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Table of Contents

2 ........... President's Message
   By Douglass Farnsley

4 ............ Terms Expire on
   KBA Board of Governors

5 ............ Q&A with KBA
   President Douglass Farnsley
   By James P. Dady

10 ........... 2015 KBA Annual
   Convention Wrap-up

Features: Kentucky Civil
Procedure: A Rules Comparison
18 ........... Overview of Themed Issue
   By Anne A. Chestnut

18 ........... What's the Difference?
   Civil Procedure in Kentucky
   vs. Federal Courts
   By Anne A. Chestnut

25 ........... Pleading Claims in Kentucky
   State Court After Twombly and
   Iqbal
   By E. Kenly Ames

28 ........... Does Kentucky Summary
   Judgement Practice Really Differ
   from Federal Practice?
   By Jonathan R. Oliver and
   Richard C. Roberts

31 ........... Attorney Misconduct and the
   Appearance of Impropriety
   By Thomas L. Rouse

Columns

34 ........... Young Lawyers Division
   By J. Tanner Watkins

36 ........... University of Kentucky
   College of Law

38 ........... University of Louisville
   Louis D. Brandeis School of Law

40 ........... Northern Kentucky University
   Salmon P. Chase College of Law

42 ........... Effective Legal Writing
   By Judith D. Fischer

43 ........... Shop Talk
   By Michael Losavio

Bar News
Pay Your KBA Dues Online .......... 44
Magna Carta's 800th Anniversary
   to be Commemorated at the
   Kentucky State Fair ............. 45
KBA Young Lawyers Division
   Honored by American
   Bar Association ............... 45
Public Defender's Recognize
   Individuals for their Service .... 46
KBA Board of Governors
   Minutes ...................... 47

Departments
Kentucky Lawyer
   Assistance Program ........... 50
Kentucky Bar Foundation ......... 51
Continuing Legal Education .... 52
Who, What, When and Where .... 54
In Memoriam .................. 58
B&B Marketplace .............. 59

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WHY THE WORLD NEEDS MORE LAWYERS

By: Doug Farnsley

In February of this year, I had the opportunity to hear Dr. Samantha Nutt talk about the significant work she is doing through an organization called Advocates for War Child. Dr. Nutt is a 45 year old family physician who lives in Toronto. A number of years ago, she traveled to a strife torn area in central Africa with the noble and idealistic goal of providing medical care to patients in desperate need. Dr. Nutt soon realized that the problems she saw were much deeper and more profound than she had thought. Those with power in the area in which she was working were warlords, gangs, and criminals. The innocent victims were average people, often children and women, who were trying to live their lives. Because the perpetrators could act with impunity, hopelessness was the order of the day.

Dr. Nutt has been leading a successful effort in Uganda, the Congo, Afghanistan, and Lebanon to transfer support from simply providing medical and food aid to assisting in re-establishing the Rule of Law and enforcing basic human rights. The approach of War Child is to re-build legal structures, provide access to free legal counsel, and provide training opportunities to police, lawyers, judges, law students and other legal aid service providers.

Dr. Nutt’s presentation made me realize that I had never fully understood what “the Rule of Law” meant. I tended to take our system for granted. Ours is a society in which the police assist in dealing with violations of our criminal laws, and our judges oversee a system in which society works to see that the guilty are punished while the rights of the accused are respected. In our society, contracts are routinely performed according to their terms. On those occasions when a contract is breached, we have courthouses in which relief can be sought.

On this the 800th anniversary of Magna Carta, we recall that King John agreed that his power would be limited and that the rights of the barons would be respected. In my lifetime, I witnessed the Watergate scandal unfold leading to the approval in the House Judiciary Committee of articles to impeach President Nixon. Soon thereafter, Richard Nixon resigned his presidency. Before President Nixon resigned, his vice president had also resigned for crimes he had committed as an office holder in Maryland. The Rule of Law applies to all of us. Or, as we sometimes hear, “No one is above the law.”

In Baltimore, six police officers have been indicted for alleged criminal misconduct in the death of a young man who had been arrested. The legal process will play out in Baltimore. We have some confidence that the rules will be followed, the rights of the accused will be protected, and a just result will be reached. The situation in Baltimore reminds us that the law applies to those who help us enforce our criminal laws as well as to those others in our society suspected of criminal activity.

Eight hundred years after Magna Carta, the Rule of Law remains a work in progress. In this country, we enslaved African Americans until the Emancipation Proclamation in 1863 and the adoption in 1865 of the 13th Amendment to the Constitution. As a nation, we did not assure the right of women to vote until 1920 when we ratified the 19th Amendment. “To Kill a Mockingbird” tells the story of our failure in many cases to assure equal justice under law.

Until 1956, the law required that Louisville’s schools would be segregated. Thus, in 1955 when I entered kindergarten, the law mandated that my classmates were all white. One year later, my first grade class included two African-American children. Six decades later, Louisville continues to work on what it means for our schools to be racially integrated.

The steps taken in the past 150 years to extend the vote to African Americans and to women, to improve fairness in the prosecution of those accused of crimes, and to erase the vestiges of Jim Crow show that progress is possible and is occurring. This tells me that the work that Dr. Nutt and her group is doing to bring the Rule of Law to areas where it is in short supply can succeed. It will take effort and time, but Advocates for War Child is making substantial progress.

My view as the Kentucky Bar Association vice president and president-elect and now as KBA president has been and is that this is our time to act. The KBA is working on several fronts to improve the administration of justice. First and foremost, the KBA Board seeks to meet its core duties in the area of attorney discipline, to oversee the KBA’s committees and sections, and to carry out budgetary oversight in other areas of Bar governance. Once we have those basic obligations in hand, we are looking outward to support overdue increases in the compensation of our judges and their staffs, to support our veterans, and to support diversity and inclusion in the legal profession. In an interview that appears in this issue of the Bench & Bar, I outline specific steps we have taken. We are not going to be able to completely solve the problems we face. But, we have already helped.

The world needs more lawyers so that the people of Uganda, the Congo, Afghanistan, and Lebanon will have safer lives and will be treated more fairly. Having learned that lesson, I have also learned to be more appreciative of the attorneys and judges who make up the Kentucky Bar Association, and I am more proud than ever to be a lawyer. I have also become more appreciative of the benefits we enjoy because of the system of laws and courts we have that I had tended to take for granted. I look forward to the coming year in which I will continue to work with the KBA’s Board and staff to improve the administration of justice in the Commonwealth.
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On June 30 of each year, terms expire for seven (7) of the fourteen (14) Bar Governors on the KBA Board of Governors. SCR 3.080 provides that notice of the expiration of the terms of the Bar Governors shall be carried in the Bench & Bar. SCR 3.080 also provides that a Board member may serve three consecutive two-year terms. Requirements for being nominated to run for the Board of Governors are contained in Section 4 of the KBA By-Laws and the requirements include filing a written petition signed by not less than twenty (20) KBA members in good standing who are residents of the candidate’s Supreme Court District. Board policy provides that “No member of the Board of Governors or Inquiry Commission, nor their respective firms, shall represent an attorney in a disciplinary matter.” In addition any member of the Bar who is considering seeking or plans to seek election to the Board of Governors or to a position as an Officer of the KBA will, if elected, be required to sign a limited waiver of confidentiality regarding any private discipline he or she may have received. Any such petition must be received by the KBA Executive Director at the Kentucky Bar Center in Frankfort prior to close of business on the last business day in October.

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Q&A WITH 2015-16 KBA PRESIDENT DOUGLASS FARNSLEY

By: James P. Dady

Douglass Farnsley, who assumed the presidency of the Kentucky Bar Association July 1st, has accumulated a trove of laurels in his 39-year career.

Farnsley is a civil trial lawyer. A partner at Stites & Harbison in Louisville, he recently won a $4.951 million verdict for a 27-year-old man struck by a city bus, has defended and managed the defense of more than 700 medical malpractice cases, and defends a Fortune 50 company from claims across the Commonwealth.

Farnsley is a fellow in three invitation-only societies of trial lawyers – the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the International Society of Barristers.

He earned degrees from the University of North Carolina, the University of Wisconsin, and the University of Louisville.

Farnsley’s father Charles P. Farnsley was elected mayor of Louisville in 1948, and was credited with leading the city into an era of greater racial comity. The elder Farnsley also served in the U.S. House in the 89th Congress, which enacted the Voting Rights Act of 1965 and created the National Endowment for the Arts, according to an obituary published upon his passing in the New York Times June 21, 1990.

The younger Farnsley is called an “ardent Democrat” in his law-firm biography. While a student at St. Albans School in Washington, D.C., he was in the congregation for a sermon at the National Cathedral on Sunday March 31, 1968, of the Rev. Dr. Martin Luther King. Four days later in his final trip to Memphis in support of striking sanitation workers, Dr. King was assassinated.

Douglass Farnsley’s wife Liza is a clinical research associate for InventivHealth Clinical. He has two adult children and four granddaughters.

Farnsley is involved with two historic sites in Jefferson County and serves on the Advisory Board of Actors Theatre of Louisville.

Your father Charles was Mayor of Louisville and a Congressman from the Louisville area. Was there something about his life that set you on a path to do what you have done during your career?

I grew up assuming that I would enter public life. In addition to my dad's elected offices, my grandfather served as a Jefferson Circuit Court judge. As I began my career and started a family, I moved away from the idea of seeking public office. However, I have remained active in politics and in supporting political candidates over the years. My experience of growing up in a family dedicated to public service undoubtedly informed my decision to seek election to the KBA Board of Governors and then to pursue positions as a KBA officer. I have found my work with the KBA to be highly rewarding, and I have made wonderful friends along the way.

It has been said that we have two different kinds of lawyers in Kentucky — high-rise lawyers and Main Street lawyers — small-firm and solo practitioners clustered around courthouses. How does the KBA continue to serve these different constituencies, while serving the paramount interest of the public?

I will approach the answer to this question by addressing its premise and by talking briefly about attorney discipline. First, I practice in a firm with more than 200 lawyers. In my eight years on the KBA’s Board of Governors, I have worked closely with lawyers from all parts of the state. Those lawyers are in solo practice, in small firms, and in large firms. I do not see any significant difference in the lawyer that I am and the lawyers that they are.

When the 17 members of our Board and our four lay members meet to consider attorney discipline, the diversity of our group is helpful. Our membership includes men and women, lawyers and citizens from across the state, and individuals from underrepresented populations. We work hard to protect the public and to protect the rights of the attorneys who stand accused of professional misconduct.

The KBA’s disciplinary process has taken some fire, some of it from respectable parties. In recent years, the staff has been expanded. Are you confident that disciplinary cases are being processed timely, fairly, and efficiently.

We have a good disciplinary process. The Office of Bar Counsel has the job of investigating complaints, taking the complaints to the Inquiry Commission for consideration of whether a charge should be issued, prosecuting cases before trial commissioners, and handling appeals to the Board and then to the Supreme Court. Bar Counsel works disciplinary cases in a timely manner. Each of us in the process plays a different role.

The Supreme Court appoints volunteers who serve as the members of the Inquiry Commission, the trial commissioners, and the lay members of the Board of Governors for purposes of discipline. The KBA members elect the Board of Governors, who are also volunteers. The non-volunteers who work on attorney discipline are Bar Counsel and the members of the Supreme Court. In my experience, all the participants in the process act in the utmost good faith and reach fair decisions. If members of the Bar and of the public could listen to the Board’s deliberations, they would find that the discussions are thoughtful and are carried on at a high level.

You have practiced in various states, each with its own requirements for admission. There is a trend out there to nationalize bar examinations — New York just took a step in that direction. Do you foresee a day when Kentucky would join with other states in some form of national bar examination, beyond the multi-state portion now administered?

I do not know a great deal about trends in bar admissions. However, it is clear that the practice of law is going to continue to evolve. I have been with my firm for 36 years. In my earlier years, I occasionally found myself frustrated because it seemed that the firm’s expectations were always changing. Over time, I came to realize that the firm and all institutions are changing every day and are hopefully improving.

This is true for the practice of law generally. But, we are not simply along for the ride. We can influence the future. To paraphrase the late Justice Charles Leibson’s decision in the case in which Kentucky adopted comparative fault, *Hilen v. Hayes*, The practice of law is not a stagnant pool, but a moving stream. The practice of law is our responsibility. We are responsible for its direction.
Let me explain my lack of knowledge about bar admissions. There are several relatively autonomous pieces to the governance of Kentucky lawyers. The Office of Character and Fitness and Bar Admissions are separate from the KBA; their budgets are under the Administrative Office of the Courts. Departments that fall within the KBA’s budget include CLE, Bar Counsel, the Kentucky Lawyer Assistance Program, the Client Security Fund, and the Inquiry Commission. The KBA works with Character and Fitness and to a lesser extent with bar admissions, but their areas of responsibility are distinct from ours.

You have made your bones as a trial lawyer over a 39-year career. Can you share some advice for attorneys just starting out who are interested in building a career of trying cases?

I have six bits of advice for young trial lawyers. First, a trial is a battle to earn and maintain the confidence of the judge and the jury. This requires that the lawyer be consistent and be scrupulously honest in everything he or she says and does in the courtroom.

Second, I believe a lawyer should be himself or herself when presenting a case to a jury. It took years for me to gain the experience and confidence to be able to accomplish this. There are a number of excellent movies about trials. In one of my favorites, “Anatomy of a Murder”, Jimmy Stewart played the defense lawyer, Paul Biegler. Stewart’s character had credibility, dry humor, and intelligence – all qualities that we associate with Jimmy Stewart. The point is not that the young lawyer should try to be like Jimmy Stewart. The point is that we need to figure out who we are and then be that person in the courtroom.

Third, a trial lawyer needs to know the pertinent facts inside and out. As part of my effort to learn about a case, I visit the place where the events occurred. Whether the place is an intersection, an operating room, or a grocery store, going to the scene always helps.

Fourth, direct examinations matter. Prepare your witnesses and plan and organize your examinations. You tell the story of your case through the direct examinations of your witnesses.

Fifth, figure out the themes of your case, then craft your presentation in each part of the trial to communicate those themes.

Sixth, keep in mind that all the players in a trial have a different role. The lawyers represent their clients, the judge does his or her job, and so on. We are not responsible for what all the other players are doing, but we are responsible for trying to lead the process to the best outcome for our clients. Taking this approach removes a bit of the angst that goes along with trying cases.

The theme of the bar convention this year was Justice for All: Securing Access in a Diverse Society. How good a job are we doing in Kentucky of meeting the need for legal services, particularly in rural areas, among economically disadvantaged Kentuckians, and among non-English speakers?

We are not doing as good a job as we should in serving Kentucky’s poorest citizens. Our colleagues who work as public defenders have caseloads that far exceed the recommended number of cases that a criminal defense attorney should be handling. Our legal aid programs are also underfunded. Lawyers who work as public defenders and who work in the legal aid arena do a terrific job, but as a society we owe them and their clients more than we are providing.

Tennessee has an excellent and efficient program of matching volunteer lawyers to citizens who need legal advice but who may not be able to afford to hire a lawyer. We are seriously evaluating adopting a similar program in Kentucky.

Law school admissions are down nationally and among our three law schools. The job market for attorneys has been down for years. We all hear horror stories about the amount of debt with which new lawyers are saddled as they begin their careers. Are you concerned that being a lawyer is just not the career choice it once was, and that the quality of the services we are rendering may become impaired over time because of these conditions?

My sense is that the market may be overcorrecting and that now may be a good time to go to law school. As I recall, in the early years of the recession, law school enrollments climbed due to the lack of jobs for new college graduates. As the larger number of new law students graduated from law school, the recession was still ongoing and there were not jobs for them. So, law school admissions dropped significantly.
Shortly after I graduated from law school and two years before I started with my current firm, I had an interesting talk with a Louisville businessman. I expressed to him my concern that there might be too many lawyers and that maybe I was entering the wrong field. The businessman responded by saying, “There will always be room for a good lawyer, just as there will always be room for a good teacher and for good candidates in any other field.” That may be little comfort to those who are currently struggling, but I believe the point is well taken.

Keep in mind that lawyers work in fields other than the practice of law. I know two lawyers who are accomplished journalists, and I can think of four other lawyer friends who have owned businesses. I do not completely understand how our legal education and experience teach us to think analytically, but I believe it is fair to say that that is how we think. That approach to problems and to people may give us an edge, regardless of whether we ever practice law.

The burden of student debt is a real concern for those who owe the money and for our economy as a whole. In my era, the state provided more funding for its universities. I and many others of my generation benefitted as a result. The good news is that those who enter certain public service legal positions may secure loan forgiveness. Unfortunately, this also ties back to my earlier comments about underfunding for public defenders and legal aid and the fact that those positions may attract talented people in exchange for the promise of loan forgiveness. I believe we should think of ways to make student debt burdensome but not absolutely terminal for those who enter the practice of law.

Judicial salaries in Kentucky have been stagnant for years, despite the best efforts of the organized bar to persuade the General Assembly to address the situation. Are we getting best judges possible in Kentucky?

Underfunding of our courts is a significant problem. Our state court judges and the staff of the Administrative Office of the Courts have not received a significant increase in pay since before 2007. Although inflation has been relatively modest in the intervening years, the fact is that our judges have effectively taken a pay cut. I also have a concern that the 2014 changes in the judicial retirement plan will negatively impact overall judicial compensation. The real possibility exists that the changes will significantly diminish judicial retirement, thus creating an additional cut in compensation. Section 120 of Kentucky’s Constitution provides, “The compensation of a justice or judge shall not be reduced during his term.” There is a case to be made that the failure for judicial salaries to at least keep up with inflation and the pension changes run afoul of the Constitution.

We have a superb judiciary in Kentucky. We owe it to our judges and their staffs to raise the revenue to compensate them fairly.

You are involved with two historic sites in the Louisville area. Could you tell our readers about them, and what you for them?

There are two historic houses in Louisville with ties to my great, great, great uncles – David and his younger brother Gabriel Farnsley. David and Gabriel were second generation Louisvillians. In 1812, David built a log cabin at what is now Cantrun Road and Lees Lane. He soon married Sarah Meriwether (a cousin of Meriwether Lewis), and the two of them raised seven children in the cabin. By 1832, David and Sarah had developed some income and modest wealth. At that time, they built a substantial brick addition to the house. After the deaths of David and Sarah, the house passed into the Kaufman family. The house now sits on the campus of the Farnsley Middle School. In the mid 1990s, when the school system acquired the house, we formed our group to help take care of it and to work with the school and its students to use the house as a teaching tool. We have held archaeological digs at the house, the students wrote and produced a play about the house, and there have been photography and essay contests. The activities generate a good bit of excitement and enthusiasm.

I am a founder of the Friends of the Farnsley-Kaufman House, and I was until recently the president of its Board. I remain active on the Board, and I am excited that my son and daughter and their spouses are now interested and are supportive of our efforts.

Gabriel Farnsley’s house is more grand than David’s. It is an 1837 two-story brick house that faces the Ohio River and is located in southwest Louisville. The City of Louisville owns the house and Louisville Metro Parks operates it as a house museum. There is also an event facility, a pavilion overlooking the river, and a nearby historic wedding chapel. The house and site are known as Riverside, the Farnsley-Moremen Landing. I served for years on the Riverside Board and am now an honorary board member.
My work with these houses has introduced me to 19th century members of my family, and for that I am deeply grateful. I have always loved history, and I have developed a real appreciation for architectural history.

President George H. W. Bush famously talked about “the vision thing.” What is your vision for the Kentucky Bar.

Our first job is to meet our basic obligations. The Board provides oversight to the various KBA departments that I mentioned earlier including Bar Counsel, Continuing Education, and others. The Board’s hands-on involvement is largely in the discipline process. Once we believe we have those areas in good shape, we can turn our attention outward. We have embarked on two paths that we feel strongly about: providing support to our members who are in the military and to veterans and promoting diversity and inclusion in the legal profession.

In 2014, then KBA President Bill Johnson encouraged the Board to create a Military Committee charged with the goal of providing support to members of the military and to our veterans. The Committee is in place, and its efforts are getting underway. The endeavor holds great promise.

For more than a decade, the KBA’s leadership has been working to promote diversity and inclusion in the profession. We want each of our 18,000 members to feel that they are valued regardless of geography, area of practice, gender, age, race, religion, sexual orientation, gender identification, or political outlook. We are doing our best to send the message that none of us needs to feel marginalized because of where we practice or who we are.

Toward this end, we have accomplished three things in the past two years. First, we supported the effort in the legislature to restore funding for KLEO, the Kentucky Legal Education Opportunity project. KLEO offers 15 incoming diverse law students – five students from each of the Commonwealth’s three law schools – a two week summer residential training experience to prepare them for the rigors of law school. The students also receive a $15,000 stipend, $5,000 during each of their three years in law school. The program was founded in 2002. With the financial crisis in 2008, funding evaporated. In 2013, Representative Jesse Crenshaw and Senator Bob Leeper led the way in restoring funding for KLEO. I should note that between 2008 and 2013, the program survived, but funding for the stipends was limited.

Second, in 2014, the Kentucky Bar Foundation created a Diversity Fund. To date, the fund has raised approximately $25,000, and we anticipate that donations will add about $20,000 to the Fund each year. In early 2015, the KBF Board awarded three mini-grants of $1,000 to each of our law schools. The grants will be used by the deans to support their ongoing diversity efforts. The new Diversity Fund will supplement the Bar Foundation’s years-long generous support of diversity in the legal profession.

