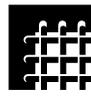


Kentucky Bar Association New Lawyer Program



January 25 - 26, 2018
Hyatt Regency
Louisville, Kentucky

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

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Commission**

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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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2018 New Lawyer Program

January 25 - 26, 2018 • Hyatt Regency Hotel • Louisville, KY

Thursday, January 25, 2018

7:30 a.m. – 8:30 a.m.	Registration/Check-In Required
8:30 a.m. – 8:45 a.m.	Introduction and Welcome (0.25 CLE Credit)
8:45 a.m. – 9:30 a.m.	Kentucky Bar Association: What We Do for You (0.75 CLE Credit)
9:30 a.m. – 10:30 a.m.	LMICK: What is Malpractice Insurance and How Does It Work? (1.0 CLE Credit)
10:30 a.m. – 10:45 a.m.	BREAK
10:45 a.m. – 11:45 a.m.	eFiling Certification Training (1.0 CLE Credit)
11:45 a.m. – 1:00 p.m.	BOX LUNCH (Provided) High-Functioning Impairment: Identification, Ethical Duties and Solutions (1.0 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. – 4:15 p.m.	Professional Responsibility for the Young Lawyer: If I Knew Then, What I Know Now... (1.0 Ethics Credit)
4:15 p.m. – 5:15 p.m.	Better Not Call Saul: Professional Ethics Lessons from "Breaking Bad" and its Prequel (1.0 Ethics Credit)
5:00 p.m.	ADJOURN

Friday, January 26, 2018

Track 1 AM

8:00 – 8:30 a.m.	Registration/Check-In Required	
8:30 – 9:30 a.m.	Access to Justice	1.00 CLE Credit
9:40 – 10:40 a.m.	Opening a Law Office: Hanging Up a Shingle and Rainmaking	1.00 CLE Credit
10:50 – 11:50 a.m.	Civil Litigation: Becoming Your Own Investigator	1.00 CLE Credit

Track 2 AM

8:00 – 8:30 a.m.	Registration/Check-In Required	
8:30 – 9:30 a.m.	Business Law Basics	1.00 CLE Credit
9:40 – 10:40 a.m.	Stranger in a Strange Land: What to Do When Your State Court Case Has Been Dragged into Bankruptcy Court	1.00 CLE Credit
10:50 – 11:50 a.m.	Domestic Law	1.00 CLE Credit

Track 1 PM

1:00 – 2:00 p.m.	Practice of a Civil Case from A to Z	1.00 CLE Credit
2:10 – 3:10 p.m.	Mediation: Nuts and Bolts	1.00 CLE Credit
3:20 – 4:20 p.m.	Depositions: Ethical and Practical Issues Based on the Kentucky Rules of Professional Conduct	1.00 Ethics Credit

Track 2 PM

1:00 – 2:00 p.m.	Wills and Probate	1.00 CLE Credit
2:10 – 3:10 p.m.	District Court 101 and the Attorney's Duty to the Court	1.00 CLE Credit
3:20 – 4:20 p.m.	Prosecuting and Defending DUI Matters	1.00 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

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. 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. 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 <https://www.kybar.org/page/gpsabout>.

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 sign into your KBA account. Your KBA ID number (attorney number) will be 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.



Lawyer to Lawyer

The Volunteer Advisor program is a great way to get advice from experienced Kentucky lawyers. These attorneys are volunteers, who have agreed to answer questions submitted to them by email or telephone regarding the practice of law in Kentucky. They have agreed to provide guidance to the best of their knowledge and ability and can in no way be held liable or accountable for advice so given.

How does the Volunteer Advisor program work?

Attorneys, with five or more years of practice experience, sign up to become volunteer advisors. The experienced attorney's name and information will be added to the list of volunteer advisors made available. New attorneys may view the Volunteer Advisors list to locate an advisor. Once found, the new attorney may then ask an advisor questions via telephone and/or email. Attorneys should be aware of the dictates of attorney-client privilege and utilize hypotheticals when appropriate.

You must be logged in to the website to view the Volunteer Advisor list. Approval to view and use the list is limited to new attorneys admitted to practice in Kentucky for five years or less.

[View Advisor List](#) [Become a Volunteer Advisor](#)

Questions?
Contact our Program & Publications Coordinator
502.564.3795 ext. 226

[Latest News](#) [more](#) [Calendar](#) [more](#)

1/3/2018 Casemaker Weekly - January 3rd	1/10/2018 Elder Law Section Quarterly Meeting
12/20/2017 Casemaker Weekly - December 20th	1/19/2018 » 1/20/2018 Board of Governors Meeting

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.



Become a Volunteer Advisor

Are you an experienced lawyer interested in sharing your wisdom and guidance with young attorneys just joining the legal profession, but don't have the time or ability to meet in person? If your answer is yes, then this program is perfect for you! This program allows you to assist young attorneys seeking answers and advice through telephonic and email correspondence. It's a great way to help young legal professionals without the commitment of appointments and in person meetings.

If you are interested in becoming a volunteer advisor, please complete and submit the Volunteer Advisor Signup Form below. Once your submission is received, your name with a link to your KBA public profile and any other provided information will be added to the list of volunteer advisors made available to new attorneys admitted to practice in Kentucky for five years or less. Note: Volunteers must be KBA members with five or more years of practice experience. Please refer to the [Volunteer Disclaimer and Release Information](#) for other eligibility details.

If you would like to change the information listed or remove yourself from the list, contact our Program & Publications Coordinator at sblackburn@kybar.org or 502-564-3795 ext. 226.

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.



Find a Mentor

The Find a Mentor program is designed to connect experienced attorneys with new attorneys who are pursuing advice with substantive law questions and looking for guidance in balancing the personal and professional demands of the practice of law. The mentor attorneys have agreed to make themselves available to newly licensed Kentucky attorneys to provide advice and guidance regarding the practice of law in Kentucky when requested. Such advice and guidance regarding practicing law in Kentucky may be in the form of telephonic communications, email, in person meetings, shadowing to court, etc. The mentors have volunteered to serve as advisors for newly admitted Kentucky attorneys to the best of their knowledge and ability and can in no way be held liable or accountable for advice and guidance given in this capacity.

How does the Find a Mentor program work?

Attorneys, with five or more years of practice experience, sign up to become mentors. The experienced attorney's name and information will be added to the list of mentors made available. New attorneys looking for assistance (mentees) may view the list to locate a mentor. Once found, the mentee may then initiate first contact with the potential mentor. This self-initiated contact from mentees to potential mentors 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.

You must be logged in to the website to view the Mentor List. Approval to view and use the lists is limited to new attorneys admitted to practice in Kentucky for five years or less.

[View Mentor List](#)

[Become a Mentor](#)

Questions?

Contact our Program & Publications Coordinator
502.564.3795 ext. 226

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.

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 \$265,000 awarded to twenty-four nonprofit law-related programs and projects throughout Kentucky in **2017**

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?

4,551 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.*

1,010 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.*

90 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.*



• 2017 •

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 \$425,000 from the IOLTA Fund were awarded to Kentucky's four regional **civil legal aid** programs in **2017**.

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.

Nearly \$17 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 2017.

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 2015</u>	<u>LMICK² 2014</u>	<u>LMICK³ 2013</u>	<u>ABA 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:

Error	<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:

Act	<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%
Failure to follow client directives	<u>1.2</u>	2%

<u>Type of misconduct alleged</u>	<u>Rule potentially violated</u>	<u>Percentage of total</u>
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.



Overview of eFiling Rules and Procedures

Presented by
**Administrative Office of the
Courts**



Where to Find eFiling Rules

Kentucky Court of Justice website

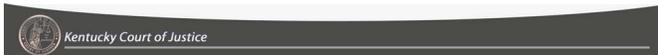
<http://courts.ky.gov/courts/supreme/Pages/rulesprocedures.aspx>

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.



CURRENT RESEARCH ON LAWYERS & MENTAL HEALTH ISSUES: WHAT LAWYERS NEED TO KNOW

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 Jane H. Herrick, Chief Bar Counsel,

The Office of Bar Counsel (OBC) recognizes that attorneys need to seek assistance without fear of losing their license to practice. Both KYLAP and OBC operate under strict rules of confidentiality. Shared communication may only occur when an attorney consents. In such disciplinary cases, OBC and KYLAP may work together to get the attorney the treatment they need so they can avoid the problems which interfered with their ability to practice.

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"

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KYLAP Commissioner (6th Supreme Court District)

Reprinted with permission from the May 2015 issue of Bench & Bar Magazine.

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.

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

If you violated the [Kentucky Supreme Court Rules of Professional Conduct](#), you may receive discipline in the form of a private reprimand, a public reprimand, a suspension for a specific period of time with or without conditions, or permanent disbarment. See [SCR 3.380\(1\)](#).

Most disciplinary cases are now resolved at, or even before, the Inquiry Commission level. Of the 1,100 disciplinary files closed during the 2016-2017 fiscal year, 837 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 forty-four other complaint cases. The Kentucky Supreme Court only issued renditions in seventy-seven cases, with eleven of those being Reciprocal Discipline after an attorney had been subjected to professional disciplinary action in another jurisdiction in accordance with [SCR 3.435](#). 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 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 eight 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 the 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. RESPOND

[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.

Additionally, [SCR 3.380\(2\)](#) provides that the Court may suspend you from the practice of law for an indefinite period of time if you fail to answer a charge filed, or if you fail to further participate in the disciplinary process after you file an answer.

Moreover, without a response, the Inquiry Commission, and possibly the Board of Governors and the Kentucky Supreme Court, 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. If you would like an attorney and cannot afford one, [SCR 3.300](#) allows for the Inquiry Commission to appoint one for you.

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](#) and are available on the KBA [website](#).

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 2016-2017 fiscal year, 1,104 disciplinary files were opened.

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

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

Also, in the 2016-2017 fiscal year, the Kentucky Supreme Court issued renditions in seventy-seven cases.

Of the bar complaints that made it past the Inquiry Commission level and were reviewed by the Kentucky Supreme Court, most related to communications ([SCR 3.130\(1.4\)](#)), dishonest conduct ([SCR 3.130\(8.4\)\(c\)](#)), candor in the discipline process ([SCR 3.130\(8.1\)](#)), terminating the attorney-client relationship ([SCR 3.130\(1.16\)](#)), and diligence ([SCR 3.130\(1.3\)](#)).

All of this being said, only 3.06 percent of the over 18,000 Kentucky lawyers even had a bar complaint filed against them during the 2016-2017 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)

THREE THINGS TO KNOW ABOUT WITHDRAWING FROM A CASE

James J. Bell and K. Michael Gaerue

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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)¹ 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 8.3,² it is clear that the lawyer must "know" of the other attorney's violation. Rule 1.0(f)³ 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.

¹ See Kentucky [SCR 3.130\(8.3\)\(a\)](#).

² See Kentucky [SCR 3.130\(8.3\)](#).

³ See Kentucky [SCR 3.130\(1.0\)\(f\)](#).

Specifically, Rule 8.3(c)⁴ 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 1.6⁵ 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 8.3⁶ 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."⁷ 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

⁴ See Kentucky [SCR 3.130\(8.3\)\(c\)](#).

⁵ See Kentucky [SCR 3.130\(1.6\)](#).

⁶ See Kentucky [SCR 3.130\(8.3\)](#).

⁷ See Kentucky [SCR 3.320](#), which states that any Kentucky attorney "who is convicted of a felony 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)⁸ 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.

⁸ See Kentucky [SCR 3.130\(8.4\)\(d\)](#).

THREE THINGS TO KNOW ABOUT THE ETHICS OF FILES

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Reprinted from *The Indiana Lawyer.com*, September 9, 2015, with permission of the author,
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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)¹ 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 and property that the lawyer generated for the lawyer's own purpose while

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

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)² 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."

² See Kentucky [SCR 3.130\(1.15\)\(a\)](#).

THREE THINGS TO KNOW ABOUT REQUESTS FOR CLIENT INFORMATION

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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 1.6¹ of the Indiana Rules of Professional Conduct says that unless you have client consent, you have a duty to resist. For example, Comment [13]² 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

¹ See Kentucky [SCR 3.130\(1.6\)](#).

² 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 1.6³ 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 1.4⁴ 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.

³ See Kentucky [SCR 3.130\(1.6\)](#).

⁴ 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.

**BETTER NOT CALL SAUL: PROFESSIONAL ETHICS LESSONS FROM
BREAKING BAD AND ITS PREQUEL**

Oran S. "Scotty" McFarlan III

I. A BRIEF DISCUSSION OF FAIR USE

A. What is Fair Use?

From the U.S. Copyright Office website, (<https://www.copyright.gov/fair-use/more-info.html>):

1. One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright law.
2. One of the more important limitations is the doctrine of "fair use," which is codified in section 107 of the copyright law. See [17 U.S.C. §107](#).
3. [Section 107](#) contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research.
4. [Section 107](#) also sets out four factors to be considered in determining whether or not a particular use is fair:
 - a. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
 - b. The nature of the copyrighted work;
 - c. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - d. The effect of the use upon the potential market for, or value of, the copyrighted work.
5. The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined and must be determined on a case-by-case basis.

There is no specific number of words, lines, or notes that may safely be taken without permission and acknowledging the source of the copyrighted material does not substitute for obtaining permission.

6. Examples of activities that courts have regarded as fair use: Quotation of excerpts in a review, quotation of short passages in a scholarly work, use in a parody, summary of an article with brief quotations in a news report, and reproduction of a small part of a work by a student or teacher to illustrate a lesson.
7. WARNING: The safest course is to get permission from the copyright owner before using copyrighted material.

B. Question:

1. If we want to show clips from Breaking Bad as part of today's CLE, is that allowable under the doctrine of fair use?
2. According to Sony Pictures Television, the answer is NO.
 - a. Because there is a fee to attend the bar convention and this CLE is part of the bar convention, the unions and various guilds (e.g., directors, writers, actors, etc.) involved with the show would likely have a problem with it.¹
 - b. When money changes hands for something like CLEs, the unions and guilds want a share of the proceeds because their work on the show "enhances the experience" for people paying to attend.

C. The Bad News

If you were hoping to come here today and get CLE credit for watching an hour of Breaking Bad or Better Call Saul, our apologies as we decided it's best not to show actual clips from the show.

D. The Good News

1. We made our own clips.
2. The clips shown throughout today's CLE are intended for THE PURPOSES OF PARODY ONLY. Breaking Bad, Better Call Saul, and its characters are registered trademarks of High Bridge Entertainment, Gran Via Productions, and/or Sony Pictures Television. The production of the clips used in this CLE was not sponsored, endorsed by or affiliated with High Bridge Entertainment, Gran Via Productions, Sony Pictures Television, or any of its subsidiaries or affiliated companies and/or third party licensors.

II. (NOT) FURTHERING CLIENTS' CRIMINAL ENTERPRISE

A. Kentucky Rules of Professional Conduct

¹ This program and accompanying materials were originally included at the 2017 KBA Annual Convention, for which a fee was charged.

1. [SCR 3.130\(1.2\)](#): Scope of representation and allocation of authority between client and lawyer.
2. Subsection (d).

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

3. Supreme Court Commentary regarding subsection (d).

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent in and of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See [Rule 1.16\(a\)](#). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See [Rule 4.1](#).

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for

legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See [Rule 1.4\(a\)\(5\)](#).

- B. **"When the going gets tough, you don't want a criminal lawyer, you want a *criminal* lawyer, know what I'm sayin'?"** Jesse Pinkman; Breaking Bad, Season 2, Episode 8, "Better Call Saul"

Examples of attorney behavior in violation of subsection (d) to [SCR 3.130\(1.2\)](#):

1. Finding ideal businesses to purchase for the purpose of laundering money.
2. Finding possible locations to conduct criminal activity.
3. Recommending certain associates "take a trip to Belize."
4. Arrange for "cleaners" to dispose of incriminating evidence at a crime scene.
5. Connect drug manufacturers with high level drug distributors.

- C. **"Did you not plan for this contingency? I mean the Starship Enterprise had a self-destruct button. I'm just saying."** Saul Goodman; Breaking Bad, Season 3, Episode 6, "Sunset"

Examples of crimes committed by attorneys in the course of improperly furthering clients' criminal enterprise:

1. Perjury.
 - a. Intentionally subscribing "as true any material matter which [the attorney] does not believe to be true."
 - b. [18 U.S.C. §1621](#).
2. Subornation of perjury.

- a. Encouraging, bribing or inducing another to commit perjury.
 - b. [18 U.S.C. §1622](#).
- 3. Tampering with evidence to conceal clients' crime.

See State v. Romeo, 542 N.W.2d 543 (Iowa 1996) (attorney fabricated false receipts to protect client from theft charge and was subsequently convicted for "record tampering").
- 4. Obstruction of justice.

Interfering with the work of police, investigators, regulatory agencies, prosecutors, or other officials, e.g., lying to investigating officers, providing a false alibi, etc.
- D. **"I never should've let my dojo membership run out."** Saul Goodman; Breaking Bad, Season 5, Episode 12, "Rabid Dog"
 - 1. [Nix v. Whiteside](#), 475 U.S. 157, 166 (1986).
 - a. Supreme Court reiterates "counsel's duty of loyalty and his 'overarching duty to advocate the defendant's cause.'"
 - b. But notes that "duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law."
 - 2. Again, as noted in the Kentucky Supreme Court commentary to [SCR 3.130\(1.2\)](#), it is important to be mindful of the "distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."

III. OVERZEALOUS REPRESENTATION

[O]ne of the dark delights of Breaking Bad is its extraordinary ability to create ambivalence about characters who do evil. Walter White is a manipulative, murdering, child-poisoning, drug-dealing megalomaniac – yet many viewers still find it difficult to condemn him. So long as we continue to feel some sympathy for the client, we are free to admire **the zealous advocacy of his lawyer.**

....

If there is any ethical lesson for lawyers in Breaking Bad, it might be a warning about the siren song of unrestrained advocacy. Clients desire it, lawyers admire it, and it plays well on TV.

But in real life, lawyers are bound to put the rule of law before the rule of the client. The Rules require that "[a]s advocate a lawyer zealously asserts the client's position under the rules of the adversary system." That last clause is where Saul Goodman and the rules of law and ethics part company.

Karen Erger, "Loss Prevention: The Zealous Advocacy of Saul Goodman," 101 Illinois Bar Journal 538 (Oct. 2013).

A. Definitions

1. Zeal (zeel) *n.* enthusiasm, hearty and persistent effort.

Zealous (zel-ūs) *adj.* full of zeal. zealous-ly *adv.* Zealousness *n.*
◇ Do not confuse *zealous* with *jealous*.

Overzealous (oh-vēr-zel-ūs) *adj.* too zealous.

Oxford American Dictionary (Oxford Univ. Press 1980).

2. zealotry (zel-uh-tree) *noun* undue or excessive zeal; fanaticism.

Dictionary.com Unabridged (Random House, Inc. 2014).

B. Perspectives

This erroneous understanding of zeal makes an obvious mistake. **"Zealotry" is not a synonym for, but rather a pejorative twist on, the noun before us.** One can no more fairly equate "zeal" with "zealotry" than one can call religious faith "fanaticism," precision "nitpicking," careful teaching "pedantry," a slender person "emaciated," a sturdier one "morbidly obese," and so on. Lawyers, of all people, ought to take better care with their words.

Anita Bernstein, "The Zeal Shortage," 34 Hofstra Law Rev. 1165, 1174-75 (2006).

"[I]f we insist on believing that we represent the angels and that all the angels are on our side, we have taken that first small step down the slippery slope into zealotry. The next step is a big one. We start to demonize our opposition. If we are on the side of angels, our opposition must be on the side of the devil. It is really easy to become a zealot when we believe we are protecting our client from evil incarnate."

Elizabeth Mary Kameen, "Rethinking Zeal: Is it Zealous Representation or Zealotry?," Maryland Bar Journal (Mar/Apr 2011).

The Preamble to the ABA Model Rules of Professional Conduct (1983) . . . and EC 7-1 of the ABA Model Code of Professional Responsibility refer to a lawyer's duty to act "zealously" for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.

Restatement (Third) of the Law Governing Lawyers §16 at 148 (A.L.I. 1998).

C. Looking Back – Historical Views of Zeal in Regard to Attorney Ethics

1. 1980 ABA Canons of Prof. Ethics.

Canon 15:

The lawyer owes entire devotion to the interest of the client, ***warm zeal*** in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or withheld from him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy and defense (internal quotation marks omitted).

2. ABA Model Code of Professional Responsibility (1969).

a. Code provisions.

- i. Canon 7: A lawyer should represent a client zealously within the bounds of the law.
- ii. EC 7-1. The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations
- iii. EC 7-10. The duty of a lawyer to represent his client with zeal does not militate against his

concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

b. Kentucky use of ABA Model Code's zeal provisions.

i. [KBA Ethics Opinion E-65](#) (May 1973).

Despite the increased liberality of the Civil Rules and forms of discovery, the rules do not contemplate discovery of privileged information between attorney and client. **While it is the duty of an attorney to represent his client zealously, it is also his duty to represent him within the bounds of the law.**

ii. [KBA Ethics Opinion E-159](#) (Jan. 1977).

When lawyers who share offices represent adverse interests, there must always be some temptation to moderate **zeal on behalf of the client** in the interest of harmony in the office. No doubt such temptation would often, even always, be successfully resisted. However, a large part of the lay public believes that in these circumstances, one or both of the clients will get **representation that is less than zealous**. It is reasonable that the lay public should believe this because the temptation to moderate **zeal** in such circumstances is a fact. Accordingly, we believe that office sharing lawyers ought not to represent adverse interests because doing so presents an appearance of impropriety.

Note: E-159 was modified in part by [E-243](#).

iii. [KBA Ethics Opinion E-190](#) (Sept. 1978).

Although DR 5-101(A) and DR 5-101(C) allow representation with full consent and full disclosure of the

parties, the Committee is of the opinion that a lawyer may not serve two masters at the same time. **A lawyer has a duty to represent the client zealously within the bounds of the law.** By being employed by both parties (city and client) in litigation the attorney's conduct would have a tendency to diminish the public's respect for the legal profession and such conduct would bring the bench and bar into disrepute.

- iv. [KBA Ethics Opinion E-203](#) (Jan. 1979): "It is an attorney's duty to represent his client **zealously** within the bounds of the law (Canon 7, EC 7-19)."
- v. [KBA Ethics Opinion E-213](#) (March 1979).

To paraphrase Canon 7 of the Code, even though a lawyer has a duty to represent his client zealously, it must be within the bounds of the law. The Rules of Civil Procedure provide for discovery of relevant information from any employees of any corporation. Therefore, if there is any question concerning the relationship of an employee to the corporation or governmental entity, it is necessary to contact the attorney of the corporation before taking any statements from the employee or from questioning any employee of the adversary corporation.

- vi. [KBA Ethics Opinion E-272](#) (July 1983).

A law school faculty member who represents a client in an action again[st] the state may raise two ethical issues: (1) if the faculty member teaches at a state institution, he or she might be representing both sides of a law suit (DR 5-105(A)); (2) the attorney/faculty member might be subject to pressure from state officials which would **prevent the attorney from**

zealously and independently representing the client (Canon 7 and 5), or preserving the confidence of the client (Canon 4) or which would make it appear that the faculty member is acting with impropriety.

- vii. [KBA Ethics Opinion E-279](#) (Jan. 1984).

There are several valid reasons for permitting a lawyer acting as defense counsel to secretly record conversations with witnesses in the proceeding. Those reasons are as follows:

.....

4. Canons 6 and 7 of the Code of Professional Responsibility require a lawyer to exercise competence in the zealous representation of his client. These duties apply in the context of criminal cases and justify his secret recording of conversations of witnesses in the representation of his client.

- viii. [KBA Ethics Opinion E-321](#) (July 1987).

There are several reasons why an attorney should not argue his or her own ineffectiveness. First, there is an apparent conflict between the client's interest and the attorney's interest in his or her reputation, which may give rise to a claim that the attorney did not **zealously pursue the claim** – an assertion of ineffectiveness in presenting the ineffectiveness claim.

- ix. [KBA Ethics Opinion E-331](#) (Sept. 1988).

A restricted budget for the defense can pose an ethical dilemma for defense counsel. This is so because the insured is defense counsel's client. **The insured is entitled to competent and zealous representation**, and a defense that

is not adversely affected by prohibited conflicts of interest. At some point carrier imposed restrictions may threaten counsel's ability to provide such representation and impact on the lawyer's ability to bring to bear his independent professional judgement on behalf of the insured.

See *also* KBA Ethics Opinion E-378 (March 1995) ("We have previously held that the **insured is entitled to** competent and **zealous representation** that is not adversely affected by prohibited conflicts of interest." (*citing* E-331)).

- x. [KBA Ethics Opinion E-230](#) (March 1980): "An attorney who represents the F.O.P. in grievances and other civil matters may not practice criminal law in the same jurisdiction."

On review, SCOKY affirms:

It is fundamental that energetic representation of criminal defendants often entails vigorous cross-examination of police officers with an eye to discrediting their testimony. Presented with the dilemma of alienating a group of police officers on the one hand and providing a criminal defendant with the most energetic possible defense on the other, the attorney faces a conflict which seriously endangers his ability to **zealously represent his client as is required by Canon 7 of the Code of Professional Responsibility.**

In re Advisory Opinion of Kentucky Bar Ass'n, 613 S.W.2d 416, 416 (Ky. 1981).

- 3. 1990 version of Kentucky Rules of Professional Conduct.
 - a. SCR 3.130(1.3), cmt. 1 (1992).

"A lawyer should act with commitment and dedication to the interest of the client and with **zeal** and advocacy on the client's behalf."
 - b. Applications.

- i. [KBA Ethics Opinion E-349](#) (Sept. 1991): A City Attorney who does not perform any prosecutorial duties and whose contract or job description does not require him to represent or advise the police department of his or her city may not engage in the defense of criminal cases that involve the city police.

On review, SCOKY affirms cites interference with zeal obligation as justification. See In re Advisory Opinion of Kentucky Bar Ass'n, 847 S.W.2d 723, 724 (Ky. 1993) ("The City Ordinance presents the likelihood that the basis for a conflict between a criminal defendant client and a municipal client, or fellow employees of the city, is not completely removed. **Therefore the attorney faces a conflict which may seriously endanger his ability to zealously represent his client, as is required by the Rules of Professional Conduct.**")

- ii. [KBA Ethics Opinion E-374](#) (Revised) (Nov. 1995).

A lawyer's duty of loyalty runs to the lawyer's client and not to his opponent's lawyer. Compare D.C. Op. 256 (1995) (D.C. law recognizes the concept of inadvertent waiver, and lawyer may attempt to use materials if lawyer read the materials before realizing it was inadvertently produced – **duty to represent client zealously discussed**).

- iii. [KBA Ethics Opinion E-410](#) (Sept. 1999).

With regard to recognizing the information as damaging to the client, the attorney's conduct is guided by KRPC 1.1. KRPC 1.1 states that a "lawyer shall provide competent representation to a client." Competence is defined to require "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." KRPC 1.1. **KRPC 1.3 requires the lawyer to "act with reasonable diligence and promptness in representing a client."** Comment 1 to 1.3 states:

"A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." The attorney representing the Insured must be every [sic] vigilant and must abide by KRPC 1.1 and 1.3 with regard to protecting the client's rights and identifying information that might be harmful to the Insured.

[Counsel] believes that he has zealously represented his client, and "Rule 11 cannot be allowed to thoroughly undermine zealous advocacy." Sadly, what [counsel] fails to realize is that one does not so advocate by categorizing one's opponents as thieves, criminal conspirators, and committers of fraudulent acts.

Smith v. Miller, 2003 WL 22681426 (Ky. App. Nov. 14, 2003) (*quoting* Jefferson Circuit Court's Order).

iv. [KBA Ethics Opinion E-425](#) (June 2005).

Some commentators have suggested that the lawyer's participation in the collaborative process may be inconsistent with the duty of zealous representation. This so-called "duty" has its roots in Canon 7 of the former Code of Professional Responsibility, and was most often associated with the tough lawyer involved in litigation (the hired gun). Today's Rules of Professional Conduct, adopted in Kentucky in 1990, no longer impose a duty of zeal, but rather impose duties of competence and diligence.

Although many of the current rules focus on the litigation aspects of lawyering, and even mention "zeal" in a comment to Rule 1.3 on diligence, the rules should not be

read to preclude non-adversarial representations.

- v. Kentucky Bar Ass'n v. Craft, 208 S.W.3d 245, 260 (Ky. 2006) (making passing reference in footnote to "how **zealous** [Plaintiff's former counsel] was in the pursuit of his case" (but without any context to that zeal) shortly before a citation to the "zeal" language in the 1992 commentary to Rule 1.3).
- vi. "We are troubled by Teater's repeated failure properly and **zealously** to represent and communicate with his clients." Teater v. Kentucky Bar Ass'n, 243 S.W.3d 349, 351 (Ky. 2008).
 - a) Attorney failed to give proper attention to client's UIM claim. Four years passed. SOL blown.
 - b) Attorney failed to negotiate Medicare lien (leaving \$5,000 of settlement money hanging in balance), took no action for a year and a half, did not return client's phone calls, failed to honor client's request for a copy of her file.

D. Current (2009) Kentucky Rules of Professional Conduct

- Textual References to Zeal Return
- 1. Preamble: A Lawyer's Responsibilities ([SCR 3.130](#)).
 - a. "III. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. **As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.** As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others."
 - b. "IX. A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, **a lawyer can be a zealous advocate on behalf of a client** and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public

interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private."

- c. "X. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by **the basic principles underlying the rules**. These principles **include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.**"

2. Commentary.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. **A lawyer must also act** with commitment and dedication to the interests of the client and **with zeal in advocacy upon the client's behalf**. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer might have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal system with courtesy and respect.

[SCR 3.130\(1.3\), cmt. 1.](#)

[SCR 3.130\(Rule 1.3\)](#): "A lawyer shall act with reasonable diligence and promptness in representing a client."

3. Applications.

[W]e do not believe that Respondent's agreement to defend Manning amounts to an actionable

conflict of interest. There are competing interests in this case. We believe that the preponderance of the evidence shows that Manning wanted to go to trial and that he directed Respondent accordingly. Respondent did not have to represent Manning. But as a practical matter, there were not a whole lot of attorneys anxious to take a case where the likelihood of full payment was in question. Had Respondent not take[sic] the case, it is likely that a public defender would have been appointed to represent Manning. **The testimony in this case suggests that Respondent's zeal may have been at least a partial motive for her taking the responsibility of representing Manning** in what was doubtless a very difficult case.

Kentucky Bar Ass'n v. Roberts, 2014 WL 1409424, *9-10 (Ky. Mar. 20, 2014) (emphasis added).

We note that Blum additional[sic] argues that the nature of the proceedings required that he toe the line between ethical and unethical behavior in order adequately to represent Dixon. We would remind Blum "the advocacy to which a client and the client's legal position is entitled cannot enable or justify an attorney in violating ethical restraints." In re Comfort, 284 Kan. 183, 159 P.3d 1011, 1021 (2007). **An attorney is obligated to advocate zealously for a client's legitimate interest, but that advocacy must be through ethically permissible means.** See *id.* ("There are times when an attorney's only ethical duty is to tell a client . . . 'your legal objective is valid, but I am ethically bound to pursue it through a different means.'").

Kentucky Bar Ass'n v. Blum, 404 S.W.3d 841, 851-52 (Ky. 2013).

The United States challenges [E-435](#)'s proscription of defense counsel's providing advice on IAC waivers in plea agreements. The United States' arguments are numerous but lacking. Primarily, the United States argues any personal conflict posed by the presence of an IAC waiver provision ordinarily will not propose a "significant risk" **because of the attorney's concomitant duty to advocate zealously for the client[.]**

U.S., ex rel. U.S. Attorneys ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Ass'n, 439 S.W.3d 136, 151 (Ky. 2014).

Even absent the likely conflicting responsibility as agent of the court, moreover, critics maintain that a "best interest" lawyer who substitutes his or her best-interest judgment for that of the child runs afoul of the duties to **"advocate . . . zealously . . . the client's position,"** [SCR 3.130](#), Preamble, and to "abide by a client's decisions concerning the objectives of representation." [SCR 3.130-1.2](#).

Morgan v. Getter, 441 S.W.3d 94, 116 (Ky. 2014).

We pause to note that case law has used the term judicial statements privilege as applicable to litigants, witnesses and to attorneys alike. Arguably, a broader privilege may be applicable to an **attorney who has the duty to zealously represent his or her client** and against whom sanctions, including [CR 11](#) sanctions, may be available.

Halle v. Banner Industries of N.E., Inc., 453 S.W.3d 179, 183 n.2 (Ky. App. 2014).

We cannot allow the presumption of innocence enjoyed by all accused to be so unceremoniously tossed aside by the very individuals tasked with zealously defending that presumption.

Commonwealth v. Tigue, 459 S.W.3d 372, 398 (Ky. 2015).

We are not blind to the fact that the Parents were at a disadvantage in this case. Here, we had a nearly perfect storm. This is a civil action in which the parents were represented by their own separate, **private counsel whose duty it is to zealously represent their clients at every critical stage. . . .**

. . . .

This Court is disappointed in the conduct of counsel for the Parents in this case. **Indications of zealous legal representation are absent** at critical stages of this case and this appeal. Although not a criminal action, there is nevertheless the prospect for punishment greater than any most parents can fathom – separation from one's own children. These parents were entitled to **representation that satisfies the letter and spirit of the Kentucky Rules of Professional Conduct**, perhaps not more so than in any other civil matter, but certainly not less so. We question whether they received it.

C.H. v. Cabinet for Health and Family Services, 2016 WL 1069037, *5 (Ky. App. Mar. 18, 2016).

The trial court did not abuse its discretion in concluding under the circumstances counsel had crossed the line from zealous advocacy into obstruction, delay, and harassment, and that such tactics, if allowed to continue, would make consumer protection law a dead letter.

Thomerson v. Commonwealth ex rel. Conway, 2016 WL 4256913, *11 (Ky. App. Aug. 12, 2016).

IV. ATTORNEY-CLIENT RELATIONSHIP

A. Lovell v. Winchester, 941 S.W.2d 466, 468 (Ky. 1997)²

1. "[t]he lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the relationship is created as a result of the client's reasonable belief or expectation that the lawyer is undertaking the representation. Such a belief is based on the conduct of the parties. The key element in making such a determination is whether confidential information has been disclosed to the lawyer."
2. It is the reasonable belief of the potential client, based on the conduct of the parties, which governs whether a relationship has been formed.

B. KBA E-316

1. An attorney-client relationship is not dependent upon payment of fees, nor upon execution of a formal contract.
2. Ordinarily, rules of agency and contract determine whether such a relationship has been formed, either expressly or impliedly. ABA/BNA Lawyers' Manual on Professional Conduct §31:101.
3. In addition, the relationship may be established by the client's reasonable and detrimental reliance on the lawyer to provide legal services. *Id.*
4. So while the payment of fees might be evidence that tends to show that an attorney-client relationship has been formed, it has

² Overruled by Marcum v. Scorsone, 457 S.W.3d 710 (Ky. 2015) (Court rejected Lovell's appearance of impropriety standard, holding "in deciding [lawyer/law firm] disqualification questions, trial courts should apply the standard that is currently in the Rules of Professional Conduct, which at this time requires a showing of an actual conflict in interest." *Id.* at 718.)

expressly been rejected as a litmus test as to whether such a relationship exists.

C. [KRE 503](#) Codifies the "Lawyer-Client Privilege"

1. Grants the client the privilege to "refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of" legal services. [KRE 503\(b\)](#).

2. Exception – [KRE 503\(d\)\(1\)](#): Furtherance of crime or fraud.

If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

3. Future crimes.

The privilege is generally considered to be absolute as to communications made by or to a person advising with an attorney as to past transactions and offenses. Cummings v. Commonwealth, 221 Ky. 301, 298 S.W. 943 (1927). However, the rule does not apply to future transactions when the person seeking the advice is contemplating the commission of a crime or the perpetration of a fraud.

4. An attorney can only assert the privilege on behalf of the client. The client can unilaterally waive the privilege and divulge any advice given to him by the attorney (or in fact anything said by the attorney) to anyone he so chooses.

5. The client alone holds the privilege.

V. **CONFLICTS OF INTEREST**

A. Entering a Transaction with a Client — [SCR 3.130\(1.8\)](#)

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the

advice of independent legal counsel on the transaction;
and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Author Notes: Obviously, this section is not meant to address the payment of legal fees. The comments to the rule refer the reader back to [Rule 1.5](#), which specifically addresses fees.

The salient point of this rule is that all of the key terms, including an exact explanation of the lawyer's involvement and the advice to seek separate legal counsel, must be in writing. In addition, the terms of the agreement must be fair to the client. This is a fact-specific, and often very subjective, inquiry. Moreover, the fairness requirement does not disappear merely because the client has independent counsel.

Attorneys would do well to avoid these types of transactions altogether, as nearly any problem ultimately resulting from the transaction could one day be grounds for a conflict-of-interest claim.

B. Conflicts Involving Multiple Parties — [SCR 3.130\(1.7\)](#)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation.

**A Selected Bibliography of "Academic" Analysis of
Breaking Bad & Better Call Saul**

Armen Adzhemyan and Susan M. Marcella, "'Better Call Saul' If You Want Discoverable Communications: The Misrepresentation of the Attorney-Client Privilege on Breaking Bad," 45 N.M. L. Rev. 477 (2015) [Note that the entire Spring 2015 issue of the New Mexico Law Review is a "Special Edition" on "Breaking Bad and the Law."]

Alafair S. Burke, "Got a Warrant?: Breaking Bad and the Fourth Amendment," 13 Ohio St. J. of Crim. L. 191 (2015)

Trisha Farrow, "The Not-So-Simple Estate Plan of Breaking Bad's Walter White," 46 Ariz. St. L.J. 955 (2014)

Veronica Finkelstein, "Better Not Call Saul: The Impact of Criminal Attorneys on Their Clients' Sixth Amendment Right to Effective Assistance of Counsel," 83 U. Cin. L. Rev. 1215 (2014-15)

David Koepsell, "Law and Morality in Breaking Bad: The Aesthetics of Justice," in Kevin S. Decker, ed., Philosophy and Breaking Bad (Springer Intl. 2017)

Cathren Koehlert-Page, "Breaking Bad Facts: What Intriguing Contradictions in Fiction Narratives Can Teach Lawyers about Coping with Harmful Evidence," 13 Legal Comm. & Rhetoric: JALWD 1 (2016)

Albert M. Kopak & Ophir Sefiha, "Becoming Badass: Teaching Katz's 'Ways of the Badass' Using the Breaking Bad Television Series," 26 J of Crim. Justice Ed. 94 (2014)

Michael C. Mims, "Don't Bake – Litigate! A Practitioner's Guide on How Walter White Should Have Protected His Interests in Gray Matter, and His Litigation Options for Building an 'Empire Business' through the Courts, not the Cartel," 45 N.M.L. Rev. 673 (2015)

Christopher Ryan, "No Longer Perry Mason: How Modern American Television's Portrayal of Attorneys Shifts Public Opinion," 17 U. Denv. Sports & Ent. L.J. 133 (2015)

Scott Shimick, "Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero," 50 Tulsa L. Rev. 43 (2014).

Matt Wanat and Leonard Engel, eds., Breaking Down Breaking Bad: Critical Perspectives (Univ. New Mexico Press 2016)

ethicsofbettercallsaul.tumblr.com

www.reddit.com/r/betterCallSaul/

I. LEGAL ORGANIZATIONS AND RESOURCES

A. LSC-funded Legal Aid Organizations

1. [Legal Aid Society](#)

Neva-Marie Polley, Executive Director
416 West Muhammad Ali Boulevard, Suite 300,
Louisville, KY 40202
Telephone: (502) 584-1254

The mission of the Legal Aid Society is to pursue justice for people in poverty. Legal Aid provides free legal services to the most disadvantaged in the community. Individuals must meet certain eligibility requirements to receive services.

2. [Kentucky Legal Aid](#) – Western Kentucky.

New client intake: (866) 452-9243
Information: (800) 782-1924

The mission of Kentucky Legal Aid is to assist and enable low income families, elderly, disabled and other vulnerable individuals in South Central and Western Kentucky to resolve legal problems that are barriers to self-sufficiency, and to provide these individuals an opportunity for an improved quality of life. Services are free. Individuals must meet certain eligibility requirements to receive services.

3. [Legal Aid of the Bluegrass](#) – Northern and Central Kentucky.

104 East 7th Street, Covington, KY 41011
Telephone: (859) 431-8200
Fax: (859) 431-3009

Legal Aid of the Bluegrass provides free civil legal assistance designed to alleviate the most brutal problems of the low income people living in thirty-three northern and central Kentucky counties. These services are typically in the areas of government

¹ This is not even close to an exhaustive list. Also, the organization of these lists is not intended to imply a hierarchy of quality or importance of either the issues the organizations are addressing or the organizations within the groups.

Did I miss an organization? More than one? Email me: ben@bencarterlaw.com

benefits, consumer, housing and family law. Individuals must meet certain eligibility requirements to receive services.

4. [AppalReD](#).

Robert C. Johns, Executive Director
Administrative Office
120 North Front Avenue, Prestonsburg, KY 41653
Central intake and advice line: (866) 277-5733
TDD/TDY: (800) 648-6056

AppalRed Legal Aid is committed to providing high quality civil legal services in a manner that promotes equal access to justice, encourages self-sufficiency and empowers the lives of low income individuals and families in eastern and south central Kentucky. AppalReD Legal Aid offers a wide variety of civil legal services to assist people with a variety of needs. Services are free. Individuals must meet certain eligibility requirements to receive services.

B. Nonprofit Law Organizations

1. [ACLU of Kentucky](#).

Michael Aldridge, Executive Director
315 Guthrie Street, Suite 300, Louisville, KY 40202
Telephone: (502) 581-1181
Fax: (502) 589-9687
Email: info@aclu-ky.org.

The American Civil Liberties Union of Kentucky (ACLU) works daily in courts, legislatures and communities to defend the individual rights and liberties guaranteed to all people by the Constitution of the United States and the Commonwealth of Kentucky. The ACLU of Kentucky has almost 3,000 members statewide. It is governed by a Board of Directors elected by the membership and its work is accomplished through a network of volunteers, coordinated by a staff of six working out of its Louisville office.

2. [Kentucky Equal Justice Center \(& Maxwell Street Legal Clinic\)](#).

Lexington Office: 201 East Maxwell Street, Lexington, KY 40508
Telephone: (859) 233-3057
Fax: (859) 554-0504

Louisville Office: 222 South 1st Street, Suite 305, Louisville, KY 40202
Telephone: (502) 333-6012
Fax: (502) 416-0022

KEJC is a non-profit poverty law advocacy and research center focusing on the following issues: consumer law, family law, housing, immigration, welfare & health, and workers' rights. One of its programs – the Maxwell Street Legal Clinic – is a high quality, low cost legal assistance clinic for immigrant and refugee communities.

3. [Appalachian Citizens' Law Center.](#)

Stephen A. Sanders, Director
317 Jenkins Road, Whitesburg, KY 41858
Telephone: (606) 633-3929
Fax: (606) 633-3925
Email: aclc@appalachianlawcenter.org

The Appalachian Citizens' Law Center is a nonprofit law firm that fights for justice in the coalfields by representing coal miners and their families on issues of black lung and mine safety and by working with grassroots groups and individuals to protect the land and people from misuse and degradation caused by extractive industries. The Center handles individual cases and engages in strategic litigation and policy work in the areas of mine safety and health, environmental protection and sustainable energy.

4. [Children's Law Center.](#)

Acena Beck, Executive Director
1002 Russell Street, Covington, KY 41011
Telephone: (859) 431-3313
Toll-Free: (866) 386-8313
Fax: (859) 655-7553.

The Children's Law Center exists to protect the legal rights of children through quality legal representation, research and policy development, and training attorneys and others regarding children's rights issues. The Center currently provides direct services in Ohio and Kentucky, but collaborates with other organizations within the region and nationally on a variety of topics.

5. [Kentucky Resources Council.](#)

Kentucky Resources Council, Inc.
P.O. Box 1070, Frankfort, KY 40602
Phone: 502-875-2428
Fax: 502-875-2845
Email: fitzKRC@aol.com

The Kentucky Resources Council (KRC) is Kentucky's only environmental advocacy organization offering legal and strategic

assistance without charge to individuals, community groups and local governments statewide. KRC's mission is to protect Kentucky's natural resources and promote healthy communities by providing legal and technical guidance and assistance to individuals, communities, and organizations with environmental concerns.

6. [Kentucky Refugee Ministries.](#)

Louisville Office

969B Cherokee Road, Louisville, KY 40204.

Telephone: (502) 479-9180 Fax: (502) 479-9190

Lexington Office

1710 Alexandria Drive, Suite 2, Lexington, KY 40504

Telephone: (859) 226-5661 Fax: (859) 226-9631

A non-profit organization dedicated to providing resettlement services to refugees through faith- and agency-based co-sponsorship in order to promote self-sufficiency and successful integration into the community. KRM is committed to offering access to community resources and opportunities and to promoting awareness of diversity for the benefit of the whole community.

7. [Micah Legal.](#)

New, sliding scale, nonprofit law firm in Lexington focusing on wills, expungement, and family law.

8. [Lexington Fair Housing Council.](#)

207 East Reynolds Road, Suite 130, Lexington, KY 40517

Telephone: (859) 971-8067 or (866) 438-8617.

General email: mail@lexingtonfairhousing.com.

The Lexington Fair Housing Council is a full-service, nonprofit civil rights agency committed to eradicating discrimination in housing. The Fair Housing Council enforces the federal Fair Housing Act, the Kentucky Fair Housing Act, and the fair housing laws of Lexington-Fayette Urban County at no charge.

C. Lawyer Referral Services

1. Central Kentucky Lawyer Referral Service.

Telephone: (859) 225-8644. M-F 8:30am - 4:30pm

www.fcba.com/cklrs.html

The Central Kentucky Lawyer Referral Service is a non-profit public service of the Fayette County Bar Association. The program is designed to assist persons who are able to pay normal attorney fees but whose ability to locate legal representation is discouraged by a lack of experience with the legal system, insufficient information about the type of services needed and fear of the potential costs of seeking an attorney. No fee is charged for calling the referral service. You may receive a reduced rate half-hour consultation with the attorney (\$25). However, the attorneys do charge their regular prices after the first half hour. They are not free or reduced rate.

2. Kentucky Lawyer's Referral Service.

(Serving: Breckenridge, Bullitt, Hardin, Henry, Jefferson, Larue, Meade, Nelson, Oldham, Shelby, Spencer, and Trimble Counties)
600 West Main Street, Louisville, KY 40202
Telephone: (502) 583-1801
Hours: Monday - Friday 8:30am - 4:30pm

The Kentucky Lawyer Referral Service (KLRS), a public service sponsored by the Louisville Bar Association, refers callers to attorneys in their geographical area who are qualified to handle specific legal problems. Attorneys are available in all areas of law including divorce, bankruptcy, labor law, real estate, and worker's compensation. *Pro bono* attorneys are not available. However, reduced-fee attorneys are available to those who qualify.

3. Northern Kentucky Bar Association Lawyer Referral Service.

(Serving: Boone, Campbell, Carroll, Gallatin, Grant, Kenton, Owen, and Pendleton)
Telephone: (859) 781-1525
www.nkybar.com/includes/referral.aspx

The Northern Kentucky Lawyer Referral Service is not a *pro bono* service and is not affiliated with Legal Aid. The attorneys will charge fees for services rendered. Hourly fees and contingency fees are left to the discretion of the individual attorney.

D. Government Agencies

1. Department for Public Advocacy.

Damon Preston, Public Advocate
5 Mill Creek Park, Frankfort, KY 40601
Telephone: (502) 564-8006
Fax: (502) 695-6767
www.dpa.ky.gov

The Department of Public Advocacy is an independent agency attached for administrative purposes to the Justice and Public Safety Cabinet. DPA is the statewide public agency providing public defender service in all of Kentucky's 120 counties as well as Kentucky's appellate courts.

2. Kentucky Protection & Advocacy.

5 Mill Creek Park, Frankfort, KY 40601
Telephone: (502) 564-2967 or (800) 372-2988
Fax: (502) 695-6764
www.kypa.net

Protection and Advocacy (P&A) is an independent state agency that was designated by the Governor as the protection and advocacy agency for Kentucky. Its staff includes professional advocates and attorneys. P&A's mission is to protect and promote the rights of Kentuckians with disabilities through legally based individual and systemic advocacy and education.

3. Kentucky Client Assistance Program.

300 Sower Boulevard, 4th Floor, 4CSW 20, Frankfort, KY 40601
Telephone: (502) 564-8035 or (800) 633-6283
Fax: (502) 564-1566
www.kycap.ky.gov

The Kentucky Client Assistance Program is an independent program established to provide advice, assistance and information regarding benefits available from rehabilitation programs to individuals with disabilities. The Program provides high-quality advocacy services and information and referral to persons with disabilities. It maintains an environment that supports individuals with disabilities in their efforts to reach an appropriate vocational goal and obtain gainful employment.

4. Kentucky Commission on the Deaf and Hard of Hearing.

Virginia Moore, Executive Director
632 Versailles Road, Frankfort, KY 40601
Telephone: (502) 573-2604. Toll Free: (800) 372-2907
Videophone: (502) 416-0607
Information Services: kcdhh@kcdhh.ky.gov
Access Center, kcdhh.access@ky.gov
www.kcdhh.ky.gov

The Commission's mission is to provide effective and efficient leadership, education, advocacy and direct services to eliminate barriers and to meet the social, economic, educational, cultural and intellectual needs of deaf and hard of hearing Kentuckians.

5. Kentucky Office for the Blind.

275 East Main Street, Frankfort, KY 40621
Telephone: (502) 564-4754 or (800) 321-6668
www.blind.ky.gov

Its mission is to provide opportunities for employment and independence to individuals with visual disabilities. The Office serves Kentuckians who are visually impaired or blind and assists individuals to obtain and maintain employment, economic self-sufficiency and independence with complete integration into society. Its goal is to provide a myriad of resources and quality services which are geared to enhance the lives for Kentuckians with disabilities.

6. Department of Housing and Urban Development, Louisville Office.

Gene Snyder Courthouse, 601 W. Broadway, 1st Floor
Louisville, KY 40202
Telephone: (502) 582-5251
TTD: (800) 648-6056

HUD's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; build inclusive and sustainable communities free from discrimination; and transform the way HUD does business.

7. Kentucky Commission on Human Rights.

John Johnson, Executive Director
332 West Broadway, Suite 1400, Louisville, KY 40202
Telephone: (502) 595-4024
Toll free: (800) 292-5566
Fax: (502) 595-4801
Email: kchr.mail@ky.gov
www.kchr.ky.gov

The agency receives, initiates, investigates, conciliates and rules upon complaints alleging violations of the Kentucky Civil Rights Act. The Kentucky Civil Rights Act prohibits discrimination in Kentucky. KCHR's mandate under the Act is "to safeguard all individuals within the state from discrimination because of familial status, race, color, religion, national origin, sex, age 40 and over, or because of the person's status as a qualified individual with a disability." The Kentucky Commission on Human Rights also enforces the policies set forth in The U.S. Civil Rights Act, The U.S. Fair Housing Act, The U.S. Americans with Disabilities Act and other federal civil rights laws.

8. Kentucky Labor Cabinet.

Derrick K. Ramsey, Secretary
1047 U.S. Highway 127 South, Suite 4, Frankfort, KY 40601
Telephone: (502) 564-3070
Fax: (502) 564-5387
www.labor.ky.gov

The primary responsibility of the Kentucky Labor Cabinet is to ensure that divisions and offices falling under the auspices of the Cabinet work within the jurisdiction of Kentucky labor law to ensure equitable and fair treatment of the Commonwealth's 2,113,000 wage earning employees. Specifically, the Cabinet, according to regulation, shall have the duties, responsibilities, power, and authority relating to labor, wage and hour issues, occupational safety and health of employees, child labor, apprenticeship, workers' compensation insurance, and all other matters under the jurisdiction of the Labor Cabinet.

9. National Labor Relations Board, Regional Office.

(Serving areas in Ohio, Indiana, Kentucky and West Virginia from its office in Cincinnati).
Gary Lindsay, Regional Director
John Weld Peck Federal Building
550 Main Street, Room 3003, Cincinnati, OH 45202
Telephone: (513) 684-3686
TTY: (513) 684-3619
Fax: (513) 684-3946. www.nlr.gov/region/cincinnati.

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

10. Kentucky Commission on Women.

Cordelia Harbut, Executive Director
700 Capitol Avenue, Suite 146, Frankfort, KY 40601
Telephone: (502) 564-2611
Fax: (502) 564-2853
www.women.ky.gov

The Kentucky Commission on Women is dedicated to elevating the status of women and girls in the Commonwealth, empowering them to overcome barriers to equity, and expanding opportunities to achieve their fullest potential. Kentucky statute mandates the Commission to encourage and provide advisory assistance in the establishment of local volunteer community improvement

programs for women; to conduct programs, studies, seminars, and conferences to educate the public to the problems of women; to consult with and advise the Governor and the agencies, departments, boards, and commissions of the state and local and municipal governments on matters pertaining to women; and to cooperate with the federal government and with the government of other states in programs relating to women.

11. Legal Associations and Membership Organizations.

[Kentucky Access to Justice Commission](#) (out of the AOC)

[Access to Justice Foundation](#)

[American Constitution Society](#) (Kentucky)

[Kentucky Justice Association](#)

State and Local Bar Associations

Small and Solo Practice Facebook Group

[National Association of Consumer Advocates](#)

[American Association of Justice](#) (trial lawyers)

[National Association of Criminal Defense Lawyers](#)

[National Lawyers Guild](#) (left-wing ABA)

II. ALLIED ORGANIZATIONS

These are organizations without any/many lawyers on staff, but doing work in areas of interest.

A. General/Multi-Issue Organizations

1. Anne Braden Institute for Social Justice Research.

Cherie Dawson-Edwards, Acting Co-Director, 2017-18
Ekstrom Library, Room 258, University of Louisville,
Louisville, KY 40292
Telephone: (502) 852-6142
www.comm.louisville.edu/abi

The Institute's mission is to bridge the gap between academic research and social justice community advocates who might apply that research. The Institute sponsors, stimulates, and disseminates interdisciplinary research relevant to the Louisville community and the U.S. South on social movements, citizen participation, public policy reforms, and social, racial, gender and economic justice.

2. Carl Braden Memorial Center.

3208 West Broadway, Louisville, KY 40211
Telephone: (502) 778-8130
Email: carlbradencenter@gmail.com
www.carlbradencenter.org

Since 1969, the Carl Braden Memorial Center has hosted meetings of the Kentucky Alliance against Racist and Political Repression, progressive lawyers' law offices, the original Black Panther Party, anti-war activists and GIs opposing the war in Vietnam, tenants unions, Occupy Louisville, and many, many more. The building that currently houses the Braden Center was donated in order to sustain Carl and Anne Braden's work of promoting justice in Louisville and the world at large.

3. Citizens of Louisville Organized and United Together (CLOUT).

Rev. Robert Owens, Lead Organizer
1113 S. Fourth Street, Suite 350, Louisville, KY 40203
Telephone: (502) 583-1267
Fax: (502) 583-9563
Email: clout@bellsouth.net
www.cloutky.org.

CLOUT is an organization of religious congregations and groups whose mission is to build the power of religious congregations to solve community problems by holding systems accountable. It is a grassroots, direct action, multi-issue organization that represents a diverse mix of races and ethnicities, as well as different religious traditions.

4. Fellowship of Reconciliation – Louisville Chapter.

www.louisvillefor.org

The Fellowship of Reconciliation seeks to replace violence, war, racism and economic injustice with nonviolence, peace and justice. It is an interfaith organization committed to active nonviolence as a transforming way of life and as a means of radical change. FOR educates, trains, builds coalitions, and engages in nonviolent and compassionate actions locally, nationally, and globally.

5. Interfaith Paths to Peace.

Haleh Karimi, Executive Director
2500 Montgomery Street, Louisville, KY 40212
Telephone: (502) 214-7322.
Email: interfaithpaths@gmail.com
www.paths2peace.org

IPP works to make its community, the nation, and the world more peaceful by bringing people of different religions together through programs and events that promote inter-religious understanding. IPP is a private organization not affiliated with any religion.

6. [Justice Resource Center of Louisville.](#)

1807 ½ West Oak Street, Louisville, KY 40210
Telephone: (502) 774-8624

The Justice Resource Center of Louisville is an active participant in the battle for civil rights and for justice for all people. The Center's work includes advocating for job opportunities for minorities, organizing against unfair utility increases, and pushing Kentucky's representatives in the U.S. Congress towards economic justice. The Center has a radio broadcast on Saturday mornings at 10AM on WLOU.

7. [Kentuckians for the Commonwealth.](#)

Burt Lauderdale, Executive Director
P.O. Box 1450, London, KY 40743
Telephone: (606) 878-2161
Fax: (606) 878-5714

KFTC is a grassroots organization of 7,500 members across Kentucky. It uses a set of core strategies, from leadership development to communications and voter empowerment, to impact a broad range of issues, including coal and water, new energy and transition, economic justice and voting rights.

8. Kentucky Youth Advocates.

11001 Bluegrass Parkway, Suite 100, Jeffersontown, KY 40299
Telephone: (502) 895-8167 or (888) 825-5592
Email: info@kyyouth.org
www.kyyouth.org

KYA is a non-partisan, non-profit, children's advocacy organization. KYA works on behalf of Kentucky's children with the state legislature, the community, and the media. KYA promotes positive changes and policies that impact children by providing research, timely publications on issues and collaborating with a variety of groups to craft policies that positively affect Kentucky's children, especially those who are poor and otherwise disadvantaged.

9. Muhammad Ali Institute for Peace and Justice, at University of Louisville, Ekstrom Library, Room 280, University of Louisville, Louisville, KY 40292
www.louisville.edu/aliinstitute

The Institute advances the work, study, and practice of peacebuilding, social justice and violence prevention through the development of innovative educational programs, training, service and research. The Ali Institute has a special concern for young

people living with violence in urban areas; therefore, they seek to equip the young and those working with them to be agents of peace and justice in their communities.

10. Sowers of Justice Network.

Post Office Box 5541, Louisville, KY 40255
Email: Sowersofjusticenetwork@gmail.com
www.sowersofjusticenetwork.org

Sowers of Justice is a network/coalition in Louisville that seeks to strengthen the collective Christian voice and action for social justice. Through networking, organizing, education, and advocacy, the Network seeks to engage local, national, and global issues of economic justice, human rights for all, environmental integrity, and peace.

11. [National Association of Social Workers-Kentucky](#).

The Kentucky Chapter of NASW (NASW-KY), with 1,600 members, represents Kentucky's professional social workers across ten branches including Northern, Northeast, Eastern, South Central, Southeast, Western, Purchase, Lake Cumberland, Jefferson, and Bluegrass.

Our members have a variety of specializations and areas of expertise from health care, schools, community organizing, politics, behavioral health, and more. Students make up one third of our membership and NASW-KY is committed to offering special attention to the goals of students and transitioning professionals.

B. Immigrant and Refugee Rights

1. The Kentucky Coalition for Immigrant and Refugee Rights (KCIRR).

560 East Third Street, Suite 203, Lexington, KY 40508
Telephone: (859) 685-0387
www.kcirr.org

KCIRR is an advocacy organization working to improve the lives of millions of immigrants and refugees in Kentucky and throughout the United States. Currently, KCIRR works on many fronts towards ensuring just rights, but is mainly focused on grassroots organizing in immigrant communities.

2. [La Casita Center](#).

223 East Magnolia Avenue, Louisville, KY 40208
Telephone: (502) 322-4036
Email: info@lacasitacenter.org

www.lacasitacenter.org

La Casita Center enhances the health and well-being of Louisville's Hispanic/Latino community through a network of women's groups engaged in education, advocacy, wellness and mutual support. La Casita Center envisions a thriving, healthy and nonviolent community that welcomes and celebrates its Hispanic/Latino members.

3. [Americana Community Center.](#)

Edgardo Mansilla, Executive Director
4801 Southside Drive, Louisville, Kentucky 40214
Telephone: (502) 366-7813
Fax: (502) 366-6382
www.americanacc.org

Americana Community Center strives to provide a spectrum of services to the diverse individuals and families of the Louisville Metro area, including refugees, immigrants, and those born in the U.S. These services enable people to realize their individual potential, build strong families, and create a healthy & supportive community for all.

4. Kentucky Dream Coalition (KDC).

Email: info@kentuckydreamcoalition.com
www.facebook.com/kentuckydream
www.kentuckydreamcoalition.com

KDC believes everyone should have the opportunity to go to college and better themselves. Every day, KDC empowers, inspires, and informs immigrant youth by serving as examples, spreading knowledge to them, and guiding them to be leaders.

C. Economic Justice

[Kentucky Center for Economic Policy](#)

Jason Bailey, Executive Director
433 Chestnut Street
Berea, KY 40403
Telephone: (859) 986-2373

The Kentucky Center for Economic Policy (KCEP) seeks to improve the quality of life for all Kentuckians through research, analysis and education on important policy issues facing the Commonwealth. KCEP produces research on timely issues; promotes public conversation about those issues through media and presentations; and advocates to decision makers on the need for policies that move all Kentuckians forward.

D. Housing

1. [Metropolitan Housing Coalition.](#)

Cathy Hinko, Executive Director
P.O. Box 4533, Louisville, KY 40204
Telephone: (502) 584-6858

MHC is a non-profit organization supported by over 300 individuals and organizations as coalition members that believe safe, decent housing is a basic human right. Its mission is to bring together Greater Louisville's public and private resources to provide equitable, accessible housing opportunities for all people through advocacy, public education and support for affordable housing providers.

