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Bench & Bar

Volume 71 Number 5

September 2007



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Jane Winkler Dyche

Your Organization — The Kentucky Bar Association

Early on in my KBA membership, I was asked to serve on the Ethics Committee and then on the Ethics Hotline Committee. My eyes were opened to the volunteer opportunities and other such endeavors available. That was only a glimpse of the human interest and energy and professional involvement that goes into keeping the bar association serving the needs of its members.

The structure of the Kentucky Bar Association includes committees of the membership, committees of the Board of Governors, ad hoc committees, and various commissions and boards for particular purposes. The following is a list of some of the service opportunities for members. Share your interest with me by email at jwdyche@kybar.org.

KBA Committees

- Child Protection & Domestic Violence
- Communications/Public Relations
- Donated Legal Services
- Elder Law
- Ethics
- Ethics Hot Line
- Investment
- Legislative
- Member Services
- Unauthorized Practice of Law

Section membership and participation allows lawyers to expand the benefits of bar membership among those in a like practice area. These are also listed on the website under "Inside KBA." I encourage you to take the opportunity to join a

section and volunteer to participate in committee work, whether on the state or local level.

KBA Sections

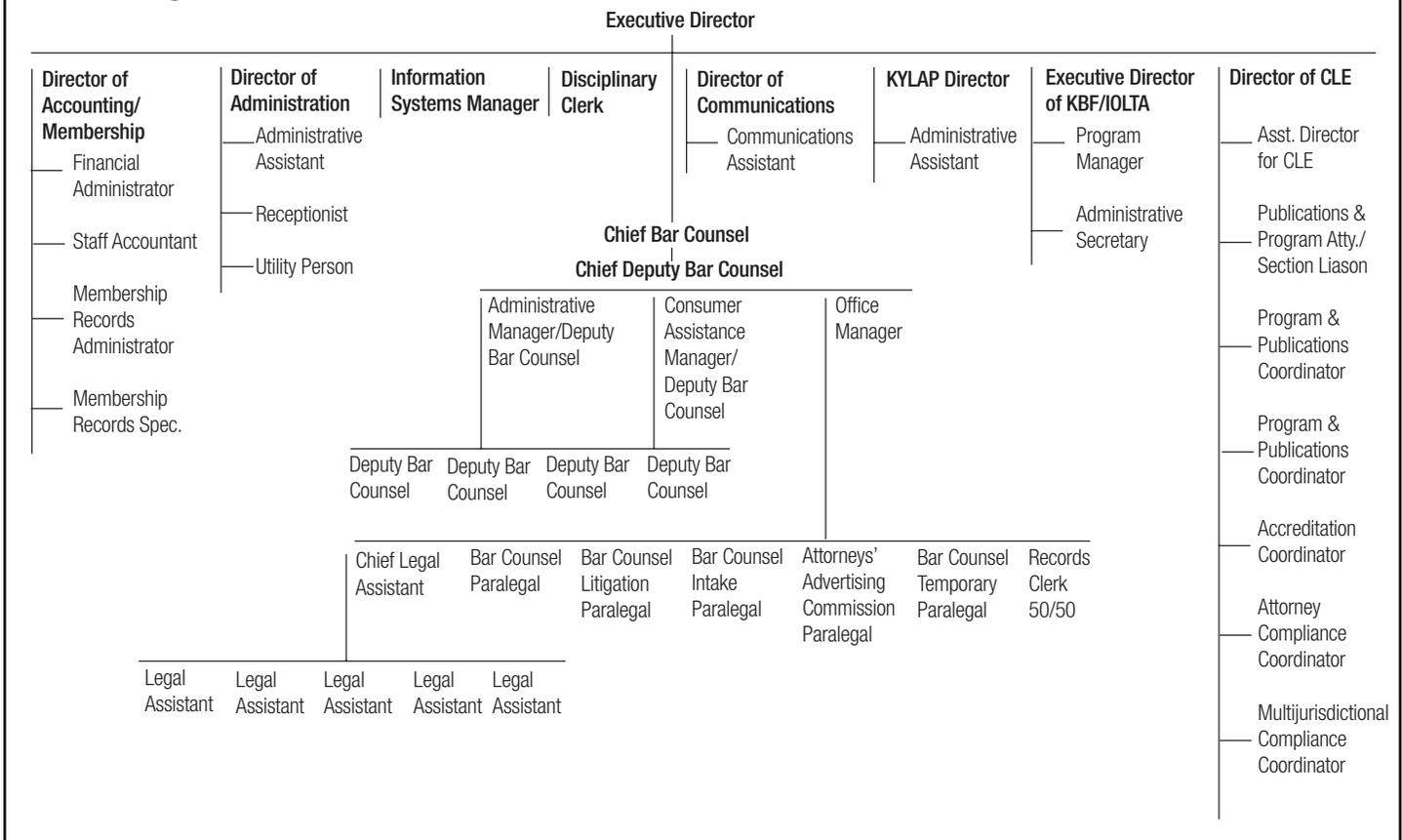
- Alternative Dispute Resolution
- Appellate Advocacy
- Bankruptcy Law
- Business Law
- Civil Litigation
- Construction & Public Contract
- Corporate House Counsel
- Criminal Law
- Education Law
- Environment, Energy & Natural Resources Law
- Equine Law
- Family Law
- Health Care Law
- Labor & Employment Law
- Local Government Law
- Probate & Trust Law
- Public Interest Law
- Real Property Law
- Small Firm Practice
- Senior Lawyers
- Taxation
- Workers' Compensation
- Young Lawyers Section

If you have not given your email address to the KBA Membership Department, please update your member profile. Email is an efficient and time effective means of communicating with KBA members.

Bits and Pieces

- Mark your calendars for June 18 - 20, 2008, when the KBA Annual Convention will be held in Lexington.
- Explore resources available on the KBA website at www.kybar.org, including the Casemaker legal research service. This service is available to every Kentucky lawyer, as a member benefit. The Casemaker consortium meets no less than annually to consider improvements and expansion of the Casemaker offerings. Let me know if you have suggestions about this service.
- Refer to the current KBA staff organization chart on the next page. It may be of help to you.
- Join your friends and colleagues in the coming weeks at the Kentucky Law Update (KLU), which will be held in nine communities across Kentucky. Take advantage of this convenient means of getting a head start on your CLE requirements for 2008. A full year's required CLE hours can be earned through participation in this program. KLU pre-registration cards were sent to the membership at the end of July and online registration is available at www.kybar.org. As I mentioned earlier, KLU attendees will also have the opportunity to provide input in the KBA strategic planning process. I look forward to seeing you there and visiting with you. ■

KBA Staff Organizational Chart



Kentucky Bar Association **2008 Outstanding Service Awards** **Call for Nominations**

The Kentucky Bar Association is accepting nominations for 2008 Outstanding Judge and Lawyer, Donated Legal Services and Bruce K. Davis Bar Service Awards. Nominations must be received by December 31, 2007. If you are aware of a Kentucky judge or lawyer who has provided exceptional service in these areas, please call (502) 564-3795 to request a nominating form or download it from our website at www.kybar.org by choosing "Inside KBA" and clicking on "Public Relations – Outstanding Service Awards."

Outstanding Judge Award

Outstanding Lawyer Award

Awards may be given to any judge or lawyer who has distinguished himself or herself through a contribution of outstanding service to the legal profession. The selection process places special emphasis upon community, civic and/or charitable service, which brings honor to the profession.

Donated Legal Services Award

Nominees for the Donated Legal Services Award must be members in good standing with the KBA and currently involved in pro bono work. The selection process places special emphasis on the nature of the legal services contributed and the amount of time involved in the provision of free legal services.

Bruce K. Davis Bar Service Award

Many lawyers take time from their practices to provide personal, professional and financial support to the KBA. This award expresses the appreciation and respect for such dedicated professional service. All members of the KBA are eligible in any given year except for current officers and members of the Board of Governors.



Building a
Strong
Foundation

Your Kentucky Bar Foundation Improving the Reputation of Attorneys

By Sheryl Egli Heeter

The Kentucky Bar Foundation, Inc. ("KBF") is the charitable arm of the Kentucky Bar Association. Its stated mission is promoting the administration of justice and educating the public about the judicial system and the legal profession in society. The unstated mission is "improving the reputation of attorneys," according to KBF President Gary Sergeant. The KBF has worked to achieve its missions by raising money for an endowment fund to provide grants for programs supporting public education of the law and our judicial system; helping individuals through law-related programs; and publishing important works regarding the law. The KBF is a section 501(c)(3) tax-exempt corporation. KBF records reflect annual grants to communities and special projects ranging from \$21,950 to an all-time record of \$173,630 in 2007. Since 1958, the KBF has awarded \$1,013,630 in such grants.

WHO BENEFITS FROM THE KBF?

KBF funded projects cover a broad spectrum, ranging from promoting mining safety to providing supervised visitation for children. The following are just a few examples of the positive impact KBF funding has afforded.

Abuse Detection for Long-term Care Residents

One of the recipients of KBF grants is the Nursing Home Ombudsman Agency of the Bluegrass, Inc. ("NHOA"). NHOA works to improve the quality of care for residents of long-term care facilities (nursing and family-care homes) and for those receiving in-home personal care. The NHOA used a KBF grant to develop a curriculum that educates law enforcement personnel about elder/adult abuse in nursing homes. Historically, law enforcement personnel have been the front-line defenders of nursing home residents suffering from physical abuse. But they receive little training on how to

investigate and handle allegations of such abuse, often incorrectly discounting statements from residents suffering from dementia, and crediting statements from nursing home personnel.

Through KBF funding, NHOA developed a training program provided to every law enforcement officer who undergoes training at Eastern Kentucky University. It provides officers with tools when dealing with people suffering from dementia who claim abuse. The tools include a list of contact persons and agencies familiar with the specific rules and regulations for long-term care facilities to assist with investigations.

Kathy Gannoe, Executive Director of NHOA, believes that the 2003 KBF grant, in conjunction with NHOA's activities, has assisted in creating a statewide awareness of and effort to improve the handling of elder abuse cases. According to Ms. Gannoe these efforts served, in part, as a catalyst for 2005 legislation that made sweeping and much needed changes to Chapter 209 of the Kentucky Revised Statutes, "Protection of Adults." The changes include mandatory personnel training at various agencies, such as adult protective services and commonwealth attorney and county attorney offices.¹ This training has enhanced the successful prosecution for the protection of some of the Commonwealth's most vulnerable citizens.

Child Victims of Sexual Abuse

Children First of Louisville, the state's first child advocacy center dedicated to serving children coping with sexual abuse, received a 2003 KBF grant that enabled the Center to develop and implement a forensic interview program. The program provides specific training for interviewers on the use of age appropriate open-ended interview questions for child victims of suspected abuse. Interviews can be observed via a one-way mirror by representatives from law enforcement,



Sheryl Egli Heeter is a solo practitioner in Covington and an assistant commonwealth's attorney in Campbell County. She focuses her private practice in the area of family law and her prosecution in the area of child sex abuse. She has recently committed to contributing \$25.00 on a yearly basis to the Kentucky Bar Foundation with the payment of her bar dues.

child protective services, and the offices of the commonwealth and county attorneys. "This ensures that the information needed by each agency is obtained in the least traumatic way for the child and has enhanced the prosecution of child sex abuse cases in Jefferson County," attests R. David Stengel, Commonwealth Attorney for the Thirtieth Judicial District.

Visitors to the Old State Capitol

The Old State Capitol contains the State Law Library, the first such library to be established west of the Appalachian Mountains. Since March of 2002, the Library has been restored to its 1850 appearance including floor-to-ceiling bookshelves stocked with more than 11,000 volumes, spittoons, gaslight lamps, period chairs, tables, and library ladders. Titles in the collection include Angell and Ames on Corporations, Bradley on Distresses, and Pirtle's Digest, as well as Acts of the General Assembly, 1792-94. This restoration was made possible by various financial donations, including a \$10,000 grant from the KBF in 2000. This grant helped to initiate a special fundraising project later in 2001 which resulted in \$56,000 being donated to the Kentucky Historical Society. The Library helps explain the history of the legal profession in Kentucky to adults, children, and families who visit the Old State Capitol.²

Students and Others

In addition to funding projects, the KBF also provides scholarships to each of the Commonwealth's three accredited law schools. This year scholarships of \$5,000 each were provided. The KBF also gives a grant each year in the name of the Kentucky Bar Association Outstanding Judge and Outstanding Lawyer. Judge Boyce F. Martin, Jr. of Louisville received this year's Outstanding Judge award and donated his \$2,000 to the Kentucky Legal Aid Society in honor of Marshall P. Eldred, Jr. Daniel T. Goyette of Louisville received this year's Outstanding Lawyer award and divided his \$2,000 award between the Public Service Fellowship Program at the Louis D. Brandeis School of Law and the Southern

Public Defender Training Center, Southern Center for Human Rights.

Current Projects

Throughout the years the KBF has funded projects too numerous to list here; the above are just a few examples of past grant recipients. In 2007, the KBF is funding both statewide and regional projects in Eastern Kentucky, Northern Kentucky, Western Kentucky, Louisville, Richmond, Pikeville, Lexington, and Frankfort. Those interested in obtaining information about these projects may view a current list of grant recipients on the KBA website³ and in the *Bench & Bar*. Lists of prior years' recipients can be obtained by contacting the KBF directly.⁴

APPLYING FOR A GRANT

Like many lawyers, you may be involved in charitable work in your community. Do not overlook the KBF as a potential funding source for your non-profit organization's law-related educational or other law-related projects. KBF grant applications are distributed to interested parties in January of each year. After reviewing completed applications, the KBF's Grant Committee makes recommendations to the KBF Board, which then approves those grant applications the Board deems appropriate. Grants are awarded in June of the application year.

To qualify for a KBF grant, a non-profit organization must demonstrate that its project furthers the mission of the KBF, that it is fiscally responsible, and that it has integrity. A qualified organization must also follow the grant application terms and agreements and open its financial records for review. Those interested in obtaining more information and a copy of the application and general forms may contact the KBF.⁵

FOUNDATION HISTORY

The KBF was founded in 1958 by organizing directors Richard L. Garnett, KBA Past President from Glasgow, D. Bernard Coughlin, then KBA President from Maysville, and Henry H. Harned, then KBA Secretary from Frankfort. The Articles of Incorporation, which were approved by the Secretary of State on

May 29, 1958, and have been amended throughout the years. Although the Articles remain similar to those originally adopted, the stated purpose of "promot[ing] the welfare of the Kentucky State Bar Association" was deleted in 1980.⁶ This deletion emphasized the KBF's focus should be on directly benefiting all citizens of the Commonwealth, not just the attorneys.

Shortly after the KBF was founded in 1958, the KBF was authorized to organize and incorporate a title insurance company, the Kentucky Bar Title Insurance Company.⁷ Bar members were encouraged to send their title insurance business to Kentucky Bar Title Insurance, with a portion of the funds generated going to bar-related charitable activities. The idea, however, never took hold and the company was dissolved in 1986.

The KBF had minimal activity until the mid-1980s. According to then KBA Board Member, William T. Robinson III, when the KBA Board members met in the mid-1980's they identified projects that they all agreed to commit to on behalf of the KBA. The revitalization of the KBF was one such project. Another impetus to revitalizing the KBF was the establishment of the Interest on Lawyers' Trust Accounts ("IOLTA") in 1986. The Kentucky Supreme Court directed the KBF to maintain the IOLTA Fund.⁸

In revitalizing the KBF, the number of directors increased from a minimum of 3 to 33,⁹ which provided an opportunity for more members of the KBA to become involved in volunteering. The Charter Life Fellow program was also created to facilitate fundraising for the KBF endowment fund. A number of members worked tirelessly to promote this program in its initial year. In particular, then KBF President William D. Grubbs recognized Charles E. English, Sr. for personally traveling to every bar meeting in 1986 in an effort to promote the Charter Life Fellow memberships.¹⁰ Based in part on these efforts and many other individual efforts, 214 Charter Life Fellows enrolled on or before May 31, 1987, and contributed \$300,000 to the endowment fund.¹¹ Following this success, the focus shifted to promoting non-charter Life Fellow mem-

berships. As of the date of this article, there are nearly 800 such members.

Additional funding has been generated through the “check-off” on the annual KBA dues statements. The “check-off” amount was raised from an initial \$25 per year to \$50. However, it was reduced back to \$25 in 2006 when the opt-out method of contributing was established. This source of revenue provides a primary source of funding for the KBF.¹² The level of contribution by KBA members has varied throughout the years. Last year it was approximately 27% of KBA members.

The KBF also accepts corporate and other organizational contributions. During the revitalization, the Gheens Foundation donated \$50,000, Ashland Oil contributed \$10,000 used to produce a film on the Kentucky judicial system, and Humana funded half of the cost for the publication of “Laws and Programs for Older Kentuckians.” In 1994, Margery and Eugene Pflughaupt of Danville made one of the largest gifts to the KBF, shares of common stock valued in excess of

\$50,000. In honor of the Pflughaupt’s support of public advocacy, the KBF for a period of time designated a yearly grant in their name.

The KBF also receives contributions from publication royalties. For example, in 1989, then Judge William Cooper assigned his royalty rights from the Kentucky Criminal Jury Instructions Handbook to the KBF.¹³ In 2007, the KBF, through the generosity of Frost Brown Todd, was assigned a percentage of the sales revenues of the new Kentucky Appellate Handbook authored by the law firm.¹⁴

FOUNDATION GOVERNANCE *Board*

The KBF is governed by a board of directors, limited to no more than 33 members. The KBA President, in consultation with the members of the Board of Governors from the respective districts, appoints three directors from each of the seven Supreme Court Districts. The remaining board members are ex-officio directors: one representative each from the Supreme Court of Kentucky, the Ken-

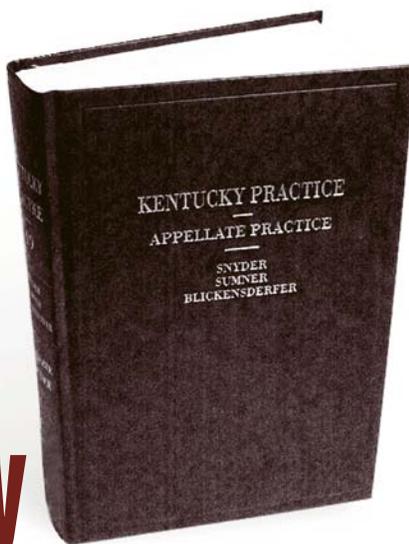
tucky Court of Appeals, the Circuit Judges Association, the District Judges Association; the Chair of the Kentucky IOLTA Fund; KBA President Representative; KBA Past President Representative; Chair of the Young Lawyers Section; Chair of the CLE Commission; and the Deans of the three state law schools. There are also five officers, who currently are Gary J. Sergent, President; L. Daniel Key, President Elect; Phillip M. Moloney, Vice President; John W. Stevenson, Secretary/Treasurer; and J. Warren Keller, Immediate Past President. These officers, along with the Chair of the Kentucky IOLTA Fund, comprise the Executive Committee of the KBF. You can determine who your district representatives are by visiting the KBA website.¹⁵

Director

The success of the KBF is attributable to the tremendous efforts of the current and past boards and volunteers as well as to the efforts of the KBF’s staff. Prior to 1990, the KBF staff consisted only of volunteers. Since 1990, the KBF has had

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an executive director and staff assistance, and within the past four years created a Program Manager Position.¹⁶ The current Executive Director, Todd S. Horstmeyer, is also the Director of the IOLTA Fund and, according to Gary Sergeant, "has done a yeoman's job in getting the KBF to the position it is in today." Mr. Horstmeyer's primary functions are the management and supervision of the day-to-day activities and operations of the Foundation, fundraising, coordinating new programs and projects, as well as "all other duties as may be assigned." He can be contacted directly at the KBF office and can be seen around the state at the District Bar Meetings in the fall and the KBA Convention each summer.

THE KBF IOLTA RELATIONSHIP *Separate Programs*

The KBF and IOLTA are related because both serve charitable roles for the KBA. IOLTA is organized under the KBF for tax purposes; however, the two entities have somewhat different goals. The purpose of the IOLTA Fund is to provide legal aid to the poor, to provide student loans, to improve the administration of justice, and to fund other programs for the benefit of the public with exclusively public purposes.¹⁷ While IOLTA's mission is similar to the KBF's mission, IOLTA's focus is on providing civil legal services to the indigent people of Kentucky. The two entities have coordinated past efforts to avoid duplication. The differences in missions will continue to become more evident upon the awarding of future grants by each entity.

IOLTA HISTORY

IOLTA was established in Kentucky on July 1, 1986, by Supreme Court Rule 3.830 and is funded by interest from lawyers' trust accounts. Before 1986, many attorneys pooled trust account funds for their clients because they were either too small to set up as separate checking accounts or the funds were to be held for only a short period of time. These funds typically did not earn interest because banking rules at that time did not permit checking accounts to earn interest. Furthermore, the rules of ethics barred attorneys from deriving any

financial benefit from client funds. When Congress changed the banking laws to permit checking accounts to earn interest,¹⁸ state supreme courts enacted rules permitting, and in some cases requiring, attorneys to place trust funds into interest-bearing checking accounts, provided the interest was donated to the respective state IOLTA funds. This new source of charitable funding was challenged in *Brown v. Legal Foundation of Washington*,¹⁹ as an unlawful taking in violation of the Fifth Amendment to the United States Constitution. However, in a 5-4 decision the United States Supreme Court ruled that even if state restrictions on interest received on client funds constituted a taking, it was for a valid public use and therefore the amount of just compensation due was zero.

The KBA Board of Governors, subject to approval by the Kentucky Supreme Court, appoints ten KBA members to serve as a Board of Trustees for IOLTA.²⁰ At least annually, these trustees are to award grants of funds, again subject to approval by the Kentucky Supreme Court, for any of the charitable and exclusively public purposes stated in the Supreme Court Rule.²¹

Kentucky IOLTA funding far exceeds that of the KBF. In the 2006 grant year, IOLTA awarded \$1,357,000.²² Grants were given to Appalachian Research and Defense Fund of Kentucky, Inc., Kentucky Legal Aid, Legal Aid of the Bluegrass, and the Legal Aid Society of Louisville. IOLTA also funded grants for local bar association pro bono programs, including Bowling Green Lawyers Care Pro Bono Program, Boyd and Greenup/Lewis County Bar Associations, Fayette County Bar Association Pro Bono Program, Inc., Louisville Pro Bono Consortium and Northern Kentucky Volunteer Lawyers, Inc. Additionally, IOLTA funded three public service fellowships for each law school in the amount of \$25,000 and provided other grants for legal services type programs. IOLTA may also allow for a portion of up to 10% of its revenues to be allocated to its endowment, from which it may meet future contingency expenses or supplement its grant fund if this becomes necessary due to declining income.

CONTRIBUTING TO THE KENTUCKY BAR FOUNDATION

KBA members are automatically members of the KBF, as are the deans and faculty of the Commonwealth's accredited law schools; no financial contribution to the Foundation is required.²³ Members are asked, though, to contribute financially to the KBF when they receive their yearly KBA dues statements and through various other fund-raising methods.²⁴ The KBA annual dues statement provides an essentially pain-free opportunity to contribute \$25 a year as a Sustaining Member. This amount is much less than one hour of a typical private attorney's billable time and can be contributed in conjunction with payment of your KBA dues payment.

Another way to contribute is by becoming a Life Fellow. As indicated, the KBF's revitalization was made possible, in large part, by Charter Life Fellows who helped establish the endowment fund. Since then new Life Fellows have helped increase the fund by initially paying \$300 and then pledging a like amount for the next four years or by making a one-time payment of \$1,250. All contributions are tax-deductible. The KBF also provides an opportunity for attorneys to contribute money in memory of or in tribute to colleagues who have engaged in the practice of law with intelligence, honesty, fairness, skill, and the avid pursuit of justice. Posthumous Life Fellow Memberships can recognize members of the bar for their lifetime contributions to the administration of justice upon a payment to the Foundation in a lump sum of \$1,250.

Another form of giving and recognition is contributing through the Partners for Justice Society in amounts varying from \$5,000 to \$50,000. The Partners for Justice are recognized for contributing at various donation levels which are named after Kentuckians who have contributed to the nation's legal system. The highest level of recognition as a Partner for Justice is the Chief Justice Fred Vinson Circle²⁵ which recognizes individuals or firms that have contributed \$50,000 or more. The KBF recognizes Meredith L. Lawrence from Warsaw,

Kentucky, as the only current member of this circle.