Third, our Diversity Committee and others organized a Diversity and Inclusion Summit. The Summit took place in April 2015 in Louisville. The Louisville Bar Association and the Brandeis School of Law co-sponsored this successful and meaningful event. Our Supreme Court’s commitment to diversity and inclusion was underscored by the presence of six of the Court’s seven justices (the seventh was on a spring break trip with family). One gay lawyer who is in his sixties sent an email to me after the Summit stating, “I just cannot express how wonderful the Diversity and Inclusion Summit was for me…. [I]t is so remarkable to feel years of invisibility and inferiority fading!”

The day before the Summit, a dedicated group led a “pipeline” project at the Brandeis School of Law. We recruited high school and undergraduate students from diverse populations, and introduced them to law school and to the practice of law. These young people may not have ever met a lawyer. As I mentioned previously, my dad and my grandfather were both lawyers. So, for me, enrolling in law school was something that seemed attainable. That is not necessarily the case for many in our society.

I am gratified by the strides we have made and that we are making in supporting the members of our military and our veterans and in supporting underrepresented populations, and I am dedicated to continuing our efforts on both fronts.

James P. Dady is an associate with Gerner & Kearns, a creditor’s rights firm with several offices in Northern Kentucky and Greater Cincinnati. He litigates throughout Kentucky and Ohio in state and federal courts.

Dady has been a member of the Kentucky Bar Association’s Communications and Publications Committee for many years, and its chairman since 2013. He is the editor of the Bench & Bar and a frequent contributor.

He is also chairman of the Planning & Zoning Commission for the City of Bellevue.
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KENTUCKY BAR ASSOCIATION HOSTS SUCCESSFUL CONVENTION IN LEXINGTON, JUNE 17-19

By: Mary Beth Cutter, KBA Director for CLE

The Kentucky Bar Association’s 2015 Annual Convention drew over 1,900 attorneys to the Lexington Convention Center in downtown Lexington, June 17-19, making it another successful convention! While the vast majority of CLE programs offered at the 2015 KBA Annual Convention in Lexington were grounded firmly in the undeniably practical, e.g., property, tax, case updates, health care, ethics, bankruptcy, etc., the spotlight and feature speakers endeavored to inspire. With a Convention theme of “Securing Access in a Diverse Society – Justice for All,” visiting the ideals of the legal profession and giving consideration to how we can create justice seemed more than appropriate.

Spotlight speakers Justice James W. Kitchens of the Mississippi Supreme Court, who was appointed to represent the man accused of murdering Medgar Evars, and attorney J. Cheney Mason, who was part of the Casey Anthony defense team in Florida, reminded us that everyone has a right to representation and that we must hold tight to our duty as attorneys and the presumption of innocence, even among public outcry and media frenzy. Talmage Boston reminded us of the intellectual honesty, eloquence, and professionalism of Abraham Lincoln, which are things we as attorneys should strive to embody. Professor George J. McGee, presenting as famous Kentucky statesman Henry Clay, reminded us of the importance of negotiation and compromise in both politics and law. Professor Gregory Gordon, who covered the 2014 Hong Kong protests, which were at heart about the legal definition of “universal suffrage,” examined the essential importance of the rule of law. Our last spotlight speaker of the convention was Mark Curriden, who delighted us with stories of seven of the best trial lawyers in America.

Our Wednesday feature speaker, Bryan Stevenson, the executive director of the Equal Justice Initiative and author of Just Mercy, inspired and challenged us as lawyers to appreciate what our responsibilities are. He summoned us to be advocates who represent the highest ideals of our profession, i.e., creating justice, protecting the poor and vulnerable, and adding to the health of the community by doing the things that reinforce a commitment to the law. Through very personal stories and observations, Stevenson laid out the five things he feels are necessary to being the kind of lawyers we should be. First, our identity plays a critical role in our ability to make a difference. Identity is not your title, but rather, it is the words that go before your title — dedicated, committed lawyers...
who care about justice. Second, the power of proximity cannot be underestimated. We have to get closer to the parts of our society where there are clear disparities in what is happening in our criminal justice system, where there is despair and marginality. Third, we must change the narrative. We cannot achieve justice without changing the narrative that created the injustice by making us comfortable with inequality, injustice and unfairness. We must commit to truth and reconciliation to move forward. Otherwise, we will continue on the path forges by fear and anger that led to over incarceration and excessive punishment. Fourth, we must remain hopeful. As Stevenson so eloquently opined, “Injustice prevails where hopelessness persists,” because people who are hopeless about their ability to make a difference do not try to make a difference. Lastly, we are reminded that we sometimes have to do things that are uncomfortable and hard. Justice does not come when we only do what is convenient and comfortable. Mr. Stevenson concluded with the assertion that because each of us is more than the worst thing we have done, there is a rule of law that must be respected. The opposite of poverty is not wealth; it is justice, and we must change the narrative. We must have more people creating justice to help those less fortunate. We can make a difference. Everyone has the ability, opportunity and obligation to make the world a better place and move closer to justice for all.

Our featured speakers are always a highlight of the KBA Annual Convention, it was particularly true for our 2015 Convention. The spotlight and feature speakers asked us to revisit our role in society, why we became lawyers, and what it means to be a true advocate striving for justice. As Justice Alan Page poignantly advised, we must constantly re-evaluate and renew our character and identity as lawyers. These speakers helped us to do just that.
2015 KBA ANNUAL CONVENTION
ANNUAL BANQUET AND MEMBERSHIP LUNCHEON

The convention not only provides attendees an opportunity to receive their continuing legal education credits, but it also allows members to participate in several time honored traditions, the annual banquet and membership luncheon.

During these events attendees pay tribute to their peers receiving awards for hard work and dedication to their profession. Senior counselors are honored for their years of service and past presidents of the Kentucky College of Law, Lexington, and to Young Lawyers Division Chairman J. Tanner Watkins.

Chief District Judge Lisa P. Jones, honoring her dedication to family law and juvenile justice.

Following the awards, the KBA’s new Officers and Bar Governors for 2015-2016 were sworn into office by Chief Justice Minton. New officers include Douglass Farnsley from Louisville as President; President-Elect R. Michael Sullivan, Owensboro; Vice President William R. Garmer, Lexington; William E. Johnson as Immediate Past President; and Young Lawyers Division Chairman J. Tanner Watkins.

Also honored were retiring KBA President Johnson; Immediate Past President Thomas L. Rouse and outgoing YLD Chair Brad Sayles, Nashville.

KBA MEMBERSHIP LUNCHEON

The annual membership luncheon was held on Friday, June 19th, at the Hyatt Regency Hotel. Prior to the luncheon President Johnson and Chief Justice Minton honored the attorneys who achieved senior counselor status. Following their ceremony the senior counselors attended the membership luncheon and watched a touching tribute to recognize their years of service. This year 113 attorneys were recognized as senior counselors. President Johnson presented the Bruce K. Davis Bar Service Award to Brian Scott West, who serves as general counsel for the Department of Public Advocacy, Richmond. Johnson later presented the 2015 Donated Legal Services Award to Allison Connelly, professor at the University of Kentucky College of Law, Lexington, and to Jeff Been, executive director of the Legal Aid Society, Louisville, to recognize all of their pro bono efforts. Young Lawyers Division Chair Brad Sayles presented the Nathanial A. Harper Diversity Award to Justice William E. McAnulty, Jr., posthumously, accepting his award was KBA Past President and Louisville attorney Margaret E. Keane. To conclude the luncheon 2015 Annual Convention Chairs Anita Britton and William Garmer received plaques from President Johnson, who thanked them for all of their hard work and dedication to the 2015 KBA Annual Convention.

MARK YOUR CALENDARS NOW!

The 2016 Kentucky Bar Association Annual Convention will be held May 11-13, 2016, at the Kentucky International Convention Center in Louisville, Ky. This is a change in the annual date, so make sure to mark your calendars now! More information on this event will be available in early fall.
Securing Access in a Diverse Society
Zachary A. Horn of Lexington receives the Outstanding YLD Executive Committee Chair Award from YLD Chair Brad Sayles of Nashville.

Megan Keane of Louisville receives the Outstanding YLD District Representative from YLD Chair Brad Sayles of Nashville.

YLD Chair Brad Sayles of Nashville accepts his plaque from KBA President William E. Johnson for his service on the KBA Board of Governors from July 1, 2014-June 30, 2015.

Lexington attorney Pete Perlman receives the President's Special Service Award from KBA President William E. Johnson.

YLD Chair Brad Sayles of Nashville accepts his plaque from KBA President William E. Johnson for his service on the KBA Board of Governors from July 1, 2014-June 30, 2015.

KBA President William E. Johnson presents Immediate Past President Thomas L. Rouse of Erlanger with a plaque honoring his 10 years of service on the KBA Board of Governors. Rouse has served on the Board from July 1, 2005-June 30, 2015.

Jennifer Brinkley, left, of Bowling Green receives the 2015 Outstanding Young Lawyer Award from Deanna Henschel of Paducah.

Christine de Briffault, right, of Lexington receives the Young Lawyers Division's 2015 Service to Community Award from Litany Webster of Lexington.

K. Gregory Haynes of Louisville receives the 2015 Distinguished Lawyer Award from KBA President William E. Johnson during the Annual Banquet.

Franklin County Chief Circuit Judge Phillip Shepherd of Frankfort receives the 2015 Distinguished Judge Award from KBA President William E. Johnson during the Annual Banquet.

Chief Justice John D. Minton, Jr., presents Daviess County Chief District Judge Lisa Jones of Owensboro, with the Chief Justice's Special Service Award during the Annual Banquet.

KBA Director of Administration Melissa Blackwell was presented a clock honoring her 25 years of service to the bar association.
Chief Justice John D. Minton, Jr., administers the oath of office to the members of the 2015-16 KBA Board of Governors.

Incoming KBA President Douglass Farnsley presents KBA President William E. Johnson with a plaque for his service as president during the 2014-2015 year.

University of Kentucky College of Law Professor Allison Connelly of Lexington receives the 2015 Donated Legal Services Award from KBA President William E. Johnson during the KBA Membership Luncheon.

President William E. Johnson presents the 2015 Donated Legal Services Award to Louisville attorney Jeff Been, during the KBA Membership Luncheon.

 Incoming KBA President Douglass Farnsley passes the gavel to incoming KBA President Douglass Farnsley of Louisville.

William R. Garmer and Anita M. Britton, both from Lexington, receive their plaques from KBA President William E. Johnson honoring their service as 2015 Annual Convention CLE Convention Chair and 2015 Annual Convention Chair, respectively.

Brian Scott West of Richmond receives the 2015 Bruce K. Davis Bar Service Award from KBA President William E. Johnson during the KBA Membership Luncheon.

Incoming KBA President Douglass Farnsley addresses the attendees during the 2015 Annual Banquet held on June 18.

Brad Sayles of Nashville presents the Young Lawyer Division’s 2015 Nathaniel R. Harper Award to the late Justice William E. McAnulty, Jr., from Louisville. KBA Past President and Louisville attorney Margaret E. Keane accepted the award on his behalf.

Eleven of the KBA’s past presidents attended the annual Membership Luncheon held June 19 in the Patterson Ballroom at the Hyatt Regency Hotel in Lexington.

Senior Counselors were honored with a reception June 19 in the Regency Ballroom of the Hyatt Regency Hotel and received certificates recognizing their service.
2015 LAW DAY AWARDS

The winners of the Kentucky Bar Association’s annual Law Day Competition received their awards during the Membership Awards Luncheon held Friday, June 19, at the Hyatt Regency Hotel in Lexington as a part of the 2015 Annual Convention. Law Day Committee Chairman Gailen W. Bridges, Jr., presented the awards during the luncheon.

The Bowling Green-Warren County Bar Association and Daviess County Bar Association shared first place in the Large Bar Category. The Madison County Bar Association received the award for the Medium Bar Category. While, the Estill County Bar Association was the recipient of the award in the Small Bar Category. Each organization focused their celebration around this year’s theme, “Magna Carta: Symbol of Freedom Under Law.”

For its Law Day celebration, the Estill County Bar Association presented the Kentucky Bar Foundation’s Credit Abuse Resistance Education (CARE) program to students enrolled in finance classes at Estill County High School. They also held a Law Day Luncheon, and coordinated a Law Day presentation for the winners of their essay contest, which was open to all Estill County juniors and seniors.

The Madison County Bar Association celebrated Law Day in several ways. They held a Law Day Banquet at the University Club at Arlington. The banquet was attended by more than 40 members of the local bar.

Judge Julia Hytton Adams was the speaker for the banquet. The Madison County Bar Association also made short presentations to eighth-grade students throughout their county. They explained the significance of Magna Carta and showed a short video. The students were invited to create a poster to reflect the theme of Magna Carta. Winners were selected and prizes were awarded in the contest.

The Bowling Green-Warren County Bar Association celebrated Law Day by first hosting a reception at English, Lucas, Priest and Owsley. The reception provided bar members with the opportunity to meet Professor Allison Connelly from the University of Kentucky College of Law, who would be their Law Day speaker at their ceremony the following day. A public ceremony was held at the Capitol Arts Center and more than 150 people attended to celebrate Law Day. The Bowling Green-Warren County Bar Association continued their tradition and held a poster and essay contest for the public and private schools in their areas. They also sponsored a community service event collecting canned food goods for the local Salvation Army and hosted a blood drive for the American Red Cross.

To honor Law Day, the Daviess County Bar organized a lesson for young ladies who attend Girls Inc.’s Rolling Heights Campus to discuss the history of Daviess County and also present the CARE program. The Daviess County Bar Association also partnered with the Daviess County Public Library to host an attorney consultation day at the library. The bar association hosted their annual Law Day Banquet and presented the CARE program to local high school students.

Thank you to all of those Bar Associations who participated in Law Day 2015.

KELLI E. BROWN RECEIVES THE PRESTIGIOUS THOMAS B. SPAIN AWARD AT THE 2015 KBA ANNUAL CONVENTION

By: Mary Beth Cutter, KBA Director for CLE

CLE Commissioner Matt Cook, from the Second Supreme Court District, had the great honor of presenting the Spain Award for Continuing Legal Education to Kelli E. Brown on June 18, 2015 during the Kentucky Bar Association’s Annual Convention. The Thomas B. Spain Award, named for the first Supreme Court Liaison to the CLE Commission, is presented annually by the CLE Commission for outstanding voluntary contributions of time and talent to the planning, organization and implementation of KBA CLE programs, including the Kentucky Law Update, the New Lawyer Program, the Annual Convention and Section programs. The recipient of the award exhibits exemplary contributions of time, expertise, quality materials and presentations for speakers, as well as frequency of participation and overall professionalism. Brown is more than deserving of this honor.

Brown served as a speaker for the Kentucky Law Update Program for numerous locations in 2006, 2010, 2013, and 2014, for the KBA Annual Convention in 2008, 2009, and 2013, and has become a regular feature at the New Lawyer Program, speaking at every offering since 2011. She served on the 2014 Annual Convention CLE Planning Committee and is a frequent speaker for UK CLE, Louis D. Brandeis School of Law, and the American College of Trust and Estate Counsel. While her willingness to aid in the planning and presenting of CLE in Kentucky is impressive, it is the quality of Brown’s contributions that has been most impactful. With humor, professionalism, and enviable knowledge of her subject matter, she masterfully delivers her presentations with ease and grace. She is consistently one of the highest rated speakers at those programs in which we are fortunate enough to have her present. Lucky for us, in her acceptance speech Brown declared her intention to continue to present for KBA programs whenever able to do so because she simply loves doing it. Congratulations to Kelli Brown for this well-deserved honor.
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While Kentucky's Rules of Civil Procedure were patterned very closely upon the federal rules then in effect, the current versions are not identical and some of their modern differences can be significant. This article provides an overview of some of the most important current differences between those rules. Other articles in this same issue will focus in greater detail on a few specific rules.

At the time this issue was being completed, the KBA Civil Litigation Section was chaired by Chad Meredith of Ransdell & Roach, PLLC, in Lexington. The section meets monthly by telephone and at the KBA Annual Convention. Anyone interested in participating is encouraged to contact:

Lori J. Alvey
Program & Publications Attorney/Section Liaison
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CR 3 - Commencement of Action

While both the state and federal rules provide that a civil action is commenced with the filing of a complaint, Kentucky's rule adds “and the issuance of a summons or warning order herein in good faith.” This can be crucial in cases involving statutes of limitations. While the filing of just a complaint in federal court might be enough to beat the limitations deadline, additional steps – issuance and service of a summons – can be critical under Kentucky law.

CR 4 - Getting the Parties Before the Court (Summons, Service, etc.)

The federal rule approves “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.” FRCP 4(e)(1) (emphasis added). But the form of the summons, who prepares it (court or plaintiffs), alternative methods of service, provisions for waiver – all of those details are completely different. Practitioners should pay special attention to the appropriate Rule 4 and comply with the respective requirements of federal or state court.

CR 5 - Serving and Filing Papers

The parts of CR 5 dealing with the service of papers on counsel or parties are generally similar to FRCP 5, with both sets now providing for electronic service. But important details are different (including state provisions for warning order attorneys), and the applicable rule should be consulted in each case. For example, CR 5.03 requires that the electronic address used for service be stated in the proof of service. On a more substantive note, FRCP 5.1 (providing for notice to the United States Attorney General in cases involving federal constitutional challenges) has no counterpart in CR 5, but does contain a counterpart in CR 24.03 (requiring notice to the Kentucky Attorney General for constitutional challenges and state law). CR 24.03 refers specifically to CR 5 for service of a motion to intervene in such cases.

CR 5.06 provides that certain discovery documents “shall not be filed with the Court unless...”
the Court orders otherwise.” Thus, while CR 5.06 is consistent with FRCP 5(d) (similarly forbidding the filing of certain discovery materials), this is an instance where the local rules must be consulted. The practice varies widely among circuit courts in Kentucky, and CR 5.06 allows this to be decided by each court as a matter of local practice.

CR 6 – Computation of Time
The federal and state rules differ slightly in the computation of certain filing deadlines. When it matters, it really matters. Count carefully every time under the set of rules that is applicable, never assuming you would reach the same date under the other rulebook.

CR 7 – Pleadings and Motions
The forms of pleadings recognized in both courts are the same, with Kentucky’s rule specifically forbidding demurrers in modern practice. CR 7.02(3). Federal court requires early disclosure statements by corporations to avoid the situation of a judge learning later in the case, perhaps, that a conflict of interest based on his or her indirect stock ownership might exist. FRCP 7.1.

CR 7.03 contains express protocols for protecting sensitive personal data in any filing and requires redaction of social security numbers and other information. Failure to comply may result in sanctions as set forth in CR 7.03(7).

CR 8 – General Rules of Pleadings
CR 8.01(1) and FRCP 8(a) remain substantively identical on the written page of the rule books. The development of federal case law, however, requiring a plausible claim to be stated under Iqbal and Twombly, is so important that a separate article is included in this issue devoted to pleading practice under rules 8 and 12.

CR 8.01(2) forbidding the pleading of a sum certain for unliquidated damages has no federal counterpart. Close attention should be paid to the obligation of a claimant to specify the amount by answer to interrogatories. While supplementation may be allowed where there is no prejudice, it could well be denied, especially in cases where the opposing party is indeed prejudiced by not knowing how to value the case for settlement or trial.

CR 9 – Pleading Special Matters
Kentucky’s rule remains substantially the same as the federal version. Both require pleading of fraud to be “with particularity.” FRCP 9(h) includes admiralty and maritime claims for which, of course, there is no state counterpart.

CR 11 – Signing and Sanctions
The state and federal versions are procedurally very different, and particular attention should be given to these points:
1) The federal rule provides for a “safe harbor” of 21 days after notice is given of an alleged violation. To facilitate this, a motion for sanctions may be served but not filed if the challenged action is withdrawn or corrected in the 21-day period.
2) Kentucky’s rule directs that the trial court “shall postpone ruling on any Rule 11 motion” until after entry of a final judgment.

In substance, the rules remain similar, requiring the signature of an attorney of record (or by the party directly, if unrepresented) on every document filed with the court and mandatory provisions for striking unsigned papers. What that signature means, in terms of “certification” under CR 11 or “representations to the Court” under FRCP 11, is also similar, although the federal rule specifically allows for factual contentions that are “specifically identified” to be made with the belief that they “will likely have evidentiary support after a reasonable opportunity for discovery and investigation. This allows the practice of good-faith pleading “upon information and belief” to continue.

CR 12 – Pleading Defenses/Motion Practice
Although CR 12 and FRCP 12 remain similar in many ways, the development of federal practice post-Iqbal, supra, now mandates consideration of whether a federal pleading states a plausible claim. Whether Kentucky will follow this development under rules 8 and 12 has not yet been determined. Compare, for example, Data Key Partners v. Permira Advisers, LLC, in which Wisconsin adopted the plausibility standard, with Walsh v. US Bank, N.A., in which Minnesota rejected it.

The time for responsive pleadings is 20 days under CR 12, and 21 days under FRCP 12. The denial of a dispositive motion postpones the responsive pleading until 10 days after denial in state court and 14 days after denial in federal court.

CR 14 – Third-Party Practice
CR 14.01 requires a defendant in state court to move for leave to bring in a third-party defendant. By contrast, FRCP 14(a) allows a defendant to bring in a third party as a matter of right without the need to file any motion, so long as the third-party summons and complaint are filed within 14 days of the defendant’s answer. If more than 14 days have passed, leave must also be sought in federal court. Both rules permit a plaintiff who is defending a counterclaim to also make a third-party claim, but CR 14.02 appears, again, to contemplate leave of court whereas FRCP 14(b) specially allows the plaintiff to “bring in a third party.”