2. [Homeless and Housing Coalition of Kentucky.](#)

Adrienne Bush, Executive Director
306 West Main Street, Suite 207, Frankfort, KY 40601
Telephone: (502) 223-1834

The Coalition works to increase opportunities for decent, safe, and affordable housing across Kentucky. It is a statewide advocacy organization for issues of homelessness and affordable housing in Kentucky, and it educates state legislators and advocates for more affordable housing in Kentucky.

3. [Coalition for the Homeless \(Louisville\).](#)

Natalie Harris, Executive Director
1300 South 4th Street, Suite 250, Louisville, KY 40208
Telephone: (502) 636-9550
Email: admin@louhomeless.org

The Coalition for the Homeless, Inc. is a nonprofit organization with a mission to advocate for people who are homeless and for the prevention and elimination of homelessness. Its efforts are targeted in a three-prong approach: educating the community about homelessness and inspiring action; advocating for system changes; and coordinating the community response to homelessness through efficient use of resources and funding.

4. Louisville Metro Affordable Housing Trust Fund, Inc.

Christie McCravy, Executive Director
1469 South 4th Street, Suite 300, Louisville, KY 40208
Telephone: (502) 637-5372
www.louisvilleahtf.org

The LAHTF was established by Metro Council to invest public funds in vital housing for the community: housing for people on fixed incomes like seniors and people with serious disabilities; for young families starting out; for veterans; and for working people whose wages are not enough to live in Metro Louisville.

E. Labor

1. AFL-CIO.

The AFL-CIO is an organization of people who work. The organization envisions a future in which work and all people who work are valued, respected and rewarded. While the AFL-CIO represents millions of working people who belong to unions and have the benefits of union membership, the labor federation embraces all people who share the common bond of work.

2. [Kentucky State AFL-CIO](#).

140 Kings Daughter Drive, Suites 100 & 200, Frankfort, KY 40601
Telephone: (502) 696-9002
Fax: 502-696-9030.
www.kyaficio.org

F. Racial Justice

1. Kentucky Conference of NAACP Branch.

Address: P.O. Box 161173, Louisville, KY 402566
Telephone: (502) 776-7608
www.kynaacp.org
Raoul Cunningham, President
Marvin Swann, Jr., First Vice President
Rev. Jonathan Lott, Sr., Second Vice President
Vador Warfield, Secretary

The Kentucky Conference of NAACP is committed to equality and justice for all. Its mission throughout the state of Kentucky is to enhance the initiatives developed by the national office.

2. [Louisville Showing Up for Racial Justice](#) (LSURJ).

10428 Bluegrass Parkway, Suite 544, Louisville, KY 40299
Telephone: (502) 400-1913
www.facebook.com/SURJLouisville

Information about national SURJ,
www.showingupforracialjustice.org

Louisville SURJ is a local effort to organize white people for racial justice. While it is an independent entity, Louisville SURJ draws

inspiration from the national SURJ effort formed in response to the rising tide of racism in the so-called colorblind era after the 2008 presidential elections.

3. [Kentucky Alliance Against Racist and Political Repression](#).

Box 1543, Louisville, KY 40201
Telephone: (502) 778-8130
KYAll1974@gmail.com

The Alliance is a multi-issue organization dedicated to exposing and eradicating racist policies and practices deeply embedded in institutions. The Alliance mobilizes people of color and whites to take visible action together against specific instances of racism in their community. The Alliance has been working to end racism in Louisville since the 1950s, and is a part of the National Alliance Against Racist and Political Repression.

G. Voting Rights (Democratic Integrity)

[Common Cause](#)

Richard Beliles, State Chair
3044 Bardstown Road, #200 Louisville, KY 40205
Telephone: (502) 592-5381
Email: richardbeliles@gmail.com

Common Cause Kentucky's mission is to promote good citizenship and to advocate open, honest, and accessible state and local government via lobbying the Kentucky General Assembly for bills that promote honest and open state and local government practices; filing court petitions when necessary; writing public officials; speaking to TV, radio stations, and community groups; and distributing a state newsletter.

H. Criminal Justice

1. [Kentucky Coalition to Abolish the Death Penalty](#) (KCADP).

Rev. Pat Delahanty, Chair
P.O. Box 3092, Louisville, KY 40201
Telephone: (502) 636-1330
Email: kcadp3092@gmail.com
www.kcadp.org

KCADP consists of individuals and organizations working to end the death penalty in Kentucky. KCADP educates Kentucky residents about why it is in their best interest to abolish the death penalty, organizes and mobilizes throughout the commonwealth, and engages in advocacy efforts that move constituents to persuade the governor and the General Assembly to abolish the death penalty.

2. [Kentucky Innocence Project.](#)

The Kentucky Innocence Project (KIP) was developed by the Department of Public Advocacy to provide incarcerated men and women who have legitimate claims of innocence with a resource through which their claims may be investigated and presented to the courts of the Commonwealth for relief. KIP serves the entire state by not only addressing each case of wrongful conviction but also addressing much broader concerns in the criminal justice system. KIP seeks to introduce innovative social policies, to create progressive legislative and constitutional reforms, and to establish itself as a conduit for progress.

3. [Restorative Justice Louisville](#) (RJL).

Libby Mills, Executive Director
812 South Second Street, Louisville, KY 40202
Telephone: (502) 585-9920
Email: libbymills@rjlou.org
www.rjlou.org

RJL's mission is to provide a restorative and holistic approach to crime that promotes justice and reparation for victims, as well as the community, and accountability, personal development and re-integration of the offender into a productive community lifestyle. RJL's general approach is based on four steps: truth telling, apology, making reparations, and reconciliation.

I. Environmental Justice

1. [Kentucky Waterways Alliance.](#)

Since 1993, Kentucky Waterways Alliance has been a leader in the fight against pollution in our waterways – winning stronger protections for over 90 percent of Kentucky's rivers, lakes and streams. We work with communities on local watershed issues at the state and national levels advocating for the best regulations possible. With a mission to protect and restore Kentucky's waterways, our work is making a difference in the quality of life for all Kentuckians one protected stream at a time.

2. [Sierra Club.](#)

The Sierra Club Cumberland (Kentucky) Chapter works statewide to focus our work at the municipal and county levels. We're involved in everything from hiking, to clean energy, to clean water and other conservation issues – join in and help us protect the air, land, water and wildlife throughout this beautiful state!

J. LGBTQ

[Fairness Campaign](#)

Chris Hartman, Director

2263 Frankfort Avenue, Louisville, KY 40206

Telephone: (502) 893-0788

Email: Fairness@Fairness.org

The Fairness Campaign is a broad-based community effort dedicated to equal rights. Its primary goal is comprehensive civil rights legislation prohibiting discrimination on the basis of sexual orientation and gender identity. The Fairness Campaign accomplishes its goals through public education and advocacy, political activity, community building and reciprocal alliances with others in the social justice community.

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 into 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.

State Law & State Taxation Corner

Let's Stop Describing LLCs as "Hybrids"

By Thomas E. Rutledge

In *Turner v. Andrews*, the Kentucky Supreme Court wrote that "A limited liability company is a 'hybrid business entity having attributes of both a corporation and a partnership.'"¹ Similar descriptions can be found in decisions of other courts.² While a description of an LLC as "a hybrid business entity having attributes of both a corporation and a partnership" may have been substantially correct in the early days of the LLC,³ today this formula is misleading and impoverished in that it indicates that partnership and corporate law are in some manner melded in the LLC and that when considering a dispute involving LLCs, the question is whether to apply one or the other to a particular question.

In a realm in which limited liability is available in not only the LLC but also in general and limited partnerships,⁴ as well as other unincorporated forms such as the limited cooperative association⁵ and the statutory trust,⁶ citing the corporation as the archetype for limited liability is misleading, especially as that characteristic is not intrinsic to the corporate form.⁷ As to tax classification, many LLCs are not taxed as partnerships but rather as either associations taxable as corporations or as disregarded entities.⁸ Furthermore, many LLCs otherwise classified as disregarded entities are required to be treated as corporations for certain employment tax purposes.⁹ In today's environment, the LLC, like each other form of business organization, must be understood as a unique construct of formulae and characteristics that may or may not be shared with other organizational forms.¹⁰

First and foremost, an LLC is an organizational form that is based on a contract identified as the "operating agreement."¹¹ Where an LLC does not adopt a particular agreement as its operating agreement, the LLC Act will itself constitute the operating agreement.¹² An LLC may supplement the Act with oral agreements as to particular points,¹³ but under the laws of certain states oral agreements will not be effective when the LLC requires that any departure from its terms be in writing.¹⁴ Assuming the operating agreement is in writing, there is almost complete flexibility to structure the internal affairs of the LLC. It is the express public policy of many states to give maximum effect to the freedom of contract in operating agreements.¹⁵ This organizational flexibility sets the LLC off from the corporation, a form in which there is limited opportunity in the articles of incorporation or



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the by-laws for modification of the standard form as set forth in the business corporation act.¹⁶

Second, the LLC is entirely a statutory construct. Partnerships, limited partnerships and corporations predate the law governing each being reduced to statute.¹⁷ In contrast, LLCs are entire strangers to the common law; there was no LLC before there was an LLC Act. The Kentucky Supreme Court, in *Pannell v. Shannon*, observed:

In fact, “limited liability companies are creatures of statute,” controlled by Kentucky Revised Statutes (KRS) Chapter 275, not primarily by the common law. To the extent that common law doctrines could arguably govern limited liability companies, the Kentucky Limited Liability Company Act “is in derogation of common law,” and the traditional rule of statutory construction that “require[s] strict construction of statutes that are in derogation of common law shall not apply to its provision.” Thus, to the extent the statutes conflict with common law, the common law is displaced.¹⁸

In today’s environment, the LLC, like each other form of business organization, must be understood as a unique construct of formulae and characteristics that may or may not be shared with other organizational forms.

While aspects of the laws of other business organizations were utilized as models in drafting certain aspects of the various LLC acts, they were simply models. LLCs have certain characteristics because those characteristics are embodied in the governing statute, not because an LLC is a “different flavor” of one of the older organizational forms. Therefore, instead of analogizing an LLC to one of the older organizational forms, the LLC needs to be understood as a separate business organization that has characteristics that may be similar to those of other organizational forms. The point is subtle but important; by way of example:

- LLCs are not similar to partnerships because both embody the rule of *in personam delectus*, but rather LLCs and partnerships are similar to one another because they both embody the rule of *in personam delectus*; and

- LLCs are not similar to corporations because both afford limited liability to the owners (members and shareholders), but rather LLCs and corporations are similar to one another because they both provide limited liability to the owners.

Third, an LLC is not a species of partnership, and it is not a species of corporation. LLCs are formed under and governed by an LLC act.¹⁹ LLCs are not as a default governed by the law of corporations. The law of corporations is not a general “gap filler” for the law of other business organizations. Corporate law governs corporations, and that is all it governs.²⁰ LLCs are not as a default governed by the law of partnerships. In fact, partnership law expressly provides that it does not apply in business organizations formed under other organizational statutes.²¹ Rather, an individual LLC is governed by its operating agreement (incorporating as it does the LLC Act) and then by law and equity.²²

Fourth, treating an LLC as a hybrid dependent for its characteristics to analogies to a previously existing form deprives the LLC of any independent functionality. As eloquently described by Professor (now Dean) Tom Geu, the LLC exists to fill a gap that otherwise exists in the law of business organizations.²³ The LLC is intended to provide a different answer to certain questions, to provide an alternative organizational paradigm that was not available under the previously available forms such as the partnership and the corporation. For that reason, it both packages pre-existing concepts in a unique manner and as well provides rules with no antecedent. In that manner, the LLC provides a unique set of rules different from the prior forms, a uniqueness lost if it is treated as a mere hybrid.

In the end, an LLC is simply that—it is an LLC in the same way that a corporation is a corporation and a partnership is a partnership. Each of those labels is simply the identifier of a unique combination of characteristics. Addressing only some of those characteristics:

LLCs share certain characteristics with corporations such as limited liability and “entity” characterization. That said, even as none of the statutes actually define what it means to be an “entity,”²⁴ LLCs share those same characteristics of limited liability and entity characterization with RUPA limited liability partnerships.²⁵ Some LLCs share with partnerships a management structure in which the owners, as owners, control the operations of the venture even as there are other LLCs that have separated management control from ownership, vesting control of at least the day-to-day operations of the LLC in persons other than in their capacity as members and even persons who are not members at all.²⁶ While the former of these models is akin to a partnership management structure and

FIGURE 1.

	Corporation	Partnership	LLC
Limited Liability:	Shareholders enjoy limited liability from the corporation's debts and obligations ¹	Partners are personally liable for all of the partnership's debts and obligations ²	Not only does the LLC Act provide that each member enjoys limited liability from the LLC's debts and obligations, but that same rule applies to its managers, employees and agents ³
Free Transferability of Interests:	Corporate shares are freely and unilaterally transferable ⁴	Right to participate in management not freely transferable ⁵	Right to participate in management not freely transferable ⁶
Centralized Management:	Control of the corporation is vested in the board of directors; directors need not be shareholders ⁷	Control of the partnership is vested in the partners ⁸	LLC elects whether to be manager-managed or member-managed ⁹
Capital Lock-In:	A shareholder may not withdraw from and thereby liquidate the investment in the corporation ¹⁰	A partner may unilaterally withdraw from the partnership and liquidate interest in the partnership ¹¹	A member has no right to withdraw and liquidate the investment in the LLC ¹²
Agency:	A shareholder is not an agent for the corporation ¹³	A partner is an agent for the partnership ¹⁴	<ul style="list-style-type: none"> • If the LLC elects to be member-managed, then each member is an agent of the LLC¹⁵ • If the LLC elects to be manager-managed, then each manager is an agent of the LLC and each member, <i>qua</i> a member, is not an agent¹⁶
Major Decisions:	Major decisions require approval of the board of directors and a majority of the shareholders ¹⁷	Major decisions require unanimous approval of the partners ¹⁸	Major decisions require the approval of a majority-in-interest of the members ¹⁹
Voting Rights:	Shareholders vote in proportion to share ownership ²⁰	Partners vote on a per capita basis ²¹	Members vote in proportion to capital contributed to the LLC ²²
Voluntary Dissolution:	Requires the approval of the board of directors and a majority of the shareholders ²³	Automatic upon the resignation of any partner ²⁴	Requires the approval of all of the members ²⁵
Treatment under Federal Securities Laws	"Stock" is a definitional security ²⁶	Partnership interest may be a "investment contract," but there is a contrary presumption ²⁷	Interest in an LLC may be an "investment contract" ²⁸
Default Treatment under UCC	Stock is an Article 8 certificated security ²⁹	Interest in a partnership is an Article 9 general intangible ³⁰	LLC interest is an Article 9 general intangible ³¹

ENDNOTES

- ¹ See, e.g., Del Code Ann. tit. 8, §102(b)(6); Ind. Code §23-1-26-3(b); Ky. Rev. Stat. Ann. §271B.6-220(2). The statute is silent as to the limited liability of directors, officers, employees and agents.
- ² See Unif. Part. Act §15, 6 (pt. 1) U.L.A. 613 (2001); Rev. Unif. Part. Act §306(a), 6 (pt. 1) U.L.A. 117; Ky. Rev. Stat. Ann. §362.175(2); *id.* §362.1-306(1).
- ³ See, e.g., Ky. Rev. Stat. Ann. §275.150(1). See also Rev. Unif. Ltd. Liab. Co. Act §304(a)(2), 6B U.L.A. 475 (2008) (including "manager" within grant of limited liability); S.D. Codified Laws §47-34A-303 (same). For a complete listing of the limited liability provisions of the various LLC acts, see 2 LARRY E. RIBSTEIN AND ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES, Appendix 12-2.
- ⁴ See, e.g., 12 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §5452 (2012) ("The owner of the shares, as in the case of other personal property, has an absolute and inherent right, as an incident of his or her ownership, to sell or transfer the shares at will, except insofar as the right may be restricted by the articles of incorporation, bylaws, an agreement among shareholders, or between shareholders and the corporation. In the absence of such restrictions, a transfer of shares does not require the consent of the corporation and cannot be prohibited.") (citations omitted); CHARLES B. ELLIOTT, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS §427 (3d ed. 1900) ("A transferee of shares acquires the rights of the transferrer..."). Still, shares of a professional corporation are typically transferable only to members of the profession practiced by the PSC. See, e.g., Ky. Rev. Stat. Ann. §274.017.
- ⁵ See, e.g., Unif. Part. Act §27(1), 6 (pt. II) U.L.A. 332 (2001); Rev. Unif. Part. Act §503(a)(3), 6 (pt. 1) U.L.A. 157 (2001); Ky. Rev. Stat. Ann. §362.1-202(2); *id.* §362.175(2); *id.* §362.280(1); *id.* §362.1-503(1)(c).
- ⁶ See, e.g., Rev. Prototype Limited Liability Company Act §502(a)(4)(19), 67 Bus. Law 117, 163 (Nov. 2011); Del. Code Ann. tit. 6, §18-702(b)(1); Ind. Code §23-18-6-3.1(b)(3); S.D. Codified Laws §47-1A-801; Ky. Rev. Stat. Ann. §275.255(1)(c).
- ⁷ See, e.g., Del. Code Ann. tit. 8 §141 (a), (b); Ind. Code §§23-1-33-1(a)-(b); Ky. Rev. Stat. Ann. §271B.8-010(2); *id.* §271B.8-020. See also *Allied Ready Mix Co., Inc. v. Mattingly*, 994 SW2d 4, 8 (Ky. 1998).
- ⁸ See, e.g., Unif. Part. Act §18(e), 6 (pt. II) U.L.A. 110 (2001); Rev. Unif. Part. Act §401(f), 6 U.L.A. 133 (2001); Ky. Rev. Stat. Ann. §362.235(5); *id.* §362.1-401(6).
- ⁹ See, e.g., Ind. Code §23-18-2-4(b)(4); *id.* §23-18-4-1; Ky. Rev. Stat. Ann. §275.025(1)(d); *id.* §275.165. See also Ribstein and Keatinge, *supra* note 3, volume 1 at Appendix 8-2.

- ¹⁰ See, e.g., *Nixon v. Blackwell*, 626 A2d 1366 (Del. 1993) (shareholder has no right to have corporation repurchase shares absent a contract to that effect); *Blaustein v. Lord Baltimore Capital*, 84 A3d 954 (Del. 2014) (same). A different rule applies under certain professional corporation statutes, they providing a default right to put the shares in the absence of a contrary agreement. See, e.g., Ky. Rev. Stat. Ann. §274.095. This rule is not however universal. See, e.g., *Corlett, Killian, Hardeman, McIntosh and Levi, P.A. v. Merritt*, 478 So2d 828 (Fla. 2nd DCA 1985) (no right of shareholder to compel redemption).
- ¹¹ See, e.g., Ky. Rev. Stat. Ann. §362.335(1); *id.* §362.1-701(1).
- ¹² See, e.g., Del. Code Ann. tit. 6, §18-603; Ind. Code §23-18-6-6.1(b); Ky. Rev. Stat. Ann. §275.280(4). Admittedly there are LLC acts that embody different rules. See, e.g., Del. Code Ann. tit. 6, §18-604 (if member is afforded the right to withdraw from LLC, absent contrary private ordering, the member is upon resignation entitled to the "fair value" of his interest therein).
- ¹³ 1 WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* §30 (2012) ("The mere fact that one is a shareholder or a majority or principal shareholder gives the individual no authority to represent the corporation as its agent in dealing with third persons.") (citations omitted); WILLIAM L. CLARK, *HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS* 38 (2nd ed. 1907) ("The mere fact that he is a stockholder does not make him an agent to contract for it or bind it by his acts.") (citation omitted); II WILLIAM W. COOK, *A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK* §709 (5th ed. 1903) ("The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The shareholders cannot, in a meeting assembled, bind the corporation by their contracts in its behalf.") (citation omitted).
- ¹⁴ See, e.g., Ky. Rev. Stat. Ann. §362.190(1); *id.* §362.1-301(1) (each partner is an agent of the partnership); *id.* §362.220(1); *id.* §362.1-306(1) (partner liability for partnership debts). Under the Revised Uniform Partnership Act (1997), while each partner is an agent of the partnership, a partner is not an agent of any other partner. See Rev. Unif. Part. Act §301, 6 (pt. I) U.L.A. 101 (2001); see also Ky. Rev. Stat. Ann. §362.1-301(1).
- ¹⁵ See, e.g., Ark. Stat. §4-32-301(a); Ind. Code §23-18-3-1.1(b); Ky. Rev. Stat. Ann. §275.135(1).
- ¹⁶ See, e.g., Ark. Stat. §4-32-301(a); Ind. Code §23-18-3-1.1(c); Ky. Rev. Stat. Ann. §275.135(2). It needs to be acknowledged that none of the Revised Prototype LLC Act, the Revised Uniform LLC Act nor the Delaware LLC Act utilize this distinction. See also Thomas E. Rutledge and Steven G. Frost, *RULLCA Section 301—The Fortunate Consequences (and Continuing Questions) of Distinguishing Apparent Agency and Decisional Authority*, 64 Bus. Law. 37 (Nov. 2008).
- ¹⁷ See, e.g., Ky. Rev. Stat. Ann. §271B.10-030 (amendment of articles of incorporation requires approval of both board of directors and shareholders); *id.* §271B.11-030 (approval of merger requires approval of both board of directors and shareholders); *id.* §271B.12-020(2) (approval of sale of substantially all assets outside the ordinary course of business requires approval of both board of directors and shareholders).
- ¹⁸ See, e.g., Ind. Code §23-4-1-18(h) ("Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."); Ky. Rev. Stat. Ann. §362.235(8); *id.* §362.1-401(10) ("An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.").
- ¹⁹ See, e.g., Ky. Rev. Stat. Ann. §275.175(2)(c) (amendment of articles of organization approved by majority-in-interest of the members); *id.* §275.350(1) (merger approved by majority-in-interest of the members); *id.* §275.247 (sale of substantially all assets outside the ordinary course approved by majority-in-interest of the members). Certain LLC acts default to unanimous approval of major decisions. See, e.g., S.D. Codified Laws §47-34A-903(a) (unanimous consent to a merger).
- ²⁰ See, e.g., Ind. Code §23-1-30-2(b); Ky. Rev. Stat. Ann. §271B.7-210(1).
- ²¹ See, e.g., Ind. Code §23-4-1-18(e); Ky. Rev. Stat. Ann. §362.235(5); *id.* §362.1-401(6).
- ²² See, e.g., Ind. Code §23-18-1-13; *id.* §23-18-4-3(a); Ky. Rev. Stat. Ann. §275.175(1); *id.* §275.015(14); *id.* §275.175(3).
- ²³ See, e.g., Ind. Code §23-1-45-2; Ky. Rev. Stat. Ann. §271B.14-020(2), (5).
- ²⁴ See, e.g., Ind. Code §23-4-1-31(1)(b); Ky. Rev. Stat. Ann. §362.300(1)(b); Unif. Part. Act §31(1)(b), 6 (pt. I) U.L.A. 370 (2001).
- ²⁵ See, e.g., Ark. Code Ann. §4-32-901(3); Ky. Rev. Stat. Ann. §275.285(3); Ohio Rev. Code Ann. §1705.43(A). Under the Indiana Business Flexibility Act, voluntary dissolution of an LLC requires the approval of two-thirds of the members. See Ind. Code §23-18-9-1.1(b)(2).
- ²⁶ See Securities Act of 1933, §2(a)(1) (definition of a "security" includes "stock").
- ²⁷ *Williamson v. Tucker*, CA-5, 645 F2d 404 (1981).
- ²⁸ See, e.g., *U.S. v. Leonard*, CA-2, 529 F.3d 83, FED. SEC. L. REP. (CCH) ¶94,746 (June 11, 2008); *U.S. SEC v. Radial Bunny, LLC*, CA-9, 532 Fed. Appx. 775, FED. SEC. L. REP. (CCH) ¶ 97,553 (2013). See also *Great Lakes Chemical Corp. v. Monsanto Co.*, DC-DE, 96 FSupp2d 376 (2000) ("As such, the grounds for creating a per se rule, or at least a presumption, that interests in general partnerships are not securities are lacking in the context of LLCs."). But see *Rossi v. Quarmley*, DC-PA, Dkt. No. 12-cv-07270, 2014 U.S. Dist. LEXIS 39705, FED. SEC. L. REP. (CCH) ¶97,871 (Mar. 25, 2014) (interest in LLC not a security consequent to member's right to participate in management).
- ²⁹ See UCC §8-102(a)(15) ("Incorporating by reference definition of 'security' from UCC §9-102(b); UCC 8-103(a) ("A share or similar equity interest issued by a corporation, business trust, joint stock company or similar entity is a security."). See also Official Comment 2 to UCC §8-103 ("Subsection [8-103](a) establishes an unconditional rule that ordinary corporate stock is a security.") See generally Lynn Soukup, *Equity Interests as Collateral* at 3, in SECURED TRANSACTIONS 2012: WHAT A LAWYER NEEDS TO KNOW ABOUT UCC ARTICLE 9 (PLI 2012, No. A-944).
- ³⁰ See UCC §8-103.
- ³¹ See UCC §8-103; *In re Dreiling*, Case No. 05-64189, 2007 Bankr. LEXIS 191 (Bankr. W.D. Mo. 2007); *In re Weiss*, 376 BR 867 (Bankr. N.D. Ill. 2007); see also Soukup, *supra* note 29 at 3, fn 5.

the latter perhaps akin to that of a corporation, (i) the LLC is unique in its capacity to make that election and (ii) the centralized management of a manager-managed LLC does not carry with it the “two-house” rule of corporate law. While under no corporation act is a shareholder as a shareholder an agent of the corporation and under every partnership act each partner is an agent for the partnership, some LLCs elect to have the members *qua* members as agents, while others elect the exact opposite result.²⁷ The suggestion of hybridization fails when a review of characteristics shows the supposed hybrid to lack characteristics of either predecessor form.²⁸

Returning to the early guidance of Professor Geu is perhaps the best direction:

The Limited Liability Company (“LLC”) is a unique and relatively new form of business organization created by statute.²⁹

Therefore, consideration of an LLC must begin by a careful analysis of its operating agreement and the underlying LLC Act. These two sources collectively embody the law of that particular LLC. Only in the rarest of instances will there be a need to reference law other than general contract law in applying that combination of private agreement and statute to assess the rights of the members, the managers and even third-parties dealing with the LLC. While recourse to the law of other organizations may be appropriate to understand particular statutory language,³⁰ that reference is appropriate because of the similarity of statutory formula employed and not because those other organizational forms are normative standards against which the LLC is to be measured. Where, in contrast, the statutory formulae are different,³¹ cross-reference is misleading and inappropriate.

An LLC is just that: it is not a form of corporation, and it is not a species of partnership. An LLC is not a hybridization of those other forms. In resolving disputes involving LLCs, each LLC needs to be considered as a unique construct.

ENDNOTE

¹ *Turner v. Andrews*, 413 SW3d 272, 275 (Ky. 2013), quoting *Patmon v. Hobbs*, 280 SW3d 589, 593 (Ky. App. 2009).

² See, e.g., *Montgomery v. eTrepid Technologies, LLC*, DC-NV, 548 FSupp2d 1175, 1180 (2008) (“While LLCs offer members the same protection from personal liability as corporations offer their shareholders, unless otherwise indicated, LLCs are generally treated as partnerships for tax purposes.” (citations omitted.)); *Weber v. U.S. Sterling Securities, Inc.*, 924 A2d 816, 822 (Conn. 2007) (“[Limited liability companies] are hybrid entities that combine desirable characteristics of corporations, limited partnerships, and general partnerships.” (Internal quotation marks omitted.)); *Purcell v. S. Hills Invs., LLC*, 847 NE2d 991, 996 (Ind. Ct. App. 2006) (“Reviewing the issue of whether an LLC’s member violated a common law fiduciary duty owed to other member, the district court in its analysis focused on the LLCs hybrid

nature between a corporation and a partnership and found that Indiana LLCs impose a common law fiduciary duty on their officers and members in the absence of contrary provisions in the LLC operating agreements.”). See also Carter G. Bishop & Daniel S. Kleinberger, *Limited Liability Companies: Tax And Business Law* ¶ 1.01 (2012) (“The limited liability company (LLC) is a relatively new, hybrid form of business entity that combines the liability shield of a corporation with the federal tax classification of a partnership.... The essence of an LLC is the co-existence of partnership tax status with corporate-like limited liability.”).

³ See, e.g., Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. Rev. 44, 45 (1991-1992) (“[The LLC] is a hybrid form of business created by combining the organizational and tax attributes of partnerships and corporations, much like its organizational cousin the limited partnership.”); Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky’s New Organization Option*, 83 Ky. L.J. 1, 6-8 (1994-95); Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 Bus. Law. 375, 380 (Feb. 1992).

⁴ See Rev. Unif. Part. Act §306(c), 6 (pt. 1) U.L.A. 117 (2001); Ky. Rev. Stat. Ann. §362.1-306(3) (eliminating partners’ liability when partnership elects to be a limited liability partnership); Unif. Ltd. Part. Act §303, 6A U.L.A. 418 (2008); Ky. Rev. Stat. Ann. §362.2-303 (eliminating liability for limited partners in a KyULPA limited partnership); Unif. Ltd. Part. Act §404(c), 6A U 432 (2008); Ky. Rev. Stat. Ann. §362.2-404(3) (eliminating general partner’s liability in an LLLP).

⁵ Unif. Ltd. Coop. Ass’n. Act §504, 6A U.L.A. 210 (2008); Ky. Rev. Stat. Ann. §272A.5-030(1); S.D. Codified Laws §47-16-30.

⁶ Unif. Stat. Trust Entity Act §304(a); 6B U.L.A. (2013 supp.) 215; Ky. Rev. Stat. Ann. §386A.3-040(3); Del. Code Ann. tit. 12, §3803.

⁷ See, e.g., WILLIAM L. CLARK, JR., *HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS* 16 (Francis B. Tiffany ed., 2d ed. 1907) (stating that limited liability is “not an essential attribute” of the private corporation).

⁸ See Reg. §301.7701-3.

⁹ See Reg. §301.7701-2(c)(2)(iv)(A).

¹⁰ See also Thomas E. Rutledge, *State Law & State Taxation Corner, Vampires and the Law of Business Organizations: The Fruitless Search for Authenticity*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2011, at 51; Thomas E. Rutledge, *State Law & State Taxation Corner, Putting the Shepherds and the Magi in the Manger—The Problem of False Isomorphism*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2012, at 49.

¹¹ See, e.g., Ind. Code §23-18-1-16 (definition of “operating agreement”); Ky. Rev. Stat. Ann. §275.015(20) (same). Under some laws, the equivalent agreement is defined as the “limited liability company agreement.” See, e.g., Del. Code Ann. tit. 6, §18-101(7); Rev. Prototype Limited Liability Company Act §102(14), 67 Bus. Law. 117, 129 (Nov. 2011).

¹² See, e.g., Ky. Rev. Stat. Ann. §275.003(8) (“To the extent the articles of organization and the operating agreement do not otherwise provide, the Kentucky Limited Liability Company Act shall govern relations among the limited liability company, the members, the managers, and the assignees.”); Rev. Prototype Limited Liability Company Act §110(a)(1)-(2), 67 Bus. Law. 117, 136 (Nov. 2011) (“[T]he [LLC] agreement governs relations among the members as members and between the members and the [LLC]. To the extent the [LLC] agreement does not otherwise provide for a matter described in subsection (a)(1), this Act governs the matter.”).

¹³ See, e.g., Del. Code Ann. tit. 6, §18-101(7) (limited liability company agreement may be oral); Ky. Rev. Stat. Ann. §275.015(20) (operating agreement may be oral); Rev. Prototype Limited Liability Company Act, §102(14), 67 Bus. Law. 117, 129 (Nov. 2011) (limited liability company agreement may be oral).

¹⁴ See, e.g., Ky. Rev. Stat. Ann. §275.170; *id.* §275.180; *id.* §275.220 (each requiring that departure from statutory rule be in a “written operating agreement”).

¹⁵ See Del. Code Ann. tit. 6§18-1101(b) (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements.”); Ky. Rev. Stat. Ann. §275.003(1) (“It shall be the policy of the General Assembly through this chapter to give

maximum effect to the principles of freedom of contract and the enforceability of operating agreements.”); Rev. Prototype Limited Liability Company Act §107(a), 67 Bus. Law. 117, 134 (Nov. 2011).

¹⁶ By way of example, a corporation must have an officer charged with control of the corporation’s records, and that officer must be identified as the “secretary.” See, e.g., Ind. Code §23-1-20-22; *id.* §23-1-36-1; Ky. Rev. Stat. Ann. §271B.8-400(3); *id.* §271B.1-400(23). The relative rights of the classes of shares in the corporation must be set forth in the publicly filed articles of incorporation, and the shareholders have cumulative voting only if that right is recited in the articles of incorporation. See, e.g., Ind. Code §23-1-25-1(a); Ky. Rev. Stat. Ann. §271B.6-010; *id.* §271B.7-280(1). The fiduciary standards of a director are not subject to modification by agreement, and a committee of directors charged to review and pass upon a conflict transaction must have at least two directors. See Ky. Rev. Stat. Ann. §271B.8-300(1); *id.* §271B.8-310(3).

¹⁷ See, e.g., KARL MOORE AND DAVID LEWIS, FOUNDATIONS OF CORPORATE EMPIRE, 32-33 (Prentice Hall 2000) (discussing the terms of an investment partnership dated to 1900 B.C.).

¹⁸ *Pannell v. Shannon*, 425 SW3d 58, 68 (Ky. 2014) (citations omitted).

¹⁹ See, e.g., Ky. Rev. Stat. Ann. §275.015(11); *id.* §275.003(8).

²⁰ See, e.g., *KNC Investments, LLC v. Lane’s End Stallions, Inc.*, DC-KY, Dkt. No. 11-107-JBC, 2011 U.S. Dist. LEXIS 130555, *12-*13 (Nov. 10, 2011) (“No justification exists to extend Kentucky law that by its own terms is strictly limited to corporations to non-corporate entities such as the LDK Syndicate.”); *Casella v. Home Depot USA, Inc.*, DC-NJ, Dkt. No.: 09-0421 (JAP), 2010 U.S. Dist. LEXIS 75894 (Jul. 28, 2010) (“As a former member of [an LLC], Plaintiff clearly does not fall within the plain meaning of the minority oppression statute which reserves the right solely for ‘corporations with 25 or less shareholders.’”); *Oolman v. ICONAG Solutions, LLC*, DC-IA, 2011 WL 6737095 (July 14, 2011) (in that claim for shareholder oppression is under Iowa law based upon statute, and as the applicable Iowa LLC Act did not provide a remedy for oppression, no claim exists for oppression of an LLC member); *Denike v. Cupo*, 394 N.J. Super. 357, 378, 926 A2d 869 (App. Div. 2007) (in the context of choosing a valuation date of an LLC, the standard set out in the business corporation act could not be used because LLCs are governed by the limited liability company act).

²¹ See, e.g., Unif. Part. Act §6(2), 6 (pt. I) U.L.A. 393 (2001); Rev. Unif. Part. Act §202(b), 6 (pt. I) U.L.A. 92 (2001); Ind. Code §23-4-1-6(2); Ky. Rev. Stat. Ann. §362.1-202(2); *id.* §362.175(2); see also *Born to Build LLC v. Saleh*, 2014 N.Y. Slip Op. 50594(U) (S.Ct. Nassau Cty. Feb. 28, 2014) (“The plaintiff’s

reliance upon comparisons to the Partnership Law to justify a levy and sale of a membership interest in a limited liability company is unavailing as limited liability companies do not fall within the ambit of the Partnership Law and the existence and character of partnerships and limited liability companies are statutorily dissimilar.”) (citation omitted).

²² See Ky. Rev. Stat. Ann. §275.003(8) (“To the extent the articles of organization and the operating agreement do not otherwise provide, the Kentucky [LLC] Act shall govern relations among the limited liability company, the members, the managers, and the assignees.”); *id.* §275.003(1) (“Unless displaced by particular provisions of this chapter, the principles of law and equity shall supplement this chapter.”); Rev. Prototype Limited Liability Company Act §107(b), 67 Bus. Law. 117, 134 (Nov. 2011) (“Unless displaced by particular provisions of this Act, the principles of law and equity supplement this Act.”).

²³ See Thomas Earl Geu, *A Single Theory of Limited Liability Companies: An Evolutionary Analysis*, XLII SUFFOLK U. L. REV. 507 (2009).

²⁴ See also Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 43 SUFFOLK U. LAW REV. 655 (2008-09); J. William Callison, *Indeterminacy, Irony and Partnership Law*, 2 STAN. AGORA 73-76 (2001), <http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf>; David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA 38, 58 (2001), <http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf>.

²⁵ See Rev. Unif. Part. Act §201(a), 6 (pt. I) U.L.A. 91 (2001) (“entity” characterization); *id.* §306(c), 6 (pt. I) U.L.A. 117 (limited liability).

²⁶ See, e.g., Ky. Rev. Stat. Ann. §275.165(2)(b).

²⁷ See table endnotes 15-16 and accompanying text.

²⁸ The mating of a donkey and a horse yields a mule having characteristics of each; we would not expect a mule to have either wings or gills, both being absent from either parent.

²⁹ Thomas Earl Geu, *Understanding the Limited Liability Company*, *supra* note 3 at 44-45.

³⁰ See, e.g., Thomas E. Rutledge & Thomas Earl Geu, *The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act*, 63 ARK. L. REV. 473, 475-76 (2010).

³¹ E.g., contrast MBCA §8.30 (fiduciary obligations of corporate directors) with Rev. Unif. Ltd. Liab. Co. Act §409, 6B U.L.A. 488 (2008) (fiduciary obligations in LLC); Ky. Rev. Stat. Ann. §271B.8-300 (fiduciary obligations of directors) with *id.* §§275.170(1), (2) (fiduciary duties of alternatively members or managers of LLC); *id.* §271B.8-310(1)(c) (allowing a “fair to the corporation” defense to a conflict of interest transaction) with *id.* §275.170(3) (precluding a fairness defense to a conflict of interest transaction).

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I. INTRODUCTION

As a solo practitioner or member of a small firm, you wear many hats: accountant, marketing director, office manager, computer technician, janitor, etc. The many duties of running a business will pull you away from the actual practice of law more than you will like.

To be the most productive as an attorney, you need to set up your practice from the beginning in an organized manner. The practice of law is a business, and that means that you need to treat it like a business. The more productive you are at running the business side, the more time you can devote to develop your client base and get out there and practice.

Practicing law as a solo, also comes with benefits: You set your own hours and rates. You choose which cases to take. You decide the kind of technology to use and can change anything if it does not work out as expected. The motto of a solo practitioner could easily come from the last two lines of William Ernest Henley's poem, Invictus: "I am the master of my fate: I am the captain of my soul."

II. THE BUSINESS SIDE OF PRACTICE

A. Business Plan

The first step for all new business should be a business plan. This document is the map for a new business. It is almost always required if a business loan is needed to cover the start-up costs. A good business plan starts with a concise statement that clarifies the business goals, the value proposition you bring, and gives the reader a reason to believe that the business will be successful. Often called the elevator speech portion of a business case, it is the passionate sales pitch and core belief of the firm.

A business plan also needs to be realistic about the market, the competition, and the areas of practice for the firm. Are there enough potential clients to keep you busy? Is the market already saturated with well-respected attorneys in this area? A sports or entertainment law practice will be unsustainable in a small town. If there is only one other attorney focusing on family law in your town, you may be more successful. The local chamber of commerce should be able to help with the market analysis.

¹ Updated from previous versions with contributions from Anne Milton McMillin, John David Meyer, Barry N. Sullivan and Escum L. "Trey" Moore, III.

The business plan needs to contain a financial plan, including forward looking balance sheets, cash flow statements, and profit and loss sheets. This process will help you realistically look at the costs related to running a business, set goals for revenue, and assure backers that you have a vision for the firm. Some business plans are rejected by bankers when the plans omit plans to provide a salary. Unless you have documented a separate revenue stream, e.g., a spouse or life partner who plans to support you during the start-up phase, you will need a personal budget to cover your living expenses. It is essential that you maintain separate books for personal and business expenses. Co-mingling funds is the fastest way to a bar complaint and professional discipline.

1. Reason to believe – elevator speech.
2. Areas of practice.
3. Market research.
4. Competitive analysis.
5. The program - Compelling biography of the players.
6. Measures.
 - a. Number of clients.
 - b. Number of cases.
 - c. Practice areas.
7. Business model – revenue.
 - a. Services provided.
 - b. Client profile.
 - c. Advertising plan.
8. Anticipated costs.
 - a. Rent.
 - b. Legal research plans.
 - c. Salaries.
 - d. Utilities.

9. Start-up funding.
 - a. Cash reserves.
 - b. Credit sources.
 10. Projected financials (forward looking).
 - a. Profit & loss statements.
 - b. Cash flow statements.
 - c. Balance sheets.
- B. Entity
1. Sole proprietorship.
 2. Partnership.
 3. PLLC.
 4. PSC.
- C. Law Firm and Name of the Firm
1. Deciding on business format.
 - a. Sole proprietorship.
 - b. Partnership/limited liability partnership.
 - c. Professional limited liability company/limited liability company.
 - d. Professional services corporation.
 2. Naming issues.
 - a. Ethical issues.
 - b. Intellectual property.
- D. Government Filings
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. Setting up your business at the state level – Kentucky One Stop Business Portal <https://onestop.ky.gov/Pages/default.aspx>.
3. Setting up your business at the county/city level – occupational business license.

E. Finances

1. Bank accounts:
 - a. Open an Operating (General) account: All income goes here and all expense comes from here.
 - b. Open a Client Trust (IOLTA) account: All your client funds go here.
2. Client funds – See [SCR 3.130 \(1.15\)](#) Safekeeping of Property – Cliffs Notes version.
 - a. 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.
 - b. 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.
 - c. 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.
 - d. Lawyer may deposit own funds in client trust account only to pay bank service charges.
 - e. Except for nonrefundable fees, Lawyer shall deposit unearned fees and expense advances into client trust account to be withdrawn only as earned or incurred.
 - f. The devil is in the details. Read [SCR 3.130 \(1.15\)](#) and pay close attention to the comments!

3. IOLTA account.
 - a. IOLTA stands for interest on lawyers trust accounts.
 - b. [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.
 - c. Interest from these accounts are pulled and collected by the IOLTA program.
 - d. The IOLTA funds are managed by the Kentucky Bar Foundation to finance grants for civil legal aid to the poor.
 - e. 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>
4. Find an accountant to help set up your books.
5. Establish your budget and adhere to it as much as possible.

F. Insurance

1. 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.

- a. What it covers.
 - i. Defense costs.
 - ii. Errors and omissions in practice of law.
 - (a) Missed deadlines.
 - (b) Title errors.
 - (c) Misapplication of the law.

- (d) Fiduciary duty to others in your capacity as an attorney.
- b. What it excludes.
 - i. Claims alleging abuse of process, etc.
 - ii. Claims alleging dishonest or deliberate wrongful acts.
 - iii. Claims against business enterprise (not insured) in which attorney is a director, officer or employee.
- c. Type of coverage.
 - i. Policy covers claims made and reported during the policy period.
 - ii. How much coverage.
 - (a) Value of matters done in firm.
 - (b) Type of matters done.
 - (c) Value of attorneys' personal assets.
 - (d) Attitude for risk.
 - (e) Frequency.
 - iii. Type of practice.
- d. 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.

- e. 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.

- f. What is Lawyers Mutual?
 - i. 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.
 - ii. 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.
 - iii. Primary focus is claims repair.
 - (a) 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.
 - (b) 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.
 - g. Why Lawyers Mutual? It is a company by Kentucky lawyers for Kentucky lawyers.
- 2. Workers' compensation.
 - 3. Business interruption insurance.
 - 4. Renter's/building insurance.

5. Life insurance.
6. Cyber insurance.
7. General liability.

G. Office Space

1. Client access and visibility versus prestigious address.
2. Lease versus ownership.
3. Home-based options.
4. Space sharing and related ethical issues.
5. 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.

H. Equipment

1. Basic equipment.
 - a. Computers.
 - b. Copier/printer.
 - c. Dictation.
2. Lease versus own.
3. Maintenance agreements.

I. Furnishings/Décor

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.

- J. Supplies
 - 1. Premium versus inexpensive.
 - 2. Minimize waste.
- K. 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.
- L. Miscellaneous
 - 1. Bar dues/KBA/ABA services to solo practices.
 - 2. Professional liability insurance.
 - 3. Workers' compensation.
 - 4. General liability, etc.

M. Staff

1. Hiring – Don't hire staff until your business plan measures confirm you have the business and cash flow to keep them on staff.
 - a. Consider the additional costs: payroll, taxes, insurance, training, employee benefits, additional equipment, etc.
 - b. Before hiring your first employee, work with an accountant to ensure that the accounting processes are set up to handle these needs.
 - c. Complete IRS I-9 forms for new employees.
2. Soft factor decisions on hiring staff.
 - a. Personality.
 - b. Intelligence.
 - c. Work ethic.
3. Match your strengths and weaknesses.
4. Technical skills.
5. 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.
6. Policy and Procedures Manual.
 - a. Remember that you are responsible for the actions your employees take on your behalf. Not only can their actions reflect badly on you, their actions can affect your law practice.
 - b. You will find that this manual will change over time.

N. Information Technology

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. Hardware: computer, phone(s), printer, scanner, fax machine.
6. Software: Office Suite, billing software, matter management, legal search tools.
7. Disaster recovery.

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. Accepting credit cards.
6. 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.
 - 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.

D. Leaving a Firm to Start a New One

1. Notifying the clients.
2. Ownership of the client files.
3. Ensuring accounts are paid.
4. Conflict check information.

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.
3. 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.
 - c. Sit second-chair.
 - d. Warning orders.
 - i. Normally \$150 per case depending upon your efforts.
 - ii. Bill for postage/copies.
 - iii. 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.

E. Marketing and Business Development

1. Advertising rules.

2. Positioning your practice.

3. Advertising methods.

a. Old: Yellow Pages, newspaper, radio, TV.

b. New: Firm website, social media, Avvo, LinkedIn.

4. Professional Organizations.

a. Local Bar.

b. KBA Section.

c. Social Organizations.

d. Chamber of Commerce.

5. Marketing 101.

One popular marketing model divides the process into four phases called moments of truth. The 1st and 2nd moments were developed by Procter & Gamble. Google added the 0 moment. Pete Blackshaw, a former P&G employee, created the 3rd moment.

a. Zero Moment of Truth (from Google).

From a legal services perspective, the Zero Moment of Truth is the point where the potential clients are determining their needs and where to go in order to find out how to meet those needs. Attorneys need to consider where their family law, personal injury, etc. clients would likely look for an attorney when they need one.

b. First Moment of Truth (from Procter & Gamble).

The First Moment of Truth is the point where the client first encounters the advertising material created by the firm to entice new clients. Will the TV spot be well received, or is it considered tasteless. Is the firm's website engaging, or does it seem stale and dated? If the client does not respond to the advertisement, the relationship ends before it can truly begin.

c. Second Moment of Truth (from Procter & Gamble).

The Second Moment of Truth is the point where the client meets with and uses the attorney's legal services. The client's experience will determine if the relationship will continue or if the initial experience did not satisfy the client and is the end of the relationship.

d. Third Moment of Truth (from Pete Blackshaw).

The Third Moment of Truth is the point where clients transition from satisfied customers to enthusiastic supporters. These clients will share their experiences with others. This is often done online. This can be an issue for attorneys because the clients could call an attorney an expert in social media. It is also possible that the clients are so dissatisfied that they publish negative content. Attorneys are quick to jump on negative online comments as libel and sue their former clients.

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.

VIII. FINAL ADVICE

- A. Find a Mentor
- B. Take Time Every Year to Review and Revise Your Business Plan

IX. RESOURCES

- A. Stephen Fishman, Working for Yourself, 7th Edition, 2008
- B. Jay G. Foonberg, How to Get and Keep Good Clients, 3rd Edition, 2008
- C. The ABA's "How to Build and Manage a Practice" series, ABA
- D. A Guide to Setting Up and Running Your Law Office (Avoiding Malpractice through Efficient Office Systems), 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.
- E. 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.
- F. Own It: How to Start Your Own Law Firm in the Virtual Office Era, 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>.

- G. Quickbooks – Law Practice Accounting Using Quickbooks, Benton, Lynette.
- H. Lexis Nexis PCLaw® Practice Management.
- 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>
- J. 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
- K. Lawyers Mutual Insurance Company, Resources. Multiple forms, articles and checklists can be found at: <http://www.lmick.com/resources/risk-management-articles/subject-index>.
- L. Time Management for Attorneys: A Lawyer's Guide to Decreasing Stress, Eliminating Interruptions and Getting Home on Time by Mark Powers and Shawn McNalis.

STRANGER IN A STRANGE LAND: WHAT TO DO WHEN YOUR STATE COURT CASE HAS BEEN DRAGGED INTO BANKRUPTCY COURT

Charity B. Neukomm and Christopher B. Rambicure

I. [RULE 2004](#): THE PRE-SUIT FISHING EXPEDITION

[Rule 2004](#) provides, in relevant part:

- (a) Examination on Motion. On motion of any party in interest, the court may order the examination of any entity.
- (b) Scope of Examination. The examination of an entity under this rule or of the debtor under [§343](#) of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.
- (c) Compelling Attendance and Production of Documents. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in [Rule 9016](#) for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.
- (d) Time and Place of Examination of Debtor. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

Fed. R. Bankr. P. 2004.

A [Rule 2004](#) exam of debtor is an excellent tool to gain effectively "free" discovery which can be just about as broad and open ended as you want it to be. As you can see from the text of the rule, the examination of the debtor in the

main bankruptcy case, as opposed to an examination in an adversary proceeding is essentially a fishing expedition. Courts have interpreted this rule broadly and allow for wide latitude in these examinations of debtors. The same is true when a party is seeking the production of documents pursuant to this rule. A party in interest is entitled to ask for just about anything. Contrast that with an adversary proceeding wherein the requests and the deposition are limited to the case or controversy, the same as it is outside of bankruptcy court. [Rule 2004](#) is an often underused tool that can provide a wealth of valuable information prior to litigation. In addition, [Rule 2004](#) is not limited to the debtors and a party in interest can obtain discovery from third parties with information regarding the debtor's financial condition, assets, plan administration, etc. It is likewise a very broad rule. However, courts have interpreted the rule a little more conservatively when it comes to third parties recognizing the balance of equities at play when it comes to compelling a third party to produce documents or testify at a [Rule 2004](#) exam.

II. **STERN V. MARSHALL**¹ AFTERMATH – BANKRUPTCY COURT JUDGE AS MAGISTRATE

A. Bankruptcy Courts are Non-Article III Courts

In other words, though created by Congress, they were not created pursuant to Article III of the United States Constitution.

Article III: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

B. Bankruptcy Courts – Creation Authorized by [28 U.S.C. §157](#)

1. "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."
2. Both the Eastern and Western Districts of Kentucky have taken advantage of [28 U.S.C. §157](#) and created bankruptcy courts.

C. Stern v. Marshall a/k/a The Anna Nicole Smith Case

1. Separation of powers: Congress cannot assign an Article III court's powers to a court that does not have "life" tenure, but it can create tribunals to decide the rights it creates.
2. If the right existed before 1789, there is a right to a final judgment by an Article III judge. If the right was created by Congress, there is no such right.

¹ [Stern v. Marshall](#), 564 U.S. 462 (2011).

3. What does it mean for a right to exist before 1789? Essentially, it is the same analysis as your right to a jury trial. A claim created by Act of Congress can still be a "private" right of action that entitles you to an Article III Court if there is a "common law" equivalent.
 4. Fraudulent transfer claims ARE "private" rights of action – though they are statutory, the claims themselves have equivalent causes of action that pre-dated 1789.
- D. O....K....? So What Now? [Stern v. Marshall](#) Left Open Two Important Questions

Could Bankruptcy Courts hear common law cases and their statutory cousins at all? And if so, is the right to an Article III Court a waivable right?

The first question was answered in the positive in 2014 by [Executive Benefits](#),² the second in 2015 by [Wellness International](#).³ So, the key takeaways are:

1. Bankruptcy Courts generally cannot enter final judgment on your state law claims, BUT;
2. They can act as magistrates; AND
3. You can intentionally or unintentionally get yourself stuck in Bankruptcy Court.

[WELLNESS INTERNATIONAL SIDEBAR] As a practical matter, you are not likely to see your car crash case tried by a Bankruptcy judge. It's technically something that could be consented to, but the bankruptcy judge might not be overly happy with you. Instead, this quasi-magistrate system is primarily equipped to handle bankruptcy-adjacent issues – breaches of fiduciary duty, fraudulent transfers, unlawful distributions, breaches of contract. In a nutshell, trust and business disputes that involve a bankrupt party.

Why are non-Article III judges permitted to do this? The simple answer: RESOURCES. Non-Article III Courts (administrative courts, magistrate judges, bankruptcy courts, etc.) were developed to aid overburdened Article III judges.

Although "magistrate-like," you are not necessarily going to receive the same process in front of a bankruptcy judge as you would a federal magistrate judge:

² [Executive Benefits Ins. Agency v. Arkison](#), 134 S.Ct. 2165 (2014).

³ [Wellness Intern. Network, Ltd. v. Sharif](#), 135 S.Ct. 1932 (2015).

[FRCP 72\(a\)](#): When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law."

[FRCP 72\(b\)](#): On dispositive motions considered by a federal magistrate judge, a party is entitled to a report and recommendation and a right to object and receive *de novo* review.

[FRBP 9033](#), the Report and Recommendation analogue, provides a similar "appellate" process, ***BUT BANKRUPTCY COURT JUDGES ARE NOT REQUIRED TO ISSUE A REPORT AND RECOMMENDATION UNLESS THEIR RULING IS DISPOSITIVE.***

- Orders granting summary judgment and motions to dismiss – dispositive.
 - Orders denying summary judgment and motions to dismiss – non-dispositive.
 - Discovery and evidentiary motions – non-dispositive.
4. IF an issue is significant enough, you might consider requesting an [FRBP 9033](#) report and recommendation, but your bankruptcy judge is not required to issue one and asking him or her to give you the opportunity to take them up on appeal might go over like a lead balloon. AND the District Court, which can always take up the issue on directed verdict, might not be happy that you are filing what amounts to a motion to reconsider, especially since the District Court probably entrusted the matter to the bankruptcy judge in the first instance.
 5. SO, if you are dealing with a significant trial point, ask for your [Rule 9033](#) Report and Recommendation in advance. "Your Honor, we believe this motion is a key jury trial issue, and, in the event you should disagree with our position, we would appreciate a Report and Recommendation so we are not at risk of the District Court saying this has already been decided."

E. What Should I Do When My Client is Named a Defendant in a Bankruptcy Court Adversary Proceeding?

1. If your client is/was a creditor, hopefully you already evaluated whether you want this to be a bench or jury case.
2. If you want a jury case, make a jury demand. DO NOT file a proof of claim without doing a cost/potential benefit analysis.
3. Unless you intend to consent to Bankruptcy Court jurisdiction, file a motion to withdraw the reference with your answer or motion to dismiss. It will be denied, but this closes off any consent arguments. You can do this for both bench and jury trials.
4. No matter what, remember that *PRESERVATION RULES STILL APPLY!!!* If you filed Daubert or other evidentiary motions at the Bankruptcy Court level and did not prevail, make a note in your calendar, planner, trial notebook, etc. to renew your objection at trial.
5. When the dispositive motion deadline has passed and all dispositive motions have been decided, make your final decision to withdraw the reference. Do it promptly.

F. Other Practical Considerations

1. Bankruptcy Courts in the Eastern and Western District of Kentucky do not sit juries. Their trials are all bench trials. As a rule of thumb, Daubert and many other evidentiary issues are weight of the evidence considerations. Reliability and prejudice are going to be tougher sells.
2. File only the evidentiary motions absolutely necessary to your dispositive motions and definitely make an advanced request for a report and recommendation when you do make these motions. Otherwise, some District Courts might be tempted to defer to the Bankruptcy Court, leaving you stuck with an appeal (after making your trial objection).
3. Be willing to focus a little more heavily on discovery at the Bankruptcy Court level than in a District Court. Though an adversary proceeding is technically subject to the same relevance and proportionality standards as a District Court case, Bankruptcy Courts and bankruptcy practitioners will probably be more cooperative in allowing your requests.
4. Bankruptcy practice is less formal than trial court practice. Do not let this cause you to sit on your clients' rights. If the opposing party fails to make a disclosure, call them on it. The judge will follow the law. Likewise, be as careful to comply with your own discovery and scheduling obligations as you would in any other Court.

III. CORE V. NON-CORE CLAIMS: WHY IT'S PROBABLY NOT WORTH IT TO FILE THAT PROOF OF CLAIM

A. Proof of Claim Subjects You to the Jurisdiction of the Bankruptcy Court

One of the most important decisions to be made as a creditor in a bankruptcy case is when and if to file a proof of claim against the debtor. A creditor who files a proof of claim in a bankruptcy case consents to the jurisdiction of the bankruptcy court.

In Granfinanciera, courts recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claim," thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction. As such, there is no Seventh Amendment right to a jury trial. If a party does not submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial. Accordingly, "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate."

Langenkamp v. Culp, 498 U.S. 42, 44-45 (1990), citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989). In In re Global Technovations, Inc., 694 F.3d 705, 722 (6th Cir. 2012), the court stated, "[t]hus, the case is fundamentally unlike Granfinanciera, where the bankruptcy estate reached out to file a fraudulent-transfer claim against a party who had filed no claim against the estate." Where a creditor "brought itself voluntarily into the bankruptcy court [t]he state-law claim in this case...was [the debtor's] defense against [the] proof of claim." *Id.* As noted in Global Technovations, "[i]t is crystal clear that the bankruptcy court had constitutional jurisdiction under Stern to adjudicate whether the sale...was a fraudulent transfer, because 'it was not possible...to rule on [the] proof of claim without first resolving' the fraudulent transfer issue." 694 F.3d at 722, quoting Stern, 131 S.Ct. at 2616 (citing Katchen v. Landy, 382 U.S. 323, 329-30, 332-33, (1966)). A creditor may retain its right to a jury trial only if the Proof of Claim is withdrawn prior to the filing of an adversary proceeding against it. In re Christou, 448 B.R. 859, 862 (N.D. Ga. 2011) citing Smith v. Dowden, 47 F.3d 940, 943 (8th Cir. 1995); In re 20/20 Sport, Inc., 200 B.R. 972 (Bankr. S.D.N.Y. 1996).

Federal courts have universally held that "a Seventh Amendment jury trial right does not mean the bankruptcy court must instantly give up jurisdiction and that the case must be transferred to the district court." In re Healthcentral.com, 504 F.3d 775, 787 (9th Cir. 2007) (collecting cases). The Supreme Court held in Langenkamp v. Culp, 498 U.S. 42 (1990) "that by filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." Langenkamp, 498 U.S. at 44 (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)). When a proof of claim is filed, it triggers "the process of 'allowance and disallowance of claims,' thereby subjecting [itself] to the bankruptcy court's equitable power." Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (*per curiam*) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58-59 & n.14 (1989)). In so doing, it voluntarily "forfeit[ed] or waive[d] any existing right to a jury trial." In re Seminole Walls & Ceilings Corp., 336 B.R. 539 (Bankr. M.D. Fla. 2006) (citing Granfinanciera, 492 U.S. at 59; In re RDM Sports Group, Inc., 260 B.R. 915, 920 (Bankr. N.D. Ga. 2001)). That waiver, once undertaken, is irrevocable. Withdrawing a proof of claim does not revert the creditor with a right to jury trial or removal of the bankruptcy court's jurisdiction.

B. You Can Have it Both Ways in Certain Circumstances

Despite the filing of a proof of claim, the bankruptcy court only has jurisdiction over core bankruptcy matters and those matters related to jurisdiction over non-core matters. It is only "[w]hen a claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy, the bankruptcy court cannot enter final judgment." In re Global Innovations Inc., 694 F.3d 705, 722 (6th Cir. 2012) (applying Stern). In Stern, a creditor filed a proof of claim in the bankruptcy. The creditor's claim alleged the debtor "had defamed [the creditor] by inducing [the debtor's] lawyers to tell members of the press that [the creditor] had engaged in fraud to gain control of [the creditor] father's assets." Stern, 131 S.Ct. at 2601. The creditor filed an adversary proceeding to except the debt from discharge pursuant to 11 U.S.C. §523. *Id.* The debtor counterclaimed, arguing that the creditor had "tortiously interfered with her receipt of an *inter vivos* gift from [the debtor's] late husband ([the creditor's] father). Debtor's counterclaim arose under state tort law. The claim sought to augment her bankrupt estate, not to disallow [the creditor's] proof of claim." Waldman v. Stone, 698 F.3d at 919 (applying Stern). "[R]esolution of [the creditor's] proof of claim would not resolve the counterclaim, which 'raise[d] issues of law entirely different from those' raised by [the creditor's] proof of claim." *Id.* (quoting Stern, 131 S.Ct. at 2617). The "counterclaim therefore concerned private rights, which meant that the bankruptcy court could not enter final judgment with respect to it." Waldman, 698 F.3d at 919 (citing Stern, 131 S.Ct. at 2620).

C. Practical Effects and Considerations

Trial by a Bankruptcy Court might not always be the worst thing in the world. Remember, bankruptcy judges see these types of cases all the time and know how to sniff out a bogus insolvency analysis. But Bankruptcy Courts are also permitted to conduct a flexible analysis and look beyond an ordinary fair market value analysis when determining solvency – and the Debtor entered Bankruptcy Court for a reason. You might end up having two trials, and which order you have them is not going to be clear.

