

KENTUCKY BAR ASSOCIATION



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Bench & Bar

September 2008

A Decade of Progress

*Joseph E. Lambert retires as
Chief Justice of Kentucky*

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Managing Editor

Barbara L. Thomas

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Barbara Dahlenburg Bonar

Now That's Courage, Mr. Lincoln

"I am not bound to win, but I am bound to be true. I am not bound to succeed, but I am bound to live by the light that I have. I must stand with anybody that stands right, and stand with him while he is right, and part with him when he goes wrong."

— Abraham Lincoln, 1854.

Abraham Lincoln really was just a simple country lawyer. In fact, throughout his legal career, he was much more like one of our fifteen thousand Kentucky Bar members than we may have imagined. He truly "practiced" law, taking a full variety of cases as they came in – criminal, transactional, domestic, personal injury and even medical malpractice. He was forever trying to stay one moment ahead of the case at hand, and one step above being inundated.

Like many of us, organization was not Lincoln's forte. He was, in fact, known to have somewhat of a unique style in his law practice management. "When he needed a particular piece of correspondence, Lincoln had to rifle through disorderly stacks of paper, rummaging, as a last resort, in the lining of his old plug hat, where he often put stray letters or notes." *Team of Rivals: the Political Genius of Abraham Lincoln*, Doris Kearns Goodwin, p. 5.

As a lawyer and politician, Lincoln was known to be embattled, criticized and constantly forced to remake himself. He lost political races time and time again, and was not even considered very popular as a political candidate. Many stories attributed to him, however, are laden with the single quality he is best known for – *courage*. He undoubtedly had a unique ability to forge ahead, despite all odds, with raw

courage, perseverance, and fortitude. In fact, most agree that it was Lincoln's single handed courage that saved our country in the days of the Civil War.

Is Lincoln's civil war mettle germane to an attorney's practice of law or the pursuit of justice today? More and more legal scholars examining professionalism in our practice are saying yes.

The virtue of courage has, in fact, long been held one of the most important to our human existence and

**"Courage is the first of human qualities because it is the quality which guarantees all others."
— Winston Churchill**

survival. Winston Churchill opined that "Courage is the first of human qualities because it is the quality which guarantees all others." Assuming the human qualities he was referring to included trust, patience, love, acceptance, strength, and mercy, the importance of courage to our very existence is difficult to deny.

The longer we live, the more we respect the virtue of courage. We also develop a clearer understanding, of course, that those who stick their necks out are usually placed directly in the line of fire. When one stands up for the

victim, the bully turns on them. Speaking the truth can sometimes turn the whole crowd glaring at once. And the first poor soul who says "*the King has no clothes*" is usually the one who gets his head wacked off. Unless we have a thick skull and lots of fortitude, it's certainly easier to stick with the crowd, keep our seats, and generally go along and get along in moments of controversy. More often than not, we choose the road *most* travelled.

As far as its relation to our profession, courage really is the love and sometimes the bane of practicing law – it somehow becomes our daily medicine. Using Lincoln's definition referenced above for how to live our professional lives, it seems all our practice relationships are bound by this virtue of courage. We are constantly choosing – with friends, foes, clients and colleagues alike – *when* to stand with someone, and *when* to part with him when he goes wrong.

In fact, it is recognized that sometimes just representing a witness to the truth these days or pursuing a controversial cause in the court system requires extensive valor. Judges who follow the rule of law often risk popularity in doing so. And we can learn a great deal from certain of our clients in observing the bravery it takes to blow the whistle, or to speak the truth under threat of coercion, economic loss, or social standing.

Lincoln also taught us when we courageously believe in ourselves and our causes, we cannot worry about the criticism that ensues. Instead, we just must know that if we remain just and true, we will be fine in the end. "If I were to try to read, much less answer, all the attacks made on me, this shop might as well be closed for any other business. I do the very best I know how - the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what's said against me won't amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference." *The Inner Life of Abraham Lincoln: Six Months at the White House* by Francis B. Carpenter.

In this brief eight years into our new millennium, a lot has changed in the Kentucky Bar, and our experience has taught us a lot about courage. In that short time, most of us have realized that choosing the right path for our profession takes a good number of individual lawyers who have a great amount of courage and persistence, and

are willing to make extreme personal sacrifices, and sometimes even act directly against self-serving ambitions. It is, in fact, complacency and acceptance that are the most obvious roadblocks to this end.

**"I do the very best I know
how – the very best I can;
and I mean to keep
doing so until the end."
– Abraham Lincoln**

And courage is not always just showing grace under fire, but also, when offensive posture is required, firing with grace. That includes taking a path of consensus, building teams from our rivals, and changing the conversation away from blame and toward solutions of common ground and hope. It seems that our youngest and newest attorneys have taken the lead on these approaches.

If we believe our particular practice gives us no opportunities to show courage, we need to be the first to honor

those lawyers among us that do. Let us celebrate attorneys who take on the just causes others are unwilling to pursue: those who are not always paid for their services, or who agree to help clients at a reduced rate; those who are helping clients challenge bad laws, defend the widow and the wrongfully accused, and pursue corruption; and, ultimately, those who speak the truth no matter how difficult.

We always knew that choosing to be a member of this great profession is not an easy one. The road is sometimes jagged rather than straight. No doubt, for every one of us, it takes courage to follow the winding road, the one less travelled, rather than the freeway. But, as Lincoln reflected, once we head down this road we've chosen, we really have no choice but to keep going. Near the end of his life he said, "I desire to so conduct the affairs of this administration that if at the end ... I have lost every other friend on earth, I shall at least have one friend left, and that friend shall be down inside of me." Now that's courage.

***Kentucky Bar Association
2009 Outstanding Service Awards
Call for Nominations***

The Kentucky Bar Association is accepting nominations for 2009 Outstanding Judge and Lawyer, Donated Legal Services and Bruce K. Davis Bar Service Awards. Nominations must be received by December 31, 2008. 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."

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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.

The Lambert Legacy

Kentucky courts gain national reputation under Chief Justice Joseph E. Lambert

“Serving on the Supreme Court and as chief justice has been the greatest privilege of my life,” said Joseph E. Lambert during his final remarks as chief justice of Kentucky.

“This floor of the Capitol and these rooms are like my second home,” he added. “The Supreme Court staff and the AOC staff are like my second family. A long time ago, I decided to spend my career in this noble endeavor. If I had it all to do over again and if my career were just beginning, I would decide, as I did before, to spend it here with you.”

Following a tradition of justices who retired before him, Chief Justice Lambert gave a brief address to the audience immediately after hearing his last oral argument as chief justice June 13 in the Supreme Court Courtroom at the Capitol.

After a decade as chief justice and 22 years as a justice of the Supreme Court of Kentucky, Chief Justice Lambert stepped down June 27.

Chief Justice Lambert, 60, was first elected to the Supreme Court in 1986 from the 27 southeastern Kentucky counties of the 3rd Supreme Court District. He was re-elected in 1994 and

2002. He became Kentucky’s fourth chief justice in October 1998 by a vote of his fellow justices. He was re-elected to two additional four-year terms as chief justice in 2002 and in 2006.

As a justice of the Supreme Court, Chief Justice Lambert authored more than 400 published opinions of the court and scores of dissenting and concurring opinions. In addition he has authored more than 500 memorandum opinions. He has also authored articles for publication in scholarly journals and the Kentucky Bar Association’s Bench & Bar magazine.

Chief Justice Lambert has been a frequent lecturer at bar conferences and has participated in numerous national

legal education events as an invited speaker or panelist. He has been an active member of the national Conference of Chief Justices and was elected to serve on its board of directors. He also currently serves as board chair of the Kentucky Judicial Form Retirement System. He is a former regent for Eastern Kentucky University.

In 2000, the Kentucky Bar Association named Chief Justice Lambert the Outstanding Judge of Kentucky. The Kentucky Department of Public Advocacy gave him its Public Service Award in 2006. In 2004, he received the Civil Rights Award from both the Northern Kentucky NAACP and the Lexington NAACP for his commitment to eliminating discrimination.



who have a limited ability to communicate in English and appointed the Jefferson County Commission on Racial Fairness to study claims of racial bias in Jefferson Circuit Court.

Under his direction, the Kentucky Court of Justice hosted a one-day conference in March 2008 titled "Equal Treatment for All: Pursuing Diversity in Kentucky Courts." This was the first court-sponsored forum to bring together professionals from across the state to discuss Kentucky's progress in pursuit of diversity and fairness in the courts.



Supreme Court of Kentucky

Seven justices sit on the Supreme Court, which is the state's highest court. They are elected from seven appellate court districts and serve eight-year terms. The Kentucky Constitution provides for the justices to elect one of their fellow justices to serve as chief justice for a term of four years.

The chief justice is executive head of the statewide judicial system. He or she oversees the Administrative Office of the Courts in Frankfort and the 4,000 statewide employees of the Kentucky Court of Justice, including elected justices, judges and circuit court clerks. The chief justice proposes a biennial budget to the General Assembly and executes the Judicial Branch budget.

Open and Accountable Courts

Following on the heels of a disclosure that many criminal cases were pending for years and languishing in Kentucky courts, Chief Justice Lambert and a group of well-respected circuit judges from across the state quickly moved to implement changes to ensure that no criminal case falls through the cracks. Kentucky judges are now charged with the responsibility of clearing their dockets in a timely manner so that the delivery of justice is not delayed.

Chief Justice Lambert's administration supported the creation of a statewide court case management system that has put Kentucky on the cutting edge of court technology nationwide. Unlike many states that still maintain court data on a county-by-county basis, Kentucky's statewide network allows data to be collected from every court facility in the state and stored in a central location at the AOC in Frankfort.

The AOC Department of Technology Services has also implemented a statewide e-mail system for Court of Justice personnel and launched a Web site that provides comprehensive information on the court system, Supreme Court and Court of Appeals opinions and court dockets statewide.

The AOC has also automated the jury management process, provided digital audio capabilities for court recordings in District Court, created a computerized bookkeeping program for the Office of Circuit Court Clerk statewide and produced platforms to support the new E-Citation and E-Warrant programs to assist law enforcement in protecting citizens in local communities.

Kentucky Summit on Children

Chief Justice Lambert was the impetus behind the first Kentucky Summit on Children in Louisville in August 2007. Nearly 500 judges, attorneys, legislators, guardians ad litem, child welfare officials, court system personnel and foster parents and children gathered for three days to discuss how our courts could improve services to children, one of the most pressing issues facing Kentucky today.

As a follow-up to the Summit on Children, the AOC hosted nine regional meetings in the fall of 2007 to gather input from communities statewide on court procedures, legislation and services pertaining to child maltreatment and juvenile delinquency.

As Chief Justice Lambert gave his parting remarks in the Supreme Court Courtroom in June, he noted that this philosophy had guided his work on the state's highest court: "For the Judicial Branch of government, nothing is more important than independent, courageous decision-making, unaffected by threat or favor. Litigants who come before the courts of Kentucky have an absolute right to decision-makers whose heads and hearts are not subject to any influence other than the facts and law of the case."

Chief Justice Lambert is currently a senior judge and serves as chief judge of the Senior Judges Program.



Remarks from Colleagues

David J. Leibson

Bernard Flexner Professor of Law
University of Louisville Brandeis School of Law

Joe Lambert was one of the first students I had the honor of teaching when I came to the University of Louisville School of Law faculty. He was a smart and earnest student and has continued to exhibit those traits throughout his distinguished career. As chief justice he has guided the Supreme Court in a way that has brought honor to the legal profession as a whole and to the judiciary in particular.

He has shown real concern for the average citizen of the Commonwealth and the importance of the justice system to the everyday life of us all. He has vigorously and vocally fought for adequate funding for the courts and innovative ways to make them more efficient and accessible. He will be a very tough act to follow, but a wonderful role model. I am really proud of him as an alumnus of the U of L School of Law and so happy that I can call him a wonderful friend. I wish him the best in his retirement.

Sara Walter Combs

Chief Judge, Kentucky Court of Appeals

During his tenure leading our court system, Chief Justice Lambert has transformed and modernized courthouses across Kentucky. He has instituted innovative programs having immediate impact on people – especially Drug Court and Family Court.

Perhaps he will be most remembered for his sincere commitment to expanding racial and ethnic diversity in the court system and to providing the needy with access to justice.

Justice James E. Keller (Retired)

Supreme Court of Kentucky, 1999-2005

Chief Justice Lambert has truly been an outstanding chief justice of the commonwealth. He has brought about more diversity to the practice of law and the Court of Justice through his steadfast and important support of the Kentucky Legal Education Opportunity Program scholarships. He has championed the expansion of Drug Court throughout the state. As a result of his leadership and advocacy, the Family Court constitutional amendment was adopted overwhelmingly and has resulted in the establishment of Family Court across the state.

Thanks to his efforts, many rural counties now have modern courthouses that incorporate up-to-date technology. These are but a few of his accomplishments. I served under all of Chief Justice Lambert's predecessors, and like them, Chief Justice Lambert leaves the Court of Justice in much better shape than when he assumed the duties of his office. He was indeed a good and faithful steward of the Kentucky Court of Justice.

I had the privilege to serve six years with Chief Justice Lambert on the Supreme Court. From my first day there until I retired, I was impressed with his leadership and his fairness. As chief justice he presided when the court met to decide cases. By his example, he encouraged each justice not only to express his or her views, but also to listen and respectfully consider the views of the other justices. He never called for a vote on a case until all justices had fully expressed their views. He was always vigilant to ensure that extraneous matters, including political views, were not a consideration in the resolution of a case. Chief Justice Lambert truly believed in the rule of law.

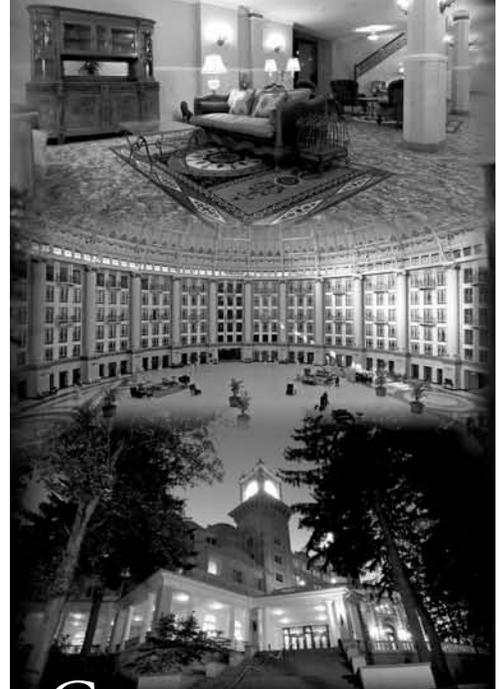
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What's an Injury?

By Norman E. Harned

Two Steps Forward, One Step Back

In an Extraordinary Session in December 1996, the General Assembly enacted House Bill #1 which made major changes to the Workers' Compensation Law in Kentucky. One of these major changes was the definition of "injury." The motivation and rationale for the change was the apparent belief that employers were paying for conditions not caused by an "injury" in the classic sense of the word, but rather resulting from aging or other non-work related causes. The definition of injury was modified in part as shown below.

The Statutory Changes

"Injury" means any work-related **traumatic event or series of traumatic events, including cumulative trauma** arising out of and in the course of employment **which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.** "Injury" **does not include the effects of the natural aging process, Injury . . . shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.**¹

In the same legislation, the Legislature also defined "objective medical findings" as "**information gained through direct observation and testing of the patient applying objective or standardized methods.**"²

In the last decade, courts have tried to decipher the intent of the legislature in making these changes.³ This article is an attempt to examine a few of the cases decided and identify the parameters of compensability within the context of the 1996 legislation.

The changes may best be examined in the context of the following three requirements for compensability:

- (1) TRAUMATIC EVENT;⁴
- (2) CAUSATION; and
- (3) HARMFUL CHANGE.

I. TRAUMATIC EVENT: Establishing the Event Before Examining the Result

Beginning January 1, 1973, and until December 12, 1996, an injury meant "any work-related harmful change in the human organism. . . ."⁵ This definition contained no reference to particular circumstances from which an "injury" would flow and contained no limitation on the manner in which a worker might have an injury inflicted upon him. Following the 1996 amendment, the Supreme Court in *Gibbs v. Premier Scale/Indiana Scale Co.*⁶ concluded that "injury" is now defined in terms of **an event** that proximately causes a harmful change rather than the harmful change itself. For purposes of the definition, the threshold determination shifted to identifying an event rather than establishing the resulting condition. This is a departure from prior law where courts looked to whether a harmful change to the human organism had occurred to determine if there had been an "injury." The new definition requires the claimant to first identify and prove an injurious event prior to addressing whether that event caused a harmful change in the human organism.

In cases involving physical injuries – i.e. those to the back, neck, knees, etc. – the causal link between an injurious event and the resulting change in the body is quite evident. Those cases have not been greatly affected by the 1996 definition in terms of establishing compensability.

One decision of note is *Ryan's Family Steakhouse v. Thomasson*.⁷ In *Thomasson* the Supreme Court had an opportunity to interpret the meaning of the phrase "traumatic event or series of traumatic events" in the context of a

physical condition stemming from alleged work activity – repetitive and prolonged work in an awkward posture. It concluded that the express terms of the Amendment to KRS 342.0011(1) reincorporated the term traumatic event or series thereof. This was contrary to focusing on the presence of a harmful change and required identification and examination of the action that allegedly caused the resulting change. The Court found that although the Amendment intended to require direct physical injury in cases where psychological or stress-related conditions were the alleged harmful change, nothing in the statutory definition abrogated the precedent allowing for the compensability of **physical** injuries resulting from physical exertion.

The class of cases most affected by the 1996 Amendment to KRS 342.0011(1) are those where the injury alleged is of a psychological or stress-related nature. These cases face the express definitional limitation that the psychological condition directly results from a physical injury.

In *Lexington-Fayette Urban County Government v. West*,⁸ the Supreme Court evaluated the 1996 definition of "injury" in the context of a psychological condition – a claim for benefits based on post-traumatic stress disorder. West was a police officer who was physically assaulted in 1989 by a knife-wielding suspect resulting in a scuffle. As a result, she suffered physical harm in the form of scratches, abrasions and soreness and was seen by a psychiatrist immediately after the incident and cleared to return to work without a diagnosis of a psychological condition. In the course of her work, she experienced other traumatic events over the years and in 1997, her symptoms became persistent enough to seek psychiatric treatment that resulted in the diagnosis of post-traumatic stress disorder. The

question addressed by the Supreme Court was whether the post traumatic stress disorder, a psychological condition, was a compensable worker's compensation injury. Based on the definitional changes to the term "injury," the compensability of the psychological condition was found to hinge upon a determination of whether or not the repeated trauma encountered by the claimant directly resulted in the psychological condition.

The Court held that if the first in a series of traumatic events involves physical trauma, and the event is a direct and proximate cause of a harmful change in human organism, the harmful change may be compensable. This was the first in a string of decisions that began to highlight the requirements of establishing the physically injurious event and a direct causal relationship to a psychological condition.

Subsequently, in *Richard E. Jacobs Group, Inc., v. White*,⁹ the Supreme Court went deeper in its analysis of the 1996 definition. Specifically, it examined the extent and nature of physical trauma necessary to establish compensability in a claim for benefits based on a psychological condition. White was a police officer but also worked off duty as a security guard. While dressed in plain clothes, he received a police dispatch regarding a subject dressed in a

security guard uniform, armed with a nightstick and threatening suicide. White drew his gun and displayed his badge and the subject responded by brandishing a gun. As the subject continued towards White, White fired four shots, three finding their mark, causing the subject to fall to the ground. White tried to perform CPR and his skin came into contact with the subject's blood and body fluids. He was not permitted to wash for an extended period of time and feared he might have contracted a communicable disease. The subject died at the scene.

Giving effect to the express language in KRS 342.0011(1), the ALJ dismissed the claim on the basis that White had not suffered any physical trauma or physical harm and therefore the 1996 definition of "injury" did not allow him to recover benefits for his resulting psychological injury, post-traumatic stress disorder. This was despite the fact that the evidence established that White suffered from post-traumatic stress disorder and could not return to police work. The Supreme Court affirmed the Court of Appeals' reversal of the ALJ's dismissal but did so on the premise that the physical exertion of performing CPR on an individual with multiple gunshot wounds constitutes a physically traumatic event. Therefore any mental harm that directly results from the physical

exertion may be compensable.

The importance of the decision in *White* is that the Court held that there is no requirement that a physically traumatic event cause tangible physical harm in addition to mental harm for which compensation is sought. Expanding its holding in *West*, the Court concluded that a *prima facie* case for compensability for a psychological or stress-related condition may be premised on physical exertion rather than an impact from an outside force.¹⁰

As an aside, it is evident that the majority of these cases involving claims for mental conditions with questionable physical harm involve those that are centered on repeated trauma involving fearful and life threatening situations. It is in these cases, where claimants are performing public safety functions, that the definition's requirement of a direct physical injury is too restrictive. In the author's opinion, being threatened with a knife, gun or other weapon constitutes a traumatic event for which compensation should issue without regard to whether the claimant is physically injured or otherwise exerts himself. If White had not performed CPR, would he have been any less likely to develop post-traumatic stress disorder?

II. CAUSATION AND THE AGING PROCESS

When the Legislature finished its work in the Extraordinary Session in December 1996, many of its members probably thought they had removed from compensability any component of injury attributable to the natural aging process. This was because the text of KRS 342.0011(1) excluded the effects of the natural aging process from being an "injury." Such was the position of the employer in *McNutt Construction/First General Services v. Scott*¹¹ where the claimant suffered a ruptured disc and two of Scott's physicians indicated one-half of the impairment was due to arousal of a pre-existing, dormant, non-disabling condition, namely degenerative disc disease – a condition resulting from the natural aging process. The Supreme Court was not quite so absolute in its interpretation and application of the definition. The Court concluded that when



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work-related trauma causes a previously dormant degenerative condition to become disabling, and results in functional impairment, then the work-related trauma is the proximate cause of the harmful change. Therefore, the harmful change, even though partially attributable to a dormant degenerative condition, comes within the definition of an injury to the extent it had not previously been active. The Court was not persuaded that the Legislature's decision to abolish the Special Fund with regard to apportionment had any effect on the longstanding principal that a harmful change to a worker's body that is caused by work activity is "an injury" for purposes of compensability. Practically, the only real effect of the change in the definition in cases, like *Scott*, that involve the arousal of pre-existing dormant conditions, is to shift the liability for compensation previously paid by the Special Fund directly to the employer.

III. HARMFUL CHANGE IN HUMAN ORGANISM EVIDENCED BY OBJECTIVE MEDICAL FINDINGS: Objective and Standardized Are Not Always Synonymous

One of the more difficult elements of the *prima facie* case for practicing attorneys is proving the existence of a harmful change by objective medical findings. The 1996 Amendment requires a claimant to demonstrate a harmful change to the body and to do so with objective medical findings – a term also defined in KRS 342.0011(33). The first effort of Kentucky's highest court to determine the meaning of "objective medical findings" was in *Gibbs v. Premier Scale Company*.¹² While driving to a work assignment, Gibbs was struck by another vehicle in the driver's door. Days later a neurological examination showed he was slightly "ataxic" (the inability to perform coordinative muscular movements). It was determined he had suffered a closed head injury due to the motor vehicle accident. After nearly a year of continued treatment, Gibbs' treating physician determined he suffered from post-concussive syndrome, a well documented condition of patients who have suffered head trauma. Gibbs'

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John W. Hays

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

Robert F. Duncan

Since 1995 Mr. Duncan has successfully mediated civil matters involving issues pertaining to personal injury, professional liability, construction, health care, insurance coverage/bad faith, as well as hospital and nursing home liability. Mr. Duncan is the Chair of the Mediation Section of the Fayette County Bar Association. Mr. Duncan received his undergraduate degree in Civil Engineering from the University of Kentucky and is a graduate of the University of Kentucky School of Law.

Daniel G. Grove

Daniel G. Grove joined Jackson Kelly PLLC in 2003. Prior to joining the Firm, Mr. Grove was in private practice for over 30 years, concentrating in the areas of civil and criminal litigation, domestic relations, fraud, business disputes and negligence. He is a Fellow of the American College of Trial Lawyers and a permanent member of the Fourth Circuit Judicial Conference. Mr. Grove has experience mediating civil disputes in Maryland, Virginia, and Washington, DC; and is now qualified to mediate disputes in Kentucky.

John W. Hays (859) 255-9500
jwhays@jacksonkelly.com

Robert F. Duncan (859) 288-2827
rduncan@jacksonkelly.com

Daniel G. Grove (859) 255-9500
dggrove@jacksonkelly.com



Lexington, Kentucky

symptoms persisted and included pain, difficulty sleeping, slurred speech, blurred vision, and unsteadiness, all of which were compatible with the diagnosis. Despite these clinical manifestations, Gibbs' treating physician explained that there were not any overt physical findings evidencing the presence of the condition. The modern diagnostic testing conducted on Gibbs, CT scan of the head, EEG and MRI, could not detect the micro-shearing of brain tissue. This tearing of certain brain cells and connective tissue within the brain of head trauma patients was established through autopsy of patients who died from other causes but also suffered head trauma. It was this tearing that was believed to be the cause of the deficits manifested in Gibbs with respect to his speech, pain, blurred vision, etc.

The Court was faced with the question of what constituted objective medical findings and whether the testimony of Gibbs' treating physician satisfied the statutory requirement that those findings be present to substantiate the harmful change in his brain. The testimony indicated that the clinical examinations of Gibbs demonstrated findings consistent with the diagnosis but there was no purely objective test to

demonstrate changes in the brain because those changes are discernible only by autopsy of the brain. Medically, there is clear evidence that head trauma causes biochemical changes within the brain, and that those changes altered the brain's chemistry thereby affecting neurotransmission.

Although the employer's examining physician agreed that no objective medical findings were necessary for the diagnosis, he remained unconvinced that Mr. Gibbs suffered from the condition.

Contrary to prior law, the new definition presupposes that a traumatic event or series of traumatic events must have occurred prior to inquiring further as to whether these events have caused a harmful change in the human organism itself. The fact that a claimant, such as Gibbs, has a medical diagnosis attributable to a traumatic injury at work does not constitute a compensable claim because of the lack of objective medical findings. Thus, to that extent, at least in this case the General Assembly's 1996 Amendment was successful in raising the threshold of the type of cases that would be compensable. To support its decision, the Court concluded that the claimant not only failed to offer direct evidence of a harmful change in the form of objective medical findings, he failed to offer direct evidence of a change through objective medical findings that demonstrated the existence of symptoms of the change. For practitioners, the latter point is equally important in those cases, such as *Gibbs*, where standard medical diagnostic testing is insufficient to reveal changes to the human organism.

Gibbs was arguably decided incorrectly and was a case not well suited for the Court to expound upon the requirement of objective medical findings. Interestingly, no evidence of permanent impairment was introduced and therefore there was no viable claim for income benefits beyond the period of temporary total disability. In addition, the ALJ's original decision that the claim was not compensable was supported by the competing testimony of the employer's examining physician who offered other causes for Gibbs'

symptoms and was unconvinced he had post-concussive syndrome.

On the other hand, the author also believes that based upon the testimony of Gibbs' treating physician, there were objective medical findings of an injury. The workup on Gibbs was performed applying objective or standardized methods as required. The testimony following that workup clearly established the existence of a harmful change to Gibbs that was consistent with autopsy studies of similar patients. In essence, other than by comparative studies to similar patients, there was no objective medical test that could substantiate a harmful change. This case is unlike cases involving a broken bone or herniated disc where accepted testing exists that can nearly always demonstrate the harmful change.

A better definition of objective medical findings might include clinical examinations where direct observation and testing of the patient evidences symptoms consistent with the condition and where objective and standardized methods have been applied. In this setting, if the physician obtains *no* findings during direct observation and testing then the threshold requirement of objective medical findings is not met.

The Court may in fact have backed away from the definition in *Gibbs* in subsequent cases. In the case of *Staples, Inc., v. Konvelski*,¹³ the Supreme Court considered the quantum of evidence necessary to sustain an award under the new definition of injury. First, the Court confirmed that a diagnosis may be considered an objective medical finding if it is based upon symptoms of a harmful change that are confirmed by means of direct observation and/or testing applying objective or standardized methods, citing *Gibbs*. The Court further concluded that while objective medical findings are necessary to establish compensability, causation is not required to be proved by objective medical findings. In other words the claimant must demonstrate the existence of the change with objective medical findings. The question of causation is left to a more subjective standard.

Konvelski, a store manager, was struck on her outstretched right arm



Norman E. Harned is a partner in the Bowling Green law firm of Harned Bachert & Denton, LLP. He focuses his practice in the areas of workers' compensation, civil litigation and business litigation. Mr.

Harned received his bachelor's degree and an engineering degree from the University of Kentucky and earned his J.D. from the University of Kentucky College of Law. He was Bowling Green/Warren County Bar Association President in 1986. He then served as KBA President from 1996 to 1997 and has served on the ABA House of Delegates since 2004. From 1999 to the present time, Mr. Harned has served as a member of the Kentucky Supreme Court Rules Committee. He has been recognized for his work in the area of workers' compensation and has authored several publications and has made numerous presentations.

when a box fell from over her head. Medical testimony was disputed with respect to the presence of the conditions of myofascitis, bicipital tendonitis, right thoracic outlet compression, major depression, post-traumatic stress disorder and generalized anxiety disorder. The Court observed that evidence submitted contained the direct observations of physicians and the results of tests they performed. A number of direct observations existed to support the opinions and conclusions. In sum, this decision establishes that the Court will defer to the conclusions of medical professionals as to the sufficiency of the evidence when the testimony is based upon direct observation and testing of the patient applying objective or standardized methods used by physicians in the practice of their profession.