CR 14.03 addresses bond issues, for which there is no federal counterpart; FRCP 14(c) addresses admiralty and maritime claims, for which there is no state counterpart. Both rules allow for an impleaded party to, in turn, engage in further third-party practice but, again, the state rule appears to contemplate that leave of court will be sought in every instance.

CR 15 – Amended and Supplemental Pleadings
With slight (but crucial) differences in the deadlines for doing so, both sets of rules allow for amended and supplemental pleadings. Both rules still frame the standard for allowing later amendments (if the time for amendment as a matter of right has passed) as "when justice so requires." Both state and federal courts recognize a futility exception by case law.

CR 16 – Pretrial Case Management
FRCP 16 is lengthier and more detailed, but both versions deal essentially with case management. Kentucky law recognizes that a court has inherent authority to control and manage its docket. Thus, everything specified in the federal rule should be available for the state court’s consideration as well. Whether a Kentucky court may use its CR 37 sanction power under CR 16, which is authorized by FRCP 16(b)(1), has not been expressly decided in Kentucky. The inherent power of a court to control the proceedings before it is not unlimited. But the “law is well settled that the parties are bound by a pretrial order.” Thus, if an order follows and confirms the state court’s CR 16 scheduling conference, CR 37.02 relief would appear to be available in state court, just as it is in federal court, despite the difference in the language of these rules.
CR 17 – Capacity to Sue and Be Sued

Kentucky’s list of persons who may sue on behalf of another without joining the person for whose benefit the action is brought is broader than the federal rule, but that is partly because FRCP 17 expressly defers to state law on certain issues of capacity to sue or be sued. Careful attention should be paid to the applicable rule, and any state rules designated by FRCP 17, to ensure that the proper party is before the court.

CR 23 – Class Actions

While CR 23 remains similar to FRCP 23, any class action (or “mass action”) brought in either court is also potentially subject to the federal Class Action Fairness Act (“CAFA”), 28 U.S.C. §1332(d). Thus actions initially filed in state court under CR 23 may be subject to removal to federal court under CAFA where they would be governed by FRCP 23.14

CR 25 – Substitution of Parties

Kentucky’s rule says substitution of a proper party for a deceased party must occur “within the period allowed by law.” CR 25.01. This implicates KRS 395.278, specifying a one-year period after death in which an application to revive an action may be filed. FRCP 25(a)(1) contains an express time limit of 90 days for filing a motion to substitute.

CR 26 – General Provisions for Discovery

FRCP 26 has been amended nearly beyond recognition, while a previous version remains essentially intact in the form of CR 26. For example, federal practice now provides for mandatory initial disclosures; specifies the timing of expert disclosures and the contents (both for witnesses who must prepare written reports and those who do not); expressly protects drafts of expert reports and disclosures; and expressly requires a privilege log. While some of the federal protocols are observed in state practice as a matter of choice or good practice, the actual governing rules are now very different.

CR 28 – Logistics of Depositions

Practice under CR 28, following the use of depositions taken out of state and the taking of depositions here for use in other states, is now also subject to KRS 421.360, the Uniform Interstate Depositions and Discovery Act. The federal rule is more directed toward foreign countries (and such circum-
stances may implicate The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters). The safest approach in any case is to consider first where the deposition will be used and make sure that those rules are satisfied, and then to consider where the deposition must be taken so that the evidence can actually be obtained. If the deposition is to be used in Kentucky and the witness is in Kentucky, CR 28 will not likely be implicated at all (except to make sure the deposition is taken before a person listed in CR 28.01). But if the deposition is to be taken in California for use in a Kentucky proceeding, careful attention to CR 28.02, KRS 421.360, and whatever California procedure requires must all be considered.

Only the federal rule expressly disqualifies a party’s relative or employee from taking depositions, FRCP 28(c).

CR 29 – Stipulations Governing Discovery Procedures

Kentucky’s rule is more restrictive than FRCP 29 concerning what stipulations the parties may reach to modify discovery deadlines. CR 29 provides that court approval is needed even to extend deadlines for responses to interrogatories and requests for admissions and for pro-

CR 31 – Depositions by Written Questions

While both sets of rules allow for depositions upon written questions (rarely used in actual practice), the deadlines for cross-questions are different. CR 31.10(3) allows 30 days for cross-questions, followed by 10 days for redirect; FRCP 31(a)(5) allows only 14 days for cross and 7 days for redirect, but does allow re-cross 7 days after that.

CR 32 – Use of Depositions in Court Proceedings

While both the state and federal rules allow the use of depositions at trial where the witness is distant or unavailable, Kentucky’s rule contains notable specific provisions for governors, postmasters, lawyers, bank tellers and quite a few others. This comes up perhaps most routinely with medical proof, because CR 45.05 pro-
vides that a physician (or any witness whose deposition can be used under 32.01(c)) cannot be compelled to appear in court unless that witness failed to appear when subpoenaed for deposition. The federal rule has no counterpart to this. A general provision in federal Rule 32(4)(E) allows for depositions to be used upon “motion and notice… in exceptional circumstances… with due regard to the importance of live testimony in open court.” This makes federal and state practice very different, with certain specified witnesses under Kentucky’s CR 32 not subject to a state court trial subpoena, while those same witnesses might not be allowed to testify by deposition in federal court in the absence of exceptional circumstances.

This same preference for live testimony in federal proceedings shows up in Rule 43, discussed below. Among the vast differences between CR 43 and FRCP 43 is the provision of CR 43.04(1) that testimony in certain cases “shall be taken by deposition” unless otherwise ordered. While some of the proceedings listed in CR 43.04(1) have no federal counterpart (divorce, for example), FRCP 43 does not list any type of proceeding for which deposition testimony is to be preferred over the appearance of a live witness.

CR 33 – Interrogatories

Federal practice is limited to 25 written interrogatories (unless otherwise stipulated or ordered by the court), while Kentucky allows a maximum of 30. Federal practice prohibits any kind of discovery before the scheduling conference, discussed above, but interrogatories under CR 33 can be served hand-in-hand with the complaint in state court. In such cases, the time for response is extended from the usual 30 days to 45 days. CR 33.01(2).

CR 34 – Document Requests

As in the case of interrogatories, Kentucky allows document requests to be served with the complaint, but allows 45 days (instead of 30) for a response in such cases. This is very different from modern federal practice, where mandatory initial disclosures and scheduling conferences must come first.

CR 35 – Physical and Mental Examinations

FRCP 35 provides expressly that the party ordered to be examined waives any privilege he or she may have concerning testimony about all other “examinations of the same condition” if the examined party asks for the court order and examiner’s report or deposes the court-ordered examiner.

CR 37 – Failure to Make Discovery; Sanctions

FRCP 37 requires a party who moves to compel discovery to certify that the movant has conferred in good faith with the party failing to make the discovery before asking the court to get involved. While CR 37 does not contain this requirement, local rules should be consulted because many Kentucky circuits do follow federal practice on this point. A movant’s failure to make the good faith attempt under the federal rule precludes the federal court from awarding expenses to the moving party, even if the motion is ultimately granted. FRCP 37(a)(5)(A)(i).

FRCP 37(e) expressly protects parties from sanctions where electronically stored information has been lost in the good faith, routine operation of a system. While Kentucky’s rule does not contain this express provision, CR 37(d) in general allows a court to refuse an award of expenses in any circumstances where the award would be “unjust.”

The federal rule also authorizes sanctions against a party who refuses to cooperate in framing a joint discovery plan as required by FRCP 26(f), for which there is no state counterpart. FRCP 37(f).

CR 38 – Jury Trials

When a jury demand is made in state court by one party for only some of the issues, the opposing party has 10 days in which to serve a demand for trial by jury on other or all issues. CR 38.03. The federal rule allows 14 days. FRCP 38(c).

CR 40 – Scheduling Trials

CR 40 requires “reasonable notice” of the trial date to all parties not in default. While not explicitly stated in the federal rules, this would seem also implicit in fundamental due process requirements. FRCP 40 does require each court “to provide by rule” for such scheduling and to give priority to scheduling trials in accordance with any federal statutory preferences.

CR 42 – Consolidation; Separate Trials

The state rule provides that a court “shall order” separate trials of claims or issues if it determines that separate trials would further convenience or avoid prejudice. The federal rule says “may,” and specifically adds that “the Court must preserve any federal right to a jury trial.”

The state and federal rules are almost completely different, similar only in their requirement that most evidence should be taken in open court. CR 43.04(1); FRCP 43(a). Attorneys who generally practice in federal court should study CR 43 to prepare carefully for any state proceedings, as it governs the order of proof, burden of proof and many other details not addressed by the federal rule. And as discussed under CR 32 above, it may not even be possible to subpoena a witness for live testimony in state court unless that witness failed to appear at a deposition.

CR 44 – Proof of Official Records

The federal version provides for “Final Certification of Genuineness” of a foreign record, and other means of proof under certain circumstances. The federal version also specifically allows proof regarding lack of a record, after diligent search, which provision has been deleted from Kentucky’s rules. The Kentucky Rules of Evidence now govern some of this proof and should, of course, be considered in addition to these rules of civil procedure.

CR 45 – Subpoenas

Both rules allow a subpoenaed party to make written objection to the inspection or copying of documents and to rest on that objection unless the party serving the subpoena obtains a court order. But the deadlines for doing so are different (10 days after service in state court, 14 days after service in federal court). Note that written objections only protect against producing documents. If a witness has been validly subpoenaed to appear to give testimony, failure to appear can be punished in both systems as contempt. CR 45.02; FRCP 45(g). A witness who does not want to appear must move to quash the subpoena, in state court on the grounds that “it is unreasonable or oppressive” (CR 45.02), or in federal court on the more specific grounds listed in FRCP 45(d)(3) (too little time to comply, exceeds the geographical limits, would require disclosure of privileged or other protected materials, etc.)

The state rule also provides residents with greater protection against forced travel for discovery (need only appear in the county where he resides or works, unless otherwise or-
CR 47, 48 and 49 – Jurors and Verdicts

These rules are not only very different in the rulebooks; much of the substance is covered by statutes, the state constitution and case law. It takes nine out of 12 jurors voting in agreement to make a civil verdict in Kentucky, and the same nine need not agree to every answer in a special verdict. 17 A federal jury can be made up of just six, but their verdict must be unanimous.18 The federal court must poll the jury at the request of any party to confirm that the verdict really was unanimous.19

Jury selection, voir dire, the exercise of challenges, and other trial logistics vary so much between federal and state courts, and even among courts in the same system, that pretrial preparation must include confirming the specific practice followed in the specific court where the case will be tried.

CR 50 – Motions Following Proof

Kentucky’s rules are still phrased in terms of asking a court to take a case away from a jury by asking the court to “direct a verdict” on legal grounds, instead of letting the jury decide the outcome by resolving factual disputes. The federal rule now spells this out as moving “for judgment as a matter of law.” FRCP 50(a).

Both systems require a movant to raise the legal issue before the case is submitted to a jury in order to move for relief after a verdict is returned.20 In state court, the post-judgment motion must be made within 10 days after entry of judgment (or discharge of the jury if they reached no verdict).21 In federal court, the deadline is 28 days.22

CR 51 – Instructions to Jury

CR 51(2) specifically requires a Kentucky court to give written instructions before closing argument is made to the jury, whereas FRCP 51(b)(3) allows instructions “at any time before the jury is discharged.”

CR 52 – Findings of the Court

Kentucky’s deadline for asking a court to amend its findings or to make additional findings is 10 days after entry of judgment; the federal rules allow 28 days.

CR 53 – Master Commissioners

The office of Master Commissioner under CR 53 is substantially different from the special master contemplated by FRCP 53. The appointment of a master in the federal system is unusual and case-specific; CR 53.02(3) provides for similar references “in special cases,” but most of CR 53 addresses the routine work of a regular Master Commissioner (judicial sales, settlement of accounts of estates, etc.). The manner and limits of compensation also differ.

CR 54 – Judgment and Costs

In addition to the express provisions of CR 54 and FRCP 54 allowing for entry of a final and appealable judgment on fewer than all of the claims in a case, federal litigants may turn to 28 U.S.C. §1292 for interlocutory appeals in certain cases, not available in state practice.

For default judgments, CR 54.03 requires proof of unliquidated damages to accompany the demand for default (because those damages are unspecified in the pleadings under CR 8.02(2), as described earlier). The federal rule does not contain this provision because federal practice does not forbid the estimate of unliquidated damages to appear in the initial pleading.

FRCP 54(d)(2) governs requests for attorney fees, which must be made within 14 days of entry of judgment. Kentucky’s rules have no counterpart to this, but good practice would be to file such a motion (if attorneys’ fees are recoverable by statute, contract, or otherwise) within the 10-day deadline for amending the judgment.23

CR 55 – Default

Other than the different provisions for notice to parties who have appeared, but are still in default (three days in state court, seven days in federal), the default rules are substantially the same (but with the state court requiring proof of damages under CR 54.03(1) above). This is another area, however, where local rules should be consulted because they may impose additional requirements in a specific circuit.

CR 56 – Summary Judgment

Fifteen years ago, state court practice appeared to veer completely away from federal practice, even under the identical rule 56, with the Kentucky Supreme Court’s decision in Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.24 Subsequent case law has clarified and reaffirmed, however, that CR 56 is alive and well in Kentucky.

A jury trial without the requisite proof is a futile exercise, wasteful of judicial time, jurors’ time, and the litigants’ time and resources. CR 56 is intended to avoid such unnecessary proceedings.25

A comparison of state and federal summary judgment practice is provided by a separate article in this issue.

CR 57 – Declaratory Judgments

While the rules are similar in state and federal court, both courts also have declaratory judgment statutes that should be consulted.26
CR 58 – Entry of Judgments

Every judgment or order entered in a state court proceeding must be signed by the judge. FRCP 58 directs the clerk of the court to enter judgment “without awaiting the court’s direction” when the jury returns a general verdict, or the court awards only costs or a sum certain, or when the court denies all relief.

CR 59 – Post-judgment Motions

Kentucky’s rule lists specific grounds for a new trial, and a motion seeking one must be made within 10 days of entry of the judgment. The federal rule allows 28 days, and as grounds refers to “any reason for which a new trial has been heretofore granted in an action at law in federal court.” FRCP 59(a)(1)(A). Both courts allow a court to grant a new trial on its own initiative or for grounds not stated in a motion, and both allow a court to take additional evidence and other action if the case was not tried by a jury.

CR 62 – Stay

The Kentucky rule does not contain the provision of FRCP 62 forbidding execution on a judgment “until 14 days have passed after its entry.” CR 69.03 provides, instead, that Kentucky’s statutes control. KRS 426.030 forbids any execution to issue until 10 days after entry of judgment.

If a party moves for post-judgment relief in state court under CR 50, 52.02, or 59, the motion serves as an automatic stay of the judgment in Kentucky (and the Kentucky court has discretion to stay proceedings while a CR 60 motion is pending). Under FRCP 62(b), a stay pending resolution of a motion made under any of the parallel rules (FRCP 50, 52(b), 59, or 60) is discretionary. This means a movant in federal court must affirmatively seek a stay when filing such a motion and should do so within 14 days (instead of waiting 28 days).

Both versions of Rule 62 allow for a stay pending appeal to be obtained by posting a bond. Injunction cases, however, are treated differently; CR 62.02 and CR 65.08 allow the circuit court to maintain the status quo long enough for the movant to seek further relief from the appellate court, while FRCP 62(c) allows the district court to stay the case pending appeal. If a federal appeal has already been docketed, however, FRCP 62.1 may constrain the district court’s authority to act.

CR 63 – Disability of Judge

Kentucky’s rule allows a successor judge to grant a new trial if disability occurs after a trial and the successor cannot perform the post-trial duties. This is different from FRCP 62 which allows the successor to proceed upon certifying familiarity with the record and lack of prejudice. In such a case, however, if there was no jury, the federal judge “must recall any witness whose testimony is material and disputed” if a party makes that request and the witness is available.

CR 65 – Injunctions

While injunction practice is conceptually the same in both courts (seeking urgent relief, needed immediately) the language and procedure are different and care should be taken to follow the applicable rules and case law for the specific court. For example, CR 65 talks about a “restraining order” and a “temporary injunction” whereas FRCP 65 refers to a “preliminary injunction” and a “temporary restraining order.” The duration of temporary relief is also different under CR 65.03 and FRCP 65. The federal rule also expressly contemplates advancing a trial on the merits of the case so that evidence taken on the motion for injunctive relief becomes the actual trial.27

Because of the immediacy and urgency inherent in injunction practice, this is one place where litigants must go straight to the applicable rule and stay focused on what that rule requires. While federal case law might be persuasive by analogy in assessing irreparable harm, for example, confusion in practice and standards could easily lead to reversible error by the next higher court.

CR 67 – Deposits Into Court

Kentucky’s rule provides for court-ordered deposits into court, for which there is no federal counterpart in FRCP 67.

If a party seeks to be dismissed from an action by making a deposit into court and relinquishing any claim to those funds, interpleader is also provided for by rule 22 in both systems, and by federal statute.28

CR 68 – Offers of Judgment

Kentucky’s rule on making an offer of judgment contains a provision that is not found in FRCP 68 nor explained by case law: “The offer may be conditioned upon the party’s failure in his defense.” Because the state rule contemplates that an offer of judgment must be accepted within 10 days after it is served, and that it must be made “more than 10 days before the trial begins,” this condition (which may be a remnant of code practice predating the civil rules) would not seem applicable to a failure of defense at trial and it is unclear how, if ever, it could apply in modern practice.

The federal rule allows 14 days for acceptance.

CR 71 – Enforcement For and Against Non-parties

These rules are substantively the same, except the federal rule contains an entire subpart, FRCP 71.1, on condemnation of property. Kentucky’s procedure is governed by the Eminent Domain Act, KRS Chapter 416.

CR 72-76 – Appellate Practice

A comparison of appellate practice is beyond the scope of this article, as federal practice is governed not by the civil rules of procedure, but rather by the Federal Rules of Appellate Procedure (and, for Kentucky practitioners, by the Sixth Circuit’s own rules and internal operating procedures). FRCP 72-73,
dealing with magistrate judges, have no state counterpart and FRCP 74-76 have been abrogated.

CR 77 – Courts and Clerks

CR 77.02(2) provides for annual "show cause" review of court dockets, by which notice "shall be given" to parties in cases where no pretrial steps have been taken in the past year to show "good cause" why the case should not be dismissed. There is no federal counterpart.

FRCP 77(c)(2) gives the federal court clerk more power to enter some orders or even a default judgment than is permitted under Kentucky's CR 77.03, but both are subject to a court's suspension or rescission.

CR 77.04(2) provides for the clerk's notation on the docket, which is a trigger for the running of the deadline for appeal. The federal rule instructs the clerk to record on the docket service of notice of entry of judgment, but it does not equate that act by the clerk with entry of the judgment.

CR 79 – Records of the Clerk

The state rule is considerably longer and more inclusive, as it provides for the recording of wills and other papers not applicable to federal practice. CR 79.02 also governs how satisfaction of a judgment is reflected on the record of a particular case. Federal practice is governed by separate administrative rules.

CR 79.06 governs appellate records, again making comparison between the federal and state court civil rules not meaningful on this point.

CR 81 – General Application of Civil Rules

Both sets of rules use rule 81 to describe their applicability, but of course they apply to completely different proceedings. The most important rule in the context discussed here is FRCP 81(c), which provides that the federal rules apply to a state court action that is removed to federal court. This can extend considerably the deadline for responsive pleading that would otherwise have been due in state court.

CR 87-98 – No Federal Rules for "Rocket Docket"

The federal set ends with FRCP 86, while Kentucky's set of civil rules continues through CR 98. The difference (other than CR 87 on amendments and CR 98 on appeals from video records) is the set of Special Rules of the Circuit Court for the Economic Litigation Docket. These apply only to particular circuits and divisions, sometimes called the "rocket dockets," with the goal of streamlining proceedings in the types of cases described in CR 89 (contracts, personal injury, property, and termination of parental rights).

CONCLUSION

With the style revisions of the federal rules in 2007, very little identical wording remains in Kentucky's less-amended version. Nevertheless, Kentucky lawyers practicing in both federal and state courts will continue to find comfort and familiarity in the general arrangement and substance of both sets, which remain very similar. What is perhaps most surprising about the comparison is that the very places where the closest or even identical language does remain (CR 8, 12, and 56, for example) are also the very places where case law has taken federal and state courts in different directions. Whether Kentucky courts will follow federal pleading practice under CR 8 and 12, and whether it is returning to federal summary judgment practice under CR 56, will remain of great interest to attorneys trying to navigate, and sometimes trying to choose between, both systems.

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Special thanks to University of Kentucky College of Law Professor Bill Fortune, whose contributions helped maximize the value of this article as a helpful tool for day-to-day practice.

1 The Federal Rules of Civil Procedure for the United States District Courts became effective September 18, 1938. They are referred to as "FRCP ___." The Kentucky Rules of Civil Procedure became effective July 1, 1953. They are referred to as "CR ____." Both sets of rules as discussed in this article in include amendments through January 1, 2015. Nearly all of the federal rules have undergone revision for style (not intentionally substantive) in 2007, leaving very little wording identical to Kentucky's current set.


3 See, e.g., Roehrig v. Merchants v. Businessmen's Mut. Ins. Co., 391 S.W.2d 369, 370 (Ky. 1965); Ailinghaus Builders v. Ky. PSC, 142 S.W.3d 693, 696 (Ky. App. 2003) (defects in summons or service may be excused, but good faith attempt is still required).