CONCLUSION

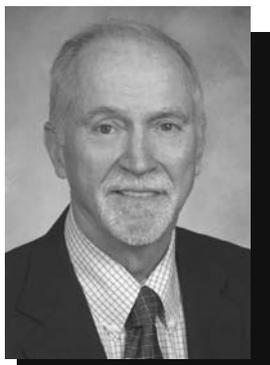
The KBF will celebrate its fiftieth anniversary on May 29, 2008. Through the passion and tireless efforts over these years of its countless volunteers and staff, the KBF has experienced tremendous growth with a projected endowment reaching \$3,000,000 by 2008. Through support of the KBF, each member of the bar can promote the administration of justice. This will, in turn, improve the overall reputation of our profession. ■

ENDNOTES

1. See Ky. Rev. Stat. Ann. § 209.180.
2. The Kentucky Historical Society at <http://www.history.ky.gov> July 6, 2007.
3. Kentucky Bar Association, <http://www.kybar.org>. Inside KBA, Kentucky Bar Foundation, Grants.
4. Kentucky Bar Foundation, 514 West Main Street, Frankfort, Kentucky 40601-1812, 502-564-3795; 1-800-847-6582 (KY); thorstmeyer@kybar.org.
5. Kentucky Bar Foundation, 514 West Main Street, Frankfort, Kentucky 40601-1812, 502-564-3795; 1-800-847-6582 (KY); thorstmeyer@kybar.org.
6. Articles of Amendment of The Kentucky Bar Foundation, Inc., February 13, 1980.
7. Resolution Adopted by the Kentucky State Bar Association Regarding the Kentucky Bar Foundation and the Kentucky Bar Title Insurance Company at Lexington, May 1, 1958, and Minutes of Meeting of Members of Kentucky Bar Foundation, June 5, 1958.
8. See Ky. Sup. Ct. R. 3.830.
9. Articles of Amendment to the Restated Articles of Incorporation of The Kentucky Bar Foundation, Inc. filed January 13, 1986.
10. KBF Minutes, December 11, 1986.
11. KBF Minutes, June 12, 1987.
12. KBF Minutes, June 12, 1986.
13. KBF Minutes, March 9, 1989.
14. KBF Minutes, January 21, 2005; February 23, 2007.
15. Kentucky Bar Association, <http://www.kybar.org>. Inside KBA, Kentucky Bar Foundation, Board of Directors.
16. Until December 2004, the staff included Marilyn Soyars and Gwen McCall. Upon Marilyn Soyars' retirement, Gwen McCall was promoted to Program Manager and currently serves in that position.
17. Ky. Sup. Ct. R. 3.830(1)(C).
18. The Depository Institutions Deregulation and Monetary Control Act lifted ceilings on the interest rates that banks could offer their customers and authorized interest-bearing transaction accounts.
19. 538 U.S. 216 (2003).
20. Ky. Sup. Ct. R. 3.830 (1)(A).
21. Ky. Sup. Ct. R. 3.830 (1)(C).
22. KBA website. <http://www.kybar.org>. Inside KBA, IOLTA Fund, Grants. July 6, 2007.
23. Bylaws of The Kentucky Bar Foundation, Inc. Article 3.1 as amended through August, 2001.
24. This author has routinely declined to contribute monies in the past because (1) it was voluntary, (2) it took money out of her pocket, (3) she contributed to other worthy charitable organizations, and (4) she did not fully realize the impact lawyer contributions have and can make on the administration of justice in the Commonwealth. After speaking to all the individuals for background on this article, she will contribute in the future and hopes that some of you who read this article are similarly persuaded.
25. This highest level of giving is named for Fred Vinson the only native of Kentucky to serve as Chief Justice of the U.S. Supreme Court. Vinson graduated with a degree in law from Centre College.

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William G. Schneider, Jr. has been executive director of the Louisville Bar Foundation since 1995, and serves as a trustee for the National Conference

of Bar Foundations. He was executive director of the Louisville Bar Association from 1995-2000 and served as the University of Louisville Director of Development from 1986-1994. He is a Certified Fund Raising Executive (CFRE) and a member and former president of the Donors Forum of Louisville and the Greater Louisville Chapter of the Association of Fundraising Professionals. Mr. Schneider is a fund raising consultant and lectures on fund development practices at local and national seminars.

Louisville Bar Foundation

By William G. Schneider, Jr.

“Giving allows me to touch the lives of people I don’t even know, but whose lives I would like to help improve.”

— *L. Stanley Chauvin, Jr.*

The Louisville Bar Foundation, Inc. was incorporated in December 1981 for public, educational and charitable purposes by leaders of the Louisville Bar Association. Envisioned by its founders to be the “charitable arm” of the LBA, the original Articles of Incorporation set forth the following purposes for the Foundation:

- to advance and promote the administration of justice and an understanding of the law by encouraging and supporting traditional, innovative and broadened activities relating to continuing education of the practicing lawyer and the introduction of the law school graduate to the practice of law;
- To establish, support and conduct programs and activities designed to promote the public’s understanding of the law and the legal system and to promote a more effective delivery of legal services to the public at large;
- To conduct research, investigations and surveys of subjects, problems and publishing reports based upon the results thereof;
- To conduct or engage in any activities related to the acquisition or construction of a facility or facilities to house the activities of the Corporation and the Louisville Bar Association; and
- To conduct or engage in such other activities as are incidental and related to the aforesaid purposes.

The initial Board of Directors was a veritable *Who’s Who* of the Louisville legal community. It included past LBA Presidents L. Stanley Chauvin, Jr., Frank

P. Doheny, Jr., Larry B. Franklin, Frank E. Haddad, Jr., (Judge) Geoffrey P. Morris, George S. Schuhmann, and Col. Paul G. Tobin. Charles J. Cronan, Jr., A. Robert Doll, Robert C. Ewald, Edward H. Stopher, Rucker Todd and Charles I. Tucker rounded out the first Board roster.

Organized as a separate corporation, the LBF maintains formal ties to the LBA in several ways. The president and president-elect of the LBF serve as voting members of the LBA Board of Directors. The LBA president, president-elect and immediate past-president serve in similar capacities on the LBF Board. In addition, the LBA Board of Directors approves all appointments to the LBF Board and any amendments to the Foundation’s Articles of Incorporation and Bylaws.

Stan Chauvin, who also served as president of both the KBA and ABA, became the first president of the Foundation (1981-1983). Under his leadership, the LBF gained tax exempt status from the IRS as a 501(c)(3) charitable organization, and began raising capital. Initial fund raising for the LBF consisted of a \$30,000 contribution from the LBA and a voluntary dues “check-off” of \$10 collected by LBA from its members (which produced \$7,000 during the first year). In 1982, the LBF began a Fellows program, soliciting pledges of \$1,000 from LBA member attorneys.

THE FORMATIVE YEARS

A review of the minutes of LBF during its formative years shows that the organization’s leaders knew that raising funds was the key to fulfilling its philanthropic objectives. At the same time, the board members were dealing with the very practical aspects of deciding how the new foundation could assist the Louisville Bar Association, which at the time was working to meet the demands of its members. Topics of discussion by the LBF Board included the need to find a new home for the LBA that would have space for a Continuing Legal Education

center (prior to the approval of mandatory CLE by the Kentucky Supreme Court), funding the Judicial Evaluation (a public service project initiated several years earlier by the LBA) and a live call-a-lawyer program on public television.

It soon became clear to the Board of Directors that the Foundation would have to raise substantial funds in order to become an effective entity. The minutes of the January 24, 1984 meeting of the Louisville Bar Foundation contain the following brief, but direct statement: "Wilson Wyatt, Bob Doll and Larry Franklin will meet to form a comprehensive plan to come up with a million dollars." They almost made it. With the vision and determination of these individuals and many others who served on the LBF Board of Directors during its formative years, the Foundation succeeded in securing gifts and pledges of \$900,000 by mid-1987. Primary contributors were the large Louisville law firms, banks and other major corporations, and several charitable foundations. Numerous attorneys made individual gifts to the Fellows program as well.

The Foundation's leaders had the wisdom to deposit the contributions from the initial fund raising campaign into an endowment fund. Monies raised were placed in an account managed by the trust department of Louisville bank. The funds were invested according to a policy approved by the Board of Directors, and the decision was made to spend only a small percentage (usually 5%) of the endowment's market value on an annual basis. The goal was to grow the endowment over time by making prudent investments, thereby protecting against inflation, while continuing to fund projects that met the stated purposes.

PHILANTHROPIC PURPOSE REFINED

There have been many changes in the operation of the LBF during the past 25 years which were reflective of a maturing process for the Foundation and the growth of the LBA. In the early years, much of the activity of the Foundation was directed toward the operation of LBA programs, such as the provision of Continuing Legal Education, the Lawyer

Referral Service, and publication of the now-defunct *Louisville Lawyer* magazine. By 1989, following the successful completion of the fund raising campaign and a management study, the Foundation Board approved a reorganization "toward functions principally applicable to the acquisition of donations and the allocations of grants for charitable and educational purposes."

In 1994, the LBF Articles of Incorporation were formally amended to make the purpose of the Corporation:

- To provide for the delivery of legal services to the poor and indigent;
- To provide for the improvement of the judiciary by periodic evaluations and other means; and
- To provide for law related education.

These statements provide the basis for the Foundation's present day mission, and its grant-making process. Projects that seek grant funds must address at least one of the above purposes, and fulfill one or more of the following objectives:

- Projects that improve access to the legal system by persons of limited financial means and, if possible, produce a tangible product that can be distributed to the public.
- Projects that promote better access to legal information and improved perception of the justice system by minorities.

- Projects that improve the operation of, and public confidence in, the Jefferson County courts.
- Projects that provide public education about our legal system and promote a positive image of the legal profession.
- Projects that stimulate volunteer participation by Louisville area attorneys.

In 1987, the LBF made its first grant award of \$1,725 to fund the Tel-Law project, a series of tape recorded messages for the public about various aspects of the law that could be accessed by telephone. The following year, the Foundation made grants for four public service projects totaling \$25,000. From this modest entry into the role of grant-maker, the LBF increased both the number and the dollar amount of its annual grant awards.

LBF grants are made almost exclusively to organizations in Jefferson County. During the past 20 years, the many beneficiaries of LBF grants include the Court Appointed Special Advocate (CASA), YMCA Safe Places, Center for Women and Families, Louisville Tenants Association, Children First, The Family Place, Louisville and Jefferson County Public Defender, Legal Aid Society, St. John Center, Wayside Christian Mission, Wesley Community House, Exploited Children's Help Organization, Boy's Haven, University of Louisville Brandeis School of Law, Jefferson Family Court, and numerous others. As this article goes to press, the LBF has awarded more than 150 grants totaling \$1.5 million since its inception.

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RECENT FUND DEVELOPMENT SUCCESS

Following the initial fund raising campaign, the Foundation's endowment grew at a slower pace. The \$1,000,000 mark was reached in 1990, but active fund development was limited to the dues check-off for LBA members which produced contributions of approximately \$20,000 annually. A favorable stock market fueled an increase in the LBF endowment during the later half of the 1990s, but the economic downturn starting in 2000 led to a substantial reduction in the fund.

At the end of 2003, the LBF endowment had a market value of \$1.6 million. The following year, the Foundation announced a campaign to raise an additional \$500,000 in endowment funds during the proceeding five years. Because it had been almost 20 years since the LBF conducted a major campaign to raise endowment funds, the Board of Directors determined that it was time for the current generation of lawyers to show its support for building a stronger and more effective Louisville Bar Foundation.

The campaign was initiated by past LBF Presidents Jeffrey E. Wallace and Ivan M. Diamond, and was chaired by Michael R. Hance, who served as LBF President in 2006. Through their leadership, and with the assistance of many other members of the Board, gift commitments of more than \$320,000 have been secured from 15 firms in Louisville. As part of the campaign, the LBF Fellows Program was rejuvenated and numerous gifts and pledges of \$1,000 or more have

been made by individual attorneys.

Today, thanks to the generosity of many Louisville area law firms and attorneys, the endowment of the Louisville Bar Foundation has reached the \$2 million mark. This is an important milestone because it allows the LBF to make grants totaling at least \$100,000 annually. Annual operating funds for the Foundation are provided by LBA members through the optional dues check-off, which is now \$35. Approximately 40% of all LBA members make this voluntary gift. Law firms that have 100% participation by the members of their firms are recognized as "Foundation Partners."

By increasing the number and amount of grants awarded each year, the LBF will have a greater charitable impact and help improve the image of the legal profession throughout the community. Grants made by the LBF are made on behalf of all Louisville lawyers. The Foundation enables lawyers and their firms to accomplish collectively what they may not be able to do individually. In addition, many programs funded by the LBF provide volunteer opportunities for local lawyers.

More information about the Louisville Bar Foundation can be found on the LBA's website, www.loubar.org. Click on the Foundation's tab at the bottom left of the homepage. There you will find the LBF Mission Statement, the Board of Directors roster, a complete list of grants, grant-making guidelines, and a grant application form. You may also make a contribution to support the LBF or join the Fellows Program. ■

Louisville Bar Foundation Roster of Presidents

1981-1983 - L. Stanley Chauvin, Jr.

1984 - Larry B. Franklin

1985 - A. Robert Doll

1986 - Robert C. Ewald

1987 - James Apple

1988 - Alvin D. Wax

1989 - W. Cliff Travis

1990 - Lee E. Sitlinger

1991 - Daniel T. Goyette

1992 - Robert Stopher

1993 - Lucille Fannon

1994 - Joseph C. Oldham

1995 - Darryl W. Durham

1996 - Stephanie Smith

1997 - Kimberly K. Greene

1998 - Hiram Ely III

1999 - Creighton Mershon, Sr.

2000 - April A. Cain

2001 - Phyllis E. Florman

2002 - Olu A. Stevens

2003 - Jeffrey E. Wallace

2004 - Ivan M. Diamond

2005 - Elizabeth U. Mendel

2006 - Michael R. Hance

2007 - Robert M. Connolly

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Building a Strong Foundation

Fayette County Creates New Bar Foundation

By Steve Ruschell and Mindy Barfield

Following the lead of the Kentucky Bar Association and other local Bar Associations, the Fayette County Bar Association (hereinafter Association) investigated the formation of a foundation to carry out its charitable mission. In January 2005, the long-range goals of the Association were expanded to include investigation of such a foundation. In the Spring of 2005, the Bar Association appointed Steve Ruschell to chair an ad hoc formation committee to investigate the possibility. The ad hoc formation committee was expanded to include then President of the Fayette County Bar Association, Elizabeth Hughes, President-elect, Theresa Gilbert, Tandy Patrick, Jack Cunningham and Scott Benton.

After the members of the Formation Committee became convinced that the formation of a Foundation was in the best interest of the local bar, the Formation Committee began the first of several meetings with the Association Board to present the case for the formation of the Bar Foundation and to request the first pledge in the amount of \$400,000 from the Association. Looking back, the Formation Committee would have to say convincing the Association to make a commitment to the Foundation was the hardest sell. In November 2005, the Association authorized the formation of

this Foundation and committed a \$400,000 challenge pledge to the Foundation provided its Board received commitments for additional funds from Fayette County Bar members and firms, thus evidencing grass roots support for the Foundation.

In February of 2006, the Foundation was incorporated, the Formation Committee became the Foundation's Initial Board, and in July 2006, it received 501(c)(3) tax exempt status. The Foundation became a reality. Jack Cunningham of Frost Brown Todd and Sally Speilgavel were invaluable for their assistance in obtaining the Foundation tax exempt status.

The initial Board then set out to raise funds in order to meet the Bar Association challenge and to ensure the future success of the Foundation. The first efforts were to solicit firms to become Founding Firms of the Foundation. Although raising funds is normally akin to a visit to the dentist's office, the Foundation Board found that fund-raising for this Foundation has been an uplifting and positive experience. The response has been overwhelmingly positive, with every firm solicited having committed to become a Founding Firm. The Founding Firms represent a commitment of over 500 attorneys supporting the Foundation. Founding Firms have committed to con-



Stephen M. Ruschell is the chairman of the Fayette County Bar Foundation and a partner practicing with Stites & Harbison. He graduated from the University of Kentucky

with a B.B.A. in 1971 and received his J.D. in 1974. Mr. Ruschell focuses his practice in the areas of real estate, business and land use planning.



Mindy G. Barfield is chairman of the Fayette County Bar Foundation Grants Committee, is a partner with Dinsmore & Shohl, and practices in Lexington. She

graduated from Transylvania University in 1985, received her M.A. from George Washington University in 1988, and earned her J.D. from the University of Kentucky College of Law in 1993.

Ms. Barfield focuses her practice in the areas of complex commercial litigation, insurance bad faith and coverage, and employment litigation. She is affiliated with and serves on a number of boards in Lexington. Ms. Barfield is the incoming secretary of the board of the Fayette County Bar Association, a member of the Fayette Urban County Government Civil Service Commission, and the president of the board of directors of God's Pantry.

tributions of \$500 for each of its attorneys, payable over five years. Each Founding Firm has a member on the expanded Foundation Board. The Foundation Board has now initiated its Founding Fellows program and already 40 attorneys have answered the call since the announcement of the program at the Annual Bar Association Law Day on May 1st. To date, including the Bar Association \$400,000 commitment, the Foundation has raised \$710,000 with \$270,000 coming from the Founding Firms and \$40,000 from Founding Fellows.

The Grants Policy

The purpose of any Foundation is to make grants for worthy projects and endeavors, and the Fayette County Bar Foundation is no different. Early in its history, the Foundation formed a grants committee from among its members. The Grants Committee, in turn, was called upon to draft a Grants Policy for ultimate approval by the Foundation Board of Directors. After seeking guidance from the policies of both the Kentucky Bar Foundation and the Louisville Bar Foundation, a Grants Policy was created and was adopted by the Fayette County Bar Foundation in January 2006. Relevant parts of that policy are reprinted below:

Funding Priorities

The Fayette County Bar Foundation will accept grant applications for projects that address the foundation's mission and fulfill one or more of the following objectives:

- Projects that improve access to the legal system by persons of limited financial means.
- Projects that promote better access to legal information and the improved perception of the justice system by minorities.
- Projects that improve the operation of, and public confidence in, the Fayette County courts.
- Projects that provide public education about our legal system and promote a positive image of the legal profession.
- Projects that stimulate volunteer participation by Fayette County area attorneys.

Eligible Applicants

Grant applications will be accepted for organizations that are recognized by the IRS as tax-exempt under section 501(c)(3) of the Internal Revenue Code or similar exempt organizations. Grants will not be made to individuals.

Grant applications must be "sponsored" by an attorney who is a current member of the Fayette County Bar Association.

The sponsoring attorney must agree to be an active volunteer participant in the project.

Ineligible Projects

Absent extraordinary circumstances, the Foundation will not fund grant requests for capital construction projects or endowment campaigns, nor does it purchase tickets or sponsorships for charitable dinners, golf tournaments or other special events, regardless of the nature of the work of the requesting organization.

While the Foundation will consider requests by eligible organizations for multi-year funding, selecting such an organization for such a grant will be the exception and not the rule.

Criteria for Selection

Grant applications will be evaluated based on the following criteria:

Does the project meet our eligibility requirements?

Is the project law-related? While the Foundation will consider grant applications which are not strictly law-related as long as they fulfill one of our listed objectives, those which are law-related will receive a priority.

How significant is the scope and impact of the project? How many people will the project reach or serve, and can the impact of those served be measured or tracked?

Does the proposal include a clear, detailed plan of action for implementation of the project within the time frame allowed?

Does the applicant have other sources of funding? The Foundation is inclined to make grants to stable organizations with other funding sources, as it is more likely that the money will have the desired impact and fulfill our objectives.

Will the project generate or encourage significant volunteer activity by attorneys?

Is this project part of a "bigger story"? Will it catch the attention of the bar or the public, or does it advance a significant issue within the legal community?

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Grant Application Process

Grant applicants must use the Fayette County Bar Foundation form and will be accepted at any time. Applications should be accompanied by: 1) a letter of endorsement from the sponsoring FCBA attorney; 2) a project budget; 3) if applicable, copies of the audited or unaudited financial statements of the applicant organization; and 4) a roster of the Board of Directors of the organization. The Foundation will acknowledge in writing the receipt of each application.

If the application meets the minimum requirements established by the Foundation, the application will be reviewed by the Grants Committee. Applicants may be contacted for additional information or a site visit. Based upon the review of the Grants Committee, a recommendation regarding funding will be made to the Fayette County Bar Foundation Board of Directors. The Board approves all grant awards. Notification of grant awards will be made in writing.

Grants will be awarded annually and announced each year by December 15th and announced at the subsequent Law Day banquet in May. Completed application packets must thus be received by September 15th each year to be eligible for a grant.

As one can see, there are several noteworthy criteria for grant eligibility. They include:

1. **Any grant application must be sponsored by a member of the Fayette County Bar Association and the sponsoring lawyer must agree to be an active volunteer in the project.**

The Fayette County Bar Foundation is intended to foster the involvement of lawyers in the Fayette County community and to raise the profile of the "citizen" lawyer. Lawyers are good citizens. Many know that already, but the Foundation believes that having lawyers directly involved in community projects will ensure the success of the mission of the Foundation.

2. **The projects for which grants are sought must fulfill a defined objective, but they do not necessarily need to be "law-related."**

To qualify for funding, the project must meet one or more of the defined objectives in the policy. Law-related projects will receive a priority when the Foundation makes granting decisions. However, because the Foundation also wants to stimulate volunteer participation by lawyers in the community, the Foundation will also consider projects which, while not related to the law, involve large numbers of our lawyers in doing good for the community.

3. **Projects Should Have a Detailed Budget or Plan of Action which Provides Accountability.**

Funding requests to the Fayette County Bar Foundation will have a better

chance of funding if they are accompanied by a detailed plan of action and implementation, and a method for measuring and tracking success and failure to meet project objectives.

4. **Does the Project Have the Potential For Having a Substantial Impact?**

The Foundation will consider any request meeting the eligibility requirements but, with a finite amount of funds to be awarded each year, the projects which stand the best chance of being funded are those that have the potential for making a big impact and serving many people and/or which provide a platform for lawyers to do good for our community.

Conclusion

The Foundation is entering its most exciting stage, making grants to community based applicants. Much has been accomplished, and much remains to be done. ■

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Building a Strong Foundation

Blueprint for the Formation of a Bar Foundation

By Jack R. Cunningham

Why Form a Bar Foundation within Your Community?

A Bar Foundation is an excellent vehicle by which to organize, manage, and invest funds in order to ensure that the legal community can most efficiently and effectively utilize the generous contributions it receives to benefit the community as a whole. Generally, a Bar Foundation is formed as a public charitable foundation established as the giving arm of a local bar association. Because of the substantial rewards that result from establishing a Bar Foundation, it is beneficial to explore the proper steps to take in forming a public charitable foundation and to further elaborate on the advantages of forming such a foundation as the charitable giving arm of a bar association.

Blueprint for Forming a Public Charitable Foundation as the Giving Arm of a Local Bar Association

(1) *Form a nonprofit Kentucky Corporation.* Pursuant to KRS 273.247, file Articles of Incorporation with the Secretary of State, giving proper indication that the corporation is to be not-for-profit and naming the initial directors of the corporation. Pursuant to KRS 273.248, the Articles may include a provision limiting the personal liability a director may have if found to have breached director or fiduciary duties.

(2) *Adopt bylaws and elect officers.* Pursuant to KRS 273.191 and KRS 273.257, after filing the Articles of Incorporation, call and hold an organizational meeting of the board of directors named in the Articles of Incorporation in order to adopt bylaws and elect initial officers. Bylaws should include sections on: the purposes for which the corporation is organized; the board of directors (election process, qualifications, terms, duties, quorum, etc.); the officers (types, duties, authority, etc.); the committees of the

board of directors (creation, types, duties, authority, etc.); the limitation of liability exposure of the directors, officers, and employees; dissolution; and amendments.

(3) *File for nonprofit, tax exempt status with the IRS.* Pursuant to Internal Revenue Code ("IRC") 501(c)(3), file Form 1023 in order to apply for determination as a tax exempt, public charitable foundation. Form 1023 requires the applicant to provide a narrative description of the organization's activities in order that the IRS may make a proper determination as to whether the organization is to be treated as a tax exempt public charitable foundation. For new entities there must be included income, expenses, and proposed grants distribution.

(4) *Establish committees.* Crucial to the success of a public charitable foundation is the establishment of committees to direct the foundation in its operations. A public charitable foundation will rarely have more than a few employees, so the committees established by the governing board of directors must be given a large amount of flexibility and control in their management of both the foundation and its investment portfolio in order to provide for the greatest opportunity for growth. Because a public charitable foundation will continue in perpetuity, it is particularly important that an investment committee is created to manage the funds of the foundation and establish long term investment goals. It is especially critical to establish an "investment policy" and a dedicated "spending policy."

