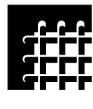


Kentucky Bar Association New Lawyer Program



January 18-19, 2017
Lexington Convention Center
Lexington, Kentucky

Presented by:
The Kentucky Bar Association
CLE Commission and Young Lawyers Division

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Commission**

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Moore, Editors**

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Editor’s Note: The materials included in this New Lawyer Program seminar book are intended to provide current and accurate information about the subject matter covered. The program materials were compiled for you by volunteer authors and from national legal publications. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of the New Lawyer Program disclaim liability therefor. Attorneys using these materials or information otherwise conveyed during the program, in dealing with a specific legal matter, have a duty to research original and current sources of authority.

The Kentucky Bar Association would like to give special thanks to the volunteer authors who contributed to this program handbook.

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2017 New Lawyer Program

January 18-19, 2017 • Lexington Convention Center • Lexington, KY

PROGRAM SCHEDULE

Day One - Wednesday, January 18

7:30 a.m. – 8:30 a.m.	Registration/Check In Required	
8:30 a.m. – 8:45 a.m.	Program Introduction and Welcome from the KBA President	0.25 CLE Credit
8:45 a.m. – 9:45 a.m.	Professional Responsibility for the Young Lawyer: If I Knew Then, What I Know Now...	1.0 CLE Credit
9:45 a.m. – 10:45 a.m.	The Attorney's Duty to the Court	1.0 Ethics Credit
10:45 a.m. – 11:00 a.m.	Break	
11:00 a.m. – 12:00 p.m.	eFiling Certification Training	1.0 CLE Credit
12:00 p.m. – 1:00 p.m.	<i>Box Lunch (Provided by KY Bar Association)</i> High-Functioning Impairment: Identification, Ethical Duties and Solutions	0.50 Ethics Credit
1:00 p.m. – 2:00 p.m.	You've Just Received a Bar Complaint: Now What?	1.0 Ethics Credit
2:00 p.m. – 3:00 p.m.	Ethics of Social Media	1.0 Ethics Credit
3:00 p.m. – 3:15 p.m.	Break	
3:15 p.m. – 4:00 p.m.	Kentucky Bar Association: What We Do for You – CLE, Membership, IOLTA	0.75 CLE Credit
4:00 p.m. – 5:00 p.m.	LMICK: What is Malpractice Insurance and How Does It Work?	1.0 CLE Credit
5:00 p.m.	Adjourn	

Day Two – Thursday, January 19

8:00 a.m. – 8:30 a.m. Registration/Check In Required

TRACK ONE – A.M.

8:30 a.m. – 9:30 a.m. Basic Courtroom Principles: Acting for Lawyers 1.0 CLE Credit

9:40 a.m. – 10:40 a.m. Opening a Law Office: Hanging Up a Shingle and Rainmaking 1.0 CLE Credit

10:50 a.m. – 11:50 a.m. Wills and Probate 1.0 CLE Credit

TRACK TWO – A.M.

8:30 a.m. – 9:30 a.m. Consumer Law 1.0 CLE Credit

9:40 a.m. – 10:40 a.m. Domestic Relations Law 1.0 CLE Credit

10:50 a.m. – 11:50 a.m. Mediation: Nuts and Bolts 1.0 CLE Credit

11:50 a.m. – 1:00 p.m. *Lunch (On Your Own)*

TRACK ONE – P.M.

1:00 p.m. – 2:00 p.m. How to Handle a Personal Injury Case 1.0 CLE Credit

2:10 p.m. – 3:10 p.m. Practice of a Civil Case from A to Z 1.0 CLE Credit

3:20 p.m. – 4:20 p.m. Depositions: Ethical and Practical Issues Based on the
Kentucky Rules of Professional Conduct 1.0 Ethics Credit

TRACK TWO – P.M.

1:00 p.m. – 2:00 p.m. Business Law Basics 1.0 CLE Credit

2:10 p.m. – 3:10 p.m. Defending DUI 1.0 CLE Credit

3:20 p.m. – 4:20 p.m. District Court 101: Basics and Proceedings 1.0 CLE Credit

4:20 p.m. Adjourn

PROGRAM INTRODUCTION: WHY AM I HERE, ANYWAY?

For most of the history of the legal profession in the United States, once a lawyer was admitted to practice no further professional education or re-qualification was required. Over the last twenty-five years there has been the growing recognition that this standard for lawyer competence, if ever valid, is not now. Lawyers must maintain currency in the law, stay abreast of new developments in the delivery of legal service, and sustain a keen sensitivity to professional responsibility issues to remain qualified to serve the public.

The first step in meeting the task of maintaining lawyer competence over the course of a career in Kentucky was the establishment of an annual continuing legal education requirement. In Kentucky, lawyers must earn each year 12.0 hours of CLE, two of which must be in the area of lawyer professional responsibility and ethics.

The next step was the recognition that newly admitted lawyers enter the profession with some significant gaps in their understanding of how law is practiced. This concern was highlighted in an American Bar Association study known as the [MacCrate Report](#). One of the report's major conclusions was that new lawyers often have inadequate practice skills and an incomplete understanding of professional values. The report described fundamental lawyering skills as:

1. Problem Solving
2. Legal Analysis and Reasoning
3. Legal Research
4. Factual Investigation
5. Communication
6. Counseling
7. Negotiation
8. Litigation and ADR Procedures
9. Organization & Management of Legal Work
10. Recognizing & Resolving Ethical Dilemmas

The fundamental values of the profession were determined to be:

1. Provision of Competent Representation
2. Striving to Promote Justice, Fairness, and Morality
3. Striving to Improve the Profession
4. Professional Self-Development

In responding to this perceived need of helping new lawyers get off to the best possible start, the Kentucky Supreme Court mandated that all lawyers within the first year of practice attend the KBA's New Lawyer Program. This two day program is designed to address some, but not all, of the areas identified by the [MacCrate Report](#) . . . to assist in filling the small, but critical, gap between law school education and the acquisition of meaningful practice experience. The program emphasizes your new role as "an officer of the court," the relationships involved in fulfilling that role, and contains as much information as a two day program will allow on "getting started."

I. KENTUCKY BAR ASSOCIATION SERVICES

A. [Casemaker](#)

The KBA website is a conduit to [Casemaker](#), one of the fastest growing online legal research services on the internet today. This research tool is offered to all KBA members through the website free of charge. Casemaker includes both state and federal research libraries.

The federal search library contains:

- United States Supreme Court, Circuit, District and Bankruptcy Court opinions
- Federal Court Rules
- United States Code
- Code of Federal Regulations
- USC Bankruptcy Reform Act
- Constitution
- Internal Revenue Service

The Kentucky search library contains:

- Administrative Regulations
- Attorney General Opinions
- Case Law
- Constitution
- Court Rules
- Federal Court Rules
- Session Laws
- Statutes
- Workers' Compensation Decisions

All state search libraries are now available and contain:

- State Case Law
- State Constitution
- State Statutes

Depending on the individual state's agreement with Casemaker, many state libraries include: local federal rules, reports, links to court forms, jury instructions, "unreported" opinions, bankruptcy decisions, ethics opinions, workers' compensation opinions, environmental decisions, Attorney General Opinions, court rules, and other legal information as specified by the individual bar's requests.

In January 2012, Casemaker released the newest version of its legal research software with several enhancements and personal features. It features many advanced, high-definition search tools and additional tools to expand your Casemaker service with add-on products. Included in Casemaker is a vast federal library, access to all state libraries (including the District of Columbia), multistate search, and State and Administrative Codes, all in an aggregated search. The new organization features allow you to create individual folders to store your research, write, post and save notes directly to any documents as you review them, and every search is saved in your history which is accessible at any time. The add-on products now available are CaseCheck+, which lets you know immediately whether or not your case is good law; CiteCheck, where you can upload your brief or document to create a report showing the citations and whether or not they have negative treatment; and CasemakerDigest, which keeps you up-to-date with the latest cases in your practice area with daily case summaries.

For those just getting started or interested in the latest updates, Casemaker offers both recorded demos and live webinar training. The recorded videos are in various formats for your convenience.

Casemaker and add-on products are available to KBA members at no extra cost.

The latest User Guide for Casemaker can be found at <http://www.kybar.org/?CasemakerInfo>.

B. [Member Services](#)

Visit the KBA's member services [webpage](#) for special savings and benefits from a growing list of products and services! The volunteers of the Member Services Committee – working in cooperation with the KBA Board of Governors – have worked diligently to provide additional offerings to KBA members including:

- GEICO Auto Insurance
- Website development and design services from Amicus Creative and ESQSites
- Credit card processing through LawPay
- Online payroll and accounting services through SurePayroll
- An association discount for Guardian Life Insurance Company's non-cancellable disability coverage (administered by National Insurance Agency, Inc.)

- A Leeward Group personal umbrella policy for a wide range of personal liability exposures (administered by National Insurance Agency, Inc.)
- Term life insurance coverage offered through National Insurance Agency

Visit <http://www.kybar.org/?memberservices> today and learn more about these and other services offered by Lawyers Mutual Insurance Company of Kentucky (LMICK); United Parcel Service (UPS); AVIS and Budget car rentals; the Kentucky Legal Directory; National Insurance Agency, Inc.; and the use of meeting rooms at the Kentucky Bar Center.

Check back regularly for updated services by selecting the Member Services link under the Members tab of the KBA homepage. For more information, contact the Membership Department by email at member-services@kybar.org.

C. Help with Ethical Dilemmas

Facing a tricky situation in a case? Not sure what to do, and worried you'll be penalized if you choose the wrong course of action? The KBA Ethics Committee is here to help you.

1. Ethics Hotline and Informal Advisory Ethics Opinions ([SCR 3.530](#)).

Any member of the KBA who is in doubt about the propriety of a professional act may request an informal advisory opinion from a member of the Ethics Hotline Committee assigned to the requestor's Supreme Court District. A list of Ethics Hotline Committee members is included in the Reference Section of these materials.

The request should be in writing and fairly, accurately, and completely state the facts and circumstances relating to the matter. In an extreme emergency, the request may be by telephone, but the requestor is benefited by making a written request and obtaining a written reply, which may be raised as a bar to a disciplinary grievance subsequently filed concerning conduct in conformity with the advisory opinion rendered by the Ethics Hotline Committee member.

An attorney who is in doubt about any act or course of conduct by any person or entity which may constitute the unauthorized practice of law as defined by [SCR 3.020](#) may request a formal or informal advisory opinion from the Ethics Hotline Committee of the KBA, or the Unauthorized Practice of Law Committee.

2. Formal Ethics Opinions.

The KBA Ethics Committee may occasionally consider requests for formal ethics opinions on subjects of interest and importance to the bar. The chair of the Ethics Committee shall cause the issuance of a formal advisory ethics opinion, which is reviewed by the Board of Governors of the KBA.

If adopted by the Board of Governors, a formal advisory ethics opinion will be published in the Kentucky Bench & Bar next issued after adoption.

Any person or entity aggrieved or affected by a formal advisory ethics opinion may request review of the opinion by the Kentucky Supreme Court by filing a motion for review with the Clerk of the Supreme Court, with notice to the KBA Executive Director, within thirty days after publication of the opinion, or a synopsis of it, in the Bench & Bar, and payment of the filing fee required by [CR 76.42\(1\)](#).

D. [Kentucky Law Update](#)

The Kentucky Law Update program was established by the Kentucky Supreme Court thirty years ago as a service to KBA members. This two-day program series is supported by a portion of your annual dues and is offered at no additional charge to attendees. The Kentucky Law Update is presented each fall and offers KBA members the opportunity to obtain the annual CLE requirement close to home and free of charge. Strategically located, the Kentucky Law Update series is presented in the following locations representing each of the seven Supreme Court districts: Lexington, London, Russell/Ashland, Prestonsburg/Pikeville, Owensboro, Bowling Green, Paducah/Gilbertsville, Covington, and Louisville. The program is designed to educate and inform the lawyers of Kentucky about changes in the law and rules of practice which impact the daily practice of law, regardless of level of experience. Pre-registration is recommended to guarantee availability of space and program materials. Full program brochures and registration materials are sent via mail and email to KBA members each summer.

E. [KRPC 7](#) Information about Legal Services

All attorneys should have a working knowledge of the Kentucky Rules of Professional Conduct found in [Supreme Court Rule 3.130](#). If an attorney engages in advertising or marketing the availability of his or her legal services to the public, the attorney should be thoroughly familiar with [KRPC 7](#). Since the decision of the United States Supreme Court in [Bates v. State Bar of Arizona](#), 433 U.S. 350 (1977), the marketing of legal services has continued to be one of the hot topics of discussion in the legal profession. In the [Bates](#) case, the U.S. Supreme Court struck down a ban on price advertising for what were deemed to be "routine" legal services. [Bates](#) and successive lawyer advertising decisions have

established that such advertising and marketing is commercial speech and therefore receives some First Amendment protection.

[Kentucky Rule of Professional Conduct 7](#) is an effort to regulate lawyer advertising within the bounds of the U.S. Supreme Court decisions. Members of the Bar who advertise should be aware of the broad scope of [KRPC 7](#) and the expansive definition of advertising. Subject to certain listed exceptions, [KRPC 7.01\(1\)](#) defines "advertise" or "advertisement" as furnishing any written, printed or broadcast information or any other communication containing an attorney's name or other identifying information.

A nine-member Attorneys' Advertising Commission is empowered to regulate attorney advertising. Commission members are appointed for terms of three years by the KBA president and approved by the Board of Governors.

If an attorney markets his/her practice, [KRPC 7.01](#) mentioned above should first be consulted to determine if the proposed marketing fits within the definition of advertising. The Rules were recently amended and the submission of all advertisements is no longer required. Advisory Opinions can still be requested regarding an advertisement under [KRPC 7.03](#) for a determination from the AAC regarding an advertisement's compliance. Information on Attorney Advertising can be found under the Discipline section at the KBA homepage www.kybar.org.

Direct contact with potential clients either in person or by live telephone is still strictly prohibited in Kentucky under [KRPC 4.5 \(former Rule 7.09\)](#).

The best procedure on lawyer advertising matters is to make an inquiry to the Attorneys' Advertising Commission if you have questions prior to advertising or marketing your practice.

REMINDER – The lawyer advertising rules are part of the [Rules of Professional Conduct](#). Members of the Bar are subject to these rules and should not risk violation by entrusting compliance to an advertising agent. Advertising correspondence and inquiries from the KBA Executive Director or the KBA Advertising Paralegal will be directed to the lawyer or law firm employee and not an advertising agency.

F. Alternative Dispute Resolution

Supreme Court Rules administered by the KBA offer several options and plans to assist and encourage members to resolve disputes between attorneys and between attorneys and their clients. There is no fee required to initiate any of these alternative dispute resolution procedures. Each of the following dispute resolution procedures is voluntary; the Association strongly encourages, but cannot compel, the use of the methods in lieu of judicial action or the disciplinary process.

The public perception of the entire profession will undoubtedly be enhanced if lawyers participate freely and frequently in alternative dispute resolution programs. You should consider mediation or arbitration before judicial action in the following circumstances:

1. Legal fee arbitration.
 - a. [SCR 3.810](#), (adopted July 1, 1984) provides that members in good standing with the KBA may submit to binding arbitration any dispute, disagreement or controversy between the attorney and a client which concerns the amount of fee due to the attorney for particular legal services rendered.
 - b. Disputes between attorneys (or law firms) concerning the amount due each for particular legal services rendered may also be submitted to binding arbitration pursuant to [SCR 3.810](#).
 - c. The parties to a fee arbitration procedure must certify in writing that a good faith effort has been made by them to resolve the dispute prior to submitting it to arbitration.
 - d. Where the dispute is already the subject of a pending law suit, the parties must follow the procedures set out in [KRS 417.060](#).
 - e. A petition for fee arbitration is reviewed by the KBA Executive Director who shall determine initially whether the arbitration plan applies. If the Executive Director accepts jurisdiction, the matter proceeds. If jurisdiction is denied, the decision of the Executive Director is final and the parties will be advised.
 - f. The procedure for arbitration is determined by the amount in controversy between the parties. The minimum amount in dispute must be greater than \$1,500. The "amount in controversy" means the difference between the sum of money an attorney proposes to charge for legal services and the sum the client offers, or is willing to pay, for the services.
 - i. Where the amount in controversy is \$10,000 or less, a sole arbitrator, who shall be a practicing attorney, is appointed by the KBA Executive Director to hear and decide the dispute.
 - ii. Where the amount in controversy exceeds \$10,000, a panel of three arbitrators shall be appointed. Two of the panel members shall be practicing attorneys appointed by the KBA Executive Director. The third

panel member shall be a lay person appointed by the Chief Judge or presiding judge of the Circuit Court of the county where the attorney/party maintains a principal law office.

- g. The KBA Consumer Assistance Manager serves as the administrator for fee arbitration procedures. All communication between the parties and member(s) of the Panel on the subject matter of the controversy shall be made through, and filed in, the KBA office.
- h. An award rendered by a sole arbitrator or a panel shall be enforced pursuant to the provisions of [KRS 417.180](#). Records of the proceedings are not open to the public.

2. Legal negligence arbitration.

[SCR 3.800](#) provides a procedure to arbitrate claims of legal negligence which do not exceed \$50,000. Arbitration is voluntary; the attorney must agree to submit the claim to binding arbitration. If the dispute is already the subject of a pending suit, arbitration is not appropriate unless the parties follow the procedures of [KRS 417.060](#). The parties must certify in writing their good faith prior attempts to settle the dispute.

- a. The parties (or one of them) may petition for legal negligence arbitration by filing a petition to be reviewed by the KBA Executive Director. If the Executive Director determines that [SCR 3.800](#) applies to the controversy, and the attorney agrees to arbitrate, a sole arbitrator or panel will be appointed. If the Executive Director declines to accept jurisdiction (by determining that the plan does not apply to the dispute), that decision is final. The minimum amount in controversy must exceed \$1,500.
- b. Where the amount of the claim is \$10,000 or less, a sole arbitrator, who shall be a practicing attorney, will be appointed to hear the dispute.
- c. Where the amount of the claim exceeds \$10,000, a panel of three practicing attorneys shall be appointed to hear the claim.
- d. The KBA Consumer Assistance Manager serves as the record-keeper and provides administrative services to participants in a legal negligence arbitration procedure. Except for communication during a hearing, all oral or written communications between the parties and the panel members on the subject of the arbitration shall be directed to the Director for transmittal.

- e. The solo arbitrator or panel shall convene and conduct a hearing and hear sworn testimony concerning the claim. Any award rendered by the solo arbitrator or panel can be enforced under the provisions of [KRS 417.180](#). With the exception of the award itself, records of the proceedings are not open to the public.
3. Public services: the Clients' Security Fund, [SCR 3.820](#).
- a. The Kentucky Supreme Court has established a Clients' Security Fund for the purpose of providing indemnification to clients who have suffered monetary loss because of the dishonest or fraudulent acts of a member of the KBA.
 - b. The purpose of the fund is "to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this State occurring in the course or arising out of a lawyer-client relationship between the lawyer and the claimant." The Court has opined that "[e]very lawyer has an obligation to the public to participate in the collective effort of the bar to reimburse persons who have lost money or property as a result of the dishonest conduct of another lawyer." Dishonesty and fraud denote wrongful conduct in the nature of theft, embezzlement and conversion of money, property or other things of value.
 - c. The fund, established in 1971, has been funded by allocation of a portion of the dues payments of KBA members. The proceeds are invested in interest bearing instruments, and are a trust administered by a Board of Trustees, under the supervision of the Kentucky Supreme Court.
 - i. The Court may assess fees or allocate such funds as are from time to time necessary and proper for the payment of claims and the costs of administration of the Fund.
 - ii. A lawyer's failure to pay any fee assessed for the Clients' Security Fund shall be cause for suspension from practice until payment is made.
 - iii. A lawyer whose dishonest conduct results in reimbursement to a claimant shall make restitution to the Fund in the amount of the claim plus interest and costs incurred in processing the claim. A lawyer's failure to make satisfactory arrangements for restitution shall be cause for suspension,

disbarment or denial of any application for reinstatement to the practice of law.

- d. Clients' Security Fund Trustees are appointed for three-year terms by the KBA Board of Governors. The Board of Trustees consists of five members; three are lawyers and two are non-lawyers. The trustees serve without compensation, elect a chair and meet as often as necessary to consider claims and conduct the business of the fund.
- e. Information concerning the Clients' Security Fund and claim forms may be obtained from the Office of Bar Counsel, which provides administrative support to the trustees and investigates claims.
- f. Eligible claims are described in [SCR 3.820\(10\)](#), and must be filed no later than two years after the claimant knew or should have known of the dishonesty or fraud by the lawyer.
- g. The KBA Board of Governors, with approval of the Supreme Court, may institute caps on claims. The current limits are \$50,000 per claim and \$150,000 aggregate payment per lawyer.
- h. The Trustees may have access to records of pending or closed disciplinary proceedings involving the same attorney, or conduct. However, a finding by the trustees that dishonest conduct has occurred which justifies reimbursement does not constitute a finding of dishonesty for purposes of imposing professional discipline.
- i. Payment of a claim, in whole or in part, is a "matter of grace," as no person shall have the legal right to reimbursement from the fund as a claimant, third party beneficiary or otherwise. Claimants may be required to exhaust other remedies prior to reimbursement by the Fund.
- j. The Trustees will not entertain a claim of consequential damages arising from the wrongful act of an attorney; reimbursement is limited to actual pecuniary losses.
- k. Clients' Security Fund proceedings and records are confidential until reimbursement is made. After payment of a claim, however, the trustees may publicize the nature of the claim, the amount of payment and the name of the lawyer. The identity of claimants is not disclosed absent specific permission. Law enforcement agencies, disciplinary authorities and other entities may be granted

access to relevant information gathered in the proceedings.

G. Unauthorized Practice Referrals

An attorney who is in doubt about any act or course of conduct by any person or entity which may constitute the unauthorized practice of law as inferred from [SCR 3.020](#) may request a formal or informal advisory opinion from the Ethics Hotline Committee of the KBA or the Unauthorized Practice of Law Committee.

1. Formal unauthorized practice opinions may be issued by the Unauthorized Practice of Law Committee and adopted by the Board of Governors and published in the same manner as formal ethics opinions.
2. Formal unauthorized practice of law opinions may be appealed by any person or entity aggrieved by filing a motion with the clerk of the Supreme Court for review in the manner described above for review of formal ethics opinions.
3. The KBA Executive Director is authorized by [SCR 3.460](#) to initiate an investigation into any report of unauthorized practice of law. Any person who engages in the practice of law without a license to do so may be subject to an injunction or a finding of contempt by the Supreme Court.
4. The unauthorized practice of law is also a misdemeanor criminal offense in violation of [KRS 524.130](#) and can be the subject of a criminal complaint issued by the county attorney of the county where it occurs.

H. Continuing Legal Education [SCR 3.600](#) to [SCR 3.695](#)

The Supreme Court Order establishing mandatory Continuing Legal Education requirements in Kentucky was issued on June 28, 1984. This Order established the CLE Commission as Kentucky's regulatory agency as well as a provider of high quality CLE programming for Kentucky Bar Association members. The CLE Commission continues to strive for advancement and improvement in CLE programming, while encouraging and promoting the offering of high quality CLE in Kentucky.

The CLE Commission consists of seven attorneys, one appointed by the Supreme Court from each appellate district of the state. CLE Commission terms are three years in length and Commission members may serve two consecutive terms. The Commission is responsible, under the direction of the Kentucky Supreme Court and the KBA Board of Governors, for the administration and regulation of the CLE program for members of the KBA.

II. COURTNET 2.0

The Administrative Office of the Courts provides Kentucky attorneys with a service called CourtNet 2.0, which offers real-time, online access to Kentucky civil and criminal cases.

In addition to being intuitive and easy to use, CourtNet 2.0 offers:

- Consolidated, detailed case information
- Active and closed cases
- Citation images
- Visual flags for warrants, summonses, and failure to appear
- Search results grouping for quick reference
- Case cart
- Ability to re-execute last ten searches

For information on how to subscribe to CourtNet 2.0, visit <https://kcoj.kycourts.net/CourtNet/>.

III. MEMBER ACTIVITIES AND OPPORTUNITIES

A. Boards & Commissions

1. Board of Governors.

Two Bar Governors are elected from each of the seven Supreme Court Districts. A bar governor term is two years and service of three consecutive two-year terms is permitted.

2. Judicial Nominating Commissions.

Pursuant to [Section 118](#) of the [Kentucky Constitution](#), two members of the bar serve on each judicial nominating commission. Bar representatives on the judicial nominating commission are elected for four (4) year terms by members of the Bar in their respective judicial circuits. There are also two bar members on the statewide judicial nominating commission that are elected by a mail ballot of all members of the bar.

3. Bar Center Board of Trustees.

Membership of the Bar Center Board of Trustees includes six trustees appointed for terms of three years each. The Supreme Court of Kentucky appoints three of the trustees and the KBA Board of Governors appoints three trustees.

4. IOLTA Board of Trustees.

Membership of the IOLTA Board of Trustees includes one trustee from each of the seven Supreme Court Districts. IOLTA trustees from the Supreme Court Districts are appointed for three year terms. The KBA Board of Governors makes the appointment subject to the approval of the Supreme Court.

5. CLE Commission.

The CLE Commission consists of seven members, one from each Supreme Court District. The members are appointed for terms of three years and may serve two successive three-year terms. The Supreme Court appoints one of the members of the commission to act as chair. Appointments to the commission are made from a list of three nominees for each vacancy that is submitted by the Board of the Governors to the Supreme Court.

6. Inquiry Commission.

The Inquiry Commission, consisting of nine members, is appointed by the Chief Justice of the Supreme Court. Six of the nine members of the Inquiry Commission must be lawyers. The role of the Inquiry Commission is to consider all lawyer discipline matters referred to it pursuant to the Supreme Court lawyer discipline rules.

7. Clients' Security Fund.

There are five trustees of the Clients' Security Fund. Three of the trustees must be members of the bar and two of the trustees are non-lawyers. Trustees are appointed by the Board of Governors for three year terms, and the Board may limit the number of successive terms that a trustee may serve.

8. Section and Division Officers.

Section and Division Officers are elected by section and Young Lawyers Division members attending their annual meetings. The KBA By-laws provide that each section and YLD shall have at least a chair, chair-elect and vice-chair.

9. Attorneys' Advertising Commission.

The nine members of the Attorneys' Advertising Commission are appointed for terms of three years each by the Board of Governors. Members may serve two successive terms.

10. Committee Chairs.

Committee chairs are appointed by the President of the Kentucky Bar Association. Membership on committees is also by appointment of the KBA President.

11. Trial Commissioners.

Trial commissioners in discipline cases are selected from a trial commission appointed by the Chief Justice subject to the approval of the Supreme Court. Members of the trial commission must possess the qualifications of a circuit judge, including a minimum of eight years of the practice of law.

B. Committees

Committee appointments are made annually by the President of the KBA. If you are interested in a committee appointment, call the Executive Director at (502) 564-3795 or email at jmeyers@kybar.org.

1. Annual Convention (General & CLE Program).

The role of the Annual Convention Committee is to assist the KBA staff in planning all of the events for the KBA Annual Convention. A CLE program committee is appointed to assist the KBA CLE Director in planning and implementing the continuing legal education programs to be presented during the Convention.

2. Child Protection & Domestic Violence.

The role of the Committee on Child Protection and Domestic Violence is to review the various legal aspects surrounding juvenile issues. Work of the committee has included publication of a handbook on children's rights.

3. Communications/Public Relations.

The role of the Communications/Public Relations Committee is to oversee the publication of the Bench & Bar. The committee accepts and reviews legal articles to be published in the Bench & Bar. In addition, the committee advises on issues regarding KBA public relations. The chair of the committee also serves as editor of the Bench & Bar Magazine.

4. Diversity in the Profession.

The role of the Diversity in the Profession Committee is to identify the roadblocks in attaining diversity and equity in the legal profession and the Kentucky Bar Association as well as produce a more diversified legal community in Kentucky. The Committee sponsored a Diversity and Inclusion Summit in April 2015.

5. Ethics.

The Ethics Committee reviews advisory opinion requests from Bar members on ethical questions based on contemplated attorney conduct. Committee members assist in drafting opinions to be presented to the Board of Governors under the provisions of [SCR 3.530](#). The Board may authorize formal or informal opinions.

6. Ethics Hotline.

The Ethics Hotline Committee consists of at least one member from each Supreme Court District. The role of the committee members is to render advisory ethics opinions of an emergency nature. By Rule, opinions may be provided only to an attorney based on the contemplated conduct of the requesting attorney.

7. Investment.

The Investment Committee reviews the performance of the investment management company retained to invest KBA surplus funds. The committee may also make recommendations to the Board of Governors on matters involving the surplus fund investment policy.

8. Legislative.

The role of the Legislative Committee is to review legislation that may affect the legal profession. The KBA has a Legislative Policy & Procedure that is followed if a determination is made that a particular piece of legislation will be recommended by the Board of Governors or a section of the Bar. As an integrated bar, the KBA is very restrictive on legislative issues that may be considered for bar endorsement.

9. Member Services.

The role of the Member Services Committee is to review proposals for endorsement of products and services that may be of assistance to members in their practices. The committee makes recommendations to the Board of Governors on whether particular products or services should be endorsed by the KBA.

10. Military Law.

The Military Law Committee provides education for lawyers and judges on programs available for Kentucky veterans.

11. Rules.

The Rules Committee is a committee whose members are members of the Board of Governors. This committee reviews proposals for amendments to the Civil Rules, Criminal Rules and Supreme Court Rules. Committee members are also involved with the drafting of proposed rule amendments.

12. Unauthorized Practice of Law.

The role of the Unauthorized Practice of Law Committee is to render advisory opinions on questions on whether a particular activity may constitute the unauthorized practice of law by a non-lawyer. Formal unauthorized practice of law opinions may be issued by the Board of Governors upon recommendation of the Unauthorized Practice of Law Committee.

C. [Sections and Divisions](#)

KBA members may join a section or sections of their choice by paying voluntary annual dues ranging from \$7-\$25 per section. Of particular importance for new KBA members is membership in the Young Lawyers Division, which specifically addresses the unique needs of "young and less young" newer attorneys. Educational programs, newsletters, social activities and public service projects are among this Division's busy agenda. For further information on how to join a section or YLD, call the KBA Accounting & Membership Office at (502) 564-3795. In addition, section information is included on the annual dues statement mailed each July.

1. [Alternative Dispute Resolution.](#)
2. [Animal Law.](#)
3. [Appellate Advocacy.](#)
4. [Bankruptcy Law.](#)
5. [Business Law.](#)
6. [Civil Litigation.](#)
7. [Construction & Public Contract Law.](#)
8. [Corporate House Counsel.](#)
9. [Criminal Law.](#)
10. [Education Law.](#)
11. [Elder Law.](#)
12. [Environment, Energy & Resources Law.](#)
13. [Equine Law.](#)
14. [Family Law.](#)
15. [Health Care Law.](#)
16. [Immigration & Nationality Law.](#)
17. [Labor & Employment Law.](#)
18. [LGBT Law.](#)
19. [Local Government Law.](#)
20. [Probate & Trust Law.](#)
21. [Public Interest Law.](#)

22. [Real Property Law.](#)
23. [Senior Lawyers.](#)
24. [Small Firm Practice & Management.](#)
25. [Taxation Law.](#)
26. [Workers' Compensation Law.](#)
27. [Young Lawyers Division.](#)

D. Bench & Bar Magazine

Bench & Bar Magazine is published by the Kentucky Bar Association six times per year. It is designed to keep you informed of new developments in the legal system, and to educate you on existing areas of the law. The magazine also provides an outlet for announcement of state and local bar association news, of promotions, law firm information or relocation, or honors. Most articles are authored by Kentucky lawyers; thus the information is beneficial for your Kentucky law practice. The Publications Committee welcomes submission of articles and editorial comments from KBA members.

The Bench & Bar is also available as an online PDF flip-book on the KBA website at <http://www.kybar.org/?BBarchives>.

E. e-News

Each month, the Kentucky Bar Association distributes e-News, an electronic newsletter providing information about the activities of the Kentucky Bar Association and other information relevant to attorneys practicing in the Commonwealth of Kentucky. e-News can also be accessed on the KBA website.

IV. THE KENTUCKY BAR ASSOCIATION

A. [SCR 3.025](#) – Kentucky Bar Association

The mission and purpose of the Association is to maintain a proper discipline of the members of the bar in accordance with these Rules and with the principles of the legal profession as a public calling, to initiate and supervise, with the approval of the Court, appropriate means to insure a continuing high standard of professional competence on the part of the members of the Bar, and to bear a substantial and continuing responsibility for promoting the efficiency and improvement of the judicial system.

B. Board of Governors

[SCR 3.070](#) provides that the Board of Governors is the governing body of the Association and the agent of the Court for the purpose of administering and enforcing the Rules of the Court governing the practice of law. Membership of the Board consists of attorneys including the KBA president, president-elect, vice president, immediate past president, the Young Lawyers Division chair and two attorneys elected from the membership of the Association in each Supreme Court District. In

addition, there are four lay members that serve on the Board of Governors for consideration of disciplinary cases.

The president is the chief executive officer of the KBA and serves a one-year term beginning on July 1. The president-elect automatically becomes president at the end of the current president's term.

The president-elect and vice president are chosen by a vote of the bar membership should there be more than one candidate for the respective positions. Any member of the Bar can petition to run for statewide office. Nominating petitions for president-elect and vice president must be filed prior to November 15 of each year. Election ballots are sent to the membership only if there is more than one nominee for either or both of the positions.

A Bar governor elected from a Supreme Court District serves a two year term and is eligible to be elected for three successive two year terms without a break in service. The Bar governor terms are staggered in order that one of the two governors from each District will be up for election each year. A candidate for Bar governor must be a member of the Bar in good standing and reside in the Supreme Court (Appellate) District in which she or he seeks election. Petitions to run for Bar governor from an appellate district must be filed in the office of the KBA Director during the month of October. If only one person files for a position, she/he is declared elected after the filing deadline. Ballots are mailed to members in the Supreme Court District where more than one attorney has filed for Bar governor. Vacancies in a Bar governor position are filled for the remainder of the term by appointment by the president subject to a written confirmation of a majority of the Board of Governors.

The Board meets at least six times a year in sessions that generally are a day and a half in length. During the discipline session of each meeting, seventeen members of the Board participate in deliberations on charges of professional misconduct brought against members of the Bar and make recommendations to the Supreme Court on guilt and punishment or innocence of charged members. In addition to the seventeen Board members who hear discipline cases, four non-lawyers appointed by the Chief Justice also participate as Board members for disciplinary matters only. During meetings the Board may also hear task force, committee and section reports, make Bar policy decisions, issue formal ethics opinions and unauthorized practice of law opinions, consider appeals from CLE Commission rulings, consider budget matters and review other matters involving Bar operations.

Each year the Board has the responsibility of recommending an annual operating budget to the Court. The proposed budget must be submitted to the Court at least four months prior to the start of the fiscal year. As a mandatory Bar, the major source of funds for Bar operations are dues from members. The Court sets the dues structure based upon recommendations from the Board. The current annual dues structure is as follows:

Member five years and over	\$310
Member under five years	\$220
Member of the judiciary	\$150
Senior Retired/Inactive (Age 70 – Non-practice)	\$ 0
Honorary Member (Age 75 or 50 years in practice)	\$ 0

- C. [SCR 3.130](#) – Kentucky Rules of Professional Conduct

V. GOVERNANCE OF THE LEGAL PROFESSION IN KENTUCKY

- A. [Section 116](#) of the [Kentucky Constitution](#)

The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other Court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the Bar and the discipline of members of the bar.

- B. [Ex Parte Auditor of Public Accounts](#), 609 S.W.2d 682 (Ky. 1980)

The Auditor of Public Accounts made direct application to the Supreme Court to determine whether he was legally entitled or required to audit the books and accounts of the state bar association. The Supreme Court held that where funds of the state bar association and the Board of Bar Examiners were not collected pursuant to any statute and were not appropriated by the legislative body, and where both the association and the Board of Bar Examiners existed solely by virtue of rules of the Supreme Court, expressly and exclusively authorized by State Constitution, and were accountable to that court only, there was not constitutional authority by which they could be made accountable to either one of the other two branches of government. Held KRS 21A.130, 21A.140, 21A.150 and 21A.160 void because they purport to erect powers and limitations that no longer fall within the legislative province. This is the definitive case on the relationship of the Kentucky Bar Association as an "arm and agency" of the Supreme Court of Kentucky.

VI. MEMBER RESOURCES

- A. Malpractice Insurance

[Lawyers Mutual Insurance Company of Kentucky, Inc.](#) (LMICK)
 323 West Main Street, Suite 600
 Louisville, Kentucky 40202
 Telephone: (502) 568-6100 or 1-800-800-6101
 FAX: (502) 568-6103

B. Lawyer Referral Services

[Fayette County Bar Association](#)

219 North Upper Street
Lexington, Kentucky 40507
(859) 225-9897

[Louisville Bar Association](#)

600 West Main Street, Suite 110
Louisville, Kentucky 40202
In-state (502) 583-5314

[Northern Kentucky Bar Association](#)

529 Centre View Boulevard
Crestview Hills, Kentucky 41017
(859) 781-1300

C. Life and Disability Insurance

[National Insurance Agency, Inc.](#)

13804 Lakepoint Circle, Ste 202
Louisville, Kentucky 40223
Telephone: (502) 425-3232 or 1-800-928-6421

References

1. [SCR 3.025](#) – Kentucky Bar Association
2. [SCR 3.040](#) – Dues; Date of Payment and Amount
3. [SCR 3.070](#) – The Board; Functions and Membership
4. [SCR 3.175](#) – Efficient Enforcement; Notice of Attorney's Address
5. [SCR 3.460](#) – Unauthorized Practices Proceeding
6. [SCR 3.530](#) – Advisory Opinions – Informal and Formal
7. [SCR 3.600 – 3.695](#) – Continuing Legal Education
8. [SCR 3.800](#) – Legal Negligence Arbitration
9. [SCR 3.810](#) – Legal Fee Arbitration
10. [SCR 3.815](#) – Mediation and Arbitration
11. [SCR 4.310](#) – Judicial Ethics Committee and Opinions

THREE THINGS TO KNOW ABOUT WITHDRAWING FROM A CASE

James J. Bell and K. Michael Gaerue

Reprinted from *The Indiana Lawyer.com*, February 24, 2014, with permission of the author,
James J. Bell

INTRODUCTION

Unfortunately, there comes a time in some attorney-client relationships when breakup is inevitable. You may have tried to "work things out" with your client, but things only got worse. So what do you do?

You could try telling your client that "it's not you, it's me," even if deep down you know that "it's not you, it's your client." The reality is that you have lost whatever spark there was at the beginning of the case, and you and your client don't see the case the same way anymore. Worst of all, you don't share the same goals. You feel your passion for the case slipping away. Oh – there is one other thing. There is that little problem with money: You haven't received any.

At the risk of sounding like Dr. Phil, it sounds like you need to "move on" and "let go." But before you do, grab Rule 1.16¹ of the Indiana Rules of Professional Conduct and make certain you are withdrawing from the case ethically.

Here are three things to know about withdrawing from a case:

1. There Are Times When You Must Terminate the Attorney-Client Relationship.

Whether you want to or not, and regardless of what Dr. Phil advises, there are situations when you must break up with your client. These situations are outlined in Rule 1.16(a)² of the Indiana Rules of Professional Conduct. These include times when the "representation will result in a violation of the Rules of Professional Conduct or other law," "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" or "the lawyer is discharged." For example, if your representation of the client will result in your assisting a client in fraud, then under Rule 1.16(a)(1),³ you must withdraw from the case.

2. When Withdrawing, Do Not Make the Client's Situation Worse.

Rule 1.16(b)(1)⁴ states that a lawyer may withdraw from representing a client if "withdrawal can be accomplished without material adverse effect on the interest of the client." What does that mean? That means you likely will not be able to

¹ See Kentucky [SCR 3.130\(1.16\)](#).

² See Kentucky [SCR 3.130\(1.16\)\(a\)](#).

³ See Kentucky [SCR 3.130\(1.16\)\(a\)\(1\)](#).

⁴ See Kentucky [SCR 3.130\(1.16\)\(b\)\(1\)](#).

withdraw from a case that is set for trial in a week. Furthermore, it also means that under Rule 1.6,⁵ you shall not reveal confidential information relating to the case.

If the reason for withdrawing is that your client has not paid you, state in your motion to withdraw that the "client has not fulfilled his obligations to the undersigned." Do not say, "The client lied to me about his willingness to pay my fees and I am upside down to the tune of \$30,000." If the reason for withdrawing is that, pursuant to Rule 1.16(b)(4),⁶ the "client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement," place in your motion something like "there has been a breakdown in the attorney-client relationship." It likely would have a materially adverse effect on the client to state something along the lines of, "My client insists that I present a conspiracy theory to the court, accuse the judge of criminal activity and otherwise impugn the impartiality of the tribunal."

3. In Formal Litigation, the Court Has the Final Say on the Breakup.

Rule 1.16(c)⁷ states that "a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." That means that the attorney must check the court's local rules prior to filing the motion to withdraw. Some rules require advance written notice to clients and that notice can include advice regarding the securing of new counsel, as well as notice of upcoming court dates.

Finally, Rule 1.16(c)⁸ states that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." In other words, the breakup is not always the lawyer's call. In many cases, a judge must approve a lawyer's termination of representation. Oftentimes, the longer a lawyer is in a case, the less likely it is that a judge will allow the lawyer to withdraw. When the attorney-client relationship begins, look for signs that "things weren't meant to be." If the case goes on too long, not only will breaking up be hard to do, but it may be impossible.

⁵ See Kentucky [SCR 3.130\(1.6\)](#).

⁶ See Kentucky [SCR 3.130\(1.16\)\(b\)\(4\)](#).

⁷ See Kentucky [SCR 3.130\(1.16\)\(c\)](#).

⁸ *Id.*

THREE THINGS TO KNOW ABOUT REPORTING ETHICS VIOLATIONS

James J. Bell and Jessica Whelan

Reprinted from *The Indiana Lawyer.com*, November 4, 2015, with permission of the author,
James J. Bell

INTRODUCTION

If you're like us, you're a lawyer who enjoys giving advice to others. As attorneys who represent other attorneys in disciplinary matters, we often receive requests to give ethics advice to lawyers. As luck would have it, we like lawyers and generally enjoy giving advice to lawyers when we can.

One request that we don't particularly like, however, is when we are asked to advise an attorney as to whether he or she "should turn in" another attorney to the Disciplinary Commission. Responding to these requests can be problematic for many reasons. Luckily, the duty to report (and most of what you need to know about it) is spelled out in the Indiana Rules of Professional Conduct. Here are three things you should know about an attorney's duty to report an ethics violation by another lawyer.

1. Not All Violations of the Rules of Professional Conduct Need to be Reported:

Rule 8.3(a)⁹ of the Indiana Rules of Professional Conduct states that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

In examining Rule 8.3,¹⁰ it is clear that the lawyer must "know" of the other attorney's violation. Rule 1.0(f)¹¹ states that "'knows' denotes actual knowledge of the fact in question." Although it goes on to say that a "person's knowledge may be inferred from circumstances," it is clear that an attorney is not required to report anything unless they have "actual knowledge" of the violation.

Furthermore, the word "substantial" is placed in the rule for a reason. Our rules did not intend for every missed phone call to be reported as a lack of diligence or a failure to communicate. In fact, as outlined in the rule, if the alleged misconduct of the other attorney does not cause you to question the lawyer's honesty, trustworthiness or fitness as a lawyer, you can report the violation, but you are not required to do so.

Even if the attorney has actual knowledge of another's misconduct that is covered by Rule 8.3, confidentiality trumps the mandatory reporting provision.

⁹ See Kentucky [SCR 3.130\(8.3\)\(a\)](#).

¹⁰ See Kentucky [SCR 3.130\(8.3\)](#).

¹¹ See Kentucky [SCR 3.130\(1.0\)\(f\)](#).

Specifically, Rule 8.3(c)¹² of the Indiana Rules of Professional Conduct states that the rule "does not require reporting of a violation or disclosure of information if such action would involve disclosure of information that is otherwise protected by Rule 1.6."

Please keep in mind that Rule 1.6¹³ is far broader than the attorney-client privilege. Rule 1.6 states that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent," or there is another exception. Therefore, if you learn of an attorney's misconduct through the representation of a client and the client will not consent to your report to the Disciplinary Commission and no other exception to Rule 1.6 applies, you are required to forever hold your peace.

2. You Are Required to Self-Report Convictions for Crimes.

Rule 8.3¹⁴ is written in terms of "another lawyer." We define "another lawyer" as "any lawyer but me." That leads to the question of whether there is a time when an attorney is required to tell on "me?"

In Indiana, an attorney is required to self-report a criminal conviction. According to the Indiana Admission & Discipline Rule 23, §11.1(a)(2), "[a]n attorney licensed to practice law in the state of Indiana who is found guilty of a crime in any state or of a crime under the laws of the United States shall, within ten days after such finding of guilty, transmit a certified copy of the finding of guilt to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission."¹⁵ Judges who are aware of an attorney's criminal conviction have a similar duty. See Admis. Disc. R. 23, §11.1(a)(l).

3. Do Not Threaten to Report an Ethics Violation to Obtain an Advantage in Litigation.

If you know that another attorney has committed an act of misconduct that would trigger a mandatory report, then follow the rule and report the attorney. Do not seek to report the attorney for your own personal gain – it could result in disciplinary sanctions.

For example, in the In re Lehman, 861 N.E.2d 708, 709 (Ind. 2007), the respondent filed an emergency request for a continuance of trial. The respondent

¹² See Kentucky [SCR 3.130\(8.3\)\(c\)](#).

¹³ See Kentucky [SCR 3.130\(1.6\)](#).

¹⁴ See Kentucky [SCR 3.130\(8.3\)](#).

¹⁵ See Kentucky [SCR 3.320](#), which states that any Kentucky attorney "who is convicted of a felon or class 'A' misdemeanor, shall within 10 days following the plea of guilty, finding of guilty by a judge or jury, or upon the entry of judgment, whichever occurs first, file a copy of the judgment with Bar Counsel. The prosecuting attorney shall also file a copy of said judgment with Bar Counsel for action under [SCR 3.160](#). Bar Counsel shall submit copies of the judgment to the Inquiry Commission which may take action under [SCR 3.165](#)."

"called opposing counsel and told him that his clients wanted to report opposing counsel for unethical conduct, but if opposing counsel agreed to the continuance, respondent thought he could dissuade his clients." The Indiana Supreme Court found that the respondent violated Rule 8.4(d)¹⁶ of the Indiana Rules of Professional Conduct, which prohibits conduct "prejudicial to the administration of justice, by communicating to opposing counsel a willingness to attempt to dissuade his clients from filing a complaint against opposing counsel as a *quid pro quo* for opposing counsel's agreement to a continuance of the trial."

Lehman and other cases demonstrate that a threat of a report to the Disciplinary Commission should not be used as a weapon in litigation. The disciplinary process serves an important purpose in regulating the legal profession. Trying to use the disciplinary process for self-serving purposes, such as to get an advantage in a case, is prohibited.

¹⁶ See Kentucky [SCR 3.130\(8.4\)\(d\)](#).

THREE THINGS TO KNOW ABOUT THE ETHICS OF FILES

James J. Bell and Jessica Whelan

Reprinted from *The Indiana Lawyer.com*, September 9, 2015, with permission of the author,
James J. Bell

INTRODUCTION

Due to renovations, we had to move our offices last week which meant we had to clean out our desks. And as you may know, when you clean out your desk, you learn about yourself. What we learned is that we should be featured on the TV show Hoarders due to the amount of "stuff" that we had hidden in our desks over the years. We also learned that James still has mini-cassettes in his desk in case he gets the urge to dictate into a handheld cassette recorder. Another thing we learned was that we had files from matters that have long since ended. That led us to many questions like: Is that file mine? Or is it the client's? And if it is the client's, why am I paying to store someone else's property? And finally: How long do I have to keep this file? The answers to these questions are not as clear as maybe they should be. As we struggle to answer them, here are three things to know about storing files.

1. Whose File Is It Anyway? Some Parts of the File Are the Client's.

Most files contain a wide array of documents and other things – original documents from the client, lawyer notes, documents from other parties, court documents and even tangible property. Rule 1.16(d)¹⁷ gives some guidance on what to do with these materials. It states that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled." In fact, some attorneys have been disciplined for failing to return client materials after client requests. See Matter of Golding, 700 N.E.2d 464, 465 (Ind. 1998).

But which materials are the client materials to which the client is entitled? A formal opinion recently issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility sheds light on this question. It states that at a minimum, when requested, a lawyer must surrender any materials provided to the lawyer by the client, legal documents filed with a tribunal (or those completed, ready to be filed, but not yet filed), executed instruments (like contracts), orders or other records of a tribunal, and correspondence of the lawyer connected to the representation on relevant issues, including email. [ABA Comm. on Prof'l Ethics & Prof'l Responsibility, Formal Op. 471](#) (2015).

2. Parts of the Files Are Yours.

Although some parts of the file are the client's, the client is not entitled to papers

¹⁷ See Kentucky [SCR 3.130\(1.16\)\(d\)](#).

and property that the lawyer generated for the lawyer's own purpose while working on the client's matter. *Id.* For example, the lawyer does not necessarily need to provide to the client: drafts or mark-ups of documents to be filed with a tribunal, drafts of legal instruments, internal legal memoranda and research materials, internal conflict checks, personal notes, hourly billing statements, firm assignments, notes regarding an ethics consultation, a general assessment of the matter or documents that might reveal the confidences of other clients. *Id.*

However, this general rule comes with an exception: When the lawyer's representation of the client in a matter is terminated before the end of the matter, protection of the client's interest may require that the lawyer give the client certain materials generated for the lawyer's own purpose. *Id.* For example, if a filing deadline is imminent in a continuing matter for which the lawyer's representation has been terminated, and the lawyer has drafted but not finalized documents in connection with the filing deadline, the lawyer's drafts should be provided to the client.

3. How Long Do I Have to Keep this File? Five Years. Maybe More. Maybe Less.

We wish we could give you a definitive answer. We looked to [ABA Informal Opinion 1384](#) for guidance and it stated that "[w]e cannot say that there is a specific time during which a lawyer must preserve all files and beyond which he is free to destroy all files. . . . Good common sense should provide answers to most questions that arise." [ABA Comm. on Ethics and Prof'l Responsibility Informal Op. 1384](#) (1977). (Gee, thanks for your clear guidance. (Speaking of hoarding, did we just quote an opinion from when Elvis was alive?)).

If you are looking for something better to hang your hat on than "good common sense," at least one Indiana authority gives a specific time frame for a specific kind of property. Rule 1.15(a)¹⁸ gives clear guidance for the maintenance of trust account records. It states that "Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation."

Since this area lacks bright-line rules, a tip for good practice would be at the end of the case, when you know you will not need the file anymore, to send notice to the client and ask them to come and get their file. Make sure to get a receipt showing that the client did, in fact, take the file. If you decide it is prudent to destroy files, keep a record of which files you have destroyed. And last, but not least, throw out those old mini-cassette tapes and go digital – it just makes "good common sense."

¹⁸ See Kentucky [SCR 3.130\(1.15\)\(a\)](#).

THREE THINGS TO KNOW ABOUT REQUESTS FOR CLIENT INFORMATION

James J. Bell and Jessica Whelan

Reprinted from *The Indiana Lawyer.com*, September 7, 2016, with permission of the author,
James J. Bell

INTRODUCTION

You're sitting at your desk, minding your own business. You're conducting yourself ethically in every possible way. For one serene moment, the practice of law is as peaceful as a pattering brook wandering down a mountain. When you speak to yourself, you use your "Deep Thoughts by Jack Handey" voice. Everything is coming together. Everything is calm. The only thing that could change the balance you have achieved in the practice of law is for someone else to...

There is a knock on the door. For the sake of this story, let's say it's the FBI. Or the IRS or the State Police. Maybe it's someone serving a subpoena. Maybe it's the fictional attorney who likes to make face-to-face visits instead of sending out nasty emails. (Wait, who are we kidding?) No matter who it is, the person is a zen-destroyer because he only wants one thing: to ask you about your client.

Here are three things to know when a third party requests information about your client.

1. Don't be cooperative, civil or otherwise charming. You're a lawyer. You're a good person. You try to get along. Clients compliment you on your ability to "bridge the divide" or get to the "solution" in a case. So while the Zen-Destroyer is standing in your doorway with his demands for information, you may instinctually say "OK. How can I help you?" Don't follow that instinct. This is one of the few times in the practice of law when it is better to get the answer from a law book than it is to follow your gut (That said, if your instinct calls for you to obstruct, be discourteous and act like a brick wall, follow that instinct. You're going to like what we are about to say next).

Rule 1.6¹⁹ of the Indiana Rules of Professional Conduct says that unless you have client consent, you have a duty to resist. For example, Comment [13]²⁰ to Rule 1.6 of the Indiana Rules of Professional Conduct says:

A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, **the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.** In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent

¹⁹ See Kentucky [SCR 3.130\(1.6\)](#).

²⁰ See Comment 11 to Kentucky [SCR 3.130\(1.6\)](#).

required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

Id. cmt. 13 (emphasis added).

Secondary legal authorities also demonstrate the lawyer's duty to resist disclosure. For example, the Restatement of the Law Governing Lawyers holds that a lawyer may disclose confidential information when required by law, but only "after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure." Restatement (Third) of the Law Governing Lawyers §63 (1998).

2. Confidentiality relates to more than privileged communications. While you're making the Zen-Destroyer comfortable on your office couch and pouring him coffee, you may feel the urge to talk "a smidge" about your client's case. After all, not everything is a privileged communication, right?

Well, everything may not be privileged, but everything is likely confidential. Rule 1.6²¹ of the Indiana Rule of Professional Conduct is broad. It provides:

"A lawyer shall not reveal information **relating to representation of a client** unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." (Emphasis added).

What could you possibly talk about that does not "relat[e] to the representation of a client?"

If you think we are reading this too broadly, look at the comment to Rule 1.6. It explains: "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer **must not** reveal information relating to the representation." *Id.* cmt. 2 (emphasis added). The comment also states that the "confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id.* cmt. 3 (emphasis added).

3. Make sure you have cover. Rule 1.6 lists several instances when confidential information can be shared. Informed consent of the client is one of those instances. Under Rule 1.4²² of the Rules of Professional Conduct, if at all possible, you should be sharing the request for information with your client. If your client gives informed consent, then you have cover. If not, you may need to seek guidance from a court to make sure you are in compliance with your ethical obligations.

²¹ See Kentucky [SCR 3.130\(1.6\)](#).

²² See Kentucky SCR 3.130(1.4).

Make sure that you have cover and make sure that cover is documented. After all, as we said above, you're a lawyer. You're a good person. Don't make a Zen-Destroyer's request for information your problem.

I. DUTY TO THE COURT

A. [Rule 3.3](#) Candor toward the Tribunal

- a. A lawyer shall not knowingly:
 - 1. Make a false statement of material fact or law to a tribunal;
 - 2. Fail to disclose a material fact to the tribunal when disclosure is necessary to avoid a fraud being perpetrated on the tribunal;
 - 3. Offer evidence that a lawyer knows to be false. If a lawyer is offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- b. These duties in paragraph 1 continue to the conclusion of the proceedings.

....

- e. The obligation of the advocate under these rules is subordinate to such constitutional requirements as may be announced by the courts.

B. [Rule 3.5](#) Impartiality and Decorum of the Tribunal

A lawyer shall not:

- a. Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- b. Communicate *ex parte* with such persons as to the merits of the case except as permitted by law; or
- c. Engage in conduct intended to disrupt the tribunal.

C. [Rule 8.4](#) Misconduct

It is professional misconduct for a lawyer to:

....

- e. Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

D. [Rule 8.2](#) Judicial and Legal Officials

1. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its trust or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
2. A lawyer who is a candidate for a judicial office shall comply with applicable provisions of the Code of Judicial Conduct.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges in courts unjustly criticized.

E. Ethics Opinions

1. A lawyer may not share a secretary, office space, library, or waiting room with a sitting judge. [KBA Ethics Opinion E-187 \(1978\)](#).
2. A lawyer may not provide loans or gifts to a judge for whom the lawyer practices. A lawyer may extend "ordinary social hospitality" to a judge before whom a lawyer practices. As a matter of ethics, a lawyer may make a contribution to a judicial campaign in a manner consistent with Canon 7 of the Code of Judicial Conduct. [KBA Ethics Opinion E-351 \(1992\)](#).

F. Misleading Legal Argument

1. Legal argument based upon a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer must recognize the existence of pertinent legal authority.
2. If a lawyer knows proffered testimony is false, the lawyer must refuse to offer it regardless of the client's wishes.
3. A lawyer is responsible for pleadings and other documents prepared for litigation but is not usually required to have personal knowledge of matters stated therein (See [Rule 11](#), *infra*).
4. However, a statement purporting to be in the lawyer's own knowledge, as an affidavit by the lawyer or a statement in open court, may be made properly only when the lawyer knows the assertion to be true.

G. Perjury by Criminal Defendant

Legal scholars disagree on the lawyer's duties when he or she knows that a criminal defendant intends to offer false testimony. Ideally, the lawyer

should withdraw but that is not always allowed. Three resolutions to this dilemma have been proposed:

1. Permit the accused to testify by narrative without guidance through the lawyer's questioning.
2. The advocate is entirely excused from the duty to reveal perjury if the perjury is that of his or her client.
3. A lawyer would be required to reveal the client's perjury if necessary to rectify the situation.

H. Remedial Measures

If the perjured testimony has already been offered, the attorney must first ask the client to withdraw the information. If withdrawal will not remedy the situation or is impossible, the attorney should make disclosure to the court.

I. Duration of Obligation

The conclusion of a proceeding is a reasonably definite point for the termination of the obligation to rectify the presentation of false evidence.

J. *Ex Parte* Proceedings

Ordinarily an advocate has the limited responsibility for presenting only one side of a matter. However, in *ex parte* proceedings, the lawyer for the represented party has the duty to make disclosures of material fact known to the lawyer and that the lawyer reasonably believes are necessary to make an informed proceeding.

K. Practical Considerations – Courtesy toward the Court

1. A lawyer should speak and write courteously and respectfully in all communications with the court.
2. A lawyer appearing in court should present a neat and tasteful appearance so that neither disrespect nor discourtesy will be implied.
3. Practice punctuality for court, co-counsel, and client. Where delay is inevitable, communication with the court should be made. A lawyer should promptly notify the court and all parties of any delays, cancellations, or continuances.
4. A lawyer should be acquainted with and observe all local rules.
5. A lawyer should at all times avoid visual or verbal displays of temper or imprudence.

6. A lawyer should stand when addressing the court. A lawyer should at all times conduct and demean him or herself with dignity.
 7. A lawyer should never go behind the judge's bench.
 8. A lawyer should never bring a cellular phone into court.
 9. A lawyer should not allow clients or other witnesses to bring children into court.
 10. A lawyer should thank judges for their time where appropriate.
 11. A lawyer should work out discovery requests without requesting the court's intervention.
- L. Things to Keep in Mind when You're in the Courtroom: Practical Pointers on Working Well with the Courts

1. Common courtesy.

Common courtesy is so easy, yet so often disregarded. The importance of starting out and keeping the habit of good manners cannot be emphasized enough. Judges appreciate and expect punctuality from professionals. Do not be that one lawyer in the local bar that is always late or forgets court all together, precipitating a manhunt by court staff. Turn your cell phones and mobile devices off while in court. Introduce yourself on the record relentlessly, even if you are sure the judge knows your name. It doesn't hurt to remind the judge, and a tape recorder does not know your name unless you state it.

2. Court staff.

Do not commit the cardinal sin of mistreating deputy clerks, bailiffs, judges' secretaries and the like. Not only do they have their own little ways of getting you back over the next thirty to forty years, judges will always be made aware of your conduct. Go out of your way to foster a good relationship with these people, as they are the keys to a happy practice. Yes, you know all about Pennoyer v. Neff, but they know all kinds of things about the mechanics that you have never been taught. Do not come across as condescending, or you will pay.

3. Pick your battles.

New lawyers in particular tend to be of a mindset that they have to fight or debate over every minute detail. It is not their fault, as they have been indoctrinated to be such zealots. One of the most important skills you can acquire, and should begin immediately to work toward, is to recognize when not to fight. Filing a venomous response to a motion that offends your sensibilities may feel good,

but it may not be a good idea. In trials, some things are clearly objectionable under the rules of evidence, but some things you just let go. My point is, whether you are right or not is largely irrelevant. The question you should ask before doing battle is whether it truly will advance the cause of your client.

4. Be ethical.

Another obvious one, but strive to get that "V" rating in Martindale someday. It takes some time and effort to gain a reputation as an ethical lawyer, and very little of either to be tagged with the other one. Don't give your colleagues and judges a reason to put the word out (and it will spread like wildfire) that you are unethical, as you will be marked your entire career. Most of your ethical rules are just fancily worded codification of common decency, sort of like the book, Everything I Know I Learned in Kindergarten. For instance, if you read [SCR 3.3](#), it just says don't lie, as [SCR 3.5](#) says don't cheat.

5. Know the law.

As bright as many are and as all-knowing as some think they are, judges simply do not have every facet of the law and every case committed to memory. Please go to court armed with the knowledge of the law regarding the topic of your appearance. Be able to cite applicable law and hand copies both to the court and opposing counsel. Judges will be grateful, and you may win by default if opposing counsel is unprepared. Judges prefer to hear about Kentucky law, not something from Puerto Rico or the Ninth Circuit. If there is no Kentucky case on point, just say so and argue for the opportunity to make new law and have your name published.

6. Recon.

Stop by or make an appointment to meet your judges. They'll know you're human, and you may find they are too. Check with other lawyers or court staff to find out their idiosyncrasies – what really impresses them, or what sets them off. I, for instance, can't stand to be interrupted by a lawyer when it is finally my turn to speak. When you travel to other courts, do the same kind of reconnaissance on the local judges. You may not prevail, but you're sure to get along better.

M. Conflict between Zealous Representation of Client and Being an Officer of the Court

1. [Rule 3.1](#) Meritorious Claims and Contentions.

A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend a proceeding as to require that every element of the case be established.

2. An advocate has a duty to use the legal procedure to the fullest benefit of the client's cause, but also a duty not to abuse the legal process. The filing of an action or a defense taken for a client is not frivolous merely because the facts have not been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though a lawyer believes that the client's position ultimately may not prevail. An action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is either unable to make a good faith argument on the merits of the action or to support the action taken in good faith argument for an extension, modification, or reversal of existing law.

3. A lawyer may have legitimate reasons for delay including need for additional time to conduct investigation or locate witnesses, or the client may not be ready due to a medical or emotional factor. This is considered justification for delay. However, a lawyer may not seek delay to preserve some existing benefit for the client or allow the client to enjoy, use or control money that he or she ultimately will have to pay to an adverse party.

4. Generally, a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law except that he or she may advance such claim or defense if it can be supported by good faith argument for extension, modification, or reversal of existing law.

5. Because the bounds of law are often difficult to ascertain, an attorney may urge any permissible construction of law favorable to a client within the bounds of the law. A lawyer is not justified in asserting a position that is frivolous.

6. A lawyer shall not conceal or fail to disclose that which he or she is required by law to reveal; however, a lawyer may withhold evidence if he or she does so pursuant to some privilege or rule.

N. Respect the Court

Kentucky Bar Association v. Waller, 929 S.W.2d 181 (Ky. 1996).

Attorney disciplinary proceedings were brought against Mr. Waller when he referred to a judge presiding over a case that he was involved with in a derogatory fashion. The Supreme Court held that his statement in court-filed papers that Judge Fuqua was a "lying incompetent ass-hole" violated [Rule 8.2](#) prohibiting unfounded statements concerning qualifications and integrity of a judge and warranted a six-month suspension from the practice of law.

II. REFERENCES

- A. Jurisdiction and Terms of Kentucky State Courts
- B. [SCR 3.130-3.3](#) – Candor toward the Tribunal
- C. [SCR 3.130-3.5](#) – Impartiality and Decorum of the Tribunal
- D. [SCR 3.130-8.2](#) – Judicial and Legal Officials
- E. [SCR 3.130-3.1](#) – Meritorious Claims and Contentions
- F. District of Columbia Bar Voluntary Standards of Civility



Overview of eFiling Rules and Procedures

Presented by
**Administrative Office of the
Courts**



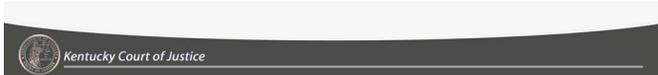
Where to Find eFiling Rules

Kentucky Court of Justice website

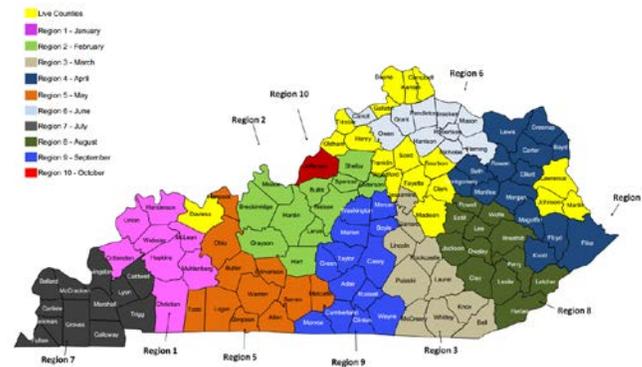
<http://courts.ky.gov/courts/supreme/Pages/rulesprocedures.aspx>

eFiling Help Page

<http://kyefiling.blogspot.com/p/table-of-contents.html>



eFiling Implementation Schedule



Integration With Existing Rules

The eFiling rules supplement the Kentucky Rules of Civil Procedure, any applicable statutes, and the Local Rules of Court ("Kentucky Rules of Procedure").

To the extent the eFiling rules are inconsistent or conflict with other rules, the eFiling rules control in cases subject to eFiling.



THREE FACES OF IMPAIRMENT: THREE FACES OF RECOVERY

Yvette Hourigan

I. INTRODUCTION

The legal community has known for some time that the rates of all forms of addiction, depression and suicide are higher among its population than the general population and other professions. However, a groundbreaking new study conducted by Hazelden/Betty Ford Foundation in conjunction with the American Bar Association's Commission on Lawyer Assistance Programs (COLAP) (hereinafter "the Hazelden study") identifies that the rates of addiction and depression within the legal community are much higher than previously thought.¹ There is an urgent need for more information, education and treatment opportunities in order to educate and protect the Kentucky legal community.² Through the Kentucky Lawyer Assistance Program (KYLAP), Kentucky's law students, lawyers and judges are provided with opportunities to learn how to recognize addiction, depression and other mental health concerns, as well as how to confront them in ourselves and in others. These recent findings, however, reveal just how much work is yet to be done. More opportunities for screenings, peer assistance, monitoring, preventive education and counseling are all critical in reducing these statistics and improving each lawyer's life.

It is KYLAP's purpose and goal to assure that these opportunities and more are readily available. While the statistics are grim and the percentages shockingly high, the stories of recovery you will hear today affirm that there is always hope, there is always help, and that recovery is possible.

II. RESEARCH MECHANISMS AND STATISTICAL BASES

The Hazelden study is a result of a nationwide effort by Patrick Krill, JD, LLM, the Director of the Hazelden Legal Professionals' Program, and several others who worked with the ABA Commission on Lawyer Assistance Programs through state lawyer assistance programs, bar associations and offices of discipline. A survey was mass-circulated amongst lawyers and judges with approximately 15,000 responses received. In an effort to focus the study only on licensed and employed attorneys, about 2,000 of the responses were discarded. As such, the results reflect the percentages and statistics of 12,825 of your professional contemporaries – lawyers who are employed and have their law licenses intact.

¹ Krill, Patrick R., JD, LLM, Johnson, Ryan, MA, Albert, Linda, MSSW, "The Prevalence of Substance Use and Other Mental Health Concerns among American Lawyers," *J Addict Med*, Volume 10, Number 1, January/February 2016, pp. 46-52. An open copy of the article is at http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx.

² www.kybar.org.

A. Mechanisms

The Alcohol Use Disorders Identification Test (AUDIT-10) is a ten-question test developed by a World Health Organization-sponsored collaborative project to determine if a person may be at risk for alcohol abuse problems.³ In a systematic review of screening tools for alcohol problems, the AUDIT was found to be the "most effective in identifying subjects with at-risk, hazardous, or harmful drinking."⁴ The AUDIT-10 focuses on frequency, amount, and consequences of use.

The AUDIT Alcohol Consumption Test (AUDIT-C) is a three-question screening test for problem drinking which can be used more quickly than the AUDIT-10, and in a doctor's office.⁵ The focus on the abbreviated AUDIT-C is frequency and amount only, without addressing consequences of use. Copies of both the AUDIT-10 and AUDIT-C with grading scales are attached in the Appendix.

For mental health issues including stress, anxiety and depression, the authors used the Depression Anxiety Stress Scale-21-item version (DASS-21), which is also a self-report test consisting of three seven-item subscales which assess symptoms of depression, anxiety and stress.⁶ Ninety percent (90%) of the answering attorneys responded to all twenty-one questions on the DASS-21. The items are scored on a four-point scale (0-3). The test results will have ranges from 0-21 for each of the three subscales. A copy of the DASS-21 along with scoring criteria is attached in the Appendix.

The short-form Drug Abuse Screening Test-10 (DAST) is a ten-item, self-report questionnaire used to screen both quantity and use of drugs.⁷ As opposed to the 88 percent of lawyers who responded to the AUDIT-10 / AUDIT-C questions, only 27 percent responded to the DAST questions. The statistical results regarding drug use and/or addiction are lower than can be accepted as statistically sound. The authors of the study hypothesize that there remains a reluctance by attorneys to self-report,

³ Bohn, MJ; Babor, TF; Kranzler, HR (July 1995). "The Alcohol Use Disorders Identification Test (AUDIT): Validation of a Screening Instrument for Use in Medical Settings." Journal of Studies on Alcohol 56 (4): 423-32. doi:10.15288/jsa.1995.56.423.PMID 7674678.

⁴ Fiellin, DA; Reid, MC; O'Connor, PG (10 July 2000). "Screening for Alcohol Problems in Primary Care: A Systematic Review." Archives of Internal Medicine 160 (13): 1977-89. doi:10.1001/archinte.160.13.1977. PMID 10888972.

⁵ Bush, K; Kivlahan, DR; McDonell, MB; Fihn, SD; Bradley, KA (14 September 1998). "The AUDIT Alcohol Consumption Questions (AUDIT-C): An Effective Brief Screening Test for Problem Drinking. Ambulatory Care Quality Improvement Project (ACQUIP). Alcohol Use Disorders Identification Test," Archives of Internal Medicine 158 (16): 1789-95. doi:10.1001/archinte.158.16.1789. PMID 9738608.

⁶ Krill, PR, *et al, supra*, 48.

⁷ Krill, PR, *et al, supra*, 48.

even anonymously, any illicit drug use. As such, these statistics are not addressed herein.⁸

B. Alcohol Addiction

One of the more unfavorable lawyer stereotypes is that of the overworked alcoholic lawyer. This stereotype is (sadly) perhaps most memorably depicted in the movie The Verdict with Paul Newman as the boozing litigator trying a medical malpractice case – the case of his life – all while horribly impaired by alcohol addiction. While most lawyers don't operate in that fashion, there's some basis of truth in the stereotype. The fact is, lawyers have rates of addiction many times higher than the general population and also higher than other professions. This includes other notably "stressful" occupations, such as doctors. Often, though, many lawyers can continue to be high-functioning even in the throes of an impairment.

While it has been known for some time that the rates of addiction within the legal profession were higher than the general population, what wasn't known was just how high they were, until the release of the Hazelden study in February 2016. The purpose of this presentation is not to explain why lawyers suffer at such a higher rate; the purpose is to provide education about the problem, provide ways to identify addiction and addictive behavior, and how to find recovery solutions if you find yourself or someone you care about addicted.

According to the Substance Abuse and Mental Health Services Administration (SAMHSA), 6.4 percent of Americans had an alcohol use disorder (AUD) in 2014.⁹ To be diagnosed with an AUD, individuals must meet certain criteria outlined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).¹⁰

- The Eleven Symptoms of Alcohol Use Disorder
 1. Alcohol is often taken in larger amounts or over a longer period than was intended.
 2. There is a persistent desire or unsuccessful efforts to cut down or control alcohol use.
 3. A great deal of time is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects.

⁸ *Id.*

⁹ See <http://www.samhsa.gov/atod/alcohol>.

¹⁰ <http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-use-disorders>. Under DSM-5 anyone meeting any two of the eleven criteria during the same twelve-month period receives a diagnosis of AUD. The severity of an AUD – mild, moderate, or severe – is based on the number of criteria met.