4 Id.

5 Ashcroft v. Iqbal, 556 U.S. 662 (2009), followed the earlier case of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in requiring a plausible claim to be stated on the face of a complaint. “Threadbare recitals” and legal conclusions will not suffice. 556 U.S. at 678.

6 See “Pleading Claims in Kentucky State Court after Twombly and Iqbal,” another article in this issue.

7 849 N.W.2d 693 (Wis. 2014).
Pleading Claims in Kentucky State Court after Twombly and Iqbal

By: E. Kenly Ames

The Federal and Kentucky Rules of Civil Procedure governing pleading and motions to dismiss for failure to state a claim have been the same for many years. And for decades, the standards that the federal and Kentucky courts applied to test the sufficiency of pleadings were indistinguishable. However, several years ago, the United States Supreme Court raised the bar for pleading under the federal rules. The Kentucky courts have not—or at least not yet. While the traditional standard continues to be cited in Kentucky’s published decisions, the stricter federal standard nevertheless affects Kentucky practitioners.

The Federal Standard

When the U.S. Supreme Court announced its decision in Bell Atlantic Corp. v. Twombly in 2007, and then reinforced that decision two years later in Ashcroft v. Iqbal, it upended federal pleading standards that had been well-settled for many years. In 1938, the Federal Rules of Civil Procedure instituted notice pleading in the federal courts, abandoning technical pleading rules. Rule 8(a)(2) required then, as it still does now, only “a short and plain statement of the claim showing that the pleader is entitled to relief.”

As the U.S. Supreme Court explained in 1957 in Conley v. Gibson, the purpose was to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Complaints satisfied Rule 8(a)(2) without setting out detailed facts, as long as they provided fair notice of the nature of the claim. Furthermore, in Conley, the Court held that a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), would not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” For 50 years after Conley was decided, the standard remained essentially unchanged. Claims were dismissed under Rule 12(b)(6) only where no viable legal theory supported them.

That changed with Twombly in 2007. The U.S. Supreme Court declared that “after puzzling the profession for 50 years,” Conley’s familiar “no set of facts” standard “has earned its retirement.” In its place, the Court substituted a plausibility standard, under which a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” Twombly was a putative antitrust class action by subscribers to local telephone and Internet services, alleging a conspiracy among the service providers. The case had the obvious potential to involve massive discovery and to be very costly and protracted. In laying out the rationale supporting the Court’s new plausibility standard, the Court stressed that the lower courts “must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” Otherwise, defendants could be coerced into settling groundless cases solely to avoid the burdens of discovery.

This emphasis on gate-keeping for complex, burdensome cases led some commentators and lower courts to conclude that Twombly applied only to cases in which the cost of discovery was likely to be so high that it could coerce settlements. However, just two years later, in 2009, the Court dispelled that idea when it issued its decision in Ashcroft v. Iqbal. In that case, which was a single plaintiff alien detainee case, the Court made it clear that the plausibility standard applied to all civil cases. The Court also laid out the “working principles” that underlay its decision in Twombly. First, the requirement that a court must accept as true all of the allegations in a complaint “is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Second, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” The Court stated that Rule 8 may have laid to rest the age of “hyper-technical” pleading, but “it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” Thus, lower courts are to draw on their judicial ex-
perience and common sense to perform the “context-specific” task of disregarding the conclusions set out in a complaint, identifying the well-pleaded factual allegations, assuming their truth, and then determining whether they “plausibly give rise to an entitlement to relief.”

Twombly and Iqbal have caused rivers of ink to flow. Scholarly debate has raged over the wisdom and impact of the decisions. Courts have cited those decisions in over 210,000 cases as of June 2015. In the federal courts of Kentucky alone (including decisions by the U.S. Court of Appeals for the Sixth Circuit in appeals from the Kentucky district courts), Twombly has been cited 1,803 times, and Iqbal has been cited 994 times.

Debate continues over whether or not Twombly and Iqbal have actually resulted in more federal cases being dismissed at the outset for failure to state a claim. It also continues over the extent to which practitioners and trial court judges have actually changed their practices. There can be no question, however, that the U.S. Supreme Court intended Twombly and Iqbal to set a heightened standard of pleading.

**KENTUCKY’S STANDARD**

Twombly and Iqbal have not yet had the same impact on the Kentucky courts; indeed, they have gone almost completely unremarked in published decisions. Since its adoption in 1953, CR 8.01(1) has been identical to Federal Rule of Civil Procedure 8(a)(2). Like its federal counterpart, CR 8.01(1) also requires only that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” The Kentucky Supreme Court has explained: “It is not necessary to state a claim with technical precision under this rule, as long as a complaint gives a defendant fair notice and identifies the claim.”

Kentucky has long followed its own version of the Conley v. Gibson “no set of facts” standard. The Kentucky Supreme Court’s formulation of the test is: “A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved....” This standard has been well-settled for decades. Traditionally, in the Kentucky state courts, “[t]he motion to dismiss for failure to state a claim is viewed with disfavor and rarely granted.”

Kentucky’s “any set of facts” standard has not changed in any published case to date, despite the stir over Twombly and Iqbal in the federal courts. As of June 2015, Twombly and Iqbal have never been cited by the Kentucky Supreme Court. In 2010, the Kentucky Supreme Court applied the traditional “any set of facts” standard without mentioning Twombly or Iqbal. The Kentucky Court of Appeals has continued to apply the traditional standard regularly; it did so as recently as June 2015.

Indeed, there appears to be only one decision available from any Kentucky court that cites either Twombly or Iqbal on issues relating to sufficiency of the pleadings. The Kentucky Court of Appeals cited Twombly in one unpublished opinion in 2009. In that case, Espinosa v. Jefferson/Louisville Metro Government; the Court of Appeals affirmed the Jefferson Circuit Court’s dis-
counterpart. However, Kentucky courts do not always follow the federal courts’ lead. It remains to be seen whether “plausibility pleading” will turn out to be one of those areas in which the Kentucky courts diverge from the federal courts. No Kentucky appellate court has yet addressed that question.

**Practice Pointers**

As the authors of Kentucky Practice caution, and rightly so, “no Kentucky practitioner would want to be the first lawyer to lose a state-court case on this point.” Where possible, it may be better to be safe than to risk being sorry, and to satisfy the plausibility standard for pleading claims in state court cases. This suggestion applies particularly to cases filed in Kentucky state court that are subject to removal to federal court. Generally speaking, in cases that are removed to federal court, the district court evaluates the sufficiency of the pleading under the federal standard (that is, plausibility pleading) rather than under the more lenient Kentucky standard. A complaint that would pass muster in state court may well be dismissed in federal court. Indeed, federal courts applying Twombly and Iqbal have granted motions to dismiss for failure to state a claim in cases removed from the Kentucky state courts. Any Kentucky attorney drafting a complaint to be filed in state court in a case where grounds exist for removal to federal court would be wise to plead, in the words of the U.S. Supreme Court in Twombly, “enough facts to state a claim to relief that is plausible on its face.”

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4. Id. at 45-46.
7. Id. at 570.
8. Id. at 558 (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17 (1983)).
9. Id. at 560.
10. See 162 U. Pa. L. Rev. at 1772.
11. Iqbal, 556 U.S. at 684.
12. Id. at 678.
13. Id. at 679.
14. Id. at 679.
15. Id. at 679.
16. Per Westlaw searches performed on June 8, 2015.
17. Per Westlaw searches performed on June 8, 2015.
19. Id. at 279-76.
25. 7 Per Westlaw searches performed on June 8, 2015.
28. Id. at 7.
29. 8 Ky. Practice, Rule 8.01, Heading 1.
30. Id. at *1.
32. 6 Ky. Practice, Rule 8.01, Heading 1.
33. E.g., Tucker v. Heaton, 2015 WL 1884384, at *2 (W.D. Ky. Apr. 24, 2015); Combs v. ICG Hazard, LLC, 934 F. Supp. 2d 915, 923 (E.D. Ky. 2013) (“Because Kentucky’s pleading standard is more lenient than the federal rules, which standard applies matters …”).
35. 6 Ky. Practice, Rule 8.01, Heading 1.
38. Twombly, 550 U.S. at 570.
DOES KENTUCKY SUMMARY JUDGMENT PRACTICE REALLY DIFFER FROM FEDERAL PRACTICE?

By: Jonathan R. Oliver & Richard C. Roberts

Almost a quarter of a century has passed since the Supreme Court of Kentucky announced in Steelvest, Inc. v. Scansteel Service Center, Inc. that it would not apply the federal standard for summary judgment, despite the existence of what was then virtually identical language in Kentucky’s CR 56 and federal rule 56. In Steelvest, the Court decided that federal case law had taken summary judgment practice in a direction the Court perceived as inconsistent with Kentucky cases, most notably what it called the “benchmark case of Paintsville Hospital v. Rose.”

This article will revisit the federal and state standards compared by the Kentucky Supreme Court in Steelvest and consider, under more recent Kentucky practice, whether those articulated standards necessarily lead to different results in cases decided today.

STEELVEST’S COMPARISON

The Kentucky Supreme Court in Steelvest undertook the same type of comparison of federal and state practice to which this issue of the Bench & Bar is devoted, under the Court’s heading: “SUMMARY JUDGMENT PRACTICE IN KENTUCKY COURTS AND FEDERAL COURTS – A COMPARISON.”

The Steelvest Court noted three differences between the Kentucky standard and the federal standard: First, the Court said, the federal standard did “not necessarily require the movant to produce evidence showing the absence of a genuine issue of material fact,” but Kentucky cases did. Second, the federal standard for summary judgment was the same as the standard for a directed verdict; whereas, in Kentucky, the standard for summary judgment was described as “a more delicate matter.” Third, in Kentucky, the movant had to show that it would be “impossible” for the responding party to prevail.

While pointing out what it called these “obvious differences,” the Kentucky Supreme Court also noted:

When comparing our summary judgment practice in Kentucky courts under our past decisions, including the holding in Paintsville Hospital, with the new summary judgment standards announced in the 1986 trilogy of United States Supreme Court cases, we find some similarities....

PAINTSVILLE HOSPITAL REVISITED

Within a year of deciding Steelvest, the Kentucky Supreme Court expounded on the Paintsville Hospital language and stated:

We accept that ‘impossible’ is used in a practical sense, not in an absolute sense.

In recent years, citation of Paintsville Hospital by the Kentucky Supreme Court frequently has been accompanied by the same qualifying language from Perkins.

The Court of Appeals has also frequently emphasized that “impossible” is not used in the “absolute sense” in the summary judgment context.

MODERN SUMMARY JUDGMENT PRACTICE

Despite the declared intention of Kentucky nearly 25 years ago to follow a different summary judgment path, recent cases confirm that summary judgment remains a viable option in appropriate cases in the state courts of Kentucky, and sometimes based on the same analysis employed in the 1986 federal trilogy discussed above. Significant examples follow.

In Brewster v. Colgate-Palmolive Company, the Kentucky Supreme Court affirmed summary judgment dismissing a claim where the respondent could not prove that the premises contained asbestos. It did so over a dissent that argued a jury possibly could have inferred that the premises contained asbestos. Nevertheless, the Kentucky Supreme Court, applying Kentucky law, affirmed the appropriateness of summary judgment. Although it did not cite to the federal trilogy, the case is similar to one of the three, Celotex, where summary judgment was entered against a plaintiff who could not prove an essential element of her case, to wit: that plaintiff’s decedent had been exposed to asbestos from a product manufactured by the defendant.

Wymer v. JH Properties, Inc. and Fort Mitchell Country Club v. LaMare are additional examples of cases in which summary judgment was affirmed where plaintiff had not produced evidence of a necessary element of her case, again in keeping with (but, of course, not citing) Celotex.
The second case in the federal trilogy is Anderson and its influence may also be seen in the Kentucky case of Welch v. American Publishing Co. of Kentucky. Both cases involved a defamation claim by a public figure in which plaintiff must prove malice of defendant by “clear and convincing evidence.” Because malice is a state of mind and is rarely admitted, malice usually is inferred from circumstantial evidence. This suggests that the fact finder, usually a jury, would have wide latitude in deciding whether defendant had acted maliciously. Nevertheless, under the holdings of both Anderson and Welch, there must indeed be clear and convincing evidence of record to defeat summary judgment.

In Anderson, the United States District Court had considered allegedly defamatory statements, found no clear and convincing evidence of malice, and accordingly granted summary judgment to defendants. The United States Court of Appeals reversed dismissal of several counts. The United States Supreme Court reversed and remanded the Court of Appeals’ decision because the Court of Appeals had not used the “clear and convincing” standard to evaluate the evidence at the summary judgment stage.

Similarly, Welch affirmed summary judgment for a state court defendant and approved use of the “clear and convincing” standard when deciding summary judgment in a defamation case. Three justices dissented in Welch because they believed that circumstantial evidence, especially a defendant’s evasiveness during his deposition, supported an inference of actual malice. Both the majority and the dissent cited Steelvest, but with the majority emphasizing the continued viability of CR 56: Steelvest did not repeal CR 56. See CR 56.03 (summary judgment shall be granted if “there is no genuine issue as to any material fact.” … The inquiry should be whether, from evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.

Thus the state court in Welch reached the same result as the federal court in Anderson, both recognizing that even in cases with mostly circumstantial proof, that proof must exist in “clear and convincing” form to survive summary judgment.

After stating explicitly in 1999 in Welch that Steelvest had not repealed CR 56, the Kentucky Supreme Court made the same point again in 2001:

A well-supported motion for summary judgment can terminate litigation. … It should be noted that this Court in Welch … clarified the situation by stating Steelvest did not repeal CR 56.

In Wymer, plaintiff was injured working at a hospital, and she was treated for her injury at that hospital. She averred negligent treatment by the hospital and its employees. Later, her employment was terminated. She sued the hospital and its employees for negligence, and she sued the hospital for wrongful discharge. The Kentucky Supreme Court held that plaintiff’s right to receive workers’ compensation had not pre-empted her negligence claims. The Kentucky Supreme Court held also that the plaintiff’s claim that she was fired because she filed a workers’ compensation claim should be dismissed because “no evidence in the record” supported that argument.

Thus not only must the movant produce evidence, according to Steelvest, to support a motion for summary judgment, Wymer and Welch put a burden on the respondent to put evidence in the record to oppose it, evidence that actually shows the responding party might prevail if the case goes to trial. To the same effect is Fort Mitchell Country Club, supra, a dram shop case in which the Kentucky Supreme Court clarified the summary judgment practice in Kentucky. It has even emphasized that summary judgment remains a viable concept. …

Summary judgment procedure authorized by CR 56.01 et seq., is intended to expedite the disposition of cases and if the grounds provided by the rule are established, it is the responsibility of the trial judge to render an appropriate decision.

Another clear recent example of the continuing viability of CR 56 is a case decided by the Kentucky Supreme Court just last year. In Dean v. Commonwealth Bank & Trust Co., the issue was whether a law firm “could have reasonably discovered the kit-checks” in its checking accounts, from which its bookkeeper was embezzling. The law firm contended “that reasonable-ness is always a factual question for the jury” that precludes summary judgment. The Supreme Court disagreed.

While reasonableness, like all factual questions, is ordinarily determined by the finder of fact, merely raising the question is not by itself sufficient to present it to the fact finder. The reasonableness of an act or omission is required to go to the jury only where there is a “factual dispute regarding the reasonableness.” …

But if “reasonable minds cannot differ,” then the matter need not be submitted to a jury.

The purpose of summary judgment is perhaps most forcefully stated in Blankenship, et al. v. Collier. Blankenship affirmed summary judgment in a medical negligence action when the plaintiff lacked expert proof necessary to establish the necessary standard-of-care element. The Court ruled that where a sufficient amount of time had expired and the plaintiff had still failed to introduce evidence sufficient to establish the possible” and “delicate matter” language of Steelvest, and trial judges seemed at first easily persuaded that summary judgment should not be granted.

But, as more recent cases demonstrate, the Supreme Court has, in its own words, “clarified the situation” considerably. It still cites Steelvest and Paintsville Hospital as the standard that still governs summary judgment practice in Kentucky. It has even announced its “recommitment to a very stringent standard for summary judgment in Steelvest and the rejection of the much more lenient federal standard.” … But it has also affirmed, repeatedly and recently, that CR 56 has not been repealed in Kentucky and continues to serve a valuable purpose. “It is important to emphasize that summary judgment remains a viable concept.”

…focus should be on what is of record rather than what might be presented at trial.
respective applicable standard of care, then the defendants were entitled to judgment as a matter of law.

In Blankenship, plaintiff argued that, before a case can be dismissed on summary judgment for not being supported by expert evidence, the trial court must rule that expert testimony is necessary, grant time to find an expert, and then grant an extension of time. Blankenship holds that these intermediate steps are unnecessary where the need for expert testimony is not in dispute and ample time has already been given. In making this ruling, the Kentucky Supreme Court reiterated the importance of CR 56:

A jury trial without the requisite proof is a futile exercise, wasteful of judicial time, jurors’ time, and the litigants’ time and resources. CR 56 is intended to avoid such unnecessary proceedings.24

Blankenship also reached back to the language of Neal v. Welker:25

“The curtain must fall at some time upon the right of a litigant” to put forth the most basic level of proof and the plaintiff’s bare assertion “that something will ‘turn up’ cannot be made [the] basis for showing that a genuine issue as to a material fact exists.”26

That the Supreme Court of Kentucky and the Supreme Court of the United States probably would have ruled the same way in many of these cases does not mean that the Kentucky standard is the same as the federal standard. The Kentucky Supreme Court continues to say it is not. But it should not be surprising when federal and state cases do reach the same result based on similar reasoning, even though the federal cases cite the federal trilogy while the Kentucky cases cite Steelvest or other Kentucky cases. After all, the underlying civil rules governing summary judgment, CR 56 and federal rule 56, remain substantively the same.

It may also be fairly questioned whether the judicial environment in which Steelvest was decided has changed in ways that now favor the federal standard more than they did in 1991. When holding that Kentucky should not adopt the federal standard of summary judgment, Steelvest stated:

...[W]e perceive no oppressive or unmanageable case backlog or problems with unmeritorious or frivolous litigation in the state’s courts that would require a new approach such as the new federal standards.27

After almost 25 years, it is worth asking if that is still the situation. (Justice Scott’s dissent in Blankenship seemed to say yes in 2010).28 Moreover, whether there is a backlog in the courts is only one consideration. The futile waste of resources as noted in Blankenship is another. Steelvest also expressed confidence in the ability of CR 11 “to handle problems concerning unmeritorious litigation and unnecessary trials.” 807 S.W.2d at 483. But CR 11 currently provides that a trial court “shall postpone ruling on any Rule 11 motions filed in the litigation until after the entry of a final judgment.” Thus, by its own terms, a CR 11 ruling cannot prevent an unnecessary trial (because the CR 11 ruling can only be made after the trial is already over).

For all of these reasons, actual summary judgment practice may no longer differ as much between Kentucky federal and state courts as was perceived immediately after Steelvest. But the fact that the cases still say the standards are different will continue to fuel strategic choices of forum where there is concurrent state and federal jurisdiction. Unless and until the Kentucky Supreme Court says otherwise, the perception that summary judgment is more easily obtained in federal court will continue to push some litigants either toward (or away from) a federal venue for that reason.

Ultimately, however, in either system, it is the same rule that applies. If there is no genuine issue as to any material fact, judgment in state court “shall be rendered forthwith” under CR 56.03 and a federal court “shall grant summary judgment” under federal Rule 56(a).
ATTORNEY MISCONDUCT
AND THE APPEARANCE
OF IMPROPERITY

By: Thomas L. Rouse

On April 17, 1992, Philip and Shirley Lovell met with attorney Charles King about representing them in a claim that alleged a shortage of acreage in land that they purchased from Fanny Kidd in 1991. They discussed their claim and left their original documents pertaining to the land transaction with King. About a month later, Charles King returned the documents along with a letter declining representation. The Lovells retained another attorney in 1994 and sued Fanny Kidd over the issue in the land purchase. Fannie Kidd, upon receipt of the summons and complaint, retained the same Charles King to defend her in this lawsuit. He prepared and filed an answer to the complaint.

When Mr. and Mrs. Lovell saw that Charles King was representing the defendant, they had their attorney file a motion to disqualify Mr. King pursuant to rules 1.7 and 1.9 of the Rules of Professional Conduct. They argued that their initial consultation, in which they disclosed information in confidence to King, precluded his representing Kidd in the same matter. In addition, they asserted that the attorney-client privilege set forth in KRE 503 entitled them to rely on the confidentiality of any statement made to King during the initial consultation.

Charles King responded by arguing that he recalled nothing about the initial consultation with Mr. and Mrs. Lovell and in fact could confirm their visit only by referring to an old office calendar.

Twenty seven months before the meeting between attorney King and the Lovells, the Kentucky Supreme Court had changed the rules governing attorney conduct by adopting its own version of the ABA's new Rules of Professional Conduct. The Court, for the previous 20 years or so, used the Code of Professional Responsibility as the set of governing principles setting forth the minimum standard of acceptable conduct for Kentucky lawyers. Attorneys that had attended the three Kentucky law schools between 1969 and 1990 were trained on the Code, its Ethical Considerations and Disciplinary Rules.

CANON 9. A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPERITY

Ethical Considerations . . .