Considerations:

1. How large is your proof of claim in relation to the remainder of the Bankruptcy Estate? If you have a small claim, filing that proof of claim is probably not worth it.
2. Other than the potential lawsuit against your client, what is the value of the Bankruptcy Estate's assets? If the claim against your client is the Estate's only asset, filing that proof of claim may not be worth it. **Except**, if you have a large proof of claim, that can be a valuable bargaining chip when discussing possible settlement of your case.
3. Know your judge. This is one of those times forum shopping is perfectly acceptable. If you know a bankruptcy practitioner in the areas, consult with them.
4. Otherwise, treat the decision like you would any other bench trial vs. jury trial decision. Just remember, though, that deciding to file the proof of claim might make the decision for you.

IV. CREDITOR/TRUSTEE STANDING: WAIT, WHO IS THE PLAINTIFF?

A. Trustee or Debtor-In-Possession Stands in Shoes of Debtor

All pending claims of the debtor are transferred to the estate of the debtor and the trustee or the debtor in possession becomes the plaintiff. [11 U.S.C. §541](#) provides, in relevant part:

- a. The commencement of a case under [section 301](#), [302](#), or [303](#) of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
 1. Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

2. All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –
 - A. under the sole, equal, or joint management and control of the debtor; or
 - B. liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
3. Any interest in property that the trustee recovers under [section 329\(b\)](#), [363\(n\)](#), [543](#), [550](#), [553](#), or [723](#) of this title.
4. Any interest in property preserved for the benefit of or ordered transferred to the estate under [section 510\(c\)](#) or [551](#) of this title.
5. Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –
 - A. by bequest, devise, or inheritance;
 - B. as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
 - C. as a beneficiary of a life insurance policy or of a death benefit plan.
6. Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
7. Any interest in property that the estate acquires after the commencement of the case.

The commencement of the bankruptcy cases automatically vests the debtor's property in the hands of the trustee or debtor-in-possession so it is important to get in touch with the trustee or debtor-in-possession at the outset of the case to ascertain whether the trustee intends to abandon the cause of action back to the debtor or whether the trustee will retain the cause of action as property of the estate. Abandonment occurs when the claim or other asset is of inconsequential or no value to the estate. The

trustee exercises his business judgment in determining whether to abandon a cause of action. If a creditor believes the trustee is failing to act, there are other options.

B. When Derivative Standing May Be Granted

When a trustee or debtor refuses to act, derivative standing may be granted to a creditor's committee or a creditor to pursue the causes of action. The Sixth Circuit has long recognized the ability of a creditor to bring a statutory avoidance action where: (1) demand has been made upon the trustee; (2) the demand is declined; (3) a colorable claim that would benefit the estate if successful exists; and (4) the inaction is unjustified. Canadian Pac. Forest Prods., Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.), 66 F.3d 1436, 1446 (6th Cir. 1995). In determining whether a claim is colorable for the purposes of derivative standing, a court "essentially performs a cost-benefit analysis. If the outcome of the case may result in a benefit to the estate, and the costs of pursuing the matter do not outweigh that benefit, the court may authorize a party in interest to pursue it." 7-1109 Collier on Bankruptcy 1109.05[2][c].

"[I]n the Sixth Circuit, the bankruptcy court must undertake a 'cost-benefit analysis' to determine whether the claim raised by the creditor seeking standing is likely to benefit the estate and, therefore, whether the debtor's refusal to sue is justified." In re Smart World Technologies, LLC, 423 F.3d 166, 178 (2nd Cir. 2005), *citing*, Canadian Pac. Forest Prods., Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.), 66 F.3d 1436, 1438 (6th Cir. 1995).

"The court's inquiries will involve in the first instance...a determination of probabilities of legal success and financial recovery in the event of success." Unsecured Creditors Comm. Of Debtor STN Enters., Inc. v. Noyes (In re STN Enterprises), 779 F.2d 901, 905 (2nd Cir. 1985). In so holding, the Second Circuit instructed that the court "should assure itself that there is a sufficient likelihood of success to justify the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce." *Id.* at 906.

C. Do I Have the Same Protections against the Trustee or Derivative Plaintiff as I Would Have Against the Debtor?

For the most part, yes.

Pursuant to [11 U.S.C. §541](#), the bankruptcy trustee becomes a successor in interest to "all legal or equitable interests of the debtor in property as of the commencement of the case." In the role of successor to all of the debtor's interests, the "trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor. [Conversely,] [t]he 'trustee is, of course, subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor.'" Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154 (3rd Cir.1989) (*quoting* Collier on Bankruptcy ¶ 323.02[4] (Matthew Bender 15th ed.)).

In other words, in asserting claims which belonged to the corporate debtor, the bankruptcy trustee is subject to all restrictions, including affirmative defenses, which could be raised, were the debtor corporation able to bring the action itself. See *generally, e.g., Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 492 (3rd Cir. 1997).

In re Total Containment, Inc., 335 B.R. 589, 620 (Bankr. E.D. Pa. 2005). However, you might run into hearsay problems. Statements by debtors, debtor companies, and agents of debtors/debtor companies may not be admissible as a statement of a party opponent against a successor trustee. See *Calhoun v. Baylor*, 646 F.2d 1158, 1162-63 (6th Cir. 1981). Rather, you may need to seek admission under the common law rule that statements by a person in privity with a party are admissible through FRE 807. See *Huff v. White Motor Corp.*, 609 F.2d 286, 290-91 (7th Cir. 1979).

V. HOW DO I GET OUT OF HERE? THE DECISION TO WITHDRAW THE REFERENCE

A. Why?

If you want a jury trial in Kentucky, you must move to withdraw the reference. If you want a bench trial, it becomes a question of forum selection. Unless you are a regular bankruptcy practitioner, the presumption should be move to withdraw. Bankruptcy Court is a court of equity, and it has its own unique practices and procedures. A regular bankruptcy practitioner is going to know how to utilize the unique standards of that court better than you, the same way a Pikeville attorney is going to have a better shot in Pikeville court than a Louisville attorney.

However, like any presumption, this is rebuttable. If the case is worth bringing in a regular bankruptcy practitioner for at least a consultation, do so, and find out more about your court and your judge. Sometimes a well-trained eye can be to the defendant's benefit.

B. When?

The first issue is whether the motions to withdraw the reference are timely. [28 U.S.C. §157\(d\)](#). Timely refers to "as soon as possible after the moving party is aware of grounds for withdrawal of reference" or "at the first reasonable opportunity after the moving party is aware of grounds for withdrawal of reference." *In re Black Diamond Mining Co., LLC*, No. 10-84, 2010 WL 5173271, at *1 (E.D. Ky. Dec. 14, 2010) (*quoting In re Mahlmann*, 149 B.R. 866, 869 (N.D. Ill. 1993)). The timeliness requirement prevents parties from "forum shopping, stalling, or otherwise engaging in obstructionist tactics." *Id.* (*quoting In re Mahlmann*, 149 B.R. at 869).

In re Appalachian Fuels, LLC, 472 B.R. 731, 736 (E.D. Ky. 2012).

As a rule of thumb, move to withdraw the reference as soon as you file your answer or motion to dismiss. You will probably get sent back to the

Bankruptcy Court until the case is "trial ready," but you want to close off any waiver or untimeliness argument. Then, when discovery has been complete and dispositive motions (if any) decided, you will want to move to withdraw a second time.

C. Legal Standard

A party may move to withdraw the reference to the Bankruptcy Court pursuant to [28 U.S.C. §157\(d\)](#), which provides that:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

In re Appalachian Fuels, LLC, 472 B.R. 731, 736 (E.D. Ky. 2012).

A district court may grant discretionary withdrawal of reference "for cause shown." [28 U.S.C. §157\(d\)](#). Although "cause" is not defined in the Bankruptcy Code, most courts consider the following factors to determine whether cause exists: (1) judicial economy; (2) uniformity in bankruptcy administration; (3) reducing forum shopping and confusion; (4) fostering economical use of the debtor's and creditor's resources; (5) expediting the bankruptcy process; and (6) the presence of a jury demand. In re Angelucci, No. 09-70, 2009 WL 798805, at *3 (E.D. Ky. Mar. 23, 2009) (*citing Big Rivers Elec. Corp. v. Green River Coal Co., Inc.*, 182 B.R. 751, 754 (W.D. Ky. 1995)). Other courts in this circuit have found that discretionary withdrawal of reference requires a "compelling" cause. See In re Washington Mfg. Co., 133 B.R. 113, 116 (M.D. Tenn. 1991) ("[O]nly a compelling cause warrants withdrawal from the automatic reference to bankruptcy under the non-mandatory provision."); In re Onyx Motor Car Corp., 116 B.R. 89, 91 (S.D. Ohio 1990) ("Let it be clear, without truly exceptional and compelling circumstances, a motion for withdrawal of reference will not be well received by this Court."). Indeed, when considering [§157\(d\)](#), Congress indicated that there was no intention to allow this subsection to become "an escape hatch through which most bankruptcy matters will be removed to the District Court from the bankruptcy court." In re Onyx Motor Car Corp., 116 B.R. at 91 (*quoting* 100 Cong. Rec. H1850) (internal quotations omitted).

In re Appalachian Fuels, LLC, 472 B.R. 731, 737 (E.D. Ky. 2012).

D. Transfer of Case based on Forum Selection Clauses Contained in Contract

A motion to transfer venue under [28 U.S.C. §1412](#) must demonstrate that the requested transfer is either in the interest of justice or would serve the convenience of the parties. [Section 1412](#) is disjunctive but not compulsory. The decision whether to transfer an adversary proceeding pursuant to [28 U.S.C. §1412](#) is left to the sound discretion of the court. Bavelis v. Doukas (In re Bavelis), 453 B.R. 832, 869 (Bankr. S.D. Ohio 2011) ("The decision to transfer a case is 'within the court's discretion[,] should 'not [] be taken lightly' and should be made giving 'great weight' to the Debtor's choice of a proper venue.") (*quoting In re Enron Corp.*, 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002)). The standards for evaluating and enforcing forum selection clauses differ radically between core and non-core proceedings. In core proceedings, the strong public interest in the centralization of all core matters in the bankruptcy court provides a basis for a debtor to avoid a forum selection clause. See, e.g., In re Commodore Intern., Ltd., 242 B.R. 243, 261 (Bankr. S.D.N.Y. 1999); In re N. Parent, Inc., 221 B.R. 609, 620-21 (Bankr. D. Mass. 1998). "Despite the general preference for enforcement of forum selection clauses, it is an open question whether forum selection clauses are applicable in "core" bankruptcy proceedings." "[B]ankruptcy courts in this Circuit have recognized that forum selection clauses should not be enforced in core matters, and specifically with regard to fraudulent transfer claims." Charys Holding Co., Inc. v. McMahan Securities Co. (In re Charys Holding Company), 443 B.R. 628 (Bankr. D. Del. 2010). As a Texas bankruptcy court posited the issue:

Within a bankruptcy context, "the mere fact that Debtor/Plaintiff is in bankruptcy is not sufficient to prevent enforcement of a contractual forum selection clause." In re Bailey, 217 B.R. 523, 527 (Bankr. E.D. Tex. 1997) (*citing Arrow Plumbing*, 810 F.Supp. at 372). However, with respect to "core" bankruptcy matters, public policy favors the centralization of bankruptcy proceedings in the bankruptcy court where the debtor's bankruptcy case is pending. In re D.E. Frey Group, Inc., 387 B.R. 799 (D. Colo. 2008). But, even in "core" matters, the language of [28 U.S.C. §1334](#), which provides for bankruptcy jurisdiction, is permissive, not mandatory. *Id.*

In non-core proceedings, by contrast, bankruptcy courts will enforce forum selection clauses according to the laws of the states in question, which is to say that there will be a strong but rebuttable presumption that such clauses are enforceable.

See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-15 (1972). Atlantic Marine is the leading authority on the issue of when and how a case can be transferred pursuant to a forum selection clause between debtor and creditor. Where the parties have pre-selected a forum in their

contracts, it is the party seeking to prevent transfer to that pre-selected forum that bears the burden of establishing that transfer is unwarranted. [Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas](#), 134 S.Ct. 568, 581 (2013). "The enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." [Atlantic Marine](#), 134 S.Ct. at 581. The Supreme Court states this unequivocally: "[Where there is a forum-selection clause,] the plaintiff's choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." [Atlantic Marine](#), 134 S. Ct. at 581.

The federal bankruptcy scheme is designed to adjudicate the estate's claims in one consolidated case and forum. [28 U.S.C. §1408](#) applies to venue in cases arising under Title 11 pursuant to which venue is properly the domicile of the debtor. Adversary proceedings arising out of such a case under Title 11 are properly venued where the bankruptcy case is pending. [28 U.S.C. §1409\(a\)](#). Neither the general venue statute nor the forum selection clause may apply, and I would argue that it does not alter the general rule that a trustee or debtor in possession can maintain an avoidance action against any defendant in the United States in one forum where the bankruptcy case is pending. See [Charys Holding Co., Inc. v. McMahan Securities Co. \(In re Charys Holding Company\)](#), 443 B.R. 628 (Bankr. D. Del. 2010) ("Despite the general preference for enforcement and forum selection clauses, it is an open question whether forum selection is applicable in 'core' bankruptcy proceedings." "Bankruptcy courts in this Circuit have recognized that forum selection clauses should not be entered in core matters, and specifically with regard to fraudulent transfer claims."). Bankruptcy courts in the Sixth Circuit have also limited forum selection clause application to non-core proceedings. [In re McCrary & Dunlap Construction Co.](#), 256 B.R. 264 (Bankr. M.D. Tenn. 2000).

VI. THAT DANG JUDGE: HOW, WHEN AND UNDER WHAT CIRCUMSTANCES YOU CAN CHALLENGE THE BANKRUPTCY COURT'S RULING

You have the same professional, ethical obligations in front of the Bankruptcy Court as you do in front of an Article III Court. Your claims, defenses, and challenges must have a basis in law and fact ([KRPC 3.1](#)), you must undertake reasonable efforts to expedite litigation ([KRPC 3.2](#)), and you must comply with all rules of the Bankruptcy Court ([KRPC 3.4\(c\)](#)). At the same time, you must comply with your obligation of reasonable diligence to your client and ensure that your client's interests are protected. [KRPC 1.3](#).

This puts you in a unique and somewhat difficult position in Bankruptcy Court. As discussed earlier, while functioning in a magistrate-like capacity, a bankruptcy judge is not subject to the same automatic review process as a magistrate judge. When you bring a non-dispositive motion, there might not be a review process unless you ask for it. Even when you bring a dispositive motion, you are not entitled to review if the motion is denied. [Stern v. Marshall](#) and its progeny only require Article III courts to issue final judgments.

The diligence you owe to your client may require you to make reasonable efforts to seek the same rights your client would have received if this were truly a federal magistrate proceeding. In other words, clear error/contrary to law review on non-dispositive matters and *de novo* review of dispositive motions. There are three possible ways to handle this:

- If the motion you are filing is significant enough, ask for a [Rule 9033 Report and Recommendation](#) up front in your motion. *E.g.*, "Pursuant to [Federal Rule of Bankruptcy Procedure 9033](#) and [Federal Rule of Civil Procedure 56](#), Defendants, by and through the undersigned counsel, respectfully ask this Court to issue a report and recommendation recommending that summary judgment be entered on all claims asserted in the Plaintiff's Complaint."
- If you did not appreciate the significance of the motion in advance of the ruling, there are two ways to seek review: (a) file a motion to alter or amend and ask the Bankruptcy Court to convert its Order into a [Rule 9033 Report and Recommendation](#); or (b) wait until the reference is withdrawn, then ask the District Court to exercise its discretion and take the issue up again.
- Both of the latter options are risky. The first option amounts to asking the bankruptcy judge for permission to let you take him up on appeal. However, without the report and recommendation, the District Court may be reluctant to disturb the ruling of his or her fellow judge.
- No matter how the process plays out, make sure to renew all evidentiary issues by objection (or proffer) at trial. Otherwise, you run the risk of the Court of Appeals finding that the issue was not properly preserved, particularly if the issue was initially decided by a different tribunal than the trial court.

REMEMBER, this is a developing, unsettled process. Be diligent, and do not be afraid to protect your client's rights, but be respectful and mindful of the fact that the judge and your opposing party are dealing with the same uncertainty you are.

I. INTRODUCTION

II. BACKGROUND

"All the world's a stage..."¹

"You see, but you do not observe."²

"The Truth is Out There."³

A. Historical Interviews

1. Nazi war criminals (Nuremburg Trials – 1946).⁴

2. Saddam Hussein (FBI – 2004).⁵

B. Types of Interviews

1. Job application.

2. Subject/client/victim.

3. Witness.

4. Background (third party).

5. Juror.

6. Expert witness.

¹ "All the world's a stage,
And all the men and women merely players;
They have their exits and their entrances,
And one man in his time plays many parts," As You Like It, William Shakespeare. Act II, Scene VII.

² "You see, but you do not observe. The distinction is clear."
~ Sherlock Holmes, A Scandal in Bohemia, 1892, written by Sir Arthur Conan Doyle.

³ "The X-Files," television show title opening, written by Chris Carter, Fox Broadcasting Company, 1993.

⁴ The Nuremburg Interviews, Leon Goldensohn, Alfred A. Knopf, 2004.

⁵ The Saddam Hussein interviews conducted by FBI Supervisory Special Agent (SSA) George Piro, 2004. <https://archives.fbi.gov/archives/news/stories/2008/january/piro012808>.

C. Interview vs. Interrogation

D. Interview Styles

There is no one uniform style of interview! YOUR interviewing style will reflect YOUR personality, as well as any adjustments you make (or attempt to make) to the goals and overall case strategy.

III. PRE-INTERVIEW RESEARCH AND PLANNING

A. THOROUGHLY Review Your Case! About What Issue(s) Do You REALLY Want to Know?

B. Number Your Issues, Separately, and then Conduct the Interview on Each Topic

C. In Complex or Technical Cases, Write out Your Questions in Advance to Focus Your Attention

D. Background Research on Interviewee: "Gotta be true, I saw it on the internet...."

E. Other Public Source Info

F. Recognizing Inherent Bias and Prejudices

1. Ethnic differences (Sirhan Sirhan interview, assassination of Robert F. Kennedy).

2. Cultural differences (German, Indian, Russian, Japanese, etc.).

3. Gender differences (male interviewer-female interviewee, female interviewer-male interviewee, etc.).

4. Significant age differences.

5. Professional/educational differences: Toughest interviewees (police, lawyers, physicians, engineers, scientists, and sociopaths).

G. Translator Needed?

H. Physical Location of Interview

1. Interviewee's home.

2. Law office.

3. Interviewee's place of employment.

- 4. Jail (yeah, it happens....).
- 5. Other: neutral, restaurant, etc..
- I. Time of Day
- J. Time Allocation

IV. INTERVIEW PRELIMINARIES (SETTING THE "STAGE")

- A. Review Your List of Topics and Questions just before Contact with Interviewee
- B. Know about any Publications Written by, or Articles about the Interviewee
- C. "Dress for Success," or... "Dress for Disaster?" ("Your ONE chance to make a good first impression....")

V. THE INTERVIEW

- A. Building Rapport^{6, 7}
 - 1. What is it?
 - a. Physical.
 - b. Mental.
 - c. Emotional synchrony.
 - d. Compare to "trust."
 - e. Losing rapport; regaining it.
- B. Body Language (Nonverbal Communications)
 - 1. Terry v. Ohio.⁸
 - 2. "What Every BODY is Saying, Joe Navarro, 2008."⁹
 - a. Limbic brain, reaction to danger/distress: Freeze, flight, fight.

⁶ www.SalesTrainingInternational.com.

⁷ www.evancarmichael.com/library.

⁸ Terry v. Ohio, 392 U.S. 1, (1968).

⁹ What Every BODY Is Saying, Joe Navarro, William Morrow, 2008. This is an excellent, up-to-date, in-depth analysis of nonverbal communications. (And, no, while the author is also a former Special Agent, I don't get any of the book sale proceeds....) See also www.jnforensics.com.

- b. "Pacifying actions:" feet, torso, arms, face.
 - 3. Establish baseline of "comfort," then look for pacifiers to introduce stress.
 - a. Comfort/discomfort vs. deception.
 - b. "Deception" indicators: A cautionary note.
- C. "Three Second Rule" Used by Police (Critical Initial Impressions)
- D. Keep a Professional Attitude at All Times: "Clinical" Objectivity
- E. Identify Your Affiliation and Role with the Subject, Defendant, or Plaintiff
- F. Seek the Interviewee's "Assistance," "Cooperation," or "Help"
- G. Be Factually Prepared! And, Be Overly-Prepared.
- H. Provide Materials to Interviewee to Write and Draw On. Retain These.
 - 1. Maps.
 - 2. Financial documents.
 - 3. Diagrams.
 - 4. Drawings.
 - 5. Timelines, etc.
- I. Viewing the Interviewee
 - 1. Table.
 - 2. Couch.
 - 3. Standing (body language).
- J. Refreshments/Food Offered? Cultural; Handling
- K. Note Taking.
 - 1. Paper.
 - 2. Laptop.
 - 3. Recording (overt, covert).
- L. Record Date, Start and End Times

- M. Format Depends on Case, the Interviewee and Time Constraints
1. Shotgun/Narrative: "In your own words, tell me what happened...."
 - a. Pro: Rapport building.
 - b. Con: Complex case can get murky.
 2. Rifle/Single issue: "What did you hear, feel, see, smell, or taste?"
 - a. Pro: Time saving.
 - b. Con: Can be perceived as confrontational/challenging by some.
- N. Handling Sensitive Issues
1. Money.
 2. Sex.
 3. Politics.
- O. Handling False/Contradictory Information
1. Shotgun: Wait till end: Speaker has "invested" in the story.
 2. Rifle: Stop interview: Discuss immediately.
 3. Non-confrontational approach: "To clarify, did you say....?"
 4. Semi-confrontational approach: "Are you aware that other people did not hear/feel/see/smell or taste those sensations/actions/statements?"
- P. The "Pregnant Pause"
- Q. Direct Quotes Attributed to another Person
1. Unless these were actually written down contemporaneously, use the interviewee's wording, and qualify with, "...or words to that effect, as understood by _____."
 2. Direct, unqualified quotes can be used to reduce credibility of testifying witness ("Are you SURE that is what the defendant said??!!").

- R. Previously "Staged, or Schooled?"
 - 1. Have you been contacted on this matter by anyone else?
 - 2. If so, by whom, when and where?" (Ask at end, not beginning.)
- S. The "Columbo" Post-Interview Exiting Questions/Statements
 - 1. "Uh, sir, just one more question...."
 - 2. Provocative, can be counter-productive.

VI. THE INTERVIEW WRAP UP

- A. At the End, Take a Moment and Review Your List of Topics. Did Any New Ones Arise?
- B. Always Ask, "Is There Anything Else You Would Like to Add?"
- C. Always Ask for Interviewee to Recontact if He/She Recalls other Info
- D. Always Ask for Possible Future Recontact by You (This Should Happen....)

VII. WRITTEN SUMMARY

- A. Complete as Soon as Possible. DO NOT DELAY. Keep Notes, Audio Tapes, Drawings, any Hand-Outs Given to You, Date and Initial Them for Authentication.
- B. Formats:
 - 1. FBI, CIA, others.
 - 2. Name, date, location, names of all participants or observers, the scope of interview, responses.
 - 3. Include interviewee's name, if the client, to be indexed in office Conflicts of Interest indices.
- C. Witness Assessment Summary (Written Separately)
 - 1. Overall, does the witness statements help, hurt, or have no impact on your case?
 - 2. Is this person a good witness, for your case, or easily intimidated, or easily confused?
 - 3. Summary about possible testimony (glasses, hearing aid, mobility, quick to anger, slow to recall, coached, etc.)

4. Is this witness hostile, or neutral to your case? Are there overt/covert prejudices to case, client, etc.?
5. Is this witness withholding information, or tailoring responses?
6. Need to recontact him/her later? On what new or remaining issues?

VIII. CONCLUSION

SAMPLE INTERVIEW WRITE-UP

[SUBJECT ID INFO, LOCATION]

Mable BLACKBURN, also known as "Mae" BLACKBURN, age 65, 123 Dover Lane, Lexington, KY, 40508, telephone 859-123-9878 was interviewed at her residence regarding her observations and statements she heard after an auto accident that occurred on May 25, 2015, near the intersection of Dover and Justice Lane. BLACKBURN advised that she retired from the Fayette County School system three years ago.....

[SCOPE]

BLACKBURN was advised that she was being interviewed in this matter as a civil suit/criminal charges had been filed against one of the drivers and this law firm represents _____, one of the parties involved.

[STATEMENT]

After being advised of this, Mable BLACKBURN advised that while preparing dinner for her family in the kitchen at approximately 6:30 p.m., she heard a loud crash in the front of her house. She and her husband, David BLACKBURN, then went to the front window of her house where she observed a black Chevrolet that had struck a white Ford in the street. The white Ford appeared to have been turning from Justice Lane onto Dover Lane and struck the Chevrolet in the right front area. She observed two white males outside the vehicles shouting at each other. One was waiving his fist at the other man. BLACKBURN then had her husband call "911" and report the accident.

[CONTRADICTORY INFO]

The male wearing a black jacket was yelling at the other driver. At no point did BLACKBURN see anyone exhibit a firearm. When advised that other witnesses had seen a firearm, BLACKBURN advised she did not see anything like that. Due to the two men yelling, BLACKBURN's husband closed and locked the front door, and told her to return to the kitchen. Her husband, David continued to watch the scene and she heard the police or fire sirens later.

[JOINT INTERVIEW DEVELOPS]

At this point in the interview, David BLACKBURN entered the room and advised that the incident had greatly upset his wife and that he would answer any further

questions for her. BLACKBURN provided this information: He is 68, retired from the AAC Company under disability for diabetes, where he had been a foreman for a work crew. He advised that....

[FILING RETRIEVAL SYSTEM –first page, at bottom]

Name(s): _____

Date(s) of Interview: _____

Location: _____

Date Summary Written: _____

Office File number: _____

Sample Re-interview Write Up:

"Mae" BLACKBURN, 123 Dover Lane, Lexington, previously interviewed in this matter on May 30, 2017, telephonically (or personally or by email) contacted the writer [OR, was contacted at her residence by telephone] on June 30, 2017.

BLACKBURN advised that she recalled one of the men in the auto accident that had occurred in front of her house had called the other man a "mean SOB." BLACKBURN said that the man saying this was the younger of the two men. BLACKBURN said that she did not want to use that language in front of her husband during the earlier interview.

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 the [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 ANTOINE ATTORNEY
ATTORNEY FOR PETITIONER
100 Main Street, Suite A
Louisville, KY 40202
(502) 555-1234

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 ANTOINE ATTORNEY
BY: _____
HON. BARRY BARRISTER
100 Main Street, Suite A
Louisville, KY 40202
(502) 555-1234

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 2017, 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 ANTOINE ATTORNEY
ATTORNEY FOR PETITIONER
100 Main Street, Suite A
Louisville, KY 40202
(502) 555-1234

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 ANTOINE ATTORNEY
ATTORNEY FOR PETITIONER
100 Main Street, Suite A
Louisville, KY 40202
(502) 555-1234

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, 2017, entered its Decree of Dissolution of Marriage incorporating and approving the Separation Agreement dated February 10, 2017, 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, 2017, 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, 2017, 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. ANTOINE ATTORNEY
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.* 2018) and Easter in odd numbered years (*i.e.* 2019) 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.* 2018) and Yom Kippur in odd-numbered years (*i.e.* 2019). 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.* 2019), 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.* 2018) and Easter in odd numbered years (*i.e.* 2019) 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 a.m. 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

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 section 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

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 great 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 online do-it-yourself document companies make 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.

For attorneys that perform estate planning services, 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 discussion concerning marital rights/issues

Meeting. 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

¹ [Ky SCR 3.130, RPC Rule 3.130\(1.14\)](#).

has special needs or whether or not there is a divorce document that requires the client to make a specific testamentary distribution are often 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. I have included a Checklist that I prepared for my associates for topics to cover during meetings.²

Asset Review. 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 spellings³). I have included a sample of my Questionnaire.⁴

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 (for estate tax purposes)
- Asset title (for the purpose of informing clients of what assets will or will not pass under the Will)
- Required distributions (example, divorce documents, charitable pledges, etc.)
- Special situations (example, special needs child, child with "problems" such as addiction or mental illness)

Tax Issues. If your client has over a certain amount of assets⁵ 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 addition, Kentucky Inheritance Tax may apply for those that leave assets to someone other than an exempt beneficiary.

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

² See Appendix A

³ 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.

⁴ See Appendix B

⁵ The [American Taxpayer Relief Act of 2012](#) made permanent the tax-free applicable credit amount of \$5,000,000 which is indexed for inflation (\$5,490,000 for those dying in 2017).

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,⁶ 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 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 separate 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

⁶ [KRS 394.092.](#)

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 indicates that an attorney-in-fact may not execute a Will document on behalf of a testator,⁷ under the newly adopted 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 to do so.⁸

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 (if any)
- Residuary estate
- Trust provisions (if any)

⁷ [Smith v. Snow](#), 106 S.W.3d 467 (Ky. App. 2002).

⁸ [KRS 386B.4-110\(1\)\(a\)](#) and [KRS 386B.6-020](#).

- 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.

- 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 can cause confusion .

- 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.⁹

An example of a specific bequest provision is as follows:

⁹ Failing to state this can create an ademption issue.

I give and bequeath my 1954 Red Corvette Convertible to my Sister, JANE SMITH, if she shall 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. Real Estate.

At the death of a real property owner, such real property can pass by one of three methods: by operation of law; by the terms of a last will and testament; or by the laws of intestate succession, if there is not a valid will.

When real property passes by intestate succession or by a last will, then the successor to the decedent's interest in the real property is not the decedent's estate, but rather the decedent's heirs or beneficiaries under a Last Will and Testament.¹⁰ Stated differently, real property vests in the heirs or beneficiaries at the moment of death. This is a challenging concept to grasp for both attorneys and their clients. Even more difficult if that although real property vests immediately, Kentucky caselaw and statutes give a fiduciary certain rights for the transfer and sale of real property under some situations such as the payment of debt or a mandated distribution.

When a decedent dies owning real estate that does not pass to a joint tenant in "survivorship" there can be significant issues. Intestacy requires sale under KRS 389A.010. Pay careful attention to the requirements of this statute, it is not just a matter of bringing a motion before the court.

Even if a decedent died testate, a power to sell is included in the Will document, it does not necessarily mean that the fiduciary may sell real estate if the beneficiaries do not agree.¹¹ This is very important and frequently misunderstood. Under our law, real estate vests at the moment of death.

This is a complicated topic.¹²

4. Residuary estate.

¹⁰ *Slone v. Casey*, [194 S.W.3d 336 \(Ky.App.2006\)](#); *Wood vs. Wingfield*, 816 S.W.2d 899 (Ky 1991)

¹¹ *Lucas v. Mannering*, 745 S.W.2d 654 (Ky. Ct. App. 1987).

¹² The author has written a separate article on the topic of the passing of real estate by a Kentucky decedent which is available upon request.

A proper residuary clause is the catch-all for those assets passing by and through the will document.

5. 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 must be established until the child reaches the age of majority. The trust under will could have avoided this.

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.

6. 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.¹³ 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.

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

¹³ [KRS 395.150](#).

sophistication and can and will handle the job. It is often a good idea to name an alternate.

7. 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 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 family 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 (in my opinion).
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.
5. Meet face-to-face with the person signing the documents. If you are asked by a family member to omit someone, take great caution.

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 (this means looking at the title on documents).
4. Determine if estate tax is applicable.
5. Determine if Kentucky 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 or unless I motion the court with notice to all interested parties.

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, assuming 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.
- f. Some counties allow the fiduciary to sign a limited power of attorney document for you (the attorney) to take the oath and sign surety. If allowed, this means that your client does not have to come to court with you. Clients generally like this.

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. The clerks in these counties are your best source of information.

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 before the judge. Your client may or may not have to be there depending upon whether the county allows the fiduciary to execute a limited power of attorney which authorizes you to take the oath and sign for the surety. 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). If intestate, your client will either have to post a bond or have it waived by the court.
- 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. Send letters to all beneficiaries in will or if there is not a will, then to all heirs at law.
7. Notify account sources of death (example insurance and retirement).
8. Personal Representative needs to open an Estate Account.
9. Send letter to your client explaining his or her duties.
10. Disallow claims without merit.
11. 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 (\$5,490,000 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 2017, I would have had only \$4,490,000 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 is a law that just came into existence in 2010. However, 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 means 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.

APPENDIX A

Estate Planning: Checklist for Meeting (Married)

Intro

- ___ Did the clients complete the Questionnaire?
- ___ Divorced, if yes any contractual obligations?
- ___ Less than the applicable credit (\$5,490,000 each for 2017)?
- ___ Explain probate vs. non-probate title
- ___ If children, any child have special needs, mental illness, or drug addiction?
- ___ Any concerns about any person receiving assets?
 - ___ Anyone married to someone “bad”?
 - ___ Any child or grandchild have special needs?

Last Will and Testament

- ___ Your personal property should all go to one another?
 - ___ Any specific bequests?
 - ___ How should your personal property be divided at the death of the last of you?
- ___ With regard to your other assets (real estate, money, etc.):
 - ___ All to one another?
 - ___ What happens at the death of the last of you? Equally?
 - ___ If under age 25, probably in trust for children
- ___ Who should be your executor? Each other, then who?
- ___ If trust for children, who should be the trustee?
- ___ If children are under age 18, who should be the guardian? Alternate?
- ___ Did you promise to give any person, church, or charity any money?
- ___ Any pets that you want to provide for?
- ___ Burial preference?
- ___ Review previous estate planning documents
 - ___ Do they have a revocable trust? If so, consider whether we should terminate or amend and restate. Any assets titled in the name of the trust?

APPENDIX A

- ___ Brief review of those documents with them
- ___ If they inquire about living trusts, explain what a revocable trust does

POA

- ___ Explain what this is
- ___ Confirm husband and wife would name one another
- ___ Who would make a good alternate?

Living Will Directive

- ___ Explain what this is
- ___ Confirm husband and wife would name one another
- ___ Who would make a good alternate?

ESTATE PLANNING QUESTIONNAIRE

Date Completed _____

**SECTION
1**

GENERAL INFORMATION Primary Phone _____

E-Mail Address: _____

Marital Status Married Single Divorced* Widowed

Your Full Legal Name

Spouse's Full Legal Name

Street Address

City State Zip

Your Employer

Address of Employer

Your Occupation Work Phone

Spouse's Employer

Address of Spouse's Employer

Spouse's Occupation Spouse's Work Phone

Referred by: _____

Military Service? Yes No Describe Branch and dates of service

	YOU	YOUR SPOUSE
Social Security #		
Date of Birth		
U.S. Citizen?	Yes No	Yes No
Currently have a Will or Trust? If so, Give year and state In which prepared.	Yes No Yr. _____ State _____	Yes No Yr. _____ State _____
Expect to receive money or other assets from (circle one)	Gift Inheritance Lawsuit Other	Gift Inheritance Lawsuit Other
If so, approximately how much?	\$	\$

**SECTION
2**

ABOUT YOUR CHILDREN, GRANDCHILDREN, AND FAMILY

1. _____ Natural Legally Adopted Foster
Full Legal Name Date of Birth

_____ Married Needs Special Care Dependent
Goes By Soc. Security #

_____ *Related To:*
Street Address Phone

_____ You Only Spouse Only Both
City State Zip Gender: Male Female

2. _____ Natural Legally Adopted Foster
Full Legal Name Date of Birth

_____ Married Needs Special Care Dependent
Goes By Soc. Security #

_____ *Related To:*
Street Address Phone

_____ You Only Spouse Only Both
City State Zip Gender: Male Female

3. _____ Natural Legally Adopted Foster
Full Legal Name Date of Birth

_____ Married Needs Special Care Dependent
Goes By Soc. Security #

_____ *Related To:*
Street Address Phone

_____ You Only Spouse Only Both
City State Zip Gender: Male Female

4. _____ Natural Legally Adopted Foster
 Full Legal Name Date of Birth

_____ Married Needs Special Care Dependent
 Goes By Soc. Security #

_____ *Related To:*
 Street Address Phone

_____ You Only Spouse Only Both
 City State Zip Gender: Male Female

5. _____ Natural Legally Adopted Foster
 Full Legal Name Date of Birth

_____ Married Needs Special Care Dependent
 Goes By Soc. Security #

_____ *Related To:*
 Street Address Phone

_____ You Only Spouse Only Both
 City State Zip Gender: Male Female

GRANDCHILDREN

1. _____ Natural Legally Adopted Foster
 Full Legal Name Date of Birth

_____ Married Needs Special Care Dependent
 Goes By Soc. Security #

_____ *Related To:*
 Street Address Phone

_____ You Only Spouse Only Both
 City State Zip Gender: Male Female

 Parents



2. _____
 Full Legal Name _____ Date of Birth _____ Natural Legally Adopted Foster

_____ Married Needs Special Care Dependent
 Goes By _____ Soc. Security # _____

_____ *Related To:*
 Street Address _____ Phone _____
 You Only Spouse Only Both

_____ City _____ State _____ Zip _____ Gender: Male Female

_____ Parents _____

3. _____
 Full Legal Name _____ Date of Birth _____ Natural Legally Adopted Foster

_____ Married Needs Special Care Dependent
 Goes By _____ Soc. Security # _____

_____ *Related To:*
 Street Address _____ Phone _____
 You Only Spouse Only Both

_____ City _____ State _____ Zip _____ Gender: Male Female

_____ Parents _____

4. _____
 Full Legal Name _____ Date of Birth _____ Natural Legally Adopted Foster

_____ Married Needs Special Care Dependent
 Goes By _____ Soc. Security # _____

_____ *Related To:*
 Street Address _____ Phone _____
 You Only Spouse Only Both

_____ City _____ State _____ Zip _____ Gender: Male Female

_____ Parents _____

5. _____ Natural Legally Adopted Foster
 Full Legal Name _____ Date of Birth

_____ Married Needs Special Care Dependent
 Goes By _____ Soc. Security #

_____ *Related To:*
 Street Address _____ Phone You Only Spouse Only Both

_____ Male Female
 City _____ State _____ Zip _____ Gender:

_____ Parents

OTHER FAMILY MEMBERS (who you may want to discuss as a beneficiary of your assets such as a niece or nephew)

1. _____ Natural Legally Adopted Foster
 Full Legal Name _____ Date of Birth

_____ Married Needs Special Care Dependent
 Goes By _____ Soc. Security #

_____ *Related To:*
 Street Address _____ Phone You Only Spouse Only Both

_____ Male Female
 City _____ State _____ Zip _____ Gender:

_____ Relationship

2. _____ Natural Legally Adopted Foster
 Full Legal Name _____ Date of Birth

_____ Married Needs Special Care Dependent
 Goes By _____ Soc. Security #

_____ *Related To:*
 Street Address _____ Phone You Only Spouse Only Both

_____ Male Female
 City _____ State _____ Zip _____ Gender:

_____ Relationship

3. _____ Natural Legally Adopted Foster
 Full Legal Name _____ Date of Birth

_____ Married Needs Special Care Dependent
 Goes By _____ Soc. Security #

_____ *Related To:*
 Street Address _____ Phone You Only Spouse Only Both

_____ City State Zip Gender: Male Female

_____ Relationship

**SECTION
3**

FINANCIAL INFORMATION

1. Do you own your own home or any other **real estate**?

Description	Titled in whose Name	Purchase Price	Current Value	Mortgage (=)	Equity
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

2. Do you own **other titled property** (car, boat, etc.)?

Description	Titled in whose Name	Purchase Price	Current Value	Loan (=)	Equity
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

3. Do you have any **checking or savings accounts or CDs?**

Name of institution	Titled in whose Name	Account Number	Approx. balance
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. Do you own any **stocks, bonds or mutual funds?**

No. of shares	Description	Account Number	Titled in Whose name	Purchase price	Current value
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

5. Do you have any **IRAs, profit sharing or pension plans?**

Description	Titled in Whose Name	Current Value
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

6. Do you or your Spouse own a **business or partnership interest?**

Name of Company	Type of Company (S Corp., LLC, Partnership)	Home state of Company	Value and Type of Interest
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____



7. Do you have any **life insurance or annuities**?

Name of Company	Policy Owner	1 st Beneficiary	2 nd Beneficiary	Death Benefit
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

8. Does anyone owe you money?

Description

9. Do you have any **special items of value (antiques, jewelry, etc.)**

Description	Approximate Value
_____	_____
_____	_____
_____	_____
_____	_____

10. What is the approximate total value of all of your **personal property** (clothes, furniture, etc.) not accounted for above?

\$ _____

11. Do you have any **debts** other than mortgage (credit cards, personal loans, home equity loans, etc.)

Description	Amount Owed
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**SECTION
4**

BENEFICIARIES

12. How would you like your property distributed at your death?

13. If you want to make specific bequests of personal property (i.e., jewelry, automobiles, etc.), please list below.

14. What individual(s) do you want to serve as the guardian of your minor children (under age 18)? Please list names of those you would want to appoint as the guardian (in the order you would want them to serve).

15. If you have a trust for your children, a Living Trust, or some other type of trust, what individual or what bank do you want to serve as the Trustee of such trust(s)? If you are going to name individuals instead of a bank, please list the names of those you would want to appoint as Trustee (in the order you would want them to serve). (NOTE: If you want to name your spouse, put his/her name on the first line.)

16. Do you wish to possibly consider a trust that would protect some or all of your estate from the spouses or creditors of your children or grandchildren?

Yes ____ No ____ Not sure ____

17. Do you want to leave any of your estate to a church, college, foundation or similar organization? If yes, please list organizations and amount or property.

Organization

Amount/Property

18. Are you on a tight time table to have your estate planning completed? _____ If so, when would you like to have your plan completed? _____

19. Once your estate plan is completed, do you want to have an annual meeting to have your plan reviewed and updated? Yes ____ No ____

20. If there is anyone I should talk with about your estate planning (such as your insurance agent, broker, CPA, banker or financial adviser), who is it:

Name and telephone number: _____

Name and telephone number: _____

**SECTION
5**

OTHER ESTATE PLAN INFORMATION

21. Do you expect any substantial inheritance during your lifetime? If so, please explain and give the approximate values.

22. Did you make any gifts of over \$3,000 between the years 1976 through 1981 to any one person in any one year or \$10,000 after 1981 to any one person? If yes, please give the name of the donee and the date of the gift and its approximate value.

23. Any other information which you feel may be helpful in understanding your family and/or financial situation?

24. Do you have a lock box? _____

If yes, at what bank or financial institution is it located?

25. Do you wish to make arrangements for your pet? _____yes _____no

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. Request and Review 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).

to the extent that the sale price is sufficient to pay such judgment considering the priorities and amounts previously adjudicated in the action.

5. Confirmation of Report of Sale

The Master Commissioner after making the sale shall report his actions to the Court. Ten (10) days after the filing of that report, if no objections have been filed thereto and without motion, the sale shall be deemed confirmed and an order confirming the sale (with sufficient copies, see RFCC 19) shall be submitted to the Court. A copy of the order of confirmation shall be served upon the purchaser.

6. Fees of the Commissioner

The Commissioner shall be entitled to those fees set forth in Part IV of the Administrative Procedures of the Court of Justice.

7. Orders of Distribution

a. Orders requiring distribution of funds held by the Commissioner shall set forth all amounts collected, identify the proper recipient(s) and the specific amounts due each under the judgment or order.

b. If disbursements are to be made to taxing authorities, a copy of the pertinent tax bill(s) must be furnished the Commissioner, giving the commissioner's office sufficient time to pay the bill(s) with the amount(s) listed in the order.

8. Appraiser's Fees

In all residential sales where an appraisal is required, the fee of each appraiser shall be \$150.00, unless otherwise ordered by the Court. Appraisal fees for commercial, farm and other sales shall be set by the court. The fee shall be paid from the proceeds of sale.

C. WRIT OF POSSESSION AND ATTACHMENT PROCEDURE

1. Pursuant to KRS 425.006, the Master Commissioner and the Deputy Commissioners are appointed judicial officers to perform such duties as may be required of them by Chapter 425 of the Kentucky Revised Statutes.

2. All requests for hearings, or ex parte relief under the provision of that Chapter shall stand automatically referred, without order, to the Commissioner's office for further proceedings.

3. When a hearing has been requested or is required, it shall be the responsibility of the attorney requesting the hearing to notify the Commissioner's office of the request, after which the Commissioner shall fix a time and place for hearing and give written notice thereof to the parties.

4. Requests for ex parte and temporary restraining orders shall be immediately delivered to the Commissioner, along with the record, by the Clerk of this

Court or the attorney requesting relief. The Commissioner shall then make a determination.

HISTORY: Approved effective January 1, 2004.

Rule 27 Procedure on rules for contempt

To procure a show cause order in proceedings for contempt:

A. A motion supported by a sufficient affidavit showing that applicant is entitled to the Order must be filed.

B. When this motion and affidavit is filed, an Order may be issued ex parte which shall not come on for hearing sooner than five (5) days from the date it is served, unless otherwise ordered by the Court. The Respondent shall appear on the date noticed for hearing, but may be entitled to a continuance if served less than 5 days from the date noticed.

C. No order shall come on for hearing unless it has been served on the person named in the Order by an officer authorized to serve a summons. The Order shall contain a short statement of the grounds for its issuance and the following statement:

IF YOU FAIL TO APPEAR AT THE HEARING, A WARRANT FOR YOUR ARREST WILL ISSUE

HISTORY: Approved effective January 1, 2004.

Rule 28 Removal of records

No record in any civil or criminal action shall be removed from the Office of the Clerk of the Fayette Circuit Court, except as needed by the Court.

HISTORY: Approved effective January 1, 2004.

Rule 29 Mediation

A. Cases for Mediation

Any judge may refer any civil or family case to mediation except a habeas corpus case or election contest.

B. Referral to Mediation

1. The Judge may, by appropriate order, refer the case to mediation with or without the consent of the parties. Cases may be referred to the Mediation Center of Kentucky, Inc. or to any other mediator appointed by the Court or agreed upon by the parties.

2. Any party may move to enter an order disqualifying the mediator for good cause. If the Court rules that a mediator is disqualified from mediating the case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing any assignment. The time for mediation shall be tolled during any periods in which a motion to disqualify is pending.

3. Referral of a case to mediation shall not operate as a stay of discovery proceedings unless otherwise

ordered by the Court or agreed to in writing by the parties.

C. Mediation Conferences

1. The parties shall contact the mediator within five (5) days from the entry of the order to schedule a mediation conference, which shall be held within thirty (30) days from the entry of the order.

2. If a party fails to appear at a duly noticed mediation conference without good cause, the Court upon motion shall impose sanctions, which may include an award of attorney fees and other costs against the party failing to appear. If a party to mediation is a public or corporate entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. In all other cases, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

a. The party, or on behalf of a public or corporate entity, a representative other than the party's counsel of record having full authority to settle without further consultation; and

b. A representative of the insurance carrier for any insured party who is not such a carrier's outside counsel and who has full authority to settle without further consultation.

The party's counsel of record, if any, may also be present.

3. The mediator may request that the parties bring documents or witnesses, including expert witnesses, to the sessions, but has no authority to order such production.

D. Confidentiality

1. Except as otherwise provided by this rule or ordered by the Court for good cause shown, all mediation documents and mediation communications except signed agreements are confidential and shall not be disclosed. They are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

2. No part of the mediation proceedings shall be considered a public record, unless entered into the record by the Court.

3. There is no confidentiality and no restriction on disclosure under this rule to the extent that:

a. All parties consent in writing to disclosure; or

b. The mediation communication or mediation document gives the mediator or persons associated with the mediator's office, knowledge of or reasonable cause to suspect that a child or a spouse has been abused or a child has been neglected; or

c. The mediation communications were made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or fraud.

4. Nothing in this rule shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

E. Reporting to the Court

1. The mediator shall notify the Court promptly in writing when a case is not accepted for mediation.

2. At any time after a case has been accepted, the mediator may refer it back to the Court for good cause, which shall be in writing.

3. If a case is settled prior to or during mediation, an attorney for one of the parties shall prepare and submit to the Court an order reflecting the fact of settlement as in any other case.

4. If some but not all of the issues in the case are settled during mediation or if agreements are reached to limit discovery or on any other matter, the parties shall submit a joint statement to the Court enumerating the issues that have been resolved and the issues that remain for trial. This statement shall be submitted within 10 days of the termination of mediation. Unsettled cases shall then be returned to the Court's active docket.

5. At the conclusion of cases accepted for mediation, the mediator will report to the Court in writing the fact that the mediation process has ended. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the Court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions, outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate settlement.

HISTORY: Approved effective January 1, 2004.

Rule 30 Appeals from District Court

A. Upon the filing of a proper notice of appeal in the District Court and the payment of costs as may be required by the Civil Rules, the Clerk shall forward the entire original record as described in CR 72.04 to the Clerk of the Circuit Court.

B. Upon receipt of the record from the District Court, the Circuit Clerk shall assign the case to a division in the same manner as done with other civil and criminal cases.

C. If the appeal is not perfected by the filing of a statement of appeal as provided by CR 72.06 within 30 days from the date of filing the first notice of appeal as provided by CR 72.08, and no motion for extension of time is filed within 10 days after that, and no notice of cross-appeal has been filed as provided by CR 74, the Clerk will prepare an order of dismissal and remand, attach same to the record and place the

FAYETTE CIRCUIT BRANCH
CIVIL BRANCH
SEVENTH DIVISION
-CI-

PLAINTIFF

VS.

PRE-TRIAL ORDER

DEFENDANT

* * * * *

This matter having come on for a pre-trial conference this ___ day of _____, 201__, and the Court and all Counsel of Record having discussed the matter and the issues of said case, and the Court being sufficiently advised;

IT IS HEREBY ORDERED as follows:

- (1) Any amendments to or additional pleadings shall be filed on or before _____ with leave to file other pleadings only for good cause shown.
- (2) Fact discovery shall be completed by all parties on or before _____.
- (3) On or before _____, Plaintiff and Defendant shall comply with RCP 26 disclosure requirements.
- (4) Any motions for Summary Judgment shall be docketed to be heard on or before _____.
- (5) On or before thirty (30) days prior to the trial the parties shall identify each exhibits and witnesses expected to be introduced at trial and shall make those exhibits available thereafter for inspection by opposing counsel. No additional exhibits shall be allowed without good cause shown.
- (6) Any objection(s), including the ground(s) therefore, to a deposition or a part thereof, shall be renewed **in writing** and noticed to be heard at the Court's next regularly scheduled motion hour at least ten (10) days prior to trial. **Objection(s) not made at the deposition and not renewed ten (10) days prior to trial, as stated above, shall be deemed waived or withdrawn.**
- (7) All video depositions to be used at trial shall be edited for objections and reviewed by opposing counsel no later than twenty-one (21) days prior to the trial of this matter. Any objections(s), including the ground(s) therefore, shall be renewed **in writing** at least ten (10) days prior to trial and noted at the Court's next regularly scheduled motion hour. **Objection(s)**

not made and not renewed ten (10) days prior to trial and noted at the Court's next regularly scheduled motion hour shall be deemed waived or withdrawn.

(8) On or before ten (10) days prior to trial, the parties shall submit written stipulations, agreed to by all parties.

(9) All Motions in Limine shall be docketed to be heard on or before ten (10) days prior to trial. No Motions in Limine will be heard thereafter without good cause shown.

(10) Trial memoranda shall be submitted by each party on or before twenty (20) days prior to trial with the Plaintiff(s) to provide its theory of liability and an itemization of its claimed damages and with the Defendant(s) to provide its defenses and with all parties to set out any issues of law or evidence anticipated at the trial.

(11) Proposed instructions shall be tendered by each party with the Court seven (7) days prior to trial. No additions or changes will be allowed after said date without good cause shown.

(12) It is hereby ordered that the parties are referred to: (1) the Mediation Center of Kentucky; (2) the mediator of their choice; OR (3) a Court-appointed mediator - _____ - for the purpose of mediating this matter. The parties and representatives of their insurers, with full authority to settle, shall attend the mediation conference, and the parties shall use their best efforts to resolve all issues. If mediation is unsuccessful, the parties may call the Judge's office for another pretrial.

(13) This matter is assigned for a pretrial conference on the ____ day of _____, 201__ at _____.

(14) This matter is assigned for trial by jury beginning on the ____ day of _____, 201__, at _____ and is expected to last ____ trial days.

(15) Other:

Dated this ____ day of _____, 201__.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

SEVENTH DIVISION
SEEN BY AND COPIES GIVEN TO THE FOLLOWING ATTORNEYS AT THE PRE-TRIAL
CONFERENCE:

Attorney for Plaintiff

Attorney for _____

Attorney for Defendant

Attorney for _____

454.011 Declaration of public policy on encouragement of dispute resolution through negotiation and settlement.

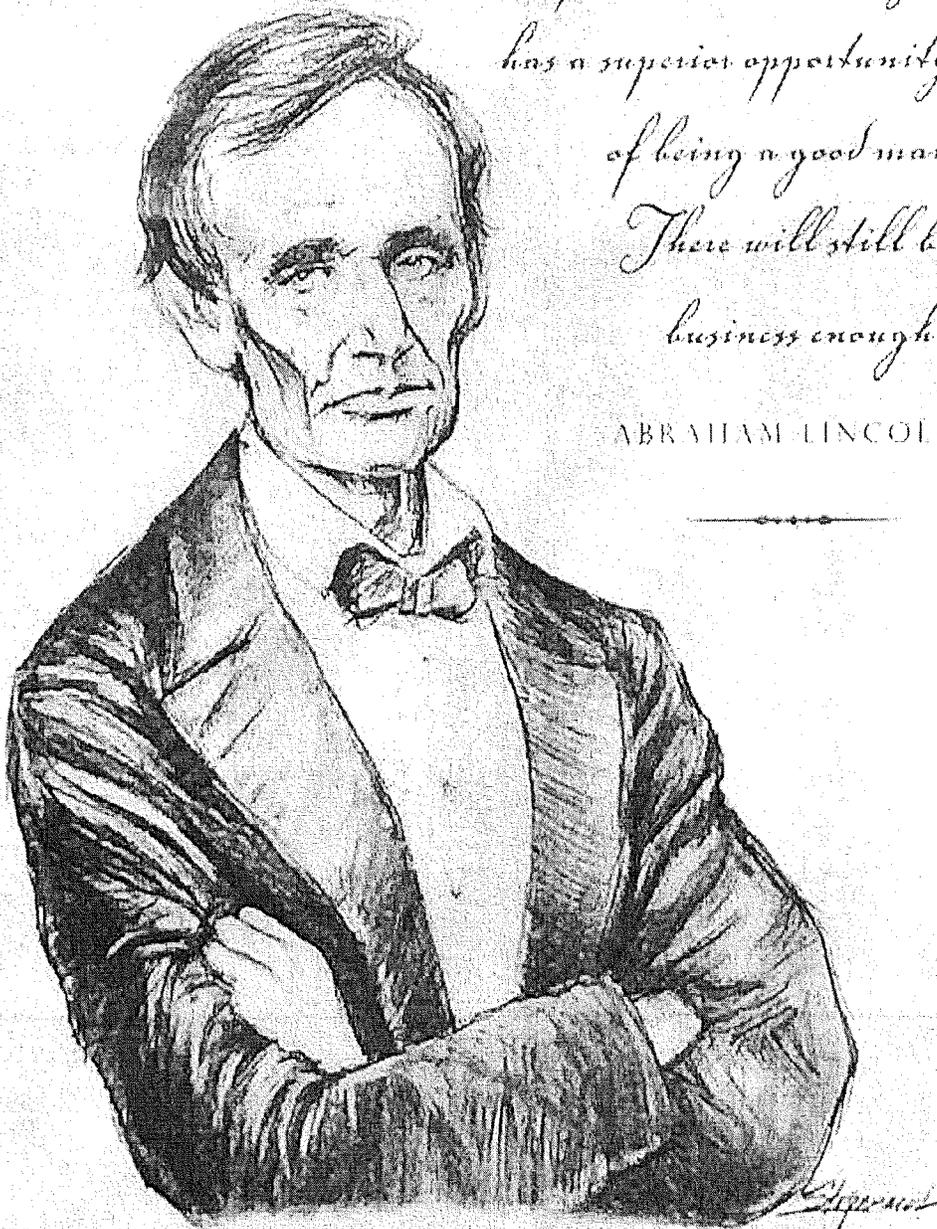
It is the policy of this Commonwealth to encourage the peaceable resolution of disputes and the early, voluntary settlement of litigation through negotiation and mediation. To the extent it is consistent with other laws, the courts and state governmental agencies are authorized and encouraged to refer disputing parties to mediation before trial or hearing.

Effective: July 15, 1998

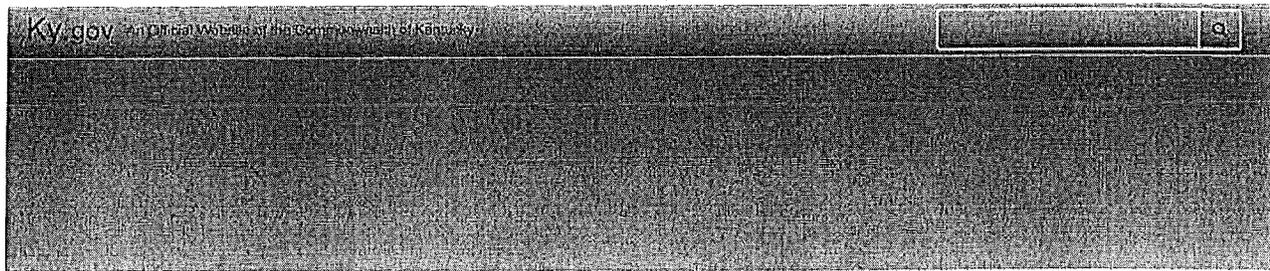
History: Created 1998 Ky. Acts ch. 261, sec. 3, effective July 15, 1998.

*"Discourage litigation. Persuade your
neighbors to compromise whenever you can.
As a peacemaker the lawyer
has a superior opportunity
of being a good man.
There will still be
business enough."*

ABRAHAM LINCOLN



PEPPERDINE UNIVERSITY
STRAUS INSTITUTE FOR DISPUTE RESOLUTION



Courts Administrative Office of the Courts Commissions & Committees Court Programs Resources

Kentucky Court of Justice Court Programs Mediation Model Mediation Rules

Model Mediation Rules

Rule 1. Preamble and Scope.

The County Trial Courts find that under some circumstances the process known as mediation may provide an efficient and cost-effective alternative to traditional litigation, and, further, that the wise and judicious use of mediation may benefit litigants.

Mediation is intended to help both litigants and the Courts facilitate the settlement of disputes. Litigants should participate in good faith and in an earnest attempt to resolve their differences.

This Rule refers to mediation. Nothing in this Rule shall prohibit parties from resolving disputes through other methods. However, in any case where one party may pose a risk of harm (such as domestic violence) to another party or family member, mediation should not be used.

Rule 2. Mediation defined.

Mediation is an informal process in which a neutral third person(s) called a mediator facilitates the resolution of a dispute between two or more parties. The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. Decision-making authority remains with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.

Rule 3. Referral of cases to mediation.

At any time on its own motion or on motion of any party, the Court may refer a case or portion of a case for mediation. In this decision, the court shall consider:

- the stage of the litigation, including the need for discovery, and the extent to which it has been conducted;
- the nature of the issues to be resolved;
- the value to the parties of confidentiality, rapid resolution, or the promotion or maintenance of ongoing relationships;
- the willingness of the parties to mutually resolve their dispute;
- other attempts at dispute resolution; and
- the ability of the parties to participate in the mediation process.

Rule 4. No stay of proceedings.

Unless otherwise ordered by the Court, mediation shall not stay any other proceedings.

Rule 5. Appointment of mediator.

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*** CURRENT THROUGH THE 2002 SUPPLEMENT. SUPREME COURT AND FEDERAL COURT RULES IN EFFECT AS OF NOV. 1, 2001. ANNOTATIONS CURRENT AS OF OCT. 5, 2001. ***

Within fifteen (15) days of referral, the parties shall agree on a mediator or a mediation service. If the parties cannot agree, they shall notify the court, which will select a mediator or a mediation service.

Rule 6. Mediator compensation.

The mediator shall be compensated at the rate agreed between the mediator and the parties if the mediator is chosen by agreement. If the mediator is appointed by the Court, the fee for the mediator shall be reasonable and no greater than the mediator's standard rate as a mediator. Unless otherwise agreed by the parties or ordered by the Court, the parties shall equally divide the mediator's professional fees.

Rule 7. Mediation procedure.

Following selection of the mediator, the mediator shall set an initial mediation conference within thirty (30) days. The mediation conference shall be held in the county in which the case is pending or at a site agreed upon by the parties. The mediator may meet with the parties or their counsel prior to the mediation conference for the purpose of establishing a procedure for the mediation conference. The mediator may require the parties to submit a confidential statement of the case or other materials that the mediator may reasonably believe appropriate for efficiently conducting the mediation conference.

Rule 8. Attendance at mediation conference.

The parties must attend the mediation conference. Counsel shall attend the mediation conference unless otherwise agreed to by the parties and the mediator or ordered by the Court. If a party is a public entity, it shall appear by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision making body or officer of the entity. If a party is an organization other than a public entity, it shall appear by the physical presence of a representative, other than the party's counsel of record, who has full authority to settle without further consultation. If any party is insured for the claim in dispute, that party shall also be required to have its insurer(s) present by the physical presence of a representative of the insurance carrier(s) who is not that carrier's outside counsel; this representative must have full settlement authority. The foregoing requirements of attendance may be varied only by stipulation of the parties or by order of the Court for good cause shown.