4. Craving, or a strong desire or urge to use alcohol.
5. Recurrent alcohol use resulting in a failure to fulfill major role obligations at work, school, or home.
6. Continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol.
7. Important social, occupational, or recreational activities are given up or reduced because of alcohol use.
8. Recurrent alcohol use in situations in which it is physically hazardous.
9. Alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol.
10. Tolerance, as defined by either of the following: a) A need for markedly increased amounts of alcohol to achieve intoxication or desired effect; b) A markedly diminished effect with continued use of the same amount of alcohol.
11. Withdrawal, as manifested by either of the following: a) The characteristic withdrawal syndrome for alcohol (refer to criteria A and B of the criteria set for alcohol withdrawal); b) Alcohol (or a closely related substance, such as a benzodiazepine) is taken to relieve or avoid withdrawal symptoms.

The presence of **at least two of these symptoms** indicates an alcohol use disorder (AUD). The severity of an AUD is graded mild, moderate, or severe:

- **Mild:** The presence of two to three symptoms.
- **Moderate:** The presence of four to five symptoms.
- **Severe:** The presence of six or more symptoms.¹¹

In contrast to the 6.4 percent rate of addiction in the general population, according to the Hazelden study between 21 percent and 36 percent of lawyers self-report problematic levels of drinking (the distinction between these two percentages is addressed below).¹² In response to the same

¹¹ *Id.*

¹² *Id.*

three questions on the AUDIT-C which showed 36 percent of lawyers having alcohol use disorders, physicians self-reported at only a 15 percent level of problematic drinking. According to these new figures, then, attorneys have alcohol use disorders between 3.5 to five times greater than the general population, and twice as often as physicians when asked specifically about quantity and frequency of use.¹³ Prior numbers reflected that lawyers suffered alcohol use disorders at between two to 2.5 times that of the general population.

C. Statistics

1. AUDIT-10.

On the AUDIT-10, 20.6 percent of lawyers scored at a level consistent with problematic drinking or alcohol use disorder (AUD). Remember the AUDIT-10 measures levels of use (frequency and amount) plus problem behaviors or consequences. "Problematic drinking" is defined as hazardous drinking and possible dependence. More male lawyers (25.1 percent) than female lawyers (15.5 percent) self-reported problematic drinking and possible dependence. In comparison, only 11.8 percent of a "broad, highly educated workforce" screened positive for problematic drinking using the same measure.¹⁴

2. AUDIT-C.

On the abbreviated AUDIT-C, 36.4 percent of lawyers scored at a level consistent with problematic drinking or alcohol use disorder. The AUDIT-C measures only frequency and amount (levels of use) but not problem behaviors or consequences. "A significantly higher proportion of women (39.5 percent) had AUDIT-C scores consistent with problematic use compared with men (33.7 percent)."¹⁵

The contrast in the results between the AUDIT-10 (quantity and frequency plus consequences) versus the AUDIT-C (quantity and frequency only) could indicate a couple of things. First, it likely indicates that as lawyers, we're drinking far more than is safe for us, but that our self-perception of our problem is very low; and/or second, it indicates that we may not be suffering consequences at the same level as individuals in the general population. Both theories support what experts observe as a higher rate of denial by professionals versus that of (not only) the "low-bottom drunk,"

¹³ Krill, PR, *et al, supra*.

¹⁴ Matano, RA, Koopman, C, Wanat, SF, Whitsell SD, Borggreffe A, Westrup D., "Assessment of Binge Drinking Alcohol in Highly Educated Employees," Psychology of Addictive Behaviors, 2003;28:1299-1310.

¹⁵ Krill, PR, *et al, supra*, 48.

but also of the general population. "Denial" is the tendency of alcoholics or addicts to either disavow or distort variables associated with their drinking or drug use in spite of evidence to the contrary.¹⁶ "If a person doesn't recognize that his or her behavior is creating problems, then he or she wouldn't see the need to change or seek assistance," said Barbara McCrady, PhD, professor of psychology and clinical director of the Center for Alcohol Studies at Rutgers University in New Brunswick, N.J. "They are also likely to react negatively to people who believe they have a problem," says McCrady.

Consider the circumstance of the alcoholic who is a minimum-wage employee who is repeatedly late for her shift-work because of her drinking. That individual ultimately loses her job. In her case, alcohol is a factor and the consequences are evident pretty quickly – her position is one that may be filled by another worker fairly easily. It's harder to legitimately deny a problem with alcohol at this point, given the significant and immediate consequence. Compare that with the judge who is suiting up for court each day, meeting with litigants and preparing opinions and orders. Just like the shift worker, the judge may be perpetually late for court, unprepared at hearings, and late in issuing opinions and orders. In spite of this, he is still able to put on his black robe and maintain the impression that he is "fine" and that everything is okay. The judge's daily shortcomings – a direct result of excessive drinking – are not necessarily alerting anyone to his actual level of impairment. He is, himself, able to minimize the truth about his own alcohol abuse. This may go on for months or years.

The following definitions may be helpful in assessing one's own level of drinking and whether one's own perception of his or her alcohol use is consistent with national standards. The National Institute on Alcohol Abuse and Addiction (NIAAA) provides the following definitions:

- a. A "drink" is defined as something containing fourteen grams or more of alcohol. Roughly, that's a 1.5 oz. shot of eighty-proof liquor; a twelve oz. beer; or a five oz. glass of wine. See Appendix for other standard measures.
- b. "Heavy drinking" or "at risk drinking" for men is defined as having more than five drinks in a single day; or fourteen drinks or more per week (two drinks a day).
- c. "Heavy drinking" or "at risk drinking" for women is defined as drinking four or more drinks per day; or eight drinks or more per week (just over one drink a day).

¹⁶ <http://www.hazeldenbettyford.org/articles/breaking-through-denial-is-first-step-in%20recovery-for-alcoholic/>.

- d. "Binge drinking" for men is defined as having more than five drinks on a single occasion; and for women it's defined as having more than four drinks on a single occasion.¹⁷ Drinking a bottle of wine (alone) is considered a "binge drinking episode" for either sex.
- e. As defined by NIAAA, for women, "low-risk drinking" is no more than three drinks on any single day with no more than seven drinks per week. For men, it is defined as no more than four drinks on any single day and no more than fourteen drinks per week.¹⁸

D. Work Environment Prevalence

The workplaces where lawyers have the highest rates of addiction are in private firms and in bar administration or lawyer assistance programs.¹⁹ Under both the AUDIT and AUDIT-C, there were higher rates (23 percent in private firms and 24 percent in bar administration or lawyer assistance programs) than any other workplaces.²⁰ Judges scored the lowest rates of addiction, according to their responses, at 16 percent, which still ranked them two and a half times the addiction rate of the general population and also higher than physicians (again, 15 percent) using the same measure. Statistically, the in-between ranges are from 17.8 percent to 19.2 percent and comprise in-house or corporate counsel, sole practitioners, and government lawyers.²¹

III. DEPRESSION AND OTHER MENTAL HEALTH ISSUES

Depressive disorders are among the most common mental health disorders in the United States. They are characterized by a sad, hopeless, empty, or irritable mood, and somatic and cognitive changes that significantly interfere with daily life. Major depressive disorder (MDD) is defined as having a depressed mood for most of the day and a marked loss of interest or pleasure, among other symptoms present nearly every day for at least a two-week period.²² Just like with substance use disorders, the rates of mental health disorders (including but not limited to depression, chronic stress and anxiety) are much higher within the legal profession, than the general population.

¹⁷ <http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/moderate-binge-drinking>.

¹⁸ *Id.*

¹⁹ Krill, PR *et al*, *supra*, at 49.

²⁰ *Id.* at Table 3, 49.

²¹ *Id.*

²² See <http://www.samhsa.gov/disorders/mental>.

According to SAMHSA, 6.6 percent of adult Americans experienced a major depressive episode (MDE).²³ Lawyers' higher stress levels (which scientists are now identifying as one of the roots of higher rates of depression and substance abuse) may have their genesis in the adversarial nature of the practice of law. There are very few professions whose core of work is completely adversarial.

The 2016 Hazelden study reveals that the percentages of lawyers with mental health concerns are even higher than previously thought. The statistical information previously relied upon was a 1990 Johns Hopkins University study which identified lawyers as having depression at a rate 3.6 times higher than non-lawyers, who shared the same socio-demographic traits.²⁴ The Hazelden study quantifies lawyers as actually suffering from depression at a rate of 28 percent, or almost 4.5 times that of the general population.²⁵ Approximately 61 percent of the study acknowledged concerns with high levels of anxiety during the course of their career; and 46 percent – almost half – reported having experienced depression during the course of their career.²⁶ Finally, and perhaps most chilling is the fact that almost 12 percent admitted suicidal thoughts at some point over the course of their career.²⁷

One still-reliable finding of the 1990 Johns Hopkins study is that in all graduate-school programs in all professional fields, the optimists outperformed the pessimists – except in one profession. The only exception was among law students, where pessimists outperformed optimists.²⁸ This is logical when you consider that pessimism is an asset for attorneys. Pessimism creates skepticism about what our clients, our witnesses, opposing counsel, and judges tell us, as well as assisting us in effectively questioning interpretations of the law. Pessimism inspires lawyers to anticipate the worst, and thus prepare for it. Benjamin Disraeli, former Prime Minister of the United Kingdom said that "I am prepared for the worst, but hope for the best." He probably learned this while training as a solicitor (he ultimately abandoned the law). But pessimism is bad for your health: it leads to stress and disillusionment, which makes us vulnerable to depression.²⁹

²³ See <http://www.samhsa.gov/disorders/mental>.

²⁴ Benjamin, GA, Darling E, Sales B. "The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse among United States Lawyers." International Journal of Law and Psychiatry, 1990;13:233-246. ISSN 0160-2527.

²⁵ *Id.*

²⁶ Forward, Joe, "Landmark Study: U.S. Lawyers Face Higher Rates of Problem Drinking and Mental Health Issues", State Bar of Wisconsin Journal, Live 2, <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=2&ArticleID=24589>.

²⁷ Krill, PR, *et al*, *supra*, 50.

²⁸ Benjamin, GA, *et al*, *supra*.

²⁹ Toshihiko, Maruta, *et al.*, "Optimists vs. Pessimists: Survival Rate among Medical Patients over a 30-Year Period," Mayo Clinic Proceedings, Volume 75, Issue 2, 140-143.

In addition to the character traits and other stressors which may decrease the good mental health of lawyers (perfectionism, pessimism, financial insecurity, etc. . .), Britain's Medical Research Council established a clear link between longer work hours and depression.³⁰ In the study, the white collar workers who put in eleven hour workdays had a two and a half times higher likelihood of developing a major depressive episode (MDE) than the employees who worked only seven to eight hour days.³¹ There was a link between long work days even after the researchers took things into account such as level of support in the workplace, job strain, alcohol use, smoking and chronic physical disease.³² The study indicated that the overworked junior and mid-level employees appear to be more prone to depression than the people at higher levels, which supports the Hazelden study's findings that junior associates and entry-level attorneys have the highest rates of depression (employees under thirty showed depression rates of 32 percent).³³ The takeaway is that regardless of age, and ignoring every other contributing factor (*i.e.*, increased rates of addiction, poor health habits and increased rates of depression), many lawyers are still two and a half times more likely to develop depression than those who work less than eleven hours a day as a result of the long hours.

While age is the primary predictor of risk for mental health issues in the Hazelden study, sex is also a factor. Historically, men have had higher rates of depression and women have higher rates of anxiety. The Hazelden study corroborates these statistics among lawyers.³⁴ Regarding anxiety, more than twice as many women are diagnosed with generalized anxiety disorder than men, which usually occurs along with other mental health conditions, substance abuse problems and mood disorders. It also commonly co-occurs with major depression. The Hazelden study also validates that non-problematic drinkers on the AUDIT had lower levels of depression, anxiety and stress than those who drank more, as measured by the DASS-21.³⁵

- Co-Occurring Disorders

Mental health issues such as depression or anxiety and substance abuse conditions often co-occur. In other words, individuals with substance use conditions often have a mental health condition at the same time, and vice versa. This is known as a co-occurring disorder, a dual disorder or a dual diagnosis. It is well-established that co-occurring disorders are more

³⁰ Virtanen M, Stansfeld SA, Fuhrer R, Ferrie JE, Kivimäki M (2012) "Overtime Work as a Predictor of Major Depressive Episode: A 5-Year Follow-Up of the Whitehall II Study." PLoS ONE 7(1): e30719. doi:10.1371/journal.pone.0030719.

³¹ *Id.*

³² *Id.*

³³ Krill, PR, *et al, supra*, Table 3, 49.

³⁴ Krill, PR, *et al, supra*, 50.

³⁵ *Id.*

likely to remit when they are addressed concurrently.³⁶ Without integrated treatment, one or both disorders may not be addressed properly.³⁷ Alcohol dependence appears to prolong the course of depression and increases the risk of suicidal symptoms and behaviors. Patients with depression and alcohol use disorders are at increased risk of relapse to heavy drinking.³⁸ Individuals with alcohol dependence are up to ninety times more likely to be at risk for suicide than the non-psychiatrically-ill population.³⁹

The more you drink, the more likely you are to suffer from anxiety and depression. It is estimated that more than one third of people diagnosed with mental disorders abuses or is dependent on psychoactive substances, especially alcohol; among alcohol-dependent patients 37 percent suffer from other mental disorders.⁴⁰ Alcohol dependence is also associated with increased risk of mood disorders – more than three times higher, depression – almost four times higher, bipolar disorder – more than six times higher, anxiety disorders in general – more than twice, generalized anxiety disorder – more than four times higher, panic disorders – almost double, posttraumatic stress disorder – more than twice.⁴¹ People who drink more than six drinks per week were more likely to have symptoms of depression and anxiety than those drinking less, regardless of age, while for women in their 20s and 40s, the lowest rates of symptoms were in those who did not drink any alcohol at all.⁴²

IV. DEMOGRAPHIC FACTORS FOR ALL DISORDERS

Contrary to the results of the 1990 Johns Hopkins study, the Hazelden results indicate that the age group with the highest rate of both addiction and mental health issues are younger lawyers. The highest percentage of lawyers with alcohol use disorders as well as depression is the under thirty crowd.⁴³ In fact,

³⁶ Gianoli, MO, Petrakis, I. "Pharmacotherapy for and alcohol comorbid depression dependence: Evidence is mixed for antidepressants, alcohol dependence medications, or a combination." January 2013. Available at: <http://www.currentpsychiatry.com/home/article/pharmacotherapy-for-comorbid-depression-and-alcohol-dependence/1cb21bfb37ec6d0d9cd85b18e6c7913a.html>. Accessed February 29, 2016.

³⁷ www.samhsa.gov/co-occurring.

³⁸ Gianoli, MO, *et al, supra*.

³⁹ Sher, L. (2006). "Alcohol consumption and suicide." *Quarterly Journal of Medicine*, 99(1), 57-61.

⁴⁰ Klimkiewicz A, Klimkiewicz J, Jakubczyk A, Kieres-Salomoński I, Wojnar M, "Comorbidity of alcohol dependence with other psychiatric disorders. Part I. Epidemiology of dual diagnosis," *Psychiatr Pol.* 2015 Mar-Apr; 49(2):265-75. doi: 10.12740/PP/25704.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Krill, PR, *et al, supra*.

age was the greatest predictor of risk for addiction and other mental health disorders. We see the same pattern with law students, who also have higher levels of distress symptoms than the general population (and even other professional school programs) but with limited help-seeking behaviors.⁴⁴

This new research also established that the majority of individuals with problem drinking reported developing those problems during their first fifteen years out of law school (typically from ages twenty-five to forty). Ages thirty and under reported a 32 percent rate of problem drinking, and the thirty-one to forty year olds reported a 25 percent rate of problem drinking. Starting at age fifty-one the percentages fell below 20 percent. Older research showed just the opposite – that the rates of addiction rose as lawyers progressed in their careers. That data suggested that the longer somebody stayed in the profession, the more likely they were to become a problematic drinker. "That aligned with a perception that the legal culture sort of promotes drinking and it's a stressful profession, so the more exposure a person has in terms of years, the more likely a problem would develop. We found that that's not true at all. It's the reverse now."⁴⁵

The overall statistics related to age and alcohol from the Hazelden study are as follows:

- 22.6 percent of attorneys felt their use of alcohol/substances was a problem sometime during their lives;
- 27.6 percent of attorneys reported problematic use prior to law school;
- 14.2 percent of attorneys reported problematic use started during law school;
- 43.7 percent of attorneys reported problematic use started within the first fifteen years after law school; and
- 14.5 percent of attorneys reported problematic use started more than fifteen years after law school.⁴⁶

V. BARRIERS TO TREATMENT

The Hazelden study reveals that only 6.8 percent of attorneys have sought help for alcohol or drug use. Compare this with the general population whose percentage of seeking help is 19.8 percent.⁴⁷ Of those 6.8 percent of lawyers, 21

⁴⁴ Bender, Katherine M., Jaffe, David B. and Organ, Jerome M. (December 2015) "Helping Law Students Get the Help They Need: An Analysis of Data regarding Law Students' Reluctance to Seek Help and Policy Recommendations for a Variety of Stakeholders." *The Bar Examiner*, Vol. 84, No.4.

⁴⁵ Forward, Joe, *supra*, quoting Patrick Krill.

⁴⁶ Krill, PR, *et al*, *supra*.

⁴⁷ <https://www.psychologytoday.com/blog/the-athletes-way/201506/what-are-the-eleven-symptoms-alcohol-use-disorder>.

percent of attorneys sought treatment programs specifically tailored to legal professionals. The AUDIT scores of those attorneys who had specialized treatment were significantly lower than participants who attended more generic treatment programs.⁴⁸ Many treatment facilities are moving towards specialized programs. A typical "professionals program" may include pilots, physicians, nurses, lawyers and judges; while some facilities offer programs exclusively for legal professionals. There are also many types of treatment, facilities and programs of recovery including twelve-step recovery; faith-based recovery; and SMART recovery, among others. One size does not fit all when it comes to recovery solutions.

As mentioned earlier, denial is one of the very first barriers to treatment. As lawyers, periodic instances of heavy or binge drinking is not all that unusual. Professional events are often dotted with cocktail parties, and happy hour is practically a rite of passage in many law firms and other employment settings. As such, we have a barrier to overcoming denial. When the problem drinker's behavior is similar to his or her peers – it's hard for them to accept or understand that anything is wrong.⁴⁹ "Also feeding denial is the stigma and shame associated with alcoholism. Unfortunately, much of society still perceives alcoholism as a moral failure."⁵⁰

All of the individuals involved in the Hazelden study who reported a previous treatment for substance use were asked about barriers to treatment and how this impacted their ability to obtain treatment services. Individuals who had not had any treatment were asked about hypothetical barriers to treatment in the event they needed help in the future. It's likely no surprise that the two most common barriers to treatment were the same for both groups: not wanting others to know that they needed help (50 percent for those who have had treatment, and 25.7 percent for those who have not); and concerns regarding privacy or confidentiality (44 percent for the treatment group and 23 percent for the non-treatment group).⁵¹

Fifty percent (or less) of the lawyers responding said that they would not seek treatment because of shame or confidentiality reasons. This percentage doesn't make sense mathematically, though. The legal population suffers from addiction in the range of 20 percent to 36 percent, and only 7 percent have sought treatment. The probability, then, is that there are much higher barriers to treatment than the 50 percent response. It also evidences that too many lawyers are suffering in silence – many out of the fear of being "found out." Given the rate of suicide among lawyers reported by the Centers for Disease Control (sixty-six lawyer suicides per 100,000 deaths versus eleven general population

⁴⁸ Krill, PR, *et al, supra*, 50.

⁴⁹ www.hazeldenbettyford.org.

⁵⁰ *Id.*

⁵¹ Krill, PR, *et al, supra*, at 50.

suicides per 100,000 deaths), suffering in silence can be deadly.⁵² In a similar study conducted in 2015 among law students, the barriers to treatment were nearly identical, although at a much higher rate based upon students' fears of impacting or preventing their initial bar licensure.⁵³

The Kentucky Bar Association's arm of discipline, the Office of Bar Counsel, recognizes and understands that impairment issues are often at the root of disciplinary complaints. Recognition and treatment of the impairment is the very best course of resolution for practicing attorneys and their clients. Seeking treatment will **not** negatively impact the individual attorney's disciplinary process. According to Tommy Glover, Chief Bar Counsel,

The Office of Bar Counsel investigates complaints of violation of the Rules of Professional Conduct by members of the bar. Some of those violations are directly related to substance abuse. Often the substance abuse leads to the violation. Attorneys should not fear losing their license to practice by seeking treatment with KYLAP. Both KYLAP and the OBC operate under strict rules of confidentiality. Shared communication may only occur when the attorney being investigated consents. In those cases, the OBC and KYLAP may work together to get the attorney the treatment they need so they can avoid the mistakes which interfered with their ability to practice. It's often the failure to ask for assistance which gets lawyers in ethical trouble.

The Kentucky Lawyer Assistance Program is a completely confidential program for all law students, lawyers and judges. Pursuant to [SCR 3.990](#), all contact with KYLAP is confidential. Neither bar counsel nor the bar association are notified if a call is received for help. No information may be disclosed unless the attorney who is seeking help signs a waiver allowing the disclosure. ([SCR 3.990\(1\)\(a\)](#)). In Kentucky, it is safe to seek help.

VI. ETHICAL CONSIDERATIONS

A. Manifestation of Impairment

The areas in which bar associations see the highest level of complaints are not coincidentally the three areas in which the impaired attorney will have the greatest struggle. Refer to the identifying traits, *supra*. Specifically: communication, competency and diligence.

⁵² This statistic has previously (repeatedly) been reported by the Centers for Disease Control, although the source of the statistical data has not been identifiable by researchers in any of the studies referenced in this article.

⁵³ Bender, KM, *et al, supra*.

B. Pursuant to [Supreme Court Rule 3.130\(1.4\)](#) Communication

(a) A lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information.

(b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

C. Pursuant to [Supreme Court Rule 3.130\(1.1\)](#) Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comments: **Thoroughness and Preparation**

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

D. [Supreme Court Rule 3.130\(1.3\)](#) Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

How can you tell when you or another attorney is on the verge of or may have already crossed ethical lines and possibly opened up themselves or your firm to a disciplinary action or legal malpractice claim? A wonderful resource and starting point is to take the "Ethics At-Risk II Quiz for Lawyers," prepared by Gregory Brock, Ph.D., in the Appendix. Take this self-test, and see what your risk factors are.

E. Your Duty to Report

The duty to report unethical behavior, as set forth in [Supreme Court Rule 3.130\(8.3\)](#), requires a lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Association's Bar Counsel." The same rule requires attorneys to report judges to the Judicial Conduct Commission for misconduct. However, before you report an attorney for unethical conduct, it is prudent to first call your local Ethics Hotline attorney, and run the scenario, in hypothetical format, through the Ethics Hotline. Each Supreme Court District has at least two representatives. The current representatives may be found on the Kentucky Bar Association [website](#) under Ethics Hotline Committee Members. The information discussed with the Ethics Hotline is not subject to disclosure nor does it fall under the reporting requirement. That is, the Ethics Hotline attorney is excluded from the reporting requirement, just as KYLAP is excluded from a reporting requirement when unethical or illegal conduct is reported to us or our volunteers while seeking or obtaining assistance from KYLAP.⁵⁴ In addition, reporting an individual to KYLAP to obtain help for that individual does not satisfy the requirement of [SCR 3.130\(8.3\)](#) of reporting unethical conduct to the KBA's Office of Bar Counsel. These are two distinct entities and the reporting obligation is on the practicing attorney.

VII. SOLUTIONS, RECOVERY, AND RESTORATION

The foundation of recovery begins when the impaired lawyer seeks help. There are even times when the help comes to the attorney, by way of the intervention. Whenever and however the help is sought or offered, it is the acceptance of that help which opens up the door to a new life for the impaired attorney. In active addiction one is surrendered to the substance (the term "addiction" is from the Latin, "to adore," "to surrender oneself"). Recovery begins when the individual is able to surrender themselves to the fact that they have lost their power to choose whether or not to use the substance. Early intervention and treatment for the affected attorney often leads to sustained recovery and often helps to prevent bar complaints or sanctions against one's law license. Chemical dependency and depression are treatable illnesses. They are neither moral defects nor a result of lack of willpower.

VIII. KENTUCKY LAWYER ASSISTANCE PROGRAM

If you think you need help, call the Kentucky Lawyer Assistance Program (KYLAP). KYLAP is a program of the Kentucky Supreme Court funded by Kentucky Bar Association lawyer dues that offers confidential help to members of the Kentucky legal community (law students, lawyers and judges) who are

⁵⁴ [Supreme Court Rule 3.130\(8.3\)\(c\)](#) A lawyer is not required to report information that is protected by [Rule 1.6](#) or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.

struggling with mental health issues, such as depression, alcohol and drug abuse, stress, compulsive gambling or any other condition that may adversely impact the individual's personal or professional life.

A. All Contact with KYLAP Is Confidential

Pursuant to the Kentucky Lawyer Assistance Program ([Supreme Court Rule 3.990](#)), all contact with KYLAP is confidential. The Rule is as follows:

SCR 3.990 Confidentiality

(1) All communications to KYLAP and all information gathered, records maintained and actions taken by KYLAP shall be confidential, shall be kept in strict confidence by KYLAP's staff and volunteers, shall not be disclosed by KYLAP to any person or entity, including any agency of the Court and any department of the Association, and shall be excluded as evidence in any proceeding before the Board of Governors or the Office of Bar Admissions, except that:

(a) if the person who is the subject of KYLAP's assistance has provided a written release authorizing disclosure of communications to KYLAP or information gathered, records maintained or actions taken by KYLAP, KYLAP may disclose such information in strict accordance with the terms and conditions of that written release;

(b) if the matter was assigned to KYLAP by the Court pursuant to paragraph [SCR 3.980](#), KYLAP may issue reports, disclose information and provide testimony as set forth in paragraph (3) of that Rule, and this [Rule 3.990](#) shall not be construed as a basis for excluding otherwise admissible evidence from any admission, disciplinary, restoration or reinstatement proceeding; and

(c) if KYLAP provided assistance pursuant to an agency referral under [SCR 3.970](#), KYLAP may issue reports, disclose information and provide testimony as set forth in paragraph (5) of that Rule, and this [Rule 3.990](#) shall not be construed as a basis for excluding otherwise admissible evidence from any admission, disciplinary, restoration or reinstatement proceeding.

(2) The foregoing requirement of confidentiality shall apply to all members of the KYLAP Commission, all KYLAP staff members and volunteers, all employees of the Association, all volunteer counselors, all persons who provide information or other assistance to KYLAP in connection with any referral or assignment, and all other

persons who participate in the performance or delivery of KYLAP's services.

Referrals to KYLAP may be made by the individual in need or by anyone concerned about an impaired attorney or judge. It is a safe place to turn for confidential assistance.

KYLAP is entirely separate from the Office of Bar Counsel of the Kentucky Bar Association. Information received by KYLAP concerning any lawyer seeking help or to whom assistance is offered is confidential. The confidentiality provided is that of the attorney-client privilege. If you call as the spouse, child, or friend of the law student, lawyer or judge whom you suspect may have a chemical dependency and/or mental health problem, your communication is also treated as confidential, and the individual you are referring does not know who referred them.

In order to assure this highest degree of trust and confidence, the Kentucky Lawyer Assistance Program is, by rule of the Kentucky Bar Association, which has been approved by order of the Kentucky Supreme Court, entirely separate from any ethics, disciplinary counsel or character and fitness committee of the KBA or the Office of Bar Admissions.

B. How Can KYLAP Help?

Among the services which KYLAP can offer the individual in need of their support people are:

1. Immediate and continuing assistance to members of the legal profession who suffer from the effects of chemical dependency or mental conditions that result from disease, disorder, trauma or other infirmity and that affects their ability to practice;
2. Planning and presentation of educational programs to increase the awareness and understanding of members of the legal profession to recognize problems in themselves and in their colleagues; to identify the problems correctly; to reduce stigma; and to convey an understanding of appropriate ways of interacting with affected individuals;
3. Investigation, planning, and participation in interventions, assessments and/or evaluations with members of the legal profession in need of assistance;
4. Sponsoring and/or maintaining substance abuse and/or mental health support meetings for members of the legal profession around the state;
5. Aftercare services upon request, by order, or under contract that may include but are not limited to, the following: assistance in structuring aftercare and discharge planning; assistance for entry into appropriate aftercare and professional peer support meetings;

and assistance in obtaining a primary care physician or local peer counselor; and;

6. Monitoring services that may include, but are not limited to, the following: alcohol and/or drug screening programs; tracking aftercare, peer support and twelve-step meeting or other abstinence-based program attendance; providing documentation of compliance; and providing such reports concerning compliance by those participating in a monitoring program as may be required by the terms of that program.

IX. CONCLUSION

More than ever, we know that the increased threat of life-ending addictions and other mental health issues are real and they're increasingly prevalent among lawyers. Don't be afraid to get confidential help. Your license is not jeopardized by your seeking treatment. If you call KYLAP or reach out to one of our volunteers, the Office of Bar Counsel is not notified. Your KBA membership is neither at risk nor is it threatened. [Supreme Court Rule 3.990](#) protects you. As lawyers, and as the profession most likely to change public policies, it is our opportunity and our responsibility to help remove the stigma of addiction and other mental illnesses. Your friends, co-workers and colleagues are far more educated on addiction, depression and other mental health maladies than you likely know. Every family is touched by something – whether it's addiction, depression, suicide or another mental health issue.

When you are standing in that forest of sorrow, you cannot imagine that you could ever find your way to a better place. But if someone can assure you that they themselves have stood in that same place, and now have moved on, sometimes this will bring hope.

— Elizabeth Gilbert, [Eat, Pray, Love](#)

We are not alone. Many, many law students, lawyers and judges have experienced these and other mental health issues. They have not only moved on to the place where their own mental health has been improved, but as a result of their own difficulties, they will make themselves available to help another lawyer who finds herself in similar circumstances. There is no shame in seeking help in order to regain good mental health. Not only might your job depend on it, but your life might, too.

"MY STORY"

Benjamin G. Dusing

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KYLAP Commissioner (6th Supreme Court District)

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I'll never forget the first time I tried cocaine.

It was a Saturday afternoon in early fall during my third year of law school at the University of Kentucky, sufficiently early in the semester such that the pressure of final exams was not yet on the horizon and those of us so inclined could feel free to "let loose." A classmate was having a pre-game party before a big UK football game and it was one of those picturesque autumn days in Lexington where the temperature was just right, the colors of the season simply magnificent. Despite the day's beauty, I have a distinct memory of feeling sad. There was a heaviness about my heart – the sort of weight recognized only in hindsight as the kind attributable to a deeply-aggrieved soul.

I can't remember how exactly I found my way into that clandestine back room – the one where I found a handful of party-goers hunched over a shiny mirror covered in a snow-like substance that I immediately recognized to be cocaine. In hindsight, I can understand that I was looking for that room. Although I had never before used a "hard" drug, I had seen enough to know that such recreational drugs were always just around the corner from every booze-fueled party. And on that particular Saturday, the booze just wasn't getting the job done. With the benefit of fifteen years of hindsight, I can look back now and recognize that it was an inner anguish – a deep, spiritual malady, incomprehensible at the time – that guided me to where I then stood. And it was that same spiritual malady that motivated me to put a straw to my nose and do my first "line."

Such was my introduction to cocaine. It was an introduction that would rock my world. I was hooked the moment the substance entered my body, and over the course of the next year or so my relationship with the drug would come to take over my life. Slowly but surely, my uncontrollable desire for that ever-diminishing period of synthetic numbness led me to push everything good in my life farther and farther away. Friends, family, hopes, dreams – one by one, these things slipped away. Over time, my existence was reduced to a chemical romance that would end, as it always does for alcoholics and addicts, only when I "hit bottom" amid consequences so impactful that the agony of my addictive existence could no longer be denied.

Looking back, it is easy to see that cocaine was hardly the cause of my fall. It merely accelerated my journey down a path that I had been on for some time. Already an alcohol-abuser (my first drink was at the ripe age of 14), I had for years relied on alcohol to soothe a troubled soul and "cure" what ailed me. What ailed me – I would come to recognize only later, in sobriety – was a deeply-rooted selfishness, insecurity, and dislike-of-self. I simply did not like the person I had somehow become. Worse still, I didn't know how to change. Alcohol became my crutch and mask – a tool to drown out the things that haunted and something to hide me from me. I had been drinking heavily even prior to law school, but its pressure-packed atmosphere and competitive undercurrent seemed to take the need to escape, and hence to drink, to a whole new level. I started drinking alone.

Like many alcoholics and addicts, however, my fragile state and substance abuse was hidden by my outward "success." To the untrained eye, I was the consummate achiever. In the top 10 percent of my class and editor-in-chief of the law review, my drinking (and later, my drugging) did not bring academic consequences. I was popular enough. I had a girlfriend. I was on my way to professional success, a federal clerkship position waiting for me upon graduation. Problems? How could I have problems when I was so clearly a "success?"

So long as I enjoyed such outward "success," it was easy to look past the increasingly-more-serious consequences of my substance abuse. (The DUI in my 2L year was explained away as "bad luck." When my closest law school friends suddenly wanted nothing to do with me, *they* were to blame.) But such "success" served only to perpetuate the lie. While slowly dying inside, I didn't dare get honest. The thought of living without booze or cocaine was at that point downright scary. (As I would later say to the doctor to whom my parents dragged me after becoming concerned: "You don't understand. The alcohol isn't a problem. It's my *solution*." It would be many years before I would appreciate the fantastic irony of this "denial.")

Mercifully, in the end my "bottom" did come. But it hardly seemed "merciful" at the time.

For me, "bottom" came in the form of my bar exam results. I failed. Not only that, I failed in humiliating fashion. I was the first editor-in-chief in the history of the University of Kentucky College of Law to fail the bar exam. (To my knowledge, I still hold this "distinction.") The correspondence informing me of my failure arrived on letterhead bearing the name of my father, who happened to be at the time a member of the Board of Bar Examiners. I was working for a federal judge.

The veneer of "success" suddenly stripped away, I was confronted for the first time with the harsh reality: I had a problem. I had spent the summer drinking and drugging (and not studying), and for the first time there was a serious, tangible consequence. Yes, I had a drinking and drugging problem, and I could deny it no more.

With that simple act of surrender, my road to recovery was begun. In my case (as with many others), recovery was not an event. It was, rather, a process. That process was at first marked by fits and starts, half-measures and hedging. After months of outpatient treatment, sustained sobriety still eluded my grasp. I would get a couple months, only to relapse. Though I had taken step one – admitting I had a problem – I was still having trouble buying into the solution. I still couldn't get it. *Wouldn't*, rather.

Enter Kentucky Lawyer Assistance Program (KYLAP). At the time operating as "Lawyers Helping Lawyers," the organization and I had an involuntary introduction when I reapplied for the bar. Having been honest in my re-application about my drinking and drugging issues, my application predictably was pulled from the pile. The Character and Fitness Committee gave me a "choice": agree to a two-year term of supervision by KYLAP (assuming I passed the bar exam) or be deemed unfit. Not much of a choice.

If only I knew then how lucky I was. Blessed rather, as anyone in recovery would be sure to correct me. Under the watchful eye of a score of Kentucky lawyers who had once "been where I'd been" – and under the particularly watchful eyes of my designated KYLAP monitor – I was forcibly immersed in recovery. Four AA meetings a week, a check-in call with my monitor, a monthly face-to-face – these requirements attached me

to recovery long enough for me to come to understand the miracle and gift that it is. As it was, I came to this understanding rather quickly. It was no time at all before I came to realize that I wanted with all my heart what those folks "in the rooms" had – and I wanted it damn bad. Serenity, peace, happiness. The very things that had eluded me for so long, and ironically the very things that I had destructively and artificially sought in the form of drink and drug.

It wasn't easy. I had to do things (the 12 steps) – take "suggestions," as the old-timers would call them – that weren't always easy to do. Like "making amends," believing in a God of my understanding (a "higher power"), taking a daily "inventory" of my actions, promptly admitting when I was wrong, and – above all – being *rigorously* honest. I had to get a "sponsor" and take direction. I had to, quite simply, *change everything*. (Only in time would I come to understand that that was precisely the point.)

It wasn't long before I started seeing changes in me – changes I could be proud of. I started to like myself, and *be* myself. Not drinking wasn't the half of it, I came to learn. Sobriety was a way of life. It was a way of living – a creed. I started too to see changes in *my life*. I had friends again. People seemed to enjoy being around me more. I enjoyed being around me more. I found my footing in the profession. I found myself contributing. In short, I found myself ... *happy*.

And so it should come as no surprise that I barely noticed when my two-year term of supervision expired. By that point, I was all in. Recovery had long since become not something I needed but something I *wanted*. It had become my most prized possession. The thought of going back to the way it had been only served to propel me forward. I felt as though I had won some lottery and the Big Man Upstairs had seen fit to reach down and give me – undeserving, hapless me – the "secret to life." There was simply no going back – thank the Lord.

As it is, I have not gone back. Not for 12 years, 9 months, and 30 days. I have the grace of God, KYLAP, and the fellowship of Alcoholics Anonymous to thank for that string of continuous sobriety. That, my friends, is a miracle. And my existence during this time has been no less miraculous. To say that I have been blessed simply does not do it justice. The truth is, my life today is silly, stupid awesome. Recovery has given me the love of my life and three precious children. Recovery has given me the opportunity to do what I love to do – be a lawyer – and make a living doing it. Recovery has given me the privilege of representing the United States of America (as a federal prosecutor for five years), the experience of being a partner at a large national law firm, and now the thrill of starting and managing my own firm. Most of all, though, recovery has given me the joy of giving – the truest form of happiness, as I have come to find out.

My story, like all of those in recovery, has no ending. It continues to be written. By design, we take it "one day at a time."

But *this* story must have an ending, and it is only fitting – given the audience – that it read like this: KYLAP and AA saved my life. I am but an ordinary miracle whose journey from despair to hope was infinitely assisted by this small but growing band of Kentucky lawyers who have dedicated themselves so selflessly to the mission of recovery and who every day give of themselves quietly and nobly in support of the greater good. It is without question my greatest professional honor to be associated with them. I will be forever indebted to KYLAP for introducing me to recovery's greatest gift: hope.

AUDIT-C Questionnaire

Patient Name _____ Date of Visit _____

1. How often do you have a drink containing alcohol?

- a. Never
- b. Monthly or less
- c. 2-4 times a month
- d. 2-3 times a week
- e. 4 or more times a week

2. How many standard drinks containing alcohol do you have on a typical day?

- a. 1 or 2
- b. 3 or 4
- c. 5 or 6
- d. 7 to 9
- e. 10 or more

3. How often do you have six or more drinks on one occasion?

- a. Never
- b. Less than monthly
- c. Monthly
- d. Weekly
- e. Daily or almost daily

AUDIT-C - Overview

The AUDIT-C is a 3-item alcohol screen that can help identify persons who are hazardous drinkers or have active alcohol use disorders (including alcohol abuse or dependence). The AUDIT-C is a modified version of the 10 question AUDIT instrument.

Clinical Utility

The AUDIT-C is a brief alcohol screen that reliably identifies patients who are hazardous drinkers or have active alcohol use disorders.

Scoring

The AUDIT-C is scored on a scale of 0-12.

Each AUDIT-C question has 5 answer choices. Points allotted are:

a = 0 points, b = 1 point, c = 2 points, d = 3 points, e = 4 points

- **In men**, a score of 4 or more is considered positive, optimal for identifying hazardous drinking or active alcohol use disorders.
- **In women**, a score of 3 or more is considered positive (same as above).
- However, when the points are all from Question #1 alone (#2 & #3 are zero), it can be assumed that the patient is drinking below recommended limits and it is suggested that the provider review the patient's alcohol intake over the past few months to confirm accuracy.³
- Generally, the higher the score, the more likely it is that the patient's drinking is affecting his or her safety.

Psychometric Properties

For identifying patients with heavy/hazardous drinking and/or Active-DSM alcohol abuse or dependence

	Men ¹	Women ²
≥3	Sens: 0.95 / Spec. 0.60	Sens: 0.66 / Spec. 0.94
≥4	Sens: 0.86 / Spec. 0.72	Sens: 0.48 / Spec. 0.99

For identifying patients with active alcohol abuse or dependence

≥ 3	Sens: 0.90 / Spec. 0.45	Sens: 0.80 / Spec. 0.87
≥ 4	Sens: 0.79 / Spec. 0.56	Sens: 0.67 / Spec. 0.94

1. Bush K, Kivlahan DR, McDonell MB, et al. The AUDIT Alcohol Consumption Questions (AUDIT-C): An effective brief screening test for problem drinking. *Arch Internal Med.* 1998 (3): 1789-1795.
2. Bradley KA, Bush KR, Epler AJ, et al. Two brief alcohol-screening tests from the Alcohol Use Disorders Identification Test (AUDIT): Validation in a female veterans affairs patient population. *Arch Internal Med* Vol 163, April 2003: 821-829.
3. Frequently Asked Questions guide to using the AUDIT-C can be found via the website: www.oqp.med.va.gov/general/uploads/FAQ%20AUDIT-C

AUDIT questionnaire: screen for alcohol misuse¹

Please circle the answer that is correct for you

1. How often do you have a drink containing alcohol?

- Never
- Monthly or less
- 2–4 times a month
- 2–3 times a week
- 4 or more times a week

2. How many standard drinks containing alcohol do you have on a typical day when drinking?

- 1 or 2
- 3 or 4
- 5 or 6
- 7 to 9
- 10 or more

3. How often do you have six or more drinks on one occasion?

- Never
- Less than monthly
- Monthly
- Weekly
- Daily or almost daily

4. During the past year, how often have you found that you were not able to stop drinking once you had started?

- Never
- Less than monthly
- Monthly
- Weekly
- Daily or almost daily

5. During the past year, how often have you failed to do what was normally expected of you because of drinking?

- Never
- Less than monthly
- Monthly
- Weekly
- Daily or almost daily

6. During the past year, how often have you needed a drink in the morning to get yourself going after a heavy drinking session?

- Never
- Less than monthly
- Monthly
- Weekly
- Daily or almost daily

7. During the past year, how often have you had a feeling of guilt or remorse after drinking?

- Never
- Less than monthly
- Monthly
- Weekly
- Daily or almost daily

8. During the past year, have you been unable to remember what happened the night before because you had been drinking?

- Never
- Less than monthly
- Monthly
- Weekly
- Daily or almost daily

9. Have you or someone else been injured as a result of your drinking?

- No
- Yes, but not in the past year
- Yes, during the past year

10. Has a relative or friend, doctor or other health worker been concerned about your drinking or suggested you cut down?

- No
- Yes, but not in the past year
- Yes, during the past year

Scoring the audit

Scores for each question range from 0 to 4, with the first response for each question (eg never) scoring 0, the second (eg less than monthly) scoring 1, the third (eg monthly) scoring 2, the fourth (eg weekly) scoring 3, and the last response (eg. daily or almost daily) scoring 4. For questions 9 and 10, which only have three responses, the scoring is 0, 2 and 4 (from left to right).

A score of 8 or more is associated with harmful or hazardous drinking, a score of 13 or more in women, and 15 or more in men, is likely to indicate alcohol dependence.

¹Saunders JB, Aasland OG, Babor TF *et al.* Development of the alcohol use disorders identification test (AUDIT): WHO collaborative project on early detection of persons with harmful alcohol consumption — II. *Addiction* 1993, **88**: 791–803.

STANDARD DRINK EQUIVALENTS	APPROXIMATE NUMBER OF STANDARD DRINKS IN:
----------------------------	---

BEER or COOLER

12 oz.

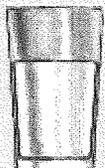


~5% alcohol

- 12 oz. = 1
- 16 oz. = 1.3
- 22 oz. = 2
- 40 oz. = 3.3

MALT LIQUOR

8-9 oz.



~7% alcohol

- 12 oz. = 1.5
- 16 oz. = 2
- 22 oz. = 2.5
- 40 oz. = 4.5

TABLE WINE

5 oz.



~12% alcohol

a 750 mL (25 oz.) bottle = 5

80-proof SPIRITS (hard liquor)

1.5 oz.



~40% alcohol

- a mixed drink = 1 or more*
- a pint (16 oz.) = 11
- a fifth (25 oz.) = 17
- 1.75 L (59 oz.) = 39

*Note: Depending on factors such as the type of spirits and the recipe, one mixed drink can contain from one to three or more standard drinks.

DASS21

Name:

Date:

Please read each statement and circle a number 0, 1, 2 or 3 which indicates how much the statement applied to you **over the past week**. There are no right or wrong answers. Do not spend too much time on any statement.

The rating scale is as follows:

- 0 Did not apply to me at all
- 1 Applied to me to some degree, or some of the time
- 2 Applied to me to a considerable degree or a good part of time
- 3 Applied to me very much or most of the time

1 (s)	I found it hard to wind down	0	1	2	3
2 (a)	I was aware of dryness of my mouth	0	1	2	3
3 (d)	I couldn't seem to experience any positive feeling at all	0	1	2	3
4 (a)	I experienced breathing difficulty (e.g. excessively rapid breathing, breathlessness in the absence of physical exertion)	0	1	2	3
5 (d)	I found it difficult to work up the initiative to do things	0	1	2	3
6 (s)	I tended to over-react to situations	0	1	2	3
7 (a)	I experienced trembling (e.g. in the hands)	0	1	2	3
8 (s)	I felt that I was using a lot of nervous energy	0	1	2	3
9 (a)	I was worried about situations in which I might panic and make a fool of myself	0	1	2	3
10 (d)	I felt that I had nothing to look forward to	0	1	2	3
11 (s)	I found myself getting agitated	0	1	2	3
12 (s)	I found it difficult to relax	0	1	2	3
13 (d)	I felt down-hearted and blue	0	1	2	3
14 (s)	I was intolerant of anything that kept me from getting on with what I was doing	0	1	2	3
15 (a)	I felt I was close to panic	0	1	2	3
16 (d)	I was unable to become enthusiastic about anything	0	1	2	3
17 (d)	I felt I wasn't worth much as a person	0	1	2	3
18 (s)	I felt that I was rather touchy	0	1	2	3
19 (a)	I was aware of the action of my heart in the absence of physical exertion (e.g. sense of heart rate increase, heart missing a beat)	0	1	2	3
20 (a)	I felt scared without any good reason	0	1	2	3
21 (d)	I felt that life was meaningless	0	1	2	3

DASS-21 Scoring Instructions

The DASS-21 should not be used to replace a face to face clinical interview. If you are experiencing significant emotional difficulties you should contact your GP for a referral to a qualified professional.

Depression, Anxiety and Stress Scale - 21 Items (DASS-21)

The Depression, Anxiety and Stress Scale - 21 Items (DASS-21) is a set of three self-report scales designed to measure the emotional states of depression, anxiety and stress.

Each of the three DASS-21 scales contains 7 items, divided into subscales with similar content. The depression scale assesses dysphoria, hopelessness, devaluation of life, self-deprecation, lack of interest / involvement, anhedonia and inertia. The anxiety scale assesses autonomic arousal, skeletal muscle effects, situational anxiety, and subjective experience of anxious affect. The stress scale is sensitive to levels of chronic non-specific arousal. It assesses difficulty relaxing, nervous arousal, and being easily upset / agitated, irritable / over-reactive and impatient. Scores for depression, anxiety and stress are calculated by summing the scores for the relevant items.

The DASS-21 is based on a dimensional rather than a categorical conception of psychological disorder. The assumption on which the DASS-21 development was based (and which was confirmed by the research data) is that the differences between the depression, anxiety and the stress experienced by normal subjects and clinical populations are essentially differences of degree. The DASS-21 therefore has no direct implications for the allocation of patients to discrete diagnostic categories postulated in classificatory systems such as the DSM and ICD.

Recommended cut-off scores for conventional severity labels (normal, moderate, severe) are as follows:

NB Scores on the DASS-21 will need to be multiplied by 2 to calculate the final score.

	Depression	Anxiety	Stress
Normal	0-9	0-7	0-14
Mild	10-13	8-9	15-18
Moderate	14-20	10-14	19-25
Severe	21-27	15-19	26-33
Extremely Severe	28+	20+	34+

Lovibond, S.H. & Lovibond, P.F. (1995). Manual for the Depression Anxiety & Stress Scales. (2nd Ed.) Sydney: Psychology Foundation.

Ethics At-Risk Test II - Lawyers

Gregory Brock, Ph.D.

Ever wonder how close you are to blundering over the ethics edge and possibly harming your clients, yourself, and/or the profession? This test may help. Check (✓) the items below that are true about you. Add the number checked and use the key for Group I to estimate your level of pile-up risk. Work on the items you checked so you can lower your level of risk. Any of the items checked in Group II pose high risk.

None of the items in either group are in themselves unethical, but all may lead to harm.

Group I - Risks that may pile-up and result in trouble:

- 1. You have **never** taken an academic course emphasizing practice ethics.
- 2. Honestly, you are unfamiliar with some parts of the latest additions to the Ethics Rules.
- 3. The Ethics Rules interfere somewhat with the quality of your legal or judicial work.
- 4. You have considered sending a false bill or a padded expense report.
- 5. You are asked to provide legal services to those who work closely with you including clerks and employees.
- 6. You have considered falsifying a CLE report.
- 7. You do not know the position of the Bar Association on ...???
- 8. Your job and/or personal financial situation cross your mind when making case management decisions.
- 9. You or those close to you consider your drinking, drug use, or gambling an issue of concern.
- 10. You are presently taking medication that may interfere with your legal work.
- 11. A client has given you an expensive gift or frequently gives you inexpensive gifts.
- 12. You are behind on your work.
- 13. You gossip a little about clients with close friends and/or family.
- 14. You sometimes fail to review clients' court documents (custody, divorce, parole).
- 15. Client family members or associates tell you secrets that compromise you.
- 16. You don't always follow through on reporting incidents of violence or abuse of others.
- 17. Unresolved tension exists in your work group.
- 18. You sometimes take off jewelry, remove shoes, loosen your tie, or become more informal during appointments.
- 19. The office environment where you practice communicates a tone of informality.
- 20. You are considering a business proposition that may create a conflict of interest.
- 21. You have stopped attending workshops and/or staying up-to-date with advances in the field.
- 22. You are considering doing work in addition to your full time responsibilities.
- 23. You have plagiarized in the past (used others' words or ideas without credit).
- 24. You think reporting a Rules violation could be harmful to your career or more hassle than you are willing to endure.
- 25. You think the Ethics Rules on conflict of interest are unnecessarily restrictive.
- 26. You think the Ethics Rules on confidentiality create too many artificial boundaries.
- 27. You are sure you have violated the Rules on confidentiality or conflict of interest at some time.

0 -Excellent, you are nearly risk free.

0-2 -Re-read the Ethics Rules. Look for CLE opportunities on ethics.

2-3 -Review your practice and personal life for problem areas. Consider needed changes.

3-4 -Seek consultation. Risks are piling to an unmanageable level.

4+ -You are in a high-risk style of practice. Make immediate changes!

Group II - Risks that by themselves may result in trouble:

- A. You fantasize about a present client.
- B. You think about borrowing money from a client escrow account.
- C. You are tempted to romance an ex-client.
- D. Presently, you socialize more than casually with a client.
- E. Presently, you are struggling with a personal, family, or legal crisis.
- F. You consider going ahead with providing professional services when you are hung over from alcohol or other drugs, even if only a little.
- G. You need to seek consultation about your practice with a colleague or supervisor but fear doing so will be harmful or embarrassing to you.
- H. If colleagues knew all of what goes on in your practice or personal life, they would worry that you are so vulnerable to risk that you might harm clients, yourself, or the profession.
- I. You feel angry, frustrated, and/or manipulated by a current client.

— If you checked (✓) any of the items in Group II, seek supervision immediately! —

Send comments and questions to Gregory Brock, Ph.D. (gwbrock@uky.edu).

You have permission to copy and/or publish the At-Risk Test with credit noted.

YOU'VE JUST RECEIVED A BAR COMPLAINT – NOW WHAT?

It's Friday morning. You are sitting at your desk, going over the list of files needing your attention before you head out for the weekend. Motions to file, clients to call, letters to send – you prioritize and prepare to dig in, when the telephone rings. You're needed up front to sign for something. You wonder what it could be, but you don't panic; you get certified mail all the time, right? You reach the receptionist's desk, and the postman hands you an envelope, green card side up of course. You sign for it, and he takes the card and hands the envelope back to you. You flip it over, and you see those four terrible words – Office of Bar Counsel.

Your first bar complaint has arrived. Whether it happens after five years in practice, or twenty-five years in practice, it is no less upsetting. So, after your heart starts beating again and your stomach stops churning, you head back to your office, and find the file. You may make a quick run through the Kubler-Ross five stages of grief: denial, anger, bargaining, depression, and acceptance. Once you hit the last stage, you're ready to say, "Ok, maybe I messed up. Now what?"

I. EDUCATE YOURSELF

Most disciplinary cases are now resolved at, or even before, the Inquiry Commission level. Of the 1,113 disciplinary files closed during the 2014-2015 fiscal year, 975 were dismissed, either by the Inquiry Commission, pursuant to [SCR 3.160\(3\)](#), which provides an informal diversion method for addressing less serious alleged violations, or simply because they were insufficient complaints. Private admonitions were the result in thirty-eight other complaint cases. So statistically speaking, you are likely to fall into one of those categories. The best way to avoid panic, however, is to know what you are facing – educate yourself about the disciplinary system.

II. THE FRAMEWORK OF THE DISCIPLINARY SYSTEM

A. Constitutional Authority

The Supreme Court of Kentucky has exclusive authority to discipline lawyers in the Commonwealth, pursuant to [Section 116](#) of the [Kentucky Constitution](#).

The Supreme Court has adopted Supreme Court Rules which establish both the substantive rules by which a lawyer's conduct is to be measured and the procedures to be followed in determining whether the substantive rules have been violated.

Specifically, the KBA acts as an agent of the Supreme Court in the disciplinary process, pursuant to [SCR 3.025](#).

B. The Disciplinary Process

1. Inquisitorial original proceeding.

The function of the OBC, the Trial Commissioner, and the Board of Governors is to prepare the case for review by the Court and make appropriate recommendations to it through the Findings of Fact and Conclusions of Law determined by the Trial Commissioner and of the Board of Governors. The action is an original action in the Supreme Court.

"A disciplinary matter is one involving the investigative process between the KBA and the lawyer, not an adversarial proceeding... There is no rule permitting an appeal of that decision (dismissal by the Inquiry Commission). Consequently, [the complainant] has no standing to appeal to this Court." Woodard v. Kentucky Bar Ass'n, 156 S.W.3d 256 (Ky. 2004) (parentheses added).

2. Immunity of participants.

Pursuant to [SCR 3.160\(4\)](#), all participants in the disciplinary process are protected by immunity. Furthermore, the filing of a bar complaint is absolutely privileged.

3. Confidentiality.

Initial proceedings are confidential. [SCR 3.150](#) makes discipline matters confidential until the Trial Commissioner or the Board finds a Rules violation and recommends a public sanction. At that point, the matter is public.

III. PERSONS AND ENTITIES INVOLVED

A. Initial Investigation

1. Complainant.

A bar complaint can be initiated by anyone who files a sworn complaint, or by the Inquiry Commission if it becomes aware of potential misconduct from any source. The Complainant is a witness, not a party to the proceeding; the KBA is the named Complainant once the Inquiry Commission issues a Charge.

2. Respondent.

The attorney sought to be disciplined is the *Respondent*.

3. Office of Bar Counsel.

The attorneys in the Office of Bar Counsel (OBC) are appointed by the Board of Governors and are given the authority and

direction by the Supreme Court to investigate and prosecute all disciplinary cases. The OBC is presently staffed with nine full-time attorneys and support staff.

4. Inquiry Commission.

The Inquiry Commission consists of nine persons, six attorneys and three non-attorneys, appointed by the Chief Justice with the consent of the Supreme Court.

The Inquiry Commission has adopted administrative regulations to ensure consistent treatment of cases by and among the three panels, and provide for overall coordination with the OBC.

The Inquiry Commission is primarily a "probable-cause panel." It determines whether probable cause exists for a charge to be filed against a Respondent ([SCR 3.190](#)) based upon the information obtained by the OBC during the initial review and investigation phase. The Respondent does not appear before the Inquiry Commission, but generally files a Response and perhaps additional information as well.

B. Post Charge Hearing Proceedings

Trial Commissioners: If the Inquiry Commission authorized a Charge and the Respondent files an Answer which raises issues of fact, the case is assigned to a member of the Trial Commission to conduct an evidentiary hearing ([SCR 3.230](#) and [SCR 3.240](#)). The Trial Commission is appointed by the Supreme Court under [SCR 3.225](#).

The Charge outlines the conduct and specifies the Rule(s) the Respondent has violated. It is a notice pleading, like other civil pleadings.

C. Appellate Proceedings

1. The Board of Governors of the Kentucky Bar Association.

The members of the Board who vote on discipline matters consist of the President, the President-Elect, the Vice President, the fourteen elected members of the Board (two from each of the Supreme Court districts), and four lay members who are appointed directly by the Chief Justice. [SCR 3.370\(4\)](#).

If the Respondent fails to file an answer, admits the violation, or agrees that the answer raises only issues of law, the case is submitted directly to the Board of Governors ([SCR 3.210](#)). The absence of a factual dispute alleviates the need for a Trial Commissioner.

However, in a case heard by a Trial Commissioner, either the Respondent or the OBC may take an appeal to the Board of

Governors by filing a notice of appeal from the Trial Commissioner's report. If no notice of appeal is timely filed, the case proceeds directly to the Supreme Court ([SCR 3.360](#)). Appeals are routinely filed.

The case is heard by the Board of Governors through briefs and oral arguments ([SCR 3.370\(2\)](#) and [\(3\)](#)). No new evidence is taken, but the Board may remand the case for additional evidence if appropriate ([SCR 3.370\(6\)](#)).

In a case on appeal from a Trial Commissioner, the Board determines whether the decision of the Trial Commissioner is supported by substantial evidence or is clearly erroneous as a matter of law. However, it may conduct a *de novo* review of the evidence presented at the hearing held by the Trial Commissioner ([SCR 3.370\(6\)](#)).

The Board issues a written decision which is advisory in nature ([SCR 3.370\(7\)](#)). The Disciplinary Clerk sends it, along with the record of proceeding, to the Court.

2. Supreme Court.

The case can proceed to the Supreme Court in a variety of ways, but ultimately it has plenary authority to review the evidence, decide the case and impose discipline as it deems appropriate. A disciplinary proceeding is an original proceeding in the Supreme Court.

Now that you have an idea of how the disciplinary system functions, and know where in the Supreme Court Rules to look for information on the system, how should you address the complaint on your desk?

IV. FORMULATE A RESPONSE

[SCR 3.130-8.1\(b\)](#) states: "[A] lawyer...in connection with...a disciplinary matter, shall not...knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority..." Still, the number of attorneys who simply ignore bar complaints is surprising. Under [SCR 3.160\(3\)](#), attorneys against whom complaints of a relatively minor rule violation, such as failure to return a file or failure to return calls, receive a letter informing them that they may be contacted by the OBC attorney to whom the file has been assigned. Many issues can be resolved by simply faxing a fee agreement, a pleading, or other document. Often these issues may be addressed in a telephone call alone, so do not ignore a telephone message from the OBC attorney.

The letter accompanying the Complaint Form may indicate a need to file a written response. In that event, you should do so within the time frame specified in your letter. If you need additional time to respond, it can be made available. Just call the OBC attorney assigned to the file. Should you try to ignore the complaint or

the telephone message in the event no written response was required, you may find yourself facing another violation of your own creation, for which the proof is clear. Moreover, without a response, the Inquiry Commission, and possibly the Board of Governors, does not have the benefit of your point of view and insight. They must rely on the information in the Complaint and the information uncovered in the investigation. The solution is to respond.

A. What Makes a Good Response?

1. Full and complete information.

Responses should focus on the allegations raised in the complaint and provide a clear, objective narrative of the facts relevant to those allegations. Candor and honesty are critical. You may include any information which could be considered a mitigating factor, such as a drug or alcohol problem which might be addressed through the [Kentucky Lawyer Assistance Program \(KYLAP\)](#).

2. Copies of relevant documents from the file or court.

Often, Responses can and should be supported by documents to paint the most complete factual picture of the attorney's explanation. Examples include, but are not limited to, contracts, fee agreements and client correspondence.

3. Relevant background on Complainant.

While Responses should not focus too heavily on Complainants, some facts may be important to an evaluation of the Complaint. Past history with Complainant, issues with collecting unpaid fees, or difficulties working with Complainant during the representation are all factors to be considered in reviewing the case.

4. Seek independent review of your response.

The decision on whether to retain counsel is, of course, entirely yours. Attorneys in the Office of Bar Counsel are not permitted to give legal advice, procedural or otherwise.

B. What Shouldn't You Argue?

1. Standing.

Bar Complaints may be filed by anyone; the ability to do so is not restricted to clients or former clients alone. Frequently, in fact, Complaints are filed by opposing parties. They may be filed by judges or other attorneys, or they may be Inquiry Commission Complaints arising from reports in the local news. Under the Supreme Court Rules, attorneys owe certain duties to their clients, along with certain duties to other parties and to the profession. An

argument that a Complainant lacks standing to make a Complaint is not a helpful argument.

2. Statute of limitations.

There is no statute of limitations contained in the Supreme Court Rules. Certainly, delay in bringing the Complaint is worth noting in the Response, particularly if the passage of time has resulted in loss of information.

3. Character attacks on Complainant.

While relevant information regarding a Complainant is helpful, demonizing a Complainant is not. Your Response should not simply be, "Complainant is crazy (or a criminal) so I shouldn't have to respond to this ridiculous complaint."

4. Motions to Dismiss Complaint.

While a motion to dismiss for failure to state a claim may be appropriate in a civil action, such is not the case here. Making such a motion as opposed to simply responding to the Complaint will not speed the dismissal of the Complaint, and a failure to address any issues will prolong the investigation. The better course of action is to use the Response to show why the Complaint should be dismissed.

5. Pleas for mercy.

Arguing that the malpractice judgment you've already paid or the criminal sentence you are about to serve should be punishment enough will not work. Ethical violations are independent of any civil or criminal remedies. Likewise, arguing the financial consequences of suspension as a reason to dismiss the Complaint will not score any points. The better tack is always to address the merits of the Complaint itself.

6. You people in Frankfort...

With complaints that require a written response, the Inquiry Commission makes the determination of how to proceed. Do not spend time in your response insulting the OBC or the KBA, or questioning the investigating attorney's background or qualifications. Respond to the issues.

V. FACE THE MUSIC

The key point to glean from this is the importance of fully responding to Bar Complaints. Ignoring them will not make them go away. Filing motions to dismiss will not make them go away. Remember that this is an inquisitorial process on behalf of the Kentucky Supreme Court, the licensing entity. It is not criminal in

nature. Your Response is critical; without it, the Inquiry Commission will only know the Complainant's side of the story. They will not know yours and may have no choice but to move forward with a Charge for a violation of [SCR 3.130\(8.1\)\(b\)](#), if for nothing else. Violation of [SCR 3.130\(8.1\)\(b\)](#) is sufficient, in and of itself, to warrant public discipline. Kentucky Bar Ass'n v. Beal, 169 S.W.3d 860 (Ky. 2005). If you face the music, you may be surprised how soon the band stops playing.

VI. ETHICS HOTLINE/UPL COMMITTEE

A. Ethics Hotline

If you have a question about how to ethically proceed in a situation, you can contact the Ethics Hotline. [SCR 3.530](#). The Ethics Hotline Committee members' information is on the Kentucky Bar Association's [website](#). When you contact the committee member by phone, he or she will attempt to give you a prompt telephonic answer. It is always advisable to follow up by submitting the request and factual information in writing to obtain a written Hotline opinion regarding your contemplated professional act.

You must call about your own conduct that has not yet occurred. You cannot contact the hotline and ask about your past conduct or someone else's conduct.

These opinions are advisory only, but you will not be disciplined for any professional act you perform in compliance with the opinion provided pursuant to your written request, provided that your written request clearly, fairly, accurately, and completely states your contemplated professional act. See [SCR 3.530\(2\) and \(5\)](#).

B. Unauthorized Practice of Law (UPL) Committee

Under this same Rule, if you believe that a person or entity may be engaging in the unauthorized practice of law, you may seek guidance from the UPL Committee.

As with the Ethics Hotline, when you contact the committee member by phone, he or she will attempt to give you a prompt telephonic answer and a written informal letter opinion as to whether the conduct constitutes the unauthorized practice of law.

Your communications with committee members in either of these situations are confidential.

If the Ethics Committee or the UPL Committee determines the issue presented to be of sufficient importance, they may present the issue to the Board of Governors to render a formal opinion. Formal opinions will be published in the Bench and Bar.

C. Duty to Self-Report

Pursuant to [SCR 3.130\(8.3\)](#), you have a duty to report misconduct. This is a self-policing profession. If you know that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, you shall inform the OBC. [Rule 8.3](#) does not require that you file a formal complaint.

This is a mandatory reporting obligation, and you can be disciplined for your failure to report another attorney's misconduct. You are not, however, required to report information that is confidential and protected by [Rule 1.6](#).

Although you cannot seek an Ethics Hotline opinion relating to another lawyer's conduct, you can seek an opinion relating to your reporting obligation regarding that other attorney's conduct.

VII. COMMON RULE VIOLATIONS

In the 2015-2016 fiscal year, 1,142 disciplinary files were opened.

By a significant margin, the three most common rule violations recorded in disciplinary files as opened are diligence, communications, and fees.

Most of these files were closed at the Inquiry Commission level either with informal procedures or a private admonition.

Also, in the 2015-2016 fiscal year, the Kentucky Supreme Court issued renditions in 50 cases.

Of the bar complaints that made it past the Inquiry Commission level and were reviewed by the Kentucky Supreme Court, most related to diligence, communications, fees, safeguarding client property, terminating the attorney-client relationship, conflict of interest, fairness to the opposing party, criminal conduct, and dishonest conduct.

All of this being said, only 2.64 percent of all Kentucky lawyers even had a bar complaint filed against them during the 2015-2016 fiscal year.

I. INTRODUCTION

Online marketing and networking are the cutting edge in technology today. Attorneys use websites and interactive media, such as [Facebook](#), [Twitter](#), [LinkedIn](#), etc., to advertise their services, network, communicate with clients, and investigate facts and witnesses in cases. As inevitable with any new technology, the use of online resources, including interactive social media by lawyers as part of their law practice (as opposed to individual, private use) is subject to the ethics rules and regulations of the jurisdictions in which an individual lawyer practices.

No matter how new the technology, the [Rules of Professional Conduct](#) (as well as the Canons of Judicial Conduct) apply to them. As Kentucky lawyers increasingly use online media, including interactive social media, in their law practice, they will need to be aware of the applicable [Rules of Professional Conduct](#) that might affect their use.

In general, lawyers use online media like other technology tools – to advertise and market services, communicate with others, and investigate facts and witnesses. This presentation focuses primarily on advertising and marketing, with a particular application of the [Kentucky Rules of Professional Conduct](#) as well as any similar treatment by other jurisdictions.

Readers should keep in mind the following caveats and the application of ethics rules generally:

- A. Online media is relatively established, but interactive social media is a young technology (relatively speaking) and, accordingly, has not been tackled extensively by legal ethics authorities (Bar organizations, ethical and discipline committees, and academics). The landscape is and constantly will be changing, as is the technology.
- B. As noted by the commentary to the [Kentucky Rules of Professional Conduct](#), Kentucky's ethics rules are "rules of reason." Common sense should always be one of your guides regarding whether or not to do something with social media in your law practice.
- C. When in doubt, seek guidance. The [Kentucky Bar Association](#) has an Ethics Committee and the Ethics Hotline. If a problem arises, use them.

II. WHY BOTHER WITH SOCIAL MEDIA?

- A. Marketing and Advertising – Potential Clients
- B. Marketing – Current & Former Clients

¹ Adapted from "Ethical Use of Social Media in Your Law Practice" by Jeffrey Alford and Michael Odell Walker

III. MARKETING

- A. All marketing, whether online or "in real life," is geared to promoting yourself in one form or another, either personally or professionally. The end is really the same.
 - 1. In a December 1997 FastCompany article, author Tom Peters wrote that, "We are CEOs of our own companies: Me Inc. To be in business today, our most important job is to be head marketer for the brand called You."
 - 2. In "How Social Media (Didn't) Change Business," from June 2008 on <http://www.searchengineguide.com>, Jennifer Laycock tells anecdotal stories of her grandfather's independent insurance agency. In this article, Ms. Laycock tells of her grandfather's success in his small town by getting to know his customers, what they needed and being "everyone's friend." Her grandfather practiced the original form of "social networking."
 - 3. It is nothing lawyers haven't been doing for years; it's just a different way of doing it.
- B. Social media is interactive and distinct from a static website.
 - 1. If all you want to do is put a site up on the web and never think about it again, social networking is not for you and your firm.
 - 2. Ideally, with social networking, we are talking about dynamic, real-time two-way (or more) communication.
- C. Social networking is a generic term for an interactive web/online presence that is an extension of your brick & mortar firm.
 - 1. Maintain contact with not only your clients, but your entire contact list.
 - 2. Disseminate news about your firm.
 - 3. Give thoughts on legal issues pertinent to your practice.
 - 4. Develop a unique personality by showcasing other areas of interest – what sets you apart from other lawyers.
- D. Carolyn Elefant of MyShingle.com wrote a still-relevant e-book in 2008 on social networking for lawyers² in which she discusses using these tools to develop the "three Rs."

² Carolyn Elefant, [Social Networking for Lawyers – The What, Why, and How](#) (2008).

1. Relationships.
 - a. Old axiom: "People like to do business with people they like."
 - b. What types of relationships?
 - i. Online relationships.
 - (a) Contacts/followers/friends on the various social networking sites.
 - (b) Other members of list servs (e.g. KJA, Solosez.net, etc).
 - ii. Reinforcement of connections and relationships you have in real life ("IRL" if you want to use the popular vernacular).
 - iii. While general postings to discussion boards and other such sites have been deemed to not inadvertently create an attorney client relationship, the attorney should be wary about giving out advice and forming an attorney client relationship. Review [KBA Ethics Opinion E-403](#) (March 1998).³
 - iv. Keep in mind the Bar's restrictions on solicitation to prospective clients and its exemptions. See [Rule 7.09](#).
 - c. Be careful not to confuse social networking with social marketing. Don't be like the guy who goes to a Rotary Club meeting and shoves his card into everyone's hand. You want to take part in the conversation, not shout everyone else down.
2. Reputation.
 - a. Your social networking profile can be used to build your reputation in your field.
 - b. Posting to your blog, listserv, or other social media informative articles, links and information related to your particular area of practice.
 - c. Comments on such topics can establish your expertise in your chosen field. It is one thing to post a link to a new

³ Available electronically at [http://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/Ethics_Opinions_\(Part_2\)/kba_e-403.pdf](http://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)/kba_e-403.pdf).

legal opinion, it is another to write an article on the practical application and impact such an opinion will have in practice.

- d. Keep in mind that what you post online about yourself (or what others might post about you) is relevant to your character and fitness. Additionally, it could provide grounds for you to be reported to (or have to report another lawyer to) the KBA under the [Rules of Professional Conduct](#).

3. Referrals.

- a. "Top of Mind Awareness" – People with whom you interact online (or people they know/interact with) may not need you now, but when they do, you want to be the first lawyer that comes to mind.
- b. If you become active on many of the popular social networking sites, you will eventually start to reconnect with people.
 - i. College or even high school classmates, former employers, family friends, relatives, etc.
 - ii. Staying connected increases the odds that they will refer potential clients your way.
 - iii. Again, be wary of giving out free advice or otherwise creating even an appearance of an attorney-client relationship.
- c. Reinforce your current client relationships and stay connected with your clients.
 - i. Many sites allow for private communication between parties rather than a public exchange of posts.
 - ii. You must protect the attorney-client confidentiality.
 - (a) A client should always approve your online relationship.
 - (b) Consider including a clause in your contract where the client approves (private) online communications.
 - (c) Goes without saying that you should not post information about your client.

- iii. Strengthen your ties to your clients. You can show yourself to not just be "Mr. or Ms. Attorney" but a real person who has other interests, a family etc.

IV. COMMUNICATIONS

A. Communications with Potential Clients

1. It is inevitable when using social media that you will receive an inquiry from a person online to represent them regarding a matter. In that case, [Rule 1.18](#) potentially kicks in.
2. [Rule 1.18](#) Duties to prospective client.
 - a. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
 - b. Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as [Rule 1.9](#) would permit with respect to information of a former client.
 - c. A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
 - d. When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (i) Both the affected client and the prospective client have given informed consent, confirmed in writing, or;
 - (ii) The lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

- (a) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (b) Written notice is promptly given to the prospective client.

B. Communication with Clients

1. Communication with clients (or with anyone for that matter) is a communication and writing for purposes of the [Kentucky Rules of Professional Conduct](#). See [Rule 1.0\(n\)](#).
2. Confidentiality.

[Rule 1.6](#) governs the lawyer's obligation to keep information related to representation of the client confidential unless the exceptions set forth under that rule exist.
3. Arguably, communications via a direct message or similar means using social media (e.g. direct messages through [Facebook](#) is allowable) is permissible but should be done with caution. See [KBA Ethics Opinion E-403](#) (March 1998).
4. With social media facilitating reviews of service providers, lawyers should be prepared to see reviews – both positive and negative – on social media. Lawyers can expect to be reviewed on both general review sites such as Yelp and Google as well as lawyer- and professional-specific sites such as Avvo and LinkedIn.