Disciplinary Rules
DR 9-101 Avoiding Even the Appearance of Improperity

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

It is interesting to note that the term “appearance of impropriety” appears in the title of the Canon and in the title of the disciplinary rule but the rule itself says nothing about a situation presenting an alleged conflict of interest. Nonetheless, the “appearance of impropriety” unofficial standard had been cited over and over to justify attorney disqualification and attorney discipline. The “appearance of impropriety” standard created a great deal of uncertainty over just how an attorney should act in certain such circumstances because what might appear improper to one person would be different than what would appear improper to another. There was no rule or no bright line for attorneys to follow. This is why the adoption of the rules of professional conduct in 1990 brought some clarity to the situation and gave attorneys some rules to follow when presented with conflict situations.

It is in this context that Mr. and Mrs. Lovell asked Circuit Judge Jerry Winchester to disqualify attorney Charles King as the attorney for defendant Fanny Kidd. Judge Winchester refused to disqualify King so the Lovells sought a writ of mandamus in the Court of Appeals. The Court of Appeals denied relief so the Lovells appealed the denial to the Kentucky Supreme Court.

On January 30, 1997, three months short of five years after the initial meeting with the Lovells, the Supreme Court granted the writ of mandamus and disqualified Charles King from representing Fanny Kidd. The Supreme Court ruled that since the Lovells consulted with King with the intention of employing him to represent them in their suit against Kidd, they became “clients” pursuant to the definition set forth in KRE 503(A)(1). The attorney-client privilege attached. The Court went on to say that once King retained the Lovell's documents for over a month, a presumption arose that he became knowledgeable of their contents and learned confidential information relative to the case. This, then, gave rise to a conflict of interest pursuant to rules 1.7 and 1.9 of the Rules of Professional Conduct. The court ruled that the situation created a perception of betrayal and disloyalty which could not be condoned, and to sanction King's conduct merely on the claim that he recalled nothing of the prior contact impaired public confidence in the legal system.

Maintaining confidence in the legal system requires that the preservation of client confidence should outweigh the interests of individual lawyers and individual clients to freely contract with each other. Merely consulting with a lawyer, the Court said, could ripen into an attorney-client relationship that precluded the lawyer from later taking representation adverse to the client who first consulted with the attorney. The attorney-client relationship can be created by contract, of course, but also by the parties' conduct. The relationship can be created when the client reasonably believes that the lawyer is undertaking the representation. The key element in making this determination is whether confidential information had been disclosed to the lawyer. The court decided that the attorney-client relationship had been created in this case.
Since attorney King did not accept the matter, however, rule 1.9 came into play because the Lovells became former clients. This rule prevents the disloyal act of switching sides in the same case and the use of information about a former client to his detriment. Up to this point, the Kentucky Supreme Court justified its decision to disqualify King by correctly classifying the Lovells as clients and then applying rules 1.7 and 1.9. That is all the Court needed to do to resolve this case. Unfortunately, the court wrote this paragraph:

Even though the comment to rule 1.9 specifically rejects the appearance of impropriety standard in favor of a fact-based test applied to determine whether the lawyer's duty of loyalty and confidentiality to a former client would likely be compromised by the subsequent representation, the appearance of impropriety is still a useful guide for ethical decisions. The Arkansas Supreme Court found that although the language of Canon nine regarding avoiding any appearance of impropriety was not adopted as part of the Arkansas rules of professional conduct, lawyers still must avoid the appearance of impropriety because such is an integral component of professional responsibility.

The Kentucky Supreme Court went on to say that although the appearance of impropriety standard is vague and leads to uncertain results, it serves a useful function in stressing that disqualification may be imposed to protect the reasonable expectations of former and present clients. It promotes the public's confidence in the integrity of the legal profession. "For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment." (Italics added) Lovell v Winchester, 941 S.W.2d 466 (KY 1997).

In 1997 when the opinion was released most attorneys likely paid little to no attention to this case but its implication to the everyday practice of law was significant. Those people involved in the world of ethics such as law school professors, CLE presenters, ethics hotline members, etc., paid a lot of attention to this case because it appeared to have a major impact on how conflicts of interest and disqualifications were to be handled. Read literally, the court announced that it would retain and use two tests when examining attorney conduct: an objective test based on the Rules of Professional Conduct set forth in KY Supreme Court Rule 3.130, and a subjective test announced in the Lovell case based on an “appearance of impropriety.”

Lovell has been a source of irritation, of contention and of concern in the Kentucky bar for 18 years. Exactly what an attorney was supposed to do in a given situation depended a great deal on how the conduct might look to a third person who may or may not be part of the legal profession. How gray can that be? In the context of attorney discipline, the court seemed to say that even if conduct complied with the rules, discipline may be handed down based upon arbitrary opinions of a majority of the court. Attorneys, as a rule, deal with black-and-white rules competently. But, when it comes to gray areas, every attorney sees an “appearance of impropriety” differently. If the “appearance of impropriety” standard were in a statute, it would likely be struck down by a reviewing court as unenforceable and void for vagueness.

No doubt some hotline attorneys offering advice to callers always erred on the side of caution and applied their own individual smell tests to similar situations. Other hotline attorneys ignored the appearance standard and based decisions strictly on the Rules of Professional Conduct. This led to an uneven, patchwork type of advice being given to Kentucky attorneys. It also created an environment where bar counsel, the disciplinary arm of the Kentucky Bar Association, could use its own understanding of “appearance of impropriety” as an independent basis of assessment in discipline matters.

On Jan. 3, 2012, a shareholder derivative action was filed in the Fayette Circuit Court alleging, among other things, that various provisions of shareholder agreements with regard to sales and stock had been violated. Miller, Griffin and Marks (MGM), a Lexington firm, was retained to represent defendants. The plaintiff moved to disqualify MGM as the attorney for those defendants for various reasons, including the assertion that MGM had represented the corporation’s board, including the plaintiff, in giving advice on litigation and had represented individual board members in the corporation’s suit against them individually. The trial judge ruled in the movant’s favor by granting the motion to disqualify MGM from representing its clients in the derivative action. The judge specifically stated that it was making no findings as to
any actual impropriety on the part of MGM. Instead, the trial judge concluded that disqualification of MGM was required based on the appearance of impropriety standard set forth in Lovell. A writ action was then filed in the Court of Appeals, which denied the writ because irreparable injury had not been shown. The case was then appealed to the Supreme Court.

Writing for the Court this year, Justice Mary Noble noted that the trial judge was simply following the precedent of Lovell. Nonetheless, the Court concluded that a disqualification based on an appearance of impropriety was inappropriate under the existing rules of professional conduct and rejected outright the appearance of impropriety standard in disqualification cases. The court wrote “disqualification under that standard is ‘little more than a question of subjective judgment by the former client.’ ” Impropriety is undefined, the Court stated, and appearance of impropriety begs the question. There should be something more substantive than just a possible conflict before disqualification takes place. The Court went on to state: “Before any lawyer is disqualified based on a relationship with a former client or existing clients, the complaining party should be required to show an actual conflict, not just a vague and possibly deceiving appearance of impropriety. And that conflict should be established with facts, not just vague assertions of discomfort with the representation.”

Striking another lethal wound to the “appearance of impropriety” standard, the Court noted that it is no longer part of the rules of professional conduct and is simply inadequate to address the interests involved in a conflict analysis. “To the extent that Lovell and the other cases have approved the appearance of impropriety standard, they are overruled.” Trial courts were directed to find an actual conflict of interest according to the rules before disqualifying counsel. Trial courts must hold an evidentiary hearing and find that an actual conflict exists, stating on the record what the conflict is, before disqualifying counsel. The Supreme Court issued a writ staying the disqualification and sent the case back to the trial court to determine whether or not an actual conflict existed. Marcum v. Scorsone, 457 S.W. 3d 710 (Ky. 2015).

The Kentucky Supreme Court has finally retired the concept of the “appearance of impropriety” in disqualification matters based on perceived conflicts of interest. The “appearance of impropriety” should no longer be used in any way as a standard of attorney conduct in the context of attorney discipline matters. But does the appearance standard still have some use after Marcum?

The Rules of Professional Conduct define what is minimally acceptable conduct by Kentucky attorneys. Given the fact that fewer than one percent of licensed Kentucky attorneys at any given time are faced with allegations of misconduct, it is safe to conclude that most do not practice around the edges of acceptable behavior. There is a difference between what attorneys are permitted to do and what attorneys should do in given situations. What is legal is not always right and what is right is not always legal. Certainly the “appearance of impropriety” is a tool that attorneys can use in deciding for themselves whether or not to take a particular action or to get involved in a particular situation. It is useful in that as a part of jurisprudence, there are older recorded cases that can be used to assist counsel in making difficult decisions that don’t necessarily approach a rules violation. Cautious counsel would be wise to keep this concept in the back of the head for use when necessary.

To reduce the “appearance of impropriety” concept to its simplest terms, when in doubt, don’t. ☐️
GET INVOLVED, STAY INVOLVED

By: J. Tanner Watkins, YLD Chair

I was alarmed to learn that participation in and identification with organizations are down amongst millennials. According to a 2014 Pew Research Center study, millennials are less likely to identify or associate with major institutions, such as politics and religion. This is also true amongst professional and community organizations, which have also seen declining participation levels over the past 20 years. As lawyers in Kentucky, we need to buck the trend. Practicing law in the state of Kentucky carries with it a duty that extends beyond the four walls of an office. Each and every one of us shares in the collective responsibility of shaping the direction of our profession, mentoring and giving back to the communities in which we live and work. Today, I challenge you to get personally involved. Are you up to the task?

The legal profession is among a small subset of professions in America that remains largely self-regulated, and it is vital that young lawyers take responsibility in guiding its development. In Kentucky, members of the Bar define the rules of professional ethics and ensure that licensed practitioners meet the highest level of competency. This process relies heavily on civic-minded individuals stepping up and advocating for the issues that uniquely affect our everyday work. Active participation through our local and state bar associations give young lawyers a voice and an opportunity to take charge of our own professional governance.

As we progress in our careers, we must also continue to pay forward the professional guidance we were fortunate enough to have received from our own mentors. Through our local and state bar associations, young lawyers are given a chance to nurture the next generation of Kentucky attorneys. While law schools might provide a foundation for legal thinking, graduates are rarely prepared for the realities and rigors of practice. Experienced attorneys involved in the mentorship programs of their respective bar associations act as an invaluable resource for new associates as they navigate uncharted waters. In our tightly-knit legal community, this act of mentorship creates a connection that truly lasts a lifetime.

But perhaps the most important duty we have is to make an impact on the communities in which we live and work. Privileged with the opportunity of higher education, practicing attorneys are among the select few who can use their skills to make a significant impact on the lives of the less fortunate. From representing residents of Eastern Kentucky, who are currently fighting for their Social Security benefits, to reaching out to school age children to end bullying, members of local and state bar associations are given substantive opportunities to serve the public. Through these efforts, we can make a positive social impact all while demonstrating that lawyers, by in large, are inherently good and compassionate individuals.

Personally, I have found my involvement as a member of the Kentucky Bar Association Young Lawyers Division to be one of the most fulfilling aspects of practicing law. I have been blessed to meet great lawyers from all areas of the state; I have been involved, in a small way, in affecting the direction of the profession; and I have had a great time in attending KBA-sponsored events. More importantly, however, my involvement has allowed me to participate in KBA YLD-sponsored activities such as “Why Choose Law,” a program that exposes minorities to careers in the law; “U@18,” a program that teaches high school students the rights and responsibilities associated with being an adult; “BullyProof,” a program geared towards middle school students that advocates for an end to bullying; and “Project Street Youth,” a program that assists homeless youth on a community level. These programs touch, in a tangible way, people in any community.

While no one denies the demanding nature of practice, we must not forget our responsibility to be engaged with the profession on a macro level. To that end, I urge all lawyers, especially young lawyers, to be actively involved in your local and state bar associations. I also urge you to get involved in your local communities. Active involvement provides us with a voice in our own governance, a chance to cultivate lasting relationships, and an opportunity to serve the public. That sounds like a pretty good legacy to me.
THE 2015-2016 KENTUCKY BAR ASSOCIATION YLD EXECUTIVE COMMITTEE:

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J. Tanner Watkins, right, presents YLD Chair Brad Sayles a plaque commemorating his service to YLD.

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Albanian Judges Visit Campus

On April 16, 2015, UK Law and the Patterson School of Diplomacy were pleased to welcome to campus, in partnership with Assistant U.S. Attorney David Grise (UK Law ’83) and U.S. District Judge Gregory Van Tatenhove (UK Law ’89), seven judges from the Albanian School of Magistrates. The Albanian School of Magistrates provides initial legal training and is the sole provider of Continuing Legal Education for judges and prosecutors.

The judges (Sokol Sadushaj, Dashamir Kore, Marjana Semini, Arta Mandro, Vangjel Kosta, Ador Koleka, and Jetnor Tafilaj) served on a panel during a student assembly with Grise and Professor Marianna Jackson Clay served as a moderator. They discussed the similarities and differences between the judicial and legal education systems of Albania and the United States.

Albania has a civil law system that has significant differences from the common law system in the United States. A few examples of this include no juries, minimal application of case law, and a preference for educational institutions designed specifically for judges and prosecutors.

During their visit, the Albanian judges had an opportunity to meet with faculty and staff in charge of several UK Law programs that were of special interest to them. “The visiting delegation was delighted to hear ways the College of Law has incorporated practical application of legal principles into its curriculum, including litigation skills courses, mock negotiations, legal research and writing classes, and legal and tax preparation clinics,” Grise said. He noted that due to the nature of their work at the Albanian School of Magistrates, the judges “were impressed with the College of Law’s active CLE program.”

The academic experience for UK Law students is enhanced when exposed to outside judiciary proceedings and policies. However, it’s more than just students who gain from this exposure; there is much to be said on the importance of judiciaries from different countries getting together to discuss their systems and procedures. “Many developing nations have benefited greatly from a continuing relationship with a U.S. law school. This is particularly true of nations which emerged from communist governments within the last 25 years, which have no history of adversarial proceedings or independent judiciaries. The relationship also assists the U.S. Institution by exposing its faculty to the advantages of alternative systems and teaching methods,” Grise explained.

Developing Ideas Conference

The University of Kentucky College of Law (UK Law) hosted its fifth Developing Ideas Conference on May 20, 2015. Eighteen untenured and recently tenured law faculty from a variety of law schools discussed research papers that they were currently working on or were planning to work on this summer. While many of the participants hailed from Kentucky and nearby states, such as Ohio, Indiana and Tennessee, others came from as far away as New York, Texas, Georgia, Mississippi and Florida.

The one-day conference allowed participants to share their developing ideas in an informal, supportive and engaging environment. The participants were divided into four groups of four or five persons. Each participant made a short presentation, which was followed by comments from the rest of the group. Several members of the UK Law faculty participated in these sessions and served as moderators.

UK Law Class of 2015 Leaves a Legacy

The Class of 2015 was the first class to participate in the newly created UK Law Legacy Program. The class raised more than $1,000 as part of a pay-it-forward initiative to build a philanthropic spirit while students are still in law school.

Dean David A. Brennen explained the new Legacy Program, “This program allows students to show appreciation for their education and experiences at UK Law by bestowing a gift to the law school that will last beyond their time as students. In participating, 3L students continue a long tradition of alumni support at UK Law and ensure that future students have the same outstanding experience that they did.”

Class of 2015 students Elizabeth Combs, Kevin Havelda, Ben Monarch and Aurelia Skipworth joined efforts with faculty to encourage their class to make a suggested donation of $20.15 to honor their year of graduation. The class reached an outstanding donor participation rate of 39 percent!

Kevin Havelda, Class of 2015 student and member of the Legacy Program committee described the importance of student giving. “UK College of Law had given us so much already: incredible professors, connections in the legal community, and the preparation necessary for life after graduation. It is essential that we continue the culture of giving before we leave the doors, in order to continue to add value to our education even before we left.”

Aurelia Skipworth agreed, “UK Law has an atmosphere that developed me into a better student, better professional, and a better person. It was important for me to give so other students can not only experience, but can further develop the atmosphere of excellence at UK Law while becoming the best that they can be.”

The money raised by the Class of 2015 will be used to purchase artwork for the Limestone lobby entrance into the law school. The exiting 3L class voted and selected local artist Enrique Gonzalez to produce an original painting to be displayed for the law school community to enjoy.
UK LAW STUDENTS SAVE TAXPAYERS $95,000, DEVOTE 2,732 HOURS TO CLIENTS

By: Whitney Harder

The American Bar Association calls on each lawyer to render at least 50 hours of pro bono legal services per year. In the 2014-2015 academic year, University of Kentucky College of Law students went well above and beyond that to serve Kentuckians.

Through the UK College of Law Legal Clinic and Volunteer Income Tax Assistance (VITA) program, UK law students provided legal and tax preparation services for free, saving clients from hefty fines and finding solutions for difficult situations.

In the Legal Clinic, 29 third-year law students handled 92 cases for a total of 2,732 hours devoted to classroom and client casework, or approximately 94 hours of free legal aid provided by each student.

“For almost 20 years, the College of Law Legal Clinic has successfully met its educational goals of academic excellence through the development of practice skills and promotion of ethical values and responsibilities,” said Professor Allison Connelly, who has directed the clinic since its founding in 1997. “The Clinic has firmly integrated itself into the community, established a sterling reputation of legal excellence and helped thousands of low-income individuals.”

“More importantly, by putting a human face on the legal problems and needs facing those without means, the clinic has promoted an understanding of the need for fairness and justice in our legal system, and has translated those needs into a valuable educational experience,” she said.

In addition to working directly with clients and representing them in estates matters, divorces, housing, and tort and contract claims, UK Legal Clinic students also gained invaluable experience in mediation, interviewing, landlord-tenant laws, civil procedure, legal drafting, consumer protection law and more.

“Our clients have limited income and are often faced with situations in which they feel helpless because of their limited resources,” said Marc Manley, who graduated from the UK College of Law in May but is still engaged in several Legal Clinic cases that will conclude over the summer. “Being able to close a difficult chapter in someone’s life is indescribably more valuable than closing the chapter of a textbook.”

Legal Clinic students also went beyond the classroom and courtroom and straight to the homes of their clients when they raised money and delivered Thanksgiving dinners to several clients and their families.

“The UK Legal Clinic is an important institution not only because it serves the less fortunate, but also because it provides meaningful assurance to the law student that their long hours in the library do in fact have the ability to make someone’s life better,” Manley said.

While the UK Legal Clinic provides an array of legal services to those in need, another UK College of Law clinic has been specializing for more than 20 years in one service: tax preparation, often a very complex and confusing process for taxpayers.

For the 2015 tax return season, 19 law and 12 accounting students volunteered in the UK College of Law VITA program to assist 475 taxpayers complete their returns. Logging a total of more than 600 hours over the course of six and a half weeks, UK law students saved taxpayers about $95,000 in return preparation fees.

“This year was particularly challenging with the large number of unusual situations presented by taxpayer clients, as well as the rollout of the Affordable Care Act requirements,” said Douglas Michael, UK College of Law associate dean of academic affairs and director of the VITA program. “These volunteers helped clients with complicated situations navigate many new and sometimes confusing rules. It is hard to imagine being a taxpayer in that situation without the help these student volunteers provide for free.”

On behalf of those taxpayers, students prepared returns claiming total refunds of $536,844 for low-income taxpayers, as well as the large population of foreign students and scholars at UK.
Four incoming 1Ls with diverse backgrounds and experiences have been named as inaugural first-year fellows in the Human Rights Fellowship Program. They include Briana Lathon, Kristen Barrow, Marianna Michael and Abigail Lewis.

The program will build off of the Louisville Bar Foundation’s Greenebaum Human Rights Fellowship that was created in the spring of 2014. The fellows, who were chosen for their interest in human rights advocacy, have been awarded an admissions-based grant and will work to address human rights needs in the Louisville community during their time in law school. The initial focus is on the city’s immigrant/refugee population.

Students will be able to explore human rights law through hands-on experiences and will develop research, project management and interpersonal skills while offering an opportunity to work with diverse and often vulnerable populations.

Their work will be supervised by Professors Enid Trucios-Haynes and Jamie Abrams.

Identifying opportunities

The initial work on the grant has so far included an extensive needs assessment effort identifying ways in which the law school could be active in the community on human rights issues. Together with the faculty supervisors, the 2014-15 LBFG Human Rights Fellows – Janet Lewis, Katherine Hall and Ben Potash – spent the school year examining what services are being provided to the immigrant population in the City of Louisville. Their preliminary findings have been communicated to local service providers and at a Muhammad Ali Center event which was geared toward the local immigrant/refugee community.

Additionally, the incoming fellows will use this research as a springboard to continue identifying unmet needs and to find solutions and opportunities. The preliminary findings were broken down into challenges/opportunities:

**Challenge:** Nearly all organizations surveyed consistently identified outreach challenges.

**Opportunity:** The Fellowship Program could be helpful in the effort to increase outreach efforts, including via a condensed resource guide and community-based needs assessments.

**Challenge:** Multiple respondents expressed support for more collaboration and communication among providers.

**Opportunity:** The Fellowship could host regular liaison meetings among organizations and others interested in the topic and any research projects could serve a dual purpose of distributing information to service providers and educating the community at large.

**Challenge:** Language access is identified as a “critical need,” including at domestic violence intake centers and courthouses.

**Opportunity:** Regular working group meetings can identify general gaps in language access services, as well as issues at government offices.

**Challenge:** Few comprehensive reports consider immigration and/or human rights issues in the city/state.

**Opportunity:** The Fellowship aims to provide public education about the legal system and human rights issues. Narrower topics affecting undocumented noncitizens can also be researched by fellows.

**Challenge:** Louisville’s noncitizen, immigrant and refugee population needs holistic services addressing a variety of concerns.

**Opportunity:** The Fellowship could act as a direct service provider via pro bono legal services in conjunction with other service providers.