Rule 9. Completion or termination mediation.

The mediator may terminate the mediation conference after a settlement is reached or when the mediator determines that continuation of the process would be unproductive. After the initial mediation conference, mediation shall continue only by the agreement of the parties, their counsel and the mediator, or by order of the Court.

Rule 10. Report to the court.

The mediator shall report to the court that the mediation has not occurred, has not been completed, or that the mediation has been completed with or without an agreement on any or all issues. With the consent of the parties, the mediator may also identify those matters which, if resolved or completed, would facilitate the possibility of a settlement.

Rule 11. Agreement.

If an agreement is reached during the mediation conference, it shall be reduced to writing and signed by the parties. The parties shall be responsible for the drafting of the agreement, although the mediator may assist in the drafting of the agreement with the consent of the parties.

Rule 12. Confidentiality.

- Mediation sessions shall be closed to all persons other than the parties, their legal representatives, and other persons invited by the mediator with the consent of the parties.
- Mediation shall be regarded as settlement negotiations for purposes of K.R.E. 408.
- Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature except on order of the Court for good cause shown. This privilege and immunity reside in the mediator and may not be waived by the parties.
- Nothing in this rule shall prohibit the mediator from reporting abuse according to KRS 209.030, KRS 620.030, or other applicable law.

1001 Vandalay Drive, Frankfort, KY 40601
502.573.2350

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HOULIHAN • ELLIOTT • HINKLE

Dispute Resolution, PLLC

December 21, 2016

VIA EMAIL & U.S. MAIL

Hon. [REDACTED]
[REDACTED]
[REDACTED]

Louisville, KY 40202

VIA EMAIL & U.S. MAIL

[REDACTED]
[REDACTED]
[REDACTED]
Hazard, KY 41702

Re: Mediation -- [REDACTED]

Dear Counsel:

We have scheduled mediation for **Wednesday, January 11, 2017**, beginning at **9:00 a.m.** at my office located at **200 West Vine Street, Suite 810**, Lexington, Kentucky.

If I do not hear to the contrary, I will assume you and your respective clients agree to the terms and conditions in the numbered paragraphs below as the basis for my engagement as mediator.

1. We have blocked off the entire day of January 11, 2017, but will charge for only the time we use. If the mediation is canceled, we will charge whatever time I have spent in preparation.

2. My fee is [REDACTED] per hour for time spent from the date of this letter forward, including any pre-mediation review or conversations with you. We will bill you when the mediation is concluded, and each party will be responsible for one-half of the total. As with all of these terms, this will be our agreement unless you advise that this condition needs to be changed.

3. I assume each of you will be present at mediation, accompanied by your respective client, or a representative of your client with full authority to settle. I ask that, when you submit any mediation position or materials you plan to give me before the mediation, each of you identify each person who will attend on your respective side.

4. Other than identities of lawyers and parties, I have no knowledge about your case. I do ask that at an early date, one of you send me the most recent iteration of the complaint and any counter or cross claims. Also, if there is an Order to mediate, send that as well. Please have any statement of position or materials you want me to review in my hands by close of business on Wednesday, January 4, 2016 in hard copy or by email in pdf format. If this date does not work for you to provide your materials to me, let me know that. As you know, the more I know, the more helpful I can be. Also, I encourage you to share any mediation statements of position with each other as this can be conducive to a successful mediation. But I will, of course, honor requests to keep what is shared with me confidential. If you want what you provide me to be kept confidential, make that explicit.

5. All statements made and information provided during the mediation process will be considered **confidential and privileged** except on order of a Court for good cause shown. For this purpose, the mediation process begins now and will include any communications I have with either of you in advance of the mediation. I will not divulge any confidential information learned by me as mediator unless authorized or disclosure is required by law. By participating in this mediation, the parties and you agree to honor this agreement of confidentiality.

6. As to how the mediation will be conducted, I start from the idea that we have a joint session that includes whatever "openings" you want to do, and then we break into separate rooms and caucus separately, or again jointly, if that seems needed. That said, every case is different, and we can determine exactly how the mediation will proceed as I learn more about the case. I will for sure call each of you in advance to learn what I can. If it looks like a pre-mediation conference call with all counsel would be helpful, we will set that up. A well prepared mediator is essential, and I will not be shy about getting myself prepared.

I look forward to seeing everyone on Wednesday, January 11, 2017 at 9:00 a.m. I promise to be prepared, listen carefully and work hard to help you resolve your case. If you have any questions, comments or requests regarding this in the meantime, feel free to call.

Very truly yours,



Robert L. Elliott

RLE/ibl

P:\Mediations - [REDACTED]

Elliott & Houlihan, LLP

Attorneys at Law
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200 West Vine Street, Suite 810
Lexington, Kentucky 40507
Telephone: (859) 280-2200
Telefax: (859) 233-2704

August 25, 2015

ROBERT L. ELLIOTT
ROBERT F. HOULIHAN, JR.

OF COUNSEL:
ROBERT J. TURLEY

VIA HAND DELIVERY

Hon. Ernest H. Jones, II
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1400
Lexington, KY 40507

Re: Mediation of [REDACTED] et al. v. [REDACTED], et al.
Mediation Date: August 26, 2015

CONFIDENTIAL MEDIATION STATEMENT OF PLAINTIFFS

Dear Mr. Jones:

I apologize for getting you this short version mediation statement at this late date prior to the mediation to be held tomorrow, but, as you know, this matter has been scrambled for scheduling by others than myself. We are providing you this mediation statement to be held in confidence by you and not shared with the Defendants.

SETTLEMENT STATUS

No settlement demand has been made at this point.

LIABILITY

This matter arises out of an automobile accident which occurred on June 11, 2012, at approximately 1:34 p.m. at the intersection of Man-O-War Boulevard and Polo Club Boulevard in Lexington, Kentucky. There is a stop and go traffic control signal at this intersection which my client, [REDACTED], clearly testified and told the police officer at the scene, was green for her as she was travelling westbound on Man O War Boulevard although the Defendant, [REDACTED] and his wife have testified that they had the green light on Polo Club Boulevard.

However, it is extremely important to note that an independent witness interviewed by the investigating policy officer advised that she did not observe the collision, but heard it, and that she was eastbound on Man-O-War Boulevard intending to turn right onto southbound Polo Club Boulevard and stated that the light was green for Man-O-War because as she was turning right she did not have to stop. The Police Traffic Collision Report is attached as **Exhibit 1**.

Clearly, therefore, with the light being green on Man-O-War Boulevard eastbound, as the independent witness advised, it was also green for [REDACTED] who was traveling westbound on Man-O-War and would certainly not have been green for the Defendant who was traveling on Polo Club Boulevard.

Therefore, we believe the issue of liability is absolutely clear and one hundred percent in favor of the Plaintiffs. As a matter of fact, the Defendant had initially filed a claim entitled Cross Claim against the Plaintiff, [REDACTED] which was dismissed with prejudice.

[REDACTED] DRIVING RECORD

The Defendant driver, [REDACTED], is almost 76 years of age and been retired as a [REDACTED] from North Dakota since September, 2001.

Other automobile accidents:

1. Several years ago at the intersection of Man-O-War and Richmond Road when he was rear-ended by a vehicle;
2. A second accident where he rear-ended another vehicle on Man-O-War and Helmsdale;
3. After the accident giving rise to this litigation he was on the off ramp from New Circle Road heading to Alumni Road and he rear-ended a pickup truck that had stopped ahead of him in late 2012 or early 2013;
4. On September 21, 2013, he was traveling through a Wal Mart parking lot in Winchester when a car backed out from a space into the passenger side of his vehicle.

Driver License History:

1. The records reveal that as of September 20, 2005, his records were purged prior to that;
2. He was cited for speeding 16-25 mph over the limit on July 15, 2011, in Fayette County and was referred to traffic school;

3. August 1, 2013, he was cited for going 16-25 mph over the speed limit in Shelby County as was sent a notice of points violation warning on August 20, 2013.

██████████ INJURIES

As a result of this accident, ██████████ suffered a ruptured spleen which was surgically removed at the University of Kentucky Medical Center, suffered two incisional hernias which had to be removed by surgery on August 1, 2013, at the University of Kentucky Medical Center, had a seroma drained following that hernia surgery and on October 13, 2013, had an exploratory laparotomy at the University of Kentucky Medical Center due to ongoing pain.

She was in the University of Kentucky Medical Center initially following the surgery on the day of the accident for five days and then after being discharged some 10-12 days later suffered delusions and hallucinations and was admitted to Ephraim McDowell psychiatric unit for seven days where she was administered anti-psychotic medication and has had no problems since. ██████████ advised her that he thought it was PTSD.

██████████ continued to suffer pain and discomfort in her abdominal area through the date of her death in early 2015.

██████████ MEDICAL EXPENSE SUMMARY

Attached hereto as **Exhibit 2** is a copy of the Medical Expense Summary incurred by ██████████ for items arising out of this automobile accident.

██████████ INJURIES

██████████ was 4 years old on the date of this accident and prior to this date had always been placed in the backseat in her car seat when traveling in the vehicle. On this particular date, her grandmother, ██████████ gave into her desire to ride in the front seat based upon her begging and that they were only traveling about a mile from their home to the Taco Bell. ██████████ placed ██████████ in the front seat in her lap belt and shoulder harness and that is how she was riding at the time the wreck occurred. The airbags deployed on both sides.

She suffered a chest contusion injury-subcutaneous emphysema, closed head injury with loss of consciousness, and a spinal transverse process fracture for which she was hospitalized at the University of Kentucky Medical Center from June 11, 2012 through June 14, 2012. Upon discharge on June 14, 2012, she was sent home with orders for home health physical therapy services, which were provided by Cardinal Hill Rehabilitation Services. She received home health physical therapy from June 18, 2012 through July 2, 2012 with the initial assessment findings being:

1. Limited functional mobility impeding normal development;
2. Decreased strength bilateral lower extremities and core;
3. Decreased balance secondary to decreased strength;

4. Occasional complaints of low back pain with steps;
5. Slight decreased coordination, but within normal range.

Following that period of time it was determined that she was no longer homebound and it was recommended that she continue with outpatient physical therapy at Cardinal Hill Rehabilitation Hospital and at the time of her admission to those services her impairments were identified as follows:

1. Requires assist with stairs;
2. Decreased balance;
3. Decreased developmental skills;
4. Decreased proprioception;
5. Abnormal gait/assist with ambulation.

Her physical therapy diagnoses were:

1. Decreased balance;
2. Decreased proprioception;
3. Decreased strength;
4. Decreased age appropriate functional mobility within her environment.

She received outpatient physical therapy 1-2 times a week including aquatic therapy, balance training, care giver training, community/work reintegration, discharge planning, gait training, instruction in HEP, patient education, posture/body mechanics training, standing program and therapeutic exercises. Her treatment schedule was extended multiple times for continued abnormal gait pattern and decreased functional age appropriate mobility.

Her outpatient physical therapy at Cardinal Hill continued from July 9, 2012 through January 10, 2013 at which time she was discharged to home with the following findings:

1. No pain;
2. Normal tone all four extremities;
3. Appropriate, calm, and cooperative behavior;

4. Mobility and transfer complete;
5. Ambulation distance 200;
6. Stairs – 14.

MEDICAL EXPENSE SUMMARY

██████████ incurred medical expenses associated with the injuries arising from this automobile accident as set forth in the Medical Expense Summary attached hereto as **Exhibit 3** in the total amount of approximately \$42,000.00.

Obviously, ██████████ is a very lucky child, but certainly experienced extraordinary pain and suffering and the requirement of extensive therapy and treatment in order to recover the abilities that she had prior to this accident ever occurring.

VEHICLE

A picture of the vehicle in which the Plaintiffs were traveling is attached hereto as **Exhibit 4**.

INSURANCE

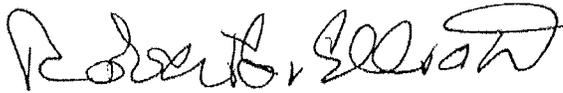
██████████ carries an insurance policy for ██████████ applicable to this accident providing \$500,000.00 coverage per person injured.

██████████ provides an underinsured motorist coverage under the policy for the vehicle owned by ██████████ mother and being driven by ██████████ in the amount of \$250,000.00 per person.

CONCLUSION

The cause of this accident is without question and one hundred percent of liability lies in the lap of [REDACTED]. However, it is clear that an apportionment instruction will likely be given regarding [REDACTED] having placed [REDACTED] in the front seat in the shoulder harness rather than in the backseat in a car seat. The question being what percentage of fault for [REDACTED] injuries would be placed upon [REDACTED]. We believe that most or at least many jurors will have experienced a grandchild begging to sit up front and bowing to their wishes. We believe this will cause the percentage of fault on [REDACTED] to be significantly less than the fault on [REDACTED] who ran a red light placing his vehicle into the traveled portion of the highway in front of the vehicle being driven by [REDACTED].

Very truly yours,



Robert L. Elliott

RLE/bl

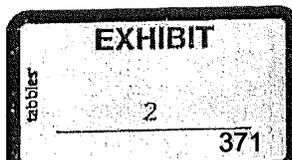
Enclosures

[REDACTED]

[REDACTED]

MEDICAL EXPENSE SUMMARY

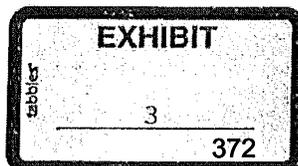
DATE OF SERVICE	PROVIDER	AMOUNT
06/11/12 06/23/12	LFUCG Fire Dept Ambulance Service	\$ 1,653.94
06/11/12-10/09/13	UKMC	\$46,364.91
06/11/12-6/12/12	KMSF	\$ 6,253.00
06/23/12	ACS Primary Care Phys-Midwest - ER Visit	\$ 592.00
06/23/12-06/24/12	St. Joseph East Hospital	\$ 1,558.91
06/25/12	Marshall Emergency Services	\$ 480.00
06/25/12 07/03/12 08/12/13	Ephraim McDowell Regional Medical Center	\$16,963.99
09/27/12	[REDACTED] & Associates	\$ 99.00
08/12/13	Boyle County EMS	\$ 924.00
08/12/13	Marshall Emergency Services	\$ 480.00
08/12/13	Danville Radiology Associates	\$ 323.00
06/14/12 06/20/12	Rite Aid Pharmacy	\$ 124.96
TOTAL		\$75,817.71





MEDICAL EXPENSE SUMMARY

DATE OF SERVICE	PROVIDER	AMOUNT
06/11/12	LFUCG Fire Dept Ambulance Service	\$ 905.96
06/11/12-06/14/12 06/11/12-08/01/12	UKMC	\$34,458.84
06/18/12-01/10/13	Cardinal Hill Rehabilitation Hospital	\$ 4,024.00
06/20/12-06/20/12 07/02/12	Home Instead	\$ 2,279.06
08/20/12	Rite Aid	\$ 12.70
10/31/12	Cascade	\$ 155.00
TOTAL		\$41,835.56





**STURGILL
TURNER**
STURGILL, TURNER, BARKER & MOLONEY, PLLC

email address:
hjones@sturgillturner.com

November 16, 2016

Via U.S. Mail and Email Transmission: belliiott@hehdr.com

Robert L. Elliott, Esq.
Houlihan Elliot Hinkle Dispute Resolution PLLC
200 West Vine Street, Suite 810
Lexington, KY 40507

Re: [REDACTED]

Mediation: November 22, 2016
[REDACTED]

Dear Bobby:

Thank you for promptly scheduling this mediation for November 22, 2016. This will serve as my mediation statement on behalf of [REDACTED]

STATEMENT OF FACTS

The plaintiff, [REDACTED] has filed suit in this matter seeking recovery of damages from [REDACTED] in regard to an incident which occurred on May 10, 2015 at the [REDACTED] Lexington, Kentucky. I am attaching hereto a copy of the Complaint. You will note that the plaintiff alleges that while she was shopping, an individual named [REDACTED] was present in the [REDACTED] and shoplifting items from the store. [REDACTED] alerted employees of [REDACTED] that Mr. [REDACTED] was shoplifting. Mr. [REDACTED] ran out of the store and into the shopping center and was ultimately apprehended by an employee of the [REDACTED]. The employee then was taking Mr. [REDACTED] back to a secured area. Mr. [REDACTED] apparently broke loose and ran out of the store and ran into [REDACTED] thereby causing injuries to her. We have filed a Third-Party Complaint against [REDACTED]. A guardian ad litem, [REDACTED] was appointed to represent Mr. [REDACTED]. No answer has been filed on Mr. [REDACTED] behalf.

Following the filing of the Answer we served Interrogatories on [REDACTED]. [REDACTED] is 76 years of age and resides in [REDACTED] Kentucky. She is not employed and has not been employed for several years. Thus, there is no claim for lost wages. Ms. [REDACTED] responded to Interrogatories by indicating that while she was shopping she witnessed an individual putting things down his pants. She informed the cashier and manager of what she had witnessed. She then indicates that Mr. [REDACTED] ran out of the store and the manager followed him, caught him, and brought Mr. [REDACTED] back into the store. The cashier then asked to borrow [REDACTED] phone

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so they could call the police because the phone at the counter was not working. The police were called. As the cashier was on the phone, [REDACTED] heard a scuffle behind her and apparently Mr. [REDACTED] had broken loose and was running out of the store and pushed her down. The police arrived within two to three minutes after she was pushed down and apprehended Mr. [REDACTED]. [REDACTED] states that she suffered an injury to her head and elbow that required stitches and that she suffered a break in her lower back. She was treated for her injuries at the Harrison Memorial Hospital.

On May 10, 2015, [REDACTED] presented herself to Harrison Memorial Hospital with the history that she was knocked over by a shoplifter in Lexington and hit the back of her head on the floor. She had a laceration to the back of her head and abrasions to both elbows. There was no loss of consciousness and no abnormal neurological symptoms. X-rays of the pelvis showed mild osteoarthritic changes in both hips and a CT scan of the head revealed no acute intracranial findings. This was compared to a CT scan in February of 2015 and it was unchanged from the prior scan. At the time of the February 2015 CT scan, [REDACTED] presented herself to the Harrison Memorial Hospital with complaints of nausea and vertigo. Again, the CT scan revealed no acute intracranial pathology. Thus, there was no significant difference between the two CT scans. The CT scan of the cervical spine on the date of the incident revealed no fracture or subluxation and only revealed degenerative changes at C5/6 and C6/7. The CT scan of the lumbar spine also revealed no acute findings and only minor degenerative changes and osteopenia. The CT scan of the back also revealed an old fracture of the sacrum that was seen on a previous CT scan of the pelvis in May of 2013. Thus, there was no fracture in her back as a result of this incident. The total bill for the treatment at Harrison Memorial Hospital on May 10, 2015 was \$9,083.20. [REDACTED] was to follow up with her family physician, [REDACTED], but there are no records to indicate a follow-up examination.

I then took [REDACTED] deposition on August 17, 2016. [REDACTED] is a very pleasant lady who admittedly will make a nice impression in front of the jury. Her recollection of the incident in the deposition was not significantly different than that of her responses to Interrogatories. When asked what she thought [REDACTED] did wrong, she simply stated that she did not feel that either of the [REDACTED] employees did anything wrong, but she thought that [REDACTED] should have paid for her medical bills. She then changed this somewhat to say that the shoplifter should have been kept outside instead of bringing him into the store.

~~[REDACTED] states that she was knocked backwards and struck her head and elbow on the floor. She complains that she sustained a broken bone in her back and was not aware of the prior CT scan showing an old fracture in her pelvis.~~

The only treatment that [REDACTED] received was on the day of the accident at Harrison Memorial Hospital where she received four stitches in her head and two stitches in her elbow. She states that the cut on her head is still somewhat sensitive when she touches it, but that the cut



on her arm is not sensitive. [REDACTED] acknowledged that her medical bills had been paid by Medicare or Humana, with only approximately \$65.00 being paid by her.

ANALYSIS

It is certainly our position that [REDACTED] did nothing wrong in apprehending a shoplifter. [REDACTED] was aware that the shoplifter had been apprehended and was brought back into the store and remained at the cashier's desk. We believe that keeping the shoplifter outside would have put the general public at much greater risk than bringing the shoplifter back inside the store. There has been no answer filed on behalf of [REDACTED] and I believe I will be entitled to either a default judgment of a directed verdict against [REDACTED]. Thus, I will be able to argue to the jury that the court has determined that [REDACTED] is responsible for this incident. All of this being said, we are very interested in resolving this matter so long as the same can be done for a reasonable amount. We anticipate that the Medicare lien, if any, is minimal, that any claim for pain and suffering will be limited to a very short period of time. Therefore, our view is that the cost of defending this matter is much greater than the value that a jury would place on this.

Sincerely,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

Ernest H. Jones, II

EHI:re

cc: [REDACTED]

MEDIATION CONFIDENTIALITY AGREEMENT

Mediation Confidentiality Agreement entered into this __ day of ____, 20__, by and between each of the below signed "Mediation Participants."

1. This Agreement is entered into by each participant (the "Mediation Participants") in a mediation commenced on the date above. Execution of this Agreement is an essential and material inducement for the Mediator and for each Mediation Participant in agreeing to this mediation.

2. It is understood and agreed that any and all statements or communications made by any Mediation Participant during the mediation process shall be deemed part of compromise negotiations within the meaning of KRE 408 and (A) shall not be offered, nor be admissible, in any current or subsequent litigation regarding matters which are the subject of the mediation, and (B) shall not be discussed or repeated by Mediation Participants either publicly or privately with anyone other than counsel or other Mediation Participants.

3. In other words, the Mediation Participants have assured each other that no statements or communications made as part of the mediation process will ever be used in any current or subsequent litigation of the matters discussed in the mediation, nor will they be used or repeated in public or private communication with anyone other than counsel or other Mediation Participants.

4. For purposes of this Agreement, all communications between counsel and the Mediator before, during and after the mediation about the subject matter of the mediation shall be deemed a part of the mediation process.

MEDIATION PARTICIPANTS

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Robert F. Houlihan, Jr., Mediator

_____ COURT
_____ DIVISION
CIVIL ACTION NO. _____

v.

MEDIATION SETTLEMENT AGREEMENT

THIS AGREEMENT made and entered into this ___ day of _____, 20___, by and
between:

WHEREAS, the parties have mediated their dispute and reached an agreement of
FULL/PARTIAL SETTLEMENT which they desire to reduce to writing.

NOW, THEREFORE, in consideration of the mutual promises contained herein the
sufficiency of which is hereby acknowledged by each of the parties, it is **AGREED** as follows:

1.

2.

3.

4.

5.

IN WITNESS WHEREOF, we sign this ___ page MEDIATION SETTLEMENT AGREEMENT this ___ day of _____, 20__.

WITNESSES:

MEDIATOR

PARTIES:

Don't Torch the Joint Session

By Eric Galton and Tracy Allen

Burning Down the House

Have you heard? Perhaps you have witnessed or participated in a very disturbing trend in mediation – the avoidance of a joint or general session including all counsel and parties in decision-making. This phenomenon, which is “reshaping” the customary mediation process, is increasingly evident throughout the United States.¹ In our view, this phenomenon is market driven and is resulting in the structural dismantling of the mediation process. While this message may sound a bit like Chicken Little’s warning, we believe that the abandonment of the bedrock foundation of mediation poses a critical danger to the process and the modern mediation movement. This article will discuss why this trend should be reversed and how the reversal could benefit parties, lawyers, and mediators.²

Many of us have wondered what the mutant child of the marriage of law and mediation might look like. Now we know: deconstruct the process and turn mediation into the more familiar judicial settlement conference. Enlist the mediator to do everyone’s “heavy lifting,” and if that doesn’t work, try a mediator’s proposal. In this manner, we take the parties and their emotions out of the process and allow the courtroom advocates to stay in their familiar roles rather than serve as settlement coaches and counselors. This result is the very antithesis of one of the key values and benefits of mediation.

In the Beginning

Long before neuroscience and psychology were able to track brain activity and before numerous studies helped us understand the science of judgment and decision-making,³ Christopher Moore,⁴ Leonard Riskin, and others promoted a basic mediation model that divided the process into stages. Properly conducted, each stage naturally propels the participants to the subsequent steps with an end goal: the fullest possible opportunity (at that moment in the dispute) to effectively explore settlement

options and evaluate risks, resulting in an informed decision about the future of the conflict.

The early and current basic models focus on active participation of all the players, recognizing that each participant has valuable contributions and worthwhile perspectives to consider in exploring resolution. The process encourages all participants to maximize the talent and wisdom of everyone at the table in seeking livable solutions to end the conflict. While we have continued to teach these mediation model variations in a linear fashion for the sake of academic certainty, quality, and consistency, experienced mediation users and providers realize the process is rarely linear.⁵ Perhaps this is where the crack in the model begins.

When we look at current research, we discover just how “spot on” our mediation forefathers were in advancing a process that includes the face-to-face meeting of the stakeholders. We know that in conflict, the brain path to resolution needs a staged de-escalation sequence that includes constructive conversation among the disputants. This kind of conversation is not only part of the de-escalation; it is necessary to

risk analysis and management of risk aversion.⁶ Without the conversation and understanding that can come from a joint meeting, one’s ability to persuade and analyze is limited.

Causation – So What is Happening?

We suspect the decision to abandon joint conversations in mediation is driven by at least two formidable forces in the market: lawyers and mediators. Lawyers frequently assume “everyone knows what the case is about,” or “we don’t want to have a meeting where people will just get upset.” The joint session, we often hear, is a waste of time. Many lawyers actually believe these are legitimate reasons to eliminate the joint session, and many mediators (often fearful of losing market-share) are afraid to cross their customer base. Ironically, many mediators and lawyers also share a fear of the joint

Many of us have wondered what the mutant child of the marriage of law and mediation might look like. Now we know: deconstruct the process and turn mediation into the more familiar judicial settlement conference.

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session “blow up,” preferring to avoid it rather than tackle it in a productive, meaningful manner.⁷

These basic rejections of the joint session (including those relayed in the companion article in this issue by Lynne Bassis on page 30) illustrate a disturbing ignorance and inflexibility of users at a time when promoters of the process should be raising the bar to craft multiple versions to deploy this valuable tool. Most lawyers have never gone to mediation advocacy school. They draw conclusions about what they should be doing from a fountain of misinformation, believing, for example, that a joint session is an emotional, accusatory diatribe by the opponent, a chance to take shots at their client and their case. We have both seen many attorneys come to the mediation table without having given five seconds of thought on how to use a joint session to persuade the opponent. Some mediators, and (sadly) many judge-mediators, think the joint session is about the mediator telling the parties and attorneys why their case stinks. These mediators do not establish ground rules, they don't pre-screen the content of the conversation, and they don't coach the participants on what would be most helpful and persuasive.

There is a small but countervailing trend in some commercial markets. Informed commercial users such as general counsel and management decision makers have learned through experience that identifying, dealing with, and managing a party's emotions and interests are key to successful mediation outcomes. They see value in keeping control over their own content and conversation as opposed to defaulting to the mediator, and they remain curious about and desirous of understanding the opponents' views. We can learn from their wisdom.

Imagine All the People

Beginning with the 1976 Pound Conference, observers predicted that the modern mediation movement would, among other things, provide citizens with better access to justice and direct participation and inclusion. In the 1980s and 1990s, the movement spoke of “party ownership” of the process. Even today, for the majority of parties involved in mediation, mediation may be their first and only exposure to the civil justice system. While this may not be true for a large insurer or multinational corporation, the first-time consumer of mediation, to the extent effectively advised by counsel, may come to the table expecting to be a direct participant in the process. Most do not come to mediation expecting to be ignored or to witness only an exchange of legal terminology between their lawyer and the mediator.

Concerns that parties or lawyers might be uncomfortable with participation in a comfortable environment, in a private conference room, in a controlled dialogue, are absurd. Without a settlement, the parties will be exposed to rigorous cross-examination and open scrutiny in a public courtroom. Judgments will be cast. Lawyers will have to perform and react quickly for extended periods of time, with much at stake. How can the predictability of courtroom drama be any less traumatic than a learning conversation of legal theories, factual disagreement, and possible solutions in an environment controlled by the stakeholders? More likely, avoidance is the result of the advocates' discomfort in having to deal with the parties' emotions, anxiety about how things might escalate, and skepticism about the sincerity of their own legal arguments.

The Rewards of the Joint Session

For Parties

The joint session can have multiple designs – and adjustments that are made to “tailor the suit” to the conflict. Approaches include addressing content, timing, participants' roles and contributions, the mediator's script and influence, and the role/dialogue of attorneys. When properly designed, an effective joint session brings forth many tangible benefits for the parties to:

1. Feel increased value in and ownership of the process
2. Get a better understanding of the process as explained and demonstrated by the mediator
3. Feel that positions and interests have been advocated, described, and heard by all, particularly the opponents
4. Express feelings and concerns directly to the other side (if prudent)
5. Express regret, apologize, and seek forgiveness without admitting liability (if prudent)
6. Gain better awareness and understanding of the other side's positions and interests
7. Understand more fully the risks and uncertainty of proceeding with litigation
8. Have an opportunity (because of all the above) to identify nonmonetary interests and options that may be part of a resolution
9. Learn new information, in a risk-free way, about the dispute that may result in a reevaluation of a position or claim
10. “Save face” while shifting a position or proposal

Generally, parties benefit from the joint session because it informs. It gives definition to their concerns. It creates a feeling of direct participation and ownership of the process. A redirection of a party's mistrust can often be critical to unlocking the impasse that brought the dispute to mediation. The sense of ownership helps parties believe the mediation process is just and trustworthy. Process control enhances people's perception of procedural justice.⁶

For the Advocate

Mediation purists may suggest that it matters not what the lawyers think of a joint session because mediation is the parties' process. Market realities, however, dictate that lawyers' opinions do matter. For a lawyer to recommend mediation with a joint session is to "expose" his/her litigation strategy and the client, so from the advocate's perspective, the return on the investment in a joint session better be significant. Lawyers often forget that such sessions provide unique and essential opportunities for both the lawyer and the client. Among the many benefits, we note that joint sessions allow lawyers to:

1. Speak directly to the other side, constructively and clearly setting out the client's position (This is the only time lawyers can do so ethically. Many lawyers have brilliantly converted litigation advocacy into mediation advocacy, and their approaches to joint sessions have favorably impacted resolution.)
2. Evaluate the position and interests of the other side, lawyer and client
3. Encourage the client to better appreciate risk by listening to the presentation of the other side
4. Establish credibility and demonstrate empathy with the other side
5. Demonstrate preparedness both for the mediation and for the litigation that may follow
6. Show commitment to the mediation and settlement process
7. In appropriate cases, introduce a client who can make an effective presentation or statement
8. Demonstrate to the client the difference between counsel's roles as settlement advocate and as trial warrior
9. Establish greater value with the client by demonstrating excellence as a mediation advocate and settlement counselor
10. Have a "dress rehearsal" of the arguments and responses relevant to the legal, judicial, and personal aspects of the conflict

The joint session provides almost unlimited opportunities for an effective mediation advocate to share and significantly advance the client's interests and settlement

goals. The advocate can easily establish value and credibility with the client (and the opposition) by effective participation in a joint session. The joint session also gives the advocate reasons to reconsider the other side's positions and potentially reevaluate risk and use risk analysis effectively in discussions with the client.

For the Mediator

The joint session is the best chance for the mediator to establish the nature, purpose, and integrity of the mediation process, especially for the parties attending the mediation. The joint session is a front-row seat into the heart of the conflict, a perspective the mediator cannot get when visiting with one side privately. The joint session provides the mediator with essential benefits and opportunities to:

1. Experience the dynamics of the conflict with the parties in the same room. (The skilled mediator can observe body language, see and hear how people react to what is being said, study each participant's risk awareness, and judge the participants' credibility quotient in the face of uncomfortableness in adversity.)
2. Get all parties to commit to the process and to working through difficult problems
3. Accurately describe the purposes of the mediation process and provide a deeper understanding of the role of the mediator, covering topics such as neutrality, confidentiality, risk assessment, party self-determination, time, cost savings, and closure
4. Emphasize the mediator's own commitment to and belief in the process
5. Demonstrate preparedness, focus, and understanding of the particular dispute
6. Continue to build the parties' and advocates' trust in the process and in the mediator by designing and managing a successful joint session
7. Facilitate a real-time communication between the parties that identifies needs and interests and reflects honest emotion
8. Better understand the dimensions of the dispute, including aspects that were not obvious from written submissions
9. Clarify issues and identify all the parties' goals
10. "Push" the participants in a symmetrical, simultaneous, persuasive manner

How to Beat Back the Trend

Mediators must appreciate, not arrogantly, that they are stewards of the process. Mediation existed long before it was co-opted to be part of the civil justice system. Mediators must also appreciate – and promote – the underlying goals of the modern (and historic) movement,

Generally, parties benefit from the joint session because it informs. It gives definition to their concerns. It creates a feeling of direct participation and ownership of the process.

those of access to and participation in justice. They should envision and require party participation. Lawyer-mediators talking to lawyers or former-judge-mediators talking to lawyers is not party participation. In fact, such a procedure is demeaning and disenfranchising to the parties.

Similarly, consumers of the mediation process, who are indeed stewards of the outcome, must respect the professional mediator's expertise and knowledge of the power of the process. Capitulation by mediators to unsophisticated and untrained users who wish to skip the joint session will result in a dangerous erosion of mediation and further incursions into the mediator's role. Simply stated, this trend must be stopped in its tracks.

Having diagnosed some of the causes and identified some of the symptoms of the disappearing joint session trend, we turn to solutions. Possible prescriptions for "Wellness Mediation" begin with an awareness and appreciation of the opportunities an effective joint session can bring to a conflict, including all those noted above for the parties, their advocates, and the neutrals working with them. This should be followed by the development of an appropriate design and strategy of deployment of the joint session in the particular mediation, one that is case-specific and strategic enough to "fit the forum to the fuss." This basic action plan mostly involves education, communication, awareness, and courage.

1. Mediators need additional training. A two-hour sound bite on the joint session in the less-than-adequate 40-hour basic training does not cut it. A full day, maybe two, of advanced training and discussion of the joint session is critical to overcoming fear and arming mediators with more tools to design and manage effective joint sessions.
2. Mediators need to take a more directive role at the "front end" (i.e., case intake) to assist lawyers in preparing themselves and their clients for the mediation and particularly for the joint session. It is not a "one-size-fits-all" model: a joint session, for example, may not come at the beginning of the mediation. The content and purpose of the joint session can be explored and agreed upon in advance through a more proactive mediator role, as a negotiation coach to the disputants. Knowing what to do and what to expect for the joint session reduces everyone's anxiety about the gathering and allows all to reap the benefits discussed above.⁹

3. Lawyer advocates need to reflect on, for each case, the benefits a joint session can bring to them, their clients, and the opposition, and then craft their summaries and presentations to maximize these benefits. A joint session can be a "dry run" of the opening statements to the jury; what wise attorney waives that critical stage of a trial?
4. Mediators need to have more conversations with the litigators they serve (outside of the mediation) to better educate litigators about the joint session's intrinsic benefits and advocacy opportunities and instruct them on how to maximize these benefits. In these conversations, mediators should listen to litigators, to further understand their concerns, the obstacles they perceive, and their bad experiences.
5. State and federal agents/judges should advise mediators and counsel who engage in court-annexed cases that party involvement and participation is a significant goal (and requirement) of the mediation process. Courts should survey participants in court-annexed cases to determine if they were actually allowed to participate and to measure their overall level of satisfaction with the process.
6. National, state, and local bar associations should visibly support the use of the joint session as well as private providers who have mastered the art of managing it.
7. Corporate users of mediation services should make it known that they support use of the joint session and that mediators who handle them well are their preferred mediators.

Conclusion

As mediators, we feel strongly about the power of mediation. Both of us have witnessed hundreds of examples of the benefits and healing properties of this form of conflict resolution, cases in which deeply estranged people have been able to understand their opponents' interests, reassess their own options, and work toward a lasting resolution that allows both sides to move on.

But we also believe that successful mediation outcomes often come from meaningful exchanges, face-to-face meetings in which everyone involved can look others in the eye and speak openly. For so many, these meetings are the start of true understanding of the nature of their conflict.

Mediators and advocates need to become the movement's own promoters of strategically designing and directing joint sessions, ones that restore power, control, dignity, and respect to the participants. ♦

**Lawyer-mediators talking to
lawyers or former-judge-mediators
talking to lawyers
is not party participation.
In fact, such a procedure is
demeaning and disenfranchising to
the parties.**

Endnotes

1 In the companion article by Lynne Bassis, she describes some theories of how and why this trend developed. Our own informal survey of highly experienced mediators who practice in California, and specifically Los Angeles, informs us that hosting a joint session is now the exception to the rule. While this trend may not be as pervasive in San Diego, San Francisco, or other California cities, it remains a trend that has spread to other large metropolitan areas across the country. See Tamará Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 456-59 (2007) (observing various studies of Toronto-based mediation centers); Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, MEDIATION Q., Summer 2000, at 377, 382 (discussing the North Carolina Mediated Settlement Conference Program); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 405-06, 434 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 524 tbl.33 (2002); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 124-25, 144-45 (1997) (discussing court-ordered mediation in the North Carolina court system) (cited in: Nancy Welsh, *Thinning*

Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization? 6 HARV. NEGOT. L. REV. 1 (2001); Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?* 79 WASH. U. L. REV. 820 (2001); Len Riskin & Nancy Welsh, *Is That All There Is? "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008) (discussing the demise of the joint session).

2 This article is not about the facilitative-evaluative style debate of the 1990s. Everyone has begun to recognize that mediators deploy a variety of styles, often in the same case, searching to apply an approach that is effective for the specific case and participants.

3 See Barry Goldman, *THE SCIENCE OF SETTLEMENT: IDEAS FOR NEGOTIATORS* (2008).

4 Christopher W. Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (4th ed, 2014).

5 Joseph Stulberg & Lela Love, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* (2nd ed. 2013).

6 Douglas Noll, *PEACEMAKING-PRACTICING AT THE INTERSECTION OF LAW AND HUMAN CONFLICT* (2003).

7 See Riskin & Welsh, *supra* note 1; see also Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of C. Heilman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U.L.Q. 1059, 1099, 1108 (1991).

8 See E. Allan Lind & Tom R. Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 58-60, 96-101 (1988).

9 See ABA Section of Dispute Resolution, *Task Force on Improving Mediation Quality: Final Report* 6-12 (2008) (showing that clients valued mediator's assistance with preparation); Riskin & Welsh, *supra* note 1 at 891-892 (on working with the parties before mediation to "map" the issues and how best to address them).



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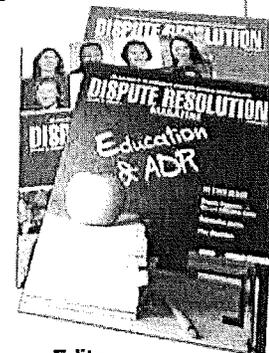
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**EFFECTIVE (AND INEFFECTIVE) MEDIATION STRATEGY FROM A MEDIATOR'S
AND A DEFENSE ATTORNEY'S PERSPECTIVE**

Ernest H. Jones, II

I. WHY MEDIATE?

- A. Guidelines and Public Policy
 - 1. [KRS 454.011](#).
 - 2. [Supreme Court of Kentucky Order 2005-02](#): Amendment to the Rules of Administrative Procedure AP Part XII. Mediation Guidelines for Court of Justice Mediators.
 - 3. [Kentucky Supreme Court Model Mediation Rules](#).
 - 4. [Family Court Rules of Practice and Procedure](#).
- B. Time and Cost Considerations
- C. Elimination of Risks

II. PROFESSIONAL AND ETHICAL CONSIDERATIONS

- A. [SCR 3.130](#) Preamble: A Lawyer's Responsibilities
- B. [SCR 3.130\(1.3\)](#) Diligence
- C. [SCR 4.130\(1.4\)](#) Communication
- D. [SCR 3.130\(1.12\)](#) Judge, Arbitrator, Mediator or Other Third-party Neutral
- E. [SCR 3.130\(1.15\)](#) Safekeeping Property
- F. [SCR 3.130\(2.1\)](#) Advisor
- G. [SCR 3.130\(2.4\)](#) Lawyer Serving as Third-party Neutral
- H. [SCR 3.130\(3.1\)](#) Meritorious Claims and Contentions
- I. [SCR 3.130\(3.2\)](#) Expediting Litigation
- J. [SCR 3.130\(3.3\)](#) Candor toward the Tribunal
- K. [SCR 3.130\(3.4\)](#) Fairness to Opposing Party and Counsel
- L. [SCR 3.130\(4.1\)](#) Truthfulness in Statements to Others
- M. [SCR 3.130\(8.4\)](#) Misconduct

III. DEVELOPING EFFECTIVE MEDIATION STRATEGY

A. What Cases to Mediate

1. Tort – most prevalent.
 - a. MVAs.
 - i. Police report and photos.
 - ii. EMT and other medical records.
 - iii. IME v. review of records.
 - iv. Aggravating circumstances.
 - v. Documentation of liens.
 - vi. Vocational/economics experts.
 - b. Products liability claims.
 - i. Violation of government or industry standards.
 - ii. Similar injuries.
 - iii. IME v. retrospective review of records.
 - iv. Aggravating circumstances.
 - v. Vocational/economics experts.
 - c. Catastrophic injury claims.

Brain injuries:

 - i. Neuropsychological testing.
 - ii. Peer/records review.
 - iii. Vocational/economics experts.
 - d. Wrongful death claims.
2. Declaratory judgment/insurance coverage cases.
3. Insurance bad faith cases.
4. Domestic.
5. Workers' compensation.

6. Professional negligence.
 7. Business dissolutions.
- B. When to Mediate
1. This is the most important question.
 2. Learned in Lit Skills in law school that when a new case/client comes in the door the first thing a lawyer should do is pull out the anticipated instructions.
 - a. Instructions become the road map by which the case will be developed.
 - b. Therefore, developing effective mediation strategy starts at the very beginning of the case and evolves throughout the discovery/proof process.
 - c. Don't oversell case at outset.
 3. Factual development.
 - a. Is the case ripe?
 - b. Has factual discovery been completed or substantially completed?
 - c. Has there been full expert discovery or disclosure of reports?
- C. What Type of Mediator to Choose
1. Evaluative v. facilitative or hybrid.
 2. Defense or plaintiff attorney.
 3. Effective communicator.
 4. Knowledgeable of venue, jury verdicts and legal and factual issues personal to case.
 5. Objective.
- D. How to Mediate
1. Attendees.
 - a. Plaintiff.

- b. Jury verdict consultant.
 - c. Defendant's presence or just representative of insurer.
2. Documentary evidence, exhibits, PowerPoint.
 3. Current documentation of liens.
 4. Lien issues.
 - a. Private insurer.
 - i. Baptist Healthcare Systems, Inc. v. Miller, 177 S.W.3d 676 (Ky. 2005).
 - ii. Dennis v. Fulkerson, 343 S.W.3d 633 (Ky. App. 2011).
 - iii. ALK Selective Self Ins. Fund v. Bush, 74 S.W.3d 251 (Ky. 2002).
 - b. ERISA liens.
 - c. Medicare/Medicaid/Social Security.
 - d. Workers' compensation payments.
 - i. [KRS 342.690](#).
 - ii. Krahwinkel v. Commonwealth Aluminum Corp., 183 S.W.3d 154 (Ky. 2005).
 - iii. Assignment of WC lien to plaintiff.
 - e. Medicare reimbursement issues.
 - i. Has client/plaintiff impacted Medicare?
 - ii. Can settlement be reached prior to impacting Medicare?
 - iii. Whose duty?
 - P, D or both
 - iv. Resolving Medicare lien.

- f. Litigation funding liens.
 - i. [SCR 3.130\(1.7\)](#).
 - ii. [SCR 3.130\(1.8\)](#).
- g. Indemnity and hold harmless agreements.

IV. EFFECTIVE MEDIATION PRESENTATION

A. By Plaintiff

1. Emphasize strengths of case but also recognize weaknesses.
2. Utilization of chronologies/charts.
 - a. Send pre-mediation package to defendant/insurer?
 - i. Why not?
 - ii. Will expedite mediation.
 - b. Know venue, court and jury verdicts.
 - c. Know your opponents propensity to try or settle cases.
 - d. Know the defendant and reputation in the community.
 - e. Don't be afraid to present the defendant with tough facts – may be the first time they have actually heard your side of case.
 - f. Prepare your client.
 - i. Pros and cons of case.
 - ii. Strengths of defendant's case.
 - ii. Leave your ego at door – is this your case or your client's case?
 - g. Time line of medical treatment.
 - h. Time line of communications in a bad faith case.
 - i. Concise summary of special damages.
 - j. Do you let your client speak – sometimes an effective tool especially if insurer has never spoken with or seen client.
 - k. Identification of family in wrongful death cases.

- I. Think in terms of opening statement but recognize risk of disclosing too much.

Since purpose of mediation is to resolve case – to move people from positional interest to resolution interest – show other side what jury will see and convince adversary why they should pay you.

- m. Be prepared to deal with liens.
 - i. Have current and concrete info – your client needs to know how much will be put in pocket.
 - ii. [SCR 3.130\(1.15\)](#) Safekeeping of property.
- n. Have documentation of restrictions and impairments.

B. By Defendant

1. Many of same points.
2. Who is your client?

Is your client present or just representative of insurer?

- a. [SCR 3.130\(1.4\)](#) Communication
 - b. Manchester Ins. & Indem. Co. v. Grundy¹ issues.
 - c. Plaintiff needs to realize your client will be the one in the courtroom and not the insurer.
3. Pre-mediation disclosure.

Ask court to include in mediation order a full package of specials, documentation of restrictions/impairments and calculation of damages at least thirty days prior to mediation.

- a. With full meds and lien info.
 - b. Full lost wage.
4. Liens.
 - Need identification, documentation and classification of all liens
 5. Release and Indemnity Agreement – Freer.

¹ 531 S.W.2d 493 (Ky. App. 1975).

6. Discuss with client insurance coverage, liability and damage analysis and risk of excess.
7. Tell opponent what jury will hear in court.
 - a. Use chronologies and time lines.
 - b. Use photographs of vehicles (minor impact claims).
 - c. Make sure Plaintiff and mediator are well informed of the strengths of your case and weaknesses of opponent's case (but caution on disclosing too much).

C. From Mediator's Perspective

1. Reassure confidential nature.
2. Cannot decide facts.
3. Role is to facilitate parties reaching an accord.
4. Will sometimes be evaluative if that is what the parties want.
5. Objectivity – be careful of body language.
6. Advantages of mediation.
7. Cost.
8. Speed.
9. Elimination of risk.
10. Need all necessary parties with settlement authority present.
11. Need firm figure on liens.
12. Give each side ample time to make presentation.
13. Show respect toward parties but be candid in evaluation and strengths of respective positions.
14. Parties have to give the mediator information to be able to push buttons appropriately.

MEDIATION ETHICS: LAWYERS AS ADVOCATES AND LAWYERS AS MEDIATORS

I. PURPOSES AND OBJECTIVES

- A. To review mediation ethics and conduct in court imposed or approved mediations for both the lawyer who serves as mediator and the lawyer who is engaged as an advocate;
- B. To present potential mediator and advocate ethical dilemmas in the context of ethical codes or standards of practice, recognizing that such codes and standards do not always articulate a definitive answer and that professional practice is a process of continuing self-examination, rather than learning a list of rules; and
- C. To provide some guidance for Kentucky lawyers as mediators and advocates as they ethically fulfill the statutory declaration of public policy on encouragement of dispute resolution through negotiation and settlement: "It is the policy of this Commonwealth to encourage the peaceable resolution of disputes and the early, voluntary settlement of litigation through negotiation and mediation. To the extent it is consistent with other laws, the courts and state governmental agencies are authorized and encouraged to refer disputing parties to mediation before trial or hearing," [KRS 454.011](#).

II. CODES AND STANDARDS

- A. Kentucky Supreme Court Model Mediation Rules
- B. Kentucky Code of Professional Responsibility
- C. Local Circuit Rules
- D. Model Standards of Conduct for Mediators from the American Bar Association, American Arbitration Association, Association for Conflict Resolution

III. LAWYER MEDIATORS AND LAWYER ADVOCATES IN MEDIATION PRACTICE

- A. Lawyer/Mediator* Model Rules/Codes as Relating to Common Mediator Ethical Dilemmas
 - 1. Competency.
 - 2. Impartiality.
 - 3. Confidentiality.

4. Informed consent.
 5. Preserving self-determination.
 6. Separating mediation from counseling and legal advice.
 7. Preventing abuse of the mediation process.
- B. Lawyer/Advocate* Rules/Codes Relating to the Advocate
1. Kentucky Model Mediation Rules.
 - a. Rule 1. Preamble and scope.
 - b. Rule 2. Mediation defined.
 - c. Rule 8. Attendance at mediation conference.
 2. Kentucky Code of Professional Responsibility.
 - a. [Rule 4.1](#) Truthfulness in Statements to Others.
 - b. [Rule 1.12](#) Judge, Arbitrator, Mediator or other Third-party Neutral.
 - c. [Rule 1.2](#) Scope of Representation and Allocation of Authority between Client and Lawyer.
 - d. [Rule 1.4\(a\)](#) Communication.
 - e. [Rule 8.3](#) Reporting Professional Misconduct.
 - f. [Rule 4.4](#) Respect for Rights of Third Persons.
 - g. [Rule 3.3](#) Candor towards the Tribunal.

* See discussion in Mediation: The Roles of Advocate and Neutral, Dwight Golann and Jay Folberg, Aspen Publishers, Chapter 12 Revised Edition.

Rule 1. Preamble and Scope.

The County Trial Courts find that under some circumstances the process known as mediation may provide an efficient and cost-effective alternative to traditional litigation, and, further, that the wise and judicious use of mediation may benefit litigants.

Mediation is intended to help both litigants and the Courts facilitate the settlement of disputes. Litigants should participate in good faith and in an earnest attempt to resolve their differences.

This Rule refers to mediation. Nothing in this Rule shall prohibit parties from resolving disputes through other methods. However, in any case where one party may pose a risk of harm (such as domestic violence) to another party or family member, mediation should not be used.

Rule 2. Mediation Defined.

Mediation is an informal process in which a neutral third person(s) called a mediator facilitates the resolution of a dispute between two or more parties. The process is designed to help disputing parties reach an agreement on all or part of the issues in dispute. Decision-making authority remains with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.

Rule 3. Referral of Cases to Mediation.

At any time on its own motion or on motion of any party, the Court may refer a case or portion of a case for mediation. In this decision, the court shall consider:

- A. The stage of the litigation, including the need for discovery, and the extent to which it has been conducted;
- B. The nature of the issues to be resolved;
- C. The value to the parties of confidentiality, rapid resolution, or the promotion or maintenance of ongoing relationships;
- D. The willingness of the parties to mutually resolve their dispute;

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Current through the 2002 supplement. Supreme Court and Federal Court Rules in effect as of November 1, 2001. Annotations current as of October 5, 2001.

- E. Other attempts at dispute resolution; and
- F. The ability of the parties to participate in the mediation process.

Rule 4 . No Stay of Proceedings.

Unless otherwise ordered by the Court, mediation shall not stay any other proceedings.

Rule 5. Appointment of Mediator.

Within fifteen (15) days of referral, the parties shall agree on a mediator or a mediation service. If the parties cannot agree, they shall notify the court, which will select a mediator or a mediation service.

Rule 6. Mediator Compensation.

The mediator shall be compensated at the rate agreed between the mediator and the parties if the mediator is chosen by agreement. If the mediator is appointed by the Court, the fee for the mediator shall be reasonable and no greater than the mediator's standard rate as a mediator. Unless otherwise agreed by the parties or ordered by the Court, the parties shall equally divide the mediator's professional fees.

Rule 7. Mediation Procedure.

Following selection of the mediator, the mediator shall set an initial mediation conference within thirty (30) days. The mediation conference shall be held in the county in which the case is pending or at a site agreed upon by the parties. The mediator may meet with the parties or their counsel prior to the mediation conference for the purpose of establishing a procedure for the mediation conference. The mediator may require the parties to submit a confidential statement of the case or other materials that the mediator may reasonably believe appropriate for efficiently conducting the mediation conference.

Rule 8. Attendance at Mediation Conference.

The parties must attend the mediation conference. Counsel shall attend the mediation conference unless otherwise agreed to by the parties and the mediator or ordered by the Court. If a party is a public entity, it shall appear by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision making body or officer of the entity. If a party is an organization other than a public entity, it shall appear by the physical presence of a representative, other than the party's counsel of record, who has full authority to settle without further consultation. If any party is insured for the claim in dispute, that party shall also be required to have its insurer(s) present by the physical presence of a representative of the insurance carrier(s) who is not that carrier's outside counsel; this representative must have full settlement authority. The foregoing requirements of attendance may be varied only by stipulation of the parties or by order of the Court for good cause shown.

Rule 9. Completion or Termination of Mediation.

The mediator may terminate the mediation conference after a settlement is reached or when the mediator determines that continuation of the process would be unproductive. After the initial mediation conference, mediation shall continue only by the agreement of the parties, their counsel and the mediator, or by order of the Court.

Rule 10. Report to the Court.

The mediator shall report to the court that the mediation has not occurred, has not been completed, or that the mediation has been completed with or without an agreement on any or all issues. With the consent of the parties, the mediator may also identify those matters which, if resolved or completed, would facilitate the possibility of a settlement.

Rule 11. Agreement.

If an agreement is reached during the mediation conference, it shall be reduced to writing and signed by the parties. The parties shall be responsible for the drafting of the agreement, although the mediator may assist in the drafting of the agreement with the consent of the parties.

Rule 12. Confidentiality.

- A. Mediation sessions shall be closed to all persons other than the parties, their legal representatives, and other persons invited by the mediator with the consent of the parties.
- B. Mediation shall be regarded as settlement negotiations for purposes of [KRE 408](#).
- C. Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature except on order of the Court for good cause shown. This privilege and immunity reside in the mediator and may not be waived by the parties.
- D. Nothing in this rule shall prohibit the mediator from reporting abuse according to [KRS 209.030](#), [KRS 620.030](#), or other applicable law

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.¹ A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory

¹ The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³ The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005, and the Executive Committee of the American Association on September 8, 2005.

agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate a mediator should make the parties aware of the importance of consulting other professionals to help them make

informed choices.

- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
 - 3. A mediator may accept or give *de minimis* gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.
- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
 - 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 - 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
 - 1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 - 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 - 3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
 - 1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 - 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - 3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from

all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
 6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
 7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
 8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
 9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
 10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
 - 1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
 - 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
 - 1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
 - 2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
 - 1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 - 2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.
 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a *pro bono* basis as appropriate.
 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 5. Assisting newer mediators through training, mentoring, and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

LOCAL RULES – FORTY-EIGHTH JUDICIAL CIRCUIT

Reprinted from http://courts.ky.gov/Local_Rules_of_Practice/C48LOCALRULES.pdf

Rule 14. Mediation.

14.01. Cases subject to mediation: Except for habeas corpus matters or cases involving election contests, administrative appeals, or appeals from the District Court, any Judge may refer any civil case to mediation at either the completion of the pleadings or at any other time before the trial.

14.02. Referral to mediation.

(a) The Judge may refer the case to mediation with or without the parties' consent. Either party may move the Court to refer the case to mediation. The Court shall refer mediation to either a Court-approved mediator or an appropriate mediation facility according to that facility's guidelines.

(b) Any party may move to disqualify a mediator from a case for good cause. If the Court disqualifies a mediator from the case, the Court shall enter an order naming a qualified replacement. Nothing in this provision precludes mediators from either disqualifying themselves or refusing an assignment. The time for mediation is tolled during any period in which a motion to disqualify is pending.

(c) Referral of a case to mediation is not a stay of discovery proceedings unless otherwise ordered by the Court or agreed to in writing by the parties.

14.03. Mediation conferences:

(a) The parties shall schedule a mediation conference with the mediation facility or mediator within five (5) business days from the entry of the Court's order to schedule a mediation conference. The parties shall hold the mediation conference within thirty (30) days from the entry of the order or later if by agreement of both parties.

(b) The parties shall attend the mediation conference once an order to mediate has been entered. Counsel for each party may attend. The mediator shall conduct the conference to consider:

(1) settlement of the case;

(2) simplification of the issues; and

(3) any other matters that either the mediator or the parties, or both, determine may aid the disposition of the case.

(c) The mediator shall schedule sessions as necessary to complete the mediation process. Mediation shall continue until either:

(1) the parties have reached a settlement;

- (2) the parties are unwilling to proceed further; or
- (3) the mediator determines that further efforts are futile.

(d) Appearance at mediation; sanctions:

(1) Upon motion, the Court may impose sanctions against a party if that party fails to appear at a duly noticed mediation conference, unless the party shows good cause why they failed to appear. Possible sanctions include, but are not limited to, either an award of attorney's fees or other costs of mediation, or both.

(2) If a party to mediation is a public entity, that party has appeared if a representative with both full authority to negotiate on behalf of the entity and to recommend settlement to the decision-making body of the entity is physically present at the mediation conference.

(3) In all other cases, a party has appeared at the mediation conference if the party (or representative with full authority to settle without further consultation, other than the party's counsel) and a representative of the insurance carrier for any insured party with full authority to settle without further consultation, other than the insurance carrier's counsel, is physically present at the mediation conference.

(e) The mediator may request that the parties bring either documents or witnesses (including expert witnesses) or both to the mediation conference, but has no authority to order the parties to do so.

14.04. Confidentiality:

(a) Except as in 14.04(d) of these rules, all mediation documents and communications made during mediation conferences are both privileged and confidential. They are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

(b) No part of a mediation proceeding is considered public record.

(c) No part of a mediation proceeding is subject to either the Kentucky Open Meetings Act or the Kentucky Open Records Act.

(d) There is no privilege and no restriction on disclosure to the extent that:

(1) the parties consent in writing;

(2) the mediation communication or document gives the mediator either knowledge or reasonable cause to suspect that either a child or a spouse has been abused, or a child has been neglected; or

(3) the mediation communications were made in furtherance or the commission of a crime or fraud or as part of a plan to commit a crime or fraud.

(e) Nothing in this rule permits an individual to obtain immunity from prosecution for criminal conduct.

(f) Except as in 14.04(d) of these rules, a party has a privilege both to refuse to disclose and to prevent any other person from disclosing any communications or documents produced or generated during mediation proceedings between or among the parties to the case.

(g) A mediator, mediation facility, or employees and agents of a mediator or mediation facility, in relation to parties or entities that engaged in mediation, have privilege not to:

(1) testify as a witness either in discovery or at trial, in any administrative proceeding, or civil or criminal litigation; and

(2) produce any documents disclosed or generated during the mediation proceedings, or any documents used in the normal course of business by the mediator or mediation facility.

(h) Any party in an administrative proceeding, or civil or criminal litigation, who tries to:

(1) subpoena as a witness; or

(2) compel the production of any documents from any mediator, mediation facility, or any of their agents or employees, shall be liable for payment to those people for all reasonable costs and attorney's fees incurred in defending the particular action or quashing the particular motion.

14.05. Reporting to the Court:

(a) Either the mediator or mediation facility shall promptly notify the Court when they decline to accept a case for mediation.

(b) Either the mediator or mediation facility may refer a case back to the Court for good cause shown at any time after the mediator or mediation facility accepts a case for mediation. Either the mediator or mediation facility shall make the referral in writing.

(c) If a case is settled either prior to or during mediation, one of the parties shall prepare and submit to the Court an order stating a settlement has been reached. That party shall deliver a file-stamped copy of the order to the mediator. Any party who tenders an order shall include a distribution list with the name and address of each party who is to receive a copy of the order. The tendering party shall also provide addressed envelopes (postage not required) with which to send a copy of the order to each party on the distribution list.

(d) The parties shall submit a joint statement to the Court within ten (10) days of termination of mediation proceedings stating both the issues that have been resolved and the issues that remain for trial if:

(1) some, but not all, of the issues in the case are settled during mediation;

(2) agreements are reached to limit discovery; or

(3) agreements are reached on any other matter.

(e) At the termination of mediation, either the mediator or the mediation facility shall report to the Court that the mediation proceeding has ended. If the parties have not reached an agreement on any other matter in the mediation proceedings, the mediator shall report the lack of an agreement to the Court without comment or recommendation. If the parties consent, the mediator may identify any pending motions, outstanding legal issues, discovery process, or any other action by any party that would facilitate settlement if resolved or [sic] completed.

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

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-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

Supreme Court of Kentucky

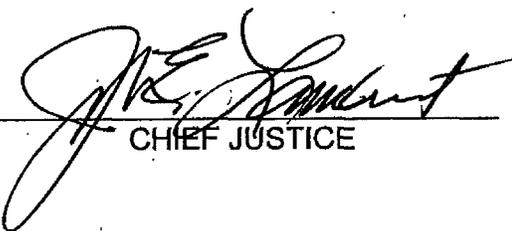
ORDER

IN RE: ORDER APPROVING AMENDMENTS TO THE LOCAL RULES OF PRACTICE FOR THE 30TH JUDICIAL DISTRICT, JEFFERSON DISTRICT COURT

Upon recommendation of the Judges of the 30th Judicial District, Jefferson District Court, and being otherwise sufficiently advised,

The amendments to the Local Rules of practice for Jefferson District Court are hereby approved. This order shall be effective as of the date of this Order, and shall remain in effect until further orders of this court.

Entered this the 14 day of January, 2008.


CHIEF JUSTICE

RULES OF PRACTICE OF THE JEFFERSON DISTRICT COURT

The Conference of Chief Justices, the Conference of State Court Administrators, the National Conference of State Trial Judges, the American Bar Association, and the Commission on Trial Court Performance Standards have all urged the adoption of time standards and of steps to promote expeditious case-flow management. The rules that follow reaffirm the commitment of the Jefferson District Court to fair and timely justice for all parties.