You can expect that most clients who bother to review a lawyer on social media will do so because they are unhappy – most people don't take the time to do positive reviews (LinkedIn endorsements being a notable exception). If a client or former client posts a negative review, remember that [Rule 1.6](#) will prohibit you from responding in a manner that reveals client confidences, even if the post arguably could be construed as a waiver. Any waiver will be limited to the information literally presented, and you cannot infer a broader waiver. While [Rule 1.6\(b\)\(3\)](#) does contain an exception allowing a lawyer to ethically breach confidentiality, that exception only extends to legal claims and discipline cases. See Comment 8 to [Rule 1.6](#). Generic social complaints that do not literally form a threat of filing a malpractice claim would not trigger the [Rule 1.6\(b\)\(3\)](#) exception.

While it can be difficult to hold your powder, so to speak, the best practice is to simply ignore social media complaints from current and former clients unless those complaints rise to the level of defamation causing substantial reputational damage. Also keep in mind the "Streisand Effect" – complaining about the post may

simply drive more attention to it. It will normally be in your best interest to ignore negative social media reviews.

C. Communications with Other Parties and Third Persons

1. Other parties or third persons not represented by counsel.

a. On the one hand, lawyers might be communicating via a social media service with another party not represented by counsel for purposes other than representation of their client. On the other hand, if the lawyer is communicating with that person regarding a matter, then [Rule 4.3](#) should be considered, and the lawyer should make sure to clarify his role on behalf of his client.

b. [Rule 4.3](#).

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.

2. Other parties or third persons represented by counsel.

a. [Rule 4.2](#) reads: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

b. Thus, a lawyer should not use social media to communicate regarding his or her representation of a client with a person who the lawyer knows is represented by counsel unless he or she has the appropriate consent, court order, or legal authority to do so.

D. Communications with Jurors and the Tribunal

1. Generally, while there is no reason a lawyer could not be connected with a judge or potential juror on a social media site, the lawyer certainly should not communicate with the judge or jury regarding a case. This includes not just direct messaging, but "wall posts" and other communications seen by other people.

2. [Rule 3.5](#) reads:

A lawyer shall not:

- a. Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
 - b. Communicate *ex parte* with such a person as to the merits of the cause except as permitted by law or court order;
 - c. Communicate with a juror or prospective juror after discharge of the jury if:
 - (1) The communication is prohibited by law, local rule, or court order;
 - (2) The juror has made known to the lawyer a desire not to communicate; or
 - (3) The communication involves misrepresentation, coercion, duress or harassment; or
 - d. Engage in conduct intended to disrupt a tribunal.
3. Two examples underscore this issue.
- a. District Judge Carlton Terry, Jr. of North Carolina was issued a public reprimand by the North Carolina Judicial Standards Commission after befriending on [Facebook](#) the counsel for one of the parties in a custody case before him and exchanging messages with the counsel regarding the case.^{4,5}
 - b. More instances are coming up of jurors using [Twitter](#), or "tweeting" during trials.⁶ While these particular instances are of juror behavior, the highlight is on the ease with which sending messages via social media about a case can have disastrous effects on individual trials and, ultimately, court management.

⁴ Ryan Jones, "Judge Reprimanded for Discussing Case on Facebook," [The-Dispatch](#), June 1, 2009. Available at <http://www.the-dispatch.com/article/20090601/ARTICLES/905319995> (last viewed December 1, 2015).

⁵ Public Reprimand, Inquiry No. 08-234, North Carolina Judicial Standards Commission, April 2009. Available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf> (last viewed December 1, 2015).

⁶ John Schwarz, "As Jurors Turn to Web, Mistrials Are Popping Up," [New York Times](#), March 17, 2009. Available at http://www.nytimes.com/2009/03/18/us/18juries.html?_r=1&pagewanted=1 (Last viewed December 1, 2015).

E. Communications with Outside World (e.g. Trial Publicity)

1. Lawyers using social media may want to use it to highlight matters in which they are involved. In addition to issues regarding confidentiality and honesty, the lawyer who wants to post about their cases should read the Kentucky rule regarding trial publicity as a good measure of what to say or not say regarding a matter.
2. [SCR 3.130\(3.6\)](#) reads:
 - a. A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
 - b. Notwithstanding paragraph (a), a lawyer may state:
 - (1) The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) Information contained in a public record;
 - (3) That an investigation of the matter is in progress;
 - (4) The scheduling or result of any step in litigation;
 - (5) A request for assistance in obtaining evidence and information necessary thereto;
 - (6) A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) In a criminal case, in addition to subparagraphs (1) through (6):
 - (i) The identity, residence, occupation and family status of the accused;
 - (ii) If the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) The fact, time and place of arrest; and

- (iv) The identity of investigating and arresting officers or agencies and the length of the investigation.
- c. Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- d. No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

F. Advertising Rules Considerations

1. The Attorney Advertising Rules in Rules 7.01-7.50 apply to the use of social media by attorneys.
 - a. Rule 7.01(1) defines an "advertisement" as "any information or communication containing a lawyer's name or other identifying information." If you have your name and the fact you are a lawyer on your [Facebook](#) page or your [Twitter](#) profile, you've engaged in advertising within the meaning of the ethics rules. If a communication promotes your law practice in any way, it's advertising, regardless of whether there's an "ask" in the communication.
 - b. The real question is how the ethical rules regarding advertising apply.
2. Keep in mind the general advertising rule in [Rule 7.10](#) – no communications may be false or misleading.

For example, [LinkedIn](#) allows for connections to "recommend" you and praise your work. Those recommendations and endorsements trigger a duty on the attorney's part to make sure that the "recommendation" is factual and does not create unjustified expectations in violation of Rule 7.10.

3. Be aware of how the disclaimer requirements of Rule 7.20(3) and (5) may apply to the particular type of social media you use.
4. Remember that direct contact using social media must strictly comply with the direct contact and solicitation requirements in Rule 4.5.

V. MISCELLANEOUS/PARTING THOUGHTS

- A. Above all, be honest in using online media. Honesty is a duty of all Kentucky lawyers. See [SCR 3.130\(4.1\)](#).
- B. If you manage others who use social media, consider preparing an office policy regarding the use of social media in the office. It can help mitigate any dangers regarding your responsibility and potential liability for the social media habits of staff.
- C. Conflicts of Interests and "Friends"

A lawyer, when deciding whether to represent an individual, should consider whether his "friending" of someone else would give rise to the need to decline representation of the potential client.

VI. FURTHER REFERENCES

- A. Carolyn Elefant, [Social Media for Lawyers: The Next Frontier](#), ABA (2010)
- B. Ryan Garcia, "Some Law Thoughts" Blog, <https://somelaw.wordpress.com/> (last viewed December 1, 2015)

I. OVERVIEW

- A. The annual requirement for Kentucky attorneys is 12.0 total credits, of which at least 2.0 must be ethics.
- B. The educational year runs from July 1 to June 30.
- C. The deadline to **complete** attendance is June 30.
- D. The deadline to **report** attendance is the August 10 following the June 30 end of the year. Therefore, the reporting deadline for the July 1, 2015-June 30, 2016, educational year is August 10, 2016. Any attendance reports received after August 10 must be accompanied by a \$50 late fee.
- E. Members may carry-forward up to two years' worth of CLE (24.0 total credits, of which 4.0 may be ethics).
- F. Kentucky is on a sixty-minute hour (note that some states measure credit "hours" in fifty-minute increments). Kentucky also rounds to the nearest quarter-hour.
- G. All CLE forms can be found on the Kentucky Bar Association website, www.kybar.org, under the "CLE" option <http://www.kybar.org/?Copyofcleforms>.
- H. The form for reporting attendance is [Form 3](#), Uniform Certificate of Attendance.
- I. Credit for preparing materials for or teaching at an accredited CLE program is reported on [Form 3](#).
- J. The application for program accreditation is [Form 1](#).
- K. **Four** things needed to apply for accreditation:
 - 1. [Form 1](#) – completed;
 - 2. Correct fee;
 - a. \$20 if a member is applying for accreditation;
 - b. \$20 if a sponsor, and program is two hours or less;
 - c. \$50 if a sponsor, and program is more than two hours;

- d. If sponsor applies less than thirty days in advance of program, the fee is doubled (never doubled for members, fee is **always** \$20 for KBA members);
- 3. Time-specific agenda or outline; and
- 4. Short bios of the presenters.
- L. Members may only claim up to 6.0 hours for non-live, on demand, technologically transmitted programs each educational year. Live teleseminars and webinars do not count toward this total; they are "live programs."
- M. Members may claim up to 2.0 credits for an approved public speaking or public service activity each educational year ([Form 4](#)).
- N. Members may claim up to 6.0 credits per educational year for qualified legal writing ([Form 2](#)).
- O. Temporary Hardship Exemption: An attorney may be granted a temporary hardship exemption for one educational year based upon application showing "undue hardship by reason of age, disability, sickness, or other clearly mitigating circumstances." Typically, this exemption is granted based upon medically-related reasons (suffered by the applicant or applicant's family member) and supporting documentation is required. See [Form 7](#).
- P. Permanent Hardship Exemption: Grounds are the same, but the disability is permanent in nature (almost exclusively medically-related), and the exemption carries forward until removed. Documentation is required. See [Form 7](#).
- Q. Hardship Time Extension: Granted to members who can show "hardship or other good cause clearly warranting relief." Documentation is required. Again, usually medically-related, and members must apply for the extension by September 10th following the June 30th end of the educational year. See [Form 8](#).
- R. Non-Hardship Time Extension: Available if members cannot show the good cause required to qualify for a Hardship Extension. The fee for obtaining this extension is \$250 for the first year, \$350 for the second year, and \$500 for all subsequent years. After three years without applying for a non-hardship time extension, the fee schedule will reset back to \$250. The deadline to apply for this extension **AND** earn/report the credits required to cure the deficiency is September 10th following the end of the educational year. See [Form 8](#).
- S. Where to find information about CLE programming:
 - 1. **KBA website**, <http://www.kybar.org>; click on "CLE"; select the following choice from the menu: "Accredited Programs/Search."

This takes you to a webpage containing a [CLEvents – Search](#). (KBA database of all approved CLE Live & Technological Programs). You will also see the following choices of KBA-Sponsored Programs – "Live Programs" and "On-Demand, Non-Live Programs." From those choices, you can go to the following: Various Annual Events (such as the [Annual Convention](#), the [Kentucky Law Update](#), the [New Lawyer Program](#), and [KBA Section Sponsored Programs](#)); [Audio CLE Self-Study Catalog](#); [KBA DVD Programs](#) (CLE Technological Programs); [KBA Online Program Catalog](#) (CLE Technological Programs); [Other Providers](#) (CLE Technological Programs from various CLE providers). **All programs listed on our website have already been accredited in Kentucky.**

2. [Bench & Bar Magazine](#).
 3. KBA e-News sent out to all members monthly.
 4. Contact regional law schools and bar associations to determine if they are sponsoring any upcoming programming.
- T. You can check your CLE record online at the [KBA website](#). Please select the "My CLE Transcript" option on the [CLE main page](#).
- U. Supreme Court Rules pertaining to CLE can be found at <http://www.kybar.org/?clerules>. They begin at SCR 3.600 and go through SCR 3.695.
- V. Important KBA CLE Events
1. The KBA Annual Convention is held in May or June each year.
 2. The [Kentucky Law Update](#) is held every fall in each Supreme Court District. For information about the 2016 dates and locations, check the [KBA website](#) in late spring. The KBA will send out a registration mailer for the program in June. Information will also be provided in [Bench & Bar Magazine](#) and the KBA e-News.

II. EVERYTHING YOU NEED TO KNOW ABOUT EARNING CLE

Congratulations on earning your license to practice law in Kentucky! Now that you are a member of the Kentucky Bar Association, one of the most important requirements you must meet each year is completing Continuing Legal Education (CLE) credits. [SCR 3.645](#) requires that all members of the Kentucky Bar Association (KBA) complete a minimum of 12.0 CLE credit hours including 2.0 ethics hours each educational year. Sometimes there is confusion regarding the 2.0 ethics hours that are required. They are not additional hours above the 12.0 hour requirement; they are **included** in the 12.0 hour total. The educational year for Kentucky begins July 1 and ends the following June 30. It is within this time period that you are required to earn your mandatory, minimum, annual CLE hours.

A. KBA CLE Department

The CLE office is staffed Monday through Friday from 8:00 a.m. until 4:30 p.m. (Eastern Time) to answer questions you may have. One of the most valuable references you can utilize is the KBA website, www.kybar.org, which is obviously available whenever you may need CLE information. You can download forms, check your CLE record, register for KBA CLE programs or take online CLE programs through the website.

B. Reporting Continuing Legal Education Credits

In order to receive credit for attending the programs you complete, you must submit your CLE attendance certification to the KBA. To certify attendance of an accredited program, submit a [Form 3](#), Certificate of Attendance. An important point to remember is that any time you submit an attendance certification, you must include your member identification number on it. If you lose or do not have a member identification card, you may request another one by calling the Membership Department at the Bar Center or through the website.

The Certificate of Attendance must be filled out completely. This includes the activity number assigned to the program by the KBA. The sponsor or provider of the program should have that number. If they do not, you should call the KBA to determine the activity number prior to submitting your CLE certification for credit.

You may only receive credit for completing programs that are accredited by the KBA.

If a program you have attended or wish to attend has not been accredited by the KBA there is an easy process you can follow to submit the program for accreditation: (1) fill out a [Form 1](#) Application for Accreditation; (2) submit a time-specific agenda, including topics presented; (3) briefly describe written materials provided; (4) provide brief speaker bios; and (5) submit the required non-refundable application fee of \$20.

Members completing or participating in an approved activity will be granted one credit for each sixty minutes of actual instruction time.

Certification of a CLE program should be submitted to the CLE Office upon completion of a CLE activity at any time during the educational year (July 1-June 30). The last date to submit CLE certifications without a penalty is August 10 immediately following the educational year in which the activities were completed. Any questions you may have regarding the proper reporting procedure can be addressed by contacting the CLE staff at the KBA.

C. Ways to Earn Your CLE

Listed below are some of the most popular methods of completing CLE used by KBA members. For a complete list of qualifying Continuing Legal Education Activities please refer to [SCR 3.650](#).

1. Attend a live CLE program.

The most popular way to receive CLE hours is by attending a live CLE program. There are many CLE providers throughout the state that regularly provide opportunities for attorneys to earn their educational hours. The [KBA website](#) provides a [list of programs](#) offered with the provider contact name and number for your reference. This list is regularly updated. All programs listed in the online database have been approved for CLE credit in Kentucky.

As a new member of the KBA, you may not be aware of the CLE program that is offered by the KBA each fall at no cost to its members. The [Kentucky Law Update](#) is a two-day program held each year at various locations throughout the state. There is at least one program offered in each of the seven Supreme Court Districts. There is no registration fee for members of the KBA in good standing, and KBA members who attend this program may obtain at least the mandatory minimum annual requirement of 12.0 CLE hours including 2.0 ethics hours. Kentucky is the only MCLE state to provide CLE free of charge to its members in good standing. Information about the 2016 dates and locations of this program will be available on the KBA website Spring 2016. Information will also be available in [Bench & Bar Magazine](#) (which you should receive bi-monthly), and the monthly eNews.

2. Online CLE.

You can earn up to 6.0 CLE hours each educational year by completing online, pre-recorded CLE available on demand.¹ Completing CLE online offers certain benefits in addition to convenience, such as finding courses in practice areas of your choice, access to nationally acclaimed speakers and programs, and twenty-four hour availability. The KBA has partnered with [InReach](#) to offer a number of programs available for viewing through the KBA website. In addition, there are links available to other online providers that can be accessed from this site.

3. Public speaking/service activity.

The KBA promotes community interaction with the legal profession by awarding a maximum of 2.0 CLE credit hours for

¹ Non-live CLE is pre-recorded and available on demand. Members may only earn up to 6.0 non-live credits each educational year. Live webinars and teleseminars, happening in real time with a moderator are “live” programs and do not count toward this maximum.

preparation and participation in public speaking activities. Methods of public speaking eligible for these credits include: teaching or participating as a panel member, mock trial coach, seminar leader for law-related education activities or for public service speeches to civic organizations and school groups on legal subjects. Members may not be compensated for these activities and are required to submit a copy of the materials presented at the event with a completed Application for CLE Credit for Participation in a Public Speaking/Service Activity form ([Form 4](#)). This is a positive way to give back to your local community and earn CLE credits at the same time.

4. Teaching a CLE program.

Several members take advantage of speaking engagements at approved CLE programs to earn credits toward their annual requirement. If you serve as a panel member or a seminar leader for an accredited activity, you can earn one credit for each two hours spent in preparation, up to a maximum of 12.0 credits per educational year. You will also qualify for credits for your actual presentation time. The best way to become involved in teaching and presenting at CLE seminars is to volunteer. Each year, the KBA recruits over 1,000 volunteers to assist with CLE programming. You may also try contacting your local bar or joining a KBA section or specialty organization that regularly provides CLE programming. Getting involved within the local legal profession is the best way to network with other attorneys and can provide you with opportunities to earn CLE credits at the same time.

5. Legal writing.

Members may earn CLE credits for publication of a legal writing up to a maximum of 6.0 credits per year. A legal writing is a publication which contributes to the legal competency of the applicant or other attorneys or judges and is approved by the CLE Commission. Writing for which the author is paid cannot be approved. One credit is granted for each two hours of actual preparation time including research, writing, and editing. While a maximum of 6.0 credits may be applied to meet the annual minimum requirement, the Commission may grant up to 20.0 award credit hours for published legal writing. Award credits do not count toward the annual CLE requirement, but do count toward earning a [CLE Award](#). To submit a legal writing for CLE credit, you must fill out [Form 2](#) and attach a copy of the publication with it. By signing and submitting the application form, you are certifying that the publication is an original work created solely by you, unless contributing authors are listed.

6. In-house CLE activities.

An in-house CLE activity is an activity sponsored by a single law firm, single corporate law department, or single governmental office for lawyers who are members or employees of the firm, department or office. At least half of the instruction must be provided by qualified persons having no continuing relationship or employment with the sponsoring firm, department or agency.

7. Audio recordings/CDs/DVDs.

Members can obtain CLE credits by listening to digital audio recordings or CDs, or by watching DVDs. Several providers supply recordings in a variety of formats for purchase or for a minimal rental fee. Accredited audio/video programs include carefully prepared written materials delivered with the digital recording file or CD/DVD order. The audio transmission files must have high quality sound so that listeners may easily hear the content. The [KBA website](#) has a link to [Webcredenza](#), which offers numerous CLE programs on CD and in other digital formats. The KBA has DVDs available for sale through the KBA website. To submit credit for a technological program you must complete a [Form 3](#), Certificate of Attendance and submit it to the KBA CLE office. Members can receive up to a maximum of 6.0 CLE credit hours each educational year derived from non-live activities.

8. CLE teleseminars.

Teleseminar CLE courses are a popular method of **LIVE** distance learning. Classes occur by telephone conference at scheduled times. Participants register in advance and are given a telephone number to call at the scheduled time. No special equipment is needed – just your phone. Due to the interactive nature of teleseminars, they qualify for live credits. The [KBA website](#) has a link to [Webcredenza](#), which offers numerous CLE teleseminar programs. Credit for these can be claimed using KBA [Form 3](#).

9. Webcasts or simulcast programs.

Webcasts (both audio and video) and simulcast programs are also ways to receive **LIVE** CLE credits. If the program is interactive and is hosted by an attorney moderator, who can address questions and comments, it is considered a "live" program.

D. Regulation of Continuing Legal Education

1. Compliance and certification.

In order to assist members in tracking their yearly CLE attendance, Courtesy Reminders are sent to all members who have not yet completed the annual educational requirement.

These Courtesy Reminders are emailed each spring prior to the end of the educational year as a service to KBA members. A second Courtesy Reminder is emailed each July, again, to those members who have not yet met their annual CLE requirement. While the deadline for timely completion of CLE is June 30th, members have until August 10th following the end of the educational year in which to report attendance that was timely completed.

Members may access their CLE record at any time via the KBA website, <http://www.kybar.org>. This gives each member the opportunity to review his/her record. Please notify the KBA CLE Department if you notice any mistakes or discrepancies in your record. Also, if you completed programs that are not on your record, report them at that time using the correct CLE form.

2. Accreditation of programs and other activities.

KBA CLE offerings include the [Kentucky Law Update](#) program series, the [New Lawyer Program](#), the nationally acclaimed Annual Convention, and various KBA section-sponsored CLE programs. Educational requirements may also be met by attending programs offered by law schools, local and specialty bar associations, and numerous other organizations. In addition, the definition of CLE activity has been expanded by the Supreme Court to include a wide array of technologically delivered educational opportunities and public service speaking activities as well. If you are interested in attending CLE programs offered by other seminar providers, please verify with the sponsor of the program or with the KBA CLE Department that the program has been approved for CLE accreditation by the KBA CLE Commission. Likewise, check in advance for accreditation of technologically delivered educational activities. Public service activities are accredited on an individual basis so check the rules, the website, or call the office for additional information.

If you want to participate in a CLE activity that has not been accredited, the KBA website has forms readily available for your use, and with a program brochure or agenda, the accreditation process is relatively simple. Application fees are required by [SCR 3.660\(2\)](#). Please direct any questions regarding accreditation applications, program status, or forms to the KBA CLE Department.

The CLE Commission is also responsible for accrediting published legal writing. Attorneys may earn part of their annual CLE requirement through the publication of articles, treatises and other legal publications.

3. Extensions, exemptions, and non-compliance.

Non-compliance with the CLE requirement is grounds for suspension from the practice of law in Kentucky ([SCR 3.675](#)), and KBA members are suspended each year for this reason. **Please do not ignore any communication that you receive from the KBA.** If you find that you are unable to complete the minimum annual educational requirement, there are several options available.

The Supreme Court on CLE Non-compliance:

Kentucky Bar Ass'n v. Keesee, 892 S.W.2d 578 (Ky. 1995). There is no good-faith defense to attorney's failure to obtain minimum required Continuing Legal Education (CLE) credits. Fact that attorney is busy does not excuse him from completing Continuing Legal Education (CLE) requirements.

Kentucky Bar Ass'n, CLE Com'n v. Clendenin, 941 S.W.2d 477 (Ky. 1997). Sanction in form of fine in amount of \$3,000 to both reimburse CLE Commission for costs expended in enforcement actions and to punish attorney was appropriate.

Without court order to contrary, continuing legal education (CLE) credits are applied to year in which they were earned.

Commission v. Clendenin, 11 S.W.3d 24 (Ky. 2000). Court has not deemed failure to read the applicable rules by a Respondent as showing cause.

Kentucky Bar Ass'n v. McIntyre, 937 S.W.2d 708 (Ky. 1997). Failure to maintain licensing requirements constitutes serious charge for which suspension is appropriate remedy for non-compliant bar member.

Failure to comply with minimum continuing legal education (CLE) requirements warranted *\$2,500 penalty and suspension*, if attorney failed to submit payment within twenty (20) days.

Kentucky Bar Ass'n, CLE Com'n v. Whites, 847 S.W.2d 56 (Ky. 1993). Credits claimed for attendance are disallowed because of unsatisfactory participation.

4. Appeal of Commission actions.

If you are the subject of any Commission action which you feel to be unfavorable to you, you may appeal the action by writing the CLE Director within thirty (30) days of notification of the action, [SCR 3.680](#).

A REMINDER: Any change of address must be reported to the Kentucky Bar Association. The KBA must have a current record of the address and email where you wish to receive your KBA mail and it is your responsibility to keep the Association informed. [Supreme Court Rule 3.175](#) includes the provision that a member shall upon a change of address notify the KBA Director within thirty (30) days of the new address. If you change your name, the KBA can give you information on the procedure for filing a motion with the Supreme Court for name change approval on Court and KBA records. Name changes cannot be made by the KBA absent order of the Supreme Court.

KENTUCKY BAR ASSOCIATION
514 WEST MAIN STREET
FRANKFORT, KENTUCKY 40601-1812
TELEPHONE: (502) 564-3795
FAX: (502) 564-3225
Website: <http://www.kybar.org>

I. ADDRESS CHANGES

A. Pursuant to [SCR 3.175](#), all KBA members must maintain a current address and current email address at which he or she may receive communications, as well as a physical address if the mailing address is a Post Office box. If you move, you must notify the Executive Director of the KBA in writing **within thirty (30) days**. Address updates can be made on the [KBA website](#) under the Membership heading.

B. The Bar roster address you provide also serves as your address for service of bar complaints under [SCR 3.160\(1\)](#).

C. Effective January 1, 2016: Amendments to [SCR 3.175](#)

(1)(b) maintain with the Director a valid email address and shall upon change of that address notify the Director within 30 days of the new address, except however, that "Senior Retired Inactive" members, "Disabled Inactive" members and those "Honorary" members who no longer actively practice law or maintain an office shall not be required to maintain an email address;

(c) include his or her 5 digit member identification number in all communications to the Association including, but not limited to, any and all communications relating to his or her membership status, membership record, dues obligations, compliance with continuing legal education requirements or disciplinary proceedings in which he or she is a respondent.

(d) If the member provides a Post Office address, he or she must also provide a current address for service of process.

(e) Failure to maintain a current address which allows for physical service of process with the Director may be prosecuted in the same manner as a violation of the Rules of Professional Conduct.

(3) After July 1, 2014, the Association may reject any communication to the Association which fails to comply with paragraph (1)(c) of this Rule [3.175](#), provided that a member's failure to include his or her member identification number in a document shall not result in a default in any disciplinary proceeding.

II. ANNUAL MEMBERSHIP DUES

- A. As a courtesy, Annual Dues Notices are mailed to each member on or before the first week of August and payment is due no later than **September 1**. Online payment of dues by credit/debit card is now available.
- B. Dues not paid on or before September 1 are assessed an additional late payment fee of fifty dollars (\$50). On or before September 15 of each year, the Treasurer shall notify a member in writing of his or her delinquency and late fee. On or before October 15 of each year, the Treasurer shall in writing certify to the Board the names of all members who remain delinquent. The Board shall cause to be sent to the member a notice of delinquency by certified mail, return receipt requested, at the member's bar roster address. Such notice shall require the member to show cause within thirty (30) days from the date of the mailing why the member's law license should not be suspended for failure to pay dues and the late fee. In addition, such notice shall inform the member that if such dues and late fee, as well as costs in the amount of fifty dollars (\$50), are not paid within thirty (30) days, or unless good cause is shown within thirty (30) days that a suspension should not occur, the lawyer will be stricken from the membership roster as an active member of the KBA and suspended from the practice of law. At the conclusion of the thirty (30) days, unless the dues, late fees and additional cost payment have been received, or unless good cause has been shown as to why the member should not be suspended, the Board of Governors will vote to suspend any such member from the practice of law. A copy of the suspension notice shall be sent by the Director to the member, the Clerk of the Supreme Court of Kentucky, the Director of Membership, and the Circuit Clerk of the member's roster address district for recording and indexing. The suspended member may apply for restoration to membership under the provisions of [SCR 3.500](#). A member may appeal to the Supreme Court of Kentucky from such suspension within thirty (30) days of the date the suspension notice is recorded in the membership records. Such an appeal shall include an affidavit showing good cause why the suspension should be revoked. Members suspended for nonpayment of dues under [SCR 3.050](#) must apply for Restoration and pay a fee of \$350 or \$750 depending on the duration of the suspension period and all applicable unpaid Bar Association dues, late fees and costs (see [SCR 3.500](#)).

III. CERTIFICATES OF GOOD STANDING

The KBA issues Certificates of Good Standing to members on request. The cost for each certificate is \$25. Payment options include online requests with credit/debit card or pre-payment by mail with check. Request forms are available at <http://www.kybar.org> under Members and Members Requests. Please allow five to seven business days for processing the certificates.

IV. MEMBERSHIP CARDS

Upon admission to the Kentucky Bar Association you received a Membership Card. This card does not expire. If you need to order a replacement card, please visit our website. Replacement Membership Cards are \$10 each. Payment options include online requests with credit/debit card or pre-payment by mail with check.

V. NAME CHANGES

- A. To change your name with the Kentucky Bar Association and the Supreme Court of Kentucky, you must complete a Name Change Form. This form is available on the [KBA website](#) under the Members heading, and then Member Requests. The completed Name Change Form should be submitted to the KBA Membership Department along with supporting documents such as a marriage certificate, divorce decree, etc. The motion and certificate of service is then prepared by the KBA and mailed to you for your signature. Upon receipt of the signed motion and certificate of service, the KBA prepares the Order for the Chief Justice's signature and the Registrar's Certificate. These are then submitted, along with the motion, to the Supreme Court for filing. After the Order is signed, you will receive a copy from the Court and the KBA will mail you a new membership card with your new name.
- B. It is very important for the Court and the KBA records to reflect the same name that you use in your daily practice of law. The KBA receives membership inquiries from the public on a daily basis, and the KBA staff works diligently to maintain accurate records.

VI. OUT-OF-STATE CERTIFICATION REQUESTS

The KBA Membership Department is responsible for working with out-of-state attorneys and their Kentucky co-counsels in issuing Out-of-State Certification receipts. Please refer to the KBA website for the form and [SCR 3.030](#). Please allow five to seven business days to process Out-of-State Certification requests. There is a \$310 fee per out-of-state attorney per case.

VII. RESTORATION

The Supreme Court Rules governing Restoration and Reinstatement to the Kentucky Bar Association can be found on the [KBA website](#) under Rules, Supreme Court Rule 3.

VIII. WITHDRAWAL FROM THE ASSOCIATION

The Supreme Court Rule governing withdrawal from the Kentucky Bar Association is [SCR 3.480](#). This Rule may be found on the [KBA website](#) under Rules, Supreme Court Rule 3.

I. BACKGROUND AND INTRODUCTION

It is generally accepted that there is a need for efforts to be made to ease the transition from the study of the law to its practice, thereby promoting professionalism and competence in new attorneys and increasing client satisfaction and confidence in newly licensed lawyers. In the past, as was the case in many professions and trades, an apprentice-type relationship would be utilized to train new attorneys and provide them with the lessons and knowledge hard learned by those who had gone before them in their chosen profession. This is still often the method of training utilized by law firms. However, opportunities for mentorship do not arise as naturally as in past years. The recession and corresponding lack of jobs have forced many new lawyers to establish solo practices. In addition, the growth in the legal profession and the specialized nature of law practice today can make it more challenging to introduce new attorneys to the legal community and guide them through the transition to law practice.

In an attempt to address this situation and facilitate mentoring within Kentucky, a Pilot Mentoring Program was created by Supreme Court Order dated August 14, 2007, and funded by a grant from the Bar Foundation. This program was successful and taught us many lessons. First and foremost, we learned that in order for a mandatory, one-to-one mentoring program to be successful, there would need to be staff and resources dedicated solely to administering the mentoring program. The benefits of mentoring are undeniable and well-proven, and so the next inquiry became whether or not it is possible and/or desirable to devote the time and resources needed to achieve a successful, mandatory, one-to-one mentoring program.

During the Mentoring in the Legal Profession Roundtable in Atlanta, Georgia, which took place in February 2011 and was attended by KBA Executive Director John Meyers, these issues were discussed at length. Current thinking is that the one-to-one mentoring model is not the most effective advisory relationship, and that there should be multiple mentors for each mentee. Many programs have found that their results are more positive when mentees choose their own mentor as opposed to having one assigned. Even more interesting, there are clear indications that virtual mentoring might be more effective than actual face-to-face meetings in today's world.

Given the above, the KBA has undertaken the development of a modern, effective information and advisory hub for our new lawyers, administered by existing KBA staff. The website is called Great Place to Start Resource Center for New Attorneys in Kentucky, or "KBA GPS." The URL for the website is <http://www.kbagps.org>.

II. OVERVIEW

A. Main Page

The main page for the GPS site provides a description of the resources and services available through the site. The site is also searchable. Many of the resources offered through the site are links and information you may find elsewhere. The benefit of the GPS site is that these useful resources and links may all be accessed through one central location, thus making the site a "Great Place to Start" when you are looking for information and assistance.

B. Services

The services offered through the site are the "Lawyer to Lawyer" service and the "Find a Mentor" service. In order to utilize these services, you need to create an account by completing the online registration form. Your year of admission and KBA ID number (attorney number) are required. Once completed, the form is submitted to CLE staff, who will verify that you are a KBA member and have been a member for five years or less. Staff will then send a response email verifying your login name and password, or a response notifying you that you do not qualify or that more information is needed to process the request. KBA member attorneys of five years or more will be asked to contact the Director for CLE and request an exception to utilize the service.



You are here: Main

Search

Search...

Login Form

User Name

Password

Remember Me

[Log In](#)

[Forgot your password?](#)
[Forgot your username?](#)
[Create an account](#)

A Great Place to Start

Welcome to the Kentucky Bar Association's Great Place to Start information center dedicated to providing *new attorneys* in Kentucky with valuable resources combined into one central location for ease and convenience. The site includes quick links to many federal and state government websites, Kentucky state courts information, as well as other great tools and online resources.

The **Lawyer to Lawyer** feature allows new or young attorneys to connect with other experienced KBA lawyers who can answer questions on a wide variety of legal topics and areas of practice through telephonic or online correspondence. The **Find a Mentor** feature is available for young attorneys who wish to connect with an experienced Kentucky lawyer for more substantive law questions and advice on balancing the personal and professional demands of practice. Between the two, you are sure to find the advice or answers you are looking for.

Take a moment to look around and see what the site has to offer. To comment on the site or make suggestions about content, visit the contact tab above.

This site is best viewed using Mozilla's Firefox browser. Click the icon to get the latest version.



MAIN	LAWYER TO LAWYER	FIND A MENTOR	ONLINE RESOURCES	KENTUCKY COURTS	CONTACT
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Great Place to Start

Resource Center for New Attorneys in Kentucky

You are here: Main

Search

User Registration

* Required field

Name: *

Username: *

Password: *

Confirm Password: *

Email Address: *

Confirm email Address: *

User Profile

KBA Member #: *

KBA Admission Year: *

or [Cancel](#)

1. Lawyer to Lawyer.

The Lawyer to Lawyer service is a means by which you will be able to call or email properly vetted, volunteer "Attorney Advisors" to seek advice or guidance in the practice of law in Kentucky. This list is comprised of volunteers who have been practicing attorneys in Kentucky for at least five years and are willing to serve in this capacity. The volunteer attorneys complete an online form which includes areas of interest and practice as well as practice location. All volunteer forms are reviewed to ensure that the attorney is in good standing with the KBA and does not have pending disciplinary issues. The main list of available attorneys is available as a sortable list by name and Supreme Court District. For your convenience, there are two additional alphabetical lists by area(s) of practice and by practice counties. Other links included in this area are the Attorney Advertising Commission and Ethics Hotline Committee. More information regarding these can also be found on the main KBA website at www.kybar.org.

You are here: [Main](#) > [Lawyer to Lawyer](#) > [Volunteer Advisor Listing](#) > > [Advisors by District](#)

Search

Search...

- » [Volunteer Advisor Listing](#)
- » [Advisors by District](#)
- » [Advisors by Practice Area](#)
- » [Ethics Hotline Committee](#)
- » [Attorneys' Advertising Commission](#)
- » [Become a Volunteer Advisor](#)

User Menu

- » [Your Profile](#)

Volunteer Advisors by Supreme Court District

Below is a listing of Volunteer Attorney Advisors listed by Supreme Court District and practice counties. Click on the person's link for more contact information.



Name	Location	Practice Counties
[Redacted]	District 1	Calloway, Livingston, Marshall, McCracken
[Redacted]	District 2	Breckinridge, Bullitt, Grayson, Hardin, Hart, Meade, Nelson, Larue
[Redacted]	District 4	Jefferson, Oldham
[Redacted]	District 5	Franklin, Anderson, Shelby, Fayette, Scott, Woodford
[Redacted]	District 5	Fayette, Clark, Franklin, Madison, Jessamine, Woodford, Boyle, Mercer
[Redacted]	District 6	Boone, Campbell, Kenton, Gallatin
[Redacted]	District 6	Pendleton, Boone, Bracken, Campbell, Grant, Harrison, Kenton

2. Find a Mentor.

The Find a Mentor service allows you to choose a Mentor from a pool of properly vetted Kentucky attorneys with at least five years of experience, who have volunteered to go beyond answering a few email and telephone inquiries. Volunteer Mentors are willing to meet with and advise you on an on-going basis if requested to do so. The scope and duration of this Mentor/Mentee association will be entirely flexible and determined by the needs and requests of the Mentees. Recruitment of Mentors is undertaken in the same manner as solicitations for Attorney Advisors. The main list of Mentors is available as a sortable list by name and Supreme Court District. For your convenience, there are two additional alphabetical lists by area(s) of practice and by practice counties.

You are here: [Main](#) > [Find a Mentor](#) > [Mentor Listing](#) > > Mentors by Practice Area

Search

Search...

- » **Mentor Listing**
 - » Mentors by District
 - » **Mentors by Practice Area**
- » Become a Mentor

User Menu

- » Your Profile

Mentors by Supreme Court District and Practice Area

Below is a listing of available Mentors listed by Supreme Court District including Practice Area(s). Click on the person's link for more contact information.



Name	Location	Practice Areas
[REDACTED]	District 4	Civil Litigation, Criminal Law, Family Law
[REDACTED]	District 4	Civil Litigation, Probate and Trust Law, Real Property Law, Business Law
[REDACTED]	District 5	Death Penalty Post-Conviction, Habeas Corpus
[REDACTED]	District 5	Health Care Law
[REDACTED]	District 5	Criminal Law, Family Law, Construction and Public Contract Law, Real Property Law
[REDACTED]	District 5	Criminal Law
[REDACTED]	District 6	Civil Litigation, Small Firm Practice & Management, Alternative Dispute Resolution
[REDACTED]	District 6	Civil Litigation

C. Resources

1. Online Resources.

The GPS site provides shortcuts to "Online Resources." These include the KBA website, "Helpful Links" to Ethics Opinions, Unauthorized Practice Opinions, the Federal Code, Supreme Court Rules, etc., Kentucky State Government websites, Federal Government websites, research websites, local bar association sites, and much more.

MAIN LAWYER TO LAWYER FIND A MENTOR **ONLINE RESOURCES** KENTUCKY COURTS CONTACT



Great Place to Start

Resource Center for New Attorneys in Kentucky

You are here: [Main](#) > [Online Resources](#) > [KBA Website](#) > [Helpful Links](#)

Search

Search...

- » KBA Website
- » **Helpful Links**
- » Casemaker
- » Kentucky State Govt Websites
- » Federal Govt Websites
- » Research Websites

User Menu

- » Your Profile

Helpful Links

- [KBA Ethics Opinions](#)
- [Kentucky Rules of Civil and Criminal Procedure](#)
- [Kentucky Rules of Evidence](#)
- [Supreme Court Rules](#) (including [SCR 3](#) governing the practice of law)
- [Kentucky Revised Statutes](#) and [Administrative Regulations](#)
- [U.S. Code](#)
- [Code of Federal Regulations](#)
- [KBA Unauthorized Practice Opinions](#)

These are just a few of the links from the KBA website. Many more are available at www.kybar.org

You can also access the [forms library](#) at the [Kentucky Court of Justice](#) website or check a docket in any court in the state. Other state court information is also available at this location. The websites for the U.S. District Courts and Bankruptcy Courts may also be accessed, providing access to the Joint Local Rules and other information including forms and electronic case filing.

2. Kentucky Courts.

There is a separate tab for "Kentucky Courts," which provides useful information regarding the District and Circuit Courts, the Court of Appeals and the Supreme Court. There is also a link to the AOC website and forms. These online resources are available to the public without having to become a registered user.

3. Banner listings.

At the bottom of the GPS web pages, there are banner links to the Young Lawyers Division website, Casemaker, and the KBA e-News. Note: The banners may change periodically to suit the needs of users.

D. Contact and Other Information

Information is continually added and updated on the GPS website. If you have a suggestion for content, a question about current listings or a general comment, feel free to contact the KBA staff listed under the Contact tab. They will be happy to assist or find the answers you seek.

What is the KBF?

The KBF is the nonprofit, charitable arm of Kentucky's legal community. Its mission is to further the public's understanding of the judicial system and the legal profession through programs and philanthropic partnerships that help those in need.

Founded in 1958 • 35 Board Members across Kentucky's seven Supreme Court Districts

2 Staff Members

Guion L. Johnstone, *Executive Director*
Gwen Smallenburg, *Program Manager*

120 Kentucky **counties** served

www.kybarfoundation.org

Who does the KBF help?

As part of serving its mission, the KBF awards annual grants to law-related organizations and projects throughout the Commonwealth and promotes the good works that Kentucky attorneys do for their communities. It also supports statewide educational programs for high school and college students that are presented by Kentucky attorneys.

Annual grants of \$262,688 awarded to twenty-four nonprofit law-related programs and projects throughout Kentucky in **2016**

Financial literacy **education** provided by attorney volunteers to **thousands** of Kentucky students



Total grants of more than \$3 million awarded to more than 160 law-related programs and projects throughout Kentucky **since 1988**

Spotlights shone on Kentucky attorneys **making a difference** by **volunteering** in their communities



How can Kentucky attorneys support the KBF?

4,540 members of the Kentucky Bar supported the KBF as **Sustainers** in 2016.
Be a **Sustainer** by contributing \$30 when submitting your annual Bar dues statement.

93 Kentucky attorneys, judges, and law firms are KBF **Patrons**.
Become a **Patron** by contributing \$100, \$150, or \$200 per year for five years.

1,007 Kentucky attorneys and judges are KBF **Fellows**.
Become a **Life Fellow** by contributing \$1,250.

Become a **Fellow** by contributing \$300 per year for five years, at the end of which you will attain Life Fellow status.

89 Kentucky law firms, attorneys, and friends are members of the KBF's **Partners for Justice Society**.
Become a member of the **Partners for Justice Society** by contributing \$5,000 or more.



• 2016 •

Annual Fact Sheet

What is the Kentucky IOLTA Fund?

The Kentucky Interest on Lawyers' Trust Accounts (IOLTA) Fund was established by Kentucky Supreme Court Rule (SCR) 3.830 in 1986. IOLTA is a unique and innovative way to increase access to justice for individuals and families living in poverty and to improve our justice system. At no cost to attorneys or their clients, interest from Kentucky lawyers' trust accounts is pooled in the IOLTA Fund and awarded annually as grants to nonprofit agencies that provide legal aid and legal education to Kentuckians.

Founded in 1986 • 11 Trustees across Kentucky's seven Supreme Court Districts

2 Staff Members

Guion L. Johnstone, *Executive Director*
Gwen Smallenburg, *Program Manager*

120 Kentucky counties served

www.kybarfoundation.org/iolta

Who does IOLTA help?

Through IOLTA, interest generated by Kentucky lawyers' pooled client trust accounts is combined and then disbursed in the form of grants to assist or establish legal services, pro bono, and other law-related programs for the public's benefit that are approved by the Kentucky Supreme Court.

Annual grants of \$335,000 from the IOLTA Fund were awarded to Kentucky's four regional **civil legal aid** programs in **2016**.

Annual grants of \$30,000 from the IOLTA Fund were awarded to Kentucky's three law schools for **student public interest fellowships** in **2016**.

\$1,377,104 in **total grants** from settlement funds received by the IOLTA Fund were awarded to Kentucky's four regional civil legal aid programs for **foreclosure prevention** and **community redevelopment** legal services.

Over \$16.5 million in **total grants** have been awarded by the IOLTA Fund since **1988**.

How can Kentucky attorneys support the Kentucky IOLTA Fund?

158 Kentucky **financial institutions participated** in IOLTA in 2016.

Encourage your financial institution to support IOLTA by participating *and* paying a higher interest rate than required.

Participation in IOLTA by Kentucky **attorneys** has been mandatory since **2010**.

Keep your escrow account information up-to-date with the IOLTA office.
Complete your annual compliance certification by September 1st each year.

"...AND HERE'S THE TOP TEN!"
ETHICS AND MALPRACTICE AVOIDANCE GUIDE
Asa P. Gullett and Benjamin Cowgill, Jr.

I. INTRODUCTION

"Top Ten" lists seem to be more popular than ever, perhaps because they appeal to our need to receive reliable information in a format that we can digest quickly as we rush through our hectic lives.

Accordingly, with USA Today as our model and David Letterman as our muse, we hereby break with all grand traditions of subtle and sophisticated ethics analysis and offer a few simple lists that speak volumes to any lawyer who wishes to avoid malpractice claims and Bar complaints.

So... from the home office in Frankfort (as Letterman might say), we are proud to present:

II. TOP TEN WAYS TO AVOID MALPRACTICE AND MISCONDUCT

10. Be mindful of how your practice setting affects your risk of receiving a malpractice claim.

Areas of law most likely to generate a malpractice claim:

<u>Area of Law</u>	<u>LMICK¹</u> <u>2015</u>	<u>LMICK²</u> <u>2014</u>	<u>LMICK³</u> <u>2013</u>	<u>ABA</u> <u>2011</u>
Personal injury (for plaintiff)	17%	23%	28%	15.59%
Real estate	26%	28%	30%	20.33%
Collection & bankruptcy	7%	11%	8%	9.2%
Workers' comp	7%	7%	5%	2.02%
Estate, trust & probate	22%	9%	6%	10.67%
Family law	6%	8%	5%	12.14%
Criminal law	2%	2%	3%	5.65%

¹ Lawyers Mutual Insurance Company of Kentucky.

² Lawyers Mutual Insurance Company of Kentucky.

³ Lawyers Mutual Insurance Company of Kentucky.

<u>Area of Law</u>	<u>LMICK¹ 2015</u>	<u>LMICK² 2014</u>	<u>LMICK³ 2013</u>	<u>ABA 2011</u>
Corporate & business org.	2%	2%	1%	6.79%
Labor law	1%	1%	1%	2.19%
Personal injury (for defendant)	3%	5%	2%	3.26%

9. Be mindful of how the stage of the case affects the risk that you will do or fail to do something that becomes the basis of a malpractice claim.

When an error is likely to occur during various stages of case development:

<u>Stage of Case</u>	<u>ABA Study 2011</u>	<u>ABA Study 2007</u>	<u>ABA Study 2003</u>	<u>ABA Study 1999</u>
Preparation, filing of documents	24.86%	25.51%	23.08%	25.24%
Pre-trial, pre-hearing advice	8.55%	11.29%	19.47%	8.18%
Commencement of action	17.31%	17.32%	15.59%	15.66%
Advice	20.19%	12.68%	15.07%	6.79%
Settlement/negotiation	6.79%	7.67%	8.20%	6.38%
Trial or hearing	5.33%	5.56%	5.07%	5.10%
Title opinion	4.46%	5.21%	4.03%	13.01%
Investigation/other than litigation	3.25%	6.04%	2.19%	16.26%
Appeal activities	1.60%	2.36%	2.15%	1.11%

8. Be mindful of how the nature of your task affects the risk that you will do or fail to do something that will result in a malpractice claim.

Activities at issue in malpractice claims presented to LMICK during 2013, 2014 and 2015:

<u>Activity</u>	2013 % Total	2014 % Total	2015 % Total
Commencement of action or proceeding	18.94%	21.31%	13.21%
Pre-trial or pre-hearing	16.67%	16.39%	11.32%

<u>Activity</u>	2013 % Total	2014 % Total	2015 % Total
Consultation or advice	3.79%	4.10%	6.60%
Settlement and negotiation	6.06%	9.84%	13.21%
Title opinion	13.64%	12.30%	13.21%
Prepare, transmit or file document (other than pleading)	15.91%	16.39%	7.55%
Trial or hearing	3.79%	3.28%	2.83%
Written opinion (other than title)	0.00%	0.00%	0.00%
Tax reporting or payment	2.27%	1.64%	0.00%
Post-trial or hearing	7.58%	8.20%	9.43%

7. Be mindful of the types of error you are most likely to commit.

a. LMICK Claims Experience in FY 2013, FY 2014 and FY 2015.

Errors alleged in malpractice claims presented to LMICK during 2013, 2014 and 2015:

<u>Alleged error</u>	<u>2013 % Total</u>	<u>2014 % Total</u>	<u>2015 % Total</u>
Failure to know or properly apply the law	11.36%	4.92%	16.98%
Failure to obtain the client's consent	1.52%	0.82%	0.00%
Error in public record search	12.88%	11.48%	13.21%
Failure to know or ascertain deadline correctly	7.58%	4.10%	2.83%
Procrastination in performance of services/lack of follow-up	2.27%	7.38%	2.83%
Failure to calendar properly	10.61%	14.75%	6.60%
Inadequate discovery of facts or inadequate investigation	9.85%	9.02%	7.55%
Failure to react to calendar	0.76%	0.00%	1.89%
Planning error in choice of procedure	18.18%	23.77%	12.26%
Conflict of interest	3.03%	3.28%	3.77%
Fraud	5.30%	2.46%	13.21%
Failure to file a document, where no deadline involved	1.52%	0.82%	0.94%
Failure to understand or anticipate tax	0.76%	1.64%	1.89%
Clerical error	1.52%	3.28%	0.94%
Failure to follow client's instructions	3.03%	8.20%	3.77%

<u>Alleged error</u>	<u>2013 % Total</u>	<u>2014 % Total</u>	<u>2015 % Total</u>
Improper withdrawal from representation	1.52%	1.64%	2.83%
Libel or slander	0.76%	0.00%	0.00%
Lost file, document or evidence	2.27%	0.82%	0.00%
Malicious prosecution or abuse of process	5.30%	1.64%	8.49%

b. Other studies, showing types of alleged error by category and sub-category.

i. Administrative errors:

<u>Error</u>	<u>LMICK 2013</u>	<u>LMICK 2014</u>	<u>LMICK 2015</u>	<u>ABA 2011</u>
Procrastination	2.27%	7.38%	2.83%	9.68%
Failure to calendar properly	10.61%	14.75%	6.60%	4.34%
Failure to react to calendar	0.76%	0.00%	1.89%	2.34%
Failure to file document – no deadline	1.52%	0.82%	0.94%	3.17%
Clerical error	1.52%	3.28%	0.94%	3.54%
Lost file – document evidence	<u>2.27%</u>	<u>0.82%</u>	<u>0.00%</u>	<u>7.05%</u>
Total	18.94%	27.05%	13.21%	30.13%

ii. Substantive errors:

<u>Error</u>	<u>LMICK 2013</u>	<u>LMICK 2014</u>	<u>LMICK 2015</u>	<u>ABA 2011</u>
Failure to know law	11.36%	4.92%	16.98%	13.57%
Planning error – procedure choice	18.18%	23.77%	12.26%	7.39%
Inadequate discovery/investigation	9.85%	9.02%	7.55%	7.82%
Failure to know or ascertain deadline	7.58%	4.10%	2.83%	6.91%
Conflict of interest	3.03%	3.28%	3.77%	4.28%
Failure to understand or anticipate tax	0.76%	1.64%	1.89%	1.37%
Public record error search	12.88%	11.48%	13.21%	3.03%
Error in math calculation	<u>0.00%</u>	<u>0.00%</u>	<u>0.00%</u>	<u>0.69%</u>
Total	63.64%	58.20%	58.49%	45.07%

iii. Client relations:

<u>Error</u>	<u>LMICK 2013</u>	<u>LMICK 2014</u>	<u>LMICK 2015</u>	<u>ABA 2011</u>
Failure to obtain client consent	1.52%	0.82%	0.00%	5.31%
Failure to follow client instruction	3.03%	8.20%	3.77%	3.22%
Improper withdrawal of representation	<u>1.52%</u>	<u>1.64%</u>	<u>2.83%</u>	<u>2.70%</u>
Total	6.06%	10.66%	6.60%	11.22%

iv. Intentional wrongs:

<u>Act</u>	<u>LMICK 2013</u>	<u>LMICK 2014</u>	<u>LMICK 2015</u>	<u>ABA 2011</u>
Malicious prosecution	5.30%	1.64%	8.49%	3.43%
Fraud	5.30%	2.46%	13.21%	5.53%
Violations of civil acts	0.00%	0.00%	0.00%	1.27%
Libel or slander	<u>0.76%</u>	<u>0.00%</u>	<u>0.00%</u>	<u>0.96%</u>
Total	11.36%	4.10%	21.70%	10.19%

- c. Experience at LMICK and the ABA 2007 study both indicate that missing deadlines is one of the most serious dangers:

<u>Deadline Error</u>	<u>LMICK 2013</u>	<u>LMICK 2014</u>	<u>LMICK 2015</u>	<u>ABA 2007</u>
Failure to know deadline	7.58%	6.01%	2.83%	6.38%
Failure to calendar	10.61%	8.60%	6.60%	7.44%
Failure to react to calendar	<u>0.76%</u>	<u>2.93%</u>	<u>1.89%</u>	<u>3.57%</u>
Total	18.95%	17.54%	11.32%	17.39%

6. Be mindful of the kind of grievance your client is most likely to make in a bar complaint.

<u>Type of misconduct alleged</u>	<u>Rule potentially violated</u>	<u>Percentage of total</u>
Lack of diligence	<u>1.3</u>	31%
Lack of competence	<u>1.1</u>	26%
Conflict of interest	<u>1.7 – 1.9</u>	11%
Fraud or misrepresentation	<u>8.4(c)</u>	7%
Inadequate communication	<u>1.4</u>	6%
Excessive or improper attorney's fee	<u>1.5</u>	4%
Misappropriation of client funds	<u>1.15</u>	3%

<u>Type of misconduct alleged</u>	<u>Rule potentially violated</u>	<u>Percentage of total</u>
Failure to follow client directives	1.2	2%
Criminal conduct	8.4(b)	2%
Respect for rights of third person	4.4	2%
Duties on termination of employment	1.16	2%
Fairness to opposing party & counsel	3.4	2%
Candor toward the tribunal	3.3	1%
Unauthorized practice of law	5.5	1%
Confidentiality	1.6	1%

5. Be knowledgeable in matters of legal ethics, law office management and protection against risk.

Recommended reading:

- a. Kentucky Rules of Professional Conduct ([Supreme Court Rule 3.130](#)), contained in Kentucky Rules of Court (West Pub. 2016 Edition).
- b. Annotated Model Rules of Professional Conduct, American Bar Association, (Eighth Edition, 2015).
- c. Stephen S. Blumberg and Willis S. Baughman, Preventing Legal Malpractice-California Case Studies.
- d. Profile of Legal Malpractice Claims, ABA Standing Committee on Lawyers Professional Liability (2007).
- e. Long & Levit, The Law Office Guide to Purchasing Legal Malpractice Insurance (West Pub. 2007).
- f. Mallen & Smith, Legal Malpractice (West Pub. 2011 Edition).
- g. Kentucky Legal Ethics Deskbook, (University of Kentucky College of Law Office of Continuing Legal Education, 5th Edition 2016).

4. Be proactive in preventing malpractice from occurring.

Lawyers Mutual Insurance Company of California has done outstanding work in developing checklists for risk management programs. The following is their list of major categories in which malpractice may arise:

Legal malpractice avoidance checklist.

- a. Calendar every case, not just those in litigation.

- b. Confirm in writing your decision to accept a case or your decision to withdraw or decline representation.
 - c. Do not sue clients for fees.
 - d. Take only those matters in which you have experience or associate with someone who does have experience or knowledge about a specific case.
 - e. Maintain good client relations.
 - f. Do not have a personal or a financial involvement with your clients.
 - g. Research potential conflicts of interest before you take the case.
 - h. Investigate your case carefully before bringing a lawsuit or filing a claim.
 - i. Document everything leaving a paper trail understandable by third parties.
 - j. Know when to reject potential clients or cases.
 - k. Know what to do upon receipt of a malpractice claim.
 - l. Obtain client consent before proceeding in a vital area of the case.
3. Be responsive when you receive a bar complaint.
- a. Do not fail to make a timely response to any bar complaint or investigation.
 - b. Do not make matters worse by attempting to cover up your mistake.

2. Be healthy and sober.

Studies throughout the nation have repeatedly demonstrated that alcohol, drugs and mental illness (including depression) are substantial contributing factors in many, and perhaps most, cases of professional misconduct that result in suspension or disbarment.

1. Be honest.

No matter what else happens in your professional career, no matter what else you may do or fail to do, pledge to yourself that you will be honest in dealing with whatever comes along. See [SCR 3.130\(8.3\)](#). It is, without question, the single most effective thing you can do to limit your exposure to a malpractice claim or a disciplinary suspension. Even in an age of top ten lists, some things never change.

III. PETE'S TOP TEN

1. Don't go in business with a client.
2. Keep your client on the same page with you and be able to prove it.
3. Don't think the standard of care moves with your profit margin.
4. Avoid people and causes you dislike.
5. Don't throw good money after bad in the courthouse.
6. Be careful.
7. File your case before the deadline.
8. Don't assume your clients are your friends.
9. Behave like a human being.
10. Take good care of your old dog.

IV. TOP TEN – Katje Kunke, President Wisconsin Lawyers Mutual Insurance Company

1. Stop lying to your calendar about who is in charge of your life.
2. "No" is a complete sentence.
Corollary: Somebody married my ex-husband.
3. If you don't like your client, you better love your carrier.
4. Conflicts of interest piss everyone off.
5. Your client already knows how this is going to turn out.
6. Never give bad news to a hungry client.
7. You have to let clients make dumb choices.
8. What your client heard matters more than what you said.
Corollary: Nobody remembers what anyone said.
9. They may call it "Practice," but they're kidding.
11. When they smile and nod, your client is not understanding or agreeing with you.

Revised July 2016

I. CONTRASTING THE WRITER, PRODUCER AND ACTOR

The writer writes, the producer creates and organizes, and the actor reads his lines; the trial lawyer must understand and play all three roles.

II. BASIC COMMUNICATION PRINCIPLES: VERBAL VERSUS NONVERBAL

A. Nonverbal Communication

Nonverbal communication plays a large role in one's ability to communicate with the jury. Often, nonverbal communication can be used to help keep the mind of the juror open for your verbal communication.

Nonverbal communication includes the following:

1. Making eye contact and knowing when or when not to do it.
2. "Owning the courtroom" – by presenting yourself with confidence – walk with confidence, look like a winner.
3. Using and understanding the importance of silence.
4. Moving around the courtroom, and knowing when and how to do it effectively.
5. Dress appropriately at all times. Your appearance is nonverbal communication.
6. Negative body language – scowling facial expressions, slumped shoulders, and other movements which show displeasure with witnesses – should be avoided completely.

Remember, nonverbal communication is very significant. For example, your dog can nonverbally communicate everything that it wants or needs. Make your nonverbal communication positive so as to open the lines of verbal communication with your jurors.

B. Verbal Communication

1. Storytelling: structure and delivery.
2. Choosing the theme that defines the case.
3. Plain speaking: like a person, not a lawyer.
4. Talking to one versus talking to twelve.

5. Translating legalese into English.
6. Hosting a human event.
7. Engineering the spontaneous.
8. Gathering and uniting an audience.
9. Making the story come alive: sensory language.
10. Turning past events into present experience.

III. THEMES

The theme for the case is critical. It is no different than the plot of a novel. No novelist could ever hope to be successful without creating a theme or plot for the book, and the theme must tell a story in and of itself.

Advertising agencies understand this very well. Remember these?

- "Paul Mason will sell no wine before its time."
- "Chevy – built like a rock."
- "The Shane Company – now you have a friend in the diamond business."
- "Wherever wheels are turning, whatever is the load, the name that's known is Firestone – where the rubber meets the road" (a slogan I actually penned myself in the mid-60s as a Firestone advertising trainee!)

Unfortunately my second brilliant trainee adventure – an "August snow tire blitz" which sold about eight tires nationally – clearly doomed my future with Firestone and thoughts of law school soon entered my mind.

I am not suggesting that you need a catchy slogan to throw out to the jury but you need to verbalize your whole case in a sentence or two as the theme for your case.

"Mary Smith had a routine outpatient colonoscopy and wound up losing both of her legs as a result. The question you will have to ultimately answer in this case is whether becoming a double amputee is an accepted complication of a simple colonoscopy."

There you have the whole case in a nutshell.

IV. CREATING AN EFFECTIVE OPENING STATEMENT

A. An Opening Statement Should Be Characterized as an Opening Argument

1. A good opening statement creates a theme for the case. The plaintiff has one theme, and the defendant has a different theme. Whichever one the jury accepts is the one that will win.
2. A good opening statement "argues" your side of the case in such a way that it doesn't sound like an argument. (If it does, the court will stop you.)

I try to contrast my side of the case with the other side's case in opening. There is nothing in the rules of procedure which prevent you from telling the jury both sides of the "story" in opening. It is a very effective way to begin to educate the jury on the implausibility of the other side's case, and it doesn't sound like argument.

Example: "Good morning ladies and gentlemen. Janie Smith went to the defendant's hospital for a routine outpatient colonoscopy. She left the hospital two months later a double amputee. The hospital's lawyers will soon tell you that the loss of both legs following a routine colonoscopy is a known and accepted complication of the procedure."

What you have done here is simply tell the jury what the facts are on both sides. The impact, however, is far greater since you have not only told the jury what the facts are in a straightforward way, but you have made the other side look fairly ridiculous from the outset.

B. Newspaper Article Technique

A good opening statement is like a well-written newspaper article. It has a headline, it has structure, it has a body, and it has a conclusion.

For example, the headline might be "Mayor Jones indicted by grand jury on twenty-one counts of extortion." The audience immediately knows what they are about to read. Not only that, but they are told enough to know whether they want to read the article.

In other words, the headline must be prominent enough and catchy enough to get the immediate attention of the audience.

Example: "On March 27, 2012, Nicholas Smith was in a car wreck. He was taken to the defendant hospital, Our Lady of the Wrongful Death, complaining of pain in his left hip and right wrist. An x-ray of his left hip revealed a fracture which required emergency surgery."

An x-ray of the right wrist revealed the possibility of a fracture and the recommendation of a follow-up CT scan. Despite the hospital being a Level I trauma center, the scan was never taken, and by the time a second opinion months later revealed the serious nature of the fracture, it was simply too late to fix it.

As a result, Nicholas has completely lost the use of his wrist and hand, endures daily intractable pain, can't work, can't sleep and the quality of his life is completely diminished. Now let us take a look at how such a thing could occur in a hospital that advertises itself as having a world-class Level I trauma center."

What the jury learned in three short paragraphs is everything they need to know: Nicholas was in a car wreck, had a serious fracture of his wrist, and the opportunity to timely treat the fracture was lost because nobody listened to the patient or read the x-ray report. The jury also learned that this is a case of major damages.

V. POWERFUL VERSUS POWERLESS LANGUAGE

While it is impossible to perfectly plan out an examination or cross-examination of a witness and sometimes even a closing argument, it is not only possible but critical to do so in the opening statement.

Studies have shown that jurors form an initial impression of who should win and who should lose after the opening statements and often **never change that opinion**, even after listening to all of the evidence. Therefore, it is doubly important to plan out your opening statement thoroughly and to use powerful rather than powerless language.

Powerful language has an impact.

Example: "The plaintiff, Johnny Jones', left wrist and left hip were destroyed and rendered permanently useless when the defendant, running a red light at **breakneck** speed **smashed** into the left side of his car. This completely avoidable **wreck** has also destroyed Johnny's dream of becoming a professional baseball player."

This is powerful language.

Contrast this type of opening, which I regrettably see all the time in the courthouse.

"May it please the court and may it please you jurors, my name is Gary Weiss and I represent the plaintiff Johnny Jones. Johnny was involved in an automobile accident with the defendant which caused fractures in his left wrist and left hip. Johnny will have a 26 percent permanent impairment rating in both the shoulder and hip."

High-speed smashup versus automobile accident. Destroyed versus fractured left wrist and left hip. Twenty-six percent permanent impairment rating versus rendered permanently useless.

A number of years ago, studies conducted by Duke University indicated among many things that the difference between powerful and powerless language had tremendous impact on jurors' perceptions.

For example, if you ask the question, "How fast was the defendant going when the accident occurred?" as opposed to "How fast was the defendant going when the wreck (or smashup) occurred?" witnesses tended to estimate the speed if asked about the wreck versus the accident fifteen miles per hour faster!

VI. STRUCTURING AN OPENING STATEMENT

As I have indicated, the structuring of an opening statement is critical. In addition to the headline of the opening, the body is equally important.

Again, referring to the Duke University studies, we know that people remember far more of what they hear and see simultaneously than what they see or hear alone. Therefore, the body of an opening statement needs to be a combination of show and tell.

First, a few simple suggestions:

- A. The jury barely knows you. Do not invade their space or get near the jury rail during opening statement.
- B. Use the lectern. It will make you look more authoritative. Think about all the authority figures that use a lectern – politicians when announcing a campaign, United States attorneys when announcing an indictment of various miscreants, the president of the United States during press conferences, etc.

When I was young, I was incredibly nervous during opening statement and during examination of witnesses. I found that holding onto the lectern assured me that I wouldn't pass out and that the jury wouldn't see my trembling hands.

- C. Do not talk and walk at the same time. It is incredibly distracting.
- D. Practice your opening statement. If you don't have a willing significant other to listen to it, your dog or cat sitting on the couch will be a handy audience (and a lot less critical). You need to practice it in a setting where you have eye contact with somebody.
- E. Do not use the phrase "the evidence will show" over and over again. It is powerless and dilutes the message.
- F. Do not use the phrase "what I tell you is not evidence. You will hear the evidence from the witness stand." Think about that. The jurors may

not necessarily know that what you tell them is not evidence. What you tell them will likely form the reason why you win or lose the case, so why tell them to disregard it?

I once had a trial where the foreperson paid rapt attention during my opening statement and promptly snoozed through the rest of the trial. I inquired as to whether or not I was so boring that she didn't want to listen to anything else I did or said. Her response was "Honey, when I heard your TESTIMONY about what the defendant did, it's all I needed to hear."

- G. Dress. Dark suits: gray or blue with muted ties. (As an example, that is what the president wears and you can rest assured that he was advised by experts). You are there to be heard, not stared at!
- H. If you represent the plaintiff, always refer to the plaintiff by his or her first name. It is critically important to personalize the plaintiff. As to the defendant, that depends on who the defendant is. (Example: I wouldn't refer to Dr. Marcus Benjamin as Marcus. Some formality here translates to authority.)
- I. The "fact technique": utilizes the show and tell principal, and is very helpful for young lawyers because it involves actually reading along while the jury watches.

Create a preprinted white board (or PowerPoint) of a step-by-step recitation of the relevant facts in your favor in the case.

For example, after your opening "headline" in a medical malpractice case, proceed with:

"Jurors, here are the facts of the case:

1. On May 12, 2013, Nicholas was involved in a very bad car wreck. As a passenger, he was completely without fault.
2. He was taken to Our Lady of the Wrongful Death, the hospital which boasts and advertises itself as having a world-class Level I trauma center. This is the place to go if you are badly injured in a wreck.
3. Because Nicholas complained of hip and wrist pain, both areas were x-rayed.
4. The x-ray of the wrist revealed a possible fracture of the scaphoid bone and the radiologist recommended a CT scan for confirmation.
5. A scaphoid fracture is a semi-medical emergency. It must be set quickly because of blood flow issues.

6. A lack of blood flow to the scaphoid will cause the bones to crumble. (powerful language)
7. Despite Nicholas continuing to complain about left wrist pain, no one followed up on the radiologist's recommendation – not his surgeon, not the nurses, not the nurse practitioners nor the residents.
8. In fact, his surgeon never even saw him one time postoperatively, leaving that task for the residents.
9. It was not until three months later that Nicholas's mother sought a second opinion about the nagging wrist pain. TRAGICALLY, he did have a scaphoid fracture.
10. Despite multiple surgeries, it was simply too late. The lack of blood supply had caused the bones to crumble, leaving Nicholas with a useless wrist and 24/7 pain.
11. Nicholas had wanted to be either a policeman or fireman, and now his physical disability has made that dream an impossibility.
12. Here is what the defendants will say about all of this:
 - a. The surgeon will tell you it's not his fault. He will contend that since he had a contract with the hospital to do trauma surgeries on Tuesdays, he's only responsible for Tuesday and the follow-up should have occurred on Wednesday-Friday.
 - b. The rest of the parties will tell you that it was "unfortunate" that there was no follow-up. It was simply not their responsibility to do so.
 - c. Lastly, they have hired a bunch of expert witnesses who will attempt to convince you that despite all of the medical literature to the contrary, the three-month delay really didn't make any difference at all. They will tell you in essence, that even if all of these healthcare providers had met their medical responsibilities to Nicholas, the result would be identical.

Jurors, at the conclusion of this case, we will ask you to make Nicholas whole in the only way we can in our society – money.

We will ask you for a very large sum of money to compensate Nicholas, who is now needlessly faced with a lifetime of pain and disability and whose dream of being a policeman or fireman is gone forever."

VII. CLOSING ARGUMENT

Closing argument is the finishing touches of the painting that you have so laboriously painted from the day you undertook representation of your client.

A. Preparation

Preparation for closing argument begins when you take the case.

As you listen to the potential client tell their "story," begin formulating the theme of your closing argument.

A routine part of a case file includes, from the beginning, a folder on closing argument. It is amazing how often closing argument thoughts will pass through your brain, and be long forgotten by the time closing is to begin unless you write them down.

Some simple suggestions for preparation:

1. Before trial begins, prepare a complete closing – word for word, from beginning to end.
2. As the trial progresses, keep your closing argument file handy and make notes where appropriate.
3. A couple of days before closing is anticipated, reduce your "script" to an outline of the key points, key phrases and key thoughts. You can refer to the outline during closing much better than a complete script.
4. Practice your closing in front of an audience.

B. General Considerations

There is generally much debate about the importance of closing argument. Is it more important than opening or less important than opening? Is it completely unimportant or is it critical?

The truth is that nobody knows, but my experience tells me that it is relatively important on liability and critical on causation and damages. Why do I say that? It would be naïve to think that jurors have not formed opinions by the time of closing argument as to who should win and who

should lose. In that regard, the importance of closing may be if you are winning, making certain the other side can't catch up. Think of it as the insurance run in the top of the ninth inning.

1. Drama.

Young lawyers who are not experienced in trying cases tend to believe that you must be dramatic during closing argument. Nothing could be further from the truth.

First of all, unless you went to acting school or have some experience or expertise in acting (supporting role in your high school play really doesn't count) if you try to be an actor, you will blow it. Don't even attempt it.

2. Being yourself.

All the trial practice books, all the lectures, and all the experts say you must be yourself in a courtroom and particularly in closing argument.

That may be the worst piece of advice one could ever give you. One of the really great trial lawyers during my years of practice was a mean, arrogant, antagonistic bully. But you should have seen him in a courtroom – Mr. Warmth and Charm.

The truth of the matter is that whoever you are in real life, you may have to be somebody else during the trial and most particularly in closing argument.

We all have bad qualities. You should recognize yours and leave them in your office during trial. The jury wants to see somebody they can believe in – somebody who is pleasant, polite, courteous, helpful and seeking justice. Practice those qualities the week before trial.

My advice to young lawyers is not to BE yourself but to KNOW yourself. Jurors want help. They want information. They want instruction. They want you to guide them in doing the right thing.

As you construct your closing argument, let the facts themselves generate the drama. Forget about television. Your audience is those twelve people who are looking forward to hearing what you have to say and are not judging your rhetorical gifts.

C. Basic Elements to a Closing Argument

1. Promises.

During *voir dire*, you likely extracted any number of commitments or "promises" from the jurors. Begin by reminding them of those "commitments."

Example: "Remember during the jury selection process that I asked you if you had any reluctance to awarding a large sum of money in the event you believed it was justified from the evidence? You all told me that you would have no such reluctance. I believed you then AND I believe you now."

"During jury selection you told me that the mere fact that plaintiff was badly injured and that my client was a multinational corporation would not influence your decision as to awarding money if you believed that the plaintiff was not entitled to a recovery. I believed you then and I believe you now."

2. Thanks.

Virtually all of the trial manuals that I reviewed in preparation for this presentation argued that the first thirty seconds of your closing argument is critical, so don't waste it on salutations to the jury. Forget that advice. It is completely wrong.

I believe strongly that it is very important at the beginning to thank the jury for the attention they have paid to the evidence. You know and they know that their minds wandered some, but it doesn't hurt at all to start out by being gracious.

3. Instructions.

It is a critical mistake to not go over the jury instructions in detail with the jury panel. Even though Kentucky instructions are very simplified and reasonably straightforward, they are still a strange flock of birds to a lay jury.

Take for example something simple like, "If you believe from the evidence..." Well, how much do you have to believe it? Certainty, possibility, probability – no, it's a preponderance and you need to explain that.

Another example would be the stock phrase "a substantial factor." What does that mean really to a layperson? It needs to be explained.

4. Elephants.

Most cases have an elephant. Take, for example, the wrongful death case where the plaintiff is a young, attractive widow. You had better believe that the jury is going to discuss her possible remarriage in the jury room, and maybe factor into the award that possibility. Thus, the plaintiff's lawyer had better deal with it in closing.