With these findings, the group’s next objective is to develop and sustain an understanding of noncitizen population needs, and to address these needs more holistically.

The Human Rights fellows entering law school will be committed to implementing these recommendations and will work with alumni on cases, create outreach presentations and help come up with legislative proposals. They will also unveil a final report during the fall semester, create a resource guide for dissemination at schools, churches, community centers, etc., and host an annual summit of service providers.

**Why immigration?**

The initial focus has been on immigration needs because it is an area in which students have an interest, said Trucios-Haynes.

“I have been teaching this subject for the past 20 or so years and I have seen an increase in interest from students because of the greater public awareness of immigration policy issues. But it’s also an area of the law that includes the unique intersection of constitutional law, criminal law, international law and a statutory code that is complex,” she said.

In Kentucky specifically, the foreign-born population has grown from 0.9 percent in 1990 to 3.3 percent in 2013. Undocumented immigrants make up 2.6 percent of the state’s workforce. And, according to the report, 3.6 percent of this population speaks a language other than English.

Public school children speak 116 languages at home.
“We have many undocumented children in Kentucky. And I think our biggest hurdle is educating people that they’re here, not just in Texas or California,” Abrams said. “Many people have no idea about the depth of our international community here, specifically in Louisville.”

Other law schools in major coastal cities have built these types of initiatives using fellowship-type programs. Abrams was familiar with one issued through her alma mater, American University. With the professors’ combined interest in immigration law, the idea to get a similar program going here was an exciting culmination to a transitional grant provided by the Louisville Bar Foundation.

Abrams and Trucios-Haynes are both aiming for the Human Rights Fellowship to have a sustained presence at Brandeis School of Law and to continue and accelerate work with the rest of the community on human rights issues.

“I hope to build something that is lasting and will provide assistance to our local community – both service providers and the immigrant/refugee/noncitizen community,” Trucios-Haynes said.

Once a dent has been made in the research and execution of the immigration project, the Brandeis Human Rights Fellowship’s focus could shift to other topics, such as women in detention centers, educational access or wage issues. The objective, however, will remain the same.

“Our dream is for this work to be collaborative between our students, faculty, alumni and community. There is a lot of work being done right now, but it’s being done mostly as piecemeal,” Abrams said. “There is a significant community need for these types of services and we will be more effective if we meet these needs holistically.”
**STEPHEN LITTLE RECEIVES OUTSTANDING ALUMNUS AWARD**

Stephen D. Little received the Northern Kentucky University Alumni Association’s Outstanding Alumnus Award for Chase College of Law. The award was presented on April 7, 2015.

Little is president and chief executive officer of Crounse Corporation, a privately held company based in Paducah, Ky. Operating 35 towboats and 1,100 barges, the company is one of the major coal carriers on the inland waterways of the United States.

After graduating from the University of Kentucky in 1974 with a B.A. in psychology, Little obtained his J.D. from NKU Chase College of Law in 1978. In 1979, Little was appointed counsel to the Merchant Marine & Fisheries Committee of the U.S. House of Representatives, where he worked directly with Representative Gene Snyder (R-Ky.) for five years. In 1984, Little moved back into the private sector and joined Crounse as a dispatcher in the company’s traffic department before being promoted to various administrative positions. He became executive vice president in 1996 and president in 2001. In 2008, he added the additional role of chairman.

Little has served as legislative committee chairman of The American Waterways Operators in addition to serving as a member of its board of directors and executive committee. He is presently a member of the board of directors and executive committee of Waterways Council Inc., and formerly served as its general counsel. From 2008 to 2011, Little served as chairman of the Inland Waterways Users Boar (IWUB), a congressionally mandated committee that advises the U.S. Army Corps of Engineers in establishing construction priorities for major navigation projects throughout the inland waterways system.

**PROFESSOR MICHAEL MANNHEIMER RECEIVES FACULTY EXCELLENCE AWARD**

Chase Professor of Law Michael J. Z. Mannheimer received Northern Kentucky University’s Award for Excellence in Research, Scholarship, and Creative Activity, in recognition of the scholarly record he has established since joining the faculty in 2004. The award was presented on April 29, 2015.

Mannheimer’s research has generally been directed toward developing an originalist account that identifies a strong federalism (“states’ rights”) component of the Bill of Rights. In essence, he has sought to show that the Bill of Rights, properly understood, places different, and stricter, constraints on the federal government than it does on the States. He has expounded upon this claim in several articles with regard to the Cruel and Unusual Punishments Clause of the Eighth Amendment and has begun recently to apply this claim of a federalism-infused Bill of Rights to search-and-seizure law. In his most recent piece, The Contingent Fourth Amendment, 64 EMORY L.J. 1229 (2015), he argues that the Fourth Amendment was widely understood in 1791 as requiring that federal agents follow state law when searching and seizing.

Mannheimer has 14 published or forthcoming law review articles. He has been not only prolific but also eclectic, having written on the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as substantive criminal law. His work has been cited by some of the leading casebooks in criminal law, criminal procedure, and sentencing; by other leading texts; and by over 90 law review articles. His argument, developed in a 2006 article, that the federal death penalty in non-death penalty States is unconstitutional has been adopted by defense attorneys in federal capital cases in Iowa, New Mexico, New York, Puerto Rico, Rhode Island, Vermont, West Virginia, and twice in Massachusetts, including United States v. Dzhokhar Tsarnaev, the Boston Marathon bombing case. His other articles have been cited by attorneys in at least 16 cases in 11 different state and federal courts.
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TIPS FOR INCORPORATING GENDER-NEUTRAL LANGUAGE

By: Judith D. Fischer

Gender-neutral language is by now widely accepted in the legal profession. Any doubters should consider the numerous articles by judges¹ and legal experts² who support it, as well as the statutes and legal documents nationwide that have been re-drafted in gender-neutral language.³ After all, our profession should promote justice. As one judge wrote, when lawyers’ language excludes “more than one-half of the population, then surely something is awry.”⁴

In English, language can exclude women with biased wording in two principal areas: with male-linked generic pronouns and with gendered nouns.

The pronoun problem occurs when a writer uses a pronoun to refer to a person of unknown or unspecified sex. Eighteenth-century grammarians had a rule for this: use the masculine pronoun for a generic reference, because the masculine includes the feminine. Their rule would produce this sentence: “A lawyer should file his brief on time.” Today, that sentence jarring, because nearly 50 percent of lawyers are women. Here’s another application of the old rule: “Man, being a mammal, breastfeeds his young.”⁵ That sentence is humorous because the masculine never really did include the feminine.

Still, some careful writers are reluctant to use gender-neutral language because it can be cumbersome. I agree—it can be. As William Safire punned, a construction like s/he is “unspeakable.”⁶ Even worse are invented words, like ter instead of he or she, or herm for her or him.⁷ And using “they” as an all-purpose reference for singular nouns is ungrammatical. Although it’s becoming common in spoken English—“A student left their book here”—it’s still not acceptable in formal writing, which lawyers are expected to use in most of their communications. All of these proposed solutions will cause readers to stumble, detracting from the effectiveness of a document.

But it’s possible for a lawyer to produce graceful, grammatically correct prose while eliminating gender bias by following a few suggestions.

1. Write the sentence in the plural, eliminating the need for a gendered pronoun: “Lawyers should file their briefs on time.”
2. Use the passive voice: “Briefs should be filed on time.” The passive voice has its pitfalls—it can be wordy and vague—but occasionally it can be a good choice to circumvent the pronoun problem.
3. Restructure the sentence: “It is important to file briefs on time.” Perhaps include a genderless pronoun in the new structure: “One should file a brief on time,” or “Lawyers who file briefs late can be sanctioned.”
4. Repeat the noun: “If a lawyer is concerned about credibility with the court, the lawyer should file all briefs on time.” This works well only when the passage is longer than the original six-word example above.
5. Alternate pronouns for different roles: “If a lawyer files his brief late, the judge may lose her temper.” This approach also works best with a longer passage.
6. Use pronoun pairs: “A lawyer should file his or her brief on time.”

The last three suggestions above can be intrusive, so they should be used sparingly. But by applying the six guidelines carefully, a lawyer can avoid biased pronouns without causing readers to stumble.

A second area of bias concerns gendered nouns. Until recently, gendered nouns like stewardess, waitress, and mailman made unnecessary distinctions on the basis of sex, often making women seem subordinate. Those terms have now largely been replaced with flight attendant, server, and mail carrier. Lists of other non-biased words for occupations are available on the Internet.⁸

A lawyer would do well to be aware that gender-biased language can affect readers negatively. As one judge wrote, it can become like “a cinder in the eye,” alienating some judges and their staffs.⁹ Not all judges react that way; Justice Scalia famously does not.¹⁰ But deftly-written prose can avoid being a cinder in the eye to some while remaining effectively graceful for others.

⁴ Hill, supra note 1, at 276.
⁸ E.g., owl.english.purdue.edu/owl/resource/608/05/.
USA FREEDOM ACT AND THE KENTUCKY LAWYER

By: Michael Losavio

I don’t fully understand the import of the USA Freedom Act and probably won’t for a while, if ever. But the debate it has generated, after review of national security surveillance of telephone metadata, is worth a bit of our attention. Its attention that, perhaps, we should have paid to the overall implementation of national security surveillance over the past decade.

That is due, in part, to the social network analysis, government and private, that can be done against all the information on who you call, who calls you, how long the call and, perhaps, the location. Creepy, but that should only apply to the target of the surveillance, who now should be someone whose nefarious ways are shown by specific facts.

Or not. The surveillance may include two or three “hops,” or next level or layer of folks called, to the metadata of the person with whom the target spoke (hop one), the metadata of the person who spoke with the person with whom the target spoke (hop two) and, in some cases, the metadata of the person who spoke with the person who spoke with the person with whom the target spoke (hop three). That is a truly exponential expansion in oversight and a wide web of people, many of whom may have no relation with a national security threat.

So, how might we feel if we fall into this web?

I’m not sure how I feel. I can see how a practitioner might be concerned, as this might subject her client base to surveillance. One aspect that the statute codified was the right of national security analysts to hand over to law enforcement information they find regarding illegal activity during the course of their analysis.

The power of this analysis is pretty extraordinary. In one test of an analytic formula for data analysis, researchers at the Massachusetts Institute of Technology were able to take the anonymized transaction data from the credit cards of about one million people and match it to buying patterns for about 90 percent of the individuals. The metadata involved included location of the transaction, the time and date of the transaction, but not names or other personal identifying information. This analyzed data match could then be matched against other data sets, such as from social networking sites like Twitter or Facebook to actually identify the individual making the purchase and time-mapping the person’s activities.

The advantage the government had in its program was that it was pulling from multiple data sources into one huge corpus for analysis. To some extent this will be more difficult with telephone companies being the default repository of their telephone metadata. But, under the relatively low standards for national security surveillance, an investigation could still be initiated that would then lay out a whole host of associations that when matched against other databases, such as criminal justice intelligence, could create inferences to justify state action.

How justified that state action might be is anyone’s guess. What is the social and political impact of national security-level surveillance of everyone? What would the impact be on the attorney-client privilege, or the work-product privilege when this metadata and traffic analysis can reveal much of what we are trying to keep confidential? Will it negate the reason for having these privileges at all, that certain relationships deserve protection because the outcomes they produce are superior to the destruction of trust in those relationships?

Again, something for us to consider, and perhaps prescribe better solutions to the dilemma posed by security and privacy. They are not incompatible notions and in fact, overlap, such that constantly opposing them is a false argument. Given the focus on these types of issues that have been part of the practice of law and the special relationship required between an attorney and her client, perhaps we can come up with that better solution.

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KENTUCKY BAR ASSOCIATION’S YOUNG LAWYERS DIVISION RECEIVES TOP HONORS FROM AMERICAN BAR ASSOCIATION

The Kentucky Bar Association’s Young Lawyers Division (KBA YLD) was recently recognized by the American Bar Association (ABA). The ABA Young Lawyers Division, Center for Racial and Ethnic Diversity, and Law Student Division sponsors the Next Steps Diversity challenge which “recognizes and awards top young lawyer organization and law student programs that increase diversity in the pipeline to the legal profession.” The KBA YLD was awarded first place among the finalists and was presented with a subgrant for the work on the KBA’s 2015 Diversity and Inclusion Summit, which was held in conjunction with the “Why Choose Law: Diversity Matters” program.

MEMBERS OF THE KENTUCKY BAR ASSOCIATION’S ATTORNEYS’ ADVERTISING COMMISSION RECOGNIZED

Ronald E. Johnson, Jr., of Fort Wright, center, was recognized for his service to the KBA’s Attorneys’ Advertising Commission (AAC) from 2009-15 during the AAC’s June 10 annual meeting. Making the presentation was Lisa B. Huber, AAC chair, on the left, and Jay R. Garrett, chief deputy bar counsel, at right.

Stephanie McGehee-Shacklette of Bowling Green, center, was recognized for her service to the KBA’s Attorneys’ Advertising Commission (AAC) from 2009-15 during the AAC’s June 10 annual meeting. Making the presentation was Lisa B. Huber, AAC chair, on the left, and Jay R. Garrett, chief deputy bar counsel, at right.

BENCH & BAR AVAILABLE THOROUGH KY NFB-NEWSLINE®

The Kentucky Bar Association and Independence Place, Inc., continue to present the Bench & Bar Magazine in audio version through the KY NFB-NEWSLINE®. The KY NFB-NEWSLINE® audio information service is available to eligible subscribers by dialing a toll-free telephone or local call number on a touch-tone telephone; Newsline Mobile App on your i-Device; or on the web at www.nfbnewslineonline.org. Eligible individuals include those who one cannot use conventional print because of a learning disability; physical impairment restricting the use of fingers, hands or arms; visual impairment or other conditions causing limited access to print information. For more information, visit: kybar.org/documents/enews/13_newsline.pdf.
On June 15, 1215, a coalition of disgruntled barons met King John at Runnymede, a wetland meadow along the Thames River near London. Under the threat of civil war, the King applied his royal seal to their list of demands—a document that would become known as Magna Carta, the “Great Charter.” Magna Carta—often called the greatest constitutional document of all time and the very foundation of freedom—is the point of origin for many constitutional principles that are fundamental to the United States Constitution, the Bill of Rights, and the Constitution of the Commonwealth of Kentucky.

To commemorate the 800th anniversary of Magna Carta, the Kentucky State Fair Board is hosting “Magna Carta: Enduring Legacy 1215-2015,” a traveling exhibition developed by the American Bar Association and curated by the Law Library of Congress. The exhibition features 16 storyboard panels and a video of the Law Librarian of Congress and the Rare Books Curator handling and discussing original charter artifacts. The State Fair is the only Kentucky stop on the exhibition’s national tour.

Funding for “Magna Carta: Enduring Legacy” in Kentucky is provided by the Louisville Bar Association and the Kentucky Bar Association (Small Firm Section and Young Lawyers Division). Attorneys from across the state will serve as volunteer docents in the exhibition, helping visitors have a fun and engaging experience.

The Magna Carta exhibits will be adjacent to an original exhibition about Kentucky’s Constitution, in South Wing B. The state-focused project was inspired by the Magna Carta anniversary and will carry the ancient document’s principles forward, to our constitutional government today. “From the ‘Powers That Be’ to the Power of WE: Exploring Our Constitution” features storyboard panels, artifacts, and interactive media.

In addition, an entertaining 30-minute musical production, “The Great Charters of Liberty,” will bring the stories of these great charters, from Magna Carta to Kentucky’s Constitution, to life each day of the Fair. The Kentucky components are funded in part by the Kentucky Bar Association (Family Law, Business Law, Health Care Law, and Public Interest Law Sections) and by a grant awarded by the Kentucky Bar Foundation.

Kentucky lawyers interested in serving as docents in the Magna Carta commemoration and adjacent Kentucky Constitution exhibition at the State Fair should contact Stephanie Seber at (502) 367-5496 or at SSEber@ksfb.ky.gov. Attorneys may also contact Shannon Roberts with the Kentucky Bar Association at (502) 564-3795 ext. 224 or sroberts@kybar.org. Sponsorship funds will cover the Fair admission and parking fees of volunteer docents, and training/orientation will be offered.

The Kentucky State Fair is August 20-30 at the Kentucky Exposition Center. For more information, go to www.kystatefair.org.

Pay Your Membership Dues Online!

Kentucky Bar Association members are able to quickly and conveniently pay their 2015-16 membership dues online with a debit or credit card.

Visit www.kybar.org to access the bar dues payment link.

An administrative fee will be assessed.

The membership cycle runs July 1-June 30 of each year. Payments are due this year on or before September 1, 2015. After that date, a late fee payment of $50 will be assessed. A notice of delinquency will be mailed after October 15 with an additional cost of $50 if dues are still unpaid.

We hope you enjoy this online service! If you have questions, please contact the KBA Membership Department at (502) 564-3795.
The right to counsel stands above all other constitutional protections. “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” U.S. v. Cronic, 466 U.S. 648, 654 (1984). Public defenders statewide gathered June 16, 2015, to recognize individuals advancing the right to counsel and protections for persons facing a loss of liberty. Presentations were made during the 2015 Kentucky Public Defender Recognition Lunch in Lexington.

The Department of Public Advocacy depends on many lawyers in private practice to provide conflict representation at rates that are inadequate. DPA contracted with 175 attorneys for 3,627 cases in FY 14 at an average of $393 per case. Most were felony cases. For their selfless conflict representation of indigent clients, the KY Bill of Rights was presented to Front Row (L to R): Luke McCall – Western Region; Rawl Kazee – Northern Region; John Austin – Central Region; Johnathan Gay – Bluegrass Region; Ryan Vantrease – Jefferson County; Kevin Johnson – Eastern Region. Back Row (L to R): Ed Monahan, Public Advocate; Eric Stovall, Western Region Manager; Chris McNeill, Paducah Directing Attorney; Rodney Barnes, Northern Region Manager; Leigh Jackson, Owensboro Directing Attorney; Jerry Cox, Chair of Public Advocacy Commission; Lisa Whisman, Stanton Directing Attorney; Dan Goyette, Jefferson Chief Public Defender; Roger Gibbs, Eastern Region Manager; Teresa Whitaker, Bluegrass Region Manager; Glenda Edwards, Trial Division Director.

The following attorneys were recognized with a Minister of Justice Award for their pro bono appellate representation of Kentucky public defender clients before the Kentucky Supreme Court and Kentucky Court of Appeals: William H. Fortune (pictured to the right), Jeffrey H. Hoover, Kristin Logan Mischel, Miles Cary, Fred Rhynhart, David Mejia, Colin H. Lindsay, James Lee Adams, Colleen Beach, Benjamin Taylor, Trevor W. Wells, Pierre H. Bergeron, Irvin Halbleib, Jason Nemes, Anna Whites, Jennifer Hall, Robert Salyer.

The Department of Public Advocacy is Kentucky’s statewide public defender program providing representation to indigent defendants in all 120 counties in over 157,000 cases a year. June 16, 2015, was the 43rd anniversary of the creation of the statewide public defender program. House Bill 461 sponsored by Representatives Kenton, Graves and Swinfon passed the House 60-18 on March 7, 1972 and passed the Senate 26-5 on March 14, 1972. The legislature allocated $1,287,000 for FY 73 and FY 74. The bill was signed by Governor Ford on March 27, 1972, and became law June 16, 1972.
SUMMARY OF MINUTES KBA BOARD OF GOVERNORS
MEETING MARCH 20, 2015

The Board of Governors met on Friday, March 20, 2015. Officers and Bar Governors in attendance were, President B. Johnson, President-Elect D. Farnsley; Vice President M. Sullivan; Immediate Past President T. Rouse and Young Lawyers Division Chair B. Sayles; Incoming YLD Chair T. Watkins. Bar Governors 1st District – M. Pitman, F. Schrock; Bar Governors 2nd District – T. Kerrick, J. Meyer; 3rd District – M. Dalton; 4th District – A. Cubbage; 5th District – W. Garmer, E. O’Brien; 6th District – S. Smith, G. Sergent; and 7th District – M. McGuire, J. Vincent. Bar Governors absent were: H. Mann and B. Simpson.

In Executive Session, the Board considered three (3) discipline cases, five (5) default disciplinary cases, involving three attorneys in attendance were, Fredrickson, Dottye Moore of Elizabethtown and Dr. Leon Mooneyhan non-lawyer members serving on the Board pursuant to SCR. Officers and Bar Governors 1st District – M. Pitman, F. Schrock; Bar Governors 2nd District – T. Kerrick, J. Meyer; 3rd District – M. Dalton; 4th District – A. Cubbage; 5th District – W. Garmer, E. O’Brien; 6th District – S. Smith, G. Sergent; and 7th District – M. McGuire, J. Vincent. Bar Governors absent were: H. Mann and B. Simpson.