What Does it Mean to Me?

For the practicing attorney, the definitional changes to KRS 342.0011(1) require attention to the following: (1) Identify the traumatic event and develop

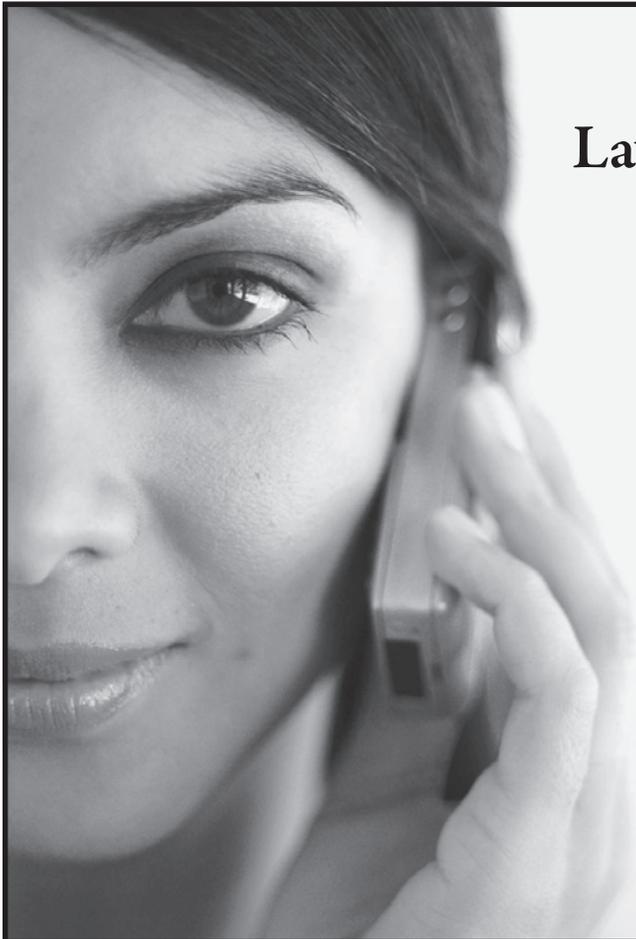
proof of its occurrence; (2) Identify the type of injury(ies) (does the claimant have a physical injury only, a psychological injury only, or a combination of both a physical and psychological injury?); and (3) Determine what serves as objective medical findings for the diagnoses and establish a harmful change by medical report or testimony. This third consideration is especially true in cases of questionable or less than obvious physical trauma and a claim is asserted for psychological or stress-related changes in the human organism. A focus from the outset on these three considerations should enable counsel to better establish the causal link between the traumatic event and the change in the human organism by objective medical findings. ■

The author appreciates the assistance of W. Gregory Harvey for research and editing.

ENDNOTES

1. KRS 342.0011(1).

2. KRS 342.0011(33).
3. It is noteworthy that the legislature did not in any respect change the traditional concept that to be compensable an "injury" must arise out of and be in the course of the employment.
4. In cases where a claimant is alleging only a psychological condition, this first requirement will require a causative link between the psychological condition and a direct physical injury or physical exertion by the claimant.
5. KRS 342.0011(1).
6. 50 S.W.3d 754 (Ky. 2001).
7. 82 S.W.3d 889 (Ky. 2002).
8. 52 S.W.3d 564 (Ky. 2001).
9. 202 S.W.3d 24 (Ky. 2006).
10. The Court did not however find it necessary to consider whether physical contact with someone's blood and body fluids by itself would constitute a traumatic event.
11. 40 S.W.3d 854 (Ky. 2001).
12. 50 S.W.3d 754 (Ky. 2001).
13. S.W.3d 412 (Ky. 2001).



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The Ever-Changing Law on Limitations and Repose for Gradual Injury Claims

By Judson F. Devlin

Due to the failure of our General Assembly to enact legislation that provides specific statutes of limitations and repose for gradual injury or cumulative trauma claims, Kentucky law on these important issues has been in a state of evolution since 1953, when the Kentucky Supreme Court judicially recognized such conditions as compensable.¹ In the absence of a legislative statute of limitations for gradual injuries, the burden has fallen on the Kentucky Court of Appeals and Supreme Court to judicially determine when the period of limitations, and now repose, begins to run in gradual injury claims. While undoubtedly done with good intent, the Court of Appeals and Supreme Court have handed down numerous decisions, particularly in the past 10 years, which have made the rules for limitations and repose even more complex. For any attorney handling a gradual injury claim, a complete understanding of the current law on limitations and repose is imperative.

The "Old" Law

Many years after the concept of a gradual injury was judicially recognized as a compensable condition under the Workers' Compensation Act, the Supreme Court in 1976 decided *Haycraft v. Corhart Refractories Co.*,² which expanded the concept of a gradual injury to include pre-existing conditions that were aggravated or worsened by the nature and duration of the employee's work. In its Opinion in *Haycraft*, the Supreme Court expressly stated that it was "assuming that legislators pay attention to such matters." Unfortunately, that has not been the case. With the concept of a gradual injury firmly entrenched and this mechanism of injury being asserted more and more often, the General Assembly did

not get around to statutorily recognizing this type of injury as compensable until the 1996 Amendments to KRS 342.0011(1). The definition of "injury" under that statute was amended to include "any work-related traumatic event or series of traumatic events, including cumulative trauma...which is the proximate cause producing a harmful change in the human organism...[.]"³ To this date, however, the General Assembly has yet to enact any statute of limitations or repose for gradual injury and cumulative trauma claims.

Left without the legislative guidance that our appellate courts were obviously anticipating, the Court of Appeals in 1988 stepped in and answered the question of when the statute of limitations begins to run for a gradual injury. In *Randall Co. v. Pendland*,⁴ the Court of Appeals held that for a gradual injury "the statute of limitations begins when the disabling reality of the injuries becomes manifest."

The *Pendland* rule required the Administrative Law Judge ("ALJ") to determine when the disabling reality of the gradual injury became manifest. In making this determination, the ALJ could consider a variety of factors and dates, including when the symptoms

started, when the employee lost time from work, when medical treatment began, when restrictions were first assigned, when job modifications were made, when the condition was diagnosed, when the employee gave notice of injury to the employer, and when the employee became aware his condition was work-related. While not a perfect standard, the *Pendland* rule allowed ALJs to employ a variety of factors on a case-by-case basis to determine the clocking date for the beginning of limitations in each particular claim. The *Pendland* rule allowed an ALJ to balance the various factors to avoid the unfair deprivation of an injured worker's right to file a claim while protecting employers from the prejudice of having to defend stale or late claims for gradual injuries.

Under the *Pendland* rule, a claimant's discovery that he had sustained a work-related gradual injury was just one of several factors that were taken into consideration by the ALJ. In fact, in the *Pendland* case itself, the determinative factor was the date the injured worker first lost time from work, rather than the date the worker discovered the condition was work-related.⁵ Even though the *Pendland* rule was a product of the

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Court of Appeals, the Supreme Court adopted and followed it until 1999.

Evolution of the Discovery Rule

Kentucky courts have struggled with application of a discovery rule in workers' compensation claims for many years. In 1937, when confronted with a claim involving a latent injury, the high court of Kentucky held in *Turner, Day & Woolworth Handle Co. v. Morris*,⁶ that the limitations period for a latent injury commences "when it becomes reasonably apparent that a compensable injury has been sustained." In subsequent decisions, though, the Kentucky high court rejected application of the discovery rule for a latent injury in *Fiorella v. Clark*⁷ and for a worker who delayed filing a claim due to a mistaken diagnosis in *Goode v. Fleishmann Distilling Corporation*.⁸ More recently, in 1994, the Supreme Court in *Coslow v. General Electric Co.*,⁹ reaffirmed the absence of a discovery rule for workers' compensation claims. In *Coslow*, the Supreme Court wrestled with the issue of "whether KRS 342.185 may be judicially construed so that the SOL [statute of limitations] does not start to run in any injury case, whether the injury is the result of a series of mini-traumas or one distinct traumatic event of accident,

until the effects of the accident or disability become manifest." While the Supreme Court noted in *Coslow* that the *Pendland* rule incorporated discovery as a factor in gradual injury claims, the Court refused to adopt the general discovery rule for injury claims altogether. The Supreme Court noted in *Coslow* that the General Assembly had enacted a discovery rule for occupational disease claims and, therefore, the Supreme Court declined to judicially create a discovery rule applicable to injury claims.¹⁰

The *Pendland* rule remained the applicable law for gradual injury claims until 1999, when the Supreme Court handed down its decision in *Alcan Foil Products v. Huff*.¹¹ In *Huff*, the Supreme Court was confronted with a limitations issue in two hearing loss claims, which have traditionally been treated as gradual injury conditions, rather than as occupational diseases. In upholding the dismissal of the hearing loss claims, the Supreme Court ruled that the statute of limitations for a gradual injury begins to run when the injured worker discovers that he has sustained an "injury" as that term is defined by KRS 342.0011(1). In other words, in gradual injury claims, the Court held that the running of limitations is not triggered until the injured

worker discovers that he has sustained a harmful change to the human organism proximately caused by his work.¹² From the employer's perspective, the Supreme Court abandoned the *Pendland* rule and adopted an inflexible discovery rule for all gradual injury claims. From the claimant's perspective, the Supreme Court merely refined the *Pendland* rule, making discovery of injury a threshold requirement. Regardless of your perspective, since 1999, a discovery rule has been in effect for gradual injury claims.

Expansion of the Discovery Rule

Due to the unique nature of gradual injury claims, in which no two claims are really alike, it was only a matter of time before our appellate courts were confronted with different fact scenarios of when and how the injured worker discovered his injury. After holding in *Huff* that limitations were triggered by physical disability or symptoms that caused a worker to discover an injury had occurred, the Supreme Court later that year revised the discovery rule in *Special Fund v. Clark*.¹³ In *Clark*, the Supreme Court expanded the discovery rule to require discovery by the injured worker not only of the existence of an injurious condition, but also the fact that it was caused by work.¹⁴

In 2001, our discovery rule further evolved in two appellate decisions. In *Toyota Motor Mfg., Ky Inc. v. Czarnecki*,¹⁵ the Court of Appeals held that an injured worker's cause of action for a gradual injury was tolled where the worker was informed by the employer's health department that her injury had resolved. Later that year, the Supreme Court held in *Hill v. Sextet Min. Corp.*,¹⁶ that an injured worker was not required to self-diagnose his condition and, therefore, was not required to give notice of his alleged cumulative trauma until he was unambiguously diagnosed by a physician as having sustained a *permanent* injury caused by work.

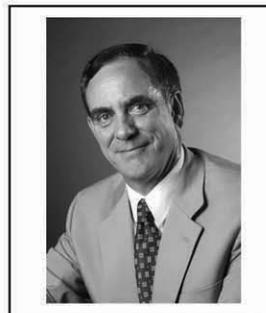
On the very same day the Supreme Court issued *Hill*, it also issued a seemingly inconsistent decision in *Holbrook v. Lexmark Intern. Group, Inc.*,¹⁷ in which the Court held that the limitations

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period for a gradual injury was triggered once the worker became aware that he had sustained a gradual injury caused by his work, regardless of whether the symptoms that led to such discovery were temporary and later subsided.

Borrowing heavily from the Workers' Compensation Board in its Opinion in *Tower Automotive v. Carter*,¹⁸ the discovery rule for gradual injuries can best be summarized as follows: The statute of limitations for a gradual injury is triggered when the worker becomes aware of the gradual injury and knows it was caused by work. This is unaffected by whether the claimant is informed or understands that the condition is permanent or whether the symptoms that led to this discovery later subside. However, knowledge by the injured worker that the condition is permanent is not completely irrelevant and may have some material effect on the extent of application of the statute of limitations. If the injured worker is led to believe by a company physician that the condition

has resolved, the statute of limitations is tolled until such time as the injured worker becomes reasonably apprised that a permanent change in the human organism has occurred. The injured worker is not required to self-diagnose either the cause of his condition or its permanency, but neither the accuracy nor specificity of a medical diagnosis has any bearing on the injured worker's duty to provide notice or on the start date for the running of limitations.

The Never-Ending Gradual Injury

Even if a gradual injury claim is barred by limitations, any additional injury or impairment from continued injurious employment that occurs within two years of the filing of the claim is still compensable. In 1995, the Court of Appeals held in *Brockway v. Rockwell Intern*¹⁹ that, in a claim in which the gradual injury is barred by limitations, any additional injury or impairment caused by continued employment within the two-year period prior to filing of the

claim can nonetheless be compensable. This rule was adopted by the Supreme Court in *Clark* and, more recently, in *University Kentucky Family Prac. v. Leach*.²⁰ Consequently, even in those gradual injury claims that are barred by limitations under *Huff* and its progeny, continued employment that causes additional gradual injury or cumulative trauma within the two-year period prior to filing of the claim is nonetheless compensable, at least to the extent it causes additional injury or impairment.

Gradual Injury Problem Areas

An already complicated limitations issue in a gradual injury claim can become much more complicated in claims involving multiple employers or multiple carriers. In *American Printing House for the Blind*,²¹ the Supreme Court was confronted with a fact scenario in which the gradual trauma occurred and the symptoms began when one carrier was on the risk for the employer, but the injured worker did not



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receive a medical diagnosis for her injury until a date when another carrier was on the risk for the employer. The ALJ imposed liability on the first carrier. The Supreme Court affirmed the ALJ decision, holding that the injured worker's disability manifested on the date when she reported to her employer



Judson F. Devlin is a founding partner of Fulton & Devlin Law Office in Louisville. He is a 1988 graduate of the University of Kentucky College of Law. Mr. Devlin is admitted to practice before the U.S.

District Court for the Western District of Kentucky and the U.S. Court of Appeals for the Sixth Circuit. For the past 20 years, he has limited his practice to workers' compensation. Mr. Devlin is a frequent lecturer and guest speaker at workers' compensation seminars for attorneys, claims professionals, and employers.

that she was experiencing pain as a result of what she believed to be a repetitive work injury. Notice by an employee to the employer of a gradual injury triggered the obligations of the employer (and its carrier on that date) to pay workers' compensation benefits and, thus, the carrier on the risk for the employer on the date notice is first received is liable for benefits.²²

However, just six months later, the Supreme Court issued its decision in *Brummitt v. Southeastern Ky. Rehabilitation*,²³ in which the Court held that the manifestation date of the worker's gradual injuries does not necessarily make the carrier on risk at that time responsible for the entire liability of the employer. The ALJ in *Brummitt* had held that the gradual injury became manifest in April 2000 and assigned liability to the carrier on risk for the employer at that time. The Supreme Court reversed the ALJ holding on the basis that the ALJ had failed to consider whether subsequent employment caused additional harmful change for which the

subsequent carrier would be liable.²⁴

Reading *Brown* and *Brummitt* together, the rule of law appears to be that the carrier on risk on the date a gradual injury becomes manifest is liable for benefits, but the ALJ must consider the extent to which continued periods of employment under another carrier have resulted in additional injury or impairment. The clear implication of *Brummitt* is that an ALJ is authorized to apportion liability between carriers where a gradual injury is caused by employment that spans a period of coverage with more than one carrier.

There is not yet any reported appellate decision that addresses liability for a gradual injury that is caused by employment with more than one company. However, the rationale in *Brummitt*, as well as previous appellate decisions on related matters, certainly support the conclusion that an ALJ has the authority to apportion liability among multiple employers for gradual injuries and cumulative trauma caused by multiple or successive employment.²⁵

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The Statute of Repose

In light of the fact that the discovery rule for gradual injuries was ushered into law in a hearing loss claim, it is ironic indeed that the period of repose adopted by the Supreme Court in *Manalapan Mining Co., Inc. v. Lunsford*²⁶ also arose from a hearing loss claim. Unlike KRS 342.316(4)(a), which governs limitations for occupational diseases and includes a five-year statute of repose, KRS 342.185, which governs limitations on injury claims, contains no such repose provision. In *Lunsford*, the Supreme Court held that the two-year limitations period in KRS 342.185(1) operates as both a period of limitations and repose for gradual injury claims. In *Lunsford*, the last exposure to injurious noise levels occurred February 18, 2001, so the injured worker had two years from that date to discover his hearing loss injury and file a claim. This is so even if the worker does not learn of the existence or the cause of the condition until more than two years after the gradual injury had ceased. The Supreme Court noted that there was an “underlying policy against adopting a rule of discovery with no accompanying statute of repose . . . [.]”²⁷ Therefore, the judicially-created period of repose for KRS 342.185(1) requires that, at the latest, a claim must be filed by the worker within two years of cessation of the gradual injury. Once the injurious employment or gradual injury ceases, whether it ends due to a change of employers, switching jobs with the same employer, or job modifications, the claimant must file a claim within two years, regardless of the date of discovery of the gradual injury.²⁸

Fixing the Problem

The period of repose created by the Supreme Court in *Lunsford* could result in some gradual injury claims being unfairly dismissed as time-barred even before the injured worker discovers the existence, cause or extent of the gradual injury sustained. If that is the case, perhaps the General Assembly will finally enact a specific statute of limitations and repose for gradual injury and cumulative trauma claims, which it has failed to do since 1953, when such claims were

deemed compensable by the high court of Kentucky. Our General Assembly has been very active in passing workers’ compensation legislation over the past two decades, but for some reason has ignored this recurrent problem in many workers’ compensation claims. The General Assembly has enacted or amended other workers’ compensation statutes dealing with limitations, so there is no reason it cannot enact statutes of limitations and repose for gradual injury claims, which the Supreme Court expressly encouraged the General Assembly to do in its 1994 decision in *Coslow*.²⁹ In the past twenty years, our General Assembly has enacted or amended statutes of limitations and repose for asbestos-related diseases, human immunodeficiency virus conditions, and radiation injuries.³⁰ The creation of a statute of limitations and repose for gradual injury claims is clearly long past due. Otherwise, under well-established rules of statutory construction, legislative inaction is tantamount to legislative approval of the judicially-created discovery rule and period of repose for gradual injury and cumulative trauma claims.³¹ ■

ENDNOTES

1. *Adams v. Bryant*, 274 S.W.2d 791 (Ky. 1953); *See also, Hudson v. Owens*, 439 S.W.2d 565 (Ky. 1969).
2. 554 S.W.2d 222 (Ky. 1976).
3. KRS 342.0011(1).
4. 770 S.W.2d 687 (Ky.App. 1937).
5. *Id.*
6. 101 S.W.2d 921 (Ky. 1937).
7. 184 S.W.2d 208 (Ky. 1944).
8. 275 S.W.2d 903 (Ky. 1955).
9. 877 S.W.2d 611 (Ky. 1994).
10. *Id.*
11. 2 S.W.3d 96 (Ky. 1999).
12. *Id.*
13. 998 S.W.2d 487 (Ky. 1999).
14. *Id.*
15. 41 S.W.3d 868 (Ky.App. 2001).
16. 65 S.W.3d 503 (Ky. 2001).
17. 65 S.W.3d 908 (Ky. 2001).
18. OWC No. 00-00499 (Dec. Rend. June 4, 2002).
19. 907 S.W.2d 166 (Ky.App. 1995).
20. *Clark, supra*; 237 S.W.3d 540 (Ky. 2007).

21. 142 S.W.3d 145 (Ky. 2004).
22. *Id.*
23. 156 S.W.3d 276 (Ky. 2005); *But cf. Henry Vogt Mach. Co. v. Quiggins*, 596 S.W.2d 17 (Ky.App. 1979), which holds that “last injurious exposure” rule determines carrier on risk for hearing loss claims.
24. *Id.*
25. *Id.*; *Phoenix Mfg. Co. v. Johnson*, 69 S.W.3d 64 (Ky. 2001); *Sears Roebuck & Co. v. Dennis*, 131 S.W.3d 351 (Ky.App. 2004); *But cf. Derr Const. Co. v. Bennett*, 873 S.W.2d 824 (Ky. 1994).
26. 204 S.W.3d 601 (Ky. 2006).
27. *Id.*; *See also, Coslow, supra* at 614.
28. *Lunsford, supra* at 604-605.
29. *Coslow, supra* at 615.
30. *See, KRS 342.316 (4)(a); KRS 342.318; KRS 342.185(2).*
31. *Inland Steel Co. v. Hall*, 245 S.W.2d 437 (Ky. 1952); *Manning v. Ky. Bd. Of Dentistry*, 657 S.W.2d 584 (Ky. App. 1983); *Cook v. Ward*, 381 S.W.2d 168 (Ky. 1964).

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Safety Penalties and Workers' Compensation Claims

By Judge Sheila C. Lowther &
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Overview

As a general rule, in Workers' Compensation Law, employer or employee fault is irrelevant. One of those rare exceptions (in addition to self-injury, willful misconduct, or intoxication) is that for certain safety violations, KRS 342.165(1) provides for a penalty for employer's or employee's intentional failure to comply with safety statutes and administrative regulations.

This section, with only minor modifications, has been part of the Kentucky Workers' Compensation Act since approximately 1916. The most recent and perhaps most significant amendment to KRS 342.165(1) occurred in 2000

when the penalty for a violation by an **employer** was increased from 15% to 30%. The 15% penalty remained the same for violations by the employee.

KRS 342.165(1) was strengthened by the 1972 enactment of the Kentucky Occupational Health and Safety Act (KOSHA). KRS Chapter 338. KOSHA sets forth numerous safety regulations and with KRS 342.165(1) dictates a joint responsibility for both employers and workers to enforce and follow safety rules in the workplace. The courts have repeatedly recognized that by imposing a safety penalty in KRS 342.165(1) the Legislature provided an incentive to **both** employers and employees to follow and enforce safety rules. This is consistent with the goal of providing a safer workplace and reducing the num-

ber of compensable injuries. *Whittaker v. McClure*, 891 S.W.2d 80, 82 (Ky. 1995).

Requirements for Imposition of Safety Penalty

Intent

One of the most controversial aspects of the safety penalty is the requirement that the accident be "caused in any degree by the **intentional failure**" of the **employer** or **worker** to comply with a safety statute or regulation. (Emphasis added).

The question of "intent" and its application to the employer and the employee was initially addressed in what may be the earliest Treatise on Kentucky Workers' Compensation law by Nicholas H. Dosker in 1916. In



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Workmens' Compensation Law of Kentucky (Baldwin 1916), the author, after citing the statute, stated the following:

If the legislature had intended that the mere failure of the employer to comply with a specific statute, regulation under statute, concerning safety appliances or methods, should increase his liability 15%, they would probably not have used the word "intentional." "Intentional," except in criminal law, is synonymous with "willful".... This construction is strengthened by the phrase "communicated to such employer" although there is room for the construction that this phrase refers not to the word "statute" but to the words "lawful regulation made thereunder." At any rate there must be something more than mere failure to comply with the statute. While ordinarily, "intention" is construed into an act of minding to a breach of statute, whether the breaker of it was ignorant of its existence or not, it seems probable that in this instance the legislature intended that the employer should not become liable for this increased compensation of 15% unless he failed to comply with a statute or regulation after it had been "communicated to him." It would make no difference from what source the employer received this knowledge.

Id. at 189-190.

Dosker made the following comment on the meaning of "intentional" for the employee:

On the other hand, if the employee "intentionally" fails to use a safety appliance furnished him, or fails to obey any lawful and reasonable rule, order or regulation of the Board or the employer, his compensation is thereby reduced 15%. It is stated "that nothing in this

section shall be construed to conflict with any of the provisions of section 3 of this Act." Section 3 refers to "deliberate intention" of the employer and "willful self inflicted injury," "willful misconduct" and "intoxication" of the employee [currently KRS 342.610(3)]. If these last named defenses are properly established they bar the employee from participation in the benefits of the Act....

Therefore, if the initial failure of the employee to use a safety appliance furnished him, or to obey lawful and reasonable rules made for his own safety, does not amount to willful self inflicted injury, or does not constitute willful misconduct or does not result from intoxication, which are bars to compensation then section 29 of the Act [currently KRS 342.165(1)] applies and his compensation is reduced 15% on each payment.

Id. at 190-191.

Subsequently the Courts in Kentucky addressed the issue of "intent" under the safety penalty statute. The leading published decision was issued by the Court of Appeals in *Barnet of Kentucky v. Sallee*, 605 S.W.2d 29 (Ky.App. 1980). It held that an intentional failure requires a finding that the party failed to attempt to comply with the regulation. Intent is defined as a determination to act in a certain manner. In a later unpublished opinion, the Supreme Court commented, "intentional concerns knowledge on the part of the employer of a violation and its failure to correct it." Failure to comply with safety regulations by not permanently removing a recognized hazard (defective equipment) and by allowing it to be placed back into service supports the finding of an intentional violation. *Enro Shirt Co. v. Overstreet*, 95-SC-0853-WC (S.Ct. 6/20/96) (unpublished).

In *Chaney v. Dags Branch Coal Company*, 244 S.W.3d 95 (Ky. 2006),

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the Supreme Court addressed the proper standard in considering whether an employer would be subject to the penalty. The ALJ held that the employer's conduct was neither egregious nor malicious and refused to impose a penalty. The Supreme Court reversed noting that KRS 342.165(1) did not require the employer's conduct to be egregious or malicious to impose a penalty on the employer. It further stated that the employer's **intent** is inferred from its failure to comply with a specific statute or regulation. A similar issue is now pending before the Supreme Court in *Wehr Constructors Inc. v. Gibson*, 2007-SC-00810.

There are several unpublished appellate and Board opinions that also illustrate the intent which is necessary before a safety penalty can be imposed. In *Warner v. Lion Apparel Service Center*, WCB 95-42380 (7/31/98), the employee was injured as the result of a previously undetected mechanical failure of a forklift. The Board affirmed the ALJ who declined to assess a safety penalty against the employer. The Board agreed that a penalty was not applicable, since the defect was not the result of the gross disregard of a patently obvious safety concept.

In *Judy McClure v. Wal-Mart*, WCB 97-71003 (11/22/00), the assessment of a safety penalty against the worker was reversed. The worker was injured when she climbed up to a shelf in order to reach merchandise for a customer. She only did this when she was unable to locate a stepladder which store policy required her to use. The Workers' Compensation Board held that it is proper to consider whether the party's actions were reasonable under the circumstances. Even a voluntary violation of a safety regulation does not, in and of itself, establish intent to violate the rule.

This conclusion is consistent with the case law cited in *Larson's Workers' Compensation Law* § 35.04 which states that "If the employee had some plausible reason to explain a violation of a rule, the defenses of violation of safety rules or willful misconduct are inapplicable even though the judgment of the employer might have been faulty or the conduct rash."

Finally, a number of these cases acknowledge that intent is often not subject to direct proof. It is a matter of inference, to be drawn from all attendant circumstances. *Enro Shirt, supra*.

Violation of Specific Safety Statute or Regulation

KRS 342.165(1) states that a safety penalty may be assessed if the accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder. The difficulty with this language is that in a number of instances, workers have been severely injured as the result of safety hazards, which are not covered by a safety statute or regulation directly on point.

In *Apex Mining v. Blankenship*, 918 S.W.2d 225 (Ky. 1996), the worker was injured while operating a road grader with multiple mechanical problems including defective brakes. There was no specific statute or regulation requiring that the brakes be in good working order. However, the ALJ assessed the safety penalty against the employer on the basis of KRS 338.031. That statute requires an employer to provide a "place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." (Emphasis added). The employer appealed, arguing that a violation of KRS 338.031 did not constitute a violation of a specific safety statute as required by KRS 342.165(1). The Supreme Court held that in the absence of a more specific statute, KRS 338.031 is sufficient to trigger a safety penalty when the safety hazard is obvious.

Shortly after the *Blankenship* decision was issued, the Supreme Court again addressed the requirements for imposing a penalty under KRS 342.165(1). In *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834 (Ky. 1997), the worker alleged that he had sustained a brain injury as the result of exposure to unidentified chemicals in the workplace. He asserted that a safety penalty should be imposed on the employer for its failure to have an

adequate ventilation system. No specific safety statute or regulation was cited. The ALJ declined to assess a penalty against the employer. The Supreme Court affirmed, noting that the facts did not establish an **obvious** and **egregious** violation of basic safety concepts. Therefore there was not an adequate basis to overcome the requirement of KRS 342.165(1) that a specific safety statute or regulation be violated. The Court also emphasized that the party arguing for the imposition of the penalty has the burden of proof.

In *John Matthew Jones v. Interstate Brands*, WCB 94-04469 (1/23/98), the Board discussed the requirement for a violation of a **specific** statute or regulation. In his dissenting opinion favoring application of the safety penalty, Judge Lovan stated the party seeking the assessment of a penalty pursuant to KRS 342.165(1) bears a fairly onerous burden. The more **generalized** the safety statute or regulation involved, the more **specific** the evidence must be that the standard has been violated.