Under these rules, the Court shall actively supervise the progress of all cases from filing to disposition, and all Judges shall continue to set and monitor the pace of litigation. In addition to overall standards of timely disposition, the Courts, under these rules, shall use differentiated case management whenever possible, recognizing that time expectations for disposition of more complex cases are properly different from those for cases with simpler issues and fewer parties. In service to the parties and the bar, the Courts, under these rules, shall seek accurate scheduling to achieve trial date credibility to maintain court control of the pace of litigation.

RULES OF PRACTICE
OF THE
JEFFERSON DISTRICT COURT
THIRTIETH JUDICIAL DISTRICT
OF
KENTUCKY

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RULE 1

INTRODUCTION

101 Purpose and Scope.

These rules apply to the civil and criminal practice of law in the Jefferson District Court and are intended to supplement the Kentucky Rules of Civil Procedure and the Kentucky Rules of Criminal Procedure. These rules shall be enforced in all divisions of Jefferson District Court.

102 Effective Date.

The effective date of these rules shall be January 1, 2007.

103 Citation.

These rules shall be cited as JDR_____.

104 Time Frames.

- A. All areas of practice shall adhere to time frames as mandated by the Kentucky Supreme Court, and as adopted by Jefferson District Court. Examples of these time frames are illustrated in **Appendix A** of these rules. Reasonable notice of significant changes in the time frames shall be provided to the bar.
- B. Any elapsed time, other than reasonably necessary for pleadings, discovery and court events to enable the just and efficient disposition of District Court cases, is unacceptable. The Court shall firmly and uniformly enforce its case-flow management procedures through any necessary steps, including a strict policy limiting continuances. No request for continuance shall be granted except for good cause shown on the record.

105 Disqualification of Judge.

A Judge shall complete Form AOC-SJ-5 (Notice of Disqualification) to provide notice to the Chief Regional District Judge of the necessity of his/her disqualification. Upon receipt of said notice, the Chief Regional District Judge shall determine whether the disqualification is necessary, and if so, shall assign a Special Judge. The forms are available in the Jefferson District Court Administrator's Office.

RULE 2 SESSIONS OF COURT & HOLIDAYS

201 Sessions of Court.

The Jefferson District Court will be in session, with regular dockets, starting as set forth within these Rules, Monday through Friday of each week. In addition, there will be an arraignment docket on Saturday and some of the below-listed holidays as determined by the Chief District Judge. The Saturday arraignment docket shall be assigned a rotation among all the Judges of the District Court.

202 State Holidays.

- A. With the exception of the arraignment docket as noted above, the Court shall be closed on the following holidays, subject to the policy of the Kentucky Administrative Office of the Courts (AOC):

New Years Day*	January 1
Martin Luther King Jr. Day	Third Monday in January
Spring Holiday	One-half Day (AOC determined)
Memorial Day	Last Monday in May
Independence Day	July 4
Labor Day	First Monday in September
Veteran's Day	November 11
Thanksgiving Day*	Fourth Thursday in November
Christmas Day*	December 25
Presidential Election Day	Tuesday after the first Monday in November in leap years

* An extra day is allotted for New Years Day, Thanksgiving and Christmas. When a holiday falls on a Saturday, the preceding Friday shall be observed as the holiday. When the holiday falls on a Sunday, the following Monday shall be observed as the holiday, subject to the AOC's holiday schedule.

- B. Judges shall keep light dockets on the dates of the Annual Convention of the Kentucky Bar Association. No regular docket will be heard during the dates of any District Court judicial conference; only emergency hearings, adult arraignments and juvenile arraignments shall be held during such conferences.

203 Times and Locations.

- A. The times and locations of the sessions of District Court, and any changes thereto, shall be available at the Court Administrator's Office. Reasonable notice of significant scheduling changes shall be provided to the bar.
- B. Where there is more than one Judge in a division, cases will be assigned equally to the Judge's dockets, except companion cases, which will be kept together on one of the Judge's dockets.

204 Teams and Rotation.

The District Term is divided into two teams. Each team is assigned the same number of divisions of District Court as the number of Judges that are on the team, with some additional arraignment dockets. Every two years, the teams will switch the assigned divisions.

Each team shall select a team leader to coordinate schedules. Each team may determine the manner and duration of the rotation of its Team members. Team members shall cover dockets for other team members, to the extent possible, for judicial leave.

Team composition, the Courts assigned to each team and the length of the assignment is subject to the discretion of the Chief Judge of the District Court.

205 Judicial Leave.

- A. Each Judge shall take leave in a manner consistent with the commitment of the Jefferson Courts to fair and timely justice to all parties.
- B. Mindful of the necessity to retain sufficient judicial staffing levels at all times to permit the prompt and effective disposition of the business of the Court, each team shall be responsible for covering the dockets of team members absent for any reason. Each team is encouraged to prepare a combined leave schedule for all Judges on its team to promote the prompt and efficient operation of court business. In the event of an extended absence of a team member (e.g. serious illness, judicial vacancy), the Chief District Court Judge shall have the authority to redistribute temporarily a portion of that team's workload.

206 Submission.

Any matters pending and ready for decision prior to rotation shall be decided by the presiding District Court Judge in compliance with the AOC policy regarding time, even though that Judge may rotate to another division prior to making the decision.

207 Duty Judge Assignment and Trial Commissioners.

The Chief District Court Judge shall assign a Judge to be on duty each day from 7:00 a.m. to 7:00 a.m. the following day to take care of emergency matters. District Court Trial Commissioners, with the approval of the Chief Justice of the Supreme Court and appointed by the Chief Judge of District Court, shall be on duty simultaneously with a District Court Judge every night from 11:00 p.m. to 7:00 a.m. for specific emergency matters. Presently, the Trial Commissioner's duties from 11:00 p.m. to 7:00 a.m. are to review and set bail, review emergency protective petitions, review emergency custody petitions, review juvenile detentions, and review adult mental inquest petitions. Appropriate agencies may contact the Trial Commissioners directly; but all other contact, e.g: search warrants and juvenile mental inquest petitions, should be through the District Court Judge on duty.

208 Pleadings.

CR 11 is supplemented to also require the attorney's telephone number.

RULE 3 CIVIL PRACTICE

301 Civil Divisions.

There shall be two civil divisions of Jefferson District Court: Division I and Division II. The style of all pleadings, briefs, motions and judgments shall include the action number, the civil division number, and the designation of Jefferson District Court.

302 Assignment to Division.

At the time of filing or transfer of each case, the District Court Clerk shall assign a division by RANDOMLY alternating I and II.

303 Scheduling.

Trial dockets shall be called Monday, Tuesday, Wednesday and Thursday of each week, except during recess or holidays under JDR 202.

304 Motion Practice.

A. In accordance with CR 78, each Friday shall be known as Motion Day. Motions shall be docketed for 10:30 a.m. in Division I and 11:00 a.m. in Division II, or at such other times designated by the Chief District Court Judge, with reasonable notice to the bar. All times and locations are subject to change. A current schedule is available at the District Court Administrator's Office. All motions to be heard at motion hours shall be filed and clocked no later than noon on the preceding Wednesday, with service of copies to be mailed by Tuesday or hand-delivered by noon on Wednesday. Unless otherwise ordered by the Court, motions filed after noon on such Wednesday shall be automatically passed to the next following motion hour.

B. Motions for Discovery.

1. Motions for Bills of Discovery are only made with the Court after notice has failed, and a subpoena has issued.
2. Motions for Discovery shall be docketed at motion hour.

C. Trial Assignment.

Upon written notice to the clerk requesting a trial assignment date, the clerk of Civil Division II shall give trial dates of Mondays between the hours of 9:00 a.m. and 3:30 p.m., and the clerk of Civil Division I shall give trial dates of Tuesdays between the hours of 9:00 a.m. and 3:30 p.m. If an objection is raised by any party as to the assignment of a trial date, the motion shall be continued to the next regularly scheduled motion hour.

- D. Motions may be made orally during the progress of trial. All other motions must be in writing. Motions to dismiss, motions for summary judgment and motions for judgment on the pleadings shall not be noticed for hearing; but, where appropriate, shall be filed along with affidavits, exhibits, and/or a memorandum of authorities. Opposing party's response time shall be twenty (20) days from the certification date on the motion. At the expiration of the twenty (20) day period, either party may submit the case for final adjudication by issuing AOC Form 280 "Notice of Submission of Cases for Final Adjudication." Counsel, or the Court on its own motion, may request oral argument.

Failure to file affidavits, exhibits and/or a memorandum of authorities by either party may be grounds for denying or granting the motion. Any matter under submission to a Judge will be decided by that Judge even though the Judge may rotate to another division. Matters under submission shall include any matter taken under submission by a particular Judge and those matters where an AOC Form 280 "Notice of Submission of a Case for Final Adjudication" has been filed with the clerk prior to the Judge rotating from that division.

E. Motions for Default Judgment.

1. Motions for default judgment shall not be noticed for a hearing but shall be filed with the Court and will stand submitted upon filing. If the Court determines a hearing is necessary under CR 55.01, a hearing date will be assigned.
2. All motions for default judgment in claims involving a liquidated amount shall be accompanied by a default judgment certificate as follows:

DEFAULT JUDGMENT CERTIFICATE

Plaintiff (by counsel) certifies that:

- 1. No papers have been served on Plaintiff (or Plaintiff's counsel) by the defendant(s) in default.**
- 2. Defendant(s) were served on _____.**
- 3. The balance is due as follows:**
 - (a) The amount of the original obligation is \$ _____.**
 - (b) The amount paid by defendant(s) to be deducted from the original obligation is \$ _____.**
 - (c) If the obligation contained pre-computed interest, and other pre-computed charges, the amount to be deducted pursuant to statute is \$ _____.**
 - (d) The balance due from defendant(s) is \$ _____.**
 - (e) The balance due on Line (d) is different from the amount sought in the default judgment because _____.**

Affidavit as to military status of defendant.

All claims for liquidated damages shall be supported by sufficient written documentation to establish that the amount claimed is accurate, including but not limited to, the following proof:

- (a) If the basis of plaintiff's claim is a promissory note, the original note, a duplicate original or a photocopy, if not previously filed.**
- (b) If the basis of the plaintiff's claim is property damage of an automobile, a copy of the repair or estimate or other document evidencing the damages sought, if not previously filed. If none is available, a statement as to the reasons for non-availability and the basis for the estimate.**

When a party seeking an award of an attorney's fee relies upon a writing to establish entitlement to the fee, a copy of the writing shall be attached with the applicable portion highlighted.

305 Discovery.

- A. The Kentucky Rules of Civil Procedure and JDR 314, Time Guidelines, pertaining to discovery shall be applicable in Jefferson District Court.**
- B. Notice for the taking of discovery shall designate the location of the attorney's office, Monday through Friday, during business hours. Upon failure to comply with said notice, counsel shall draft a subpoena summoning the person to Court. Once served, if the party fails to comply, a Forthwith Order of Arrest may issue.**

- C. Post-judgment bills of discovery may only be made every six (6) months unless otherwise granted by the Court for good cause shown.

306 Jury Trial.

Any party upon obtaining a date certain for jury trial under CR 38.02 shall pay the jury fee to the clerk as required by CR 3.03(3). Failure to pay the jury fee may be deemed a waiver of the right to trial by jury. Any party desiring a jury trial shall make a demand in conformance with CR 38.02; otherwise, the right to a jury trial is waived.

307 Notice of Settlement.

Promptly upon settlement of a case, if a trial or hearing has been scheduled, counsel shall notify the clerk of the division in order that the case may be taken from the docket. Failure to comply with this rule may result in sanctions against counsel.

308 Schedule of Preliminary Hearings.

All preliminary hearings brought pursuant to KRS Chapter 425 shall be held each Friday at 10:30 a.m. in Civil Division I and at 11:00 a.m. in Civil Division II, or at such other times designated by the Court. All times and locations are subject to change, and a current schedule is available at the District Court Administrator's Office. Ex parte motions and applications for relief may be heard by the Court at any convenient time, and writs of possession or attachment and temporary restraining orders may issue in accordance with the grounds specified in KRS Chapter 425.

309 Fees.

All monies ordered paid into Court shall be paid to the Clerk of District Court and may be withdrawn only by order of the Court upon proper notice to all interested parties.

310 Bonds.

The personal appearance of any person, including the judgment debtor, in aid of execution of a judgment may be secured. If this person fails to appear, having been personally served with a subpoena, the Court may issue a Forthwith Order of Arrest to compel the person's appearance.

311 Appearance.

Whenever a defendant, party or witness has appeared and been examined under oath on discovery proceeding upon a judgment, such person shall not be compelled to appear again within six (6) months unless an affidavit is filed by counsel showing a change of conditions or circumstances warranting same.

312 Answer to Garnishment.

Proceedings to compel an answer to a garnishment shall be by contempt subpoena or by a rule issued on the garnishee directing the filing of an answer within ten (10) days of service of the rule, and said rule shall be made absolute upon the failure of the garnishee to file said answer in a timely manner. Proceedings under this rule shall be heard on Motion Day.

313 Special Bailiffs.

Special bailiffs shall be appointed upon the record showing unsuccessful service under CR 4.01 or upon affidavit showing good cause. Special bailiffs shall be compensated as prescribed by law. KRS 454.145. However, additional compensation may be awarded by the Court pursuant to CR 3.03(4) upon affidavit of the special bailiff. Special bailiff fees shall be taxed as costs of the action.

314 Time Guidelines.

The following time guidelines are hereby adopted by the Jefferson District Court for disposition of civil cases:

- A. All active cases as defined herein, shall be disposed of in an expeditious manner.

Ninety percent (90%) of those cases should be disposed of within six (6) months;

One hundred percent (100%) of those cases should be disposed of within twelve (12) months.

Active cases are defined as those cases where summonses have been served upon the defendants and the actions have not been stayed because of bankruptcies or for some other good cause shown.

- B. Any elapsed time, other than reasonably necessary for pleadings, discovery and court events to enable the just and efficient resolution of civil cases, is unacceptable. The Court shall firmly and uniformly enforce its time guidelines through any necessary steps, including a strict policy limiting continuances. Continuance of any pretrial event shall not extend the date set for trial. No request for continuance shall be granted except for good cause shown on the record.

315 Small Claims Practice.

- A. All pre-trial motions must be filed in the Clerk's office five (5) days before the trial date. Post-trial motions will be scheduled not less than five (5) days from the date of filing.
- B. Amended complaints and counterclaims per KRS 24A.290, must be filed at least five (5) days before the trial date. Service of a copy delivered to the defendant/plaintiff may be effected as follows:
 - 1. By hand delivery at least five (5) days prior to the trial; or
 - 2. By first class mail at least eight (8) days prior to the trial per CR 6.05.
- C. Bonds on Forthwith Orders of Arrest may be in the amount of the judgment plus court costs and then rounded up to the nearest dollar, or in an amount deemed appropriate by the Judge.
- D. Agreed settlements must be in the form of a money judgment reduced to a writing and signed by the parties.
- E. In cases of service of process on the Secretary of State, once the Small Claims Clerk has received the memo from the Secretary of State indicating that the statutory requirements have been satisfied, the case will be scheduled for trial. When the Secretary of State returns the memo after the court date, a new court date will be given and notices mailed to the parties.
- F. The time standards of KRS 24A.280 will govern the scheduling of trials. Hearing time shall not be less than twenty (20) days nor more than forty (40) days after service of process.
- G. Upon the filing of an appeal, the Judge will review any motions for supersedeas bond.
- H. Post-judgment Bills of Discovery and show cause rules shall be heard as assigned by the clerk at the direction of the Court. Post-judgment Bills of Discovery may only be made every six (6) months unless otherwise granted by the Court for good cause shown.
- I. All motions and service to the other party must be in writing, except those made orally during the process of trial.
- J. Special bailiffs shall be paid as prescribed by law. Additional compensation may be awarded by the Court pursuant to CR 3.03(4) upon affidavit of the special bailiff. Service fees are taxed as costs of the action.
- K. To request a jury trial, pursuant to KRS 29A.270(2), the claim must be over \$250.00 and the defendant must file a written motion with service to the

other party. In addition, the defendant shall give notice to the division at least seven (7) days prior to the time set for the hearing pursuant to KRS 24A.320(2).

- L. A Consumer Guide shall be available from the Small Claims Clerk which provides step-by-step guidance through the small claims process and collection procedures.

316 Forcible Detainers and Evictions.

- A. Upon the filing of the Petition, the Civil District Court Clerk shall assign trial dates in the order in which the petitions are filed, Monday through Friday.
- B. The assignment of jury trial dates will be made at the time that the motion for jury trial is granted. Jury fees must be paid at that time.
- C. All motions shall be docketed at 9:30 a.m. Monday through Thursday in the appropriate division. All times and locations are subject to change, and a current schedule is available at the District Court Administrator's Office.
- D. The following guidelines are established for the disposition of cases:

Ninety percent (90%) are to be disposed of within thirty (30) days of filing; ninety-five percent (95%) are to be disposed of within forty-five (45) days of filing; and one-hundred percent (100%) are to be disposed of within ninety (90) days of filing.

317 Petition Authorizing or Prohibiting Cremation.

- A. Petitions initiated pursuant to KRS 367.97527(3) shall be filed with the Clerk of the Civil Division. Petitions may be filed by an authorized agent, as defined by KRS 367.97501(1), or by the crematory authority.
- B. Unless extraordinary circumstances exist, the Court shall give due deference to the desires of the deceased as expressed in the pre-need cremation authorization form.
- C. Petitions can be obtained from the Clerk of the Civil Division.

318 Civil Jurisdiction.

The Jefferson District Court Civil Division has jurisdiction over the following matters:

- A. Small Claims Complaints;
- B. Civil Complaints up to and including \$4,000.00;
- C. Evictions (Forcible Entry & Detainer);

- D. Petitions for Emancipation by Minors;
- E. Petitions Authorizing or Prohibiting Cremation;
- F. Appellate Jurisdiction from Administrative Agencies, including:
 - 1. Denial or Suspension of the Carry Concealed Deadly Weapon License;
 - 2. Parking Tickets; and,
- G. All matters reserved pursuant to KRS 23A.100(3).

RULE 4 PROBATE PRACTICE

401 Scheduling.

The Probate Division of the Jefferson District Court shall convene pursuant to JDR 203. The regular docket shall be called at 1:00 p.m., the rule docket shall be called at 2:00 p.m. and the hearing docket shall be called immediately thereafter each day, or at such other times as designated by the Chief District Court Judge. Updated schedules are available at the District Court Administrator's Office.

402 Filing and Payment of Fees.

Any initial petition for appointment of a fiduciary, probate of a will, or similar initial proceeding shall be filed in the Probate Division of the Jefferson Circuit Clerk's Office (Clerk), and all District Court fees shall be paid upon the filing of the Petition.

The fee to record the will shall also be tendered to the Clerk upon the filing of a petition to probate a will. The Clerk will then attach that check to the will and forward both the will and the recording fee to the Jefferson County Clerk's Office, upon the will being admitted into probate.

Any petition filed with the Probate Division that does not include the appropriate fees shall be rejected by the Clerk until the full amount of fees is tendered.

Matters shall be filed and placed on the Court's docket not later than the preceding day, unless by leave of Court. Cases may be placed on the docket at the time of filing or after filing by calling the Clerk's Office and advising the date desired and the style of the estate or other matters involved.

403 Pleadings.

All pleadings and other papers presented to the Court shall be typewritten. The most recent AOC form shall be used at all times. Where appropriate, an order should be presented with a motion or a petition.

- A. The full name of the attorney and his/her address, including zip code and telephone number, shall be typed on each petition.
- B. The petitioner shall indicate if the will is self-proven.

404 Petition.

The Court requires the names, ages and post office addresses of heirs at law unless good cause is shown and ordered otherwise by the Court (KRS 394.145). The petitioner shall list all the real and personal property individually owned by the deceased, including the total amount of the market value of all such real and personal property, to allow the Court to set bond in the proper amount. If the fiduciary requesting the appointment by the

Court is a non-resident of the Commonwealth of Kentucky, the full name and address of the process agent residing in Kentucky shall be typed on the petition.

405 Bond Guidelines.

In exercising its discretion under KRS 395.130(1), the Probate Division hereby adopts the following guidelines:

- A. The bond of the personal representative shall continue to be set in the amount of the probatable estate even though a testamentary instrument excuses bond or surety. The value of the real estate will be excluded unless an instrument grants the power of sale or the fiduciary has petitioned the Court to sell the real estate under KRS 389A.010.
- B. Surety will be excused (in the absence of a compelling reason) where a testamentary instrument requests that surety not be required. A waiver of surety executed by all parties in interest will be honored by the Court (in the absence of compelling reason) upon the Court being satisfied that all interests are adequately protected. Said waivers need not be notarized by the parties executing the waivers.
- C. Banks and trust companies may continue to pledge their capital stock in the amount of the bond.
- D. Surety on other fiduciary bonds will be required in the amount of the bond, where persons under disability are involved, unless the facts clearly indicate that no surety bond or a surety bond in a lesser amount will adequately protect all interests. (Example: KRS 387.122 – blocked accounts.)
- E. Whenever a fiduciary is required to execute a bond, the fiduciary may, by special power of attorney, grant another person the power to sign the bond of the fiduciary and execute the fiduciary's oath on his/her behalf. The power of attorney shall be in a separate instrument and shall be notarized.

406 Increase/Reduce Bond.

A motion to increase bond shall be made whenever it is learned that the previous bond is inadequate on probatable assets. A motion to reduce bond on probatable assets of a fiduciary may be made any time after the inventory or periodic settlement has been filed showing a reduction in the assets remaining in the hands of the fiduciary.

407 Matters Not Scheduled on Court Docket.

There shall be a pre-docket consisting of petitions to:

- (1) Dispense with administration;
- (2) To probate (only) self proven wills;

- (3) To probate (only) by affidavit pursuant to KRS 394.230 and
- (4) Uncontested motions and orders, unless otherwise placed on the docket by the Court, such as:
 - (a) Motions for extension of time (If the extension of time is for longer than sixty (60) days from the original due date, Jefferson District Court Probate Form #407 (2003) is required [See **Appendix B** for Form]);
 - (b) Motions to increase or decrease bonds; and,
 - (c) Motions to sell real property. (An affidavit will is required indicating that all interested parties have notarized waivers, which must be attached, and that no interested parties are under disability. An affidavit of descent is required for the record.)

408 Settlements.

All settlements shall include the checklist provided by the Probate Clerk, along with an affidavit by counsel or personal representative indicating compliance with each item on said checklist.

An affidavit of descent shall be filed with all settlements except when the will distributes all assets to specifically named individuals. Guardianship settlements are exempted by this requirement.

Settlements shall include the following:

- A. Formal Settlements
 1. Date of death,
 2. Date of appointment of fiduciary,
 3. Statement indicating decedent is testate or intestate,
 4. Description of the settlement as periodic or final,
 5. A photocopy of the first page of the Kentucky Inheritance Tax Return for Final Settlements of decedents' estates, along with copies of the Kentucky Inheritance Tax Acceptance forms or Affidavits of Exemption if taxes are exempt by statute,
 6. Description of all distributions under a will in sequence of their mention in the will, indicating either that the distribution occurred or a statement explaining the failure of distribution,

7. A summary itemization of all assets received and all disbursements and distributions with amounts listed,
8. A provision for all formal settlements indicating all forms of compensation and commission received by any attorney or fiduciary, the total thereof, and the basis of its determination, and,
9. An affidavit of settlement, the example of which follows:

**FORMAL SETTLEMENT AND PERIODIC SETTLEMENT
AFFIDAVIT OF ATTORNEY OR FIDUCIARY**

The undersigned states the settlement tendered in this Court has been reviewed, and the following is provided to the Court:

- ___ 1. **Distribution is in conformance with the Will and Codicil [see JDR 408(6)].**
- ___ 2. **Vouchers or cancelled checks are provided and attached.**
- ___ 3. **Checks are listed individually.**
- ___ 4. **Gross summary page and/or tax clearance or affidavit of exemption is attached.**
- ___ 5. **Distribution is in accordance with the statute of intestate succession.**
- ___ 6. **Six (6) months have passed since date of appointment.**
- ___ 7. **Explanation of any guardianship funds is attached.**
- ___ 8. **There are no outstanding Proof of Claim(s) filed.**
- ___ 9. **Infant(s) are now of age and have signed a release or matters of guardianship are resolved.**
- ___ 10. **Personal representative's fee with supporting evidence is attached.**
- ___ 11. **Attorney's fee with supporting evidence is attached.**
- ___ 12. **An Inventory has been filed.**
- ___ 13. **There is attached an itemization, in summary form, with a running total, of all assets received, including any income, and all disbursements and distributions.**
- ___ 14. **Receipts and/or disbursements balance.**
- ___ 15. **OTHERS: _____.**

B. Informal Settlements

1. Informal settlements shall reflect all forms of compensation and commission received by any attorney or fiduciary, the total amount, and the basis of its determination.
2. An affidavit as follows shall be submitted with all informal settlements:

**INFORMAL SETTLEMENT
AFFIDAVIT OF ATTORNEY OR FIDUCIARY**

The undersigned states the informal settlement tendered in this Court has been reviewed and the following is provided to the Court:

1. Each beneficiary has signed a notarized waiver stating BOTH that he/she has received his/her share and he/she is waiving a formal accounting and settlement (in compliance with KRS 395.605).
2. Receipts or checks for individual bequests are attached.
3. TAXES: Gross summary page, tax clearance or tax exemption is attached.
4. Six (6) months have passed since date of appointment.
5. Explanation of any guardianship funds is attached.
6. There are no outstanding Proof of Claim(s) filed.
7. Infant(s); now of age, has(ve) signed receipt of disbursements.
8. Personal representative's fee with supporting evidence is attached.
9. Attorney's fee with supporting evidence is attached.
10. An Inventory has previously been filed.

C. Guardianship: (see AOC forms)

All disbursements shall be supported by the original vouchers, receipts or bank proof of processed check(s) filed with the settlement, and in the order shown on the settlement.

- D.** Settlements shall be accompanied by checks payable to the "Jefferson Circuit Clerk" in the appropriate amounts.
- E.** When required by KRS 395.610(1) a fiduciary shall make an appointment with the Court, through the Clerk, to present for review all securities reflected on the periodic settlement as being in the hands of the fiduciary or in the alternative, file with the settlement a certificate as permitted by KRS 395.610(1).
- F.** If no exceptions to the settlement are filed following advertising pursuant to KRS 395.625, the settlement will be automatically confirmed on the

confirmation date. If exceptions are filed, the attorneys involved should move the Court for a date when the matter may be heard.

- G. Subsection E and F of this rule shall not apply to an estate in which an informal settlement is filed in accordance with KRS 395.605.

409 Guardian Accountability.

Guardians shall render their accountings and file settlements annually after the first accounting pursuant to discretion granted the Court under KRS 387.175. [See JDR 405(D) for bond matters.]

410 Name Change.

In a petition for a name change, the fee to record the name change shall be tendered to the Probate Division of the Jefferson Circuit Court Clerk's Office, along with the filing fee for the petition. If the Court grants the order changing the name, the recording fee and a true copy of the order shall be forwarded to the Jefferson County Clerk's Office for recording. The order shall state if the order is to be sent to the Office of Vital Statistics.

411 Inventory or Other Settlement.

Whenever an inventory, account, or report pursuant to KRS Chapter 387 is not filed by the Guardian within the time required by appropriate statute, the Clerk shall issue a notice of the failure to file any such report or any notice of a rule motion to the current counsel of record for the guardian, if any. If there is no attorney of record for the Guardian, then the notice shall be sent to the Guardian. If a second or subsequent notice relating to failure to file reports or a rule motion is necessary, said notice shall be sent to the Guardian and to the counsel of record, if any.

412 Filing Incomplete.

Any filing determined to be incomplete by the accepting Clerk shall be clocked and the filer notified that it is incomplete. The file shall be placed on hold for a period not to exceed ten (10) days in order that it might be corrected by the filer. If at the end of the correction period the filing has not been corrected, the Clerk shall forward the file to the District Court Judge presiding in the Probate Division with proper notification as to the deficiency. This time period shall not be used to extend any filing deadline.

RULE 5 GUARDIANSHIP PRACTICE (KRS CHAPTER 387)

501 Interdisciplinary Teams.

The Court shall maintain separate Interdisciplinary Teams consistent with the provisions of KRS 387.540(1). If the person evaluated is a poor person as defined in KRS 453.190, the compensation of the physician, the psychologist, and the social worker team members shall be paid by the Louisville Metro Government pursuant to KRS 387.540(8), upon a finding by the Court that the fees are reasonable. Additional compensation may be allowed upon a finding by the Court of extraordinary work.

502 Appointed Counsel.

The Court shall maintain an approved attorney list for appointment as counsel in initial or renewal disability proceedings, restoration proceedings and Guardians Ad Litem for the sale of real estate. Counsel shall be appointed by the Court. Procedures for listing and selection should be identical to JDR 903.

503 Emergencies.

Emergency hearings shall be set by the Court within statutory time frames upon Petitioner's affidavit establishing reasonable grounds to believe the presence of a need for immediate action under KRS 387.740(1).

504 Motion Hour.

Motion hour shall be on each Thursday at 9:30 a.m., or at such other times as designated by the Chief District Court Judge with reasonable notice to the bar, with the following matters to be heard by the Court:

- A. Sales of real estate pursuant to KRS Chapter 389A, including appointments of Guardians Ad Litem;
- B. Removal of limited or full guardians or conservators appointment of sucesors and increases of bond;
- C. Guardian appointments under KRS Chapter 388, where no jury trial has been demanded;
- D. Modifications of prior disability declarations or restoration proceedings under KRS 387.620;
- E. Petitions for renewal of appointments of limited guardian or conservator under KRS 387.610;
- F. Rules to compel filing of inventories, periodical and final reports, annual reports and plans preserving the ward's estate;

- G. Rules to compel payment of any fees or monies awarded by the Court or due under any provisions of these rules or KRS 387.500, et seq.;
- H. Request for advice from the Court concerning the duties and responsibilities of guardianship or conservatorship; and,
- I. Such other matters as the Court in its discretion may direct to be heard.

505 Verification of Annual Reports.

Where the ward's residence is not licensed or monitored by the Kentucky Cabinet for Health and Family Services, the Court shall appoint an appropriate person or agency to verify by personal contact the contents of the annual report. This person or agency shall be compensated by the Louisville Metro Council if the ward is indigent, or by the ward's estate if not.

506 Record-keeping.

After biennial reports are filed pursuant to KRS 387.710 and have been approved by the Court, all cancelled checks and receipts shall be returned by the deputy clerk to the guardian/conservator for safe keeping with an order from the Court directing them to keep said items for five (5) years unless otherwise ordered by the Court.

507 Guardian Inventories, Accounts and Reports.

Whenever an inventory, account, or report pursuant to KRS Chapter 387 is not filed by the Guardian within the time required by appropriate statute, the Clerk shall issue a notice of the failure to file any such report or any notice of a rule motion to the current counsel of record for the Guardian, if any. If there is no attorney of record for the Guardian, then the notice shall be sent to the Guardian.

If a second or subsequent notice relating to failure to file reports, or a rule motion is necessary, said notice shall be sent to the Guardian and to the counsel of record, if any.

RULE 6 TRAFFIC/CRIMINAL PRACTICE

601 Schedule for Traffic Offenses.

The District Court of Jefferson County adopts the pre-payable schedule for traffic offenses, as set out in AOC Form AOC-056-19, attached hereto as **Appendix C**.

602 Scheduling.

- A. Regularly scheduled court dates shall be assigned by the Chief District Judge or his/her designee.

- B. Subject to the schedule established under Subsection (A) of this Rule, all persons arrested and in custody of Louisville Metro Corrections shall be arraigned on the date of arrest, or the next following scheduled court day. A person held in custody shall not be detained for more than forty-eight (48) hours from the time of arrest without being arraigned, unless there are exigent circumstances to be determined by a judge, which prevent arraignment within the forty-eight (48) hour period.

- C. If a defendant appears before the Court and there is an unserved summons or warrant pending against him/her, the Court shall do the following:

Summons:

- 1. Have the summons served upon the defendant and set a date certain for the defendant to return to the appropriate Court for further proceedings; or,

Arrest Warrant:

- 2. Remand the defendant to the custody of the sheriff and determine the validity of the unserved warrant as soon as practicable. If the warrant has not previously been set aside, the Court may set bail, release the defendant on his/her own recognizance, or remand the defendant to custody, and set a date certain, pursuant to Subsection (B) of this Rule, in the appropriate Court for arraignment.

603 Driver Education.

Traffic School (Driver Re-education) shall be set at the discretion of the Court, or as specified by statute.

604 Motion Practice.

All motions shall be in writing and shall be delivered to the District Court Clerk and served on the prosecution and/or opposing counsel at least twenty-four (24) hours prior to being brought on the docket, except by leave of Court.

605 Notice.

At all arraignments, the Court shall ensure that the defendant is given in-hand notice of the next scheduled court date.

606 Continuances.

When a trial date has been set, the prosecution and defense attorney will make diligent preparation and notify all witnesses. No continuances will be granted except in proper circumstances with good cause shown.

607 Notice of Warrant.

The County Attorney shall notify the maker in writing ten (10) days prior to the issuance of an arrest warrant for theft by deception involving a dishonored check that such a warrant has been sought. Copy of such notice shall be filed with the Court's copy of any warrant subsequently issued.

608 Copies of Search Warrants.

Copies of all search warrants and affidavits in support thereof issued by a District Court Judge shall be filed immediately with the Circuit Court Clerk. An executed copy shall also be filed by the applicant with the Circuit Court Clerk within twenty-four (24) hours of execution.

609 Motions for Shock Probation.

Motions for shock probation, pursuant to KRS 439.267, shall contain the following certification in writing prior to being placed on the Court's docket:

1. The name of the sentencing Judge;
2. List of any and all charges to which the defendant is serving time;
3. Length of sentence(s);
4. Date of the sentence(s)/date of the defendant's reporting to jail if applicable;
5. Number of days actually served in jail;
6. Number of days requested to be shock probated;
7. Statement as to whether fines, service fees, court cost and/or restitution has been paid; and,
8. Photocopy of the Judge's Court docket showing the defendant's conviction shall be attached.

610 Time Guidelines.

The time guidelines adopted for the District Court Criminal Division are:

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Traffic and misdemeanor cases:

Seventy-five percent (75%) of the cases should be disposed of within forty-five (45) days;

Ninety-eight percent (98%) of the cases should be disposed of within ninety (90) days; and

One-hundred percent (100%) of the cases should be disposed of within 180 days.

Time guidelines are subject to modification by the Chief District Court Judge or District Court Administrator with the approval of the Chief Justice of the Supreme Court. Failure to meet these time guidelines shall not alone be grounds for dismissal. The model code definition of the institution of and disposition of a criminal case is adopted; i.e. a case is considered opened and the time begins to run when an arrest is made, or when a citation, summons, or warrant is served.

Citations must be properly delivered to the District Court Clerk within seven (7) days of issuance or they will not be processed, unless good cause is shown or as otherwise ordered by the Chief Judge of Jefferson District Court.

Disposition of a case occurs at the time of dismissal, plea of guilt, finding of guilt, or transfer to the Grand Jury. The following occurrences specifically do not count toward measurement of the time: show cause date; sentencing date; pre-trial diversion; drug court referral; Department of Transportation referral; mental health diversion; competency and/or criminal responsibility evaluations; or, arrest/or bench warrants.

611 Collection of Fees Pursuant to KRS Chapter 31.

- A. Partial fees for public defender services shall be set at arraignment, subject to review at each stage of the proceedings.
- B. Upon disposition, a form order shall be entered indicating the total amount of fees due, and the date (or dates if installment payments) upon which they shall be paid.
- C. The form order shall be in quadruplicate, with one (1) copy delivered to the defendant, one (1) copy for the court file, one (1) copy for the Jefferson County Court Administrator, and one (1) copy for the Department of Public Advocacy in Frankfort.
- D. Fee(s) paid to the Jefferson County Circuit Court Clerk shall be duly recorded by case number. If the fee, or any portion thereof, is not paid by the due date, the court's order is a civil judgment subject to collection pursuant to Kentucky law.

612 No Liability Insurance Diversion Program.

The Pre-Trial Services Department of the Administrative Office of the Courts (AOC) shall provide a monitoring program for all defendants who have entered a plea of guilty to having no liability insurance and who have, at the time of the plea of guilt, shown proof of current liability insurance covering the vehicle for which he/she was charged, or any subsequently owned vehicle or, in the event that he/she no longer owns a vehicle, proof of non-owner's insurance covering him/her on any other vehicles as follows:

- A. If the person is a first time offender within a five (5) year period:
 - 1. Upon the recommendation of the county attorney and the consent of the defendant, the District Court Judge shall approve participation in the monitoring program, unless the District Court Judge, in his or her discretion believes that:
 - a. There is a substantial risk that the defendant will abscond from the jurisdiction of the court prior to fulfillment of the terms of the monitoring contract;
 - b. There is a substantial risk that the defendant will commit another crime prior to fulfillment of the terms of the monitoring contract;
 - c. The defendant is in need of correctional treatment that can be provided most effectively by commitment to the county jail; or,
 - d. Participation in the program would unduly depreciate the seriousness of the defendant's crime.
 - 2. The county attorney's recommendation of a defendant's participation in the program shall not be unreasonably withheld. If the county attorney refuses to consent to a defendant's participation in the program, he or she shall state on the record the reasons therefore.
 - 3. Upon referral to the program, sentencing on the underlying charge shall be withheld. Notice to the Department of Transportation (DOT) of a finding of guilt shall be withheld until, and only if, sentencing is pronounced upon the defendant.
 - 4. Upon approval for participation in the program, the defendant shall meet with a monitoring officer to establish a formal contract which specifies the court ordered conditions, the length of the contract and, if required, the need for the defendant to make restitution. The contract shall commence upon approval by the District Court Judge. Individual contract lengths shall be determined by the District Court Judge not to exceed twenty-four (24) months.

5. The program participant shall be required to comply with all provisions of the monitoring contract. (See **Appendix F**). If the program participant fails to comply with the conditions of the contract, the monitoring officer shall refer the matter to the sentencing Court, with notice to the defendant and/or the defendant's attorney, for a decision whether to terminate the contract and sentence the defendant or to modify the terms of the contract. Notice to the defendant to show cause why the defendant has failed to comply with the terms of the contract shall be deemed sufficient if sent by regular mail to the defendant's last known address listed by the monitoring program. Violation of any of the terms of the contract may be shown by way of sworn affidavit of the monitoring officer or the county attorney. The trial judge shall enter an order reflecting the court's decision. As with the original monitoring contract, the participant must agree to any contract modifications prior to reinstatement.
 6. When the defendant fully complies with all of the terms of the contract, the monitoring officer shall notify the county attorney. The county attorney shall move the Court to set aside the plea of guilt and dismiss the charge. The Court shall enter an Order reflecting said determination.
 7. All program records and all statements made by a defendant to the monitoring officer regarding the contract shall be privileged; shall not be admissible or discoverable for any purpose; shall be exempt from subpoena; and shall be deemed confidential. However, program staff, the District Court Judge, the county attorney, and the Chief District Court Judge may access the information for purposes of program review, monitoring and supervision. The information shall not be released to any other person or entity without prior written consent of the District Court Judge or the defendant. Nothing in this paragraph shall be deemed to prohibit release of information to the victim regarding a defendant's participation in the program.
 8. The fee for participation in the program shall be in an amount set by the Director of the Administrative Office of the Courts. The Court may assess the fee on a sliding scale basis upon ability to pay or waive the fee entirely in the case of indigence.
 9. Court costs shall be assessed in all cases unless the District Court Judge determines that the defendant is indigent.
- B. If the defendant is a second or subsequent offender within a five (5) year period:

1. The Court may order, at sentencing, participation in the monitoring program as a term of probation or conditional discharge of the sentence.
2. All rules and regulations set forth in subsections (A) 4, 5, 7, 8, and 9 above, for first time offenders shall be applicable to second or subsequent offenders.
3. Violation of the terms of probation or conditional discharge may be proven by way of sworn affidavit of the monitoring officer or the county attorney.

RULE 7 CITIZENS COMPLAINTS/MEDIATION

701 Obtaining Warrants and Summons.

Citizen Complaints may be made by individuals at the Jefferson County Attorney's Office during normal business hours. Domestic Violence Criminal Complaints may be filed in the Domestic Violence Intake Center during normal business hours. For an emergency criminal complaint after hours, the individual may go to the Deputy Sheriff on duty who will contact the on-call Assistant Jefferson County Attorney, who will then make the determination of whether the matter needs to be addressed immediately or may wait until the next regular business day.

702 Mediation.

1. In General.

- A. The Jefferson District Court General Term finds that under some circumstances mediation may provide an efficient and cost effective alternative to traditional litigation or criminal matters. Further, the wise and judicious use of mediation may benefit all participants.
- B. Mediation is an informal process in which a neutral third person, called a mediator, facilitates the resolution of a dispute between two (2) or more individuals. The process is designed to help individuals reach an agreement on some or all of the issues in dispute. The decision making authority rests with the participants, not with the mediator. The mediator assists in identifying issues, fostering joint problem solving and exploring resolution alternatives.
- C. The Court may refer any case or portion of a case to mediation, except as otherwise provided in these rules.
- D. When referring a case to mediation, the Court shall consider:
 - 1. The nature of the issues presented;
 - 2. The value to the individuals involved in the mediation of confidentiality, rapid resolution or the promotion or maintenance of ongoing relationships;
 - 3. The willingness of the individuals involved in the mediation to mutually resolve the dispute or issue;
 - 4. Other attempts by the individuals to resolve the dispute or issue; and,
 - 5. The ability of the individuals involved to participate in the mediation process.

2. Mediation Session.

- A. Mediation sessions shall be closed to all persons other than the individuals subject to the mediation, their counsel and any other person(s) invited by the mediator with the consent of the individuals involved.
- B. The mediation session and the mediator's conduct shall be governed by the Rules of Administrative Procedure of the Court of Justice, Part XII, mediation Guidelines for Court of Justice mediators.
- C. If the matter is resolved, the mediator shall reduce the agreement to writing for the signatures of the participants.
- D. With the exception of those conducted by private mediators who charge a fee, all mediations in Jefferson District Court shall take place in the Hall of Justice, unless another location is agreed upon by the mediator and all individuals subject to the mediation. Private mediators offering pro bono services may conduct mediations for Jefferson District Court in the Hall of Justice.

3. Report of Mediation Status.

- A. After the scheduled mediation date, the mediator shall provide the District Court Administrator with a Report of Mediation Status utilizing the forms and procedures directed by the Administrative Office of the Courts.
- B. If the case/matter is not resolved by mediation, the matter shall be referred to the District Court Judge for further action.

4. Confidentiality.

- A. Except as otherwise provided by this rule, all mediation documents and mediation communications shall be confidential and shall not be released to any other person or agency without the written consent of the individuals subject to the mediation. Further, the mediation documents and communications shall not be subject to disclosure through discovery or any other process and are not admissible as evidence in any judicial or administrative proceeding.
- B. The mediator shall not be subject to process requiring the disclosure of any matter pertaining to the mediation, and such matters shall be considered privileged and confidential. The privilege and resulting immunity reside with the mediator. Mediation occurring as part of a civil case is protected as a settlement negotiation for purposes of KRE 408.
- C. No part of the mediation shall be considered public record.
- D. No restriction on disclosure shall be required, and the privilege may be waived under this rule, if:

1. All parties consent to the disclosure in writing and the mediator agrees; or,
2. The mediator learns of abuse subject to mandatory reporting by KRS 209.030, KRS 209A.030, KRS 620.030, or other applicable law.
3. Nothing in this Rule shall prevent the AOC from reviewing mediation information for the purpose of evaluation and supervision.

5. Civil Mediation.

- A. The procedures in this Rule shall pertain to all District Court civil cases.
- B. A District Court Judge may refer cases to mediation at any time by referring the parties to Civil District Court Clerk's office for scheduling.
- C. Following the scheduled mediation, the mediator shall file a Report of Mediation Status with the District Court Administrator, along with a signed copy of any agreement reached by the parties.

6. Mediating Citizen's Criminal Complaints.

A. Citizen Criminal Complaints.

1. A citizen's criminal complaint may be made as follows:
 - a) During normal business hours, the criminal complaint shall be made to the Jefferson County Attorney's Office.
 - b) During normal business hours, domestic violence criminal complaints may be made in the Domestic Violence Intake Center.
 - c) After normal business hours, emergency criminal complaints may be made with the deputy sheriff on duty, who shall contact the on-call Assistant Jefferson County Attorney. The on-call Assistant Jefferson County Attorney shall make a determination as required by subsection (5) below.
2. For a matter to be referred for mediation, the complaining witness and the alleged offender shall be eighteen (18) years of age or older, and the alleged offense must have occurred in Jefferson County, Kentucky.
3. Where related complaints (cross-complaints) are filed, every effort shall be made to refer such complaints to the same reviewing authorities, and to schedule any subsequent proceedings on the same dates.
4. When a complaint is referred to mediation, a mediation conference shall be scheduled within fourteen (14) days of the referral, absent extraordinary circumstances.

5. Citizen complaints shall be referred to mediation according to the following procedures:
 - a) The Assistant Jefferson County Attorney shall interview the complaining witness to determine if probable cause exists to believe a criminal offense has been committed. If probable cause does not exist, the Assistant County Attorney shall reject the matter and it shall be presented to the District Court Judge.
 - b) If the Assistant County Attorney determines that there is probable cause to believe an offense was committed, the complaining witness should be afforded an opportunity to request mediation as a resolution to his or her complaint with the alleged offender.
 - c) If there is a determination of probable cause, the Assistant County Attorney shall complete an AOC Form 315.B, Criminal Complaint, which shall include a sworn statement of the complaining witness, the recommended criminal charge(s), and one of the following recommendations for disposition to the District Court Judge:
 - i. Request that the District Court Judge issue a warrant (in complaints presented after-hours, the on-call Assistant County Attorney shall determine whether to contact the on-call District Court Judge immediately or make the request on the next regular business day);
or
 - ii. Request that the District Court Judge issue a summons; or,
 - iii. Request that the District Court Judge refer the matter to mediation.
 - d) The AOC Form 315.B shall be tendered to the District Court Administrator for submission to the District Court Judge.
 - e) The District Court Administrator shall present the completed AOC form 315.B containing the complaining witness's sworn statement and the Assistant County Attorney's recommendations to a District Court Judge, who may take one of the following actions:
 - i. Issue a summons or arrest warrant for the defendant;
 - ii. Refer the matter to mediation; or,
 - iii. Reject the action.

Any action taken by the District Court Judge shall be in writing and signed. For a mediation referral, the District Court Judge shall refer the matter to the District Court Administrator to schedule the mediation and assign a mediation number in the Mediation Division of KY Courts II.

6. Any agreement reached between the complaining witness and the alleged offender shall be voluntary. The terms for compliance with the agreement shall not exceed one (1) year from the date the alleged offense occurred,

and shall not be legally enforceable by the complaining witness, the alleged offender, the County Attorney, the mediation program, or the courts. Failure by the alleged offender to comply with the terms of the agreement may result in the re-initiation of the underlying criminal complaint.

7. If the criminal complaint is not resolved at mediation, the following may occur:
 - a) If the complaining witness fails to appear at the scheduled mediation, the matter shall be closed, and shall only be reinitiated if the complaining witness comes forward again to swear to the allegations and the County Attorney determines there is probable cause to believe an offense has been committed.
 - b) If the alleged offender fails to appear at the scheduled mediation and the complaining witness wishes to proceed, the County Attorney shall request that the District Court Judge issue an arrest warrant or summons for the alleged offender.
 - c) If the complaining witness and alleged offender both appear, but the mediation is unsuccessful and the complaining witness wishes to proceed, the County Attorney shall request that the District Court Judge issue an arrest warrant or summons for the alleged offender.

B. Judicial Referral of Criminal Cases.

1. Once the complaint has been signed by a District Court Judge and criminal prosecution has commenced by the assignment of a case number in the Criminal Division of the Jefferson District Court and the defendant has been served, a District Court Judge may continue the case by referring it to mediation, if:
 - a) The County Attorney agrees to the mediation;
 - b) The complaining witness agrees to the mediation;
 - c) The defendant agrees to the mediation; and,
 - d) The County Attorney agrees to dismiss the case if the complaining witness and the defendant reach an agreement.
2. Mediations should be scheduled at least fourteen (14) days in advance of the next scheduled hearing date.
3. Following the scheduled mediation, the court mediator shall send a Report of Mediation Status to the District Court Administrator.

4. If the criminal complaint is resolved, the defendant shall not be required to return to court, and the County Attorney shall move to dismiss the case at the scheduled hearing date.
5. If the criminal complaint is not resolved, the defendant shall return to court on the next scheduled court date for further action.
6. If any citizen, attorney, or peace officer is denied a warrant or summons by a Judge of the District Court, the decision of the reviewing judge shall be final. The same case shall not be presented to any other District Court Judge for reconsideration, unless new or different circumstances from those originally presented for review are found to exist.

703 Sworn Complaint.

- A. Complainants must be informed of the general court process by the Jefferson County Attorney's Office. They shall be informed of the following:

Their sworn statement will be reviewed by an Assistant County Attorney, who must determine whether probable cause exists to believe a criminal offense has been committed in order to go forward. The sworn statement and recommendations of the County Attorney will be reviewed by a District Court Judge as well. Once a warrant is signed by a District Court Judge, it becomes the case of the Commonwealth of Kentucky and cannot be dropped by the Complainant. The Complainant's failure to appear in court may result in sanctions, including arrest. False swearing is a criminal offense, for which the Complainant may be prosecuted. Complainants may be required to testify at trial.

- B. The Jefferson County Attorney's Intake Officer shall prepare a complaint/warrant form for review by the County Attorney, and thereafter, review by a District Court Judge.
- C. No action shall be taken if the County Attorney determines that the Complainant has not made a valid criminal complaint. The County Attorney shall indicate the reason for rejection in the space provided on the warrant form, and it shall be reviewed by a District Court Judge.
- D. All warrants being reviewed shall be in the Jefferson District Court Administrator's Office. If any warrants are removed for any reason, the person removing them shall inform the Court Administrator where in the building they are being taken, and they must be returned to the Jefferson District Court Administrator's Office the same day. Unless the Chief Judge of District Court specifically provides otherwise, no warrant under review shall be located any place other than in the Jefferson District Court Administrator's Office overnight.
- E. The County Attorney or District Court Judge may determine that the case is best suited for disposition through the Mediation program, even if not the chosen means of resolution by the Complainant. However, the County Attorney will recommend a

criminal charge even if mediation is recommended. (The mediator will advise the County Attorney and Judge if mediation has previously been attempted in this matter and has failed.) If mediation is ordered by the District Court Judge and thereafter fails, the Complaint will be re-reviewed by a District Court Judge.

- F. If any citizen, attorney, or peace officer is denied a warrant or summons by a Judge of the District Court, the decision of the District Court Judge who considered the matter is final. The same case shall not be presented to any other District Court Judge, unless new or different circumstances exist from those originally presented to the District Judge first considering same.

704 Domestic Violence Protocol.

The District Court of Jefferson County adopts the Domestic Violence Protocol, attached hereto as **Appendix D**.

RULE 8 JUVENILE SESSION

801 Definitions.

- A. "Juvenile Court" or "Court" as used in this Rule 8 means either the morning or afternoon juvenile session of Jefferson District Court.
- B. "DJJ" means the Department of Juvenile Justice and applies to any successor agency.
- C. "Emergency" means imminent risk of harm to persons or property.

802 Session.

The Court will be in session daily, Monday through Friday, excluding holidays. The Chief Judge of the Jefferson District Court may authorize special dockets to be held on weekends and holidays.

803 Detention of Juveniles.

All detention facilities maintained and operated by the Louisville-Jefferson County Metro Government, pursuant to the requirements of KRS 67.0831(1) and subject to the provisions of KRS 67.0831(3) shall receive and maintain custody of juveniles in accordance with the pre-adjudicative detention criteria as outlined on AOC Form JW-39 and the provisions of the Kentucky Revised Statutes.

When a child who is alleged to be a public offender or a youthful offender, prior to his or her arraignment in either of the juvenile sessions of Jefferson District Court, is ordered by a Judge or Trial Commissioner to be released from the Louisville Metro Youth Detention Center (LMYDC) to the custody of Cabinet for Health and Family Services (CHFS), that child must be picked up from the LMYDC as soon as practical. In any event, no such child who is ordered to be released shall remain in detention for any period exceeding twelve (12) hours, exclusive of weekends or holidays, from the time of the original order of release. This rule, while taking into consideration the special situations involved in the placing of children who are in the care and custody of CHFS, reflects the policy that children who are in the temporary custody of or committed to CHFS should not be required to spend more time in secure detention than non-CHFS involved children who are otherwise similarly situated.

804 Allotment of Cases.

Cases are to be assigned to the two (2) divisions of the Juvenile Court on the basis of the first letter of the alleged offender's last name. The Chief Judge of the Jefferson District Court shall determine the letter allocation among the two (2) divisions of the Juvenile Court. Cases having multiple defendants in connection with a specific case shall all be assigned to the Juvenile Court division to which the senior action has been assigned, regardless of the defendants' last names.

805 Arraignments.

When a person is taken into custody and not released, and is charged with a criminal offense for which the Juvenile Court has jurisdiction, that person shall be arraigned in the division to which that person's case has been assigned no later than the next regularly scheduled Juvenile Court session. The in-detention arraignment dockets shall convene at 9:00 a.m. and 1:00 p.m., or at such other times as designated by the Chief District Court Judge with reasonable notice to the bar. Current schedules are available at the District Court Administrator's Office.

806 Form of Pleadings.

All pleadings, motions, briefs, orders and judgments shall be styled as follows:

NO. _____	JEFFERSON DISTRICT COURT JUVENILE SESSION DIVISION _____
IN THE INTEREST OF:	
_____, A CHILD,	

807 Motion Practice.

A. In General

An application to the Court for an Order shall be by motion, which shall be in writing unless made during a hearing or trial, shall state with particularity its grounds and relief sought. Motions shall be filed in the Juvenile Court Clerk's Office. Motions shall be signed by counsel and, when required by law, shall contain an affidavit in support thereof signed by the person having knowledge of the matters which are sought to be brought before the Court.

B. Procedures

The Juvenile Court will entertain motions on any day that the District Court is in session. No motion shall be heard by the Court unless the moving party has complied with the notice requirements set forth in JDR 809, excepting motions made during a hearing or trial. When a motion is initially called by the Court, the Court shall set a hearing date within twenty-one (21) days if a hearing is necessary to resolve the matter before the Court. The twenty-one (21) day hearing date may be waived by the parties for good cause shown.

808 Motion for Release of Confidential or Privileged Information in Juvenile Delinquency Cases.

- A. All requests for the release of confidential and/or privileged information, with regard to Juvenile Delinquency case files, shall be made by motion before the Juvenile Session of the Jefferson District Court, or before the Court in which the information is sought to be used.
- B. When the motion is made before the Juvenile Session of District Court, if the Court makes a preliminary determination that the party requesting the release of such information may be entitled to relief, the Court may release the name, address, and age of the person against whom the relief of information is sought, and the name and address of person's most recent counsel of record. The Court will then schedule a hearing within twenty-one (21) days to determine whether the law allows the release of any confidential or privileged information to the moving party. Notice of the motion and hearing date shall be prepared and served by the moving party upon the person against whom the release of such information is sought and upon his or her counsel.

809 Notice.

No motion shall be heard by the Court unless the responding party has received written notice of the motion at least forty-eight (48) hours, excluding weekends and holidays, prior to the matter being heard by the Court. The notice requirement may be waived by the responding party. The forty-eight (48) hour notice rule may also be waived by the Court when the Court determines that immediate court action is necessary because of the existence of an emergency or as is otherwise appropriate.

810 Court Procedures – Conferencing and Calling of Cases.

- A. Attorneys seeking to conference cases that appear on the Court's docket should sign the case name on the sheet posted for that purpose in the conference room area. Assuming that all persons necessary for the conference are physically present, cases shall be conferenced in the order that they are signed up on that sheet. It is recommended that the DJJ worker having case responsibility participate in the conference.
- B. At the conclusion of the conference, the case file shall be delivered to the Deputy Sheriff assigned to that Court to be called formally before the bench. Assuming that all necessary persons are available, the cases shall be called in the order in which they are provided to the Deputy Sheriff. If a case requires the taking of sworn testimony or extensive argument by counsel, the Court may direct that the case be heard at the foot of the Court's docket.

811 Disposition.

- A. The pre-dispositional investigation report prepared in connection with an adjudicated offender's dispositional hearing shall be provided to the Court and to counsel for the parties three (3) days prior to the adjudicated offender's dispositional hearing. The three (3) day requirement may be waived by the adjudicated offender.
- B. If the Court commits an adjudicated offender to the DJJ, the Court shall set a date certain for the DJJ to take custody of that offender. If the offender is held in a secure juvenile detention facility, the Court shall order the DJJ to pick up and place the offender by a date certain. The time specification is set out in statute as thirty-five (35) days from the date of commitment. KRS 635.060(3). In the event that the DJJ is unable to secure an appropriate placement for the committed offender by the date specified by the Court, a representative of the DJJ shall notify the Juvenile Court Clerk at least twenty-four (24) hours prior to the previously ordered placement of the DJJ's inability to place the offender. Upon the receipt of this information, the Clerk shall redocket the offender's case for a hearing before the Juvenile District Court on the date that the child was previously scheduled to be placed in the DJJ's custody, and notify counsel for the Commonwealth and counsel for the offender of the time, date and purpose of the hearing. At that hearing, the Court will enter an appropriate order with respect to the placement of the offender.

812 Treatment Plans.

Individualized treatment plans for all children committed to the DJJ shall be forwarded by the DJJ to the Court and the child's counsel of record within forty-five (45) days of placement in any setting outside of the home. Copies of any progress reports shall also be forwarded to the Court and the child's counsel.

813 Scheduling of Cases – Time Guidelines.

The scheduling of cases for the Juvenile Session of District Court is found in **Appendix E**. Any elapsed time, other than is reasonably necessary for pleadings, discovery and Court events to enable the just and efficient initial disposition and timely post-disposition exercise of court jurisdiction of juvenile cases, is unacceptable. The Court shall firmly and uniformly enforce its time guidelines through any necessary steps, including a strict policy limiting continuances. No request for continuance should be granted in a delinquency case except for good cause shown on the record.

RULE 9 APPOINTMENT OF GUARDIANS AD LITEM

901 Appointment Eligibility.

In order to be appointed as a Guardian Ad Litem in District Court, any licensed attorney in good standing with the Kentucky Bar Association may apply, subject to continued ratification by a majority of the members of the General Term of District Court. The appointment is to be made and compensation paid according to the statute, case law, or civil rule authorizing the appointment.

902 Application.

Application is to be made by submitting the appropriate form, which is available in the Jefferson County District Court Administrator's Office. Appointees serving as Guardians Ad Litem who fail to demonstrate appropriate knowledge of the statutes, law and procedures in the area in which appointment is made, or who fail to discharge diligently the duties for which the appointment is made, may be stricken from the list by a majority vote of the members of the General Term of District Court Judges.

903 Procedure for Appointment.

- A. Appointments shall be made by blind rotation under the following procedures, except for good cause shown by the Court on the record. Examples of good cause may include, but are not limited to: reappointment for prior representation, same sex appointments for sexually abused child, if indicated, etc.

- B. The Clerk of each division of District Court in which the Guardians Ad Litem are appointed shall maintain a list containing each attorney's name, upon which the style of the case and date of appointment as Guardian Ad Litem shall be noted by the clerk. And after each appointment the attorney shall be rotated to the end of the list. Each new applicant shall be placed at the end of the list.

904 Compensation.

Motions for compensation shall be accompanied by an affidavit indicating:

- A. The statutory basis for appointment;

- B. The hours of service rendered with a brief description of the services rendered and reasonableness of the fee requested; and,

- C. That the action or proceedings have been concluded.