(5) *Establish a "grants policy".* Once the structure of a public charitable foundation is intact and contributions have begun to come in, it is necessary to establish a policy that describes who is eligible to receive a grant, how one goes about applying for a grant, and how the governing board of directors or grants committee will prioritize grant applications received.



Jack R. Cunningham is a member of Frost Brown Todd LLC. He received a B.A. in 1968 from the University of Kentucky and earned his J.D. in 1973 from the University of Kentucky College of Law. Mr. Cunningham practices primarily in the areas of probate, estate planning, and trust administration in the firm's Lexington office.

Advantages to a Bar Association in Forming a Public Charitable Foundation

- (1) *The foundation lasts forever.*
Because an applicant will be establishing a public charitable foundation, in either the trust form or non-profit corporate form the rules against perpetuity do not apply if the trust form is used. Thus, if the foundation is properly managed, it can preserve perpetually the fund/corpus.
- (2) *Funds contributed to endowment and income earned from endowment are not taxable.* Because of its status under IRC 501(c)(3) as a public charitable foundation, neither the funds contributed to the foundation by donors nor the internal investment portfolio returns of the foundation are taxable to the foundation within certain strictly enforced guidelines.
- (3) *Donors to the foundation may receive the maximum tax deduction.*

Because of its status as a 501(c)(3) public charitable foundation, any donor who makes a contribution to the foundation may receive the maximum allowable deduction under the IRC for the individual's personal tax return.

- (4) *Establishing the foundation allows for the governing board of directors to make significant and prudent investments.* Pursuant to KRS 273.520, the governing board of directors of a public charitable foundation may establish a spending policy which incorporates the use of some of the capital appreciation of the discretionary endowed funds, subject to a maximum spending amount set at the historic dollar value of the endowment (value of the endowment fund at the time of original contribution to the endowment fund). Also, pursuant to KRS 273.540, the governing board of directors has broad discretion in

investing an endowed/institutional fund into whatever type of investment it deems appropriate for the long and short term benefit of the foundation. The board is held to the "prudent investor standard." Last, pursuant to KRS 273.560, all decisions made by the governing board of directors are subject to the standards of prudent fiduciary practice.

- (5) *Kentucky statutes benefit the management of foundation funds.* Public charitable foundations benefit significantly from the Kentucky Principal and Income Act in KRS 386.450 through KRS 386.504 and from the Kentucky Uniform Management of Institutional Funds Act in KRS 273.510 through KRS 273.580. These Acts allow the board of directors of foundations, through its committees, to maximize the growth of foundation funds by utilizing a portion of the appreciation for distribution purposes without penalizing the



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function of the grants, much as has happened with “personal unitrust” vehicles.

- (6) *The foundation provides an exclusive bar association entity dedicated to charitable activities, tax deductible fund raising, grant making, and fund/corpus preservation.* With the creation of a public charitable foundation to serve as the giving arm of a bar association, a bar association will reduce its workload and place the responsibility of raising and distributing funds for the benefit of the community into the hands of a separate, highly-capable organization.
- (7) *The foundation actively enhances the perception of the law and legal community within a bar association's community through both charitable giving and community service.* Probably the best advantage resulting from the establishment of a public charitable foundation as the giving arm of a bar association is that it will get more attorneys involved in planning and assisting with community activities and, in return, the legal profession will be better perceived by the community at large.

Please keep in mind the legal requirements that need to be met in order to create a public charitable foundation, mentioned in the steps above. This blueprint merely gives a “bullet-point outline” of the very involved process to be completed in order to create a tax-exempt Bar Foundation. If difficulties arise in your attempt at creating a Bar Foundation, feel free to reach out for help from sources within your legal community or local bar association.

The positive rewards realized as a result of the formation of a Bar Foundation as the giving arm of a local bar association make going through the steps required to create the foundation well worth the trouble. Not only will a bar association benefit from having a separate entity to deal with the responsibility of raising and distributing funds for the benefit of the community, but also the community will truly come to appreciate the hard work and dedication that members of the bar put forth in assisting in meeting community needs. ■

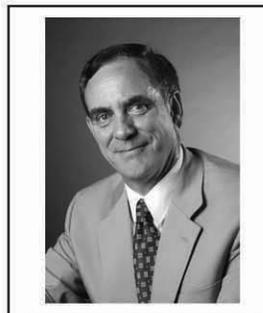
** The author wishes to thank Eric Weihe (May '08) University of Kentucky School of Law for his great assistance with this Article.*

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The Fairness in Construction Act

Balancing Owner-Contractor Interests in Commercial Construction

By Thos. H. Glover

The 2007 legislature has enacted the new Kentucky Fairness in Construction Act.¹ It is intended to provide prompt payment from project owners to commercial contractors for work performed under written contract, or at least according to a fixed time schedule. In that sense, it is a "Prompt Pay Act." Similar legislation has been enacted in approximately forty four (44) other states or territories. Kentucky is a bit late to the table, but may benefit from the experience of other states in implementing the changes to our state laws. Passage of the Act was not without opposition and it is likely to see future revisions.²

The Act reforms the law of contracts in Kentucky in several meaningful ways. Although most changes are intended to apply to this Act only, the courts may look to the intent of this legislation when interpreting contracts generally. First, some basic terms have been defined, which means their use as terms in construction contracts has been standardized. Second,

the new law prohibits selected contract provisions or conditions as against public policy. Those banned provisions had historically benefited project owners in their relationship with construction contractors. Third, by establishing time frames for compensation and interest for late payment, the right of commercial contractors to secure timely payment for their work has been strengthened. Amounts due but unpaid will earn interest at a default rate. Fourth, certain statutory terms will be read into all future commercial construction contracts, even if those terms are not contained in the actual contract language. Fifth, by extending the time for filing a lien on public projects, the right to security for payment for public construction has been reinforced.

Formerly these issues were left to arms length negotiations between owner and contractor. Because of real or perceived inequalities in the relative negotiating strengths of the parties, specific terms and conditions have now been either required or restricted. Although the effect on commercial construction is significant, the Act does not apply to all construction projects. It only pertains to commercial construction contracts, and does not apply either to public utilities which are regulated by the PSC or to residential construction.

DEFINITIONS: Certain terms are defined for use in this Act only.³ Many are interrelated so that some terms employ others in their definition. The term "construction" includes building, altering, repairing, or demolishing structures or making other improvements to realty. The term does not include maintenance or upkeep of existing structures, so

that building repairs are, by definition, not construction. An "owner" is a person with an ownership interest in realty, which probably means a property interest in fee. Presumably, the use of the term, "ownership interest" excludes the holder of a leasehold estate or an easement. The definition of a "contracting entity" broadly embraces both an owner and an owner's agent, and also includes a public entity. An owner's agent is not defined, and may include an employed site representative, an owner's construction superintendent, or an architect under contract.

"Disputed amount" and "undisputed amount" are each defined terms which one would assume are two sides of the same coin. However, "disputed amount" is defined as a process to question the validity of a request for payment, rather than as an amount on which there is a failure to agree as due. An "undisputed amount" is an acknowledgement by an entity owing money that a submitted payment request is due and owing. Strangely, both terms define a process instead of a condition. A verb rather than a noun. In practice this may cause confusion in attempting to strictly construe the statutory language.

The term "retainage," which is a commonly used term in the construction industry, is defined for the first time in the statutes. It refers to those contract funds earned by the contractor but withheld and unpaid by an owner to ensure proper and eventual performance. It is further and unnecessarily defined as a sum of money required to be paid upon the completion of all contract obligation, since most contracts require eventual payment of all sums due the contractor for



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satisfactory work. Again, the definition is strangely worded. To create an obligation for payment or statutory duty within the definition of a term is simply odd. Alternatively, it may be an indication either of drafting carelessness or of time constraints in the hurried process of creating and enacting this legislation.

“Subcontractor” utilizes most of the other statutorily defined terms in the Act in describing a person or entity performing construction work by contract with a contractor and not by contract with the contracting entity or owner.

While not defined until the body of the Act,⁴ “substantial performance” is a complex term which is commonly understood in the industry. It is statutorily defined as that stage of project completion when (a) all permits are obtained, (b) all warranties and documents have been given, and (c) the owner has beneficial use or occupancy of the building or project and may use the constructed project for its intended purposes. Substantial performance is to be construed strictly and its use in the Act triggers further duties and obligations of the parties.

VOID TERMS AND PERMITTED TERMS: Section two of the Act⁵ invalidates some commonly used contract provisions. Those prohibited terms are statutorily determined to be void and unenforceable as against public policy. The Act makes clear that certain other terms are permissible and encouraged.

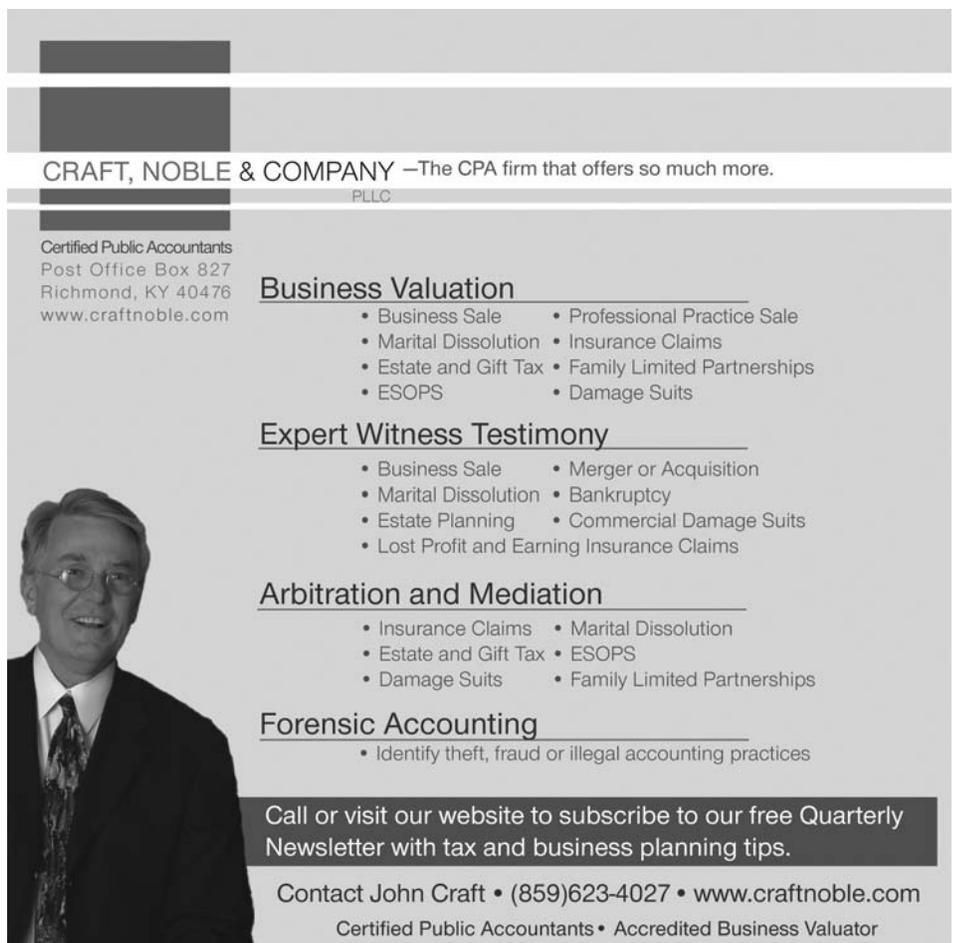
Void or unenforceable items include any waiver of the right to sue.⁶ A contractor can't waive the right to file suit to enforce its contract rights or to seek damages for breach. Excepted from this prohibition is an agreement to settle disputes by arbitration. Also excepted is the use of mediation as a prerequisite to suit or arbitration. Because arbitration or pre-mediation agreements are not included in the prohibition against a waiver of the right to sue, such alternative dispute resolution agreements are permitted. A waiver of the right to sue is therefore not simply voidable, so that the parties may change their minds on discovering that litigation is expensive. An agreement in the contract to waive the right to sue is void. The parties cannot agree to waive the right of one or both of them to seek their remedies in court.

Neither can a party waive the right to assert and file a materialman's or mechanic's lien under the lien statutes.⁷ Lien rights are non-waivable by statutory prohibition in the Act. The giving of a partial lien waiver in exchange for a progress payment is excepted from this prohibition. It seems this exception may be technically unnecessary since a partial waiver of lien is usually and typically given in exchange for the consideration of partial payment which fact would remove it from the effect of the prohibition anyway. The making of a partial payment extinguishes the right to assert a lien *protanto* by the act of payment. In other words, you can't assert a lien for a claim for which you have already been paid.

This doesn't mean that a party with lien rights cannot lose them by allowing them to lapse, for example. One who has rights under the lien statutes, KRS chapter 376, can lose them by neglect, by sitting on them and allowing the statutory time to expire without taking affirmative steps to assert those rights as provided in the statutes.

No-damage-for-delay clauses are also void.⁸ Commercial construction contracts routinely contain provisions that if the project is delayed for any reason or for a particular reason, the party harmed by the delay may not claim or recover damages. Such terms were meant to shift the burden of delay, postponements, suspensions, or work stoppage from the owner to the contractor, regardless of who was responsible for the delay. These terms were bargained for and bids were required to be increased to account for the possibility of the expense of unanticipated delay in the progress of the work. Ideally, an increase in the added price of a bid to account for risk of uncompensated delays will now be unnecessary. This change should tend to reduce a contractor's bid in proportion to the risk avoided.

Cautionary language in this subsection [.405(2)(c)] suggests that unanticipated bad weather will not automatically justify an excusable delay damage claim. In other words, a contractor won't be able to be routinely compensated for delay damages just because of bad weather. So a



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contractor may be stuck with the costs of bad weather delays even with this exclusion of the delay damage prohibition. The language also suggests that the apportioning of the costs of delay remains an equitable exercise, so that the parties responsible for delay will bear those expenses in proportion to the extent to which each caused the delay.

The Act's approval of damages for delay does not excuse a party who is contractually required to give notice of an interruption from the obligation to give that notice.⁹ Neither does the section prohibit a contract provision for liquidated damages,¹⁰ provided such damages are reasonable. Contract terms providing for liquidated or fixed damages that are contingent on a breach of terms are routinely used in commercial contracts because the process of calculating and determining actual damages is difficult and imprecise. If the parties can agree on what incremental damages would apply in the event of an adverse contingent occurrence, such as a daily amount that bears some relation to the damages that would actually flow from a breach, the courts will enforce their agreement. So the language of this subsection doesn't change the state of current law.

A tricky subsection suggests that a contract may specify which delay costs among those that are incurred are recoverable.¹¹ This implies that some delay costs may not be recoverable. This provision seems to suggest a way for an owner to reduce the loss of some anticipated expenses by contracting to diminish or limit the owner's obligation to reimburse those expenses and therefore shift some of the responsibility for the costs of delay back onto the contractor.

LIQUIDATED SUMS CARRY INTEREST: The spirit of the Act is embodied in the provision determining that interest will accrue on sums that are due but unpaid.¹² The interest rate is twelve (12%) percent. Payments not made within thirty (30) days of when they are due will accumulate interest. The fact that interest is statutory may remove the discretion courts may exercise when assessing interest, even on fixed amounts due. The tricky part, of course, is that the amount must be undisputed. If the

amount claimed is disputed, interest won't run until the parties agree that it is due. It is not clear if this will provide owners an avenue to avoid the payment of interest at all.

Procedural requirements restrict the contractor's right to interest. For interest to begin to accumulate on a missed or delayed payment the contractor must send, by certified mail, a notice that the amount is due. Such notice must be given twenty five (25) days after the amount had been requested by the contractor in writing. If the contractor doesn't send the notice that the amount is due, the owner does not have to pay interest. Two mailings are required: one to claim the amount, and one 25 days later warning that interest is about to start.

Schools have special time periods which are generally half again longer than the typical notice rule. A postsecondary institution or board of education has forty five (45) days to make payments for amounts due.¹³ It isn't obvious whether the 25 day notice applies to contractors working for schools before interest on amounts due begins to run, so the notice that interest is about to start should be given on school construction projects until the statute is made clear.

FLOW DOWN DUTIES: A contractor's obligation to pay its subcontractors and suppliers is commensurate with the owner's obligation to pay contractors. Subs are required to be paid within fifteen (15) days of the contractor's receipt of funds from the owner.¹⁴ So when the contractor is paid, it has 15 days to pay its subs and suppliers. The threat of interest drives payment in this relationship also. If a sub or supplier is not paid within the required 15 day period, interest begins to run on the sixteenth (16th) day.¹⁵

No warning notice is required to be given by the sub or supplier that interest is about to start. Payment to the contractor starts the clock on the contractor's obligation to pay its subs. Subcontractors and suppliers will therefore be interested in exactly when a contractor is paid so they can calculate when their own payment is due. However, just as a contractor is required to actually make a request for payment from the owner, so a subcontractor is required to request payment from

the contractor before the interest provision takes effect.

Second and third tier subs and suppliers are also covered by these prompt pay provisions.¹⁶ The payment of retainage at substantial completion is also covered by the same schedule as explained below.

RETAINAGE: The Act incorporates the spirit and requirements of many of the AIA Document A201 provisions. How and when to hold retainage is one of those requirements. The contract for construction may provide that no more than ten (10%) percent of earned contract funds may be withheld by the owner on behalf of the contractor as security for the completion of the work.¹⁷ When the work is half complete, the Act provides that retainage is reduced to five (5%) percent for the remainder of the project. It should be noted that the funds being held as retainage are monies already earned by the contractor but unpaid. It's the contractor's money. Current statutes require those funds to be held in an interest bearing account.¹⁸ The contractor also has the statutory duty¹⁹ to spend the money received from an owner or contracting entity to satisfy the obligations on that project and not some other project on which he currently owes money.

Substantial completion is a defined term as discussed above. The requirements of KRS 371.410(2) give legs to that definition. When the project reaches substantial completion, the owner's agent determines the cost to complete the work. The owner is then permitted to withhold twice that amount from the retainage already held until the project is finally and fully complete. That withheld amount is to give the contractor inducement for the actual completion of the work. Presumably, that amount of retainage which is not withheld pending final completion is paid to the contractor at substantial completion. The contractor then becomes obligated to pay its suppliers, its subs, and sub-subs, down the line. If the architect is to be the owner's agent, then language of the AIA document B141 may need to be revised or amended to define the duty to calculate the cost to complete as a contract administration function.

Substantial completion also initiates the requirement for creating a completion

schedule. The parties who are to perform any work necessary for the completion of the project must agree to the schedule. Those subs whose work is completed need not participate in the creation of such agenda. The schedule is only generated by and for those who must perform work toward completion. This subsection [.410(2)] does not give any time table for the creation of this schedule, but it is reasonable to assume that since all parties have skin in the process, they will not drag their feet. The contractor's earned retainage is now being held at 200% (twice the cost to complete) rather than at 10% or 5%, so sufficient motivation exists for all to agree to a prompt schedule to complete the remaining work. The subs and suppliers faced with the same proportionate increase in retainage have a similar incentive to schedule a timely completion. The owner which will not get to close out the project without final completion is equally financially encouraged. It is probably not unintentional that the 200% figure coincides with the amount required to bond off a mechanic's

lien in KRS 376.100.

In keeping with the spirit of the Act to encourage prompt payment of monies due, the failure to pay retainage when due starts the process of accruing interest at the default rate when that payment becomes overdue.²⁰

BAD FAITH: Costs and attorneys fees shall be awarded for bad faith.²¹ While that may be the stated general rule in an action to enforce the Act, certain conditions, restrictions and limitations make an award of such expenses remote. The court or arbitration panel must first find that a party acted in bad faith. The requirement to make such a finding may factually limit the effect of the rule. The obligation to award costs and fees is mandatory upon a finding of bad faith and is not simply discretionary. So, the judge or arbitrator²² must find as fact that a party acted without just cause, with the intent to deceive or misrepresent, or with a sinister or fraudulent motive. In other words, a party acted in bad faith. If costs and fees were not made mandatory by the Act, a judge or panel could make such a

finding as a punishment in name only without a follow up award of costs and fees. But the fact that an award of costs and fees must be made as a result of such a finding will make judges and arbitrators hesitant to determine that active misrepresentation or fraud has occurred. Reasonable attorney fees are \$125 an hour for public contracts. Venue for an action to enforce any provision of the Act will be in Kentucky courts.

Although bad faith is not defined, a substantial case history has developed in connection with decisions under the Unfair Claims Settlement Practices Act²³ and one is advised to consult the annotations of that body of law for further assistance on how the courts might apply the language in this section of this Act.

TIME FOR LIENS EXTENDED: Private Liens - Existing lien law requires one who has supplied labor or materials for an improvement to give notice, if required, and file with the county clerk's office, a statement of lien against the real property where the work was performed or materials supplied. The lien statement

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must be filed within six months from the last material supplied or labor performed. If the requirements of the statute²⁴ are followed, a right to lien will attach to the realty which was improved by the lien claimant's work. The recorded statement is notice to the world that a lien has attached.

One new subsection of the Act extends the time for a contractor to file its lien until it has a judgment on its claim.²⁵ The interpretation of this section may give courts and litigators the most trouble of all of the Act's provisions. It only applies to liens on private property and will change the dynamic of owner-contractor relations. It means a lien is now a remedy of last resort rather than one of first resort. A contractor may now sue for breach of contract for non payment before it must pursue its lien rights by statute. Prior to the enactment of this section, a lien holder was wise to pursue both remedies at once. Now it may wait until its contract rights are adjudicated before seeking to enforce its lien. The apparent danger is that if the contractor loses its breach of contract suit against the owner, and is not awarded judgment, its lien rights will have expired and been extinguished under KRS 376. But, if a contractor cannot prevail on its breach of contract suit on the merits, it cannot win its claim for lien.

However, since no mention is made of a supplier or subcontractor's rights having been extended²⁶, the provisions of KRS 371.420(2) only apply to contractors and so do not apply to subs or suppliers. Therefore, not all lien rights are extended until after judgment. A subcontractor or material supplier must continue to abide by the time limits in KRS 376.010 et seq for giving notice of its intent to file a lien, filing its statement, perfecting and enforcing its lien. But since a sub or supplier must give notice of its lien intent, and since a contractor with extended lien rights usually has the duty to keep the owner's property lien free, there will be contractual ways for contractors and subs to outmaneuver this omission.

Neither does the extension of the time for a contractor to file a lien extend the time for a sub or supplier to file a claim on a performance or payment bond. The

time for making a claim against a construction bond is typically governed by the language of the bond rather than by statute, and may be enforceably shorter than the statutory time for filing a lien.²⁷

Public Liens – Since a lien cannot attach to public property, a claim for lien for work on a public project attaches to the contract funds rather than the real estate.²⁸ The public lien statutes required shorter notice and filing times than for private liens. Under the Act, the time for filing a public lien has also been extended.²⁹ A lien statement must be filed with the county clerk where the project is located within sixty (60) days after the last day of the month when labor was performed, or materials supplied, or by the date of substantial completion, whichever is later. The time for filing a public works lien is therefore extended from the time the contractor finishes its work until permits are obtained, warranties exchanged, and the owner has the use and benefit of the building.³⁰ This change applies equally to contractors, subcontractors and suppliers.

Since the date of substantial completion of a public project is dependant on several factual occurrences and is neither fixed nor easily calculated, and since lien statutes are to be strictly construed, proof of the actual date for filing compliance on a public project may be problematic.

Because the time to file a lien has been extended for both public and private projects, most of the changes in legal strategies will apply to both. However these lien law changes do not relieve the labor or material provider from the ultimate requirement of proving its equitable claim. But because liens disrupt a commercial construction project unless or until the claim is paid or the lien bonded off, the owner may have some relief from the burden that a contractor file its lien while the job is still in progress.