"I know you jurors might be thinking about whether Gladys will remarry, but we don't know that do we? In fact, if she does, is there any guarantee that he won't get killed or leave her a widow once again? Will he be the stepfather to the children that their own father was? You see, jurors, why it would be so unfair to take such a thing into consideration and BECAUSE you shouldn't take it into consideration, that is precisely why the instructions of law that you are bound to follow make no mention of it."

"You heard from the defendant's experts that even if Nicholas had been treated timely, it would not have made any difference. Defendants tell you that he would have wound up with the crippled left wrist anyway. I candidly concede to you that there is doubt about it. On the one hand, our experts say timely treatment would've cured the problem and the defense experts say otherwise."

"The real question, however, isn't whether there is doubt, but who should bear the burden of the doubt. Should it be the innocent victim, Nicholas, or should it be the defendants who by their negligent inaction created the doubt in the first place."

The whole point is that you must deal with the elephants in the room because you can rest assured that the jury will discuss them outside of your presence.

D. Using Themes in Closing

Closing argument is not the time to recount all of the evidence. How boring could that be? Closing argument is the time that you deal with the MEANING of the evidence.

That is WHY we call it closing argument, not closing statement. Closing argument is the time to weave your theme into the evidence.

Example: "The defense to this case is that the loss of both legs is a known and accepted complication of a colonoscopy."

Let's think about that for a second. Doesn't that make the defense sound ridiculous? Make no mistake about it – the ultimate goal is to make the other side look ridiculous, if possible.

Or how about this theme, where the plaintiff has caught the doctor tampering with the plaintiff's medical records:

"I will always remember this case as the one where the defendant doctored the records more than he doctored the patient."

One tip about the ridiculousness of life: everybody understands when somebody's position is ridiculous. Your closing argument should be geared to a reasonable attempt to make the other side's position look ridiculous.

Jurors typically want to believe that their verdict is meaningful, not necessarily just for the parties, but in a sense, for their community. This is the genesis of the often used but improper "conscience of the community" argument. In that argument, the lawyer (typically the plaintiff's lawyer) tells the jury in a plea for a verdict that "you are the conscience of this community." Of course, this is an inappropriate argument.

However, there are more artful ways to make the jury believe that their verdict means something more than just a resolution of an individual case. For example, the vast majority of commercials you will see on television have a theme – some positive aspect of American life. Remember, "Chevy-built like a rock"?

The reason is that advertising agencies know that kind of approach sells cars, toilet paper, breakfast cereals, etc. If you can somehow figure out a way to weave into your side of the case a broader theme, that alone will go a long way toward success.

For instance, a broader theme that might work is using an America theme. Think about all of the commercials and print advertising you have seen over the years. All manner of products are sold by showing happy American families doing happy American things: eating American breakfast cereals, feeding the family dog healthy American dog food, buying Fords and Chevys (and even all manner of foreign cars shown to be built right here in the good old US of A, etc.) What's good enough for Madison Avenue ought to be good enough for us. Your jurors can relate to this.

Example: You have a defense case that is a close call on liability but the plaintiff has overstated the damages. "You know what jurors? The plaintiff has without a doubt, overstated their damages. This is exactly

the kind of thing that is wrong with America." In that way, you appeal to the inherent belief in many people that there are too many lawsuits and that they are motivated by greed.

1. Personal responsibility.

"In this country, we believe in personal responsibility. If the plaintiff had only followed my client, Dr. Kildare's orders, this would've never happened."

2. Case of pretty obvious liability.

"We have been here for a couple of weeks now and it's pretty darn obvious what's happened here. The real question isn't what happened, but what are you going to do about it?"

3. Dealing with evidence.

Keeping in mind that this is closing argument, one needs to present the evidence obviously, in a light most favorable to your side. You don't need an experienced lawyer to tell you that any more than you need to have me tell you that you can only make fair comment observations on the evidence itself.

However, there's a huge difference between RECOUNTING the evidence and ARGUING the evidence. I have seen even experienced lawyers go on and on with a meticulous review of the evidence. Worse, they don't even argue it. They simply retell it. How boring is that, and completely ineffective.

The way to present a closing argument is not to tell a jury WHAT but to tell them WHY. It sounds simple and it's really not that complicated, but you must tell the jury why you should win the case.

"There are a large number of reasons why we should win this lawsuit. Not the least of which is that Nicholas was admitted to defendant's hospital, which claims to be a world-class trauma center. He complained of wrist pain to the extent that an x-ray was taken. The x-ray revealed a potential fracture and the radiologist recommended additional studies. Those studies were never conducted despite his continued complaints of pain during a five day hospitalization. During that time the bones in his wrist began to crumble and die because of a lack of blood supply, and the opportunity to save Nicholas' wrist was lost forever. And that, ladies and gentlemen is why we should win the case."

Simple, sweet and right to the point. You don't need to be a drama major to use compelling language. You just need to think about what you are attempting to convey to the jury.

E. Closing the Closing

A closing always needs an appropriate ending. "It has been a long day or week so I will finish now" isn't the closing to the closing. It simply is an ending which makes no sense.

At the end of a closing argument, you need to again remind the jury somehow of something larger or grander than the case itself. You need to make them feel good about their service and what they are about to do. You also need to make them understand that what they are about to do has consequences, AND you need to appeal to something larger and grander than your case itself.

Example: "We now come to the end of our responsibilities and the beginning of yours. I have argued many cases in the courtrooms of this commonwealth and have always been somewhat in awe of our legal system in America, a system which allows ordinary citizens to come to court and ask for justice in front of their fellow citizens.

I am by no means a constitutional lawyer or scholar, but at this point of the case, I am always reminded of my favorite Justice of the United States, Supreme Court Justice Oliver Wendell Holmes. Justice Holmes served the court well into his nineties and walked from his home to the Court every morning. He many times lovingly told the story about how his wife, Alice, always kissed him goodbye as he left and said to him, 'Oliver, do justice today.'

And, if like Justice Oliver Wendell Holmes, you do justice today, then our American system of justice will have worked once again. Thank you very much."

And there is your closing to the closing: AMERICA, JUSTICE, LOVE, MARRIAGE – it has it all!

Consumer law, like any specialized area of law, is complicated. It requires an awareness of local, state, and federal statutes, tort and contract law, and strategic thinking regarding jurisdiction, discovery, causes of action, and arbitration. Please consider joining the National Association of Consumer Advocates: avoid many costly mistakes and learn from the community of excellent consumer advocates across the state and nation. For more information, please visit <http://consumeradvocates.org>.

I. KENTUCKY CONSUMER PROTECTION ACT

A. Legislative Intent

1. [KRS 367.120](#): "The General Assembly finds that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services..."
2. "[T]he Kentucky legislature created a statute which has the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts. In addition, [KRS 446.080](#) requires that the statutes of this Commonwealth are to be liberally construed." Stevens v. Motorist Mutual Ins. Co., 759 S.W. 2d 819 (Ky. 1988).

B. Who Is Protected?

"Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by [KRS 367.170](#), may bring an action under the Rules of Civil Procedure in the Circuit Court in which the seller or lessor resides or has his principal place of business or is doing business, or in the Circuit Court in which the purchaser or lessee of goods or services resides, or where the transaction in question occurred, to recover actual damages. The court may, in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper. Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate." [KRS 367.220](#)

¹ A complete copy of this outline – supplemented with links to statutes, cases, and relevant pleadings – is available at <http://bencarterlaw.com/blog/kentucky-consumer-law-outline>.

C. Who's Covered in Practice

1. A person (not business) who "purchases or leases goods or services primarily for personal, family, or household purposes."

"But the absence of a finding of a valid contract is not fatal to a claim for unfair trade practices under the KCPA as it would be to a breach of contract claim. Nothing in the KCPA – particularly [KRS 367.170](#) and [KRS 367.220](#) – explicitly requires that a binding contract be reached for a purchaser damaged by unlawful trade practices to have a private right of action. Rather, because Piles and Warner qualified as purchasers under the KCPA, they were entitled to sue for any damages resulting from unfair trade practices by Sonny Bishop Cars under [KRS 367.220](#)." Craig & Bishop, Inc. v. Piles, 247 S.W.3d 897, 903 (Ky. 2008).

2. Renters.

"In both matters the tenant asserts that the landlord's failure to make needed repairs and his violations of the local housing code constitute unfair, false, misleading or deceptive acts. As a violation of a housing code does not create a cause of action in favor of the tenant, the failure of the landlord to comply with a housing code cannot be deceptive in the absence of an express covenant or agreement that the landlord would comply with such housing code. Likewise, in the absence of a duty or obligation to make repairs to a rental unit, the failure to make such repairs cannot be construed to constitute an unfair, false, misleading or deceptive act." Miles v. Shauntee, 664 S.W.2d 512, 518-19 (Ky. 1983).

3. Homebuyers/homeowners.

"That brings us to the violation of the Kentucky Consumer Protection Act, [KRS 367.110](#), *et seq.* The jury did make a finding of a breach, but with zero damages. We need not get into a discussion as to whether the verdict is an oxymoron because we do not believe that the Kentucky Consumer Protection Act applies to real estate transactions by an individual homeowner." Craig v. Keene, 32 S.W.3d 90, 91 (Ky. App. 2000).

Summary: Buyers of "as is" mobile home can still maintain causes of action for fraudulent misrepresentation and for KCPA violations. Elendt v. Green Tree Servicing, LLC, 443 S.W.3d 612 (Ky. App. 2014).

4. People seeking the extension of credit.

A federal court has interpreted case law and the KCPA to determine that the sale of credit, so long as it was purchased for personal use, is covered by KCPA. Stafford v. Cross Country Bank, 262 F.Supp.2d 776, 792-3 (W.D. Ky. 2003).

5. Purchasers of insurance policies.

"It is the holding of this Court that the Kentucky Consumer Protection Act provides a homeowner with a remedy against the conduct of their own insurance company pursuant to [KRS 367.220\(1\)](#) and [KRS 367.170](#)." Stevens v. Motorists Mut. Ins. Co., 759 S.W.2d 819, 821-22 (Ky. 1988).

D. What Are They Protected From?

[KRS 367.170](#): "(1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (2) For the purposes of this section, unfair shall be construed to mean unconscionable."

"The terms 'false, misleading and deceptive' has sufficient meaning to be understood by a reasonably prudent person of common intelligence. Therefore, when the evidence creates an issue of fact, that any particular action is unfair, false, misleading or deceptive it is to be decided by a jury." Stevens v. Motorist Mut. Ins. Co., 759 S.W.2d 819, 820 (Ky. 1988).

E. What Are They Not Protected From?

1. Not covered: incompetence.

"While there can be no doubt Gamble was initially buried in the wrong plot in contravention of the burial contract, '[n]ot every failure to perform a contract is sufficient to trigger application of the Consumer Protection Act. The statute requires some evidence of "unfair, false, misleading or deceptive acts" and does not apply to simple incompetent performance of contractual duties unless some element of intentional or grossly negligent conduct is also present.'" Keaton v. G.C. Williams Funeral Home, Inc., 436 S.W.3d 538, 546 (Ky. App. 2013) *quoting* Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287, 291 (Ky. 1991).

2. Not covered: "mere breach of promise."

"A mere breach of promise does not constitute an unfair, false, misleading or deceptive act. The facts in Miles v. Shauntee indicate that the landlord made assurances of repair which were never significantly honored or fulfilled. This Court cannot hold as a matter of law that such assurances constitute unfair, false, misleading or deceptive acts declared unlawful under the Consumer Protection Act." Miles v. Shauntee, 664 S.W.2d 512, 519 (Ky. 1983).

But, breach of promise to do something in the future is actionable when there is no present intent to perform that future act.

"An accepted rule is, a misrepresentation, to be actionable, must concern an existing or past fact, and not a future promise, prophecy, or opinion of a future event, unless declarant falsely represents his opinion of a future happening." "One may commit 'fraud in the inducement' by making representations as to his future intentions when in fact he knew at the time the representations were made he had no intention of carrying them out." PCR Contractors, Inc. v. Danial, 354 S.W.3d 610, 614 (Ky. App. 2011) *quoting* Bear, Inc. v. Smith, 303 S.W.3d 137, 142, 614 (Ky. App. 2010) and Major v. Christian County Livestock Market, Inc., 300 S.W.2d 246, 249 (Ky. 1957).

F. Damages

1. Compensatory damages.

a. Logical and natural consequences.

- i. Diminished value.
- ii. Higher repair costs.
- iii. Time missed from work dealing with issue.

Inconvenience: "Clearly, the inconvenience award was not duplicative of the loss of use award. No loss of use award was permitted for Piles. Thus, without an inconvenience award to her, Piles would stand to recover no compensatory damages at all, despite testimony that she had to miss work and suffered difficulties at her job caused by constant telephoning and trips to the dealership." Craig & Bishop, Inc. v. Piles, 247 S.W.3d 897, 907 (Ky. 2008)

b. Rescission (equitable relief).

[KRS 367.220](#) explicitly allows the Court the power to "in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper."

c. Mental and emotional suffering.

No case that says damages for mental and emotional suffering are available under KCPA. No Kentucky case says they're not.

"Defendants also assert that Plaintiffs are not entitled to mental suffering or emotional distress damages. Kentucky courts have been clear that these types of damages are not recoverable under a contract-type cause of action.

See, e.g., Combs v. Southern Bell Tel. & Tel. Co., 38 S.W.2d 3, 5 (Ky. 1931). Plaintiffs cite no persuasive authority to the contrary. No Kentucky court has concluded that the KCPA entitles plaintiffs to mental suffering or emotional distress damages. This Court declines to do so now." Peacock v. Damon Corp., 458 F.Supp.2d 411, 420 (W.D. Ky. 2006).

2. Punitive damages.

- a. [KRS 367.220\(1\)](#): "Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate."

Because actual damages will likely be relatively small, punitive damages in consumer cases can be larger than punitive damages in other kinds of cases.

- i. "It appears that the amount of the punitive damages award was rationally imposed by the jury to serve the deterrent effect for which punitive damages were designed, especially in consumer protection cases where the economic harm suffered is relatively small." Craig & Bishop, Inc. v. Piles, 247 S.W.3d 897, 906-07 (2008).
- ii. The United States Supreme Court has provided three factors trial courts may consider:
- a) The degree of reprehensibility of the conduct;
 - b) The disparity between the actual harm and the punitive damages, generally expressed as a ratio; and
 - c) A comparison of penalties that could be imposed for similar conduct in similar analogous cases.

Paraphrasing BMW of North America, Inc. v. Gore, 517 U.S. 559, 573-75 (1996).

Of these three factors, the first – the degree of reprehensibility of the conduct – is the most important. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

- b. Attorney's fees should be included in the damages awarded when determining the reasonableness of the ratio between actual harm and punitive damages.

- i. In Willow Inn, Inc. v. Public Service Mut. Ins. Co., the Third Circuit Court of Appeals included the attorney's fees into the ratio calculus of an insurance bad faith case (called a [Section 8371](#) action in Pennsylvania). It explained, "[Section 8371](#)'s attorney fees and costs provisions vindicate the statute's policy by enabling plaintiffs such as Willow Inn to bring [§8371](#) actions alleging bad faith delays to secure counsel on a contingency fee. Moreover, 'one function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes,' Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003), and the structure of [§8371](#) enlists counsel to perform a filtering function akin to prosecutorial discretion, because rational attorneys will refuse to work on a contingent fee arrangement when their investigation reveals the bad faith allegations of prospective clients to be meritless." Willow Inn, Inc. v. Pub. Service Mut. Ins. Co., 399 F.3d 224, 236 (3d Cir. 2005).
- ii. The Third Circuit noted that its decision to include attorney's fees in the ratio analysis "is supported in the case law" and explained that a recent Pennsylvania state court decision also included the attorney's fees incurred in a bad faith claim in the ratio analysis. This position has also been adopted by the Eleventh Circuit in Action Marine, Inc. v. Continental Carbon Inc., 481 F.3d 1302 (11th Cir. 2007) and Illinois state courts in Kirkpatrick v. Strosberg, 894 N.E.2d 781 (Ill. App. Ct. 2008).

3. Attorney's fees.

- a. [KRS 367.220\(3\)](#): "In any action brought by a person under this section, the court may award, to the prevailing party, in addition to the relief provided in this section, reasonable attorney's fees and costs."
- b. The seminal case on the award of fees pursuant to the Kentucky Consumer Protection Act is Alexander v. S&M Motors, Inc., 28 S.W.3d 303 (Ky. 2000). That case holds that the award of fees is in the sound discretion of the trial court. In Alexander, the Kentucky Supreme Court explained that permitting the additional recovery of attorney's fees in consumer protection cases serves two purposes. First, it "is intended to compensate the prevailing party for the expense of bringing an action under the

statute." The Court continued, "[a] further aim is to provide attorneys with incentive for representing litigants who assert claims which serve an ultimate public purpose (*i.e.* a deterrent to conduct resulting in unfair trade practices which perpetrate fraud and deception upon the public)." Alexander at 305.

Attorney's fees are determined by using the "lodestar method."

- i. In Hensley v. Eckerhart, 461 U.S. 424, 429 (1983), the United States Supreme Court noted that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."
- ii. You must keep your time contemporaneously. I suggest using a time-tracking service like Harvest (<https://www.getharvest.com/>) to capture and track time.

II. KENTUCKY LEMON LAW ([KRS 367.840](#), *ET SEQ.*)

A. Purpose

Kentucky's "Lemon Law" is intended to accomplish three goals: (1) To protect consumers who buy or lease new motor vehicles that do not conform to applicable warranties by holding manufacturers accountable for certain nonconformities; (2) To limit the number of attempts and the amount of times that a manufacturer or its agents shall have to cure such nonconformities; and (3) To require manufacturers to provide, in as expeditious a manner as possible, a refund, not to exceed the amount in [KRS 367.842](#), or replacement vehicle that is acceptable to the aggrieved consumer when the manufacturer or its agents fail to cure any non-conformity within the specified limits. [KRS 367.840](#).

Note: the Magnuson-Moss Warranty Act ([15 USC 2301](#), *et seq.*) may also offer remedies for breach of warranty issues arising from the sale of a new vehicle.

B. Application

Kentucky's Lemon Law applies to new motor vehicles and not to: (a) Any vehicle substantially altered after its initial sale from a dealer to an individual; (b) motor homes; (c) motorcycles; (d) mopeds; (e) farm tractors and other machines used in the production, harvesting, and care of farm products; or (f) vehicles which have more than two (2) axles. [KRS 367.841](#).

C. Process

1. [KRS 367.842](#) outlines the process and rights of consumers afflicted with a "lemon."

Consumers must give the manufacturer a "reasonable number" of attempts to repair any nonconformity.

- a. There is a presumption that the consumer has given the manufacturer a reasonable opportunity to repair the vehicle if he or she has a) returned the vehicle for repair of the same nonconformity four times or b) lost use of the vehicle for the nonconformity for more than thirty days.
 - b. The nonconformity must "substantially impact" the "use, value, or safety" of the motor vehicle.
 - c. The consumer must report the failure to repair the nonconformity in writing to the manufacturer in the first twelve months or 12,000 miles of use, whichever comes first.
2. [KRS 367.842\(4\)](#) requires consumers to participate in an informal dispute resolution process before filing suit

D. Damages

The consumer can choose between replacement of the vehicle or refunding the money he or she paid for the vehicle.

Under [KRS 367.842\(2\)](#), "the manufacturer, at the option of the buyer, shall replace the motor vehicle with a comparable motor vehicle, or accept return of the vehicle from the buyer and refund to the buyer the full purchase price. The full purchase price shall include the amount paid for the motor vehicle, finance charge, all sales tax, license fee, registration fee, and any similar governmental charges plus all collateral charges, less a reasonable allowance for the buyer's use of the vehicle.

A court may award reasonable attorney's fees to a prevailing plaintiff. [KRS 367.842\(9\)](#)

III. KENTUCKY REPOSSESSIONS

There is an entire book published by the National Consumer Law Center on protecting consumers from repossession, prosecuting wrongful repossession, and helping consumers recover from repossessions.

Repossessions in Kentucky are governed by [KRS 355.9-601](#), *et seq.*

- A. Repossessions must be 1) after default and 2) must not breach the peace. [KRS 355.9-609](#).

- B. The repossessing business can resell the collateral but only after providing notice to the consumer. [KRS 355.9-610](#) and [9-611](#).
- C. Remedies for violations of UCC's repossession provisions are located at [KRS 355.9-625](#).

IV. USURY

A. Legal Rate of Interest

[KRS 360.010](#) states that the legal rate of interest is 8 percent.

1. On loans of \$15,000 or less, the parties can contract for up to 19 percent; and
2. On loans greater than \$15,000, the parties can contract for whatever interest rate they want.

B. Damages under [KRS 360.020](#)

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by [KRS 360.010](#), when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the creditors taking or receiving the same: provided, that such action is commenced within two (2) years from the time the usurious transaction occurred."

- C. Often, businesses effectively charge interest greater than the legal or contractual rate by padding the deal with additional charges and fees. You must acquaint yourself with the case law on these statutes to determine whether certain charges are "interest" and therefore usurious.

V. FEDERAL LAWS

A. Fair Debt Collection Practices Act (FDCPA)

1. Protects people from abusive debt collection practices.
2. [15 USC 1692, et seq.](#)
3. Prohibits false or misleading representations, unfair practices, harassment or abuse.
4. Again, the National Consumer Law Center publishes an entire book on this subject and some practitioners focus exclusively on prosecuting these claims.

5. Damages.

- a. [15 USC §1692K](#) allows people to recover their actual damages suffered as a result of the violation, up to \$1,000 in statutory damages, and attorney's fees
- b. This area of law is extremely rewarding and challenging. Abuse is rampant and the issues that arise are novel and nuanced.

Conway v. Portfolio Recovery Assocs., LLC, 13 F.Supp.3d 711 (E.D. Ky. 2014) held that a person stated a cause of action for FDCPA violations when a debt collector that received payments in Virginia sued on the debt in Kentucky. Conway's attorney argued that the debt collector violated the FDCPA because it sued beyond the statute of limitations of the debt, and the Court held that the SOL that applied was Virginia's (three years), not Kentucky's (five or fifteen years).

B. Fair Credit Reporting Act (FCRA) [15 USC §1681 et seq.](#)

1. Provides a mechanism for consumers to dispute inaccurate information on their credit reports and imposes penalties on credit reporting agencies and furnishers of credit information for failure to correct inaccuracies.
2. FTC's Summary of Consumer Rights under FCRA: <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>
3. Damages ([1681\(n\)](#)).
 - a. Actual damages in any amount or statutory damages not to exceed \$1,000.
 - b. Punitive damages.
 - c. Reasonable attorney's fees.

C. Truth in Lending Act (TILA) [15 USC §1601 et seq.](#)

1. Standardizes how fees and interest are calculated in consumer finance transactions.
2. Creates environment in which consumers can comparison shop by requiring businesses to calculate the "true cost" of the loan and the "real" interest rate after taking into account fees, charges, and other costs of credit.

3. TILA's specific requirements are in the awesome-sounding "Regulation Z": [12 CFR 226](#).

D. Real Estate Settlement and Procedures Act (RESPA)

The CFPB's new Regulation X provides a private cause of action for violations of many of the regulations governing mortgage servicers. Read more here: <http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/>

E. Telephone Consumer Protection Act (TCPA): [47 USC §227](#)

The Telephone Consumer Protection Act prohibits obnoxious and costly use of telephones. It limits the circumstances under which businesses can contact consumers and places meaningful restrictions on telemarketers and the use of automated dialing systems ("autodialers" or "robodialers"), text messages, voice recordings, and fax machines.

Damages:

1. Actual damages.
2. Statutory damages up to \$1,500 per violation.
3. No attorney's fees under the TCPA.

VI. OTHER CAUSES OF ACTION

A. URLTA (Uniform Residential Landlord Tenant Act) [KRS 383.505](#)

1. [KRS 383.500](#) requires local governments to adopt URLTA in its entirety and without amendment. As of 2009, the following jurisdictions had adopted URLTA's provisions: Barbourville, Bellevue, Bromley, Covington, Dayton, Florence, Lexington-Fayette County, Georgetown, Louisville-Jefferson County, Ludlow, Melbourne, Newport, Oldham County, Pulaski County, Shelbyville, Silver Grove, Southgate, Taylor Mill and Woodlawn.
2. Remedies include a private right of action.
 - a. [KRS 383.520](#): "(1) The remedies provided by [KRS 383.505](#) to [383.715](#) shall be so administered that an aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages. (2) Any right or obligation declared by [KRS 383.505](#) to [383.715](#) is enforceable by action unless the provision declaring it specifies a different and limited effect."
 - b. No decision on whether attorney's fees are "appropriate damages" under URLTA.

B. Equitable Estoppel

Under Kentucky law, equitable estoppel requires both a material misrepresentation by one party and reliance by the other party:

"The essential elements of equitable estoppel are[:] (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." Fluke Corp. v. LeMaster, 306 S.W.3d 55 (Ky. 2010).

C. Intentional Infliction of Emotional Distress

In certain circumstances, unscrupulous businesses' actions will rise to the level of Intentional Infliction of Emotional Distress.

"Our Commonwealth first adopted the tort of intentional infliction of mental distress in the case of Craft v. Rice, 671 S.W.2d 247 (Ky. 1984). In Craft, we adopted Restatement (Second) of Torts, section 46, and recognized the elements of proof necessary for this new tort: (1) The wrongdoer's conduct must be intentional or reckless; (2) The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) There must be a causal connection between the wrongdoer's conduct and the emotional distress; and (4) The emotional distress must be severe." Kroger Co. v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1996)

D. Breach of Contract

Of course, in many cases, not only will you have KCPA violations and tortious activity, you will also have breach of contract claims.

E. Insurance Bad Faith

Kentucky's Unfair Claims Settlement Practices Act ([KRS 304.12-230](#)) supplements common law "bad faith" administration of insurance claims.

It prohibits specific activities that are unfortunately common during the process of making a claim for coverage including, but not limited to, "failing to acknowledge and act reasonably promptly upon communications," failing to investigate claims, "failing to affirm or deny

coverage of claims within a reasonable time after proof of loss statements have been completed," and "not attempting in good faith to effectuate prompt, fair, equitable settlements of claims in which liability has become reasonably clear." Reading the entire statute and surrounding jurisprudence is, of course, necessary.

F. Fraud

1. Elements.

In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation; b) which is false; c) known to be false or made recklessly; d) made with inducement to be acted upon; e) acted in reliance thereon; and, f) causing injury. Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. App. 1978). United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999)

2. Promises of future performance.

"An accepted rule is, a misrepresentation, to be actionable, must concern an existing or past fact, and not a future promise, prophecy, or opinion of a future event, unless declarant falsely represents his opinion of a future happening." "One may commit 'fraud in the inducement' by making representations as to his future intentions when in fact he knew at the time the representations were made he had no intention of carrying them out." PCR Contractors, Inc. v. Dania, 354 S.W.3d 610, 614 (Ky. App. 2011) *quoting* Bear, Inc. v. Smith, 303 S.W.3d 137, 142, 614 (Ky. App. 2010) and Major v. Christian County Livestock Market, Inc., 300 S.W.2d 246, 249 (Ky. 1957).

3. Fraudulent omission.

a. This subset of "fraud" is a common cause of action in consumer law practice.

b. To prevail on a claim of fraudulent omission, a plaintiff must prove: (a) a duty to disclose a material fact; (b) a failure to disclose a material fact; and (c) that the failure to disclose a material fact induced the plaintiff to act and, as a consequence, (d) to suffer actual damages. Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 641 (Ky. App. 2003). A caveat to the necessary elements under either claim is that "mere silence does not constitute fraud where it relates to facts open to common observation or discoverable by the exercise of ordinary diligence, or where means of information are as accessible to one party as to the other." Waldrige v. Homeservices of Kentucky,

Inc., 384 S.W.3d 165, 171 (Ky. App. 2011) *quoting* Bryant v. Troutman, 287 S.W.2d 918, 920-921 (Ky. 1956).

- c. A duty to disclose facts is created only where a confidential or fiduciary relationship between the parties exists, or when a statute imposes such a duty, or when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure. Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 641 (Ky. App. 2003) *citing* Dennis v. Thomson, 43 S.W.2d 18 (Ky. 1931).

Beyond these three situations cited in Rivermont in which a duty arises, Kentucky courts have found other circumstances in which a party may commit fraudulent concealment:

- i. A duty to disclose may arise from a fiduciary relationship, from a partial disclosure of information, or from particular circumstances such as where one party to a contract has superior knowledge and is relied upon to disclose same. Smith v. General Motors Corp., 979 S.W.2d 127, 129 (Ky. App. 1998).
- ii. "We may readily agree with the appellants that mere silence with respect to something related to a transaction is not necessarily misrepresentation and does not itself constitute fraud. However, it is otherwise when the circumstances surrounding a transaction impose a duty or obligation upon one of the parties to disclose all the material facts known to him and not known to the other party. The suppression or concealment of the truth under such circumstances may constitute a means of committing a fraud as well as misrepresentation openly made. Since the beginning of our jurisprudence, the principle has been consistently adhered to that the concealment by a seller of a material defect in property being sold, or the suppression by him of the true conditions respecting the property, so as to withhold from the buyer information he is entitled to, violates good faith and constitutes deception which may relieve the buyer from an obligation or may permit him to maintain an action for damages or to vacate the transaction." Hall v. Carter, 324 S.W.2d 410, 412 (Ky. 1959).

4. Negligent misrepresentation.

"A majority of jurisdictions have adopted Restatement (Second) of Torts §552, which outlines the elements of negligent misrepresentation as follows: '(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.'" Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 580 (Ky. 2004)

G. Foreclosure Defense

See outline linked at <http://bencarterlaw.com/blog/kentucky-consumer-law-outline>.

Foreclosure Defense includes helping your client rigorously pursue all loss mitigation options.

<https://www.makinghomeaffordable.gov/pages/default.aspx>

I. INTRODUCTION

As a sole practitioner or member of a small firm, you wear many hats. The many duties of running a business will pull you away from the actual practice of law more than you will like. Setting up your practice from the beginning in an organized manner will make the time spent managing the business side of the practice more productive, allowing you to develop your client base and get out there and practice.

II. THE BUSINESS SIDE OF PRACTICE

A. Entity

1. Sole proprietorship.
2. Partnership.
3. PLLC.
4. PSC.

B. Resources

[A Guide to Setting Up and Running Your Law Office \(Avoiding Malpractice through Efficient Office Systems\)](http://www.lmick.com/resources/documents/references/2009_a_guide_to_setting_up_and_running_your_law_practice.pdf), published by the Oregon State Bar Association, can be found at:
http://www.lmick.com/resources/documents/references/2009_a_guide_to_setting_up_and_running_your_law_practice.pdf.

[The Essential Formbook: Comprehensive Management Tools for Lawyers, Vol. 1](#), Munneke, Gary A. and Davis, Anthony E., American Bar Association Section of Law Practice Management.

[Own It: How to Start Your Own Law Firm in the Virtual Office Era](http://legalsolutions.thomsonreuters.com/law-products/news-views/small-law-firm/how-to-start-a-law-firm), a free how-to guide published by Thomson Reuters. Available for download at <http://legalsolutions.thomsonreuters.com/law-products/news-views/small-law-firm/how-to-start-a-law-firm>.

¹ Barry N. Sullivan and Escum L. "Trey" Moore, III also contributed to portions of this outline.

- C. Before You Earn that First Fee or Accept that First Retainer You Must:
1. Obtain a tax identification number or employer identification number. See <https://irs-tax-id.com>. Yes, you should do this even if you are a sole proprietor with no employees. Who wants to hand out their Social Security number?
 2. Open an Operating (General) account and a Client Trust (IOLTA) account.
- D. Money Management
1. Bookkeeping.
 - a. Accountant vs. in-house.

For a small practice, in-house bookkeeping with CPA oversight is probably the best bet.
 - b. Resources.
 - i. Quickbooks – Law Practice Accounting Using Quickbooks, Benton, Lynette.
 - ii. Lexis Nexis PCLaw[®] Practice Management.
 2. Budgeting – Critical to success and sanity.
 3. Operating/general account.
 - a. All income goes in...all expenses go out.
 - b. Client funds never go into this account.
 4. Business line of credit.
 5. Client funds.
 - a. [SCR 3.130 \(1.15\)](#) Safekeeping of Property – Cliffs Notes version.
 - i. Client funds must be held separate from the lawyer's funds. Funds shall be kept in a separate account. The account shall be with a bank that has agreed to notify the KBA if an overdraft occurs. Complete records of the account funds shall be kept and preserved for five years after termination of the representation.
 - ii. Lawyer shall promptly notify client or third party with interest upon receiving the funds. Lawyer shall

promptly deliver to client or third party the funds to which they are entitled except as stated in this Rule or otherwise permitted. Upon request, Lawyer shall deliver a full accounting.

- iii. When Lawyer is in possession of funds in which two or more persons (including Lawyer) claim interest, the property shall be kept separate until the dispute is resolved. Lawyer shall promptly distribute funds as to which there is no dispute.
- iv. Lawyer may deposit own funds in client trust account only to pay bank service charges.
- v. Except for nonrefundable fees, Lawyer shall deposit unearned fees and expense advances into client trust account to be withdrawn only as earned or incurred.

The devil is in the details. Read [SCR 3.130 \(1.15\)](#) and pay close attention to the comments!

b. Kentucky IOLTA Fund.

- i. IOLTA stands for interest on lawyers trust accounts.
- ii. [SCR 3.830](#) requires that all clients' funds be placed into interest bearing accounts, with the exception of funds which would earn interest for the client above the costs incurred to generate such interest.
- iii. Interest from these accounts are pulled and collected by the IOLTA program.
- iv. The IOLTA funds are managed by the Kentucky Bar Foundation to finance grants for civil legal aid to the poor.
- v. You must give notice to the bank that the account is an IOLTA account. The form is available at the KBA website: <https://www.kybar.org/?IOLTAauth>

c. Resources.

- i. [Client Trust Account, Principles & Management for Kentucky Lawyers](#), Second Edition 2010, edited by Del O'Roark. This joint effort of the Kentucky IOLTA Fund and Lawyers Mutual Insurance Company is available for download at the Lawyers Mutual website: <http://www.lmick.com/resources/risk->

[management-articles/subject-index/item/client-trust-account-principles-management-for-kentucky-lawyers-2nd-edition](#)

- ii. ABA Model Rules for Client Trust Account Records, as adopted by the American Bar Association House of Delegates on August 9, 2010.
www.americanbar.org

E. Professional Liability Insurance

In today's world, the question is not whether you will be sued for malpractice, but when.

The pace of practice has increased to the point that it makes it much easier to make mistakes. Client expectations now often exceed reality, and the lawyer will get blamed, because it is always someone else's fault.

Lawyers are viewed as deep pockets when something goes wrong, even if it is not the lawyer's fault.

1. What it covers.
 - a. Defense costs.
 - b. Errors and omissions in practice of law.
 - i. Missed deadlines.
 - ii. Title errors.
 - iii. Misapplication of the law.
 - iv. Fiduciary duty to others in your capacity as an attorney.
2. What it excludes.
 - a. Claims alleging abuse of process, etc.
 - b. Claims alleging dishonest or deliberate wrongful acts.
 - c. Claims against business enterprise (not insured) in which attorney is a director, officer or employee.
3. Type of coverage.
 - a. Policy covers claims made and reported during the policy period.
 - b. How much coverage.
 - i. Value of matters done in firm.

- ii. Type of matters done.
 - iii. Value of attorneys' personal assets.
 - iv. Attitude for risk.
 - v. Frequency.
 - c. Type of practice.
4. Mandatory insurance.
- [SCR 3.024](#) provides: "If you practice in a limited liability entity or company, the entity must have proof of liability insurance or other form of financial coverage for acts, errors and omissions arising from the performance of legal services."
- Minimum coverage is \$50,000/100,000 for each attorney, with a minimum coverage for the entity being \$250,000 per claim and \$500,000 for all claims in a year.
5. What does it cost?
- Lawyers Mutual's smallest policy for an individual attorney is \$100,000/\$300,000 per claim, per year, and costs about \$1,050, plus tax, annually, with a \$1,000 deductible and new lawyer discount. Premiums can be put on a payment plan or may be paid with a credit card.
6. What is Lawyers Mutual?
- a. In 1986, the Board of Governors of the Kentucky Bar Association established a committee to research the issue of why malpractice rates were soaring, and what solutions existed. The findings were that Kentucky, along with a number of other states, were paying for the very negative experience developed in California and New York. As a result, the Board of Governors developed an independent mutual insurance company known as Lawyers Mutual Insurance Company of Kentucky (LMICK). The goal and purpose was to subsequently have Kentucky rates based on the Kentucky experience. The company raised \$3 million in capital and started in 1987.
 - b. LMICK currently has over \$20 million in assets and over \$6.5 million in surplus. It currently insures about 2,500 attorneys and 1,200 law firms. LMICK's focus specialty is firms of five and fewer lawyers, though it represents firms with thirty-plus lawyers.

- c. Primary focus is claims repair.
 - i. Unlike many carriers, the report of an incident or claim will not automatically necessitate a rise in premium. LMICK wants to hear from insureds because staff can often repair a claim or resolve a problem before it results in litigation against the lawyer.
 - ii. If there is a claim filed, LMICK works to resolve it as quickly as possible, but is prepared to defend it if it is the appropriate thing to do.
 - 7. Why Lawyers Mutual? It is a company by Kentucky lawyers for Kentucky lawyers.
- F. Office Space
- 1. Client access and visibility versus prestigious address.
 - 2. Lease versus ownership.
 - 3. Building expenses.
 - a. Heating and cooling for old buildings.
 - b. Repair and maintenance issues.
 - c. Know your responsibilities under the lease.
 - d. Know reputation of landlord.
- G. Equipment
- 1. Basic equipment.
 - a. Computers.
 - b. Copier/printer.
 - c. Dictation.
 - 2. Lease versus own.
 - 3. Maintenance agreements.
- H. Furnishings/Decor
- 1. Keep it simple (you can always upgrade).
 - 2. Conversion of home furniture to office furniture.

3. Ergonomic products make a difference.
 4. Clean versus clutter.
- I. Supplies
1. Premium versus inexpensive.
 2. Minimize waste.
- J. Library
1. Online research.
 - a. KBA's [Casemaker](#).
 - b. Westlaw.
 - c. Lexis.
 2. Books/online resources.
 - a. [Civil Rules](#).
 - b. [Kentucky Revised Statutes](#).
 - c. [Caldwell's Kentucky Form Book](#).
 3. Other resources.
 - a. Kentucky Practice Series.
 - b. Seminar material (UK blue books).
 - c. Law school libraries.
 - d. Local bar libraries.
 - e. Clerk's office – other cases.
- K. Miscellaneous
1. Bar dues/KBA/ABA services to solo practices.
 2. Professional liability insurance.
 3. Workers' compensation.
 4. General liability, etc.
 5. Employee benefits.

L. Staff

1. Hiring.
 - a. Personality.
 - b. Intelligence.
 - c. Work ethic.
2. Match your strengths and weaknesses.
3. Technical skills.
4. Function.
 - a. Identify job function and expectations.
 - b. Define the work process and how each person relates to the end product.
 - c. Communication/feedback/respect.
 - d. Answering the phone/placing calls.

M. Operating Systems

1. Keep it simple. A system is only as good as the extent to which you use it.
2. Calendar/tickler systems.
 - a. Paper versus computer (what works for you).
 - b. Dual control.
3. Office organization.
 - a. A place for everything and everything in its place.
 - b. Set up a flow chart for all major functions.
4. Planning.
 - a. Forecast thirty days ahead.
 - b. Plan weekly.
 - c. Daily to-do lists.

- d. Designate a fixed time each week for planning purposes and communicate the same to your staff.
 - e. Don't let the immediate dominate the important.
5. Software options.

III. THE LAW SIDE OF PRACTICE

"A lawyer's time and advice is his stock and trade." – Abraham Lincoln.

A. Keep Track of Your Time. It Is Your Inventory.

B. Establish Procedures for Handling:

- 1. Mail.
- 2. Phone calls and faxes.
- 3. Opening files.
- 4. Billing.
- 5. Closing files and rejecting cases.

Even if you are practicing alone without employees, write down the procedures. This will become your training manual for when you add staff to your office.

C. Establish Risk Management Procedures

- 1. A conflict check should be performed for every new client. Conflicts happen every day. They can usually be worked around with proper disclosures and waivers. However, if the conflict cannot be resolved, decline the matter.
- 2. For every new client there should be an engagement letter or contract setting forth:
 - a. The matter for which you are being engaged;
 - b. The terms and conditions of the engagement; and
 - c. The consideration and method of payment.
- 3. Any time you exit a case, a letter of disengagement should be hand delivered or sent to the client by certified mail, return receipt requested. Return the file and keep a copy of key file documents, if not the entire file. Have the former client sign a receipt acknowledging that you returned the file.

4. Have a diary and tickler systems for all statutes of limitations, deadlines and other important dates.
5. Resources:
 - a. Lawyers Mutual Insurance Company, Resources. Multiple forms, articles and checklists can be found at: <http://www.lmick.com/resources/risk-management-articles/subject-index>.
 - b. The Essential Formbook: Comprehensive Management Tools for Lawyers, Vol.1, Munneke, Gary A. and Davis, Anthony E., American Bar Association Section of Law Practice Management.
 - c. Time Management for Attorneys: A Lawyer's Guide to Decreasing Stress, Eliminating Interruptions and Getting Home on Time by Mark Powers and Shawn McNalis.

IV. CLIENT RELATIONS

The best referral source for business and the best defense to malpractice claims are positive client relationships.

A. Respect.

1. Always remember that their case is more important to them than it is to you.
2. Treat them as they want to be treated.
3. Ask them what you can do for them.

B. Communicate.

Early, often, and in writing where a record of the communication is needed.

1. Authority to take an action.
2. Clarification of instructions.
3. Communications should be systemic and on a defined periodic basis.
4. You should touch every case at least once every thirty days.

C. Establish Goals and Expectations

1. Prior to taking the case, always talk to your client about what they want to achieve. Give them a range of options as to what you believe may or may not be possible, and have them acknowledge and buy into that range of options before taking the case.
2. Never take the case of a client whose expectations you do not feel you can meet, as you have just purchased a malpractice claim, if you do.
3. Screening clients.
 - a. Weigh the merits of the case.
 - b. Measure the demeanor of the client. Are they going to be difficult to work with? Are they going to be high maintenance? Will they pay you?
4. It is okay to say no. IT IS OKAY TO SAY NO!
5. Firing clients.
 - a. Within the ethical guidelines, you may withdraw for various reasons.
 - b. If a client ever shows distrust or expresses suspicions or doubt about your work, if the matter cannot be quickly resolved, then it is in your best interest to withdraw.
 - c. You should withdraw if a client places you in a situation where you may risk violating the Ethics Rules.

V. **BUILDING A PRACTICE**

Every lawyer hangs a shingle. Whether you enter an existing practice or go out on your own, you must develop your own client base. In doing so, consider the following:

A. Where Are My Clients?

Your first clients may differ depending on where you begin your professional life. Remember what your parents told you when you were young: someone is always watching. Potential clients are everywhere. Always remember that other attorneys can be a source of business.

- B. Does the Image You Project Send the Right Message to Potential Clients, Other Lawyers, and the Court?
1. Return all phone calls, emails and letters promptly.
 2. Be on time. Everyone is busy.
 3. Try your best to keep promises about when work will be completed. Do not over commit. Be careful to establish realistic boundaries and expectations.
 4. Look for ways to make legal services more valuable to clients. Give clients more than they pay for.
 5. Be loyal to your clients. Resist all temptation to break confidence or compromise your duty of loyalty and zealous representation.
 6. Ask for help. People generally like feeling useful, as long as they are appreciated.
 7. Work really hard to learn and know the law. But also work hard to know and understand your client's business, whatever that may be.
 8. Never lose sight of damages and probable outcomes. There is not always a legal solution to a problem.
 9. Read the rules of procedure. Read the local rules of procedure, and then ask local attorneys what rules the local judge actually follows.
 10. Always display confidence, not arrogance.
 11. Develop a distaste for losing. You won't always win, but you should hate to lose. Do everything reasonably possible to help the client succeed.
 12. Don't make it personal. Don't challenge the credibility or honesty of someone without good reason and basis. Remember, there are two sides to everything.
 13. Remember – It's not your money.
 14. Remember – You can't change the facts, and you shouldn't try to do so.
 15. Don't compromise your integrity or credibility. Adherence to the truth is a powerful weapon.
 16. Keep up with your law school classmates. They will be a great resource for you.

17. Take every opportunity to learn from more seasoned and experienced attorneys. Watch them in action. Figure out what you like and don't like; what works and what doesn't work. Show up a few minutes early to listen and watch others.
18. Admit when you are wrong or mistaken. It's not a show of weakness, quite the opposite.
19. You are in customer service. Think about things that make you feel like you've received good service, and then do them.
20. Be kind and respectful to everyone, not just the lawyers. You will be amazed at the knowledge and skill of the non-lawyers with whom you work.

C. Am I Communicating Effectively?

1. Develop your own voice. This will take a few years and experience and confidence will help.
2. Listen carefully. I mean carefully. You'll learn so much more with your mouth closed and your ears open. Let others fill the void. In addition, clients very often have great suggestions for dealing with developments and their own problems.
3. Ask why? Sometimes the most important information and the greatest truths are disclosed and discovered by that question.
4. You will be nervous and unsure of a lot of things you say. If you aren't, beware. You can't and shouldn't be an expert about everything.
5. Practice your written skills, and then practice them more. Edit your work, and then edit it again.
 - a. Don't take pot-shots at your opponent or opposing counsel. Sharp remarks and hyperbole decrease your persuasive advocacy.
 - b. If you can, competently and clearly seek relief in five pages, don't use ten to fifteen.
 - c. Don't assume the judge recalls your case. Spend some time on background facts or procedural posture when helpful.
 - d. Spend time crafting your introduction and conclusion (tendered order) to state clearly the relief you seek.
 - e. Eliminate typos. Plan written work projects so you can review with fresh eyes.

- f. Respect legal citation and follow the [Bluebook](#).
 - g. Don't cite or quote a case without updating it first.
 - h. Don't cite or quote a case without reading it first. The whole case – not just the headnotes, or that portion of the opinion which serves your purpose.
 - i. Follow the rules. If you are supposed to tender an order, do it. If the rule says to file a separate memorandum, do it.
6. Say thank you, and praise others and their good work.
- D. How Do I Get Clients/Business?
1. Join your local bar association.
 - Focus on subsections and network
 2. Attend CLE programs for your practice areas and network.
 - Be prepared to speak and ask questions
 3. Lawyer referral services.
 - a. Many require experience and malpractice insurance so know the requirements.
 - b. Modest means programs.
 4. Advertising.
 - a. Follow all [Supreme Court Rules](#).
 - b. Develop your means for advertising based upon your budget.
 - i. Print/website/yellow pages/back of a bus/radio/TV.
 - ii. Use of social media – [Facebook](#), [LinkedIn](#), other sources.
 - iii. YOU – go to court!
 - Appearance is everything

5. Court appointed cases – state.
 - a. Warning order attorney.
 - i. Some counties require billing by the hour while some require a flat fee.
 - ii. Bill for your postage.
 - iii. Bill for your copies.
 - b. Dependency neglect and abuse cases.
 - c. Statutory cap of \$500.
 - d. Conflict counsel for the Department of Public Advocacy.
 - i. The Jefferson County DPA is separate from the Commonwealth's DPA.
 - ii. District court appointments.
 - (a) Juvenile cases.
 - (b) Guardian *ad litem* cases.
 - e. Mental health appointments.
 - i. As guardian *ad litem* of individuals who are subject to guardianship/conservatorship.
 - ii. Bill hourly but there are restrictions per local rules.
6. Federal court appointed cases.
 - a. Obtain your license to practice in both Western & Eastern District Courts including Bankruptcy Courts.
 - b. CJA panels.
 - Sit second-chair
 - c. Warning orders.
 - i. Normally \$150 per case depending upon your efforts.
 - ii. Bill for postage/copies.

d. Appellate work.

- Co-counsel: before accepting a co-counsel position, make sure you know what you will be paid

7. Word of mouth.

a. Anyone you meet is a potential client.

Be careful of those seeking "free" advice. Have them make an appointment!

b. Friends.

There is no such thing as friendship when it comes to paying your bills so watch the discounts and the "free advice."

c. Family.

Your family will contain your biggest supporters and your biggest detractors so NEVER represent family unless they give you a \$10,000 non-refundable retainer. I can't stress this enough.

d. Volunteer.

Some of your best clients may come from the organizations you aid and work with.

VI. MAINTAIN YOUR SANITY

A. Be Mindful of Your Personal Life and Balance the Two

1. Spouse/significant other.

2. Kids.

3. Family.

B. Don't Give out Your Cell Phone to Clients

C. Turn off the Email

D. Take Some Time for Yourself

1. Vacations are good.

2. Take a three day weekend.

VII. THE KENTUCKY BAR ASSOCIATION

- A. The Kentucky Bar Association Is There to Help You. The KBA's Success Greatly Depends upon the Success of You.
- B. When in Doubt, Call the Ethics Hotline.
- C. Respond to Any Bar Complaint.
 - 1. We all make a mistake at some point.
 - 2. Need to hear your side, not just the client's side.

I. INTRODUCTION

"Domestic relations" encompasses a wide range of legal proceedings and substantive law. It includes not only divorce actions in circuit court, but also actions to establish paternity, custody and child support, child abuse and neglect, adoptions, domestic violence, termination of parental rights, and actions against juvenile status offenders. It also has a "transactional" side, including drafting prenuptial agreements, third-party custody agreements, open adoption contracts, unmarried or same-sex partnership contracts or custody agreements, financial planning, and retirement division.

Once brought into court, all of these claims or causes of action are or can be separate proceedings within the court system, even if the parties involved are identical. Prior to the advent of the "Family Court" system in 1991, one family often had to participate in different proceedings, with a different judge presiding, in order to obtain piecemealed (and at times conflicting) relief. However, under the family court system, now in place in seventy-one Kentucky counties, all proceedings involving the same family will be heard by the same judge. This has helped streamline the process for families involved in more than one proceeding.

In an effort to further unify the various courts across the state, the Kentucky Supreme Court enacted the [Family Court Rules of Procedure and Practice \(FCRPP\)](#) on January 1, 2011. These rules of civil procedure for family court proceedings were modified effective July 1, 2015. The new Family Court Rules represent the Supreme Court's efforts to standardize practice in this area of law. With the advent of these rules, and the changes to most circuit's local rules to comply with the state rules, compliance with the procedural requirements within the family court system require a great deal of due diligence from practicing attorneys.

Regardless of any lawyer's chosen field, it is inevitable that family law questions will arise, whether as a personal matter or in the context of his or her practice. Few areas of law touch more people's lives, or involve such a broad range of substantive issues, than domestic relations matters. Though there are several types of domestic relations cases, this primer focuses on the most prevalent: the basic process of a divorce action.

II. PRELIMINARY MATTERS

A. Initial Client Meeting

Many divorce clients have never engaged the services of an attorney, and are therefore nervous, apprehensive, and often very emotional when they first meet with a lawyer to discuss divorce. The clients are not sure of their rights or what will be involved in the divorce process. To help alleviate this apprehension, the attorney should go through a general

outline of the procedure from filing the Petition, to testifying at hearings, to appealing an adverse decision. Clients will also want an explanation of the law concerning divorce, maintenance, custody and support. The attorney should give an overview of the statutory guidelines and current case law that will have an impact on their case, but help the client understand that many of their questions do not have an absolute answer in these highly discretionary matters. According to the [Rules of Professional Conduct](#), a lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Although difficult to determine in many jurisdictions, to the extent that it is possible to do so, the attorney should also give the client a generalized time frame for completion of the divorce. However, the client should be advised that in litigation, nothing is certain or guaranteed.

During this initial meeting, the attorney must gather as much information as possible about the client. The best and most effective method for obtaining the necessary information is to create a domestic case questionnaire and give this to every client. See the [Appendix](#) for an example of a simple case questionnaire. The attorney may want to walk the client through the questionnaire during the initial visit, or he or she may want to let the client take the form home to complete. The questionnaire should help the attorney to assess the client's expectations as to the outcome of the divorce. As many clients would rather discuss the emotional components of their case instead of focusing on the information the attorney needs to properly prepare the case, the client should be informed that great effort needs to be made to answer the questionnaire fully, completely, and in as organized a manner as possible. The more organized the attorney and client can be at a given hearing, the more likely the client is to be successful. However, after reviewing the questionnaire and evaluating the case at the initial client contact, if the attorney believes that the client's goals are unreasonable or unrealistic, the attorney has a duty to inform the client that his or her goals will likely not be achieved. The client should be informed as to what he or she may be entitled to receive pursuant to the applicable law, but a client should never be promised a certain outcome. Unfortunately, what the client is entitled to receive is not always awarded to him/her.

Lastly, an attorney must remember to keep his or her client abreast of any developments in the case. [Rule 1.4\(a\)](#) of the [Rules of Professional Conduct](#) requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." As a general rule, the attorney should consider copying the client on all incoming and outgoing correspondence. Likewise, it is very important to return telephone calls. Many client complaints against their attorneys arise because of the failure to return phone calls.

B. Counseling the Client

It is important to understand there will be clients who come to see you for divorces, but who are not quite sure that they really want a divorce. Some may just want to know what the procedure involves, the costs, and what "their rights" are. Frequently clients inquire as to the difference between divorce and separation. Others will tell you that they do not want a divorce, but that their marriages have deteriorated to the point that they do not believe they have any other option. Thus, the attorney steps into the role of "counselor," which should be approached cautiously.

Attorneys should be prepared to advise these clients of the marriage and family counseling services available in their communities. Persons having marital difficulties, and who would like to try to avoid divorce, may be helped by the services of social workers, psychologists, ministers/priests, and even psychiatrists.

There may even be some people who approach an attorney for information on "trial separations." Thus, the attorney must be prepared to discuss the pros and cons of legal separation, and actual separation, as well as divorce from bed and board. See [KRS 403.050](#) and [KRS 403.140](#).

C. Joint Representation

Some husbands and wives will approach a lawyer seeking joint representation in a divorce because they do not think they can afford the services of two separate attorneys. Others will tell the attorney all the details have been mutually agreed upon. Do not believe it. Rarely does a couple reach total harmony on property division, child support and custody; and even if they are in agreement, the agreement is likely to unravel. The attorney, therefore, must advise the clients of the rules concerning conflicts of interest. An attorney's duty is to represent his or her client to the best of the attorney's ability. When an attorney represents two individuals in a divorce, their interests are likely competing. If those individuals begin to have even slight disagreements, the attorney cannot possibly represent the best interests of both parties. Eventually, the attorney will be forced to resign from representing either client. See [Rule 1.7](#), [1.8](#), and [1.9](#) of the [Rules of Professional Conduct](#) for more detail on conflicts of interest.

The better decision is to never undertake representation of both parties. From the very beginning there are inherent conflicts with representing both parties.

D. Collaborative Divorce

Collaborative divorce is the newest trend in divorce cases. Collaborative cases are resolved outside of court and resemble alternative dispute resolution. The lawyers and clients circumvent discovery and motion practice, and work together to complete the divorce with as little hostility as possible. Sometimes family therapists become involved to lessen the

stress on the parties or emotional toll on the parties' children. Collaborative divorce is sometimes called "divorce with dignity" for the aspiration of avoiding adversarial court proceedings.

Collaborative divorce has particular nuances that any attorney must be aware of, including the requirement that in the event a settlement is not completely reached through the collaborative process, the Collaborative Participation Agreement requires both lawyers to withdraw from the case, and for new attorneys to be hired to handle the divorce litigation in court. For more information about collaborative divorce, contact the Kentucky Collaborative Network, Inc. or [Northern Kentucky Collaborative Group](#).

E. Attorney Fees

Attorney fees should always be discussed with the potential client during the initial meeting. As in most circumstances, any fee agreement should be reduced to writing and signed by both the client and attorney. The retainer agreement should be as detailed as possible, and should specifically set forth any additional costs for which the client will be responsible. The extra costs may include filing fees, service of summons fees, depositions costs, and any other items for which the attorney's firm customarily bills. Also, it is important to clarify at the outset of the representation that time spent in communication with the client is billable, whether by phone or email. Clients need to know that the times he or she calls to ask "just one more question" or make emotional complaints that cannot be resolved by the legal system or the lawyer add up quickly on the bill.

[Kentucky Rules of Professional Conduct Rule 1.5\(d\)](#) states that lawyers may not charge contingent fees in a domestic relations case. (*Note* that this does not apply to liquidated sums in arrearage). Therefore, many firms will charge a flat fee for the less complicated, uncontested divorces, and an hourly fee for more complex divorces. If a flat fee is charged, the client must be informed that should the divorce become more complicated and difficult, the attorney will begin to bill on an hourly basis. This must be specifically detailed in your retainer letter. Of course, the client should be credited with the amount paid as a flat fee.

III. INITIATING THE PROCESS

A. Preparation of the Petition

A sample Petition has been included in the [Appendix](#) of this chapter. The averments required in a Petition for Dissolution of Marriage are set forth in [KRS 403.150](#) and include the following:

1. Verification and irretrievable breakdown.

The Divorce Petition shall be verified by the Petitioner who shall allege that the marriage is irretrievably broken. For purposes of divorce, irretrievable breakdown means there is no reasonable

prospect of reconciliation. [KRS 403.170\(3\)](#). If the response to the petition alleges that the marriage is not irretrievably broken, the court may order a continuation of not fewer than thirty, nor more than sixty days, and may also suggest that the couple seek counseling. The court may also, at the request of either party, or on its own motion, order a conciliation conference. [KRS 403.170\(2\)\(b\)](#).

2. Explanation of no fault.

Often clients will want to use the divorce petition to express why they believe the marriage failed. It is important to explain that the contents of the petition are prescribed by statute and that it is not necessary or appropriate to place blame for the breakdown of the marriage. Kentucky is considered a "no fault" state, and fault has very little role in the divorce process.

3. Jurisdiction and venue.

Before a person may obtain a divorce within the Commonwealth of Kentucky, they must reside within the Commonwealth, or have been stationed in this state while a member of the armed services for "180 days next preceding the filing of the petition." [KRS 403.140\(1\)\(a\)](#). The status of residency may be proved by either the Petitioner or Respondent. See [KRS 403.025\(2\)](#).

[KRS 452.470](#) governs venue for dissolution cases. The statute requires actions for maintenance or dissolution of marriage to be brought in the county where the wife or husband usually resides. If venue is improper, but the Respondent spouse is served with a valid summons and fails to properly object or file a motion to dismiss, the question of venue is waived. Shepherd v. Mann, 490 S.W.2d 760 (Ky. 1973). However, if both parties agree on a different venue, they may file in a different county. Commonwealth v. Hampton, 814 S.W.2d 584 (Ky. 1991). Often, parties will agree to a different venue for purposes of convenience or privacy. However, in such cases, the "agreed upon" court has the discretion to decline to take jurisdiction of the case as a matter of public policy favoring in-county residents on the court docket.

Because venue can have a significant effect on availability and court scheduling, convenience, and judicial discretion, forum shopping is not uncommon. Separating couples often relocate to nearby counties immediately preceding court action in order to file in a particular court, while the other spouse rushes to the courthouse in the "home" county. [FCRPP 2\(2\)](#) established a "first to file" rule when venue is otherwise proper in actions concerning the same subject matter are filed in different circuits.

4. Separation.

According to the provisions of [KRS 403.170\(1\)](#), no decree of divorce may be entered until the parties have lived apart for sixty days. The requirement that couples be living apart includes those living in the same house so long as they have ceased to engage in sexual relations.

It is useful to explain the meaning of separation to clients. Most clients believe they are separated when one party moves out. Few clients realize that separation refers to cessation of marital relations, and even fewer clients understand that marital property continues to accrue after a party moves out, files for divorce, or marital relations cease.

5. Minor children.

If the divorcing couple has minor children, the provisions of [KRS 403.838](#), the Uniform Child Custody Jurisdiction and Enforcement Act must be incorporated into the Petition for Dissolution. The sample Petition contains the necessary provisions. The statute requires that the Petition state the child's present address, each address at which the child has resided during the last five years, and the names and present addresses of the persons with whom the child has lived during that time. The petition must also state whether the petitioner has (1) participated in any other litigation involving custody of the minor children; (2) whether the petitioner has information of any other custody proceeding; and (3) whether the petitioner knows of any person, not a party to the proceeding, who has, or claims to have, custody of the child, or who has visitation rights.

Additionally, when there are minor children, no testimony, other than on temporary motions, will be received for sixty days from the earlier of (1) service of summons; (2) appointment of a warning order attorney; or (3) the filing of a responsive pleading or entry of appearance. [KRS 403.044](#).

6. Pregnancy.

If, at the time of filing the petition, the wife is pregnant, the court may continue the case until the pregnancy ends. [KRS 403.150\(7\)](#).

7. Domestic violence.

At the initial meeting the attorney must ask the client whether there is any violence involved in the marriage. This information will be necessary for the petition, and, as a practical matter, it is something about which the attorney will need to counsel the client. [KRS 403.150\(2\)\(a\)](#) requires any party alleging domestic violence to certify the "existence and status of any domestic violence

protective orders." The statute also allows the abused party to substitute their attorney's address for their address so that the abusive spouse will not be apprised of their whereabouts.

Whenever there is a problem with domestic abuse, the attorney must act as quickly as possible to obtain emergency protective orders or restraining orders. Emergency protective orders are governed by [KRS 403.715](#) *et seq.* All attorneys practicing divorce law should acquaint themselves with these provisions. Attorneys must also look up any provisions which might be set forth in their local rules. If there is time, the attorney can file a motion for a restraining order and obtain an *ex parte* ruling by the court. The attorney should be familiar with any local shelters and agencies that provide services for abused persons. Lastly, the attorney should never assume that all victims of domestic abuse are female.

There will be men who are abused by their wives. Do not, as is often the urge, shrug off any allegations of abuse and violence, whether they are made by female or male.

8. Miscellaneous allegations.

The ages, social security numbers, occupations, and residences of the parties used to be required in the petition. Now, pursuant to [CR 7.03\(1\)](#), effective April 1, 2009, the social security numbers and day/date of birth must be redacted or replaced with neutral placeholders. The attorney is required to maintain an unredacted copy of the Petition in his or her records. The petition should also set forth the date of marriage, the place where the marriage is registered, and whether there are any arrangements as to custody, visitation, support of minor children and maintenance of a spouse. Finally, but most importantly, the Petition must demand the relief which the petitioner is seeking, including a dissolution of the marriage, distribution of marital and non-marital assets and debts, maintenance, custody, support, and attorney fees, if applicable.

9. Indigent clients.

If the petitioner is indigent, a motion to proceed *in forma pauperis* must be prepared to file with the standard petition. The motion must merely allege that the petitioner does not have sufficient funds or property with which to pay in advance the costs of the divorce action. An affidavit, signed by the petitioner, must accompany the motion, and must set forth the following:

- a. An allegation that the petitioner is unable to pay the costs of the action;
- b. The petitioner's financial condition;

- c. All sources of petitioner's income, including food stamps, aid to families with dependent children, maintenance, etc.; and
- d. A list of petitioner's monthly expenses.

See [Appendix](#) for a sample motion and affidavit.

Obviously, an attorney who files a motion to proceed *in forma pauperis* on behalf of a client will be handling the divorce on a *pro bono* basis. New attorneys who want divorce experience can contact their local legal aid offices and ask for referral of some *simple* divorce cases. *Pro bono* work through legal aid will not only provide invaluable experience for a new attorney, but will also help indigent persons who may have been on the divorce waiting lists for months. The legal aid office will usually ask the attorney to keep track of the number of hours the attorney spends performing *pro bono* work.

10. Summons.

Like all civil actions, a divorce petition is "commenced" by the filing of the Petition and issuance of a summons. A summons should be filed with the Petition for the clerk to "issue" and serve pursuant to [CR 4.01](#) if desired.

11. Vital statistics form.

When a couple divorces, a "Certificate of Divorce or Annulment" must be prepared. This is referred to as a "VS 300." These forms are available online at <http://chfs.ky.gov/dph/vital> and must be printed according to specific instructions. The form must be signed by the attorney in blue or black ink and filed with the petition. Once a Decree is entered, the clerk will forward the certificate to the vital statistics office to register the divorce. Some courts also require a Case Data Information Sheet ([AOC-FC-3](#)) pursuant to local rule.

B. Service of Process

The petitioner in divorce actions must provide reasonable notice of the action to the respondent in order to meet the requirements of due process. Unless service of process (or an accepted substitute therefore) is obtained, the case is not properly before the court for adjudication.

The [Rules of Civil Procedure](#) apply to divorce actions. For in-state residents, service may be made by certified mail, sheriff or voluntary entry of appearance by the party. In cases that are filed *in forma pauperis*, the sole method of service is by sheriff. Many divorce practitioners prefer to attempt cooperative acceptance of service by voluntary entry of

appearance in order to avoid unpleasant visits from the sheriff's office at the outset.

For out of state residents, service may be made by certified mail through the Secretary of State's Office or by warning order attorney. The attorney should remember that unless the out of state respondent enters his or her appearance, the court may not have personal jurisdiction over him or her unless the respondent is served pursuant to the long-arm statute [KRS 454.210](#). Without personal jurisdiction, a court may not award monetary judgments against the respondent.

C. Entry of Appearance and Waiver

See [Appendix](#) for a sample entry of appearance form. The entry of appearance waives the necessity of service of process. Entry is especially helpful for cases in which the respondent is an out of state resident, because an entry of appearance will cure problems with personal jurisdiction. Also, if the respondent does not intend to defend or contest the action, he or she may wish to simply enter an appearance.

D. Preparation of Response

The timely response to a petition for dissolution is just as important as the petition. If the respondent does not believe that the marriage is irretrievably broken, he or she must allege so, and may ask the court for a conciliation conference. All responses should be verified by the Respondent.

Additionally, if the respondent wants custody of the children, maintenance or any other specific relief, he or she must allege that such relief is sought. In these cases, the document is usually styled "Response and Counter-Petition." Otherwise, the allegations contained within the petition must be admitted or denied as the case may warrant.

IV. DISCOVERY AND TRIAL

A. Purpose

Effective discovery practice in domestic cases not only aids the attorney in simplifying the issues involved, but is essential in helping to locate and value marital assets of the parties. As some of the standard discovery tools allow the opposing party thirty days in which to answer, it is important to begin discovery proceedings as soon as possible in domestic cases.

B. Methods

All of the traditional methods of discovery, interrogatories, requests for production, and requests for admissions and depositions are available to the attorney in divorce cases. Any combination of these methods may be utilized.

However, pursuant to [FCRPP 2\(3\)](#) and [3\(3\)](#), the parties must disclose their assets and liabilities through Preliminary and Final Verified Disclosure Statements. These Rules are intended to eliminate much of the "game-playing" and controversy which take up large amounts of the Court's time to settle discovery disputes. See [Appendix](#) for sample forms.

[FCRPP 2\(3\)](#) provides that the Preliminary Mandatory Disclosure Form [AOC-238](#) must be exchanged by the parties within forty-five days of service of the Petition upon the Respondent. There has been significant debate as to whether this requirement can be waived by the parties in simple cases, resulting in different filing requirements depending on local rule in order to obtain a Decree. Some jurisdictions require the parties to exchange the form prior to initiating formal discovery. Regardless of whether this form is required in your county, it is a simple and relatively prompt method of exchanging information that is very useful in most cases. The form can be provided to the client at the outset of the case as a part of the case data collection packet to further expedite the initial process.

After the preliminary disclosure has been exchanged, usually the best way to obtain further information and cover your bases prior to trial is by the use of interrogatories and requests for production.

1. Interrogatories.

[Civil Rule 33.01\(1\)](#) allows a party to have interrogatories served along with the summons. A maximum of thirty interrogatories may be served without the permission of the court. Interrogatories may be used to determine what property and assets the parties own, as well as the location of the same. Interrogatories should also seek out information regarding the factual basis for claims for custody and maintenance. Also, remember that each subpart of a question is to be counted as a separate Interrogatory. See [Appendix](#) for sample interrogatories.

2. Requests for production of documents.

[Civil Rule 34.02](#) allows for the service of a maximum of thirty requests for production of documents at the time of service of summons. These are extremely important, and should be utilized for gaining access to necessary documents such as tax returns, corporate or business records, doctor's reports and any other document that has relevance to the particular facts of a case. See [Appendix](#) for sample requests.

3. Depositions.

Depositions should be utilized after interrogatories have been answered by the opposing parties. The main reason for taking a deposition is to clarify any areas that the interrogatories or requests may not have adequately covered. Depositions are

costly, however, and not always necessary. Always obtain approval from the client before scheduling depositions and confirm that authority in writing to the client. In smaller cases where the client does not have a great deal of financial resources, a complete set of interrogatories and requests may be sufficient.

4. Requests for Admissions.

Requests for Admissions may also be served upon a party at the time of service of summons. Requests for Admissions may be used to determine the accuracy of documents or statements of fact. The admissions must be responded to within thirty days. If the attorney fails to respond, the requests are deemed admitted. Even when deemed admitted, in some jurisdictions it is wise to have the court confirm the admissions.

5. Releases.

Many family law matters necessitate access to otherwise confidential or protected records such as bank statements or medical records. [FCRPP 2\(4\)](#) requires parties to sign appropriate releases to obtain records for relevant information, unless a proper objection is made.

6. Subpoenas.

A lawyer may now issue a subpoena to compel a witness to appear at a deposition or hearing, or to produce documents. [CR 45.01](#). As of January 1, 2013, subsection requires that notice of the subpoena be given to opposing counsel and the individual subpoenaed prior to actually being served. [CR 45.03](#).

C. Witnesses

1. Experts.

In some instances an expert is necessary, even essential, in a divorce case. Experts may be used to testify regarding matters such as appraisals of real estates, businesses, employability of a spouse seeking maintenance and the fitness of parents seeking custody. Expert testimony is not conclusive however; it is merely evidence to be considered by the court.

2. Lay witnesses.

The attorney may also wish to utilize lay witnesses at the hearing. Lay witnesses are competent to testify to such matters as the residence of the Petitioner. Such witnesses, who are familiar with the family, may also testify as to the relationship of the parents seeking custody of their children. Also, if a party claims that a piece of property is not marital property, but was given as a gift,

the attorney may want to question the person who gave the gift and have them specify what his or her intentions were in making the gift. No matter what the witness is expected to testify to, it is important to prepare them for taking the witness stand. The witness should be acquainted with any documents that may be used and advised as to the questions that will be asked.

D. Hearings

As stated earlier, organization is the key to a successful divorce hearing. Well in advance of the hearing, an attorney should prepare a list of what he or she will prove, and how he or she will offer that proof. For example, if an attorney is attempting to prove that his or her client is entitled to maintenance, he or she should have a checklist setting forth the statutory requirements for an award, and she should secure testimony in support of those factors. Once each factor is met by appropriate testimony, the attorney can check it off and proceed to the next item. This type of method not only ensures that the attorney does not forget any essential details during the hearing, but also enables him or her to present the case in a logical and sensible fashion.

The attorney, prior to the hearing date, should check the local rules to make sure he or she has complied with all hearing requirements. For example, in some counties, the parties are required to file financial disclosures prior to the hearing date. In an increasing number of counties, parents must attend parenting classes, called the Families in Transition program, before their case will be set for hearing. In Jefferson County, the parties must first attempt mediation of certain issues prior to hearings. [Note: Mediation is not required when domestic violence is present. See [KRS 403.740\(2\)](#)].

[FCRPP 3\(3\)](#) and [\(4\)](#) contain important procedural requirements prior to trial, including the filing and exchange of a Final Verified Disclosure Statement, exhibit and witness lists, testimony of experts, and use of depositions.

V. TEMPORARY ORDERS

A. Custody and Support

[KRS 403.160\(2\)](#) allows for temporary orders for child support. The motion must be accompanied by an affidavit stating the number of children, the income of the parties required to calculate the combined parental gross income set forth in [KRS 403.212\(2\)\(g\)](#) and notice must be given to the opposing party. Pursuant to [FCRPP 9](#), you must also include a completed child support worksheet, three most recent pay stubs, the most recently filed tax return, proof of the children's health insurance costs, and a notice to the Respondent regarding any objections. The court, within fourteen days, shall order child support in accordance with the guidelines that shall be retroactive to the date of the filing of the motion unless otherwise ordered by the court. The court does not have to hold a hearing unless

one is requested. The order of support becomes effective immediately, and terminates when the final decree is entered or when the action is dismissed.

A motion for temporary custody must also be accompanied by an affidavit which sets forth the supporting facts. The opposing party may file counter-affidavits. If the court finds that the child is in the custody of a *de facto* custodian, the court shall make the *de facto* custodian a party to the proceedings. The court will deny the motion unless it finds that the affidavits set forth adequate grounds for a hearing on the matter, in which case the Court will set a hearing date on an Order to show cause why the requested Order or modification should not be granted. See [KRS 403.350](#).

B. Maintenance

Motions for temporary maintenance are governed by [KRS 403.160\(1\)](#). Such motions must be accompanied by an affidavit setting forth the factual basis for the motion. It is clearly important to set forth the client's income versus expenses to establish the client's inability to provide for her reasonable needs. Again, the order is effective immediately, and only terminates upon entry of a final decree, dismissal of the action or revocation upon a showing of appropriate facts.