Test

In two subsequent cases, the courts approved a test for determining whether the imposition of a safety penalty was appropriate. In *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky.App. 2000), a police cadet suffered a heat stroke during a training exercise. The Court of Appeals affirmed the ALJ's application of a four-prong test in determining whether a violation of the general duty clause in KRS 338.031 occurred:

- A. Did the condition or activity present a hazard to the employee?
- B. Did the employer's industry generally recognize this hazard?
- C. Was the hazard likely to cause death or serious physical harm to the employee?
- D. Did a feasible means exist to eliminate or reduce the hazard?

The ALJ found that the answer to each of these four questions was

“yes.” He therefore assessed a safety penalty against the employer. The Court of Appeals affirmed.

A few months later the Supreme Court again considered the safety penalty. In *Brusman v. Newport Steel Corp.*, 17 S.W.3d 514 (Ky. 2000), the employee was fatally injured while working as switchman on an in-plant railway. She was riding on the side of a railcar and was crushed between it and a car on an adjacent track. There are no specific safety statutes or regulations concerning these railways. The employer was cited for a violation of KRS 338.031. In the subsequent workers compensation claim, the ALJ imposed a safety penalty against the employer. The Supreme Court affirmed because the facts of the case established:

- A. An obvious hazard existed;
- B. Complaints had been made to the employer at a recent safety meeting; and

C. The employer had not enforced a rule prohibiting employees from riding on the side of the railway cars.

Calculations

The Supreme Court has stated that the safety penalty “clearly is not an income benefit and presents no conflict with the limitation on income benefits which is contained in KRS 342.730(1)(a).” *Apex Mining v. Blankenship*, 918 S.W.2d 225 (Ky. 1996). A worker can receive an award for 100% permanent total disability, plus the additional safety violation benefit.

In *Harvey Saylor Trucking Co. v. Wilson*, WCB 94-43219 (5/1/98), an employee was found to have a 60% occupational disability, and was awarded benefits for 520 weeks. A safety penalty was assessed **against** the employee. The Board held this reduction was from each individual payment by the employer, not from the percentage of occupational disability. Therefore, the compensable

period was not reduced from 520 weeks to 425 weeks.

In *Porter v. Magoffin County Fiscal Court*, 97-CA-2059 (Ky.App. 8/14/99) (unpublished), the ALJ’s award of income benefits equal to a 15% occupational disability for a safety penalty was reversed where there was no permanent partial disability. Since no income benefits were awarded, the worker was not entitled to any monetary award for the safety penalty. Essentially, the award of the safety penalty was moot.

In *Overstreet v. Enro Shirt Co.*, 97-CA-002968 (Ky.App. 9/4/98) (unpublished), the employee argued that the 15% safety penalty awarded to her should be applied to medical as well as income benefits. She relied on the reference to “compensation” contained in KRS 342.165(1), which is defined in KRS 342.0011(14) as including both income and medical benefits. The Court rejected this argument stating that the statutory definition should be

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applied only in instances where the use of the definition is reasonable.

Whittaker v. McClure, 891 S.W.2d 80 (Ky. 1995) held that the application of the safety penalty does not affect the amount of income benefits payable by the Special Fund. There is no case law concerning the application of a safety penalty award in a claim paid by the Uninsured Employers Fund.

The Supreme Court held in *Realty Improvement Company, Inc. v. Raley*, 194 S.W.3d 818 (Ky. 2006), that the lump sum benefit paid to the estate of a deceased worker pursuant to KRS 342.750(6) is also subject to an increase (or decrease) pursuant to KRS 342.165(1). The Court affirmed the ALJ's holding that the lump sum payment constituted "compensation" and was subject to the provision of KRS 342.165(1).

Actions of a Coworker

The Supreme Court reiterated in *Enro Shirt Co. v. Overstreet, supra*,



Sheila C. Lowther received her B.A. from Transylvania University in 1977 and earned her J.D. from the University of Kentucky College of Law in 1980. She served as an administrative law judge with the Ken-

tucky Department of Workers Claims from 1995 until June 2008, when she accepted an appointment as an administrative law judge with the Social Security Administration.



Charles E. Lowther is a partner with Boehl, Stopher & Graves, LLP at its Lexington office, where he has practiced since October 2000. After graduating from the University of Kentucky College of

Law in 1980, Mr. Lowther has focused his practice primarily in the area of Kentucky workers' compensation law, as well as Federal Black Lung and Federal Employers' Liability Act (FELA) claims. He is a member of the KBA Workers' Compensation Law Section.

that a violation of a safety regulation is the responsibility of the employer, even when it is due to the unauthorized action of an employee. The classification of the violation by KOSHA is irrelevant for purposes of KRS 342.165(1).

Contractor/Subcontractor Relationship and Independent Contractors

The Court of Appeals held in *Ernest Simpson Construction Co. v. Conn*, 625 S.W.2d 850 (Ky. 1981), that the general contractor is not liable for a safety penalty to an employee of a subcontractor who has workers' compensation coverage, even though the safety violation was committed by the general contractor.

Payment of the Penalty

On December 13, 2000, the Workers' Compensation Board held in a case where an employee received an award of income benefits, which were enhanced by a safety penalty, that the workers' compensation carrier was responsible for payment of the penalty. This was based on the Board's interpretation of the definition of "compensation." *AIGS/AIU Ins. Co. v. Campbell*, WCB 98-99259 (12/13/00).

The Supreme Court followed this same reasoning in *AIG/AIU Insurance Company v. South Akers Mining Company, LLC*, 192 S.W.3d 687 (Ky. 2006). The employee died in a roof fall. There was a finding that the accident resulted from the intentional violation of several mine safety regulations. The ALJ enhanced the income benefits awarded to the widow by 30%. On appeal, the workers' compensation carrier argued that it was not responsible for the additional benefits. The contract of insurance with the mine company excluded payments required because of its willful misconduct or failure to comply with safety regulations. The Court noted that KRS 342.365 requires the carrier to promptly pay all benefits awarded under this chapter and held that the carrier was responsible for any increase in benefits pursuant to KRS 342.165(1), regardless of the terms of

its contract with the employer. The Court also added in its Opinion that its decision was consistent with the principal that workers' compensation benefits were a cost of production and that the carrier would be free to consider the amount of compensation paid when assessing the risk and deciding whether to continue to offer coverage and, if so, at what rate.

But the Court's decision may also raise questions about whether this actively perpetuates the goal of encouraging safety by employers and placing the liability for any violation of safety standards on a party, i.e. the insurance carrier, who, ordinarily does not have the ability to ensure that safety is a top priority at all times. In other words, from a practical standpoint, there may be a very significant problem in ensuring that there is a safe work place at all times and the employer, who ultimately has the best opportunity to ensure such safety, has less incentive to do so if it is assured that the cost will not come directly out of its pockets of profits. Finally, the terms of the contract between the insurer and the employer may allow an independent action by the insurer, to collect any sums paid by the insurer for a safety penalty from the employer.

Conclusion

Even though the "safety penalty" statute has been a part of the Workers' Compensation Act since its earliest date, it has only recently become a much more vibrant and litigated portion of the Act. In the early years of the safety penalty statute, most of the cases seemed to deal with situations in which the employee was alleged to have violated safety standards. More recently, more of the litigation hinges on violations alleged against the employer. That may be due largely to an increased emphasis on employee safety, including passage and enforcement of more stringent regulations at both the state and federal level. But the impact of changes to the Act in 2000, increasing the compensation to 30% for employer violations, has undoubtedly contributed to the increase in this area of litigation.

Medical Benefits

By Carole Meller Pearlman

Overview

KRS 342.020(1) governs medical benefits under the Kentucky Workers' Compensation Act and requires the employer to pay for the "cure and relief" from the effects of a work-related injury or occupational disease. The Kentucky Court of Appeals has construed "cure and relief" in the disjunctive as "cure and/or relief" requiring the employer "to pay for any reasonable and necessary medical treatment for relief whether or not the treatment has any curative effect."¹ Compensable medical expenses may include medical, surgical, dental, hospital, nursing, and medical rehabilitation services, medication, artificial or prosthetic devices and chiropractic treatment.² An employee may seek reimbursement for reasonable travel expense incurred in obtaining medical treatment.³ In-home attendant care rendered by a spouse or other non-professional is compensable if "medically necessary, performed competently, and . . . [for the] cure and relief from the effects of the injury."⁴

The employee has the right to select the treating medical provider, where the employer does not have a managed care system. Except for emergency care, all medical treatment shall be rendered by or under supervision of the "designated physician";⁵ however the designated physician does not have carte blanche. "[T]he legislature did not intend to require an employer to pay for medical expenses which result from treatment that does not provide 'reasonable benefit' to the injured worker."⁶

Medical expenses may be disallowed where treatment is "unproductive or outside the type . . . generally accepted by the medical profession as reasonable in the . . . particular case."⁷ The regulations provide for utilization review defined as "a review of the medical necessity and

appropriateness of medical care and services for purposes of recommending payments for a compensable injury or disease."⁸ Utilization review affords employers and their carriers an opportunity to evaluate medical expenses before having to challenge them.⁹

Medical expenses may be challenged by filing a medical fee dispute or "Form 112."¹⁰ In addition, the employer may file a motion to select the treating physician, where the employee is not receiving proper medical treatment and recovery is being substantially affected or delayed; where funds for medical expenses are being spent without reasonable benefit; or where the employer will be substantially prejudiced in a compensation proceeding as a result of

the subject treatment.¹¹

KRS 342.020(1) imposes time limitations for the payment of medical expenses.¹² The statute requires the medical payment obligor to pay a statement for services within 30 days of receipt.¹³ In *R.J. Corman R.R. Constr. v. Haddix*,¹⁴ the Kentucky Supreme Court held that the 30-day rule under KRS 342.020(1) – to pay or challenge medical expenses – applies post-award. 803 KAR 25:096§8(1) governs challenges to statements for services *following resolution of a claim*. It requires the medical payment obligor to tender payment or file a medical fee dispute with an appropriate motion to reopen¹⁵ within 30 days following receipt of a completed statement for services. The rule also applies

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where utilization review has denied a request for precertification.¹⁶ The 30 days is tolled where the medical provider submits an incomplete statement for services or fails to respond to a reasonable information request, where the designated physician fails to provide a treatment plan if required, or where utilization review is pending.¹⁷

Whether a Form 112 must be filed prior to resolution of a claim is unclear.¹⁸ *Corman*¹⁹ was decided before adoption of utilization review regulations providing that the 30 days to pay or challenge medical expenses under KRS 342.020(1) shall commence on the date of the final utilization review decision.²⁰ But, 803 KAR 25:096§7(1), governing denials of statements for services prior to resolution of a claim, only requires the medical payment obligor to provide a written notice of denial within 30 days of receipt of a statement for services.

According to Chief Administrative Law Judge, Hon. Donna H. Terry, who graciously agreed to be quoted in this article, the “best practice” is to file a Form 112 in a pending claim. The Form 112 should clearly identify the problem and be filed as early as possible so that the parties have time to develop proof on the issue and the provider has an opportunity to respond.²¹

KRS 342.020(1) also imposes time limitations upon medical providers to submit statements for services – within 45 days of initiation of treatment and every 45 days thereafter as long as the treatment continues.²² The duration of an employee’s entitlement to medical treatment is a significant issue in workers’ compensation practice.

Duration of medical benefits

In *Robertson v. UPS*,²³ the employee’s pre-existing dormant, non-work-related spondylolisthesis became symptomatic after an incident at work. The Kentucky Supreme Court held that where the effects of a work-related incident are only transient, resulting in symptoms but no permanent harmful change, the employee is entitled to medical treatment for the temporary flare-up of symptoms; however, an award of future medical benefits is not warranted.

By contrast, where a work-related injury permanently arouses a pre-existing dormant condition, future medical benefits may be warranted. In *Finley v. DBM Techs.*,²⁴ the employee had pre-existing, dormant scoliosis. The Court of Appeals remanded for further findings, with direction that the employee would be entitled to recover benefits for medical treatment and permanent impairment directly attributable to the permanent arousal of the scoliosis. If only temporary, the employee would be entitled to medical treatment during the period of arousal, but not thereafter.

KRS 342.020(1) requires the employer to pay for medical expenses at the time of the injury and thereafter “during disability.” Prior to the 1996 revision of the Act, KRS 342.0011(11) defined “disability” by an occupational disability standard. As amended, KRS 342.0011(11) defines three types of disability for which income benefits are payable – temporary total, permanent partial and permanent total. Under the current version of the Act, “permanent total disability [exists] if the evidence shows a permanent impairment rating applies and the worker has a complete and permanent inability to work. . . . [P]ermanent partial disability [exists] if the evidence shows a permanent impairment rating yet the worker retains the ability to work.”²⁵ The issue arose whether future medical benefits could be awarded in the absence of a permanent impairment rating.

The Kentucky Supreme Court resolved the issue in *FEI Installation, Inc. v. Williams*.²⁶ The Court rejected the employer’s argument that Williams was not entitled to future medical benefits under KRS 342.020(1) because the injury caused no permanent partial disability. Distinguishing *Robertson*,²⁷ the Court held that Williams was entitled to an award of future medical expenses – his condition was entirely work-related, he had undergone surgery, had continued to attend therapy and there was no medical evidence future treatment would be unreasonable or unnecessary.²⁸

Entitlement to future medical benefits is fact specific. Although future medical benefits can be awarded in the absence of a ratable impairment, an award is not

required in every case. In *Mullins v. Mike Catron Constr.*,²⁹ the Court of Appeals affirmed the denial of future medical expenses where substantial evidence established future treatment was unnecessary. Future medical benefits may be limited to specific treatment. In *Greene v. Paschall Truck Lines*, the Court of Appeals affirmed an award of future medical expenses limited to removal of glass from the employee’s skin, following an accident that also caused wrist and scapula fractures which had resolved.³⁰

The employee bears the burden of proving entitlement to an award of future medical benefits. In *McCauley v. PPG Industries*,³¹ the parties had stipulated a work-related injury, but the employee did not submit proof of a permanent impairment rating or the need for future treatment. The Kentucky Supreme Court explained that the employee must produce medical evidence that the injury continued to cause impairment. The “mere absence” of medical evidence that the employee has reached maximum medical improvement does not satisfy the burden.

An employer was relieved of liability for future medical benefits in *Stidham v. Hazard ARH*.³² The ALJ had awarded permanent total disability and future medical benefits for a 1996 work-related heart attack. In 2006, the employee was hospitalized for a cardiac condition. The employer reopened to resolve a medical dispute. The ALJ concluded the 2006 treatment was related to atherosclerosis, not the 1996 heart attack. The Board and the Court of Appeals affirmed. Unrebutted medical evidence established the present condition was not work-related; moreover, the ALJ drew a reasonable inference from the evidence that the effects of the 1996 heart attack had fully resolved, requiring no future treatment.

Apportionment of Liability for Medical Expenses

In *Sears Roebuck & Co. v. Dennis*,³³ the employee sustained work-related back, neck and shoulder injuries at Radio Shack in 1995. He injured his back at Sears in 2000 and 2001. He reopened the claim against Radio Shack alleging worsening of impairment and filed a new

claim against Sears alleging back and psychological injuries. The ALJ found Radio Shack liable for payment of all medical expenses for the shoulder, neck, and back (except for a period in 2001) and Sears liable for psychological medical expenses. The Board affirmed; the Court of Appeals agreed with the Board's reasoning. "While it is true in general that the last employer would be responsible for medical expenses, there are occasions where medical expenses can be clearly distinguished as resulting from . . . separate events and body parts."³⁴

Compensability of Expenses

In *Graham v. Richmond Auto Parts*,³⁵ the Board affirmed the ALJ's determination that a functional capacity evaluation was a litigation expense, rather than medical treatment compensable under KRS 342.020(1).

In *KESA v. Lexington Diagnostic Center*,³⁶ the contents of a syringe containing bodily fluids splashed into the employee's eye while flushing an IV. The Board agreed that a post-exposure testing protocol for infection was compensable under KRS 342.020(1).

In *Kelly Temporary Services v. Maggard*,³⁷ the ALJ had determined that scar revision surgery was non-compensable. The Board reversed, holding it was not outside the type of treatment generally accepted by the medical profession as reasonable under the circumstances. The Court of Appeals agreed that cosmetic medical treatment is not, *per se*, non-compensable, but disagreed with the Board's analysis. The Court viewed the issue as one of conflicting medical evidence and held the ALJ could reasonably infer from a physician's testimony that the procedure would be unnecessary and unproductive. Where evidence is in conflict, the question of which evidence to believe falls within the ALJ's exclusive province.

Submission of Medical Expenses

In *Lupian v. Cintas*,³⁸ a post-award medical fee dispute, the Court of Appeals rejected the employee's argument that the 45 days to submit a statement for services under KRS 342.020(1) was tolled pending the employer's appeal of the ALJ's original award. The employee,

rather than the medical provider, had presented unpaid bills long after medical treatment was incurred. The bills as well as untimely-submitted requests for reimbursement were deemed non-compensable, there being no reasonable excuse for the delay.

In *Clark v. Hamilton*,³⁹ also a post-award medical fee dispute, the Board explained that where an employee untimely submits a Form 114 request for reimbursement of out-of-pocket and travel expenses more than 60 days old, an employer or its insurance carrier may reject payment and is not obligated to initiate reopening proceedings. If reasonable grounds exist for the delay, the burden to go forward rests with the employee – not the employer or its insurance carrier.

In *Brown Pallet v. Jones*,⁴⁰ the Board held that an employer's notice that it would not pay for surgery would constitute reasonable grounds for the failure to timely submit statements for services and requests for reimbursement during the pendency of a claim.

In-home spousal care was at issue in *Speedway/SuperAmerica v. Elias*.⁴¹ Although there were reasonable grounds for the failure to timely submit Forms 114 for past services, the Board held that the ALJ had exceeded her authority in ordering a fixed weekly amount for future services and that Forms 114 for future services must be submitted in accordance with 803 KAR 25:096§11.

Attorney's Fees

Rager v. Crawford & Co.,⁴² involves attorney's fees in a post-award medical fee dispute. The ALJ determined that

contested medical treatment and expenses were compensable, but denied the employee's request for sanctions in the form of his attorney's fees under KRS 342.310,⁴³ having found the employer had reasonable grounds to challenge the subject medicals. The ALJ ultimately approved a fee under KRS 342.320⁴⁴ to be paid by the employee. On appeal, the employee and his attorney argued that the employer should pay the fee as a matter of public policy, otherwise attorneys would be discouraged from representing employees in medical fee disputes. The Kentucky Supreme Court disagreed, noting that the legislature is the proper forum for that argument. An employee is responsible for paying his own attorney's fees under KRS Chapter 342. Unless a determination is made under KRS 342.310(1) that proceedings were brought, prosecuted or defended without reasonable ground, there is no authority for requiring an employer or its insurance carrier to pay the fee.

Where the ALJ denies assessment of attorney's fees under KRS 342.310(1), the standard of review on appeal is abuse of discretion. In *Deaton v. Hazard ARH*,⁴⁵ the Kentucky Supreme Court explained that the fact an employee prevails on the merits in a medical fee dispute does not compel a finding that the employer lacked reasonable ground in filing the dispute, nor does the fact that an employer sends the employee to a physician whose recommendation the employer later contests.

Conclusion

Additional information is available on the Kentucky Office of Workers' Claims'

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website which provides links to statutes, regulations and downloadable forms.⁴⁶ The Kentucky Bar Association⁴⁷ and CompEd, Inc.⁴⁸ websites provide searchable databases of decisions. ■

ENDNOTES

1. *National Pizza Co. v. Curry*, 802 S.W.2d 949, 951 (Ky. App. 1991).
2. KRS 342.0011(15); KRS 342.020(6); KRS 342.019.
3. *C & L Constr. v. Cannon*, 884 S.W.2d 647 (Ky. 1994).
4. *Bevins Coal Co. v. Ramey*, 947 S.W.2d 55, 59 (Ky. 1997).
5. KRS 342.020(5); See 803 KAR 25:096§(3).
6. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309-310 (Ky. 1993).
7. *Id.* at 310.
8. 803 KAR 25:190§1(6). Unless the claim is denied in good faith as compensable, reasonably related medical services are subject to utilization review where the provider requests preauthorization; there is notification of a surgical procedure; medical costs cumulatively exceed \$3,000.00; lost work days cumulatively exceed 30 days or an ALJ orders the review. 803 KAR 25:190§5(1).
9. *E-Town Quarry v. Goodman*, 12 S.W.3d 708 (Ky. App. 2000).
10. 803 KAR 25:012 governs the procedure for filing medical fee disputes.
11. KRS 342.020(7); See *Transport Assocs. v. Butler*, 892 S.W.2d 296 (Ky. 1995).
12. In addition, 803 KAR 25:096§11 governs requests for payment of services rendered by non-medical providers and requests for reimbursement of expenses incurred by an employee. Such requests must be submitted within 60 days on a Form 114. Failure to timely submit a Form 114, without reasonable grounds, may result in a finding that the expenses are not compensable.
13. 803 KAR 25:096§1(5) defines statements for services:
 - (a) For a nonpharmaceutical bill, a completed Form HCFA 1500, or for a hospital, a completed Form UB-92, with an attached copy of legible treatment notes, hospital admission and discharge summary, or other supporting documentation for the billed medical treatment, procedure, or hospitalization; and
 - (b) For a pharmaceutical bill, . . . the identity of the prescribed medication, the number of units prescribed, the date . . . and the name of the prescribing physician.
14. 864 S.W.2d 915 (Ky. 1993).
15. See 803 KAR 25:012(6).
16. *Garrett Mining #2 v. Rondal Miller*, Workers' Compensation Board No. 97-78726, rendered August 29, 2001.
17. 803 KAR 25:096§8(2).
18. In *King's Daughters Medical Center v. Vallance*, Workers' Compensation Board No. 99-99826, rendered June 5, 2002, the Board explained that although a Form 112 may be filed in a pending claim, it is not a necessity. Notice of a medical contest during the pendency of a claim by means other than a Form 112 can satisfy the requirement of the regulation. Cf. *Dyer v. MW Manufacturers Holding Corp.*, Workers' Compensation Board No. 04-85372, rendered May 14, 2007, on appeal in Kentucky Supreme Court No. 2007-SC-000850, holding that the ALJ did not abuse his discretion in refusing to consider the issue of contested medical expenses where the employer did not file a Form 112 in a pending claim. [*Dyer* was appealed on other grounds; the issue of the Form 112 was not raised in the Court of Appeals.]
19. 864 S.W.2d 915.
20. 803 KAR 25:190§5(4).
21. See *Ausmus v. Pierce*, 894 S.W.2d 631 (Ky. 1995).
22. 803 KAR 25:096§6 provides: "If the medical services provider fails to submit a statement for services as required by KRS 342.020(1) without reasonable grounds, the medical bills shall not be compensable."
23. 64 S.W.3d 284 (Ky. 2001).
24. 217 S.W.3d 261 (Ky. App. 2007).
25. *Farris v. City of Louisville*, 209 S.W.3d 486, 488 (Ky. App. 2006).
26. 214 S.W. 3d 313 (Ky. 2007).
27. 64 S.W.3d 284.
28. *FEI Installation*, 214 S.W.3d at 319.
29. 237 S.W.3d 561 (Ky. App. 2007).
30. 239 S.W.3d 94 (Ky. App. 2007).
31. No. 2006-SC-000696-WC, rendered May 24, 2007, designated "Not to be Published."
32. No. 2008-CA-000215-WC, rendered May 16, 2008, designated "Not to be Published."
33. 131 S.W.3d 351 (Ky. App. 2004).
34. *Id.*, at 356; See also *Phoenix Mfg. Co. v. Johnson*, 69 S.W.3d 64 (Ky. 2002).
35. Workers' Compensation Board No. 2004-75964, rendered April 4, 2008.
36. Workers' Compensation Board No. 2006-001234, rendered October 29, 2007, pending on appeal in *KESA v. Lexington Diagnostic Center*, No. 2007-CA-002360.
37. 2004-CA-001492-WC, rendered April 22, 2005.
38. 2007-CA-001011-WC, rendered February 1, 2008.
39. Workers' Compensation Board No. 95-19085, rendered April 11, 2008.
40. Workers' Compensation Board No. 03-69633, rendered September 28, 2007.
41. Workers' Compensation Board No. 99-54592, rendered May 1, 2008, on appeal in *Speedway/SuperAmerica v. Elias*, No. 2008-CA-001039.
42. 256 S.W.3d 4 (Ky. 2008).
43. KRS 342.310(1) provides for assessment of costs, including attorney fees, where "proceedings have been brought, prosecuted, or defended without reasonable ground, . . ."
44. KRS 342.320(4) provides that an employee's attorney fee may be paid from his personal funds, deducted from a lump sum settlement or weekly benefits over the duration of an award.
45. No. 2006-SC-000577-WC, rendered November 1, 2007, designated "Not to be Published."
46. <http://www.labor.ky.gov/worker-claims>.
47. <http://www.kybar.org>.
48. <http://www.comped.net>.

Carole Meller Pearlman is in private practice in Louisville, concentrating in workers' compensation defense. She formerly served as a staff attorney for the Kentucky Court of Appeals. Ms. Pearlman is a 1985 graduate of the University of Louisville (Brandeis) School of Law.

Exclusive Remedy in the New Millennium

By James G. Fogle

Historical Background

In the early decades of the 20th century, a movement to adopt workers' compensation laws developed in the United States. The purpose of the movement was to provide social insurance to compensate employees who sustained industrial accidents. The so-called "unholy trinity" of judicially-created employer defenses, assumption of the risk, contributory negligence and the fellow servant rule, developed and were strictly enforced as legal rules in the last half of the 19th century. The result was recovery by the injured worker in less than a quarter of work-related accidents.

Workers' compensation programs are a social contract between labor and industry. In return for accepting full medical benefits but lower income benefits, injured workers received benefits

more quickly and in many more claims than under common law, since the employer's liability is based upon a "no-fault" premise. The employer gave up common law defenses, in return for lower liability for income benefits and immunity from liability to its injured employees in a civil action based upon negligence. The "exclusive remedy" provision has been a part of the Kentucky Workers' Compensation Act since its enactment in 1916.¹

The social contract between labor and industry is a delicate balance of the interests of both. With medical benefits consuming increasingly more of the workers' compensation dollar, the balance between what labor wants and what industry can afford to pay becomes even more delicate. Throughout this decade, labor has made multiple attempts to erode the exclusive remedy. The most recent effort during the 2008 Regular Session

was House Bill 624, which would have permitted employees to sue employers for injuries resulting from "reckless conduct." The General Assembly has wisely continued to protect the exclusive remedy since its adoption a century ago.

The Workers' Compensation Act:

The exclusive remedy provisions of the Kentucky Workers' Compensation Act appear in KRS 342.690 [which references KRS 342.610(2)], and KRS 342.610(4).

What is the "Exclusive Remedy"?