CONCLUSION: The Fairness in Construction Act may offer perceived assistance to contractors in the form of prompt pay provisions to be read into commercial contracts. It may also actually promote prompt payment by the threat of interest on unpaid amounts. The exclusion of forbidden terms such as no-dam-

age-for-delay clauses, waiver of the rights to sue or to claim and perfect liens will also give contractors additional leverage in negotiating commercial contract terms and conditions with project owners. ■

ENDNOTES

1. It is codified in KRS 371.400 et seq and amends KRS 376.230.
2. Because the act was strongly opposed, it may be back on the legislative agenda.
3. KRS 371.400
4. KRS 371.410(2)
5. KRS 371.405
6. KRS 371.405(2)(a)
7. KRS 371.405(2)(b)
8. KRS 371.405(2)(c)
9. KRS 371.405(3)(b)
10. KRS 371.405(3)(c)
11. KRS 371.405(3)(e)
12. KRS 371.405(5) and (6)
13. KRS 371.405(7)
14. KRS 371.405(8)
15. KRS 371.405(9)
16. KRS 371.405(10)
17. KRS 371.410(1)
18. KRS 371.160 only applies to contracts of half a million dollars or more.
19. KRS 376.070
20. KRS 371.410(3) maintains the 12% rate.
21. KRS 371.415
22. See the state arbitration act in KRS 417.
23. KRS 304.12-230
24. KRS 376.010 et seq
25. KRS 471.420(2) extends the time to file a private lien under KRS 376.
26. By definition, KRS 371.400, a sub or supplier is not a contractor.
27. Johnson v. Calvert Fire Ins., Ky., 183 S.W.2d 941 (1944) and Burlew v. Fid. & Cas. Co. of N.Y., 64 F.2d 976 (6th Cir. 1933) 122 S.W.2d 990 (Ky., 1938). See also 6 ALR3d 1197.
28. See KRS 376.210 et seq
29. KRS 376.230
30. Although KRS 371.410(2) limits the definition of "substantial completion" to that subsection, there is no other definition of the term known to the author in the statutes. However, it is typically defined in public contracts.

Recent Amendments to Kentucky Business Entity Laws

By Thomas E. Rutledge

The 2007 amendments to Kentucky's various business entity statutes serve primarily to reconcile and clarify the various acts. The effective date of most provisions of H.B. 334 was June 26, 2007.

The Contingency of the 2002 Amendments to the Business Corporation Act

In anticipation of the deletion of sections 190, 191, 192, 193, 194, 195, 198, 200, 202, 203, 205, 207, and 208 of the Kentucky Constitution, amendments to KRS §§ 271B.6-210, 271B.6-230, 271B.7-040, 271B.7-280, and 271B.8-080 were proposed to and approved by the 2002 General Assembly, each contingent upon the amendment of the Kentucky Constitution. Unfortunately, these provisions became trapped in something of a time warp. Senate Bill 121, containing the 2002 KyBCA amendments, stated that these provisions would be effective if that series of thirteen provisions of the Kentucky Constitution were deleted by the voters. However, it was not until later in the session that the two chambers reached agreement on the proposed amendments to the Kentucky Constitution. By that time, the proposal had been

modified, and the voters were not asked to delete sections 195 or 205 of the Kentucky Constitution, two sections that had been listed in section 22 of S.B. 121. In the end, the voters did approve the amendment of the Kentucky Constitution through the deletion of the eleven provisions. In response to this discrepancy, the Reviser of the Statutes determined there to exist a "contingency" with respect to whether these statutory provisions had been amended.¹

A new and non-codified section provides that the amendments to KRS §§ 271B.6-210, 271B.6-230, 271B.7-040, 271B.7-280, and 271B.8-080 as set forth in 2002 SB 121 were effective as of the amendment of the Kentucky Constitution by the voters in 2002.²

Names of Business Entities

The single largest group of amendments made in 2007 deal with business entity names. One significant problem has been inconsistent standards for name distinguishability. The various acts have been made consistent by adding to each act a defined term "name of record with the Secretary of State,"³ being a real,⁴ fictitious, reserved, registered or assumed name of an entity, and requiring that distinguishability be determined against each "name of record with the Secretary of State."⁵

Reserved names have been made renewable for additional periods of 120 days,⁶ and a registered name may be cancelled prior to its expiration.⁷

Statements in the KyBCA, the KyLLCA, the Nonprofit Corporation Act and elsewhere to the effect that the chapter in question does not govern "fictitious" names have been revised to properly refer to "assumed" names.⁸

The provision in the PSC Act permitting a PSC to use a name containing the name of a shareholder even if that name is not distinguishable has been eliminated.⁹ The limitation on the use of "cooperative" in a business entity name has been clarified.¹⁰ Similar additions have been made with respect to the use of "rural electric cooperative" in a business entity name.¹¹

The Kentucky Revised Uniform Partnership Act (2006) and the Kentucky Uniform Limited Partnership Act (2006)

The repeal of Kentucky's old partnership and limited partnership acts has itself been repealed,¹² and those old laws will mostly remain on the books. Those provisions of KyRULPA addressing the qualification of foreign limited partnerships to transact business¹³ have been repealed,¹⁴ and the provisions of the LLP amendments to KyUPA allowing foreign LLPs to qualify¹⁵ have been likewise repealed.¹⁶ From January 1, 2008, all foreign limited partnerships seeking to qualify to transact business in Kentucky must comply with the requirements of KyULPA,¹⁷ and foreign LLPs seeking to qualify to transact business must comply with the requirements of KyRUPA.¹⁸

The Business Trust Act

The Business Trust Act has been significantly expanded to address names,¹⁹ registered office and agent,²⁰ foreign qualification,²¹ annual reports,²² and the internal affairs doctrine.²³

Inspection Rights

Notwithstanding having received a certificate of authority, the law of the jurisdiction of incorporation governs the



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“internal affairs” of a foreign corporation.²⁴ Language has been added to several acts to make express that the right of inspection against a foreign business entity will be determined by reference to the laws of the jurisdiction of organization of that foreign business entity.²⁵ The LLC Act now expressly permits a written operating agreement to impose reasonable limitations upon a member’s use of the LLC’s records and information.²⁶

Preserving Limited Liability Subsequent to Dissolution

In *Forleo v. American Products of Kentucky, Inc.*,²⁷ the Kentucky Court of Appeals held that corporate shareholders may be personally liable for debts and obligations of a corporation incurred after administrative dissolution.

In the *Forleo* case, a corporation was administratively dissolved. However, notwithstanding that dissolution, the shareholders, who were also the officers and directors of the corporation, continued to carry on an active business. Certain suppliers were not paid, and those suppliers brought suit against the corporation and its shareholders seeking payment. The Court held that the shareholders were personally liable on the debt to the supplier. Thereafter, the administrative dissolution of the corporation was cured and the corporation was reinstated. On the basis that the cure related back to the original administrative dissolution, the shareholders sought to have set aside the judgment against them. The Court of Appeals, while acknowledging that the cure of the administrative dissolution did relate back to the original dissolution, still held that the actions undertaken during the period of administrative dissolution, because they were outside the scope of those necessary or appropriate for the winding up and termination of the corporation, were not protected by the limited liability shield. Rather, because the corporation had acted outside of its legal authorization, the shareholders would be liable upon those debts. This ruling is subject to a number of criticisms, and in consequence amendments have been made to the KyBCA as well as other acts of preclude this result in the future.²⁸

The Notice Effect of the Articles of Organization

As originally enacted, the KyLLCA did not address the notice effect of the Articles of Organization.²⁹ However, the notice effect of the member- or manager-manager election in the articles of organization is implied.³⁰ Under the amended act, the articles of organization are notice of the formation of the LLC, of the information set forth in response to the mandatory requirements of KRS § 275.025(1), including whether it is member- or manager-managed, whether it is a professional LLC, and whether it is a non-profit LLC.³¹ Other statements made in the articles do not, by filing, give notice. Still, one acting as an agent for an LLC must properly identify that principal in order to avoid personal liability on the obligations undertaken on its behalf.³²

Modification of Rules for Dissolution of LLCs, Succession in Single Member LLCs

The modification of KRS § 275.285(2) serves to (a) require that the departure from the default rule be in a written operating agreement and (b) provide a default rule of unanimous (as contrasted with majority-in-interest) approval of the members to voluntarily dissolve an LLC. Requiring unanimity among the members to voluntarily dissolve the LLC (unless they have elected a lower threshold in the operating agreement) has benefits when determining appropriate discounts for federal estate and gift taxation.³³

An LLC must have at least one member.³⁴ Under the amended act, upon the dissociation of the last member, the LLC will not be dissolved if:

- a succession mechanism set forth in a written operating agreement is satisfied; or
- the successor-in-interest of the last remaining member determines to continue the LLC.³⁵

Durational Limits of Corporation and LLCs

A corporation, upon reaching the maximum duration set forth in its articles of incorporation, is treated as having been administratively dissolved.³⁶ Under the amended KyBCA, the Secretary of State will notify the corporation of the adminis-

trative dissolution,³⁷ and the corporation is afforded a sixty-day window within which to amend its articles of incorporation to extend or delete the period of duration.³⁸ The extension or deletion of the period of duration will relate back and will cure the administrative dissolution. After the sixty day period the corporation may not amend its articles and must proceed to wind-up and dissolve.

The KyLLCA did not address any mechanism for cure of the consequences of an LLC having reached its date of dissolution.³⁹ Under the revised act, reaching the end of an LLC’s duration is treated as an administrative dissolution with notice and cure similar to that now in place for corporations.⁴⁰

Dissenters’ Rights in LLC

Dissenters rights do not exist at common law.⁴¹ Several states provide for corporate-style dissenters rights in their LLC Acts; Kentucky does not. Amendments to the KyLLCA expressly provide that absent a provision giving members dissenter’s rights, members have no such rights.⁴²

Pledges of LLC Interest

An addition to the KyLLCA serves to preempt KRS §§ 355.9-406 and 355.9-408, which may be interpreted to preempt limitations upon pledges of LLC membership interests contained in a written operating agreement.⁴³

Not-for-Profit LLCs

An entirely new series of provisions applies to non-profit LLCs, defined as those formed for a non-profit purpose,⁴⁴ with that definition coming from the non-profit corporation act. Although, in the course of its initial drafting, it was not contemplated that an LLC could be formed for a non-profit purpose, the KyLLCA does not contain an express requirement of a for-profit purpose.⁴⁵ In *Mercy Regional Emergency Medical System, LLC v. John Y. Brown, III* it was held that an LLC need not have a for-profit purpose.⁴⁶ Still, a non-profit LLC was not subject to the substantive limitations imposed upon non-profit corporations. With these additions, a non-profit LLC will be subject to a variety of limitations equivalent to those to which non-profit corporations are subject. Under these

provisions, a non-profit LLC may not:

- issue membership interests;
- issue dividends or distribute its income to its members or managers;
- make loans to its members or managers;
- merge other than with a non-profit LLC; or
- distribute its assets other than as provided by statute.⁴⁷

These amendments:

- acknowledge that LLCs may be organized for non-profit purposes, while requiring that such non-profit LLCs be subject to special requirements;
- add definitions of a “non-profit limited liability company” and “non-profit purpose” to the table of definitions used in the KyLLCA, which definitions have been adopted from the KyNPCA;
- require non-profit LLCs to set forth their non-profit purpose in the articles of organization and prevent subsequent deletion of that statement of purpose; and
- recite the limitations upon distributions by non-profit LLCs.⁴⁸

Conversions

A new series of provisions permit a business corporation to convert into a LLC. The approval of a conversion requires the consent of a majority of the board of directors and a majority of the shareholders and, if there is class voting, a majority of each class.⁴⁹ Dissenter rights will apply in the event of a conversion of a corporation into an LLC.⁵⁰ No provision permits an LLC to convert into a corporation, and this provision allowing the conversion into an LLC is limited to business, and does not include non-profit, corporations. The LLC resulting from the conversion is the same entity that existed before the conversion.⁵¹

The provision addressing the conversion of either a general or a limited partnership into an LLC have been simplified by providing for the automatic cancellation of LLP elections and certificates of limited partnership as part of the conversion.⁵² Certificates of assumed name of the predecessor entity need not be cancelled as they may now become assumed names of the successor LLC.⁵³ The effect of a conversion has been made

more specific,⁵⁴ and it is provided that upon the conversion a written operating agreement becomes binding upon each member in the new LLC.⁵⁵

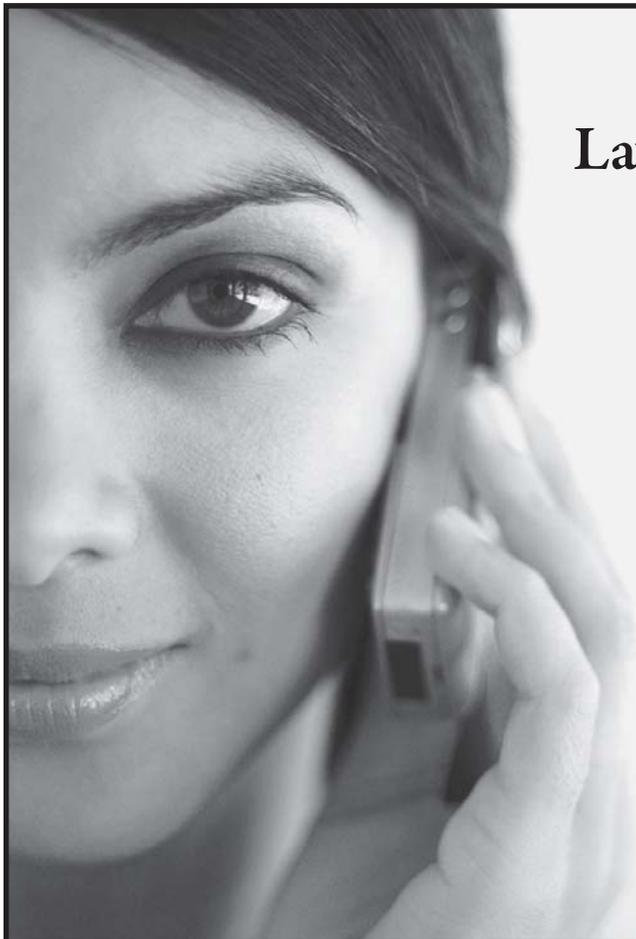
KyULPA provides that a LLC may convert into a limited partnership.⁵⁶ The statute has been revised to delete a confusing reference to an effective date of conversion,⁵⁷ with that date now determined exclusively from the effective date of the certificate of limited partnership.⁵⁸ The LLC Act has been supplemented to require the unanimous approval of all members for a conversion.⁵⁹

Changing Orders

The changing order provisions under KyRUPA, KyULPA and the KyLLCA have been amended to provide parallelism between those acts.⁶⁰

Amendments to Annual Reports

Various of the annual report provisions have now been amended to expressly allow the amendment of the information set forth in the last filed annual report.⁶¹



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Other Changes to the Business Corporation Act

Amendments to KRS § 271B.1-200 expressly allow the reference to facts extrinsic to the articles of incorporation, and this flexibility extends to various plans and articles of merger.⁶²

In most circumstances shares of stock owned by a corporate subsidiary are not voted; this provision has been expanded beyond corporate subsidiaries to any entity controlled by the corporation.⁶³ In the adoption, modification or deletion of a super quorum or voting requirement, it must be approved by the higher of the existing or the proposed requirements.⁶⁴

Adopting the principle set forth in MBCA § 7.47, already implicit in KRS § 271B.15-050(3), an addition has been made to the derivative action statute making clear that where a derivative action is brought on behalf of a foreign corporation, it is the law of the jurisdiction of incorporation that governs the suit.⁶⁵

It has been made express that the list of activities that do not constitute “transacting business” does not determine whether a foreign corporation is subject to service of process, taxation or other regulation.⁶⁶ A new section directs that corporations notify the Secretary of State of changes of the principle office address by means of a distinct filing and not by means of amending either the articles of incorporation or the annual report.⁶⁷ KRS § 271B.8-570 has been revised to include LLC managers, to utilize the defined term “entity” and to render the language gender neutral.

Beginning January 1, 2008, a corporation, having been administratively dissolved, will be required to submit with its application for reinstatement a certificate from the Division of Unemployment Insurance “reciting that all employee contributions, interest, penalties, and service capacity upgrade fund assessments have been paid.”⁶⁸

Other Changes to the Limited Liability Company Act

A new subsection has been added to KRS § 275.100 to confirm that an LLC is a legal entity.⁶⁹ Language has been added to address in greater detail the time of formation of an LLC and the conclusiveness of the filing of the articles of

organization.⁷⁰ A series of amendments to the LLC Act authorize an LLC to engage in a share exchange with a corporation pursuant to which the LLC acquires the shares of the corporation.⁷¹ A provision newly added to the KyLLCA directs that a sale of all or substantially all of the assets of the LLC may be done on the terms and conditions approved by a majority-in-interest of the members.⁷²

Departures from the default rule of KRS § 275.170, addressing the standard of culpability applicable to members and managers of an LLC, must be in a written operating agreement.

The provision addressing how managers vote has been amended to make clear that, except as provided in the articles of organization or in a written operating agreement, managers vote on a per-capita basis and decisions are made by a simple majority.⁷³ A new provision directs that membership interests under the control of the manager subject to the conflict of interest do not vote on the approval of the transaction.⁷⁴ At the same time the rather ambiguous language allowing the approval of a conflicted transaction by one-half of the number of “other persons participating in the business or affairs of the [LLC]” has been deleted.

An interest in an LLC has previously been issued by an LLC upon the making of or the undertaking of an obligation to make a contribution to the LLC.⁷⁵ A pair of new provisions allow the issuance of a membership interest without requiring a contribution or an obligation to make a contribution⁷⁶ and as well permit a member who does not have a membership interest.⁷⁷

An important new subsection has been added to the provision setting forth limitations on distributions.⁷⁸ Prior to this provision, the limitations upon “distributions” were applicable to compensatory payments made by the LLC to its members.

Confirming the common law of agency, the act has been supplemented to note that one who acts on behalf of an LLC without actual authority to do so, even within their apparent agency authority,⁷⁹ shall be liable on all liabilities so created.⁸⁰

The LLC Act lists dentistry as a professional service that may be rendered through a professional LLC.⁸¹ KRS § 313.240 permitted dentists to practice

through professional service corporations, but did not address professional LLCs. As amended, KRS § 313.240 expressly permits dentists to practice through professional LLCs, and as well for the first time expressly authorizes dentists to practice through partnerships.

Other Changes in the Professional Service Corporation Act

KRS § 274.087, addressing the merger of a professional service corporation, has been repealed.⁸² The merger of a PSC will be governed by the merger provisions of the KyBCA⁸³ and if a corporation surviving the merger is rendering a professional service it must comply with the PSC Act. With this amendment a PSC may also merge with an LLC and otherwise partake in organic transactions as can any business corporation.

The deletion from the listing of “qualified persons”⁸⁴ of a “registered limited liability partnership” does not mean that an LLP may not be a shareholder in a PSC. Rather the deletion was to eliminate a redundancy. As every LLP is a partnership,⁸⁵ there is no need to separately list that sub-category.

Other Changes

KRS § 14.105, which addresses the ability of the Secretary of State’s office to accept electronic signatures, has been expanded as to the acts for which electronic signatures may be accepted.⁸⁶

Conclusion

The 2007 amendments to the business entity acts in no way complete the task of rationalizing all of Kentucky’s various business entity laws. There continue to exist nonsensical distinctions that need to be addressed and there exist as well numerous distinctions and open questions regarding the application of non-business entity statutes to new forms of business entities. Still, with the 2007 amendments to the various business entity acts, Kentucky law is more rational and consistent than it was. ■

ENDNOTES

1. See also Cynthia W. Young, *Modernizing Kentucky’s Corporate Laws*, 67 BENCH AND BAR 12 (May 2003).
2. 2007 Acts, ch. 137, § 179.

3. See KRS §§ 271B.1-400(16); 275.015(17); 362.401(9); 272.010(1); 273.161(14); 379.310(15); and 386.370(3). Accord KRS §§ 362.1-101(9); 362.2-102(15).
4. "Real name" is a new defined term and is determined by reference to the assumed name statute. See KRS §§ 271B.1-400(21); 272.010(1)(h); 273.161(15); 275.015(17); 362.401(14); 379.310(16); and 386.370(3).
5. See KRS §§ 271B.4-010(2); 271B.4-030(1); 271B.15-060(2); 362.403(3); 272.131(4); 272.390(5); 275.100(2); 275.410(2); 273.177(2); 273.179(1); 279.340(2); 293.364(2); 272.010; 273.161(14); and 386.382(1). Accord KRS §§ 362.1-114(1); 362.2-108(4).
6. See KRS §§ 271B.4-020(1); 275.105(1); 362.404(2); 362.1-115(1); 362.2-109(1); and 273.178(1).
7. See KRS §§ 271B.4-020(3); 275.105(3); 273.178(3); and 362.405(3).
8. See KRS §§ 271B.4-010(5); 273.177(5); 275.100(5); 279.030(5); and 279.340(6). Accord KRS §§ 272.131(7); 272.390(8); 362.1-114(4); and 362.2-108(6).
9. See KRS § 274.077(3) (before deletion by 2007 Acts, ch. 137, § 91).
10. KRS § 272.050. See also KRS § 272.010(1)(g) (new defined term for "entity").
11. KRS § 279.060.
12. See 2007 Acts, ch. 137, § 180. See also KRS § 446.010(2).
13. KRS §§ 362.495 through 362.509.
14. See 2007 Acts, ch. 137, § 181.
15. See KRS § 362.585; 362.595(4).
16. See 2007 Acts, ch. 137, § 181 (repealing KRS §§ 362.585 and 362.595(4)).
17. See KRS §§ 362.2-901 through 362.2-910.
18. See KRS §§ 362.1-1101 through 362.1-1105.
19. KRS §§ 386.382; 386.4432.
20. KRS §§ 386.384; 386.386; 386.288; 386.4434; and 386.4436.
21. KRS §§ 386.4422; 386.4426; 386.4428; 386.4430; 386.4442; 386.4444; 386.4446; and 386.4448.
22. KRS § 386.392.
23. KRS § 386.4420.
24. KRS § 271B.15-050(3). See also KRS §§ 275.405(3); 362.495; 362.2-901; and 386.4420(1)(a).
25. KRS §§ 271B.15-050(3); 275.380(1)(a); 362.495; and 362.2-901(1).
26. KRS § 275.185(5). See also KRS §§ 362.2-110(2)(d); 362.2-304(7); and 271B.16-040(4).
27. 2006 WL 2788429 (Ky. App. Sept. 29, 2006).
28. See KRS §§ 271B.14-050(2)(i); 275.300(3)(i); 362.1-802(3); and 362.2-803(5).
29. Contrast KRS § 271B.18-050. See also KRS §§ 362.429; 362.2-103.
30. See KRS § 275.135.
31. KRS § 275.025(7).
32. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 6.03.
33. The KyLLCA originally provided a default rule of unanimous approval for the voluntary dissolution of an LLC. See 1994 Acts, ch. 389, § 57, codified at 275.285(2). In 1998 this default

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- rule was reduced to majority-in-interest. *See* 1998 Acts, ch. 341, § 38.
34. KRS § 275.015(8).
 35. KRS § 275.285.
 36. KRS § 271B.14-200(4).
 37. KRS § 271B.14-210.
 38. KRS § 271B.14-220(5).
 39. KRS § 275.285 recites that upon reaching that date the LLC “shall be dissolved and its affairs wound up.”
 40. KRS § 275.295(1)(d).
 41. *See, e.g.*, 12B WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.10 (2000 Perm. Ed.) (“The appraisal remedy is entirely the product of statute.”).
 42. *See* KRS §§ 275.030(6); 275.175(4); 275.345(3); 275.350(4); and 275.247(2). A new defined term “dissent” has been added at KRS § 275.015(6).
 43. KRS § 275.255(4).
 44. *See* KRS §§ 275.015(18), (19).
 45. *See* KRS § 275.005. *Contrast* KRS § 362.1-201(1).
 46. Civ. Action No. 98-CI-01357, Franklin Circuit Ct. (Feb. 16, 1999).
 47. *See* KRS §§ 275.520; 275.525; and 275.530. *Accord* KRS §§ 273.237; 273.241; and 273.277.
 48. KRS §§ 275.015(18); 275.015(19); 275.530; and 275.525.
 49. KRS § 275.376. *See also* KRS §§ 271B.11-030; 271B.12-030. This provision was patterned on KRS § 271B.11-030.
 50. KRS § 271B.13-020(1)(d).
 51. KRS § 275.377. *Accord* KRS §§ 275.375(1); 362.1-904(1); and 362.2-1105(1).
 52. KRS § 275.370.
 53. KRS § 365.015(8).
 54. KRS § 365.375(2)(a)-(c).
 55. KRS § 365.375(2)(d).
 56. KRS §§ 362.2-1102 through 362.2-1105.
 57. KRS § 362.2-1104(1)(c), deleted by 2007 Acts, ch. 137, § 161. KRS § 362.2-1104 has been supplemented to make more clear that it applies only to an LLC into an LP conversion.
 58. KRS § 362.2-1104(2). *See also* KRS § 362.2-120.
 59. KRS § 275.372(2). *See also* KRS § 362.2-1102(4).
 60. KRS §§ 275.260; 362.1-504; and 362.2-703. The charging order provisions of KyUPA (KRS § 362.285) and KyRULPA (KRS § 362.481) have not been revised.
 61. *See* KRS §§ 271B.16-220(5); 275.190(5); 362.1-121(5); 362.2-210(5); 273.3671(5); and 386.392(5).
 62. KRS §§ 271B.1-200; 271B.6-010(4). Similar revisions have not been made in the LLC and limited partnership acts in that there has been no call for similar additions to the various model and uniform acts and because in that contractual realm there likely already exists the flexibility to so reference extrinsic facts.
 63. KRS § 271B.7-210(2).
 64. KRS § 271B.7-270(2).
 65. KRS § 271B.7-400(6).
 66. KRS § 271B.15-010(3). *Accord* KRS §§ 275.385(3); 362.2-903(2) (as amended by 2007 Acts, ch. 137, § 159); and 386.4442.
 67. KRS § 271B.5-025. There is a \$10.00 fee for this filing. *See* KRS § 271B.1-220(1)(i). A similar change has been made with respect to non-profit corporations. KRS § 273.1842. *See also* KRS § 273.2521(e). *Accord* KRS § 275.040; 362.2-115. *See also* KRS § 271B.1-210(1)(g).
 68. KRS § 271B.14-220(1)(e). No similar revision was made in the other business entity acts. *Contrast* KRS §§ 275.295(3)(a); 362.1-122(5); and 362.2-810(1).
 69. KRS § 275.100(2). *Accord* KRS §§ 362.1-201(a); 362.2-104(1).
 70. KRS § 275.020(2), (3). *Accord* KRS § 271B.2-030(2). While counsel, in issuing opinions on the formation of LLCs, will find comfort in these new provisions, attention needs to be paid to other aspects of the KyLLCA such as the definition of an LLC (KRS § 275.015(8)) and its requirement that an LLC have at least one member.
 71. *See* KRS §§ 275.500; 275.505; 275.510; and 275.515.
 72. KRS § 275.247(1). *Accord* KRS § 275.350(1)(requiring majority-in-interest approval for a merger).
 73. KRS § 275.175(1).
 74. KRS § 275.170(2). *Accord* KRS § 271B.8-310(4).
 75. KRS § 275.195, now recodified at KRS § 275.195(1).
 76. KRS § 275.195(2).
 77. KRS § 275.195(3).
 78. KRS § 275.225(7). *Accord* KRS § 362.2-508(8).
 79. *See* KRS § 275.135.
 80. KRS § 275.095. *See also* RESTATEMENT (THIRD) OF AGENCY § 6.10.
 81. KRS § 275.015(20).
 82. *See* 2007 Acts, ch. 137, § 181.
 83. *See* KRS § 274.015(2).
 84. KRS § 274.005(4).
 85. *See* KRS §§ 362.555(1); 362.1-201(2).
 86. KRS § 14.105(1).