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

- Heard status reports from the 2015 Annual Convention Planning Committee, Investment Committee, Legislative Outreach Committee and Rules Committee.
- President-Elect Douglass Farnsley reported that the Diversity & Inclusion Summit will be held on April 10, 2015, at the Galt House Hotel in Louisville with a pipeline service project held the prior day at the Louis D. Brandeis School of Law. Farnsley reported that much support has been received from the Supreme Court, the Kentucky Bar Foundation and law firms with $27,000 in sponsorships being donated. Farnsley reported that 60 have registered to date and that members can receive six hours of CLE credit for $100.00.
- Young Lawyers Division Chair (YLD) Bradley Sayles reported on the following activities of the Division: sponsoring approximately 30 CLE programs at the annual convention, March issue of the Bench & Bar will be articles regarding substantial legal issues having been authored by young lawyers. Legal Aid Project, Outstanding Awards, Law Student Mixer, Why Chose Law Program, Bully-Proof Project and the Project Street Youth program.
- Vice President R. Michael Sullivan reported on his recent trip to the ABA Bar Leadership Institute in Chicago. Sullivan reported that the ABA stresses having a living, breathing, working and sometimes modified strategic plan and that the KBA is about to undergo this process to keep on track and know the issues that need to be addressed. Sullivan also reported that the ABA president addressed the changes and challenges which will face the Bar, including artificial intelligence through computers to answer legal questions and on-line forms.
- Approved the following 2015 Distinguished Awards: K. Gregory Haynes of Louisville as the recipient of the Distinguished Lawyer Award; Brian Scott West of Richmond as the recipient of the Bruce K. Davis Special Service Award; Professor Allison Connelly of Lexington and Jeff Been of Louisville as co-recipients of the Donated Legal Services Award and Pete Perlman of Lexington as the recipient of the President’s Special Service Award.
- Approved payment of expenses for current and incoming Board members to attend the Board of Governors meeting on June 16 and the convention itself on Jun 17-19 as follows: Lodging at the Hyatt Regency Hotel at a rate of $145.00 single/double per night for a maximum of four (4) nights and be reimbursed for round trip mileage at the rate of forty-one cents ($0.41) per mile and meal expenses incurred on Monday, June 15 and Tuesday, June 16 above and beyond group meal functions on those dates.
- Approved waiving convention registration fees for the Supreme Court, Court of Appeals and AOC staff attorneys.
- President William E. Johnson reported that he has appointed a Task Force on Lawyer Malpractice Insurance to be co-chaired by Charles E. “Buzz” English, Jr., of Bowling Green and Beverly R. Storm of Covington.
- Ratified the email vote to waive registration fees for the judiciary to attend the Diversity & Inclusion Summit as well as the Annual Convention.
- Ratified the email vote for approval of LGBT Section following a KBA Bylaw revision which no longer required approval by the Supreme Court for a section to be created. The Board originally approved the group as a section at their September 2014 meeting.
- Executive Director John Meyers updated the Board on the progress of the IT conversion and the website.
- Meyers reported that renovations to the Board Room at the Bar Center will begin July 1, 2015. Renovations include a drop down media screen and mounted projection system, redecorated walls, new carpeting and new chairs. Estimated completion date is September 1, 2015.
- Meyers reported that the Kentucky Bar Foundation/OLTA Executive Director Search Committee met and has a proposed ad that will be sent by a blast email to the KBA membership and published in the Bench & Bar. The goal is to have someone hired by September 1 in order to work with Todd Horstmeyer before he leaves October 1.
- Approved the filing of the IRS Form 990 and Form 990T.
SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING MAY 15, 2015

The Board of Governors met on Friday, May 15, 2015. Officers and Bar Governors in attendance were, President B. Johnson; President-Elect D. Farnsley; Vice President M. Sullivan; Immediate Past President T. Rouse and Young Lawyers Division Chair B. Sayles; Incoming YLD Chair T. Watkins; Bar Governors 1st District – M. Pitman, F. Schrock; Bar Governors 2nd District – T. Kerrick, J. Meyer; 3rd District – M. Dalton, H. Mann; 4th District – A. Cabbage, B. Simpson; 5th District – W. Garmer, E. O’Brien; 6th District – S. Smith, G. Sergent; and 7th District – M. McGuire. Bar Governors absent were: J. Vincent. Also present was incoming Fifth Supreme Court Bar Governor Mindy Barfield of Lexington.

In Executive Session, the Board considered one discipline case and one (1) default disciplinary case. Judy Campbell of Frankfort, Brenda Hart of Louisville, Dotty Moore of Elizabethtown and Dr. Leon Mooneyhan non-lawyer members serving on the Board pursuant to SCR 3.375, participated in the deliberations.

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

- Heard status reports from the 2015 Annual Convention Planning Committee and Rules Committee.
- President-Elect Douglass Farnsley reported that the Summer Board meeting will be held on Thursday through Saturday, July 16-18, 2015, in Bowling Green.
- President-Elect Douglass Farnsley reported on the success of the Diversity & Inclusion Summit which was held on April 10 in Louisville and sponsored by the KBA, U of L Brandeis School of Law and the Louisville Bar Association. Farnsley reported that the KBA YLD was nominated for ABA recognition in conjunction with the Diversity & Inclusion Summit and has been selected as a finalist.
- Young Lawyers Division Chair (YLD) Bradley Sayles reported on the recipients of their awards that will be presented at their luncheon during the annual convention, including the Nathaniel R. Harper Award which will be presented posthumously to Justice William E. McNulty, Jr., Jennifer Brinkley will be awarded the Outstanding Young Lawyer of the Year, Christine de Briffault will receive the Young Lawyer Service to Community Award and Professor William H. Fortune will be awarded the Service to Young Lawyers Award. In addition the YLD awards several scholarships each year. The Kentucky Leadership Program scholarships will be awarded to Walter Robertson and David Wilson. Sayles reported that the YLD is in the process of selecting its bar scholarship award recipients, which will be one from each law school and one out of state.
- Vice President R. Michael Sullivan reported that serious consideration is being given to holding the 2017 Annual Convention in Owensboro. Sullivan reported that there is a new convention center with two hotels. He also stated that there is a lot to offer in the area of enrollment for the attendees. He advised that more information will be forthcoming.
- President William E. Johnson reviewed the proposed resolutions submitted by DPA for consideration by the Board with regard to providing assistance in securing additional financing for the DPA. Johnson also discussed how overworked the DPA attorneys are and the fact that they handle approximately 450 cases which brings the concern if they are providing due process of law to their clients. Following discussion, the proposed resolutions were passed to the June meeting for further review.
- Approved the reappointment of Margaret E. Keane of Louisville and W. Douglas Myers of Hopkinsville as the Kentucky delegates to the ABA House of Delegates for their second two year term ending at the conclusion of the 2017 Annual Meeting.
- Approved the following appointments and reappointments to the Attorneys’ Advertising Commission: reappointed Kerry D. Smith of Paducah for a second three year term ending on June 30, 2018 as well as appointed Smith to serve as chair for one year expiring on June 30, 2016; appointed Andrea Anderson of Bowling Green and Sarah Lynch of Ft. Wright each for a three year term ending on June 30, 2018.
- Approved the submission of three nominees to the Supreme Court of Kentucky for appointment of one person from each District to the CLE Commission for three year terms ending on June 30, 2018: 1st Supreme Court District – Samuel Joseph Wright of Paducah, Jason Franklin Darnall of Benton and Gerald Lynn Bell of Murray and in the 6th Supreme Court District – David B. Sloan of Covington, Jacqueline Suzanne Wright of Maysville and Catherine Daphne Stavros of Florence.
- Approved the following appointments and reappointments to the Clients’ Security Fund Board of Trustee: appointed Frank Farris of Louisville to a three year term ending on June 30, 2018 and reappointed Justice Martin Johnstone of Louisville for a second three year term ending on June 30, 2018.
- Approved the following reappointments to the Kentucky Bar Foundation: 3rd Supreme Court District – John Douglas Hubbard of Bardstown to a second three year term ending on June 30, 2018; 4th Supreme Court District – Ekundayo “Dayo” Seton of Louisville for a second three year term ending on June 30, 2018 and 7th Supreme Court District – R. Stephen McGinnis of Greenup to a second three year term ending on June 30, 2018.
- Executive Director John D. Meyers reported that the Supreme Court approved the KBA 2015-2016 Budget for the term of incoming President Douglass Farnsley on March 24, 2015.
- Approved the list of the 2015 Honorary Members, pursuant to SCR 3.030(3) and Bylaw Section 2, who reached the age of 75 or have been admitted to the practice of law for 50 years.
- Meyers reported that the KBA website is now online with much positive feedback being received. He stated that work is still being finalized to incorporate changes from the membership database and that currently both old and new programs are running parallel. Meyers reported that he and Director for CLE Mary Beth Cutter have a meeting scheduled with Digital Ignite who has been acquired by the Your Membership company with whom the KBA is already working. The goal being for members to go online to report CLE activity and get program accreditation. Meyers reported that the case management program is currently being configured and training has been scheduled with some Office of Bar Counsel staff and the Disciplinary Clerk. Meyers reported that one of the challenges in both programs has been converting the old data into a new format and that has been done for the member database and work is still being done on the discipline database. Online target date is November.
- Meyers reported that the Kentucky Bar Foundation/IOLTA Executive Search Committee has received 20 resumes and the committee has selected six individuals to interview on June 2.
- Approved the Fiscal Year 2015-2016 KBA staff salary schedule.
Position Announcement

GENERAL COUNSEL

GENERAL DUTIES:
Required attendance and participation in scheduled and called meetings. Serve as legal advisor when legal analysis and judgment is critical to planning and decision making. Draft correspondence, notices of hearing, disciplinary charges, recommended orders, settlement agreements, and other pleadings, as assigned. Provide legal opinion, when requested, concerning application of the Board’s statutes and administrative regulations to its licensing processes, continued competency requirements, open records requests, and discipline procedures. Draft proposed legislation and administrative regulations and oversee the promulgation process. Testify before legislative committees on pending legislation and regulations. Represent the Board during all administrative hearings and civil and criminal litigation. Prepare, brief, try and argue complex cases on behalf of the Board before state and federal courts and administrative forums. Provide advice and consultation to Board staff. Perform other duties as assigned and under the management of the Board’s Executive Director.

QUALIFICATIONS:
Applicants must be members in good standing of the Kentucky Bar Association. Sufficient experience which would assure knowledge, skills and abilities to accomplish position objectives. Minimum of five (5) years’ experience in both health care law and administrative law.

PREFERRED DEMONSTRATED QUALIFICATIONS AND ABILITIES:
Admitted to practice in the United States District Court for the Eastern and Western Districts of Kentucky. Working familiarity with MS Word, Excel, PowerPoint and Outlook. Correctly interpret state and federal statutes and administrative rules and regulations according to well-defined standards, and apply rules to a variety of work situations. Proficient in multitasking while working under stress. Punctual in meeting deadlines. Successful in participating as a team member while contributing toward a common goal. Self-reliance and autonomous functioning.

COMPENSATION:
Rate: (monthly) min-$6,550.00 to mid-$7,550.00
State employee travel reimbursement policies apply
State employee benefits (i.e., health insurance, etc.)

HOW TO APPLY:
In MS Word format, send letter of application (specifically addressing interest in and qualifications for the position), current resume, and minimum of three (3) professional references to:

Steve Hart, R. Ph. Executive Director
steve.hart@ky.gov

APPLICATION DEADLINE: AUGUST 31, 2015
PROJECTED START DATE: OCTOBER 1, 2015

The Kentucky Board of Pharmacy is an Equal Opportunity Employer.

Note: Applicants for this position may be required to submit to a drug screening test and background check.
The KYLAP Foundation is a 501(c)(3) non-profit Kentucky Corporation created and approved pursuant to Supreme Court Rule 3.910(8) to promote the mission of the Kentucky Lawyer Assistance Program (KYLAP). KYLAP’s mission is to assist Kentucky’s lawyers, law students and judges who suffer from impairments including drug, alcohol, or other addictions, depression, and other mental health disorders.

The Foundation helps Kentucky’s lawyers, law students and judges seek medical and professional treatment for impairment issues when no other financial resources for treatment exist. The Foundation is premised on the same principle as the Kentucky Lawyer Assistance Program — Lawyers Helping Lawyers.

Your tax-deductible contribution provides direct help for suffering lawyers through the extension of (forgivable) loans for treatment (paid directly to the medical providers).

All money given by lawyers goes directly to the treatment of lawyers.

For more information on the Kentucky Lawyer Assistance Program Foundation, Inc., please contact KYLAP Director Yvette Hourigan at (502) 564-3795 or at yhourigan@kylap.org.

KYLAP Hosts Lawyers in Recovery Meetings in Northern Kentucky and Lexington

The Kentucky Lawyers Assistance Program offers weekly open recovery meetings for lawyers, law students and judges in Northern Kentucky and Lexington. The Northern Kentucky Lawyers in Recovery meeting is held 7:30 a.m., on Tuesdays at Lakeside Christian Church, 195 Buttermilk Pike, Lakeside Park. The church is located off I-75 exit 186 for Kentucky 371/Buttermilk Pike. The facility will open at 7:15 a.m. Please bring your own coffee. The Lexington Kentucky Lawyers in Recovery meeting is held at 7:30 a.m. on Wednesdays at the Alano Club downtown, 370 East Second Street, Lexington, KY 40508.

All meetings are open to law students, lawyers and judges who are already involved or who are interested in a 12-step program of recovery, including but not limited to Alcoholics Anonymous, Narcotics Anonymous, Overeaters Anonymous and Al-Anon. Come meet other attorneys and network. All meetings and contacts are confidential. SCR 3.990. For additional information, please visit www.kylap.org, call (502) 564-3795, ext. 266, or email abeitz@kylap.org.

Quintairos, Prieto, Wood & Boyer, P.A.
Attorneys at Law

A multi-office law firm is seeking ATTORNEYS for its Louisville and Lexington office. Must have experience in civil trial and/or insurance defense litigation. Portable book of business is a plus.

E-mail resume to resume@qpwblaw.com
# 2015 Grants

"Providing Help Today and Hope for Tomorrow"

<table>
<thead>
<tr>
<th>Organization</th>
<th>Amount</th>
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<tbody>
<tr>
<td>Hopkinsville High School, Mock Trial Team</td>
<td>$ 2,000</td>
</tr>
<tr>
<td>ElderServe, Louisville, Crime Victim Services</td>
<td>$ 5,000</td>
</tr>
<tr>
<td>Kentucky State Fair Board, Statewide: <em>From the “Powers That Be” to the Power of WE: Exploring Our Constitution</em></td>
<td>$ 5,000</td>
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<tr>
<td>Family &amp; Children’s Place, Louisville, Kosair Charities Child Advocacy Center &amp; Shively Visitation Center</td>
<td>$10,000</td>
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<tr>
<td>Kentucky Association of Children’s Advocacy Centers, Statewide: <em>Your Guide to Kentucky’s Children’s Advocacy Centers</em></td>
<td>$10,000</td>
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<tr>
<td>Sunflower Kids, Lexington, Supervised Visitation &amp; Safe Exchange</td>
<td>$10,000</td>
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<tr>
<td>Credit Abuse Resistance Education (CARE) Programs, Statewide</td>
<td>$13,500</td>
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<tr>
<td>Survive and Thrive Foundation, Inc., Northern Kentucky, Survive and Thrive Summer Program</td>
<td>$15,000</td>
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<tr>
<td>Kentucky Association of Sexual Assault Programs, Statewide, <em>Seeking Justice for Victims of Human Trafficking: A Practice Guide &amp; Training Series for Attorneys</em></td>
<td>$20,000</td>
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<tr>
<td>Liberty Hall Historic Site, Frankfort, Restoration of Senator John Brown’s Library &amp; Archives at Liberty Hall</td>
<td>$22,000</td>
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<tr>
<td>The Kentucky CASA Network, Statewide, Court Appointed Special Advocates Training</td>
<td>$25,000</td>
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<tr>
<td>Daviess, McCracken &amp; Warren Bar Associations with Kentucky Legal Aid, <em>Western Kentucky Pro Se Assistance – Family Law Clinics</em></td>
<td>$30,000</td>
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<tr>
<td>Kentucky YMCA Youth Association, Statewide, Kentucky Youth Assembly Rural and Urban Outreach</td>
<td>$50,000</td>
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**KBF Scholarships:**
- Louis D. Brandeis School of Law                                               $10,000
- Salmon P. Chase College of Law                                                $10,000
- University of Kentucky College of Law                                         $10,000

**KBA Distinguished Judge Award**
Judge Phillip J. Shepherd, Frankfort
- Maxwell Street Legal Clinic, Lexington                                         $ 2,000

**KBA Distinguished Lawyer Award**
K. Gregory Haynes, Louisville
- Jefferson County Public Defender’s Office                                     $ 1,000
- Legal Aid Society Inc., Louisville                                             $ 1,000

**TOTAL AWARDS** - **$251,500**
The Continuing Legal Education (CLE) Commission is pleased to announce the Kentucky Supreme Court’s new appointments to the commission. For the First Supreme Court District, Jason Franklin Darnall of Benton, Ky., has been appointed, and for the Sixth Supreme Court District, David Bryan Sloan of Covington, Ky., has been appointed. These appointments became effective on July 1, 2015.

Jason F. Darnall is a native of Marshall County. He attended the University of Kentucky, receiving a Bachelor of Arts in political science. From there, he graduated magna cum laude from Salmon P. Chase College of Law at Northern Kentucky University. While in law school, he served as editor of the Northern Kentucky Law Review and was awarded the Order of the Curia. Immediately following law school, he clerked for former Kentucky Court of Appeals Judge Rick A. Johnson, where he assisted in drafting hundreds of appellate court decisions. In 2004, he became Assistant Marshall County Attorney and began a private law practice. Since that time, Darnall has prosecuted thousands of cases ranging from violations to felonies. He has tried dozens of civil and criminal cases to jury verdict, and has handled matters in a wide range of practice areas, including estate planning, real estate, personal injury, and general litigation. Darnall has been the City Attorney for the City of Hardin since 2007, and has also acted as legal advisor to the Marshall County Fiscal Court since 2004. He and his wife Jenny, who is an English and French teacher at Marshall County High School, live in Benton. We look forward to Darnall’s fresh perspective on the commission.

David B. Sloan, a native of Virgie, Ky., is a partner with O’Hara, Rubberg, Taylor, Sloan & Sergent in Crestview Hills, Ky. He earned his Bachelor of Arts Degree from Berea College and his law degree from the Salmon P. Chase College of Law at Northern Kentucky University. Sloan concentrates his practice in the areas of insurance defense litigation, particularly in the area of insurance coverage issues, criminal law, and workers’ compensation. He is admitted to practice in Kentucky and Ohio, as well as before the United States District Court for the Eastern and Western Districts of Kentucky, and the United States Court of Appeals for the Sixth Circuit. Sloan is no stranger to serving his profession. He has served as president of the Northern Kentucky Bar Association, as a member of the Board of Governors and as past president of the Kentucky Bar Association (KBA), and was elected to the American Bar Association’s House of Delegates. He is currently a member of the Character and Fitness Committee of the Kentucky Office of Bar Admissions and a co-chair of the Kentucky Bar Association’s Diversity in the Profession Committee. In 2013, he was appointed by Governor Steve Beshear to serve as a special justice on the Kentucky Supreme Court. Currently, he is a member of the Mine Safety Review Commission for the Commonwealth of Kentucky and serves on the Berea College Board of Trustees. Sloan and his wife of 43 years, Cheri, live in Fort Mitchell, Ky. Sloan’s invaluable experience will certainly contribute to the commission, and we look forward to working with him.

The CLE Commission is made up of one attorney representative from each of the seven Supreme Court Districts. Each representative is appointed by the Kentucky Supreme Court and volunteers his or her time in a spirit of public service with the goal of bettering the profession we have chosen. In addition to the seven attorney Commissioners, the KBA is fortunate enough to have Justice Michelle M. Keller serving as the Supreme Court Liaison to the KBA CLE Commission.

The purpose of this commission is to administer and regulate all continuing legal education programs and activities of the KBA. This includes ensuring that the members of the KBA complete high quality, timely continuing legal education programming each year. From developing and implementing rules and policies to ensure high standards in the accreditation of CLE programming, to developing and sponsoring quality programming, to regulating attorney compliance with the mandatory minimum CLE requirements, the CLE Commission is working toward the increased competency of the legal profession in Kentucky.

Mary Beth Cutter is the director for Continuing Legal Education of the Kentucky Bar Association. Cutter received her B.A. with distinction from Centre College, and her Juris Doctorate from the University of Kentucky College of Law. Following her admission to the Kentucky Bar, Cutter was engaged in private practice, focusing primarily in the areas of health care, civil litigation, employment, real estate, and domestic law. She has been with the Kentucky Bar Association since November of 2008.

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Looking for Upcoming KBA Accredited CLE Events?

Look no further...
Check out cle.kybar.org/580

This easy to use search engine contains up to date information on CLE events that have been accredited by the Kentucky Bar Association Continuing Legal Education Commission.

Users can search by program date, name or sponsor for information about future and past events. Program listings include sponsor contact information, approved CLE and ethics credits, and KBA activity codes for filling out the certificate of attendance (Form #3).

Programs are approved and added in the order in which they are received. It may take up to two weeks for processing of accreditation applications. If an upcoming or past event is not listed in the database, check with the program sponsor regarding the status of the accreditation application.

THANK YOU

to those individuals whose contribution of time and expertise helped make the

JUNE 2015
NEW LAWYER PROGRAM
A GREAT SUCCESS!

Thank you to the following individuals for their contributions:

**Moderators, Speakers and Contributing Authors**

- Judge Glenn E. Acree
- Ashleigh N. Bailey
- Ashley L. Chilton
- Judge Thomas L. Clark
- Mary E. Cutter
- Carl N. Frazier
- Anna K. Girard
- Todd S. Horstmeyer
- William E. Johnson
- Escum L. “Trey” Moore, III
- Rebecca R. Schafer
- Bryan Stevenson
- J. Tanner Watkins

Mark your calendars now! The final dates and locations for the KBA’s 2015 Kentucky Law Update (KLU) are confirmed. The KLU program series is an exceptional benefit of KBA membership and Kentucky is the only mandatory CLE state that provides its members a way of meeting the annual CLE requirement at no additional cost. Registration is now open online. Please visit [https://kybar.site-ym.com/?KLU](https://kybar.site-ym.com/?KLU) Dates and Locations to register today!