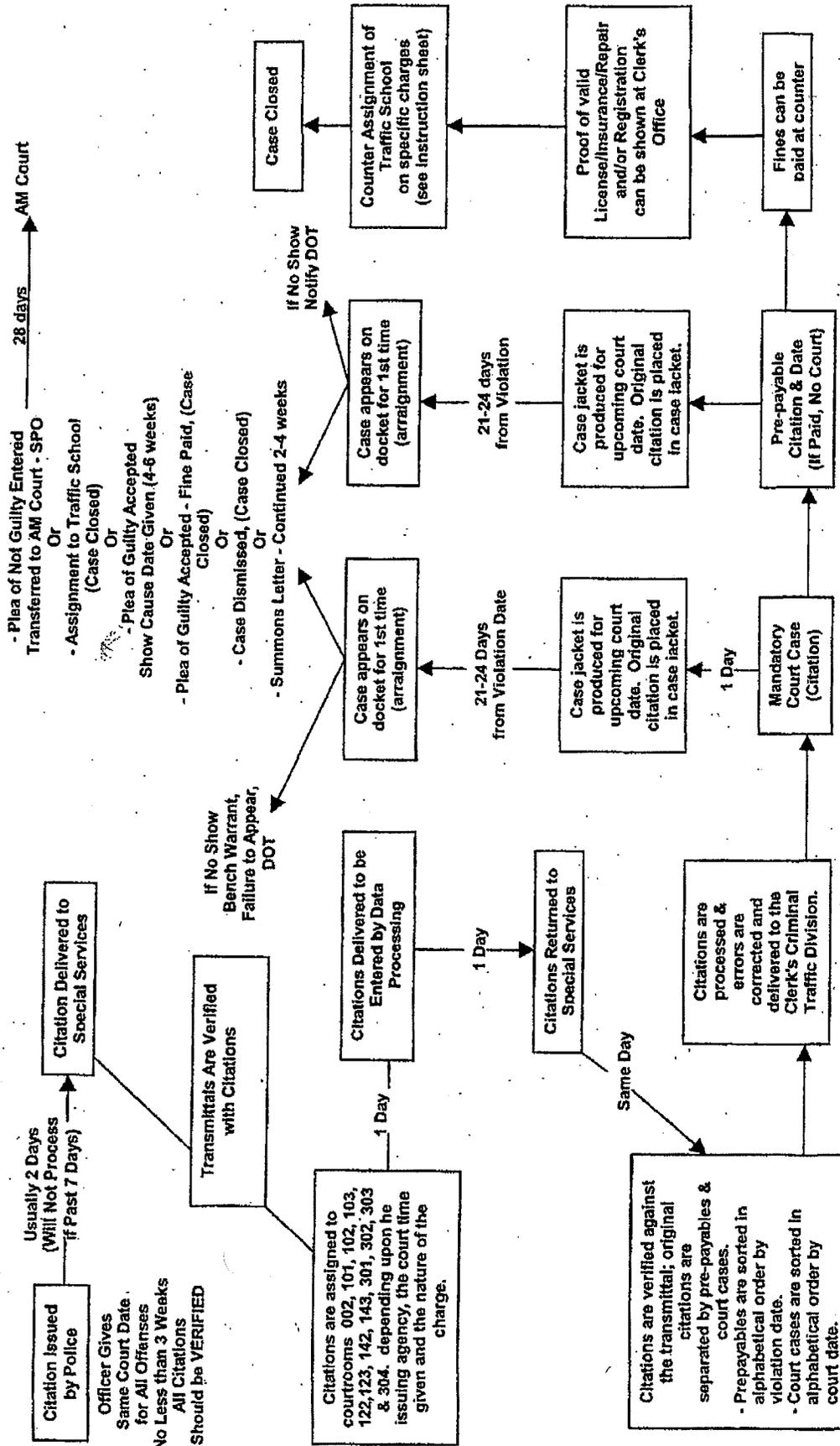
RULE 10 REDUCTION OF WITNESS APPEARANCES IN DISTRICT COURT

Recognizing that excessive appearances as witnesses in court proceedings take citizens away from other important activities, and in particular, that excessive court appearances by law enforcement officers interfere with their availability to be present in the community to protect and serve the citizens of Jefferson County, the District Court shall take all reasonable steps to reduce excessive witness appearances in Court.

All cases continued from arraignment in Court should be continued without process for a pretrial conference with the exception of all felony cases and all citizens' warrants. Pass dates from arraignment should be scheduled within two (2) weeks, if possible.

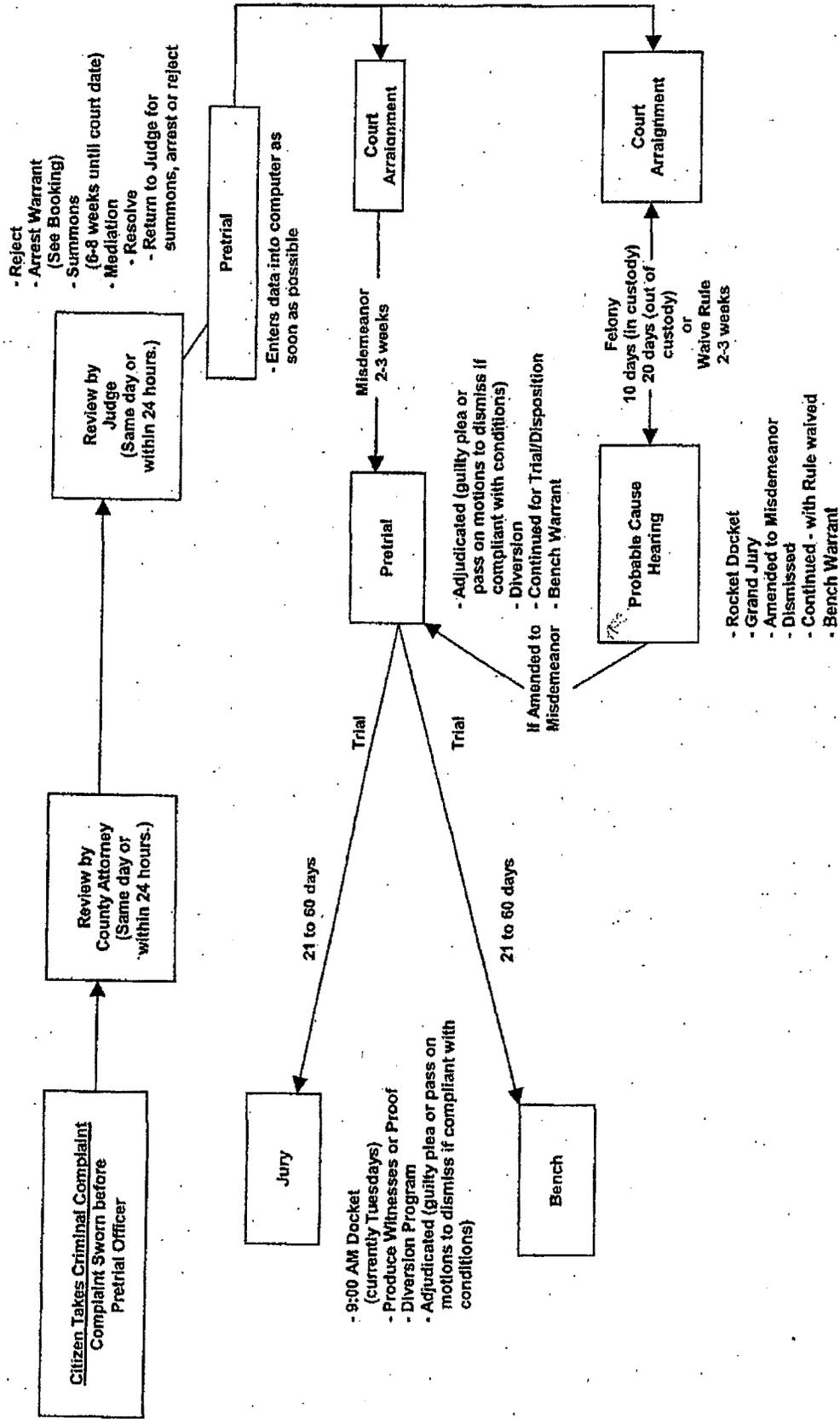
District Court - Citation Case Processing

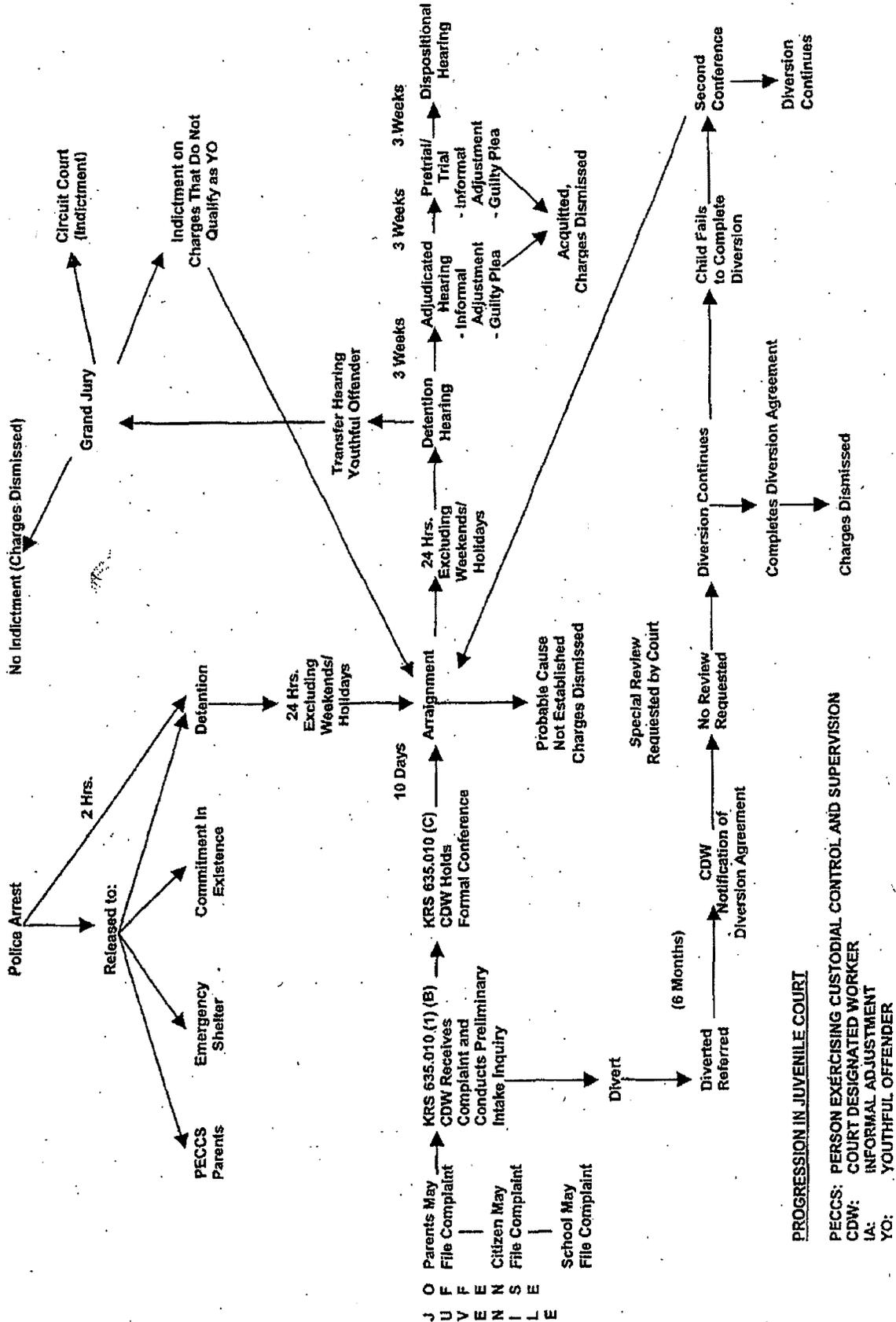
Updated: 01/10/07



District Court - Warrant Processing

Updated: 01/11/07

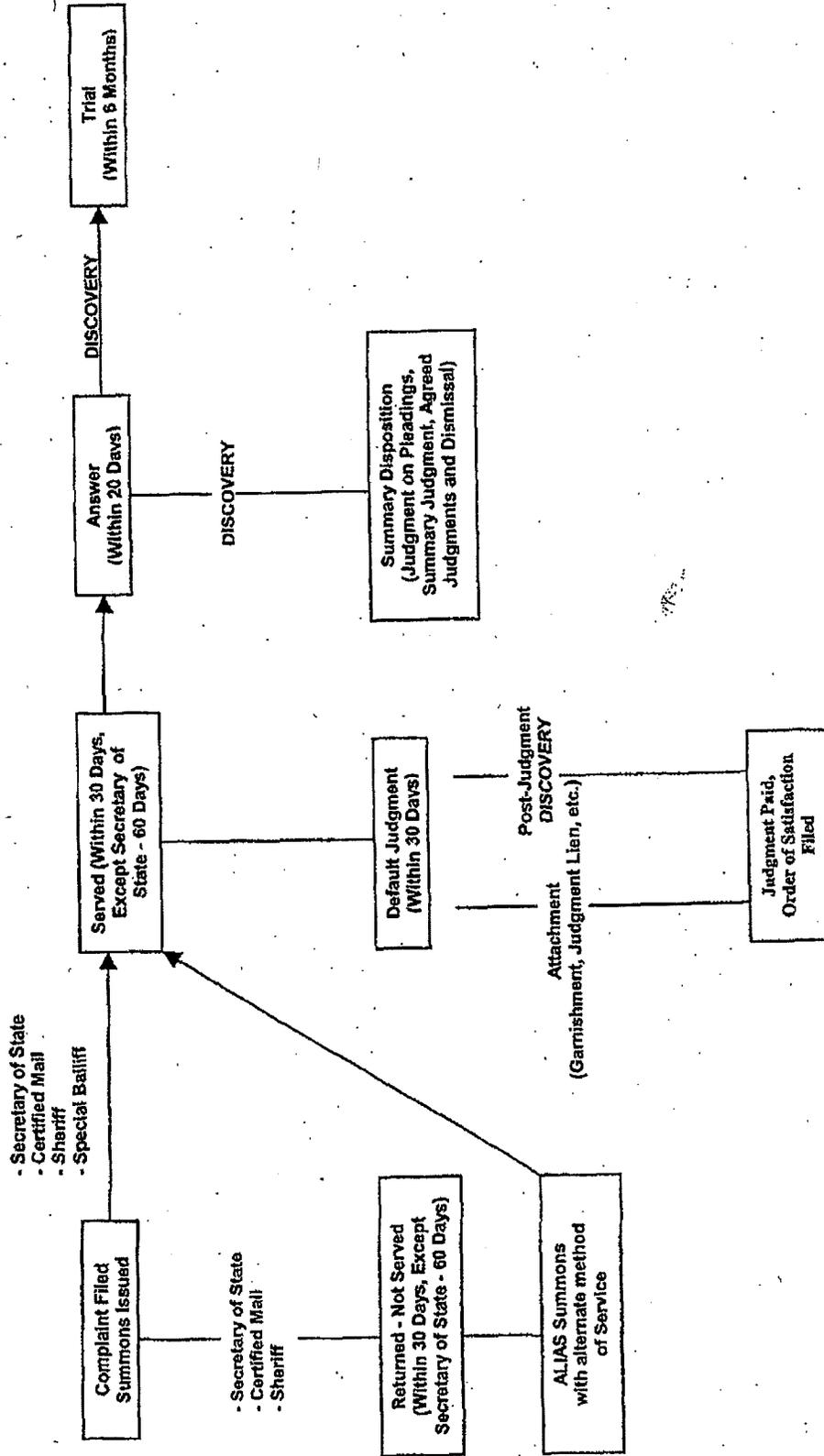




PROGRESSION IN JUVENILE COURT
 PECCS: PERSON EXERCISING CUSTODIAL CONTROL AND SUPERVISION
 CDW: COURT DESIGNATED WORKER
 IA: INFORMAL ADJUSTMENT
 YO: YOUTHFUL OFFENDER

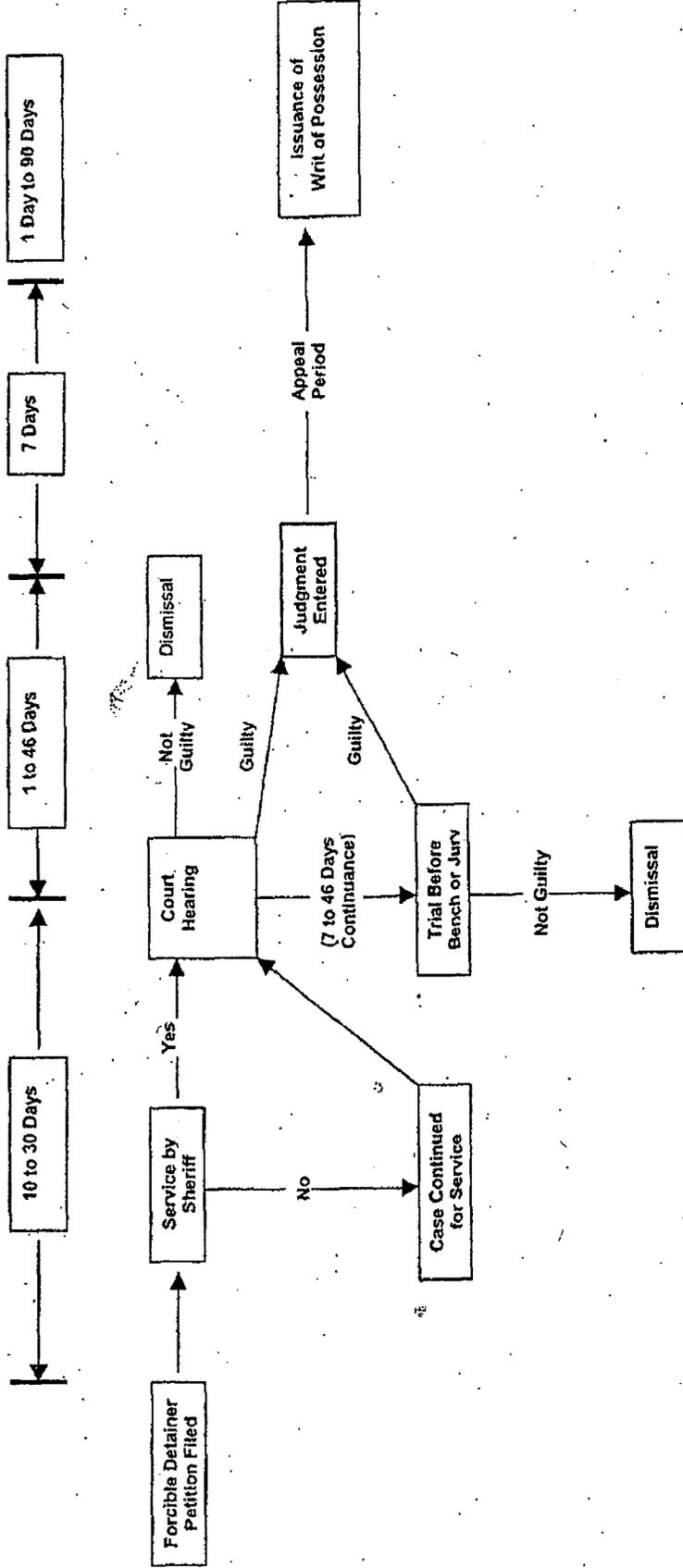
District Court - Civil Division

Updated: 1/10/07



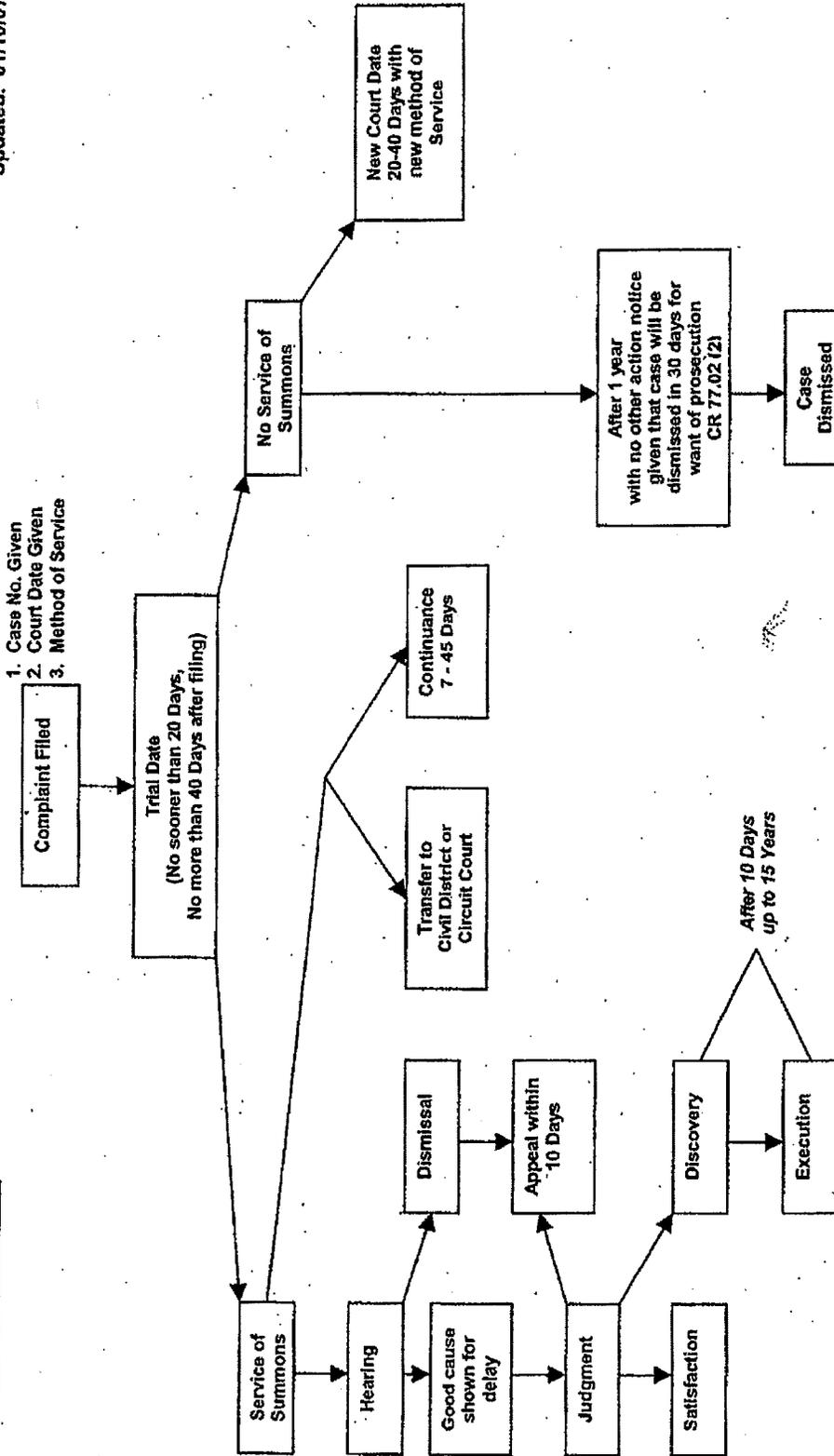
District Court - Forcible Detainer

Updated: 01/10/07



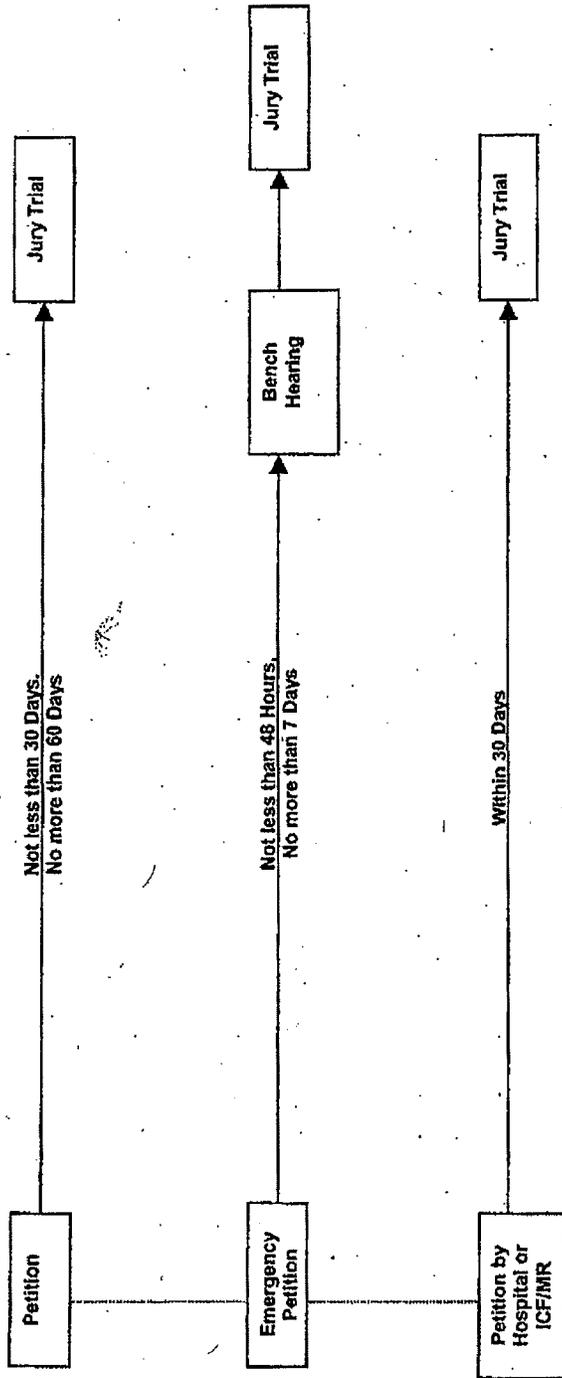
Small Claims Processing

Updated: 01/10/07



Disability/Guardianship

Updated: 01/10/07

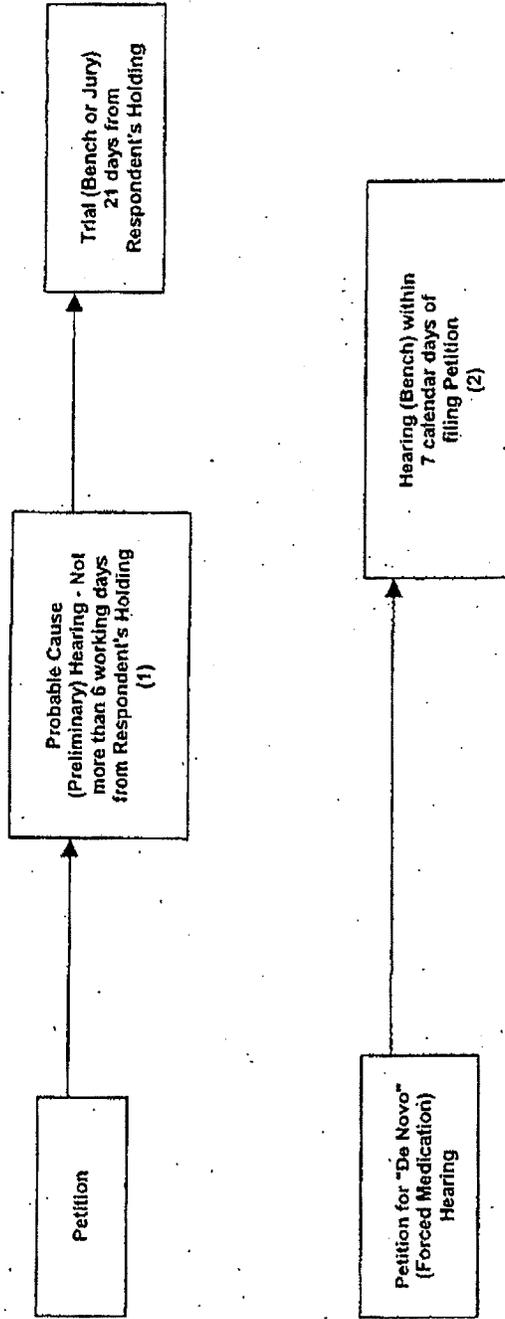


Notes:

1. KRS 387.550 requires interdisciplinary team reports to be filed not less than 10 days before Trial, if petition filed by institution, reports filed with petition.
2. Post adjudication proceedings at weekly motion hour, which is currently scheduled each Thursday at 9:30 a.m. (See JDR 504.)

Mental Inquest - Involuntary Psychiatric Hospitalization

Updated: 01/10/07

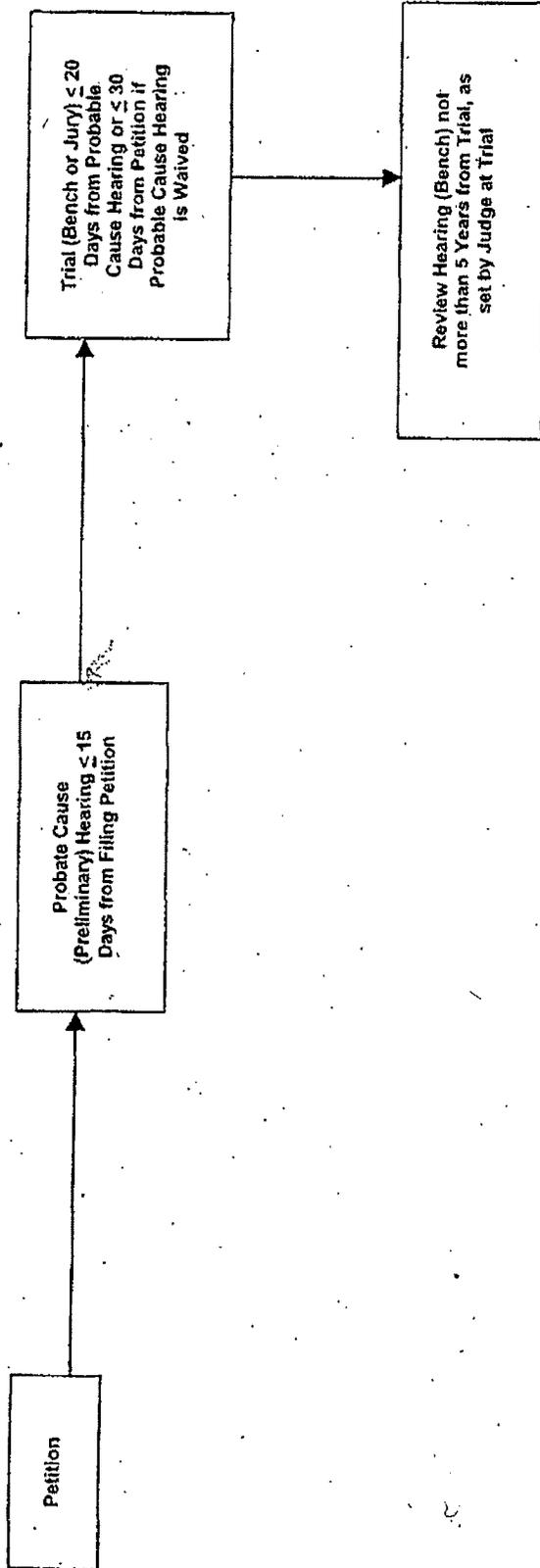


Notes

- (1) - Court (Judge, Clerk, Prosecutor, Defense Attorney) normally travels once each week to area hospitals for these hearings (currently Wednesdays).
- (2) - If Petition for De Novo hearing filed prior to trial, this hearing will usually be held immediately following the trial.

Mental Retardation - Admission Proceedings

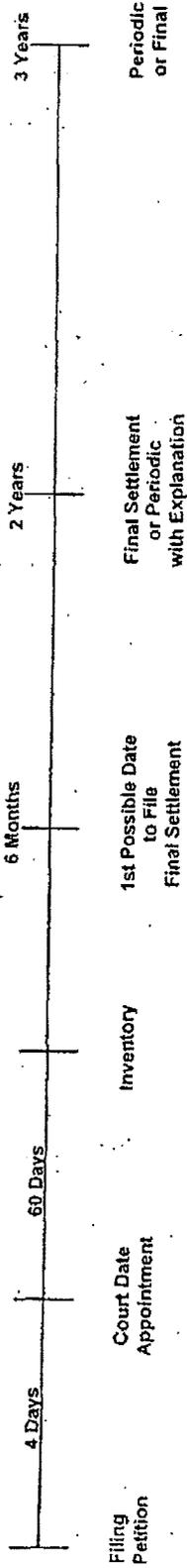
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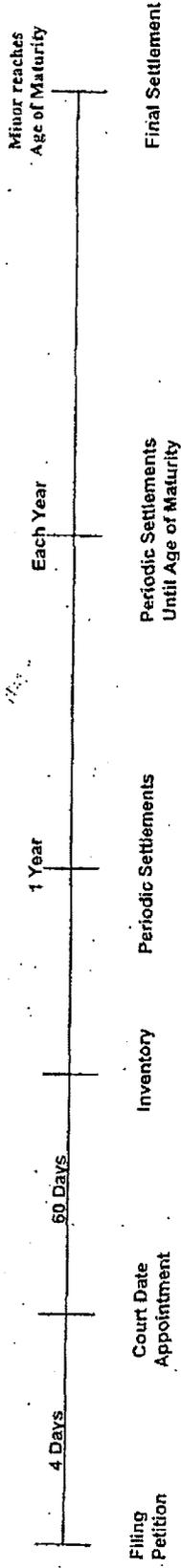
Probate Court (Adult)

Updated: 01/10/07

Decedent's Estate

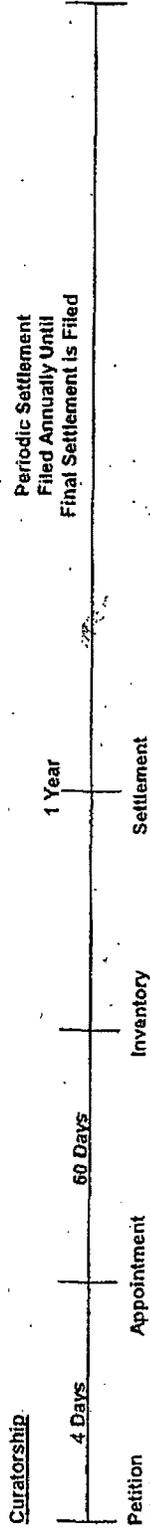


Estate of Minor

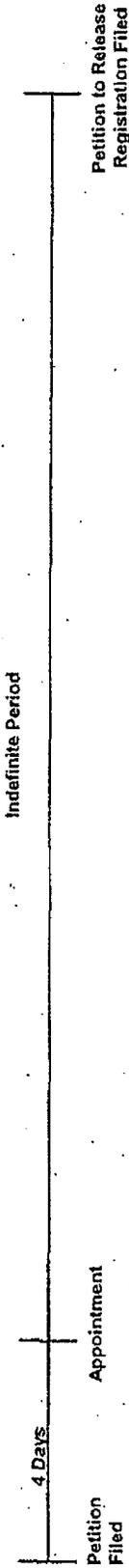


Probate Court - Continued

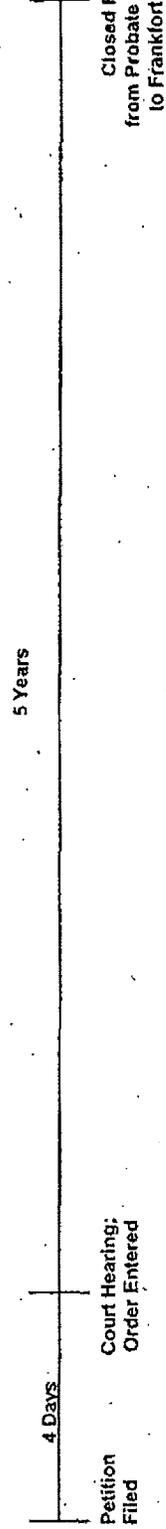
Updated: 01/10/07



Testamentary Trust



Will Probate only, Petition for Name Change, Petition to Dispense with Admin.,
Petition for Infant Settlement without Guardianship.



FORM 407 (2007)

REQUEST FOR EXTENSION OF TIME

RE: ESTATE OF _____

FILE # _____

Original due date fiduciary wishes to extend: _____

Amount of time extension requested: _____

Number of prior requests for time extensions: _____

Reason for requested extension: _____

ATTORNEY OR FIDUCIARY

ADDRESS

SPEEDING VIOLATIONS					SPEEDING VIOLATIONS-HWY WORK ZONE				
OFFENSE CODE	OR	LIA CODE	VIOL.	AMOUNT	OFFENSE CODE	OR	LIA CODE	VIOL.	AMOUNT
* 00001		*00029	1 MPH	\$1.00	* W0001		*W0029	1 MPH	\$2.00
* 00002		*00030	2 MPH	2.00	* W0002		*W0030	2 MPH	4.00
* 00003		*00031	3 MPH	3.00	* W0003		*W0031	3 MPH	6.00
* 00004		*00032	4 MPH	4.00	* W0004		*W0032	4 MPH	8.00
* 00005		*00033	5 MPH	5.00	* W0005		*W0033	5 MPH	10.00
* 00006		*00034	6 MPH	16.00	* W0006		*W0034	6 MPH	32.00
* 00007		*00035	7 MPH	17.00	* W0007		*W0035	7 MPH	34.00
* 00008		*00036	8 MPH	18.00	* W0008		*W0036	8 MPH	36.00
* 00009		*00037	9 MPH	19.00	* W0009		*W0037	9 MPH	38.00
* 00010		*00038	10 MPH	20.00	* W0010		*W0038	10 MPH	40.00
* 00011		*00039	11 MPH	22.00	* W0011		*W0039	11 MPH	44.00
* 00012		*00040	12 MPH	24.00	* W0012		*W0040	12 MPH	48.00
* 00013		*00041	13 MPH	26.00	* W0013		*W0041	13 MPH	52.00
* 00014		*00042	14 MPH	28.00	* W0014		*W0042	14 MPH	56.00
* 00015		*00043	15 MPH	30.00	* W0015		*W0043	15 MPH	60.00
* 00016		*00044	16 MPH	32.00	* W0016		*W0044	16 MPH	64.00
* 00017		*00045	17 MPH	34.00	* W0017		*W0045	17 MPH	68.00
* 00018		*00046	18 MPH	36.00	* W0018		*W0046	18 MPH	72.00
* 00019		*00047	19 MPH	38.00	* W0019		*W0047	19 MPH	76.00
* 00020		*00048	20 MPH	40.00	* W0020		*W0048	20 MPH	80.00

THE FOLLOWING FINES APPLY IF YOU ARE CITED FOR SPEEDING 21-25 MPH OVER THE LIMIT IN A SPEED ZONE LOWER THAN 55 MPH.

* 00021		*00049	21 MPH	\$43.00	* W0021		*W0049	21 MPH	\$86.00
* 00022		*00050	22 MPH	46.00	* W0022		*W0050	22 MPH	92.00
* 00023		*00051	23 MPH	49.00	* W0023		*W0051	23 MPH	98.00
* 00024		*00052	24 MPH	52.00	* W0024		*W0052	24 MPH	104.00
* 00025		*00053	25 MPH	55.00	* W0025		*W0053	25 MPH	110.00

THE FOLLOWING FINES APPLY IF YOU ARE CITED FOR SPEEDING 21-25 MPH OVER THE LIMIT IN A 55 MPH OR GREATER SPEED ZONE.

* 00021		*00049	21 MPH	\$60.00	* W0021		*W0049	21 MPH	\$120.00
* 00022		*00050	22 MPH	60.00	* W0022		*W0050	22 MPH	120.00
* 00023		*00051	23 MPH	60.00	* W0023		*W0051	23 MPH	120.00
* 00024		*00052	24 MPH	60.00	* W0024		*W0052	24 MPH	120.00
* 00025		*00053	25 MPH	60.00	* W0025		*W0053	25 MPH	120.00

OFFENSE CODE	VIOLATION	AMOUNT
* 00271	Disregard / Fail To Yield Right of Way	\$20.00
* 00270	Improper Lane Usage / Vehicles Keep Right Except to Pass	20.00
* 00107	Improper Passing	20.00
* 00108	Failure To or Improper Signal	20.00
* 00109	Improper Turning	20.00
* 00111	Disregarding Stop Sign	20.00
* 00113	Disregarding Traffic Control Device	20.00
* 00115	Reckless Driving	20.00
* 00120	Driving Too Slow For Conditions	20.00
* 00122	Failure to Dim Lights	20.00
* 00126	Failure to Give Right of Way	20.00
* 00128	Disregard RR Crossing Lights	20.00
* 00273	Improper Use of Left lane / Overtaking Vehicle	20.00
* 00130	Failure to Stop at RR Crossing	20.00
* 00131	Failure to illuminate Headlights	20.00
* 00136	Careless Driving	20.00
* 00272	Following Another Vehicle Too Closely	20.00
* 00173	Disregard Compulsary Turn Lane	20.00
* 00176	Driving Too Fast for Conditions	20.00
00231	Obstructed Vision and/or Windshield	20.00
*** 00580	Improper Parking Violation	20.00
00581	Improper Parking Violation Firelane/Block Travel Portion of HWY	20.00
00506	Fail to use Child Restraint Device	50.00
00499	Fail to use Seat Belt	25.00
00470	Open Alcohol Container	35.00
02305	Drinking in a Public Place	25.00
**** 00590	Parking in Handicapped Parking Zone	250.00

If you have been cited and the offense code is not listed on this instruction Sheet, you may call the Criminal Traffic Division of District Court at (502) 595-3060 for instructions.

If you have any questions regarding points assessed call the Department of Transportation.

NOTE: FINES SHALL BE DOUBLED FOR SPEEDING IN A SCHOOL ZONE.

Payment Due Worksheet

Court Cost	\$ 129.00
+ Fine for Violation #1	_____
+ Fine for Violation #2	_____
+ Fine for Violation #3	_____
+ Fine for Violation #4	_____
= Payment Due	_____

ADD THE \$129.00 COURT COST TO YOUR FINE AMOUNT(S) UNLESS YOU WERE ONLY CITED FOR PARKING VIOLATION; 00580, OR 00590.

You must pay court cost even if you do not go to court.

EQUIPMENT/LICENSE/REGISTRATION/INSURANCE VIOLATIONS
(You may pay amount listed or present proof before court date)

OFFENSE CODE	VIOLATION	AMOUNT
00205	Inadequate Silencer (muffler)	\$20.00
00209	Vehicle Nuisance	\$20.00
00220	No Tail Lights	\$20.00
00226	One Headlight	\$20.00
00231	Broken/Cracked Windshield	\$20.00
00240	No Brake Lights	\$20.00
00242	Excessive Window Tinting	\$20.00
00380	No Operators / Moped License	see front of sheet
00405	Improper Registration Plates	**
00407	No/expired Registration Receipt	**
00408	Improper Registration	**
00424	No/expired Registration Plates	**
00425	Improper Display of Plates	**
00435	License To Be In Possession	**
00436	Failure To Report Change of Address D.O.T.	**
00439	License Plate Not Legible	**
00480	No Insurance Owner - 1 st offense	**
00481	No Insurance Owner - 2 nd offense	**
00482	No Insurance Non-Owner - 1 st offense	**
00483	No Insurance Non-Owner - 2 nd offense	**
00484	No Insurance Owner permitting vehicle operation - 1 st offense	**
00485	No Insurance Owner permitting vehicle operation - 1 st offense	**

* Signifies Eligible for Traffic School with a Court Cost of \$129.00 before court date.
 ** See front of Instruction Sheet
 *** No court cost
 **** If you are cited for parking in Handicapped Parking Zone (00590), the fine is \$250.00. If fine is paid before court date, there is no court cost.

**PREPAYABLE OFFENSES
INSTRUCTION SHEET**

This instruction sheet contains important information. Please read in its entirety. Failure to comply with the directions below and make appropriate payment or respond to the citation may result in suspension of your drivers' license.

PLEA OF GUILTY AND PREPAYMENT OF COURT COST AND FINE(S)

Many violations are payable prior to the court date. If your citation is marked "payable," you may prepay the court cost and fine(s) by mail or in person. By prepaying, you are pleading guilty to the violation(s) for which you were cited. **THE TOTAL AMOUNT FOR COST AND FINE(S) MUST BE RECEIVED AT THE ADDRESS LISTED BELOW BEFORE THE COURT DATE ON YOUR CITATION.**

1. Mailed payments should be in the form of a certified check or money order in the amount specified in the payment box and made payable to the Circuit Court Clerk noted below. Do not send cash through the mail. All mailed payments must be post marked at least seven (7) business days prior to the court date on your citation.
2. Payments made in person may be made in the form of cash, certified check or money order. Canadian checks must indicate that payment is in "U.S. dollars."

PAYMENT OF COURT COST AND FINE(S)

OFFENSE(S) CITED	FINE AMOUNT
1. 00020 SPEEDING 20 MPH OVER LIMIT (LIMITED ACCESS)	\$ 40.00
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10. Court Cost	\$ 129.00
TOTAL AMOUNT DUE	\$ 169.00

Mail payment and copy of citation to: David Nicholson
Jefferson County Circuit Clerk
600 W. Jefferson Street
Louisville, KY 40202-4731
(502) 595-4428

PLEA OF NOT GUILTY AND COURT APPEARANCE

If you wish to plead not guilty, appear in court on the date written on your citation. **FAILURE TO RESPOND TO THE CITATION MAY RESULT IN SUSPENSION OF YOUR DRIVERS' LICENSE.**

STATE TRAFFIC SCHOOL

If you have a valid drivers license with your current address and have not been assigned to State Traffic School in the last twelve (12) months, you may be eligible. **TO REQUEST STATE TRAFFIC SCHOOL, CONTACT THE CIRCUIT COURT CLERK.** If you are permitted to attend State Traffic School, you must provide the Circuit Court Clerk a written request to attend State Traffic School, a copy of your citation, and payment for the court costs listed on line 10 in the payment box before your court date. If State Traffic School is ordered, you will be billed an additional fee by the school at a later date.

YEAR	CONTROL NUMBER	TYPE
07	AC65350	1

JEFFERSON COUNTY DOMESTIC VIOLENCE PROTOCOL

Pursuant to KRS 403.735 (3) the Jefferson Trial Courts establish the following procedures to insure twenty-four (24) hour accessibility to Emergency Protective Orders (EPO).

I. Access to Protection from Domestic Violence:

A. Three hundred and sixty-five (365) days per year, seven (7) days per week, and twenty-four (24) hours per day the following persons are authorized to provide Domestic Violence Petition Forms to any person seeking an EPO:

(1) Jefferson Circuit Court Clerk and Deputy Clerks.

B. A verified petition for a Domestic Violence Order (DVO) of protection and an ex parte EPO shall be filed at the Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 or the Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202.

<u>Days</u>	<u>Times & Location</u>
Monday – Friday	7:30 a.m. – 3:30 p.m. Family Court Clerk's Office 1 st floor, Judicial Center
Monday – Friday	3:30 p.m. – 7:30 a.m. Criminal/Traffic Clerk's Office 1 st floor, Hall of Justice
Holiday, Weekends	All times Criminal/Traffic Clerk's Office 1 st floor, Hall of Justice

C. A criminal complaint and/or an EPO with a criminal complaint on domestic violence only shall be filed at the Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202.

<u>Days</u>	<u>Time & Location</u>
Monday – Friday	8:00 a.m. – Midnight Domestic Violence Intake Office 1 st floor, Hall of Justice
Weekends Holidays	10:00 a.m. – 6:00 p.m. 8:00 a.m. – 4:30 p.m. Domestic Violence Intake Office 1 st floor, Hall of Justice

II. Domestic Violence Petitions

All domestic violence petitions shall be assigned a domestic violence "D" case number with the appropriate trailer number, if any, regardless of who (District Court Judge, Family Court Judge, Circuit Court Judge or Trial Commissioner) reviews the petition and orders the case filed.

- A. This procedure shall apply to petitions filed during the pendency of a dissolution or child custody proceedings.
- B. If a verified motion alleging an act of domestic violence is filed in a dissolution or child custody proceeding, an AOC-275.1 (Domestic Violence Petition) must be filed with the motion pursuant to KRS 403.730 (2). The petition shall be assigned a domestic violence "D" case number with the appropriate trailer number.
- C. The judge number of the judge or trial commissioner reviewing the petition and ordering the case filed shall be entered on the case screen as the opening judge.

III. Domestic Violence Petitions Filed During Regular Office Hours.

- A. At the time the case is opened, the Circuit Clerk shall check the index of Circuit Court cases to ascertain if a dissolution or child custody proceeding is pending.
- B. The Circuit Clerk shall present the petition to a Family Court Judge, and then, if a Family Court Judge is not available to a District Court Judge, or Circuit Court Judge.
- C. If an EPO is issued, the Circuit Clerk shall file the Petition as a domestic violence "D" case in Family Court and schedule a domestic violence hearing with the appropriate Family Court Judge.
- D. If it is determined a dissolution or child custody proceeding is pending and an EPO is issued, the Circuit Clerk shall cross-reference the "D" case with the dissolution or child custody case file and place a copy of the EPO in the file. Additionally, if a DVO is issued, upon entry, the Circuit Clerk shall place a copy of the DVO in the dissolution or child custody case file.

IV. Domestic Violence Petitions Filed After Regular Office Hours and Weekends.

- A. The Circuit Clerk shall present the petition to the on-duty District Court Judge or on-duty Trial Commissioner and, if unavailable, to the secondary duty Judge. If these individuals are unavailable the petition shall be presented to any District Court Judge and, if none available, to any Family Court Judge or Circuit Court Judge.

- B. Upon receipt by the Circuit Clerk of a verified domestic violence petition taken after business hours or during a weekend, for which a domestic violence hearing has been scheduled with a Family Court Judge, the Circuit Clerk shall check the circuit court case index to ascertain if a dissolution or child custody proceeding is pending.
- C. The Circuit Clerk shall file the petition (and any EPO issued) as a domestic violence "D" case in the Family Court, regardless of which District Judge, Trial Commissioner, Circuit Judge or Family Court Judge ordered the filing of the petition. The Circuit Clerk shall calendar the hearing by completing a scheduled event screen in the case management system.
- D. If it is determined a dissolution or child custody proceeding is pending, the Circuit Clerk shall notify the Family Court Judge of the pendency of same. The Clerk shall cross-reference the "D" case with the dissolution or child custody case. Additionally, a copy of the EPO/DVO shall be placed in the dissolution or child custody case file.
- E. If it is determined that a dissolution or child custody proceeding is pending in another Kentucky county, the Jefferson County Judge at the DVO hearing will consider whether to retain jurisdiction or reissue the EPO until the matter can be heard by the judge in the other county in accordance with KRS 403.740(4).

V. Violation of Domestic Violence Orders

- A. Alleged violations of Domestic Violence orders shall be processed as criminal actions for a violation and referred to District Court for prosecution, except as set forth below.
- B. Alleged violation of Domestic Violence orders pertaining to visitation, child support, counseling or firearms provisions shall be initiated through the Family Court and scheduled for contempt hearings on the appropriate Family Court docket. A copy of the EPO/DVO shall be placed in the dissolution or child custody file.

(01/23/07)

APPENDIX E – JDR 813

Scheduling of Cases -- Juvenile Session of District Court

TYPE OF CASES	PUBLIC OFFENDERS	FIREARM-FELONY OFFENDER CASES	TRADITIONAL WAIVER CASES
ARRAIGNMENT (ARR)	w/i 24 hrs of DET	w/i 24 hrs of DET	w/i 24 hrs of DET
DETENTION (DET)	w/i 24 hrs from ARR	w/i 24 hrs from ARR	w/i 24 hrs from ARR
PRETRIAL (PT)	w/i 3 weeks after ARR	w/i 3 weeks after ARR	w/i 3 weeks after ARR
WAIVER/ PROBABLE CAUSE HRS (PC) KRS 640.010(2)(A)	n/a	w/i 3 weeks after PT	w/i 3 weeks after PT
WAIVER KRS 640.010(2)(B)	n/a	n/a	w/i 3 weeks after PC hearing
DISPOSITION	w/i 4 weeks after PC or trial	n/a	n/a
TRIAL	w/i 3 weeks after PT	n/a	n/a

Latest Draft: January 23, 2007

Name _____

Case # _____

Kentucky Pretrial Services
Participation Agreement

The Pretrial Diversion Program is a program of the Courts made available to you on a voluntary basis. Your successful participation will result in a recommendation that the charge(s) now pending against you be dismissed without trial. In order to become enrolled as a participant, you must agree to the following conditions:

1. I understand that this program is entirely voluntary and I agree to participate.
2. I may withdraw from the program at any time and must answer in court of accusations made against me regarding my future.
3. I voluntarily agree to waive my right to a speedy trial.
4. I will not be involved in any criminal acts during the diversion period or I may be prosecuted for this and any additional offenses that may result.
5. I agree to allow my Diversion Officer to talk to my immediate family about the conditions of this contract.
6. I agree to attend all appointments as arranged with my Diversion Officer.
7. I agree to report any changes in my address or phone number to my Diversion Officer within 3 business days.
8. I will report and cooperate with any agencies that I am referred to by my Diversion Officer.
9. I must pay a program fee of \$_____. I understand a bill will be sent to me and that I will send a check or money order made payable to: **Kentucky State Treasurer**
Payments should be mailed to:

Diversion Fee
100 Millcreek Park
Frankfort, KY 40601

10. I must pay restitution in the amount of \$_____. I can make payments of \$_____ per week/month starting on_____.
11. I further agree to the following conditions:

12. I understand that failure to fulfill any of these obligations may be considered sufficient reason by the Diversion Officer, Judge, Prosecutor, and or Director of the program to proceed with prosecution for this offense.

I understand also that if I demonstrate that I can and will behave in a law-abiding manner, a dismissal recommendation will be made, and if accepted by the court, my case will be dismissed without trial and that I will not then have a conviction record because of the present charge(s) against me.

Witness _____
Diversion Officer

_____ Date _____
Participant

**DEPOSITIONS: ETHICAL AND PRACTICAL ISSUES
BASED ON THE KENTUCKY RULES OF CIVIL PROCEDURE**

William H. Fortune

I. DEPOSITIONS COME IN FOUR FLAVORS

A. Discovery

1. Of the adverse party.
2. Someone with relevant knowledge.

B. Evidentiary to Perpetuate Testimony

1. At the time of taking, it is contemplated that the deposition may – or must – be used in place of the live testimony of the witness, e.g. as stipulated or as required by [CR 32.01\(c\)](#) for the protection of certain kinds of witnesses (occupations, distance, military, etc.).
2. 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 45.05](#).

C. Evidentiary in Equity Actions

1. Divorce.
2. Judicial sales.
3. Accountings, etc.
4. The rule provides that **all** proof shall be submitted by deposition unless the court thinks it's important for the witness to testify in person. The procedure is much the same as at trial – plaintiff goes first, then the defendant, with rebuttal and sur-rebuttal evidence. Exceptions may be filed. When the proof is complete it is submitted to the court. [CR 43.04](#).

D. Evidentiary or Discovery on Written Questions. [CR 31](#).

1. May be used in any case. Questions, including any submitted by the opposing party, are delivered to the officer who will take the deposition; that person swears the witness and records the answers, filing the questions and answers with the court.
2. Neither party nor an agent/attorney may be present when the witness answers the question.

3. An evidentiary deposition should proceed as if the deponent had been called as a witness at trial. Direct examination without leading, cross examination, etc. Leading by the deposing attorney is proper only if the witness is hostile, an adverse party, or a witness identified with an adverse party. [KRE 611](#).

II. DISCOVERY DEPOSITIONS ARE FOR THE FOLLOWING PURPOSES

- A. For the Discovery of Information
- B. To Facilitate Settlement – Shared Information Leads to Informed Settlements
- C. To Support a Motion for Summary Judgment
- D. To Prepare for Trial

III. PREPARING TO TAKE A DISCOVERY DEPOSITION OF THE ADVERSE PARTY

- A. Know as Much as You Can before the Deposition
 1. Interrogatories, request for production, investigation.
 2. You can combine a notice to take with a request for production.
- B. Decide What You Want to Ask and Make a Checklist
- C. Decide What You Want To Agree To
- D. Be Prepared for Dirty Tricks by the Opponent
- E. Decide Whether to Videotape
 1. Arrange for the videographer.
 2. Arrange for the stenographer.
- F. Arrange the Date and Venue by Agreement; If Not Possible, Give Notice
- G. Arrange for the Officer – A Notary – but not One Employed by the Lawyer

IV. RULES RELATING TO SETTING UP THE DEPOSITION

- A. An Authorized Person Must Swear the Witness (Can Use Any Notary Public Except One Employed by Counsel)
- B. The Opposing Party Can Be Put under an Obligation to Attend by Notice Mailed to the Party's Attorney

1. The notice may be coupled with a [CR 34](#) request to produce documents at the deposition.
 2. 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\(6\)](#).
 3. The attorney for the corporation represents – for purposes of the deposition – employees produced pursuant to [CR 30.02\(6\)](#).
 4. Those employees have agreed to appear on behalf of the corporation.
- C. Corporation Representation?
1. Does the attorney for the corporation represent – for purposes of depositions taken by opposing counsel – employees other than those designated by [CR 30.02\(6\)](#)?
 2. 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 with Notice to Opposing Counsel
1. Failure to subpoena a witness might abort a deposition and result in the imposition of costs as a sanction.
 2. A witness may be required to attend a deposition only in the county in which the witness resides or works unless the court orders differently. [CR 45.04\(3\)](#).
- E. [CR 30.02](#) Allows Testimony to be Taken Stenographically, by Videotape, or Both
1. There is no provision in [CR 30.02](#) for audiotaped depositions; however, the parties may agree to only audiotape the deposition.
 2. 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 is to be kept by the 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.
 3. Attorneys considering videotaping should read [CR 30.02\(4\)](#) carefully.

- F. Protective Orders May Be Issued to Control the Number, Time, Place and Manner of Depositions ([CR 26.03](#))

V. TAKING A DISCOVERY DEPOSITION

- A. Put Agreements on the Record
 - 1. Is the deposition taken by agreement?
 - 2. Is deposition taken 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?
 - 1. Is there a difference between the deponent asking to consult with his lawyer and the lawyer interrupting the deposition to consult with the deponent?
 - 2. The most logical rule is that, in the absence of an agreement, there is only a "right" for the deponent or the deponent's lawyer to go off record when a matter of privilege is implicated. [Hall v. Clifton Precision, 150 F.R.D. 525 \(E.D.Pa. 1993\)](#) is the leading case.
 - 3. Going off the record with a pending question should be impermissible. This would not be allowed at trial.
 - 4. 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?
 - 1. Local rules might speak to this. Example: In Fayette County depositions shall not be filed unless there is a discovery controversy.
 - 2. The lawyer taking the deposition becomes the custodian of a non-filed deposition.
 - 3. Some local rules require depositions to be filed, so always check the local rules.

- F. Is Signature of the Deponent Waived?
1. [CR 30.05](#) requires a written request to the officer taking the deposition (the person who swore the witness).
 2. 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.

VI. QUESTIONING THE DEPONENT

- A. Ask the Deponent to Commit to Answer the Question Asked
1. Tell the deposing attorney if the deponent doesn't understand.
 2. Try to make the deponent's attorney into a bystander (a "potted plant").
 3. The taking attorney tries to get the deponent to narrate, then uses leading questions to solidify important points.
 4. Very important that questions be clear and not compound.
- B. Leading Questions Are Appropriate
1. If the deponent is the opposing party, but problematic if the deponent is a mere witness unassociated with the opposing party.
 2. Nevertheless, the custom appears to be that leading questions may be used with any witness.
- C. Reserve Objections?
1. Attorneys defending the deposition sometimes agree to reserve objections as to form.
 2. Such agreements deprive the attorney representing the deponent of the ability to protect the deponent against unfair or confusing questions.
- D. Discovery vs. Evidentiary
1. A discovery deposition might become an evidentiary deposition if the deponent is unexpectedly unavailable at trial.
 2. 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.

VII. RULES RELATED TO THE TAKING OF THE DEPOSITION

A. [CR 32.04](#) Provides that Objections as to Form Are Waived

1. Unless made at the time of taking, but objections as to substance (competency, relevance, 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.
2. 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.
3. 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.
4. Objections as to form are waived unless made at the time.
5. An objection as to privilege, of course, must be made at the time of the deposition (usually coupled with an instruction not to answer).

B. Should the Attorney Taking the Deposition Agree to Have All Objections Reserved?

1. 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.
2. Examples of objections as to form: leading, compound, unwarranted assumption.
3. Examples of objections as to substance: hearsay, irrelevant, calls for speculation.

C. Writings Used during a Deposition

1. [KRE 612](#) provides that the opposing attorney is entitled to see any document that a witness looks at during a deposition.
2. Thus, the attorney representing the deponent should approve notes or a summary that a deponent takes into a deposition.

D. Deposition Documents

1. Documents used during a deposition should be marked as exhibits and copies.

2. Documents should be attached to the transcript or filed with the videotape.

VIII. PREPARING A CLIENT FOR A DISCOVERY DEPOSITION

- A. Prepare the Client Thoroughly
 1. Rehearse.
 2. Go over all matters.
- B. Make Sure that the Client Understands
 1. That the attorney's role is limited to protecting the attorney-client privilege and protecting the client from harassment.
 2. The attorney cannot tell the client how to answer the questions.
- C. Tell the Client Not to Volunteer; Answer the Question Asked
- D. Make Sure the Client Understands the Question
 1. Tell the client to ask for a clarification if the client doesn't understand.
 2. Hesitating before you answer might not be good advice if the deposition is videotaped.
- E. Answer Truthfully and Accurately – But Don't Guess
- F. Tell the Truth and Don't Be Evasive
- G. Don't Argue or Become Angry

IX. TIPS FOR DEONENTS IN DEPOSITIONS TO BE VIDEOTAPED

- A. Where to Look?
 1. Look at the attorney asking the questions.
 2. At a point between the camera and the attorney.
 3. Do not look at the camera.
 4. At the deponent's attorney.
- B. Dress as if You Were Going to Church

- C. Try to Eliminate Distracting Mannerisms
 - 1. Shifting in chair.
 - 2. Rocking.
- D. Remember that You Are "On" all the Time, even when the Attorneys Are Talking

X. PREPARING A NON-CLIENT WITNESS FOR A DEPOSITION

- A. There is a Difference between Preparing a Client for a Deposition and Preparing a Non-Client for a Deposition
 - 1. Discussions with a client are privileged.
 - 2. Discussions with a non-client are not. The opposing attorney may legitimately ask the non-client about those discussions.
- B. Privileged Documents
 - 1. Showing a prospective witness privileged documents (attorney client or work product) might serve to waive the privilege.
 - 2. This will make the documents subject to subpoena.

XI. 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
 - 1. Changing the story.
 - 2. Wanting to know what others say happened.
 - 3. Selective memory.
 - 4. Wanting to know what the attorney wants to have happened.
- C. Estimates: Speed, Time and Distance
 - 1. Estimates are often inaccurate.
 - 2. Client is entitled to know the implications of an inaccurate estimate of one or more of these variables.

D. Consequences

1. The client is entitled to know the legal consequences of a particular version of the facts.
2. The client 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."