C. Injunctions and Restraining Orders

Parties filing motions for temporary support or maintenance may also ask for a temporary injunction or restraining order in accordance with the [Rules of Civil Procedure Rule 65](#) *et seq.* Both motions for restraining orders and injunctions must be accompanied by affidavits.

VI. MAINTENANCE

A. Generally

An award of maintenance is a matter within the discretion of the court, and will not be overturned on appeal unless there is a showing that the award is clearly erroneous or constitutes an abuse of discretion. [Moss v. Moss](#), 639 S.W.2d 370 (Ky. App. 1982). The court may award maintenance to either party. However, personal jurisdiction must be obtained over both parties before an enforceable award can be entered. [KRS 403.200](#) governs maintenance awards.

B. Factors

Before a court may award maintenance, a division of marital property must be made except when dealing with issues of temporary maintenance as discussed above. A party seeking maintenance must establish two elements in order to be awarded maintenance: (1) that the party seeking maintenance lacks sufficient property to meet his/her reasonable needs; and (2) that the party is unable to support themselves

through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home. [KRS 403.200\(1\)](#) and Drake v. Drake, 721 S.W.2d 728 (Ky. App. 1986).

Because there is no set formula for determining maintenance awards, it is one of the most often litigated issues in divorce cases. Preparing a maintenance case requires establishing at a minimum proof of the standard of living enjoyed by the parties during the marriage to show "reasonable needs," and the ability of each party after the divorce to meet those financial needs through appropriate employment and using realistic budgets.

C. Amount

Pursuant to [KRS 403.200\(2\)](#) the court has the discretion to set maintenance at an amount and for a period as it deems just based upon the following factors: 1) the financial resources of the person seeking maintenance; 2) the time necessary to acquire the education or training necessary to find appropriate employment; 3) the standard of living established during the marriage; 4) the duration of the marriage; 5) the age, physical and emotional condition of the person seeking maintenance; and 6) the ability of the spouse to meet his needs while meeting those of the spouse seeking maintenance. See [KRS 403.200\(2\)](#). Fault is not a factor to be used in determining the amount of maintenance awarded, except to the extent necessary to prevent the person at fault who is seeking maintenance from receiving a possible windfall. Platt v. Platt, 728 S.W.2d 542 (Ky. App. 1987).

The court may order what is termed "rehabilitative maintenance" in order to allow the spouse seeking maintenance to acquire the education or training necessary to obtain employment through which they can support themselves. However, even if the spouse seeking maintenance is employed, but is living below the standard to which he or she had become accustomed during the marriage, the court may make an award. Drake v. Drake, 721 S.W.2d 728 (Ky. App. 1986).

An award of maintenance may only be modified upon a showing of changed circumstances that are so substantial and continuing as to make the terms unconscionable. See [KRS 403.250\(1\)](#). The provisions of the decree as to property distribution may not be revoked or modified unless the court finds the existence of conditions that justify the reopening of a judgment under the law of the state. Unless a modification is granted, the spouse paying maintenance may not unilaterally stop making payments. If the spouse does stop making payments, even if modification is justified, he/she will be liable for arrearage. Combs v. Combs, 787 S.W.2d 260, (Ky. 1990).

Pursuant to [KRS 403.250](#), unless otherwise agreed to in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the

remarriage of the party receiving maintenance. However, if the party receiving maintenance lives with another, the cohabitation can render continued maintenance "unconscionable" if the nature of the cohabitation constitutes a new "financial resource" as contemplated by [KRS 403.200\(2\)\(a\)](#). See Combs v. Combs, 787 S.W.2d 260 (Ky. 1990). See *also* Hutton v. Hutton, 118 S.W.3d 176 (Ky. 2003) (effect of annulment of remarriage on a maintenance obligation).

Additionally, it is important to note that the notion that a maintenance award in a fixed amount to be paid over a definite period of time is not subject to modification has been overruled. (Example: \$500 per month for a period of sixty (60) months beginning on 1/1/2007). Dame v. Dame, 628 S.W.2d 625 (Ky. 1982) (but see *also* Low v. Low, 777 S.W.2d 936 (Ky. 1989)). Now, a maintenance award in a fixed amount to be paid out over a definite period of time is subject to modification under [KRS 403.250\(1\)](#). Woodson v. Woodson, 338 S.W.3d 261 (Ky. 2011). The Woodson holding is also applicable to lump sum maintenance awards, such that they are also modifiable pursuant to [KRS 403.250](#).

VII. CUSTODY

A. Statutory Considerations

The child custody provisions contained in [KRS 403.270](#) delineate the relevant considerations for cases involving custody. The statute states that the circuit court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and any *de facto* custodian. (*De facto* custodian is defined at [KRS 403.270\(1\)\(a\)](#); Clear and convincing evidence is needed before a court will determine that a person constitutes a *de facto* custodian for purposes of custody determinations). In determining what constitutes the child's best interests, the court shall consider all of the following: (1) the wishes of the parents; (2) the wishes of the child; (3) the interaction and interrelationship of the child with the parents, siblings, and any other person who may significantly affect the best interests of the child; (4) the adjustment of the child to his or her home, school and community; (5) the mental and physical health of all relevant parties; (6) any information, records or evidence of domestic violence, (7) the extent to which the child has been cared for by any *de facto* custodian; (8) the intent of the parties in placing the child with a *de facto* custodian; and (9) the circumstances under which the child was placed or caused to remain with a *de facto* custodian. The court shall not consider the conduct of a parent seeking custody unless that conduct affects, or is likely to affect, the child adversely so that it relates to the best interests of the child.

It should be noted that there is no longer a preference for the mother in cases involving children of tender years, and instead both parents must be given equal consideration by the court. Jones v. Jones, 577 S.W.2d 43 (Ky. App. 1979). Additionally, there is no preference for natural parents over adoptive parents. Davis v. Davis, 619 S.W.2d 727 (Ky. App. 1981).

Custody matters are to be given expedited hearing dates. During the hearing, the court may interview the child in chambers in order to ascertain the child's wishes as to custody and visitation pursuant to [KRS 403.290](#). Some judges are willing to listen to the wishes of children, and will place great emphasis on the child's preferences, while some judges will absolutely refuse to interview the child. Regardless, the decision is a matter of judicial discretion, and is not likely to be disturbed on appeal.

The parents may wish to present expert testimony at the custody hearing. Custody may become a highly contested issue in which the child's best interests are not the top priority of the parents. In such a case, the attorney probably should request that the court appoint a guardian *ad litem* to represent the child; however, the attorney should make sure that he or she has a complete understanding of responsibilities to the client pursuant to the [Rules of Professional Conduct](#). Also, at the request of the child or the child's custodian, the Court may order an investigation and report concerning custodial arrangements. [KRS 403.300](#). Courts are increasingly relying on court-appointed child psychologists, often called custodial evaluators, to make recommendations to the court. These recommendations, though costly, provide valuable psychological insight into the parties and children.

B. Joint Custody versus Sole Custody

Pursuant to [KRS 403.270](#), the Court may award joint custody if doing so is in accordance with the best interests of the child. Joint custody is defined as letting both parents share in the decision-making in major areas of the child's upbringing. These major areas are healthcare, education, and religious upbringing. On the other hand, sole custody grants one parent the authority to unilaterally make all major upbringing decisions.

The Kentucky Supreme Court held that joint custody "must be accorded the same dignity as sole custody and trial courts must determine which form would serve the best interest of the child." [Squires v. Squires](#), 854 S.W.2d 765 (Ky. 1993). Practically speaking, joint custody is an option that an attorney should urge parents to consider. The most common custody arrangement in Kentucky is joint custody.

It is important to explain to clients that custody and parenting time are two different issues: custody refers solely to decision making, and parenting time refers to when a child will be with each parent. Clients frequently confuse joint custody as equal timesharing, or believe that if they are granted sole custody, the child will not have to visit with the other parent at all. These are both misconceptions.

C. Modification

The law on modification of custody has undergone a significant change recently with the case of [Scheer v. Zeigler](#), 21 S.W.3d 807 (Ky. App. 2000). Under prior Kentucky case law, different standards were applied to

modification of sole custody awards versus joint custody awards. Scheer changed this approach and mandates that all custody modification shall be governed by [KRS 403.340](#).

Pursuant to [KRS 403.340](#):

(1) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:

(a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health, or

(b) The custodian appointed under the prior decree has placed the child with a *de facto* custodian.

The purpose of the two-year period is to allow the child's living conditions to stabilize. Quisenberry v. Quisenberry, 785 S.W.2d 485 (Ky. 1990). Once the two-year period has passed, the court cannot modify a custody order unless a change has occurred in the circumstances of the child or his custodian. Even then, unless either the custodian agrees to the modification, the child has been integrated into the movant's family with the custodian's permission, or the child's environment is dangerous, the court must leave the original custody order intact. [KRS 403.340\(2\), \(3\)](#).

If the two year period has passed, then [KRS 403.340\(2\)](#) governs modification. The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the custodian appointed pursuant to the prior decree unless:

1. The custodian agrees to the modification;
2. The child has been integrated into the family of the petitioner with the consent of the custodian; or
3. The child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him; or
4. The custodian has placed the child with a *de facto* custodian.

In determining whether a child's environment is endangering him or her, the court must consider all relevant facts including, but not limited to, domestic violence and abuse, and any conduct that adversely affects the

child. A motion for modification must be accompanied by more than one affidavit in support of the motion if made prior to the expiration of the two-year heightened standard. See [KRS 403.350](#) and [403.340\(1\)](#). This requirement merely places the burden of proof on the movant, and is intended to prevent continuous litigation over the child. If a court finds that such a motion is made for vexatious purposes or to harass, it may order that the movant pay attorney fees and costs.

However, before a court may even consider a motion for modification of custody, [KRS 430.340\(2\)](#) requires that the court have jurisdiction of the matter pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. The Kentucky version of the UCCJEA is set out in [KRS 403.800 et seq.](#) The attorney should be familiar with the requirements of the UCCJEA. The attorney should note that the provisions of the UCCJEA apply to all modification cases regardless of whether the original custody order issued by the court was asked to consider modification, or whether it was issued elsewhere. Further, it should be noted that the UCCJEA has replaced the older version of the UCCJA and was codified by our General Assembly in 2004.

There have been numerous developments in regard to various aspects of custody, none more discussed than the Supreme Court's decision in [Pennington v. Marcum](#), 266 S.W.3d 759 (Ky. 2008), *overruling* [Fenwick v. Fenwick](#), 114 S.W.3d 767 (Ky. 2003). [Pennington](#) established a rule that permits a parent seeking changes that will not result in the child's spending a different amount of time in each home but not seeking to change legal authority over the child to move for a change in time without regard to the two-year limitation in [KRS 403.340](#). The "child's best interest" is the standard. This has resulted in a great decrease in motions to modify "custody" *per se*, since most modification issues arise in the context of desired changes to the visitation schedule as opposed to a change in decision making authority. As a practical result, the two year heightened standard of [KRS 403.340](#) that was designed to provide some stability for custody decrees has been all but eliminated in most cases.

D. Visitation

Any parent who is not granted custody of minor children is entitled to reasonable visitation rights. Visitation is a statutory right which may not be denied unless, after a hearing, the court finds that such visitation would endanger the child's physical, mental, moral or emotional health. [KRS 403.320\(1\)](#). Courts may even grant visitation rights to grandparents if the Court determines that it is in the best interest of the child to do so. If the Court grants visitation rights to grandparents, those rights are not extinguished unless the circuit court determines that such rights are against the best interests of the child. See [KRS 405.021\(1\)](#). Any order granting or denying visitation may be modified by the court when it serves the best interests of the child. [KRS 403.320\(3\)](#).

In many cases, parties are able to agree as to visitation. If the parents are unable to agree, however, the court shall, upon request, issue specific

orders as to visitation. Also, the use of the Parent Coordinator has become a popular alternative dispute resolution method to assist the parents with visitation and custody issues outside of the courtroom.

Visitation rights are separate and distinct from the duty to provide support. If a non-custodial parent does not pay support, the custodial parent does not have the right to deny visitation. Similarly, even if the non-custodial parent is being denied visitation, the duty to support is not abrogated. Instead, the court's contempt power by way of a Motion for Rule is another way to settle disputes over visitation and support. An interesting argument arises from whether a parent who fails to exercise visitation with their children is or should be in contempt of a Visitation Order.

It should be noted that in many courts, visitation is now being called "parenting time" or timesharing in cases of joint custody. The rationale is that joint custodians share parenting time, and a sole custodian provides visitation to the noncustodial parent. This is the more progressive way to differentiate between the two situations. Many jurisdictions have established timesharing guidelines for parties to consider in developing a timesharing agreement, but these are not to be considered law and are not applicable in every case. [FCRPP 8](#) includes the model timesharing guidelines established by the Supreme Court as well (see [Appendix](#)), but these are not mandatory.

E. Relocation

The rules governing relocation of parents have changed as a result of the [Pennington](#) decision discussed above. The original Supreme Court rule required any parent wishing to relocate to obtain a court order of agreement of the parties to relocate out of state with a child, or more than 100 miles away. However, the current version of the rule seeks to clarify the holding of [Pennington](#), and provides for slightly different procedures depending on whether the parties share joint or sole custody. [FCRPP 7\(2\)](#).

Whether the parties share joint or sole custody, the relocating parent must file and serve written notice of the intended relocation. In cases of sole custody, if the intended relocation affects the current timesharing or visitation schedule, the non-relocating parent may file an objection to the notice. In cases of joint custody, either party may seek an amended timesharing schedule from the court. In either case, the relocating parent must either comply with the current timesharing schedule after relocation, or seek an amended schedule from the court to avoid being in violation of the prior Decree. In any relocation case, the best practice is to provide ample notice of the intended relocation and obtain a court order either by agreement or after a hearing modifying the prior Decree.

VIII. CHILD SUPPORT

A. Generally

Parents have a duty to support their minor children, and sometimes their children who have reached the age of majority but are still in high school, or who have disabilities which make them unable to provide for themselves. See [KRS 403.213\(3\)](#) and Abbott v. Abbott, 673 S.W.2d 723 (Ky. App. 1983).

Stepparents are not required to support their ex-spouse's children, but adoptive parents are required to do so. Also, children born out of wedlock are entitled to support from their fathers upon a determination of paternity. Mayfield v. Com. ex rel/ Phelps, 546 S.W.2d 433 (Ky. 1976). The Kentucky child support guidelines and related laws are set forth in [KRS 403.211-215](#). An action for support may be instituted by the parent, custodian or agency which has substantially provided for the child's support. The guidelines set forth in [KRS 403.212](#) serve as a rebuttable presumption as to the amount of support payable, and may be deviated from only upon a finding that their application would be unjust or inappropriate. If the court finds that the application of the guidelines is not appropriate, it must make a written finding. The finding may be based on one or more of the criteria set forth in [KRS 403.211\(3\)](#). The Kentucky Court of Appeals has also indicated that, in addition to the statutory criteria of [403.211\(3\)](#), courts may deviate from the guidelines if appropriate given the shared parenting time schedule and relative financial positions of the parties. Downey v. Rogers, 847 S.W.2d 63 (Ky. App. 1993). In cases of equal timesharing, the court must consider the shared financial obligations resulting from the equal timesharing, but this does not always result in a decrease or elimination in child support if the parties have sufficiently disparate income or financial resources. Plattner v. Plattner, 228 S.W.3d 577 (Ky. App. 2007).

B. Calculations

In order to calculate the amount of child support due from both the custodial and non-custodial parents, worksheets are available at the Circuit Clerk's office. Additionally, there are computer software programs that can be purchased for calculating support, which require the attorney to plug in financial information. The worksheets and computer programs can be adjusted to calculate support on monthly, weekly and bi-weekly basis. One particularly useful program is the Craig-Ross software, which computes child support as well as estimates spousal maintenance.

To begin the calculations, the monthly gross income of each parent must be determined. Gross income includes income from any source (including gifts), but does not include benefits received from public assistance programs such as Aid to Families with Children, Supplemental Security Income and food stamps. [KRS 403.212\(2\)\(b\)](#). Courts should require some form of income verification such as tax returns, pay stubs and testimony from employers. If a parent is self-employed, his or her gross

income is reduced, in order to find adjusted income, by the amount of their legitimate and necessary business expenses. Also, either parent is entitled to subtract from their gross incomes any amount of pre-existing child support obligations to the extent that such payments are actually paid. Additionally, [KRS 403.212](#) was recently amended to provide that gross income is also reduced for the support of prior born children who are not the subject of the proceeding if the parent is responsible for and is actually providing support for those other prior born children. Note that the court has the discretion to order either or both parents to pay the cost of reasonable health insurance coverage. [KRS 403.211\(7\)](#).

Once the adjusted income of each parent is calculated, the amounts are added together to find the combined parental income. The amount of each parent's adjusted income will then be divided by the amount of the combined parental income to determine the percentage of parental income. The combined parental income is also used to find the base support obligation in the guidelines. For example, if the combined parental income is \$4,000, the guidelines call for base child support, for families with just one child, in the amount of \$571. This base amount would be divided between the parties in proportion to income, and the non-custodial parent's obligation is determined by applying his or her percentage of total income to the base child support number. See [Appendix](#).

[KRS 403.211](#) also requires the court to order a provision for the child's health insurance coverage, and apportion work related child care costs and the cost of health insurance between the parties in proportion to income. Accordingly, the child support worksheets include these obligations in the calculation and apportion out the cost in the final calculation of the monthly total. However, it is not always appropriate to include these amounts as part of the base child support obligation in cases warranting a deviation from the application of the guidelines. Because these costs often fluctuate, it is appropriate to enter separate orders apportioning these obligations in many cases.

C. Parent Voluntarily Unemployed or Underemployed

If the court finds that either parent is voluntarily unemployed or underemployed, support will be calculated based on imputed potential income unless that parent meets certain exemptions. There can be no imputation of income to a parent who stays at home to care for a child younger than four years of age. Potential income is determined by the employment potential and probable earnings level based upon the parent's work history, and occupational qualifications, as well as prevailing job opportunities and earnings levels in the community. [KRS 403.212\(2\)\(d\)](#).

Incarceration does not relieve a parent of his or her child support obligation. Incarceration may affect an obligor's earning capacity, but is not justification for non-payment of support. Kentucky courts have held that the assets of an unemployed obligor who is incarcerated may be

used to satisfy child support obligations. Further, the Court has held that incarceration could not be treated as an "extraordinary factor" permitting not only deviation from the child support guidelines but abating all support duties during the incarceration. Commonwealth ex rel. Marshall v. Marshall, 15 S.W.3d 396 (Ky. App. 2000). Abatement means that as soon as the obligor is released from prison, he or she must start payments on the arrearage accrued during the imprisonment.

D. Enforcement

1. Orders.

[FCRPP 9](#) requires that all child support orders be entered on a specific AOC form ([AOC-152](#)). See [Appendix](#). If the award is to be implemented by issuance of a wage assignment order, there are additional separate forms that must be utilized depending on whether the family qualifies for certain types of enforcement under federal law.

2. Contempt.

When a parent falls behind on his or her child support payments, the custodial parent may bring a Motion for Rule seeking the court to exercise its contempt powers. The court will hold a hearing on the matter, at which time the custodial parent merely has to allege that payments have not been made. The burden of proving that child support payments have been satisfied is upon the obligor. Raymer v. Raymer, 752 S.W.2d 313 (Ky. App. 1988). If the obligor cannot prove that payment has been made, the court has the power to jail him or her. Therefore, it is essential to advise non-custodial clients to document all child support payments made, either by way of returned checks, signed receipts, or any other accurate method. Also, remember to ask the court to award interest, as each payment of child support becomes due and owing it is a liquidated judgment with interest at 12 percent annually until paid in full.

3. Wage assignment.

[KRS 403.215](#) requires that any new or modified child support order shall provide for a wage assignment. The wage assignment shall take effect immediately, and is binding on the present, as well as any future, employer. For good cause shown, the wage assignment will not be ordered to take effect unless and until the obligor falls behind on payments. See also [KRS 405.465\(2\)](#) which provides for a mandatory wage garnishment. Now almost all jurisdictions in Kentucky require child support payments to be processed through the Centralized Collection Unit of the Cabinet for Health and Family Services.

4. State agency enforcement.

The state may enforce the provisions of any child support orders. If a state agency is substantially contributing to a child's care, it will vigorously seek enforcement. Also, if the custodial parent's income is derived from AFDC and food stamps, the state will seek enforcement. These enforcement cases are handled through the county attorney's office.

5. Judgment.

Any child support arrearage may be reduced to judgment, which may then be executed upon the same as any money judgment. Past due child support obligations are fixed and liquidated debts to which the custodial parent is absolutely entitled. Stevens v. Stevens, 729 S.W.2d 461 (Ky. App. 1987). Remember also that an attorney may seek a contingent fee for services in such situations.

6. Uniform Interstate Family Support Act.

[KRS 407.5101 et seq.](#) provides a means of enforcing child support orders in other states that have adopted the Uniform Interstate Family Support Act. A verified UIFSA complaint must be prepared and filed in the appropriate court of the state in which the obligee resides. The court must determine whether the complaint sets forth facts from which it can be determined that the defendant owes a duty of support. The court shall then certify and forward copies of the complaint to either the state information agency or other proper official of the responding state. UIFSA actions may be used not only for enforcement of child support orders, but also for establishment of awards.

E. Modification

A motion to modify the amount of child support payments may be made by any person or agency that substantially contributes to the support of the child. Modification may be granted only upon a showing of a material change in circumstances that is substantial and continuing. [KRS 403.213](#) and Wilcher v. Wilcher, 566 S.W.2d 173 (Ky. App. 1978). A "material change in circumstances" is defined as one that would result in a 15 percent change in the amount of support due under the guidelines. Note that this merely constitutes a rebuttable presumption that there is a material change. Hence, if the amount of change is less than 15 percent, a rebuttable presumption exists that modification is not warranted. All motions to modify child support must be accompanied by the same proof required by an initial motion to establish child support. [FCRPP 9\(4\)](#).

A court may not award built-in automatic increases in child support orders unless the parties have agreed to do so. Flora v. Flora, 707 S.W.2d 793

(Ky. App. 1986). If a parent obligated to pay support dies, the court may modify, revoke or reduce to lump-sum the amount of support.

IX. PROPERTY DIVISION

A. Generally

In the area of property disposition, an attorney should never accept a case that is more complex than he or she is equipped to handle. Attorneys may get into a case with numerous and substantial assets and think that the matter can be concluded by way of settlement agreement. A marital settlement agreement or separation agreement should dispose of most, if not all, issues in a case. In such an agreement, provisions for maintenance for either spouse and property disposition are binding unless the court, upon review of relevant economic and other factors, finds the agreement to be unconscionable. However, the terms of the agreement providing for custody, support, and visitation of the children are not binding. See [KRS 403.180\(1-6\)](#).

There are always matters which can cause trouble for the attorney, however, whether a seasoned and experienced trial lawyer or a novice. For example, if the attorney is not knowledgeable about the tax consequences and the practical aspects of property division, he or she might give a client poor advice that not only hurts the client but also exposes the attorney to malpractice claims. Thus, always make sure to involve any support help necessary, whether it be an outside accountant or even another attorney.

B. Division of Assets

1. Marital versus nonmarital property.

The basic definition of "marital property" includes all property acquired after the marriage but before the date of divorce or legal separation. Statutory exceptions to this definition include: 1) property acquired by gift, bequest, devise or descent; 2) property acquired in exchange for property acquired by gift, bequest, devise or descent; 3) property acquired by a spouse after a decree of legal separation; 4) property excluded by valid agreement of the parties; and 5) the increase in value of property acquired before the marriage to the extent that such increase was not a result of efforts of the parties. [KRS 403.190\(2\)](#).

Once the court determines whether an asset is nonmarital or marital, appropriate dispositions must be made. The statute requires that the court first assign all nonmarital property to the spouse owning it. Then, the court must divide the marital property in "just proportions," without regard to marital misconduct, based upon the following factors: 1) contribution of each spouse to the acquisition of the property, including the contribution of homemaker; 2) the value of the property set aside to each spouse;

3) the duration of the marriage; and 4) the economic circumstances of each spouse at the time of division. [KRS 403.190\(1\)](#). Remember that the statute clearly considers the efforts of a homemaker as contributing to the marital property. The court need not make a fifty-fifty distribution of the marital property, just an "equitable," or fair, division.

Property may increase or decrease in value between the time of filing the divorce petition and the actual hearing. It is important, therefore, to decide the cut-off date for valuation of the property. If it appears that there will be a long fight over the marital property, attorneys may want to have the court award a Putnam v. Fanning divorce, which merely divorces the parties, but leaves all other issues open for settlement or for determination by the court. Putnam v. Fanning, 495 S.W.2d 175 (Ky. 1973). This is also called a "Limited Decree of Dissolution." The date of divorce or the date of legal separation will provide the date on which all assets are valued. Additionally, the parties are always free to stipulate as to the value of the marital assets. Many courts, however, are reluctant to bifurcate. In the event of death of one of the parties before the property has been divided, the remaining party, lawyers and judge can find themselves in a very complex and protracted administrative and probate nightmare!

In order to preserve the marital estate and relative rights between the parties after a divorce has been filed but before a Decree is entered, the court can enter a "status quo" order to ensure assets are not liquidated or hidden, payments continue on joint obligations, and insurance remains in effect. This helps prevent unilateral changes from being made by either party. [FCRPP 2\(5\)](#).

2. Tracing.

When a spouse claims that they brought property into the marriage, either by gift, inheritance or otherwise, which during the marriage was converted into other assets, the attorney will be faced with a tracing problem. Simply put, tracing is the tracking of nonmarital property from its original form into its current form. For example, if a wife inherits money that is used by the husband to buy himself a race car, the wife must trace the inherited money into the car. In other words, the original property must be traced into assets owned at the time of dissolution. Chenault v. Chenault, 799 S.W.2d 575 (Ky. 1990). Tracing can become quite problematic when the original asset goes through two or more conversions. While the requirement for tracing is firmly set in the law, the Kentucky Supreme Court has stated that there are situations in which strict tracing requirements may not be appropriate. *Id.*

3. Problem areas.

a. Workers' compensation awards.

Workers' compensation awards which have been paid, or awards which are payable in weekly benefits and have accrued but have not been paid as of the date of divorce are marital property. Benefits that accrue and are paid after dissolution are not marital property. Mosley v. Mosley, 682 S.W.2d 462 (Ky. App. 1985).

b. Social Security.

Social Security benefits are not marital property. However, such benefits may be garnished or attached for purposes of collecting child support and maintenance. Also, some divorced parties will be entitled to benefits if they have been married to the person receiving benefits for ten years. [42 U.S.C. §416](#).

c. Personal injury awards.

A personal injury award may be treated as marital property if the injury occurred during the marriage to the extent that the award for loss of earnings and permanent impairment of earning capacity is applicable to the years of the marriage. Any part of the award that can be prorated to the remaining years of life expectancy after divorce is nonmarital. Also, any award for pain and suffering, whether the injury occurred during the marriage or not, is not marital. Weakley v. Weakley, 731 S.W.2d 243 (Ky. 1987).

d. Professional degrees.

Generally, professional licenses and education are not treated as marital property. However, they can be used as a factor in a maintenance award for the spouse without a license or degree. Inman v. Inman, 648 S.W.2d 847 (Ky. 1982).

e. Retirement and pensions.

Pensions may be one of the most important areas of property division, especially for couples who do not have many other assets. A thorough examination of the law concerning pensions is a necessity. However, the general rule is that pension benefits that constitute deferred compensation are marital property unless specifically excepted by law. If one spouse's retirement is excepted from division, then the level of exception for the one with

the greater pension will not exceed the level of exception allowed the other spouse. [KRS 403.190\(4\)](#).

Also, military pensions are subject to division. [10 U.S.C. §1408](#). However, if a military pension is a disability retirement pension, it is not divisible marital property. [West v. West](#), 736 S.W.2d 31 (Ky. App. 1987). See also [Holman v. Holman](#), 84 S.W.3d 903 (Ky. 2002) (firefighter disability retirement benefits). Railroad retirement benefits are not divisible if disability related. [20 C.F.R. 295](#).

Teachers' pensions are another special area of law in Kentucky. Under [KRS 161.700\(2\)](#), teacher retirement benefits are not divisible marital property, nor are they considered an "economic circumstance" in the division of assets.

Many retirement assets are governed by federal rules prohibiting access or division of the funds unless certain requirements are met. If the parties are not currently entitled to receive pension benefits under their specific plan, the plan administrator must be given a Qualified Domestic Relations Order (QDRO) in order to allow the plan to segregate the assets. Each plan may have their own requirements, thus the attorney should contact the administrator for information on drafting the QDRO. See [Appendix](#) for a sample QDRO.

f. Valuation of businesses.

The value of business interests requires the use of experts to determine fair market value. The Supreme Court's decision in [Gaskill v. Robbins](#), 282 S.W.3d 306 (Ky. 2009) represents a sea change in the way our courts will view goodwill for purposes of dividing marital business and practices. With [Gaskill](#), Kentucky joins the majority of jurisdictions that differentiates between personal and enterprise goodwill and declares personal goodwill to be non-marital property.

g. Appreciated property.

The Kentucky Court of Appeals has held that if there is nonmarital property which increases in value due to the joint efforts of the parties during marriage, the court must determine the nonmarital and marital interests held by the parties. Likewise, if the increase in value is not a result of joint efforts, then the increase will not be considered marital property. See [Brandenburg v. Brandenburg](#), 617 S.W.2d 871 (Ky. App. 1981). Though [Brandenburg](#) was overruled, the [Brandenburg](#) method of calculation is still

used by courts to determine the amount of marital and nonmarital equity in real estate. As noted in Travis v. Travis, 59 S.W.3d 904 (Ky. 2001), "[KRS 403.190\(3\)](#), however, creates a presumption that any such increase in value is marital property, and, therefore, a party asserting that he or she should receive appreciation upon a nonmarital contribution as his or her nonmarital property carries the burden of proving the portion of the increase in value attributable to the nonmarital contribution. By virtue of the [KRS 403.190\(3\)](#) presumption, failure to do so will result in the increase being characterized as marital property."

However, in [KRS 403.190\(2\)\(e\)](#), the legislature included in the definition of marital property the increase in the value of property acquired before marriage to the extent that it increased in value as a result of the efforts of the parties during marriage. Thus, it seems that substantial efforts by either party will result in the inclusion of such property in the marital assets. One circumstance where this issue arises is the characterization of a spouse's interest in their nonmarital business.

X. SETTLEMENT AND SUBMISSION

A. Generally

Many divorces are resolved through settlement or mediation agreements rather than a determination of the court. All settlement agreements must be approved by the court and found not to be unconscionable in order for the court to incorporate them in the final decree. [KRS 403.180](#). If the terms of the agreement are not unconscionable, they are binding on the court, except in matters relating to custody and support. The court retains the ultimate authority to determine whether such agreements are in the best interests of the children.

In drafting settlement agreements, the attorney should include clear provisions that resolve allocation of property and debt, payment directives, custody and support, dispute resolution options, tax liability, bankruptcy protections, sanctions for breach, inchoate interests of the parties, and obligations for post decree enforcement.

B. Submission on the Record

If the parties are able to enter into a complete settlement agreement, most courts allow the matter to be submitted for final entry of the Decree without having to appear in court for an uncontested hearing. However, in order to enter a Decree, the court must be able to make certain findings of fact based on the testimony of the parties. [KRS 403.140](#). The court must also find that several statutory and procedural requirements have been met and that all necessary information has been provided,

exchanged, filed, and resolved in order to approve a case for entry of a Decree. The documents required for submission of a case differ in each district, and are governed by local rule. By way of example, the submission requirements of the 14th Judicial Circuit are included in the [Appendix](#). Some jurisdictions do not include all of these requirements, but at a minimum include an agreed order to submit the matter for entry of a Decree (included), a settlement agreement, deposition testimony of one of the parties (included), and a proposed Decree (included).

C. Post-Decree Litigation

If modification of any term in a final agreement or order is sought six months or more after the last decree was entered, the litigant is required to pay a re-opening fee when filing the motion. [FCRPP 3\(5\)](#).

XI. APPENDIX

A. Resources

1. Statutory resources.

Obviously this chapter cannot answer every question regarding divorce law. Therefore, the attorney should consult the appropriate statutes and case law. Generally, Kentucky's domestic relations statutes are located at [KRS Chapters 401 to 407](#). Dependency, Neglect, and Abuse is covered under [KRS Chapter 620](#). Termination of Parental Rights is covered under [KRS Chapter 625](#). These statutes can be researched online via the [Kentucky Legislative Research Commission's website](#). Additionally, the attorney should also consult the appropriate local Family or Circuit Court rules. The attorney should also be aware of recent amendments to the [Federal Rules of Civil Procedure](#) affecting electronic discovery.

2. Print research resources.

The following print resources provide excellent discussions in the area of domestic law:

- a. Graham and Keller, [Kentucky Domestic Relations Law](#), West Publishing, 2012.
- b. Revell and Slyn, [Kentucky Divorce: A Practice Systems Library Manual](#), Thomson West 2010.

3. Organizations.

Several organizations exist within the Commonwealth of Kentucky and around the country that focus on domestic relations law. They include the following:

- a. The [Kentucky Bar Association Family Law Section](#).
 - b. The [American Bar Association Family Law Section](#).
 - c. The [Kentucky Chapter of the American Academy of Matrimonial Lawyers](#).
 - d. The [American Academy of Matrimonial Lawyers](#).
 - e. The [Kentucky Collaborative Family Network, Inc.](#)
 - f. The [Northern Kentucky Collaborative Group, Inc.](#)
4. Online resources.

There are several excellent online resources available to the Kentucky domestic relations practitioner. They include:

- a. Divorce Law Journal.
<http://www.louisvilledivorce.com/journal> This blog, maintained by the Louisville firm of Diana L. Skaggs and Associates, provides excellent up-to-date summaries of important domestic relations law issues and cases in Kentucky and beyond. It is a daily must-read for any Kentucky domestic relations practitioner.
- b. Kentucky Law Review (formerly Kentucky Law Blog).
<http://www.kentuckylawblog.com/>. This blog, maintained by Louisville lawyer Michael Stevens, focuses on just about anything related to the practice of law in the Commonwealth of Kentucky, including Kentucky statutes, cases, rules changes, verdicts, etc. It is a daily must-read for any Kentucky practitioner.
- c. Kentucky Court Report.
<http://www.kycourtreport.com/>. This blog provides information about decisions, arguments, and news regarding the Kentucky Supreme Court and the Kentucky Court of Appeals.

B. Forms

1. These forms are available online at <http://courts.ky.gov>:
 - a. Preliminary Verified Disclosure Statement. [AOC-238](#)
 - b. Final Verified Disclosure Statement. [AOC-239](#)

- c. Uniform Child Support Order. [AOC-152](#)
 - d. Status Quo Order. [AOC-237](#)
 - e. Dissolution Findings of Fact and Conclusions of Law. [AOC-245](#)
2. Other sample forms follow.
- a. [Domestic Case Questionnaire.](#)
 - b. [Petition for Dissolution of Marriage.](#)
 - c. [Motion and Affidavit to Proceed *in Forma Pauperis*.](#)
 - d. [Entry of Appearance and Waiver of Notice.](#)
 - e. [Interrogatories.](#)
 - f. [Requests for Production of Documents.](#)
 - g. [Qualified Domestic Relations Order.](#)
 - h. [Model Timesharing Guidelines.](#)
 - i. [Child Support Worksheet.](#)
 - j. [Submission Checklist for the 14th Judicial Circuit.](#)
 - k. [Agreed Order to Submit.](#)
 - l. [Deposition Questions for Submission on the Record.](#)
 - m. [Proposed Decree.](#)

DOMESTIC CASE QUESTIONNAIRE

CLIENT

SPOUSE

Full Name: _____ () _____
Date of Birth: _____ () _____
Soc. Sec. #: _____ () _____
Address: _____ () _____
Phone: _____ () _____
Employer: _____ () _____
Occupation: _____ () _____
Wages (Gross): _____ () _____
Wages (Net): _____ () _____
Previous Marriage: _____ () _____
Race: _____ () _____

ADDITIONAL INFORMATION

1. Length of Residence in Kentucky: _____
2. Date of Marriage: _____
3. Place of Marriage (county and state): _____
4. Date of Separation: _____
5. Husband's Place of Birth: _____
6. Husband's Age: _____
7. Wife's Place of Birth: _____
8. Wife's Age: _____
9. Wife's Maiden Name: _____

10. Minor/dependent children of marriage (name, date of birth and age):

11. Has there been any other litigation over children? If so, explain

12. With whom are children living? _____

13. Is wife pregnant? _____

14. History of violence/abuse: _____

15. Marital property/assets (description, approximate values and amount of any liens):

16. Nonmarital Property (Client's):

17. Nonmarital Property (Spouse's):

18. Debts (Creditor and Amount):

19. Do either you or your spouse have any of the following:

Life Insurance _____

Retirement/Pension Plan _____

Trust Fund _____

Workers' Comp Award _____

Personal Injury Award _____

Social Security Disability or SSI Award _____

20. Demands to be stated in Petition/Response:

	<u>yes</u>	<u>no</u>	<u>other</u>
custody of children	_____	_____	_____
award of fees	_____	_____	_____
restore maiden name	_____	_____	_____
maintenance	_____	_____	_____
maintain insurance	_____	_____	_____

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
CASE NO. _____
DIVISION _____

IN RE THE MARRIAGE OF:

JOHN DOE

PETITIONER,

vs.

PETITION FOR DISSOLUTION OF MARRIAGE

JANE DOE

RESPONDENT.

SERVE: Certified Mail
400 Armco Road
Ashland, KY 41101

Comes the Petitioner, John Doe, by Counsel, and for his cause of action herein, states as follows:

1. That Petitioner resides in the Commonwealth of Kentucky, and has been a resident thereof for more than 180 days next preceding the filing of this Petition;

2. Petitioner, John Doe, is 30 years of age, SS# XXX-XX-1111 currently resides at 220 Woodland Avenue, Lexington, Fayette County, Kentucky, and is presently employed by SuperAmerica;

3. Respondent, Jane Doe, is 26 years of age, SS# XXX-XX-2222 and resides at 400 Armco Road, Ashland, Boyd County, Kentucky, and is presently employed by McDonald's;

4. The parties were married on February 29, 1994, in Boyd County, Kentucky, where the marriage is so registered;

5. The parties are separated, having separated on September 2, 2011;

6. There are two (2) living infant children born of this marriage, namely, Sara Lee Doe, age 2, DOB 1-1-xx, ss# XXX-XX-3333 and John Doe, Jr., under age 1, DOB 2-2-XX, ss# XXX-XX-4444. The Petitioner states that to the best of his knowledge and belief the Respondent is not pregnant;

7. The marriage between the parties is irretrievably broken;

8. In accordance with [KRS 403.838](#), the Petitioner gives the following additional information concerning the minor child:

a. The minor children have lived at the present address of 400 Armco Road, Ashland, Boyd County, Kentucky, during the parties' marriage;

b. The parties have not participated as a party, witness or in any other capacity in any other litigation concerning the custody of said children in this or any other state;

c. The parties have no information of any custody proceeding concerning said children in any Court of this or any other State; and

d. The parties do not know of any person not a party to this proceeding who has physical custody of the children or claims to have custody or visitation rights with respect to the children;

9. No arrangements have been made between the parties regarding custody, visitation, or support of the minor children or maintenance of the Respondent;

10. The Petitioner states that he is the fit and proper person to have custody of said minor children, and that such custody would be in the best interest of the children.

WHEREFORE, the Petitioner prays:

1. For a dissolution of the parties' marriage;
2. Restoration of nonmarital property and equitable division of the marital estate;
3. For custody of the parties' minor children, with reasonable and liberal visitation rights to the Respondent;
4. That each party bear their own attorney's fees and Court costs incurred in this action;
5. For any and all other appropriate relief to which he may appear entitled.

Respectfully submitted,

LAW OFFICES OF MICHAEL DAVIDSON
HON. MICHAEL DAVIDSON
ATTORNEY FOR PETITIONER
139 West Short Street, Suite 100
The Barrow Building
Lexington, Kentucky 40507
(859) 225-1717

The Petitioner, John Doe, states that he has read the allegations contained in the foregoing document and states that they are true and correct to the best of his knowledge and belief.

JOHN DOE

NOTARY

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
DIVISION NO. _____
CIVIL ACTION NO. 07-CI-_____

IN RE THE MARRIAGE OF:

JANE DOE,
PETITIONER,

vs.

**MOTION AND AFFIDAVIT TO
PROCEED *IN FORMA PAUPERIS***

JOHN DOE,
RESPONDENT

Comes the Petitioner, Jane Doe, by Counsel, pursuant to [KRS 453.190](#) and moves this Court for an order granting leave to prosecute the above-styled action without pre-payment of fees and costs and without security therefore, and states that she is without sufficient property or funds to pay the costs of the action or the cost of the stenographic transcript of the record.

WHEREFORE, Movant prays for leave to prosecute said action *In Forma Pauperis* pursuant to [KRS 453.190](#).

RESPECTFULLY SUBMITTED,
LAW OFFICES OF MICHAEL DAVIDSON
BY: _____
HON. MICHAEL DAVIDSON
139 West Short Street, Suite 100
The Barrow Building
Lexington, Kentucky 40507
(859) 225-1717

AFFIDAVIT

Comes the Affiant, Jane Doe, after first being duly sworn, and states and deposes as follows:

1. This Affidavit is made in support of the Motion to proceed *in forma pauperis* to which it is attached;

2. I am entitled to and intend to commence a petition for dissolution of marriage in this Court against John Doe, but because of my poverty, I am not able to pay the costs or give surety for the same in this action;

3. My financial condition is as follows:

a. The only source of income for me and my three dependent children is Aid to Families with Dependent Children in the amount of \$285.00 per month, and Food Stamps in the amount of \$347.00 per month;

b. My husband does not give me maintenance;

c. I do not have any cash on hand or money in a savings account;

d. I do not own any real estate, stocks, bonds, or notes;

e. My monthly expenses are:

Rent	\$221.00
Utilities	22.00
Car payment	100.00
Gasoline	50.00
Childrens' school supplies	15.00
Childrens' clothes	30.00
Soap/sundries	20.00
Loan payment (First Bank)	60.00
TOTAL:	\$518.00

JANE DOE

COMMONWEALTH OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by JANE DOE on this the ____ day of _____, _____.

My Commission expires:_____.

Notary Public, State-at-Large, Kentucky

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
CASE NO. 07-CI-_____

IN RE THE MARRIAGE OF:

JANE DOE,

PETITIONER

vs.

**ENTRY OF APPEARANCE AND
WAIVER OF NOTICE**

JOHN DOE,

RESPONDENT

The Respondent, John Doe, hereby enters his appearance and waives service of summons. The Respondent further consents and agrees that depositions and proof may be taken in this action at any time and place without notice being given or served upon him. Respondent agrees that the Petitioner, Jane Doe, may produce the proof in this action at any time a hearing may be set by the Court.

The Respondent, John Doe, agrees that this cause may be submitted to the Court without a motion for trial or judgment at any time, and that the judgment of the Court may be entered without further notice to him.

JOHN DOE

COMMONWEALTH OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by JOHN DOE on this the _____ day of _____, _____.

My Commission expires:_____

Notary Public, State-at-Large, Kentucky

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
CASE NO. 07-CI-_____
DIVISION. _____

IN RE THE MARRIAGE OF:

JANE DOE,

PETITIONER

vs.

INTERROGATORIES

JOHN DOE

RESPONDENT

The Respondent, JOHN DOE, is hereby notified under oath to answer the following interrogatories set forth below, within thirty (30) days from the time service is made upon him, in accordance with Rule 33 of the Kentucky Rules of Civil Procedure.

1. List all real estate in which you have an interest of any nature; how the property is held (individually, jointly, partnership or otherwise); describe the property; identify the nature of the interest; and the location, current market value, tax assessment for the year 2012, date acquired, and amount paid on purchase price during marriage. Attach copies of contracts, deeds, or any other evidence of ownership interest.

2. Are there any encumbrances upon the foregoing real estate? If so, give the nature of encumbrance, the holder, the date incurred, and the value of any outstanding claim. Attach copies of encumbrances or liens.

3. List the personal property in which Respondent has any interest, including the property's current value, location, date of acquisition, and interest therein. Include current cash value of all life insurance, as well as the number of policies, the name of each company, Respondent's age when purchased, the current cash value of each policy. Also list any interests in partnerships, estates, joint ventures, individual enterprises, or any other type of ownership, showing amounts paid thereon since marriage if same was owned before marriage. Include all property which Petitioner may claim is excludable from the marital estate.

4. What encumbrances, if any, are outstanding against the personal property listed in number three (3) above? If any, explain its nature, date, holder, and outstanding amount.

5. Give location and name of any and all banks or financial institutions, including but not limited to, stock or security firms, savings and loan associations, ("banks") in which Respondent has either checking, trust, savings account, certificate of deposit or any other type of account, and specify the type of account in each bank, both in and outside the state of Kentucky. Give balance of any and all accounts as of date of service of these interrogatories. Identify any sums withdrawn or investments converted to cash within the last twelve (12) months and date of occurrence, account and bank.

6. Does Respondent carry, or have in his personal possession or control, cash or otherwise convertible properties? If yes, give amount, type and location of such property. Does any person hold property of any nature belonging to Petitioner? Identify

the property, name of such persons and give their addresses and the location of the properties?

7. List all governmental or institutional bonds and/or all other securities owned by the Petitioner. Provide the number, face value, and how held.

8. List any and all stocks and bonds of any private or public corporations or bodies in which Petitioner has any interest.

9. Give the name, type of security, company, par value, present value and book value, total number of shares, certificate numbers, when purchased, purchase price, interest of the Respondent (individual or otherwise).

10. List properties, real or personal, valued at more than \$500.00 that the Respondent has disposed of within the last twenty-four (24) months. List the property, the party to whom the property was transferred, the date of sale or disposition, sale price, and expense of sale, if any.

11. List any and all indebtedness of any nature the Respondent has at the time of the service of these interrogatories. Show present amounts, dates incurred and due dates.

12. State any and all salary or other compensation Respondent currently has from any employment or enterprise during the last thirty-six (36) months including rents collected.

13. If any property owned and/or possessed by Respondent is claimed to be nonmarital property, show the source of such property (such as by deed, will, gift, etc.), and attach copies of documents of transfer as well as gift tax returns, inheritance and/or estate tax returns, or other evidence of the description and value of such properties.

14. Attach a list, if any, of properties you owned at the time of your marriage.

15. Identify all employment benefits which you enjoy, including pension benefits. State each employment benefit and its current value and value upon maturity. Has it matured?

16. Please identify any IRA account, where held and the amount in any IRA account maintained by you.

17. Please provide the balance of any credit union, thrift plan or any profit sharing account maintained by you through your employment or otherwise.

18. Please list all witnesses whom you expect to call at the hearing on this matter.

19. For each such witness listed above whom you expect to be qualified as an expert witness, please provide a summary of their qualifications, summary of their opinions and a summary of the factual basis supporting said opinions.

20. Please state your present state of health.

21. Please list all physicians, chiropractors or other medical providers from whom you have received treatment in the last ten (10) years.

22. Please list all employers for whom you have worked, whether for pay or otherwise, for the last five (5) years.

23. Please state the highest level of education you have had, including any degrees received.

Respectfully submitted,

LAW OFFICES OF MICHAEL DAVIDSON
HON. MICHAEL DAVIDSON
ATTORNEY FOR PETITIONER
139 West Short Street, Suite 100
The Barrow Building
Lexington, Kentucky 40507
(859) 225-1717

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
CASE NO. 07-CI-_____

IN RE THE MARRIAGE OF:

JOHN DOE

PETITIONER

vs.

REQUEST FOR PRODUCTION OF DOCUMENTS

JANE DOE

RESPONDENT

Comes the Petitioner, by and through counsel, and requests, pursuant to C.R. 34.01 and all other applicable law, that the Respondent produce for inspection at the Law Offices of Michael Davidson, 139 West Short Street, Suite 100, Lexington, Kentucky 40507, within thirty (30) days, the following described documents:

1. A copy of the complete income tax return for each of the last five (5) years for the parties individually and for any and all entities of any kind whatsoever, corporate, partnership or otherwise, in which you own any ownership interest, legal equitable, whole or partial, for which you are required to file such return.

2. Any and all pay stubs, statements of earnings, W-2 forms, 1099 forms, K-1 forms, and any other documents given to you by any employer, partnership, corporation or other entity showing your income from any source from _____ (the last five (5) years is usually sufficient).

3. Any and all records of banks or other savings institutions regarding checking accounts maintained by you, individually or jointly with others, or maintained by you as trustee or custodian for any other person or persons, including but not limited to monthly bank statements, cancelled checks, deposit slips, check registers, passbooks, statements relating to the said amounts or certificates of deposit and/or any such records, from _____ to the present. This request shall be construed to include a request for information as to any financial or investment firm which maintains similar accounts.

4. Any and all records, statements, notices of accounts or other tangible evidence of your interest in any profit sharing plans, pension plans, Keogh plan, individual retirement accounts and any other deferred compensation or retirement plans of any nature whether or not qualified pursuant to the Internal Revenue Code of 1954 as amended for a period from _____ to the present, also produce any documents reflecting the present beneficiaries of your interest in any and all such plans.

5. Any and all warranty deeds, quitclaim deeds and deeds to secure debt which you executed as guarantor or grantee, whether individually or jointly with any other person, as well as any leases or rental agreements naming you as lessor or lessee relating to real property in which you have an interest or equity. Also produce all closing statements, contracts of sale, notes or other documents relating to your purchase or sale of any interest in real property in the last twenty-four (24) months.

6. Any and all evidence of your ownership during the period from _____ to the present of any interest of any stock, tax free securities, annuities, bond funds, mutual funds, money market funds, or any other security or investment of any kind. If you maintain an account with a stock broker, investment company or other financial institutions, please produce all monthly, quarterly, annual and other statements from the stockbroker, investment counselor or financial institution relating to your accounts from the period from _____ to the present.

7. Any and all records of any interest bearing assets such as bonds, municipal bonds, and other tax free bonds, negotiable instruments, notes, receivable treasury bills, certificates of deposit, savings books, savings accounts or any other such assets in which you have or have had an interest from the period from _____ to the present.

8. Any and all evidence of property and interest in property of any kind and character other than the above listed types of property owned by you individually or jointly including, but not limited to partnerships, joint ventures, trusts, interest in any trust or estate or provisional interest or contingent interest, oil and gas interest, travelers checks, bank drafts, cashier checks, or other cash equivalent from _____ to the present.

9. Any and all receipts, sales or purchase notices or other documents reflecting your purchase or sale of any tangible personal property including but not limited to any gold, silver, watches, automobiles, boats, motorcycles, stereo equipment, televisions, cameras, video equipment, appliances or other valuable tangible assets (cost exceeding \$499.00) of any nature (excluding real estate) for a period from _____ to the present.

10. A list of the location, box number, and contents of all safe deposit boxes maintained by you individually or jointly, or of any box to which you have access as of the date of service of this notice and request for production.

11. Any and all copies of personal finance and net worth statements submitted to you individually or jointly with any other person to any bank or lending institution from _____ to the present.

12. Any and all life insurance policies and certificates on your life as well as all premium notices, beneficiary designation forms and other records and documents received or completed by you in connection with any life insurance policy of which you are the owner and insured person since _____ to the present. If you have changed the beneficiary of any of your life insurance policies in the past two (2) years, produce all forms reflecting such change.

13. Any and all copies of any notes, installment obligations or other obligations of any nature whatsoever on which you are currently an obligor or have been an obligor from _____ to the present, individually or jointly with any other person.

14. Copies of any notes, installment obligations, or other obligations of any nature of which you were an obligor individually or jointly with any other person since _____.

15. Copies of any and all credit account or charge cards and monthly statements and receipts showing all charges and payments made and the balance due on any credit card or charge account maintained by you or regularly used by you including but not limited to any accounts maintained in your name, the name of your spouse, the name of your spouse and yourself together or the name of your employer or any other person or entity for the period from _____ to the present.

Respectfully submitted,

LAW OFFICES OF MICHAEL DAVIDSON
HON. MICHAEL DAVIDSON
ATTORNEY FOR PETITIONER
139 West Short Street, Suite 100
The Barrow Building
Lexington, Kentucky 40507
(859) 225-1717

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
DIVISION NO. I
CASE NO. 07-CI-_____

IN RE THE MARRIAGE OF:

JANE DOE

PETITIONER,

vs.

QUALIFIED DOMESTIC RELATIONS ORDER

JAMES DOE

RESPONDENT

* * * * *

This Court on February 14, 2012, entered its Decree of Dissolution of Marriage incorporating and approving the Separation Agreement dated February 10, 2012, which includes the property division between the parties. Following a review of the file, the Court makes the following findings:

1. James Doe, 1111 Oak Street, Lexington, Kentucky 40508, is the Participant in a retirement pension plan with XYZ Company's Pension Fund Plan (hereinafter "Plan"). James Doe's Social Security number is 200-00-0703, and his date of birth is January 1, 1950.

2. Jane Doe, 511 Woodstream Court, Lexington, Kentucky 40515, shall be the Alternate Payee pursuant to Section 414(p) of the Internal Revenue Code with respect to James Doe's benefits under the Plan. Jane Doe's Social Security number is 300-02-2000, and her date of birth is January 1, 1953. Jane Doe is James Doe's former spouse.

3. It is the intention of the Court to transfer the ownership of fifty percent (50%) of James Doe's benefits in the Plan as of February 14, 2012 to Jane Doe. The benefits awarded to Jane Doe shall participate in gains and losses of the Plan pursuant to its terms from and after February 14, 2012 until complete and full distribution is made to Jane Doe of her fifty percent (50%) share of the plan.

4. The Administrator of the Plan shall pay the benefits awarded to Jane Doe hereunder in such form as allowed by the Plan, and at such time as elected by Jane Doe pursuant to the provisions of the Plan; provided, however, unless otherwise allowed by the Plan, payment of benefits to Jane Doe may not be made before James Doe has separated from service, unless James Doe has attained the "Earliest Retirement Age" as defined by Section 414(p)(4)(B) of the Internal Revenue Code.

5. The benefits awarded to Jane Doe hereunder shall survive James Doe's death even if such death occurs prior to James Doe receiving or being eligible to receive any benefits under the Plan

6. Nothing contained in this Order shall be construed to require the Plan or the Administrator of the Plan to provide: (a) any type or form of benefits or any option not otherwise provided under the Plan; (b) increased benefits (determined on the basis of

actuarial value); or, (c) payment of benefits to Jane Doe which are required to be paid to another Alternate Payee under another order previously determined to be a Qualified Domestic Relations Order.

7. The Court reserves the right to amend or modify this order, if necessary, in order to carry out the intent of this Qualified Domestic Relations Order in compliance with the requirements of the Internal Revenue Code, Section 414 of the 1954 Code as amended and/or any other state or federal law dealing with this subject, compliance with which is necessary in order to carry out the parties' intention to permit the Respondent to receive interest in the Plan to the precise extent provided hereinabove. No amendment or modification of this Order may alter the amount to be transferred as specified above.

This the _____ day of _____, 2_____.

JUDGE FAYETTE FAMILY COURT

HAVE SEEN:

HON. MICHAEL DAVIDSON
ATTORNEY FOR PETITIONER

HON. LARRY LAWYER
ATTORNEY FOR RESPONDENT

This is to certify that a copy of the foregoing QUALIFIED DOMESTIC RELATIONS ORDER has been served by mail upon:

ATTORNEY

XYZ Company
Kalamazoo, MI

This the _____ day of _____, 2_____.

CLERK, FAYETTE FAMILY COURT
BY: _____ D.C.

TIMESHARING / VISITATION GUIDELINES

The following schedules are suggested as **guidelines** for the parents and the court establishing time-sharing/visitation schedules. Each case will present unique facts or circumstances which shall be considered by the court in establishing a time-sharing/visitation schedule and **the final schedule established by the court or agreed to by the parents may or may not be what these guidelines suggest.**

EACH PARENT SHALL:

I. BEHAVIOR

- A. Realize that these Guidelines require both parents to put the child(ren)'s needs ahead of their own, to actually utilize the timeshare granted, and to be responsible for getting the child(ren)'s homework and other activities done during that parent's time with the child(ren).
- B. Understand that there may be circumstances from time to time with regard to work schedules and/or activities of the child(ren) which require flexibility and cooperation, and that changes in scheduling may be required.
- C. Do not send written or verbal messages to each other through the child(ren).
- D. Keep the other parent advised as to current residential address, business address, telephone numbers for home, work, cell phone, fax and pager for the purpose of notification unless otherwise ordered by the Court. Each parent shall provide to the other parent contact numbers and addresses where the child(ren) can be located during their scheduled timesharing / visitation time.
- E. Do not schedule activities for the child(ren) when the child(ren) are to be with the other parent, without first consulting with the other parent.
- F. Cooperate to ensure that the child(ren) have appropriate clothing and other personal items at both parents' residences.
- G. Do not do or say anything that will interfere with the love and affection of the child(ren) for the other parent or allow third parties to do or say anything to or in the presence of the child(ren) that will interfere with the love and affection of the child(ren) for the other parent.
- H. Do not consume alcohol, take illegal drugs or prescribed drugs, other than as prescribed, while in care of their child(ren).

II. TRAVEL

- A. Be responsible to pick up the child(ren) from the other parent's residence, school or daycare when assuming physical custody of the child(ren) unless otherwise ordered by the Court.
- B. Do not unreasonably object to assistance in transportation by responsible third parties.
- C. Do not turn over the child(ren) to an intoxicated individual.
- D. Ensure the child(ren) are secured in an appropriate child restraint system when transporting the child(ren).
- E. Be prompt when picking up or dropping off the child(ren). However, each parent is entitled to a thirty (30) minute grace period. After this period, the parent shall continue with their daily activities, and the timesharing is forfeited for that period for Parent B who is late. If timesharing / visitation is missed through no fault of Parent B and reasonable notice has been given, that time should be made up if reasonable to do so. If Parent A is more than thirty (30) minutes late, Parent A shall be required to schedule an additional visitation day (from 6:00 p.m. to 6:00 p.m.) within the next thirty (30) days.

III. SCHOOL / HEALTH

- A. Have the right and responsibility to obtain schedule and activity information regarding the child(ren)'s school, daycare, healthcare or any other organized activity from any third party.
- B. Have the opportunity to complete and view the school information for the child(ren), including emergency contact information, and persons allowed to pick up the child(ren) from school. Both parents shall be listed on all information with the school.
- C. Keep the other parent advised as to the child(ren)'s serious illness or any other major development, whether medical, educational or otherwise.

IV. MISCELLANEOUS

- A. Realize that these Guidelines assume that both parents reside in Knox or Laurel County or an adjacent county. These Guidelines will not address all of the appropriate terms for timesharing of parents who do not live within a reasonable proximity of one another.
- B. Realize that these Guidelines will apply **only** in cases where both parents have been involved in the child(ren)'s lives. The Guidelines would not be appropriate for cases in which the parent is a stranger to the child(ren).
- C. Realize that timesharing in accordance with these Guidelines, or timesharing of less than these Guidelines, shall not be the basis for a

motion to reduce child support or deviate from the child support Guidelines.

- D. Times in this schedule are to be in the time zone where the child(ren) primarily reside(s).
- E. Realize that if an Emergency Order of Protection or Domestic Violence Order is in place between the parents, these guidelines may not apply as to contact and/or communication pursuant to the terms of the Emergency Order of Protection or Domestic Violence Order.

V. GENERAL GUIDELINES FOR CHILD(REN) OF ALL AGES

- A. Both parties shall be permitted reasonable telephone visitation with their child(ren) every day.
- B. The regular weekend visitation schedule shall not change and all holiday, birthday, spring, summer, fall and winter break visitation shall supersede regular weekend visitation and regular weekday visitation on Tuesdays and Thursdays.
- C. Child(ren)'s Birthday. The child shall celebrate his/her birthday in the home of Parent A, unless it falls on a visitation day for Parent B. If the child's birthday does not fall on a visitation day, an additional, non-scheduled day shall be granted so that Parent B may celebrate the child's birthday with him/her as well, from 9:00 a.m. until 7:00 p.m., if desired. This additional day shall be the first non-scheduled Saturday after the child's birthday unless otherwise agreed by the parties.
- D. Parent's Birthday. The child(ren) shall spend each parent's birthday with that parent, except in those years, if any, on which it is a holiday to be spent with the other parent. In the latter event, the child(ren) shall spend four (4) hours with the parent who is having a birthday, on the first day following the holiday spent with the other parent.
- E. Parent A shall have all holiday and break visitation not otherwise granted to Parent B in these guidelines.

VI. FOR CHILD(REN) UNDER EIGHTEEN (18) MONTHS

- A. Regular Visitation. Regular visitation with Parent B shall occur on alternate weekends from Friday at 6:00 p.m. until Saturday at 6:00 p.m. or Saturday at 6:00 p.m. until Sunday at 6:00 p.m. In addition, Parent B shall have visitation with the child(ren) on Thursday evening following Parent B's weekend visitation from 5:30 p.m. on Thursday until 8:00 a.m. the next morning and also visitation on Tuesday evening preceding Parent B's weekend visitation from 5:30 p.m. on Tuesday until 8:00 a.m. the next morning.
- B. Additional Holiday Parenting Time. Parent B shall have parenting time with the child(ren) on New Year's Day and July 4th in even numbered

years (*i.e.* 2012) and Easter in odd numbered years (*i.e.* 2013) from 6:00 p.m. on the day prior to the holiday and ending 6:00 p.m. on the holiday. Parent B shall have visitation on Martin Luther King, Jr. Day and Labor Day in odd numbered years and on Memorial Day in even numbered years from 6:00 p.m. on the day prior to the holiday and end at 6:00 p.m. on the holiday.

- C. Winter Break. In families which celebrate Christmas, the Parent B shall have the child(ren) each year from 1:00 p.m. to 7:00 p.m. on Christmas Eve and on December 26th from 10:00 a.m. through December 27th at 6:00 p.m. In families which celebrate Hanukkah, Parent B shall have one (1) overnight visitation during Hanukkah, as agreed between the parties thirty (30) days in advance. In families which observe the religious holidays of Rosh Hashanah and Yom Kippur, Parent B shall have visitation for Rosh Hashanah in even numbered years (*i.e.* 2012) and Yom Kippur in odd-numbered years (*i.e.* 2013). In families which practice other religions, the Parents shall attempt to divide their religious holidays in a similar manner.
- D. Thanksgiving. In odd-numbered years (*i.e.* 2013), Parent B shall have the child(ren) for Thanksgiving, beginning at 6:00 p.m. Thursday and ending at 6:00 p.m. Friday.
- E. Mother's Day/Father's Day. On Mother's Day and Father's Day, the child(ren) shall be with the appropriate parent from 9:00 a.m. to 7:00 p.m., regardless of who would have otherwise had the child(ren).

VII. FOR CHILD(REN) EIGHTEEN (18) MONTHS TO THREE (3) YEARS

- A. Regular Visitation. Regular visitation with Parent B shall occur on alternate weekends from Friday evening at 6:00 p.m. to Sunday evening at 6:00 p.m. In addition, Parent B shall have visitation with the child(ren) on Thursday evening following Parent B's weekend visitation from 5:30 p.m. on Thursday until the next morning at 8:00 a.m. and also visitation on Tuesday evening preceding Parent B's weekend visitation from 5:30 p.m. on Tuesday until the next morning at 8:00 a.m.
- B. Additional Holiday Parenting Time. Parent B shall have parenting time with the child(ren) on New Year's Day and July 4th in even numbered years (*i.e.* 2012) and Easter in odd numbered years (*i.e.* 2013) from 6:00 p.m. on the day prior to the holiday and ending 6:00 p.m. on the holiday. Parent B shall have visitation on Martin Luther King, Jr. Day and Labor Day in odd numbered years and on Memorial Day in even numbered years from 6:00 p.m. on Friday of the holiday weekend and end at 6:00 p.m. on the Monday of the holiday weekend.
- C. Winter Break. In families which celebrate Christmas, Parent B shall have the child(ren) each year from 1:00 p.m. to 7:00 p.m. on Christmas Eve and from December 26th at 10:00 a.m. through December 29th at 6:00 p.m. In families which celebrate Hanukkah, Parent B shall have three (3) consecutive days of visitation during Hanukkah, as agreed between the

parties thirty (30) days in advance. In families which observe the religious holidays of Rosh Hashanah and Yom Kippur, Parent B shall have visitation for Rosh Hashanah in even-numbered years and Yom Kippur in odd-numbered years. In families which practice other religions, the Parents shall attempt to divide their religious holidays in a similar manner.

- D. Spring Break. Parent B shall have four (4) days with the child(ren) in March or April in even-numbered years. If the child(ren) attends preschool and the preschool has a spring break, the four (4) day period shall be during the time of that spring break.
- E. Fall Break. Parent B shall have four (4) days with the child(ren) in October in odd-numbered years. If the child(ren) attends preschool and the preschool has a fall break, the four (4) day period shall be during the time of that fall break.
- F. Thanksgiving. Parent B shall have the child(ren) for Thanksgiving, beginning at 5:00 p.m. Wednesday and ending at 7:00 p.m. Sunday in odd-numbered years.
- G. Mother's Day/Father's Day. On Mother's Day and Father's Day, the child(ren) shall be with the appropriate parent from 9:00 a.m. to 7:00 p.m., regardless of who would have otherwise had the child(ren).
- H. Summer. Parent B shall have three (3) periods each summer of four (4) days each. Each party shall give the other party at least sixty (60) days' notice of his or her vacation schedule so that both parties have an opportunity to have the child(ren) during their vacations.

VIII. FOR CHILD(REN) THREE (3) YEARS AND OLDER

- A. Regular Visitation. Regular visitation with Parent B shall occur on alternate weekends from Friday evening at 6:00 p.m. until Sunday evening at 6:00 p.m. In addition, Parent B shall have visitation with the child(ren) on Thursday evening following Parent B's weekend visitation from 5:30 p.m. until school the next morning or until 8:00 a.m. if there is no school that day. Parent B shall also have visitation on Tuesday evening preceding Parent B's weekend visitation from 5:30 p.m. on Tuesday until school the next morning or until 8:00 am. if there is no school that day. For the Tuesday and Thursday visitation under this section, Parent B shall be responsible for making sure the child(ren) is(are) taken to school during Parent B's visitation period
- B. Additional Holiday Parenting Time. Parent B shall have parenting time with the child(ren) on New Year's Day and July 4th in even numbered years and Easter in odd numbered years from 6:00 p.m. on the day prior to the holiday and ending 6:00 p.m. on the holiday. Parent B shall have visitation on Martin Luther King, Jr. Day and Labor Day in odd numbered years and on Memorial Day in even numbered years from 6:00 p.m. on Friday of the holiday weekend and end at 6:00 p.m. on the Monday of the holiday weekend.

- C. Winter Break. In families which celebrate Christmas, Parent B shall have the child(ren) each year from 1:00 p.m. to 9:00 p.m. on Christmas Eve and from December 26th at 10:00 a.m. through December 31st at 6:00 p.m. In families which celebrate Hanukkah, Parent B and Parent A shall equally divide visitation during Hanukkah, as agreed between the parties thirty (30) days in advance. In families, which observe the religious holidays of Rosh Hashanah and Yom Kippur, Parent B shall have visitation for Rosh Hashanah in even-numbered years and Yom Kippur in odd-numbered years. In families which practice other religions, parents shall attempt to divide their religious holidays in a similar manner.
- D. Spring Break. Parent B shall have nine (9) days (five (5) weekdays during which spring break is observed plus the weekend before spring break beginning Friday at 6:00 p.m. and the weekend after spring break until Sunday at 6:00 p.m.) with the child(ren) in March or April when spring break is observed by the child(ren)'s school in even-numbered years.
- E. Fall Break. Parent B shall have nine (9) days (five (5) weekdays during which fall break is observed plus the weekend before fall break beginning Friday at 6:00 p.m. and the weekend after fall break until Sunday at 6:00 p.m.) with the child(ren) in September or October when fall break is observed by the child(ren)'s school in odd-numbered years.
- F. Thanksgiving. Parent B shall have the child(ren) for Thanksgiving beginning at 5:00 p.m. Wednesday and ending at 7:00 p.m. Sunday in odd-numbered years.
- G. Mother's Day/Father's Day. On Mother's Day and Father's Day, the child(ren) shall be with the appropriate parent from 9:00 a.m. to 7:00 p.m. regardless of who would have otherwise had the child(ren).
- H. Summer. Parent B shall have two (2) periods each summer of two (2) weeks each. Parent A shall have one period each summer of two (2) weeks. Each party shall give the other party at least sixty (60) days' notice of his or her vacation schedule so that both parties have an opportunity to have the child(ren) during their vacations.

Commentary

A completed child support worksheet is required to be attached to any motion for temporary child support or for modification of child support. Additionally, a completed child support worksheet is required to be in the record or submitted at the final hearing in a case.

DISSOLUTION CHECKLIST

Where proof is submitted by deposition upon written questions and the parties have executed a settlement agreement resolving all issues, a motion to enter a decree need not be placed upon the Court's docket but may be submitted directly to the Court in the form of a Motion to Submit with an Order to Submit and a certified dissolution checklist.

(NOTE: Please place a checkmark (✓) or write not applicable (N/A) in the spaces provided below. Cases with checklists that are not certified or incorrectly filled out will not be submitted to the Court for consideration.)

The undersigned certifies the following and that the necessary documentation has been submitted to the Court:

- _____ 1. Petition is verified and complies with all statutory requirements.
- _____ 2. Summons was issued by the Clerk.
- _____ 3. Respondent is properly before the Court by one of the following means:
- summons served upon Respondent by sheriff or constable;
 - summons served by certified mail and return receipt signed by Respondent;
 - verified Entry of Appearance signed by Respondent and filed in record;
 - verified response, OR
 - entry of warning order and the report of warning order attorney has been filed.
- _____ 4. (a) 20 days have passed since service upon Respondent, and
- _____ (b) 60 days have passed since the parties' date of separation.
- _____ 5. If there are minor children of the parties:
- _____ (a) 60 days have passed since service of summons, filing of entry of appearance or response or the appointment of a warning order attorney;
 - _____ (b) Petitioner has attended Families in Transition, or an order waiving the requirement is of record;

- _____ (c) Respondent has attended Families in Transition, or an order waiving the requirement is of record;
 - _____ (d) children ages 6-14 have attended Families in Transition, or an order waiving the requirement is in the record.
- _____ 6. Two copies of a completed Case Data Information Sheet (Form AOC-FC-3), in cases involving minor children. **14th FCR 701(C).**
 - _____ 7. A completed VS-300 form typed and signed. **14th FCR 701(B).**
 - _____ 8. Each party's AOC-238 Preliminary Verified Disclosure Statement. **Pursuant to FCRPP 2(3), Preliminary Verified Disclosure Statements cannot be waived. Pursuant to 14th FCR 701(A) Preliminary Verified Disclosure Statement shall be filed with the Court.**
 - _____ 9. Original copy of the settlement agreement. **14th FCR 707(C):**
 - filed in the record;
 - to be filed at hearing; OR
 - not to be entered for the following reason: _____
 - _____ 10. Deposition upon written questions. **14th FCR 707(C).**
 - (a) If child custody is involved the deposition upon written questions and Findings of Fact include proof of specific findings for each of the applicable statutory factors set forth in KRS 403.270(2).
 - (b) If child custody is involved, the Conclusions of Law and Final Decree include the following language: "The Court, in accordance with the best interests of the child(ren) and having considered the statutory criteria of KRS 403.270(2), concludes/orders the following custody arrangement:" London v. Collins, 242 S.W.3d 351 (Ky 2007).
 - _____ 11. Findings of Fact and Conclusions of Law. **14th FCR 707(C).**
 - _____ 12. Decree of Dissolution. **14th FCR 707(C).** The signature box for the presiding judge complies with 14th FCR 207.
 - _____ 13. If child support is ordered, the Decree States or Decree incorporates by reference a settlement agreement which states: (a) amount; (b) frequency of the payments; (c) if wage withholding is applicable, payments are enforceable by wage withholding; (d) if wage withholding is not applicable, payments are payable through Division of Child Support; (e) party responsible for health insurance and medical expenses of the child(ren); and (f) percentage of extraordinary medical expenses each party will assume.
 - _____ 14. Child Support
 - _____ (a) A completed child support worksheet signed by both parties if applicable.