**Kentucky Bar Association**

2015 New Lawyer Program
Steffen is also a Major in the United States Army Judge Advocate General’s (JAG) Corps, where he has served as a Reservist since 2000. He is a veteran of Operation Enduring Freedom, having been assigned to active duty from 2003-2004 and 2008-2009. Prior to service at the Executive Branch Ethics Commission, Steffen was assistant general counsel for the Finance and Administration Cabinet, and also served as a staff attorney for the Public Service Commission and the Labor Cabinet. Steffen earned a B.A. in history and government from Centre College and received his J.D. from the University of Kentucky College of Law. Steffen is a member of the Kentucky Bar Association, and is admitted to practice before the Kentucky Supreme Court, the Sixth Circuit United States Court of Appeals, and the United States District Courts for the Eastern and Western Districts of Kentucky. The executive director position with the Registry was previously held by Sarah M. Jackson, who retired in the fall of 2014. The Registry is charged with administering Kentucky’s campaign finance laws, including those relating to gubernatorial slates and statewide candidates who are running for election this year. Kentucky law requires the disclosure by a gubernatorial slate or candidate of contributions to and expenditures by the campaign.

Emily M. Cochran joined Children’s Law Center (CLC) as a staff attorney/guardian ad litem in March 2015 after working as a family law attorney for two years at a private law firm in Ft. Mitchell, Ky. After graduating magna cum laude with her Bachelor of Science in business administration from Bluefield State College, Cochran spent a year working in London as a business consultant where she met the recruitment needs of global businesses and jobseekers throughout Europe, Africa and Australia. She moved to Kentucky in 2007 to attend Northern Kentucky University Salmon P. Chase College of Law, where she earned her J.D. in 2011. She has over 10 years of experience working in law firms as either a paralegal, law clerk, or associate attorney. She also was previously a volunteer attorney for Legal Aid Society of Southwest Ohio as a co-guardian ad litem in dependency, neglect and abuse cases. At CLC, she provides legal representation to children and youth throughout the Northern Kentucky region, primarily focusing on child custody and education cases.

VanAntwerp Attorneys, LLP, announces that Ashley Leann Adkins has joined the firm as an associate attorney. Adkins’s practice will be focused in the area of litigation. Adkins graduated from the University of Kentucky College of Law in 2014 and is admitted to practice in Kentucky. While in law school, she served as treasurer of the Women’s Law Moot Court. Adkins was selected as a top oral advocate for the Reed Club and was runner-up at the 2012 Kentucky Intrastate Trial Competition. Adkins currently is an assistant coach for the Paul Blazer High School Mock Trial Team, and she serves as a board member for Safe Harbor Children’s Advocacy Center and Ashland Young Professional Association.

Gwin Steinmetz & Baird PLLC announces the Patricia Harmeling has been elected member. Harmeling focuses her practice in insurance defense litigation.

Stites & Harbison, PLLC welcomes attorney Michael T. Leigh to the Louisville office. Leigh joins the firm as an attorney in the business litigation service group. His practice focuses on complex civil litigation and white collar criminal defense. He represents publicly traded and privately held companies in corporate governance, securities, and commercial litigation, and advises clients in internal corporate and regulatory investigations. He earned his J.D., magna cum laude, from New York Law School in 2010. While in law school, he was executive editor of the school’s Law Review and was a John Marshall Harlan Scholar. He earned his B.S. from the University of Louisville in 2007.

Duane Cook & Associates, PLC, announces that Mikel D. McKinley, Jr., has joined the firm. McKinley received his undergraduate degree in business management from the University of Kentucky in 2004, his M.B.A. from Eastern Kentucky University in 2006 and his J.D. from
the University of Kentucky College of Law. He is a business owner and has four years’ experience in estate and financial planning. McKinley’s practice will focus on commercial law, business sales and acquisitions, secured lending, business exit planning, elder law and estate planning.

Durrett & Kersting announces that Casey S. Kimball has joined the firm as an associate. Kimball received her B.A. in political science from the University of Louisville in 2003 and her J.D. from Northern Kentucky University Salmon P. Chase college of Law in 2006. In 2009 Kimball was the recipient of the Louisville Bar Association’s “Frank Haddad Young Lawyer Award.” She is an acting board member for C-Fair. Kimball focuses primarily on civil plaintiff’s work and criminal defense.

Nick Volk is the fiduciary officer at First Kentucky Trust with a focus on estate planning, trusts and estate administration, and tax planning. Prior to joining First Kentucky Trust, Volk served as a trust officer with a regional bank and an associate in the corporate and estate planning sections at the local law firm of Goldberg Simpson, LLC. He earned his bachelor’s degree from the University of Kentucky, a law degree from the University of Louisville Louis D. Brandeis School of Law, and a Masters of Law degree in taxation from Southern Methodist University. He is a member of the Kentucky, Louisville, and Texas Bar associations, the Southern Indiana Estate Planning Council, and recently served as the chairman of the Louisville Bar Association’s Probate & Estate Planning Section.

Will Matthews recently opened a new office at 113 East Main Street across from the Carter County Justice Center in Grayson, Ky. Matthews is engaged in the general practice of law and is licensed in Kentucky and Ohio. Matthews can be reached at willjared@gmail.com or at (606) 474-0087.

Fogle Keller Purdy PLLC announces that Richard W. Hartsock has joined the Bowling Green office to practice workers’ compensation defense and family law. Hartsock is active in the business and legal community through his work with the Bowling Green Chamber of Commerce, Hotel Inc. and Bowling Green Bar Associations. He is a graduate of Northern Kentucky University Salmon P. Chase College of Law and Western Kentucky University.

Steptoe & Johnson PLLC announces the addition of Roger L. Nicholson to its energy transactional team. Nicholson is a 25-year veteran of the legal profession who works closely with energy industry clients on commercial and transactional matters. He will practice in the firm’s Charleston, W.Va., office. Nicholson’s experience includes serving as both general counsel and outside counsel to major publicly traded energy producing companies nationally. He is admitted to practice before the state courts of Kentucky and West Virginia. Nicholson earned his law degree from the University of Kentucky College of Law and his bachelor’s degree from Georgetown College. He is a trustee-at-large of the Energy & Mineral Law Foundation and serves on the Boards of Directors for the Clay Center for the Arts and Sciences of West Virginia and the Kentucky Coal Association.

Frost Brown Todd (FBT) announces the addition of Melanie McCoy to its Louisville office. McCoy joins the firm’s estates, trusts and wills team, which is comprised of more than 30 legal professionals. McCoy will concentrate her practice on estate and gift planning for individuals and families, focusing on business succession and charitable gift planning. She actively serves the Louisville community as a director of the Louisville Free Public Library Foundation and as a commissioner for the Library Advisory Commission. She also serves on the Board of Directors for Volunteers of America of Kentucky. McCoy was part of the Ignite Louisville Leadership Louisville Center Class of 2006 and was recognized in the 2008 Class of Forty Under 40 by Louisville Business First. She earned her bachelor’s degree from the University of Kentucky and her J.D. from the University of Kentucky College of Law.

Dinsmore & Shohl welcomes Wil R. Schroder II to the firm’s Covington office. Schroder will practice part-time with the finance department and the public finance group to balance his responsibilities as a Kentucky State Senator. Schroder joined the Kentucky Senate in January after being elected to represent the 24th District made up of Campbell, Pendleton and Bracken Counties. He has been assigned by leadership to the Judiciary Committee where he serves as the vice-chairman to the Appropriations and Revenue Committee and to the Economic Development Committee. A member of the Republican Majority, Schroder was also one of five senators assigned to a conference committee to negotiate with House Democrats on key heroin legislation. Prior to winning the Kentucky Senate seat, Schroder was an Assistant Commonwealth Attorney for Campbell County where he prosecuted felony cases, served as the lead attorney in a number of trials and was appointed special assistant attorney general on a case. He also served as an Assistant Commonwealth Attorney for Boone County. Schroder earned his J.D. from Northern Kentucky University Salmon P. Chase College of Law and received his B.A. from the University of Kentucky.

Adams, Stepenr, Woltermann & Dusing, PLLC, announces that Michelle E. James has joined the firm as an associate attorney. She will practice in the firm’s business law and commercial banking and real estate practice groups. Admitted to the Ohio Bar in 2013, she has legal experience representing lenders in multiple HUD-insured mortgage loan closings. James received her B.A. from the University of Louisville in 2010, cum laude, and graduated from the University of Cincinnati College of Law in 2013, magna cum laude. While in law school, she was a member of the University of Cincinnati Law Review and was the recipient of the Tyler Short Award for Entrepreneurial Excellence.

Fogle Keller Purdy PLLC (FKP) announces that Stephanie M. Carr and Derek S. Monzon have joined the firm’s Louisville office. Monzon will focus his practice in the areas of workers’ compensation defense and subrogation. He is a 2014 graduate of the University of Louisville Louis D. Brandeis School of Law. He is a member of the Kentucky Bar Association and a candidate for the Indiana State Bar Association. Carr will focus her practice in the areas of workers’ compensation and federal black lung defense, in addition to practicing general civil litigation. She graduated cum laude from the University of Louisville Louis D. Brandeis School of Law and is licensed in both Kentucky and Indiana. She also holds a Master of Library Science from the University of Kentucky.
IN THE NEWS

Lacey A. Napper, attorney at Frost Brown Todd in Louisville, has been invited to join the inaugural class of “Leadership Bullitt County.” The new program consists of seven one-day sessions that provide unique opportunities to learn about the needs and resources of the Bullitt County community. Napper practices in Frost Brown Todd’s labor and employment practice group. As a law school student, she represented the University of Louisville’s St. Thomas More Moot Court Board and as a member of the University of Louisville Law Review. She received her bachelor’s degree from Transylvania University.

Palmer G. Vance II, a partner at Stoll Keenon Ogden PLLC in Lexington, was part of an American Bar Association (ABA) delegation that participated in the five-day celebration in London and Runnymede of the 800th anniversary of the sealing of Magna Carta. Vance, a member of the ABA Magna Carta Anniversary Committee and the ABA London Sessions Planning Committee, took part in the events and activities led by the Association in conjunction with the Magna Carta celebration. The ABA London Sessions, which ran from June 11-15, were the culmination of a yearlong celebration of the historic charter. The celebration featured pre-eminent speakers and 16 continuing legal education programs that focused on the Great Charter’s impact and relevance on the rule of law today. Vance was present at the morning-long Magna Carta anniversary celebration, attended by Her Majesty Queen Elizabeth II, where he met Princess Anne.

David Bryant with David Bryant Law PLLC participated on an Ignite Louisville team that worked with Louisville-based Fund for the Arts Inc. to restructure its NeXt program, which was named the winner of the Spring 2015 Yum! Ignites Louisville Challenge. Ignite Louisville is a Leadership Louisville Center program for young professionals. Each class is divided into teams, and each team undertakes a project for a nonprofit organization. This year’s winning team helped analyze, restructure and relaunch Fund for the Arts NeXt program, a nationally recognized program that is designed to prepare the next generation of professionals for volunteer leadership positions in the arts community.

Robert L. Steinmetz, of Gwin, Steinmetz & Baird PLLC, has been selected to the 2015 list as a member of the Nation’s Top One Percent by the National Association of Distinguished Counsel (NADC). NADC is an organization dedicated to promoting the highest standards of legal excellence. Its mission is to objectively recognize the attorneys who elevate the standards of the Bar and provide a benchmark for other lawyers to emulate. Members are thoroughly vetted by a research team, selected by a panel of attorneys with podium status from independently neutral organizations, and approved by a judicial review board as exhibiting virtue in the practice of law. Due to the selectivity of the appointment process, only the top one percent of attorneys in the United States are awarded membership in NADC.

Philip J. Schworer, member of Frost Brown Todd in Florence, Ky., was represented among United Way of Greater Cincinnati’s 100 Heroes as the organization kicked off a year-long celebration of its 100th anniversary with the “Gathering of Heroes Reception & Dinner” at Duke Energy Convention Center on April 21. Schworer has been extensively involved in United Way for many years. He has served as chairman, vice-chairman and division leader for the annual Northern Kentucky United Way Campaigns, co-chair of the Greater Cincinnati Tocqueville Society Campaign, and member of the foundation board. He has led the Frost Brown Todd employee campaign for the past eight years. In 2014, Frost Brown Todd was recognized in the United Way’s ranking of the Top 25 largest campaigns. Schworer is an attorney in Frost Brown Todd’s environmental practice group, where he represents business and industry in all aspects of environmental, health and safety, and toxic tort issues.

The American College of Real Estate Lawyers (ACREL) has elected Stites & Harbison, PLLC, attorney Greg Ehrhard to fellowship in its organization. The American College of Real Estate Lawyers is the premier organization of U.S. real estate lawyers. Admission is by invitation only after a rigorous screening process. Ehrhard is chair of the real estate & banking service group and a member (partner) of Stites & Harbison based in Louisville. He advises clients in many areas of commercial real estate law, including zoning/land use, leasing, lending and condominium development. Outside of the firm, Ehrhard serves on the Board of Trustees of Greater Louisville Medical Society Foundation and is a board member of The Cabbage Patch Settlement House. He is also a member of the Sponsorship Committee of the March of Dimes REACH Award. Stites & Harbison is privileged to have three fellows in ACREL. The other honored attorneys include Alfred Joseph III from the Louisville office and Thomas Meng from the Lexington office.
Ramsey is a member (partner) of the group. He is an experienced trial attorney based in Louisville and a member of the firm’s security committee. Her practice as a member of the firm’s information privacy practice of Stites & Harbison. They serve as chair of the firm’s information security committee. Spurlock is an attorney representing clients in federal and state courts across the U.S. and also serves as a member of the firm’s information privacy practice of Stites & Harbison. They now join the ranks of more than 5,000 data protection attorneys in the U.S. The star attorneys are nominated by their peers and in-house counsel. The Stites & Harbison attorneys named to the “IP Stars” list include: Joel T. Beres, Mandy Wilson Decker, David W. Nagle, Jr., and Jack A. Wheat.

Recently the International Association of Privacy Professionals (IAPP) awarded Stites & Harbison, PLLC, attorneys Ian Ramsey and Sarah Cronan Spurlock the Certified Information Privacy Professional/United States (CIPP/US) credential. Ramsey and Spurlock join a group and are among the first attorneys in the state of Kentucky to have received this important credential. The IAPP is the first organization to publicly establish standards in professional education and testing for privacy and data protection. Ramsey and Spurlock are co-chairs of the privacy & data security practice of Stites & Harbison. They now join the ranks of more than 5,000 professionals worldwide who currently hold one or more IAPP certifications. Ramsey is a member (partner) of the firm based in Louisville and a member of the torts & insurance practice service group. He is an experienced trial attorney representing clients in federal and state courts across the U.S. and also serves as chair of the firm’s information security committee. Spurlock is an attorney with the firm also based in the Louisville office. She is a member of the health care service group, as well as a member of the firm’s information security committee. Her practice includes a wide range of health care issues, including HIPAA and state and federal regulatory matters.

Drew Eckman, attorney at Frost Brown Todd (FBT), has been appointed to the executive committee of the Young Professionals Association of Louisville (YPAL) Board of Directors. Eckman started a one-year term as secretary on July 1, 2015, taking over after Tiffany Ge, also with Frost Brown Todd. Eckman practices in the areas of corporate law, entrepreneurial law, and mergers and acquisitions. He is a 2014 graduate of the University of Louisville Louis D. Brandeis School of Law, where he served as employment law editor for the Journal of Law & Education. Since 1999, YPAL has provided leadership development, educational opportunities and philanthropic support to Louisville young professionals for the benefit of the local community. Its purpose is to connect, engage and develop the city’s young professional community through numerous activities and causes.

Wyatt, Tarrant & Combs, LLP, is pleased to announce that Virginia H. Snell has been nominated to join the American Academy of Appellate Lawyers. Membership is open only to individuals who possess reputations of recognized distinction as appellate lawyers. To be eligible for membership, a nominee’s practice must have focused substantially on appeals during at least the last 15 years. Academy membership is limited to 500 members in the United States and is reserved for appellate advocates who have demonstrated the highest skill level and integrity. Snell regularly represents clients in appellate courts and in cases before lower courts that are likely to proceed to the appellate level. Her experience encompasses a wide range of issues, including constitutional, contract, statutory, class action, regulatory, professional malpractice, trusts and estates, wrongful death, tax, healthcare provider, employment and business disputes. She is licensed to practice law in Kentucky and is based in Wyatt’s Louisville office. Snell is a Master of the Brandeis Inn of Court and a member of the Commission on Bar Admission, appointed by the Kentucky Supreme Court. Snell serves on the Committee on Board Leadership and Governance as a member of the Board of Directors for Louisville Public Media. She is a member of the Litigation Committee of the Kentucky Chamber of Commerce, as well. She earned her undergraduate degree from the University of Texas, *summa cum laude*, and her law degree from the University of Texas School of Law, with honors.

Dinsmore & Shohl’s Lira Johnson was a featured mentor at Louisville Business First’s BizWomen Mentoring Monday event on March 30, 2015. Johnson was one of 40 mentors selected by Business First as the “most influential women in the business community” to take part in the event. Johnson is a partner in the firm’s labor and employment law department. Johnson advises employers on compliance with state and federal laws and regulations governing employees. Johnson earned her J.D. from Indiana University School of Law and her Bachelor of Science from Indiana University.

George “Bud” Strickler was presented the Pro Bono Publico Award at the 2015 Law Day ceremonies conducted by the Bowling Green-Warren County Bar Association. This award is presented each year by the Lawyers Care Volunteer Attorney Program to a member of the Bar who has made significant contribution to the provision of donated legal services to low-income elderly or disabled individuals in their community. Strickler received this award for his continued commitment to the mission of Lawyers Care and pro bono service. Strickler currently practices law in the firm of Bell, Orr, Ayers & Moore, PSC, in Bowling Green, Ky.

Shaye Page Johnson, with Walters Meadows Richardson, PLLC, has been elected to be on the Board of Directors for the Fayette County Bar Association.
As a final tribute, the Bench & Bar publishes brief memorials recognizing KBA members in good standing as space permits and at the discretion of the editors. Please submit either written information or a copy of an obituary that has been published in a newspaper. Submissions may be edited for space. Memorials should be sent to sroberts@kybar.org.

<table>
<thead>
<tr>
<th>Name</th>
<th>City</th>
<th>State</th>
<th>Deceased</th>
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<tbody>
<tr>
<td>Carl R. Clontz</td>
<td>Mount Vernon</td>
<td>KY</td>
<td>June 5, 2015</td>
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<td>Ronald C. Endicott</td>
<td>Lexington</td>
<td>KY</td>
<td>May 13, 2015</td>
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<tr>
<td>Stanley Goodman</td>
<td>Cincinnati</td>
<td>OH</td>
<td>May 16, 2015</td>
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<td>John O. Hardin</td>
<td>Hopkinsville</td>
<td>KY</td>
<td>June 4, 2015</td>
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<td>John G. Heyburn II</td>
<td>Louisville</td>
<td>KY</td>
<td>April 29, 2015</td>
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<tr>
<td>Mark Joseph Hinkel</td>
<td>Lexington</td>
<td>KY</td>
<td>May 23, 2015</td>
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<td>Joe Lee</td>
<td>Lexington</td>
<td>KY</td>
<td>May 21, 2015</td>
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<th>City</th>
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<tr>
<td>Charles B. Lester</td>
<td>Bradenton</td>
<td>FL</td>
<td>April 26, 2015</td>
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<tr>
<td>Rhonda S. Melton</td>
<td>Georgetown</td>
<td>KY</td>
<td>April 6, 2015</td>
</tr>
<tr>
<td>Louis M. Nicoulin</td>
<td>Louisville</td>
<td>KY</td>
<td>October 24, 2014</td>
</tr>
<tr>
<td>Charles H. Schaffner</td>
<td>Park Hills</td>
<td>KY</td>
<td>April 7, 2015</td>
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<tr>
<td>Warren N. Scoville</td>
<td>London</td>
<td>KY</td>
<td>May 7, 2015</td>
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<tr>
<td>Mastin G. Smith</td>
<td>Harlan</td>
<td>KY</td>
<td>June 14, 2015</td>
</tr>
<tr>
<td>Ray Allen Webb</td>
<td>Bald Head Island</td>
<td>NC</td>
<td>February 2, 2015</td>
</tr>
<tr>
<td>James D. Winter</td>
<td>Scottsdale</td>
<td>AZ</td>
<td>May 17, 2015</td>
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COURT MOURNS THE PASSING OF SENIOR U.S. DISTRICT JUDGE JOHN G. HEYBURN II

John Gilpin Heyburn II, a federal district judge whose passion for the rule of law made him a leading figure in the governance of the Third Branch, died on April 29, 2015, at his home in Louisville. He was 66.

In 1992, Judge Heyburn was appointed to the bench and served as Chief Judge from 2001 to 2008, where he established a reputation for court governance by consensus and an ability to engender camaraderie among fellow judges and enthusiastic participation from staff. Judge Heyburn also led the judiciary in significant national roles that strengthened its independence and improved its handling of complex cases. Judge Heyburn continued his judicial service in spite of a hard-fought battle with cancer over the past few years.

Judge Heyburn is survived by his wife, Martha, two sons, Will and Jack, his mother, Frances, sister Frannie Pistell, and brothers, Franklin and Henry.

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