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The Ethics of Civil Practice Investigations - Part I

"Pretexting Ain't What It Used to Be"

Del O'Roark, Loss Prevention Consultant, Lawyers Mutual Insurance Company of Kentucky

If you follow the business news, you heard a great deal about the Hewlett-Packard board of directors' flap involving an investigation ordered by the chairman of the board to determine who was leaking confidential board meeting discussions. The investigation was conducted by private investigators under the supervision of a senior house counsel in HP's general counsel office. Among other investigative methods, the private investigators used pretexting (using someone else's identity to obtain information, goods, or services) to get telephone records of members of the board of directors. The end result was that the chairman of the board, the senior house counsel, and several of the private investigators were indicted under California law for fraudulent wire communications, wrongful use of computer data, and pretexting. The chairman of the board defended herself by asserting that she had been advised by house counsel that all investigative methods used were lawful.

This high profile case resulted in new emphasis on the ethics of what has been called deceptive lawyering.¹ What are the legal and ethical implications of use of misrepresentation, subterfuge, tape recording, undercover operatives, surveillance, eavesdropping, and dumpster diving when investigating a matter? Does it make a difference if the lawyer is doing the investigating or nonlawyers are employed to conduct the investigation? If the investigative method is legal, but unethical, does a lawyer's duty to his client override professional responsibility rules? The answer to these and other questions are muddled by the confusion of laws that might apply to a given investigation, inconsistent professional responsibility rules, renewed aggressiveness by government officials in enforcing privacy and consumer protection laws, and the likelihood of new laws and regulations in the future.

The purpose of this two-part article is to highlight the major legal and ethical considerations in civil practice investigations and place you in a position to ask the right ethics and risk management questions when undertaking an investigation. The practice policy advocated is that a lawyer should ask three questions when embarking on an investigation:

- Are the methods of investigation legal?
- Are the methods of investigation ethical?
- Are the methods of investigation smart?

Part I begins with an overview of lawyer investigative competence. It includes a brief review of the risks an incompetent

investigation can create and addresses the question "Are the methods of investigation legal?" Part I concludes with a review of the question "Are the methods of investigation ethical?" concerning the ethical issues a lawyer faces as an investigator.

Part II, to be published in the next edition of the *Bench & Bar*, completes consideration of the question "Are the methods of investigation ethical?" by reviewing the ethics issues when a lawyer supervises an investigation. It then covers the question "Are the methods of investigation smart?" Part II concludes with suggestions for investigation risk management. Not considered in this article are criminal or government investigations and those aspects of civil investigations covered by rules of civil procedure.

Lawyer Investigation Competency and What Can Go Wrong

The lawyer skills required for conducting a competent factual investigation are identified in the ABA's MacCrate Report on legal education as follows:

In order to plan, direct, and (where applicable) participate in factual investigation, a lawyer should be familiar with the skills and concepts involved in:

- Determining the need for a factual investigation. (*Evaluation of the information in hand and applicable law to determine if more factual information is needed.*)
- Planning a factual investigation. (*Consider degree of thoroughness required in light of purpose of the investigation, time available, client's resources, etc.*)
- Implementing the investigative strategy. (*Consider hiring investigator, interview fact witnesses, document analysis.*)
- Memorializing and organizing information in an accessible format. (*Appropriately correlated to legal analysis.*)
- Deciding whether to conclude the process of fact-gathering. (*Includes consulting with the client about lawyer's judgment that investigation should be concluded.*)

- Evaluating the information that has been gathered. (*Assess accuracy and reliability, identify inconsistencies and possible reasons for them.*)²

When applying these investigative skills lawyers face several risks. Using illegal investigative methods can lead to criminal indictment as the HP case illustrates. Methods that violate the Kentucky Rules of Professional Conduct (KRPC)³ risk bar disciplinary action. An inadequate (read negligent) investigation will draw a malpractice claim. Intrusive investigations that overstep privacy and consumer rights open the door to civil suits. Investigative techniques that offend a judge can result in evidence suppression, disqualification of the lawyer, and court-ordered sanctions. From this fierce list of what can go wrong in an investigation, it is obvious that lawyers must know what they are doing when conducting or supervising an investigation — or face the consequences.

Are the Methods of Investigation Legal?

Answering whether an investigative method is legal involves that most difficult of all research problems — determining that no law forbids it. A number of federal and state laws could be implicated by any given investigation (e.g., criminal laws, telecommunications laws to include the Internet, consumer protection laws, and laws that protect the right of privacy). What follows is information on some of the laws concerning pretexting, consumer protection, and eavesdropping. A review of all possible laws that might apply to investigations is beyond the scope of this article and as practical matter may not be feasible.

Pretexting: The Federal Trade Commission takes an aggressive position on pretexting as shown in this extract from a FTC Fact Sheet for the general public:

Pretexting: Your Personal Information Revealed

When you think of your own personal assets, chances are your home, car, and savings and investments come to mind. But what about your Social Security number (SSN), telephone records and your bank and credit card account numbers? To people known as “pretexters,” that information is a personal asset, too.

Pretexting is the practice of getting your personal information under false pretenses. Pretexters sell your information to people who may use it to get credit in your name, steal your assets, or to investigate or sue you. Pretexting is against the law.

How Pretexting Works

Pretexters use a variety of tactics to get your personal information. For example, a pretexter may call, claim he’s from a survey firm, and ask you a few questions. When the pretexter has the infor-

mation he wants, he uses it to call your financial institution. He pretends to be you or someone with authorized access to your account. He might claim that he’s forgotten his checkbook and needs information about his account. In this way, the pretexter may be able to obtain personal information about you such as your SSN, bank and credit card account numbers, information in your credit report, and the existence and size of your savings and investment portfolios.

Keep in mind that some information about you may be a matter of public record, such as whether you own a home, pay your real estate taxes, or have ever filed for bankruptcy. It is not pretexting for another person to collect this kind of information.

There Ought to Be a Law — There Is

Under federal law — the Gramm-Leach-Bliley Act — it’s illegal for anyone to:

- use false, fictitious or fraudulent statements or documents to get customer information from a financial institution or directly from a customer of a financial institution.
- use forged, counterfeit, lost, or stolen documents to get customer information from a financial institution or directly from a customer of a financial institution.
- ask another person to get someone else’s customer information using false, fictitious or fraudulent statements or using false, fictitious or fraudulent documents or forged, counterfeit, lost, or stolen documents.

The Federal Trade Commission Act also generally prohibits pretexting for sensitive consumer information.⁴

At the state level KRS 367.170 in the Consumer Protection chapter provides: “Unlawful acts. (1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” I found no case applying this law to lawyers, but be aware that the law exists and appears to cover pretexting.⁵

Fair Credit Reporting Act: Obtaining consumer reports in violation of the federal Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.) is another major pitfall for lawyers investigating a matter. The FCRA carries both criminal penalties and civil damages. Damages include actual damages sustained by the consumer, punitive damages, and costs and reasonable attorney’s fees for the successful plaintiff. The law has a two-year statute of limitations. Lawyers have tripped over the FCRA in these situations:

- Obtaining a credit report in a divorce proceeding (*Berman v. Parco*, 986 F. Supp. 195, S.D.N.Y. 1997).

- Obtaining a credit report to determine the collectibility of a judgment (*Bakker v. McKinnon*, 152 F.3rd 1007, 8th Cir. 1998).
- Obtaining a credit report to impeach the plaintiff at deposition (*Duncan v. Handmaker*, 149 F.3rd 424, 6th Cir. 1998).
- Obtaining credit information for a divorced wife's use in child visitation litigation (*Bils v. Nixon, Hargrave, Devans & Doyle*, 880 P.2d 743, Ariz. App. Div. 2, 1994).

Eavesdropping: Hardest of all to keep up with are federal and state laws concerning eavesdropping and tape recording. The Kentucky Penal Code has these provisions relevant to investigations in KRS Chapter 526, Eavesdropping and Related Offenses:

- KRS 526.010 Definition. The following definition applies in this chapter, unless the context otherwise requires: "Eavesdrop" means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device. (*But KBA ethics opinions require all party consent in civil matters – see below.*)
- KRS 526.020 Eavesdropping. (1) A person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time. (2) Eavesdropping is a Class D felony.
- KRS 526.030 Installing eavesdropping device. (1) A person is guilty of installing an eavesdropping device when he intentionally installs or places such a device in any place with the knowledge that it is to be used for eavesdropping. (2) Installing an eavesdropping device is a Class D felony.
- KRS 526.060 Divulging illegally obtained information. (1) A person is guilty of divulging illegally obtained information when he knowingly uses or divulges information obtained through eavesdropping or tampering with private communications or learned in the course of employment with a communications common carrier engaged in transmitting the message. (2) Divulging illegally obtained information is a Class A misdemeanor.

Are the Methods of Investigation Ethical? — Lawyer as Investigator

Skill and Competence: Failure to comply with KRPC 1.1, Competence, in conducting an investigation can lead to both a bar complaint and a malpractice claim. Comment [5] to the Rule provides "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." Lack of competence can be reflected in the adequacy of the investigation, the validity of the lawyer's evaluation of facts gathered, and the

advice given. Complaints by clients include that the lawyer failed to advance funds to hire investigators, talk to all necessary witnesses, and have the client examined by a doctor.⁶ The following cases provide further insight on the adequacy of investigations:

- A Wisconsin lawyer was suspended for two months in part for an inadequate investigation in his representation of a client in a racial discrimination and sexual harassment case against a college. The client gave the lawyer plastic laminated documents purporting to be letters, memos, and e-mails she was sent by college personnel containing racially derogatory comments, apologies for sexual assaults, and threats. The college personnel asserted that the highly damaging documents were fabrications. The lawyer made no inquiry into the veracity of the documents notwithstanding their being suspicious on their face. At trial these documents were found to be obviously fraudulent. In the subsequent bar disciplinary case against the lawyer the hearing Referee cited Rule 1.1, Competence, Comment [5] and ruled "By making only a cursory and *pro forma* effort to validate the documents, after substantial doubt had been raised as to their authenticity, the Respondent shirked his duty of inquiry into an analysis of both the factual and legal ramifications of their continued use."⁷ The Referee concluded that this was a matter of incompetence and that the lawyer was not as he claimed "merely a hapless victim of an unscrupulous client. It is the attorney's lack of preparation and inquiry that is a basis for the violation."⁸
- In an unusual case a Kentucky lawyer received a private reprimand for failing to recognize at the inception of an investigation the full implications of a conflict of interest in representing two persons. He was retained to investigate a shooting for the purpose of supporting the clients' assertion that they were not involved. He properly advised the clients of the potential conflict of interest and of the possibility he might have to withdraw, but did not advise that any and all information he obtained would be available to each of them. The investigation uncovered information indicating that one of the clients was directly involved in the shooting. The lawyer withdrew without revealing the information to either because he could not get the consent of both clients to do so. The clients then filed a bar complaint resulting in the lawyer's private reprimand for failing to fully communicate the significance of a joint representation including confidentiality considerations that could impact the clients individually.⁹
- Language in a Kentucky criminal case provides some balance to the question of what a reasonable investigation is and is offered here as equally applicable to a civil investigation. The defense counsel was accused of failing to conduct an adequate pretrial investigation. The Court reasoned "Trial counsel has a clear 'duty to make reasonable investigations or to make a reasonable decision that

makes a particular investigation unnecessary.' A reasonable investigation is not, however, the investigation that the best defense lawyer, blessed not only with unlimited time and resources, but also with the inestimable benefit of hindsight, would conduct."¹⁰

Deceptive Investigating: Pretexting, subterfuge, and secret tape recording may be useful investigation methods, but raise serious ethical issues for lawyers conducting an investigation. The key professional conduct rules are:

- *KRPC 8.3, Misconduct.*

Paragraph (b) provides that it is misconduct to: "Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;"

Paragraph (c) provides that it is misconduct to: "Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;" Note that there are no exceptions in Paragraph (c) thus seemingly forbidding any guile in pursuing an investigation.

- *KRPC 4.1, Truthfulness in Statements to Others.* The Rule provides: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." Note that this Rule has materiality as a qualifier, but KRPC 8.3 (c) does not.
- *KRPC 4.4, Respect for Rights of Third Persons.* This Rule provides in part: "In representing a client, a lawyer shall not ... knowingly use methods of obtaining evidence that violate the legal rights of such a person." A primary application of this Rule concerns tape recording. Once again Kentucky lawyers face an anomaly. KRS 526.010 provides: "'Eavesdrop' means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device." Conversely, KBA ethics opinions hold that, other than in criminal representations, lawyer recording of a conversation requires the consent of all parties. Upon inquiry lawyers may advise clients of their legal authority to record conversations, but must be careful not to do indirectly what they cannot do directly.¹¹ Read ethics opinions KBA E-279 (1984) and KBA-E 289 (1984) before giving any advice or instructions on tape recording.¹²

Another example of a violation of Rule 4.4 is requesting a credit report in violation of the FCRA.

Interviewing Witnesses. In addition to the skill required in effective interviewing, lawyers must be keenly aware of the following KRPCs in deciding whom to interview and what to avoid when conducting an interview:

- *KRPC 4.2, Communication with Person Represented by Counsel.* Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Application of this Rule becomes complicated when investigating an organization or business entity with many constituents. Comment [2] addresses the entity context of the Rule:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. Prior to communication with a nonmanagerial employee or agent or an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

In researching whether a member of an organization or business entity may be contacted begin with *Shoney's, Inc. v. Lewis*, 875 S.W. 2d 514 (Ky., 1994). This case covers much of how Rule 4.2 applies to the corporate setting. Also read the ABA Committee on Ethics and Professional Responsibility Formal Opinion 95-396, *Communications With Represented Persons* (1995). This opinion is a comprehensive analysis of Rule 4.2. covering many additional issues to those in *Shoney's*.

- *KRPC 4.3, Dealing with Unrepresented Person.* Rule 4.3 provides: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."
- *KRPC 3.7, Lawyer as Witness.* Rule 3.7 provides that with few exceptions a lawyer cannot act as advocate at a trial in which the lawyer is likely to be a necessary wit-

ness. The problem this presents for the investigating lawyer interviewing a witness is that, if impeaching the witness becomes an issue, the lawyer may become a necessary witness and thus disqualified to continue in an advocacy role. The recommended approach when it is foreseeable that it may become necessary to impeach a witness is to either have someone else conduct the interview or have someone else present when conducting the interview. If feasible, reduce the interview to a signed statement.¹³

Part I – Summing Up

The inconsistencies in the professional conduct rules and the tension between adhering to ethical conduct and providing the client with every advantage the law allows make the investigating lawyer's situation problematic to say the least. One authority in considering Rules 4.1, 4.3, and 8.3(c) summarizes the standard as "In sum, an attorney must identify himself and the interest he represents and must not engage in trickery or overreaching to obtain information or neutralize a potential witnesses (footnotes omitted)." Then goes on somewhat ambivalently to observe "The reality, however, is that some misrepresentation and overreaching are accepted and perhaps even required if one is to adequately represent a client. The rub is to define the boundary between the acceptable and the unacceptable."¹⁴ It seems clear that at minimum lawyers in conducting an investigation should not break the law, lie, or misrepresent themselves.

Further consideration of the ethical limits on investigations is developed in Part II of this article. If you are interested in a more detailed analysis at this time, I recommend Douglas R. Richmond's article, *Deceptive Lawyering*, 74 U. of Cin. L. Rev. 577 (2005) available on the Internet.¹⁵ ■

TO BE CONTINUED

ENDNOTES

1. See, Richmond, *Deceptive Lawyering*, 74 U. Cin. L. Rev. 577 (2005). Available on the Internet at <http://www.law.uc.edu/lawreview/>.
2. Cited information is a paraphrase of relevant material in ABA Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development – An Educational Continuum* (1992), page 138; and *The MacCrate Report – Building The Educational Continuum* (1994), page 174, West Publishing Co.
3. SCR 3.130
4. <http://www.ftc.gov/bcp/online/pubs/credit/pre-text.shtm>.
5. See generally, Proof of a Claim Involving Alleged Violation of State Consumer Protection or Similar Statute Against Physician or Attorney, 79 Am. Jur. Proof of Facts 3d 199.
6. See generally, Mallen and Smith, *Legal*

Malpractice, 2007 Ed., § 30.28.

7. Wisconsin's Rule 1.1 and Comment [5] are identical to Kentucky's.
8. *In Re Nunnery*, 725 N.W.2d 613 (Wis., 2007).
9. *An Unnamed Attorney v. Kentucky Bar Association*, 186 S.W.3d 741 (Ky., 2006).
10. *Baze v. Commonwealth*, 23 S.W.3d 619, 625 (Ky., 2000).
11. KRPC 1.2 (d), Scope of Representation, has this cautionary guidance when discussing questionable actions with a client: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
12. ABA Formal Opinion 01-422 (6/24/2001), Electronic Recordings by Lawyers Without the Knowledge of All Participants, is the latest consideration of this issue by the ABA Standing Committee on Ethics and Professional Responsibility. In the opinion the Committee withdrew a prior opinion that held that a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation.
13. For more guidance on this issue see Fortune, Underwood, Imwinkelreid, *Modern Litigation and Professional Responsibility Handbook*, 2d Ed., 2002, §§ 4.5, the Attorney Investigator, and 5.7, Interviewing Witnesses.
14. Fortune, Underwood, Imwinkelreid, *Modern Litigation and Professional Responsibility Handbook*, 2d Ed. 2002, § 5.7, Interviewing Witnesses, p. 230.
15. <http://www.law.uc.edu/lawreview/>.



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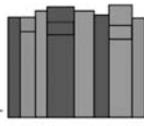
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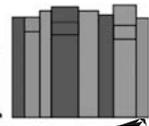
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“Did you hear about the young lawyer who ...”

By Ryan C. Reed
Chair, KBA Young Lawyers Section

Chris McKinney has had a remarkable, if not enviable, existence over the past couple of years. Remarkable enough to merit the 2007 Kentucky Outstanding Young Lawyer Award from the KBA Young Lawyers Section.

Throughout late 2005 and much of 2006, Chris was involved in combat operations with the United States military in Afghanistan and then Iraq. That deployment followed closely on the heels of post-Katrina disaster relief service Chris provided in the Gulf Region as a member of the Kentucky National Guard. His service surely took him away from his home, his family, his friends and his practice for far too long.

The fact that Chris was, chronologically speaking, a soldier before he was a lawyer, might suggest that his service is not noteworthy. After all, serving when called is part of the job of a soldier. Even Chris has tended to diminish the remarkable nature of his service.

But his time in the Gulf regions, both the Gulf of Mexico and the Persian Gulf, is memorable and noteworthy for the significant humanitarian efforts he undertook while there. Chris organized the collection and distribution of hundreds, if not thousands, of books, shoes, school supplies, toys, clothing, and hygiene items for those affected by the natural and man-made disasters. That is, in essence, how he spent his free time, of which there was precious little. He spent it in service to the community in which he found himself.

From all appearances, Chris must have spent some of that time creating for himself an ambitious agenda of all he would do when he returned home. Suffice it to say, his civic and charitable works have continued unabated. He has completed training as an EMT/First Responder and joined the Woodburn Volunteer Fire Department in Warren County, where he also serves as Chair of its Charitable Contributions Commit-

tee. He has provided service on a volunteer, unpaid basis as a Board Member and General Counsel to the National Guard Association of Kentucky. He has become a member of the Governmental Relations Committee of the Bowling Green Area Chamber of Commerce. He has also continued his contributions to the Bowling Green/Warren County Bar Association.

Chris's professional achievements have followed a similarly accomplished trajectory. He is an associate with English, Lucas, Priest & Owsley in Bowling Green, where he is engaged in a robust litigation and counseling practice. He has lectured on the Servicemembers Civil Relief Act, HIPAA, and OSHA regulations, and has accepted federal Criminal Justice Act appointments for representation of indigent clients charged with federal crimes. His time in private practice follows decorated service as a Special Agent of the FBI, and a member of the Judge Advocate General's Corps of the Department of the Army, Kentucky National Guard.

The accomplishment of which Chris is most proud is his record as a loving husband to Terri and father to Kate and Ryan, a record that is a living testament to Chris's stated belief that a truly outstanding young lawyer serves his or her family, community, and profession equally well.

And that is a truly remarkable existence, of which we should all be envious. ■



The KBA Young Lawyers Section honors one “Outstanding Young Lawyer” each year. Even before being admitted to the Bar, I recognized there are hundreds of outstanding young lawyers in the Commonwealth doing exceptional work in their practices and their communities.

Do you know such a young lawyer who deserves recognition for his or her civic activities and legal accomplishments? If so, I would like to ask that you please do a few things. First, pat that young lawyer on the back and thank him or her for all he or she is doing to enhance the community, raising, in the process, the image and profile of our fine profession. Second, drop me a note at rreed@hughesandcoleman.com introducing me to the young lawyer and explaining how she or he excels. Finally, make sure that young lawyer gets nominated next spring for the 2008 Kentucky Outstanding Young Lawyer Award. A call for nominations is usually made in the March issue of this publication, and details will follow at that time.

ADVISORY ETHICS OPINION

FORMAL ETHICS OPINION KBA E-428

June 19, 2007

Subject: Participation in not-for-profit bar association lawyer referral services.

Question I: May a lawyer participate in a not-for-profit bar association lawyer referral service and agree to pay the association a percentage of the legal fee earned from the referred client?

Answer: Yes

Question II: May a lawyer participate in a not-for-profit bar association lawyer referral service where the fees generated may be used to defer the reasonable expenses of the referral service and other service activities of the referral service or the sponsoring organization.