The exclusive remedy provision grants immunity to the employer for liability arising from common law and statutory claims, meaning such claims cannot be pursued in the courts of this Commonwealth. The statute extends this immunity to the employer's workers' compensation insurance carrier. The



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effect of this statute is that KRS 242.690(1) shields a covered employer and its insurer from any other liability to a covered employee for damages arising out of a work-related injury. If fault is apportioned between the defendants, and one of the defendants at fault is the employer, the portion of the damages assigned to the employer is not recoverable through the civil action.²

The immunity is extensive, ranging from disputes over the payment for injuries of the employee,³ to allegations of tortious conduct related to dealing with the workers' compensation claim itself,⁴ to allegations of bad faith,⁵ to a claim involving an award of workers' compensation benefits in another state,⁶ to allegations of negligent hiring and negligent failure to provide a safe work place.⁷ A child's claim for loss of parental consortium – like a claim for loss of spousal consortium – is barred by the exclusive remedy.⁸

The language in KRS 342.630 provides that “[a]ny person ... that has in this state one (1) or more employees subject to this chapter” shall be considered an employer subject to the provisions of the Act. The provisions relating to contractors, KRS 342.610(2) and KRS 342.700(2), do not require that a contractor have one or more employees. Moreover, the Act does not specify that a contractor must also be an employer at the same time in order to be liable under the Act. A contractor without any employees shall be liable for payment of compensation to the employees of an uninsured subcontractor, and is similarly entitled to the protections of the exclusiveness of liability provision.⁹

But, the exclusive remedy does not extend to the owner of the premises where the employer does business, even if the owners of the premises are also the managers of the LLC that employed the claimant. An LLC is considered to be a separate legal entity from its members or managers.¹⁰ In *Davis v. Hensley*,¹¹ the Supreme Court ruled that KRS 342.610(2) does not hold a governmental entity liable as the “up-the-ladder” employer. Thus, KRS 342.690(1) does not entitle a governmental entity or its employees to an exclusive remedy defense on that basis. The Supreme Court did not discuss gov-

ernmental immunity, official immunity, or sovereign immunity. In at least one case, the Supreme Court has applied the sovereign immunity defense.¹²

The exclusive remedy protects only the employer and its workers' compensation carrier, not a separate UIM carrier.¹³ The parent company is not immune from tort liability by the employee of a wholly owned subsidiary for its own acts of negligence, but the appellate courts have upheld the exclusive remedy in every decision since 2000.¹⁴ Where there are separate corporate entities, an employee of one corporation may maintain a cause of action against a sister corporation.¹⁵ The exclusive remedy provision does not preclude an employee injured in a work-related automobile accident from recovering against both the workers' compensation insurance and the UIM insurance coverage provided by his employer.¹⁶

A work-related injury occurred when the employee suffered an injury to her shoulder as a result of a patient kicking her when coming out of anesthesia. The second injury occurred during physical therapy provided by the employer when the therapist tore the deltoid muscle from her shoulder. The medical malpractice injury was not in the course and scope of her employment, and the exclusive remedy did not apply to that second injury.¹⁷

Kentucky appellate courts have repeatedly rejected the general argument that KRS Chapter 342 is unconstitutional and the specific argument that the fundamental right to bring a common law action cannot be waived by implied consent to the provisions of the Act.¹⁸

Tort Immunity Only Applies to Work-Related Injuries that Arise out of and in the Course of Employment

An employee who was injured while picking up her paycheck on her day off was in the course and scope of employment; the employer was entitled to tort immunity.¹⁹ The issue may be whether the employer and employees were killed in a helicopter crash while on a business mission as opposed to a personal mission.²⁰ The circuit court may be called upon to determine whether an exception to the going and coming rule applies, thus entitling the employer or co-worker

to tort immunity.²¹ The issue may be whether the injured person was an employee or an independent contractor;²² or, whether the employee rejected coverage under the Act prior to the date of the injury.²³ The issue in circuit court may be whether the plaintiff was a loaned servant,²⁴ or whether the injury resulted from “horseplay.”²⁵

There is no requirement that workers' compensation benefits actually must have been paid. The workers' compensation claim may be barred by the statute of limitations, but the tort immunity still applies.²⁶ A claim is not carved out of the Act simply because a work-related injury is not compensable under the Workers' Compensation Act. Regardless of whether or not the claim or injury is compensable, the employer's liability under the Workers' Compensation Act is exclusive and the civil courts have no jurisdiction.²⁷

The Defendant May be Immune from Tort Liability as a “Contractor” or “Deemed Up-the-Ladder” Employer

If premises owners are “contractors” as defined in KRS 342.610(2)(b), they are deemed to be the statutory, or “up-the-ladder,” employers of individuals who are injured while working on their premises and are liable for workers' compensation benefits unless the individuals' immediate employers of the workers have provided workers' compensation coverage. If deemed to be “contractors,” the owners, like any other employers, are immune from tort liability [exclusive remedy immunity] with respect to work-related injuries whether or not the immediate employer actually provided workers' compensation coverage. See Thomas M. Cooper, *The “Comp” Factor in Tort Cases*, 51 *Ky. Bench & Bar*, No. 1, Winter 1987, at 14, 37. Thus, whether an owner is entitled to exclusive remedy immunity depends upon whether the worker was injured while performing work that was “of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession” of the owner. If so, the owner is immune; if not, the owner is subject to tort liability.²⁸

Our Supreme Court recently detailed the relevant case law interpreting KRS

342.610(2)(b) in *General Electric Company v. Cain*.²⁹ The Supreme Court began by noting that Kentucky case law interpreting KRS 342.610(2)(b) is limited to two primary Supreme Court opinions and three Court of Appeals opinions: *Elkhorn-Hazard Coal Land Corp. v. Taylor*;³⁰ *Fireman's Fund Insurance Co. v. Sherman & Fletcher*;³¹ *Krahwinkel v. Commonwealth Aluminum Corp.*;³² *Tom Ballard Co. v. Blevins*;³³ *Wright v. Dolgencorp, Inc.*;³⁴ and *Daniels v. Louisville Gas & Electric Co.*³⁵ The Supreme Court proceeded to reach the following conclusions:

"Work of a kind that is a 'regular or recurrent part of the work of the trade, business, occupation, or profession' of an owner does not mean work that is beneficial or incidental to the owner's business or that is necessary to enable the owner to continue in business, improve or expand its business, or remain or become more competitive in the market. It is work that is customary, usual, or normal to the particular business (including work assumed by contract or required by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees. The test is relative, not absolute. Factors relevant to the 'work of the . . . business,' include its nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform. Employees of contractors hired to perform major or specialized demolition, construction, or renovation projects generally are not a premises owner's statutory employees unless the owner or the owners of similar businesses would normally expect or be expected to handle such projects with employees. Employees of contractors hired to perform routine repairs or maintenance that the owner or owners of similar

businesses would normally be expected to handle with employees generally are viewed as being statutory employees. Whether a project is customized to the premises owner's needs is irrelevant. When characterizing a project as being routine repair or maintenance versus a capital improvement, a relevant consideration is whether the premises owner capitalized and depreciated its cost for tax purposes or deducted its cost as a business expense. Capitalized costs tend to indicate that the business was not the injured worker's statutory employer, while expensed costs tend to indicate that the owner was the statutory employer. This factor is not conclusive, however, because even projects performed entirely with a premises owner's workforce may be capitalized depending on their character. It is irrelevant when a contractor's employees are used to supplement the premises owner's workforce. Stated simply, KRS 342.610(2)(b) refers to work that is customary, usual, normal, or performed repeatedly and that the business or a similar business would perform or be

expected to perform with employees."³⁶

Since January 1, 2000, the Court of Appeals in a number of unpublished cases has consistently ruled in favor of the employer when the issue was whether the work was a regular and recurrent part of the business of the employer. This is by far the single most frequently appealed exclusive remedy issue.³⁷

Intentional Injury by Employer

In order to abrogate the exclusive remedy provisions of KRS Chapter 342, a plaintiff must establish that his employer acted with the specific intent to harm him.³⁸ It is not sufficient to show gross negligence or even recklessness, and intent will not be inferred from such negligence.³⁹ Most of the cases, if not all, from the other jurisdictions have interpreted the meaning of the phrase "deliberate intention" to be that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent.⁴⁰ A violation of OSHA regulations by the employer and acknowledgment of the possible consequences does not amount to a deliberate intention to produce the employee's death.⁴¹

Conduct which may be grossly negligent, reckless or wanton fails to satisfy

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the exception provision of KRS 342.690(1). The record clearly shows that the employee's truck was overloaded with coal at the time of the accident, overloading trucks is common practice in the coal mining business and the employer knew that the employee consistently operated an overloaded truck. The evidence further revealed that employer provided the employee little, if any, safety training. However, at no time has the plaintiff brought forward evidence that the employer, through willful and unprovoked physical aggression, caused the employee's death.⁴²

The injured employee or the dependent or personal representative of a deceased employee must make an election as to the forum in which to proceed. It does not afford an opportunity to proceed in both forums and elect the judgment or award that is most beneficial. Thus, if the plaintiff accepts payment of workers' compensation benefits under KRS Chapter 342, the plaintiff is then precluded from suing her employer in circuit court for the same injuries and disabilities.⁴³

Tort Immunity Extends to Co-Workers

In Kentucky, one cannot maintain a common law negligence action against his fellow servant for injuries sustained in the course of or arising out of his employment. The only remedy for such an injury is under the Workmen's Compensation Act.⁴⁴

However, both of the co-workers involved in the accident must have been in the course and scope of their employment. If one of the co-workers was not in the course and scope of his employment, then the co-worker is not immune from tort liability.⁴⁵



James G. Fogle is a partner in Ferreri & Fogle, PLLC. His practice focuses on the defense of workers' compensation claims. Mr. Fogle received his law degree from Salmon P. Chase College of Law in 1978. In March 2008, he was inducted into the American Bar Association College of Workers' Compensation Lawyers.

Other Parties May Not Have Tort Immunity

A hotel site owner hired a construction manager and a job site superintendent, but the contract with the subcontractor was made between the owner of the hotel site and the subcontractor. The job site superintendent was not a party to the contract. While the construction manager may have directed the activities of the subcontractor, it is not classified as the "contractor" as that term is set forth in KRS 342.610(1). Thus, it had no "up the ladder" immunity since it was not "in the ladder."⁴⁶

Conclusion

Any attorney considering filing a civil action against a potential "up-the-ladder" employer should first read *GE v. Cain*. Of the 65 appellate court Opinions regarding exclusive remedy issues reviewed since 2000, the plaintiff was successful in only a very few. That will probably change with the decision in *GE v. Cain*, which creates new restrictions on who is immune from tort liability. The decision in *Davis v. Hensley* is potentially a major opportunity for recovery by plaintiff's against government employees, but the other immunity issues will need to be resolved. ■

ENDNOTES

1. K.S. §4882 (1916 Ky. Acts, ch. 33, § 3, repealed KRS 447.025, 1942 Ky. Acts, ch. 208, § 20); replaced by KRS 342.015(1) (1942 Ky. Acts, ch. 208, §§1, 2, repealed 1972 Ky. Acts, ch. 77, §36, eff. January 1, 1973); replaced by KRS 342.690(1) (1972 Ky. Acts, ch. 78, §9, eff. January 1, 1973).
2. *AIK Selective Self-Insurance Fund v. Bush*, 2003-CA-000037-MR (4/9/04).
3. *Brown Badgett, Inc. v. Calloway*, 675 S.W.2d 389 (Ky. 1984).
4. *Zurich Ins. Co. v. Mitchell*, 712 S.W.2d 340 (Ky. 1986); *General Accident Ins. Co. v. Blank*, 873 S.W. 2d 580 (Ky. App. 1993).
5. *Traveler's Indemnity Co. v. Reker*, 100 S.W.3d 756, 760 (Ky. 2003); *Kentucky Employers Mutual Insurance Authority v. Casada*, 2002-SC-0196-MR (5/22/03); *Kentucky Employers Mutual Insurance*

- v. Coleman*, 236 S.W.3d 9 (Ky. 2007); *Brown v. Colonial Health & Rehabilitation*, 1999-CA-000845-MR (2/25/00); *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94 (Ky. 2000).
6. *Ison v. Pennington*, 2006-CA-001773-MR (7/27/07).
7. *Estes v. Carpenter Company*, 2003-CA-000090-MR (11/19/04).
8. *Hardin v. Action Graphics, Inc.*, 57 S.W.3d 844 (Ky.App. 2001); *Smith v. Sidney Coal Company, Inc.*, 1999-CA-001104-MR (9/1/00).
9. *Mills v. Arthur Construction Co.*, 559 S.W.2d 742 (Ky.App. 1977); *Bays v. Raven Mining Company*, 1999-CA-000165-MR (4/28/00).
10. *Jessie v. Dermitt*, 2005-CA-001961-MR (12/8/06).
11. *Davis v. Hensley*, 2007-SC-000066-DG (6/19/08).
12. *Kubajak v. Lexington-Fayette Urban County Government*, 2003-SC-0953-DG (12/22/05).
13. *Samples v. Cincinnati Insurance Company*, 2002-CA-000869-MR (12/5/03).
14. *Boggs v. Blue Diamond Coal Company*, 590 F.2d 655 (6th Cir. 1979); but see, *Ramler v. Spartan Construction Incorporated*, 2002-CA-001646-MR (9/5/03); *Hensley v. First Health Corporation*, 2002-CA-001342-MR (9/19/03).
15. *Moore v. Addington Mining, Inc.*, 2002-CA-001933 (2/9/05).
16. *Philadelphia Indemnity Insurance Co. v. Morris*, 990 S.W.2d 621 (Ky. 1999); *Cincinnati Insurance Company v. Samples*, 192 S.W.3d 311 (Ky. 2006).
17. *Wymer v. J. H. Properties, Inc.*, 50 S.W.3d 195 (Ky. 2001).
18. *Priddy v. Concord Roofing*, 1999-CA-001440-MR (6/2/00); *Greene v. Caldwell*, 170 Ky. 571, 186 S.W. 648 (1916); *Wells v. Jefferson County*, 255 S.W.2d 462 (Ky. 1953); *Shamrock Coal v. Maricle*, 5 S.W.3d 130 (Ky. 1999); *Williams v. Campbell-Hausfeld*, 1999-CA-000882-MR (8/11/00); *Davis v. Hensley*, 2007-SC-000066-DG (6/19/08).
19. *Nunn v. First Healthcare Corporation*, 2003-CA-000777 (9/10/04);

- Barnette v. Hospital of Louisa, Inc.*, 64 S.W.3d 828 (Ky.App. 2002).
20. *Harrod v. The Estate of Fred A. Collatz, Jr.*, 2003-CA-001158-MR (8/27/04).
21. *Collins v. Kelley*, 2002-CA-002472-MR (6/4/04).
22. *Kilgore v. Martin County Coal Corporation*, 2003-CA-001353 (11/5/04); *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005); *Smith v. Kentucky Growers Insurance Co., Inc.*, 2001-CA-001624-MR (11/1/02).
23. *Roberts v. George W. Hill & Co.*, 113 S.W.3d 156 (Ky. 2003).
24. *Moore v. Addington Mining, Inc.*, 2002-CA-001933 (2/9/05).
25. *Haines v. Bellsouth Telecommunications, Inc.*, 133 S.W.3d 497 (Ky.App. 2004).
26. *Clark v. Clark Construction Company*, 2002-CA-002406-MR (10/24/03); *Turner v. The Pendenis Club*, 19 S.W.3d 117 (Ky.App. 2000).
27. *Adkins v. R & S Body Company*, Ky., 58 S.W.3d 428 (2001); *Kubajak v. Lexington-Fayette Urban County Government*, 2002-CA-001919-MR (10/31/03); *Hawkins v. Anchorage Ambulance District*, 2001-CA-001161-MR (8/2/02); *Jenkins v. B & S Trucking*, 2000-CA-001352-MR (5/4/01).
28. *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007).
29. *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007).
30. *Elkhorn-Hazard Coal Land Corp. v. Taylor*, 539 S.W.2d 101 (Ky. 1976).
31. *Fireman's Fund Insurance Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 462 (Ky. 1986).
32. *Krahwinkel v. Commonwealth Aluminum Corp.*, 183 S.W.3d 154, 158 n. 5 (Ky. 2005).
33. *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247 (Ky.App. 1980).
34. *Wright v. Dolgencorp, Inc.*, 161 S.W.3d 341, 354 (Ky.App. 2004).
35. *Daniels v. Louisville Gas & Electric Co.*, 933 S.W.2d 821 (Ky.App. 1996).
36. *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007); but see *Newton v. E. L. Pipe, Inc.*, 2004-CA-002333-MR (9/9/05) where the Court of Appeals discussed that the regular and recurrent part of a contractor's business need not be performed by its own employees.
37. *Trent v. Lake Cumberland Resort, Inc.*, 2005-CA-001935-MR (10/13/06); *Petronis v. Churchill Downs*, 2005-CA-001925-MR (5/25/07); *Gibson v. Leeco, Inc.*, 2006-CA-001640-MR (3/7/08); *Clark v. Clark Construction Company*, 2002-CA-002406-MR (10/24/03); *Lee v. E. I. Dupont De Nemours*, 2006-CA-002566-MR (1/18/08); *Hosack v. Grayson Rural Electric Cooperative, Inc.*, 2003-CA-001290 (11/5/04); *Ramler v. Spartan Construction Incorporated*, 2002-CA-001646-MR (9/5/03); *Hensley v. First Health Corporation*, 2002-CA-001342-MR (9/19/03); *Sizemore v. D. W. Wilburn, Inc.*, 2001-CA-001427-MR (8/23/02); *Madewell v. Towne Square Mall, Inc.*, 2001-CA-000489-MR (2/22/02); *Hooper v. Accuride Corporation*, 2000-CA-002789-MR (12/28/01); *All American Bottlers v. Richardson*, 2000-CA-002305-MR (9/14/01); *Smith v. Sidney Coal Company, Inc.*, 1999-CA-001104-MR (9/1/00).
38. *Bratcher v. Conopco, Inc.*, 2003-CA-002153-MR (5/16/08).
39. *Russell v. Able*, 931 S.W.2d 460 (Ky.App. 1996); *Sexton v. Shoney's, Inc.*, 1997-CA-002281-MR (11/6/98).
40. *Lee v. E. I. Dupont De Nemours*, 2006-CA-002566-MR (1/18/08). See also, *McCray v. Davis H. Elliott Co.*, 419 S.W.2d 542 (Ky. 1967); *Shamrock Coal Co., Inc. v. Maricle*, 5 S.W.3d 130 (Ky. 1999); *Hunton v. Detrex Corporation*, 2004-CA-002221-MR (6/30/06).
41. *Moore v. Environmental Const. Corp.*, 147 S.W.3d 13 (Ky. 2004); *Blanton v. Cooper Industries, Inc.*, 99 F.Supp.2d 797 (E.D.Ky. 2000).
42. *Wilder v. Fuson*, 2000-CA-002920-MR (7/26/02).
43. *Zurich American insurance Co. v. Brierly*, 936 S.W.2d 561 (Ky. 1997); *Borman v. Interlake, Inc.*, 623 S.W.2d 912 (Ky.App. 1981); cf. *Preston v. Elm Hill Meats, Inc.*, 420 S.W.2d 396 (Ky. 1967); *American General Life & Accident Insurance Company v. Hall*, 74 S.W.3d 688 (Ky. 2002).
44. *Black v. Tichenor*, 396 S.W.2d 794, 795-96 (Ky. 1965); *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986); *Nightingale v. Willhoite*, 2006-CA-001412-MR (9/7/07).
45. *Kentucky Farm Bureau v. Davis*, 2004-CA-001884-MR (6/10/05).
46. *Oakley v. Crawford Electric, Inc.*, 2005-CA-001471-MR (10/6/06).

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A History of Civility: From Plato to the KBA Code of Professional Courtesy

By Donald H. Vish

The tie that holds me by the law of courtesy seems to me much tighter and stronger than the law of legal compulsion —
Michel de Montaigne.

Be Brief

An invitation to write or speak about civility provides the recipient with an opportunity to demonstrate its first law: *be brief*.

There is a more elaborate formulation of the rule: *pensa molto, parla poco, e scrivi meno* which I hasten to translate into English: *think much, speak little, and write less*. Otherwise, the useful Italian dictum violates George Washington's 72nd Rule of Civility:

Speak not in an unknown tongue in company, but in your own language....

What is civility

So what does civil conduct have to do with speaking briefly and writing concisely? The common denominator is that each is based on thoughtful concern for the comfort and convenience of others. That is the cornerstone of civility.

Civility transcends the realm of the merely useful and belongs to the higher realm of ethics and morality. Civility is more than a way of acting — it is a way of living.

George Washington's lifelong interest in civility began at the age of 14 when he wrote in his journal 110 *Rules of Civility and Decent Behaviour in Company and Conversation*. His First Rule of Civility could serve as the ONLY rule of civility, a complete and brief treatise on the subject:

Every action done in company ought to be done with some sign of respect to those that are present.

Civility is more than courteous, well-mannered behavior. "Being civil means being constantly aware of others and weaving restraint, respect, and consideration into the very fabric of this awareness," according to P. M. Forni, the co-founder of the Johns Hopkins Civility Project and a noted author and speaker on the subject of civility. "Civility is a form of goodness," he concludes in his best-selling book *Choosing Civility: the Twenty Five Rules of Considerate Conduct*. Those who practice civility, Dr. Forni believes, find both serenity and contentment. Benjamin Franklin was similarly inclined. Franklin believed practicing the art of civil virtue leads first to personal happiness and eventually to greatness.

Emulating Washington and Franklin, the Kentucky Bar Association codified eleven aspirational rules of professional courtesy in 1993 and petitioned the Kentucky Supreme Court to adopt and promulgate the Code of Professional Courtesy [CPC] by formal order.

Effective September 1, 1993, Kentucky lawyers had two sets of civil rules: The Rules of Civil Procedure, governing civil actions, and the Rules of Professional Courtesy, governing civil behavior. See Kentucky Rules of Court 2008 page 425.

The CPC is intended as a series of guidelines for lawyers in their dealings with clients, opposing parties, their lawyers, the courts and the general public. While not constituting a disciplinary code or a legal standard of care, Kentucky attorneys are expected to comply with the letter and spirit of the Code adopted by the Supreme Court.

The eleven rules in their totality encompass Washington's First Rule, *be considerate of those present*, and Plato's dictum, *be kind*.

The Concept of Civility

The words "civil" and "civics" derive from the same root word *civitas* mean-

ing city. The early Greeks thought that civility held the state together. Civility was both a private virtue and a public necessity. Without civility, the state could not function.

While the Greeks thought civility served a high calling, Lord Chesterfield found civility serving a low calling: stratagem. In his famous letters to his son, Chesterfield advised how the rules of courtesy, polish and good manners might be used to manipulate allies and gain the upper hand over competitors. Dr. Johnson observed that Chesterfield taught good manners but bad morals.

Plato's concept of civility is encompassed in his empathetic dictum:

Be kind, for everyone you meet is fighting a hard battle.

The grand Hindu pronouncement, *Thou art that* (pronounced *tat twam asi*), provides an intersection where the well-mannered self interest of Lord Chesterfield meets Plato's Platonic empathy. What we do for others we do for ourselves because we are all one in the Hindu world-view. Civility benefits the giver and the receiver.

Since the Enlightenment, philosophers have regarded ethics as the fountainhead of civility since civility is concerned with the well-being of others and requires the actor to transcend self.

Rules and Ways of Civility

The ideal of an urbane gentleman traces its antecedents to the secular morality of the *Distichs of Cato* (3rd or 4th century). Here is an example: "If you can, even remember to help people you don't know."

The first "courtesy book" written in England appeared in the thirteenth-century. The *Liber Urbani* (*The Book of the Civilized Man*) by Daniel of Beccles represented an awakening of etiquette among the common people

who were not to the manner born. One if its principal themes is self-control: "Be careful to whom, what, why and when you speak."

Desiderius Erasmus, the Prince of Renaissance Humanists (died 1536), was the first to popularize rules of "civility" (*On Civility in Children*) and extend their reach beyond the realm of mere social polish. According to Erasmus, the architecture of civility rests on two pillars of virtue: *humanitas* and *pietas*. *Humanitas* comes from Cicero's conception of social obligation and encompasses both love of others and respect for their dignity. *Pietas* means internally generated reverence, humility and charity as opposed to externally imposed formalistic observances.

Michel de Montaigne condemned both idle civilities and manners based upon rote application of rules; i.e., the formalistic observances rejected by Erasmus and counseled by Lord Chesterfield. He cites, for example, the complex rules associated with the order of precedence and arrival at a conference of princes. According to the custom of the times, the most important person arrived first. Arriving first signifies that those of inferior rank go to find their superiors and not the other way around. Montaigne also cited his experience with people who are uncivil through over-civility.

Benjamin Franklin, whose role model was Cato, never completed his book, *The Art of Virtue*. But he lived the book he did not write and from his life and his journals we know enough about its precepts and him to reconstruct his code.

Franklin knew that the art of diplomatic speech did not come naturally to him so he worked especially hard to cultivate it. He refused to respond directly to personal attacks and rarely even acknowledged them — which did not come naturally to him either.

By refusing to respond to insult Franklin avoided spreading the calumny further. He also deprived his adversary of knowing whether the missile had hit its mark.

Franklin practiced another method of enhancing social interaction (*humanitas* to Cicero and Erasmus) — he conceded

points of contention even when he was right. Sometimes to preserve a friendship, sometimes out of respect and sometimes because the point was not important enough to win.

Franklin also courted his adversaries, even after he bested them. About one such adversary he wrote:

I did not, however, aim at gaining his favor by paying any servile respect to him but [after hearing] that he had in his library a certain very scarce and curious book I wrote a note to him [asking to borrow it]. He sent it...I returned it...with another note [thanking him]. When next we met in the House he spoke to me (which he had never done before) with great civility...so that we became great friends....

Dr. Forni has revived the courtesy-book genre, and in the classical tradition his book presents certain rules of civility (in a 2008 Wall Street Journal news article, Dr. Forni is quoted as telling a rules-adverse critic that had he met her before writing his book he would have dropped the word "rules" and used the word "ways" instead), paring Washington's list from 110 rules to 25. *Think much, speak little and write less.*

Dr. Forni's 25 rules are few enough and brief enough to list:

- pay attention
- acknowledge others
- think the best
- listen, be inclusive

- speak kindly
- don't speak ill
- accept and give praise
- respect "No"
- respect others' opinion
- mind your body
- be agreeable
- keep it down and rediscover silence
- respect other people's time and space
- apologize earnestly
- assert yourself
- avoid personal questions
- care for your guests
- think twice before asking for a favor
- refrain from idle complaints
- accept and give constructive criticism
- respect the environment
- be gentle to animals
- don't shift blame.

Just as Washington's list can be summed up in one rule (*respect others*), Dr. Forni cites one rule as being at the heart of all civil behavior: *speak kindly*.

That is Plato's advice. Substantial portions of the Old Testament and the Hebrew Bible are devoted to the maxim, *control your tongue*. And to that there might be added your pen, your email, your car, your cell-phone, your blog and your camera-phone.

Kentucky Code of Professional Courtesy

Like all codifications of the civil rules of courtesy, the Kentucky Code is animated by respect for others, including the "others" often referred to as the "adversary" or "adverse counsel" or, more colloquially, the "other side." At the center of the Kentucky Code is one

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rule that leads to all the rest:

A lawyer should not engage in intentionally discourteous behavior.

— Rule 5, Kentucky Code of Professional Courtesy (KCPC)

Rule 11 particularizes this principle to the courtroom, where courtesy is mandated and where conflicts should always remain:

A lawyer should recognize that the conflicts within a legal matter are professional and not personal...leave the matter in the courtroom.

—Rule 10, KCPC

Has civility declined

There is in some a misty-eyed belief that civility is in decline among the bar and in society at-large. Stories portraying a long-lost golden age of decorum and grace are wistfully told by the Old Guard. But there is an alternate history suggested by the oath that lawyers take upon their admission to practice: *I have not fought a duel with deadly weapons nor acted as a second....* Kentucky lawyer and Jefferson County legislator William Jordan Graves (1805-1848) did just that in 1838, while a member of the House Representatives. Jonathan Cilley, a member of Congress from Maine was killed in the duel.

And listen to the verbal invective of 19th century Virginia Senator John Randolph directed to a fellow senator. Randolph said:

“[He is] so brilliant, yet so corrupt, and like a rotten mackerel by moon-

light, which shines and stinks.”

And how did Henry Clay react to the insult? According to the custom of the day, he challenged Randolph to a duel with deadly weapons.

The golden age of decorum was not always as we like to remember it.

Concern for civility has been present throughout the history of civilization. Rules and customs may change. For example, smoking in public became unacceptable within the last fifteen years. Eye contact is respectful in some cultures and disrespectful in others. But while the rules may change the reasons for incivility remain constant: failure to consider the needs and comfort of others.

Whether the omission is based on anger, carelessness or lack of knowledge, the result is the same. We put ourselves first.

The Kentucky Code of Professional Courtesy encourages lawyers to consider the context of the wider world. Sometimes, the “other” should be first.

A lawyer should respect opposing counsel's schedule by seeking agreement...rather than merely serving notice.

—Rule 3, KCPC

Rule 8 speaks to use of a “courteous tone” in written communications, Rule 6 disapproves of personal criticism and intentional embarrassment of another attorney and Rule 4 mandates avoidance of “ill-considered accusations of unethical conduct.” Read together, these three rules sum up much of the wisdom of the Hebrew Bible (*hold your tongue*), Plato (*be kind*), Dr. Forni (*speak kindly*) and the Italian proverb (*write less*).

Rule 9 concisely states the two laws of good scouts, good citizens and St. Paul: *keep your word, tell the truth*. And Rules 1 and 7 point the way to the higher road: *don't take unfair advantage of any situation*. Hence:

A lawyer should avoid taking action adverse to a litigant known to be represented without timely notice to opposing counsel....

—Rule 1, KCPC

and

A lawyer should not seek sanctions or disqualification of another attorney...for the mere purpose of obtaining tactical advantage.

—Rule 7, KCPC

Procrastination has been the ruin of many good intentions. Alexander the Great credited his ability to accomplish so much by his habit of dealing with matters without delay. Rule 2 of the Kentucky Code formulates Alexander's dislike of procrastination as a rule of courtesy:

...promptly return telephone calls and correspondence...

But there is much more to the rule than good manners. Indeed, that may be said of all rules of civility.

So, with so many benefits accruing to those who practice civility and courtesy, why is it in actual or perceived decline? Why should the Kentucky Supreme Court find it helpful to codify in eleven rules what Mother taught in two words: *be nice*.

Forni identifies several current cultural conditions that make incivility more widespread if not more pronounced, even though there are some areas of our culture where there is MORE civility today: a culture of narcissism (*I did it my way*), the Age of Self, the decline of authority, mistrust of forms over substance, anonymity, the drive to succeed (*we are too busy, too goal directed*), stress, winning.

To Dr. Forni's list, I would add: *The Plague*. That is to say, incivility is contagious. One uncivil act begets another which treads on the heels of another and spreads like ripples on water.

So are there antidotes to the Plague? Well, if there are not enough Rules already, I would propose four:

Think much, speak little, and write less.

Save your anger for the right occasion but always withhold it in two cases: 1) where you can't change the outcome; and 2) where you can.

Look and overlook, bear and forbear. Always make haste slowly.



Donald Vish is an attorney with Middleton Reutlinger in Louisville. The author would like to acknowledge and thank Justice James E. Keller for his encouragement of and enthusiasm for the advancement of civility and the expert editorial and stylistic advice provided by James Dady. Errors and omissions, however, are those of the author alone.