- _____ (b) Uniform child support order and/or wage withholding order, Form AOC-152, Rev.6-12, available at www.courts.ky.gov. **14th FCR 707(C)**.
- _____ (c) The Federal Income Withholding Support Form OMB 0970.0154 [Effective June 1, 2012, this form must be utilized by private parties and attorneys in non-IV-D eligible cases, and must direct the employer to remit payment to the State Disbursement Unit at Kentucky Child Support Enforcement at Centralized Collection Unit, P.O. Box14059, Lexington, KY 40512-4059. Requesting party must mail form OMB 0970-0154 and a copy of this form, AOC-152, by certified mail to the employer within two (2) working days of entry.]
- _____ (d) If child support is waived or deviates from guidelines, the deposition upon written questions, Findings of Fact and the Final Decree shall include proof of and a specific finding that "application of the child support guidelines would be unjust or inappropriate" for a statutory basis set forth in KRS 403.211(2)(3).
- _____ 15. Appropriate number of copies and stamped, properly addressed envelopes for service upon each party. Each copy tendered to be signed is pre-marked "COPY" on the first page. In the event the attorney or party does not include the required number of copies and/or stamped addressed envelopes at the time tendered, the clerk may hold the order, decree, judgment, form or settlement agreement until compliance with this rule and the Court may impose sanctions upon the attorney or party for failure to comply with this rule. It is not the responsibility of the clerk to communicate a defect in compliance to any party or attorney. **14th FCR 207(C)**.

I HEREBY CERTIFY THAT I REVIEWED THE COURT FILE IN THIS ACTION AND THAT ALL OF THE REQUIREMENTS SET FORTH IN THIS CHECKLIST HAVE BEEN MET.

_____, 20__.
Date

Attorney for Petitioner/Respondent OR
Pro Se Petitioner/Respondent

COMMONWEALTH OF KENTUCKY
_____ FAMILY COURT
_____ DIVISION
CASE NO. _____

IN RE THE MARRIAGE OF:

PETITIONER

AND

AGREED ORDER OF SUBMISSION

RESPONDENT

* * * * *

This matter having come before the Court on the agreement of the parties, without having appeared in Court, as is represented by the signatures below, and the Court being otherwise sufficiently advised,

IT IS HEREBY AGREED, ORDERED, AND ADJUDGED AS FOLLOWS:

1. This case is hereby submitted to the Court upon deposition upon written questions for the entry of a Decree of Dissolution.

2. The Property Settlement Agreement between the parties is submitted herewith.

Entered this the _____ day of _____, 20__.

JUDGE, _____ CIRCUIT COURT

TO BE ENTERED:

ATTORNEY FOR PETITIONER

ATTORNEY FOR RESPONDENT

CLERK'S CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was served by mailing same, postage prepaid, this _____ day of _____ to:

CLERK, _____ CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
____ DIVISION
CASE NO.: __-CI-_____

IN RE THE MARRIAGE OF

PETITIONER

AND

**DEPOSITION UPON WRITTEN QUESTIONS
UNCONTESTED DISSOLUTION OF MARRIAGE**
(With Minor Children)

RESPONDENT

**

**

**

The deposition upon written questions of the Petitioner _____ was answered by the party on the _____ day of _____, 20___. Said deposition upon written questions was taken pursuant to _____ and is to be used as evidence in the above-captioned uncontested dissolution of marriage.

Comes the Petitioner, (NAME), by counsel, after first being duly sworn and under penalty of perjury, submits the following responses to this deposition upon written questions:

QUESTION NO. 1 What is your full name?

A-1

QUESTION NO. 2 Are you the Petitioner or Respondent in this case?

A-2

QUESTION NO. 3 What is your spouse's full name?

A-3

QUESTION NO. 4 Are they the Petitioner or Respondent in this case?

A-4

QUESTION NO. 5 What was your date of marriage to the Petitioner/Respondent?

A-5

QUESTION NO. 6 In what County and State is your marriage registered?

A-6

QUESTION NO. 7 What is your age?

A-7

QUESTION NO. 8 What is your spouse's age?

A-8

QUESTION NO. 9 Are you or your spouse on active duty in the military?

A-9

QUESTION NO. 10 [Are you/Is your spouse] pregnant at this time?

A-10

QUESTION NO. 11 At the time this case was filed, on [DATE], how long had you been a resident of Kentucky?

A-11 More than 180 days preceding the filing of the Petition for Dissolution of Marriage.

QUESTION NO. 12 Is there a Domestic Violence Order in existence or requested in these proceedings? (If in existence, what is the Court and case number, and against whom is it entered?)

A-12

QUESTION NO. 13 Are you and your spouse separated at this time?

A-13

QUESTION NO. 14 When did you and your spouse separate?

A-14

QUESTION NO. 15 Have you and your spouse lived separate and apart without sexual cohabitation since that date?

A-15

QUESTION NO. 16 Is your marriage irretrievably broken?

A-16

QUESTION NO. 17 Is there any possibility of reconciliation at this time if the Court were to Order you and your spouse to undergo counseling?

A-17

QUESTION NO. 18 Are there any minor children of the marriage?

A-18

QUESTION NO. 19 What are the name(s), age(s) and date(s) of birth and current grade in school, of the minor child(ren)?

A-19

QUESTION NO. 20 What is the custodial arrangement agreed upon or requested?

A-20

(If there is a minor child or children and no written or oral agreement as to custody, question 22 should be asked; otherwise, this question would be omitted.)

QUESTION NO. 21 Do you believe that it is in the best interest of the child(ren) to award [TYPE OF CUSTODY] to [you, your spouse, you and your spouse]?

A-21

QUESTION NO. 22 Have you and your spouse attended the Parents' Education Clinic?

A-22

QUESTION NO. 23 Have your children in first through fifth grades attended Kids' Time?
A-23

QUESTION NO. 24 Have your children in the Sixth through Eighth grade attended TweenTime?
A-24

(If there is a minor child or children and if the parties have not agreed orally or in writing to child support in accordance with the child support guidelines, then questions 25 and 26 would be asked; otherwise, these questions are optional.)

QUESTION NO. 25 What is your gross income?
A-25

QUESTION NO. 26 What is your spouse's gross income?
A-26

QUESTION NO. 27 Has a completed child support worksheet been [filed in the record][submitted with the Order of submission]?
A-27

(If there is a minor child or children and if there is no written agreement but an oral agreement as to child support, then questions 28, 29, and 30 would be asked; otherwise, these questions would be omitted.)

QUESTION NO. 30 Have you and your spouse agreed on child support?
A-30

QUESTION NO. 31 What amount have you agreed on?
A-31

QUESTION NO. 32 Is this amount in accordance with the child support guidelines which indicate child support of \$_____?
A-32

(If the answer to question 32 is "no", then question 33 would be asked; otherwise, this question would be omitted.)

QUESTION NO. 33 Why is child support not in accordance with the guidelines?
A-33

(If there is a minor child or children and there is no written or oral agreement as to child support, then questions 34 and 35 would be asked; otherwise, these questions are omitted.)

QUESTION NO. 34 What amount of child support are you requesting from your spouse?
A-34

QUESTION NO. 35 Is this amount in accordance with the child support guidelines, which indicate child support of \$_____?
A-35

(If the answer to question 35 is "no", then question 36 would be asked; otherwise, this question would be omitted.)

QUESTION NO. 36 Why is child support not in accordance with the guidelines?

A-36

(If the parties have entered into a written agreement, then questions 37, 38, 39, 40, and 41 would be asked; otherwise, these questions are omitted.)

QUESTION NO. 37 Have you and your spouse signed a written separation agreement resolving all matters such as custody, timesharing, child support, health insurance, extraordinary medical expenses, maintenance, division of property and debts, and allocation of attorneys' fees? *(Please attach the original separation agreement, or a copy if the original has been filed, to this deposition)?*

A-37

QUESTION NO. 38 Do you recognize your signature and the signature of your spouse on the original written agreement?

A-38

QUESTION NO. 39 Did you read the agreement in its entirety?

A-39

QUESTION NO. 40 Did you review this agreement thoroughly before you signed it?

A-40

QUESTION NO. 41 Do you believe that this agreement is fair to both of you?

A-41

(If there is a written agreement and a minor child (children) of the marriage, then question 42 would be asked; otherwise, the question is omitted.)

QUESTION NO. 42 Is the amount of child support set forth in the agreement in accordance with the child support guidelines, which indicate child support of \$_____?

A-42

(If the answer to question 42 is "no", then question 43 would be asked; otherwise, this question would be omitted.)

QUESTION NO. 43 Why is child support not in accordance with the guidelines?

A-43

(If there is no written agreement dividing property and debts, then questions 44 and 45 would be asked; otherwise, these questions would be omitted.)

QUESTION NO. 44 Have you and your spouse divided your property and debts?

A-44

QUESTION NO. 45 Are you satisfied with the division of your property and debts?

A-45

QUESTION NO. 46 Are you or your spouse requesting maintenance?

A-46

QUESTION NO. 47 [Are you requesting to be restored to your former name of _____?][Has your wife requested in writing to be restored to her former name of _____?]

A-47

QUESTION NO. 48 What are the attorney's fees agreed upon or requested?

A-48

I, _____, swear that the above answers are true and correct to the best of my knowledge.

PETITIONER

COMMONWEALTH OF KENTUCKY

COUNTY OF FAYETTE

Subscribed and Sworn to before me by _____ on this the ____ day of _____, 20 __.

My commission expires:

NOTARY PUBLIC, STATE AT LARGE

COMMONWEALTH OF KENTUCKY
_____ FAMILY COURT
_____ DIVISION
CASE NO.: _____

IN RE THE MARRIAGE OF:

PETITIONER

DECREE OF DISSOLUTION OF MARRIAGE

RESPONDENT

* * * * *

This matter having come before the Court on the record, the Court having examined the record, and made certain Findings of Fact and Conclusions of Law, which are filed herewith, made a part of the record and incorporated by reference into this Decree, and the Court being sufficiently advised;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The marriage between the parties, being irretrievably broken, is hereby dissolved and each of the parties is restored to the status of an unmarried person.
2. The parties' Separation Agreement filed herein and bearing the date of _____, is not unconscionable and is hereby approved and incorporated by reference as if set forth verbatim, and the parties are ordered to obey the terms thereof.
3. The Parties are awarded Joint custody of the parties' minor child, _____. Parenting time shall be according to the Property Settlement Agreement.
4. Respondent is ordered to pay child support in the amount of \$ _____ per month, to be paid by wage assignment
5. Petitioner shall maintain health insurance for the parties' child. Petitioner shall pay the first \$100 of any uninsured and/or extraordinary medical expenses per year. Any of such expenses beyond that amount shall be shared by the parties in proportion to their combined monthly adjusted gross income.
6. _____ is awarded maintenance in the amount of _____ per month pursuant to the terms of the settlement agreement.
7. _____ is awarded _____ for attorney fees, to be paid pursuant to the settlement agreement.
8. Wife is restored to her former name of _____.
9. This is a final and appealable order, and there is no just reason for delay.

Entered this the _____, day of _____ 20__ .

TENDERED BY: _____
JUDGE, _____ COURT

ATTORNEY FOR PETITIONER

ATTORNEY FOR RESPONDENT

CLERK'S CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was served by mailing same, postage prepaid, this _____ day of _____ to:

CLERK, FAYETTE CIRCUIT COURT

I. INTRODUCTION

Death is inevitable. It is not a pleasant thought but the good news is that every client you have (or will have) needs estate planning and eventually might have a probate. Estate planning requires the drafting of quality documents that meet your clients' specific needs in planning for death or incapacity. Probate is the wrapping up of the legal affairs of a person's life. The legal implications of estate planning and probate are important and require care. This article will walk you through the bare basics of estate planning and probate in an attempt to provide general assistance to you.

II. BASIC ESTATE PLANNING

When assisting clients with estate planning the reality is that documents that *you* (the attorney) draft could control the disposition of a person's entire life savings, his or her most cherished possessions, and also control who is in charge when a crisis occurs. These are significant issues to resolve.

A. Initial Steps

Despite all the promises the media makes about a person's ability to draft his or her own will, estate planning is often so complicated that it is outside the realm of the abilities of the average non-lawyer. Even for attorneys, estate planning can be challenging. A firm understanding of the basics is necessary.

At the very least, estate planning requires:

- A face to face meeting with the client
- A review of the client's situation
- A review of the client's assets
- A discussion with the client concerning title
- A discussion with the client concerning designation of fiduciaries
- A discussion with the client concerning disposition of assets

A face to face meeting is necessary for many reasons. Some clients seeking estate planning are elderly, and it is your job to evaluate whether the client has diminished capacity.¹ Also, a proper analysis of the situation requires a discussion of the client's situation, background, assets, and issues. Clients tend not to reveal personal facts until they are comfortable with an attorney. For example, whether or not a client's child has special needs or whether or not there is a divorce document that requires the client to make a specific testamentary distribution are often

¹ [Ky SCR 3.130, RPC Rule 3.130\(1.14\)](#).

brought out only during discussions about the family dynamics and the responsibilities of the client. These types of facts fundamentally impact what you should (and can) do within the client's estate planning documents.

In reviewing a client's assets a good practice is to develop an Estate Planning Questionnaire and require clients to complete it. For efficiency, it works best if your client completes the Questionnaire prior to your meeting so that you are not spending your time completing clerical tasks (like asking for name spellings²).

In your review of the Questionnaire and/or your client's information, here is a sample of what you are looking for:

- Gross asset amount
- Asset title
- Required distributions (example, divorce documents)
- Special situations (example, special needs child, child with "problems")

If your client has over a certain amount of assets³ then he or she could be subject to Federal Estate Tax. This takes the matter out of the "simple" context and requires an experienced trusts and estates attorney who can implement an estate plan which could result in significant tax avoidance.

In terms of asset title, many people (even lawyers) do not know that certain assets pass outside of a will and instead go directly to a beneficiary. Those assets include those where there is a named beneficiary who is alive when the decedent dies. Examples are life insurance, retirement plans, and annuities. Other assets that can pass outside of a will include assets that are owned "jointly to the survivor" or "pay on death."

As an example, and from a practical standpoint, your client could come into your office and request that you draft a will leaving all of his assets to his beloved sister. When you review his assets you see that his only asset is a \$500,000 life insurance policy that designates his ex-spouse as the beneficiary. While a will is revoked by divorce,⁴ a beneficiary designation is not. This means that even if your client has a will naming his sister as his sole beneficiary, she will not get the life insurance if the ex-wife is living at the time of your client's death and your client does not

² For example, it is not uncommon for "Amy" to be spelled "Amiee" or even "Aymee." If the client fills out the form in advance, you will already know the spelling and will avoid these spelling errors within the documents that you draft.

³ The [American Taxpayer Relief Act of 2012](#) made permanent the tax-free applicable credit amount of \$5,000,000 which is indexed for inflation (\$5,450,000 for decedents dying in 2016, \$5,490,000 for those dying in 2017).

⁴ [KRS 394.092](#).

change his beneficiary form. If your client wants his sister to be the beneficiary of the life insurance you need to advise him: (1) to complete a new beneficiary form naming his sister as the beneficiary; or (2) complete a new beneficiary form naming his estate as the beneficiary (which will then release the funds to the estate to be distributed in accordance with this will). As this example illustrates, an unknowing client will believe that a will erases all other designations. It is up to the attorney to facilitate the client's wishes for the disposition of his or her assets.

B. Basic Documents

Situations differ and there is not a one size fits all solution for every client. To the contrary, providing good legal work for your clients means that your knowledge of estate planning extends to whatever is necessary to fully represent your client. That said, the average non-millionaire client with children under eighteen will need an estate plan which includes the following documents:

- Last Will and Testament
- Living Will Directive
- Power of Attorney
- Limited Power of Attorney for Medical Authorization for Children

1. Last Will and Testament.

A will is a written disposition of all the assets that make up a person's probate estate. The will document allows a person to appoint a personal representative (an "executor" if male and an "executrix" if female) to conclude the legal affairs of his or her life. A will provides for who gets what, when they get it, and who is in charge. A will can have a trust in it. It is a public document that is recorded in the county in which the person was domiciled at his or her death.

2. Living Will Directive.

A Living Will Directive allows a person to state whether he or she does or does not want to be kept on machines in the event of an incurable and irreversible condition, which will result in death within a relatively short period of time. It also allows a person to expressly state whether he or she does or does not want artificial nutrition and hydration. This directive further allows a person to designate someone to make medical-type decisions (a "health care surrogate") in the event the client is incapable of making those decisions for him or herself. Finally, a person may designate the donation of his or her body or organs within this directive document.

3. Power of Attorney.

A Power of Attorney document allows a person to name someone (an "attorney-in-fact") to handle all of his or her business and can be written to become effective immediately upon execution (a general power of attorney) OR it can become effective only in the event of incapacity (a so-called springing power of attorney). This document can also be written to allow an attorney-in-fact to make gifts on behalf of the client. Note that whether or not a person can make gifts can be very important. [KRS 386.093\(6\)](#) states that if a document does not specifically grant this power, then the attorney-in-fact does not have it.

Although case law indicated that an attorney in fact may not execute a will document on behalf of a testator,⁵ under the Uniform Trust Code, an attorney-in-fact can amend a trust document so long as the Power of Attorney document and the Trust document provide that the attorney-in-fact has this power.⁶

4. Limited Power of Attorney for Medical Authorization.

Parents will sometimes leave a child or children in the care of a family member or friend in order to travel or for some other reason. A Limited Power of Attorney for Medical Authorization is a document which would allow designated persons (or a particular person) to authorize medical treatment of children in the event that a client is unavailable to do so.

C. Drafting a Basic "Simple" Will

Most wills should contain language concerning the following:

- Payment of expenses, debts, obligations and taxes
- Specific bequests
- Residuary estate
- Trust provisions
- Appointment of fiduciaries

1. Payment of expenses, debts, obligations and taxes.

a. Debts.

A will should contain a provision providing that payment of debts be paid out of the Estate.

⁵ [Smith v. Snow](#), 106 S.W.3d 467 (Ky. App. 2002).

⁶ [KRS 386B.4-110\(1\)\(a\)](#) and [KRS 386B.6-020](#).

b. Obligations.

Unless there is a provision for sale, a will should contain a provision stating that any property which has a mortgage, lien, or other encumbrance passes with that obligation in place. If the will did not contain such a provision, it often has implications that are contrary to the intention of the testator. For example, if one child is devised the home but the residuary passes to all three children equally, it is possible that after the payment of the mortgage, the residuary does not have any funds. This means that one child gets all of the parent's assets. Likely, the testator wanted the home to go to the child but still wanted the other children to have assets as well.

c. Taxes.

A will may provide the client's wishes in regard to the payment of taxes including estate, inheritance, and other. Most often, clients wish for these taxes to be paid out of the Estate.

This is often a very important issue for "simple" wills because of the Kentucky inheritance tax. For those clients leaving property to someone related further away than a sibling, Kentucky inheritance tax likely applies. If the will does not designate, the Kentucky law provides that the person receiving the property is responsible for paying the inheritance tax. However, note that if a decedent's will provides that the inheritance tax is payable from the residuary estate, the Kentucky Revenue Cabinet takes the position that there is an additional bequest to a non-residuary beneficiary. This additional bequest is the amount of the tax paid from the residuary estate as a result of bequest, etc., to the non-residuary. This is in essence a tax on a tax. It is very exasperating and just try to explain this to a client!

2. Specific bequests.

Specific bequests are what they sound like: the testator makes a specific gift of an asset or money to a specific person or entity. The specific bequest needs to specify what occurs: (1) if the beneficiary predeceased the testator; or (2) if the testator does not own the asset at the time of his or her death.⁷

An example of a specific bequest provision is as follows:

I give and bequeath my 1954 Red Corvette
Convertible to my Sister, JANE SMITH, if she shall

⁷ Failing to state this can create an ademption issue.

survive me. Provided, however, if Jane Smith shall not survive me, then this gift shall be void and shall pass in my accordance with ITEM III of this my Last Will and Testament. Provided, further, however, if at my death, I do not own a 1954 Red Corvette, then this gift shall be void.

3. Residuary estate.

A will should include the executor provisions as provided under [KRS 395.195](#). It is also prudent to allow an executor to sell real property for the purpose of satisfying debt. If not specifically included, then an executor would have to seek court permission for the sale of real estate under [KRS 389A.010](#).

4. Trust provisions.

A trust is a legal relationship whereby a party (the trustee) holds assets for the benefit of another (the beneficiary) in accordance with the provisions of a written document (the trust document). For "simple" will purposes, it may be necessary to establish a trust for the benefit of children within the will. If a minor receives assets outside a trust, then a conservatorship will have to be established until the child reaches the age of majority.

Note that all trusts, whether under a will document or not, are subject to the Uniform Trust Code adopted by Kentucky on July 15, 2014. The Uniform Trust Code can be found in [KRS Chapter 386B](#). One important aspect is that the Uniform Trust Code applies to trusts retroactively. In other words, trusts established before the Uniform Trust Code was enacted are still subject to the Uniform Trust Code.

5. Appointment of fiduciaries.

a. Executor.

The executor is the person appointed in the will to be legally in charge. An executor is entitled to a fee up to 5 percent of the assets passing through his or her hands.⁸ This person will open the probate, marshal assets, file an inventory, pay debts, disburse assets in accordance with the law and the will, and settle and close the estate. If female, she is an "executrix"; if male, he is an "executor." In the nomination of an executor, it is important to consider whether surety on the bond should be waived for the appointment. If not waived, the executor will have to pledge assets or go to an insurance company for bonding in order to be appointed.

⁸ [KRS 395.150](#).

b. Guardian.

If the client has minor children, the testator should name a guardian if the other biological parent is also deceased or cannot act. It is a good idea to name at least one alternate.

c. Trustee.

This is a person appointed to handle the trust funds. This should be a person or entity who has some business sophistication and can and will handle the job. It is often a good idea to name an alternate.

6. Self-proving clause.

Include a self-proving clause in the wills you draft. If a will is "self-proved" under [KRS 394.225](#) then the witnesses do not have to come to probate court and testify concerning the authentication of the signature after the testator's death.

Unfortunately, some attorneys seem to purposefully leave this out as a mechanism of probate retention. In other words, the testator dies and executor either has to hire the lawyer that drafted the will or face many steps to authenticate the signature of the testator in probate court. It is just not good practice and in my opinion is unnecessarily self-serving and just plain wrong.

D. Execution of Estate Planning Documents

1. Signing.

For a valid will, the Testator must execute the documents in the presence of two witnesses. These witnesses should be disinterested (*i.e.* they should not be beneficiaries or fiduciaries under the will). The will should be self-proved meaning that the signatures of the witnesses are notarized. [KRS 394.225](#) provides a self-proving form.

2. Oath.

Every will signed in my presence is followed by the administration of an oath. I ask the client to raise his or her right hand and I state the following:

Do you swear in the presence of these witnesses that this document that you sign, your Last Will and Testament, is in fact your document, that you sign it under no undue influence or duress, that you are of sound mind and eighteen years of age or older?

3. Document retention.

Attorneys differ on the subject as to whether or not to retain original documents. My position is that I generally do not retain originals. My reasoning is that clients move, lawyers move or die, clients re-do their documents with other attorneys, and/or the beneficiaries may not necessarily know how to find the will twenty years from now. However, I generally make copies of the signed documents and scan them in and then give the originals to the client with an Instruction Sheet (see *below* Instructions).

4. Instructions.

Generally it is prudent to advise a client as to where important estate planning documents should be kept. I generally advise that the original will needs to be kept in a safe deposit box or in a safe location along with the Power of Attorney documents. At least one living will needs to be kept at home (because medical emergencies happen at all hours of the day and night). If clients keep documents in a safe deposit box or safe, I recommend that they grant their alternate fiduciaries access by having their name placed on the box or knowing how to access the safe.

E. A General List of Things TO Do

I have been fortunate to have learned to practice estate law from smart, experienced attorneys who trained me and invested time in me. I have also learned from experience. Based upon these sources, below is a general list of things to do in estate planning:

1. Keep good notes.
2. Listen to clients.
3. Have face-to-face meetings.
4. Efficiency is key – make your practice habitual:
 - a. Meet.
 - b. Draft summary notes after the meeting.
 - c. Draft a summary letter to clients with a separate engagement letter.
 - d. Send Joint Representation letter for spouse clients.
 - e. If engaged, send draft documents for review.
 - f. Schedule execution of documents.
 - g. Execute documents.

- i. Two disinterested witnesses and a notary.
 - ii. Administer the Oath.
 - h. Have a system for keeping copies.
 - 5. Establish checklists.
 - 6. Seek help when you need it.
 - 7. Be careful about excluding heirs from a will.
 - 8. Charge a fair price.
- F. A General List Things NOT to Do

A very basic list of things not to do is as follows:

- 1. Do not name yourself as executor or trustee if the will is not for a (very) close family member. Although there are not specific rules against this, it is not good practice.
- 2. Do not exclude self-proving clauses.
- 3. Do not take the word of a family member (or caretaker) as to what the testator wants; the testator needs to tell you him or herself. You may be called to testify later as to what occurred.
- 4. Do not draft documents outside of your expertise.

III. PROBATING A SIMPLE ESTATE

Probate is the wrapping up of the legal affairs of a person's life. It requires you to determine the assets that are subject to probate, to facilitate the appointment of a fiduciary, to interpret estate planning documents, to facilitate in the transfer of assets, and to advise clients concerning administration and the legalities thereof.

A. Initial Meeting

A *basic* list of what should be accomplished at the initial meeting is as follows:

- 1. Meet with the family.
- 2. Review the last will document or determine intestacy.
- 3. Review probate vs. non-probate assets.
- 4. Determine if estate tax is applicable.
- 5. Determine if inheritance tax is applicable.

6. Review known creditors.
7. Address immediate issues (property tax, payment of ongoing bills).
8. Check Unclaimed Property for assets.
9. Secure information including:
 - a. Name of decedent.
 - b. Address of decedent.
 - c. Date of birth.
 - d. Date of death.
 - e. Social Security number.
 - f. Name, addresses and birthday of spouse.
 - g. Names, addresses and birthdays of all children and beneficiary in will.
10. Gather documents.
 - a. Last three years' tax returns.
 - b. Bank statements.
 - c. Vehicle, boat and plane titles.
 - d. Stock certificates.
 - e. Life insurance.
 - f. Retirement information.
 - g. Deeds.

B. Engagement

You will need a written engagement letter which summarizes the terms of your employment. Note that payment of your fees is subject to the discretion of the district court. As a result, I generally do not submit my bill until the matter is complete.

C. Dispensing with Administration

If the decedent had a surviving spouse or children, it may be possible to dispense with administration if the probate estate has less than \$15,000

in assets. See [KRS 391.030](#). Basically, you can avoid probate and re-title the exempted assets.

A word of caution about this course of action: sometimes clients are in such a hurry to dispense with the probate that assets are missed. For example, assume that the decedent rented an apartment, was unmarried and had one child, and only had \$10,000 in assets subject to probate. If the child moved quickly and filed a Petition to Dispense, he could get the \$10,000 released to himself without a full probate; however the decedent may have been entitled to refunds from cell phones, income taxes, premiums for car and rental insurance, deposits for utilities, and security deposits for rent. Those assets often do not come immediately. Thus, the child could have to re-do the Dispense with Administration probate process several times in order to secure the later-found assets. This could become expensive. Had the child come to an attorney for assistance, prudence would dictate recommending that the child investigate assets fully before a Dispense with Administration Petition is filed.

D. Preparing the Probate Documents and Appointment Hearing

1. Necessary documents.

Probate will be in the county where the decedent was domiciled. You will need at least these documents:

- a. Petition for Probate.
- b. Bond.
- c. Order (or Certificate of Qualification, depending upon the jurisdiction).
- d. If the decedent had a will, you may need to file it before the hearing. Different jurisdictions have different rules (call the clerk in the county where you will file the will and/or check local rules).
- e. If the decedent died intestate, then draft waivers from those who have a right to be appointed or provide notice that those who have a right to be appointed and give notice of the hearing.

Each Kentucky county may have different rules for what they require and will allow. For example, some counties like Jefferson, Shelby, and Oldham require petitions to be made on AOC Forms. Other counties like Warren, Simpson, and Logan allow the use of a Petition for Probate form that you develop. Call the clerk in advance and ask if you intend to file your own petition.

If a person dies with a will, the petition is signed by the executor. If a person dies without a will, the petition is signed by the administrator.

2. Court appointment.

Once the Petition, Order, and Bond are filed with the district court, a hearing date is secured. At the hearing you will appear with your client. When the judge calls your name, you will likely be expected to explain the matter to the Court, and may state the following:

- a. Your name and who you represent.
- b. That the client died testate or intestate and on what date.
- c. State that the decedent was domiciled in the county.
- d. If testate, show the will, where the appointment is and whether surety is waived.
- e. If intestate, tell the court your client's relationship to the decedent and why appointment is appropriate (also state if waivers were filed or if notice was given to others who could be appointed).
- f. State whether the will is self-proved.
- g. Tell the court what surety you recommend (*i.e.* how much in assets will be passing through the probate estate).
- h. Ask the court to probate the will and administer the oath.

E. After Appointment

Probate is very often not simple, even when there are few assets. Below is a very basic list of the initial duties and responsibilities of the parties.

1. Secure a tax identification number.
2. Inventory probate assets and file an inventory within sixty days.
3. If tax returns will be due, file an [IRS Form 56](#) and [IRS Form 2848](#).
4. Send letters to known creditors.
5. Send letters to the decedent's CPA.
6. Notify account sources of death (example insurance and retirement).

7. Personal representative needs to open an estate account.
8. Send letter to your client explaining his or her duties.
9. Disallow claims without merit.
10. Docket certain deadlines:
 - a. Inventory – sixty days.
 - b. Creditor period – six months from date probate is opened.
 - c. Spousal renunciation – six months from date probate is opened.
 - d. Inheritance Tax – due nine months from date of death to get 5 percent discount, and eighteen months to avoid delinquency.
 - e. Disclaimer – nine months from date of death.
 - f. Federal Estate Tax – due nine months from date of death.
 - g. Income Tax for decedent – end of year.
 - h. Income Tax for Estate – depends on fiscal or calendar year choice.

F. Taxes

A decedent's tax obligations can seem endless and are complex to boot. From a basic standpoint, you should know the basics and when to seek the help of a professional (*i.e.* a CPA).

1. Federal estate tax.

In general, each person has an estate tax exemption amount (known as the "applicable credit amount" or "unified credit"), which he or she can use during his or her life to make gifts. Any portion of the applicable credit amount not used during life is exempt from estate taxes at death. The [American Taxpayer Relief Act of 2012](#) made permanent the applicable credit tax-free amount of \$5,000,000 which is indexed for inflation (\$5,450,000 for those dying in 2016 and \$5,490,000 for those dying in 2017).

Under current law if a person dies with assets in excess of applicable credit (determined upon the year of death) then a Federal Estate Tax Return must be filed with the IRS. Your applicable credit amount can also be used during your lifetime to make gifts. To the extent this credit is utilized to make tax-free gifts, it reduces the applicable credit amount available at death by

the amount of the lifetime gifts. For example, I could have given \$1,000,000 to you and if I died in 2016, I would have had only \$4,450,000 of my tax-free applicable credit amount left.

Under current law, spouses can pass property estate and gift tax free to each other. In other words, one spouse could re-title all of his or her assets into the other spouse's name (and vice versa) without incurring any estate or gift taxes. This is also true when one spouse leaves property to his or her spouse at death. Thus, if spouses leave all of their property to each other at death then at the death of the first spouse (no matter how large the value of the gross estate), the estate of the first to die will not owe estate taxes on any property passing to the surviving spouse.

And, here's where things get a bit complicated – but in a good way. Widows and widowers can add any unused exclusion of the spouse who died most recently to their own. This enables them together to transfer approximately \$11 million tax-free (because of the indexing of the applicable credit). This is referred to as "portability." This law came into existence in 2010, and the [American Taxpayer Relief Act of 2012](#) made this permanent. But, note that portability is not automatic. The executor handling the estate of the spouse who died will need to transfer the unused exclusion to the survivor, who can then use it to make lifetime gifts or pass assets through his or her estate. The prerequisite is filing an estate tax return when the first spouse dies, even if no tax is owed. Estate tax returns are complicated and often require appraisals which mean attorneys and CPAs are involved. To avoid this expense, I hope that the Internal Revenue Service develops a modified way to make this election. An estate tax return is due nine months after death with a six-month extension allowed. If the executor does not file the return or misses the deadline, the spouse loses the right to portability.

If a decedent dies with gross assets in excess of the applicable credit amount or if you want to protect the portability of the deceased spouse's applicable credit, then: (1) an [IRS Form 706](#) must be completed; (2) appraisals may be required; (3) taxes, if any, would be due within nine months of death; and (4) an acceptance from the IRS is required before the probate estate can be closed.

2. Kentucky inheritance tax.

For decedents dying after July 1, 1998, Kentucky phased out the Inheritance Tax for Class A Beneficiaries (spouse, children, parents, grandchildren, brothers, and sisters). If assets are passing to anyone else, then a Kentucky Inheritance Tax Return is required to be filed and an acceptance received from the Department of Revenue.

3. Individual income tax.

A decedent may have to file an income tax return for the portion of the calendar year for which he or she lived. For example, if a decedent died on June 10, 2012, his personal representative would have to report his taxable income from January 1, 2012 until June 9, 2012. This is to be filed by April 15 in the year following the death. Death of a decedent would not preclude his spouse from filing jointly.

4. Estate income tax.

If the estate has assets that earn income over \$600, an [IRS Form 1041](#) Fiduciary Income Tax Return may have to be filed. Also, if the estate is selling real estate, a 1041 will have to be filed. It is a good idea to consult with an accountant concerning the preparation of this document.

G. Settlements

After the passing of the six month creditor period, after all tax returns have been filed and accepted, and after all creditors have been satisfied, a final settlement may be filed with the district court to close the estate. A settlement may either be completed as "informal" or "formal," depending upon what occurred in the estate and whether all beneficiaries/heirs are in agreement.

In an informal settlement, all beneficiaries/heirs sign a waiver stating that they have received their share of the estate and waive a formal settlement. In a formal settlement, documents must be submitted to the court and a hearing must be held for approval. It is also possible to submit a proposed settlement to the court prior to the formal settlement. This is where you ask the Court to agree to your proposals for settlement. Often when an estate is insolvent (there are more debts than assets), these proposed settlements are necessary in order to gain permission for a *pro rata* distribution to unsecured creditors.

IV. RESOURCES

A. Seminars

1. University of Kentucky Estate Planning Institute. Held every July in Lexington.
2. University of Louisville Estate Institute. Held every April or May at U of L.
3. KBA Annual Convention. Typically hosts informative sessions on basic estate planning and probate issues.

B. Books

Kentucky Practice Volume 23, Elder Law.

C. Publications

1. University of Kentucky, Kentucky Estate Administration, published every five years.
2. University of Kentucky, Kentucky Estate Planning, published every five years.

I. MY APPROACH TO MEDIATION

After having participated in a vast number of mediations as an advocate and as a mediator, I have developed certain principles which I believe will assist lawyers and parties in working toward a just resolution of their respective disputes. They include the following:

A. Requesting and Reviewing Materials Prior to Scheduled Mediation

In order for the mediator to truly assist in the process designed to reach a just resolution of a dispute, I believe the parties should submit mediation material adequate to educate the mediator as to the facts and issues necessary to be resolved. I will in fact read and study these materials in order to educate myself prior to the mediation. It will not be at all unusual for me to call the lawyers for both sides to ask questions to further educate myself and/or clarify my thinking regarding the issues in dispute.

B. Listen Carefully

In order to effectively assist the lawyers and their clients in working toward a just resolution of a dispute, a mediator must listen carefully to what is being said by all parties. It is somewhat similar to carefully listening to what a witness is saying from the witness stand so that you can ask appropriate and detailed follow-up questions in order to educate a jury.

C. Establish Trust and Confidence

Hopefully, the lawyers utilizing my services as a mediator will already have trust and confidence in me, but it will be important for me to develop the same in their clients. For the process to be as successful as possible, all participants must understand and respect my neutrality and role. I will work to develop that trust and confidence.

D. Be Honest and Willing to Answer Questions

I believe successful mediators must be honest in the process and have the experience, knowledge and willingness to answer questions posed to them during the process. I certainly do not mean to indicate that the ultimate decision will ever be mine, but that I am willing to give my honest thoughts and impressions where appropriate.

E. Honor Confidences

It is vital to the process that the lawyers and their clients fully trust the mediator to honor what is shared in confidence and that it not be communicated to the other side without authorization to do so.

F. It Ain't Over 'Til It's Over

Mediation is a process. Each mediation must have a beginning time, but there is no way to appropriately schedule an ending point. As long as progress toward a just resolution is being made, the process needs to be allowed to continue. I will offer to remain involved for whatever period of time it takes even after the formal mediation has terminated, if counsel believe my assistance will be of benefit to the parties.

II. MEDIATION SERVICES

A. Mediation

The mediator facilitates exploring and finding potential ways to settle disputes. The exact process employed will vary and be determined by the mediator in consultation with counsel. Preparation is an essential part of the process. Telephone contact with counsel for each party before the mediation is standard operating procedure. In some cases, we will have pre-mediation telephone conferences with all counsel. In appropriate situations, we may have face-to-face meetings with counsel, even on occasion with their client present.

B. Evaluative Mediation

In some cases, but only at the request of counsel, a mediator may provide feedback about the relative strengths or weaknesses of legal and factual positions, ranges of potential damage awards, or settlement values.

C. Dispute Evaluation, Risk Assessment & Counseling

We confidentially assist a party confronted with a dispute by evaluating claims and defenses, assessing the risk of an adverse result and suggesting options for dispute avoidance, risk reduction and resolution of claims.

D. Pre-suit Mediation

Mediation of disputed matters before suit is filed can be successful in appropriate cases. We have succeeded in (a) evaluating whether pre-suit mediation is appropriate, and then (b) mediating even very highly charged disputes before suit was filed. Not every case is appropriate for this, but a few are and participants are typically happy they at least tried. In most instances, there is little downside. We encourage our customers and potential customers to call and discuss this alternative.

E. Binding Arbitration

Under an agreed set of rules and procedures, the Arbitrator makes binding pre-hearing decisions (such as scheduling, discovery and evidence) and then presides over the presentation of proof and post-hearing submissions culminating in a binding dispositive decision.

F. Non-Binding Arbitration

This process is structured like a binding arbitration, but is advisory only. This approach can be modified to fit the nuances of a particular situation and provide a highly credible evaluative tool.

G. Court Appointed Special Master/Discovery Master

When appointed by Court Order, a Special Master can rule on discovery issues in highly contentious situations, sometimes in real time, or facilitates settlement negotiations or mediation.

H. Dispute Review Board and Standing Neutral

Given the complexity and duration of construction projects (frequently lasting for months or years), questions, misunderstandings and disagreements between project participants are not uncommon. To discourage disputes and claims as early as possible, a Dispute Review (usually a panel of three neutrals) or a single Standing Neutral are retained when the project begins. They remain on call to assist the parties as issues arise and, on request, will make recommendations or findings, which can be non-binding or binding unless subject to review in legal proceedings.

I. Guided Choice

Guided Choice is a multi-faceted process through which a neutral adviser, facilitator or mediator serves as a guide to the dispute resolution process. The neutral may advise the parties during contract formation about the dispute resolution process suited for the particular project or transaction. Or the mediator may work independently and confidentially with the parties to develop the customized ADR process after a dispute arises. If a dispute arises, the key for Guided Choice is getting the mediator involved early in the dispute resolution process. The Guided Choice mediator customizes the process to comport to the intricacies of the dispute, the personalities of the key decision makers and the corporate cultures of the involved companies. The Guided Choice mediator assists the parties in preparing for negotiations, anticipates potential impasses, develops means to avoid those likely stalemates in settlement discussions and designs the most efficient ways to resolve the disputes.

J. Partnering

The neutral is retained by the parties shortly after a contract is signed and facilitates face-to-face discussions for the purpose of setting joint project goals and promoting cooperation and trust between the parties. Partnering sessions typically result in an agreed statement of principles that will govern the relationship going forward. Partnering may be particularly appropriate for lengthy projects.

K. Independent Investigation

We conduct independent, neutral fact investigations for both private parties and for public bodies.

L. Charges

Standard hourly rate is \$300 and direct expenses (including travel expense when authorized).

I. OVERVIEW OF LITIGATING AN AUTO CASE

- A. You've Filed Suit, Now What?
- B. The Liability Octagon
- C. Sticker Shock – Can You Back It Up?
- D. Take Me to the Other Side
- E. The Litigation Family Reunion – Do You Go?
- F. If You Can Talk the Talk, Then Walk the Walk
- G. What Are You Bringing for Show and Tell?
- H. Things That Make You Go Hmmm?

II. YOU'VE FILED SUIT, NOW WHAT?

- A. Check Service – May Need Special Process Server
- B. Has Answer Been Filed?
 - 1. Review each defense – anything you didn't expect?
 - 2. Any counterclaims?
- C. Has Everyone Been Put on Proper Notice?
 - 1. [KRS 411.188\(2\)](#).
 - 2. Government Employees Ins. Co. v. Winsett, 153 S.W.3d 862 (Ky. App. 2004).
- D. Send Initial Discovery
 - 1. Interrogatories – sometimes better after deposition.
 - 2. Request for production.
 - 3. Discovery answered? Motion to compel necessary? Do you have *clean hands*?

- E. Do You Need to Take Any Depositions?
 - 1. The defendant?
 - 2. Prepare your client.
 - 3. Never agree until you're ready.

III. THE LIABILITY OCTAGON

- A. Pinpoint the Dispute
 - 1. 100 percent liability denial?
 - 2. Comparative fault?
- B. What Does the Police Report Say?
 - 1. Any statements that help you? Hurt you?
 - 2. Interview police officer?
 - 3. Anything else in officer's file besides police report?
- C. Any Eyewitnesses?
 - 1. EMS?
 - 2. Tow truck driver?
 - 3. Other motorists?
 - 4. Have you or your investigator spoken to them?
 - 5. May need to depose them.
 - 6. Always visit the scene and take photographs.
- D. Do You Need a Liability Expert?
 - 1. Is there physical evidence that may help?
 - 2. Are there visibility or illumination issues?
 - 3. Accident reconstructionist?

- E. Other Considerations
 - 1. 911 tape and dispatch log.
 - 2. Department of Transportation.
 - 3. Any security/surveillance cameras nearby?

IV. STICKER SHOCK – CAN YOU BACK IT UP?

- A. Are All Medical Expenses Documented?
 - 1. Prepare itemized medical list, include ICD-9 and CPT codes.
 - 2. Make sure there is a bill for every date of treatment.
 - 3. Does defense have current list and all bills?
 - 4. Are all the bills reasonable, necessary & related? Langnehs v. Parmelee, 427 S.W.2d 223 (Ky. 1967).
- B. Is There Support for Future Medical Expenses?
 - 1. Is this a component of your case?
 - 2. What is the law in Kentucky? Cannot be speculative; must establish specific future care needed and cost of this care in terms of reasonable probability – see Kentucky & Indiana Terminal Railroad Co. v. Mann, 312 S.W.2d 451 (Ky. 1958), Chesapeake & O. Ry. Co. v. Yates, 239 S.W.2d 953 (Ky. 1951), and Walton v. Grant, 194 S.W.2d 366 (Ky. 1946).
 - 3. Utilize life expectancy table. Morris v. Morris, 293 S.W.2d 243 (Ky. 1956).
 - 4. May need life care planner.
- C. Can Lost Income Be Proven?
 - 1. Off-work notes from doctor?
 - 2. Support from employer/supervisor?
 - 3. Make sure to review personnel file.
 - 4. Do tax returns/W-2s help or hurt?
 - 5. Hourly, salaried, self-employed or independent contractor?

D. Will You Be Asking for Impairment of Power to Earn Money?

1. Measured by impairment of capacity to earn money; not actual loss of earnings. Caton v. McGill, 488 S.W.2d 345 (Ky. 1972).
2. Evidence of permanent injury is enough for an instruction. Siler v. Williford, 375 S.W.2d 262 (Ky. 1964).
3. Look at client's injuries compared to job duties.
4. Utilize work-life expectancy tables. Adams v. Davis, 578 S.W.2d 899 (Ky. App. 1979).
5. May need a vocational expert or economist.

E. General Damages – Past and Future

1. Do you know what juries are awarding where you are? Kentucky Trial Court Review.
2. Before and after witnesses.
3. Have injuries really affected your client's life?
4. *Per diem* arguments are permitted. Paducah Area Public Library v. Terry, 655 S.W.2d 19 (Ky. App. 1983).
5. Loss of enjoyment of life is recoverable as a component of P&S (pain & suffering) damages, but not a separate category of loss. Adams v. Miller, 908 S.W.2d 112 (Ky. 1995).
6. Future P&S is recoverable if it is reasonably certain to occur. American States Ins. Co. v. Audubon Country Club, 650 S.W.2d 252 (Ky. 1983).
7. Future P&S does not require a permanent injury Louisville & Nashville R.R. Co. v. Stewart, 173 S.W. 757 (Ky. 1915) and Consolidated Coach Corp. v. Hopkins, 14 S.W.2d 768 (Ky. 1929).
8. Future P&S includes the increased likelihood of future complications. Capital Holding Corp v. Bailey, 873 S.W.2d 187 (Ky. 1994) and Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984).

V. TAKE ME TO THE OTHER SIDE

A. Identifying Weaknesses

1. Minimal property damage.
2. Delay of, gap in or lack of treatment.

3. Low amount of specials (medical and/or wage).
4. Pre-existing conditions.
5. Unrelated treatment or injuries (causation problems).
6. Client makes more now than at time of injury.
7. Future treatment recommended but never obtained.
8. Alternative treatment or therapies.

B. Anticipating Defenses

1. Seatbelt defense.
2. Sudden emergency.
3. "It was just an accident" defense.
4. Comparative negligence (speed, proper lookout, etc.).
5. Multiple vehicle collision.

VI. THE LITIGATION FAMILY REUNION – DO YOU GO?

A. Alternative Dispute Resolution

1. Will it benefit your case?
2. Do you have a choice?
3. Is it just an exercise in futility?
4. Do you have client control?

B. Mediation Concerns

1. Sneak peek of your case.
2. Reasonable for case to settle?
3. Decide movement in advance of mediation.
4. Be able to justify demand and position.
5. Prepare client for "realities" of mediation.
6. Who's your mediator?
7. Will an insurance adjuster with settlement authority attend?

8. Make sure defense has ALL pertinent documentation.
9. If it can't be settled consider negotiating a Hi-Low agreement for arbitration.

C. Arbitration Concerns

1. Takes more effort.
2. Binding or non-binding?
3. Decision may "box you in."
4. May help case settle or guarantee a trial.
5. Creates a record if court reporter is hired.
6. Can be more costly than mediation.

VII. IF YOU CAN TALK THE TALK, THEN WALK THE WALK

A. It's Trial Time

1. File motion to set.
2. Review pros and cons with clients.

B. Prepare (and Follow) Trial Checklist

1. Witnesses to call and subpoena.
2. Exhibits to use.
3. Depositions to take.
4. Order of proof.
5. Jury instructions.
6. *Voir dire*, opening, closing and examinations.
7. Supplement discovery responses.
8. Stipulations.
9. Request for admissions (ninety-120 days before trial); get medical records and bills admitted.
10. "Sponsor" for documents/medical records.
11. Get jury questionnaires.

12. Where are you on trial docket?

13. Prepare trial notebooks.

14. Etc.

C. Evidentiary Issues

1. Identify areas for motions and/or objections.

2. Brush up on evidence rules and case law.

VIII. WHAT ARE YOU BRINGING TO SHOW AND TELL?

A. Physical Evidence

1. Photographs of vehicles.

2. Photographs of injuries.

3. Photographs of the scene.

4. X-rays (positives).

5. Medical hardware, braces, etc.

6. 911 tape.

B. Demonstrative Evidence

1. PowerPoint.

2. Video recreation and/or animation.

3. Aerial photograph.

4. Medical illustration.

5. Anatomical model.

6. Don't out "tech" your opponent too much.

C. Documentary Evidence

1. Medical list (with redacted bills).

2. Wage loss list.

3. Medical records.

4. Timeline.

5. Any other documents obtained in discovery?

IX. THINGS THAT MAKE YOU GO HMMMMMM ???

- A. What Court Are You in?
- B. Who's Your Judge?
- C. Who Is the Defense Lawyer?
- D. What Does Palmore Say?
- E. Have You Researched Jury Verdicts (KTCR)?
- F. Do You Have a Likeable Plaintiff?
- G. Who Will Be on Your Jury?
- H. What's Been in the News?
- I. How Long Has It Been Since You've Tried a Case?
- J. Will This Be Your First Trial?
- K. What about Subrogation Liens?
- L. Have You Reviewed Trial Procedures?
- M. Have You Updated [CR 8.01](#) Disclosures?
- N. Have You Cleared Your Calendar?
- O. Trying the Case Solo or with Help?
- P. Do You Need a Trial Consultant?
- Q. What Are the Case Expenses to Date?
- R. What Will the Case Expenses Be after Trial?

THIRTEEN OF THE TOP TEN RULES OF WRITING CONTRACTS

Thomas E. Rutledge

I. THE LAW SCHOOL CLASS NAMED "CONTRACTS" IS A VIOLATION OF TRUTH IN ADVERTISING

- A. "Contracts" is a class in which you read cases about what were typically poorly written contracts or in which the court explained some obscure point of contract enforcement or defense.
- B. Likely little, if any, time was spent actually using the business end of a pencil and attempting to draft a contract.

II. THERE IS A STORY TO TELL, SO TELL IT

- A. A contract is an agreement between two or more parties wherein they undertake certain obligations and responsibilities and in turn have certain rights. It is a private law among them as to a particular subject.
- B. There is a story in that agreement – tell it. Seller, who is the owner of equipment that produces widgets, agrees to manufacture at least X widgets not later than date Y and to sell those widgets to Buyer for price Z, and Buyer agrees to pay price Z to Seller for the widgets.
- C. Who is doing what and why and who is getting what out of the deal?

III. FROM WHOSE PERSPECTIVE ARE YOU TELLING THE STORY?

- A. You must always remember from whose perspective you are telling the story. Recall Rosencrantz and Guildenstern Are Dead? – Hamlet told from the perspective of two of the minor characters. Perspective matters.
- B. Are you representing the prospective buyer of widgets? If that is the case you will be seeking a hard and fast obligation of seller to make the widgets and to have them available on a fixed schedule and with no risk that the price will increase. Alternatively, if you represent the seller you want flexibility as to production schedules (your machine might break down) and the ability to raise prices if the cost of raw materials increases.
- C. Are you the majority owner of the business who will operate it on a day-to-day basis? Then you want to restrict the minority owner's participation and your exposure to them for fiduciary claims. If you are representing the minority owners you will insist upon strict fiduciary responsibility, easy access to company records, and regular reporting of results.

IV. STOP LOOKING FOR "FORMS"

- A. The Internet and the computer are the death of good drafting. Everyone, thinking they know what they need, goes to the Internet (or the firm's file folders) to start their agreements.
1. When you do this, you are assuming that the drafter did a good job in drafting the form on which you are about to rely. Exactly why do you think that assumption is reliable?
 2. Most forms are end products, the result of negotiations between parties. Do you really want to start off negotiating a deal with a document that embodies someone else's give and take? Where now is your room to negotiate? And how do you know that this is not the document that came out of a deal in which one side either lacked any bargaining strength or in which one side was simply out-lawyered? Answer – you don't.
 3. How you write an agreement depends upon the perspective of the side to the transaction you are there to represent. Seldom will you know whether a particular form was written to favor one side or the other.
 - a. Does this asset/stock purchase agreement provide greater protection to the seller or to the buyer?
 - b. Does this operating agreement/partnership agreement embody maximum flexibility and protection for those in control or does it provide rights of control and recompense to those not in control?
 4. Typically you will not know against which state law the agreement was drafted. How do you know that the form addresses and satisfies the requirements of this state's laws? How do you know whether the state law has or has not been changed in the interim?
 5. A form on your computer screen looks so comprehensive, so complete, that you are invited to no longer really focus upon what is there. Times New Roman, 12 point, fully justified text is to your mind "done." Your mind is leading you astray.
- B. Pick up a legal pad, pick up a pencil, and outline what it is that needs to be addressed. Draw arrows to reorder the points to be considered. Add points that you missed in the first effort. Start writing (yes, with a pencil and paper) the primary provisions.

V. BUT THEN, WHAT?

- A. Most contracts do a decent enough job of saying who will do what, and sometimes they even do a good job of saying why they are going to do it. All too many contracts fail, however, to define the consequences of a

parties' failure to do something. These failures are often not in the big deal points, but in the procedural obligations.

- B. Consider a stock restriction agreement in which the buy-out price is determined by valuation by three appraisers. Seller and the corporation are to each appoint an appraiser, and those two select a third. What happens, however, when the seller does not designate an appraiser? He/she simply will not respond to letters and calls reminding them they need to do so. Absent court intervention the valuation cannot proceed because the drafter failed to set a time limit for appointing the appraiser as well as addressing the consequence of not making the appointment within the time requirements (e.g., "if either Seller or the Corporation fails to designate an appraiser within XX days of YY, the appraisal shall proceed with only the single appraiser appointed, whose determination of value shall be binding and conclusive.")

VI. THE ENTIRE TRUTH NEED NOT BE SET FORTH IN EVERY SENTENCE

There is a great little book by Howard Darmstadler, Hereof, Thereof and Everywhereof: A Contrarian Guide to Legal Drafting – you can read it in two hours and it will be two well-spent hours. He therein cites a sentence that was rated by the computer as being at the 106th grade reading level. I don't know about you, but I am pretty sure I am not at that level. A sentence of that length is not complete and comprehensive, but rather it is gobbledygook. Be thinking about the people who will ultimately need to read and apply the contract language you are drafting. Be concise. Be clear. Organize the structure of the agreement.

VII. EXAMPLES

Especially with respect to application of mathematical formulas, examples are a crucial tool for both understanding the agreement that is being written and for providing clarity as to its application in future situations. Let's focus for now upon the use of examples as a tool for making sure your contract makes sense. Consider a buy-sell agreement that provides for multiple valuations and goes on to provide that "if the two valuations differ by 10 percent or less, they will be averaged in order to determine the final purchase price." Valuation A comes in at a value of \$100 per share, while valuation B comes in at \$90 per share. Valuation B is within 10 percent of valuation A, but valuation A is not within 10 percent of valuation B. In trying to write the example, you come to realize that the contractual language is deficient because it does not indicate whether you determine the 10 percent spread off of the higher or off of the lower valuation.

VIII. CLEAR DEFINED TERMS

Words are simply labels for concepts; there is a generally agreed meaning for most of them. In a contract, when you use defined terms, you are altering those generally defined concepts, hopefully with greater specificity.

IX. EVERYTHING THAT SHOULD BE SAID SHOULD BE SAID NOT MORE AND NOT LESS THAN ONCE

If you talk about essentially the same concept in two different places in a contract using slightly different wording, you will invariably introduce an ambiguity in to the agreement, an ambiguity that will be seized upon by one side or the other in any litigation. Careful outlining of your document *before* you put pen to paper will minimize these problems. Thereafter, be careful and specify when and how particular provisions are to be employed: "In the event an employee dies or is disabled as determined under paragraph 8(c), he shall be entitled to the following benefits, In the event an employee is terminated for cause as determined under paragraph 8(a), the employee"

X. YES, BUT DOES IT MAKE SENSE?

A. My practice often involves reviewing operating agreements, and from time to time I stumble upon provisions that fall into the category of "certainly that can't say what they meant to have said." One of my favorites, written by a St. Louis firm, provided:

"The Company may engage in any activity lawfully permitted a limited liability company organized under the Act. The Company may engage in any other activity with the approval of a majority of the Members."

B. If, under the first sentence of this provision, the LLC may do anything that it is legally permitted to do, what is the range of activities that are intended to be addressed by that second sentence? Trafficking in cocaine and money laundering?

C. Just because it gets past "spell check" does not mean it makes sense.

XI. UNDERSTAND THE LAW AGAINST WHICH YOU ARE WRITING

There are limits to what you can do in a contract, and there are laws that will provide rules if you do not either specify a different rule or elect (assuming you may) out of the statute. LLC and partnership acts provide rules that will apply if no contrary provision is set forth in the agreement. If you don't know and address both sorts of rules, you are not addressing the entire deal in your agreement and you don't know the effect of your agreement.

- Kentucky's UNIQUE statute on personal guarantees
- Amending operating agreements by majority vote
- Delaware law on fiduciary duties

XII. BOILERPLATE MATTERS

Pay attention. Bombs can be buried in the "boilerplate" section of the agreement. You can address important issues of interpretation and application

there as well. Do you know the difference between a merger clause and a non-reliance clause? No? Well, you need to.

XIII. TALK TO A LITIGATOR

Assume your agreement is going to be read by a judge and then explained to a jury of twelve people who lack the intellectual firepower to get out of jury duty. Find out how it will play in that environment.

PRACTICAL ASPECTS OF CIVIL PRACTICE IN STATE COURTS

By Mark S. Medlin; revised/updated December 2016 by Christina L. Vessels

I. INTRODUCTION

Social influences like television and films provide most of modern culture's perceptions about law practice. Most lawyers are perceived, therefore, to "earn their salt" in courtrooms, at trial. In reality, however, not all tasks performed by lawyers involve judicial process. Nevertheless, most practitioners will have some contact with the court and some need to operate within the framework of the court system. This chapter summarizes some of the practical aspects of state court practice.

II. JURISDICTION

Any proper discussion of state court practice must necessarily begin with some understanding of the court's subject matter jurisdiction.

In the restructuring of the judicial system in 1975, the circuit courts became Kentucky's courts of general jurisdiction.

Circuit Court is the court of general jurisdiction that hears civil matters involving more than \$5,000, capital offenses and felonies, land dispute title cases and contested probate cases. Circuit Court has the power to issue injunctions, writs of prohibition and writs of *mandamus* and to hear appeals of certain judgments and decisions from District Court and administrative agencies.

As a division of Circuit Court with general jurisdiction, the family court division of Circuit Court further retains primary jurisdiction in cases involving dissolution of marriage; child custody; visitation; maintenance and support; equitable distribution of property in dissolution cases; adoption; and, termination of parental rights. In addition to general jurisdiction of Circuit Court, the family court division of Circuit Court, concurrent with the District Court, has jurisdiction over proceedings involving domestic violence and abuse; the Uniform Act on Paternity and the Uniform Interstate Family Support Act; dependency, neglect, and abuse; and, juvenile status offenses.

One judge may serve more than one county within a circuit. Some circuits contain only one county but have several judges, depending on population and caseload. Circuit judges serve in eight-year terms.

Family Court provides one judge to hear all of a family's issues relating to divorce, child custody, adoption, termination of parental rights, domestic violence, child abuse and neglect. Because Family Court is devoted exclusively to cases involving families and children, these cases do not compete with criminal and other civil cases for court time.

Family Court is a division of Circuit Court, Kentucky's highest trial court level, and employs full-time judges with the same qualifications as those who serve other

divisions of Circuit Court. Family Court currently serves more than 3.2 million Kentuckians in seventy-one counties.

The district courts are courts of limited jurisdiction, which hear misdemeanor charges, juvenile criminal proceedings, estate probate administration, civil actions not involving controversies exceeding \$5,000 and small claim matters, involving \$2,500 or less. Also within the district court's exclusive jurisdiction are forcible entry and detainer proceedings and guardianship appointments.

Consult the provisions of [KRS Chapter 23A](#) and [24A](#), [§112](#) and [§113](#) of the [Kentucky Constitution](#), and the statutes governing the subject matter of the legal issue before undertaking any unfamiliar judicial process.

III. PREPARING TO LITIGATE

Except for an occasional designation by the court to serve as counsel in a criminal proceeding or termination of parental rights proceeding, most attorney-client relationships do not originate in the courtroom. Most such relationships develop among existing or prospective clients at the lawyer's office. Careful evaluation of the case is therefore essential to effective litigation in state or federal court. The first and most important aspect to case evaluation is a clear and admissible set of facts, then a preliminary analysis of legal issues, followed by an estimation of the value of the case and the potential costs and expenses associated with pursuing the litigation.

A. Evaluating the Facts

Facts may be developed from several sources. The best initial source, however, is a detailed interview with the client (or where the client is a business organization, its most knowledgeable representative/employee). The initial client interview serves many purposes, including formal introductions between attorney and client (which can produce a lasting impression), an avenue for obtaining facts about the client's case, and a setting in which to offer advice and alternatives, or a timeline for such advice and alternatives. This discussion will focus upon the second of these stated purposes without minimizing the significance of others.

Counsel should not treat casually the opportunity to learn what the interviewee knows about the matter at hand. Where possible, the interviewee should be instructed to bring all documentation related in any way to the matter. Any such materials should be reviewed with and explained by the interviewee, with emphasis upon their context and the client's intent or understanding.

The interview should be comprehensive, with emphasis upon details concerning the times, dates and participants in, or witnesses to, the events of concern. The attorney should begin to evaluate the facts in the context of legal theories or defenses to ensure that some fundamental factual foundation is presented.

Counsel is cautioned to be aware of the development of the attorney-client relationship with the exchange of information from a potential client. The Rules of the Supreme Court of Kentucky, [Kentucky Rules of Professional Conduct, SCR 3.130 \(1.6\)](#) sets forth the attorney's duty of confidentiality and [SCR 3.130\(1.7\)](#), [\(1.8\)](#), [\(1.9\)](#), [\(1.10\)](#) and [\(1.11\)](#) set forth the rules and duties as it relates to conflicts of interest.

B. Evaluating the Preliminary Law

When counsel has developed a background of factual information from the initial interview, the next essential step is a review of relevant law. The critical research needs at this early stage are the applicability of any statutes of limitation, or other legal deadlines. Thus, several sources should be consulted and carefully reviewed.

The attorney should first examine the official court record, if any. A memorable experience illuminating the importance of the official record occurred a few years ago when opposing counsel appeared on a motion to set aside a default judgment. Based on a runner's review of the file, opposing counsel maintained that the damages the court had fixed were unsupported by the evidence of record. In fact, a hearing of nearly one hour had taken place, which involved live witness testimony and the admission of a stack of exhibits. To avoid being on the receiving end of questions such as the first from the judge -- "Did counsel inspect the file personally?" – The lesson learned is simple: ALWAYS CHECK THE CLERK'S FILE PERSONALLY!

A careful analysis of statutes of limitation must be performed. At this early stage of representation, keep an "open mind" about the applicable statutory provision. Certain legal issues do not fit neatly into the relatively broad, undefined classes of the respective statutes of limitations. For example, liability arising from the furnishing of alcoholic beverages, commonly referred to as "dram shop" liability, has no express limitation in the statutes. Some matters have special statutes of limitations not found in [KRS Chapter 413](#). For example, suits arising under the Motor Vehicle Reparations Act are governed by the limitation provision in that act. Finally, the same facts may support multiple theories of recovery, all of which may have different statutes of limitation.

Common Statutes of Limitations include:

<u>Claim</u>	<u>KRS</u>	<u>Limitations Period</u>
Assault and Battery	§413.140	One year
Bodily Injury (non-MVA)	§413.140	One year
Loss of Consortium	§413.140	One year
Medical Malpractice	§413.140	One year
Malicious Prosecution	§413.140	One year
Libel	§413.140	One year

Defamation	§413.140	One year
Slander	§413.140	One year
Wrongful Death	§413.180	One year*** (See statute)
Bodily Injury from MVA	§304.39-230	Two years*** (See statute)
Damage to Personal Property	§413.125	Two years
Breach of Contracts not in Writing	§413.120	Five years
Trespass on Real or Personal Property	§413.120	Five years
Fraud	§413.120	Five years
Intentional Infliction of Emotional Distress	§413.120	Five years
Bodily Injury Claims against the builder of a home or a person making home improvements	§413.120	Five years*** (See statute)
Statutory Claims	§413.120	Five years
Breach of a Written Contract	§413.090	Fifteen years
Claims for Minors and Incompetents	§413.170	See statute

Counsel should not rely on work done by a previous attorney or an attorney who declined to accept the matter, particularly with respect to opinions regarding statutes of limitation or viability of causes of action. It is not uncommon for prospective clients who are shopping for an attorney, strangely enough, to claim that an attorney who actually declined the matter nonetheless expressed a glowing opinion of the potential claim.

Counsel should then review the [Kentucky Rules of Civil Procedure](#) to learn whether any procedural limits exist that may impose deadlines upon the client. This step is most significant for the client in the posture of defendant or some individual otherwise compelled to respond to a pleading. Defendants are required to appear or file a responsive pleading within twenty (20) days of service of the Complaint. Replies to counterclaims and cross-claims must also be filed within twenty (20) days of service. Additional deadlines may be established by local rules or by explicit order of court.

Jury instructions are a good place for counsel to start in evaluating the nature of the case as well as the elements that will need to be proven at trial. While the court may not require jury instructions to be submitted

until days before trial commences, knowing the elements of your clients' claims and/or defenses from the outset will allow you to better navigate the matter; discovery; motions and pre-trial proceedings.

C. Evaluation of Damages

The third aspect of case evaluation – placing an estimate on damages – is for some the least tasteful and the most difficult. This phase of case evaluation has been too often overlooked. New attorneys, particularly those hoping to build a practice around personal injury cases, should learn to make this a priority.

Several criteria should be considered:

First, counsel should attempt to estimate the actual damages that may be recovered. This requires review of substantive law to learn the items and measures of damages pertinent to the matter. Then counsel should review available supporting information and data like medical records and medical bills; property damage repair estimates; lost income information (days missed from work; sick days used; vacation days used; short term disability benefits; long term disability benefits) and incorporate other facts and data gathered from the initial interview into the legal damages formula.

Second, some value must be estimated for reasonably anticipated litigation expenses. More important still is the anticipated time counsel may invest if the case is tried. Counsel should consider the fee arrangement to be established with the client as well as counsel's ethical obligation to enter into a written fee agreement with a client at the outset of the litigation. If the recoverable damages are not appreciably greater than the combined value of litigation expense and likely fee, the client should be firmly discouraged from pursuing lawyer-assisted litigation.

But, a thorough evaluation of the potential damages does not conclude with legal research on measures of damage and estimates of legal costs. The process also includes some consideration of the party or parties against whom recovery is sought. If all such persons lack the financial soundness or resources to pay an anticipated recovery, the client should be so informed and advised that economic considerations weigh against lawyer-assisted pursuit of the claim. This consideration should take into account, however, the availability of indemnity from various types of insurance coverage and parties who may bear imputed or vicarious liability.

Lastly, a risk/reward calculation should be performed and provided to the prospective client. Many clients new to the legal system are not familiar with the various costs of litigation, in time, money, and anxiety, and many have no idea that counterclaims often result from the filing of the initial complaint. Beware of the client who indicates that a huge cost is an acceptable means to a small recovery or "moral victory." If an apology is what a client is after, there are better ways to accomplish this than filing at

the courthouse. These clients are generally less receptive to reasoned advice and may become a burden on one's practice. Great decisions in one's practice may as often relate to troublesome cases declined as promising cases accepted.

IV. PRETRIAL LITIGATION PROCESS

The litigation process commences with the filing of a complaint and the issuance in good faith of a summons. Responsive pleadings then follow. This chapter does not attempt to give significant treatment to pleadings issues. Persons having an interest in more thorough development are encouraged to review one of several valuable resources such as the Kentucky Practice Series published by West or the UK/CLE two-volume monograph Kentucky Civil Practice before Trial. In addition, the importance of a careful and close reading of the Kentucky Rules of Civil Procedure, and keeping updated on revisions to those rules annually, cannot be overstated.

A. Pleadings Issues

A few practical pleadings issues merit consideration here. First, for many proceedings, particularly in district court, the Administrative Office of the Courts has prepared forms to be used in lieu of formally drawn pleadings. All forms prepared by the Administrative Office of the Courts can be found at <http://courts.ky.gov/resources/legalforms/Pages/default.aspx>. A list of commonly used forms appears in the Appendix (Section VII).

Second, certain theories of recovery – like fraud and mistake – must be pleaded "with specificity." This requirement implies more than a "clear and plain statement," which is sufficient for most claims. Review case decisions to ensure compliance with this requirement, where one of the enumerated theories is involved.

Be alert for possible counterclaims, cross-claims, or the joinder of additional third parties who may bear part or all of the potential liability for asserted claims. Under [CR 12.08](#), certain claims may be barred if not raised in a timely fashion with responsive pleadings.

Finally, if a jury trial is desired, it should be demanded plainly in the caption and in the body of the complaint or the answer. The request for a jury trial will also typically require a higher filing fee. Always be sure to check with the Court you are filing in to determine exactly what fees apply.

B. Jurisdiction and Venue

Jurisdiction and venue considerations are often significant factors in the outcome of litigation. [KRS Chapter 452](#) governs the venue of civil actions. Plaintiffs have some discretion within the law of venue to select a forum for suit. However, this discretion is rebuttable. Defendants who are sued in state court may change the venue where the initial forum is

proved unfair, improper or inconvenient; and they may remove the case to federal court in certain circumstances, within a given time.

C. Discovery

Beyond these preliminary litigation issues, the pretrial discovery process is similar to the case evaluation process. This includes fact gathering, legal research, and motion and pretrial practice. Fact gathering is performed both formally, pursuant to the Civil Rules governing discovery, and informally, where permissible. Effective fact gathering early in the action is imperative, and in almost every conceivable circumstance, should precede the filing of a complaint.

Start with names obtained in the initial interview to obtain statements from each witness identified. Persons having relevant data, tangible evidence, or documentation should be requested to furnish that material, and any relevant documents should be copied.

Interrogatories ([CR 33](#)) and requests for production of documents ([CR 34](#)) should be prepared and served, where possible, with the first pleading. Requests for admission ([CR 36](#)) may also be beneficial to narrow facts and issues. Other discovery can then build upon the information served in response to those requests. Site inspections may be needed ([CR 34](#)) or medical examinations may be helpful. ([CR 35](#)) You may also subpoena relevant records and information from third-parties. ([CR 45](#))

Once all relevant documentation and information has been compiled, depositions of the parties and of relevant witnesses should be taken. ([CR 30](#)) This includes both lay witnesses and expert witnesses.

Discovery may focus upon "any matter," not privileged, which is relevant to the subject matter and which "appears reasonably calculated to lead to the discovery of admissible evidence" even if the matter itself is not admissible. ([CR 26](#)).

D. Legal Research

Legal research is also important. Many of the most successful trial lawyers practice a policy of sufficiently researching their cases at the pleading stage to prepare and understand jury instructions before any discovery begins. While this may seem unreasonably ambitious, it is an excellent system for outlining proof for trial. The research should frame the elements of the theory of recovery or defense. Additional research should be performed on likely evidentiary disputes in preparation for motions *in limine* and a formal motion for directed verdict. The research should be ongoing as facts develop in discovery.

E. Motion Practice

With the great majority of cases settling prior to trial, most of the time spent in the courtroom will be dedicated to pre-trial motion practice. Volumes could be written concerning the broad range of issues for which the court may be asked to rule by means of a motion. The Civil Rules are, for the most part, silent regarding the proper formulation of a motion. This section will discuss a few substantive motions but will focus primarily upon stylistic and procedural suggestions for such motions.

A few motions are so common they may be expected to appear frequently in the litigation process. One such motion is a motion for an enlargement of time pursuant to [CR 6](#). Another frequent motion requests leave to amend a pleading pursuant to [CR 15](#). Counsel often file motions seeking an order compelling late or incomplete discovery responses under [CR 37](#) (or, on the flip side, a motion for a protective order under [CR 26.03](#)). One practical motion available during discovery is a motion to permit service of interrogatories or requests beyond the limit imposed by rule if an agreement among counsel cannot first be reached as to an extension. Another frequent motion requests the docketing of trial or, as many courts prefer, a pretrial conference.

1. Motions for Summary Judgment.

Litigation typically includes at least one party's effort to obtain summary judgment pursuant to [CR 56](#). Summary judgment gained popularity in the 1980s following a trilogy of decisions from the U.S. Supreme Court. In [Celotex Corp. v. Catrett](#), 477 U.S. 317 (1986), and sister decisions, the Supreme Court reestablished the validity of summary judgments according to the original and literal purpose of [Fed. R. Civ. Pro. 56](#). Where a party had adequate opportunity to develop a genuine issue of material fact and failed, the matter is appropriate for summary judgment. Failure to respond with sufficient supporting affidavits to a properly supported motion for summary judgment entitles the moving party to such judgment.

This federal standard gained acceptance as the "new era" of summary judgment practice in Kentucky state courts. However, the Supreme Court of Kentucky rejected the "new era" in [Steevest, Inc. v. Scansteel Service Center, Inc.](#), 807 S.W.2d 476 (Ky. 1991). The [Steevest](#) position was best stated in the following excerpt from that opinion:

We adhere to the principle that summary judgment is to be cautiously applied and should not be used as a substitute for trial. As declared in [Paintsville Hospital](#), it should only be used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce

evidence at trial warranting a judgment in his favor and against the movant."

Thus, even in those cases where summary judgment would appear to be proper, some circuit courts, fearing reversal, are reluctant to test the ominous Steelvest standard and prefer to allow the non-moving party great flexibility until trial to prove the existence of a genuine issue of material fact.

However, there are cases where the facts and information developed in written discovery and depositions, coupled with the relevant case law or statutory support, do warrant summary judgment. And, even if an entire case may not be ripe for summary judgment, portions of a case may be, and partial summary judgment can be granted. When a trial court finds it impossible for a party to produce evidence at trial warranting a judgment in his or her favor, summary judgment is proper. And, when witnesses have been deposed, all relevant evidence and documents have been produced, and full hearing has been held, summary judgment may be obtained. Only disputed material facts can overcome a summary judgment, and "impossible" – as set forth in the Steelvest standard – is to be interpreted in a practical sense, not an absolute sense.