Answer: Yes

References: SCR 3.130 - 7.20; ABA Comm. on Prof. Ethics and Grievances, Formal Op. 291 (1956); ABA Comm. on Ethics and Professional Responsibility, Inf. Op. 1076 (1968); Tn. S.Ct. Bd. of Professional Responsibility, Formal Op. 88-F-115(a) (1989); State Bar of Wisc. Formal Op. E-88-8 (1988); State Bar of Cal. Formal Op. 1893-70 (1983); Oh. Adv. Op. 92-1 (1992); KBA E-288 (1984).

Opinion

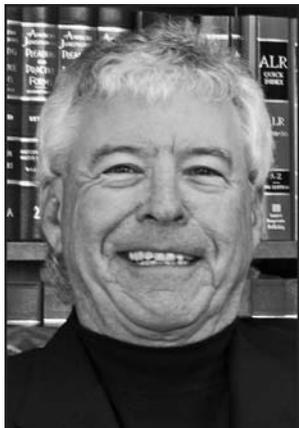
For well over fifty years, not-for-profit bar associations have been operating

lawyer referral services as part of their public service mission. Referral services provide two separate but related services to the public. First, such services have a screening function by providing potential clients with a means of assessing their problem to determine whether there is a need for a lawyer. Second, lawyer referral services provide potential clients with an unbiased referral to a lawyer with relevant experience. Traditionally, lawyer referral services have been funded, at least in part, by charging participating lawyers (panel members) a fee for referrals received. In some cases, the fee charged to the lawyer has been related to the amount the lawyer earned in a referred case. Where the lawyer earned nothing, he or she would pay nothing. If the referral generated a fee, the lawyer would forward an agreed upon percentage of the legal fee to the referral service or sponsoring organization. This referral fee arrangement has been the subject of dozens of bar association ethics opinions and considerable legal commentary. The ABA has issued two opinions expressing the view that bar associations may sponsor lawyer referral services where the panel members pay a percentage of the legal fee collected to the referral service, without violating the ethical prohibition on splitting fees. ABA Comm. on Prof. Ethics and Grievances, Formal Op. 291 (1956); ABA Comm. on Ethics and Professional Responsibility, Inf. Op. 1076 (1968).¹ Many state bar associa-

tions that have considered this issue have reached the same result. See, e.g., Tn. S.Ct. Bd. of Professional Responsibility, Formal Op. 88-F-115(a) (1989); State Bar of Wisc. Formal Op. E-88-8 (1988); State Bar of Cal. Formal Op. 1893-70 (1983); Oh. Adv. Op. 92-1 (1992). In addition, the American Bar Association has adopted Model Standards for Lawyer Referral & Information Services, which were adopted by the House of Delegates in 1993. Those standards contemplate that panel members may be required to pay the referral service a percentage of the fee earned by the lawyer to whom a referral is made.

In 1984, the Louisville Bar Foundation asked this Committee for advice concerning the proposed Kentucky Lawyer Referral Service (KLRS). Among other things, the Foundation asked whether lawyer referral panel members could pay the referral service a percentage of fees from referred cases. At that time, the KLRS contemplated that participating lawyers might agree to contribute 10% of any fees collected from referred clients to the bar association, which would use the collected fees to defer costs for the KLRS. In KBA E-288 (1984), the Committee opined that a lawyer could participate in such a program without violating the prohibitions on fee splitting. In the intervening years, the Kentucky Supreme Court has adopted the new Rules of Professional Conduct, the American Bar Association has adopted Model Standards for Lawyer Referral & Information Service and other bar associations in the state have established lawyer referral services. The question that has been presented for consideration by the Committee today is whether the model proposed by the LBA and addressed in E-288 in 1984, is the only model in which lawyers may ethically participate.

Since the earlier opinion, the Supreme Court of Kentucky has adopted SCR 3.130 (7.20). It provides, in part, as follows:



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(2) A lawyer shall not give anything of value to a non-lawyer for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or communication permitted by this Rule.

The accompanying Commentary reinforces a long line of ethics opinions, including E-288, holding that this prohibition does not apply to not-for-profit lawyer referral services. Comment (4) is titled "Paying Others to Recommend a Lawyer" and provides that

...a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fee charged by such programs.

Thus it is clear from the current rules that lawyers are permitted to participate in not-for-profit lawyer referral programs, and pay the usual fees charged by such programs. Moreover, the Committee continues to adhere to the position that a participating panel member may agree to pay the not-for-profit referral service a percentage of any fee generated from a referred case. The arrangement presented by the KLRS in 1984 contemplated a 10% payment for referred cases. It is the view of the Committee that the only ethical issue is whether percentage payments are permissible.² Having concluded that such a payment is not unethical, the amount of the payment and its method of computation is a matter of contract between the panel lawyer and the referring non-profit organization; it is not a question of ethics. Ethics Opinion E-288 should not be read to suggest that the only ethical arrangement is one which calls for a 10% payment.

The second question relates to the bar association's use of funds generated by fees paid by panel members. When KLRS began operation, it was contemplated that the fees would be used to defer the operating expenses of the referral service. In fact, E-288 could be read to suggest that payments made by panel members could only be used to cover the reasonable expenses of the service. However, the Committee sees no ethical basis

for such a limitation. Bar associations operating lawyer referral services need not operate them as a separate entity. Many of the costs incurred by the bar association will benefit the referral service and vice versa. For example, a bar association's webpage or other publications might contain information about the referral service, as well as information of interest to the general public and members of the profession. There is no ethical reason for allocating these costs between the association and the referral service. Beyond the accounting issue, there appears no ethical reason why referral services funds cannot be used to support other public service activities of the referral service or sponsoring bar association. It is noteworthy that, while not controlling, the American Bar Association Standards for Lawyer Referral & Information Service approve of the use of fees to support not only the operating expenses of the service but also to fund public service activities of the service or its sponsoring organization, including the delivery of pro bono legal services.

Conclusion

The Committee reaffirms the conclusion reached in E-288 that there is nothing unethical about a lawyer participating in a not-for-profit bar association lawyer referral service and agreeing to pay the association a fee based upon a percentage of the legal fee from the referred client. E-288 should not be read to limit the percentage paid by the lawyer to 10%. The percentage paid is a matter of contract between the lawyer and the referral service. Finally, it is the Committee's view

that there is no ethical reason why a lawyer cannot participate in a not-for-profit bar association referral arrangement where the fees paid by the lawyer are used to defer the reasonable expenses of referral service and other service activities of the referral service or the sponsoring organization. To the extent that E-288 implies otherwise, it is withdrawn.

Note to Reader

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

ENDNOTES

1. Although these opinions were decided under the old ABA Canons of Ethics, the concerns about fee splitting are the same as under the current rules and these opinions continue to be cited today.
2. Obviously there are ethical issues regarding the fee paid by the client to the lawyer and, as E-288 notes, that attorney fee cannot exceed the fee the client would have incurred if no referral service has been employed.

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Michael Losavio

An ESI Discovery Question

What problems are there with too much discovery?

Whether a nasty divorce or vicious business dispute, chances are that electronically stored information may be part of discovery. And that information may be stored in a small package like a hard drive or a CD-ROM but contain millions of “pages” of information. What if that is what’s produced in discovery?

The sheer volume of information that is possible creates potential problems in responding to discovery. One risk is that more information will be disclosed than is necessary. This creates issues as to the time and resources that can reasonably be given to vetting material for a response. It also risks inadvertent disclosure of privileged or confidential material.

The use of a pretrial discovery conference under the federal rules of civil procedure or by direction of the court is one way to address these issues before a problem develops. This includes use of “sneak peek” and “claw-back” agreements to try and protect privileged material against inadvertent disclosure.

But what risks attend the disclosure of other kinds of information? And what obligation does a *receiving* party have as to disclosure of that information?

Let’s consider what responsibilities, if any, a lawyer receiving a huge mass of unvetted discovery material or open access to electronic media of the opposing party, whether in a divorce or business case.

Data systems now contain huge amounts of sensitive material, like medical records, identifying information, cred-

it card numbers and the like. And, it seems, highly personal items like pictures and videos that might be embarrassing to some. Turning over a hard drive for examination in its entirety may well lead to discovery of such items.

If relevant to the instant proceedings then disclosure is warranted. If not, are there any limits on disclosure?

The Code of Professional Conduct requires respect for the rights of third persons and fairness to the opposing party and counsel. As to third persons, “a lawyer shall not knowingly use means that have no substantial purpose other than to embarrass, delay, or burden a third person” EC 4.4. As to the opposing party a lawyer shall not “Present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter” nor allude at trial to irrelevant material. EC 3.4(e & f).

These rules might be applied for the gratuitous disclosure of such personal information revealed in litigation.

Kentucky recognizes the tort of invasion of privacy to include the outrageous publication of private facts to the public where no public interest is served. Perhaps there is potential liability for such disclosure if of no relevance to the proceedings.

It may be this issue is moot, as adequate vetting of discovery responses and the general good manners of the bar keep this from being a problem. One commentator has noted that lawyers have been sanctioned for “boorishness.”¹

But it might be difficult to restrain a

client who wants to use embarrassing, scurrilous material against the other party, regardless of its relevancy. The growth in ESI and personal use of these systems for all aspects of our lives, matched against the cost pressures for handling its production, may be a problem for the future.

Some federal magistrate judges have opined on this in relation to applications for search warrants of home computer hard drives. Given that the entire information life of a person may be contained in single, small device, some have begun requiring greater specificity in the scope of warrants, in effect limiting its use in discovery. But that’s before any information is revealed.

In some ways this parallels the policy discussions as to the privacy in court records. The disclosure of so much significant and relevant information in legal proceedings may also increase the risk of compromised privacy, including identity theft, where those records are public.

It is something else to consider, especially if a party, to contain costs, opens up their electronic records to inspection rather than supplies material vetted by counsel. It is scary to think what might be found on any machine connected to the Internet these days.

Let me know your thoughts on this, or if it’s even an issue, at Michael.losavio@louisville.edu. ■

ENDNOTE

1. David Dodge “Eye On Ethics: Boorishness Be Gone Ban Bullying From Your Practice” 39 AZ Attorney 8, September, 2002.



Drafts: A Critical Tool for Planning, Revising, and Reflecting

Helene Davis, Director, University of Kentucky Law Library

Most legal professionals are quite familiar with the maxim “time is money”¹ — a concept that often has a place in legal writing and drafting. Yet, few skills suffer more when rushed than writing. Clear, concise and effective writing comes easiest for most legal professionals when they have time to re-read, edit, revise, and reflect.

Every professional can remember an instance when they hastily threw a document together and later regretted it. The document might have omitted an important fact or significant data, it might have had several typographical errors, or it might have benefited from input from a colleague. For many of us, those documents were first drafts that saw the light of day when they shouldn’t have. (Or even third drafts that needed a fourth draft.) All too often, multiple drafts are sacrificed to time constraints. For the lawyer who is well-versed with their subject, who is nearing a filing deadline, or who simply procrastinates, it’s easy to forego multiple drafts in favor of calling a document complete.

Drafts, however, can strengthen your writing.

Planning

The first advantage to using multiple drafts is that drafts force a writer to plan writing time more efficiently. For the procrastinator, this may pose a challenge, since most procrastinators are content to complete one full draft, not to mention multiple drafts. But the tendency to procrastinate can often be related back to initial uncertainty about how to begin a document or to “get it right the first time.” This is true even in more technical or specialized professional writing. A will-

ingness to produce a less-than-perfect first draft, knowing that there will be subsequent drafts, can mitigate this tendency to procrastinate. A first draft is a workable foundation upon which to build.

Even for non-procrastinators, multiple drafts can ease writer’s anxiety. Allowing sufficient time for a substantial re-read and revision (not just a perfunctory spell or grammar check) will have the inevitable consequence of lessening deadline pressures.

Diligence

Using drafts can also help to ensure that a writer covers all the bases. One technique is to do separate drafts (or reads of a variety of drafts) for individual aspects or components of the document. For example, use one read-through to check for consistent point-of-view and tense. Use a separate read-through to check presentation of substance and the logic of the document’s organization. Use yet another read-through to review the use of headings, emphasis, and physical



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presentation on the page.

Individual preference will dictate at what point a writer incorporates edits and generates a new draft before proceeding with the next draft or re-reads the current draft. In fact, a writer might approach this process in different ways depending upon what they are writing, using one set of guidelines for a client letter, another for a brief, and yet another for a business plan or proposal. Customize the process to fit individual needs and circumstances.

Before questioning whether any document is worth this amount of work, consider that most legal professionals are already familiar with a version of this process. One area where lawyers are likely to use this process is in citation verification — using Shepard's®² or Keycite®³. Few legal writers stop to verify citations while creating a first draft. This task is usually performed while working with a subsequent draft. Another area where this process often occurs is with footnotes. Creating multiple drafts to write, update and revise footnotes is a

common practice amongst those who publish legal scholarship, for example.

Perspective

There are at least two ways in which using multiple drafts can enhance a writer's perspective about a document in progress.

A legal writer can use multiple drafts to solicit input. Some writers are uneasy showing their first draft to a colleague whose opinion they value or to a superior who is responsible for evaluating their performance. Routing a later draft that's more polished gives the lawyer numerous opportunities to refine sentence structure, chose terms, develop arguments, and, of course, check spelling and grammar.

Drafts also allow for reflection. Writing a draft one day and returning to it the next allows a writer to re-evaluate the tone of a client letter or revisit possible weaknesses in positions being advanced in an appellate brief, for example. Even when a lawyer doesn't make substantive changes between drafts, the vetting that

occurs usually increases confidence in the effectiveness of the document.

When Time Is of the Essence

When there simply is no time for multiple drafts, compact the process in a way that fits document type, the document's relative importance, and the available timeframe. ***Then write at least one additional draft anyway.*** It may be a challenge to find ways to incorporate extra time, but finding that time will put (at least a little) indispensable distance between you and your written product. Time to re-think what you're trying to express it and how you're expressing it increases the likelihood that you will be more satisfied with the final product. ■

ENDNOTES

1. Attributed to Benjamin Franklin.
2. Shepard's® is a registered trademark of Reed Elsevier Properties Inc.
3. KeyCite® is a registered trademark of West, a Thomson Business.



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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.

SEPTEMBER

- 25 Fall Video Series - Professionalism, Ethics & Substance Abuse
Cincinnati Bar Association
- 25-26 Kentucky Law Update - Covington
Kentucky Bar Association
- 26 New Rules on E-Discovery & Medical Records
Fayette County Bar Association
- 26 Solo/Small Firm Practitioners Conference
Cincinnati Bar Association

2007 KENTUCKY LAW UPDATE Dates and Locations

September 25-26 (T/W) Covington
Northern Kentucky Convention Center

October 4-5 (Th/F) Ashland
Ashland Plaza Hotel

October 25-26 (Th/F) Prestonsburg
Jenny Wiley State Resort Park

October 29-30 (M/T) Bowling Green
Holiday Inn & Sloan Convention Center

November 7-8 (W/Th) Owensboro
Executive Inn Rivermont

November 29-30 (Th/F) Louisville
Kentucky International Convention Center

December 4-5 (T/W) Paducah
Kentucky Dam Village

- 27-28 Annual Convention
Kentucky Justice Association
- 28 Labor & Employment Law Symposium
Cincinnati Bar Association

OCTOBER

- 4-5 Kentucky Law Update - Ashland
Kentucky Bar Association
- 5 Basic Estate Planning Institute
Cincinnati Bar Association
- 8-9 New Lawyers Program - Louisville
Kentucky Bar Association
- 9 Fall Video Series - Professionalism, Ethics & Substance Abuse
Cincinnati Bar Association
- 17 Domestic Relations CLE
Fayette County Bar Association
- 18 Professionalism, Ethics & Substance Abuse
Cincinnati Bar Association
- 19 Environmental Law
Cincinnati Bar Association
- 25 Appellate Practice
Cincinnati Bar Association
- 25-26 Kentucky Law Update - Prestonsburg
Kentucky Bar Association
- 26 Law Firm Communication & Team Building
Cincinnati Bar Association
- 29-30 Kentucky Law Update - Bowling Green
Kentucky Bar Association

NOVEMBER

- 1 Everything Email for the Legal Professional
Cincinnati Bar Association
- 1 16th Biennial Family Law Institute
UK CLE

Kentucky Bar Association

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AOC Juvenile Services

Lyn Lee Guarnieri • (502) 573-2350

Louisville Bar Association

Lisa Maddox • (502) 569-1361

KYLAP

Anna Columbia • (502) 564-3795

Kentucky Justice Association (KJA)

Ellen Sykes • (502) 339-8890

Chase College of Law

Jennifer Baker • (859) 572-1461

Kentucky Department of Public Advocacy

Jeff Sherr or Lisa Blevins

(502) 564-8006 ext. 236

AOC Mediation & Family Court Services

Malissa Carman-Goode • (502) 573-2350

UK Office of CLE

Melinda Rawlings • (859) 257-2921

Mediation Center of the Institute for

Violence Prevention

Louis Siegel • (800) 676-8615

Northern Kentucky Bar Association

Christine Sevendik • (859) 781-1300

Fayette County Bar Association

Mary Carr • (859) 225-9897

Cincinnati Bar Association

Dimity Orlet • (513) 381-8213

Mediation Center of Kentucky

Tami Bowen • (859) 246-2664

Access to Justice Foundation

Nan Frazer Hanley • (859) 255-9913

Administrative Office of the Courts

Malissa Carman-Goode
(502) 573-2350, Ext. 2165

- | | | | | | |
|-----|--|----|--|-------|---|
| 6 | Cyber-Sleuth: Research Strategies for Legal Professionals
<i>Cincinnati Bar Association</i> | 15 | Working with a Computer Forensics Expert: Identifying Experts, Creating Protocols and Explaining New Technology
<i>Cincinnati Bar Association</i> | 28 | Corporate Counsel Seminar
<i>Cincinnati Bar Association</i> |
| 7-8 | Kentucky Law Update - Owensboro
<i>Kentucky Bar Association</i> | 16 | Law & Film: Do Films Influence Law or Reflect It?
<i>Cincinnati Bar Association</i> | 29 | Gain the Edge - Negotiation Strategies for Lawyers
<i>Cincinnati Bar Association</i> |
| 9 | Making Your Case with a Better Memory
<i>Cincinnati Bar Association</i> | 16 | Meeting Dynamics for Lawyers: How to Conduct & Participate in Effective Meetings
<i>Cincinnati Bar Association</i> | 29-30 | Kentucky Law Update - Louisville
<i>Kentucky Bar Association</i> |
| 9 | Ethical Communication for Lawyers
<i>Cincinnati Bar Association</i> | 16 | Meeting Dynamics for Lawyers: How to Conduct & Participate in Effective Meetings
<i>Cincinnati Bar Association</i> | 30-1 | Tax Institute
<i>Cincinnati Bar Association</i> |
| 13 | Fall Video Series - Professionalism, Ethics & Substance Abuse
<i>Cincinnati Bar Association</i> | 20 | Fall Video Series - Professionalism, Ethics & Substance Abuse
<i>Cincinnati Bar Association</i> | | |

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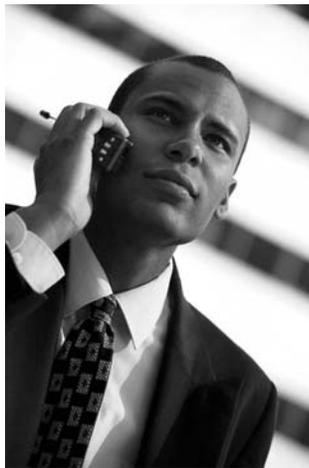
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Upcoming teleseminars for September and October 2007

September 4	Sexual Harassment Update
September 6	Entity Depositions: Rule 36(b) & Most Knowledgeable Parties
September 11-12	Digital Evidence: Recent Developments from the Courts, Parts 1 & 2
September 13-14	Developments in Daubert Evidence in the Courtroom, Parts 1 & 2
September 24	Innocent Spouse Defense for Family Law Practitioners
October 12	Art of the Deal 2: Due Diligence (LIVE REPLAY)
October 16	Asset Protection in Bankruptcy Law
October 19	Art of the Deal 3: Preparing the Deal, Part 2 (LIVE REPLAY)
October 23	Fiduciary Litigation Update
October 25	Section 409A and Compensation Agreements: Changes as the Deadline Approaches

Register and find more information at www.kybar.org

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

Summer Scholarship at Chase

Chase faculty were active scholars this summer. Many traveled the world to showcase Chase's commitment to teaching and scholarship.



Lowell Schechter

Jennifer Anglim Kreder and **Lowell Schechter** both delivered presentations at international conferences. Professor Kreder, at a joint conference in Vancouver of the Association of American Law

Schools and the American Society of International Law conference, urged that an international tribunal be established to help resolve disputes over Nazi-looted art. Professor Kreder's work on this topic has resulted in the publication of a journal article and two separate essays.

Professor Schechter, at an International Society of Family Law conference also in Vancouver, discussed the impact of current American immigration laws on family unity.



Michael Whiteman

Michael Whiteman and **Iain Barksdale** traveled to Las Vegas for a legal education technology conference. Their presentation explored using distance education to teach skills-based legal education courses.



Iain Barksdale

Roger Billings returned this summer after a semester as guest professor at the University of Salzburg College of Law, where he taught international trade law and did research at the World Trade Organization in Geneva. He is writing an article on "National



Roger Billings

Champions and the Future of World Trade" and also preparing for several presentations this fall about Abraham Lincoln's commercial law practice.



Dennis Honabach

Dennis Honabach completed the 2008 edition of the *D&O Liability Handbook* he and Dean Mark Sargent (Villanova Law) publish with the West Group.



Christopher Gulinello

Christopher Gulinello has been working on his most recent article, which explores whether we should require public companies to disclose certain aspects of the corporate law of their states of incorporation. He also spent seven weeks in Taipei, Taiwan, preparing for the classes he will teach at the National Taiwan University College of Law on his Fulbright grant next spring.



Annette Burkeen

Annette Burkeen spent the summer writing a paper currently titled "Race, Law and Social Norms," discussing the role of social norms and non-legal social sanctions in monitoring and regulating negative racial stereotypes and discriminatory behavior.



William Sjostrom

She presented an early version of this paper at the University of Cincinnati's faculty workshop in June.

William Sjostrom collaborated with Young Sang Kim of the NKU School of Business on the article "Majority Voting for the Election of Directors," and finished a separate article on PIPEs – an important source of financing for small public companies.

Jennifer Jolly-Ryan's article on the use of timed and flagged LSATs will be published in the *Cumberland Law Review*



Jennifer Jolly-Ryan



Davida Isaacs

this fall. She is now researching a guidebook for undergraduate students with disabilities who are thinking about attending law school.

Davida Isaacs spent the summer preparing her next article, which discusses whether patents are entitled to Due Process Clause protection. She also joined the Board of the Cincinnati Intellectual Property Law Association, and worked throughout the summer to place students in externships with firms and companies with vibrant intellectual property practices, such as Procter & Gamble.



Lawrence Rosenthal

Lawrence Rosenthal continued to work on his Title VII anti-retaliation article, which will appear in the next issue of the *Arizona State Law Journal*. He also taught employment discrimination law, and worked with **Barbara McFarland** and **Jennifer Kreder** to restructure the Introduction to Legal Studies course.



Barbara McFarland



Jennifer Kreder

Rick Bales spoke at the University of Cincinnati College of Law on the Nineteenth Century spread of the at-will employment rule, and at the KBA's Annual Convention on whether attorneys have an ethical duty to inform their litigating clients about ADR. He also finished a book, *Understanding Employment Law*, to be published in September by LexisNexis.

UK University of Kentucky School of Law

By Allan W. Vestal, Dean,
University of Kentucky College of Law
Lucky for Us, He Changed His Mind

Recently, a good friend sent me a copy of a brochure published by the UK College of Law in 1964, highlighting the members of that graduating class.

The introduction, by Dean W.L. Matthews, Jr., suggests that the purpose of the brochure was to solicit employment offers for members of the class. Accordingly, the brochure lists each member of the class with his – no women among the forty-three graduates listed – marital status, undergraduate education, practice or geographic preference, law school activities, undergraduate activities, work experience and military service status. Dean Matthews concludes:

The knowledge, experience, and record achieved by each graduate during his academic career provide a good measure of the quality of his legal education and a good basis for estimating his potential in his professional career. For this reason the faculty of the College of Law is confident that these members of the class of 1964 will make a strong contribution to the legal profession and the society in which they will live.

Dean Matthews was surely proved right about the overall strength of the class: included among the graduates are the likes of Jim Amato, Hal Rogers, Joe Savage, Bill Montague, Bill Reik, Burl Spurlock, Paul Gudge, and Dick Ward.