The Impact of the Internet on a Lawyer's Standard of Care & Professional Responsibility

Part II

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

Introduction

The purpose of this two-part article is to provide you with a report on the effect the Internet is having on lawyer ethics and malpractice risk management. Part I covered:

- E-Mail Confidentiality
- E-Mail Metadata
- E-Mail Disclaimers
- Uninvited E-Mail
- Computer Assisted Legal Research (CALR)
- Google Research
- Internet Court Case Management Systems

Part I appeared in the May 2008 issue of the *Bench & Bar* (Vol.72 No. 3, page 29). It is available on Lawyers Mutual's Website at lmick.com on the Risk Management page/*Bench & Bar* Articles. If you have not read it, you may want to glance at it before reading this article.

Part II completes this survey of selected Internet issues with a review of:

- Lawyer Websites
- Blogs, Chat Rooms, and Bulletin Boards
- Internet Lawyer Referral Services
- Duty to Protect Client Electronic Documents from Internet Attacks

Websites, Blogs, Chat Rooms, and Bulletin Boards

Many, if not most, law firms now have a website. Firms and individual lawyers have blogs and participate on Internet blogs, chat rooms and bulletin boards. Using these Internet features raise the following ethics and malpractice considerations:

- How do the lawyer advertising and solicitation ethics rules apply to websites, blogs, and chat room and bulletin board participation?
- What is the risk of inadvertently establishing an attorney-client relationship over the Internet?
- What potential client confidentiality duties can arise from Internet contacts?
- What is the risk of receiving too much information over the Internet creating a disqualifying conflict of interest with an existing or prospective client?

Advertising and Solicitation Rules

The KBA Ethics Committee in KBA E-403 (1998) adopted

the following language from an Illinois Bar ethics opinion that addresses when advertising and solicitation rules apply to Internet communications:

[T]he Committee believes that the existing Rules of Professional Conduct governing advertising, solicitation and communication concerning a lawyer's services provide adequate and appropriate guidance to a lawyer using the Internet. For example, the Committee views an Internet home page as the electronic equivalent of a telephone directory "yellow pages" entry and other material included in the web site to be the functional equivalent of the firm brochures and similar materials that lawyers commonly prepare for clients and prospective clients. An Internet user who has gained access to a lawyer's home page, like a yellow pages user, has chosen to view the lawyer's message from all the messages available in that medium. Under these circumstances, such materials are not a "communication directed to a specific recipient" that would implicate Rule 7.3¹ and its provisions governing direct contact with prospective clients. Thus, with respect to a web site, Rule 7.1,² prohibiting false or misleading statements concerning a lawyer's services, and Rule 7.2,³ regulating advertising in the public media, are sufficient to guide lawyers and to protect the public.

On the other hand, lawyer participation in an electronic bulletin board, chat group, or similar service, may implicate Rule 7.3, which governs solicitation, the direct contact with prospective clients. The Committee does not believe that merely posting general comments on a bulletin board or chat group should be considered solicitation. However, if a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.

The KBA Ethics Committee further considered the Internet and advertising and solicitation rules in KBA E-427 (2007). The question was what kind of web addresses – domain name – may lawyers use. The Committee gave a qualified ‘yes’ to the question: May a lawyer or law firm use a domain name that does not identify the lawyer or firm, but links to a website that clearly identifies the sponsoring lawyer or firm?

The Committee has concluded that it is not inherently unethical for a lawyer or a lawyer firm to adopt a domain name, unrelated to the name of the lawyer or the law firm, if the following conditions are met:

- The domain name complies with RPC 7.15; it is not false, deceptive or misleading.
- The website to which the domain name connects prominently identifies the name of the firm or the lawyers involved. The domain name cannot be used as a substitute identity for the lawyer or the firm.
- The domain name does not imply that the lawyer is a specialist, except as permitted by Rule 7.40. *(footnote omitted)*

KBA E-427 is well written and reasoned. It is recommended reading.

Website Contacts: Unintended Formation of Attorney-Client Relationships and Creation of Confidentiality Duties and Conflicts Of Interests

The risk of inadvertently establishing attorney-client relationships, owing potential clients confidentiality, and backing into conflicts of interest resulting from a person contacting a lawyer’s website is considerable. I covered these issues in detail in my article “*Lawyer Website Disclaimers – Fact or Fiction?*” (Bench & Bar Vol. 70, No. 1, Jan. 2006; available on Lawyers Mutual’s website at www.lmick.com — go to the Risk Management/Bench & Bar page). It covers use of disclaimers to avoid these risks, includes the “Best Practice Guidelines for Legal Information Web Site Providers” developed by the E-Lawyering Task Force and the ABA, and the following website risk management guidelines:

- Prepare and keep on file a written firm policy on the purpose of the website, what it is supposed to do, and what it is not intended to do. Include detailed guidance on specific features of the site and how they are to function. Specifically, how legal advice, if any, is to be provided through the website. This guidance should include how information is to be displayed that avoids misleading site visitors into believing they are getting legal advice for their matter; how terms and conditions and disclaimers are prominently featured to assure that site visitors assent to them; and how prospective client e-mail is managed to avoid issues of attorney-client relationships, confidentiality, and failure to respond to an e-mail.

- Keep a complete paper and disk copy of each iteration of the website for at least five years. Be sure it reflects how site visitors manifest assent to terms and conditions and disclaimers. Use “click wraps” or “click throughs” that require a site visitor to click on a disclaimer to show affirmatively the visitor’s assent before accessing the website and before information can be sent to the firm. Be sure that the site visitor cannot finesse the click wrap procedure. Click wraps may be appropriate for several of the website pages.
- Use plain English in drafting disclaimers – think in terms of the least sophisticated site visitor. Do not assume that terms such as “attorney-client relationship” or “confidential,” that have specific meaning for lawyers, are understood by site visitors.
- Be sure that disclaimers are prominently displayed on the home page. While it may be undesirable to pepper the disclaimer notice on every page of the website, that is the percentage way to go. Rulings that have not accepted disclaimers as effective often note their brevity or inconspicuous display on a website. Use click wraps liberally.
- Use letters of non-engagement in response to prospective client e-mails when the firm declines representation. Respond to all e-mails – do not leave a site visitor dangling. Advise site visitors not to consider that their e-mail was received until they receive a confirming e-mail from the lawyer. Save e-mails to disk just as you would file written correspondence from and to potential clients. It is hard to defend against a claim without some record of what occurred.
- Design prospective client information intake procedures so that only the minimum information necessary to perform a conflict of interest check is initially received. Use a click wrap to warn site visitors about sending too much information initially and to protect the firm from a conflict of interest issue if the site visitor does not comply.
- In managing information received from prospective client site visitors, consider the teaching point of *Barton*⁴ that a website disclaimer of confidentiality can lead to problems of waiver of the lawyer-client privilege and client confidentiality if the prospective client’s matter is accepted by the firm. Conversely, accepting the information as confidential may lead to a conflict of interest issue if the prospective client is declined. Professor David Hricik offers this disclaimer language as one way of dealing with this issue:

“By clicking ‘accept’ you agree that our review of the information contained in the e-mail and any attachments will not preclude any lawyer in our firm from representing a party in any matter where that information is relevant, even if highly confidential, and could be used against you, unless that lawyer had actual knowledge of the content

of the e-mail. We will otherwise maintain the confidentiality of your information.”⁵

Hricik points out that this disclaimer is a fair balance between a prospective client’s interest and the firm’s by not disqualifying the entire firm. It should work in Kentucky because screening lawyers to prevent imputed disqualifications is permitted by Kentucky Rule of Professional Conduct 1.10, Imputed Disqualifications. To be absolutely sure call the KBA Ethics Hotline.⁶

- Recognize that a website can be visited from anywhere in the world. Complying with the advertising and unauthorized practice rules of every jurisdiction is impossible. Website disclaimers should clearly indicate that the lawyer is seeking site visitors only in certain jurisdictions and that the website is inoperative in any jurisdiction that has rules different from those of the lawyer’s jurisdiction. Another way to accomplish this is to accept e-mails only from persons residing in specified zip codes in named jurisdictions.⁷ Admittedly, this is flimsy, but it is the best fix available at this stage of development of Internet ethics.
- Links to other websites require disclaimers of responsibility for their content and currency. Links require routine maintenance to assure that they are still operative and relevant.
- The website should not contain links that serve as referrals to other lawyers that a site visitor can unilaterally choose other than bar referral services. Referral to another lawyer is a malpractice risk and should be done only after sufficient information is received to competently evaluate the site visitor’s matter – preferably by telephone or an in-office consultation.

Blogs, Chat Rooms, and Bulletin Boards

The nature of Internet chat rooms and bulletin boards are self-explanatory and are covered in KBA E-403 (see above). A blog is a website that anyone including lawyers and law firms may have to put on it just about anything – personal thoughts, legal information, political views, etc. The key risk management considerations for lawyers in using any of these Internet media is that they are interactive with the public and can be construed as advertising or solicitation as well as creating expectations of confidentiality and representation by correspondents. This invokes all the risk management considerations discussed above plus one.

Individual law firm members including lawyers and non-lawyers may have personal blogs outside the firm’s practice and privately participate on interactive blogs. There is nothing risky about this as long as firm business is not discussed and interactive contacts are not made that expose the firm to bad publicity, ethics violations, and malpractice claims.

What is currently causing problems for firms are the so-called gossip blogs such as Above the Law and Greedy Associates.⁸ Leigh Jones in her article “Gossip blogs bedevil law firms”⁹ reports that there are several blogs that “dig up the legal profession’s dirt.” Postings include firm bonuses, firings, retaliatory discharge allegations, and sexual harassment allegations. Jones points out that while it is permissible to prohibit media contact about a firm’s internal operations as a condition of employment, few firms have such agreements. Jones attributes this to the generation gap between partners and associates.

In response to the gossip blog problem some firms now routinely monitor the legal gossip blogs. Jones writes that in addition to blog monitoring, firms are directing lawyers not to submit firm information to gossip blogs and are applying blocking software to firm computer systems that do not allow forwarding or printing of internal e-mail.

A current consideration for use of blogs by Kentucky lawyers is a proposed change to Kentucky’s lawyer advertising rule, SCR 3.130 (7.02), Definitions. The change would except blogs that conform to the following limitation from the advertising rules:

- (1) (j) Information and communication by a lawyer to members of the public in the format of web log journals on the internet that permit real time communication and exchanges on topics of general interest in legal issues, provided there is no reference to an offer by the lawyer to render legal services.

The explanation for the recommended change is: “The list of exceptions is merely expanded to include web log journals (commonly referred to as blogs and blawgs) maintained by attorneys, as long as they do not make offers regarding legal services.”

This change, if approved, would seemingly make the ethical issues of lawyer blogs clearer. Perhaps so, but there are two considerations when blogging to keep in mind. First, the fact that conduct is ethical is not a defense to a malpractice claim. If blog activity leads to a claim of malpractice by a disgruntled correspondent, even if frivolous, it must be defended and that can be costly. Second, there is a view that lawyer blogs are inherently a form of advertising.¹⁰ A survey of several law firm blogs revealed that many of them provided information that easily could be viewed as seeking new clients from readers. For example, many lawyer blogs have links to firms, include firm news that is laudatory, and list practice areas of the lawyer blogger.¹¹ The proposed change to Kentucky’s advertising rules removes the concern that blogs are inherently advertising, but it is not going to be that simple to avoid bad publicity and professional conduct and malpractice risks when firm members go blogging.

Internet Lawyer Referral Services

Before discussing the Internet implications of lawyer referral services, I offer this update on the status of the

professional conduct rules that apply to these services. Comment [4] to Kentucky Rule of Professional Conduct 7.20, Advertising, provides this guidance on when a lawyer may pay others for referring clients:

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs.¹²

The KBA Advertising Commission has recommended to the Supreme Court the following addition regarding referral services (underlined) to Rule 7.20, paragraph 2:

A lawyer shall not give anything of value to a non-lawyer for recommending the lawyer's services, except that a lawyer may:

....

(c) pay the usual charges of a not-for-profit or qualified lawyer referral service that has been approved by the highest court in the jurisdiction where the service operates an agency designated by that court or by the Kentucky Bar Association

While some authorities argue that Internet lawyer referral services require special ethics rules, Kentucky's rules are not hard to apply to an Internet traditional lawyer referral service program. If the Commission's recommended changes to the advertising rules on referral services are approved by the Supreme Court (which is considered likely), we will have all the guidance needed to ethically use traditional lawyer referral services on the Internet.

The problem with some Internet referral services, however is that they are not traditional referral services.¹³ Some online services do not refer the prospective client to the next lawyer in line on the list. Others seem to merge blogging with referral activities. One example is LegalMatch. It is an online lawyer-client matching service. "A customer enters information about his or her legal issue on LegalMatch's website, and the company searches its database of attorneys in the client's geographical area who specialize in that practice. It then provides the customer with a list of possible attorneys, their biographies, and their consumer rating (*footnotes omitted*)."¹⁴

I understand that the KBA Ethics Committee is considering questions concerning novel Internet referral services and should issue an opinion in the near future – perhaps before this article is published. For that reason, rather than speculate on guidance for using novel referral services, I suggest we all consult that opinion for answers when it is issued. *Editor's Note: This new opinion, KBA E-429, appears on pages 52-55 of this issue.*

Duty to Protect Client Electronic Files from Internet Attacks

As use of the Internet has dramatically expanded in the delivery of legal services, the risk of theft and destruction of firm electronic files has equally increased. Firm computers connected to the Internet allow access to them from the public creating the risk of hackers breaking into electronic files and the destruction of them by a virus attack. Access to electronic files by firm employees from locations remote from the firm office further increase the risk of a breach of electronic file security.

It is axiomatic that lawyers owe clients a duty to protect and keep confidential electronic records as much as any other part of a client's file. Negligent failure to do so risks claims of ethics violations and malpractice. The question, thus, becomes what should a competent lawyer do to protect electronic files.

One method is to have two computer systems in the office – one for Internet connections with no access to electronic files and the other for internal office use with full access to electronic files. This really works, but is expensive and cumbersome. An Arizona lawyer facing this dilemma asked the Arizona State Bar Ethics Committee for guidance resulting in a well reasoned opinion. I am unaware of any Kentucky authority on point and, therefore, offer the following extracts from the Arizona opinion for your evaluation.

Question Presented

How do we protect the confidentiality and integrity of client information while continuing to increase reliance on [the] internet for research, filings, communication, and storage of documents?

A panoply of electronic and other measures are available to assist an attorney in maintaining client confidences. "Firewalls" - electronic devices and programs which prevent unauthorized entry into a computer system from outside that system - are readily available. Recent upgrades in Microsoft operating systems incorporate such software systems automatically. A host of companies, including Microsoft, Symantec, McAfee and many others, provide security software that helps prevent both destructive intrusions (such as viruses and "worms") and the more malicious intrusions which allow outsiders access to computer files (sometimes call "adware" or "spyware").

Software systems are also readily available to protect individual electronic files. Passwords can be added to files which prevent viewing of such files unless a password is first known and entered. The files themselves can also be encrypted so that, even if the password protection is compromised, the file cannot be read without knowing the encryption key — something that is extremely difficult to break.

....

It is not surprising that few lawyers have the training or experience required to act competently with regard to computer security. Such competence is,

however, readily available. Much information can be obtained through the internet by an attorney with sufficient time and energy to research and understand these systems. Alternatively, experts are readily available to assist an attorney in setting up the firm's computer systems to protect against theft of information and inadvertent disclosure of client confidences.

The Inquiring Attorney also expressed concern that allowing access to client files on computers which are also used to access the internet can lead to the malicious destruction of those files. The threat of such destructive viruses is well known.

As with the inadvertent disclosure analysis above [the ethics rules] require the lawyer to act competently in assuring that electronic information transmitted to the attorney is not lost or destroyed. Much of the security software and hardware discussed above provides protection against such destructive intrusions. Moreover, it is common practice to routinely back-up computer files. In that way, even if a computer system is entirely disabled through malicious attack, nearly all data can be retrieved from back-up files. Easy to use and inexpensive systems are available to make this kind of back-up an automatic process.

....

Conclusion

[The ethics rules] require that an attorney act competently to safeguard client information and confidences. It is not unethical to store such electronic information on computer systems whether or not those same systems are used to connect to the internet. However, to comply with these ethical rules as they relate to the client's electronic files or communications, an attorney or law firm is obligated to take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence. In addition, an attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed. In order to do that, an attorney must either have the competence to evaluate the nature of the potential threat to the client's electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end, or if the attorney lacks or cannot reasonably obtain that competence, to retain an expert consultant who does have such competence.¹⁵

This opinion is available on the Arizona State Bar Association's website. It is well worth reading in its entirety. John Comford's article *Competent Computing: A Lawyer's Ethical Duty To Safeguard the Confidentiality and Integrity of Client Information Stored on Computers and Computer Networks* (19 Geo. J. Legal Ethics 629 (2006)) is a more detailed analysis of this issue with emphasis on the insider threat to firm computer security. The author points out that it is essential

that those with access to confidential electronic files be given guidance on system security requirements and that there is an enforcement mechanism to assure compliance.

Have you ever checked under computer keyboards at the office to see how many members of the firm keep passwords on a piece of paper under them? It could prove to be an interesting experiment.

Summing Up

Anytime you get on the Internet for whatever purpose you must be mindful of the advertising and solicitation rules. It is imperative that you manage the risks of inadvertently establishing attorney-client relationships, creating confidentiality duties, involving yourself in a conflict of interest, or causing a claim that you were somehow negligent in providing what was taken to be legal advice. Persons coming to you via a lawyer Internet referral service may have unreasonable expectations at the inception of an Internet contact of what your duties are. Your website and e-mail address should have appropriate disclaimers and click wraps that require agreement to limitations on any obligation you have by reading an e-mail. Written office procedures should be provided to all firm members on Internet and computer use. These procedures should make it clear to all members of the firm that firm business is not to be discussed on a personal or any other blog and that they should avoid any blog activity that could be construed as firm advertising, solicitation, or promises of confidentiality. Finally, you must take steps to protect the firm computer system from hackers by establishing effective firewalls. ■

ENDNOTES

1. Kentucky's current solicitation rule is SCR 3.130(7.09).
2. Kentucky's current communications concerning a lawyer's services rule is SCR 3.130(7.15).
3. Kentucky's current advertising rule is SCR 3.130(7.20).
4. *Barton v. United States District Court*, 9th Cir. Ct. App. No. 05-71086 (June 9, 2005).
5. David Hricik, Mercer University School of Law, "Whoops! I Did It Again! What Britney Spears Can Teach Us About the Ethical Issues Arising From the Intentional Transmission of Confidences From Prospective Clients to Firms," E-Ethics Vol. III, No. I (May 2004). Available at www.hricik.com (last viewed 7/7/2008).
6. SCR 3.530(2).
7. D.C. Legal Ethics Committee Opinion 302 (11/21/2000).
8. Last viewed on 7/7/2008.
9. Leigh Jones, *Gossip blogs bedevil law firms*, The National Law Journal, June 2, 2008, Vol. 30, No. 38, p 1.
10. Sarah Hale, *Lawyers at the Keyboard: Is Blogging Advertising and if So, How Should It be Regulated?*, 20 Geo. J. Legal Ethics 669 (2007).
11. *Id.* at p. 671.
12. See KBA E-428, 6/19/2007.
13. See, Geeta Kharkar, *Googling for Help: Lawyer Referral Services and the Internet*, 20 Geo. J. Legal Ethics 769 (2007).
14. *Id.* at 775.
15. Arizona State Bar Ethics Committee Opinion No. 05-04.



Michael Losavio

A Correctional View of Information Security

Information security is important to us and our clients, especially those for whom operational information is the heart of their business. Securing those information assets is both a legal and techno-physical effort, a continuing one.

In trying to envision a good security environment, I miss many obvious things. I was surprised and a bit concerned, given the high security and low use of electronic devices I'd expect, at yet another security challenge of the electronic information revolution: keeping information control in correctional facilities. If prisons can be compromised, can any place be secure?

The challenge, as you might guess, is due to the omnipresence of electronic systems, their shrinking size and expanding power. The risks relate to the damage information can do once control has been lost and our increasing reliance on electronic information systems for so many tasks. Added to this is the time and focus inmates can devote to any problem and their, well, personal inclinations.

Prisons are an environment generally alien to all but correctional staff, dedicated criminal defense counsel, and their clients. They can maintain high levels of physical security, a foundation for all other security issues. Control of information in and out of a correctional facility may be crucial to the security and safety of those inside and out.

For example, Google Earth provides a nice scalable picture of the Kentucky State Penitentiary:

How useful might such information be to an inmate in this, the maximum security facility for Kentucky? How useful might such information on our clients' homes, businesses and factories be to others? For correctional officers, control of information runs from maxi-



Courtesy Google Earth

mum security facilities to probation and parole monitoring of people on the street. Although these officers have far greater control over the subjects of their oversight than any other social relationship, controlling access to information resources is a significant concern. The problems and concerns of officials in even such highly controlled environments as prisons can warn of issues in other environments, whether those of our clients or our own practices.

The Usual Suspect

Computers with Internet services are now found in prisons, just as with offices and schools. Inmates may have access as part of their prison employment, inmate legal research, or education. A former governor of Louisiana, serving time in federal prison, had an e-mail newsletter that dismayed officials for its criticism of correctional cuisine.

Unfortunately these systems have been used to access and collect contraband information, often pornography, and otherwise confidential information, such as personal identifiers and data, including those of children. The risk is seen from one (non-electronic) breach where inmates in a maximum security facility

used such data to obtain and taunt guards with information and pictures of their homes, spouses, and children.

These and other potential abuses led the Arizona legislature to ban inmates from direct and indirect access to Internet web sites, the most extreme ban in the United States. Banning indirect access means an inmate cannot even access web site information through a third party, such as an associate outside the prison.

Putting aside rights of access to information, such a solution might work with typical computer systems within a facility. It may leave an inmate unprepared for many types of jobs upon release, but as an absolute bar it should stop such misconduct within a prison. Whether or not it will help with indirect access outside the facility is problematic, since these may also be the most easily monitored computers inside. Tracking and forensic software on prison systems can catch most improper activity and alert to the use of anti-forensic technologies by inmates.

Shrinking Size, Growing Power

Large computer systems with Internet connectivity are hard to conceal. Centralized monitoring can limit the misuse of work computers. But cell phones and personal data assistants are easy to conceal and are growing in power and features. Cell phones in prison? Isn't that contraband? As with most other contraband, where there is a will there will be a way to get a cell phone inside and with that correctional authorities lose control of the information flow within their facilities. Cell phones in prisons are an opportunity for uncontrolled coordination with people on the outside, whether to run a criminal enterprise, or intimidate a witness or victim, or plan an escape.

With the growing power of cell phones, they are micro-computers capable of many of the same abuses of a full sized computer. The shrinking size of cell phones has made them easier to hide and harder to find. The problem will only expand as more and more features are incorporated in smaller and smaller hand-held devices, themselves designed to connect with other computing and communication systems. The iPhone, for example, provides telephony, Internet connectivity and viewing, music/video reception and viewing and GPS mapping. In gorgeous, high-quality detail, complete and total access to all the information resources of the world in the palm of the hand.

Analysis of cell phone forensics is more complex than with regular computer systems, given the different proprietary formats of the various providers. As inmates have learned to set up security on their phones and remove identifying information, more time-consuming, technical methods must be used. Such tools, like hex-editors and special cell phone software analyzers, may be either expensive, require technical training or both, and are resources prisons may not have. They may then be left to guess how important analysis of a particular phone may be before dedicating resources to its analysis.

Solutions?

A direct solution to securing a facility from uncontrolled cell phone use has low power transmitters jam the frequencies used by the phones. An alternative is a transmitter that sends false cell phone “no service” signals. Both options, unfortunately, violate FCC regulations and could interfere with legitimate cell phone use around the facilities. Interception of cell phone activity, either content or transactional information, may require a court order under the Wiretap and other statutes. Retrofitting a wire cage to ground and block all signals around a facility might cost too much and would block all use of radio-based systems, including those of law enforcement.

An affordable way to detect and triangulate on cell phone use within facilities may be the best solution.

Using only the signal generated by the cell phone, this alerts to phone use and location with the facility in time to conduct a sweep of the area. The reduced expectation of privacy inside prisons avoids legal problems with the technology. The problem has been cost, building a system cash-strapped correctional departments can afford.

Arrangements with cell phone companies to log activity off cell tower antennae aimed at a facility might help, given the increasing willingness of companies to share their data with law enforcement. This could be cross-indexed against handsets legally in the institution and institutional records of inmate telephone logs. But, again, there may be conflicts with federal privacy statutes and risks of infringing the privacy of ordinary citizens, depending on the location of the prison facility.



Lexington Police officers Chy'anne Krugler, Kyle Mounce, Michael Sharp, Daniel Burnett and Gerald Florence addressing a class of criminal justice students in Morelia, Mexico.

As for legal solutions, in Kentucky contraband possession of a cell phone by an inmate is a misdemeanor; only possession of “dangerous contraband” is a felony. Simple possession penalties themselves may not deter anyone other than someone nearing release.

In Conclusion

Great. More problems. But in computer software testing, one rule is to test at boundary conditions, the extreme end of programming where a program may face the worst conditions or transition to a new, different state. Information security in prisons would seem to be at a boundary; if we can secure there, we can move on to other, easier environments. At the least, we can begin securing an environment with a particularly high risk. Any success in locking that down is a benefit to all.

Note Bene

Kentucky, of all places, makes an exceptional effort to extend the effective rule of law to minority, non-English speaking populations. We have one of the best court interpreter programs in the world. And one of the most aggressive programs for training law enforcement, prosecutors, defenders, and judges in dealing with our growing Spanish-speaking population, to the amazement of departments around the country. *You are doing this in KENTUCKY???* Sigh. What can you do with the ahistorical and poorly read.... So while Harlan and Brandeis spin at this, a crew of Lexington police officers worked their Spanish immersion – language and culture – in Central Mexico this summer.

Morelia, Mexico is a bit larger than Louisville and the capital city of the Central Mexican State of Michoacan. As a government and university center with a cool, temperate mountain climate and no beaches, it is a perfect study city for language and ride-alongs and seeing what happens when no one, criminal or upstanding citizen, trusts the police. That includes police officers upset about corruption in their own departments, but who must work second and third jobs to support their families.

When they return, the Lexington officers, like their counterparts in Louisville Metro and Kentucky State Police, will be better able to protect and serve. To the inevitable question about all this effort for people who *ought* to speak English, the unanimous response, in essence, was that the *oath* they took applied to everyone, whatever language they spoke. Just like ours.

I met these folks while teaching a comparative criminal justice class in Morelia. The lessons learned can inform our efforts of the United States to help our brethren in Mexico combat corruption and organized crime, especially the drug cartels that poison our country. We will discuss those soon, particularly the Merida Initiative to help our neighbors. Information on that is available from the Woodrow Wilson Institute at: http://www.wilsoncenter.org/index.cfm?topic_id=5949&fuseaction=topics.item&news_id=407349.

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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

- 30 Business Law Brown Bag
Louisville Bar Association
- 30 Video Replay: Professionalism, Ethics and Substance Abuse
Cincinnati Bar Association
- 30 3RD Annual Mediation Colloquium
Campbell House, Lexington
Division of Mediation of the Kentucky AOC & U.S. Ombudsman Association

OCTOBER

- 4 Lincoln: The Lawyer
Northern Kentucky Law Review
- 6-7 Kentucky Law Update – Ashland
Kentucky Bar Association
- 8 Environmental Law Brown Bag
Louisville Bar Association
- 8 Bankruptcy Basics
Cincinnati Bar Association

- 9 Taxation Law Brown Bag
Louisville Bar Association
- 14 Video Replay: Professionalism, Ethics and Substance Abuse
Cincinnati Bar Association
- 15 Environmental Law
Cincinnati Bar Association
- 16 Stock Yards Bank & Trust – Brown Mackie College
Northern Kentucky Bar Association
- 17 Bankruptcy Law Brown Bag
Louisville Bar Association
- 17 Professionalism, Ethics and Substance Abuse
Cincinnati Bar Association
- 17 Child Custody Training – Louisville
Children's Law Center
- 17-18 17TH Biennial Workers Compensation Institute
UK CLE
- 20-21 Kentucky Law Update – Prestonsburg
Kentucky Bar Association
- 22 Real Estate – Foreclosures
Cincinnati Bar Association
- 22 Beginning Practice: Domestic Law 101 – Young Lawyers
Northern Kentucky Bar Association
- 23-25 KBA Fall Getaway
French Lick, IN
Kentucky Bar Association
- 23 Everything Email for the Legal Professional
Cincinnati Bar Association
- 24 Social Security Brown Bag
Louisville Bar Association
- 24 Tort & Insurance – The Madison Event Center – Covington
Northern Kentucky Bar Association
- 28 Video Replay: Professionalism, Ethics and Substance Abuse
Cincinnati Bar Association
- 28-29 Kentucky Law Update – Paducah
Kentucky Bar Association
- 29 Gain the Edge! Negotiation Strategies for Lawyers
Cincinnati Bar Association
- 29 Real Estate Law Brown Bag
Louisville Bar Association
- 30 In-House Counsel Brown Bag
Louisville Bar Association

NOVEMBER

- 5 Public Record Laws
Cincinnati Bar Association
- 6 Making Your Case with a Better Memory
Cincinnati Bar Association
- 6-7 Kentucky Law Update – Somerset
Kentucky Bar Association
- 7 Law & Film: Do Films Influence the Law or Reflect It?
Cincinnati Bar Association
- 7 KACDL Annual Conference & Seminar
Caesars Indiana Convention Center
Kentucky Association of Criminal Defense Lawyers

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11	Solo/Small Firm Brown Bag <i>Louisville Bar Association</i>	14	Basic Estate Planning Institute <i>Cincinnati Bar Association</i>
11	Video Replay: Professionalism, Ethics and Substance Abuse <i>Cincinnati Bar Association</i>	18	Child Custody Training – Morehead <i>Children's Law Center</i>
12	Health Law Brown Bag <i>Louisville Bar Association</i>	19	DUI Law <i>Cincinnati Bar Association</i>
12	Highlights of the Past Term of the Supreme Court of Ohio <i>Cincinnati Bar Association</i>	20	Corporate Counsel Seminar <i>Cincinnati Bar Association</i>
13	eDiscovery <i>Cincinnati Bar Association</i>	21	The Business of Law – Everything They Didn't Teach You in Law School <i>Cincinnati Bar Association</i>
13-14	10 TH Biennial Real Estate Law & Practice Institute <i>UK CLE</i>	25	Video Replay: Professionalism, Ethics and Substance Abuse <i>Cincinnati Bar Association</i>
13-14	Kentucky Law Update – Owensboro <i>Kentucky Bar Association</i>		

2008 KENTUCKY LAW UPDATE

Dates and Locations

October 6-7 (M/T) Ashland Plaza Hotel	Ashland
October 20-21 (M/T) Jenny Wiley State Resort Park	Prestonsburg
October 28-29 (T/W) KY Dam Village State Resort Park	Paducah
November 6-7 (TH/F) The Center for Rural Development	Somerset
November 13-14 (Th/F) RiverPark Center	Owensboro
December 4-5 (TH/F) Lexington Convention Center	Lexington

Save the Date!