2. Motions *in limine*.

Frequently, before trial, counsel may prepare, and the court may sometimes request, motions *in limine* to obtain a ruling on specified evidentiary issues. The Civil Rules do not provide specifically for these motions. Accordingly, while these motions are intended to aid trial preparation by obtaining early warnings of evidentiary rulings, practices vary widely among jurisdictions such that some courts withhold ruling on them until the day of trial. Investigate the court's typical practice before you put the time in to prepare the motion.

In the absence of uniform guidelines, counsel should follow a simple outline in drafting motions *in limine*:

- a. State anticipated facts, which are the subject of the motion and refer, where possible, to recorded testimony or documentary evidence to accompany or support those facts.
- b. State whether you seek to introduce or exclude the facts.
- c. Present a clear argument supported, where possible, by case authorities and the Rules of Evidence.

- d. Close with a concise statement of how the court should rule, or if necessary, how the testimony should be introduced under a limiting instruction.
- e. Tender a written order, even if not intended for use, as a reminder to obtain a ruling on the record.

Finally, counsel should be aware that the Rules are the beginning of a court's handling of procedural issues, but far from the end. As different referees make different calls using the same rules, judges apply rules as individuals. Moreover, most or all jurisdictions in Kentucky have Local Rules that augment or modify the statewide rules, particularly with respect to docket management, filing requirements, deadlines, and motion practice; therefore, practitioners should pay special attention to these Local Rules before filing a motion. All local rules are available on the [AOC's website](#) and should be reviewed for every case. Do not assume every county utilizes the same rules.

F. Pre-trial Exchanges

Standard pre-trial orders routinely require parties to exchange the names of witnesses and lists of exhibits. Such formal pre-trial compliance should usually be drafted so as to follow some latitude or flexibility, particularly regarding the anticipated testimony of witnesses. However, fair characterizations of witness testimony are recommended to prepare the court for the party's case-in-chief.

Some pre-trial orders specifically request a trial brief, while others do not. Trial briefs should be prepared and filed at or before the time of pre-trial conference and amended as necessary by facts discovered after the pre-trial conference. The trial brief should include a thorough statement of facts, and where numerous witnesses are involved or a number of specialized experts are to testify, the trial brief should categorize the evidence (e.g., Heading A: Accident Evidence; Heading B: Medical Evidence, etc.). Major legal issues should be separately set forth in an "Argument" section. Evidentiary disputes should be included, or motions *in limine* should be incorporated by reference. A thorough trial brief, even if not filed with the court, will give counsel a helpful reference and outline for proof at trial.

Routinely, courts also require parties to provide proposed jury instructions. Lexis Nexis publishes Kentucky Instructions to Juries, authored by Donald Cetrulo, Judge Palmore and Judge Cooper, which is an invaluable resource that should be consulted frequently. If you do not follow Palmore's Instruction templates, courts generally will not accept them.

G. Economical Litigation Docket

Counsel should be aware that certain courts follow the Economical Litigation Docket (ELD) under the Civil Rules. Not all Kentucky courts have adopted the ELD as part of their procedure. However, when the ELD has been adopted, the docket consists of cases falling substantially within the following categories: Contracts, personal injury, property damages, property rights, and termination of parental rights. Practice and procedure for cases on the ELD are governed by [CR 1](#) through [CR 87](#) and by the local rules of the trial court; however, certain rules are modified by [CR 88](#) through [CR 98](#), which relate only to the ELD. The ELD rules place a case on a specific fast-track course for completion and provide for sanctions if a party fails to comply with the rules. Therefore, it is important for all counsel to consult [CR 88](#) through [CR 98](#) when a court is operating under the ELD.

V. TRIAL PROCESS

Only the most fundamental elements of trial process will be discussed in this limited space. Consequently, only those aspects of practical benefit will be addressed here. These include the jury selection process, opening statement, identification and introduction of exhibits and closing arguments. Volumes could be devoted to trial practice alone. You are also encouraged to seek out an experienced and skilled trial lawyer to serve as a mentor.

A. Selecting the Jury

Methods of jury selection vary. On one end of the spectrum, a lawyer's first exposure to potential jurors comes when the clerk or jury administrator calls the names for *voir dire* at the beginning of trial. At the other end of the spectrum, a lawyer employs psychological and sociological experts long before trial and establishes a jury selection committee, all at great cost, to scrutinize each potential juror. Some balance between these two extremes is generally recommended.

The purpose for advance consideration in jury selection is to learn as much about the jury panel as possible. The hope of every trial lawyer is to select the jury that is most favorable to the client. Jury selection also serves to identify those potential jurors who may be predisposed to render a verdict for the opposing party or have some bias adverse to your client.

Some basic information may be obtained from the [jury qualification forms](#) maintained by the clerk or jury administrator. These forms are completed by the jurors and often contain invaluable information (such as the juror's prior involvement in the legal system). Additional information can be gleaned from other lawyers. If available, obtain the jury list and circulate it in your office and request each lawyer to review it. If the case is being tried in another county, ask staff who reside there to review and comment on the list. Contact other trusted lawyers in the forum county and obtain their comments and suggestions. Friendly clerks can sometimes give

significant insights, but attorneys must avoid taking undue advantage of that friendship.

The next significant phase of jury selection is *voir dire*. This process allows counsel to examine each of the prospective jurors. The focus of this examination should be to disclose such bias relevant to the issues, witnesses, parties and counsel as is reasonably ascertainable. The classic example is drawn from criminal cases, where jurors are routinely asked to state whether they oppose the death penalty in capital murder cases.

The trial court has the discretion to conduct the *voir dire* examination itself or to allow the attorneys to do so. [CR 47.01](#). If the court conducts the examination itself, the parties may supplement with further inquiry, as the court deems proper, by either having the attorneys ask additional questions directly to the jury or by having the court ask questions requested by counsel.

In civil cases, jurors may be questioned on such issues as whether they have bias for or against cigarette smoking, whether a chiropractor is as credible as a medical doctor or whether they will assume all contracts must be written. In civil cases, parties have unlimited right to challenge jurors for cause, but each party usually receives only three peremptory strikes. See [KRS 29A.290\(2\)\(a\)](#) and [CR 47.03](#).

It should be remembered that even the best efforts of counsel will by no means guarantee a favorable verdict. Successful verdicts are based more on the credibility or strength of the evidence than the makeup of the jury panel; however, jury selection cannot be ignored or neglected.

B. Opening the Case

The opening statement serves as your first opportunity to tell your client's story. It is an outline for the jury of your client's case and of the evidence you plan to introduce in order to prove and win your case. It is also an opportunity to respond to the opposing party's anticipated case. The most important thing to know about openings is that the weight of authority forbids argument or discussions of the applicable law during an opening statement. Statements in the opening are best framed in the following manner: "The evidence will show [insert matters to be proved]."

The statement should cover all material elements of the *prima facie* case. Some mention should be made of each testifying witness as a preliminary introduction to the jury. The statement should ALWAYS conclude with a specific request for the remedy counsel seeks from the jury. An excellent treatment of opening statements appears in Thomas L. Osborne's [Trial Handbook for Kentucky Lawyers](#).

The opening statement can be a pivotal presentation to the jury. Careful thought and meticulous organization are indispensable. You should establish the theme(s) that will be carried throughout your presentation of

the case and revisited in closing argument. Tell a good story. Give the jury a reason to decide the case in your favor. Set up the narrative you want them to carry with them throughout the trial and back into the deliberation room.

C. Offering Exhibits

Exhibits properly authenticated and offered are competent evidence, entitled to the same weight as witness testimony. Common exhibits include business records, diagrams, charts and photographs. For ease of reference and simple monitoring for the transcript, exhibits must be identified. This function – commonly called "marking" – is sometimes performed by the court reporter or, at other times, in advance of trial by counsel. Many courts require pre-marked exhibits. Pay close attention to local rules and pretrial orders for these particulars.

When the exhibit has been properly marked, it must be offered to a witness for authentication. The witness must be qualified to establish some foundation for the exhibit. This would include acknowledgement of familiarity; description of the exhibit; the custody of the exhibit prior to trial; where the exhibit is a reproduction testimony that the reproduction is fair and complete; and the witness' capacity as preparer or custodian.

Once authenticated with a proper foundation, the exhibit should then be qualified as competent evidence. Exhibits, like witness testimony, must meet the standards of relevancy and materiality. Where the exhibit contains hearsay, the exhibit must satisfy one or more exceptions to the rule excluding hearsay.

When the exhibit is established as authentic and competent, it should then be introduced. Introduction of an exhibit is accomplished generally by motion. The exhibit may be tendered directly to the jury, upon request. This should be avoided where the exhibit is a lengthy document; it may otherwise interrupt the proceedings or may distract jurors from the witness' further testimony. One practical approach may be to establish the foundation of authenticity and competency during the examination, then wait until the witness is finished testifying to introduce the exhibits. The jury then has the opportunity to review the exhibit(s) during a period between witnesses when no other evidence is being offered. Exhibits can be invaluable because they remain in the possession of the jury during verdict deliberations. Witness testimony can rapidly dissipate from memory and jurors otherwise have no permanent record to review. Demonstrative evidence is also significant for persuasion and should be planned carefully.

Excellent resources for all evidentiary issues are found in Robert G. Lawson's [The Kentucky Evidence Law Handbook](#) and in Richard H. Underwood and Glen Weissenberger's [Kentucky Evidence Courtroom Manual](#).

D. Closing the Case

The closing argument is counsel's opportunity to challenge the weight of testimony from adverse witnesses and to promote the quality of the client's case-in-chief. Closing arguments are reminiscent of the opening statement, and tie the theme you started with in that opening together with the evidence and analysis. This is your opportunity to remind the jury what they have been shown throughout the trial and to make your final argument to convince the jury of your perspective and discount that of your opponent.

Not to be ignored, however, are the instructions read by the court to the jury before arguments begin. It is important to stress the law, as furnished in the instructions. The jury instructions are the jurors' roadmap in the deliberation room, and you want to make sure they are fully understood. You will also seek to persuade the jurors that the instructions should be answered in a manner favorable to your client. In short, effective closing arguments incorporate jury instructions.

Obviously, counsel is not given unfettered discretion in their closings. Attorneys may not assert personal knowledge or "state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." [SCR 3.130 \(3.4\)\(e\)](#). But, counsel may comment on the credibility of witnesses without stating a personal opinion, for example by bringing attention to what a contradictory witness has testified to. It is also unethical to attempt to persuade a jury through appeals to racial, religious, ethnic, gender or other forms of prejudice. *Id.* Similarly, no "Golden Rule" arguments may be made; a jury cannot be persuaded to decide a case by placing themselves in the position of one of the litigants nor can considerations outside of the facts and law be used as influence. Appeals to decide solely based upon emotion, sympathy and passion are not proper. Further, attorneys may make reasonable inferences and deductions from the evidence that has been presented, but must be careful not to misstate or mischaracterize evidence.

An illustration of the limits to attorney discretion in closing argument has been discussed by the Supreme Court of Kentucky. The Court soundly criticized a pattern of improper remarks by defense counsel. The following excerpt illustrates the Court's sentiment:

The summation by appellee's counsel consists of sixteen pages in the transcript and hardly a page is without an improper argument or some reference to an extraneous matter such as his own health or age designed to elicit sympathy or inspire prejudice ... When the foregoing rules are applied to the facts presented here, we have no reluctance to presume that the jury's failure to award damages, despite its finding of negligence, was influenced by the improper jury argument.

Smith v. McMillan, 841 S.W.2d 172 (Ky. 1992).

However persuasive, the closing argument should not be relied upon to save victory from the jaws of defeat. But, to discount its potential benefits completely is equally unwise. Unlike the opening statement, trial lawyers do not typically have days or weeks to prepare the closing argument. The argument must be organized and planned as the trial proceeds, and often must be formulated in the moments following the close of proof and the reading of instructions. This facet of trial practice tests the determination and extemporaneous ability of the trial lawyer. Effective preparation of the case before trial, as described above, greatly enhances the persuasive impact of the closing argument.

VI. CONCLUSION

Each litigation experience produces new and practical tips for future litigation. No recommendation or hint is any more valuable, however, than this clichéd bit of advice: READ THE RULES. The familiar phrase, in this case, has become familiar because it is of paramount importance. The practitioner who determines that an examination of the rules is beneath him will usually find himself beneath the rules. The rules of procedure and evidence – and any applicable statutes – should be consulted before any litigation activity is commenced. Never presume you have a full knowledge or understanding of the rules or law. Refer back to the rules and law throughout the process, and keep abreast of the developing law coming from the appellate courts.

Prepare every case as if it's going to trial, not as if it's going to settle, even though most do. You never know which cases will settle and which will go to trial. Approaching a case from the outset as if it is going to go all the way will ensure you are in the best position to serve your client.

VII. APPENDIX

- The AOC online form library is available at <http://courts.ky.gov/resources/legalforms/Pages/default.aspx>. All forms are in PDF format. Below are links to a sample of commonly used forms.
 - Civil Summons AOC-105 – <http://courts.ky.gov/resources/legalforms/LegalForms/105.pdf>
 - Third-Party Summons AOC-120 – <http://courts.ky.gov/resources/legalforms/LegalForms/120.pdf>
 - Subpoena *Duces Tecum* AOC-025 – <http://courts.ky.gov/resources/legalforms/LegalForms/025.pdf>
 - Small Claims Complaint AOC-175 – <http://courts.ky.gov/resources/legalforms/LegalForms/175.pdf>
 - Small Claims Counter-Claim AOC-185 – <http://courts.ky.gov/resources/legalforms/LegalForms/185.pdf>

- Small Claims Summons AOC-180 –
<http://courts.ky.gov/resources/legalforms/LegalForms/180.pdf>
 - Forcible Detainer Complaint AOC-216 –
<http://courts.ky.gov/resources/legalforms/LegalForms/216.pdf>
 - Eviction Notice -- Warrant for Possession AOC-220 –
<http://courts.ky.gov/resources/legalforms/LegalForms/220.pdf>
 - Kentucky Court of Appeals Civil Appeal Prehearing Statement –
<http://courts.ky.gov/resources/legalforms/LegalForms/070.pdf>
- Kentucky's Constitution may be found at
<http://www.lrc.ky.gov/Legresou/Constitu/list1.htm>
 - Kentucky statutes can be found on the LRC's website at
<http://www.lrc.ky.gov/Statutes/index.aspx>
 - Kentucky regulations can be found on the LRC's website at
<http://www.lrc.ky.gov/kar/frntpage.htm>
 - Kentucky Attorney General Opinions can be found at
<http://ag.ky.gov/civil/civil-enviro/opinions/Pages/default.aspx>
 - Attorney Ethics Opinions can be found on the KBA website at
<http://www.kybar.org/?page=opinsethics>
 - Contacts for the KBA Ethics Hotline may be found at
<http://www.kybar.org/page/scdistricts>
 - Kentucky Circuit and District Court dockets can be found on the AOC website at
<http://kcoj.kycourts.net/dockets/>
 - Kentucky Local Rules of Practice can be found on the AOC website at
<http://courts.ky.gov/Pages/localrules.aspx>
 - E-filing is available and Kentucky Circuit and District Court cases may be searched on CourtNet from the AOC's website at
<https://kcoj.kycourts.net/CourtNet/>
 - Kentucky Supreme Court and Court of Appeals case step sheets can be found at
http://apps.courts.ky.gov/Appeals/COA_Dockets.shtm
 - A Basic Appellate Practice Handbook is found on the AOC website at
<http://courts.ky.gov/resources/publicationsresources/Publications/P56BasicAppellatePracticeHandbook.pdf>
 - Checklists for Briefs in the Kentucky Court of Appeals are found on the AOC website at
<http://courts.ky.gov/courts/coa/Pages/checklistsforbriefs.aspx>

- Kentucky Supreme Court and Court of Appeals briefs may be found on the NKU Chase College of Law website at http://chaselaw.nku.edu/new/library/electronic_resources/briefs_search.php
- Kentucky Supreme Court Minutes are posted on the AOC website at <http://courts.ky.gov/courts/supreme/Pages/SupremeCourtMinutes.aspx>
- Kentucky Court of Appeals Minutes are posted on the AOC website at <http://courts.ky.gov/courts/coa/Pages/minutes.aspx>
- Kentucky Supreme Court Oral Arguments Calendars are posted on the AOC website at <http://courts.ky.gov/courts/supreme/Pages/OralArgumentsCalendar.aspx>
- Live streaming of Kentucky Supreme Court Oral Arguments may be watched when court is in session at <http://courts.ky.gov/courts/supreme/Pages/OralArguments.aspx>
- Kentucky Court of Appeals Oral Arguments Calendars are posted on the AOC website at <http://courts.ky.gov/courts/coa/Pages/oralargumentscalendar.aspx>
- Kentucky Judicial Circuit Map is found on the AOC website at http://courts.ky.gov/resources/publicationsresources/Publications/P107KYJudicialCircuitsMap85x14_211web.pdf
- Kentucky Supreme Court and Court of Appeals District Map is found on the AOC website at <http://courts.ky.gov/resources/publicationsresources/Publications/P103SupremeCtandCOAFacemap.pdf>
- Kentucky Secretary of State information is accessible at <http://www.sos.ky.gov/Pages/default.aspx>
- Kentucky Department of Insurance information is accessible at <http://insurance.ky.gov/>
- Kentucky Office of Workers' Claims is accessible at <http://www.labor.ky.gov/workersclaims/Pages/Department-of-Workers'-Claims.aspx>

TRIAL CHECKLIST

(subject to revision for compliance with Court Scheduling Orders and deadlines)

90 DAYS BEFORE TRIAL:

- Assemble trial team
- Review Order or Local Rules to ensure calendaring and compliance with all pre-trial deadlines
- Determine division of labor amongst trial team and assign tasks and responsibilities
- Prepare complete "to do" list of all trial preparation
- Confirm all clients, witnesses and experts are available and prepared to attend trial
- Review pleadings and prepare any necessary amendments
- Review written discovery
 - Supplement any necessary responses for your client
 - Review opposing party responses and follow-up on any deficient responses or missing information
 - Is there any additional discovery to be completed prior to trial?
 - Ensure full, up-to-date records are in your possession
- Prepare update to client outlining pretrial preparations and anticipated budget through trial
- Prepare lay witnesses
 - Ensure availability for trial
 - Prepare for direct and cross examination
 - Review prior testimony and relevant exhibits
- Prepare your expert witnesses
 - Ensure availability for trial
 - Prepare for direct and cross examination
 - Review prior testimony and relevant exhibits
 - Provide any additional relevant records or testimony
 - Supplement any necessary expert reports
- Prepare for attack of opposing expert witnesses
 - Prepare any Daubert challenges or *Motions in Limine* regarding testimony
 - Secure/update any impeachment materials
- Review jury instructions and burden of proof
- Review elements of proof and prepare checklist of how each element will be proven
- Prepare witness and exhibit lists
- Focus trial themes
- Update any legal research
- Prepare dispositive motions, if not already done
- Prepare or update relevant chronologies/timelines
- Review and summarize witness and party depositions and prepare cross-examination outlines
- Consider mock jury presentation, if warranted
- Consider mediation or informal settlement talks

60 DAYS BEFORE TRIAL:

- Re-visit and re-confer with trial team on division of labor and assignment of tasks and responsibilities
- Review and update "to do" list of all trial preparation
- Maintain communication with clients, necessary witnesses and experts
- Continuing updates to client outlining pretrial activity and any revisions to budget through trial
- Review and refine direct examination of witnesses
- Review and refine cross examination of witnesses
- Review and refine presentation of evidence and checklist against elements of proof and jury instructions
- Continue development of trial themes
- Update any legal research
- Plan for any technology or demonstrative exhibits to be used at trial
- Prepare any travel arrangements or accommodations for trial
- Prepare *Motions in Limine*
- Prepare subpoenas
- Review juror qualification forms (if available) and conduct juror research
- Prepare required pretrial filings in advance of Final Pre-Trial Conference
 - Witness List
 - Exhibit List
 - Objections to Deposition Testimony
 - Jury Instructions
 - Pre-Trial Memo
- Confer with opposing counsel regarding any stipulations that may be reached
- Prepare exhibits and demonstrative aids
- Authenticate records

30 DAYS BEFORE TRIAL:

- Organize trial notebook
- Prepare research binder for anticipated legal issues
- Visit courtroom; check technology to ensure it works as you plan to use it and get a feel for courtroom set up and anticipated presentation to jury
- Have all exhibits ready and authenticated
- Prepare *voir dire* questioning and ideal juror profile
- Prepare opening statement
- Prepare client and witnesses for direct examination and for anticipated cross examination
- Prepare cross examination of opposing witnesses
- Prepare closing argument
- Conduct focus groups
- Prepare for likely objections

DRIVING UNDER THE INFLUENCE LAW
HOW TO SUCCESSFULLY DEFEND A DRIVING UNDER THE INFLUENCE CASE

Ryan M. Beck and Wil M. Zevely

I. IMPORTANT CASES

- A. Adams v. Commonwealth, 275 S.W.3d 209 (Ky. App. 2008). This case defines what is meant by motor vehicle. The case holds that a vehicle is a means of transporting persons or property. If it has a motor, it is a motor vehicle.
- B. Ballinger v. Commonwealth, 459 S.W.3d 349 (Ky. 2015). This case overruled Commonwealth v. Beard, 275 S.W.3d 205 (Ky. App. 2008). Ballinger had a prior DUI conviction. Thereafter, he received two more DUI charges. While the latter two were pending, he received another DUI charge. The last DUI charge was listed as a second. Thereafter, he plead guilty to the middle two DUIs. The last DUI, which was charged as a second, was indicted as a fourth offense by the grand jury. The Kentucky Supreme Court held, on DUI cases, because of the statute, Kentucky is NOT a conviction to offense date state for enhancement purposes. The court must look at prior convictions at plea date to determine any appropriate enhancements. At conviction, Ballinger had three prior convictions.
- C. Elery v. Commonwealth, 368 S.W.3d 78 (Ky. 2012). This case seems to suggest the limitation on the admissibility of a PBT is on the Commonwealth and not the defense. PBT numbers that are favorable to the defendant may be admissible under this case.
- D. Rogers v. Commonwealth, 315 S.W.3d 303 (Ky. 2010). As stated by the Court in this case, "As differentiated from defining reasonable doubt, we have more recently held that attempts to show what reasonable doubt is not do not violate the rule against defining reasonable doubt."
- E. Commonwealth v. Davis, 25 S.W.3d 106 (Ky. 2000), *abrogated by Commonwealth v. Carman*, 455 S.W.3d 916 (Ky. 2015) (prosecution cannot initiate a request for the Supreme Court to certify a law.) This case involved a Campbell County Intoxilyzer. The machine had a number of out of tolerances over a number of different time periods. All the time periods were close in time to the date of the defendant's test. On the day of the test, there were no out of tolerances and the machine had a calibration check within the requirements. The Supreme Court held that if the machine was working properly on the day of the test, the results were admissible even though the machine did not work properly at other times. The problems with the machine went to the weight, not the admissibility of the result. The machine is working properly if the testing unit and the calibration unit are in proper working order on the day of the test. The

testing unit (the Intoxilyzer) is in proper working order if the accuracy of the machine is established before and after the subject test.

- F. Commonwealth v. House, 295 S.W.3d 825 (Ky. 2009). This is a DUI case where a subpoena *duces tecum* under [R.Cr. 7.02\(3\)](#) was issued to CMI, the manufacturer of the Intoxilyzer 5000 EN. The subpoena required the production of the computer's source codes. The source codes are the programs the computer uses to interpret data obtained in analyzing the defendant's breath sample. The Commonwealth and CMI objected to the subpoena and moved to quash. During the hearing, the defendant put on a computer software engineer who testified that if the source codes for the instrument were produced, he could examine the codes for any "bugs" or "flaws" in the code's logic which may be contained therein and which, as a result, MAY produce an inaccurate blood alcohol reading. The expert did not testify he knew of any errors or flaws or had any knowledge of any defects in the machine. The Supreme Court reversed the Court of Appeals and disallowed the issuance of the subpoena. The Court relied, in part, on [U.S. v. Nixon](#), 418 U.S. 683 (1974). That case held a four part test would be used in determining whether or not a defendant is entitled to production of the subpoenaed material prior to trial. The moving party must show:

1. The documents are evidentiary and relevant;
2. That they are not otherwise producible reasonably in advance of trial by exercising due diligence;
3. That the party cannot properly prepare for trial without such production and inspection in advance of trial;
4. That failure to obtain such inspection may tend unreasonably to delay the trial; and,
5. That the application is made in good faith and is not intended as a general fishing expedition.

The Supreme Court held that a subpoena is unreasonable if the party demanding the production can point to nothing more than hope or conjecture that the subpoenaed material will produce admissible results. The Court stated the subpoena was nothing more than a classic fishing expedition. This issue is not dead. It is well-known that the mouth alcohol safety aspect of the Intoxilyzer is defective. The Intoxilyzer is also susceptible to interference from other volatile organic compounds. These could include acetone, paint vapors, cleaning fluids, or other similar organic compounds. These issues were not before the Court. It would be much easier to show that the source codes are flawed, as they certainly are, as the codes pertain to these areas of the machine.

- G. Commonwealth v. Lamberson, 304 S.W.3d 72 (Ky. App. 2010). In this DUI case, the attorney for the defendant pled him guilty to DUI in his

absence. The written paperwork that was produced at the plea showed a knowing, voluntary, and intelligent plea and waiver of his constitutional rights. This was the standard DUI guilty plea form. There was not, however, a written waiver of the defendant's right to be present under [R.Cr. 8.28\(4\)](#). The Court held that the conviction was defective; however, the Court went on to say that if prior DUIs are going to be attacked under Boykin issues, the attack must be done at the first opportunity. In this case, the defendant had been convicted with an enhanced penalty using the defective DUI plea in a subsequent case. The prior DUI had not been attacked in that case. The Court held his right to attack the prior DUI was waived as he had not attacked it at the first opportunity.

- H. Commonwealth v. Long, 118 S.W.3d 178 (Ky. App. 2003). This case set forth standards required by the police in reference to the rights of the defendant in obtaining his own test after taking all of the requested tests by the Commonwealth. The case basically holds that the cop must use reasonable efforts to allow the defendant to obtain his test. The effects of this case under the new Drug Driving Bill may present a problem for the Commonwealth.
- I. Commonwealth v. Mattingly, 98 S.W.3d 865 (Ky. App. 2002). This case involved a *per se* prosecution. Only the number was prosecuted. In this case, the Court would not allow any evidence in reference to field sobriety test results or the number and timing of drinks. The Appellate Court reversed, holding that this evidence is admissible as circumstantial evidence that the machine was not working correctly. Hence, someone who does well on field sobriety testing may introduce the results to show that the machine is wrong. Also, the number and timing of drinks may be introduced for the same purpose.
- J. Ferguson v. Commonwealth, 362 S.W.3d 341 (Ky. App. 2011). This case deals with the implied consent statute and a person's right to call a lawyer. The defendant had her cell phone with her attorney's number programmed in it. A jail policy precluded the use of cell phones. The cop would only allow the defendant to make a collect call and would not allow her to even use her cell phone to get the attorney's number. The appellate court held the cop's conduct was not reasonable *citing Long (supra)*. The cop should have allowed the defendant to retrieve the phone number and to call.
- K. Greene v. Commonwealth, 244 S.W.3d 128 (Ky. App. 2008). In this case the defendant was charged as a fourth offense DUI. The case held that the PBT is inadmissible in any trial pursuant to [KRS 189A.104 \(2\)](#). The case went on to state that the PBT would be admissible, but only for the purposes of showing probable cause. In that instance, the number is not admissible, only the fact that the machine showed the presence of alcohol.

- L. Hardin v. Commonwealth, 2007 WL 79055 (Ky. App. Jan. 12, 2007) (opinion ordered not to be published). Field sobriety testing, as it stands, is admissible under KRE 701, not KRE 702. The difference is lay opinion versus expert testimony. The National Highway Traffic Safety Administration (NHTSA) standard tests are not Daubert qualified. A police officer can only testify as to what he asked the defendant to do and what the defendant did. He cannot testify as to pass/fail, indicators, or anything to do with scientific aspects of these tests.
- M. Lopez v. Commonwealth, 173 S.W.3d 905 (Ky. 2005). This is Kentucky's landmark decision on relation back. The case holds that the jury must be instructed that to find guilt the defendant must be 0.08 or above at the time of operation. The test must be administered, to be admissible in *per se* prosecutions, within two hours of operation. If this time period is stipulated, it need not be in the instructions. Do not let the prosecution argue that all they have to do to prove guilt is to show that the test was given within two hours and the defendant was a 0.08. Also, the case holds no expert is needed to prove and argue relation back.
- N. Wells v. Commonwealth, 709 S.W.2d 847 (Ky. App. 1986). This is Kentucky's landmark decision on what constitutes operation or physical control of a motor vehicle under the Kentucky DUI statute. The case holds that factors to be considered are as follows:
1. Whether or not the person in the vehicle was asleep or awake;
 2. Whether or not the motor was running;
 3. The location of the vehicle and the circumstances bearing on how the motor vehicle arrived at that location;
 4. The intent of the person behind the wheel.
- O. Commonwealth v. Armstrong, 2013 WL 645979 (Ky. App. Feb. 22, 2013) (ordered not to be published). Passed out in lot at Fourth Street Live. Foot on accelerator, engine revving. Parked legally – doors locked. One hand on wheel – other on shifter. Reviews and approves Wells v. Commonwealth, 709 S.W.2d 847 (Ky. App. 1986) – Starting vehicle not enough.
- P. Commonwealth v. Bedway, 466 S.W.3d 468 (Ky. 2015). "Reasonable accommodations" must be made by arresting officer to allow accused right to attempt to contact an attorney. Sets forth list of factors to consider. (Calling daughter on cell at 5:45 a.m. to get attorneys phone number is allowed; cell phone = phone book; a phone that allows collect calls only is an impermissible limitation – suppressing BA proper – Ferguson v. Commonwealth, 362 S.W.3d 341 (Ky. App. 2011)). Automatic suppression of test results not appropriate remedy unless

officer deliberately disregarded statute or accused suffered prejudice – Copley v. Commonwealth, 361 S.W. 3d 902 (Ky. 2012).

- Q. [Missouri v. McNeely](#), 133 S.Ct. 1552 (2013), Natural dissipation of alcohol in blood is not an exigent circumstance in every case.
- R. Commonwealth v. Duncan, 483 S.W.3d 353 (Ky. 2015). "[W]hen a law enforcement officer has reasonable grounds to believe that a driver is operating a motor vehicle under the influence of alcohol, that officer may request that the driver submit to a blood test in order to determine the driver's BAC. The officer is under no obligation to administer a breathalyzer test prior to the admission of the blood test. Our holding is supported by the plain language of [KRS 189A.103](#) and Beach, 927 S.W.3d 826."

II. THEORY AND THEMES

- A. How Can You Advance Your Theory of the Case?
- B. What Is Your Plan?
 - 1. What is your story of innocence?
 - 2. What is your theory of the case?

III. DISCOVERY – THE KEY TO SUCCESS

- A. Avenues to Obtain Discovery
 - 1. Discovery by the rules.
 - 2. Statement of witnesses.
 - 3. Videos.
 - 4. Motions to suppress.
 - a. The stop – driving.
 - b. The arrest – field sobriety tests.
 - c. B.A.
- B. Motions to Suppress – Why?
 - 1. Learn about driving – stop.
 - 2. Learn about tests – p/c to arrest.

3. Learn about BA – problems.
4. A record for cross examination and impeachment.
5. Under [RCr 8.18](#) motion to suppress must be made pretrial.
6. Under [RCr 8.27\(2\)](#) hearing must be before trial.

C. Motions to Suppress

1. Is the stop valid?
 - a. Weaving.
 - i. [U.S. v. Freeman](#), 209 F.3d 464 (6th Cir. 2000).
 - ii. [U.S. v. Smith](#), 799 F.2d 704 (11th Cir. 1986).
 - b. Statutory violation.
 - c. Pre-textual stops are valid.
 - [Whren v. U.S.](#), 517 U.S. 806 (1996)
 - d. Caretaker function.
 - [Poe v. Com](#), 169 S.W.3d 54 (Ky. App. 2005)
2. Is the intrusion valid?
 - a. What right to give field tests in minor traffic stops?
 - b. [State v. Dixon](#), 2000 WL 1760664 (Ohio App. 2000).
 - c. [State v. Taylor](#), 444 N.E.2d 481 (Ohio App. 1 Dist. 1981).
 - d. [Garcia v. Commonwealth](#), 185 S.W.3d 658 (Ky. App. 2006).
 - e. Adults different than <21.
3. Is there probable cause to arrest?
 - a. Field test.
 - b. Speech.
 - c. Driving.
 - d. Smell of alcohol.

4. What right to do the breathalyzer or blood?
 - a. Reasonable grounds to believe DUI – [189A.103\(3\)](#).
 - b. Implied consent – probable cause.
5. Suppress Breathalyzer.
 - a. Operator at BA room twenty minutes – [189A.103](#).
 - Personal observation
 - b. Operator certified every two years – [189A.103](#).
 - c. Follow administrative regulations – [500 KAR 8](#).
 - d. Follow manufacturer's instructions – [189A.103](#).
 - e. Test within two hours of operation.
 - f. If BA machine is working the day of the test – test is admissible – Commonwealth v. Davis, 25 S.W.3d 106 (Ky. 2000), *abrogated by* Commonwealth v. Carman, 455 S.W.3d 916 (Ky. 2015) (prosecution cannot initiate a request for the Supreme Court to certify a law.)
 - i. Simulator must work day of test.
 - ii. Intoxilyzer must be accurate $\pm .005$ on the day of service before and after test.

D. Dealing with PBT

1. Greene v. Com, 244 S.W.3d 128 (Ky. App. 2008).
 - a. PBT not admissible at trial.
 - b. PBT admissible for probable cause.
 - c. PBT must be properly administered.
 - d. Number not admissible.
2. [KRS 189A.104](#) – PBT not admissible.
3. PBT may be admissible in trials not involving DUI.
 - Allen v. Com., 817 S.W.2d 458 (Ky. App. 1991)

IV. WAYS AROUND THE BLOOD ALCOHOL NUMBER

- A. Relation Back – Lopez v. Commonwealth, 173 S.W.3d 905 (Ky. 2005)
- B. BA Wrong
 - 1. Field tests good.
 - 2. Good driving.
 - 3. BA wrong – number of drinks unequal to test result.
 - 4. Machine errors from temperature, hematocrit and breathing patterns.
 - 5. Interferent – Volatile organic solvents.
 - a. Paint.
 - b. Ketones.
 - c. Cleaning fluids.
 - d. Source code; Commonwealth v. House, 295 S.W.3d 825 (Ky. 2009).
- C. Wreck with Airbag Deployment – Talcum Powder Affects BA
- D. Mouth Alcohol
 - 1. Substances and other things in mouth.
 - a. Cavities.
 - b. Plates.
 - c. Chewing tobacco.
 - d. Acid reflux.
 - e. Burp or sick at stomach.
 - 2. Intoxilyzer will not fix this problem even though maker claims it will.
 - Source code; Commonwealth v. House, 295 S.W.3d 825 (Ky. 2009)

3. The slope detector does not always detect the presence of mouth alcohol.
 - a. The Champion March 2006.
 - b. Journal of Forensic Sciences, Vol. 37 No.4, July 1992, pp. 999-1007.

The chart below shows estimated blood-alcohol levels for different body weights and number of drinks. This is a general rule for the average person; however, this may vary when measured by certified instruments.

Estimated % of Alcohol in the Blood by Number of Drinks in Relation to Body Weight

Body Wt.	Number of Drinks — % Blood-Alcohol											
	1	2	3	4	5	6	7	8	9	10	11	12
100 lb.	.03	.07	.11	.15	.18	.22	.26	.30	.33	.37	.41	.45
120 lb.	.03	.06	.09	.12	.15	.18	.21	.25	.28	.31	.34	.37
140 lb.	.02	.05	.08	.10	.13	.16	.18	.21	.24	.26	.29	.32
160 lb.	.02	.04	.07	.09	.11	.14	.16	.18	.21	.23	.25	.28
180 lb.	.02	.04	.06	.08	.10	.12	.14	.16	.18	.20	.22	.25
200 lb.	.01	.03	.05	.07	.09	.11	.13	.15	.16	.18	.20	.22
220 lb.	.01	.03	.05	.06	.08	.10	.11	.13	.15	.17	.18	.20
240 lb.	.01	.03	.04	.06	.07	.09	.10	.12	.14	.15	.17	.18

HAS DRINKING MADE YOU AN ILLEGAL DRIVER?
 Percent of blood alcohol can be estimated by counting your drinks?
 (1 drink = 1 oz. 100 proof whiskey, or 12 oz. beer or 4 oz. 12% wine)

Under Number of Drinks and opposite Body Weight, find the % of blood-alcohol listed on the chart above. Subtract from this number the average % of alcohol "burned up" (1 drink per hour) since your first drink.

Example: 180 lb. man — 7 drinks in 4 hours
 7 minus 4 = 3 drinks or .06% BAC

CAUTION: This is a mathematical calculation. Many factors influence the effect of alcohol on different people and the same person at different times.

How To Control Your Drinking.
 If you plan to drink, you can control the effects by:

- **SPACING OUT YOUR DRINKS.** Do not drink more than one drink an hour. This keeps alcohol from building up in your blood.
- **KNOWING WHAT YOU ARE DRINKING.** People who mix drinks often put in more than one ounce. One cocktail may have as much alcohol as two drinks. Know how much is in your drink.
- **EATING FOOD.** Food in your stomach slows down how fast alcohol gets into your blood. Eat before you drink and while you are drinking.

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Relationback Chart

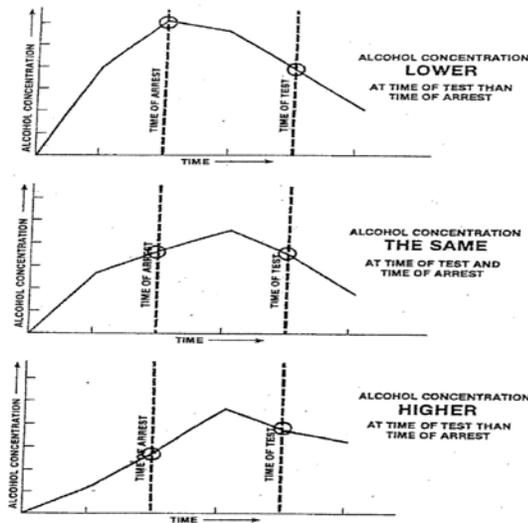


FIGURE 7: THREE POSSIBLE RELATIONSHIPS BETWEEN ALCOHOL CONCENTRATION AT TIME OF TEST VS. TIME OF ARREST

E. Discovery for Intoxilyzer (Instrument not in proper working order)

1. Downloads.
2. Maintenance records.
3. Service records.
4. Log book.
5. History of machine.



Kentucky State Police Forensic Laboratory
 100 Sower Blvd, Suite 102
 Frankfort, Ky 40601
 (502) 564-5230

B. City Jail
 6/10/13 - 7/10/13
 283
 installed into serv. 6/11/13

I-5000EN Subject Test Results

TestTime	TZ	TestDate	SubName	OpriName	OfficeName	Agency	Citation	ReportNum	OffNum	Sex	Race	DuRR	Ethnic	Rept	Test1	Test2	Cal	Serial	
13:43	EDT	06/10/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0610131586	KYO	Male	W	N	NH	000	000		.083	68-011321	
13:51	EDT	06/10/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0610131586	KYO	Male	W	N	NH	RF1	RF1		.083	68-011321	
13:55	EDT	06/10/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0610131586	KYO	Male	W	N	NH	ABT	ABT		.082	68-011321	
14:03	EDT	06/10/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0610131586	KYO	Male	W	N	NH	000	000		.082	68-011321	
02:13	EDT	06/17/2013	MARTIN,ANDREW.A	KEIPERT,JASON	KEIPERT,JASON	BOONE CO SO	EM47025	13008405	KY0080000	Male	W	Y	NH	233	233		.079	68-011321	
04:33	EDT	06/17/2013	HUTH,SAMANTHA,S	RILEY,SAMANTHA,J	RILEY,SAMANTHA,J	FLORENCE PD	B,852249	13008405	KY0080200	Female	W	Y	NH	USR	USR			68-011321	
04:38	EDT	06/17/2013	HUTH,SAMANTHA,S	RILEY,SAMANTHA,J	RILEY,SAMANTHA,J	FLORENCE PD	B,852249	13008405	KY0080200	Female	W	Y	NH	USR	USR			68-011321	
16:13	EDT	06/19/2013	TEER,CHARLOTTE.A	HUFF,JEROME,R	HUFF,JEROME,R	BOONE CO SO	EM52527	13008470	KY0080000	Female	W	Y	NH	USR	USR			68-011321	
01:01	EDT	06/20/2013	HALFIN,KENIA,S	HEHMAN,DAVE,P	HEHMAN,DAVE,P	BCSD	EM38312	13008540	KY0080000	Female	W	Y	H	131	131		.081	68-011321	
03:05	EDT	06/20/2013	TOLENTINO,ANGEL	LEONE,THOMAS,A	LEONE,THOMAS,A	FLORENCE POLICE	BL91042	13008540	KY0080200	Male	W	Y	H	MOA	MOA		.085	68-011321	
03:28	EDT	06/20/2013	TOLENTINO,ANGEL	LEONE,THOMAS,A	LEONE,THOMAS,A	FLORENCE POLICE	BL91042	13008540	KY0080200	Male	W	Y	H	USR	USR			68-011321	
17:38	EDT	06/21/2013	HOMER,RYAN,T	DOVER,BRETT,M	DOVER,BRETT,M	BOONE CO SHERIFF	EM141520	13008637	KY0080000	Male	W	Y	NH	USR	USR			68-011321	
17:38	EDT	06/21/2013	HOMER,RYAN,T	DOVER,BRETT,M	DOVER,BRETT,M	BOONE CO SHERIFF	EM141520	13008637	KY0080000	Male	W	Y	NH	USR	USR			68-011321	
08:52	EDT	06/25/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0625131586	KYO	Male	W	N	NH	000	000		.079	68-011321	
09:31	EDT	06/25/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0625131586	KYO	Male	W	N	NH	RF1	RF1		.081	68-011321	
00:08	EDT	06/25/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0625131586	KYO	Male	W	N	NH	ABT	000	ABT		.082	68-011321
09:44	EDT	06/25/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0625131586	KYO	Male	W	N	NH	000	000		.079	68-011321	
02:43	EDT	06/22/2013	CARLOTTA,KIMBERLY,R	BOWLING,DUSTIN,J	BOWLING,DUSTIN,J	BOONE COUNTY SHERIFF	EM49290	13008935	KY0080000	Female	W	Y	NH	USR	USR			68-011321	
02:52	EDT	06/22/2013	CARLOTTA,KIMBERLY,R	BOWLING,DUSTIN,J	BOWLING,DUSTIN,J	BOONE COUNTY SHERIFF	EM49290	13008935	KY0080000	Female	W	Y	NH	USR	USR			68-011321	
05:28	EDT	07/04/2013	JOHNSON,JONATHAN,E	CROWDER,RICHARD,A	CROWDER,RICHARD,A	BOONE COUNTY SHERIFF	EM49581	13009328	KY0080000	Male	W	Y	NH	178	178		.080	68-011321	
00:16	EDT	07/09/2013	BEARTON,ROBERT,M	EVANS,STEVE,D	EVANS,STEVE,D	BOONE CO SO	EM43103	13009424	KY0080000	Male	W	Y	NH	089	089		.082	68-011321	
14:19	EDT	07/09/2013	BOLING,MASON,E	HALL,CHRISTOPHER,M	HALL,CHRISTOPHER,M	BOONE CO S.O.	EM47843	13009454	KY0080000	Male	W	Y	NH	.191	.191		.080	68-011321	
01:17	EDT	07/07/2013	THOMASON,PHILLIP,A	STRUCKE,JARROD,M	STRUCKE,JARROD,M	BOONE CO S.O.	EM178434	13009474	KY0080000	Male	W	Y	NH	USR	USR			68-011321	
01:20	EDT	07/07/2013	THOMASON,PHILLIP,A	STRUCKE,JARROD,M	STRUCKE,JARROD,M	BOONE CO S.O.	EM178434	13009474	KY0080000	Male	W	Y	NH	USR	USR			68-011321	
08:49	EDT	07/16/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0716131586	KYO	Male	W	N	NH	000	000		.081	68-011321	
08:52	EDT	07/16/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0716131586	KYO	Male	W	N	NH	USR	USR			68-011321	
08:53	EDT	07/16/2013	TEST,TEST,T	TEST,TEST,T	TEST,TEST,T	KSP	0	0716131586	KYO	Male	W	N	NH	USR	USR			68-011321	

15/4

BREATH ALCOHOL LOG

A	B	C	D	E	F	G
SERIAL NUMBER	CITATION NUMBER	SUBJECT'S NAME OPERATOR LICENSE NUMBER	DATE TIME	ALCOHOL RESULT	ARRESTING OFFICER TESTING OPERATOR	SERVICE COMMENTS (TECHNICIAN USE ONLY)
1	68-011321	8191042 Angel Talentino KY T3364213	6/20/13 0305	Invalid Sample	T. Leone #70	
2	68-011321	8191042 Angel Talentino KY T3364213	6/20/13 0329	Invalid Test	T. Leone #70	
3	68-011321	BM41520 Horse, RYAN J. KY Hoo-359-475	06/21/13 1736	INVALID TEST	B. Dore #3769	
4	68-011321	BM41520 Horse, RYAN J. KY Hoo-359-405	06/21/13 1738	" "	B. Dore #3769	
5	68-011321	N/A Kearney Services	06/25/13 08:45	ALL TESTS O.K.	Paul W. Lee UNIT 1586	Instrument is operating properly 0.081 0.2323
6	68-011321	BL5930 Carroll, Kimberly R. KY CAS-003-402	06/27/2013 0247	Invalid Test	D. Bowling 3749	
7	68-011321	BL5930 Carroll, Kimberly R. KY CAS-003-402	06/27/2013 0252	Invalid Test	D. Bowling	
8	68-011321	BM49956 Johnson, Jonathan E. KY J00-492-004	7/4/13 0925	0.178	J. C. Crowder 3719	
9	68-011321	BM49303 Braeton, Robert M. KY 893-561-380	7/6/13 0851	0.089	Steve Evans 3744	
10	68-011321	BM47843 Boling, Mason E. KY B78-071-088	7/8/13 1419	0.191	Sgt. Chris M. Hale 3702	
11	68-011321	BM78494 Thomason, Phillip A. KY T11-209-964	07/01/13 0118	Invalid Test	J. Strucke 3712	
12	68-011321	BM78434 Thomason, Phillip A. KY T11-209-964	7/2/13 0121	" "	J. Strucke 3712	
13	68-011321	N/A Follow-up on Service Complaint - Not Working	07/02/13 08:40	Taken out of service	Paul W. Lee UNIT 1586	Instrument removed from site due to unable reference
14	68-016495	N/A Louisiana Services Installation of Instrument	07/02/13 09:10	ALL TESTS O.K.	Paul W. Lee UNIT 1586	Instrument is operating properly 0.081 0.2323

V. VOIR DIRE

A. Purposes of Voir Dire

1. Learn.
2. Educate – relation back.
3. Introduce your theory.
4. Inspire jurors to care about your theory.
5. Find jurors who can buy your story.
6. Humanize client.
7. Make jury step into client's shoes.
8. Challenge for cause.

B. Basic Thoughts

1. Don't talk.
2. Listen.

3. Look for bad jurors.
 4. Don't look for good jurors.
 5. What do you want jurors to think about?
 6. How do you make jurors solve your problems?
 7. Theory of the case.
 - a. What things exist that show sobriety?
 - b. What is your story of innocence?
 - c. How are you going to sell it?
 - i. Is it relation back?
 - ii. Is it machine not right?
 - iii. Refusal?
 8. How can you advance your case with the cop?
 9. Plan your use of the cop.
 - a. Can you impeach him?
 - b. Can you show he is a liar?
 - c. Can he be your friend?
 - d. The jury will judge your treatment of the cop.
 10. *Voir dire*.
 - a. Must deal with cross on *voir dire*.
 - b. Will people buy what you are selling?
 - c. How do jurors feel about cops?
- C. Communication Style of the Storyteller
1. Give up control to the juror.
 2. Take advantage of primacy and recency.

3. No legalese or jargon.
 4. Use simple language.
 5. Do not lecture – Teach your theory.
 6. Do not try to change the juror's opinions.
 7. Be yourself.
- D. Yes & No Questions
1. Allows you to talk to every juror.
 2. You must question each juror.
 3. Expand areas of questioning.
 4. Make every juror answer the question.
 5. Remember you learn nothing with yes/no questions.
- E. The Storyteller Uses Open Ended Questions
1. An open ended question is one that cannot be answered yes or no.
 2. A closed ended question can only be answered yes or no.
 3. Good:
 - a. How do you feel about . . .
 - b. What do you think of . . .
 - c. What does that mean to you ...
 - d. Can you think of a reason . . .
 - e. Why would someone . . .
 - f. Why
 - g. How . . .
 4. Bad:
 - a. Can you . . .
 - b. Could you . . .

- c. Would you . . .
- d. Will you . . .
- e. Promise me . . .
- f. Any problems with . . .

F. Talk with Each Juror

- 1. Do not concentrate on one or two jurors.
- 2. Each juror must be questioned on your most important areas.
- 3. This may be a problem with some judges.

G. How Many Topics

- 1. Remember primacy and recency.
- 2. Focus on your theory of the case.
- 3. Take out the sting. Deal with problems here, you can't deal with them in the jury room.
- 4. Problems:
 - a. BA over limit.
 - b. Bad driving.
 - c. Bad field tests.
 - d. Bad statements.
 - e. Prior DUI convictions.

H. The Scaled Question

- 1. As Henry sits there, on a scale of 1 to 10, guilty – not guilty – how do you see him?
- 2. On a scale of 1 to 10, as to believability, how do you see the officer?
- 3. On a scale of 1 to 10, as to believability, how do you see Henry?

I. Modified Scaled Question

1. Strongly agree.
2. Somewhat agree.
3. Somewhat disagree.
4. Strongly disagree.
 - a. It is better to set nine guilty people free than it is to convict one innocent person.
 - b. If machine is properly serviced and appears to be working properly, you must believe the number.

J. Beware of Qualified Answers

1. What are they?
 - a. Probably.
 - b. I think so.
 - c. Usually.
 - d. Sometimes.
 - e. I generally agree.
2. Listen to what jurors say.
3. Pay attention to jurors – not your questions.
4. Always make eye contact.

K. Demonstrative Evidence

1. Can you use it in *voir dire*?
 - Parker v. Commonwealth, 241 S.W.3d 805 (Ky. 2007)
2. It must be admissible.
3. Show pictures – jurors need to be where your client was.

L. Things to Talk About

1. Drinkers & non-drinkers.
 - a. How will non-drinkers look at a DUI trial?

- b. Can non-drinkers sit on a jury?
 - c. Why don't they drink?
 - d. If they did drink, why did they stop?
 - e. Believe wrong to drink & drive – moral reason.
 - f. Do you ride with people who have been drinking?
 - g. How do you know if they are ok to drive?
 - h. How much is enough?
 - i. How does time factor into this?
2. Relation back – Lopez v. Commonwealth, 173 S.W.3d 905 (Ky. 2005).
- a. .08 at driving.
 - b. Have BA of .128 at 2:00 a.m.; driving at 1:00 a.m.
 - c. Are they the same?
 - d. How do you relate back?
 - e. What is the fastest way to get something in the blood?
 - f. What is the slowest way?
 - g. What happens to alcohol when you drink?
 - h. How long does it take alcohol to get in the blood?
 - i,. How long does it take alcohol to get out of the blood?
3. Driving.
- a. Who has gone the wrong way down a one way street?
 - b. Who has had a wreck?
 - c. Who has been caught speeding?
 - d. Drinking with above.
 - e. Why do people drive badly?

- i. Cell phone.
 - ii. Smoking.
 - iii. Talking.
 - iv. Strange area.
 - v. Sleepy.
 - f. Does bad driving not equal DUI?
- 4. Field testing.
 - a. Taken.
 - b. Seen.
 - c. Why do people do poorly on these tests?
 - i. Environment.
 - ii. Rain.
 - iii. Wind.
 - iv. Road conditions.
 - v. Traffic.
 - vi. Weight.
 - vii. Age.
 - viii. Nervous.
 - ix. Injury.
 - x. Not coordinated/athletic vs. clumsy.
 - xi. Other traffic.
- 5. Intoxilyzer.
 - a. Above .08 why shouldn't we just plead guilty?
 - b. How do you do with your machines?

- c. What would you want to know about machine before you believe?
 - i. Past performance.
 - ii. Past mistakes.
 - iii. Maintenance records.
 - iv. What if broken before?
 - v. What about age?
 - vi. What about warranty?
- d. If the machine is properly serviced and appears to be working properly, you must believe the number.
- e. Why wouldn't you believe the machine?
- f. What things may cause you to doubt machine?
 - i. Good driving.
 - ii. Good field tests.
 - iii. Showing not impaired.
- g. What effect would something trapped in your mouth have on machine?
 - i. Taste it hours later.
 - ii. What about dentures, plates, cavities?
 - iii. What about paint or cleaning fluids/why do they keep young kids away from it?
- h. If you took a drink and immediately blew into the machine, what would happen?
 - i. How long must you wait before the alcohol is gone?
- j. If you took a drink and immediately took a blood test, what would it show?
- k. What if you burped?
- l. What if you have acid reflux?

- m. What if you are sick – have a fever?
 - n. What effect if you have smoked for years?
6. Refusal of Intoxilyzer.
- a. Do you have to take it?
 - b. Would you take it if you knew it was broken?
 - c. Would you take it if someone told you it was not reliable?
 - d. If you had questions would you want to talk to someone who knew?
7. Presumption of innocence.
- a. Assault on the attorney.
 - b. How do you prove innocence?
 - c. Have you heard of people being set free after being locked up for years for a crime they didn't do?
 - d. Why were they freed?
 - e. Should someone not guilty have to prove their innocence?
 - f. What is my job?
8. Client testifying.
- a. If he doesn't testify, he must be guilty.
 - b. Why wouldn't he testify?
 - c. Why would I tell him not to?
 - d. What would you tell client to do?
 - e. What would be your considerations?
9. Unanimous verdict.
- a. Do you have to agree on guilt or innocence?
 - b. What if you can't agree?

- c. What if the split is eleven to one, would you change your vote?
- d. Why would you change your vote?
- e. What do you do if you can't agree?
- f. Who runs your life – boss, wife, kids?
- g. What if you disagree – fight?

VI. CROSS EXAMINATION

- A. You Are the Witness in Cross Examination
- B. Use the Cop to Show Indications of Sobriety
- C. Rules of Cross in DUI
 - 1. Make the cop your friend.
 - 2. Never repeat the direct.
 - 3. Never repeat bad facts.
 - 4. Review all good points – indications of sobriety – things your citizen did properly.
 - 5. Use the cop to advance your theory of the case.
- D. Mistakes Made in Cross
 - 1. Lack of preparation.
 - a. Must get discovery.
 - b. Motion practice – a way to win quick.
 - i. Bad stop – driving doesn't violate law or show reasonable suspicion.
 - ii. State v. Dixon motions – 2000 WL 1760664 (Court of Appeals of Ohio, Second District, Green County Dec. 1, 2000) (not reported in N.E.2d) – what right to go beyond stop.
 - iii. State v. Chatton, 463 N.E.2d 1237 (Ohio 1984).

- iv. Field tests – no showing of probable cause to arrest.
 - v. Reasonable suspicion DUI required to give BA; [KRS 189A.103\(1\)](#).
 - c. Discovery and motions to suppress are the tools for effective cross.
 - 2. Not asking leading questions.
 - 3. Not keeping total control of cop.
 - 4. Repeating prosecution case.
 - 5. Never ask open-ended questions.
- E. Good Starts v. Bad Starts
 - 1. Good starts.
 - a. Use statements, not questions.
 - b. Single fact statement.
 - i. He was . . .
 - ii. He wasn't . . .
 - iii. He did . . .
 - iv. He didn't . . .
 - c. Cop can only answer "yes" or "no."
 - d. Cop can never explain an answer.
 - 2. Bad starts.
 - a. Would you explain?
 - b. Why?
 - c. Who?
 - d. How?
 - e. Any open-ended question.

F. Areas to Review

1. Good driving.
2. Good stopping.
3. Good things at initial contact.
4. Good things about field tests.
5. Things that can affect all of the above.
6. Environment.
7. Personal problems of client.

G. Field Tests

1. Are they admissible?
2. What can prosecutor use?
 - a. Hardin v. Com, 2007 WL 79055 (Ky. App. Jan. 12, 2007) (ordered not to be published).
 - [701](#) lay witnesses vs. [702](#) expert witnesses
 - b. Bridgers v. Com, 2007 WL 121846 (Ky. App. Jan. 19, 2007) (not reported in S.W.3d).
 - c. Unreported cases can be cited
 - [CR 76.28\(4\)\(c\)](#)
 - d. U.S. v. Horn, 185 F.Supp.2d 530 (D. Md. 2002).

SFSTs

- A tool to assist you in seeing visible signs of impairment
- Not pass/fail tests

OBJ6 Remember the three SFSTs are all tools to assist you in seeing visible signs of impairments

They are not pass/fail tests

The three SFSTs, along with the PBT, are all field sobriety tests. Their role in DUI detection is to help establish probable cause, aid in the arrest decision, and help you decide which evidential test you should request.

AFQ

H. Field Tests - Your Cross

3. These tests are no longer pass/fail.
4. Use manual.
5. Review things done right – Absence of indicators.
6. Use own scoring chart with things done right and wrong.
7. May not have failed tests using manual – one clue no matter how many times repeated.
8. Review things cop did wrong – contrary to manual.
9. Learn clues on all tests.

I. General Concerns

1. Be aware of what is happening during tests.
2. Weather.
 - a. Cold.
 - b. Wind.
 - c. Snow.
 - d. Ice.

- e. Rain.
 - 3. Other traffic and flashing lights.
 - 4. Amount of traffic.
 - 5. Flashing lights and cars driving by with lights – HGN.
 - 6. Proximity of citizen or distractions.
- J. In Car Field Sobriety Tests
- 1. Number count – twenty-eight to sixteen.
 - 2. Alphabet – D to Q.
 - 3. Finger count.

Walk & Turn Test Clues

Instruction Stage:

- B. Can't keep **B**alance
- S. **S**tarts too soon

Walking Stage:

- S** **S**tops Walking
- H** Fails to touch **H**eel to Toe
- O** Steps **O**ff Line
- R** **R**aises Arms
- T** **T**urns Improperly
- S** Wrong Number of **S**teps

OBJ1 Walk and Turn Clues:

LEC **Instruction Stage:**

Can't keep Balance
Starts too soon

Walking Stage:

- S** **S**tops Walking
- H** Fails to touch **H**eel to Toe
- O** Steps **O**ff Line
- R** **R**aises Arms
- T** **T**urns Improperly
- S** Wrong Number of **S**teps

NTF

Inform students that the acronym **SHORTS** will help them to learn the eight clues possible in the W&T test.

Have the students copy the information from the slide.

QUALIFYING QUESTION

Prior to starting the balance tests ask:

"Is there anything that would prevent you from taking a balance test?"

**OBJ3
LEC**

Qualifying Question:
Prior to starting the W&T the following question should be asked:

"Is there anything that would prevent you from taking a balance test?"

Ask this question in this manner. Do not suggest an answer within the question, *i.e.*, "There's no reason you can't take a balance test is there?" This would be a leading question.

AFQ

Test Interpretation of Clues

Both balance tests – Even if a clue shows up more than once, each clue is counted only once.

Instructions Stage: Can't Keep Balance –

- Record this clue if the suspect does not maintain the heel-to-toe position throughout the instructions.
- The feet must actually break apart.
- Do not record this clue if the suspect sways or uses the arms to balance but maintains the heel-to-toe position.

**OBJ1
LEC**

Test Interpretations

For both of the two balance tests, even if a clue shows up more than once, each clue is counted only once.

You may observe a number of different behaviors when a suspect performs this test. Research, however, has demonstrated that the behaviors listed below are the most likely to be observed with a BAC of 0.08 or more. Look for the following clues each time this test is given:

Cannot keep balance while listening to the instructions. Two tasks are required at the beginning of this test. The suspect must balance heel-to-toe on the line and at the same time, listen carefully to the instructions. Typically, the person who is intoxicated can do only one of these things. He or she may listen to the instructions. but not keep balance.

TEST CONDITIONS

- Walk-and-Turn test requires a designated straight line, and should be conducted on a reasonably dry, hard, level, non-slippery surface. There should be sufficient room for suspects to complete nine heel-to-toe steps.
- **Note:** *Recent field validations studies have indicated that varying environmental conditions have not affected a suspect's ability to perform this test.*

OBJ2 Test Conditions

LEC Walk and turn requires a hard, dry, level non-slippery surface with sufficient room for the suspect to complete nine heel-to-toe steps. A straight line must be clearly visible on the surface. If no line is available, it is possible to conduct the test by directing the suspect to walk in a straight line parallel with a curb, guardrail, etc. Conditions must be such that the suspect would be in no danger if he/she were to fail.

NTF Point out to students that the Colorado study in 1995 took into consideration the environmental conditions such as weather and terrain. Varying environmental conditions have not affected suspects' ability to perform this test. Additionally, be careful around the guardrail or curb. Suspects could fall and injure themselves.

Restrictions

The original research indicated that individuals over 65 years of age, back, leg or middle ear problems had difficulty performing this test.

Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

OBJ2 Some people have difficulty with balance even when sober.

LEC People more than:

- 65 years of age
- Over 50 pounds overweight
- With physical impairments that affect their ability to balance should not be given this test.

Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes if they choose to.

AFQ

TIME: 1 Hour

SCORING THE WALK & TURN

Original Source Unknown

<u>Possible Points</u>	<u>Points Awarded</u>	<u>Exercise Performed</u>
1	_____	Can't Balance During Instruction
1	_____	Starts Too Soon
18	_____	Stops While Walking
18	_____	Touches Heel-to-Toe
18	_____	Steps Off Line
18	_____	Uses Arms to Balance
1	_____	Improper Turn
<u>18</u>	_____	Wrong Number of Steps
93		

Total Points:

_____ ÷ 93 = .

._____ x 100 = _____%

One-Leg Stand Test Clues

- P** Puts foot down
- U** Uses arms for balance
- S** Sways while balancing
- H** Hops

**Note – There are no possible clues during the Instructions Stage.*

OBJ1

One Leg Stand Test Clues:

LEC

- P** Puts foot down
- U** Uses arms for balance
- S** Sways while balancing
- H** Hops

There are no possible clues during the Instructions Stage.
 The acronym "PUSH" will help you learn the clues.
 Have students jot down this learning tool.

NTF

TEST CONDITIONS

One-Leg Stand requires a reasonably dry, hard, level, and non-slippery surface. Suspect's safety should be considered at all times.

The original research indicates that certain individuals over 65 years of age, back leg or middle ear problems, or people who were overweight by 50 or more pounds had difficulty performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

OBJ2 The One-Leg Stand requires a reasonably dry, hard, level, and non-slippery surface. Suspect's safety should be considered at all times.

The original research indicated that certain individuals over 65 years of age, back, leg or middle ear problems, or people who were overweight by 50 or more pounds had difficulty performing this test.

Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

EX2 Select a student and demonstrate the One Leg Stand Test to the class. Have the entire class time the thirty seconds. If

SCORING THE ONE LEG STAND

Original Source Unknown

<u>Possible Points</u>	<u>Points Awarded</u>	<u>Exercise Performed</u>
1	_____	Following Officer's Instructions
30	_____	Not Swaying
30	_____	Not Using Arms for Balance
30	_____	Not Hopping
30	_____	Keeping Foot Off the Ground
<u>30</u>	_____	Counting Properly
151		

Total Points:

_____ ÷ 151 = .

._____ x 100 = _____%

MEDICAL IMPAIRMENT

"PRE" CHECK: RULE OUT POSSIBLE MEDICAL IMPAIRMENT

P – Pupil Size

R – Resting Nystagmus

E – Equal Tracking (2x)

OBJ4

SHO

SFST Instruction Sheet

LEC

Medical Impairment – Prior to administering horizontal gaze nystagmus to a potential DUI subject, we must rule out possible medical impairment. Should signs of medical impairment be recognized it may be advisable to not administer the remaining SFSTs. For instance, a glass eye or a victim of an auto crash may show these conditions.

"PRE" may help you remember these 3 pre-checks.

Check **pupil size**. Move in slightly towards the subject (remembering officer safety) to ensure the size of the pupils are the same in one eye as in the other. If one pupil is larger than the other, this is indicative of a medical disorder or injury to the head.

Check for **Resting Nystagmus** – If, when looking at the eyes without moving the stimulus, the eyes begin jerking, this is known as resting nystagmus. Take precautions as this indicates a high dosage of alcohol or certain other drugs, such as PCP.

Check for **Equal Tracking Ability (2x)** – Beginning at the starting point, move the stimulus to a point beyond the shoulders, back across to the outside of the other shoulder at a speed of approximately 2 seconds from the nose to the outside, 2 seconds on the return and two seconds to the other side and 2 seconds on that return. One complete pass will be about 8 seconds; 16 total seconds when checking each eye twice. The sole purpose of this evaluation is to ensure both eyes are following the stimulus. If one eye is following but the other is not, it is possible the person has a medical condition, a head injury or a glass eye.

AFQ

THREE CLUES OF HORIZONTAL GAZE NYSTAGMUS

1. Lack of smooth pursuit (2x)
2. Distinct and sustained Nystagmus at maximum deviation (2x)
3. Onset of Nystagmus prior to 45 degrees (2x)

OBJ2 Three Indicators of Horizontal Gaze Nystagmus
LEC

1. Lack of Smooth Pursuit –

This occurs when the eyes fail to smoothly follow the stimulus as it is being moved from side to side horizontally. When the eyes are pursuing smoothly it is similar to a marble rolling down a piece of glass. When the eyes are not following smoothly it is similar to a marble rolling down rough sandpaper. You will notice some jerking as the eyes attempt to catch up to the stimulus.

Many students become confused when they practice equal tracking and smooth pursuit. We administer both of them in the same manner. The difference is we are looking to see if they eyes track in the first case. In the second case we know the eyes track, now we want to see if they pursue smoothly. Thus, two different objectives, even though they are both administered in the same manner.

2. Distinct Nystagmus at Maximum Deviation

Here we are looking to see if there is any jerking of the eye when it is held at the maximum distance from the center. The stimulus should be beyond the shoulder and there should be no white showing between the eyeball and the furthest point or maximum deviation. The stimulus will be held at that point for at least four seconds.

The reason for holding at maximum deviation for at least four seconds is because in fifty percent of the population, nystagmus can be seen for a few seconds, even when no alcohol or drugs have been consumed. This naturally occurring nystagmus will dissipate after two-three seconds.

Note: If jerking stops when detected prior to 45 degrees, continue out to the 45 degree angle.

The 45 degree angle is usually at the tip of the shoulder. Another way to determine if the 45 degree angle is present is to measure the distance from the stimulus to the nose, then the distance from the starting point to the 45 degree angle will be the equal distance as this. For instance, if the stimulus is 12 inches from the nose, then the stimulus will be moved horizontally 12 inches. If the stimulus is 14 inches from the nose, then move 14 inches from the starting point. Also, there should be white showing from the eye to the side closest to the ear.

AFQ

ADMINISTRATIVE PROCEDURES

- **Eyeglasses**
- **Verbal Instructions:** *I am going to check your eyes. Follow my stimulus with your eyes only; do not move your head.*
- **Position Stimulus**
 - (12-15 inches from nose)
 - (Slightly elevated above eyebrow)
- **Equal Pupil Size and Resting Nystagmus Tracking (2x)**
(Note: Always start with subject's left eye)

OBJ5 Officers are to use the following administrative procedures each time they administer the HGN, in the same order:

LEC

Eyeglasses: If the person wears glasses, have them remove them for this test. The subject does not need to be able to focus on the stimulus, only follow it.

If the subject is wearing any type of brimmed hat, either remove it or turn it around so as not to shade the eyes. Shading the eyes make nystagmus more difficult to see.

Be sure to hold your stimulus in your non-weapon hand.

ADMINISTRATIVE PROCEDURES

- Check for lack of smooth pursuit (2x)
- Check for Nystagmus at maximum deviation (2x)
- Check onset of Nystagmus prior to 45° (2x)
- Total the Clues

- Check for Vertical Nystagmus

OBJ5
NTF

Explanations for this slide are on the next two pages of this lesson plan.

HGN TEST CRITERION

4 or More Clues Indicates BrAC/BAC of 0.08 or Higher
(88% Reliable)

OBJQ
LEC

HGN Test Criterion –
4 or more clues indicates a BAC of 0.08 or higher
88% reliable (based on the 1998 San Diego study)

NTF

Caution students that the reliability factor is based upon the number of correct decisions made by officers, to arrest or to not arrest, in the 1998 study. It does not necessarily mean that 88% of the suspects will be .08 or higher or that the probability will be 88%.

AFQ

TIME: 3 Hours

HORIZONTAL GAZE NYSTAGMUS TEST (cont.)

Procedure	Objective	Looking For	Speed of Stimulus
Equal Tracking	Rule out medical impairment	Both eyes to track at the same time; equal pupil size; resting nystagmus	2 seconds from starting point to outside of shoulder; 2 seconds back
Smooth Pursuit	Look for Nystagmus	Each eye to pursue smoothly	2 seconds from starting point to outside of shoulder; 2 seconds back.
Maximum Deviation	Look for Nystagmus	Distinct and sustained nystagmus for at least 4 seconds	Does not matter
Onset Prior to 45 degrees	Look for Nystagmus	Nystagmus from starting point to any point prior to 45° angle.	From starting point, move slowly approximately 4 seconds to 45° angle, return to starting point at normal speed.
Vertical	Look for Nystagmus	Nystagmus when eyes are held, looking upward, for at least 4 seconds.	Does not matter.

VII. 2,100 TO 1 BREATH BLOOD RATIO

Per [KRS 189A.005](#)

Alcohol concentration: Grams of alcohol per 210 Liters of breath or grams of alcohol per 100 milliliters of blood

Based upon 2100:1
2100 ml of Breath to 1 ml of Blood

Breath to Blood Ratio

11.7% of the population has a ratio higher than 2100:1
86% of the population has ratio of 2100:1 (Standard)
2.3% of the population has a ratio lower than 2100:1

Examples

2300:1 Blood test result will be HIGHER than their breath test
1900:1 Blood test result will be LOWER than their breath test

LEC grams per 210 liters of breath (Breath test)
Or
Grams per 100 milliliters of blood (Blood test)
This is found in [KRS 189A.005](#) as definition of an alcohol concentration.

The instrument measures the breath alcohol concentration found in the sample. The processor uses a breath to blood ratio of 2100 ml of breath to 1 ml of blood to determine the concentration.

How does the 2100:1 ratio relate back to the KRS?

Convert 210L to ml – 210,000. Now you have 210,000 ml breath and 100 ml blood. To simplify remove two 0's and you have 2100:1

The following pages are for your reference, not necessarily to be covered in class.

NTF The 2100:1 breath to blood ratio means each given volume of blood has as much alcohol as 2100 equal volumes of breath.

Do not use % in BrAC results. Why? Convert 0.100% BAC to decimal – 0.00100.

The size of the sample chamber of the Intoxilyzer 5000 is 81.4 ml or cc. 81.4 ml is what part of 2100 ml? You divide 81.4 into 2100- 1/25.79 parts of 2100.

1200 ml:1 ml 81.4 ml 1/25.79 {fractional amount of air gathered}
(2100 divided by 81.4 – 25.79)

Everyone does not have the same breath to blood ratio. The breath to blood ratio has no bearing on body size or lung capacity. What determines it involves many factors such as a person's hematocrit which is the number of red blood cells per 1 cc of tissue, body temperature. The ratio can vary hour to hour and day to day.

Research has shown that:

- 2.3% 1500:1
1900:1 (Lower ratio) 73.6ml sample chamber
Difference of 7.8ml less
- 86% 2100:1 81.4ml sample chamber
- 11.7% 3400:1
2300:1 (Higher ratio) 89.1ml sample chamber
Difference of 7.6ml more

Before we go further, at 1900:1 ratio what should the sample chamber size be? We know the sample chamber is 1/25.79 parts of 2100. Divided 1/25.79 into 1900 = 73.6ml, we collected too much breath for the individuals 1900:1 ratio. In that extra breath sample we drew in alcohol molecules that increased the breath test results.

NOTES: 1/25.79 divided into 1900 = 73.6ml
 1/25.79 divided into 2300 = 89.1ml

Everyone has heard the myth: "Blood test results always will be higher than breath test results." That is not always a correct statement.

NTF: If someone had a lower ratio than what the instrument was set for, what result could we expect from the BLOOD test results? Here is how you figure that:

$$\frac{2100}{1900} = \frac{100}{X} \text{ BrAC}$$

$$\frac{2100X}{2100} = \frac{190}{2100}$$

$$X = .090 \text{ BAC}$$

The blood test RESULT is lower than the breath test results "WHY?"