F. 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.

XII. REPRESENTING A CLIENT DURING A DISCOVERY DEPOSITION

- A. Make Legitimate Objections to Form
- B. Make Objections on Matters of Substance that Might Be the Subject of a Waiver Argument
- C. Make Legitimate Objections on Matters of Privilege; Instruct Deponent Not to Answer
- D. Use "Rebuttal" to Clarify "What the Witness Meant"
- E. Call "Time Outs" where Appropriate
- F. Protect Your Client from Abuse. Be Prepared to Terminate. Make a Good Record before You Terminate.

- G. Tell Your Client Not to Volunteer to Provide Additional Information (Documents). Perhaps Deal with this after the Deposition.

XIII. UNCIVIL BEHAVIOR BY THE ATTORNEY TAKING THE DEPOSITION

- A. Sending Notice Rather than Trying to Work out a Date
- 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

**XIV. 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
 - 1. [CR 30.03\(3\)](#) states that "Any objection . . . shall be stated concisely and in a non-argumentative and non-suggestive manner."
 - 2. 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. An Attorney May Instruct a Client Not to Answer [CR 30.03\(3\)](#)
 - 1. Only to preserve a privilege.
 - 2. To enforce a limitation on the evidence imposed by the court.
 - 3. Or to make a motion to prevent the client from harassment.
- E. An Attorney Has No Authority to Instruct a Non-Client Not to Answer
 - 1. An attorney should try to protect a non-client from harassment by the opposing attorney.
 - 2. An attorney may recess the deposition to ask the court to protect the non-client.

- F. Secret Constructions of Words or Phrases to Enable the Deponent to Answer the Question Negatively
 - 1. Narrow the definition of "sex"
 - 2. "Have you ever had sex with her?"

XV. 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

XVI. CORRECTING A DEPOSITION

- A. [CR 30.05](#) Provides that Any Party May Request that the Transcript (if One Exists) be Submitted to the Witness for Examination and Signing
 - 1. This gives the witness an opportunity to correct errors in transcription.
 - 2. The officer taking the deposition is to note the changes and the witness's reasons for making the changes.
 - 3. 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
 - 1. This duty arises as soon as the attorney becomes aware of the false response.

2. 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)?
1. [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."
 2. 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.

FIELD SOBRIETY TESTS REVIEW
A QUICK REFERENCE GUIDE FOR PROSECUTORS & OFFICERS ON WHAT THEY
SHOULD KNOW ABOUT THE STANDARDIZED FIELD SOBRIETY TESTS

Bob Stokes, Esq.¹

INTRODUCTION

By Jared Olson, Idaho TSRP

Like you, I am passionate about holding drivers accountable for their choice to drive under the influence of alcohol and other drugs. Impaired driving cases are among the most difficult a patrol officer or a misdemeanor prosecutor will handle, particularly early in their careers. Defense attorneys routinely take advantage of this. Additionally, popular culture has raised the burden of proof in all types of criminal cases. Jurors may expect to be presented with "scientific" evidence even where none should be expected to exist. My hope is prosecutors and officers will use this outline to prepare for court and then better explain the SFST evidence to jurors.

Back to the Basics

The focus of an impaired driving case can take a wrong turn when it becomes all about the officer's performance and/or knowledge of the standardized field sobriety tests (SFSTs). The defendant's impairment and decision to drive must remain our focus. Defense counsel will always put officers on trial for their execution of SFSTs, but there are things we can do as officers and prosecutors to keep our trials on the correct path. I learned by watching Saturday morning cartoons that "Knowledge is Power!" We keep our trials on the right path by proactively educating ourselves in the science and the law and then present our information in a manner that will be remembered and believed by the finders of fact. The purpose of this guide is to provide the necessary knowledge to effectively present this important evidence in the courtroom.

Review of the Field Sobriety Tests

The current edition of NHTSA's Standardized Field Sobriety Testing Manual was published **October 2015**. This review was created using this updated manual. If you have not attended a refresher course, my suggestion is to do it now. If you have been using my older versions of the "Field Sobriety Tests Review" please disregard those documents and replace them with this version.

The Texas District & County Attorneys Association has done all of the heavy lifting for me and has graciously granted permission to reprint their materials. I have taken their original work, added to it, and updated it to coincide with the current NHTSA manuals. TDCAA material is copyright protected, as is IPAA material. My thanks to Texas prosecutors Clay Abbott and Warren Diepraam, who originally authored much of this

¹ This handout is a collaboration between Jared Olson of the [Idaho Prosecuting Attorneys Association](#) and Clay Abbott of the [Texas District & County Attorneys Association](#) and is copyright protected. Permission was granted to reprint these materials with the addition of Kentucky case law.

document and made it available to law enforcement and prosecutors across the country! Please visit www.tdcaa.com for more of their excellent impaired driving resources.

I also want to thank Deena Ryerson, Oregon's Traffic Safety Resource Prosecutor. She spent many hours reviewing the 2013 NHTSA SFST Manuals, which made this 2015 update so much easier to accomplish.

Wait . . . We Better Start with Mom

Before we delve into the Standardized Field Sobriety Tests, let's not forget *Mom's Field Sobriety Tests*. Clay Abbott explains that all jurors had mothers, just like yours. Like you, your jurors' mothers likely conducted their own field sobriety tests when your jurors were teenagers coming home late at night, just like Clay's mom did. In Clay's words:

My mother made me wake her up and give her a hug; then she asked me silly questions about my night, all while smelling my breath for alcohol, scanning for bloodshot eyes, and checking my ability to converse with all my faculties.

Mom's sobriety tests – while not as well researched, tested and verified as the SFSTs – are far better accepted by and understandable to the average juror. So before officers on the stand ever get to SFSTs, they must fully explain they conducted Mom's sobriety tests on the defendant too. This is where impaired driving cases are won. While defense counsel will always put officers on trial for their execution of SFSTs, the defendant remains the focus of Mom's sobriety tests.

Nothing in a DUI investigation is as important as this first contact and conversation you have with the defendant. Don't rush it. Spend as much energy developing this set of skills and techniques as you do any other. ****Reprinted from "The Prosecutor" (Vol. 38, No. 3, 2008) a publication of the TDCAA with permission of the author. [CLICK HERE](#) to read the full article.*

The importance of "Mom's sobriety tests" cannot be overstated. They are observations everyone can relate to, as opposed to the SFSTs some jurors think they "couldn't do sober." SFSTs are not to be discounted, of course. But when analyzing them and presenting them at trial, focus should be on common place observations, as opposed to "clues" and "points."

Why is a field sobriety test important to driving? Not because the driver cannot stand on one leg for thirty seconds without putting their foot down or raising their arms. They are important because they are divided attention activities. *What is driving?* A divided attention activity! If a driver cannot follow simple instructions and maintain attention to the relatively easy task at hand, then how can they expect to maintain attention to the more difficult task of driving a 2,000-pound car?

This Field Sobriety Test Review becomes powerful only when the research is understood and the training is applied in the field and later demonstrated in the courtroom to draw a simple visual picture of a very dangerous impaired driver who needs to be held accountable. Let's get started!

FIELD SOBRIETY TEST REVIEW²

This review includes hyperlinks to original sources, additional studies and other materials. Clicking on any of the text in blue will take you directly to the materials. For example, clicking on the following blue text you can download the entire October 2015 NHTSA [Instructor & Participant](#) manuals. Of course, you must have Internet access for these links to work. Please feel free to contact me at bstokes@prosecutors.ky.gov if you have any problems accessing the materials.

In addition, the review is organized in the same order the Standardized Field Sobriety Tests are conducted. The review begins with Horizontal Gaze Nystagmus, followed by Walk and Turn, and finally the One-Leg Stand. The document concludes with an overall summary of the field sobriety tests. Let's begin . . .

Horizontal Gaze Nystagmus (HGN)

Nystagmus is a jerking of the eye or a bouncing eye motion caused by multiple factors. It is displayed in either pendular form where the eye oscillates equally in two directions or jerk form where the eye moves slowly away from a fixated point and then rapidly corrects by a fast movement or saccade. Horizontal Gaze Nystagmus (HGN) is a form of jerk nystagmus where the saccadic movement is towards the direction of the gaze. HGN is an involuntary motion that is not controlled by the individual.

Basically, HGN is a visible physiological sign of impairment like slurred speech or staggered gait. Officers frequently use the HGN test and look for the following six clues (or three in each eye):

- Lack of smooth pursuit
- Distinct and sustained nystagmus at maximum deviation
- Onset of nystagmus prior to forty-five degrees

These signs do not result from problems with the eye muscles directly. Rather, the brain and nerve centers that control the eye muscles are affected by alcohol, other central nervous system depressants, inhalants or dissociative anesthetics, such as phencyclidine (PCP) or its analogs. The signs appear in the order of testing as the level of impairment increases. These eye movement clues are not subject to control, practice or tolerance, making the HGN test a very valuable evidentiary tool.³

Based on recent research, if the subject exhibits **four or more** clues on this test they are impaired at or above 0.08. Using this criterion, officers were able to accurately classify 88 percent of the subjects, with no other clues considered from other SFSTs.

² **Published by TDCAA (<http://www.tdcaa.com>) ©2013 – Reprinted by permission with updated edits by the Idaho Prosecuting Attorneys Association (IPAA) ©2016.

³ National District Attorneys Association (May 2003), [Admissibility of Horizontal Gaze Nystagmus Evidence](#), p. 5.

Categories of Nystagmus

There are more than forty possible types of nystagmus, known and documented. A quick online search will reveal great discussion among the defense community regarding this fact. The bottom line is, "No conditions other than impairment with alcohol and other specific drugs will produce exactly the types of eye movements associated with such impairment when assessed with the HGN and VGN tests. A properly trained police officer will know how to distinguish such eye movements."⁴

This review discusses some of the most common types of nystagmus that have been compared to HGN. It is important to note many of the following types of nystagmus will be present either when the subject views straight ahead or under conditions inconsistent with the HGN and VGN test procedures.⁵ Becoming familiar and conversant on these various categories will improve your credibility with the judge and/or jury.

Vestibular System Nystagmus

The vestibular system is the system of fluid-filled canals located in the inner ear that assists in balance, coordination and orientation. Positional Alcohol Nystagmus, discussed below is a form of vestibular system nystagmus. However, there are a number of non-alcohol related vestibular system nystagmuses. See [NHTSA SFST Participant Manual Session 8 – page 16 of 82.](#)

1. **Rotational:** Nystagmus occurs when an individual is spun around rapidly causing the fluid in the inner ear to be disturbed. This cannot happen at roadside. Only occurs while person is spinning.
2. **Post Rotational:** Nystagmus is present when an individual stops spinning because the fluid in the inner ear remains disturbed for a period of time. This type of nystagmus only lasts for a few seconds, is more prevalent in one eye, and would not be present for entire duration of the HGN test.

Note: Neither rotational nor post rotational nystagmus will interfere with the Horizontal Gaze Nystagmus test because of the conditions under which they occur. See [NHTSA SFST Participant Manual Session 8 – page 16 of 82.](#)

3. **Caloric:** Nystagmus is caused by movement of inner ear fluid due to a difference in temperature of the fluid between the left and right ear. This occurs by putting warm water in one ear and cold water in the other. This is not a roadside practice of law enforcement. Caloric nystagmus will not occur due to "swimmer's ear" nor driving with your car window open on a cold night, with the heater on inside. See ["HGN and the Role of the Optometrist," by Karl Citek, OD, PhD, FAAO, in Admissibility of Horizontal Gaze Nystagmus Evidence, NDAA 2003 – Page 19.](#)

⁴ *Id.* at 20.

⁵ *Id.* at 17.

Positional Alcohol Nystagmus

Nystagmus occurs when a foreign fluid, such as alcohol, alters the specific gravity of the blood in unequal concentrations in the blood and the vestibular system. If the subject's head is uneven and they have this fluid inequity, this type of nystagmus may occur. For this reason, the head is held straight (note that the person can be standing, seated, or supine for the HGN test).

You will ALMOST NEVER see Positional Alcohol Nystagmus in the field. The only way you will is if the defendant is lying down on a backboard and you turn his head to the side. The action of turning the head will induce Positional Alcohol Nystagmus. See [NHTSA SFST Participant Manual Session 8 – page 17 of 82](#).

Note: In the original HGN study, research was not conducted for performing HGN on people lying down. Current research demonstrates that HGN can be performed on someone in this position. Also see [the "Sleep Deprivation Does Not Mimic Alcohol Intoxication on Field Sobriety Testing" study](#).

Nystagmus Caused by Neural Activity

Nystagmus (which should be distinguished from gaze nystagmus) can also result from neural activity:

- **Optokinetic Nystagmus:** Occurs when the eyes fixate on an object that suddenly moves out of sight or when they watch sharply contrasting moving images such as watching scenery from a moving vehicle or watching a train go by while parked at a crossing, etc. This type of nystagmus only lasts as long as it takes for the object to stop moving or for the person to stop looking at the moving object. You can avoid this by facing subject away from moving traffic and turning off your overheads (or also facing subject away from overheads and traffic). You can also be certain it is not Optokinetic when the subject's eyes converge and is[sic] focused on your stylus. The movement of the stimulus and the fixation on the stimulus by the subject precludes[sic] this form of nystagmus from being observed by the officer. See [NHTSA SFST Participant Manual Session 8 – page 18 of 82](#).
- **Epileptic Nystagmus:** Occurs during epileptic or other type of seizures, which are easily detectable at scene!
- **Physiological Nystagmus:** Is a natural nystagmus that keeps the sensory cells of the eye from tiring. It is the most common type of nystagmus. It occurs in all of us all the time. It causes extremely minor tremors or jerks in the eyes, but these are generally too small to be seen with the naked eye and if visible, not sustained if proper HGN procedures are followed. See [NHTSA SFST Participant Manual Session 8 – page 18 of 82](#).

Gaze Nystagmus

Nystagmus occurs as the eyes move from the center position. It is separated into three types. See [NHTSA SFST Participant Manual Session 8 – pages 18-19 of 82.](#)

1. **Horizontal Gaze Nystagmus (HGN):** occurs as the eyes move side to side. [\(Click Here\)](#)
2. **Vertical Nystagmus (VGN):** up and down jerking of the eyes as they are held in the upmost position. The presence of VGN may indicate a high dose for that individual and will not be present without HGN. [\(Click Here\)](#)
3. **Resting Nystagmus:** is referred to as jerking as the eyes look straight ahead and is indicative of a pathological condition or the influence of PCP. [\(Click Here\)](#)

Nystagmus Caused by Certain Pathological Disorders

They include brain tumors and other brain damage or some diseases of the inner ear. These disorders occur in very few people and in even fewer drivers. Many of these causes are so severe that it is unlikely that a person afflicted with the disorder would be driving (and if they do have it, notify the medical review board of Kentucky's Transportation Cabinet). *These types of nystagmus tend to be pendular* rather than jerk nystagmus. See [NHTSA SFST Participant Manual Session 8 – pages 20 & 22 of 82.](#)

Medical Impairment

It is important to distinguish between the entire HGN test, with any single indicator of possible medical impairment the officer may witness while conducting certain aspects of the standardized HGN test. The examinations the officer conducts to assess possible medical impairment include: (1) equal pupil size; (2) resting nystagmus; and (3) equal tracking. For example, if the two pupils are distinctly different in size, it is possible the person may be suffering from a head injury, has a neurological disorder, or has a prosthetic eye. In addition, if the two eyes do not track together, there is a possibility of a serious medical condition or brain injury. Medical personnel should be contacted and the officer should ask questions about head trauma. See [NHTSA SFST Participant Manual Session 8 – pages 23-25 of 82.](#)

If HGN testing is conducted on a person with a blind eye, typical inconsistent findings could be related to the blind eye not being able to see or track the stimulus, or when the normal eye can no longer see the stimulus. See "Eye Tests on a Suspect with a Blind Eye," Karl Citek, OD, PhD, FAAO, Pacific University College of Optometry, Sept. 2014.

Congenital Nystagmus

About one person in 200 has congenital nystagmus, which presents at birth or shortly thereafter. Similarly, nystagmus may accompany certain congenital conditions such as *albinism*, which is identified by the lack of skin and hair pigmentation. In all congenital conditions, and depending on the individual, the nystagmus may be constant, only at certain times (for example, when looking close up or when fatigued), or it may change appearance with the viewing direction (for example, more pronounced when looking right and diminished when looking left. See ["HGN and the Role of the Optometrist," Karl](#)

[Citek, in Admissibility of HGN Evidence, p. 18.](#)

Natural Nystagmus

A very small number of people exhibit a visible natural nystagmus. The number is small according to Dr. Marcelline Burns, who conducted many NHTSA studies and who was in the field for over thirty years. She states she could count the total number of individuals with this condition on her hands. Visible nystagmus is evident only at particular angles of gaze, but not before or beyond that point. During the test for HGN you are looking not only for nystagmus at a particular angle of gaze, but smooth pursuit and end point nystagmus as well.⁶

In addition, people who have natural nystagmus will know they have it and will most likely tell the officer before the test is administered. See [HGN: The Science and the Law, pages 25-26.](#)

Fatigue Nystagmus

Fatigue or endpoint nystagmus is caused by holding the eye at maximum deviation for thirty seconds or longer. It has nothing to do with being tired as this type of fatigue does not cause nystagmus. The HGN test instructions refer to the stylus being held at maximum deviation for a minimum of four seconds. As long as the officer does not hold the stimulus at maximum deviation for thirty seconds, there will be no fatigue nystagmus. See [NHTSA SFST Participant Manual Session 8 – page 40 of 82.](#)

The defense may claim the defendant was fatigued for lack of sleep, and this fatigue caused nystagmus. According to Dr. Burns, fatigue has no effect. This finding was validated by a 1981 NHTSA study that showed fatigue had no significant effects on the manifestation of HGN. There is a 2001 study that suggests lack of sleep may exaggerate endpoint nystagmus,⁷ but no other studies are known to prove that sleeplessness or systemic fatigue affect any other eye movements. The key is to not confuse fatigue with "fatigue nystagmus," which is created if the eye is held at maximum deviation for thirty or more seconds.⁸

Conclusion – Various Types of Nystagmus: A search of the Internet will reveal over forty different types of nystagmus, but they are different from Horizontal Gaze Nystagmus (HGN). For example, caffeine or nicotine has been argued to cause HGN, which is untrue. Caffeine and nicotine are stimulants. Stimulants do not create or make HGN visible to the naked eye. There is no evidence that smoke causes HGN. In addition to

⁶ National Highway Traffic Safety Administration, U.S. Department of Transportation, [Development and Field Test of Psychophysical Tests for DWI Arrest](#), No. DOT-HS-805-864 (March 1981) at 7983, note 16 at 10-11, and at 9. Also C.J. Forkiotis, [Optometric Expertise: The Scientific Basis for Alcohol Gaze Nystagmus](#), 59 Curriculum II, No. 7 at 9 and No. 5 at 11 (April 1987).

⁷ Booker JL. [End-position nystagmus as an indicator of ethanol intoxication.](#) *Sci Justice* 2001;41:113-6.

⁸ Citek, Karl *et. al.* [Sleep Deprivation Does Not Mimic Alcohol Intoxication on Field Sobriety Testing](#), *J Forensic Sci.*, September 2011, Vol. 56, No. 5.

stimulants mentioned above, none of the following drug types create HGN: cannabis, hallucinogens or narcotic analgesics.

Things You Should Know About HGN

1. Officers are trained to administer the HGN test using a systematic ten-step process. Deviation from the ten-step process does not affect the validity of the test. However, it is good practice to always systematically follow the ten-steps to make sure no step is overlooked so no evidence is missed. See [NHTSA SFST Participant Manual Session 8 – pages 27-31 of 82.](#)
2. The first step is to check if the subject is wearing eyeglasses. Eyeglasses are removed so the officer may have a better view of the subject's eyes. Nystagmus is not a vision test. Therefore, it does not matter whether the subject can see the stimulus with perfect clarity, as this will not produce the clues associated with alcohol impairment. The reason eyeglasses are removed is they may impede the subject's peripheral vision, and may also impede the officer's ability to observe the eye carefully. In short, the eyeglasses may get in the way of the officer being able to observe the clues. See [NHTSA SFST Participant Manual Session 8 – page 28 of 82;](#) and [NHTSA SFST Instructor Manual Session 8 – page 28 of 82.](#)
3. In addition to the questions asked of the subject, the first two passes of the test are to check for medical impairments: tracking ability and pupil size. If the eyes do not track together or the two pupils are of distinctively different size, these are signs of possible medical impairments. Medical personnel should be contacted and the subject should be asked more about head trauma. See [NHTSA SFST Participant Manual Session 8 – pages 23-25 of 82.](#)
4. Always ask subject if he/she has any medical conditions and have the subject explain the conditions. It is beneficial to ask about treatment plans for the condition and symptoms.
5. Resting Nystagmus: If resting nystagmus is observed the officer should continue with the remainder of the test to check for other possible indicators of impairment and any possible indicators of medical conditions. See [NHTSA SFST Instructor Manual Session 8 – pages 29 of 82.](#)
6. [Always start with the subject's left eye.](#) This is a standardized test. Although it makes no scientific difference, this is the way the test is written and should be performed. While it would not invalidate the result, it could add confusion for the judge/juror and possible impeachment for the officer.

The stimulus is to be held [12-15 inches](#) in front of subject's nose and slightly higher than the level of his/her eyes. This slight elevation results in the eyes being open wider, which makes it easier to see the nystagmus. Deviations from the instructions are discouraged because these are NHTSA guidelines, but do not affect the validity of the test. They are simply guidelines for ease of viewing and comfort of the subject.

7. Equal Tracking: The speed of the stimulus should be approximately the same speed used when checking for the lack of smooth pursuit. There should be a

clear, distinguishable break between the check for equal tracking and lack of smooth pursuit. Equal tracking can be performed once or twice. See [NHTSA SFST Instructor Manual Session 8 – page 29 of 82.](#)

8. Smooth Pursuit: Two passes for each eye. It should take approximately two seconds to bring the eye from center to side and four seconds across the body. The time suggestion is required by NHTSA because it is an effective amount of time for the tester to view the required nystagmus. Defense counsel will attack speeding up the process, but in reality the officer is missing clues not inducing a nystagmus. See [NHTSA SFST Participant Manual Session 8 – pages 34-35 of 82.](#)
9. Distinct and Sustained Nystagmus at Maximum Deviation: Take eye out until it has gone as far as possible. No white showing in the outside corner of the eye. Hold for a minimum of four seconds. Unless a valid reason can be articulated, do not hold at maximum deviation for longer than ten seconds. Again holding over ten seconds, but less than thirty does not affect the validity. Whereas, holding the stimulus for longer than thirty seconds can induce fatigue nystagmus. It is best that officers follow the standardized performance. Repeat the procedure. See [NHTSA SFST Participant Manual Session 8 – pages 39-40 of 82.](#)
10. Onset Prior to Forty-five Degrees: The angle of onset is simply the point at which the eye is first seen jerking. You will reach forty-five-degrees when you have moved the stimulus an equal distance to the side. (If you held stimulus fifteen inches from the subject's nose then it is about fifteen inches to the side, or if stimulus is twelve inches from the nose, move it twelve inches to the side). At forty-five degrees, some white usually will be visible in the corner of the eye. Move the stimulus slowly. It should take about four seconds to reach a forty-five-degree angle. When you think you see jerking, stop moving the stimulus and hold it steady at that position to verify that the nystagmus is distinct and sustained. When you locate the onset of nystagmus, verify it is prior to forty-five-degrees (some white still showing in corner of eye). Repeat the procedure. See [NHTSA SFST Participant Manual Session 8 – pages 43-45 of 82.](#)

A training aid is provided for students to practice estimating a forty-five-degree angle. See [NHTSA SFST Participant Manual Session 8 – 45 Degree Template.](#)

The clues are cumulative. Generally, nystagmus at maximum deviation should not be observed without observation of lack of smooth pursuit. And onset prior to forty-five degrees should not be observed without observing both lack of smooth pursuit and nystagmus at maximum deviation. However, that may not always be true. See [NHTSA SFST Instructor Manual Session 8 – page 30 of 82.](#)

It is also possible for all three clues to be found in one eye, while only two (or sometimes only one) will show up in the other eye. It is always necessary to check both eyes and to check them independently. Notwithstanding, it is unlikely the eyes of a person under the influence of alcohol will behave totally different. Consider a pathological disorder if one eye is showing three clues and the other eye is showing none. See [NHTSA SFST Participant Manual Session 8 – page 31 of 82.](#)

11. If the officer observes four or more clues, the implication is the BAC is at or above 0.08. This [test is 88 percent accurate in and of itself](#) when done according to NHTSA guidelines by trained and experienced officers. This means there is no reliance on other corroborating evidence of impairment such as smell of alcohol, slurred speech or reliance on clues observed using the Walk & Turn or One Leg Stand sobriety tests to reach this 88 percent accuracy!
12. Defense attorneys will try to commit you to 77 percent accuracy based on the first validation study, but keep in mind this study was done in the lab, in the 1970s, with untrained officers. The updated 2015 NHTSA SFST manual emphasizes officers and prosecutors should be relying on the most recent study conducted in 1998, in San Diego, by experienced officers. Furthermore, the San Diego Study identified validity of SFSTs for both 0.08 and 0.04 BACs. See [NHTSA SFST Participant Manual Session 8 – pages 8-13 of 82](#).
13. This 88 percent figure does not mean 12 percent of the individuals studied were not intoxicated (and therefore would have been arrested wrongfully). Rather the studies revealed that officers failed to detect clues and released intoxicated drivers (according to Dr. Burns, this is the most common error of police: giving the subject the benefit of the doubt and releasing too many intoxicated drivers). Even if relying on the 77 percent figure, the above analysis still applies.

Comparison of SFST Accuracies 1981 vs. 1998

Study: Combined Tharp, Burns, & Moskowitz (1981)

BAC: 0.10

HGN: 77%

WAT: 68%

OLS: 65%

Combined: 81%

Study: Stuster & Burns (1998)

BAC: 0.08

HGN: 88%

WAT: 79%

OLS: 83%

Combined: 91%

The greater component and overall accuracies found during the 1998 study are attributable to greater law enforcement experience with the SFSTs since the original study and a lower criterion BAC than in the original study (*i.e.*, 0.08 vs. 0.10 percent).

[Click here](#) to also see the discussion below regarding correct arrest decisions when combining all three standardized field sobriety tests (HGN, Walk & Turn, One Leg Stand).

14. Additionally, simply because a person's BAC is below a 0.08 does not mean the individual is not impaired or maintains their normal use of mental or physical faculties. Most subjects in laboratory studies are significantly impaired regarding visual acuity, vigilance, drowsiness, psychomotor skills and information

processing by the time they reach 0.05 BAC.⁹ Based on decades of research, there is scientific consensus that alcohol causes deterioration of driving skills beginning at 0.05 BAC or even lower.

15. National and international traffic safety and public health organizations, including the [American Medical Association \(AMA 2013\)](#), the [World Health Organization \(WHO 2013a\)](#), the [World Medical Association \(WMA 2013\)](#), and the [Association for the Advancement of Automotive Medicine \(AAAM 2009\)](#) and the [National Transit Safety Board \(NTSB 2013\)](#) have advocated setting BAC limits at 0.05 or lower.

The AMA has called for per se BAC limit of 0.04 for more than two decades, explaining this is the limit where all individuals are measurably impaired. More than [100 countries](#) have already established per se BAC limits at or below 0.05. See [Alcohol and the Driver, The Journal of the American Medical Association, 1986: 255\(4\): 522-527.](#)

16. All people have a natural nystagmus, it's just not visible by the naked eye, except in extremely limited circumstances. Natural nystagmus is not the same thing as Horizontal Gaze Nystagmus. It is important to understand the differences and be able to simply explain it when testifying in court. See [HGN: The Science and the Law, pages 25-26.](#)
17. Remember: Only four things are known to cause Horizontal Gaze Nystagmus: (1) Depressants (such as alcohol, Xanax, Valium and so forth); (2) Inhalants (*i.e.* glues, gasoline, spray paint, "whippets"); (3) Dissociative Anesthetics (*i.e.* PCP and its analogs, Ketamine, etc.); and (4) Serious Brain Stem Injury. See [NHTSA SFST Instructor Manual Session 8 – page 14 of 82.](#)
18. The [American Optometric Association](#) passed [Resolution 1901](#) on June 20, 1993, stating, "that the American Optometric Association acknowledges the scientific validity and reliability of the HGN test as a field sobriety test when administered by properly trained and certified police officers and when used in combination with other evidence..." This resolution is reviewed every five years. See [2001](#), [2006](#) and [2011](#).
19. It is estimated that about one person in 2,000, when sober and in absence of drugs or known medical conditions, show signs that an officer could associate with alcohol impairment. However, experienced officers will recognize the quality of eye movements is not consistent with those he/she normally observes on impaired subjects. In addition, there is typically other evidence such as slurred speech, bloodshot eyes, lack of balance, inappropriate attitude or behavior, and so forth, that would be absent if the person were sober. See [Admissibility of Horizontal Gaze Nystagmus Evidence, NDAA 2003 – Pages 19-20.](#) (Click Here for [Full Monograph](#))
20. Vertical Gaze Nystagmus (VGN): This test reveals whether or not the tested

⁹ Fell, James C. & Voas Robert B., [Reducing Illegal Blood Alcohol Limits for Driving: Effects on Traffic Safety.](#) In *Drugs, Driving and Traffic Safety*, Birkhauser, 2009, pp. 415-437.

individual has ingested a high dose, for that individual. An up and down jerking of the eyeball is indicative of the presence of VGN. Position the stimulus in a horizontal position approximately twelve to fifteen inches from the subject's nose, tell the subject to hold his/her head still and follow with his/her eyes only, raise the stimulus until the eyes are elevated as high as possible, and hold for a minimum of four seconds to look for jerking. See [NHTSA SFST Participant Manual Session 8 – pages 52-53 of 82.](#)

The VGN test was not part of the original study. See [NHTSA SFST Instructor Manual Session 8 – pages 52-53 of 82.](#)

21. Each state may have unique legal issues and case law regarding the admissibility of HGN evidence. The National Traffic Law Center has summarized each state's case law under the following three issues: evidentiary admissibility, police officer testimony, and purpose and limits of the HGN test results. [Click Here to access the most recent "NTLC Horizontal Gaze Nystagmus State Case Law Summary."](#)

[Click Here to access the most recent "NTLC Horizontal Gaze Nystagmus State Case Law Chart."](#)

KENTUCKY HGN CASES

Commonwealth v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996)

1. Opinion testimony of officer on issue of defendant's intoxication is admissible.
2. To admit HGN test results into evidence, Commonwealth must show:
 - a. Some foundation testimony that the officer was trained/certified in HGN testing.
 - b. That the test was properly administered.
 - c. That the proper procedures were employed.

Leatherman v. Commonwealth, 357 S.W.3d 518 (Ky. App. 2011)

Failure of HGN combined with other evidence establishes probable cause for arrest.

Walk and Turn (WAT)

The Walk and Turn (WAT) is a field sobriety test based on the important concept of divided attention. The test requires the subject to divide attention among mental tasks and physical tasks. The person is mentally tasked with comprehending verbal instructions, processing the information and recalling it from memory. The person is physically tasked with maintaining balance and coordination while simply standing still, walking, and turning.

There are eight scored clues:

- Cannot keep balance while listening to the instructions
- Starts too soon
- Stops while walking
- Does not touch heel-to-toe (by more than ½ inch while walking)
- Steps off line
- Uses arms to balance (raises six inches or more)
- Improper turn
- Incorrect number of steps

Based on recent research, if the subject exhibits **two or more** clues on this test, **or fails to complete it**, they are impaired at or above 0.08. Using this criterion, officers were able to [accurately classify](#) 79 percent of the subjects, with no other clues considered from other standardized field sobriety tests.

If the subject cannot perform the test, or fails to complete it, make sure to document this fact, and *list only the clues* you were able to see. Also document the reason for not completing the test – *i.e.* the subject's safety due to their obvious intoxication.

List all other observations indicating impairment but are not counted as clues. For example if the subject fails to count steps out loud as instructed, sways or uses arms to balance while listening to instructions but subject's feet never breaks apart, takes the correct nine steps but verbally counts ten, walks very slowly but does not stop, and so forth. They are not validated clues, but are certainly valid clues of impairment.

Things You Should Know About the Walk and Turn

1. Like all divided attention tests, the Walk and Turn has two stages: (1) instructions stage, and (2) walking stage. Do not overlook the importance of either stage. Too often, I have seen officers speak too quickly or rush through the instructions, which can affect the credibility of the officer and the weight of the evidence gathered during the walking stage. Be very clear and simple in your instructions. It is recommended you review the instructions provided in the manual. See [NHTSA SFST Participant Manual Session 8 – pages 56-57 of 82.](#)
2. **Test Conditions:** Whenever possible this test should be conducted on a reasonably dry, hard, level, non-slippery surface. There should be sufficient room for subjects to complete nine heel-to-toe steps. The language requiring a designated straight line was removed from the previous 2013 NHTSA SFST manuals.
It is commonly argued the original studies were conducted and validated in a controlled laboratory environment and therefore the tests are not validated for roadside. Remember, the recent field validation studies have indicated that varying environmental conditions have not affected a subject's ability to perform this test. See [NHTSA SFST Participant Manual Session 8 – page 55 of 82.](#)
3. Original research for the WAT test suggested subjects older than sixty-five years of age or those with back, leg, or inner ear problems, had difficulty performing this test. However, less than 1.5 percent of the test subjects in the original studies were over sixty-five years of age. Therefore, there was not a statistically

significant group to draw a good conclusion. Remember, it may be argued the test is not "validated" for subjects older than sixty-five, but this does not mean the test is not "valid" in showing evidence of impairment. Officers should consider age, environmental factors, location, injury or physical ailments while administering the tests. The importance of the totality of all factors should never be overlooked. See [NHTSA SFST Participant Manual Session 8 – page 55 of 82](#).

It is a misperception that the subject's weight invalidates the Walk and Turn test. Rather, weight is an issue explored only in regards to the One Leg Stand test. Nevertheless, weight can be one more factor for the officer to consider under the totality of the circumstances. The Walk and Turn test can still be conducted if safe for the officer and the subject.

4. The subject's footwear, or lack thereof, often becomes a source of contention when assessing the walking stage of the test in court. The manual suggests the officer give individuals wearing heels more than two inches high an opportunity to remove their shoes. However, subjects with any form of unusual footwear (flip flops, platform shoes, etc.) should be given the opportunity to remove the footwear prior to the test. Officers should ask the subject some probing questions regarding their unusual footwear to help in considering the totality of the circumstances (*i.e.*, How often do you wear those shoes? Are they comfortable to walk in? Do you think you will do better wearing or not wearing them during this test?) See [NHTSA SFST Participant Manual Session 8 – page 55 of 82](#).
5. The preface found in the 2015 NHTSA SFST manuals is especially helpful when facing defense challenges to the various environment condition challenges to the Walk and Turn. The preface was inadvertently removed from the 2013 NHTSA Participant Manual but could still be found in the 2013 NHTSA Instructor Manual. The removal of the language was an oversight and has been reinserted in the 2015 preface, which states:

"The procedures outlined in this manual describe how the Standardized Field Sobriety Tests (SFSTs) are to be administered under ideal conditions. We recognize that the SFSTs will not always be administered under ideal conditions in the field, because such conditions do not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, *i.e.*, the inability to find a perfectly smooth surface at roadside, may have some effect on the evidentiary weight given to the results. However, this does not necessarily make the SFSTs invalid."

Keep this preface handy when testifying! See [NHTSA SFST Participant Manual Preface – page 1 of 1](#).

6. Safety Precautions in administering the test were added to the 2013 NHTSA Manual and modified in the 2015 NHTSA Manual. Officers and prosecutors should be aware of this addition, in case the defense tries to argue these precautions are standardized and failure to follow them somehow invalidates the test. These safety precautions include:

- Keep subject to your left when starting demonstration
- Be aware of surroundings
- Officer should not turn his/her back to the subject for safety reasons

These precautions are exactly what they purport to be – Safety Precautions! Not actions that somehow affect the validity of the administration of the test if not followed. See [NHTSA SFST Participant Manual Session 8 – page 55 of 82.](#)

7. Officers, during your demonstration of the Walk and Turn – DO NOT STOP – this includes before, during and after the turn. If you demonstrate a stop and later count "stops while walking" as a clue, the defense will claim in court their client was merely doing the test the way you demonstrated it. So either do not stop while demonstrating, or make the statement during your instructions that you are stopping to instruct the next portion of the test, but the subject should not stop when they perform the test.
8. **Test Performance** – Improper Turn Clarification: "[T]here may be times when the suspect takes a wrong number of steps or begins the heel-to-toe walk with the wrong foot resulting in a turn on the right foot instead of the left. If this occurs the suspect would normally be assessed a clue for an incorrect number of steps **and not assessed a clue for an improper turn** if the turn was made using a series of small steps as instructed and the suspect did not lose his/her balance while attempting the turn. This scoring is consistent with the original research and training conducted by the Southern California Research Institute and with the administration and scoring of the Walk and Turn test in the San Diego Field Study." (emphasis added.) See [NHTSA SFST Instructor Manual Session 8 – page 60 of 82.](#)
9. Remember, the SFSTs are tools to assist you in seeing visible signs of impairment and are not a pass/fail test. See [NHTSA SFST Participant Manual Session 8 – page 61 of 82.](#)

Note: Idaho courts have consistently used the terms "pass" and "fail" in written decisions. Some Idaho prosecutors recommend using the terms "pass" and/or "fail" in emphasizing the evidence observed while others do not. In most other states, the overwhelming recommendation is to not use the terms "pass" or "fail" in relation to the SFSTs. This is certainly consistent with the recommendations in the NHTSA manual.

The terminology recommendations when referring to the scored observations when testifying in court, is simply refer to them as "clues" of impairment or even "validated clues," based on the research studies.

10. Based on the 1989 San Diego Study, if the subject exhibits two or more clues on this test, or fails to complete it, the indication is the subject is at or above 0.08. The San Diego Study found officers' arrest decisions were 79 percent accurate, in and of itself, without considering any other clues or indicators of impairment. See [NHTSA SFST Participant Manual Session 8 – page 62 of 82.](#)

[Also see "Correct Arrest Decision" below in Quick Review.](#)

One Leg Stand (OLS)

The One Leg Stand (OLS) is another field sobriety test based on the important concept of divided attention. The test requires the subject to divide attention among mental tasks and physical tasks. The subject's attention is divided among such simple tasks as balancing, listening and counting out loud for a set amount of time (thirty seconds). None of these mental and physical tasks are particularly difficult on their own, but the combination can be very difficult for an impaired individual to do for more than twenty-five seconds.

There are four clues on this test:

- Sways while balancing
- Uses arms to balance (Moves arms six inches from side)
- Hopping
- Puts foot down

Based on recent research, if the subject exhibits **two or more** clues on this test, **or fails to complete it**, this person is impaired at or above 0.08. Using this criterion, officers were able to [accurately classify 83 percent](#) of the people they tested, with no other clues considered from other SFSTs.

If the subject cannot perform the test, or fails to complete it, make sure to document this fact, and list only the clues you were able to see. Also document the reason for not completing the test – *i.e.* the person's safety due to his/her obvious intoxication.

List all other observations indicating impairment but are not counted as clues. For example if the subject did not hold his/her foot parallel to the ground or verbally miscounting thirty seconds.

Things You Should Know About the One Leg Stand (OLS)

1. Like all divided attention tests, the One Leg Stand has two stages: (1) instructions stage, and (2) balance and counting stage. Do not overlook the importance of either stage. As discussed with the Walk and Turn, do not rush the instructions, which can be a tendency when officers become extremely familiar to the administration of the instructions through repetition. It is recommended you review the instructions. See [NHTSA SFST Participant Manual Session 8 – pages 66--67 of 82.](#)
2. It is "One Leg Stand" not "One Legged Stand." Failure to use the correct terminology can potentially harm your credibility with judge, jurors and/or others.
3. Test Conditions: The One Leg Stand requires a reasonably dry, hard, level and non-slippery surface. The person's safety is always an important consideration when administering this test.

The 2013 SFST Manual added an explanation to the removal of a previous

recommendation. In the original research study, the recommendation was if the test could not be performed on the above described surface, the subject could be asked to perform the test elsewhere or to only administer the HGN test. This is no longer the recommendation. Standardizing the OLS test for every type of road condition is unrealistic. Recent field validation studies have indicated that varying environmental conditions have not affected a subject's ability to perform this test. See [NHTSA SFST Participant Manual Session 8 – page 65 of 82.](#)

It is not good police procedure to only administer the HGN. It affords the defense an opportunity to attack the officer for failing to give the benefit of the doubt to the subject. If it is unsafe, or the conditions of the surface are such that the One Leg Stand cannot be done, offer the subject alternative field sobriety tests (alphabet, finger count, counting backwards, etc.).

4. Original research for the OLS suggested that subjects older than sixty-five years of age, those with back, leg, or inner ear problems, or those who are more than fifty pounds overweight had difficulty performing this test. Unlike the Walk and Turn test, the subject's weight was considered to be a factor by the researchers for the One Leg Stand test. The test can still be conducted if safe for the officer and the subject, but the clues may hold less evidentiary weight.

As noted above with the Walk and Turn test, less than 1.5 percent of the OLS test subjects in the original studies were over sixty-five years of age. There was no data containing the percentage of test subjects fifty pounds overweight in the final report. See [NHTSA SFST Participant Manual Session 8 – page 65 of 82.](#)

Remember, it may be argued the test is not "[validated](#)" for subjects older than sixty-five or for subjects more than fifty pounds overweight, but this does not mean the test is not "[valid](#)" in showing evidence of impairment. Officers should consider age, weight, environmental factors, location, injury and/or physical ailments while administering the tests. Officers should fairly consider and document all factors when conducting SFSTs. See [NHTSA SFST Instructor Manual Session 8 – page 4 of 82.](#)

5. The subject's footwear, or lack thereof, should be considered just as it was in the Walk and Turn test. The NHTSA manual suggests the officer give individuals wearing heels more than two inches high an opportunity to remove their shoes. It is a good idea to give subjects wearing any type of unusual footwear the opportunity to remove them prior to the test. See [NHTSA SFST Participant Manual Session 8 – pages 65 of 82.](#)
6. The preface found in the 2015 NHTSA SFST manuals is especially helpful when facing defense challenges to the various environmental condition challenges to the One Leg Stand. The preface was inadvertently removed from the 2013 NHTSA Participant Manual, but was found in the 2013 NHTSA Instructor Manual. The removal of the language from the Participant Manual was an oversight and has been reinserted in the 2015 preface, which states:

"The procedures outlined in this manual describe how the Standardized Field Sobriety Tests (SFSTs) are to be administered under ideal conditions. We recognize that the

SFSTs will not always be administered under ideal conditions in the field, because such conditions do not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, *i.e.*, the inability to find a perfectly smooth surface at roadside, may have some effect on the evidentiary weight given to the results. However, this does not necessarily make the SFSTs invalid."

Keep this preface handy when testifying! See [NHTSA SFST Participant Manual Preface – page 1 of 1.](#)

7. The 2015 NHTSA SFST manual clarifies the appropriate instruction in how the raised foot is to be held during the balance and counting stage. The proper instruction should be, "With your raised foot parallel to the ground," not "foot pointed out," or "point your toe." See [NHTSA SFST Participant Manual Session 8 – page 52 of 62.](#)

The intent was to remove "foot pointed out" from all manuals because the instructions in the original research study said "foot parallel to the ground." This may be making a "mountain out of a molehill," but the change is to avoid courtroom arguments that failing to use the instruction from the original research somehow invalidates the entire OLS test. To avoid this ridiculousness, the recommendation is to use the original phrase.

8. Time is critical in this test. The original SCRI research has shown a person with a BAC **above** 0.10 percent can maintain balance for up to twenty-five seconds, but seldom for as long as thirty seconds. See [NHTSA SFST Participant Manual Session 8 – page 69 of 82.](#)
9. Officers should always time the thirty seconds and document how they timed the test. The test should be discontinued after thirty seconds. See [NHTSA SFST Instructor Manual Session 8 – page 69 of 82.](#)
10. Based on the [1989 San Diego Study](#), if the subject exhibits two or more clues on this test, or fails to complete it, the indication is the subject is at or above 0.08. The San Diego Study found officer's arrest decisions were **83 accurate, in and of itself**, without considering any other clues or indicators of impairment. See *NHTSA SFST Participant Manual Session 8 – page 70 of 82.*

[Also see "Correct Arrest Decision" below in Quick Review.](#)

Kentucky Cases Re: Field Sobriety Tests (*i.e.* WAT and OLS)

Kidd v. Commonwealth, 146 S.W.3d 400 (Ky. App. 2004)

Evidence that the driver could not perform simple tasks involved in field sobriety tests established that his ability to drive was impaired. SFSTs establish impairment due to marijuana.

Commonwealth v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996)

1. Opinion testimony of officer on issue of defendant's intoxication is admissible.
2. To admit HGN test results into evidence, Commonwealth must show:
 - a. Some foundation testimony that the officer was trained/certified in HGN testing.
 - b. That the test was properly administered.
 - c. That the proper procedures were employed.

Bridgers v. Commonwealth, 2007 WL 121846 (Ky. App.) UNPUBLISHED

Commonwealth was not required to make a showing that the field sobriety testing was scientifically reliable. This Court has previously held that evidence of field sobriety testing is admissible and that officers observing a defendant's driving and physical condition may offer both lay and expert opinion testimony that a defendant was intoxicated.

Leatherman v. Commonwealth, 357 S.W.3d 518 (Ky. App. 2011)

Failure of HGN combined with other evidence establishes probable cause for arrest.

Hadaway v. Commonwealth, 352 S.W.3d 600 (Ky. App. 2011)

Officers' testimony alone can support a conviction without the results of a breath test instrument. SFSTs, smell of alcohol and erratic driving sufficient evidence for conviction of DUI.

Quick Review of Field Sobriety Tests & Things You Should Know:

1. What are field sobriety tests?

Field sobriety tests are methods for assessing another's mental and/or physical impairment. Some of the tests are considered divided attention tests in that they require the individual to divide their ability between adhering to simple instructions and performing simple instructions. This basically means that a person will have to concentrate on more than one thing at a time. Impaired individuals have difficulty dividing their attention.

2. What do you mean by divided attention tests?

The test requires the suspect to divide attention among mental and physical tasks. Equate it with driving to looking forward, in the mirrors, watching the speedometer, braking, and making simple driving decisions at the same time. See [NHTSA SFST Instructor Manual Session 7 – pages 9-11 of 25](#).

3. Why is this important?

Divided attention capabilities are important because most intoxicated people can concentrate on one task, such as standing straight. They exhibit their intoxication when forced to concentrate on two or more different tasks. An example would be that an intoxicated person may see and focus on a child stepping out into the street in front of them, but would have trouble estimating the distance to the child and more difficulty in applying the brakes. Another example of this is NHTSA's ½ inch heel to toe requirement on the walk and turn: this can be equated to missing the brake pedal by ½ inch when attempting to brake.

4. Is driving an automobile a divided attention function?

Yes, a driver engaging in many tasks at once such as control speed, keep car in lane, keep eye on other traffic, monitoring speed, listening to conversations in vehicle, determining when and where to turn, and so forth, are all dividing the driver's attention among mental and physical tasks.

5. Are field sobriety tests simple or complex tasks?

Simple. NHTSA performed these tests on hundreds of people, young and old, athletes and couch potatoes, large and skinny, tired and alert, and so forth. This group of normal people could pass the test within NHTSA guidelines when sober, but could not when intoxicated.

6. Does fatigue affect a person's ability to perform these tests?

Fatigue does not have a significant effect on a person's ability to perform these tests. In any case, a trained officer will take into consideration the subject's tiredness and give the subject the benefit of the doubt.¹⁰

7. What does NHTSA stand for?

It is the acronym for the [National Highway Traffic Safety Administration](#). It is best to avoid acronyms such as NHTSA, HGN, WAT, OLS and others when testifying in front of a jury (or even the judge). Jurors are unlikely to be familiar with these acronyms leading to confusion or a juror deciding to not pay attention. Make a point of knowing the acronyms, but avoid using them when testifying, to ensure credibility with the judge and/or jury.

8. What does IACP stand for?

It is the acronym for [International Association of Chiefs of Police](#). In 1986, the Advisory Committee on Highway Safety of the IACP passed a resolution recommending law enforcement agencies adopt and implement the SFST program developed by NHTSA. NHTSA has since sought IACP input to appoint a curriculum revision workgroup consisting of subject matter experts.

¹⁰ See Citek, Karl *et. al.* "Sleep Deprivation Does Not Mimic Alcohol Intoxication on Field Sobriety Testing," *J Forensic Sci.*, September 2011, Vol. 56, No. 5.

9. Does NHTSA certify the SFST course?

No. NHTSA is not a certifying agency for impaired driving training courses. There is no such thing as a "NHTSA certified course."

10. Does NHTSA certify instructors and/or the officers who complete the SFST training?

No. NHTSA also does not certify instructors or officers in Standardized Field Sobriety Testing. SFST certification is only through the respective state's law enforcement training organizations. See [NHTSA SFST Instructor Manual Administrator's Guide – Introduction – page 2 of 4](#).

11. How many versions of the NHTSA SFST Manual have been published?

There have been twelve versions of the NHTSA SFST Manual. The Original NHTSA SFST Manual was published in 1987. Curriculum revisions have occurred in 1989, 1992, October 1995, September 1997, February 2000, January 2002, September 2004, February 2006, August 2006, May 2013 and the latest revision October 2015.

In addition, each state may add supplemental materials to their manuals. Therefore, the state may have an additional revision date in their manuals. Kentucky does not have a supplemental manual and uses the latest revision of the NHTSA manuals. Understanding the version of the manual you (or your officer) have most recently been trained on helps establish the credibility of your testimony. In addition, the testifying officer should ensure they are being questioned with the most up-to-date manual, and that they have received the most up-to-date training.

12. What exactly does the "Correct Arrest Decision" mean when considering the validation studies? For example, if according to the 1989 San Diego Study the correct arrest decision was made 91 percent of the time, doesn't that mean 9 percent were wrongfully arrested?

No. It does not mean drivers are being wrongfully arrested 9 percent of the time. The 2015 SFST Manual provides an explanation on what these statistics mean. It is recommended all officers and prosecutors familiarize themselves with the training provided on the SFST Field Validation Studies. See [NHTSA SFST Instructor Manual – Session 8 pages 8-13 of 82](#) and/or [NHTSA SFST Participant Manual – Session 8 pages 8-13 of 82](#).

The manuals describe the four categories of arrest decisions. We will quickly review the two categories where the research stated the officers made an incorrect arrest decision: (1) the officer decided NOT to arrest the subject and the subject's BAC was above the illegal per se limit; and (2) the officer decided to arrest the subject but the subject's BAC was below the illegal limit. See [NHTSA SFST Instructor Manual – Session 8 pages 9 of 82](#).

In the first category – these subjects were impaired individuals but the officers failed to observe the clues. The officers missed the clues! This may have been

due to a number of individuals who were alcohol tolerant and able to do well on the Walk and Turn and One Leg Stand, despite the fact they were still impaired at a level above the per se limit. The non-arrest decision ultimately benefited the driver.

In the second category – these individuals had BAC levels below the illegal per se level and the arrest decision was recorded as an error. Yet, the arrests may have been legally justifiable according to the individual state's statute. For example, a person with a BAC of 0.07 is impaired and likely to exhibit clues in the SFSTs. In many states, these individuals would have been rightfully prosecuted for their driving impairment. However, in the studies, the decision to arrest the subject was considered an error.

The fact is every driver with a BAC of 0.07 is impaired and is not safe to drive a motor vehicle. Simply because a person's BAC is below a 0.08 does not mean the individual is not impaired or maintains their normal use of mental or physical faculties. Based on decades of research, there is scientific consensus that [alcohol causes deterioration of driving skills beginning at 0.05 BAC or even lower. Refer to discussion in HGN section by clicking here.](#)

Therefore, when considering the 91 percent statistic, it is a gross mischaracterization that 9 percent of the test subjects were incorrectly arrested. A more correct interpretation is that impaired individuals were not arrested, when they should have been. An understanding of this section of the SFST manual should help clarify why the HGN is the most reliable in making correct arrest decisions and when combined with other field sobriety tests the accuracy is much higher.

Review the material in the manuals and be prepared to explain the statistics in simple terms in order to effectively articulate them to a judge or jury in a courtroom.

13. What is the definition of impairment?

Historically, neither scientists nor legal scholars could agree on a definition of "impairment" or "under the influence." In 1938, the National Safety Council's Committee on Alcohol and Other Drugs (CAOD) collaborated with the American Medical Association's Committee to Study Problems of Motor Vehicle Accidents to establish standards for defining the phrase "under the influence." Based on the research at that time, these committees established presumptive levels, defined in terms of blood alcohol concentration. Based on their recommendations states began enacting statutes wherein the "presumptive levels" shifted focus from officer observations to chemical testing in impaired driving investigations. In 1971, CAOD recommended lowering the presumptive level to 0.08. However, it took decades before this recommendation was reflected in criminal statutes.

Research Studies Regarding SFSTs:

1. Most Recent Validation Studies at 0.08 or Below

A. [Colorado 1995](#)

Dr. Burns and the SCRI revealed that snow, cold, and slightly sloped sidewalks did not affect the officer's ability to make the correct arrest decision. Seven agencies were involved. Observers were in half the police vehicles. These observers were SFST trained. They were there to ensure SFSTs were done correctly. These observers also tested people who were [released. The study revealed that officers using SFST battery, made the correct arrest decision 86 percent of the time based on the three SFSTs. In fact, 93 percent of those arrested had a BAC of 0.05 or higher. This was corroborated by a breath test.](#)

B. [Florida 1997](#)

Dr. Burns, and the Southern California Research Institute (SCRI) used officers in this study with an average of 9.5 years' experience conducting the three standardized test battery and they followed the NHTSA guidelines. [The study demonstrated that 95 percent of the officers' decisions to arrest drivers were correct using 0.08 BAC as legal intoxication.](#) Again, some of those released were too impaired to drive, but the officers gave them the benefit of the doubt. Dr. Burns states that overwhelmingly, when officers err, they err by releasing intoxicated individuals and not by arresting sober individuals.

C. [San Diego 1998](#)

Dr. Burns and the SCRI used trained officers in this study using the SFST battery. [The study revealed that the officers made the correct arrest decision 91 percent of the time at BACs below 0.10. The study examined the validity of SFSTs for both 0.08 and 0.04.](#) In this study there were no observers riding with the officers and the officers were allowed to use portable breath test devices (PBTs). This is the most current research used to describe the accuracy of the SFSTs and should be the one referenced when explaining SFST accuracy in court.

2. Original SFST Validation Studies

A. [NHTSA's Psychophysical Tests for DWI Arrest – June 1977:](#)

Study to determine the easiest and most effective methods of roadside testing in order to increase the ability of police to detect impaired drivers.

The study concluded that alcohol gaze nystagmus testing was most effective, along with walk-and-turn and one-leg stand tests.

B. **Development and Field Test of Psychophysical Tests for DWI Arrest – March 1981:**

Study to determine the effectiveness of the sobriety test battery and standardized the administration and scoring of each test. Test battery was subject to laboratory and field evaluation. Concluded that more field testing needed to be performed, but the study showed the test battery would be effective in increasing the ability of police officer's to detect impaired drivers.

C. **Evaluation of a Behavioral Test Battery for DWI – September 1983:**

Study to confirm the effectiveness of the standardized field sobriety test battery using a larger sample size. Concluded that the HGN test was the most effective of the three tests and that greater accuracy in determining whether a subject's BAC is over 0.10 can be gained by combining the scores of the HGN and Walk-and-Turn.

3. **Study: A Review of the Literature on the Effects of Low Doses of Alcohol on Driving-Related Skills**

By Dr. Herbert Moskowitz (April 2000):

This study reviewed the scientific literature regarding the effects of alcohol on driving-related skills. One hundred and twelve articles – from 1981 to 1987 – were reviewed. The review of the literature provided strong evidence that impairment of some driving-related skills begins with any departure from zero BAC. By 0.050 g/dl, the majority of studies have reported measurable impairment by alcohol. By BACs of 0.080 g/dl, more than 94 percent of the studies reviewed exhibited skills impairment. Specific performance skills are differentially affected by alcohol. Some skills are significantly impaired by BACs of 0.01 g/dl, while others do not show impairment until BACs of 0.06 g/dl.

4. **Study: Driver Characteristics and Impairment at Various BACs**

NHTSA (August 2000):

This study used a driving simulator and a divided attention task. The data obtained with 168 subjects demonstrates that alcohol impairs driving-related skills at 0.02, the lowest level tested. The magnitude of impairment increased consistently at BACs through 0.10, the highest level tested. While there is partial evidence of impairment at 0.02, a major conclusion of this study is that by 0.04, all measures of impairment that are statistically significant are in the direction of degraded performance. The data provides no evidence of a BAC below which impairment does not occur. Rather, there was evidence of significant impairment throughout the BAC range of 0.02 to 0.10, with increasing percentage of subjects impaired and increasing magnitude of impairment at higher BACs.

5. [Study: Analysis and Evaluation of the Effect of Varying Blood Alcohol Concentrations on Driving Ability](#)

Maurice E. Dennis (April 2000)

Dr. Dennis trained nineteen people on a Driving Skills Enhancement Program that consisted of six different complex driving situations. They were: Skid Control, Auto Control Monster, Crash Simulator, T-Turn, Blocked Lane, and the Slalom.

There were also Non-Driving Exercises involving balance, vision, and reaction time. All subjects received training on all aspects of the experiment. The test subjects were given a test using the Intoxilyzer to ensure they had no alcohol in their system. They were given a pretest on all driving and non-driving activities to determine their pre-drinking abilities.

The data was recorder[sic] on all subjects for comparison with ability after reaching designated BACs. The subjects were then dosed to .04, .07, and .10 and given all the tests after each designated BAC.

Results: On Complex Driving Exercises (Skid Pad, Auto Control Monster, Crash Simulator)

BAC DECLINE

.04 13%

.07 17%

.10 24%

On Less Complex Exercises (Blocked Lane, T---Turn, Slalom)

BAC DECLINE

.04 2%

.07 3%

.10 8%

6. [Study: Nystagmus Testing in Intoxicated Individuals](#)

Karl Citek, OD, PhD (November 2003)

Dr. Citek, an optometrist, did a study testing HGN and VGN at different positions: standing, seated, and supine. He confirmed the validity of the HGN test in the standing posture to discriminate blood alcohol levels of .08 and .10. He also established, with similar accuracies and reliabilities, the use of the HGN test in the seated and supine postures. There was a statistical difference in the observation of HGN based on test posture. The difference happened in the seated position and was attributed to the difficulty of seeing the eyes. If officers have to conduct the HGN in the seated position, it is recommended that they position the subject in such a way that the subject's eyes can be seen easily throughout the test. This may involve asking the subject to turn the body slightly at the waist, in addition to the head turn used in the current study. Such a minor change in posture will not affect the result. They also confirmed that VGN is present only when signs of HGN are present, and that the VGN test can be used to identify high levels of impairment at any test posture.

7. **Study: [Robustness of the Horizontal Gaze Nystagmus Test](#)**

See [also NHTSA – Traffic Tech – January 2008](#)

Marcelline Burns (September 2007):

Dr. Burns conducted a study to determine if defense attorney attacks on variations on the HGN test makes it inaccurate, thereby invalidating the test. The three important experiments test three major challenges by defense attorneys: change in stimulus speed; change in stimulus elevation; and stimulus distance from eyes.

The first experiment varied the speed of the stimulus from one, two, and four seconds. Conclusion: In summary, the principal effect of variations in the speed of the stimulus was found to be false negatives, failures to detect a breakdown of smooth pursuit movements (failure to detect clues). The finding that rapid stimulus movement lessens the likelihood of observing lack of smooth pursuit is relevant to law enforcement. In the interest of accuracy, stimulus speed should not be faster than two seconds. The findings do not support the suggestion the variations in stimulus speed led to false alarm errors and thus should not invalidate test findings.

The second experiment tested variations in stimulus level compared to eye level, two inches above eye level, and four inches above eye level. Conclusion: Greater accuracy in detecting nystagmus was observed when HGN was conducted at eye level and four inches above eye level. A four-inch stimulus elevation results in the test subject opening the eyes more thereby making clue observation easier for the officer. It did not increase false positive observations in comparison to the other conditions. It has been suggested that this position engages different eye muscles than more moderate positions and would, therefore, yield radically different observations. The data does not confirm that claim nor do they provide evidence that would support a change in current training.

The third experiment varied the distance of the stimulus from ten inches, to twelve to fifteen inches, and to twenty inches. Conclusion: NHTSA recommends that the stimulus be held twelve to fifteen inches from the eyes. Increasing that distance to 20" did not alter the number of signs observed. When the distance was decreased to 10", officers correctly reported more signs. The magnitude of the difference is small, however, and is viewed as insufficient basis for changing the current standard.

Over-All Conclusion: Variations in the way HGN is performed tend to lead to false negatives, not false positives, and do not invalidate the HGN test.

8. **Study: ["The Visual Detection of DWI Motorists" U.S. Department of Transportation, DOT HS 808 677](#)**

Problems Maintaining Proper Lane Position

Weaving, weaving across lanes, straddling a lane line, swerving, turning with a

wide radius, drifting, almost striking a vehicle or other object.

Speed and Braking Problems

Stopping problems (too far, too short, or too jerky), accelerating or decelerating for no apparent reason, varying speed, slow speed (10+ under speed limit).

Vigilance Problems

Driving in opposing lanes or wrong way on one-way, slow response to traffic signals, slow or failure to respond to officer's signals, stopping in lane for no apparent reason, driving without headlights at night, failure to signal or signal is inconsistent with action.