2009 KBA Annual Convention

June 10-12, 2009

Covington, Kentucky

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

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

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

KYLAP
Anna Columbia • (502) 564-3795

**Kentucky Association of Criminal
Defense Lawyers (KACDL)**
Charolette Brooks • (606) 677-1687

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

Chase College of Law
Bonnie Osborne • osborne1@nku.edu

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

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

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

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

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

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

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

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

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

Northern Kentucky Law Review
Rhonda Schechter
schechterr1@nku.edu

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

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



Randy Ratliff

You're Too Busy to Read This Article

In 1997, at my orientation to University of Kentucky College of Law, Robert L. Elliot, then president of the Kentucky Bar Association, welcomed us to law school with a speech entitled: *"Lawyers Are People Too."*

I try to remember that. We are susceptible to the same failings and pitfalls as all other people. In fact, a number of Bar Association studies (Oregon, North Carolina, and Louisiana, e.g.) make it pretty clear that we are **more** susceptible to some of life's pitfalls. Our incidence of substance abuse and depression is as high as twice that of our fellow citizens. Many things may explain this, but one thing seems apparent: The same personality traits that attract people to the

Randy Ratliff is the Kentucky Lawyer Assistance Program Director. His legal practice has been diverse including medical malpractice defense, in-house counsel and, more recently, advocacy for residents of nursing homes and long-term care centers. Prior to law school, he worked with adolescent male offenders adjudicated to the Kentucky Cabinet for Human Resources in treatment centers in Louisville and Owensboro. Mr. Ratliff has been clean and sober since 1989.

Randy Ratliff, Director
Kentucky Lawyer Assistance Program
Kentucky Bar Association
P.O. Box 1437
Frankfort, Kentucky 40602
Office: 502-564-3795, ext. 265
Cell: 502-724-5904
Fax: 502-564-3225

practice of law and drive them toward success are often the same traits that bring about their demise.

For example, most attorneys are driven to win, win, win. That drive can bring about both professional success and financial reward. It is a time-honored and laudable trait. Unfortunately, that same drive can lead to burnout or depression. The human body does not differentiate stress that leads to success from stress that leads to failure. Continued high levels of stress over a long period of time, without adequate coping strategies, can lead to burnout for any judge, lawyer or law student. Moreover, it can have a real and devastating impact on your physical health.

It is perfectly normal to occasionally feel frustrated, depressed and dissatisfied. But when someone experiences depression or burnout, these negative emotions become chronic and can last for weeks or months. We all have a limited stock of psychological energy to get us through the day. In addition to normal workloads, the unique stresses of law practice may completely deplete this energy. When this happens, work performance is further reduced in terms of quality and quantity. This exacerbates the problem by putting additional strains on personal relationships. These relationships are vital in sustaining us.

Burnout has been called a "romantic disorder" because it is characteristic of a work ethic admired in the legal culture. It really is nothing more than a form of depression. It has been defined as a type of depression characterized by apathy, negative feelings about the job, declining productivity, increased illness, and difficulty in personal relationships. Sometimes it includes an increase in substance abuse or other escape outlets such as gambling, sexual acting out, or raging.

The North Carolina bar survey found that 36 percent of judges and lawyers surveyed in North Carolina had not taken even a one-week vacation in the year prior to the survey. Learning how to manage stress and improve self-care is critical to preventing burnout and can help minimize the effects of depression.

Think you may be feeling burned out or over-stressed? You can take a quick anonymous on-line self-assessment at <http://www.carolinasmedicalcenter.org/body.cfm?id=1523>. A 6-month score of 300 or more, or a year score of total of 500 or more, indicates high stress in your life.

Some people have a natural predisposition for dealing with stress. Others do not. So what do you do? There are several things. First, understand that your time is your own. Your choices are your choices. Sometimes it is the small things that matter most. For example, one researcher found that simply taking 10 or 15 minute breaks to do things you enjoy such as calling a friend, walking to get coffee, sitting in the park, and walking to work can significantly lower stress levels and make the work environment more enjoyable (www.abajournal.com/news/planned_leisure_can_be_a_job_stress_tactic_researcher_says/-31k-2008-05-30). Another resource worth a look is the Hardiness Institute, Inc. at <http://www.hardinessinstitute.com/>.

Take time to take care of yourself. It can make you a better lawyer and, more importantly, a better person.

If you suspect that you, a family member or another member of the legal community has a problem or if you are not sure what to do with someone you care about, then please call me or my assistant, Anna Columbia. ALL calls are CONFIDENTIAL. ■

Kentucky Clients' Security Fund

The Kentucky Clients' Security Fund was established by the Supreme Court of Kentucky (Rule 3.820) to be administered by the Kentucky Bar Association. It is a voluntary effort, funded by the Bar dues of the lawyers of Kentucky, to reimburse clients for losses caused by their attorney's dishonest conduct, defined as the wrongful taking of clients' money or other property. The amount of \$7.00 per lawyer, \$6.00 per member of the judiciary, is allocated from member dues by the Kentucky Supreme Court for this Fund. The Fund does not consider losses resulting from negligence. There are caps on recovery.

In the fiscal year 2005-2006 through the end of 2007-2008, the Fund paid \$351,018.75 to victims.

The Fund provides a last-resort avenue for client victims who are unable to get reimbursement for their losses from the responsible lawyer, or from insurance or other sources. There is no charge to the client for this process. The Rule prohibits lawyers from being compensated for assistance in a claim.

Claims are reviewed by a Board of Trustees appointed by the Board of Governors of the Kentucky Bar Association. These five (5) Trustees consist of three lawyers and two lay members who perform their duties as a public service and receive no compensation.

Fund Payments in Fiscal Year 2007-2008

Attorneys Whose Clients Suffered Losses	Total Paid	Number of Clients Reimbursed
Richard Kip Cameron.....Hopkinsville, KY.....	\$514.00.....	1
David A. Griffiths.....Bellevue, KY.....	\$500.00.....	1
Maxwell Lee Hammond.....Grayson, KY.....	\$33,443.60.....	28
Irvin Scott Johns.....Jeffersonville, IN.....	\$9,200.00.....	10
R. Allen McCartney.....Louisville, KY.....	\$874.41.....	2
Kari Marie Morton.....Madisonville, KY.....	\$361.00.....	1
Arthur Woodson Pulliam.....Munfordville, KY.....	\$10,798.00.....	8
Estate of Leslie Judson Shekell.....Paducah, KY.....	\$32,100.97.....	1

Further information regarding the Fund can be found on the Kentucky Bar Association website, www.kybar.org under the Law & Ethics page.

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

As approved by the
KBA Board of Governors
July 19, 2008

Publisher's Note:

Supreme Court Rule SCR 3.130 contains the Kentucky Rules of Professional Conduct (KRPC) which include rules on lawyer advertising. KRPC 7.03 establishes an Attorney's Advertising Commission (AAC) with general responsibilities for implementing the lawyer advertising rules. In discharging its responsibilities, the AAC has the authority to issue and promulgate regulations subject to prior approval by the Board of Governors. When regulations are proposed and issued, members of the Kentucky Bar Association are entitled at least sixty (60) days advance notice and an opportunity to comment. The Commission has promulgated the following amendments to regulations 2-3 and additions to the enumerated regulations 13-16. The Kentucky Bar Association Board of Governors approved the proposed regulations for publication on July 19, 2008. They are subject to further review and consideration after comments from the membership. **Members wishing to comment on the proposed regulations must do so in writing. Written comments must be delivered no later than December 15, 2008, to the Attorneys' Advertising Commission, c/o KBA Director, 514 West Main Street, Frankfort, KY 40601-1812.**

PROPOSED CHANGES TO AAC REGULATION NO. 2: PERMISSIBLE CONTENT OF ADVERTISEMENTS SUBMITTED WITHOUT A FEE

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

1. Participation by the lawyer in community groups or clubs and nonprofit charitable organizations or groups, either as a member or officer;
2. Previous employment positions, including governmental and non-governmental employment;
3. Enlargements of business cards that are not themselves advertisements under SCR 3.130-7.02(1)(a), but if the advertisement includes reference to a website, the website is considered a separate advertisement;
4. Listings of immediate family, such as spouses, children and parents;
5. Information identifying the offices of the firm in several jurisdictions or cities within or without the Commonwealth of Kentucky;
6. The length of time any particular law firm of lawyer has been in practice;
7. The types of information listed in SCR 3.130-7.05(1)(a)(6-13) may include both past and present participation or status, if the advertisement discloses, when necessary, that the lawyer is no longer a participant or no longer holds that status;
8. A photograph of the lawyer with no accompanying scene in the background of the photograph;
9. Words such as "congratulations" or "good luck," when used in program advertisements for charitable or education functions;
10. The designation of a law firm as "A debt relief agency" as required by the Bankruptcy Abuse Prevention and Consumer Protection Act [11 USC§528(b)(1)(a)(b)];
11. The website address of a lawyer or law firm's website advertisement, if the website has been submitted and approved as required by SCR 3.130(7.05);
- ~~12.~~ Such variations on the items contained herein and in SCR 3.130-7.05(1) (a)(1-25) that are minor or technical in nature and

may be reviewed and approved by the designee of the Commission named herein;

13. Additions or revisions to a previously submitted and approved advertisement, as required by SCR 3.130 (7.05)(2), need not be re-submitted to the Commission if the new addition or revision is limited to the items listed in SCR 3.130(7.05)(1)(1 – 26) and AAC Regulation 2.

PROPOSED CHANGES TO AAC REGULATION NO. 3: COMMUNICATIONS THAT REQUIRE THE DISCLAIMER "THIS IS AN ADVERTISEMENT"

SCR 3.130-7.09(3) requires that certain types of advertisements contain the disclaimer "THIS IS AN ADVERTISEMENT." In addition, SCR 3.130-7.25 authorizes the Commission to require the disclaimer "THIS IS AN ADVERTISEMENT." This Regulation No. 3 clarifies the relationship ~~between among~~ SCR 3.130-7.09(3), ~~and~~ SCR 3.130-7.25 and SCR 3.130-7.15.

1. SCR 3.130-7.09(3) does not apply to every written, recorded or electronic communication from a lawyer, including emails. Rather, it applies only to any such communication, including email, that solicits "professional employment from a prospective client known or reasonably believed to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship." The term "particular matter" includes any identifiable type or category of legal matter as well as any specific case of that consumer. An advertisement that is within the scope of SCR 3.130-7.09(3) must include the disclaimer "THIS IS AN ADVERTISEMENT."
2. Even if an advertisement does not constitute a solicitation of

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

3. Website advertisements must state “THIS IS AN ADVERTISEMENT” on every page, in a manner such that these words are visible in the top portion of the page, without scrolling.

PROPOSED
AAC REGULATION NO. 13:
DEFINITION OF AN
ADVERTISEMENT

SCR 3.130-7.01 states, “Rule 7 shall apply to advertisements of legal services directed to residents of the Commonwealth of Kentucky or which originate in the Commonwealth of Kentucky.”

SCR 3.130-7.02(1) defines the word “advertise” or “advertisement” as “to furnish any information or communication concerning a lawyer’s name or other identifying information.” SCR 3.130-7.02(2) states: “ ‘legal services’ means the practice of law as defined SCR 3.020.”

SCR 3.020 provides: “The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. ...”

The definition of “advertise” or “advertisement” does not include a communication if the communication meets the following criteria:

- a. It is a lawyer to lawyer contact directed solely to other lawyers or law firms, and
- b. It is in the nature of providing information concerning fields of practice, or availability to be employed by clients as co-counsel, or to receive referrals not prohibited by the Rules of Professional Conduct, and

- c. It is **not** a solicitation prohibited by SCR 3.130-7.09(1) to a prospective client, even if the prospective client is a lawyer, nor is it a communication that requires compliance with SCR 3.130-7.09(3).

PROPOSED
AAC REGULATION NO. 14:
ADVERTISING OF FEES

The Supreme Court Rules and the Attorney Advertising Regulations require specific information regarding fees, as well as information about services to be provided, in certain attorney advertisements. Supreme Court Rules 3.130-7.04 and SCR 3.130-7.15 establish what minimum information is required in advertisements which reference attorney fees.

If the advertisement uses any language to imply or state that there will be no fee owed unless there is a recovery, as is typical in contingent fee advertisements, then the advertiser must include language identifying whether the attorney or the client is responsible for court costs and/or case expenses. It is deceptive, and therefore in violation of SCR 3.130-7.15, to employ advertising that refers to contingent fee arrangements without addressing the client’s liability for court costs and case expenses. Language similar to that provided in SCR 3.130-7.04 is adequate to explain whether or not the court costs and/or case expenses will be the responsibility of the client. AAC Regulation 1 also addresses other information that must be included in advertisements to avoid a misleading omission under SCR 3.130-7.15.

Further, if the advertisement states a contingent fee percentage or rate then the advertisement must also disclose whether percentages are computed before or after deduction of court costs and case expenses. It is deceptive, and therefore in violation of SCR 3.130-7.15, to employ advertising that refers to a contingent fee percentage without addressing the manner in which the fee is computed.

Contingent fee percentages are allowed to be stated in advertisements

not requiring a submission fee pursuant to SCR 3.130-7.05(1)(a)(22) and SCR 3.130-7.05(b)(1).

PROPOSED
AAC REGULATION NO. 15:
ELECTRONIC SUBMISSION OF
ADVERTISEMENTS

SCR 3.130-7.05(1)(b) states, “If the advertisement contains only those items listed in SCR 3.130-7.05(1)(a), the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement.

SCR 3.130-7.05(2) states, “If the advertisement does not qualify under SCR 3.130-7.05(1) for submission without a fee, the lawyer shall mail or deliver to the Commission, c/o the Director of the Kentucky Bar Association, three (3) copies of the advertisement.

1. Advertisements containing only those items listed in SCR 3.130-7.05(1)(a) and AAC Regulation 2 for submission without a fee, may also be electronically submitted via facsimile or emailed in PDF (Portable Document Format) to the Attorneys’ Advertising Commission address attorneyadvertising@kybar.org.
2. Website advertisements that do not qualify for submission without a fee may be submitted in electronic format only if on a data disc in PDF (Portable Document Format). Three (3) copies of the data disc should be mailed or delivered to the Commission, c/o the Director of the Kentucky Bar Association.

PROPOSED
AAC REGULATION NO. 16:
RECORD RETENTION

SCR 3.130-7.08 states, “The records of the Commission shall be available for inspection and copying at the offices of the Kentucky Bar Association at reasonable times and upon reasonable notice.”

The availability of the records of the Commission shall be limited to two years from the date of submission of the advertisement. The Commission may destroy any records two years after submission.

ADVISORY ETHICS OPINION

FORMAL ETHICS OPINION KBA E-429

June 17, 2008

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.

Subject: Participation in for-profit group marketing.

Question I: May a lawyer participate in a for-profit group marketing arrangement where prospective clients are provided information about lawyers through an 800 number or an internet website?

Answer: Qualified yes, so long as the arrangement complies with the Advertising Rules and does not function as a for-profit lawyer referral service. See discussion below.

Question II: May a lawyer pay reasonable costs to participate in a for-profit group marketing arrangement?

Answer: Qualified yes. See discussion below.

Question III: If a lawyer participates in for-profit group marketing, is the lawyer responsible for assuring that the advertisement complies with the requirements of the Kentucky Rules of Professional Conduct?

Answer: Yes

References: SCR 3.130 - Rule 5.4; 7.01 - 7.06; 7.09 - 7.50; 8.3; KBA E-427; KBA E-428; NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); WA. Inf. Op. 2106 (2006); S.C. Ethics Adv. Comm. Op. 01-03 (2001).

Introduction

The KBA Ethics Committee has been

asked to opine on the ethical propriety of various group marketing arrangements, specifically those that provide prospective clients with information about participating lawyers through the internet or an 800 telephone number. Before beginning a discussion of group marketing, it should be noted that the Attorneys' Advertising Commission (AAC) has jurisdiction over lawyer advertising under SCR 3.130 (7.01-7.06). Rule 7.05 provides that all advertisements must be submitted to the AAC not later than the publication date of the advertisement. The AAC reviews advertisements and may issue advisory opinions to individual lawyers. As in the past, however, when specific advertising arrangements raise ethical questions beyond the advertising rules, the Ethics Committee will address the ethical implications of those arrangements.¹

It would be virtually impossible to address the specific details of each and every conceivable group marketing model. It is, however, possible to describe some of the more common features of these models and address the most frequent challenges and pitfalls a lawyer may face.

Most of the group marketing models have several common characteristics. They are all sponsored by for-profit entities² and the lawyer pays a fee to participate. In addition, the initial advertisement, whether it is in the newspaper, on television or on the internet, is generic in nature; it usually does not promote an individual lawyer. Only after the prospective client makes an initial contact with the group marketer, either through an 800 number or over the internet, does the prospective client receive more individualized information about one or more specific lawyers. Some group advertisements are targeted at anyone who might need a lawyer, while others target those with specific needs, such as those who have been

charged with a crime or have been injured in an accident. As the following discussion indicates, the marketer's level of involvement in analyzing the problem and identifying a specific lawyer may vary substantially. At one end of the spectrum, there are marketing arrangements designed so that the prospective client inputs certain demographic information, such as a zip code or type of practice needed, and a list of participating lawyers is provided. The list may include an internet link to each lawyer's webpage or provide a way to contact the participating lawyers. It is up to the client to evaluate the information about the lawyers and decide which, if any, to contact. At the other end of the spectrum is the arrangement where the prospective client provides considerable detail about his or her needs; the marketing organization then evaluates the client's needs and selects one or more lawyers from its participating members. The organization may represent that it is evaluating the needs of the client and the qualifications of the lawyer, thereby providing the prospective client with the best "match."

Discussion

As this Committee has noted previously,³ the Rules of Professional Conduct were not designed to specifically address many of the issues that arise in an age of advanced technology and sophisticated marketing schemes. Nevertheless, despite the many changes in the profession and the way in which we communicate, the underlying values and principles of the profession remain unchanged – lawyers must protect their clients and the public. These principles are reflected in the Rules of Professional Conduct in various ways, but those most relevant to group marketing are as follows:

- A lawyer may not use a third party to do that which the lawyer

is prohibited from doing under the Rules of Professional Conduct. Rule 8.3(a).⁴

- Communications regarding the lawyer's services cannot be false, deceptive or misleading. Rule 7.15.⁵
- A lawyer may not give anything of value to a non-lawyer for recommending the lawyer, except that the lawyer may pay the reasonable cost of advertising. Rule 7.20(2).⁶
- A lawyer may not share a fee with a non-lawyer. Rule 5.4.⁷

It is against the backdrop of these principles that we will evaluate the propriety of group marketing.

Participation in Group Marketing

It is the view of the Committee that there is nothing inherently unethical about two or more lawyers pooling their financial resources in order to maximize the effectiveness of marketing, as long as those lawyers follow the applicable Rules of Professional Conduct. Each participating lawyer remains responsible for assuring that marketing arrangements comply with the Rules of Professional Conduct, even where the advertisement and the underlying arrangements are controlled by a third party.⁸ Issues of compliance with the Advertising Rules, including those which prohibit communications that are false, deceptive or misleading,⁹ fall within the jurisdiction of the Advertising Commission, but will be mentioned briefly. For example, it would be a violation of the rules for the marketing organization to state or imply that it "selects" attorneys based on experience and training, when, in fact, the attorney's selection is based upon payment of a participation fee. Likewise, ads that promote a participating lawyer as "specialist" in a particular area violate the rules.¹⁰ In addition, all advertisements must contain the name of at least one lawyer or law firm, licensed in Kentucky, responsible for the content.¹¹ As with any communication promoting

the lawyer, group advertisements must be submitted to the Attorneys' Advertising Commission. Any changes must be submitted as well. These purely advertising issues are mentioned here because they often present the biggest challenges to participation in group marketing arrangements. In addition to the advertising issues, there are other ethical challenges to this type of arrangement and the balance of this opinion will focus on the non-advertising issues, specifically whether the arrangement is, in reality, a for-profit referral service rather than advertising and whether the payment arrangement between the lawyer and the service provider is permissible.

Much of the debate over group marketing has focused on whether the marketing arrangement is just another type of advertising or is really a for-profit referral service. Whether a particular arrangement falls in one category or the other will depend upon a careful analysis of the facts. For example, some internet group marketing arrangements are merely directories, similar to the lawyer advertisements in the Yellow Pages, except that the prospective client may be able to narrow the search by locality or area of practice. But even some traditional directories, authorized under the advertising rules, have similar features. Some 800 number ads in newspapers and on television are also similar to the directories described above. The prospective

client may provide minimal information about the type of lawyer sought and the locality, and the operator provides the caller with names of participating lawyers. The operator does not analyze the prospective client's needs or the qualification of the particular lawyers, but merely passes on information about participating lawyers. It is the Committee's view that a group marketing arrangement that provides directory services, such as those described above, is a type of advertising contemplated by the rules¹² and can be structured in such a way so as to comply with the Rules of Professional Conduct.

Other group marketing arrangements have characteristics of for-profit lawyer referral services. For example, some group marketing arrangements require the prospective client to provide extensive information about the client's needs. In some cases, third parties purport to analyze the needs of the client and match the client with a specific lawyer. This arrangement goes beyond the mere pooling of financial resources of group advertisers. The participating lawyer is paying a fee for a specific referral, something that is prohibited by Rule 7.20(2). Once the advertising organization becomes actively involved in screening cases and matching prospective clients to specific lawyers, the arrangement functions as a lawyer referral service, which the rules prohibit, except when it is a non-profit organization.¹³ The Committee agrees



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with the substantial number of jurisdictions that have addressed this issue and concluded that such arrangements are unethical. NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); Wa. Inf. Op. 2106 (2006); S.C. Ethics Adv. Comm. Op. 01-03 (2001).

Finally, the Committee understands that some group marketing arrangements limit the number of lawyers who may participate in a particular field or geographic area so as to assure that the participating lawyers will not be competing with other lawyers for the clients who contact the service. Without an appropriate disclaimer, such an arrangement may mislead the client into believing that there is an evaluative process being conducted when in fact there is not. This would violate the prohibition on false, deceptive or misleading advertisements. Further, it is the Committee's view that, by limiting the number of participants in this way, the service is in effect directing prospective clients to a particular lawyer, thus violating Rule 7.20(2) in the same way that the matching process described above violates the rule.

Payment for Group Marketing

The Rules of Professional Conduct prohibit a lawyer from paying a non-lawyer for recommending his or her services, but the rule authorizes a lawyer to "pay the reasonable costs of advertising or communications permitted by [the] rule." Rule 7.20(2). Most group advertising arrangements require the participating lawyer to pay some kind of enrollment fee, and/or a monthly or yearly fee. The arrangement is not substantially different than the arrangement with the print advertiser who charges a set-up fee of some kind, and then charges another fee for the specific time that the advertisement runs. As long as the advertising costs are reasonable, there is nothing unethical about this type of compensation arrangement.

The compensation issue becomes more complicated if the advertising fee paid by the lawyer is based in whole or in part on the presumed or real economic benefit to the lawyer. For example, some sponsors of internet

group advertising charge the lawyer based the number of "hits" to the website or link. Others may charge on the basis of the number of referrals, clients represented or fee generated.

As the Committee understands the system based on "hits," the lawyer is charged each time a potential client accesses a particular website or link. The question is whether such a fee structure is payment for a referral, which is prohibited under Rule 7.20(2), or is the payment the reasonable cost of advertising, which is permitted under the same rule. The Committee is of the view that "hits" do not constitute "referrals" within the meaning of the Rules. Calculating the cost of advertising based on the number of viewers of the ad (hits) is no different than basing advertising charges on newspaper circulation or television viewership. Once the prospective client has viewed the information, he or she makes an independent decision whether to contact the lawyer. A "hit" does not necessarily result in employment or even contact with the lawyer. Charging based on "hits" is merely a method of calculating viewership. It is the Committee's view that payment of reasonable costs for advertising based on the number of hits is consistent with the rules which permit a lawyer to pay the reasonable cost of advertising. This conclusion is consistent with opinions in other jurisdictions, including a recent opinion out of South Carolina. S.C. Ethics Advisory Opinion 01-03 (2001).

While compensation arrangements based "hits" may be permissible, most other arrangements based on presumed or actual economic benefit are highly suspect. For example, if the group advertising organization becomes active in directing potential clients to a specific lawyer and then charges the lawyer a fee for a specific referral, then the arrangement violates Rule 7.20, which prohibits the lawyer from paying for referrals. As the Comments to the Rule observe, "[a] lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work." Once the group

marketing organization becomes actively involved in matching or referring clients, it ceases to be advertising and a lawyer may not give anything of value for that service. See, New York State Bar Association Committee on Professional Ethics, Opinion Number 799 (2006); SCR 3.130 - Rule 5.4; 7.01 - 7.06; 7.09-7.50; 8.3; KBA E-427; KBA E-428; NY State Ethics Op. 799 (2006); Va. Ethics Op. A-0117 (2006); WA. Inf. Op. 2106 (2006); S.C. Adv. Op. 01-03 (2001). Also problematic is the compensation system that is tied to the fee that is earned in a referred case. In addition to the fact that it is payment for the referral, which is prohibited under the Rules, it also is fee splitting with a non-lawyer, which is likewise prohibited under Rule 1.5(e).

Lawyer's Responsibility for Group Marketing

Rule 8.3 provides that "[i]t is professional misconduct for a lawyer to violate ... the Rules of Professional Conduct ... through the acts of another." Thus, lawyers who participate in group marketing arrangements are responsible for the content of the advertisements and methods employed in promoting their services. Lawyers who rely on marketing organizations to promote their professional services must thoroughly investigate the practices of the organization to assure that they comply with all of the applicable Rules of Professional Conduct.

Conclusion

Group advertising represents just one of many new marketing arrangements that have been developed in recent years. While such arrangements may be attractive to lawyers in promoting their services, lawyers must be careful to assure that the arrangements comply with all of the Rules of Professional Conduct, including the Advertising Rules. The lawyer is responsible for the content of all advertisements. He or she may pay the reasonable costs of advertising, but may not pay for client referrals. A lawyer may not participate in arrangements that are for-profit referral services.

ENDNOTES

1. For example, KBA E-427 (2007) dealt with the ethical implication of domain names and KBA E-428 (2007) dealt with not-for-profit lawyer referral services.
2. Participation in not-for-profit lawyer referral services is specifically authorized by Rule 7.20 and KBA E-428 (2007) addresses compensation arrangements with not-for-profit bar associations.
3. KBA E-427 (2007).
4. Rule 8.3(a) provides:
It is professional misconduct for a lawyer to:
 - (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
5. Rule 7.15 provides:
A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's service. A communication is false, deceptive or misleading if it:
 - (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
 - (b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
 - (c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."
6. Rule 7.20(2) provides:
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."
7. Rule 5.4 provides, in part:
 - (a) A lawyer or law firm shall not share legal fees with a non-lawyer....
8. See note 4 for text of Rule 8.3, which prohibits a lawyer from circumventing the rules through the acts of another.
9. See note 5 for text of Rule 7.15, which prohibits the use of false, deceptive or misleading advertising.
10. Rule 7.40 provides, in part:
A lawyer may communicate the fact that the lawyer does nor does not practice in particular fields of law. ... Any such advertisement or statement shall e strictly factual and shall not contain any form of the words "certified," "specialist," "expert," or "authority." A lawyer shall not state or imply that the lawyer is a specialist ... (*exceptions omitted*).
11. Rule 7.20 (3) provides:
Any communication made pursuant to these Rules shall include the name of at least one lawyer licensed in Kentucky, or law firm any of whose members are licensed in Kentucky, responsible for its contents.
12. Rule 7.02 provides the definitions for the Advertising Rules. Rule 7.02(1) provides:
For the purposes of Rule 7, the following definitions shall apply:
 - (1) "Advertise" or "advertisement" means to furnish any information or communication containing a lawyer's name or other identifying information... (*exceptions omitted*).
13. According to the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral & Information Service, a referral service is an entity that helps potential clients determine if a problem is truly of a legal nature by screening inquiries and, where appropriate, providing an unbiased referral to an attorney who has experience in the area of law appropriate to the potential client's needs.