Possibly because we collected at a breath to blood ratio of 2100ml : 1ml instead of 1900ml : 1ml of the subject. Using the 2100:1 ratio the sample chamber size is 81.4ml. At 1900:1 we should have used a chamber size of 73.6ml. Instrument gathered +7.8ml more than necessary, thereby resulting in a higher breath test.

If someone had a higher ratio than what the instrument was set for, what result could we expect from the BLOOD test results? Here is how you figure that:

$$\frac{2100}{2300} = \frac{.150}{X} \text{ BrAC}$$

$$\frac{2100X}{2100} = \frac{345}{2100}$$

$$X = .164 \text{ BAC}$$

Possibly because we collected at a breath to blood ratio of 2100ml:1ml instead of 2300ml:1ml of the subject. Using the 2100:1 ratio of the sample chamber size is 81.4ml. At 2300:1 we should have used a chamber size of 89.1ml. Instrument gathered -7.7ml less than necessary, thus lowering the breath reading possibly due to not collecting enough sample which contained alcohol molecules.

If the breath and blood results are significantly not the same and without doing the math, can you determine if an individual's breath to blood ratio is higher or lower than the average 2100:1?

Yes.

Rule of thumb to determine if ratio is higher than average or lower than the average:

The ratio is higher than 2100:1, if the blood test result is higher than breath test result.

The ratio is lower than 2100:1, if the blood test result is lower than the breath test result.

BrAC .098 breath

BAC .110 blood

Without a calculator, what would you expect the individual's ratio to be?

NTF: Higher than 2100:1, the ratio all instruments are set up to use.

How can you determine a person's Breath to Blood ratio? Need to have a blood test conducted at a reasonable time after the breath test. This reduces the absorption or elimination possibility when both tests are done in close time of each other.

Option comment: To determine an individual's breath to blood ratio:

BrAC .110 Breath
BAC .100 Blood
BAC x 2100 = Breath to Blood Ratio
BrAC
 $\frac{.100}{.110} \times 2100 = 1909$

Breath to Blood Ratio = 1909:1

In this case the blood test is lower than the breath test. The person's ratio is lower than what the instrument is set up for. So we collected too much breath!

Recent research has actually shown that the majority of population does not have a 2100:1 but actually it is higher, 2300:1. If we changed the sample chamber size to reflect 2300:1 ratio, how much more would we hurt the 2.3% with a 1500:1 ratio? It is better to let one guilty man go free than to falsely convict ten.

**DEPOSITIONS: ETHICAL AND PRACTICAL ISSUES
BASED ON THE KENTUCKY RULES OF CIVIL PROCEDURE**
Professor William H. Fortune, University of Kentucky College of Law

I. THE DISTINCTION BETWEEN EVIDENTIARY DEPOSITIONS AND DISCOVERY DEPOSITIONS

- A. Evidentiary depositions are taken to perpetuate testimony. At the time of taking, it is contemplated that the deposition may be used in place of the live testimony of the witness – *eg.*, as stipulated or as required by [CR 32.01\(c\)](#) or [CR 43.04](#).

The rules provide for proof to be taken by deposition:

1. By agreement.
2. In certain actions in equity, notably divorce, [CR 43.04](#).
3. For the protection of certain kinds of witnesses (occupations, distance, military, etc.) [CR 32.01\(c\)](#). *A witness whose deposition might be used under [CR 32.01\(c\)](#) shall not be compelled to appear in court for oral examination, unless he/she failed to appear for a deposition after having been subpoenaed. [CR 45\(2\)](#).* The rule contains an exception if the court thinks it's important for the witness to testify in person.

- B. Discovery depositions are for the following purposes:

1. The discovery of information;
2. To facilitate settlement – shared information leads to informed settlements;
3. To support a motion for summary judgment; and
4. To prepare for trial.

II. TAKING THE DEPOSITION

- A. The Waiver Rule

1. [CR 32.04](#) provides that objections as to form are waived unless made at the time of taking, but objections as to substance (competency, relevancy, or materiality) are not waived unless the ground of the objection is one that might have been cured if an objection had been made at the time of taking.

Example where the ground for the objection could have been cured if an objection had been made at the time: hearsay, but a

foundation could have been laid for a hearsay exception if the examiner had been put on notice by an objection at the time of taking.

This rule is qualified by a later-enacted rule ([CR 30.02\(e\)](#)) that, in videotaped depositions, all objections as to substance are reserved and shall not be stated on the videotape. Objections as to form are waived unless made at the time. An objection as to privilege, of course, must be made at the time of the deposition (usually coupled with an instruction not to answer).

2. Should the attorney taking the deposition agree to have all objections reserved? Such an agreement deprives the opposing attorney of a reason to object, but makes the deposition vulnerable to challenges which could have been cured if an objection had been made at the time of taking.

B. Questioning the Deponent

1. Ask the deponent to commit to answering the question asked and to tell the deposing attorney if the deponent does not understand. Try to make the deponent's attorney into a bystander (a "potted plant").
2. The taking attorney tries to get the deponent to narrate, then uses leading questions to solidify important points.
3. Very important that questions be clear and not compound.
4. Leading questions are appropriate if the deponent is the opposing party, but problematic if the deponent is a mere witness unassociated with the opposing party. Nevertheless, the custom appears to be that leading questions may be used with any witness.
5. Attorneys defending the deposition sometimes agree to reserve objections as to form, but such agreements deprive the attorney representing the deponent of the ability to protect the deponent against unfair or confusing questions.
6. A discovery deposition might become an evidentiary deposition if the deponent is unexpectedly unavailable at trial. Consistent with [CR 32.04](#), in such a case the court will deem non-preserved objections as to form waived, but rule on non-preserved objections as to substance.

Examples of objections as to form: leading, compound, unwarranted assumption.

Examples of objections as to substance: hearsay, irrelevant, calls for speculation.

III. RULES RELATING TO TAKING THE DEPOSITION

- A. An authorized person must swear the witness (can use any notary public).
- B. The opposing party can be put under an obligation to attend by notice mailed to the party's attorney. The notice may be coupled with a [Rule 34](#) request to produce documents at the deposition. A corporate party may be noticed to produce employees with knowledge of matters on which discovery is sought – as set out in the notice. [CR 30.02\(6\)](#). The attorney for the corporation represents – for purposes of the deposition – employees produced pursuant to [CR 30.02\(6\)](#). Those employees have agreed to appear on behalf of the corporation.
- C. Does the attorney for the corporation represent – for purposes of depositions taken by opposing counsel – employees other than those designated by [CR 30.02\(6\)](#)? Corporate counsel is likely to make this assertion. By analogy, the Rules of Professional Conduct ([3.130\(3.4\(g\)\)](#)) suggest that an attorney for a corporation represents only those employees who "supervise, direct or regularly consult with the client concerning the matter (the subject of the deposition) or have authority to obligate the client with respect to the matter."
- D. Non-parties must be subpoenaed. Failure to subpoena a witness might abort a deposition and result in the imposition of costs as a sanction.
- E. [CR 30.02](#) allows testimony to be taken stenographically or by videotape – or both. There is no provision in [CR 30.02](#) for audiotaped depositions; however the parties may agree to only audiotape the deposition.
- F. The videotape rule ([CR 30.02\(4\)](#)) requires: notice to the other side; a qualified operator; the camera is to remain stationary during the deposition and focused on the witness, zooming in only to show exhibits; and the tape to be kept by attorney taking the deposition. No transcript is necessary and the cost of the video is taxed as costs. Either party may prepare a transcript at his or her own cost.

Attorneys considering videotaping should read [CR 30.02\(4\)](#) carefully.
- G. Protective orders may be issued to control the number, time, place and manner of depositions ([CR 26.03](#)).

IV. PREPARING YOUR CLIENT FOR A DISCOVERY DEPOSITION

- A. Make sure that the client understands that the attorney's role is limited to protecting the attorney-client privilege and protecting the client from harassment; the attorney cannot tell the client how to answer the questions.
- B. Prepare the client thoroughly – rehearse and go over all matters.

- C. Make sure the client understands the question. However, "hesitating before you answer" might not be good advice if the deposition is videotaped.
- D. Answer truthfully and accurately – but don't guess.
- E. Tell the truth and don't be evasive.
- F. Don't argue or become angry.
- G. Tips for deponents in depositions to be videotaped.
 - 1. Look at the attorney asking the questions – or at a point between the camera and the attorney; do not look at the camera or at the deponent's attorney.
 - 2. Dress as if you were going to church.
 - 3. Try to eliminate distracting mannerisms – shifting in chair, rocking, etc.
 - 4. Remember that you are "on" all the time, even when the attorneys are talking.

V. PREPARING A NON-CLIENT WITNESS FOR A DEPOSITION

There is a difference between preparing a client for a deposition and preparing a non-client for a deposition. Discussions with a client are privileged; discussions with a non-client are not – and the opposing attorney may legitimately ask the non-client about those discussions. Furthermore, showing a witness privileged documents (attorney client or work product) might serve to waive the privilege, making the documents subject to subpoena.

VI. COACHING – THE FINE LINE BETWEEN HELPING THE WITNESS TO REMEMBER AND SUBORNING PERJURY. STAYING ON THE RIGHT SIDE OF THE LINE IN PREPARING THE CLIENT (OR NON-CLIENT WITNESS).

- A. The client relates the facts; the attorney shapes the telling of the facts.
- B. Signs of a lying client: changing the story; wanting to know what others say happened; selective memory; wanting to know what the attorney wants to have happened.
- C. Speed, time and distance estimates are often inaccurate and a client is entitled to know the implications of an inaccurate estimate of one or more of these variables.
- D. The client is entitled to know the legal consequences of a particular version of the facts, but is not entitled to change his recollection of the facts to match a favorable outcome.

- E. A lawyer-prepared statement might prove embarrassing if it found its way into the opposing attorney's hands.

Example: In 1998, the Dallas, Texas law firm of Baron and Budd received unfavorable publicity for sending its asbestos plaintiffs a twenty-page document instructing them how to testify at their depositions. Among the "instructions" were the following:

1. "It is important to remember that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it."
2. "It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER."
3. "You may be asked how you are able to recall so many product names. The best answer is that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered."

VII. WRITINGS USED DURING A DEPOSITION

- A. [KRE 612](#) provides that the opposing attorney is entitled to see any document that a witness looks at during a deposition. Thus the attorney representing the deponent should approve notes or a summary that a deponent takes into a deposition.
- B. Documents used during a deposition should be marked as exhibits and copies attached to the transcript or filed with the videotape.
- C. The attorney representing the deponent should be alert to overbroad requests to produce documents. The deponent should not agree to produce documents or anything else without first talking with the deponent's attorney.

VIII. PRELIMINARY MATTERS – ANY AGREEMENTS SHOULD BE PUT ON THE RECORD

- A. Is the deposition taken by agreement (rather than by notice)?
- B. Are all objections reserved – or are objections as to form waived?
- C. Is going off the record to consult with the deponent permissible or not? Is there a difference between the deponent asking to consult with his lawyer and the lawyer interrupting the deposition to consult with the deponent? The most logical rule is that, in the absence of an agreement, only when the matter is one of privilege is there a "right" for the deponent – or the deponent's lawyer – to go off the record. Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525 (E.D. Pa. 1993).

Going off the record with a pending question should be impermissible. This would not be allowed at trial.

Suggestion: The civil thing to do is to comply with the request unless there is a pending question in the absence of an up-front agreement that there will be no consultations. *Perhaps the "default" rule should be that the deponent's request to consult should be honored, but the lawyer's request to consult should not be honored unless the lawyer provides a sufficient explanation.*

- D. Total time, breaks, etc.
- E. Deposition to be filed or not? Local rules might speak to this – example: In Fayette County depositions shall not be filed unless there is a discovery controversy. The lawyer taking the deposition becomes the custodian of a non-filed deposition. However, it appears that Northern Kentucky local rules require depositions to be filed.
- F. Is signature of the deponent waived? [CR 30.05](#) requires a written request to the officer taking the deposition (the person who swore the witness). The rule contemplates that the deposition be transcribed and submitted to the witness who may then state the "correction" and the reasons for the correction.
- G. Is there an agreement to supplement responses going beyond what is required by the rules (e.g., an agreement to produce documents which have been referred to during the deposition)? This is dangerous – must be clear about the agreement.

IX. UNCIVIL BEHAVIOR BY THE ATTORNEY TAKING THE DEPOSITION

- A. Sending notice rather than trying to work out a date (by email or phone).
- B. Scheduling games. Short notice, cancelling at the last minute, etc.
- C. Intimidation and lack of civility.
- D. Unfair questions (unwarranted assumptions in the question).
- E. Interrupting the deponent.
- F. Using the broad concept of relevance to wear everyone out.

X. UNCIVIL BEHAVIOR BY THE ATTORNEY FOR THE DEPONENT [CR 30.03\(4\)](#)

- A. Frivolous objections, interrupting.
- B. The "coaching" objection to instruct the client how to answer. [CR 30.03\(3\)](#) states that "any objection . . . shall be stated concisely and in a non-argumentative and non-suggestive manner."

Suggestion – An attorney with a long objection should consider having the client leave the room, which would make it clear that the objection is made in good faith and not to instruct the client.

- C. Bad faith claims of privilege (attorney client and work product).
- D. Instructing the witness not to answer. An attorney may instruct a *client* not to answer only to preserve a privilege, to enforce a limitation on the evidence imposed by the court, or to make a motion to protect the client from harassment. [CR 30.03\(3\)](#).
- E. An attorney has no authority to instruct a non-client not to answer; however, an attorney should try to protect a non-client from harassment by the opposing attorney. An attorney may recess the deposition to ask the court to protect the non-client.
- F. Secret constructions of words or phrases – example: a narrow definition of "sex" to enable the deponent to answer negatively the question, "Have you ever had sex with her?"

XI. REMEDIES FOR UNCIVIL BEHAVIOR

- A. Object for the record; perhaps with the client out of the room (to keep things civil).
- B. Instruct the client not to answer.
- C. Make a record.
- D. Terminate the deposition and ask for a protective order. [CR 30.04](#).
- E. Obtain a copy of the audiotape or videotape.
- F. Seek sanctions.
- G. Ask the judge to be available during the retake of the deposition.

XII. CORRECTING A DEPOSITION

- A. [CR 30.05](#) provides that any party may request that the transcript (if there is one) be submitted to the witness for examination and signing. This gives the witness an opportunity to correct errors in transcription. The officer taking the deposition is to note the changes and the witness's reasons for making the changes. The rule does not allow the witness to simply substitute what the witness says was intended for what was said at the time.
- B. On motion, the court will resolve issues of the accuracy of the transcription. [CR 32.04](#).
- C. Should the attorney representing the deponent waive signature? It would seem that requiring the deposition to be submitted for signature is for the protection of the witness.

- D. An attorney is ethically obligated to take remedial measures to correct an answer by the attorney's client that the attorney knows to be false. This duty arises as soon as the attorney becomes aware of the false response. The attorney should first ask the client to correct the matter. [SCR 3.130\(3.3\)](#).
- E. Is there an obligation to correct a false statement of a witness (other than the client)? [SCR 3.130\(3.3\)](#) addresses this issue – the rule states that "if the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal." Thus the attorney defending a discovery deposition of a non-client does not have a duty to correct an answer unless the attorney knows the answer is materially false.
- F. In addition, [CR 26.05](#) requires a party to correct a response which was incorrect when made or which has become incorrect and the circumstances are such that failure to correct amounts to a knowing concealment. In my opinion, the discovery rules require the correction of responses that are literally true but are misleading.

I. DISTRICT COURT DIVISIONS

- A. Criminal Arraignments
- B. Probate
- C. Misdemeanor Pretrials
- D. Small Claims
- E. Felony Preliminary Hearings
- F. Civil
- G. Juvenile
- H. Mental Health
- I. Traffic
- J. Forcible Detainers
- K. Appellate (Sort of)

II. *EX PARTE*

- A. The defense attorney should not contact the court *ex parte* about reduced bond/summons prior to the arrest. Commonwealth v. Wilson, 384 S.W.3d 113 (Ky. 2012).
- B. A judge can't allow *ex parte* contact about substantive issues (including bond) at any stage of the proceeding. Commonwealth v. Carman, 455 S.W.3d 916 (Ky. 2015).

III. VENUE

Venue is distinguished from jurisdiction. Venue for a protective order is appropriate both in the county where the victim resides (or has fled to) and any county circuit court where on-going dissolution proceedings involving the same parties are pending. Also: concurring opinion condemns deputy clerk for refusing to accept original filing. Holt v. Holt, 458 S.W.3d 806 (Ky. App. 2015).

IV. CONTEMPT

An attorney can be in contempt for failure to appear at a defendant's arraignment, despite the attorney's attempt to withdraw. Criminal defense

counsel should be aware that representation of persons charged with criminal law violations is not a faucet to be turned on and off at their convenience. Poindexter v. Commonwealth, 389 S.W.3d 112 (Ky. 2012).

V. RECUSAL OF JUDGE

Motion to recuse: Maybe a bad idea. Missud v. Court of Appeals of California, 136 S.Ct. 329 (2015).

VI. PROBATE

(3) The execution of an acknowledgment of a will by a testator, and of the affidavits of witnesses, made before an officer authorized to administer oaths under the laws of this state and evidenced by the officer's certificate substantially in the form set out in this section during the period between June 21, 1974, and the effective date of the 1982 amendments to this section shall be considered to be a valid execution and attestation of a written will even though the will was not signed and attested separately from the execution of the acknowledgment by the testator and the affidavits of the witnesses.

(4) A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise treated no differently from a will not self-proved.

Ky. Rev. Stat. Ann. §394.225 (West)

VII. SELF-INCRIMINATION

The statement is suppressed because the officer's assurance of confidentiality contradicted previously given Miranda warnings. Leger v. Commonwealth, 400 S.W.3d 745 (Ky. 2013).

VIII. JURY SELECTION

Jurors friended the victim's mother on Facebook. Remanded for a hearing. Sluss v. Commonwealth, 381 S.W.3d 215 (Ky. 2012).

This is not automatically error. (Victim's wife was one of the juror's 629 Facebook friends.) McGaha v. Commonwealth, 414 S.W.3d 1 (Ky. 2013).

IX. REASONABLE SUSPICION FOR THE STOP

A. An uncorroborated anonymous tip does not justify a search. Accountability is critical. Florida v. J.L., 529 U.S. 266 at 272 (2000).

B. "Citizen informants" (bystanders, victims or eyewitnesses who make face-to-face contact with police) are not anonymous tipsters. Commonwealth v. Kelly, 180 S.W.3d 474 (Ky. 2005); Hampton v. Commonwealth, 231 S.W.3d 740 (Ky. 2007).

- C. But an anonymous tip coupled with a man pointing at a car is not sufficient. Garcia v. Commonwealth, 335 S.W. 3d 444 (Ky. App. 2010).
- D. If a motorist calls 911 and reports having been run off the road, that can be sufficient cause for police to stop a vehicle fitting the caller's description. Navarette v. California, 134 S.Ct. 1683 (2014).
- E. Failure to signal a lane change justifies a stop. Commonwealth v. Fowler, 409 S.W.3d 355 (Ky. App. 2012).
- F. So does an expired registration. Piercy v. Commonwealth, 303 S.W.3d 492 (Ky. App. 2010).

X. CHECKPOINTS

- A. Court finds that the defendant was not stopped at a validly operated checkpoint. Monin v. Commonwealth, 209 S.W.3d 471 (Ky. App. 2006); Commonwealth v. Cox, 491 S.W.3d 167 (Ky. 2015).
- B. The police can set up roadblocks for safety checks, but not to check for a city sticker, because it doesn't relate to highway safety. Singleton v. Commonwealth, 364 S.W.3d 97 (Ky. 2012).

XI. COMMUNITY CARETAKER

- A. The Kentucky Court of Appeals adopts the "Community Caretaker" exception (but the courts are usually reluctant to apply it.) Mundy v. Commonwealth, 342 S.W.3d 878 (Ky. App. 2011).
- B. The officer used his emergency equipment to stop the defendant, who seemed "lost." This was not a reasonable application of the community caretaking function. Poe v. Commonwealth, 169 S.W.3d 54 (Ky. App. 2005).

XII. LENGTH OF STOP

A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. Rodriguez v. U.S., 135 S.Ct. 1609 (2015); Lane v. Commonwealth, No. 2015-CA-001698-MR, 2016 WL 6543573, ___ S.W.3d ___ (Ky. App. 2016).

XIII. EVIDENCE

- A. The natural dissipation of alcohol in the bloodstream does not establish a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations. Missouri v. McNeely, 133 S.Ct. 1552 (2013).
- B. (1) the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving; (2) the Fourth Amendment does not permit warrantless blood tests incident to arrests for drunk driving; and (3)

motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

[Birchfield v. North Dakota](#), 136 S.Ct. 2160 (2016).

- C. The deputy made a reasonable effort to accommodate DUI arrestee's request for an independent blood test. He asked the defendant if he knew anyone to call to draw blood, but he did not know anyone. The deputy offered to transport the defendant back to the local hospital for a second blood draw but the defendant declined. The deputy contacted his supervisor about possible locations to have blood drawn again, but the only option was going to a hospital out of the county a half-hour away; and, because there were only two other officers on duty that night and both were engaged in other police matters, transporting defendant to that location was not a realistic option. Also, the stop was justified – ATV near highway and locked gate.

[Hardin v. Commonwealth](#), 491 S.W.3d 514 (Ky. 2016).

XIV. CALLING A LAWYER

Police shouldn't restrict defendant's calls to lawyers only. (Defendant wanted to call his daughter to obtain phone number of attorney.) No suppression, since the defendant took the test and thereafter got the minimum sentence, but the result might have been different if he had refused. [Bedway v. Commonwealth](#), 466 S.W.3d 468 (Ky. 2015).

XV. MULTIPLE OFFENSES

Prior DUI convictions that were entered after commission but before conviction on current offense could be used to enhance instant alleged offense to felony DUI. [Ballinger V. Commonwealth](#), 459 S.W.3d 349 (Ky. 2015).

DISTRICT COURT BASICS FOR YOUNG LAWYERS

J. Jason Rothrock and Brian E. Mattone

Updated January 2017 by Lori J. Alvey

I. COURTS IN THE COMMONWEALTH

- A. There are four levels of court in Kentucky (two appellate, two trial).
 - 1. Appellate courts: The Supreme Court and the Court of Appeals may be asked to review the judgment of another court to see if a mistake was made. An appeals court generally cannot hear any new evidence and must rule on what was presented to the trial court.
 - 2. Trial courts: The circuit court (with general jurisdiction) and the district court (with limited jurisdiction): First hear the facts and issue judgments on those facts.
- B. Kentuckians have the right to one appeal per lawsuit. Beyond this one "matter of right" appeal, further appeals are discretionary and the appellate court may refuse to review such cases.

II. DISTRICT COURT

- A. The district court has "limited jurisdiction" which means it may handle only certain types of cases that the Kentucky General Assembly has, by statute, designated to be heard in district court.
- B. Ninety percent of all Kentuckians involved in court proceedings appear before district court (which is why it's often called "the people's court").
 - 1. Juvenile matters.
 - 2. City and county ordinances.
 - 3. Misdemeanors and violations.
 - 4. Traffic offenses.
 - 5. Probate of wills.
 - 6. Arraignments.
 - 7. Felony probable cause hearings.
 - 8. Small claims involving \$2,500 or less.
 - 9. Civil cases involving \$5,000 or less.
 - 10. Voluntary and involuntary mental commitments.
 - 11. Cases relating to domestic violence and abuse.
 - 12. Cases involving guardianship & conservatorship.
 - 13. Cases involving child abuse, neglect, and domestic violence.
- C. There are 116 district judges in sixty judicial districts in Kentucky.
- D. Judicial districts (like judicial circuits) vary in size and number of judges based on population and caseload. If a district has a high population and

a heavy caseload, it may consist of only one county but have multiple judges. In less populated areas, a district may encompass more than one county, but have only one judge who travels among the four-county district to hear cases. There may also be trial commissioners appointed to handle emergency or preliminary judicial duties, particularly where a judge does not reside in a county. District judges serve four-year terms.

- E. Appeals from district court decisions are made to the local Circuit Court.

III. CIRCUIT COURT

- A. Circuit court is the court of general jurisdiction and can hear all types of cases unless the General Assembly has given exclusive jurisdiction of particular kinds of cases to another court to handle, such as district court.
- B. Circuit court hears civil matters involving more than \$5,000, capital offenses and felonies, land dispute title cases, and contested probate cases. Circuit court has the power to issue injunctions and writs of prohibition and *mandamus* to compel or prohibit acts, and to hear appeals from district court and administrative agencies. As a division of Circuit Court with general jurisdiction, the family court division of Circuit Court retains primary jurisdiction in cases involving dissolution of marriage, child custody, visitation, maintenance and support, equitable distribution of property in dissolution cases, adoption, and termination of parental rights. In addition to general jurisdiction of Circuit Court, the family court division of Circuit Court concurrent with the district court has jurisdiction over proceedings involving domestic violence and abuse, the Uniform Act on Paternity and the Uniform Interstate Family Support Act, dependency, neglect and abuse cases, and juvenile status offenses. More information regarding Circuit Court and Family Court may be found in this handbook on 259-278.

IV. SPECIALTY COURTS

"Specialty courts" are divisions of either district court or circuit court which handle cases of a particular type to improve case management, either for reasons of efficiency or to provide special services or attention to those kinds of cases.

- A. Small Claims Court (District Court)

Small claims is a division of district court. It is an informal, inexpensive means for people to file claims in disputes involving money or personal property valued at \$2,500 or less. Parties involved in small claims actions can and often do represent themselves without an attorney.

- B. Juvenile Court (District Court).

- 1. Juvenile court is a division of district court. Cases involving children under the age of eighteen are handled in juvenile court. Cases filed in juvenile court include dependency, neglect and abuse ("D.N.A. court"); status offenders ("status court") such as

runaways, children who are consistently tardy and/or absent from school and those who have behavioral problems or are beyond adult control; and public offenders (delinquency), which include children charged with misdemeanors and felonies. In jurisdictions where there is a family court division of circuit court, the family court will hear matters of dependent, neglected and/or abused children, as well as status offenses when no public offense is pending. All other juvenile matters remain within the jurisdiction of juvenile (district) court.

2. Children charged with more serious felonies, such as rape or murder, may be transferred from juvenile court to circuit court to be tried as adults and, if convicted, imprisoned first in a juvenile facility and later in an adult prison.
3. In most cases, the first contact the child has with delinquency proceedings is through a Court Designated Worker (C.D.W.). C.D.W.s interview children, review charges filed against them and advise the children of their rights. Unlike other district court and circuit court hearings, which are open to the public, juvenile court hearings are closed to the public. However, once a juvenile has been transferred to circuit court to be tried as an adult, those circuit court proceedings are as open to the public as any other circuit court criminal proceeding.

C. Drug Court (Circuit, Family and District Courts)

1. Drug court is a form of intensive judicial supervision of individuals with drug problems. Instead of immediate incarceration for drug use, drug court participants must regularly report before the judge regarding compliance with a drug rehabilitation program.
2. In addition to statistics supporting drug court's impact on reducing recidivism, the program has saved the Commonwealth more than \$14.5 million for the first 1,000 drug court graduates, based on outcome evaluations. Drug court is supported by federal and state funds.

D. Mental Health Court

The Mental Health Court's mission is to protect public safety and reduce the recidivism rate of mentally ill offenders. It provides judges with an alternative to incarceration for offenders who meet Mental Health Court admission criteria and would benefit from mental health treatment.

E. Veterans Treatment Court

The Kentucky Court of Justice launched its Veterans Treatment Court (VTC) program in 2012 to aid U.S. military veterans who struggle with transition to civilian life and suffer with mental health problems and substance abuse. These courts combine the principles used in Drug

Court and Mental Health Court to help veterans achieve stable mental health and recover from addiction. The VTC program provides court-supervised treatment for veterans as an alternative to incarceration and supports them with services to address the issues that contributed to their criminal behavior. Jefferson County opened the first VTC, and programs have been implemented in Christian, Fayette and Hardin Counties. Another VTC is being planned for Northern Kentucky.

V. LOCAL RULES

A. General Housekeeping

Example: trial motions must be filed seventy-two hours prior to trial.

B. Practical: Learn What Irritates Judges & What Their Pet Peeves Are

Example: calling juries in for no reason = pay fees for jurors; don't accept plea or recommendation.

VI. LOCAL RULES: EXAMPLES FROM FAYETTE DISTRICT COURT

A. RFDC Rule 2: Organization of the Fayette District Court

1. **Sessions:** The Fayette District Court shall be composed of the following sessions: (1) Criminal (2) Civil (3) Juvenile (4) Mental Health and (5) Traffic. The sessions of the Fayette District Court shall be held as follows:

a. Criminal: The Criminal session shall be held in Courtroom No. 3 of the Fayette District Court Building Monday through Friday as follows:

i. Felony Preliminary Hearings: 8:30 a.m.

ii. Misdemeanor Pre-trials/Motions: 10:00 a.m.

iii. Arraignments: 1:00 p.m.

iv. Fine Payment: 2:30 p.m.

v. Trials and/or Hearings: The Judge of the division may schedule trials and/or hearings on any of the Judge's scheduled trial dates, Monday through Friday. Unless otherwise ordered by the Court, trials and hearings will be held in Courtroom No. 2 or 4 of the Fayette District Court Building.

b. Civil. The Civil session shall be held in Courtroom No. 5 of the Fayette District Court Building Monday through Friday as follows:

- i. Probate at 8:30 a.m.
 - ii. Small Claims at 9:30 a.m. The parties will be requested to resolve the case with the mediator present in court. If the matter is not settled, any hearings shall be immediately following the conclusion of the call of the Forcible Detainer docket.
 - iii. Forcible Detainer Hearings at 9:30 a.m.
 - iv. Civil Motions. Each numerical Division of the Fayette District Court shall have its regularly scheduled civil motion hour at 10:30 a.m. on its assigned day of the week. Civil cases shall be assigned for trial at the convenience of the Court upon written motion, as provided in RFDC 4.
- c. Juvenile. The Juvenile session shall consist of matters involving juvenile public offenses. The Juvenile docket shall be held in Courtroom 6 of the Fayette District Court Building Monday through Fridays as follows:
- i. Arraignments: 8:30 a.m.
 - ii. Detention hearings: 9:00 a.m.
 - iii. Pre-trials: 9:30 a.m.
 - iv. Dispositions: 10:30 a.m.
 - v. Hearings: 1:00 p.m. or at another time to be determined by the Court.
- d. Mental Health. The Mental Health session shall be held, as follows:
- i. Involuntary Hospitalization Preliminary Hearings and Jury Trials: 8:30 a.m. Tuesday at Eastern State Hospital.
 - ii. Conservator/Guardian Appointment Jury Trials: 8:30 a.m. on the second and fourth Mondays of each month in Courtroom No. 1 of the Fayette District Court Building.
- e. Traffic: The Traffic session shall be held in Courtroom No. 3 of the Fayette District Court Building at 5:30 p.m., Monday through Thursday.

2. **Assignment of cases to divisions.**
 - a. Criminal cases. If a case is not resolved at arraignment, the case shall be assigned to a numerical division of the Court by random assignment and scheduled for further proceedings in accordance with these rules.
 - b. Civil cases. All civil cases, including probate and small claims, but excluding forcible detainer cases, shall be assigned to a numerical division of the Court by random assignment at the time of the filing of the Petition or Complaint, and scheduled for hearing according to these rules. Forcible detainer cases shall be assigned to a numerical division of the Court by random assignment only upon the entry of an order granting a motion for a jury trial in such matter.
 - c. Juvenile cases. At the time of filing of a complaint or petition, the Clerk of the Court shall review the Court's records to determine whether the family involved has had any prior contact with the Court. If no contact is revealed, the case shall be assigned to a numerical division of the Court by random assignment, and scheduled for further proceedings in accordance with these rules. If prior contact is revealed, the case shall be assigned to the numerical division of the Court which issued the most recent order concerning a family.
 - d. Traffic cases. Traffic cases shall be assigned to a numerical division of the Court by random assignment only upon transfer of the case to the criminal session of the Court.
 - e. Random Assignment of Cases. The Court Administrator shall prepare sets of two hundred fifty (250) cards. The underside of fifty (50) cards shall be printed, stamped or written with the number of each numerical division of the Fayette District Court. The cards shall be mixed or shuffled so that the sequence of the cards is entirely random. Each set of cards shall be sealed at the top and on each side so that the number of the division cannot be seen. At such time as a numerical division is required to be assigned by random assignment according to these rules, the Clerk of the Court shall draw the top card and assign the matter to that numerical division. The card drawn shall be appended to the Court's file.
3. **Substitution of Judges.** Any Judge of any division may preside, hear and determine any case or question in any other division when requested to do so by the Judge of that other division, or when the Judge of that other division is absent from the county or

otherwise unavailable. Provided, however, once a case has been assigned to a division, any matter connected with the case will be heard by the Judge to whom the matter was assigned, absent good cause shown to the contrary.

4. **Court Calendar.** The Court Administrator shall maintain a yearly calendar detailing the assignment of the Judges to the various sessions of the Court. Such calendar shall be available for review by all interested persons.
5. **Change of Schedule.** Any indication of day, time, Judge assignment or courtroom for particular sessions of the Court designated within these Rules shall be subject to temporary or permanent change by the Court without notice should circumstances so require.
6. **Continuous Session.** The Fayette District Court shall be a Court of continuous session.

B. RFDC Rule 3: Criminal Practice

1. **Pre-payable Offenses.** Anyone charged with an offense that is pre-payable may appear in the Clerk's office, enter a plea of guilty, and pay the fine and costs specified without appearance in Court. Any attorney may appear and enter a plea of guilty and pay a fine and costs specified on behalf of a client, provided the attorney has authority from the client to do so. Any person charged with an offense not pre-payable shall be required to appear to answer the charge in Court and may not be authorized by any person to pre-pay a fine by pleading guilty.
2. **Pre-trial Release Interviews.** If an attorney believes that a person incarcerated should be released, the attorney must make a request for release to pre-trial services. The pre-trial services officer will interview the defendant, attempt to verify the defendant's information, and present the information to the Judge on duty. Judges will not review conditions of release unless a pre-trial interview has first been completed.
3. **Motions.** Motions may be made in writing or orally on the record in open court. Any motions regarding trial issues shall be in writing and filed no later than seventy-two (72) hours prior to the scheduled trial.
4. **Pre-trial Conferences.**
 - a. Pre-trial conferences shall be held as a matter of course in all criminal or traffic cases in which a jury trial has been requested pursuant to the order of the Judge to which the case has been assigned in accordance with RFDC 2B(1).

- b. The attorney for the defendant shall be in attendance at the pre-trial conference and shall be prepared to discuss plea-bargaining with the Prosecutor. A Judge of the Fayette District Court will be available to accept guilty pleas from any defendant desiring to do so at the conclusion of all pre-trial conferences set on that day, or as soon as practicable thereafter. Any case in which a plea of guilty is not arranged will be set for jury trial at a day and time certain. Pre-trial Motions may be heard by the Judge to whom the case is assigned at such time and place as the Judge may be order direct.

5. **Continuances.**

- a. Continuances of any pending case will not be granted for the prosecution or the defense absent a showing of good cause.
- b. A party shall make any motion for a continuance of a scheduled trial date as soon as such party becomes aware of the matter necessitating continuance in order to allow for the excusal of witnesses. (See 3C)

6. **Guilty Pleas on Jury Trial Date.** In order to allow for the proper and efficient scheduling of jurors, no defendant charged with a criminal offense whose case has been scheduled for a jury trial will be permitted to enter a plea of guilty based upon a recommendation of the County Attorney on the actual day scheduled for trial unless permitted to do so by the presiding Judge. Notice of a defendant's intent to enter a plea of guilty upon a recommendation to any charge scheduled for jury trial shall be given to the County Attorney and to the Court Administrator at least 24 hours in advance of the scheduled time of trial. If proper notice is **not** given, the plea may be entered, but shall be without recommendation of the County Attorney.

7. **Scheduled Court Time.** The policy of the Judges of the Fayette District Court is to begin each scheduled court session on time. To the extent that attorneys or parties desire to confer with the County Attorney prior to Court they should arrange to arrive at Court in sufficient time to do so without delaying the commencement of Court at the scheduled time, and without attempting to talk to the County Attorney after Court has convened.

C. RFDC Rule 7: Miscellaneous Practice Provisions

1. **Entry of Orders and Judgments.** Whenever any ruling is made or opinion rendered, an order or judgment in conformity therewith shall immediately be prepared by counsel for the successful party, shall be attested by counsel for all parties thereto as in conformity to the ruling or opinion, and shall be presented to the Court. If the

party against whom the order or judgment is to be entered is not represented by counsel, or is represented by counsel who declines to attest the order or judgment, such fact shall be endorsed thereon. When signed by the Judge, the order or judgment shall be delivered to the Clerk for entry. Counsel preparing the order or judgment shall also deliver to the Clerk a sufficient number of copies together with properly addressed stamped envelopes to permit the Clerk to complete service thereof when required by [CR 77.04](#). Counsel may waive service of any order or judgment, and notice.

2. **Motions, Pleadings and Briefs.**

- a. All motions, pleadings and orders shall be typewritten on 16 pound or heavier, white, opaque, unglazed paper, 8 ½ x 11 inches, and must be written with a black-record ribbon which is not worn or faded and with typewriter keys which are clean and do not blur the letters. All motions, pleadings and orders shall be double spaced, except legal descriptions of real property. All motions, pleadings and orders shall be written with type never smaller than pica, with larger type being preferable, especially in briefs.
- b. Unless otherwise permitted by Order of Court, the movant's brief or memorandum and the respondent's brief or memorandum shall be limited to twenty-five (25) pages each. Reply briefs or memoranda shall be limited to five (5) pages each.

3. **Exhibits to Pleadings.** No party is required to respond to any pleading if any exhibit, or copy thereof, referred to in the pleading as part thereof is missing, not filed, or not served upon such party. Response shall not be required until the exhibit is filed and a copy thereof delivered to such party or his or her counsel. In addition, the non-offending party may move to compel filing under penalty of the Court striking from the record any pleading, including a complaint, which refers to exhibit(s) which are not filed. Photostatic copies of exhibits may be used if legible.

4. **Answers to Interrogatories.** A party answering interrogatories or requests for admission shall, as part of the answer, set forth immediately preceding the answer, the question or the request made with respect to which such answer is given.

5. **Orders of Submission.** Upon submission of any action to the Court for final judgment, the parties shall prepare and present to the Court an order of submission setting forth in particular the issue or issues on which the action is submitted. An action shall be submitted only upon the entry of an order of submission. No party shall file any further pleadings, proof or briefs after the entry of the order of submission, unless ordered or allowed by the Court

for good cause shown. The Court may, but need not, pass upon any action before such order of submission, and will not render a decision over 90 days after the order of submission is entered.

6. **Record of Proceeding.** A record of all proceedings in all divisions and sessions of the District Court will be made by Court personnel by electronic recording devices operated by that personnel. No written transcript of the proceeding is required or necessary. All appeals will be upon the record as preserved by said recording; provided, however, any party may, at its sole cost and expense, provide a Court reporter to make stenographic notes of the proceedings which can serve as an additional record of the proceeding. Any such stenographic notes shall not serve as an official record of the proceeding.
7. **Withdrawal of Attorney.** An attorney who has appeared at any stage of a case and who has been noted as attorney of record by the Clerk may not thereafter withdraw as attorney of record in that case or fail to appear at any subsequent proceeding in that case, unless the attorney has appeared before the Court seeking permission to withdraw as counsel of record. If the Court, at a hearing, grants the motion, the attorney permitted to withdraw as attorney of record shall tender to the Court an order permitting the attorney's withdrawal. If the client does not appear at the hearing, the attorney shall also serve an attested copy of the order by mail upon the client. In all sessions of the Court except Criminal and Traffic, the motion shall be in writing and properly noticed for hearing before the Court.
8. **Holiday Schedule.** The Court will observe the State Holiday schedule and no sessions of the Court will be held on dates designated as state holidays. The Court Administrator shall maintain a yearly list of state holidays for review by interested persons.

VII. TOP PRACTICE TIPS FOR DISTRICT COURT

- A. Introduction
- B. Punctuality
- C. Notice
- D. Information
- E. Courtesy & Common Sense
- F. Deference
- G. Protocol
- H. Noise
- I. Perpetuity
- J. Customs
- K. Awareness
- L. Questions

VIII. DUIs

A. [KRS Chapter 189AKRS 189A](#)

B. Memorization

1. Minimum sentences and suspensions for DUI.
 - a. First offense within a ten year period: fine of not less than \$200 nor more than \$500, or imprisonment in county jail for not less than forty-eight (48) hours nor more than thirty (30) days, or both, plus \$375 service fee and court costs. License suspension of not less than thirty (30) days nor more than 120 days. If any aggravating circumstances listed in [KRS 189A.010\(11\)](#) are present, the mandatory minimum term of imprisonment is four days.
 - b. Second offense within a ten year period: fine of not less than \$350 nor more than \$500 and imprisonment in county jail for not less than seven (7) days nor more than six (6) months, plus \$375 service fee and court costs. In addition to fine and imprisonment, the offender may also be sentenced to community labor for not less than ten (10) days nor more than six (6) months. License suspension of not less than twelve (12) months nor more than eighteen (18) months. If any aggravating circumstances listed in [KRS 189A.010\(11\)](#) are present, the mandatory minimum term of imprisonment is fourteen (14) days.
 - c. Third offense within ten years: fine of not less than \$500 nor more than \$1,000 and imprisonment in county jail for not less than thirty (30) days nor more than twelve (12) months, plus \$375 service fee and court costs. In addition to fine and imprisonment, the offender may also be sentenced to community labor for not less than ten (10) days nor more than twelve (12) months. License suspension of not less than twenty-four (24) months nor more than thirty-six (36) months. If any aggravating circumstances listed in [KRS 189A.010\(11\)](#) are present, the mandatory minimum term of imprisonment is sixty (60) days.
 - d. Fourth offense or subsequent offense within ten years: Class D Felony, 120 days minimum imprisonment, \$375 service fee, costs, sixty month suspension. Mandatory minimum 240 days imprisonment if any aggravating circumstance is present.
2. For second or subsequent offenses, unless the offender provides proof that the requirements of [KRS 189A.420](#) have been met for issuance of an ignition interlock license, license plates must be

surrendered to the court or the vehicle(s) owned by the defendant must be transferred to someone else.

3. Pre-trial suspension applies to refusals, prior DUIs or refusals within the preceding ten years, and accidents that result in death or serious physical injury. Must surrender license to clerk at arraignment or as soon as relevant information becomes available.

IX. PRELIMINARY HEARINGS

- A. Purpose
- B. Bond Assignments

X. CLIENTS

- A. Payment
- B. Rules (again!)
- C. In Custody
- D. Continuances
- E. Information

XI. RESOURCES

- A. Online Court Directory –
<http://kcoj.kycourts.net/ContactList/AddressList.aspx>

Provides contact information for Circuit and District Court Judges, Family Court Judges, Court of Appeals Judges, Supreme Court Justices, Circuit Clerks, court administrators, court designated workers, master commissioners, mediators, and pre-trial officers.

- B. Circuit & District Court Online Docket –
<http://kcoj.kycourts.net/dockets/>
- C. Local Rules of Practice
<http://courts.ky.gov/Pages/localrules.aspx>
- D. Judicial Districts Map –
http://courts.ky.gov/resources/publicationsresources/Publications/P108KYJudicialDistrictsMap85x11_211web.pdf
- E. Judicial Circuits Map –
http://courts.ky.gov/resources/publicationsresources/Publications/P107KYJudicialCircuitsMap85x11_211web.pdf

REFERENCES AND ONLINE RESOURCES

In this section, you are provided with numerous references and online resources to make your research even easier.

Please note that web addresses can change rapidly. If you find a link that does not work, please report that address to Sonja Blackburn at sblackburn@kybar.org or (502) 564-3795. In addition, web content changes daily, and the Kentucky Bar Association is not responsible for the content found on the Internet sites linked to in this program book.

I. ONLINE RESEARCH RESOURCES

A. Kentucky Bar Association Website

The Kentucky Bar Association website at www.kybar.org offers a broad spectrum of legal research materials and practice information and changes daily. Make this your homepage and first stop for free practice information and legal research tools. Chances are that what you're looking for will be available directly or as a link from the KBA website.

This site gives you information about the KBA and its various departments and resources, as well as numerous research resources and links. You can find information about meeting your annual CLE requirement, the New Lawyer requirement and much more. You can obtain [CLE applications and forms](#), review your [CLE transcript](#), and find a [calendar of CLE offerings](#) including live programs, teleseminars, webinars, and online video/audio programs. We provide you with the ability to access online CLE offerings and complete up to six hours of credit per year directly from the KBA website.

The KBA website also contains [Ethics Opinions](#), an index of [SCR 3](#) governing the practice of law, [Unauthorized Practice of Law Opinions](#) and more. The [Online Resources Page](#) provides links to Kentucky information and sites, federal case law, the U.S. Constitution & selected federal statutes, federal rules & regulations, U.S. government resources & related sites, miscellaneous laws & codes, and links to other state and local bar associations. You can also access the [forms library](#) at the Kentucky Court of Justice [website](#) or check a docket for any court in the state. Other state court information is also available at this location. The websites for the U.S. District Courts and Bankruptcy Courts may also be accessed, providing access to the Joint Local Rules and other information including forms and electronic case filing.

The KBA website includes a [Lawyer Locator](#) feature that allows you to locate other members of the bar by geographic area or section membership. A link to the online research site [Casemaker](#) is also provided through the KBA website, as is our [Career Center](#) for job seekers and employers.

For the latest in KBA events and other legal news, be sure to visit <http://www.kybar.org>.

B. Great Place to Start Website

Many of us could benefit from having a mentor to guide, counsel and encourage us. The KBA Find a Mentor program is designed to connect experienced attorneys with new attorneys who are seeking advice and guidance in balancing the personal and professional demands of the practice of law.

How it works:

Qualified mentors sign up and volunteer to participate in the GPS mentor program. New attorneys looking for assistance (mentees) may locate a mentor through the GPS website by the mentor's location or area of practice. The mentee can view detailed information about potential mentors and then initiate first contact. This self-initiated contact may involve a single issue, or entail a more lasting, formal mentor relationship. The limits of the relationship are determined by the preferences of the participants. This service is available to new attorneys admitted to practice in Kentucky for five years or less. For more detailed information, visit <http://kbagps.org> and see what the program has to offer.

C. Kentucky State Government Websites

Although these government sites may be accessed through the KBA website, direct links are provided herein for your convenience. The Legislative Research Commission's website at www.lrc.state.ky.us provides access to the Kentucky Revised Statutes, Kentucky Administrative Regulations, the Kentucky Constitution and other valuable information. The State Attorney General's website at <http://ag.ky.gov/> includes information about consumer public protection programs as well as Attorney General Opinions. The official website of Kentucky State Government is found at <http://kentucky.gov/>. This website provides access to all state government agencies.

Other valuable state resources include:

Kentucky Secretary of State – <http://sos.ky.gov/>

Kentucky Vital Records Index – <http://ukcc.uky.edu/vitalrec/>

Kentucky Office of Workers' Claims – www.labor.ky.gov/workersclaims

State Law Library –

<http://courts.ky.gov/aoc/statelawlibrary/Pages/default.aspx>

D. Federal Government Websites

U.S. Dept. of Education – www.ed.gov

U.S. Code – <http://uscode.house.gov/>

U.S. Sentencing Commission – www.ussc.gov/

Internal Revenue Service – www.irs.gov

U.S. Courts – www.uscourts.gov
Dept. of Commerce – www.commerce.gov
Federal Bureau of Investigation – www.fbi.gov/homepage.htm
Federal Trade Commission – www.ftc.gov
FedWorld Information Network – <http://fedworld.ntis.gov/>
OSHA – www.osha.gov
SEC Edgar Database – www.sec.gov/edgar.shtml
Thomas: Legislative Information – <http://thomas.loc.gov/home/thomas.php>
U.S. Copyright Office – www.copyright.gov
U.S. Government Printing Office – www.access.gpo.gov
U.S. Postal Service – www.usps.com
U.S. Supreme Court – www.supremecourt.gov
U.S. White House – www.whitehouse.gov
USA.gov – <http://www.usa.gov/>

E. Miscellaneous Research & Reference Websites

Westlaw – www.westlaw.com (subscription service)
LexisNexis® – www.lexis.com (subscription service)
LexisNexis® Legal Newsroom –
<http://www.lexisnexis.com/legalnewsroom/>
Findlaw – www.findlaw.com
LawGuru – www.lawguru.com
Cornell Legal Information Institute – www.law.cornell.edu
American Bar Association – www.americanbar.org/aba.html
National Law Library – www.itislaw.com (subscription service)
LexisNexis® Martindale-Hubbell – www.martindale.com
LawReader.com – www.lawreader.com (subscription service)
Jurist – <http://www.jurist.org/>
Searchsystems Public Records Directory –
<http://publicrecords.searchsystems.net>
NETR Public Records Online – www.netronline.com
University of Kentucky – www.law.uky.edu
University of Louisville – <http://www.law.louisville.edu>
Salmon P. Chase College of Law – <http://chaselaw.nku.edu>

II. GOVERNANCE OF THE LEGAL PROFESSION IN KENTUCKY

- A. Supreme Court of Kentucky – [§116](#) of the [Kentucky Constitution](#)
- B. KBA Board of Governors – [SCR 3.070](#) and [3.080](#)
1. KBA governing body and agent of the Court for administering and enforcing Rules.
 2. Elected by Bar members.
- C. KBA Continuing Legal Education Commission – [SCR 3.600-3.695](#)
1. Operates under policy direction of Board and Supreme Court.
 2. Members appointed by the Supreme Court.

3. Responsible for administration and regulation of all CLE programs and activities.
- D. Inquiry Commission – [SCR 3.140](#)
1. Appointed by Chief Justice with consent of the Court.
 2. Considers all lawyer discipline matters and has authority to charge lawyer with professional misconduct.
- E. IOLTA Board of Trustees – [SCR 3.830](#)
1. Appointed by Board of Governors subject to Court approval.
 2. Oversees interest on Lawyers Trust Account Program.
- F. Clients' Security Fund Trustees – [SCR 3.820](#)
1. Appointed by Board of Governors.
 2. Considers claims against lawyers regarding misappropriated funds.
- G. Attorneys' Advertising Commission – [KRPC 7.03](#)
1. Appointed by Board of Governors.
 2. Reviews lawyer advertisements.
- H. Consumer Assistance Program – [SCR 3.160](#)
- Addresses client concerns and inquiries regarding attorney conduct.
- I. Kentucky Lawyer Assistance Program (KYLAP) – [SCR 3.910](#)
1. Appointed by Board of Governors.
 2. Addresses impairment issues within Kentucky legal community.

III. KENTUCKY BAR ASSOCIATION CODE OF PROFESSIONAL COURTESY

Attorneys are required to strive to make the system of justice work fairly and efficiently. In carrying out that responsibility, attorneys are expected to comply with the letter and spirit of the applicable Code of Professional Responsibility adopted by the Supreme Court of Kentucky.

The following Code of Professional Courtesy is intended as a guideline for lawyers in their dealings with their clients, opposing parties and their counsel, the courts and the general public. This Code is not intended as a disciplinary code nor is it to be construed as a legal standard of care in providing professional services. Rather, it has an aspirational purpose and is intended to serve as the

Kentucky Bar Association's statement of principles and goals for professionalism among lawyers.

1. A lawyer should avoid taking action adverse to the interests of a litigant known to be represented without timely notice to opposing counsel unless *ex parte* proceedings are allowed.
2. A lawyer should promptly return telephone calls and correspondence from other lawyers.
3. A lawyer should respect opposing counsel's schedule by seeking agreement on deposition dates and court appearances (other than routine motions) rather than merely serving notice.
4. A lawyer should avoid making ill-considered accusations of unethical conduct toward an opponent.
5. A lawyer should not engage in intentionally discourteous behavior.
6. A lawyer should not intentionally embarrass another attorney and should avoid personal criticism of other counsel.
7. A lawyer should not seek sanctions against or disqualification of another attorney unless necessary for the protection of a client and fully justified by the circumstances, not for the mere purpose of obtaining tactical advantage.
8. A lawyer should strive to maintain a courteous tone in correspondence, pleadings and other written communications.
9. A lawyer should not intentionally mislead or deceive an adversary and should honor promises or commitments made.
10. A lawyer should recognize that the conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter. In other words, "leave the matter in the courtroom."
11. A lawyer should express professional courtesy to the Court and has the right to expect professional courtesy from the Court.

IV. [SCR 3.130 KENTUCKY RULES OF PROFESSIONAL CONDUCT](#)

[1.0 Terminology.](#)

Rule

[1.1 Competence.](#)

[1.2 Scope of Representation and Allocation of Authority between Client and Lawyer.](#)

[1.3 Diligence.](#)

[1.4 Communication.](#)

- [1.5 Fees.](#)
- [1.6 Confidentiality of Information.](#)
- [1.7 Conflict of Interest: Current Clients.](#)
- [1.8 Conflict of Interest: Current Clients, Specific Rules.](#)
- [1.9 Duties to Former Clients.](#)
- [1.10 Imputation of Conflicts of Interest: General Rule.](#)
- [1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees.](#)
- [1.12 Judge, Arbitrator, Mediator or Other Third-Party Neutral.](#)
- [1.13 Organization as Client.](#)
- [1.14 Client with Diminished Capacity.](#)
- [1.15 Safekeeping Property.](#)
- [1.16 Declining or Terminating Representation.](#)
- [1.17 Sale of Law Practice.](#)
- [1.18 Duties to Prospective Client.](#)

Counselor

- [2.1 Advisor.](#)
- [2.2 Evaluation for Use by Third Persons.](#)
- [2.3 Lawyer Serving as Third-Party Neutral.](#)

Advocate

- [3.1 Meritorious Claims and Contentions.](#)
- [3.2 Expediting Litigation.](#)
- [3.3 Candor toward the Tribunal.](#)
- [3.4 Fairness to Opposing Party and Counsel.](#)
- [3.5 Impartiality and Decorum of the Tribunal.](#)
- [3.6 Trial Publicity.](#)
- [3.7 Lawyer as Witness.](#)
- [3.8 Special Responsibilities of a Prosecutor.](#)
- [3.9 Advocate in Nonadjudicative Proceedings.](#)

Transactions with Persons Other Than Clients

- [4.1 Truthfulness in Statements to Others.](#)
- [4.2 Communication with Person Represented by Counsel.](#)
- [4.3 Dealing with Unrepresented Person.](#)
- [4.4 Respect for Rights of Third Persons.](#)

Law Firms and Associations

- [5.1 Responsibilities of Partners, Managers and Supervisory Lawyers.](#)
- [5.2 Responsibilities of a Subordinate Lawyer.](#)
- [5.3 Responsibilities Regarding Nonlawyer Assistants.](#)
- [5.4 Professional Independence of a Lawyer.](#)
- [5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law.](#)
- [5.6 Restrictions on Right to Practice.](#)

Public Service

- [6.1 Donated Legal Services.](#)
- [6.2 Accepting Appointments.](#)
- [6.3 Membership in Legal Services Organization.](#)
- [6.4 Law Reform Activities Affecting Client Interests.](#)
- [6.5 Nonprofit and Court-Annexed Limited Legal Services Programs.](#)

Information about Legal Services

- [7.01 Applicability.](#)
- [7.02 Definitions.](#)
- [7.03 Attorneys' Advertising Commission.](#)
- [7.04 Advertising of Fees.](#)
- [7.05 Filing of Advertisements.](#)
- [7.06 Advisory Opinions.](#)
- [7.07 Review of Filings.](#)
- [7.08 Records of the Commission.](#)
- [7.09 Direct Contact with Potential Clients.](#)
- [7.10 Waiver and Forfeiture of Fees for Prohibited Solicitation.](#)
- [7.15 Communications Concerning a Lawyer's Service.](#)
- [7.20 Advertising.](#)
- [7.25 Identification of Advertisements.](#)
- [7.40 Communication of Fields of Practice.](#)
- [7.50 Firm Names and Letterheads.](#)
- [7.60 Kentucky Bar Association Disaster Response Plan.](#)

Maintaining the Integrity of the Profession

- [8.1 Bar Admission and Disciplinary Matters.](#)
- [8.2 Judicial and Legal Officials.](#)
- [8.3 Reporting Professional Misconduct.](#)
- [8.4 Misconduct.](#)
- [8.5 Disciplinary Authority; Choice of Law.](#)

V. SUPREME COURT DISTRICTS BY COUNTY

FIRST DISTRICT	SECOND DISTRICT	THIRD DISTRICT	FOURTH DISTRICT	FIFTH DISTRICT	SIXTH DISTRICT	SEVENTH DISTRICT
Allen	Barren	Adair	Jefferson	Anderson	Bath	Boyd
Ballard	Breckinridge	Bell		Bourbon	Boone	Breathitt
Butler	Bullitt	Casey		Boyle	Bracken	Carter
Caldwell	Daviess	Clay		Clark	Campbell	Elliott
Calloway	Grayson	Clinton		Fayette	Carroll	Floyd
Carlisle	Hancock	Cumberland		Franklin	Fleming	Greenup
Christian	Hardin	Estill		Jessamine	Gallatin	Harlan
Crittenden	Hart	Garrard		Madison	Grant	Johnson
Edmonson	Henderson	Green		Mercer	Harrison	Knott
Fulton	Larue	Jackson		Scott	Henry	Lawrence
Graves	Meade	Knox		Woodford	Kenton	Letcher
Hickman	Ohio	Laurel			Lewis	Magoffin
Hopkins	Union	Lee			Mason	Martin
Livingston	Warren	Leslie			Nicholas	Menifee
Logan		Lincoln			Oldham	Montgomery
Lyon		Marion			Owen	Morgan
Marshall		McCreary			Pendleton	Owsley
McCracken		Metcalfe			Robertson	Perry
McLean		Monroe			Shelby	Pike
Muhlenberg		Nelson			Spencer	Powell
Simpson		Pulaski			Trimble	Rowan
Todd		Rockcastle				Wolfe
Trigg		Russell				
Webster		Taylor				
		Washington				
		Wayne				
		Whitley				

VI. SCR 3.175 EFFICIENT ENFORCEMENT: NOTICE OF ATTORNEY'S ADDRESS

(1) In order to facilitate the efficient enforcement of the Kentucky Rules of Professional Conduct, the rules of the Continuing Legal Education Commission, the dues obligations of attorneys, and such other communications of importance to the profession as the Supreme Court may consider appropriate, each attorney licensed by the Supreme Court to practice law in this Commonwealth shall:

(a) maintain with the Director a current address at which he or she may be communicated with by mail, the said address to be known as the member's Bar Roster address, and shall upon a change of that address notify the Director within thirty (30) days of the new address; and

(b) maintain with the Director a valid email address and shall upon change of that address notify the Director within thirty (30) days of the new address, except however, that "Senior Retired Inactive" members and

"Disabled Inactive" members shall not be required to maintain an email address.

(c) include his or her five (5) digit member identification number in all communications to the Association including, but not limited to, any and all communications relating to his or her membership status, membership record, dues obligations, compliance with continuing legal education requirements or disciplinary proceedings in which he or she is a respondent.

(d) If the member provides a Post Office address, he or she must also provide a current address for service of process.

(e) Failure to maintain a current address which allows for physical service of process with the Director may be prosecuted in the same manner as a violation of the Rules of Professional Conduct.

(2) After July 1, 2004, every member of the Association shall be deemed to have appointed the Director as that member's agent for service of any document that is required to be served upon that member by any provision of [Supreme Court Rule 2](#) or [3](#), provided that service of a document upon the Director shall constitute constructive service of that document upon the member only upon proof that all of the following requirements have been satisfied:

(a) Reasonable efforts have been made to achieve actual service of the document upon the member;

(b) Two (2) true copies of the document have been provided to the Director, accompanied by a written request that the Director serve the document upon the member at the member's current Bar Roster address;

(c) Within seven (7) days after receipt of such request, the Director mailed one (1) copy of the document to the member at the aforesaid address, posted by certified mail, return receipt requested, restricted delivery - addressee only, in an envelope bearing the return address of the Director and marked on the outside as "OFFICIAL COMMUNICATION – IMMEDIATE ATTENTION REQUIRED"; and

(d) No less than thirty (30) days after mailing the document pursuant to subparagraph (c), the Director shall enter a Return of Service which attests:

(i) that the Director mailed one of the copies of the document mentioned in subparagraph (b) to the member's Bar Roster address in accordance with the requirements of subparagraph (c);

(ii) that the Director has attached to the Return of Service all communications received in response to the service or attempted service of the document, including any certified mail receipt or other postal notice or return receipt relating to the delivery or attempted delivery of the document and any communication from

the member of the Association or other person acting on behalf of such member; and

(iii) that the Director has provided a true copy of the Return of Service, with copies of all attachments, to the person or entity who requested service of the document upon the member of the Association.

(3) After July 1, 2004, the Association may reject any communication to the Association which fails to comply with paragraph (1)(b) of this [Rule 3.175](#), provided that a member's failure to include his or her member identification number in a document shall not result in a default in any disciplinary proceeding.

VII. ADVISORY ETHICS OPINIONS

A. Written Requests for Assistance

[SCR 3.530](#) Advisory Opinions – Informal and Formal

(1) The Ethics Committee and the Unauthorized Practice Committee are authorized to issue informal opinions, and to submit to the Board for its action formal opinions, on questions of ethics or unauthorized practice, as applicable.

(2) Any attorney licensed in Kentucky or admitted under [SCR 3.030\(2\)](#), who is in doubt as to the ethical propriety of any professional act contemplated by that attorney may request an informal opinion. The President shall designate members of the Ethics Committee to respond to such requests. Ordinarily, the request shall be directed to a member of the requestor's Supreme Court district. Such request shall be in writing or by telephone followed by a request in writing. The committee member to whom the request is directed shall attempt to furnish the requesting attorney with a prompt telephonic answer and written informal letter opinion as to the ethical propriety of the act or course of conduct in question. A copy of any such informal opinion shall be provided to the Director for safekeeping and statistical purposes, and to the Chair of the Ethics Committee, to determine whether the informal opinion has broader application.

(3) Communications between the requesting attorney and the Ethics Committee member shall be confidential. However, the requesting and giving of advice under this Rule does not create an attorney-client relationship. In order to promote uniformity of advice, redacted copies of informal opinions may be circulated among members of the Ethics Committee, as applicable, provided that such confidentiality is preserved.

(4) If the Ethics Committee determines an ethical issue to be of sufficient importance, the Committee may issue and furnish to the Board of Governors a proposed opinion authorized by such Committee for approval as a formal opinion. Such approval shall require a vote of three-fourths of the voting members present at the meeting of the Board. If the

Board is unable to approve of the opinion as written, then the Board may return the matter to the Committee for further review and consideration, or may modify the opinion and approve the opinion as modified by the three-fourths vote, or may direct the Committee to furnish the requesting attorney, if any, with an informal opinion in the form of a Chair's letter opinion, with a copy to the Director.

(5) Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney's written request, provided that the written request clearly, fairly, accurately and completely states such attorney's contemplated professional act.

(6) Any attorney licensed in Kentucky who is in doubt as to the propriety of any course of conduct or act of any person or entity which may constitute the unauthorized practice of law may make a request in writing, or in emergencies, by telephone, to the Chair of the Unauthorized Practice Committee, or such other members of the Unauthorized Practice Committee as are designated by the Chair, for an advisory opinion thereon. Local bar associations may also request advisory opinions. The Committee member to whom the request is directed shall bring this matter to the attention of the Committee at its next meeting. The Committee may attempt to furnish the requesting attorney with a prompt telephonic answer and written informal letter opinion as to whether the conduct constitutes the unauthorized practice of law. A copy of such informal opinion shall be provided to the Director and the Chair of the Unauthorized Practice Committee.

(7) Any attorney licensed in Kentucky or admitted under [SCR 3.030\(2\)](#) who is in doubt as to the ethical propriety of any professional act contemplated by that attorney with respect to the unauthorized practice of law shall be referred to the Ethics Committee district member for an informal opinion as set forth in (2) and (3). Communications about such an inquiry between the requesting attorney and the unauthorized practice committee member, and between the committee members of the two committees, shall be confidential.

(8) The requesting and giving of advice by the Unauthorized Practice Committee under this Rule does not create an attorney/client relationship.

(9) If the Unauthorized Practice Committee determines an issue regarding the unauthorized practice of law to be of sufficient importance, the Committee may issue and furnish to the Board of Governors a proposed opinion authorized by such Committee for approval as a formal opinion. Such approval shall require a vote of three-fourths of the voting members present at the meeting of the Board. If the Board is unable to approve the opinion as written, then the Board may return the matter to the Committee for further review and consideration, or may modify the opinion and approve the opinion as modified by the three-fourths vote, or may direct

the Committee to furnish the requesting attorney, if any, with an informal opinion in the form of a Chair's letter opinion, with a copy to the Director.

(10) Ethics Committee and Unauthorized Practice Committee members shall be immune from suit for advice given in the performance of duties under this Rule.

(11) All formal opinions of the Board arising from either Committee shall be published in full or in synopsis form, as determined by the Director, in the edition of the KENTUCKY BENCH & BAR next issued after the adoption of the opinion.

(12) Any person or entity aggrieved or affected by a formal opinion of the Board may file with the clerk within thirty (30) days after the end of the month of publication of the KENTUCKY BENCH & BAR in which the full opinion or a synopsis thereof is published, a copy of the opinion, and, upon motion and reasonable notice in writing to the Director, obtain a review of the Board's opinion by the Court. The Court's action thereon shall be final and the Clerk shall furnish copies of the formal order to the original petitioner, if any, the movant and the Director. The movant shall file a brief in support of the review, and the Director may file a response brief thirty days thereafter.

(13) The filing fee for docketing a motion under paragraph (7) of this Rule 3.530 shall be as provided by [Civil Rule 76.42\(1\)](#) for original actions in the Supreme Court.

HISTORY: Amended by Order 2006-09, eff. 1-1-07; prior amendments eff. 1-1-97 (order 96-1); 11-1-95, 11-15-91, 12-31-80, 1-1-78, 12-4-74, 7-2-71

B. Emergency Requests for Assistance

In November 1991, the Kentucky Bar Association inaugurated an official "Ethics Hotline." An unofficial "Hotline" had been operating for some time under [Kentucky Supreme Court Rule 3.530](#), but requests for telephone opinions began to overwhelm the system. Lawyers assumed that telephone opinions could be obtained on a twenty-four hour basis, not just for the defensive purposes set forth in [Rule 3.530](#), but also for "expert opinions" and other purposes. Such expectations put a severe strain on the volunteer Ethics Committee. The "Ethics Hotline" provides telephone opinions in emergencies. However, opinions are only provided to a requesting lawyer regarding the lawyer's own contemplated (future) conduct. Opinions are not furnished to clients, the media, or other non-lawyer sources. The opinions continue to be non-binding, except that they provide a defense to discipline in the event that the lawyer follows the advice given. The opinions are not provided for the purposes of resolving disputes in litigation, or as "expert testimony" in civil, criminal, or disciplinary cases. Each hotline volunteer has discretion to refuse to give an opinion in any particular case, especially if it is not an emergency. A volunteer may require that a written statement of the question or facts

giving rise to or assumed in any question be submitted before or after the giving of an emergency opinion.

Readers are directed to opinions [KBA E-297](#) (1984) (jurisdiction of the Committee) and [KBA E-348](#) (1991) (misuse of Committee opinions), as well as to the amended "Hotline Rules" at [SCR 3.530\(1\) and \(2\)](#). The list of "Hotline Volunteers" is included in this handbook. The requestor should call the "Hotline Volunteer" for the requestor's Supreme Court District.

Written requests for Advisory Opinions may still be forwarded to the Chair under [SCR 3.530](#).

Please note that requests for Advisory Opinions dealing with Justices, Judges, and Trial Commissioners ([SCR 4.310](#)), should go to the Ethics Committee of the Kentucky Judiciary and not the Kentucky Bar Association Ethics Committee.

C. Hotline Volunteers by Supreme Court District

A current listing of the Ethics Hotline volunteers for each Supreme Court District is located at <http://www.kybar.org/?page=EthicsHotline>.

D. Researching Ethics Questions

1. R. Underwood (ed.), Kentucky Legal Ethics Opinions and Professional Responsibility Deskbook (KBA/UKCLE, 2d ed. 1999.) – collects all opinions of the KBA Ethics, Unauthorized Practice, and Judicial Ethics Committees.
2. G. Hazard and W. Hodes, The Law of Lawyering (Harcourt Brace Jovanovich) – two volumes dealing with the ABA Model Rules.
3. ABA/BNA Lawyer's Manual on Professional Conduct (ANA/BNA) – Multi-volume loose leaf with text, current news, and collection of ethics opinions.
4. C. Wolfram, Modern Legal Ethics, (West 1986) – hornbook.
5. R. Mallen and J. Smith Legal Malpractice, (West 2d ed. 1989).
6. R. Underwood and W. Fortune, Trial Ethics (Little Brown 1988).
7. R. Underwood, "Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals", 81 Ky. L.J. 1-104 (1992-1993) – ethics and prosecutors.
8. J. Shaman, S. Lubet, and J. Alfani, Judicial Conduct and Ethics (Michie 1990).

VIII. SUMMARY OF KENTUCKY STATE COURTS

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SUPREME COURT

The Supreme Court of Kentucky is the court of last resort and the final interpreter of state law. It consists of seven justices who are elected from the seven appellate districts and serve eight-year terms. The Chief Justice of the Commonwealth is chosen by his or her colleagues and serves a term of four years. The justices, as a panel, hear appeals of decisions from the lower courts and issue decisions or "opinions" on cases. A case, which comes before the Supreme Court, is not retried. Attorneys with written briefs and oral arguments addressing the legal issues, which the Court must decide, present the case to the Supreme Court. Cases involving the death penalty, life imprisonment or imprisonment for twenty years or more go directly from the circuit court level, where the cases are tried, to the Supreme Court for review as a matter of right. The Supreme Court is also responsible for establishing rules of practice and procedures for the Court of Justice, which includes the conduct of judges and attorneys.

CHIEF JUSTICE

John D. Minton, Jr., (2nd Dist.)

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601, (502) 564-4162

Warren County Justice Center, 1001 Center St., Ste. 305 – Bowling Green, KY 42101 (270) 746-7867

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103 West Court Square, P.O. Box 757 – Princeton, KY 42445-0757, (270) 365-3533

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Jefferson County Judicial Center, 700 W. Jefferson St., Ste. 1000 – Louisville, KY 40202, (502) 595-3199

Deputy Chief Justice Mary C. Noble, (5th Dist.)

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Michelle M. Keller, (6th Dist.)

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Samuel T. Wright III, (7th Dist.)

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COURT OF APPEALS

The Court of Appeals is exactly what its title implies. Nearly all cases come to it on appeal from a lower court. If a case is tried in District or Circuit court, and the losing parties involved are not satisfied with the outcome, they may ask for a higher court to review the correctness of the trial court's decision.

Some cases, like criminal case acquittals and divorces, may not be appealed. In a divorce case, however, child custody and property rights decisions may be appealed. Cases are not retried in the Court of Appeals. Only the record of the original court trial is reviewed, with attorneys presenting the legal issues to the court for a decision.

Fourteen judges, two elected from seven appellate court districts, serve on the Court of Appeals. The judges are divided into panels of three to review and decide cases, with the majority determining the decision. The panels do not sit permanently in one location, but travel about the state to hear cases.

Court Clerk: Samuel P. Givens, Jr.

Clerk of the Court of Appeals
360 Democrat Drive
Frankfort, Kentucky 40601

Clerk's Phone: 502-573-7920

CIRCUIT COURTS

Circuit Court is the court of general jurisdiction that hears civil matters involving more than \$5,000, capital offenses and felonies, land dispute title cases and contested probate cases. Circuit Court has the power to issue injunctions, writs of prohibition and writs of *mandamus* and to hear appeals from District Court and administrative agencies.

As a division of Circuit Court with general jurisdiction, the family court division of Circuit Court further retains primary jurisdiction in cases involving dissolution of marriage; child custody; visitation; maintenance and support; equitable distribution of property in dissolution cases; adoption; and, termination of parental rights. In addition to general jurisdiction of Circuit Court, the family court division of Circuit Court, concurrent with the District Court, has jurisdiction over proceedings involving domestic violence and abuse; the Uniform Act on Paternity and the Uniform Interstate Family Support Act; dependency, neglect, and abuse; and, juvenile status offenses.

One judge may serve more than one county within a circuit. Some circuits contain only one county but have several judges, depending on population and caseload. Circuit judges serve in eight-year terms.

DISTRICT COURTS

District Court is the court of limited jurisdiction and handles juvenile matters, city and county ordinances, misdemeanors, violations, traffic offenses, probate of wills, arraignments, felony probable cause hearings, small claims involving \$2,500 or less, civil cases involving \$5,000 or less, voluntary and involuntary mental commitments and cases relating to domestic violence and abuse.

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