And our own Professor Bill Fortune: looking out from page seven of the brochure is 23-year-old William Hifner Fortune, virtually unchanged in appearance from then to now. His entry indicates that his military status was 2-S, and he was active in the KLJ and Young Democrats during his time in law school.

If truth be told, the graduates of the Class of 1964 were not always perfect in predicting their futures. Judge Paul

Gudge lists “corporate law” and Congressman Hal Rogers lists “practice,” although Joe Savage and Dick Ward both list “practice.”

Lucky for us, Bill Fortune was also wide of the mark. As to his future plans, Bill listed: “*Preference: Practice.*” Of course, Bill did practice at various times in his professional life. He engaged in private practice in Lexington from his graduation in 1964 through 1968, when he joined the faculty of the College of Law. He practiced as a Federal Public Defender from 1975-76 and 1977-79, and as public defender for the Commonwealth in Pikeville from 1992-93. But surely his primary claim to fame is as an award-winning professor at the College of Law.

Bill is an excellent classroom teacher. He is renowned for his teaching in the areas of civil procedure, criminal law, criminal procedure, evidence and professional responsibility. But the other courses Bill has taught over the years for the convenience of the College would, as one colleague observed, fill the curriculum of a reasonably good law school. As remarkable as the breadth of his teaching is the quality; in 2001 he was named an Alumni Association Great Teacher of the University in recognition of excellence in his teaching career.

As is often the case with excellent teachers, Bill is also a notable scholar. He has written highly-regarded works on trial ethics, law and psychology, professional responsibility, and criminal law.

Bill is also a good citizen of the College of Law, the University of Kentucky, and the Commonwealth. He has twice served as an Associate Dean of the College, and led the University as Chair of the University Senate Council. Recently, his work on judicial campaign ethics served the Commonwealth.

In the 1964 brochure, Dean Matthews said that “the faculty of the College of Law is confident that these members of the class of 1964 will make a strong contribution to the legal profession and the society in which they will live.” Bill Fortune has done his part to make Dean Matthews’ prediction a reality. He has made a strong contribution to the legal profession and the society in

which he lives.

It is an appropriate time to mark Bill’s contributions. As we begin the 2007-2008 academic year Bill has officially entered into “phased retirement.” In that status he will teach one-half time for up to five years before he begins full retirement. Many of us are skeptical about this development, as we cannot imagine Bill making anything less than a full-time commitment to the College of Law and the students he has served so well. We suspect that, just like his 1964 prediction of how he would spend his career, his 2007 prediction about the next few years may be superseded.



University of
Louisville
School of Law

In the Cards

By Jim Chen, Dean and Professor of Law,
University of Louisville School of Law

An extraordinary season of success greets Louisville Law as the 2007-08 academic year approaches. That success lies in the Cards. To track just a few of the remarkable developments in legal education at the University of Louisville, join the Cardinal faithful in that familiar chant: C-A-R-D-S

C = Clinic

Louisville Law’s success lies in its ability to translate theory and doctrine to practice. The University of Louisville proudly aspires to a simple but powerful goal: We graduate lawyers who are ready to work.

Clinical legal education lies at the heart of this agenda. There is no better way to learn the law than to handle real cases and to represent real clients.

On May 7, 2007, the Law School’s faculty voted unanimously to launch the University of Louisville Law Clinic. The faculty’s resolution contemplates that the clinic will “help students develop essential lawyering skills and [will] partner with other units and civic organizations to address some of the unmet legal needs of the metropolitan community.” The Law Clinic unites three grand objectives of legal education: providing the best possible training to

KENTUCKY BAR NEWS

future lawyers, delivering research and scholarship with real-world impact, and serving the broader public.

Participating students will work in either a transactional clinic or an advocacy clinic. The transactional clinic will focus on community development by helping small businesses, nonprofit organizations, and entrepreneurs start businesses and create jobs in low-income neighborhoods. The advocacy clinic will provide civil representation for needy individuals.

The Law School expects to open the clinic in time for the 2008-09 school year. First-year students matriculating this fall will have the opportunity to experience clinical education before graduation. At least one tenured or tenure-track faculty member will work in the clinic. In addition, the clinic will provide invaluable community service by supplementing the efforts of public defenders, Legal Aid, and individual lawyers performing *pro bono* work.

A = Additions

This is a time of great excitement. The Law School is delighted to welcome a half-dozen faculty visitors during the 2007-08 school year.

Alberto Lopez, a member of Northern Kentucky University's law faculty, will serve as a visiting professor this fall. He will teach property and decedents' estates. Four additional visitors will serve as visiting assistant professors. They are the first members of a new program designed to foster young scholars who seek to secure full-time, tenure-track teaching positions in the legal academy.

Ariana Levinson, formerly associated with the University of Southern California, will serve as a visiting assistant professor. She will teach basic legal skills throughout the academic year.

Andy Long will also serve as a visiting assistant professor. He will teach environmental Law in the fall and property in the spring.

Luke Milligan, formerly a visiting assistant professor of law at Emory University, will teach criminal procedure and criminal law as a visiting assistant professor at Louisville Law.

Aleatra P. Williams will teach prod-

ucts liability and torts as a visiting assistant professor. Ms. Williams has served as a visiting assistant professor at the University of Minnesota Law School.

In addition, Jennifer Jordan Hall will bolster the efforts of our visiting assistant professor corps by teaching basic legal skills. A former staff attorney for Justice Martin Johnstone, Ms. Hall brings 11 years of experience in appellate litigation to the Law School.

The Law School also welcomes a new assistant dean for student affairs. Keith E. Sealing brings a distinguished record of service as assistant dean for student administration at the Syracuse University College of Law. He is a published scholar in constitutional and international law.

R = Results

There is no better measure of a law school's success than the success of its graduates. We are extremely proud of our class of 2007. Our students found jobs in a geographic range spanning from Delaware to Alaska. One graduate, Sean Deskins, will study in Slovakia as a Fulbright Scholar.

The class of 2007 distinguished itself even before it graduated. The Black Law Students Association delivered an extraordinary amount of time and energy in recruiting minority students to the University of Louisville. On the eve of the 2007-08 school year, those efforts appear to have paid off. According to Jack Cox, assistant dean for admissions, the Law School is poised to triple the number of minority students in its entering class. Dean Cox has described the BLSA's contribution to this campaign as "invaluable."

Our students have also continued the Law School's tradition as a pioneer in integrating public service with legal education. Ten students spent their winter break in Louisiana giving legal aid to Katrina survivors. In at least one instance, our students represented the last line of defense between a family and foreclosure. In a citywide fundraiser last fall, the Law School's AIDS Walk team finished first among teams representing colleges and universities, and third overall among 104 teams.

I am proud of our students and our

graduates. There may be no more succinct way of defining my mission as dean: I wish to lead a school where every student, by dint of her or his hard work, will be able to achieve the following goals:

- Graduation on her or his schedule, after a law school career spent entirely in good academic standing
- A job offer in hand on graduation day
- Rock-solid confidence in passing the bar exam
- The ability to take that bar exam in any jurisdiction in the United States, subject solely to the graduate's career goals.

D = Development

Like any other great law school, Louisville Law depends on the generosity of its graduates and the larger legal community that sustains it. I have set a personal goal of lifting our alumni giving rate from its current 11 percent level to the 25 percent rate that typifies public law schools nationwide.

Recent successes in private giving hold promise for even greater success in development and alumni relations. Wyatt, Tarrant & Combs, Robert Greenwell '98, and Murry J. Klein '70 have all recently made generous contributions toward our scholarship programs. Thanks to the generosity of its donors, the Law School is completing the renovation of two classrooms — one honoring the class of 1979, the other honoring the career and public service contributions of former Louisville mayor Frank W. Burke '48. We are especially grateful to Mayor Burke's son-in-law, Dennis Clare '68, for his leadership in securing this room.

These gifts have placed the Law School on the verge of completing a major renovation project begun three years ago under the leadership of Dean Laura Rothstein. Very soon, the Law School will be pleased to announce two additional breakthrough contributions that will not only complete the renovation initiative, but also enable the Law School to increase its annual income from private, nonendowment-based sources by as much as a factor of five. Stay tuned for the details; I will be

delighted to share them with you.

I treat development and alumni relations at the University of Louisville School of Law as a personal mission. I had the pleasure this summer of welcoming our class of 1997 back to Louisville for a delightful reunion weekend. On homecoming weekend, October 25-27, the Law School will stage a wide variety of events: its first ever all-alumni reunion event, the annual alumnae/alumni awards banquet, and the University of Louisville's first annual Conference on Law, Ethics, and the Life Sciences.

In my seven months as dean, I have had the privilege of connecting with the Law School's graduates in places ranging from Rocco's Ristorante (the finest Italian dining in Ceredo, West Virginia) to the food court at Denver International Airport. Wherever our graduates go, the Law School will follow their careers with intense interest.

S = Scholarship

Legal education thrives on active research and scholarship. At Louisville Law, we not only excel in writing legal

scholarship; we also apply it to real-world problems and make our research accessible to the broader public.

The *University of Louisville Law Review* will proudly host a conference on January 18, 2008, on the landmark Supreme Court decision, *Meredith v. Jefferson County Board of Education* and its companion case, *Parents Involved in Community Schools v. Seattle School District*. Our first annual Conference on Law, Ethics, and the Life Sciences brings the Law School into harmony with the University of Louisville's plans to become a global leader in medicine and the life sciences, as evidenced by the University's recent announcement of plans for a \$2.5 billion capital investment in expansion, renovation and infrastructure over the next two decades in a 30-block health sciences area that includes the University of Louisville Health Sciences Center. In the summer of 2008, the Law School will cosponsor an international conference on the law of innovation and intellectual property, to be held at the University of Turku, Finland.

In quieter but no less significant

fashion, the Law School has pursued other academic innovations designed to promote its faculty's scholarship and to enhance the school's standing within the legal academy. Our faculty appeared in force at this summer's Law & Society Association conference in Berlin and at the annual meeting of the Southeastern Association of Law Schools, held this year on Amelia Island, Florida. Professors Susan Kosse and Tim Hall represented Louisville Law at Jurisgenesis, an exciting annual conference sponsored by Washington University and St. Louis University that provides junior scholars a chance to present their work and secure helpful commentary from senior scholars from at other law schools. In calendar year 2007, the Law School's faculty has dramatically improved its profile on the Social Science Research Network, the leading online clearinghouse for scholarship by professors of law and other social sciences.

To sum up, join me again in other round of the University of Louisville's Cardinal chant: C-A-R-D-S!



Kentucky Bar Foundation Past Presidents

Eight Past Presidents of the Kentucky Bar Foundation were among those who attended the annual Fellows and Partners For Justice Society Luncheon held at the Hyatt Regency Hotel on Thursday, June 21, 2007 during the KBA Convention in Louisville. Pictured from left to right are Kathryn Ross Arterberry (Louisville), Jerry J. Cox (Mount Vernon), Douglas L. McSwain (Lexington), M. Gail Wilson (Jamestown), William M. Arvin, Sr. (Nicholasville), Sarah M. Jackson (Frankfort), Earl M. "Mickey" McGuire (Prestonsburg), and J. Warren Keller (London).

■ In Memoriam

John C. Bondurant	Hickman
Gary Duncan Garrison	Louisville
John Miller	Russellville
Paul F. Henderson, Jr.	Richmond
John Paul Blevins	Edmonton
Charles Raulston Ray	Nashville, TN
John R. Sampson	Brooking
	Fort Wright
Christopher Wayne	Johnson
	Georgetown

KENTUCKY BAR NEWS

Court of Appeals Chief Judge Sara Combs received Honorary Degree from Union College and delivered University of Louisville School of Law Commencement Address

Union College presented Kentucky Court of Appeals Chief Judge Sara Walter Combs with an honorary doctor of laws degree on May 5, 2007 in Barbourville. Judge Combs, who was on hand to deliver the commencement address to the 128th graduating class, was recognized by Union College for her “distinguished judicial record and pioneer legacy as the first woman on the Kentucky Supreme Court.” The honorary degree noted Judge Combs’ distinguished legal career.

Union College also honored Judge Combs and her late husband, former Kentucky Governor Bert T. Combs, by announcing the establishment of the Sara W. and Bert T. Combs Leadership Grant. The grant honors their devotion to Kentucky, love of education, and civic leadership. It will benefit students who show promise as future civic leaders in Kentucky.

Judge Combs also addressed the 2007 graduating class of the University of Louisville School of Law on May 12, 2007. She received her undergraduate degree in 1970 from the University of Louisville, where she graduated as valedictorian. She also completed a master’s degree in French at the University of Louisville. In 1979, Judge Combs earned her law degree from the University of Louisville School of Law, where she ranked second in her class and was later honored with a Distinguished Alumni Award.

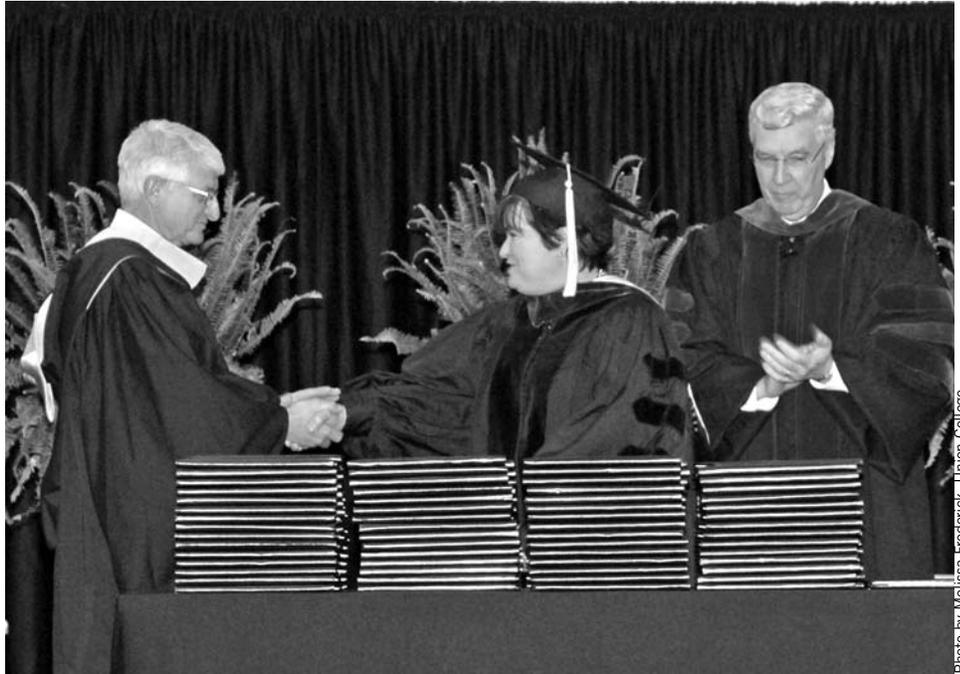


Photo by Melissa Frederick, Union College.

Union College Board of Trustees Chairman Leonard Shetler, left, and Vice President for Academic Affairs Dr. Tom McFarland, right, congratulated Court of Appeals Chief Judge Sara W. Combs for her honorary doctor of laws degree.

Northern Kentucky Lawyers Honored for Pro Bono Service

The 2007 Pro Bono Awards Luncheon honored Volunteer Lawyers of Northern Kentucky on May 24, 2007 at Summit Hills Country Club. Judge Danny J. Boggs, United States Court of Appeals for the Sixth Circuit, was the speaker for the luncheon.

The Pro Bono Attorney of the Year Award was presented to John A. Fortner, Assistant Campbell County Attorney, for exceptional pro bono service and dedication to the legal needs of families and children throughout Northern Kentucky. Fortner graduated from Salmon P. Chase College of Law in 1982, and practiced law with Wil and Robert Schroder in Covington.

The firm of Knoebel & Vice received the Outstanding Firm Award in recognition of their commitment and support of Access to Justice for members of the community. The firm is located in Burlington.

Trista Portales, a third year law school student at Salmon P. Chase College of Law, was the recipient of the 2007 Pro Bono Student Scholarship in the amount of \$500.00. The award reflects Portales’

significant contributions to the Chase Law Advocate Pro Bono Program and various community service activities. The firm of Deters, Benzinger & LaVelle is the sponsor of this year’s scholarship award.

David Schneider was honored with the Nick of Time Award for his quick response to critically important legal matters facing elderly and disadvantaged clients who had nowhere else to turn for help. Schneider practices with the law firm of Ziegler & Schneider in Crescent Spring.

Ryan Green was awarded the Distinguished New Volunteer Award for his willingness to accept a variety of legal cases and represent clients pro bono before the courts. Green practices with the firm of Cetrulo & Mowery in Edgewood.

The 2007 Pro Bono Awards Luncheon was sponsored by Lawyer’s Mutual Insurance Company of Kentucky. The Northern Kentucky Volunteer Lawyers, Inc. is a joint venture of the Northern Kentucky Bar Association and Legal Aid of the Bluegrass funded in part through the Kentucky IOLTA Fund.

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**SUMMARY OF MINUTES
KBA BOARD OF GOVERNORS
MEETING
MAY 18, 2007**

The Board of Governors met on Friday, May 18, 2007. Officers and Bar Governors in attendance were *President* R. Ewald, *President-Elect* J. Dyche, *Vice President* B. Bonar, *Immediate Past President* D. Sloan, *Bar Governors 1st District* - M. Whitlow, D. Myers; *2nd District* - C. Moore, J. Harris, Jr.; *3rd District* - R. Madden; *4th District* - M. O'Connell, J. White; *5th District* - F. Fugazzi, D. McSwain; *6th District* - M. Grubbs, T. Rouse; and *7th District* - J. Rosenberg, W. Wilhoit. Bar Governors absent were: *Young Lawyers Section Chair* A. Schaeffer and *Bar Governor* M. McGhee.

In Executive Session, the Board considered eleven (11) default discipline cases involving three (3) attorneys. Mark Harrell of Somerset and Steve Langford of Louisville, non-lawyer members serving on the Board pursuant to SCR 3.375, participated in the deliberations.

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

- Heard status reports from the KYLAP Committee, Office of Bar Counsel and Mentoring Program Committee.
- Approved the following nominees recommended for appointment to the ABA House of Delegates: reappointment of David B. Sloan of Covington and the new appointment of Palmer Gene Vance II of Lexington. The appointment of Mr. Sloan and the appointment of Mr. Vance are each for a two (2) year term ending in August 2009 at the end of the 2009 ABA Annual Meeting.
- Approved reappointments to the Kentucky Bar Foundation: 1st Supreme Court District W. David Denton of Paducah and 3rd Supreme Court District G. Barry Bertram of Campbellsville for respective three (3) year terms ending on June 30, 2010. Also approved the following appointments to the Foundation: 2nd Supreme Court District Frank Hampton Moore, Jr. of Bowling Green, and 5th Supreme Court District J. Guthrie True of Frankfort for respective three (3)

year terms ending on June 30, 2010. Appointed 4th Supreme Court District Edward M. King of Louisville to an unexpired three (3) year term ending on June 30, 2008.

- Approved reappointment of Nancy Beck of Edgewood and the appointment of William Gary Crabtree of London as Clients' Security Fund Trustees for respective three (3) year terms ending on June 30, 2010.
- Approved to support the resolution of the Virginia State Bar for adoption and approval to the ABA House of Delegates at the August 2007 meeting recommending that all bar organizations permit a waiver or suspension of bar membership obligations for lawyers serving with our military in combat zones.
- Executive Director James L. Deckard advised the Board that the Supreme Court approved the KBA Annual Operating Fiscal Year Budget for July 1, 2007 - June 30, 2008.
- Mr. Deckard advised the Board that the employment of Kelley, Galloway & Company, P.S.C. of Ashland, Kentucky to audit the accounts of the Kentucky Bar Association and the Kentucky Bar Foundation/IOLTA Fund for the Fiscal Year ending June 30, 2007 had been approved by the Supreme Court.
- Mr. Deckard reported on his receipt of Orders from the Supreme Court, entered April 10, 2007:

Appointment of members to the IOLTA Board of Trustees for three (3) year terms ending on June 30, 2010:

- 1st Supreme Court District - Ken Haggard, Hopkinsville
- 2nd Supreme Court District - Douglas W. Gott, Bowling Green

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KENTUCKY BAR NEWS

6th Supreme Court District - John A. Bonar, Covington

Appointment of members to the CLE Commission for three (3) year terms ending on June 30, 2010:

2nd Supreme Court District - Kerry Morgan, Bowling Green

3rd Supreme Court District - Melinda Gillum Dalton, Somerset

4th Supreme Court District - Olu A. Stevens, Louisville

Appointment of Anita M. Britton to serve as Chair of the CLE Commission beginning July 1, 2007.

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING JUNE 19, 2007

The Board of Governors met on Tuesday, June 19, 2007. Officers and Bar Governors in attendance were *President* R. Ewald, *President-Elect* J. Dyche, *Vice President* B. Bonar, *Immediate Past President* D. Sloan and *Young Lawyers Section Chair* A. Schaeffer. *Bar Governors 1st District* - M. Whitlow, D. Myers; *2nd District* C. Moore, J. Harris, Jr.; *3rd District* - R. Madden, M. McGhee; *4th District* - M. O'Connell, J. White; *5th District* - F. Fugazzi, D. McSwain; *6th District* - T. Rouse; and *7th District* - J. Rosenberg, W. Wilhoit. *Bar Governor* M. Grubbs was absent.

In Executive Session, the Board considered one (1) discipline case and one (1) restoration case. Carol Frederick of Louisville and Steve Langford of Louisville, non-lawyer members serving on the Board pursuant to SCR 3.375, participated in the deliberations.

New Officers and Bar Governors taking office on July 1, 2007, in attendance were: *Vice President* Charles E. English, Jr. of Bowling Green, *Young Lawyers Section Chair* Ryan C. Reed of Bowling Green and *Bar Governors: 2nd Supreme Court District* R. Michael Sullivan of Owensboro; *3rd Supreme Court District* Richard W. Hay of Somerset; and *4th Supreme Court District* Douglas C.E. Farnsley of Louisville.

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

- Heard status reports from the Attorneys' Advertising Commission and the Clients' Security Fund.
- Approved the Mentoring Pilot Program subject to the approval by the Supreme Court of Kentucky.
- Young Lawyers Section Chair A.J. Schaeffer reported that the focus of the section during the year had been to increase section membership and increase revenues. He advised that the public service project of the Section was the statewide, county-to-county Wills for Heroes, and that the Section had embraced the goals of the KBA to

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increase pro bono hours for not only the Section but all lawyers. Mr. Schaeffer also stated that it had been one of the goals of the Section to increase attendance at the Annual Convention. He advised that at the 2005 Louisville convention, the Section had accounted for approximately 4.5% of the Bar Convention revenues, approximately 4.2% at the Covington Convention in 2006, and that for the 2007 Louisville Bar Convention, they were projecting their section to account for approximately 10% of the Bar Convention revenue. Mr. Schaeffer further discussed the possibility of the Section being able to orient and introduce the new Section District representatives of their Executive Committee to the corresponding District representative of the Board of Governors for an intergenerational partnership and collaboration of ideas and concepts.

- Approved staff salaries for the fiscal year beginning on July 1, 2007.

- Approved the list of the 2007 Honorary Members who reached the age 75 or have been admitted to practice of law for 50 years during the period beginning January 1, 2007 and ending June 30, 2008.
- Approved as a proposed formal ethics opinion KBA E-428, regarding the participation in not-for-profit bar association lawyer's referral services. KBA E-428 will be scheduled for publication in the Bench & Bar magazine under the provisions of SCR 3.530.
- Executive Director James L. Deckard advised effective June 15, 2007, the KBA travel reimbursement increased to \$.41 per mile. On June 1, 2007, the Court of Justice travel increased from

\$.38 a mile to \$.41 per mile. The KBA Travel Policy mileage reimbursement is to mirror the Court of Justice Travel Policy.

- President-Elect Dyche reported that the July Summer Board Meeting would be held at Dale Hollow State Resort on July 19-21, 2007. Ms. Dyche reported that Elizabeth Derrico of the American Bar Association would be attending the meeting for participation in focus groups with the Board, CLE Commission and Young Lawyers Section Executive Committee to address the issues surrounding the Long Range & Strategic Planning process.

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 to make **ONLINE** changes or to print an Address Change/Update Form

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

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

**Executive Director/Membership Department
(502) 564-3225**

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

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

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

To KBA Members

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

November 16-17, 2007

January 18-19, 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.