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JUDICIAL ETHICS OPINION

FORMAL

JUDICIAL ETHICS OPINION JE-116

August 5, 2008

The Committee has received an inquiry from a judicial candidate, requesting a formal opinion in response to questions posed by an attorney on behalf of the candidate. The fact that the original request was made by an attorney on behalf of the candidate is mentioned only for the purpose of advising the Bar, members of the judiciary and candidates for judicial office that the Committee has adopted a policy of responding to inquiries from judges or judicial candidates only, and even then only in regard to a question posed regarding the inquirer's own proposed action. Without the inquiry being made by the judge or candidate personally, the Committee cannot learn if it is fully informed as to the facts on which the opinion is solicited; even more important, a question by one person, regarding the propriety of another's actions, might be based on a biased presentation of the facts. In this instance, the candidate subsequently ratified the request in writing.

The questions posed to the Committee (with modifications to preserve the anonymity of the candidate) were:

QUESTION 1: May a Judicial Candidate publicize the endorsement of a parent, who holds a partisan-elected public office, through any means, if the parent is identified as such an official?

QUESTION 2: If the answer to Question 1 is no, may a Judicial Candidate publicize the endorsement of the office-holding parent, through any means, if the parent is not identified as holding his office?

QUESTION 3: May a Judicial Candidate campaign alongside the office-holding parent at church picnics and other public functions if the parent's office is identified (such as by name tag)?

QUESTION 4: If the answer to Question 3 is no, may a Judicial Candidate campaign alongside the office-holding parent at church picnics and other public functions, if the parent's office is not identified?

QUESTION 5: May a Judicial Candidate use the name and image of the office-holding parent in campaign literature and on campaign advertisements if the parent's office is identified?

QUESTION 6: If the answer to Question 5 is no, may a Judicial Candidate use the name and image of the office-holding parent in cam-

aign literature and on campaign advertisements if the parent's office is not identified?

QUESTION 7: May a Judicial Candidate authorize the office-holding parent to host a fundraiser for the Judicial Candidate's campaign committee if the parent is identified in invitations or during the fundraiser as holding that office?

QUESTION 8: If the answer to Question 7 is no, may a Judicial Candidate authorize the office-holding parent to host a fundraiser for the Judicial Candidate's campaign committee if the parent is **not** identified in invitations or during the fundraiser as holding that office?

QUESTION 9: May a Judicial Candidate knowingly permit the office-holding parent to send letters, postcards and emails to his friends and acquaintances urging a vote for the Judicial Candidate if the parent is identified in the letters, postcards and emails as holding that office?

QUESTION 10: If the answer to question 9 is no, may a Judicial Candidate knowingly permit the office-holding parent to send letters, postcards and emails to friends and acquaintances urging a vote for the Judicial Candidate if the parent is **not** identified in the letters, post-

cards and emails as holding that office?

With regard to questions 1, 2, 3 (one member dissenting), 5, 6, 7 and 8, the Committee responds: "a qualified No".

With regard to questions 4, 9 and 10, the Committee responds: "Yes".

JE 93 and 66 advise that the candidate should not advertise the office-holding parent's support as the support of a public official, and the Committee sees no reason why those opinions do not apply to questions 1, 2, 3 (one member dissenting), 5, 6, 7 and 8. Canon 5B(1)(b) prohibits candidates from allowing "public officials...subject to the candidate's direction and control from doing for the candidate what the candidate is prohibited from doing..." Thus, a candidate may not explicitly or implicitly advertise the office holder's support, and a listing of the name of the official in campaign literature, even though the office is not stated, is a violation of the Canons.

The Committee is not unaware of *Carey vs Wolnitzek*, 2006 WL 2916814. Even so, the Committee reaches the foregoing opinions for two reasons. First, this Committee is not empowered to alter the substance of the Canons of Judicial Ethics, and is bound by their provisions, which can only be changed by the Kentucky Supreme Court. Second, the Committee believes that the reference to *Carey* in the letter ratified by the candidate contains an overstatement. While we would be bound by a clear decision by a

court of competent jurisdiction that a particular part of the Canons is unconstitutional, Judge Caldwell actually said, at page 15 of her opinion:

Carey cannot establish an intent to engage in a course of conduct proscribed by the Endorsement Clause because he has failed to show that the clause proscribes the activity in which Carey proposes to engage, i.e., soliciting the endorsement of public officials. While that issue is unresolved, Carey cannot establish an objectively real, immediate or credible threat of sanctions for soliciting the support of public officials. Accordingly...Carey has failed to establish the requisite injury to satisfy the standing or ripeness doctrines.

Judge Caldwell went on to point out that it is unknown whether the Kentucky Supreme Court would interpret the Canons to prohibit the use of public officials for support. The Committee is in the same position, especially since

Carey is not final, and is therefore compelled to follow the conclusions reached in JE 66 and 93 and, with the following exception, the candidate may not publicize the support of a person holding political office, whether or not the office is mentioned.

The exception is based on the fact that the official in question is a parent of the candidate. In JE 93 this Committee noted that the Canons of Judicial Ethics do not apply to non-judicial elected public officials; thus, such an official is generally entitled to do as he or she wishes in regard to supporting a judicial candidate, and cannot be prohibited from announcing support for the candidate while identifying himself as an elected public official. While the office-holding parent might accede to the candidate's wishes if asked by the candidate to refrain from identifying himself/herself as a public official during any supportive activities, the Committee does not believe that an office-holding parent is so under the candidate's "control" that such support would taint the campaign. Also, common sense dictates that no candidate should be deprived of the opportunity to demonstrate that he or she is a family person and to appear in person or in campaign materials with a spouse or

parent should not be prohibited, so long as the office is not itself mentioned. *Caveat*, this is to be clearly distinguished from activities of the official which are directed by the candidate.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Very truly yours,
Arnold Taylor, Esq.
Chair, The Ethics Committee of the
Kentucky Judiciary

cc: Donald H. Combs, Esq.
The Honorable Laurance B.
VanMeter, Judge
The Honorable Jean Chenault
Logue, Judge
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By Molly T. Tami, *Pro Bono Service Program Director*

NKU Chase Launches New Pro Bono Service Program

As reported in the January *Bench & Bar*, NKU Chase College of Law has instituted a *pro bono* service requirement for all students entering Chase in fall 2008 and thereafter. Under this program, each student will complete a minimum of 50 hours of *pro bono* legal service as a graduation requirement. The goal of the Chase *Pro Bono* Service Program is to instill in our students a commitment to provide *pro bono* services as members of the legal profession. As an educational tool, the program will help students gain legal skills, expose students to various areas of the law, and enhance student contact with the legal community.

At NKU Chase, we are very excited about the program, and we now have everything in place to launch the program this fall. We have identified a number of placement sites for students choosing to do *pro bono* service during this academic year, and we are continuing to develop additional placements.

For purposes of our program, *pro bono* work is defined as law-related work performed in legal service organizations, government agencies, private law firms (*pro bono* cases), non-profit organizations, and legislative offices. Students may undertake a variety of *pro bono* assignments, including client intake, case preparation, legal research, legislative analysis, and community legal education.

In addition to serving at placement sites throughout the region and state, Chase students will also have the opportunity to participate in several *pro bono* projects based at the law school. The Chase Volunteer Income Tax Assistance Program provides students the opportunity to assist low-income clients in preparing their tax returns each year. The Chase Law Advocates Program, which is a partnership between the Northern Kentucky Volunteer Lawyers and Chase, allows students to engage in a range of *pro bono* activities that include participating in *pro se* clinics, drafting wills, and assisting *pro bono* attorneys with case preparation. The Chase Street Law Program will be launched this year in partnership with the Kentucky AOC Juvenile Services diversion program and with the support of the Kentucky Bar Foundation. Street Law is a nationally recognized educational outreach program which exists at more than 60 law schools across the country and serves to teach practical law to the community.

While many Chase students have actively participated in *pro bono* activities in the past, the formalized *Pro Bono* Service Program will ensure that all of our students have this opportunity with the choice of a wide variety of established placements. For example, we recently matched a fourth-year Chase student, eager to gain legal

experience in the community, with a placement opportunity at the Carnegie Visual & Performing Arts Center in Covington. The Chase student provided valuable research assistance on an issue of importance to the Center, working under the supervision of this non-profit organization's attorney.

To learn more about the Chase *Pro Bono* Service Program or about serving as a placement site or "*pro bono* partner," please visit our new website at http://chaselaw.nku.edu/pro_bono/. Questions or comments about the program are welcome, so we hope to hear from you. Because our *pro bono* program will only be successful with the participation of the legal community, we invite you to join us in helping our students "do well while doing good."



By Louise E. Graham, *Interim Dean, University of Kentucky College of Law*

UK faculty set standard of excellence and hard work for students

First year law students tell us that they never realized how much "work" law school would be. Certainly, we hope to engage our students intellectually in that first year, stretching their minds at every chance. As I begin this year as interim dean at the college, I'm ever more aware that as we ask students to work hard, we develop them as emerging professionals.



Louise Everett Graham

That sense of professionalism energizes the faculty's work as we consider exciting changes in legal education. Like others, we are studying the Carnegie Report *Educating Lawyers* and debating ways that our curriculum might provide an even better education, emphasizing professional skills development. As we do this work, Professor Mary J. Davis will serve as the

■ In Memoriam

Robert M. Braden	Corbin
Robert E. Cato	London
Samuel Carlick	Rockville, MD
Marshall Davidson	Prestonsburg
James Wheeler Deese	Saint Petersburg, FL
Charles L.J. Freihofer	Edgewood
George W. Hatfield, Jr.	Whitley City
Gerald Dee Hunt	Florence
Stanley J. Mack	Louisville
James Carl Miller	Campbellsville
Don B. Mills	Barbourville
Henry J. Potter, Jr.	Bowling Green
Jon E. Rickert	Elizabethtown
A.B. Rouse, Jr.	Lexington
Squire N. Williams, Jr.	Frankfort

Associate Dean for Administration and Faculty Development, while Professor Doug Michael will serve as the Associate Dean for Academic Affairs. I know that these talented individuals will be invaluable to our effort.

For over thirty years, our students have had excellent models of professionalism. Professor Alvin Goldman, who taught Labor Law and Negotiations for many years, and Professor Carolyn S. Bratt, who, since 1974, taught many students Property, Trusts and Estates, and Women and the Law retired this year. Each was an exemplary faculty member who leaves behind an intellectual legacy of which he or she can be justly proud. Professor Bratt served the College of Law not only as a faculty member, but also last year as the Executive Associate Dean, winding up a university career that included many honors. Professor Goldman gained an international reputation as an author and labor arbitrator. Our school is richer for having had them as teachers and colleagues.

This fall we welcome two new faculty members, Scott Bauries and Stephen Clowney. Professor Clowney is a graduate of Princeton University and of Yale Law School. He will teach Trusts and Estates and Property. Professor Bauries is a graduate of the University of Florida College of Law, and received his Ph.D. in Education from the University of Florida. He will teach Civil Procedure and Education Law.

Several faculty members attended the annual Southeastern Association of Law School Conference. Jonathan Cardi, Mary J. Davis, Nicole Huberfeld, and Andrea Dennis were among the presenters. We are proud that Professor Melynda Price has won a Ford Foundation Diversity Postdoctoral Fellowship. She will spend next year at the Capital Punishment Center at the University of Texas, working on a book about the death penalty.

All of us at the College of Law helped build a Habitat for Humanity house for Rita Mays, a school employee. Rita and her family will enjoy this new house next year as a result of the efforts of Professor Sarah

Welling; Amanda DeBord, staff assistant; student coordinators Kent Barber and Hunter Mobley and our friends at Dinsmore & Shohl, who provided food and labor.

As we resume and re-energize our Dean Search this fall we will work together to better the University of Kentucky College of Law and the Commonwealth.



University of Louisville School of Law

By Jim Chen
Dean and Professor of Law

Legal learning, lifelong earning: The University of Louisville welcomes Kathy Urbach

Law students devote thousands of dollars and at least a thousand days of their lives to formal legal education. They expect – and deserve – a material return on this investment.

This reality highlights the significance of the University of Louisville's appointment of Kathy Urbach as the Law School's new assistant dean for career services and public service. Given the centrality of our graduates' professional lives beyond law school, I believe that Kathy plays one of the most important roles at the Law School.

Our graduates contribute mightily to all fields touched by law, from dispute resolution to the organization of businesses, governments, and peacemaking organizations. Enhancing the economic power of our graduates and of the Commonwealth lies at the very core of the University of Louisville's mission. As a premier metropolitan research university, we are proud to serve first generations and provide second chances. Thanks to the success of our graduates, the University of Louisville does its best to right wrongs, to ensure peace, to serve the underprivileged, and to advance justice. Our graduates do well that they might do good.

With those thoughts, I am delighted to introduce my new colleague, Kathy Urbach.

Urbach Selected to Lead Brandeis School of Law Career and Public Services

The University of Louisville's Brandeis School of Law welcomes new Assistant Dean for Career Services and Public Service, Kathy Urbach. In this role, Urbach will assist students in obtaining part-time positions while in school and full-time legal employment upon graduation; she will also direct the Law School's Samuel L. Greenebaum Public Service Program. Urbach is a Louisville native. She received her Juris Doctor from Georgia State University in 1991. She has experience as a federal government attorney and in nonprofit management, legal services, and career and public service programs at law schools in Florida. Between 1998 and 2003, Urbach was at the University of Florida's Levin College of Law. During her tenure there, she served as Assistant Director and Director of the Public Service and *Pro Bono* Programs and as Assistant Dean of Career Services.

In her own words, Kathy Urbach has commented on her new post:

"I am delighted by this opportunity. The University of Louisville's true commitment to public service cemented my decision to apply for the position.

Public service should be an integral part of the career development of every law student. In addition to the inherent obligation of our profession and the highest level of personal satisfaction, the rewards of public service include the opportunity to gain practical legal work experience.

The mission of the Office of Career Services and Public Service is to assist our students with every aspect of the job search process while ensuring that they perform the hours required by the Samuel L. Greenebaum Public Service Program. As a result, our students' resumes contain a breadth and depth of experience and professionalism that sets them apart from other job seekers. In addition, this is a very exciting time at the University of Louisville! The outstanding leadership, scholarship and prominence of its faculty and staff, together with its commitment to diversity, create an academic and professional environment that will provide nation-wide opportunities for its graduates in an expansive range of substantive and innovative areas."

KENTUCKY BAR NEWS

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING JUNE 17, 2008

The Board of Governors met on Tuesday June 17, 2008. Officers and Bar Governors in attendance were *President J. Dyche, President-Elect B. Bonar, Vice President C. English, Jr., Immediate Past President R. Ewald, Young Lawyers Section Chair R. Reed, Bar Governors 1st District – D. Myers, M. Whitlow; 2nd District – J. Harris, Jr., R. Sullivan; 3rd District – R. Hay, R. Madden; 4th District – D. Farnsley, M. O’Connell; 5th District – F. Fugazzi, Jr., D. McSwain; 6th District – M. Grubbs, T. Rouse; and 7th District – J. Rosenberg, W. Wilhoit.*

In Executive Session, the Board considered five (5) discipline default cases, involving two attorneys.

New Officers and Bar Governors taking office on July 1, 2008, in attendance were: Vice President Bruce K. Davis of Lexington, Young Lawyers Section Chair Scott D. Laufenberg of Bowling Green and Bar Governors: 1st Supreme

Susan Stokley Clary, Clerk, Court Administrator, and General Counsel of the Supreme Court of Kentucky, is now President-Elect of the National Conference of Appellate Court Clerks. Clary has served on the Board of the organization and was elected President-Elect in August. Clary will serve as President of NCACC in 2009. The National Conference of Appellate Court Clerks is an organization for clerks of state and federal courts of last resort or intermediate appellate courts. Its mission is to improve the skill and knowledge of appellate clerks, to promote effective appellate court administration and to collect and disseminate information regarding the operation of the offices of appellate court clerks.

Court District Jonathan Freed of Paducah; 3rd Supreme Court District Daniel J. Venters of Somerset; 4th Supreme Court District Douglas C. Ballantine of Louisville; 6th Supreme Court District David V. Kramer of Covington; and 7th Supreme Court District Bobby Rowe of Prestonsburg.

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

- Heard a status report from the Mentor Committee Pilot Program.
- Approved as a proposed formal ethics opinion KBA E-429, regarding the participation in for-profit group marketing. KBA E-429 will be scheduled for publication in the *Bench & Bar* magazine under the provisions of SCR 3.530.
- Young Lawyers Section Chair Ryan C. Reed reported on the efforts of the YLS over the last several years to increase YLS attendance at the KBA Annual Convention. Mr. Reed reported that an outstanding program had been put together for the young lawyers track on Thursday. The Outstanding Young Lawyer Award recipient would be recognized at the YLS luncheon scheduled on Thursday at noon as well the award of scholarships to several law students. The section will host a reception that evening and extended an invitation to the Board to attend both events. Mr. Reed reported that the section’s membership has increased from 1,150 to 1,500 over the last four years, which he attributes to a focus on membership development, including programming for young lawyers’ needs, an effective electronic list-serve, updated website, completion of a membership survey and participation in the Long Range Planning process.
- Approved staff salaries for the fiscal year beginning on July 1, 2008.
- Adopted a Resolution concerning budgetary shortfalls for the Department of Public Advocacy and encouraging Kentucky lawyers to participate in *Pro Bono* programs.

- Approved the list of the 2008 Honorary Members who reached the age of 75 or have been admitted to the practice of law for 50 years during the period beginning July 1, 2007 and ending on June 30, 2008.
- Reviewed the Judicial Nominating Commission lists to be distributed to the membership, contingent upon a final review of qualifications, with any necessary corrections/substitutions made by members of the Board for their respective districts on or before July 1, 2008.
- Approved the appointment of Harry D. Rankin of Edgewood to the Board of the Kentucky Bar Foundation for the 6th Supreme Court District to fill the remainder of the two-year term of Katharine Weber, who has resigned.
- Approved the reappointments of Norman E. Harned of Bowling Green and Jennifer A. Moore of Louisville to the ABA House of Delegates for a two year term, ending in August 2010. Ms. Moore serves as the young lawyer representative.
- Appointed Bar Governor Fred E. “Bo” Fugazzi, Jr. of Lexington as the Board of Governors representative on the Access to Justice/*Pro Bono* Project Advisory Committee.
- Approved the appointment of Tracy Wise of Lexington to a three year term on the Clients’ Security Fund Board of Trustees for a term ending in June 2011.

To KBA Members

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

November 21-22, 2008
January 16-17, 2009

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.

THE KENTUCKY BAR FOUNDATION AWARDS \$183,000 FOR LAW-RELATED GRANTS AND PROJECTS IN 2008

The Kentucky Bar Foundation in June 2008 awarded a total of \$183,000 in annual grants, which represents the largest annual grant awards in the Foundation's history. Among the recipients are 10 agencies and programs statewide that will receive funding to meet law-related needs of our Commonwealth's citizens. Included in the total awards are scholarships in the amount of \$5,000 each to Kentucky's three law schools.

GRANTS

Abraham Hall (*Art Meets Justice*), Paducah, \$15,000. Art Meets Justice is a program for at-risk teens to divert them away from serious delinquent behavior. Teens who are status offenders will be court ordered by Family Court Judge Cynthia Sanderson into the program. The court designated worker may also refer teens into Art Meets Justice before their conduct warrants court intervention. The program is an expansion of the art and drama programs offered by the McCracken County Family Court since 2004, and is renamed and expanded to incorporate attorneys' involvement with the teens. Attorneys will participate by providing instruction and discussion with teens on their legal rights and obligations as children and young adults, including both criminal and civil matters such as paternity, signing contracts, obtaining loans, and general life skills. The attorneys will also act as mentors to help the participants with career development.

Administrative Office of the Courts (*Kentucky Legal Education Opportunity Program*), Statewide, \$35,000. In the spring of 2002, then Chief Justice Lambert proposed that the Kentucky General Assembly adopt and fund the Kentucky Legal Education Opportunity (KLEO) Program to increase the number of historically under-represented students in Kentucky's public law schools. Despite a tight state budget, the KLEO program became a reality. Each year the KLEO program accepts five entering first year

law students from each of Kentucky's three public law schools: the University of Kentucky College of Law; the University of Louisville Louis D. Brandeis School of Law; and the Northern Kentucky University Salmon P. Chase College of Law. As KLEO scholars, these 15 students are each awarded a \$5,000 annual stipend to apply toward the cost of their legal education. A total stipend of \$15,000 may be awarded to the scholar during the three years of law school if the student remains eligible. To be eligible for the KLEO stipend, each new KLEO scholar must attend a two week summer residential program with the other incoming KLEO scholars that is held at the University of Kentucky College of Law. The KLEO Summer Institute was established as a pre-law preparatory program designed to prepare students from low-income, minority and disadvantaged backgrounds for the rigors of law school. During the Summer Institute, law professors introduce the KLEO scholars to the curriculum they will encounter during their first year of law school. KLEO scholars are also exposed to the special study skills and strategies they will need to succeed in law school. During the Institute, former KLEO scholars from each law school serve as mentors to the new KLEO students. The Kentucky Bar Foundation grant is helping to pay the cost of the KLEO Summer Institute.

Bowling Green/Warren County Bar Association, Inc. (*The People's Law School*), Bowling Green, \$17,000. The People's Law School is a multi-faceted approach to community legal education that includes forums, clinics and a series of informative paid television programs. It is a community education project undertaken by the Bowling Green/Warren County Bar Association, Inc. in partnership with Bowling Green/Warren County Community Education. Legal topics under consideration for the grant cycle include domestic law issues, social

security disability, home foreclosures, and repeat forums on elder law and probate matters. As done in 2007, the Bowling Green/Warren County Bar Association plans to include other community groups in its efforts. In 2007, the elder law forum was chaired and presented by Kentucky Legal Aid. The probate forum was presented by volunteer attorneys and Warren District Court Judge John B. Brown. At the probate forum, volunteers from Kentucky Legal Aid and the Western Kentucky University Paralegal Program assisted in the preparation of living wills. Community Education handled the registration for all of the forums and promoted them in their mailings and print advertising. It is the goal of the program to help people in need by directing them to existing legal resources, by educating them about the law, and by offering support and guidance as they utilize the legal system. There is the opportunity to highlight various programs that offer aid to people in need, and introduce the public to local judges and attorneys to humanize the justice system for people who may otherwise only encounter it under difficult circumstances. The bar works with other civic organizations, strengthening the ties between the legal community and the community at large.

Gardner Yates Ministries, Inc. (*Facing Reality Support Group*), Frankfort, \$5,000. The Facing Reality Support Group is a voluntary, comprehensive drug education and prevention program for at-risk teenagers (13-17 years of age) in Franklin County. The focus of the support group is to develop meaningful mentoring relationships with the teens, promote safe and healthy behavior, and provide moral and character education. The program's main goal is to reach out to teenagers and help them make positive life choices before they become involved in criminal activity. Gardner Yates Ministries, Inc. operates several drug prevention and intervention programs and has had a

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presence in Franklin County for the past four years. Gardner Yates, a local minister, developed these programs in response to the growing demographic of teenagers who are facing serious mental health, family life, safety, and drug abuse problems. It has been found that the most effective way to reach teenagers who are spiraling down a destructive path is to become directly involved in their lives. The program

promotes investing the time and energy as mentors to develop trusting relationships with the participating teenagers.

Kentucky State University (*Victims of Incarceration Choosing Empowerment*), Frankfort, \$6,000.

The Children of Incarcerated Parents Mentoring Program proposes a comprehensive and proven approach with the partnerships of an extensive coalition of

community leaders, organizations and student mentors to provide critical empowerment to 25 youths of incarcerated parents and support to their families. Kentucky State University will create a one week summit that will help youth participants from Anderson, Franklin and Scott Counties, and through activities and speakers will provide a one-of-a-kind arena for young people to engage in dialogue about the national crisis of incarceration, familiarize participants about the importance and role of the judiciary system, and receive personal contact with many of the individuals to whom justice is entrusted. Children are recruited from target partnering area schools, churches, and the local Head Start programs. Identified youth are then linked with positive adult role models who aid them with enhancing their pro-social behavior, educational, and personal development. The Kentucky Bar Foundation grant is for the purpose of conducting a one week summit for 25 children having either one or both parents incarcerated in a federal, state or local correctional facility, or on probation or parole. This will provide an opportunity to have a forum to address the impact of incarceration on their lives, listen to and receive strategies from motivational speakers and be involved in a unique opportunity to be educated about the importance of justice for all, through activities such as tours and small group meetings with judges and attorneys.

Lexington Leadership Foundation (*Amachi of Central Kentucky*), Lexington, \$15,000. The grant from the Kentucky Bar Foundation for Amachi of Central Kentucky will help support an initiative that helps children of prisoners achieve their highest potential by engaging them in mentoring relationships. Research shows that these children are at high risk for serious behavioral and emotional problems and are likely to become incarcerated themselves without intervention. Amachi is a successful and proven model for reaching out to these children. Lexington Leadership Foundation adopted the Amachi model in 2004,

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with support from the federal Mentoring Children of Prisoners Program. It plans to expand its reach by matching 120 children with mentors and recruit additional volunteers to make this possible. Central Kentucky's most isolated and at-risk children are the estimated 1,280 who have one or both parents in prison. It's a number that has more than doubled in the last three years due to the growing rate of incarceration statewide. Without effective intervention, over 70% of these children will end up in jail or prison themselves. Amachi was designed to stop the generational cycle of incarceration by addressing the specific needs of the kids who are left behind when a parent is imprisoned. Research shows that one of the best ways to help is through mentoring. Mentored youth are less likely than non-mentored youth to begin using drugs and alcohol, to initiate violence, and are more likely to have improved their school attendance and performance as well as their attitude toward peer and family relationships.

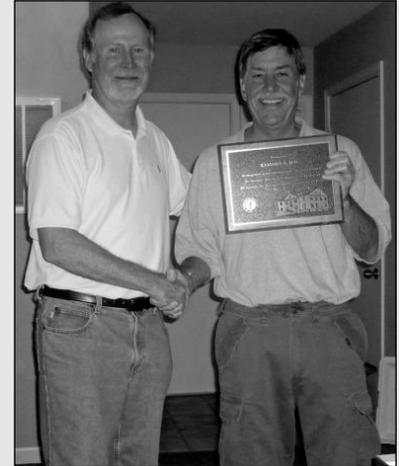
Lighthouse Recovery Services, Inc. (Sponsorship of Indigent Program Participants), Owensboro, \$20,000. In August 2001 District Judge Joe Castlen, along with several leaders of the faith community and the community at large in Owensboro, Kentucky, researched and directed the initial planning and programming for Lighthouse Recovery Services. It was decided that it was the mission of Lighthouse Recovery to restore productive lives through effective mentoring, drug testing and educational classes in an attempt to break the cycle of addiction and drug related crimes. The Lighthouse program quickly grew to the point that referrals were being received from district and circuit court judges, probation and parole, and community based services, as well as judges in several of the surrounding counties. In 2003 the program expanded to begin serving women. Almost all elements of drug courts are included within the Lighthouse program, which provides an even broader array of services. If drug free housing is not available for the participant, they may stay in one of the

three safe group homes that Lighthouse oversees. The Kentucky Bar Foundation grant will be used to pay the program costs for 25 participants for one year. Most enter direct from jail and are indigent, with little or no family support and, therefore, do not have the money to pay for the initial program and participant fees or their weekly rent until they find employment. In some cases this takes several months. The Bar Foundation grant will provide financial assistance to help defray these expenses.

Recording for the Blind & Dyslexic (Adopt-A-Text Program "Learning through Listening"), Louisville, \$6,000. The Kentucky Bar Foundation grant will be used to sponsor the recording of law textbooks through the Adopt-A-Text Program. The Kentucky Unit of Recording for the Blind & Dyslexic is one of 21 such units located in the country. The Kentucky Unit has the distinction of ranking "number one" in per booth production, and has one of the highest percentages of specialty readers enjoyed by any of the studios. There are 10 practicing or retired attorneys who volunteer weekly at the Kentucky studio to record law textbooks for students in Kentucky and around the country. Recording for the Blind & Dyslexic is a private, volunteer organization, and the world's largest resource of textbooks and academic materials in accessible formats for students who are unable to effectively read standard print because of a disability. Its mission is to create opportunities for individual success by providing and promoting the effective use of accessible educational materials.

Survive and Thrive Foundation (Survive and Thrive Summer Program), Northern Kentucky, \$20,000. Survive and Thrive is a four week summer program designed to aid children and adolescents in creating and enhancing coping skills. The youth are referred to the program because they are either suffering from mental health impairment, struggling with conflict within the home environment, or are victims of previous abuse and/or neglect. The premise of the program is to

Attorneys' Advertising Commission Recognizes Member for Dedicated Service to the AAC



Hazard attorney Randy May (right) accepted an award from Attorneys' Advertising Commission Chair Michael O'Hara in recognition of his service to the AAC.



