogian, PLLC**, a Nicholasville firm concentrating its practice in the areas of criminal defense, domestic relations and personal injury, is pleased to announce its relocation to 114 North Main Street in Nicholasville. The firm's contact information will not change.



*A. Carl Platt*

**A. Carl Platt**, a 1973 graduate of the University of Louisville School of Law, announces his relocation and the opening of his New Albany, Indiana (Floyd County) law office, at 430 West First Street, while continuing his general practice in Indiana and Kentucky focusing on construction law and litigation. Platt may be reached at (812) 944-2770 or (502) 599-1256.

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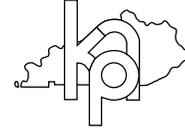
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