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All lawyers admitted to practice in one or more of the federal courts of the Sixth Circuit and their guests are invited to attend. Attendees will enjoy not only the amenities of this wonderful and friendly city, but they will also have the opportunity to meet and become acquainted with the judges of the Sixth Circuit and the opportunity to enjoy the fellowship of colleagues and friends.

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For more information visit the website for the United States District Court for the Eastern District of Tennessee (www.tned.uscourts.gov) and click on "2008 Sixth Circuit Conference."

For more information about Chattanooga visit www.chattanoogaofun.com and www.chattanoogameetings.com or call 800-964-8600.

ON THE MOVE

Fultz Maddox Hovious & Dickens PLC is pleased to announce that managing member **Benjamin C. Fultz** has become a name member in the firm. **Benjamin C. Fultz, Victor Maddox, Gregg Hovious, and Scott Dickens** will continue their practices with the firm along with **Carmin Grandinetti, Phillip Martin, John David Dyche, A.J. Simon, Lynn Fieldhouse, Brian Zoeller, and Jennifer Stinnett**. Their offices are located in Louisville at 101 South Fifth Street, 2700 National City Tower. They may be reached by telephone at (502) 588-2000. The firm will continue to focus on providing legal services to businesses and individuals nationwide, with a focus on commercial litigation and transactional work for all types and sizes of business organizations. The firm also handles constitutional and public interest litigation, employment matters and personal injury litigation for plaintiffs and defendants, and works with several national providers of health care services on litigation and business counseling matters.



George L. Fletcher

The Danville law firm of **Sheehan, Barnett, Hays, Dean & Pennington, PSC**, is proud to announce that **George L. Fletcher** has joined the firm as an associate attorney focusing on estate planning, wills, trusts, probate, business planning, real estate, and guardianship. A Breathitt County native, Fletcher received a B.A. at the University of Kentucky and earned his J.D. at Salmon P. Chase College of Law. After relocating to Central Kentucky in 2000, Fletcher served as trust officer and vice president of PNC Advisors and performed financial and estate planning for clients at Fifth Third Bank before returning to private practice.

Brian H. Potts, of Louisville, has joined the law firm of **Foley & Lardner LLP** in its Madison, Wisconsin office as an environmental and energy law associate. Potts recently received his LL.M. in

Energy Law from the University of California, Berkeley School of Law - Boalt Hall, and is a graduate of Vermont Law School and Centre College.



Linda D. Bullock

The Louisville law firm of **Diana L. Skaggs & Associates** is pleased to announce **Linda Dixon Bullock** has joined the firm as an associate. The firm will continue to limit its practice to divorce and family law.



Adrian Mendiondo

The Lexington firm of **Kinhead & Stilz, PLLC** is pleased to announce that **Adrian Mendiondo** has joined the firm and that **Thomas M. Todd** has joined the firm as a member. Mendiondo received his B.A. from Emory University in 2000 and earned his J.D., with honors, in 2003 from Pepperdine University. He practices in the areas of commercial and business litigation, employment litigation, corporate law,



Thomas M. Todd

real estate law, administrative proceedings, and personal injury law. Todd received his B.A. from the University of Kentucky in 1982 and earned his J.D. from the University of Kentucky College of Law in 1985. He focuses his practice on construction law, real estate development and commercial transactions.



David Tachau

David Tachau, Dustin E. Meek and Brian F. Haara, formerly partners at Tachau Maddox Hovious & Dickens PLC, are pleased to announce the July 1, 2007 opening of their new firm **Tachau Meek PLC** where they continue their practices in commercial and general civil litigation with **Katherine E. McKune**



Dustin E. Meek

and **James Craig** at 101 South Fifth Street in Louisville at 2400 National City Tower.



Brian F. Haara

Rhoda Faller has joined her husband, Bernard Faller, in his law practice, **Kentucky ElderLaw, PLLC**, located in Shalom Towers in Louisville. Rhoda Faller, an attorney since 1979, will be handling Medicaid issues including eligibility, planning, applications, hearings and appeals. In addition, she will handle wills, trusts, estates, powers of attorney, and special needs trusts for people of all ages as well as other issues that affect older folks and their families. Faller may be reached at (502) 581-1111.



Katherine E. McKune



James Craig

Jennifer Jordan Hall is pleased to announce the new location of her law office in Louisville at 3701 Taylorsville Road in Suite 1A. In addition to appellate law, Hall's practice focuses on



Jennifer J. Hall

immigration law. She graduated, *magna cum laude*, from Harvard College in 1987 and earned her J.D., *cum laude*, from Harvard Law School in 1991. Hall was a law clerk for Chief Judge Danny J. Boggs, U.S. 6th Circuit Court of

Appeals, and served on the national board of directors of the American Inns of Court. She is admitted to practice law in Kentucky and Massachusetts.

D. Jane Osborne is pleased to announce the opening of her law and mediation practice in Paducah at 111 South 6th Street. Her telephone number is

WHO, WHAT, WHEN & WHERE

(270) 442-0121. Osborne is a 1985 graduate of Murray State University and a 1988 graduate of the University of Kentucky College of Law. She is a certified family law mediator and has worked as a staff attorney to Family Court Judge Cynthia Sanderson. Osborne has spent the last five years in the McCracken County Attorney's Office prosecuting domestic violence and child support cases.



Regan B. Tirone

The Crestview Hills law firm of **O'Hara, Ruberg, Taylor, Sloan & Sergent** is pleased to announce it has hired two new attorneys, **Regan B. Tirone** and **Roula Allouch**. Tirone received her B.A. from the University of Louisville in 2002 and earned her J.D. from Salmon P. Chase College of Law in 2005. She joined the firm as a law clerk in

August of 2005 and as a general practice associate in April of 2006. Tirone concentrates her practice in insurance defense and general litigation. Allouch received her B.B.A. from the University of Kentucky in 2002 and earned her J.D. from the University of Kentucky College of Law in 2006. She joined the firm as a general practice associate in October of 2006 and concentrates her practice in insurance defense, general litigation, employment, and immigration law. Tirone and Allouch are both currently admitted to practice law in Ohio and Kentucky.



James L. Adams

Dinsmore & Shohl LLP is pleased to announce that **James L. Adams, Matthew J. Hallingstad, and H. Trigg Mitchell** have joined the firm as associates. Adams and Hallingstad will practice in the Louisville

office in the firm's Litigation Department. Mitchell will practice in the



Matthew J. Hallingstad



H. Trigg Mitchell

firm's Lexington office in the Corporate Department. Adams received his B.A. from Indiana University-Bloomington in 1975 and earned his J.D. from the University of Louisville School of Law in 2004. Hallingstad graduated from Iowa State University in 1995 with a B.S. He received his M.S. from Eastern Kentucky University in 2002 and earned his J.D. from the University of Wisconsin Law School in 2005. Mitchell graduated from the University of Kentucky in 1995 with a B.S. He earned his J.D. from Salmon P. Chase College of Law in 2000 and received his LL.M. in Taxation from the University of Denver in 2002.

Jones Dietz & Swisher is pleased to announce that **Lance Yeager** has joined the firm as an associate in the firm's Louisville office. Yeager graduated from Eastern Kentucky University in 1997. He earned his J.D. from the University of Louisville School of Law in 2003 and was licensed to practice law in Kentucky that same year. Since 2003, Yeager has concentrated his practice in the areas of workers' compensation defense and the defense of federal black lung claims.

John Lucas was elected second vice president, associate counsel, and secretary for **Union Central**. Lucas joined Union Central in February 1988. He has served as assistant counsel and assistant to secretary; second vice president, counsel, and assistant secretary; and most recently as second vice president, counsel, and secretary. Lucas received a B.A. from Northern Kentucky University, earned his M.A. from Xavier University, and is a graduate of Chase College of Law. He is also an adjunct professor of American History at Northern Kentucky University.

Seiller Waterman LLC is pleased to announce that **Jonathan D. Boggs, Sean**



Jonathan D. Boggs



Sean E. Mumaw



Gordon C. Rose



Theodore W. Walton

E. Mumaw, Gordon C. Rose and **Theodore W. Walton** have joined the firm as associate attorneys. Boggs received his B.A. from Franklin & Marshall College in 2002 and earned his J.D. from Washington University School of Law in 2005. He is licensed to practice law in Kentucky, Illinois and Missouri and will be a member of the firm's Litigation Practice Group. Mumaw received his B.A. from the University of Louisville in 1995 and earned his J.D., *cum laude*, from the Louis D. Brandeis School of Law in 1999. He will be a member of the Estate Planning and Business Law Practice Groups. Rose received his B.A. from the University of Louisville in 1995 and earned his J.D., *cum laude*, from the Louis D. Brandeis School of Law in 2000. He will be a member of the Corporate and Commercial Real

Estate Practice Group. Walton received his B.A. from Earlham College in 1994 and earned his J.D., *magna cum laude*, from the Louis D. Brandeis School of Law in 1999. He is licensed to practice law in Kentucky and Indiana and will also be a member of the firm's Litigation Practice Group.

The Lexington law firm of **Miller & Wells, PLLC**, is pleased to announce that **Walker P. Mayo, III** and **Seth J. Johnston** have joined the firm. Mayo, Of Counsel to the firm, is a graduate of Washington & Lee University, the Duke University School of Law, and holds a Ph.D. from Oxford University. He will practice in the areas of health care law and commercial litigation. Johnston, an associate, is a graduate of Washington &

WHO, WHAT, WHEN & WHERE

Jefferson College and the Washington & Lee University School of Law. He will practice in the areas of commercial litigation and mineral law.



Adam T. Adkins

Reinhardt & Associates, PLC announces that **Adam T. Adkins** has joined the Lexington law firm as an associate. Adkins received his undergraduate degree and Masters of Professional Accountancy from

West Virginia University and is a 2004 graduate of the West Virginia University College of Law. He is a member of both the Colorado and Kentucky Bars and recently clerked for the Honorable Judge David Tapp of the 28th Judicial Circuit. His primary area of practice is civil litigation with a focus on insurance defense.



J. Mark Grundy

Greenebaum Doll & McDonald PLLC has announced that **J. Mark Grundy** and **Michael de Leon Hawthorne**, members in the firm's Louisville office, have been named to the firm's Management Committee. Grundy is the Construction Litigation Team Chair and concentrates his practice in construction litigation, business litigation, and dispute resolution. Hawthorne is the Family Business



Michael de Leon Hawthorne

Team Co-Chair, Securities Team Co-Chair, and the Technology Team Chair. His practice is focused on business law matters.



Sallie Stevens

The Louisville law firm of **Thompson Miller & Simpson** is pleased to announce that **Sallie Stevens** has been named a partner in the firm. Stevens concentrates her practice in civil litigation defense with an

emphasis on products liability, medical malpractice, and appellate work. She is a graduate of the University of Kentucky College of Law.

Lynn, Fulkerson, Nichols & Kinkel, PLLC is pleased to announce that Jason B. Baker has joined the Lexington firm as an associate. Baker is a graduate of Georgetown College and the University of Kentucky College of Law. He will be practicing in the area of insurance defense litigation.



Brent E. Dye

The Louisville law firm of **Fulton & Devlin** is pleased to announce that **Brent E. Dye** has joined the firm as an associate. Dye graduated, *cum laude*, from Georgetown College with a B.S. and earned

his J.D., *magna cum laude*, from Salmon P. Chase College of Law in 2006. His practice will concentrate in the areas of workers' compensation and insurance defense.

The Lexington law firm of **Casey Bailey & Maines, PLLC** is pleased to announce that **Steven R. Armstrong** has been named a member of the firm. **Barbra Salyer McGuire**, formerly with the Fayette County Commonwealth Attorney's Office, and **Krista M. Moore** have joined the firm as associates. Armstrong continues to focus his practice in the area of insurance defense and workers' compensation. McGuire will focus her practice in the area of insurance defense and professional malpractice. Moore will focus her practice in the area of insurance defense and workers' compensation. The firm is also pleased to announce that it is relocating its offices. Effective September 1, 2007, the firm will be located at 3151 Beaumont Centre Circle, Suite 200, in Lexington. The firm's telephone number will remain unchanged, (859) 243-0228.

IN THE NEWS

Laurie K. Dudgeon has been named deputy director of the Administrative



Laurie K. Dudgeon

Office of the Courts. AOC Director Jason M. Nemes said that "The combination of her legal experience and administrative abilities will enable her to make a strong contribution in the position of deputy director."

Dudgeon began serving as an attorney with the Justice and Public Safety Cabinet in 2005 and was named executive director of Kentucky's Office of Drug Control Policy in October 2006. Prior to her work with the Justice Cabinet, she was in private practice for 11 years where she concentrated on constitutional law, employment law, administrative law, and commercial and residential real estate law. Dudgeon graduated from the University of Kentucky in 1991 and earned a J.D. from the University of Kentucky College of Law in 1994.



Laura A. D'Angelo

Laura A. D'Angelo, a partner in the Lexington office of Wyatt, Tarrant & Combs, LLP, has been appointed by Mayor Jim Newberry to serve on the Lexington-Fayette Urban County Government Ethics

Commission. D'Angelo was nominated by the Lexington Chamber of Commerce, where she currently serves as a board member. The LFUCG Ethics Commission is composed of nine members nominated by seven different community organizations and two at-large members. Commission members serve four-year terms.

Wyatt, Tarrant & Combs, LLP is pleased to announce **Kathie McDonald-McClure** has successfully completed the Certified in Healthcare Compliance Examination, thus earning the "CHC" designation. McDonald-McClure advises healthcare providers in the areas of fraud and abuse, anti-kickback, Stark II, Medicare Part D, nursing home regulatory matters, FDA and clinical trial matters, compliance programs, and insurance coverage disputes. Before joining Wyatt, she

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practiced as a healthcare liability mediator, preceded by a 12-year legal career with Kindred Healthcare, Inc.



Betty Moore
Sandler

Betty Moore Sandler, a partner with the law firm of Nichols Zauzig Sandler P.C., Woodbridge, Virginia, was elected president of the American Academy of Matrimonial Lawyers (Virginia Chapter) at

the Academy's annual meeting in Virginia Beach in June 2007. Sandler's main area of practice is family law.

Col. Barbara Goodwin Brand,

United States Air Force, was recently appointed as an appellate military judge to the Air Force Court of Criminal Appeals. A 1976 graduate of Western Kentucky University and a 1981 graduate of the University of Louisville School of Law, Col. Brand is stationed at Bolling Air Force Base in Washington, D.C.



David J. Clement

David J. Clement, a colonel in the U.S. Marine Corps Reserve with twenty-six years of service and an attorney practicing in the Louisville office of Stoll Keenon Ogden PLLC, was awarded

France's National Defense Medal on June 18, 2007 in Washington, D.C. at the French Embassy. The National Defense Medal is typically awarded to French military members for service to their country. In this case, the award is being made to honor U.S. Armed Forces officers who have fought alongside the French Armed Forces in recent years on various operations throughout the world.



Wm. T. Robinson III

Wm. T. "Bill" Robinson III, a recent addition to Frost Brown Todd and member-in-charge of the firm's new Northern Kentucky office, has

been unanimously elected to serve a three-year term on the Taft Museum of Art Board of Directors. A National Historic Landmark built in about 1820, the Taft is home to an extensive art collection that includes European and American master paintings, Chinese porcelains, and European decorative arts.

Karen Zerhusen Kruer has taken the position of executive director of the Northern Kentucky University Foundation. The NKU Foundation is responsible for accepting and managing all funds raised to support Northern Kentucky University. Kruer spent the last two years as the director of development for special gifts and campaigns at the University of South Florida Foundation in Tampa.



Job D. Turner

Job D. (Darby) Turner, a member in Greenebaum Doll & McDonald's Lexington office, has been named to the Junior Achievement of the Bluegrass Business Hall of Fame. The Bluegrass Business Hall of Fame pays tribute

to selected business leaders for achievement in their careers, service to the community, and their part as role models for youth.



Philip C. Eschels

Philip C. Eschels, a member in the Louisville office of Greenebaum Doll & McDonald PLLC, has been elected a Fellow of the College of Labor and Employment Lawyers. The Fellows of the College are dedicated to the study and enhancement of professional ethics in the practice of labor and employment law and to the improvement of the delivery and quality of labor and employment legal services.



Mark A. Loyd

Mark A. Loyd, Michael A. Grim, and Ross D. Cohen, asso-



Michael A. Grim

ciates in the Louisville office of Greenebaum Doll & McDonald PLLC, have been elected to leadership positions within the Kentucky Bar Association Taxation Section. Loyd has been elected chair-elect of the KBA Taxation Section. Grim has been elected vice-chair, and Cohen has been elected treasurer.



Ross D. Cohen

Joseph H. Terry, a partner at Dinsmore & Shohl LLP, is one of seven selected to join the current ten member World Games 2010 Foundation, Inc. Board. The World Equestrian Games are the world championships for eight equestrian sports. The games will take



Joseph H. Terry

place September 25 to October 10, 2010 at the Kentucky Horse Park in Lexington.

Grahmn N.



Grahmn N. Morgan

Morgan, an attorney at Dinsmore & Shohl LLP, was selected to participate in Leadership Lexington, a 10-month program that began on August 10, 2007. Leadership Lexington is an educational opportunity sponsored by Commerce Lexington and has been running for nearly 30 years.



D. Craig York

D. Craig York, a partner in the Louisville office of Woodward, Hobson & Fulton, LLP, has been elected president of Kentucky Defense Counsel, Inc. The Kentucky Defense Counsel is an organiza-

tion of lawyers throughout the Commonwealth who practice primarily in

the area of civil litigation defense. York works primarily in the area of product liability defense with a concentration in transportation related accidents.



Timothy Price

Kentucky Employers' Mutual Insurance (KEMI) has promoted **Timothy Price** to manager of legal services. Price has been an attorney with KEMI since 1999 and has held numerous roles within the Legal Services Department, including legal services supervisor. He received his B.A. from Eastern Kentucky University in 1993 and earned his J.D. from Salmon P. Chase College of Law in 1996.

Milton C. Toby has been hired as the Equine Division Chair for Midway College. Toby earned his B.S. from the University of Kentucky in 1972 and served as a staff writer and photographer for the *Blood-Horse* for twelve years. In 1984, he supervised photography for the equestrian events at the Olympic Games in Los Angeles. In 1995, Toby earned his J.D. from the University of Kentucky College of Law and has represented equine business clients. In addition, he has been teaching on the collegiate level since 2003 and has developed and delivered an equine course and a business course online for Midway College. He is also a published author with five books in print, *Col. Sager, Practitioner; Ruffian; Understanding Equine Business Basics; Understanding Equine Law; and The Complete Equine Law and Business Handbook* (to be published in 2007).

John D. Hafner has been appointed by the American Bar Association Young Lawyers Division as the national committee chairman for Corporate Counsel. Hafner is the managing director of the Tree Anchor Law Firm, PLLC in Lexington. The firm assists public and private companies in their corporate transactions, securities regulation, corporate litigation, and real estate matters. Hafner obtained his B.S. from Fairfield University and earned his J.D. from St. John's University School of Law. Prior to

founding the firm, Hafner worked in the Corporate Litigation Department of AIG American International Group, Inc. in New York.

H. Hamilton "Chip" Rice, a senior attorney practicing in the Bradenton, Florida office of Lewis, Longman & Walker, P.A., received the William C. Grimes Award for Lifetime Achievement in Community Service at the annual meeting of the Manatee County Bar Association. The award highlights members of the local association who provide service to the community through participation in organizations and activities beyond the scope of the Bar and mandatory pro bono legal services. Rice is an adjunct law professor at Stetson University College of Law and served as Manatee County Attorney for thirteen years.

Lloyd C. Chatfield II has been named vice president, general counsel, and secretary of the Brunswick Corporation, of Lake Forest, Illinois, reporting to Brunswick Chairman and Chief Executive Officer Dustan E. McCoy. Chatfield joined the company in 2000 and has held a number of positions of increasing responsibility. He is a graduate of the University of Tampa and the University of Kentucky College of Law.

RELOCATIONS

Bowles Rice McDavid Graff & Love LLP, a regional law firm, has relocated to new offices at the top of the World Trade Center located in downtown Lexington at 333 West Vine Street. Bowles Rice merged with Lexington-based Vimont & Wills in 2005. Timothy C. Wills, a founding partner of Vimont & Wills and a partner in the Lexington office of Bowles Rice, says the seventeenth floor location is a tangible illustration of the merger's success.

Roland P. Merkel, PSC announces its recent office relocations. The main office is now located in Lexington at 269 West Main Street in Suite 600 and may be reached by telephone at (859) 263-1123. The Frankfort office has moved to 649 Charity Court # 2 in Frankfort and may be reached by telephone at (502) 227-1123.

Merkel's practice includes business, family, and administrative law, as well as extensive mediation/ADR practice and services as an administrative hearing officer for the Kentucky Personnel Board.

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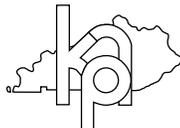
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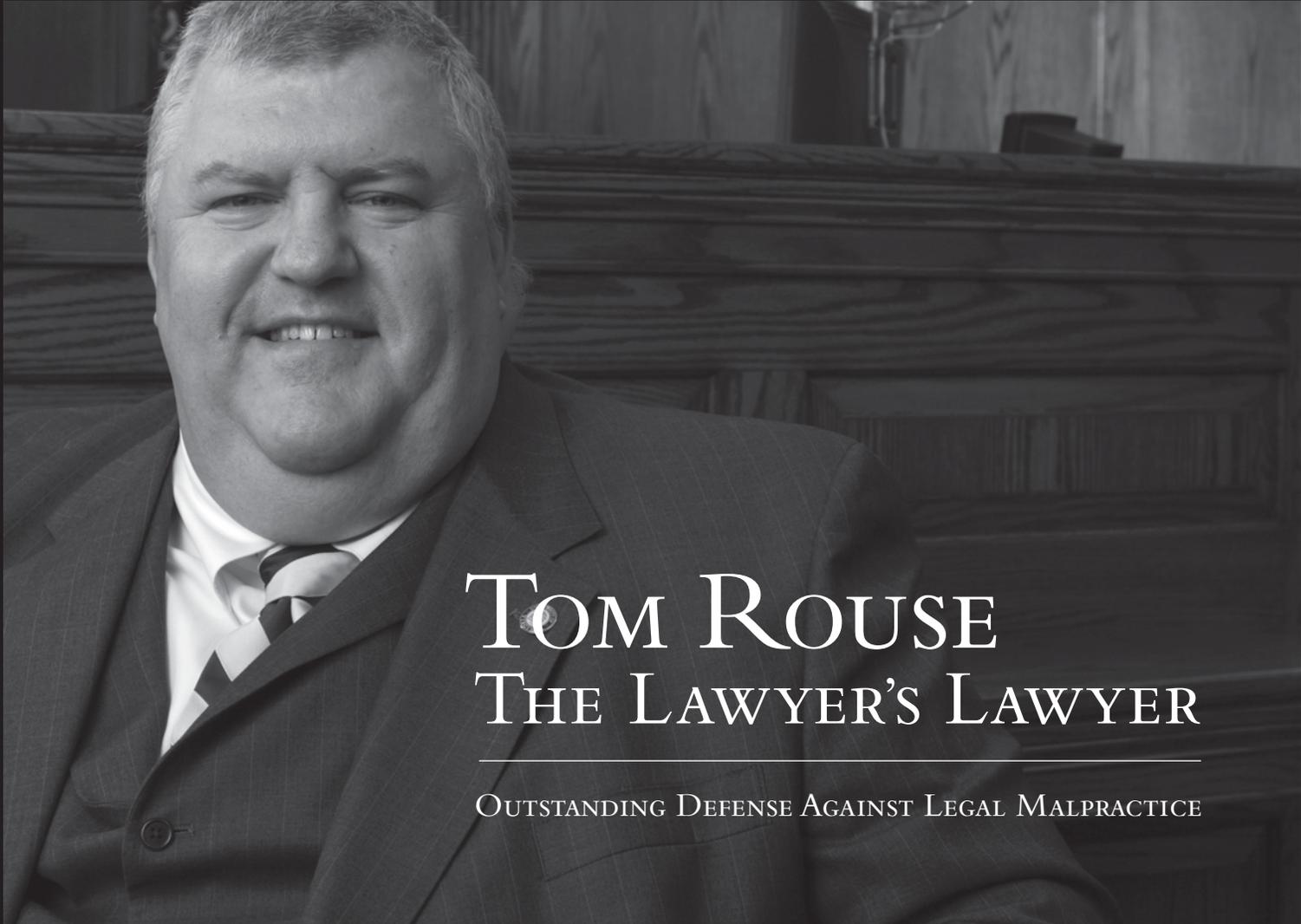
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