Blaine Lewis

James T. Blaine Lewis was reappointed to serve on the Kentucky Bar Association's Attorneys' Advertising Commission, effective July 1, 2008. He is a

partner with Woodward, Hobson & Fulton, LLP in Louisville. In addition, David Latherow, a member of Williams, Hall & Latherow PSC in Ashland, Kentucky, was recently appointed to serve on the Commission, also effective July 1, 2008. The Attorneys' Advertising Commission is made up of nine Commissioners appointed by the President of the KBA with the assent of the Board of Governors. The Commission is established by the Kentucky Supreme Court to review advertisements, issue advisory opinions and conduct such proceedings as necessary to assist in the enforcement of the Rules of Professional Conduct relating to attorney advertising.

KENTUCKY BAR NEWS

provide youth with the skills to “survive and thrive” in their lives. This is accomplished through various techniques to include, but not limited to: mental health screenings; individual, group, and family counseling; recreational activities; independent living skills; mentoring from highly skilled staff; and physical activity and fitness outlets. The program also continues throughout the year with ongoing case management, school meetings, resource referrals, crisis intervention, home visits, and many other requested services. Referrals to the program are often made through the court system. The program’s goal for 2008 is to serve 40 children.

UNITE Pike (Pike County Women’s Jail Pilot Program), Eastern Kentucky, \$25,000. The UNITE Pike Coalition was formed in January 2003. As the coalition began examining the area’s substance abuse

problem, it was alarmed to find that Pike County was included in some of the most negative statistics for drug use and abuse in the nation. To help address this critical need, the Kentucky Bar Foundation grant will fund a long-term in-house substance abuse recovery program located in the Pike County Detention Center. The focus will be on women who are incarcerated more than 180 days with substance abuse issues. The program will address the needs of each female inmate on an individual basis and will provide needed education, treatment, and life skills. The paramount goal of the community program is to reduce the substance abuse relapse and re-incarceration rates of participants by providing professional group and individual counseling, individualized progress/recovery plans, case management preparation for reentry into the community, life and job skills training, including domestic violence education

and parenting skills. The program is designed to provide six months of intensive treatment and will be offered two times a year, being able to provide treatment services to approximately 40 women per year.

AWARDS AND SCHOLARSHIPS

Justice William E. McNulty, Jr., Louisville, was selected posthumously as the **2008 KBA Outstanding Judge.** His family designated **The Justice William E. McNulty, Jr. Scholarship Fund at the University of Louisville Louis D. Brandeis School of Law** to receive the **\$2,000 award** in his name from the Kentucky Bar Foundation.

The **2008 KBA Outstanding Lawyer, Margaret E. Keane, Louisville,** donated **\$1,000** of her **\$2,000 award** to the **Louis D. Brandeis American Inn of Court** and the remaining **\$1,000** to the **American Inns of Court Foundation.**

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The Louis D. Brandeis School of Law at the University of Louisville, Salmon P. Chase College of Law, and the University of Kentucky College of Law received a **Kentucky Bar Foundation Scholarship in the amount of \$5,000 each**. They will be awarded to qualified students based on criteria established by the law schools.

The Kentucky Bar Foundation remains the Commonwealth's only statewide law foundation. Since 1958, through grants which total **\$1,196,630**, the Foundation has funded law-related, community based programs benefiting citizens in urban and rural counties in every region of Kentucky. A special thanks to the members of the Kentucky Bar whose financial support and volunteer leadership have made these efforts possible.

Kentucky Bar Foundation
514 West Main Street
Frankfort, Kentucky 40601
(502) 564-3795
(800) 874-6582 (KY)

What: Red Mass
When: Wednesday, October 1, 2008, at 12:00 p.m.
Where: St. Peter Catholic Church in Lexington, 153 Barr Street (across the street from the Fayette District Courthouse)

All are invited to attend the Red Mass and a special invitation is offered to those who work in any aspect of the judicial system. The Red Mass will be presided over by Bishop Ronald Gainer. A complimentary reception will immediately follow the Red Mass in the Fayette Circuit Court Building. For additional information, contact Chuck McQueen at 859-253-2373 or abmcqueen@wspmlaw.com or Trip Redford at 859-255-6676 or cmr@kentuckybar.com.

Legally Insane by Jim Herrick



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 40601-1812

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



Grammar (Etcetera) to Go

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

Scenario one: You're in the midst of penning an important document - perhaps a brief or a motion, perhaps a client letter - and suddenly you have a question about whether you need a comma or a semicolon. Scenario two: You're in the midst of describing a situation involving a client accosted by an angry neighbor. You're seeking the perfect word to describe the neighbor's state of mind, and you're not sure *angry* is that word. Scenario three: You've just finished your document and you're proofreading it when you realize that one of your sentences isn't as strong as it could be. You identify a run-on sentence, but aren't sure how to fix it.

Whatever the scenario, you may not have a print grammar guide nearby. If that's the case, or you don't own a guide, consider using an online grammar guide.

Grammar Help Online

A large percentage of legal writers compose either on their computers, or with pen and paper at a desk near a computer. If you're already using your computer and you have Internet access, accessing a grammar Web site is easy.

What follows is an introduction to a few of the many Web sites that tackle the ins and outs of English grammar.

Grammar Bytes: <http://www.chomp-chomp.com/>. This appealing primer on the basics includes sections on grammatical terms and principles, interactive lessons, and grammar rules. Grammatical terms and principles range from abstract nouns and prepositional phrases to infinitives and relative clauses. Throughout, grammatical basics are presented in a narrative style that includes examples. Interactive exercises let you test your knowledge, if you wish, by placing the rules in common contexts. For those simply looking for the rules, HTML

and PDF versions of grammatical rules are available on the following topics: fixing comma splices and fused sentences; fixing fragments; using irregular verbs; using lay and lie; and, using commas.

Lynch Guide to Grammar and Style: <http://andromeda.rutgers.edu/~jlynch/Writing/index.html>. This site features clear and concise definitions and explanations of grammatical concepts. An online version of a print publication, it is organized in alphabetical sections. Although this scheme can be a drawback if you're not sure how a concept is categorized, the actual substance is worth a few clicks. This guide also includes internal cross-references to other relevant sections, as appropriate.

Guide to Grammar and Writing: <http://grammar.ccc.commnet.edu/grammar/>. A longtime favorite resource, this guide provides comprehensive coverage of all aspects of grammar. The bulk of the site is organized into topics related to the *word and sentence level*, the *paragraph level*, and the *essay and research paper level*. Each level uses drill-down menus that make it easier to locate exactly what you're looking for when you're unsure of the exact label for a grammatical concept or rule, or if you're unsure if you're in the correct section of the Web site. As with other grammar sites, this site also contains quizzes or lessons to help you further your understanding of rules and concepts.

Related Help Online

Not only are grammar sites available on the Web, but it's also easy to check spelling and usage online. Online dictionaries and thesauri are easy to use. A few indispensable online resources are described below.

Merriam-Webster: <http://www.merriam-webster.com/>. This site might be described as the online equivalent of a comprehensive (but not exhaustive), abridged dictionary. Entries include definitions, pronunciations, limited etymology, and synonyms or antonyms (selectively). If you search an arcane or obscure term, you will be prompted to enter the fee-based, unabridged dictionary section of the site. Don't let that prospect discourage you, however. Most users find that the free section of this site meets all of their needs. The Merriam-Webster name is also a trusted one. Like many online dictionaries, the Merriam-Webster site also includes a comprehensive thesaurus.

Dictionary.com: <http://dictionary.reference.com/> and **Thesarus.com:** <http://thesaurus.reference.com/>. These two sites provide wide-ranging dictionary and thesaurus information. They are easy to use, provide clean interfaces with a prominent search box, and link to companion services, including not only each other but an encyclopedia (available directly at <http://reference.com>). Dictionary.com, a multi-dictionary resource, draws from a variety of print and online sources. Several Webster's dictionaries, specialized dictionaries (e.g., medical, technical, and idiomatic), and the U.S. Census Bureau's *U.S. Gazetteer* are among the aggregated services that comprise the Web site. Thesaurus.com is an online version of *Roget's Thesaurus*, but in a much more accessible and user-friendly format than the traditional publication.

Here Today, Gone Tomorrow?

Any of the sites described herein are subject to the transient nature of Internet content - they can disappear with a few clicks. That fact (and the potential for inaccurate or untrustworthy content), should not deter you from putting good information to use, however. Like any information on the Web, every user needs to assess credibility, accuracy, and appropriateness and come to their own conclusions. Once you explore online grammar resources, you'll likely settle on one that meets your needs. Whichever grammar or writing resources you ultimately choose, you'll find them valuable additions to your arsenal of writing tools. ■

ON THE MOVE



Judge Lewis G. Paisley

Stoll Keenon Ogden PLLC is pleased to announce that **Judge Lewis G. Paisley** (ret.) is now Of Counsel to the firm. Prior to joining the firm, Judge Paisley served on the Fayette District Court, the Fayette Circuit Court, and the Kentucky Court of Appeals. Judge

Paisley is a graduate of Georgetown College and the University of Kentucky College of Law. He is also a graduate of the National Judicial College Civil Mediation Program and has served as a participating judge in the Fayette County Drug Court Program. Judge Paisley will practice primarily in the areas of civil litigation and appellate practice.

Stevenson & Land, an Owensboro law firm, is pleased to announce that **Matthew C. Tierney** has joined the firm as an associate. Tierney, a graduate of Centre College, earned his J.D., *cum laude*, from Thomas M. Cooley Law School in 2008.



Kathleen A. Renda

Middleton Reutlinger is pleased to announce that **Kathleen Albers Renda** has joined the Louisville firm. Her practice concentrates on commercial litigation and business law. Renda was a legal case officer for the Irish Competition Authority in

Dublin, Ireland, where she investigated alleged violations of Irish and European competition law, particularly in relation to telecommunications companies, trade unions and professional representative organizations. She received her law degree from Vanderbilt University School of Law in 2004 and earned a Masters in Law at the University of Dublin, Trinity College in 2005.



Catharine Young

Catharine (Kippy) Young has been named vice president, employment counsel for **Kindred Healthcare, Inc.** She joined the company in January 2000 and was previously senior director and litigation counsel. Young graduated from the University

of Louisville School of Law in 1990.



Bryan M. Cassis

Bryan M. Cassis is pleased to announce the opening of **The Cassis Law Office**. He will continue to focus his practice on labor and employment law and business litigation.

Cassis represents companies in state and federal court employment litigation and advises management on all human resources and employee discharge issues. He also represents plaintiffs in harassment, discrimination, and wrongful discharge lawsuits. Cassis was admitted to the Kentucky Bar in 1996 and is a former federal law clerk for the United States District Court, Western District of Kentucky.



Chris Evensen

Chris Evensen is proud to announce the opening of the **Evensen Law Office** located in Louisville at 325 West Main Street in 2000 Waterfront Plaza. The firm's phone number is (502) 719-3145.

Evensen will concentrate his practice in representing injured workers in Kentucky workers' compensation claims, as well as other personal injury claims arising from automobile accidents, premises liability, and defective products. He will also be working as Of Counsel with attorney **Will Driscoll of Driscoll & Associates**, handling long-term disability denials/ERISA claims and nursing home neglect cases.

The Lexington law firm **Casey Bailey & Maines, PLLC** is pleased to announce that **Jonathan D. Weber** has joined the firm as an associate. Weber, a 2002 graduate of the University of Cincinnati College of Law, will focus his practice on insurance defense litigation.

Jeffrey Hunt Raines, Edward J. Buechel, Joseph E. Conley, Jr., and Jennifer Raines Dusing are pleased to announce the opening of their new northern Kentucky law firm, **Raines, Buechel, Conley & Dusing, PLLC**. Raines, a 1978 graduate of NKU Chase College of Law, practiced for two years in northern Kentucky until joining the law department of Ashland Oil, now Ashland Inc., where he served for more than 27 years in various positions, including associate general counsel in charge of litigation. He also provided legal services on a variety of transactions, including acquisitions in the U.S., Canada,



Jeffrey H. Raines



Edward J. Buechel



Joseph E. Conley, Jr.



Jennifer R. Dusing

University of Kentucky College of Law, has been practicing principally in the areas of adoptions, domestic relations, and business planning and litigation, as well as providing mediation and alternative dispute resolution services. **Raines, Buechel, Conley & Dusing, PLLC** is located in Florence at 6900 Houston Road in Suite 43 and can be reached at (859) 578-6600. The firm provides legal services to individuals and businesses in both Kentucky and Ohio.



Nora F. Meldrum

Brazil, and Germany. His practice areas for the new firm will include commercial and civil litigation, mediation, and alternative dispute resolution services and contract, corporate, and business law. **Buechel**, a 1977 graduate of the University of Kentucky College of Law, is a Fellow in the American College of Trust and Estate Counsel and practices principally in the areas of estate planning, business planning, and probate. **Conley**, a 1977 graduate of the University of Kentucky College of Law, was a LSU law professor and teaches a seminar every fall at the University of Cincinnati in complex litigation. He will continue his practice in commercial, business, and construction litigation and employment law, which he has pursued for over thirty years, both as a partner with Cincinnati's Dinsmore & Shohl, and for the past twelve years with partner, Ed Buechel. **Dusing**, a 2005 graduate of the

University of Kentucky College of Law, has been practicing principally in the areas of adoptions, domestic relations, and business planning and litigation, as well as providing mediation and alternative dispute resolution services. **Raines, Buechel, Conley & Dusing, PLLC** is located in Florence at 6900 Houston Road in Suite 43 and can be reached at (859) 578-6600. The firm provides legal services to individuals and businesses in both Kentucky and Ohio.

The law firm of **Woodward, Hobson & Fulton, LLP** has announced that **Nora FitzGerald Meldrum** has joined the firm in their Louisville office. A Louisville native, Meldrum received her undergraduate degree from Georgetown

WHO, WHAT, WHEN & WHERE

University and her law degree from the University of Michigan. She is admitted to practice in Kentucky, Illinois, and the District of Columbia. Meldrum spent six years practicing employment law with firms in Washington, D.C. and Chicago, Illinois. Most recently, she served as the director of Northwestern University's Sexual Harassment Prevention Office. Meldrum represents public and private sector employers in all aspects of labor and employment law.



William P. Emrick

William P. Emrick is pleased to announce the opening of his Lexington law practice at 1092 Duval Street in Suite 220. He will engage in the private practice of law with particular emphasis on administrative, personal injury, and insurance law and will handle select family law matters. He will also be available as a legal and legislative counselor concerning issues involving the Kentucky Workers Compensation Act. Emrick may be reached by telephone (859) 309-9842. He will be reentering the practice of law after serving from 2004-2008 as the Kentucky Office of Workers' Claims Executive Director/Commissioner. Prior to that, he served as the Environmental and Public Protection Cabinet's Executive Director of Legal Services and was general counsel to the Kentucky Horse Racing Authority.

The Cincinnati law firm of **Peck, Shaffer & Williams LLP** has announced that Lewis Diaz has joined the Cincinnati office. Diaz concentrates his practice on housing matters relating to multifamily housing and single family housing. Diaz has joined Peck Shaffer from the Kentucky Housing Corporation where he served in various capacities during his six-year tenure. He received his B.A. and his M.P.A. from Eastern Kentucky University and earned his J.D. in 2006 from Salmon P. Chase College of Law. Diaz is admitted to practice in the Commonwealth of Kentucky.

Napier Gault, PLC is pleased to announce that **Karen L. Keith** has joined the firm as a member. Keith is a graduate of the University of Louisville School of Law and will continue to concentrate her practice in the areas of general insurance defense and professional negligence.

Taylor, Keller, Dunaway & Tooms, PLLC, with offices in London and Lexington, is pleased to announce that

Michael Bender has joined the firm as an associate. He will concentrate his practice in insurance and corporate defense and general business litigation. Bender graduated, *cum laude*, from Creighton University School of Law in 2007. Prior to joining the firm, Bender was a judicial law clerk for Judge David Tapp of the 28th Judicial Circuit.

Lawlor, Winston & Justice is pleased to announce that **Patricia Morris** has joined the firm as managing partner of the Louisville office. The firm concentrates in the areas of personal injury, products liability, insurance claims, professional malpractice, labor and employment disputes, and ERISA claims. The Louisville office is located at 3805 Poplar Level Road and may be reached by telephone at (502) 458-6943.



Steve Gossman



Chrisandrea Turner

Wyatt, Tarrant & Combs, LLP is pleased to announce that **Steve Gossman** has joined the firm's health care practice and that **Chrisandrea Turner** will join the firm's bankruptcy and creditors' rights practice, residing in the Lexington office. Gossman will concentrate his practice in all areas of general health care law. Prior to joining the firm, he worked in Saint Louis University School of Law's Office of the General Counsel and practiced law in Evansville, Indiana. Gossman earned his LL.M. from the Saint Louis University School of Law after receiving his J.D. from the University of Louisville and his B.B.A. from the University of Kentucky. He is admitted to practice law in Kentucky and Indiana. Turner has experience in bankruptcy litigation in state and federal courts. After graduating from the University of Kentucky College of Law where she achieved the distinction of Order of the Coif, Turner clerked in the U.S. District Court for the Eastern District of Kentucky and in the U.S. Court of Appeals for the Sixth Circuit.

The Louisville law firm of **Seiller Waterman LLC** is pleased to announce that **Michael T. Hymson** has become a member of the firm and that **Lynn M. Watson** has joined the firm as a senior associate. Hymson graduated in 1973 from the University of Louisville and received his J.D., *cum laude*, from the University of Louisville

School of Law in 1977. He concentrates his practice on estate planning, estate administration, taxation, qualified retirement plans and corporate law. Watson graduated from Alma College in 1986 and received her J.D. from the University of Kentucky in 1989. She will concentrate her practice in all aspects of civil litigation, representing both plaintiffs and defendants in a variety of matters deriving from personal injury, employment practices, and business disputes.

Children's Law Center, Inc., of Covington, recently announced the hiring of **Rebecca Ballard DiLoreto** as its litigation director. DiLoreto graduated *magna cum laude* from Amherst College earned her J.D. from the University of Kentucky College of Law. DiLoreto had a twenty-four year career with the Department of Public Advocacy (DPA) in indigent defense. The Juvenile Code was implemented in 1986, and she wrote the first Juvenile Law Manual for the DPA. DiLoreto's career has spanned appellate, trial and post conviction work. She assisted in two assessments of the quality of juvenile representation in Kentucky and has also participated in ABA juvenile indigent defense assessments in eight other states.



Michele L. Wessel

Graydon Head & Ritchey LLP is pleased to announce that associate **Michele L. Wessel** has been admitted to practice law in the Commonwealth of Kentucky. She earned her J.D. in 2007 from the University of Kentucky College of Law. Wessel received her B.A. from Westminster College in 1997 and obtained her M.A. from Eastern Kentucky University in 2003. Wessel's practice focuses in the area of commercial litigation.



Ann E. D'Ambruoso

The Lexington law firm of **Davidson & Oeltgen, PLLC** announces that **Ann E. D'Ambruoso** has joined the firm as an associate. D'Ambruoso received her B.A. from Transylvania University in 2001 and earned her J.D. from the University of Kentucky College of Law in 2007.

Zachary M. Kafoglis has joined **Rendigs, Fry, Kiely & Dennis, LLP**. Kafoglis has 21 years of litigation experience, with his primary focus on the areas of

WHO, WHAT, WHEN & WHERE



Zachary M. Kafoglis

domestic relations, criminal defense, personal injury, and alternative dispute resolution, and is a certified family law mediator. He is admitted to practice in Kentucky and also before the U.S. Court of Appeals for the Sixth Circuit.



Wendell R. Clark III

The Frankfort law firm of **Christopher M. Hill & Associates** announces that **Wendell R. Clark III** has joined the firm as an associate attorney. Clark received his B.A. from Berea College in 1996 and earned his J.D. from the University of Akron School of Law in 2007.

Admitted to the Kentucky Bar in 2008, he is licensed to practice in Kentucky. His areas of practice are foreclosures, creditors' rights, civil litigation, evictions, and bankruptcy.



Tim Bratcher

Tim Bratcher was recently named a partner in Jones Day's Atlanta office. Bratcher received his B.A., *cum laude*, from the University of Louisville in 1993 and earned his J.D. with honors in 1996 from the University of Louisville School of Law. He began

his law practice in Louisville at Stites & Harbison. At Jones Day, Bratcher is a member of the banking and finance practice.

David H. Cooper recently accepted the position as senior corporate attorney with **E.ON U.S., LLC**. As the attorney assigned to the power generation group, his responsibilities include the negotiation and drafting of procurement and/or construction/engineering contracts. He was previously a senior partner at Goldberg Simpson, LLC and a member of Roth & Cooper, PLLC where he focused his practice in general corporate/transactional matters and trademark law.

IN THE NEWS

David V. Kramer, a partner with the law firm Deters, Benzinger & LaVelle, PSC in Crestview Hills, was recently appointed by Governor Steve Beshear to serve as a Special Justice of the Kentucky Supreme Court in the case of *Cape Publications, Inc. d/b/a The Courier-Journal v. The University*



David V. Kramer

of Louisville Foundation, Inc. Kramer has been with DBL since 1986 and practices primarily in the areas of health care law and medical malpractice defense.



Todd V. McMurtry

Todd V. McMurtry, who is also a partner in the law firm of Deters, Benzinger & LaVelle, was recently sworn in as a Fort Wright, Kentucky city council member. In his law practice, McMurtry handles complex litigation involving business disputes, land use, real estate, construction, and personal injury in Ohio and Kentucky courts.

Charles H. Pangburn III, a member of the northern Kentucky firm of Hemmer Pangburn DeFrank PLLC, retired as a colonel in the U.S. Marine Corps Reserve after 30 years of active and reserve service on June 6, 2008 at the U.S. Naval Academy in Annapolis, Maryland. His career included over 15 years of active duty, including a tour in Iraq in 2004. He was awarded the Legion of Merit on the occasion of his retirement.



David J. Clement

Stoll Keenon Ogden PLLC is pleased to announce that member, **David J. Clement**, has been chosen to participate in the 2008 Louisville Bar Association Leadership Academy. The Academy focuses on practical, professional and ethical

issues facing lawyers in Greater Louisville. Clement concentrates his practice in the area of intellectual property. He is a colonel in the United States Marine Corps Reserve.



LaJuana S. Wilcher

LaJuana S. Wilcher, a partner in the Bowling Green law firm of English, Lucas, Priest & Owsley, LLP, was a featured speaker at the National Association of Clean Water Agencies' Summer Conference held in Anchorage, Alaska on July 16, 2008. She discussed approaches to amend the federal Clean Water Act. Wilcher, who focuses her

practice on environmental law, served as head of the U.S. Environmental Protection Agency's Office of Water in Washington, D.C. (1989-1993) and as Kentucky's Environmental and Public Protection Cabinet Secretary (2003-2006).



Carolyn M. Brown

Carolyn M. Brown, a member in the Lexington office of Greenebaum Doll & McDonald PLLC, has been invited to join the American College of Environmental Lawyers and will be inducted into the organization this month. Brown is the chair of Greenebaum's regulatory and administrative practice group and is also chair of the group's environmental and natural resources team.



Mary P. Burns

Mary P. Burns, trust counsel at Johnson Trust Company, was recently elected to the Cincinnati Estate Planning Council Board of Trustees. Burns is also currently president of the Estate Planning Council of Northern Kentucky.

Hunton & Williams LLP has announced that **Amy Alcoke Quackenboss**, counsel in the firm's Atlanta, Georgia office, has been elected to serve as president-elect of the Georgia Association for Women



Joy D. Denton

Lawyers. Quackenboss is a member of Hunton & Williams' bankruptcy, restructuring, and creditors' rights team.



Timothy B. Theissen

The American Academy of Matrimonial Lawyers is pleased to announce that **Joy D. Denton**, with Harned Bachert & Denton, LLP of Bowling Green, and **Timothy B. Theissen**, with Strauss & Troy, LPA of Covington, have been elected Fellows of the American Academy of Matrimonial Lawyers.

Betty Moore Sandler, of Nichols Zauzig Sandler, PC and currently president of the Virginia Chapter of the American Academy of Matrimonial

WHO, WHAT, WHEN & WHERE



Betty Moore
Sandler

Lawyers, was recently appointed to Substitute Judge for Arlington County JDR. Sandler limits her practice to domestic relations and maintains her primary office in Woodbridge, Virginia.



Robert J. Caldwell

The American Bar Association has appointed **Robert J. Caldwell** of the Las Vegas law firm of Kolesar & Leatham as chair-elect of the Tort Trial and Insurance Practice Section's Business Litigation Committee. Caldwell's term as chair officially

began in August. He is a member of the State Bar of Nevada and the Kentucky Bar Association.

Christopher H. Morris and **Gail Nall** graduated from the Kentucky Justice Association's first Trial College on May 21 at the University of Kentucky College of Law. The Trial College is an intense five-day instructional course. Morris and Nall practice with the law firm of Hargadon, Lenihan & Herrington.

Burton Milward has announced that his new book entitled *Louisville's Legendary Lawyer: Frank E. Haddad, Jr.* (448 pp.) is

available for purchase at authorhouse.com/bookstore.



Richard L.
Robinson

Graydon Head & Ritchey LLP's **Richard L. Robinson** and his political thriller, *The Maximum Contribution*, was named a finalist in the best political fiction category by the Indie Book Awards. **Kevin L. Murphy**, who also practices at Graydon Head & Ritchey, has been reappointed to serve a second term on the Children's Law Center Board of Directors. Murphy has now served on the Children's Law Center Board for 12 years.



Kevin L. Murphy

Thomas E. Rutledge, a member of Stoll Keenon Ogden PLLC, co-chaired a symposium entitled *Limited Liability Companies at 20* which was held on June 13, 2008 at Suffolk University Law School. He presented the paper titled "External Entities and Internal Aggregates: A Deconstructionist's Conundrum."

Prodigal Ministries will present **Robert G. Lawson** with the 2008 Judge Charles Mengle Allen Advocate for Fair Criminal Justice Award on October 7, 2008. Lawson, a

professor and former Dean at the University of Kentucky College of Law, has written extensively about criminal justice throughout his career. In 2004, he published a study analyzing the reasons for the high growth in Kentucky's prison population. He also visited nine jails for his 2006 study, *Turning Jails into Prison – Collateral Damage from Kentucky's War on Crime*. Prodigal Ministries, a non-denominational Christian organization, implements its mission of reducing recidivism by providing mentoring at three residential facilities for ex-inmates.

RELOCATIONS



Nichole T.
Compton

Nichole T. Compton is proud to announce the new location of **Compton Law Office, PLLC** in Louisville at 455 South 4th Street in Suite 380 of the Hertz-Starks Building. The Compton Law Office, PLLC primarily handles family law cases, estate planning, minor criminal cases, and immigration. The firm also provides comprehensive mediation cases.

The Owensboro law firm of **Stevenson & Land** is pleased to announce that it has relocated its offices in Owensboro to 100 West Third Street in Suite 302. The firm's contact information, including its telephone and facsimile numbers, remains the same.

Notice from the Mediation Division of the Administrative Office of the Courts

The Mediation Division of the Administrative Office of the Courts would like to encourage qualified mediators to submit an application to our office for approval to be placed on the Court of Justice Mediator Roster. The AMENDMENT TO THE RULES OF ADMINISTRATIVE PROCEDURE AP PART XII MEDIATION GUIDELINES FOR COURT OF JUSTICE MEDIATORS suggests minimum standards for training, experience, education, and ethical conduct for mediators practicing in courts of the Commonwealth of Kentucky. They are intended to promote public confidence in the mediation process. Judges and the public are encouraged to refer to the Administrative Office of the Court's (AOC) website (<http://courts.ky.gov/stateprograms/mediation/>) for the roster of mediators who voluntarily agree to comply with these Guidelines.

The AOC Mediation Division is confident that there are many qualified mediators practicing in Kentucky who are not currently on the Roster. We would appreciate your help in getting the word out to mediators in your area. The link to the Roster application form is below. If you have questions, please do not hesitate to contact the mediation division at: adr@kycourts.net or by calling: 502/573-2350 ext. 2110. Application form: <http://courts.ky.gov/stateprograms/mediation/mediationforms.htm>

Thank you for your assistance in this matter.
Carol Paisley, AOC Mediation Division Manager

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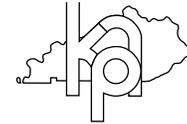
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- ◆ Free unlimited use for all KBA members
- ◆ At your fingertips and simple to use

Login Instructions for KBA members:

- Go to the Kentucky Bar Association website
<http://www.kybar.org>
- Click on the "Login" button on the far left of the menu bar
- Enter your KBA Attorney Number in the first field (Username)
- Enter your Password in the second field
(Your password will either be your date of birth in the form 01/01/19xx or the password you have assigned yourself.)
- Click on the "Log In" button
After you have logged in, you will notice that the button to the far left on the menu bar now says "Logout" and your name will be on the menu bar to the right
- Casemaker® is the first item on the "Resources" menu
You will be asked to read and agree to the End User License Agreement
From this screen, you will also have access to the Casemaker® user manual

If you need assistance with logging on to Casemaker®, contact the Kentucky Bar Association at (502) 564-3795 or send an email to cjones@kybar.org.

Note: you must be a KBA Member and you must log in before you will be able to access Casemaker®.

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2009

K B A

Annual Convention

June 10-12, 2009

Covington, Kentucky