Judgment Problems

Following too closely, improper or unsafe lane change, illegal or improper turn, (too fast, too slow, or too jerky), driving on other than designated roadway, stopping inappropriately in response to officer, inappropriate or unusual behavior (throwing, arguing, etc.), appearing to be impaired.

9. **[Study: Sleep Deprivation Does Not Mimic Alcohol Intoxication on Field Sobriety Testing](#)**

Karl Citek, O.D., Ph.D.; Ashlee Elmont, O.D., Christopher Jons, O.D., *et.al.*

Previous research shows that sleep deprivation (SD) produces cognitive impairment similar to that caused by alcohol intoxication. Individual studies suggest that SD also causes deficits in motor skills that could be mistaken for intoxication. Consequently, SD often is used as a defense when an impaired driver is charged with driving while intoxicated. Twenty-nine adult subjects participated in two test sessions each, one after a full night's rest and the other after wakefulness of at least twenty-four hours. Subjects consumed prescribed amounts of alcohol during each session. Law enforcement officers conducted field sobriety tests identical to those with which a driver would be assessed at roadside. Researchers also measured clinical responses of visual function and vital signs. The presence and number of validated impairment clues increase with increasing blood alcohol concentration but not with SD. Thus, SD does not affect motor skills in a manner that would lead an officer to conclude that the suspect is intoxicated, unless intoxication also is present.

Note: The "previous research" discussed in this study is the Booker study found in [Footnote 7](#). In addition, Booker also published an article entitled, "The Horizontal Gaze Nystagmus Test: Fraudulent Science in the American Courts," 44 SCI. & JUST. 133 (2004).

The NDAA's National Traffic Law Center addressed Booker's article explaining the study is "replete with hyperbole and flawed reasoning, factually and legally." [Click here to read the NTLC response.](#)

10. [Study: The Competency and Accuracy of Police Academy Recruits in the Use of the Horizontal Gaze Nystagmus Test for Detecting Alcohol Impairment – New England Journal of Optometry](#)

Jack E. Richman, O.D. and John Jakobowski, M.S. (1994: Vol. 47. No.1)

The purpose of this study was to determine the accuracy in the use and interpretation of the HGN test by new police officers following a precise training program in determining probable cause for arresting an impaired driver. The results indicated 87.8 percent sensitivity, which is the percentage of individuals who will fail the test and be identified correctly on alcohol breath testing as being under the influence of alcohol. The present study demonstrates and supports earlier studies as to the effectiveness of the eye movement procedure in differentially identifying impaired individuals from those who are not impaired. It further supports the training program to effectively train new police officers to apply the HGN test with excellent results.

11. [Study: Experimental Evaluation of an FST Battery in the Marine Environment](#)

U.S. Coast Guard (June 1990)

In this study, ninety-seven volunteers were dosed with alcohol in a recreational boating setting. Experienced marine officers estimated the subject's BAC through field sobriety testing. The agents estimated impairment correctly 82 percent of the time. It was concluded that the accuracy of FSTs, notably the HGN, was not deteriorated in the marine environment. All officers gave the HGN test on the boat and on land. The remaining water tests consisted of some combination of the "hand pat," "alphabet recital," or "nose touch." On land, after allowing the subjects ten minutes to regain "land legs," the subjects were then given either the WAT or the OLS (in addition to all being given the HGN again).

12. [Study: Validation of Sobriety Tests for the Marine Environment](#)

D.D. Fiorentino (2010)

In this study, 331 boaters were administered four float tests in a seated position on The Lake of the Ozarks to determine their effectiveness in detecting impaired boaters. The four tests were the HGN, the Finger To Nose (FTN), the Palm Pat (PP), and the Hand Coordination (HC) tests. The study concluded that the four tests' results were consistent with the findings in roadside SFSTs and that these tests may be useful for marine officers to use in determining impairment at 0.08 and above for operators on the boat. HGN alone correctly predicted BAC status in 85 percent of the cases. FTN alone correctly predicted BAC status in 67 percent of the cases. PP alone correctly predicted BAC status in 65 percent of the cases. HC alone correctly predicted BAC status in 59 percent of the cases. Administering the HGN test alone was the most predictive of impairment even when combined with the other tests, although HGN and any one of the other tests was also 85 percent predictive. The study found that officers who could properly administer the test may confidently rely on HGN done on the water.

13. [Admissibility of Horizontal Gaze Nystagmus](#)

NDAA – National Traffic Law Center (2003)

This monograph discusses how to overcome the foundational hurdles placed before prosecutors in many jurisdictions when attempting to admit HGN evidence. The authors explain how the HGN test is the best field sobriety test – one that cannot be practiced or physically controlled by the impaired driver. The monograph includes articles from a variety of leading HGN researchers and experts in the field of optometry.

14. [Horizontal Gaze Nystagmus: The Science and the Law – A Resource Guide for Judges, Prosecutors and Law Enforcement](#)

NDAA – National Traffic Law Center

This guide is an effort to provide accurate information regarding the use of the HGN test in impaired driving enforcement and dispel the continuing controversy around HGN. Among other things, this guide provides an overview of the science supporting the HGN test as a valid indicator of impairment, distinguishes between HGN and other forms of nystagmus, and provides the necessary tools to establish admissibility of the HGN test in court. The tools include studies, articles, illustrations and predicate question examples.

15. [A Behavioral Optometry/Vision Science Perspective on the Horizontal Gaze Nystagmus Exam for DUI Enforcement – The Forensic Examiner](#)

Bertolli, E.R., Forkiotis, C.J., Pannone, R.D., and Dawkins, H. (Spring 2007)

Many myths and incomplete information relate to the Horizontal Gaze Nystagmus (HGN) standardized field sobriety test (SFST). This article addresses many of these misconceptions and distortions from a vision science standpoint. Brief reviews of the SFSTs, optometry perspectives on vision science relating to the SFSTs, and ocular findings of drugs follow.

16. [American Medical Association – Policy Recommendations](#)

Although drunk driving did not become a prominent public health issue until the 1980s, the American Medical Association was involved in defining "under the influence" in 1938 and had recommended limits to determine the influence of alcohol on suspected drunk drivers in 1945. The AMA continues to encourage state medical societies to urge their state legislators to adopt a blood alcohol level of 0.05 as per se illegal for driving under Policy H-30.973 and Policy H-30.986, modified in 1997 calls for 0.04 percent. The AMA has explains[sic] this is the limit where all individuals are measurably impaired.

As discussed above, national and international traffic safety and public health organizations, including the [American Medical Association \(AMA 2013\)](#), the [World Health Organization \(WHO 2013\)](#), the [World Medical Association \(WMA 2013\)](#), and the [Association for the Advancement of Automotive Medicine \(AAAM 2009\)](#) and the [National Transit Safety Board \(NTSB 2013\)](#) have advocated setting BAC limits at 0.05 or lower.

More than [100 countries](#) have already established per se BAC limits at or below 0.05.
See Alcohol and http://www.tsrp-idaho.org/resources/SFST/43_AMA_1986.pdf

Rules Change:

As of January 1, 2007, the Kentucky Rules of Civil Procedure have been amended to allow for citation to unpublished cases in certain situations. The amendment reads:

CR 76.28(4)(c) Opinions

Section (4)(c) of [CR 76.28](#) shall read:

(c) Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

I. OPERATION-PHYSICAL CONTROL**A. Adams v. Commonwealth, 275 S.W.3d 209 (Ky. App. 2008)**

1. "Vehicle" is defined as a means of transporting or carrying persons or property. If it has a motor, then it is a "motor vehicle." "Motor vehicle" is not defined by [KRS 189A](#) and is construed according to its common usage. The definition of "motor vehicle" in [KRS 186](#) does not apply to DUI cases under [KRS 189A](#).
2. A moped with any size motor is a "motor vehicle" regardless of how it's defined in [KRS 186](#).

B. Bauder v. Commonwealth, 299 S.W.3d 588 (Ky. 2009)

1. Whether or not an officer has reasonable suspicion when a driver circumvents a DUI roadblock.
2. Officers set up a DUI roadblock. The roadblock consisted of police cruisers on either side of the intersection with the cruiser's emergency lights activated, but did not have a sign warning the public of the roadblock. Defendant made an abrupt stop some eighty to 100 yards before the roadblock, pulled off onto a side road and thereby bypassed the roadblock. Subsequently, the defendant was pulled over and charged with DUI.
3. The Court did not determine whether or not the act of making a turnaround prior to a DUI roadblock can by itself be a specific and articulable fact sufficient to give rise to reasonable suspicion.

Rather, reasonable suspicion is based on a totality of the circumstances.

- C. Blades v. Commonwealth, 957 S.W.2d 246 (Ky. 1997)
1. Circumstantial evidence and reasonable inferences therefrom are adequate to support conviction.
 2. Confession not made in open court must be corroborated by other proof, including circumstantial evidence and reasonable inferences therefrom.
- D. Commonwealth v. Clare, 1997 WL 808653 (Ky. App. Feb 14, 1997)
UNPUBLISHED
1. All four factors from Wells need not occur to find operation/physical control by defendant
 2. The issue determined on a case-by-case basis based on the facts of each case.
- E. Mattingly v. Commonwealth, 2009 WL 1098111 (Ky. App. Apr. 24, 2009)
UNPUBLISHED
1. Whether the definition of "motor vehicle" included a golf cart driven on private road located in a platted subdivision with access to public roads.
 2. Defendant argued that the definition did not cover a golf cart on a private road because it is not primarily for use on highways.
 3. The golf cart fit the definition because although it is not made for use on the highways, it was being driven on private road with access to public streets, other drivers, and service providers.
- F. McCreary v. Commonwealth, 2008 WL 4601231 (Ky. App. Oct. 17, 2008)
UNPUBLISHED
1. Whether sitting in the driver's seat of a vehicle with the keys in his pockets and the engine not running constituted having physical control of the vehicle while intoxicated. This defendant did not start drinking alcohol until he had arrived at the location of the arrest.
 2. The Wells factors to consider: whether the driver is awake, whether the engine was running, the vehicle's location and any facts supporting reasonable inferences.
 3. Here, the factors led to the conclusion that the defendant lacked the requisite intent or physical control of the vehicle even if he was intoxicated.

G. Nemeth v. Commonwealth, 944 S.W.2d 871 (Ky. App. 1997)

A farm tractor is a motor vehicle within meaning of DUI statute.

H. Newman v. Stinson, 489 S.W.2d 826 (Ky. 1972)

1. Commonwealth does not have to produce eyewitness who actually saw defendant drive or exercise control over vehicle – operation/physical control may be proved by circumstantial evidence.
2. Fifth Amendment privilege against self-incrimination not triggered by taking of blood/breath samples for chemical analysis.

I. Robbins v. Commonwealth, 336 S.W.3d 60 (Ky. 2011)

While outside of vehicle, unlocking vehicle's door with remote key entry demonstrates physical control over vehicle.

J. Wells v. Commonwealth, 709 S.W.2d 847 (Ky. App. 1986)

Established four factors to determine whether defendant operated or was in physical control of a motor vehicle:

1. Whether person was asleep or awake.
2. Whether motor was running.
3. Location of vehicle and all circumstances bearing on how vehicle arrived at that location.
4. Intent of person behind the wheel.

K. White v. Commonwealth, 132 S.W.3d 877 (Ky. App. 2003)

1. Whether or not probable cause to arrest for DUI exists when the officers did not witness the individual drive and the only evidence is based off of the testimony of a non-present witness.
2. Officers received a dispatch call regarding a stationary vehicle in the roadway. When the officers arrived at the scene, defendant, defendant's wife and a wrecker were present along with another officer. The officers questioned the defendant's wife and the defendant. The defendant's wife stated that the defendant had been drinking prior to driving and that the defendant drove the then stationary truck.
3. Wells and Harris factors for determining probable cause are not exclusive when there is question of whether or not the defendant was driving. The test for determining probable cause is reviewing

the totality of the circumstances.

II. BAC TESTS

A. Combs v. Commonwealth, 965 S.W.2d 161 (Ky. 1998)

When defendant refuses to take blood test, the officer cannot seek a search warrant to have defendant's blood drawn in a case NOT involving death or serious physical injury.

B. Cook v. Commonwealth, 129 S.W.3d 351 (Ky. 2004)

1. Police officer's refusal to allow defendant to contact an attorney before conducting BA test did not prejudice defendant enough to require suppression of BA test results
2. In order for there to be a valid refusal by a driver to take an admissible BA test, there must be a specific request that the driver take the test, not an inquiry whether the driver would like to take the test. There must also be a positive refusal, shown either by express or implied conduct.

C. Culver v. Commonwealth, 2004 WL 1301318 (Ky. App. Jun. 11, 2004)
UNPUBLISHED

The start time, the calibration check, and the ambient air analysis are all irrelevant as they relate to KAR's twenty minute observation requirement prior to administering a BA test. The controlling factor is whether the officer had the subject under present sense perception for a period of at least twenty minutes prior to analysis of subject's breath.

D. Cummins v. Lentz, 813 S.W.2d 822 (Ky. App. 1991)

Officer is NOT required to administer breath test where defendant refuses to take test, and then changes her mind and requests to take the test.

E. Commonwealth v. Davis, 25 S.W.3d 106 (Ky. 2000)

1. Results of BA test admissible when calibration unit and subject testing unit were shown to be in proper working order on the testing date.
2. Any problems with the Intoxilyzer machine on dates other than the testing date go to the weight of the evidence, not to its admissibility.

F. Commonwealth v. Filben, 2006 WL 2033376 (Ky. App. Jul. 21, 2006)
UNPUBLISHED

1. Failure of officer to use reasonable efforts to facilitate defendant's request for an independent blood test leads to suppression of

state administered breath test. Dismissal of DUI is not the remedy.

2. The "reasonable efforts" requirement obligates the officer to inform defendant of second hospital that he knows performs independent blood tests and he must offer to transport him to this second hospital after the initial hospital chosen by the defendant refuses to perform this test.

G. Jones v. Commonwealth, 279 S.W.3d 522 (Ky. 2009)

Pursuant to [KRS 189A.120](#), the Commonwealth shall not amend a DUI charge where the defendant refuses an alcohol concentration test.

H. Lee v. Commonwealth, 313 S.W.3d 555 (Ky. 2010)

1. Whether actions of police officer were sufficient to accommodate defendant's right under [KRS 189A.103](#) to have an independent blood test performed by a person of his own choosing.
2. Totality of circumstances approach, look at five factors: 1) availability of or access to funds or resources to pay for the requested test; 2) protracted delay in the giving of the test if the officer complies with the accused's request; 3) availability of police time and other resources; 4) location of requested facilities; and 5) opportunity and ability of accused to make arrangements personally for the testing.
3. Defendant did not request a specific hospital so the officer took him to the nearest one, where the doctor diagnosed alcohol intoxication and declined to administer a blood test. The defendant did not request to be taken elsewhere. The officer did make the necessary accommodations.
4. Defendants are entitled to be informed of their right to have an independent test at least twice, but here the defendant was already aware of his right since he asked in the first place.

I. Lewis v. Commonwealth, 217 S.W.3d 875 (Ky. App. 2007)

Testimony that breathalyzer went through calibration check is enough to lay proper groundwork for introduction of breathalyzer evidence.

J. Commonwealth v. Lopez, 3 S.W.3d 351 (Ky. 1999)

1. Clarifies the deceptive "head note holding" of the Combs case.
2. Blood test results may be admissible in a DUI case not involving death or physical injury to someone other than the defendant where the defendant expressly consents to the blood test.

- K. Marks v. Commonwealth, 698 S.W.2d 533 (Ky. App. 1985)
1. BA tests performed by private entity for diagnostic purposes and not at the direction of the Commonwealth are not violative of defendant's Fourth Amendment or due process rights.
 2. Statutes governing the drawing of blood from persons under arrest govern only when law enforcement places a person under arrest, and not situations in which a private entity draws blood for diagnostic purposes.
- L. Commonwealth v. Roberts, 122 S.W.3d 524 (Ky. 2003)
1. Restated the foundation requirements for admission of a BA test:
 - a. The machine was properly checked and in proper working order at the time of the test.
 - b. The test consisted of the steps and sequence set forth in [500 KAR 8:030\(2\)](#).
 - c. A certified operator had continuous control of the person by present sense impression for at least twenty minutes prior to the test and that during the twenty minute period the subject did not have oral or nasal intake of substances which will affect the test.
 - d. That the test was given by an operator who was properly trained and certified to operate the machine.
 - e. The test was performed in accordance with standard operating procedures.
 2. Overruled Marcum v. Commonwealth and Owens v. Commonwealth – The Commonwealth can satisfy the foundation requirements by relying solely on the testimony of the machine operator, provided the documentary evidence (*i.e.* maintenance records and test ticket) are properly admitted making it unnecessary to produce the testimony of the technician who serviced and calibrated the BA machine.
- M. Rowe v. Commonwealth, 2008 WL 4754923 (Ky. App. Oct. 31, 2008)
UNPUBLISHED
1. Certified maintenance records of breathalyzer machine before and after the defendant's test can be introduced in lieu of testimony from breathalyzer technician to show that breathalyzer machine was working properly.
 2. Breathalyzer maintenance and test records are not testimonial

and their admissibility is not governed by the holding of [Crawford v. Washington](#).

- N. Smith v. Commonwealth, 181 S.W.3d 53 (Ky. App. 2005)
 - 1. Commonwealth has the burden of proving by a preponderance of the evidence that the defendant gave his voluntary consent to a blood draw (*i.e.*, to a search).
 - 2. Excellent recitation of the admissibility of expert opinion testimony.
- O. Commonwealth v. Walther, 189 S.W.3d 570 (Ky. 2006)
 - 1. Follows Roberts and Wirth cases – a certified copy of the Intoxilyzer maintenance records can be admitted into evidence to show instrument was in proper working order.
 - 2. Notations by breathalyzer technician on maintenance and performance records of breath analysis instruments are not testimonial and their admissibility is not governed by [Crawford v. Washington](#).

III. EVIDENCE

- A. Allen v. Commonwealth, 817 S.W.2d 458 (Ky. App. 1991)
 - 1. Taking of breath sample does not constitute an illegal search.
 - 2. Absent a showing of bad faith by the Commonwealth, failure to preserve blood sample does not amount to constitutional error, *i.e.*, denial of due process, where defendant requested an independent test of sample but the sample was destroyed by the lab pursuant to established policy.
 - 3. Conviction of DUI may stand solely on the officer's testimony without resort to various testing devices.
- B. Commonwealth v. Armstrong (Broady), 2005 WL 2574022 (Ky. App. Oct. 14, 2005) **UNPUBLISHED**
 - 1. Follows Long – Officer has a duty to provide transportation and provide other assistance as may be reasonably necessary to facilitate a defendant who has requested an independent blood test.
 - 2. Officer should transport defendant to a second hospital if first hospital will not perform independent blood test, so long as this request is not unreasonable.

C. Armstrong v. Commonwealth (Rowland), 205 S.W.3d 230 (Ky. App. 2006)

1. Follows Osborne – results of voluntary toxicology tests and blood sample taken at hospital are available to Commonwealth as evidence.
2. Commonwealth can obtain medical records from hospital after blood sample taken voluntarily from defendant in the course of medical treatment.
3. HIPAA and defendant's expectation of privacy do not outweigh Commonwealth's right to obtain blood test results.

D. Bhattacharya v. Commonwealth, 292 S.W.3d 901 (Ky. App. 2009)

1. Defendant's right to contact an attorney is not violated when Officer dials the telephone number for the defendant rather than allowing the defendant to dial the number himself.
2. Officer must provide the defendant with some means of obtaining an attorney's phone number and the defendant's right to attempt to contact an attorney is satisfied by providing the defendant with a local phone book.

E. Burton v. Commonwealth, 300 S.W.3d 126 (Ky. 2009)

1. Whether or not urinalysis results are admissible to determine impairment when the defendant did not appear to be under the influence of alcohol at the site of the wreck.
2. Defendant was involved in a head-on collision with another car. The officer reported that the defendant did not appear to be under the influence of alcohol. Once transported to the hospital, the defendant was subjected to urinalysis, which showed remnants of cocaine and marijuana. The test could not determine the amount of impairment from the drugs and the exact date of consumption.
3. Urinalysis test alone will not determine whether or not the individual is impaired at the time of the wreck. (*But see Pemberton*).

F. Collins v. Commonwealth, 142 S.W.3d 113 (Ky. 2004)

"Anonymous tipster" must also provide some predictive information for tip to have sufficient *indicia* of reliability to justify officer's pulling over motorist and administering field sobriety tests. Can't simply state license plate number, must also give some indication that tipster has intimate knowledge of the state of motorist's drunkenness. Without more, tip does not give officer clear and articulable suspicion to pull over motorist, and the evidence of the stop and sobriety tests may be suppressed. Contrast

with Kelly.

G. Evans v. Commonwealth, 45 S.W.3d 445 (Ky. 2001)

Conviction under alternative theories of criminal liability contained in DUI statute was proper even though no separate findings were made as to each means of commission of offense.

H. Ferguson v. Commonwealth, 362 S.W.3d 34 (Ky. App. 2011)

1. Is a denial to use a cell phone while in a detention center to call a detainee's attorney a violation of [KRS 189A.105\(3\)](#)? Does a violation of [KRS 189A.105\(3\)](#) require suppression of the detainee's subsequent breathalyzer test?
2. This case distinguishes Bhattacharya. The defendant in this case was taken to a detention center and informed of her rights under [KRS 189A.105\(3\)](#). Defendant stored her attorney's number in her cell phone and requested to use her cell phone to obtain this information. Defendant was denied and subsequently, she was administered a breathalyzer test.
3. Officer must permit an individual to use anything reasonably accessible in the immediate area when an individual is attempting to contact an attorney.
4. When determining whether or not an individual's rights under [KRS 189A.105\(3\)](#) have been violated, the court must look at the totality of the circumstances, which includes affording the detainee appropriate means capable of contacting his/her attorney.
5. Since state action frustrated the detainee's right to counsel, the breathalyzer evidence must be suppressed or [KRS 189A.105\(3\)](#) would be meaningless.

I. Commonwealth v. Hager, 702 S.W.2d 431 (Ky. 1986)

1. Whether a defendant's refusal to submit to a breathalyzer test was admissible in his trial for DUI.
2. Previously the court held that evidence of a defendant's refusal could not be introduced at trial because such evidence violated protections against self-incrimination. However a Supreme Court decision in 1983, South Dakota v. Neville, 459 U.S. 553 (1983), found the opposite and the Kentucky court decided to adopt its holding.
3. A refusal to take a blood-alcohol test after a police officer has lawfully requested it is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.

J. Herndon v. Commonwealth, 2009 WL 2475331 (Ky. App. Aug. 14, 2009)
UNPUBLISHED

1. Follows the Litteral decision – the defendant does not have a right to privately consult with an attorney prior to administration of the breath test.
2. Officer does not have to leave the room during the Defendant's conversation on the phone with his attorney since this would interfere with the twenty minute observation period.
3. Seems to open door that conversation on suspect's side is evidentiary as court states that it is up to the suspect's attorney to "strategically illicit relevant information" in yes or no answers.

K. Commonwealth v. Kelly, 180 S.W.3d 474 (Ky. 2005)

Tip from identifiable "citizen informant" has strong presumption of reliability, and is enough to provide officer with reasonable suspicion necessary to pull over motorist who otherwise exhibits no signs of DUI. Contrast with Collins.

L. King v. Commonwealth, 875 S.W.2d 902 (Ky. App. 1993)

1. In *per se* prosecution where defendant's BA is .08 or greater, 0.005 margin of error (AKA "variance") does not preclude finding of guilt beyond a reasonable doubt, *i.e.*, where defendant's BA result is between .080 and .084.
2. In *per se* prosecution, defendant may not introduce evidence to show that he was not under the influence.

M. Litteral v. Commonwealth, 282 S.W.3d 331 (Ky. App. 2008)

1. Defendant's right to contact an attorney is "very circumscribed" and it is merely the right to an opportunity to attempt to contact and communicate with an attorney.
2. Defendant does not have the right to consult privately with an attorney and no right to have attorney present prior to BAC testing.
3. No coercion even with inaccurate implied consent:

"We thus held that inaccuracies in the 'pre-testing warnings' established in the same Act that created [KRS 189A.105\(3\)](#)'s right to counsel could not render a DUI suspect's submission to testing involuntary because, 'as consent is implied by law, one cannot claim coercion in consenting to a test.'"

4. Court does not address admissibility of statements made by

suspect during conversation with attorney.

N. Commonwealth v. Long, 118 S.W.3d 178 (Ky. App. 2003)

When offering the independent BA test, police officers must act reasonably under the totality of the circumstances to facilitate the preservation of this statutory right so long as the test can be administered within a reasonable time of arrest.

O. Lopez v. Commonwealth, 173 S.W.3d 905 (Ky. 2005)

Under the "*per se*" section of the DUI statute, Commonwealth must prove that the defendant's blood alcohol concentration was 0.08 or greater at the time he was operating a motor vehicle, rather than at the time the BAC test was given.

P. Love v. Commonwealth, 55 S.W.3d 816 (Ky. 2001)

1. Lapse of four hours between cessation of operating vehicle and collection of blood sample did not render sample inadmissible. There is no bright-line rule as to when the lapse is so great that the BA is automatically suppressed. Lapse goes to the weight of evidence, not its admissibility.
2. Commonwealth is not required to present extrapolation evidence but nothing precludes the Commonwealth or defendant from presenting such evidence.
3. Commonwealth does not have to establish a perfect chain-of-custody with the blood sample testing so long as there is a reasonable probability that the evidence has not been altered in any material aspect. Gaps in the chain go to the weight of the evidence, not its admissibility.
4. Blood test results of serum testing must be converted to whole blood reading.
5. Kentucky Administrative Regulations on blood samples and their testing do not apply to blood drawn by the hospital that is not at the request or under the direction of the officer.

Q. Matthews v. Commonwealth, 44 S.W.3d 361 (Ky. 2001)

Results of blood-alcohol content tests performed on defendant in the hospital following multi-car accident were admissible, despite state's failure to offer identity or credentials of nurse who actually drew defendant's blood, where substantial compliance with required procedures and lack of contamination of blood sample were adequately established. Statute and regulations setting forth required credentials for persons drawing blood to be used for blood alcohol testing were not exclusive, but merely established presumption of regularity, and

testimony of officer who witnessed blood being drawn adequately established that proper procedures were used.

R. Commonwealth v. Mattingly, 98 S.W.3d 865 (Ky. App. 2002)

Defendant's performance on FSTs is relevant evidence in .08 DUI prosecution.

S. Commonwealth v. Minix, 3 S.W.3d 721 (Ky. 1999)

Defendant's right to independent test not triggered until he has consented to tests requested by officer.

T. Commonwealth v. Morriss, 70 S.W.3d 419 (Ky. 2002)

1. If defendant has been charged with DUI: if death or physical injury and there is a refusal to submit to tests for alcohol concentration, implied consent statute permitting court-ordered testing applies and a search warrant may be obtained.
2. If defendant has not been charged with DUI: if death or physical injury, the statute does not apply and traditional search and seizure principles control.

U. Osbourne v. Commonwealth, 867 S.W.2d 484 (Ky. App. 1993)

Blood collected and tested by hospital for routine medical reasons, *i.e.* not at the direction of the Commonwealth, can be subpoenaed and introduced into evidence.

V. Pemberton v. Commonwealth, 2008 WL 4530906 (Ky. App. Oct. 10, 2008) **UNPUBLISHED**

1. Results of defendant's urinalysis test were relevant, and thus admissible, in DUI prosecution.
2. Police chemist's testimony that defendant's urinalysis results showing the presence of cannabinoid metabolites at a level tested indicated ingestion of marijuana within thirty-six hours of driving was a useful fact for the trier of fact in determining whether or not the defendant was driving while impaired by marijuana.

W. Peters v. Commonwealth, 345 S.W.3d 838 (Ky. 2011)

1. Toxicology report prepared by lab technician at State Police Laboratory was a testimonial statement pursuant to the [Crawford](#) case. Lab supervisor or another lab technician cannot testify in lieu of the unavailable technician who performed the testing and prepared the lab report as this violates the defendant's Sixth Amendment right of confrontation.

2. Impliedly overrules the case of Brown v. Commonwealth, which had allowed the admission into evidence of a lab report under the business exception to the hearsay rule, where the lab technician was unavailable and the lab supervisor was allowed to testify in lieu of the technician who had performed the testing and prepared the report.
- X. Commonwealth v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996)
1. Opinion testimony of officer on issue of defendant's intoxication is admissible.
 2. To admit HGN test results into evidence, Commonwealth must show:
 - a. Some foundation testimony that the officer was trained/certified in HGN testing.
 - b. That the test was properly administered.
 - c. That the proper procedures were employed.
- Y. Commonwealth v. Walther, 189 S.W.3d 570 (Ky. 2006)
- Notations made by breathalyzer technician in course of testing and maintenance of machine are not testimonial statements, and so not barred from admission by Crawford.
- Z. Wilson v. Commonwealth, 2009 WL 960750 (Ky. App. Apr. 10, 2009)
UNPUBLISHED
1. Officer can testify that PBT "detected the presence of alcohol" in the case in chief. Officer cannot testify as to specific BAC reading and cannot state whether defendant passed or failed the PBT.
 2. PBT testimony is not evidence offered to prove guilt, rather it corroborates the Officer's testimony that the defendant smelled of alcohol.
- AND**
- Williams v. Commonwealth, 2003 WL 1403336 (Ky. App. Mar. 21, 2003) **UNPUBLISHED**, Court found no error with officer's testimony of "presence of alcohol" on PBT (actual reading was 0.114). Presence is not same as result.
- AA. Commonwealth v. Wirth, 936 S.W.2d 78 (Ky. 1996)
1. Commonwealth does not have to elect under which section of statute it would proceed and can go forward with proof and seek conviction on whatever section is supported by the evidence, e.g.,

Commonwealth may present proof and prosecute under more than one section to seek conviction on DUI.

2. Commonwealth required to give reasonable notice as to which of the four possible sections of statute would be proven at trial.
3. The trial court cannot require any supplementation of implied consent law on theory that it is misleading or inaccurate so long as the inaccuracy does not rise to constitutional violation.
4. Admissibility of Intoxilyzer results does not require testimony of technician who serviced and calibrated the machine.
5. Commonwealth is not required to present expert testimony in *per se* prosecution to extrapolate backward from time BA was performed to establish defendant's blood-alcohol content at moment he was operating vehicle.
6. There is no bright-line rule where lapse of time between cessation of operation and BA testing becomes so great as to prevent admissibility of BA test results. The lapse goes to the weight of the evidence, not its admissibility.

BB. Kidd v. Commonwealth, 146 S.W.3d 400 (Ky. App. 2004)

Evidence that the driver could not perform simple tasks involved in field sobriety tests established that his ability to drive was impaired. SFSTs establish impairment due to marijuana.

CC. Bridgers v. Commonwealth, 2007 WL 121846 (Ky. App. Jan. 19, 2007)
UNPUBLISHED

Commonwealth was not required to make a showing that the field sobriety testing was scientifically reliable. This Court has previously held that evidence of field sobriety testing is admissible and that officers observing a defendant's driving and physical condition may offer both lay and expert opinion testimony that a defendant was intoxicated.

DD. Leatherman v. Commonwealth, 357 S.W.3d 518 (Ky. App. 2011)

Failure of HGN combined with other evidence establishes probable cause for arrest.

EE. Hadaway v. Commonwealth, 352 S.W.3d 600 (Ky. App. 2011)

Officers' testimony alone can support a conviction without the results of a breath test machine. SFSTs, smell of alcohol and erratic driving sufficient evidence for conviction of DUI.

IV. IMPLIED CONSENT

A. Beach v. Commonwealth, 927 S.W.2d 826 (Ky. 1996)

1. Implied consent law does not require an officer to first offer a breathalyzer test before requesting a blood and/or urine test, *i.e.*, no preferred method for determining BAC or testing priority is expressed in the law.
2. Blood test results are admissible, even if obtained in violation of the implied consent statute, so long as no violation of a constitutional right is involved.

B. Furcal-Peguero v. State, 566 S.E.2d 320 (Ga. App. 2002) AND State v. Tosar, 350 S.E.2d 811 (Ga. App. 1986)

Implied consent law must be read to defendant, but law neither requires the officer to ensure that the defendant understands the implied consent law nor that it be printed in the defendant's native language (or any other language than English).

C. Commonwealth v. Hernandez-Gonzalez, 72 S.W.3d 914 (Ky. 2002)

The implied consent law does not unconstitutionally coerce a defendant into submitting to a BA test.

Also: "While the statutory warning may be inaccurate in some circumstances, the duty to submit to testing is foremost under the statutory scheme. Thus, the implied consent warning contained in [KRS 189A.105](#) is not so defective as to prejudice, as a matter of law, a suspected drunk driver's decision-making process since there is no constitutional right to refuse to submit to a test to determine blood alcohol concentration."

D. Helton v. Commonwealth, 299 S.W.3d 555 (Ky. 2009)

1. By operating a motor vehicle in Kentucky, one has consented to BAC testing and this implied consent is not nullified when the subject is unconscious.
2. If DUI suspect is in a motor vehicle accident that results in death or physical injury to someone other than the suspect, the officer can obtain blood sample either by the suspect/driver's consent or by search warrant if suspect/driver expressly refuses to submit to testing. If the suspect/driver is unconscious, then officer can obtain blood sample without a search warrant and without the express consent of the suspect/driver.

E. Commonwealth v. Rhodes, 308 S.W.3d 720 (Ky. App. 2010)

1. Whether or not someone can impliedly or explicitly refuse to take

a breathalyzer when officers never read the implied consent warning.

2. Defendant was pulled over and arrested for DUI. After the arrest, defendant became combative and belligerent. When the officers escorted the defendant into the Intoxilyzer room, the defendant became belligerent again. Officers testified that they tried multiple times to complete the reading of the implied consent warning, but were unable to complete it because of the defendant's actions.
3. The officers must read the entire implied consent warning to the defendant. This does not mean that the defendant must listen. Once the warning has been read, only then can the defendant impliedly or explicitly refuse consent to be tested.

F. Roberts v. Commonwealth, 2009 WL 2408436 (Ky. App. Aug. 7, 2009)
UNPUBLISHED

Defendant's unconsciousness, or being in a semi-conscious state, does not invalidate implied consent and the Commonwealth does not have to prove that the defendant voluntarily consented to the blood test where there is no evidence of a "positive refusal" by the defendant to the blood test.

G. Rodriguez v. State, 565 S.E.2d 458 (Ga. 2002)

1. In absence of evidence indicating intent to discriminate against non-English speakers, implied consent statutes did not violate equal protection.
2. Even if implied consent statutes required that the implied consent warnings be read only in English, and thus created classification of English and non-English-speaking drivers, rational basis test, rather than strict scrutiny, applied to determine whether they violated equal protection.
3. Even if implied consent statutes required that implied consent warnings be read only in English, and thus created classification of English and non-English-speaking drivers, equal protection was not violated.
4. Implied consent warnings are a matter of legislative grace, and thus due process does not require that warnings be given in a language the driver understands.

H. Sigretto v. Commonwealth, 2010 WL 1508166 (Ky. App. Apr. 16, 2010)
UNPUBLISHED

1. Whether a refusal to submit to a blood alcohol test and then a subsequent consent after speaking with the defendant's attorney

should result in a determination that the defendant consented to the test.

2. Defendant was pulled over and charged with DUI. Defendant was transported to a hospital to conduct a blood alcohol test. Pursuant to [KRS 189A.105\(3\)](#), the defendant was given her fifteen-minute period to contact her attorney. After being unable to contact her attorney during this period, defendant refused to submit to the test. Within about five minutes of refusing the test, defendant received a call from her attorney, who advised her to submit to the test. Defendant then told the officer that she would consent to the test. The officer refused to accept the subsequent consent as the officer was already filling out the citation.
3. Once the defendant has refused to take a blood alcohol test, government is not required to wait for the defendant to change his/her mind to consent to the test. Accordingly, based on [KRS 189A.105](#), the defendant's refusal to submit to the test can be used as evidence that the defendant violated [KRS 189A.010](#). (See Cummins case).

I. Commonwealth v. Bedway, 466 S.W.3d 468 (Ky. 2015)

The Kentucky Supreme Court unanimously held that suppression of DUI breathalyzer test results was **not** an appropriate remedy under the circumstances of this case regarding a violation of the statutory right in [KRS 189A.105\(3\)](#) to contact an attorney before the test since Bedway's request was actually to telephone his **daughter** to get attorney information. However, the Kentucky Supreme Court held that the statutory right to contact an attorney **was** violated and that suppression was an available remedy under appropriate circumstances, *i.e.*, an officer's deliberate violation of the statute or evidence that but for the violation the result of the case would have been different or the penalty greater.

J. Cook v. Commonwealth, 826 S.W.2d 329 (Ky. 1992)

Consent to draw blood need not be knowing or intelligent, just voluntary.

V. PRE-TRIAL ISSUES

A. Cranmer v. Commonwealth, 2003 WL 21990216 (Ky. Aug. 21, 2003)
UNPUBLISHED

1. Testimony that technician routinely checked blood-alcohol testing machine, in lieu of actual memory of testing the machine, acceptable as evidence of habit in pretrial admissibility hearing.
2. As long as Commonwealth shows sufficient chain of custody, language on blood sample that states that said sample is not to be used for "legal" purposes may be ignored.

- B. Commonwealth v. Gonzalez, 237 S.W.3d 575 (Ky. App. 2007)

Pursuant to [RCr 9.64](#), it is an abuse of discretion for the trial court to dismiss a case due to the nonappearance of a subpoenaed witness when case is NOT set for trial, unless the Commonwealth consents to the dismissal.

- C. Commonwealth v. House, 295 S.W.3d 825 (Ky. 2009)

1. Commonwealth is not required to produce the Intoxilyzer "source code."
2. Subpoena *duces tecum* to manufacturer of breath test machine that sought computer source code for expert to examine for errors in logic was nothing more than a classic fishing expedition.
3. Subpoena *duces tecum* may be quashed if it is unreasonable or oppressive – it is unreasonable if the party demanding production can point to nothing more than hope or conjecture that the subpoenaed material will provide admissible evidence.

- D. Shackelford v. Commonwealth, 2006 WL 1867911 (Ky. App. Jul. 7, 2006)
UNPUBLISHED

As distinguished from Roberts there are no foundational requirements that must be met before evidence of breathalyzer test results are introduced in a suppression hearing.

- E. Botkin v. Commonwealth, 890 S.W.2d 292 (Ky. 1994)

Held that use of defendants' previous convictions for driving under the influence to enhance penalty upon conviction under new statute providing *per se* offense of operating motor vehicle with blood alcohol content of 0.10 or more did not violate constitutional prohibitions against *ex post facto* laws (issue of new law ten-year look back).

VI. TRIAL ISSUES

- A. Allen v. Walter, 534 S.W.2d 453 (Ky. 1976)

Without the consent of the Commonwealth, a trial court may not amend or reduce to a lower degree the charge brought against a defendant before trial.

- B. Commonwealth v. Buchanon, 122 S.W.3d 565 (Ky. 2003)

1. For a "traffic safety checkpoint" to be reasonable, *i.e.*, constitutional, there must be constrained discretion of officers at the scene and the checkpoint must be established pursuant to some sort of systematic plan.
2. If primary purpose of checkpoint is to detect narcotics or any

violation of the law, then it's unreasonable/unconstitutional. If primary purpose is DUI detection, then courts are to use balancing test from [Brown v. Texas](#), 443 U.S. 47 (1979) to determine its reasonableness. Courts should weigh the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty.

3. Follows Supreme Court decision in [Michigan Dept. of State Police v. Sitz](#), 496 U.S. 444 (1990), which held that the State's interest in eradicating drunk driving was advanced by the sobriety checkpoint program and this interest outweighed the intrusion upon motorists who were only briefly stopped at the checkpoints.

C. [Campbell v. Commonwealth](#), 2008 WL 4998829 (Ky. App. Nov. 26, 2008)
UNPUBLISHED

1. For a "vehicle safety checkpoint," *i.e.*, roadblock, to be constitutional under the Fourth Amendment, Court will examine guidelines established in [Buchanon](#) to see if this was actually an isolated stop later characterized as a checkpoint.
2. Nonexclusive list of guidelines from [Buchanon](#) are applied on a case-by-case basis to determine the reasonableness of the checkpoint – violation of one guideline does not make the checkpoint unconstitutional.

D. [Corbett v. Commonwealth](#), 717 S.W.2d 831 (Ky. 1986)

A defendant's plea of guilty waives all defenses to original charges other than the defense that the charging instrument fails to charge an offense.

E. [Commonwealth v. Corey](#), 826 S.W.2d 319 (Ky. 1992)

Whether to engage in plea bargaining is a matter reserved to sound discretion of prosecuting authority per [RCr 9.26](#).

F. [Commonwealth v. Dedic](#), 920 S.W.2d 878 (Ky. 1996)

In DUI trials, prior DUIs may not be introduced until guilty verdict is rendered on underlying charge; thus repeat DUI offenders must have bifurcated trials.

G. [Dixon v. Commonwealth](#), 982 S.W.2d 222 (Ky. App. 1998)

Defendant cannot be prosecuted for operation of motor vehicle while license is suspended for DUI when, at the time of the arrest, the period of license suspension has expired.

H. Commonwealth v. Gaitherwright, 70 S.W.3d 411 (Ky. 2002)

Refusal to submit to BA test on a first offense DUI is not an aggravating circumstance mandating mandatory jail sentence.

I. Hayden v. Commonwealth, 766 S.W.2d 956 (Ky. App. 1989)

Other than date, time and location of offense, the only essential elements to prove in DUI are:

1. Operation/physical control, and
2. Under the influence.
3. The Commonwealth DOES NOT HAVE TO PROVE IMPAIRED DRIVING ABILITY.
4. Also (SFSTs): Evidence of impaired ability to drive is presented at trial through description of the performance of field sobriety tests.

J. Commonwealth v. Hicks, 869 S.W.2d 35 (Ky. 1994)

Party who announces ready for trial is entitled to go forward and it is not within province of trial judge to evaluate evidence in advance to determine whether trial should be held. The time for such evaluation is upon motion for directed verdict.

K. Commonwealth v. Howlett, 328 S.W.3d 191 (Ky. 2010)

1. Issue – Whether there are any special prohibitions which exist in a bench trial against a judge taking judicial notice of a fact that comes from the judge's personal knowledge given [KRE 201](#)'s silence on the matter.
2. Defendant was arrested and charged with DUI. During the bench trial of the defendant, without request by either attorney, the presiding judge took judicial notice that a burp during the twenty-minute observation period necessitated a restart of the twenty-minute period prior to administering the breathalyzer test. The judicial notice was based off of the judge's prior personal experience as a DUI prosecutor and his knowledge of the operating instructions for the breathalyzer.
3. Based on [KRE 201](#), a trial judge is prohibited from relying on his personal experience to support the taking of judicial notice.

L. Hubbard v. Commonwealth, 145 S.W.3d 419 (Ky. App. 2004)

Defendant cannot be convicted of operating a motor vehicle on a DUI suspended license when, at the time of the offense, the defendant's

license was not suspended for DUI, but for driving on DUI suspended license.

M. Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006)

Alcohol intoxication is not a lesser included offense of DUI, and so defendant may not request a jury instruction for alcohol intoxication in a DUI case.

N. King v. Venters, 595 S.W.2d 714 (Ky. 1980)

The fundamental rights of a defendant do not demand a series of mini-trials to be hurdled by prosecuting authorities before gaining entrance to the main ring.

O. Monin v. Commonwealth, 209 S.W.3d 471 (Ky. App. 2006)

1. For traffic checkpoint to be reasonable/constitutional, it must be set up and run according to an established system or policy which is designed to limit the officer's discretion at the checkpoint and to maximize public safety.
2. Stop of defendant determined to be an "isolated stop" later characterized as a checkpoint detention.

P. Commonwealth v. Pace, 82 S.W.3d 894 (Ky. 2002)

Defendant's prior DUI convictions were not admissible during guilt phase of trial, but the error of admitting them, without an objection from the defendant was not reversible, nor did their admission constitute palpable error warranting review under [RCr 10.26](#).

Q. Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981)

1. Neither court nor counsel may comment about consequences of a particular verdict at any time during the trial.
2. Right to trial by jury is limited to determination of guilt or innocence on underlying offense.

R. Ramsey v. Commonwealth, 157 S.W.3d 194 (Ky. 2005)

DUI combined with another aggravating act can lead to wanton endangerment charge. The act need not be related to driving at all. Driving drunk while a child is in the car constitutes wanton endangerment.

S. Commonwealth v. Reynolds, 136 S.W.3d 442 (Ky. 2004)

The statute imposing a *per se* violation for defendant under twenty-one years of age with BAC of .02 does not prohibit Commonwealth from charging defendant under twenty-one with *per se* violation for operating a

motor vehicle with BAC of .08 or higher. The penalty for subsequent DUIs can be enhanced as a result of a conviction of DUI before the age of twenty-one.

T. Commonwealth v. Steiber, 697 S.W.2d 135 (Ky. 1985)

In DUI trial, jury may not be instructed that defendant's operator's license is revoked upon conviction.

U. Commonwealth v. Stephenson, 82 S.W.3d 876 (Ky. 2002)

Defendant drove from Kentucky into Indiana. Indiana arrested defendant and convicted him of DUI 1st, then Kentucky dismissed on double jeopardy grounds even though this was defendant's fourth offense (moral – do a records check before allowing a defendant to plead at their arraignment).

1. Defendant's Indiana conviction was not a double jeopardy bar to Kentucky conviction because he was only prosecuted for conduct while within each respective state.
2. Kentucky District Court's dismissal of felony DUI charge did not bar subsequent prosecution in Circuit Court.

V. Woods v. Commonwealth, 793 S.W.2d 809 (Ky. 1990)

State rule permitting pleas in absentia to misdemeanors is discretionary, and it is abuse of discretion to accept guilty plea in absentia for any offense for which enhanced penalty may be imposed for subsequent convictions (See Lamberson—probably impliedly overrules Woods).

VII. PRIOR CONVICTIONS

A. Commonwealth v. Brewer, 2011 WL 2693574 (Ky. App. Jul. 8, 2011)
UNPUBLISHED

1. Establishes the "conviction-to-offense" sequence for penalty enhancement.
2. Effectively overrules the Ball, Royalty and Beard cases which had previously used a "conviction-to-conviction" sequence for penalty enhancement.
3. When defendant has a pending DUI, and prior to being convicted of this charge, he is charged with a subsequent DUI, then the second DUI must be treated as a first offense (defendant has two DUI first offense charges). For penalty enhancement purposes, defendant must have been convicted of the prior DUI before he is charged with the subsequent DUI for this subsequent DUI to be charged as a DUI second offense.

- B. Corbet v. Commonwealth, 717 S.W.2d 831 (Ky. 1986)
1. To rely upon a prior conviction in PFO proceeding, Commonwealth must show that:
 - a. The defendant was represented by counsel; OR
 - b. That the plea was knowingly and intelligently made.
 2. Non-constitutional challenges to prior conviction, e.g. ineffective assistance of counsel, must be made in the court in which that conviction was obtained, not in the current trial court.

But also see...

- C. Commonwealth v. Duncan, 939 S.W.2d 336 (Ky. 1997)
1. Certified copy of defendant's DOT driving history, NOT certified copy of the judgment of conviction which suspended defendant's license is sufficient evidence of suspension or revocation of defendant's license for charge of OSL.
 2. This overrules Commonwealth v. Dean, and now means that it is not necessary to prove prior conviction in prosecution for OSL – it is only necessary to prove that defendant was operating a vehicle while his operator's license was suspended or revoked.

But also see...

- D. Commonwealth v. Gadd, 665 S.W.2d 915 (Ky. 1984)
1. A duly authenticated record of a prior judgment and conviction which is silent on the exercise of constitutional rights is *prima facie* evidence to establish prior conviction in PFO proceeding and burden is on defendant to prove that prior was constitutionally invalid.
 2. Constitutional challenge to prior conviction, e.g. Boykin, must be by pre-trial motion before the current trial court – not the court in which the conviction was obtained.
 3. Commonwealth does not have to prove that prior was not obtained by constitutionally impermissible means.

But also see...

- E. Lovett v. Commonwealth, 858 S.W.2d 205 (Ky. App. 1993)
1. A collateral attack on a prior DUI conviction claiming ineffective assistance of counsel must be made by [RCr 11.42](#) or [CR 60.02](#) in the court in which that conviction was obtained.

2. A guilty plea is a judicial admission of the underlying requisites to the prior charge.

Result – Lovett narrows holding of Gadd to allowing pre-trial challenges only to Boykin-type considerations.

F. Commonwealth v. Lamberson, 304 S.W.3d 72 (Ky. App. 2010)

1. [RCr 8.28\(4\)](#) permits a guilty plea in absentia to DUI only if defendant executes a written waiver of his right to be present.
2. A challenge to the validity of a prior conviction used for enhancement purposes under the DUI statute must be made before the prior offense is successfully used to enhance a conviction. This defendant did not execute a written waiver of appearance for his first DUI plea, pled guilty to his second and third DUIs and then challenged the validity of the first DUI plea when he was charged with his fourth DUI. The Court held that this defendant waived his right to challenge the validity of the first DUI by pleading guilty to his second and third DUIs.

G. Estis v. Commonwealth, 864 S.W.2d 317 (Ky. App. 1993)

Defendant can be convicted of a third offense even though priors were both adjudicated as two firsts.

H. Little v. Commonwealth, 2009 WL 1110336 (Ky. Apr. 23, 2009)
UNPUBLISHED

1. Whether introduction of a defendant's prior DUI convictions during the prosecution's case in chief was reversible error.
2. Previous DUI convictions do not fall within any of the evidentiary exceptions under [KRE 404\(b\)](#), and will be reversible error as long as the error was not harmless.
3. Here, the prior convictions were presented during the guilt phase of the trial as opposed to the sentencing, and thus were unduly prejudicial to the defendant requiring reversal.

I. Commonwealth v. Pace, 82 S.W.3d 894 (Ky. 2002)

1. Whether introduction of a defendant's prior DUI convictions during the guilt phase of his current DUI conviction was reversible error.
2. The "palpable error" rule requires that a party make an objection to the trial court and request a ruling on the objection or it is waived. An appellate court may review even if an objection was not made, but it must consider whether on the whole case there is a substantial possibility that the result would have been any different.

3. Here, given the lack of an objection, and that the defendant did not deny that his license was suspended for DUI at the time he committed the offense, the court could not say that the error would have resulted in a different outcome.

J. Commonwealth v. Ramsey, 920 S.W.2d 526 (Ky. 1996)

On a DUI fourth offense, the priors are not elements of the offense. The priors are not admissible during guilt phase, but come in during sentencing to enhance penalty.

K. Skeans v. Commonwealth, 912 S.W.2d 455 (Ky. App. 1995)

Certified copy of Uniform Citation from record of previous trial for DUI can be used to prove the date of the prior offense during a later trial for a subsequent DUI offense.

L. Toppass v. Commonwealth, 799 S.W.2d 587 (Ky. App. 1990)

For operating on a license suspended or revoked for DUI, either prior judgment of conviction, or duly authenticated copy of same OR certified copy of guilty plea are proof of prior conviction.

M. Commonwealth v. Willis, 719 S.W.2d 440 (Ky. 1986)

To prove a prior conviction for DUI, a certified copy of that prior judgment of conviction IS required as the "best evidence" of that conviction. A certified copy of the defendant's DOT driving history IS NOT the "best evidence" of a prior DUI conviction.

VIII. CONSTITUTIONAL ISSUES

A. Berkemer v. McCarty, 468 U.S. 420 (1984)

Roadside questioning of motorist detained pursuant to routine traffic stop did not constitute "custodial interrogation" for purposes of Miranda, so that pre-arrest statements motorist made in answer to such questioning were admissible against motorist.

1. The roadside stops are presumptively temporary and brief.
2. Motorists are not completely at the mercy of police because the stops are made in public.

B. Donta v. Commonwealth, 858 S.W.2d 719 (Ky. App. 1993)

1. Defendant's constitutional rights are not violated when the court conducts a bench trial in the absence of a defendant's demand for a jury trial.
2. If the offense charged is not one which would be required to be

tried to a jury at common law, the court is not in error if it conducts a bench trial.

- C. Dunn v. Commonwealth, 2003 WL 22928462 (Ky. App. Dec. 12, 2003)
UNPUBLISHED

Cannot attack earlier, out of state DUI conviction as unconstitutional if it has already been used to enhance a subsequent in-state DUI charge. Similar to estoppel – once opportunity arose, Commonwealth has enhanced based on the earlier DUI conviction, and defendant has remained silent, defendant is foreclosed from questioning validity of earlier, enhancing charge (See Lamberson).

- D. Commonwealth v. Elliott, 322 S.W.3d 106 (Ky. App. 2010)

1. Pursuant to Gant, officer's search of defendant's vehicle following his arrest was permissible under the "search incident to arrest" warrant exception based on the officer's reasonable belief that the vehicle contained evidence of the offense of arrest.
2. Search of vehicle also permissible under the "automobile exception" to the search warrant requirement (even though Gant seems to abolish this exception).

- E. Commonwealth v. Green, 194 S.W.3d 277 (Ky. 2006)

Penalty for first-offense DUI qualifies as "petty" under U.S. Supreme Court reasoning in Blanton v. City of North Las Vegas, 489 U.S. 538 (1989), and so a jury trial is not mandatory.

- F. Commonwealth v. Hager, 702 S.W.2d 431 (Ky. 1986)

Motorist refusal to take a blood-alcohol test is not an act coerced by the officer requesting it, and so is not protected under Fifth Amendment right against self-incrimination. Admissible at trial. Based on South Dakota v. Neville, 459 U.S. 553 (1983) and overruled Hovious v. Riley, 403 S.W.2d 17 (Ky. 1966).

- G. Hourigan v. Commonwealth, 962 S.W.2d 860 (Ky. 1998)

Miranda warnings are not required prior to administering roadside sobriety tests.

- H. Lay v. Commonwealth, 207 S.W.3d 18 (Ky. App. 2006)

Charging defendant with DUI third offense and operating motor vehicle with license suspended for DUI did not constitute double jeopardy.

- I. Poe v. Commonwealth, 169 S.W.3d 54 (Ky. App. 2005)

1. A defendant has been seized within the meaning of the Fourth

Amendment when stopped by police officer using emergency lights on a patrol car as a reasonable person in the defendant's position would not have felt free to walk or drive away.

2. For the "community caretaking" function to apply there must be specific articulable facts that would lead an officer to reasonably believe a citizen is in need of assistance. An officer's routine practice alone cannot provide reasonable grounds.

- J. Price v. Commonwealth, 2006 WL 3690991 (Ky. App. Dec. 15, 2006)
UNPUBLISHED

Court notification to group of defendants waiting in the courtroom of their constitutional rights is effective explanation of those rights, and allows for a guilty plea to from any of the individuals so informed be admitted.

- K. Commonwealth v. Priddy, 184 S.W.3d 501 (Ky. 2005)

Information, personally given to officer by citizen in the area, was sufficient to support articulable suspicion that criminal activity was afoot, and thus, justified stop of defendant's car and subsequent search of his person.

- L. Robbins v. Commonwealth, 336 S.W.3d 60 (Ky. 2011)

Search incident to arrest permissible under the second prong of Gant because it was reasonable to believe that the vehicle contained evidence of the offense of arrest.

- M. Smith v. Commonwealth, 219 S.W.3d 210 (Ky. App. 2007)

Officer decision to stop and restart checkpoint because of dangerous highway backups was not unnecessarily discretionary and so did not violate Fourth Amendment. As a result, stops under these conditions resulting in DUIs cannot be suppressed.

- N. Strauss v. Commonwealth, 2009 WL 2633692 (Ky. App. Aug. 28, 2009)
UNPUBLISHED

1. Court rejected defendant's argument that his post-Miranda statements should be suppressed because he was under the influence and thus unable to make a knowing, intelligent and voluntary waiver of his rights because defendant's intoxication did not rise to the level of hallucinations.
2. Court ruled that while the defendant may have voluntarily been under the influence of alcohol and drugs, he was in sufficient possession of his faculties to deem his statements to be reliable.

O. Torrez v. Commonwealth, 2010 WL 4860357 (Ky. App. Nov. 12, 2010)
UNPUBLISHED¹¹

1. Whether warrantless search of defendant's vehicle after arrest for DUI, lack of identification/license was unconstitutional.
2. Defendant indicated that he did not speak English, did not have a license or ID, and was under the influence. The officer placed him under arrest and performed a search incident to arrest finding five pounds of marijuana.
3. Pursuant to Gant, police may search a vehicle incident to arrest when it is reasonable to believe the vehicle contains evidence of the offense of arrest. Here, the defendant was arrested for, among other things, driving without a license or valid ID. Therefore the officer was justified in searching the car for evidence of a license.

P. Owens v. Commonwealth, 291 S.W.3d 704 (2009)

Office has authority to order either driver or passenger out of vehicle during routine traffic stop. Citing Maryland v. Wilson, 519 U.S. 408 (1997).

¹¹ Opinion withdrawn and superseded by Torrez v. Commonwealth, 2011 WL 1327129 (Ky. App. Apr. 8, 2011), not reported in S.W.3d.

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.](#)
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- [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.](#)
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- [4.4 Respect for Rights of Third Persons.](#)

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- [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

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- [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.](#)
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- [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. Alfini, Judicial Conduct and Ethics (Michie 1990).

VIII. SUMMARY OF KENTUCKY STATE COURTS

Reprinted from

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

Last updated: December 2015

This information is provided only as a service and is subject to change. Attorneys who rely exclusively upon information within this publication do so at their own risk. For more information regarding the Kentucky Court of Justice please visit their website at <http://courts.ky.gov/Pages/default.aspx>.

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

JUSTICES

Bill Cunningham, (1st Dist.)

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601-3488, (502) 564-5444

103 West Court Square, P.O. Box 757 – Princeton, KY 42445-0757, (270) 365-3533

Daniel J. Venters, (3rd Dist.)

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601, (502) 564-4160

Pulaski County Court of Justice, Suite 3500, 50 Public Square, – Somerset, KY 42502, (606) 677-4248

Lisabeth T. Hughes, (4th Dist.)

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601, (502) 564-5444

Jefferson County Judicial Center, 700 W. Jefferson St., Ste. 1000 – Louisville, KY 40202, (502) 595-3199

Deputy Chief Justice Mary C. Noble, (5th Dist.)

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601, (502) 564-5444

300 West Vine Street, Suite 2201 – Lexington, KY 40507, (859) 246-2220

Michelle M. Keller, (6th Dist.)

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601, (502) 564-4165

Kenton County Justice Center, 230 Madison Ave., Suite 821 – Covington, KY 41011, (859) 291-9966

Samuel T. Wright III, (7th Dist.)

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601-3415, (502) 564-5444

Letcher County Courthouse, 156 Main Street, Suite 205 – Whitesburg, KY 41858, (606) 633-2259

CLERK/COURT ADMINISTRATOR/GENERAL COUNSEL

Susan Stokley Clary

State Capitol, Room 235, 700 Capital Ave. – Frankfort, KY 40601-3415, (502) 564-5444

CHIEF OF STAFF AND COUNSEL FOR THE OFFICE OF CHIEF JUSTICE

Katie A. Shepherd

Supreme Court of Kentucky, 700 Capital Ave., Room 230 – Frankfort, KY 40601, (502) 564-4162

ADMINISTRATIVE OFFICE OF THE COURTS DIRECTOR

Laurie K. Dudgeon

1001 Vandalay Drive – Frankfort, KY 40601, (502) 573-2350, FAX (502) 573-0177

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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WHY KENTUCKY DEFENSE COUNSEL?

The Kentucky Defense Counsel is an organization of civil defense attorneys that promotes and supports its members through legal education, professional development, collegiality and diversity while enhancing the quality of service its members offer their clients an improving the access to justice in the courts.



Kentucky Defense Counsel, Inc.

Common Defense

Common Defense is KDC's semi-annual full-color publication containing quality articles written by its members, legal updates, defense verdicts and more ...

CLE Programs

KDC's CLE Committee organizes and schedules 1.0 hour CLE programs throughout the year, applicable to its members' defense practices, and which members attend for minimal or no cost.

Young Lawyers Section

The YLS provides an opportunity for young lawyers to network with their peers, assist with mentoring programs, and help organize seminars.

Member Assistance

A blast e-mail will be sent upon request to all KDC members if information is needed regarding experts, witnesses or assistance with motions ...

Committees

KDC has several committees in which all of its members are able to get involved.

Membership Directory

Need assistance from an attorney in another part of the state? Go to KY-Def.org to find one of over 400 KDC members.

Spring Seminar

The one day Spring Seminar is organized by our Young Lawyers Section, Trial Tactics Committee, or another individual as requested by the KDC Board of Directors. A minimum of 6.0 hours of CLE is available, including a minimum 1.0 hour ethics credit. This year's program will focus on mediations.

Fall Seminar

The Fall Seminar occurs over 1-1/2 days. The 3.0 hour CLE program on Thursday is organized by the YLS. The 6.0 hour CLE program on Friday is organized by the Vice President of KDC, with assistance from KDC's Board of Directors. The KDC Annual Meeting and Awards Luncheon are held on Friday at which time members of KDC are recognized for their contributions to the civil defense bar. A minimum of 9.0 hours of CLE is available, including a minimum 1.0 hour ethics credit.

Speakers for both seminars are carefully selected to give attendees the best legal education for their registration fee.

Award Winning



KDC was recently presented the Rudolph A. Janata Award, which is presented annually by DRI to a progressive state legal defense organization. The plaque is passed annually to the incoming President of KDC.

The One and Only ...

Founded in 1971, KDC is Kentucky's only civil defense legal organization.

WHY KENTUCKY DEFENSE COUNSEL?